2016 IL App (2d) 140522-U
No. 2-14-0522
Order filed May 5, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-613
PETER MAUTER,	)	Honorable Robert G. Kleeman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly summarily dismissed defendant's postconviction petition, which alleged ineffective assistance of counsel: defendant did not comply with section 122-2 of the Act, as he attached no evidence and did not explain its absence, and in any event defendant did not show arguable prejudice.

¶ 2 Defendant, Peter Mauter, appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) from his conviction, based upon nonnegotiated guilty pleas, of three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)). We affirm.

¶ 3 On March 10, 2010, defendant was indicted on six counts of predatory criminal sexual assault of a child. Three counts named his daughter, D.M., as the victim; the other three named his other daughter, C.M. Defendant was also charged with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 2004)), with each daughter named as the victim in one count. Predatory criminal sexual assault was a Class X felony (720 ILCS 5/12-14.1(b)(1) (West 2004)) for which consecutive sentences were mandatory (730 ILCS 5/5-8-4(b) (West 2004)). However, convictions of committing the offense against both D.M. and C.M. would make a life sentence mandatory (720 ILCS 5/12-14.1(b)(1.2) (West 2004)).

¶ 4 The trial court appointed counsel for defendant. On May 17, 2010, counsel told the court that he had received a plea offer from the State and wanted to discuss it with defendant. The court continued the cause to June 3, 2010. On that date, counsel told the court that he had received an offer that morning; the court continued the cause to June 17, 2010. On June 17, 2010, counsel told the court that he and the State were "attempting to work this out," and the court continued the cause to July 8, 2010. However, on July 1, 2010, counsel informed the court that the State had just tendered a new plea offer that he needed to discuss with defendant. The court continued the cause to July 20, 2010. On that date, counsel stated that the parties were in negotiations. The court continued the cause to August 3, 2010. On August 3, 2010, with negotiations still going on, the court continued the cause to August 17, 2010.

¶ 5 On August 17, 2010, the parties presented an agreement under which defendant would plead guilty to the three charges of predatory criminal sexual assault involving D.M. and the State would dismiss the remaining charges. The parties and the court noted that defendant was eligible for extended-term sentencing; that the possible sentence for each conviction was between 6 and 60 years' imprisonment, with a maximum aggregate of 120 years; and that the

sentences would be mandatorily consecutive. The court admonished defendant and explained to him the charges and the possible sentences. Defendant told the court that he understood the admonishments and the rights he was forgoing. The court accepted his pleas.

¶ 6 On September 14, 2010, defendant moved to withdraw his guilty pleas, alleging that he had not understood the consequences of his decision. However, he later moved to withdraw his motion, and, on October 20, 2010, the court allowed him to do so. On March 14, 2011, defendant, through new counsel, again moved to withdraw his guilty pleas. On May 20, 2011, the court allowed him to withdraw his motion.

¶ 7 On July 11, 2011, defendant filed a third motion to withdraw his guilty pleas. That day, the trial court heard the motion. Defendant and his original trial attorney testified. They differed on how many times they discussed plea offers from the State. Neither witness, however, referred to any specific offer other than the one that defendant eventually accepted. The court denied the motion. On September 7, 2010, defendant was sentenced to three consecutive 15-year prison terms. On September 28, 2011, he moved to reconsider his sentences. The court affirmed the sentences but granted him credit for time in presentencing custody.

¶ 8 On appeal, this court vacated the denial of defendant's postjudgment motion and remanded the cause for compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), including allowing defendant to file a postjudgment motion and holding a new motion hearing. *People v. Mauter*, 2012 IL App (2d) 110973-U (summary order). On April 20, 2012, defendant filed motions directed against both the pleas and the sentences. However, on April 26, 2012, the court granted defendant's motion to withdraw the motion directed against his pleas. The court then denied the sentencing motion. On appeal, we affirmed the judgment as modified, vacating or reducing various fines and fees. *People v. Mauter*, 2013 IL App (2d) 120481-U.

