2015 IL App (1st) 131218-U

FIFTH DIVISION
May 22, 2015

No. 1-13-1218

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. 10 CR 10185
	)	
DEANDRE LITTLE,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in summarily dismissing postconviction petition; there is no reasonable probability that defendant's additional evidence would have resulted in not-guilty plea and trial.

¶ 2 Pursuant to a negotiated guilty plea, defendant Deandre Little was convicted of attempted first degree murder and sentenced to 20 years' imprisonment. Defendant appeals from the summary dismissal of his *pro se* postconviction petition, contending that he stated an arguably

meritorious claim of ineffective assistance of counsel for not investigating an alibi witness, thereby rendering his plea involuntary.

¶ 3 Defendant was charged with the attempted first degree murder of Frank Mann on or about June 17, 2008, while armed with a firearm and by personally discharging a firearm proximately causing great bodily harm. He was also charged with home invasion for, on the same date, entering the dwelling of Delilah Dixon and remaining therein while he knew or had reason to know that one or more persons were present and, in the course of that offense, personally discharging a firearm proximately causing great bodily harm to Mann.

¶ 4 During pre-trial proceedings, the court denied defendant's motion to suppress an identification and statements made by defendant. The former concerned Mann's lineup identification of defendant. The latter concerned a statement following defendant's arrest on June 17, 2008, in which he admitted purchasing a gun that later forensic testing linked to the Mann shooting; that is, he told an officer that "I bought the gun for $125 but it still rips flesh."

¶ 5 On June 27, 2012, the parties informed the court that defendant would plead guilty to attempted first degree murder, with the State amending the charge to remove the firearm allegation, and receive 20 years' imprisonment. Defendant agreed to the plea agreement and was admonished of the rights he was waiving. The factual basis stipulated by the parties was:

> "Frank Mann would testify that he was [at] 3014 West Walnut Street on the second floor in the early morning hours of June 17, 2008, approximately 2:15 a.m. He was asleep in the bed [of] the home of Delilah Dixon [when] he was awakened by the defendant, Deandre Little. Frank Mann would identify Deandre Little in open court and there was a co-offender, Robert Herrod. They woke the

> victim up and Ms. Dixon. Deandre Little produced a handgun and shot Frank Mann about the body [and he] suffered serious injury. He was hospitalized for over six months. He sustained serious injury throughout the course of this. The police were called, they processed the crime scene [and a] spent bullet was recovered underneath the mattress where the victim was shot. [T]here would be evidence from the Illinois State Police Crime Lab matching that evidence to evidence that was found on Deandre Little, who was arrested later that night."

The court accepted defendant's plea, was apprised of his criminal record, and sentenced him as agreed to 20 years' imprisonment for attempted first degree murder with the firearm charge stricken and all other charges nol-prossed.

¶ 6 Defendant filed his *pro se* postconviction petition in December 2012 alleging ineffective assistance of trial counsel. Defendant alleged that he accepted the plea offer because counsel informed him that the evidence against him was overwhelming, that counsel had investigated the evidence and defendant's alibi, and that he would receive a prison sentence near the 30-year maximum if he went to trial. However, defendant argued, the evidence against him was not overwhelming and counsel did not investigate his alibi; he would not have pled guilty had he known so. Defendant's alibi was that he was with Tamarie Lipscomb at 3447 West Flournoy Street in Chicago on the night in question when Herrod (or Herred) came by at about 2:50 a.m. After Herrod and defendant conversed in defendant's car, defendant and Lipscomb argued and defendant struck Lipscomb. Defendant claimed that "Herred must have left the gun in my car."

¶ 7 Attached to the petition was defendant's affidavit, averring in relevant part that he informed counsel of his alibi, asked counsel to interview Lipscomb, and would not have pled

guilty had counsel not misadvised him. Also attached was Lipscomb's affidavit that "on June 17, 2008, Deandre Little, A.K.A. 'D' was with me at 3447 W. Flournoy from a little past midnight until he slapped me shortly after 3:00 a.m. While he was there, his cousin Robert Herred A.K.A. Ferg came to see him about a half hour to 45 minutes prior to him slapping me. They sat in 'D"s car and talked for a few minutes." Lipscomb also averred that she was not contacted by defendant's counsel though she told defendant she would give her account if interviewed.

¶ 8 Also attached to the petition were various police reports. One indicated that the "occurrence" of the invasion of Dixon's home and Mann's shooting at 3014 W. Walnut St. in Chicago was at 2:15 a.m. and an officer arrived at 2:39 a.m., by which time the assailants were not at the scene. Another indicated that the "occurrence" at 3447 W. Flournoy St. in Chicago was at 3:10 a.m. and an officer arrived at 3:15 a.m., that officers responding to the report that defendant slapped Lipscomb and threatened to shoot her to death found a gun in defendant's car, and that defendant said after his arrest that "I bought it for $125, but it still rips flesh." Another report indicated that Dixon was interviewed by police a few days after the shooting, named former boyfriend Herrod and defendant, Herrod's cousin, as the men who entered her home on the night at issue, and said that defendant shot Mann before defendant and Herrod fled.

