

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 382
)	
ROBERTO ESTRADA,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Griffin and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's summary dismissal of defendant's *pro se* postconviction petition is affirmed over his contention that he raised an arguable claim of ineffective assistance of trial counsel.

¶ 2 Roberto Estrada appeals the trial court's summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act. Estrada contends that the trial court erred in summarily dismissing his petition because he presented an arguable claim that his trial counsel was ineffective for failing to inform him that, if he rejected a purported offer from the State of a 10-year sentence in exchange for a plea of guilty, he would face mandatory consecutive sentences.

We affirm. Estrada cannot show a reasonable probability that, but for counsel's deficient advice, he would have accepted the alleged plea offer so his petition is patently without merit.

¶ 3 Background

¶ 4 On February 14, 2014, a jury found Estrada guilty of four counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(2), (a)(3) (West 2016)), based on two instances of sexual penetration. After merging counts 3 and 4 into counts 1 and 2, the court sentenced Estrada to two consecutive terms of eight years' imprisonment. On direct appeal, this court affirmed his convictions. *People v. Estrada*, 2016 IL App (1st) 141674-U. We recount the facts to the extent necessary to resolve the issue raised on appeal. *See Estrada*, 2016 IL App (1st) 141674-U.

¶ 5 The evidence adduced at trial showed that, about 3:15 a.m. on November 16, 2012, M.P. was sexually assaulted while waiting for a bus on the north side of Chicago. She screamed and the assailant placed a hand over her mouth and told her, "Shut up or I'll kill you." M.P. bit her assailant's hand and he bit her back on her right hand. The assailant pulled down her clothing and inserted objects into her vagina and anus. The assailant ran away when a man approached and came to M.P.'s aid. Within a few minutes, Chicago police officers arrived.

¶ 6 John Sippy, who lived on the corner near the bus stop, testified that he was awake and working when he heard noise outside. He looked out a window and saw a man dragging a woman off a bench. Sippy dialed 911 and went outside to help. He saw a man wearing a dark "hoodie" climb over a chain link fence and run away. Another man, who had been walking to work, had stopped to assist M.P. Two police officers arrived almost immediately. Sippy showed the officers the area where the assailant had fled. The police then discovered two ID's and a cellphone lying in the grass in front of the fence.

¶ 7 When Chicago Police officer Nelson Crespo and his partner arrived, they saw two men and M.P. Crespo spoke with Sippy and searched the area, recovering a cellphone, military ID, and Illinois driver's license from a grassy area close to the fence. Crespo called his sergeant as required by protocol. Sergeant Lessner arrived after the recovery of the cellphone and identifications.

¶ 8 Chicago police detective Mark Regal and his partner, Detective Heeredt, received the cell phone and IDs from Crespo. Both identifications contained Estrada's name. The next morning, Regal contacted Estrada's sister. Estrada was not there, and Regal and Heeredt left their contact information with her.

¶ 9 That same afternoon, Estrada contacted Regal and went to police headquarters. He spoke to Regal and Heeredt. Estrada said that the previous night, after leaving a bar, his car was stopped by a police sergeant. Regal would learn this was Sergeant Lessner. Estrada told Regal that Lessner took him to a different location and let him go. Estrada then got into two incidents but could not tell Regal which happened first. One involved a fight with four male Hispanics. Estrada had his cell phone, wallet, and IDs after that incident. The other incident occurred when he grabbed "an unknown girl" and pushed her to the ground. Then he ran away, hailed a cab, and found his car. Regal asked Estrada about specific acts that were committed against M.P. Estrada said he could not remember, but that he could not deny them because he could not remember. Estrada said the cellphone and identifications belonged to him. He did not know when he had lost the items, but he had searched his car trying to locate them. Estrada voluntarily gave a DNA sample. Photographs of scratches on Estrada's face, knee, elbow, and hands were presented and admitted into evidence.

¶ 10 The following day, Regal interviewed M.P. and, on November 18, requested Estrada return to police headquarters. Estrada went to police headquarters and was arrested.

¶ 11 DNA evidence taken from a bite injury on M.P.'s hand showed a mixture of two DNA profiles. The major profile matched M.P. and the results could not exclude Estrada as a source of the minor profile. The State rested.

¶ 12 Estrada testified that he was drinking for several hours with friends and was intoxicated when, after midnight, he left a bar on the north side. As he was driving to the expressway, Chicago police Sergeant Lessner stopped him. Estrada knew it was a sergeant because he recognized the "three chevrons on the arm" from his military experience. Estrada gave Lessner his driver's license and insurance card and admitted he had been drinking. He also gave Lessner his military ID. Lessner told Estrada a patrolman would park Estrada's car so it would not be towed. Lessner lectured Estrada about drinking and driving, drove Estrada to Milwaukee Avenue, and told Estrada to get out.

