2017 IL App (2d) 150531-U
No. 2-15-0531
Order filed May 15, 2017
Modified Upon Denial of Rehearing August 7, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-184
HERIBERTO LOPEZ,	)	Honorable C. Robert Tobin, III,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's dismissal of defendant's first-stage postconviction petition where defendant failed to present an arguable claim of ineffective assistance where trial counsel (1) did not mislead defendant into waiving his right to testify with lies or false promises; (2) did not fail to present mitigating evidence at the sentencing hearing; and (3) did not labor under an actual conflict of interest at sentencing due to nonpayment such that it adversely affected his performance.

¶ 2 Following a jury trial, defendant, Heriberto Lopez, was convicted of five counts of criminal sexual assault of his step-daughter, K.L., and the trial court sentenced defendant to five consecutive terms of 10 years' imprisonment. Defendant appealed, in which he contended that

the prosecution indoctrinated the jurors during *voir dire* and denied him a fair trial, and this court affirmed. *People v. Lopez*, 2014 IL App (2d) 121008-U, ¶ ¶ 13, 21.

¶ 3 Defendant filed a *pro se* petition for postconviction relief pursuant to section 122-1 of the Post–Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2014)), arguing that he was denied effective assistance of trial counsel. On May 6, 2015, the trial court summarily dismissed the postconviction petition.

¶ 4 Defendant contends that his petition stated the gist of a constitutional claim that trial counsel rendered ineffective assistance for: (1) misleading defendant into waiving his right to testify; (2) failing to present mitigating evidence at the sentencing hearing to rebut evidence admitted in aggravation; and (3) acting under an actual conflict of interest at sentencing due to nonpayment, which adversely affected counsel's representation of defendant at sentencing. We affirm.

¶ 5 The Act establishes a three-stage process for adjudicating postconviction petitions. *People v. Hommerson*, 2013 IL App (2d) 110805, ¶ 7. At the first stage (as here), the trial court considers, without input from the State, whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a) (2) (West 2014). A claim is frivolous or patently without merit where it has no "arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (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 indisputable meritless legal theory is one which is completely contradicted by the record." *Id.* A dismissal of a postconviction petition at the first stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 6 At the first stage of postconviction proceedings, an ineffective-assistance-of-counsel claim may not be dismissed if it is arguable that: (1) counsel's performance fell below an objective standard of reasonableness (performance prong); and (2) the defendant was prejudiced (prejudice prong). *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). The performance prong requires us to consider whether, applying a strong presumption that counsel's representation fell within the wide range of reasonable assistance (see *Strickland*, 466 U.S. at 689), there is an arguable basis to find that counsel's performance was "objectively unreasonable under prevailing professional norms." *People v. Cathey*, 2012 IL 111746, ¶ 23. The prejudice prong requires us to ask whether there is an arguable basis to conclude that there exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* The failure to satisfy either prong will defeat the ineffective-assistance claim. *People v. Williams*, 193 Ill. 2d 306, 375 (2000). We now address and reject each of defendant's ineffective-assistance claims.

¶ 7 Defendant first argues that counsel misled him into waiving his right to testify by falsifying the consequences of testifying at trial. Specifically, defendant alleges that counsel lied to him and told him that, if defendant took the stand, the State would be able to bring in evidence of defendant's prior arrests, convictions for misdemeanor domestic battery, restraining orders, complaints of abuse against him, reported or not, an implication that his oldest step-daughter committed suicide as a result of defendant's inappropriate sexual relationship with her, and that he fled Mexico to avoid prosecution in connection with a fatal car accident.

¶ 8 While defendant argues that counsel's lies kept him from testifying, he nevertheless alleges in his petition that he "still insisted" he "needed to testify against the lies they were spreading." Clearly, by defendant's own allegations, the statements allegedly made by his

counsel about what the State would be able to admit if defendant testified did not keep defendant from his intention to testify. Simply put, it is not arguable that defendant was prejudiced by any of counsel's misrepresentation of the consequences of testifying at trial should defendant testify, where defendant admits that this did not dissuade him from testifying. Moreover, given the evidence presented at trial, counsel's advice that defendant not present the State an opportunity for cross-examination and possible impeachment was well within the range of reasonable professional assistance.

