

No. 1-10-0584

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. 07 CR 23396
)	
JESUS GARCIA,)	Honorable
)	John P. Kirby,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice KARNEZIS concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court erroneously dismissed defendant's post-conviction petition where petition alleged that defendant was promised that his prison time would be calculated at a rate of 50% per day of good time in return for his guilty plea and sentence to 9 years in prison. In fact defendant's sentence is being calculated at a rate which will require that he serve at least 75% of his sentence. The case is reversed and remanded for second-stage proceedings where counsel may be appointed to aid defendant in amending his petition.

¶ 2 Defendant Jesus Garcia appeals from an order of the circuit court of Cook County dismissing his *pro se* post-conviction petition. Defendant alleged in his petition that when he pleaded guilty he was not only promised a prison sentence of 9 years, but also that the

calculation of his prison term would be at a rate of 50% for each day of good time. Defendant alleges that this calculation has been changed by prison authorities so that he must serve 75% of his sentence if he receives the maximum good time. The State contends that the circuit court correctly dismissed this petition at the first stage as frivolous and without merit.

¶ 3 Defendant was charged with delivery of over 900 grams of cocaine. On March 10, 2008, defendant pled guilty to the lesser offense of delivery of between 400 and 900 grams of cocaine. In return he received the minimum sentence of 9 years in prison. The record of the plea proceedings does not indicate any other facet to this agreement. On December 29, 2009, defendant filed this *pro se* post-conviction petition, claiming that in effect he is serving a term 25% greater than what he negotiated because prison authorities, after first calculating his prison time at 50% per day for each day of good time, have now begun to calculate it at 75% per day. Defendant specifically contends in his petition that his plea agreement was "void of any 75% sentence but rather negotiated to a 50% term." In support of these contentions defendant attached to his petition the sentence calculation sheets from the Illinois Department of Corrections indicating that his projected "out date" was extended by a corrected calculation utilizing the 75% multiplier. The circuit court dismissed this petition as frivolous and without merit and defendant has appealed.

¶ 4 Our review of the circuit court's ruling at this first stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998). First-stage dismissal is appropriate where the petition has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. To overcome a first-stage dismissal, a defendant need only allege the gist of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. Although this threshold is low, a defendant at this stage must still set forth some facts which are susceptible to

corroboration and which are objective in nature, or he must explain why such facts have not been included. *Hodges*, 234 Ill. 2d at 10.

¶ 5 We find such a claim in defendant's allegation that his plea agreement was "negotiated to a 50% term" but he is "being made to serve a 25% longer sentence than agreed upon." As was stated in *People v. Owsley*, 66 Ill. App. 3d 234, 237 (1978):

"Certainly, a defendant ought not to be misled, in any way into entering a plea of guilty. It is extremely important to a defendant to know when he or she is eligible for parole or other 'freedom-related' benefits before that defendant can decide whether to plead guilty."

Thus a constitutional claim of ineffective assistance of counsel is raised when a defendant asserts that his guilty plea was induced by counsel's misrepresentations or erroneous statements about benefits which would reduce the time of incarceration. *People v. Stewart*, 381 Ill. App. 3d 200, 201 (2008) (defendant asserted that counsel erroneously told him he was eligible for day-for-day good conduct credit when he was statutorily required to serve 85% of his sentence); *People v. Young*, 355 Ill. App. 3d 317, 324 (2005) (allegation that counsel erroneously told defendant he would receive good-time credits and work release credits if he pled guilty was sufficient to avoid dismissal of post-conviction petition). In this case defendant is alleging that he was promised good-time credit calculations at a rate which could result in him serving only 50% of his sentence when in fact he will be serving at least 75% of that sentence. 730 ILCS 5/3-6-3(a)(2)(v) (West 2008) (defendant convicted of Class X delivery of a controlled substance may receive no more than 7.5 days' good-conduct credit for each month of his sentence). In addition to the documentation of the sentence calculation sheets which defendant appended to his petition, we note that appellate counsel for defendant represents that the law was changed from a

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50% multiplier to a 75% multiplier just seven months before defendant was sentenced. Under these circumstances, we cannot say that defendant's claim is based on an indisputably meritless legal theory or a fanciful factual allegation. He is entitled to a second-stage proceeding where counsel may be appointed to further refine his claim in an amended post-conviction petition. Accordingly we reverse and remand for second-stage post-conviction proceedings where counsel may be appointed to aid defendant in his petition.

¶ 6 Reversed and remanded with directions.