THIRD DIVISION
July 31, 2013

No. 1-11-1864

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. 07 CR 8746
	)	
CARLOS BELTRAN,	)	Honorable
	)	Garritt E. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Neville and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 ***Held*:** The trial court properly dismissed defendant's first-stage postconviction petition where defendant failed to attach an affidavit supporting the allegations contained in his petition and the petition's allegations were facially deficient. We affirm.

¶ 2 Defendant Carlos Beltran appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act ("Act"). 725 ILCS 5/122-1 *et seq*. (West 2010). On appeal, defendant contends the trial court erred in summarily dismissing the petition because it presented an arguable claim of ineffective assistance of counsel based on counsel's alleged failure to file post-plea motions and a notice of appeal, contrary to defendant's wishes.

¶ 3 Pursuant to a negotiated guilty plea, defendant was convicted of aggravated battery to a child and sentenced to 20 years' imprisonment, to be served at 85%. Defendant signed a plea agreement which provided that he would give truthful testimony against his co-defendant, Mila Petrov. He also stipulated to the factual basis for the plea. Petrov and defendant lived together and were the parents of the deceased, five-year-old Melanie, who died as a result of blunt force trauma to her head. According to the stipulated facts, Melanie suffered numerous burns and bruises upon her body that defendant noticed but did not seek medical care for or prevent from occurring. Additionally, defendant attempted to self-treat Melanie's badly burned body from hot water scalding. He also observed Melanie's skin peeling over time due to the burns and observed new bruises about Melanie's face and eyes. He admitted that he knew Melanie was being continuously injured while in Petrov's care and that he failed to protect the child.

¶ 4 On July 22, 2009, defendant pled guilty to one count of aggravated battery of a child. The trial court accepted his plea and sentenced defendant to 20 years' imprisonment and required him to serve 85% of the sentence.

¶ 5 Defendant did not file a motion to withdraw his guilty plea or a notice of appeal. He filed a *pro se* postconviction petition on April 19, 2011, asserting that his trial attorney was ineffective for failing to file a motion to withdraw defendant's guilty plea and to reconsider his sentence and for failing to file an appeal, even though defendant wanted to appeal. Defendant argued that nothing in the record indicated that counsel reviewed the plea proceedings for error or consulted with defendant regarding potential grounds for appeal before deciding not to file any post-plea motions or an appeal. Defendant also attached a sworn verification to his petition. The trial court dismissed the petition and defendant appealed.

¶ 6 At the first stage of postconviction proceedings, summary dismissal is allowed only if the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v.*

Brown, 236 Ill. 2d 175, 184 (2010). Taking the allegations in the petition as true and construing them liberally in favor of the *pro se* petitioner (*Brown*, 236 Ill. 2d at 184), a petition is considered frivolous or without merit only if it "has no arguable basis either in law or in fact," meaning it is "based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009); see also *People v. Tate*, 2012 IL 112214, ¶¶ 9, 12 (explaining that the threshold for survival at the first stage is low and that the "petition cannot be said to be at issue"). A first stage petition claiming ineffective assistance of counsel must show that it is arguable that 1) counsel's performance fell below an objective standard of reasonableness, and 2) the defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We review *de novo* the trial court's dismissal of a postconviction petition at the first stage. *People v. Williams*, 186 Ill. 2d 55, 59-60 (1999); *People v. Coleman*, 183 Ill. 2d 366, 378 (1998).

¶ 7 Section 122-2 of the Post-Conviction Hearing Act provides that a petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2(West 2010). Failing to attach the necessary "affidavits, records, or other evidence" or explain their absence is "fatal" to a postconviction petition and alone "justifies the petition's summary dismissal." *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 8 In this case, the trial court properly dismissed defendant's petition because he failed to support his petition with "affidavits, records, or other evidence" and he offered no explanation for their absence. Defendant merely attached a sworn verification in the form of an affidavit stating the facts in the petition were true and correct. Section 122-1 addresses the necessity of a sworn verification, and as *Collins* explains, the sworn verification "serves a wholly distinct" purpose from the "affidavits, records, or other evidence" described in section 122-2. *Collins*,

202 Ill. 2d at 67. The sworn verification "confirms that the allegations are brought truthfully and in good faith," while the "affidavits, records, or other evidence" "shows that the verified allegations are capable of objective or independent verification." *Id.* Conflating the two renders section 122-2 "meaningless surplusage." *Id.* Therefore, defendant's sworn verification simply does not satisfy the requirement that defendant attach an affidavit or some other form of evidence supporting the allegations in the petition. 725 ILCS 5/122-2.

¶ 9 This case factually aligns with *Collins*. The *Collins* defendant pled in his postconviction petition:

> "I wanted to appeal the case, which my counsel told me that he will. But never did. that brings me to submitt this motion. thinking im waiting to go back on appeal. I also ask him to put me in for a reduction sentence. which he mislead me. He never submitted that either." [Errors in original.] *Collins*, 202 Ill. 2d at 62.

¶ 10 The defendant also attached the following sworn verification to his petition, which stated in its entirety: "I, London Collins, a prisoner incarcerated in Tamms Minimum Security Unit, have read and understand the above Petition for Post Conviction Relief. All the facts presented are true and correct to the best of my recollection." *Id.* Our supreme court concluded that the circuit court was justified in summarily dismissing the defendant's petition because "[c]ontrary to the clear mandate of section 122-2 of the Act, [the] defendant's petition was unsupported by 'affidavits, records, or other evidence' and offered no explanation for the absence of such documentation." *Id.* at 66.

