SIXTH DIVISION
NOVEMBER 30, 2012

No. 1-11-0812

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 9409
	)	
JOSHUA ROBINSON,	)	Honorable
	)	Kenneth J. Wadas,
Defendants-Appellant.	)	Judge Presiding.

JUSTICE R. GORDON delivered the judgment of the court.
Justices Hall and Garcia concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's first-stage dismissal of defendant's *pro se* postconviction petition as frivolous and patently without merit, where defendant claims that he would not have pled guilty if his trial counsel had informed him that an involuntary manslaughter instruction was possible, but where the record contains no evidence that defendant would have been entitled to an involuntary manslaughter instruction at trial and where the record shows that defendant entered his guilty plea knowingly and voluntarily.

¶ 2 Defendant Joshua Robinson appeals the first-stage dismissal of his *pro se* postconviction petition, which the trial court denied as frivolous and patently without merit. On November 24,

2008, after a plea hearing, defendant entered a negotiated plea of guilty to the first-degree murder of his three-month-old son, J.R., in exchange for 20 years in the Illinois Department of Corrections, with a credit for 1,351 days considered served, and the State's agreement not to seek an extended-term sentence. Defendant had admitted in a videotaped confession that he had repeatedly punched J.R. when he cried at night and dropped J.R. on his head on a date close to the baby's death. On November 18, 2010, defendant filed this *pro se* postconviction petition arguing that his trial counsel was ineffective because defendant was misled into believing that he could not be found guilty of the lesser offense of involuntary manslaughter and that his guilty plea was therefore not knowing and voluntary. On January 21, 2011, the trial court dismissed the petition at the first stage as frivolous and patently without merit. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Pretrial Proceedings

¶ 5 On April 19, 2005, defendant was indicted on four counts of first-degree murder: intentional murder, strong probability murder, and extended-term versions of both of these charges because the victim was under 12 years of age and because the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty. The indictment charged that defendant murdered his three-month-old son J.R. on March 14, 2005.

¶ 6 Defendant filed suppression motions to quash his arrest and suppress his videotaped confession, which the trial court denied. At the suppression hearing, Detective Gregory Andras from the Chicago police department testified that he learned through his investigation that, on

March 14, 2005, J.R.'s mother Casha Jackson fed J.R. around 3 a.m. and put him down to sleep. Detective Andras testified that, the next morning when Jackson awoke, she noticed J.R.'s toes were cold and his lips blue. Defendant was arrested later that day for first-degree murder after he admitted inflicting physical injuries on J.R. After hearing the officer's testimony, the trial court denied defendant's suppression motions.

¶ 7 On November 20, 2008, the State filed a pretrial motion to admit evidence of other crimes. The State intended to present evidence at trial that defendant admitted that he would pick up J.R. by the neck, say "man why you crying-stop acting like a sissy," and slam J.R. down. The State intended to show evidence that defendant admitted to hitting J.R. from mid-February 2005 until the date of the J.R.'s death, on March 14, 2005. During this time period, defendant admitted to pounding his fists on J.R.'s back or stomach when J.R. cried during the night. The State also intended to present evidence that, on the evening before J.R. was found dead, defendant told Jackson, "[M]ove that n*** out the bed, I don't want that n*** laying in the bed with me," so Jackson placed some padding on the floor and laid the baby there.

¶ 8 II. Plea

¶ 9 Four days after the State filed its motion, defendant pled guilty pursuant to an agreement with the State. At the plea hearing held on November 24, 2008, the prosecutor stated that the following facts constituted the factual basis supporting defendant's plea. J.R. was born on December 16, 2004, to defendant and Jackson, who were married. From February 2005 through March 14, 2005, defendant was J.R.'s sole caretaker while Jackson was at work. When J.R. cried, defendant would punch him in the chest. Additionally, sometime shortly before March 14,

2005, defendant dropped J.R. on his head on a marble floor. On March 14, 2005, Jackson awoke to discover that three-month-old J.R. was dead. Defendant also gave a videotaped confession in which he admitted to repeatedly punching J.R. However, in the confession, he claimed that dropping J.R. on his head was an accident.

