FIRST DIVISION
October 5, 2015

No. 1-14-0740

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. 06 CR 12661
	)	
GEORGE GOMEZ,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed.

¶ 2 Defendant, George Gomez, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2012). He contends that he set forth an arguable claim of ineffective assistance of trial counsel for failing to advise him that he could be found guilty of first-degree murder under a theory of accountability, and that his cause should be remanded for second-stage proceedings.

¶ 3 Following a bench trial on October 21, 2009, defendant was found guilty of the 2004 first-degree murder of Ivan Sanchez while armed with a firearm and sentenced to an aggregate term of 50 years' imprisonment. This court affirmed that judgment on direct appeal over defendant's sole claim that his sentence was excessive. *People v. Gomez*, 2011 IL App (1st) 093007-U (unpublished order under Supreme Court Rule 23).

¶ 4 On July 11, 2013, defendant filed the *pro se* postconviction petition at bar alleging, *inter alia*, ineffective assistance of trial counsel for failing to inform him of the possibility that he could be found guilty of first-degree murder under a theory of accountability. Defendant claimed that, prior to trial, he discussed with counsel his defense that he was not the shooter and that counsel never informed him of "such issues." Defendant claimed that this deprived him of "the opportunity to properly decide whether to plea bargain [or] whether to take a bench or jury trial." In support of his petition, defendant attached a number of supporting "affidavits" signed by him, but not notarized. As pertinent to the ineffective assistance claim, defendant stated that counsel never informed him of any accountability instructions, or of a possible accountability outcome, and that, if he had been properly informed, he "definitely [would have] taken different routes *** such as a jury instead of a bench trial."

¶ 5 On August 27, 2013, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. In assessing defendant's ineffective assistance of counsel claim for failing to inform him that he could be found guilty of first-degree murder on a theory of accountability, the court stated that counsel's advice on how to proceed was a matter of trial strategy, which would be left undisturbed; that a defendant has no constitutional right to be offered an opportunity to plea bargain; and that counsel's failure to initiate or pursue plea discussions does not necessarily constitute ineffective assistance.

¶ 6 In this court, defendant contends that he set forth an arguable claim of ineffective assistance of trial counsel for failing to advise him that he could be found guilty under a theory of accountability. He maintains that counsel's failure to properly advise him of this possibility influenced his decision on how to proceed at trial. The State responds that defendant's claim is refuted by the record and is purely speculative.

¶ 7 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2012); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2012); *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 9, 16 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 8 In this case, defendant raised a number of issues in his petition, but on appeal he focuses solely on his claim of ineffective assistance of counsel for failing to inform him of his liability under a theory of accountability. In doing so, he has waived the other issues for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 9 Claims of ineffective assistance of counsel are examined under the two-prong test set forth in *Strickland v. Washington*, 446 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, defendant must show that his counsel's performance "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defense.

Hodges, 234 Ill. 2d at 17, citing *Strickland*, 466 U.S. at 687-88. At the first stage of postconviction proceedings, however, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19, quoting *Hodges*, 234 Ill. 2d at 17.

¶ 10 Here, defendant's claim rested on his assertion that he told counsel before trial that he was not the shooter, but that counsel never told him that he could be found guilty of first-degree murder under a theory of accountability. Defendant asserted that if counsel had properly advised him of his potential liability, he would have sought a plea bargain or asked for a jury trial.

¶ 11 Although defendant points out that his co-defendant was offered and accepted a plea bargain from the State, we note that the State is under no duty to initiate or participate in plea bargaining (*People v. Boyt*, 129 Ill. App. 3d 1, 17 (1984), *aff'd*, 109 Ill. 2d 403 (1985)), and that defendant has no constitutional right to a plea bargain (*People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 13). In his petition, defendant did not contend that the State offered him a plea bargain, nor that counsel's failure to inform him of his possible liability under a theory of accountability would have forced or otherwise influenced the State to offer him one. Defendant's claim, therefore, is entirely speculative, and cannot serve as a basis to show that he was prejudiced by counsel's alleged failure to inform him of his potential culpability under a theory of accountability. *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 12 Defendant also contends that he would have proceeded to a jury trial instead of a bench trial if he had been properly advised by counsel. When defendant's challenge to a jury waiver is predicated on a claim of ineffective assistance of counsel, the court must determine whether counsel's performance fell below an objective standard of reasonableness, and whether it is

reasonably likely that defendant would not have waived his right to a trial by jury in the absence of the alleged error. *People v. Simon*, 2014 IL App (1st) 130567, ¶ 73, citing *People v. Batrez*, 334 Ill. App. 3d 772, 782 (2002).

¶ 13 The decision of whether to choose a bench or a jury trial belongs solely to defendant. *Simon*, 2014 IL App (1st) 130567, ¶ 74. In this case, defendant has not alleged that counsel coerced, or otherwise advised him to waive a jury trial, nor did he contend in his petition that he would not have waived his right to a jury trial if counsel had advised him on accountability. *People v. Thompkins*, 161 Ill. 2d 148, 179 (1994). Rather, he merely asserts in his "affidavit" that he "definitely [would have] taken different routes *** such as a jury instead of a bench trial."

¶ 14 Even if this non-affidavit (*Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002)) were construed as "other evidence" under the Act (*People v. Allen*, 2015 IL 113135, ¶ 34), it is contradicted by the record which shows that defendant initially requested a jury trial, but subsequently waived his right to one knowingly and voluntarily. The record reveals that before accepting his jury waiver, the trial court apprised defendant of the procedure for a jury trial, and confirmed that no one was forcing him or threatening him to waive a jury trial. The court noted that jurors had been called in the day before in anticipation of a jury trial, and defendant confirmed that he had changed his mind overnight and decided not to have a jury trial. The trial court then accepted defendant's jury waiver finding that it was given knowingly and voluntarily without force or threats. Under these circumstances, we find that defendant failed to meet the arguable Strickland test for first stage petitions (*Tate*, 2012 IL 112214, ¶ 19), and affirm the summary dismissal of his postconviction petition by the circuit court of Cook County.

¶ 15 Affirmed.