

No. 1-12-1540

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 20464
)	
JOSEPH HOBAN,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** Summary dismissal of defendant's *pro se* post-conviction petition reversed and case remanded where actual innocence claim based on involuntary intoxication from prescription Depakote had an arguable basis in law and fact; mittimus corrected to reflect 1,641 days spent in pre-sentence custody.

¶ 2 Defendant Joseph Hoban appeals from an order of the circuit court summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends his claim of actual innocence based on involuntary intoxication

from prescription Depakote had an arguable basis in law and fact. We reverse and remand for further proceedings under the Act.

¶ 3 The record reveals that defendant was charged, among other offenses, with home invasion, attempted first degree murder, aggravated criminal sexual assault, aggravated criminal sexual abuse, aggravated battery, theft, and unlawful restraint relating to acts he committed against his former girlfriend in the late hours of July 29, 2005 at her home in Oak Park. Initially, defendant intended to assert the affirmative defense of insanity, but later entered a negotiated guilty plea and was found guilty but mentally ill.

¶ 4 Throughout pre-trial proceedings, defendant was examined several times by Forensic Clinical Services. Reports indicated that defendant was fit to stand trial with medications. The reports also stated that defendant was prescribed Depakote, Risperdal, Prozac, and Trazodone and did not experience side effects which would impair his fitness. Additionally, defendant was found to be legally sane at the time of the alleged offenses, in that he was not suffering from a mental disease or defect which caused him to lack substantial capacity to appreciate the criminality of his alleged conduct.

¶ 5 On January 26, 2010, after the parties participated in a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), the matter proceeded to a plea hearing. At one point in the proceedings, defense counsel noted that there had been prior findings of fitness, defendant had agreed to waive the affirmative defense of insanity, and defendant wanted to plead guilty.

¶ 6 The State then presented the factual basis for the plea, which we summarize as follows. On the evening of July 29, 2005, defendant hid in a tree outside the home of his former girlfriend. After she arrived home, defendant snuck into the house, where he forcibly engaged in various sexual acts with her, threatened her, and caused physical injuries to her face and body.

After defendant left, she called 9-1-1. Defendant was arrested the next day at North Avenue Beach in Chicago.

¶ 7 Finding a factual basis, the court found defendant guilty but mentally ill. The court sentenced defendant to consecutive prison terms of 15 years for one count of home invasion, 15 years for one count of aggravated criminal sexual assault, and 12 years for one count of aggravated criminal sexual abuse. The mittimus reflected that defendant received 1,639 days of presentence custody credit.

¶ 8 Defendant filed no postplea motions nor a direct appeal. On March 22, 2012, defendant filed a *pro se* post-conviction petition. The petition alleged that while in prison in 2010, a psychiatrist at Pontiac Correctional Center, Dr. Matthews, determined that he suffered from a potentially fatal allergy to Depakote based on observations of anomalies in a blood test and physical symptoms consistent with the allergy. This was the first time the allergy was discovered by a doctor. Defendant asserted that upon learning of the allergy, Dr. Matthews immediately discontinued the Depakote prescription and the symptoms abated.

¶ 9 Defendant described how the Depakote had previously affected him. Defendant stated he suffered from bipolar-schizoaffective disorder and had been treated for this condition since 1992. Defendant began taking Depakote approximately three months before the incident and experienced skin rashes, chronic ear infections, “horrific and ghastly nightmares,” loss of sleep, loss of memory, and “anxiety, unusual beliefs, aggressiveness, false feelings of security[,] and repression of fear.” Further, the Depakote allergy caused defendant to “think aggressively, unusually, incoherently, and most importantly[,] it blocked my memories.” Defendant also alleged that Depakote interacted with another psychotropic medication, a condition referred to as “the Depakote synergy,” which “had an enormous negative impact” on defendant’s thinking. The Depakote allergy “operated against Risperadone’s suppression of delusional thinking.”

Defendant asserted that the Depakote synergy “played a major part in the events of” the day of the attack on his girlfriend.

¶ 10 Defendant attached a number of documents to the petition. These documents included reference materials about Depakote that listed possible side effects, such as rashes, abnormal thinking, memory loss, and new or worsening mental or mood changes, including aggressiveness, agitation, anxiety, depression, hostility, and panic attacks. Defendant also attached his medical and prescription records from the Cook County jail as well as a Depakote Allergy Proof (DAP) chart, which set out to correlate his symptoms with his medical and prescription records. Also attached to the petition was a Cook County jail medical intake form dated August 2, 2005 that indicated defendant was taking Depakote and Elavil. The intake form additionally stated that defendant had attempted suicide twice in the last seven days, once by drowning and once by slashing his wrist at the Oak Park lock-up. Defendant requested that the court subpoena his IDOC medical and psychiatric records, as “IDOC officials have been uncooperative and onerous” and refused to provide defendant with these records.

¶ 11 On April 6, 2012, the circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 12 In this court, defendant contends summary dismissal was improper because his claim of actual innocence based on involuntary intoxication from prescription Depakote has an arguable basis in law and fact. Defendant argues his claim has an arguable basis in law because involuntary intoxication has been defined to include ingesting a medication that was prescribed by a doctor and had unwarned side effects. As to an arguable basis in fact, defendant points to the statements in his petition regarding the symptoms he experienced before and after the incident, his later diagnosis of having a Depakote allergy, and the petition’s supporting documents, including his prescription and medical records, reference materials about Depakote,

and his DAP chart. Defendant contends he presented evidence that his allergic reaction to Depakote, possibly in combination with his other psychotropic drugs and diagnoses, deprived him of substantial capacity to either appreciate the criminality of his conduct or conform his conduct to the requirements of law.