¶ 10 The prosecutor further stated that medical examiner Dr. Mitra Kalelkar performed an autopsy on J.R. on March 15, 2005. The examination revealed that J.R. had a subgaleal hemorrhage on his head, a cerebral edema, multiple old and new rib fractures, a hemorrhage in the right capsule of his thymus, and a subcutaneous hemorrhage on his lower back. The parties stipulated that, if Dr. Kalelkar were called to testify, she would state that J.R.'s death was caused by multiple injuries and blunt force trauma, and that the manner of death was homicide.

¶ 11 The defense then stipulated to the factual basis as stated by the prosecutor. The trial court then admonished defendant: (1) that he would have to serve a mandatory supervised release; (2) that he was giving up his right to a jury and a bench trial; (3) that he was giving up his right to confront his accusers and test the evidence against him; (4) that he could serve 20 to 60 years, or 60 to 100 years if his sentence was subject to an extended term; (5) that he could be fined $25,000; (6) that he was not eligible for probation; (7) that the charge was first-degree murder; (8) that if he were a non-citizen, there could be immigration consequences to the plea; and (9) that he was forfeiting his right to maintain his innocence. When the trial court admonished defendant regarding the knowing and voluntary nature of his plea, defendant responded as follows:

"THE COURT: You're charged with first-degree murder. Do you understand the nature of the charge, Mr. Robinson?

DEFENDANT: Yes, sir.

* * *

THE COURT: Knowing the nature of the charges and the possible penalties, do you want to [plead] guilty to this case at this time?

DEFENDANT: Yes, sir.

* * *

THE COURT: Did anyone force you or threaten you to make that decision?

DEFENDANT: No, sir.

THE COURT: Are you making that decision on your own free will?

DEFENDANT: Yes, sir.

* * *

THE COURT: Are you pleading guilty of your own free will?

DEFENDANT: Yes, sir."

Defendant responded to the trial court's admonishments regarding his waiver of a trial as follows:

"THE COURT: I have a document here that's a waiver of the jury trial. Is this your signature?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that by signing that paper you're telling me that you are voluntarily giving up your right to have a jury trial?

DEFENDANT: Yes, sir.

* * *

THE COURT: You also understand that by pleading guilty not only will there not be a jury trial, there will not be a bench trial in front of me?

DEFENDANT: Yes, sir.

THE COURT: You also understand that by pleading guilty you're giving up your right to plead not guilty and to actually force the State to prove you guilty at some type of trial?

DEFENDANT: Yes, sir.

THE COURT: [D]o you understand by pleading guilty you're giving up your right to see and confront any of [the] witnesses that would testify against you in this case?

DEFENDANT: Yes, sir."

¶ 12 The trial court found that there was a sufficient factual basis for the guilty plea (Ill. S. Ct. R. 402(a) (eff. July 1, 1997)) and accepted that defendant had knowingly and willing entered the plea (Ill. S. Ct. R. 402(b) (eff. July 1, 1997)). As noted, the trial court then sentenced defendant to 20 years in the Illinois Department of Corrections pursuant to the plea agreement. The trial court also gave defendant credit for 1,351 days served and admonished defendant of his appeal rights, including that, in order to appeal, defendant had to move to vacate the judgment and withdraw his guilty plea within 30 days.

¶ 13 III. Posttrial Motion

¶ 14 On January 20, 2009, 57 days after the plea was accepted, defendant filed a motion to vacate his guilty plea. On March 9, 2009, the trial court denied the motion as untimely filed, and defendant subsequently filed a notice of appeal on April 9, 2009. On May 19, 2010, the appellate court entered an agreed order for summary disposition amending defendant's fines and fees.

