2021 IL App (1st) 170657-U
No. 1-17-0657
Order filed February 1, 2021

First Division

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.
Justice Pierce and Justice Coghlan[*] concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of Estrada's *pro se* postconviction petition is reversed where he raises 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

[*] Justice Coghlan was substituted on the panel to replace Justice Griffin. Justice Coghlan has reviewed the original briefs and the parties' briefs on rehearing.

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.

¶ 3 We reverse. Faithfully applying the low threshold for first-stage postconviction pleadings, it is at least arguable that there is a reasonable probability that, but for counsel's deficient advice, Estrada would have accepted the alleged plea offer. Whatever credulity we may possess about the ultimate success, we are obligated to set aside for now.

¶ 4 Background

¶ 5 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.

¶ 6 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.

¶ 7 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.

¶ 8 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.

¶ 9 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.

¶ 10 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.

¶ 11 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.

¶ 12 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.

¶ 13 Estrada testified that he was drinking for several hours with friends and was intoxicated when, after midnight, he left the bar. 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 instructed Estrada to get out.

¶ 14 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.

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

¶ 16 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.

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

¶ 18 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 convictions and acknowledged 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.

¶ 19 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. *See Estrada*, 2016 IL App (1st) 141674-U.

¶ 20 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.

¶ 21 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."

¶ 22 Analysis

¶ 23 Estrada argues that the trial court erred in dismissing his petition at the first stage of postconviction proceedings 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.

¶ 24 On March 9, 2020, we issued an order rejecting Estrada's argument and affirming the trial court's dismissal of his petition. Estrada filed a timely petition for rehearing arguing our original order held his claims to a standard too high for the first stage of postconviction proceedings. We received a response from the State and Estrada's reply. After further consideration we agree with Estrada, reverse the judgment of the circuit court, and remand for further proceedings consistent with the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2016).

¶ 25 The Act provides a method by which a defendant may assert that his or her conviction was the result of a substantial denial of constitutional rights. *Id.*; *People v. Tate*, 2012 IL 112214, ¶ 8.

At the first stage of postconviction proceedings, the trial court may dismiss a petition only when "'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)). To warrant dismissal, the petition must depend on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16.

¶ 26 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. Though a *pro se* petitioner is not excused from "attach[ing] 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 do not require petitioners raising their counsel's ineffectiveness to seek affidavits from counsel whose performance is at issue. *People v. Hall*, 217 Ill. 2d 324, 333 (2005) ("Failure to attach independent corroborating documentation *** may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney."). We review the dismissal of a first stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 27 At this stage, Estrada need not yet prevail on his claim of ineffective assistance of counsel. Instead, he must make the "gist" of a claim. In other words, it need only be arguable 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. 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.

¶ 28 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.

¶ 29 We originally found Estrada's petition patently without merit because nothing in the record suggests a plea offer having been made to Estrada. The State repeats that argument in its response to Estrada's petition for rehearing. That conclusion was error because, at the first stage, we are

governed by the *pleadings*, not the trial record. See *Hodges*, 234 Ill. 2d at 10 (requiring court to "tak[e] the allegations [in the petition] as true."). The only time we are to doubt the truth of the pleadings is where they are "completely contradicted by the record." *People v. Allen*, 2015 IL 113135, ¶ 25. We do not doubt our obligation, which the State emphasizes, to carefully examine the original trial record; but the State is wrong about our purpose for doing so. Importantly, claims evident on the face of the record cannot be raised on postconviction review because they could have been raised on direct appeal and are forfeited. *E.g. People v. Porter*, 164 Ill. 2d 400, 404 (noting, "general rule that post-conviction petitioners are barred from raising claims that *** could have been raised on direct appeal."). And, by definition, nothing in the record could ever support Estrada's claim as it depends on off-record conversations.

¶ 30 The State also argues Estrada's petition lacks specificity: it does not contain sufficient "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)). Claims like Estrada's—that counsel received a plea offer from the State and failed to advise him of the consequences of rejecting it—are in a class of claims that are likely *easiest* to corroborate (or disprove, if untrue). All it will take is an affidavit from trial counsel (if Estrada's second-stage postconviction counsel can procure one) or a few simple questions to counsel (if counsel is called as a third-stage witness) to corroborate or disprove Estrada's claim. We do not think, as the State argues, that Estrada's petition fails at the first stage for lack of dates, times, and participants in the alleged conversations about a possible plea. The parties' memory of these minute details relates to their ultimate credibility, which we cannot (and the trial court could not)

consider at this stage. *People v. Coleman*, 183 Ill. 2d 366, 385 ("fact-finding or credibility determinations *** made at the evidentiary stage, not the dismissal stage").

¶ 31 Our original order also found 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."). We now conclude we erred by failing to heed our supreme court's admonition that we construe liberally the allegations in *pro se* petitions at the first stage. *Allen*, 2015 IL 113135, ¶ 25 (allegations "must" be construed liberally). Estrada alleges he was offered a plea of 10 years and was not told that rejecting the offer would subject him to possible conviction for four Class X offenses. Accounting for merger of offenses based on the same conduct, this comes down to a guaranteed sentence of 10 years versus a possible combined penalty of 12 to 60 years. We see no basis on which Estrada would complain about this possible disparity other than that he would have accepted the 10 years if confronted with the possible reality ahead of him.

¶ 32 The State's arguments (and our original conclusion) that Estrada's claims amounted to "self-serving" and "subjective" declarations constitute nothing more than credibility determinations in loose disguise. See *id.* His factual claims are not "fantastic or delusional" and his legal argument is not "indisputably meritless." *Id.* (reciting standard). Consistent with the Act, Estrada must be permitted to test those claims during further proceedings.

¶ 33 Reversed and remanded.