¶ 9 On March 8, 2013, the court summarily dismissed the petition. The court found that defendant's attachments did not support his allegation that counsel's advice was erroneous or improper. The court also found that Lipscomb's affidavit "fails to explain how she knew where [defendant] was between approximately 2:15 a.m. and 2:30 a.m." on the day at issue and "does not explain her basis of knowledge for claiming that [defendant] was not with her, but rather was allegedly sitting in his car with Robert Herred." The court found it "difficult to believe" that

defendant would have proceeded to trial rather than accept the "relatively low" 20-year plea offer. This appeal timely followed.

¶ 10 Defendant contends that his *pro se* postconviction petition stated an arguably meritorious claim of ineffective assistance of counsel for not interviewing Lipscomb or otherwise investigating defendant's alibi, which rendered his plea involuntary.

¶ 11 A postconviction petition may be summarily dismissed within 90 days of filing and docketing if the court finds that the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit if it fails to present the gist of a meritorious claim because it has no arguable basis in law or fact. *People v. Cathey*, 2012 IL 111746, ¶ 17. At this stage, all well-pled facts must be taken as true unless positively rebutted by the record. *People v. Brown*, 236 Ill. 2d 175, 189 (2010). A petition has no arguable basis in law or fact when based on an indisputably meritless legal theory or fanciful factual allegation. *Brown*, 236 Ill. 2d at 185. A claim completely contradicted by the record is an example of an indisputably meritless legal theory, while fanciful factual allegations include those that are fantastic or delusional. *Id*. Our review of a summary dismissal is *de novo. Cathey,* 2012 IL 111746, ¶ 17.

¶ 12 To state a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient – objectively unreasonable – and that the defendant was prejudiced by the deficient performance in that there is a reasonable probability that the result of the proceeding would have been different absent the deficiency. *Cathey*, 2012 IL 111746, ¶ 23. Generally, a postconviction petition alleging ineffective assistance may not be summarily

dismissed if counsel's performance arguably fell below an objective standard of reasonableness and the defendant was arguably prejudiced. *Id.*

¶ 13 In a guilty plea case, prejudice is a reasonable probability that the defendant would have pled not guilty and insisted on going to trial absent counsel's error. *People v. Hughes*, 2012 IL 112817, ¶ 63. However, a defendant's bare allegation that he would have done so is insufficient; instead, he must raise a claim of actual innocence or articulate a plausible defense that could have been raised at trial. *Hughes*, 2012 IL 112817, ¶ 64. Stated another way, a defendant must show that a decision to reject the plea bargain would have been rational under the circumstances, which depends mainly on predicting whether the defendant would have likely been successful at a trial. *Hughes*, 2012 IL 112817, ¶¶ 64, 65.

¶ 14 Attempted first degree murder is a Class X felony generally punishable by 6 to 30 years' imprisonment. 720 ILCS 5/8-4(c)(1); 730 ILCS 5/5-4.5-25(a) (West 2012). If that offense is committed "while armed with a firearm," 15 years' imprisonment must be added to the Class X sentence. 720 ILCS 5/8-4(c)(1)(B) (West 2012). If in committing attempted first degree murder a defendant "personally discharged a firearm that proximately caused great bodily harm," the court must add a prison term of 25 years to natural life. 720 ILCS 5/8-4(c)(1)(D) (West 2012).

¶ 15 Here, defendant pled guilty to attempted first degree murder with the firearm allegation deleted and the home invasion charge nol-prossed. He thereby received 20 years' imprisonment, which is one year less than the minimum sentence for that offense with the "armed with a firearm" enhancement, 11 years less than the *minimum* sentence with the enhancement for personally discharging a firearm causing great bodily harm, and immeasurably less than the *maximum* enhanced sentence of natural life imprisonment. The factual basis for his plea was his

identification by Mann and his link to the gun used to shoot Mann. Notably, Mann's lineup identification and defendant's statement admitting to buying the gun found in his car survived motions to suppress. Defendant was arrested about an hour after the shooting and less than two miles away with the gun used to shoot Mann in his car, and his post-arrest statement belies his claim in the petition that Herrod left the gun in his car. Moreover, Dixon also gave a statement naming defendant and Herrod as the men who invaded her home and defendant as the shooter.

¶ 16 Against this evidence and these circumstances, defendant presents Lipscomb's affidavit that places defendant and Herrod in defendant's car, less than two miles from Dixon's home, around the approximate time of the shooting. Taking Lipscomb's affidavit as true on its face, her statement that Herrod and defendant "sat in [defendant's] car and talked for a few minutes" does not preclude the opportunity for defendant and Herrod to use that car to go to Dixon's home and commit the charged offenses. In light of all the aforesaid, we find no reasonable probability that defendant would have pled not guilty and demanded trial had counsel investigated Lipscomb. We thus find no arguable claim of ineffective assistance of counsel and accordingly affirm the judgment of the circuit court.

¶ 17 Affirmed.