¶ 9 On February 6, 2014, defendant filed his postconviction petition. It raised several claims; only one concerns us. According to paragraph 23 of the petition, on May 17, 2010, just before the hearing, counsel told defendant that the State had offered "a 30[-]year sentence on a plea of guilty on 3 charges." Defendant responded that he needed time to consider the offer. "[He] was not told the offer had any kind of time limit. [Defendant and counsel] never talked of this offer again." On June 3, 2010, counsel told defendant that he had received another offer and needed more time; on July 1, 2010, he told defendant the same thing. On July 20, 2010, and August 3, 2010, "the same thing happened in court."

¶ 10 Paragraph 23 continued as follows. Sometime between August 3, 2010, and August 17, 2010, counsel told defendant that "the State's offer had come down to this[:] that the State would throw out certain charges and not seek a life sentence." Defendant "did not receive a copy of this until August 20, 2010." Paragraph 23 then alleged:

> "[Counsel] never explained to me what had happened to the original offer of 30 years. I probably would had [*sic*] accepted the offer of 30 years as soon as it was offered had [counsel] explained to me [that] the offer had a time limit, and the consequences of not accepting the offer. I would not have withdrawn the guilty plea and asked to go to trial."

Defendant's petition did not attach any affidavits or other documents in support of its claims and did not explain the absence of affidavits or other nonrecord evidence.

¶ 11 The trial court dismissed the petition summarily. As pertinent here, the court explained that the claim of ineffectiveness failed to allege prejudice and had been "waived" in that it could have been raised on direct appeal. Defendant timely appealed the dismissal of his petition.

¶ 12 On appeal, defendant contends that his petition stated the gist of a meritorious claim that his trial attorney was ineffective for failing to inform him that the State's plea offer, under which

he could have served a total of 30 years for three convictions of predatory criminal sexual assault of a child, came with an expiration date. Defendant also contends that the trial court erred in holding that he had forfeited his claim by failing to raise it in his direct appeal.

¶ 13 We agree with defendant that the trial court erred in holding that his claim was forfeited. Although claims that a defendant could have raised on direct appeal are forfeited, defendant's ineffective-assistance claim relied on matters outside the record on his direct appeal. Therefore, as it could not have been raised on direct appeal, it was not forfeited. See *People v. Munson*, 206 Ill. 2d 104, 124 (2002). We turn to whether the dismissal was proper on the merits.

¶ 14 We review *de novo* the summary dismissal of a petition under the Act. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). The trial court may not dismiss the petition unless it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). The petition's allegations, taken as true unless they are contradicted by the record, must state the gist of a meritorious claim of constitutional error. *Collins*, 202 Ill. 2d at 66.

¶ 15 Under section 2 of the Act, the 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 2014). Our supreme court has repeatedly held that the failure to meet this requirement justifies the summary dismissal of a postconviction petition. *Collins*, 202 Ill. 2d at 66; *People v. Turner*, 187 Ill. 2d 406, 414 (1999); *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). The *Collins* court explained that satisfying 122-2's requirement is necessary for a petition to "show[] that the verified allegations are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 67.

¶ 16 Defendant's petition attached no affidavits or other evidence in support of its allegations, other than some excerpts from the record in the underlying case, of which the trial court could

already take judicial notice and which provided no corroboration for his claim here. The State maintains that, under section 122-2 as construed by *Collins* and previous opinions, this deficiency alone requires us to affirm the summary dismissal of the petition.

¶ 17 Defendant's appellate brief anticipates this issue. He concedes that his petition did not attach any affidavits or other evidence that would satisfy *Collins*. He maintains, however, that these opinions' holding that the failure to satisfy section 122-2, in itself, justifies summary dismissal has been qualified by *People v. Allen*, 2015 IL 113135. We disagree.