¶ 9 In his reply brief, defendant maintains that his petition also "implied that counsel failed to follow through on his promise to present evidence" in defendant's defense. The petition alleges that counsel told defendant that, by taking the stand, he would "undue [sic] his planned defense of the case, insisting he had something planned," but then after counsel informed him that he had something planned, counsel rested the case without offering any evidence. In other words, defendant argues that he was duped by counsel's false promise into waiving his fundamental right to testify.

¶ 10 Generally speaking, unless counsel refused to allow defendant to testify, advice not to testify constitutes trial strategy and does not support an ineffective-assistance claim. *People v. Coleman*, 2011 Ill App (1st) 091005, ¶ 29. Here, the petition alleges that counsel told defendant that he "had something planned" for their case, that defendant patiently waited for counsel to fulfill that promise, and that defendant was "shocked" when counsel rested the case "without offering a defense." Even taking defendant's allegation as true, counsel never promised to present evidence. Counsel's statement that defendant's testimony could harm the planned defense was simply counsel's professional opinion. Defendant's allegations reflect that counsel did not prohibit defendant from testifying but, rather, counsel gave strategic advice, defendant

listened to that advice, and defendant chose not to testify. See *People v. Brown*, 54 Ill. 2d 21, 24 (1973) (Counsel "is free to engage in fair persuasion and to urge his considered professional opinion on his client."). Further, the record reflects that both counsel and the trial court thoroughly addressed defendant's right to testify, admonishing defendant of his right to testify, and confirming that defendant's decision not to testify was his own.

¶ 11 Defendant relies on *People v. Seaberg*, 262 Ill. App. 3d 79 (1994). In that case, the defendant alleged in his postconviction petition that his attorney erroneously advised him that he would be impeached with a misdemeanor battery conviction if he testified and he would have testified but for that erroneous advice. *Id.* at 82-83. We held that the trial court erred in dismissing the petition at the first stage because the defendant's claim was not rebutted by the record. We also found that, taken as true, the claim had an adequate basis in fact where the defendant's misdemeanor battery conviction would not have been a legal basis for impeachment of defendant's credibility. *Id.* As in *Seaberg*, defendant argues that his *pro se* petition raised the gist of an ineffective assistance of counsel claim by alleging that defendant would have asserted his right to testify but for trial counsel's erroneous advice.

¶ 12 We find *Seaberg* distinguishable. Here, the record refutes that defendant refrained from testifying because of erroneous advice by counsel. Defendant's petition explicitly states that he still insisted on testifying, even after receiving the alleged erroneous advice. Defendant only chose not to testify after counsel stated that his testimony would harm his case. This was simply counsel's professional opinion. As such, defendant has failed to set forth an arguable claim of ineffective assistance of counsel.

¶ 13 Defendant next contends that he was arguably prejudiced by counsel's failure to present mitigating evidence at sentencing of personnel from DCFS to rebut "damning" allegations made

by K.L. in her victim impact statement that defendant sexually abused her older sister, Mallory, and that Mallory committed suicide as a result of the abuse. Defendant alleges that he advised counsel to investigate the truth about Mallory's death and that DCFS investigated defendant's family multiple times, including after Mallory's death, and during that investigation, a social worker spent "extra time" with defendant's children and step-children. Defendant alleges that his counsel was in possession of DCFS reports and that Mallory's death had been ruled accidental; that she had died while playing something called the "shocking game." Defendant notes that trial counsel subpoenaed DCFS records related to the investigations of defendant's family, and DCFS returned the requested records to the court for *in camera* inspection. The court concluded that the records were relevant to defendant's case, distributed them to counsel, and ordered that they be returned to the court at the conclusion of the case. Defendant alleges that the precise contents of the records are unknown and DCFS was unresponsive to his letters requesting the records for purposes of the petition. Nevertheless, defendant argues that, assuming the records and testimony of DCFS personnel would have rebutted evidence admitted in aggravation, as is alleged in the petition, then that evidence certainly would have been mitigating and, defendant could have received a lesser sentence.