Here, defendant pled in his petition:

> "Defendants, [*sic*] Constitutional rights were violated because defendant (s) [*sic*] counsel provided ineffective assistance defendant has the burden of showing a substantial violation of his constitutional rights occurred in the proceedings that resulted in his conviction which allege a violation of his sixth amendment right to effective counsel failure to preserve appeal. Defendant failed to file notice of appeal or reconsider sentence defendant wanted to appeal but counsel decided not to file one."

Defendant also attached a sworn verification to his petition stating: "I Carlos Beltran, a prisoner incarcerated at the Shawnee Correctional Center, in Vienna, Illinois, have read and [u]nderstand the above petition for Post-Conviction Relief[.] All of the facts presented in this Petition are true and [c]orrect to the best of my recollection[.]" Following *Collins*, we must conclude that the trial court was justified in summarily dismissing defendant's petition at the first stage because he failed to attach supporting affidavits, records, or other evidence, and he failed to explain the absence of this documentation in his petition.

¶ 11 Defendant argues that he is excused from the affidavit requirement because an affidavit from his attorney is the only evidence he could have obtained to support his allegation of ineffective assistance of counsel, and it is unlikely that his attorney would admit ineffective assistance in a sworn affidavit. While it is true that in some cases, the requirement of attaching affidavits, records, or other evidence would place an unreasonable burden upon postconviction petitioners, the *Collins* court nevertheless made it clear that petitioners must still comply with section 122-2:

> "This does not mean, however, that the petitioners in such cases are relieved of bearing any burden whatsoever. On the

> contrary, section 122-2 makes clear that the petitioner who is unable to obtain the necessary 'affidavits, records, or other evidence' must at least explain why such evidence is unobtainable. In this case, defendant is asking to be excused not only from section 122-2's evidentiary requirements but also from 122-2's pleading requirements. Nothing in the Act authorizes such a comprehensive departure." (Emphasis omitted.) *Collins*, 202 Ill. 2d at 68.

Clearly, defendant could have alleged facts in his petition relating to any requests made to his counsel to pursue post-plea relief and could have supported those allegations with his own affidavit. Thus, the circumstances of this case do not justify departure from the procedural requirements of section 122-2.

¶ 12 Further, wholly apart from defendant's failure to satisfy section 122-2's requirement to attach supporting materials or explain their absence, defendant has failed to allege in his petition that he affirmatively informed his counsel of his desire to appeal and challenge his sentence. Defendant's reliance on *People v. Edwards*, 197 Ill. 2d 239 (2001), is misplaced because in that case, the defendant specifically alleged in his petition that he asked his attorney to file an appeal on the defendant's behalf when the defendant wrote in his petition:

> "I requested to [my attorney] Lenik to file an appeal, after the Judge (DeLaMar) explained to me that I could do so. Atty. Lenik stated in regard to the appeal, *quote* [*sic*] On what grounds? *unquote* [*sic*] Atty. Lenik had taken it or decided for herself not to file an appeal, in spite of my numerous requests to. She (Atty.

> Lenik) also became totally unavailable in regard to the case in spite of the repeated calls by my wife on my behalf." *Id.* at 242.

Here, defendant never alleged that he requested that his attorney file an appeal or move to reduce his sentence. He merely alleged that he wanted to appeal and that his attorney did not do so.

¶ 13 The Supreme Court held in *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), that "a lawyer who disregards specific instruction from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." However, Illinois courts have also held that a defendant must nevertheless allege that he asked his counsel to file a notice of appeal. Defendant must satisfy the first prong of *Strickland* to show his counsel was ineffective, *i.e.,* that counsel's performance in failing to perfect an appeal was deficient, by alleging that he communicated to his attorney a desire to appeal (see *People v. Franzen*, 251 Ill. App. 3d 813, 821-22 (1993); *People v. Jett*, 211 Ill. App. 3d 92, 97 (1991)), or at least satisfactorily explain why he did not request an appeal earlier. *People v. Hernandez*, 283 Ill. App. 3d 312, 318 (1996). Without the allegation that he affirmatively asked his counsel to appeal, defendant has not met even the very low pleading standard of first-stage postconviction petitions. He has not stated an arguable claim of ineffective assistance. *Hodges*, 234 Ill. 2d at 11-12.

¶ 14 Accordingly, defendant's petition for postconviction relief was properly summarily dismissed both because defendant failed to attach the necessary affidavits, records, or other evidence to support the allegations in his petition or offer an explanation for their absence, and because he failed to allege sufficient facts to establish that counsel's performance was deficient.

¶ 15 Defendant next requests corrections to his fines and fees order to reflect a reduced amount due of $540, due to corrected calculations of the fines and fees imposed against him, as well as a credit for the $5 per day presentence custody credit against the $30 Children's Advocacy Center assessment. The State agrees that defendant's fines and fees order should be

reduced to $540. The first reduction is the result of a mathematical error: the total amount of fees and fines is $570, not $590. Next, defendant was in custody 838 days prior to sentencing. Pursuant to section 110-14 of the Code of Criminal Procedure of 1963, defendant was permitted to offset any fines against him with a credit of $5 per day for his time in custody prior to sentencing. 725 ILCS 5/110-14(a) (West 2008). Therefore, we apply a credit of $30 toward the Children's Advocacy Center fine pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999). See *People v. Coleman*, 404 Ill. App. 3d 750, 754 (2010) (vacating unauthorized assessments).

¶ 16 For the foregoing reasons, the judgment of the circuit court of Cook County dismissing defendant's first-stage postconviction petition is affirmed. We correct the total amount of fines and fees, apply a credit of $30 toward the Children's Advocacy Center fine, and order the clerk of the circuit court to modify the fines and fees order to reflect the correct amount due of $540.

¶ 17 Affirmed; fines and fee order corrected.