¶ 18 In *Allen*, the defendant's *pro se* petition challenged his conviction of murder, claiming actual innocence as well as various constitutional violations. The petition attached a signed but unnotarized statement. The statement, which certified that Robert Langford was its author and that he made the statement under penalty of perjury, asserted that Langford and a since-deceased accomplice had robbed the victim; that Langford had shot the victim; and that the defendant was innocent of the crime. *Id.* ¶ 14. The trial court dismissed the petition summarily, explaining that the Langford statement did not qualify as an affidavit under section 122-2 of the Act, as it was not sworn or notarized and did not even state that Langford would testify under oath to the facts asserted therein. Further, the court said, the statement was substantively insufficient to raise the gist of a claim of actual innocence. *Id.* ¶ 15. The appellate court agreed with the trial court that, owing to its lack of notarization, the statement was not an affidavit (or "other evidence" (725 ILCS 5/122-2 (West 2008)) required by section 122-2 and the case law. *Id.* ¶ 17.

¶ 19 On appeal, the supreme court first considered whether, in itself, the statement's lack of notarization required that the petition be summarily dismissed. *Id.* ¶ 19. The court noted that, on the one hand, it had stated that, at the first stage, " 'the [trial] court considers the petition's substantive virtue rather than its procedural compliance.' " *Id.* ¶ 24 (quoting *People v.*

Hommerson, 2014 IL 115638, ¶ 11). On the other hand, however, the court had allowed summary dismissal based on the failure to comply with section 122-2 by attaching affidavits (or other evidence) or explaining why that evidence was not attached. *Id.* ¶ 26.

¶ 20 The court turned to the case before it. The petition had not failed altogether to attach an affidavit or other evidence in accordance with section 122-2. Instead, it had attached substantive evidence that, although not within the definition of "affidavit" as a statement sworn to before a person with the legal authority to administer oaths (*id.* ¶ 31), nonetheless served section 122-2's purposes of enabling the trial court to decide the petition's substantive virtue and showing that the petition's allegations could be independently corroborated (*id.* ¶ 34). The defendant's failure to have the "affidavit" notarized was a procedural defect that the State could raise at the second stage of the proceedings. *Id.* ¶ 35. But, at the first stage, the trial court could not dismiss the petition for failure to comply with section 122-2, as the statement, although not notarized, satisfied section 122-2's purposes and thus did not frustrate the trial court's efforts to decide whether the petition stated the gist of a meritorious claim. *Id.* ¶ 34.

¶ 21 Defendant argues that, in light of *Allen*, his petition's failure to satisfy section 122-2's corroboration requirement should not be sufficient to support the summary dismissal of the petition. We cannot endorse this generous reading of *Allen*. The supreme court did not repudiate the holding of *Collins* that a petition cannot survive the first stage if it completely fails either to (1) attach affidavits or other evidence to support its claims; or (2) explain the absence of such supporting evidence. In *Allen*, relying on the distinction that it had previously drawn between substantive virtue and formal or procedural compliance, the court held only that the evidence that the defendant's petition had attached—the unnotarized but factually specific statement by Langford—provided some independent corroboration for the petition's assertions and thus

enabled the trial court to pass on its substantive virtue. There is an obvious difference between (1) an evidentiary attachment that does not comply with the procedural formalities of the Act; and (2) no evidentiary attachments at all. The difference, quite simply, is between something and nothing. Something, even in imperfect form, can provide a basis for a claim of constitutional error.

¶ 22 Defendant concedes that his petition neither attached any affidavits or other evidence nor explained the absence of such evidence. For this reason alone, we conclude that the summary dismissal of the petition was proper. We recognize, of course, as defendant points out, that a postconviction petitioner who alleges that his trial counsel was ineffective need not supply an affidavit from the allegedly ineffective attorney. See *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005); *People v. Williams*, 47 Ill. 2d 1, 2-4 (1970). Nonetheless, the petition did not explain the complete absence of evidence to support the claim of ineffective assistance that defense counsel failed to inform him that prosecutors made a 30-year offer that included some time limit, even though defendant now concedes that "the prosecutors or other witnesses might be able to verify that a 30-year offer was made." Given the lack of compliance with section 122-2—the complete absence of either evidentiary support or an explanation for that absence—we must conclude that, under *Collins*, dismissal was proper.

