NOTICE
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2012 IL App (4th) 110232-U

Filed 5/17/12

NO. 4-11-0232

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Mason County
ANTHONY D. OSING,	)	No. 07CF50
Defendant-Appellant.	)	
	)	Honorable
	)	Scott J. Butler,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by dismissing defendant's postconviction petition at the first stage because defendant failed to state the gist of a claim of ineffective assistance of counsel.

¶ 2 In January 2008, defendant, Anthony D. Osing, pleaded guilty pursuant to a fully negotiated plea to (1) predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000) and (2) criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2002), in exchange for consecutive terms of 10 years and 5 years in prison, respectively. The sentences would be followed by three-year and two-year terms of mandatory supervised release (MSR). Under the truth-in-sentencing statute, defendant would be required to serve 85% of his sentence.

¶ 3 On November 24, 2010, defendant *pro se* filed a petition for postconviction relief, supported by affidavits from himself, his wife, his father, and his mother. On February 14, 2011, the trial court dismissed defendant's petition at the first stage of postconviction proceedings.

¶ 4 Defendant appeals, arguing that the trial court erred by dismissing his postconviction petition at the first stage of postconviction proceedings. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 On April 9, 2007, Angela Haarmon discovered a digital audio recorder in a bag of clothes given to her by Glee Osing, defendant's wife. Upon playing the recorder, Haarmon, her husband Tony, and her son realized the recording was of sexual acts between defendant and a juvenile. Haarmon turned the recorder over to the police, explaining the substance of the recording and that she knew who the juvenile was in the recording and that he was currently only 16 years old. Haarmon also explained that defendant was an adult teacher at the junior high school and the husband of Glee Osing, from whom she had received the bag of clothes that contained the recorder. Agent Carl Linderman listened to the recording Haarmon gave him and heard what he believed to be two individuals engaged in oral sex. The recording revealed these individuals to be defendant and a juvenile, J.C.

¶ 7 The following day, the police interviewed J.C. at his residence. J.C. confirmed that the recording was of himself and defendant engaged in oral sex acts. J.C. told the officers that this recording took place approximately two years before and that he and defendant had engaged in 10 separate incidents of oral sex together at defendant's home, while defendant—J.C.'s schoolteacher—was supposed to be helping J.C. with his homework. J.C. explained that defendant had made the recording and told J.C. that if he told anyone, defendant would play the recording for others to hear.

¶ 8 Shortly after the interview with J.C., investigators arrested defendant and

transported him to the Mason County jail. During questioning, defendant admitted the recording was of him and J.C. engaged in a sexual act while at defendant's home. Defendant told the officers he was sorry for what he had done to J.C. and said that the recording was made approximately two years ago.

¶ 9 On April 23, 2007, the State charged defendant with two counts of predatory criminal sexual assault of a child (counts I and II) (720 ILCS 5/12-14.1(a)(1) (West 2000)), two counts of criminal sexual assault (counts IV and V) (720 ILCS 5/12-13(a)(4) (West 2002)), and three counts of aggravated criminal sexual abuse (counts III, VI, VII) (720 ILCS 5/12-16(c)(1) (West 2000)).

¶ 10 On April 24, 2007, the trial court advised defendant, who appeared with counsel, Michael Metnick, of the nature of the charges against him and the minimum and maximum penalties for each offense. The court admonished defendant, *inter alia*, that predatory criminal sexual assault, a Class X felony, was punishable by 6 to 30 years in prison, followed by a 3-year MSR term, and that consecutive terms were mandatory if defendant was convicted on more than one of the counts for which he was charged (730 ILCS 5/5-8-1(a)(3), (d)(1), 5-8-4(a)(ii) (West 2000)), but that defendant was eligible for an extended term of no less than 30 nor more than 60 years in prison because the victim was under the age of 18 at the time of the offense (730 ILCS 5/5-5-3.2(c), 5-8-2(a)(2) (West 2000)). Defendant was also notified that criminal sexual assault, a Class 1 felony, was punishable by 4 to 15 years in prison, followed by a 2-year MSR term, and that consecutive terms on all counts were mandatory. 730 ILCS 5-8-1(a)(4), (d)(2), 5-8-4(a)(ii) (West 2002). Last, defendant was informed that aggravated criminal sexual abuse, a Class 2 felony, was punishable by 3 to 7 years in prison, followed by a 2-year MSR term but that

defendant was eligible for an extended term of 7 to 14 years in prison on count III because the victim was under the age of 13 at the time of the offense. 730 ILCS 5/5-8-1(a)(5), (d)(2), 5-8-2(a)(4) (West 2000). When asked by the court whether he had any questions concerning the penalties, defendant responded that he did not.