¶ 13 The Act provides a three-stage process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2012). Proceedings begin when the defendant files a petition in the court where the conviction took place. 725 ILCS 5/122-1(b) (West 2012). At this first stage, the threshold for survival is low. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The petition must present a “gist” of a constitutional claim, which requires only a limited amount of detail and does not require that the claim be set forth in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). When reviewing the petition, the court may not engage in any fact-finding and all well-pleaded facts are taken as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). The petition is dismissed if the court deems the petition frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2012)), meaning that it has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 11-12. A petition which lacks an arguable basis in law or fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16. We review the summary dismissal of a post-conviction petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

¶ 14 A claim of actual innocence based on newly discovered evidence is cognizable under the Act as a matter of due process. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The evidence in support of the claim must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 15 We find that defendant's claim of actual innocence has an arguable basis in law. Defendant asserted that his newly-diagnosed Depakote allergy, in combination with his other psychotropic medications, had an "enormous negative impact" on his thinking and played a "major part in the events of that day." Defendant also described the psychological and physical symptoms he experienced before and after the incident, which he alleged were consistent with the allergy. In *People v. Hari*, 218 Ill. 2d 275, 292 (2006), the supreme court expanded the scope of the involuntary intoxication defense to include situations where a person is in a drugged condition due to unexpected and unwarned side effects caused by a prescription drug taken under a doctor's orders. *Hari* has been held to apply retroactively to a post-conviction petition claiming actual innocence. *People v. Alberts*, 383 Ill. App. 3d 374, 385 (2008). Moreover, involuntary intoxication is an affirmative defense which exculpates a defendant if the trier of fact believes that the elements of involuntary intoxication have been proven. *Hari*, 218 Ill. 2d at 295. As such, defendant's actual innocence claim is not indisputably meritless.

¶ 16 Defendant's claim also has an arguable basis in fact. The petition's attached reference materials corroborate the psychological symptoms defendant alleged in his petition. The medical and prescription records support defendant's allegations that he experienced the conditions he describes in his petition while in the Cook County jail. As they are not positively rebutted by the record, we take as true defendant's allegations that he started taking the Depakote prior to the incident, the Depakote impacted his thinking at the time of the incident, and he was not diagnosed with the allergy until 2010. See *Coleman*, 183 Ill. 2d at 385. While the State contends that any claims relating to defendant's IDOC records should be rejected because those records are not attached, defendant has indeed met his burden under section 122-2 of the Act to attach affidavits, records, or other evidence, or "state why the same are not attached." See 725 ILCS 5/122-2 (West 2012). Defendant's petition explained IDOC officials refused to provide

defendant with his medical and psychiatric records. Defendant additionally requested the court to subpoena his records to support his claims and attached documents to support his allergy claim. No more is needed at this stage.

¶ 17 The State also challenges defendant's claim by referring to the Forensic Clinical Services reports and defendant's conduct during the offense. Specifically, the State asserts that defendant took Depakote for three months without anyone noticing side effects and that the reports undermine defendant's assertions regarding side effects from his medications. The State also contends that both the reports and defendant's conduct during the offense show that he had the substantial capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law—an element of the involuntary intoxication defense. See 720 ILCS 5/6-3 (West 2004).

¶ 18 We find the State's arguments ill-suited for the first-stage of post-conviction proceedings, where the court acts strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. The State's arguments would require this court to engage in fact-finding and credibility determinations, which we cannot do at this stage. See *Coleman*, 183 Ill. 2d at 380-81. Further, the State incorrectly conflates previous findings about sanity and the absence of side effects that would impair fitness with defendant's claim of involuntary intoxication. A sanity inquiry questions whether a defendant has a mental disease or defect (720 ILCS 5/6-2(a) (West 2004)). The key question for fitness is whether the defendant could understand the proceedings against him and cooperate with his counsel in his defense (*People v. Easley*, 192 Ill. 2d 307, 323 (2000)). The involuntary intoxication defense, however, concerns whether a person is in an intoxicated or drugged condition (720 ILCS 5/6-3 (West 2004)). These are three distinct inquiries. That defendant was found not to have a mental disease or defect that caused him to lack substantial

capacity to appreciate the criminality of his conduct, and that his medications were not found to have side effects that impaired his ability to understand the nature of the proceedings and assist his counsel, does not answer the question of whether defendant was involuntary intoxicated due to his Depakote allergy. Although we express no opinion on the ultimate outcome of defendant's petition, we find that it was sufficient to withstand summary dismissal.

¶ 19 In his petition and in this appeal, defendant also contended that his counsel was ineffective for failing to request a fitness hearing before he pled guilty. However, having found that one of defendant's claims is not frivolous and patently without merit, the entire petition is advanced for second-stage proceedings and we will not address defendant's ineffective assistance of counsel claim. See *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001); *People v. Plummer*, 344 Ill. App. 3d 1016, 1024-25 (2003) (if any allegation raises the gist of a constitutional deprivation, the entire petition is docketed for second-stage review).

¶ 20 Lastly, defendant contends, and the State agrees, that his mittimus should be corrected to reflect 1,641 days spent in presentence custody, rather than 1,639 days. An amended mittimus may be issued at any time. *People v. Quintana*, 332 Ill. App. 3d 96, 110 (2002). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the mittimus to reflect 1,641 days of presentence custody credit.

¶ 21 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further post-conviction proceedings.

¶ 22 Reversed and remanded.