¶ 15 IV. Postconviction Petition

¶ 16 On November 18, 2010, almost two years after his guilty plea, defendant filed this *pro se* petition for postconviction relief. The petition was not notarized and was not supported with a verification affidavit. Defendant's petition argued, first, that the evidence showed that J.R. died from being dropped, which was an accident, rather than from being punched. He argued that this was reckless behavior which would have supported a conviction for involuntary manslaughter. Accordingly, defendant alleged ineffective assistance of his trial counsel for failing to inform him that he could have been found guilty of the lesser offense of involuntary manslaughter. Second, defendant also claimed that his guilty plea was not knowing and voluntary: (1) because defense

counsel misled him into believing that it was not possible for him to be convicted of involuntary manslaughter; and (2) because counsel coerced him into pleading guilty to avoid the possibility of an extended-term sentence of 60 to 100 years. 730 ILCS 5/5-8-2(a)(1) (West 2006); 730 ILCS 5/5-5-3.2(b) (West 2002). On January 21, 2011, the trial court dismissed defendant's petition at the first stage as frivolous and patently without merit. Defendant filed a notice of appeal on March 8, 2011, and this appeal followed. For the following reasons, we affirm.

¶ 17 ANALYSIS

¶ 18 In his *pro se* postconviction petition, defendant made two claims: (1) that his trial counsel was ineffective; and (2) that his guilty plea was not knowing and voluntary. On this appeal, defendant claims: (1) that the trial court erred in dismissing his postconviction claims as frivolous and patently without merit; and (2) that his petition's lack of a verification affidavit was not a reason for summary dismissal. For the following reasons, we affirm.

¶ 19 I. Standard of Review

¶ 20 The summary dismissal of a postconviction petition is a legal question that is subject to *de novo* review. *People v. Petrenko*, 237 Ill. 2d 490, 296 (2010). *De novo* consideration means that this court performs the same analysis that a trial judge would perform. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 19; *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). This court is free to substitute its own judgment for that of the trial court in order to formulate the legally correct answer. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). We can affirm the trial court on any basis that appears in the record without regard to whether the trial

court relied upon such a ground or used a correct rationale. *Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998).

¶ 21 II. Postconviction Petitions

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his or her federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a) (West 2010); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 182).

¶ 23 The Act creates three stages of postconviction proceedings for noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. The first stage of proceedings "shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). The trial court must review a defendant's petition within 90 days and may summarily dismiss the petition if it finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within 90 days, it must docket the petition for further consideration. 725 ILCS 5/122-2.1(b) (West 2010); *Pendleton*, 223 Ill. 2d at 472.

¶ 24 "Frivolous" and "patently without merit" are not defined in the Act. The Illinois Supreme Court has held that "legal points 'arguable on their merits' are not frivolous." *People v. Boclair*, 202 Ill. 2d 89, 101 (2002) (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). Accordingly, our supreme court holds that "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16. "Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 17. Additionally, at the first stage of proceedings, "a *pro se* litigant need only present the gist of a constitutional claim to survive the summary stage of section 122-2.1." *People v. Ligon*, 239 Ill. 2d 94, 104 (2010) (citing *People v. Jones*, 213 Ill. 2d 498, 504 (2004)).

¶ 25 At the first stage of proceedings, the petition's allegations "must be taken as true and liberally construed." *People v. Brown*, 236 Ill. 2d 175, 193 (2010). The trial court must evaluate only the merits of the petition's substantive claims, and not the petition's compliance with procedural rules. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The trial court "examines the petition independently, without input from the parties." *Brown*, 236 Ill. 2d at 184 (citing *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). Furthermore, the trial court "may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate

court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010).

¶ 26 III. Ineffective Assistance of Trial Counsel

¶ 27 Defendant argues, first, that the trial court erred by dismissing as frivolous his claim that his trial counsel was ineffective for failing to inform him that he could be convicted at trial of the lesser included offense of involuntary manslaughter.