¶ 11 In September 2007, defendant filed a motion *in limine* seeking to bar admission of the recording between defendant and J.C. Defendant alleged that (1) during the interview with the police, "J.C. indicated that the recording was fake and that there was no sex act between him and the [d]efendant on the recording"; (2) the recording was inadmissible because it would be offered solely to prove the character of defendant; and (3) the probativeness of the recording was substantially outweighed by the prejudice to defendant. Following a November 2007 hearing, the trial court took the motion under advisement, noting that the State would provide the recording to the court. Shortly thereafter, the court denied the motion.

¶ 12 On January 4, 2008, defendant appeared in court with Metnick's partner, Scott Sabin. The parties advised the trial court that they had reached a plea agreement. Under the negotiated plea agreement, defendant agreed to plead guilty to predatory criminal sexual assault of a child (count I) (720 ILCS 5/12-14.1(a)(1) (West 2000)) and to criminal sexual assault (count IV) (720 ILCS 5/12-13(a)(4) (West 2002)), in exchange for consecutive terms of 10 years and 5 years in prison, respectively. The sentences would be followed by three-year and two-year terms of MSR. Under the truth-in-sentencing statute (730 ILCS 5/3-6-3(a)(2)(ii) (West 2002)), defendant would be required to serve 85% of his sentence. The court asked defendant whether these terms were what he had negotiated and defendant responded that they were.

¶ 13 The trial court then advised defendant of the minimum and maximum penalties

for each count contained in the information, just as it had at the April 2007 hearing. Defendant responded that he understood the possible penalties.

¶ 14 In support of the plea, the State recited the evidence that it would present at trial. First, Angela Haarmon would testify that she received some clothing from defendant's wife, and while she was unpacking the clothing, she found a digital audio recorder. Haarmon, her husband, and her son listened to the recording and identified the voices on the recording as defendant and J.C. The recording, which would be placed in evidence, included a conversation between defendant and J.C. while defendant was engaged in oral sex with J.C. Haarmon turned the recording over to the Illinois State Police. The recording would be played during trial.

¶ 15 Next, the State indicated that J.C. would testify that the first incident in which defendant engaged in oral sex with him occurred when he was between fifth and sixth grade and under the age of 13, and that this type of conduct lasted "up until the end of his grade." J.C. would testify there were approximately 10 incidents of such sexual conduct between him and defendant, and that one of those times defendant recorded himself engaged in oral sex with J.C. Further, J.C. would testify that defendant told him that if J.C. ever told anybody about these acts, defendant would play the recording for others to hear.

¶ 16 The State continued that defendant admitted during a police interview that he had engaged in oral sex with J.C. while at defendant's home and under the guise of helping J.C. with his homework. The State also pointed out that defendant was J.C.'s fifth-grade teacher and held a position of trust, authority, and supervision over J.C. Further, defendant was over the age of 17, and J.C. under the age of 13 for at least one of the incidents.

¶ 17 Defense counsel confirmed that the State would be able to present such evidence

and that the evidence "would be sufficient to prove [d]efendant guilty beyond a reasonable doubt." The trial court then addressed defendant as follows: "[Y]ou heard the proposed plea as stated by [the State], is that your understanding of what the plea is going to be this afternoon?" Defendant responded, "Yes, Your Honor." The court then asked defendant, "Has anybody made any threats or promises to get you to plead guilty to Count I and IV of the information?" Defendant responded, "No, Your Honor." Thereafter, the court accepted defendant's guilty pleas and sentenced him in accordance with the plea agreement. The court admonished defendant regarding his appeal rights, asked him if he had any questions about these rights, and defendant responded, "No, that is clear, Your Honor." Defendant took no direct appeal.

¶ 18 In November 2010, defendant *pro se* filed a postconviction petition. The petition alleged in pertinent part that he was denied effective assistance of counsel because his attorney forced him to plead guilty. Specifically, defendant asserted that his counsel "was very bias [*sic*] and prejudicial toward [him] in meetings that were held between [defendant] and his family." Further, "during some of the meetings held, [defendant] was called profanity [(*sic*)] names such as Fuck-in [(*sic*)] Idiot, [and] Stupid Son of a Bitch." Defendant also claimed that counsel once threw a pencil at him because defendant did not want to plead guilty, and on one occasion, Metnick's associate, Sabin, asked Metnick to leave the room because Metnick was so upset and mad. Additionally, defendant alleged that Sabin told defendant to "swallow his pride and do the right thing," which defendant took to mean pleading guilty. Defendant claimed that he told counsel numerous times he was not willing to plead guilty because he was innocent.