¶ 23 In any event, we need not rely solely on the petition's noncompliance with section 122-2. Even assuming that *Collins* did not justify the summary dismissal of the petition, the petition did not sufficiently raise a claim of ineffective assistance. To do so, the petition had to show that it was arguable that (1) trial counsel's performance was objectively unreasonable; and (2) defendant was prejudiced as a result. See *Strickland v. Washington*, 466 U.S. 668, 687-88

(1984); People v. Hodges, 234 Ill. 2d 1, 17 (2009). The petition's nebulous and conclusional allegations were, even at the first stage, insufficient to satisfy *Strickland*'s prejudice prong.

¶ 24 Paragraph 23 of the petition alleged the following facts. On May 17, 2010, just before the hearing, counsel told defendant of the 30-year offer but did not tell him that there was a deadline to accept the offer. Had defendant been told that there was a deadline, he "probably would [have] accepted this offer." However, as it was, defendant told counsel that he needed time to consider the offer. Counsel and defendant did not speak of the offer again. On June 3, 2010, counsel told defendant that the State had made a new offer. After several continuances, defendant learned from counsel that the State was now offering the agreement that he accepted—pleading guilty to three charges, all involving the same victim, with no agreement on sentencing.

¶ 25 We note some aspects of this claim. The assertion that the offer had a "time limit" is based on inference, apparently from the alleged fact that, on June 3, 2010, the State made a different offer. Also, defendant told counsel that he needed time to consider the 30-year offer, yet, by his own assertion, he *never* spoke to counsel about it again. Thus, between May 20, 2010, and June 3, 2010, he did not communicate any interest in accepting the offer. However, had counsel (1) told him that the offer had a time limit and (2) explained "the consequences of not accepting the offer," defendant "probably would [have] accepted [it] as soon as it was offered." Defendant's entire claim of prejudice came down to his somewhat conclusional assertion that, had counsel told him that the State's 30-year offer had a time limit, he "probably" would have accepted it "immediately," even though he admittedly showed no further interest in the same offer over the course of two weeks.

¶ 26 We note that, in assessing a postconviction petitioner's claim that counsel's errors induced him to plead guilty, courts require more to support an allegation of prejudice than the

bare allegation that, had counsel performed competently, the defendant would have declined to plead guilty and instead would have elected to go to trial. See, *e.g.*, *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). Instead, the claim must be supported by factual allegations that make the allegation colorable (such as a claim of innocence or the articulation of a plausible defense that could have been raised at trial). *Id.* at 459-60. Although this case involves a claim that defendant would have accepted a plea offer, the same general principle applies.

¶ 27 Defendant's bare contention that he "probably" would have accepted the offer immediately had counsel told him of the time limit was a conclusion, and one hardly in accordance with the context or common sense. It was inconsistent with defendant's lack of interest in the 30-year offer in the interim between May 17, 2010, and whenever the alleged time limit ran out. This lack of interest is implied in the allegation that defendant and counsel did not discuss the offer after May 17, 2010, and it is also supported by the complete absence of any reference to the offer in the trial court record. Although we hesitate to state that the record refutes defendant's assertion that he would have accepted the 30-year offer on the spot had he known that he did not have an indefinite time in which to consider it, the record does undercut his already conclusional allegation that the offer interested him at all: he never raised the existence of the alleged offer at any time. Finally, the whole premise that counsel's failure to communicate to defendant that this was a limited-time-only offer made the offer forgettable, instead of all but irresistible, is simply illogical. The offer's terms were the same either way, as was the strength of the State's case against defendant. The petition did not show arguable prejudice.

¶ 28 We hold that the trial court did not err in summarily dismissing defendant's petition.

¶ 29 The judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 30 Affirmed.