¶ 28 The Illinois Supreme Court has held that ineffective assistance of counsel claims are governed by the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Petrenko*, 237 Ill. 2d at 496 (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must show (1) that "counsel's performance was objectively unreasonable under prevailing professional norms" and (2) that "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Petrenko*, 237 Ill. 2d at 496-97 (quoting *Strickland*, 466 U.S. at 694). Under the second prong, "a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome – or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Manning*, 241 Ill. 2d 319, 328-29 (2011) (citing *People v. Evans*, 209 Ill. 2d 194, 220 (2004)). The *Strickland* standard applies equally to claims of ineffective trial counsel and appellate counsel. *Petrenko*, 237 Ill. 2d at 497.

¶ 29 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the *Strickland* standard. *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *Evans*, 209 Ill.

2d at 220. Thus, if a defendant did not suffer prejudice, the appellate court "need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). At the first stage of proceedings under the Act, "a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Petrenko*, 237 Ill. 2d at 497 (citing *Hodges*, 234 Ill. 2d at 17).

¶ 30 In the case at bar, defendant asserts that there is an arguable basis in law and fact for his claim that he was misled by his trial counsel to believe that he was not eligible for an involuntary manslaughter instruction at trial. He claims that he would have sought an involuntary manslaughter instruction rather than plead guilty to first-degree murder if he had not been misled. Specifically, defendant argues that there was sufficient evidence to support an instruction for the lesser offense of involuntary manslaughter. He claims that, while he may have acted recklessly toward J.R., he did not intend to kill the baby, and he did not realize that hitting him in the chest or dropping him on his head could kill him.

¶ 31 However, there is no evidence that defendant would have been entitled to an involuntary manslaughter instruction at trial. Involuntary manslaughter requires a less culpable mental state than first-degree murder. *People v. Robinson*, 232 Ill. 2d 98, 105 (2008). A person commits first-degree intentional murder if he or she kills an individual without lawful justification and either intends to kill or do great bodily harm, or knows that such acts will cause death. 720 ILCS 5/9-1(a)(1) (West 2006). A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if the acts that cause the death are likely to cause

death or great bodily harm to an individual, and he or she performs them recklessly. 720 ILCS 5/9-3(a) (West 2006). "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2006). Reckless conduct generally involves a lesser degree of risk than conduct that creates a strong probability of death or great bodily harm. *People v. DiVincenzo*, 183 Ill. 2d 239, 250 (1998). Although not dispositive, factors that suggest whether a defendant acted recklessly include the disparity in size and strength between the defendant and the victim, the brutality and duration of the beating, and the severity of the victim's injuries. *DiVincenzo*, 183 Ill. 2d at 251.

¶ 32 A defendant is entitled to an instruction on "defense theories about which there is at least 'slight' evidence." *People v. Davis*, 213 Ill. 2d 459, 478 (2004) (quoting *People v. Everette*, 141 Ill. 2d 147, 156 (1990)). Whether an involuntary manslaughter instruction is warranted depends on the facts and circumstances of each case. *DiVincenzo*, 183 Ill. 2d at 251. However, an involuntary manslaughter instruction is generally not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, shows that defendant did not act recklessly." *DiVincenzo*, 183 Ill. 2d at 251.

¶ 33 In the case at bar, the evidence does not support an involuntary manslaughter instruction. Defendant admitted in a videotaped confession that he repeatedly punched an infant's back and stomach, as well as repeatedly picked up and slammed down J.R., from mid-February 2005 until March 14, 2005, when J.R. was only two and three months old. He also admitted to dropping the

baby on his head. J.R. had several rib fractures and hemorrhaging, and the medical examiner concluded that J.R.'s cause of death was multiple injuries and blunt force trauma. This evidence shows that defendant beat J.R. on multiple occasions, contradicting defendant's argument that his conduct was merely reckless. Furthermore, defendant's intent is shown by: (1) the disparity in size between defendant, a grown man, and J.R., his three-month-old son; (2) J.R.'s complete defenselessness; (3) the regularity with which defendant beat J.R. over the course of several weeks; (4) the severity of J.R.'s hemorrhaging; and (5) J.R.'s multiple fractured ribs. The evidence establishes that defendant, rather than consciously disregarding a substantial and unjustifiable risk, intended to do great bodily harm to J.R., which supports a first-degree murder instruction.