¶ 19 Defendant's *pro se* postconviction petition was supported with affidavits from defendant, his parents, Mardelle and Dale Osing, and his wife Glee. According to Mardelle's

affidavit, Metnick initially gave the family the impression that he would not allow defendant to plead guilty to something he did not do. However, when she attended later meetings with defendant and Metnick, Metnick used unprofessional language and called defendant a " 'fucking idiot' " and a " 'stupid son of a bitch.' " As the date for trial got closer, Metnick told defendant he most likely would not be out of prison in time to go to his parents' funerals if he went to trial. Metnick also told the family to " 'get their heads out of their rear ends.' "

¶ 20 Dale's affidavit stated that Metnick first told the family he would not have defendant plead guilty to something he did not do. Dale felt in future meetings, however, that "Metnick was not doing anything new in hopes that [defendant] would accept a plea bargain at the last minute." Metnick was belligerent with defendant and on one occasion, threw a pencil at defendant. Metnick called defendant a "fucking idiot" and a "stupid son of a bitch." Metnick told defendant if a jury found him guilty, he could be imprisoned for 30 to 90 years and most likely would not be out to attend his parents' funerals, whereas if he accepted the 15-year plea, he would be able to see his son get married and share a drink with him on his twenty-first birthday. Dale further averred that "Metnick intimidated [defendant] into taking a plea that he did not want to do." When defendant wanted to go to trial, Metnick told the family to "get their heads out of their rear ends," and if the case proceeded to trial, there was a lot of work that needed to be done. Dale stated that defendant "fell under the pressure of Mr. Metnick and took the plea of 15-years."

¶ 21 According to Glee's affidavit, as time went by, Metnick had a temper while meeting with defendant and the family. "He swore at [defendant] calling him a fucking idiot and a stupid son of a bitch. He threw a pencil at [defendant]. He would slam his papers on his desk." Glee stated that Metnick "felt [defendant] should take the plea and that he did not want to mess

with us any longer." At the last meeting, Metnick told them they needed to "get their heads out of their rear ends." Further, Glee stated, "We were scared and intimidated and felt like our hands were tied. *** [Metnick] shortchanged [defendant] by pressuring him into taking a plea at the last minute." Attorney Sabin told defendant to "swallow his pride." Glee opined that "now a 15-year prison sentence is looking pretty good, especially when you have an attorney that you feel does not want to support you, and the court date is only a few days away."

¶ 22 According to defendant's affidavit, during the initial meeting, Metnick went over the possible outcomes of his case with his family. Defendant explained to Metnick that the statement taken by the Illinois State Police and the Department of Children and Family Services (DCFS) was taken out of context. However, defendant stated he stuck with that story because he did not want to be charged with perjury. Eventually, he broke down and told Metnick he could no longer go along with the State Police and DCFS statements because they were not true and he did not want to go to prison for something he did not do. Metnick told defendant he would not allow him to plead guilty to something he did not do and they would take the case to trial.

¶ 23 During future meetings, defendant stated that Metnick never shared any new information with him and Metnick filed motions on defendant's behalf without defendant's permission. As the months passed, Metnick's attitude changed and the State started offering defendant plea offers. Metnick shared the offers with defendant. "As the meetings continued, Mr. Metnick's attitude took a 100% degree turn. He was *** pushing [defendant] to accept a plea of 15 years—they started at 25 years." During one meeting, Metnick became so upset with defendant that he called defendant a "Fuck-in [(*sic*)] Idiot" and a "Stupid Son of a Bitch." Metnick also threw a pencil at defendant because he did not want to accept the 15-year plea offer,

and one of Metnick's associates had to remove Metnick from the office.

¶ 24 When they began to prepare for trial, "Metnick would scream and holler the whole time. He scared [defendant] to death." Metnick had Sabin call defendant and tell him to "swallow his pride." Sabin also told defendant if he wanted to take his son out for a drink on his twenty-first birthday, he should take the 15-year plea offer. Defendant told Metnick and Sabin "over and over that the tape was nothing more than role-play." Toward the end, Metnick scared defendant by telling him he could be sent away for 40 to 60 years if the case went to trial, and defendant would not be able to attend his parents' funerals. Defendant begged counsel not to make him accept the plea offer because he did not commit the offenses. Every time defendant met with Metnick to prepare for trial, Metnick screamed and yelled, called him names, and told him "the prosecution would eat [him] up on the stand." Defendant stated counsel was pushing him to accept the 15-year plea offer.

¶ 25 In February 2011, the trial court dismissed defendant's petition in a written order, finding, in pertinent part, that defendant's allegations of ineffective assistance of counsel did not present the gist of a constitutional claim.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Defendant argues that his postconviction petition stated the gist of a constitutional claim that his sixth-amendment rights were violated when he received ineffective assistance of counsel due to trial counsel's abusive behavior, causing defendant to enter an involuntary plea of guilty. Defendant contends that because his claim is not frivolous and patently without merit, this court should remand for a second-stage proceeding. We disagree.