¶ 13 Estrada started walking, approached four men on the sidewalk, and got into a fight with them. The men beat him up and eventually they ran away. Estrada had money in his pocket, so he hailed a cab and went to Addison Street, near the expressway, and found his car. Eventually, Estrada drove to his sister's house and she gave him Detective Regal's business card. Estrada called Regal and went to the police station. Regal showed him a photograph of a woman who had been attacked the night before and told him his military ID, driver's license, and cell phone were found at the scene. Estrada denied attacking the woman.

¶ 14 On cross-examination, Estrada stated he did not realize his identification cards were missing until the next day. He denied telling Regal anything about an incident with a woman that night.

¶ 15 In rebuttal, Chicago Police detective Edward Heeredt testified that Estrada had acknowledged he was "aggressive" with a woman and had pushed her to the ground. Estrada did

not know whether he had sexually penetrated the woman because he could not remember, but he could not deny it either.

¶ 16 The jury found Estrada guilty of four counts of aggravated criminal sexual assault.

¶ 17 At sentencing, the court stated that Estrada faced two sentences of 6 to 30 years each, which the statute requires be served consecutively. The State acknowledged that Estrada did not have a criminal history, had been honorably discharged from the military, and presented several letters of his good character in mitigation. Based on the force and predatory nature of the offense, the State asked for a term of 10 years for each count. Defense counsel presented letters, photographs, and records of Estrada's honorable discharge from the military, as well as details on honors and medals that he received. Estrada was in the reserves and was attending school. He had no prior convictions and stated that he had a problem with alcohol. Counsel asked for treatment in custody and the minimum aggregate sentence of 12 years' imprisonment. The trial court sentenced Estrada to two consecutive terms of eight years' in prison, for a total of 16 years.

¶ 18 On direct appeal, Estrada argued that the trial court wrongly aggravated his sentence based on the court's mistaken belief that he falsely testified that Lessner planted his cell phone and IDs at the scene of the offense. This court affirmed Estrada's convictions and sentences. *See Estrada*, 2016 IL App (1st) 141674-U.

¶ 19 Estrada filed a *pro se* postconviction petition, raising instances of ineffective assistance of trial counsel and prosecutorial misconduct. Relevant to this appeal, Estrada claimed that trial counsel failed to advise him "that should he reject the plea offer by the State he would be subject to mandatory consecutive sentences. Pre-trial, [he] was offered a plea bargain of 10 years imprisonment by the State. [He] was not informed that he would be facing four Class-X felonies and that they would be consecutive sentences if he refused." Estrada included his own notarized

statement that the facts were true to the best of his knowledge. He stated he was unable to obtain affidavits or documents to support his claims.

¶ 20 In a written order, dated January 18, 2017, the court summarily dismissed Estrada's postconviction petition as frivolous and patently without merit. The court noted that Estrada failed to attach affidavits or other evidence to support his claims. And the court found that his claim was meritless where he did not claim counsel recommended that he reject the plea offer or affirmatively misstated his potential sentence. The court stated, "[t]here is no evidence in the record to substantiate that this offer was extended."

¶ 21 Analysis

¶ 22 Estrada argues that the trial court erred in dismissing his petition at the first stage of proceeding because he presented an arguable claim that trial counsel was ineffective for failing to inform him that, if he rejected the State's purported offer of a 10-year sentence in exchange for a plea of guilty, he would face mandatory consecutive sentences.

¶ 23 The Act provides a method by which a defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (West 2016); *People v. Tate*, 2012 IL 112214, ¶ 8. At the first stage of postconviction proceedings, the trial court may dismiss a petition only if it is "frivolous or patently without merit." *People v. Cotto*, 2016 IL 119006, ¶ 26, 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition is frivolous or patently without merit if it "has no arguable basis *** in law or in fact." *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 21 (2009)). No arguable basis in law or fact occurs when the petition depends on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16.

¶ 24 As a defendant with little legal knowledge or training typically drafts the petition at the first stage, we employ a low threshold for survival. *People v. Mayberry*, 2016 IL App (1st) 141359,

¶ 34. A *pro se* petition “must still attach affidavits, records, or other evidence supporting the petitioner’s allegations to establish that the petitioner’s allegations are capable of objective or independent corroboration.” *Hodges*, 234 Ill. 2d at 10. We review the dismissal of a first stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 25 To prevail on a claim of ineffective assistance of counsel, “a defendant must show that counsel’s performance was objectively unreasonable under prevailing professional norms and that there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). At the first stage, a court may not summarily dismiss a petition alleging ineffective assistance of counsel where: (i) counsel’s performance arguably fell below an objective standard of reasonableness (ii) which arguably prejudiced petitioner. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 29. A defendant must show both elements; we may conduct our analysis in any order. *People v. Walker*, 2018 IL App (1st) 160509, ¶ 28; *People v. Gray*, 2012 IL App (4th) 110455, ¶ 25. Should prejudice be absent, we may dismiss on that basis alone without further analysis. *Walker*, 2018 IL App (1st) 160509, ¶ 28.