¶ 34 Taking all of defendant's allegations as true, the evidence establishes that an involuntary manslaughter instruction was not warranted. Thus, defendant was not prejudiced by not having the chance to seek this instruction at trial, and counsel's performance was not unreasonable for not suggesting it. The allegation that defendant did not know that physically abusing an infant child could endanger the child's life is a "fanciful factual allegation" that further supports the dismissal of his postconviction petition. *Hodges*, 234 Ill. 2d at 16. Therefore, we hold that defendant's claim of ineffectiveness does not have an arguable basis in either law or fact.

¶ 35 IV. Knowing and Voluntary Nature of the Guilty Plea

¶ 36 Second, defendant argues that the trial court erred by dismissing as frivolous his claim that his guilty plea was not knowingly and voluntarily entered. He claims that he was ignorant of

the true nature of his options because he did not know that it was possible for him to be convicted of involuntary manslaughter.

¶ 37 "A defendant who pleads guilty waives several constitutional rights ***. Due process of law requires that this waiver be voluntary and knowing." *People v. Williams*, 188 Ill. 2d 365, 370 (1999). Furthermore, Illinois Supreme Court Rule 402(b) (eff. July 1, 1997) requires the trial court to determine that a guilty plea is voluntary before accepting it and to determine "whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea." The Illinois Supreme Court has long held that, "with respect to voluntariness, the pertinent knowledge to be provided by the court prior to accepting a guilty plea includes only the direct consequences of the defendant's plea." *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009) (citing *People v. Manning*, 227 Ill. 2d 403, 415 (2008)). Direct consequences of a plea are "those consequences affecting the defendant's sentence and other punishment that the circuit court may impose." *Delvillar*, 235 Ill. 2d at 520 (citing *Williams*, 188 Ill. 2d at 372). However, due process does not require that the trial court inform a defendant of the collateral consequences of a guilty plea. *Delvillar*, 235 Ill. 2d at 520-21. Collateral consequences are "effects upon the defendant that the circuit court has no authority to impose." *Delvillar*, 235 Ill. 2d at 520.

¶ 38 In the case at bar, the trial court admonished defendant that the charge was first-degree murder, that he could receive a sentence of 20 to 60 years (or 60 to 100 years if his sentence was extendable), that he could receive a $25,000 fine, and that he was not eligible for probation. In response to these admonishments, defendant stated that he understood the nature of the charge, that he wanted to plead guilty, that he had not been forced or threatened to make his decision, and

that he had pled guilty on his own free will. He also stated that he understood that, by pleading guilty, he would waive his right to a jury or bench trial, his right to plead not guilty and to force the State to prove him guilty, and his right to observe and confront any witnesses who would testify against him.

¶ 39 On appeal, defendant claims that he was never admonished by the trial court that he could possibly be found guilty of the lesser offense of involuntary manslaughter. However, a trial court is not required to inform a defendant of lesser included offenses before accepting a guilty plea. Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) lists the required admonishments, and that is not one of them. The rule does not require the trial court to inform defendant of every collateral consequence of his plea. The trial court properly determined that defendant's guilty plea was not obtained through coercion and informed defendant of the direct consequences of his guilty plea. The record shows that defendant entered his guilty plea knowingly and voluntarily. Therefore, defendant's claim that his plea was not knowing and voluntary lacks an arguable basis in law and fact, and we hold that the trial court's summary dismissal of defendant's postconviction petition as frivolous and patently without merit was proper.

¶ 40 V. Notarization of Postconviction Petition

¶ 41 Lastly, defendant argues that his petition's lack of a verification affidavit was not a reason for summary dismissal. *People v. Parker*, 2012 IL App (1st) 101809, ¶¶ 74-77; *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 72; *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 34. Since we affirm the dismissal of the petition on its merits, we need not reach this issue.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition as frivolous and patently without merit.

¶ 44 Affirmed.