¶ 29 A. Postconviction Proceedings and the Standard of Review

¶ 30 The Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). A postconviction proceeding is a "collateral attack on a prior conviction and sentence, and the scope of such a proceeding is generally limited to constitutional matters that have not been, or could not have been, previously adjudicated." *People v. Cummings*, 375 Ill. App. 3d 513, 518, 873 N.E.2d 996, 1001 (2007).

¶ 31 A postconviction proceeding that does not involve the death penalty contains three stages. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). At the first stage of a postconviction proceeding, a *pro se* defendant must allege sufficient facts to make out the "gist" of a constitutional claim; the petition does not need to contain formal legal arguments or citations to legal authority. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A *pro se* defendant must, however, "set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254-55, 882 N.E.2d 516, 520 (2008). A postconviction petition must "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). At the dismissal stage of a postconviction petition, all well-pleaded facts which are not positively rebutted by the record are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 385, 701 N.E.2d 1063, 1073 (1998).

¶ 32 If a trial court "determines the [postconviction] petition is frivolous or is patently without merit, it [must] dismiss the petition in a written order[.]" 725 ILCS 5/122-2.1(a)(2)

(West 2010). A claim is frivolous or patently without merit if it lacks an arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. Fanciful factual allegations include those that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212.

¶ 33 We review *de novo* the summary dismissal of a postconviction petition. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 34 B. Ineffective Assistance of Counsel

¶ 35 Defendant asserts that his negotiated guilty plea was involuntary because the actions of his privately retained counsel, Metnick, forced him to plead guilty and accept the 15-year deal offered by the State. Specifically, Metnick called him names, threw a pencil at him, and warned him he could face up to 90 years in prison if he did not accept the 15-year plea offer. Further, defendant claims that counsel was not prepared to go to trial.

¶ 36 "Challenges to guilty pleas which allege ineffective assistance of counsel are subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)." *People v. Rissley*, 206 Ill. 2d 403, 457, 795 N.E.2d 174, 204 (2003). To establish that counsel was ineffective, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that he was prejudiced by this deficient performance. *Strickland*, 466 U.S. at 687, 104 S. Ct. 2064. The failure to satisfy either prong of *Strickland* precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill.

2d 302, 317-18, 939 N.E.2d 310, 319 (2010). Therefore, we may resolve this issue " ' "solely on the ground that the defendant did not suffer prejudice without deciding whether counsel's performance was constitutionally deficient." ' " *People v. Goodwin*, 2012 IL App (4th) 100513, ¶ 36, 2012 WL 273148 at * 4 (quoting *People v. Rinehart*, 406 Ill. App. 3d 272, 278, 943 N.E.2d 698, 704 (2010)). "To establish prejudice, a defendant must show that there is a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Rissley*, 206 Ill. 2d at 457, 795 N.E.2d at 204 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)). The question of whether a defendant was prejudiced depends largely upon predicting whether he would have likely succeeded at trial. *People v. Pugh*, 157 Ill. 2d 1, 15, 623 N.E.2d 255, 262 (1993).

¶ 37 In this case, defendant did not suffer prejudice as a result of pleading guilty pursuant to the negotiated plea. The evidence of defendant's guilt in this case is overwhelming. Thus, had defendant proceeded to trial, he would have been convicted and received a much lengthier prison sentence than the 15 years agreed to by the State (up to 120 years on the predatory criminal sexual assault charges).

¶ 38 At trial, the State would have introduced the recording, which included a conversation between defendant and J.C. while defendant was engaged in oral sex with J.C. J.C. would have testified that he and defendant engaged in approximately 10 separate incidents of such conduct. J.C. would testify that the first incident occurred when he was under the age of 13 and defendant over the age of 17. This incident would satisfy the predatory-criminal-sexual-assault charge that carried an extended sentence of no less than 30 years nor more than 60 years in prison. Additionally, J.C. would have testified that defendant made the recording during one

of these acts, and obtained J.C's silence by threatening to play the recording for others if J.C. told anyone. Further, the State would have pointed out that defendant was J.C.'s fifth-grade teacher who abused his position of trust and authority. Defendant lured J.C. into his home under the guise of helping him with his homework and then subjected J.C. to acts of oral sex over a period of time that lasted "up until the end of [J.C.'s] grade." Last, the State would have introduced defendant's statement made to the police, in which he admitted that he had engaged in oral sex acts with J.C.

¶ 39 In sum, defendant cannot satisfy the prejudice prong of *Strickland* because he cannot show that he was actually prejudiced by pleading guilty. Had defendant proceeded to trial, the evidence would have been sufficient to convict him and defendant would be serving a much lengthier prison sentence. Thus, the summary dismissal of defendant's postconviction petition was appropriate.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.