¶ 26 Estrada argues his trial counsel was ineffective for failing to inform him that, if he rejected the State’s purported offer of a 10-year sentence in exchange for a plea of guilty, he would face mandatory consecutive sentences.

¶ 27 A criminal defendant has the constitutional right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer. *People v. Hale*, 2013 IL 113140, ¶

16 (citing *People v. Curry*, 178 Ill. 2d 509, 528 (1997)). This right to effective assistance of counsel extends to the decision to reject a plea offer, even if defendant receives a fair trial. *Id.* To show prejudice in the plea bargain context, “a defendant must show a reasonable probability (1) that, but for his counsel’s deficient advice, he would have accepted the plea offer, (2) that the plea would have been entered without the prosecution cancelling it, (3) that the trial court would have accepted the bargain, assuming that it had discretion under state law to accept or reject it, and (4) that ‘the end result of the criminal process would have been more favorable by reason of the plea.’ ” *People v. Walker*, 2018 IL App. (1st) 160509, ¶ 31 (citing *Missouri v. Frye*, 566 U.S. 134, 147 (2012); *People v. Hale*, 2013 IL 113140, ¶ 19). If a defendant does not show he or she would have accepted the State’s plea offer but for counsel’s deficient performance, then he or she cannot demonstrate prejudice and no need exists to address additional factors. *Hale*, 2013 IL 113140, ¶ 21.

¶ 28 We find that Estrada’s petition is patently without merit as he has not shown that he was arguably prejudiced by his counsel’s alleged failure to inform him of the mandatory consecutive sentences. *See Walker*, 2018 IL App (1st) 160509, ¶ 33.

¶ 29 As noted by the trial court in summarily dismissing Estrada’s petition, other than Estrada’s claim in his *pro se* petition, nothing in the record suggests a plea offer having been made to Estrada. Additionally, nothing in the record suggests counsel made any misrepresentations or provided Estrada with any erroneous information about his possible sentences. A defendant’s claims in a *pro se* petition must set forth “facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.” *Hodges*, 234 Ill. 2d at 10 (quoting *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008)).

¶ 30 Based solely on Estrada’s allegation in his petition, Estrada cannot claim to be arguably prejudiced. Estrada does not claim that he would have accepted the alleged plea, but for the erroneous advice from his counsel. See *Hale*, 2013 IL 113140, ¶ 21 (stating, “to establish the prejudice prong of *Strickland*, a defendant must show that he would have accepted the State’s plea offer had counsel’s performance not been deficient.”). So, Estrada’s claim does not show a reasonable probability that the proceedings would have been different and, standing alone, Estrada’s claim is no more than “subjective, self-serving [testimony]” that is insufficient to satisfy prejudice under *Strickland*. See *People v. Miller*, 393 Ill. App. 3d 629, 639 (1st Dist. 2009) (quoting *Curry*, 178 Ill. 2d at 531); see also *Hale*, 2013 IL 113140, ¶ 18.

¶ 31 We realize that a disparity between the sentence faced and a significantly shorter plea offer can support Estrada’s claim of prejudice. *Hale*, 2013 IL 113140, ¶ 18. But, the showing of prejudice “must encompass more than a defendant’s own self-serving testimony.” *Id.* Estrada faced a sentence of 12 to 60 years and was sentenced to two consecutive 8-year terms, for a total of 16 years’ imprisonment. Even without consecutive sentences, Estrada does not dispute that he was aware that he faced a sentence of 6 to 30 years in prison and the sentence of 16 years that he received was less than this sentence. Thus, accepting Estrada’s allegations as true, he was willing to risk a possible 30-year sentence in the hope of acquittal. See *Walker*, 2018 IL App (1st) 160509, ¶¶ 32-34 (defendant failed to show reasonable probability that, but for counsel’s deficient advice, he would have accepted plea offer); see also *Hale*, 2013 IL 113140, ¶¶ 8, 28 (finding no prejudice from 40-year total sentence where “defendant was willing to risk a 30-year sentence and go to trial, rather than plead guilty in exchange for a 15-year sentence.”).

¶ 32 The record shows that Estrada asserted a theory at trial that he was not the perpetrator and indicates that he chose to proceed to trial based on considerations other than his possible sentences. The only reasonable inference from the record indicates that Estrada intended to pursue his theory of defense and chose to hold the State to its burden of proving his guilt beyond a reasonable doubt. See *Miller*, 393 Ill. App. 3d at 636-37 (affirming summary dismissal and finding claim of ineffective assistance of counsel failed on prejudice where “the only reasonable inference” from defendant’s rejection of plea offer was that he desired to assert his claim of self-defense at trial and “lost his gamble.”).

¶ 33 In sum, Estrada’s claim of ineffective assistance is no more than subjective and self-serving. See *Hale*, 2013 IL 113140, ¶ 18; *Walker*, 2018 IL App (1st) 160509, ¶36. Estrada has failed to present an arguable claim of ineffective assistance of counsel, and the trial court did not err in summarily dismissing his *pro se* petition under the Act.

¶ 34 Affirmed.