¶ 14 Absent a sound reason for not doing so, counsel has a duty to investigate potential sources of mitigating evidence and to present such evidence at sentencing. *People v. Thompkins*, 191 Ill. 2d 438, 469 (2000). Counsel's failure to present mitigating evidence at a defendant's sentencing hearing may serve as a basis for finding that counsel's performance was deficient. *People v. Perez*, 148 Ill. 2d 168, 187-88 (1992). Although courts generally defer to counsel's strategic decisions regarding the presentation of mitigation evidence, "such deference is not

warranted where the lack of mitigation evidence presented stems not from strategy, but from counsel's failure to properly investigate and prepare." *Thompkins*, 191 Ill. 2d at 469-70.

¶ 15 When ineffective assistance of trial counsel is alleged in the sentencing context, prejudice may be established by showing that, but for trial counsel's failure to present certain mitigating evidence there is a reasonable probability that a lighter sentence would have been imposed. *People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 102. In assessing prejudice, the evidence in aggravation should be re-weighed against the totality of available mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

¶ 16 As the State points out, defendant relies on his conclusory statement, unsupported by specific factual allegations, that DCFS was aware of Mallory's cause of death, which was not suicide. More importantly, defendant has not established prejudice. No facts are offered to show to what extent the trial court considered K.L.'s victim impact statement in fashioning defendant's sentence. The State never argued that defendant should be held accountable for abusing Mallory or for her death. The trial court, in imposing sentence, never mentioned Mallory's death.

¶ 17 K.L.'s victim impact statement relates only her opinion that her sister must have committed suicide because of her own experiences with defendant. She does not suggest any real knowledge as to the cause of Mallory's death. No evidence was presented at trial or sentencing in support of any contention that defendant sexually abused Mallory or that she committed suicide as a result of that abuse. In fact, the State only argued that the victim impact statement showed "what goes through [the victim's] mind everyday as a result of the defendant's conduct."

¶ 18 A trial judge is presumed to ignore irrelevant, inflammatory, or emotional factors in determining a sentence. *People v. Johnson*, 149 Ill. 2d 118, 154 (1991). Here, there is nothing

in the record to rebut the presumption that the trial court did not consider K.L.'s unsupported opinion regarding Mallory's death. Defendant has not shown the gist of a claim of ineffective assistance of counsel as to the prejudice prong of *Strickland*.

¶ 19 Defendant also challenges counsel's failure to present any mitigating evidence to rebut and counterbalance the substantial aggravating evidence presented at sentencing. We disagree. In mitigation, defendant's trial counsel presented the sex offender evaluation to address whether defendant posed a threat to the public. The evaluation showed that defendant was predicted only to be at a 16% risk to reoffend within 15 years. Counsel also argued that defendant's lack of a criminal history warranted a lighter sentence. Accordingly, defendant has failed to make out the gist of a constitutional claim of ineffective assistance of counsel for failing to present mitigating evidence at sentencing.

¶ 20 Defendant last contends that he arguably was deprived of effective assistance of conflict-free counsel at sentencing because of defendant's inability to fully pay for the entirety of the cost of representation. Defendant claims in his petition that counsel suffered from an actual conflict of interest such that his duty was compromised because defendant owed counsel money, but the court denied counsel's firm's motion to withdraw. Defendant alleges in his petition that a conflict of interest arose when counsel gave him an ultimatum of pleading guilty or possibly proceeding to trial without him. Defendant attached to the petition a partial billing statement from trial counsel's law firm, which shows that the last payment toward defendant's outstanding balance of legal fees had been made on March 29, 2012, and a letter from Michael Crosby (presumably the managing partner of trial counsel's law firm) to the Attorney Registration and Disciplinary Commission, which alleged that defendant still owed nearly $7,000 for services rendered by trial counsel as of February 28, 2013. Defendant was convicted on April 5, 2012,

and sentenced on July 20, 2012. On appeal, defendant notes the following two alleged deficiencies in counsel's performance at sentencing to show how the conflict of interest arguably adversely affected counsel's performance: (1) counsel failed to bring in DCFS personnel to rebut the victim's claim that her sister Mallory committed suicide as a result of defendant sexually abusing her, and (2) counsel failed to present defendant's sister to testify in mitigation. The State responds that defendant has forfeited this claim.

¶ 21 Regardless of forfeiture, trial counsel's representation of defendant was not compromised. A criminal defendant's Sixth Amendment right to effective assistance of counsel includes the right to conflict-free representation. *People v. Morales*, 209 Ill. 2d 340, 345 (2004). The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations. *People v. Washington*, 101 Ill. 2d 104, 110 (1984). Effective assistance means assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988).

¶ 22 Illinois recognizes two classes of impermissible attorney conflicts of interest. *Spreitzer*, 123 Ill. 2d at 14. The first category of conflict, termed "*per se* conflicts," consist of those "certain facts *** [that] engender, by *themselves*, a disabling conflict" (emphasis in original), usually "the defense attorney's prior or contemporaneous association with either the prosecution or the victim." *Id*. Defendant does not allege a *per se* conflict.

¶ 23 The second category of conflict, argued by defendant here, often called a "potential," "possible," or "actual" conflict, describes something short of a *per se* conflict. See *Id*. at 17-18. In such cases, a defendant's conviction may be reversed if the trial court was informed of the

problem and failed to take adequate protective steps, or where the court was not apprised and the defendant can show that " 'an actual conflict of interest adversely affected' counsel's performance." *Spreitzer*, 123 Ill. 2d at 18 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)). In cases where a defendant claims that an actual conflict adversely affected counsel's performance, a defendant must show "some specific defect in his counsel's strategy, tactics, or decision making attributable to [a] conflict." *Spreitzer*, 123 Ill. 2d at 18. Speculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance. *People v. Morales*, 209 Ill. 2d at 349.

¶ 24 Defendant never alleged any specific defect in counsel's performance attributable to the alleged conflict. This alone supports a basis for first-stage dismissal of the claim. Furthermore, the record does not show that defendant's inability to fully pay counsel led counsel to perform in a manner adverse to defendant. Here, the record shows that counsel knew that defendant would not be able to pay for the entirety of the cost of representation through trial and sentencing. Prior to trial, counsel informed the court that a partner in the firm requested that counsel withdraw from representation. By sentencing, the record shows that defendant had no funds left to pay counsel. The documents appended to the petition show that a payment may have fulfilled defendant's obligation to counsel for a portion of the trial. Nevertheless, counsel continued to represent defendant even though he could not pay the full amount.

¶ 25 Our review of the record reveals that counsel zealously represented defendant to the end of the commitment, regardless of whether he was fully compensated for the representation. Such vigorous representation by defense counsel belies a claim of ineffective assistance. See Illinois Rule of Professional Conduct 1.3[1], [4] (providing that a lawyer should pursue the matter with zeal, commitment, and dedication to the interests of the client unless the representation is

terminated). Unlike the case of *People v. Falls*, 235 Ill. App. 3d 558, 563 (1992), relied on by defendant, where counsel stated he could not concentrate and give his best to his client because his client owed him money, there is nothing to suggest that defense counsel stated that he could not give the case his full attention or that he would not represent defendant to the best of his abilities.

¶ 26 We previously rejected, defendant's argument regarding counsel's failure to bring in DCFS personnel to rebut the victim's claim that her sister Mallory committed suicide as a result of defendant sexually abusing her. Accordingly, defendant cannot establish that an actual conflict of interest affected counsel's performance because of his failure to call DCFS personnel at the sentencing hearing.

¶ 27 Finally, defendant's argument that counsel did not call defendant's sister to testify at the hearing due to counsel's own financial interests is speculative at best. Defendant merely assumes that his sister's testimony would have been favorable. Defendant did not submit an affidavit from his sister of any other specific information of what her testimony would be. To sustain an ineffective assistance of counsel claim for counsel's failure to investigate or present a witness, the defendant's allegation must be supported by an affidavit from that witness that contains the witness's proposed testimony. 725 ILCS 5/122-2 (West 2014); *People v. Enis*, 194 Ill. 2d 361, 380 (2000); see also *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (when defendant attacks competency of trial counsel in postconviction petition for failure to call or contact certain witnesses, defendant must attach affidavits from those witnesses). "In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380; see also *People v. Burgess*, 2015 IL App (1st)

130657, ¶ 189 ("A detailed and specific offer of proof is necessary when it is not clear what the witness' testimony will be or his basis for so testifying").

¶ 28 In sum, we find that defendant cannot demonstrate that his trial counsel arguably labored under an actual conflict of interest at sentencing due to nonpayment. Accordingly, defendant's claim of ineffective assistance of counsel fails on this basis.

¶ 29 III. Conclusion

¶ 30 For the reasons stated, the judgment of the circuit court of Boone 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, 178 (1978).

¶ 31 Affirmed.