

No. 1-10-1820

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).

SECOND DIVISION
June 14, 2011

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 14750
)	
DARRYL HUNT,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

O R D E R

HELD: Where defendant's post-conviction petition sufficiently stated an allegation of ineffective assistance of trial counsel that had an arguable basis in law and fact, the circuit court's summary dismissal of the petition was reversed and the cause remanded for second-stage post-conviction proceedings.

Defendant Darryl Hunt appeals from an order of the circuit court summarily dismissing his post-conviction petition as

frivolous and patently without merit. On appeal, defendant contends that the trial court erred in dismissing his petition because his claim that counsel rendered ineffective assistance when he misadvised him about good-time credit was supported by the record and affidavits from three witnesses.

In a nine-count indictment, defendant was charged with being an armed habitual criminal, six counts of aggravated unlawful use of a weapon (UUW) and two counts of UUW. Following a June 2009 fully-negotiated guilty plea, defendant was convicted of the charge of being an armed habitual criminal, a Class X offense, and was sentenced to the agreed term of seven years' imprisonment. It is undisputed that at the plea hearing, the trial court sufficiently admonished defendant in accordance with Supreme Court Rule 402 (eff. July 1, 1997). Pursuant to the court's questioning, defendant stated that no one had threatened him or promised him anything in exchange for his guilty plea. Defendant did not move to withdraw his guilty plea, nor did he attempt to perfect an appeal from that judgment.

On March 5, 2010, defendant, through retained counsel, filed the instant petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) alleging that his trial counsel rendered ineffective assistance because he misadvised him about good time credit. Defendant stated that following the plea conference, counsel informed him that if he

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pled guilty to the armed habitual criminal charge, he would be sentenced to a term of seven years' imprisonment. Defendant alleged that counsel further advised him that he would receive day-for-day good time credit, and thus, would be required to serve only 50% of that sentence, spending approximately three and a half years in prison. Defendant further alleged that on the day of the plea hearing, counsel again informed him that he would have to serve only 50% of his sentence. Defendant stated that his wife, sister and brother were all present on both dates when counsel made his statements.

Defendant alleged that it was not until several weeks later that he learned he would be required to serve 85% of his sentence. Defendant stated that he contacted his trial counsel, who said he would look into the matter, but he never again heard from counsel. Defendant claimed that counsel told his wife and sister that there was nothing more he could do. Defendant alleged that counsel's erroneous advice was highly instrumental in his decision to plead guilty, and that he would not have entered a guilty plea if he knew he would have to serve 85%, rather than 50%, of his sentence. Defendant asserted that counsel's erroneous advice amounted to ineffective assistance, and that the outcome of the proceedings would have been different if counsel had not given him such advice. Defendant requested that his plea be vacated, that the State be required to

restructure its plea offer to allow for specific performance of the plea agreement between the parties, that the parties be allowed to engage in further plea negotiations if appropriate, and any other relief the court deemed proper.

Attached to defendant's petition was his own sworn affidavit in which he averred to each of the allegations alleged in his petition, again stating that he would not have pled guilty if he had known he would be required to serve 85%, rather than 50%, of his sentence. Also attached were sworn affidavits from defendant's wife, Tondelaya Hunt, his sister, Cassandra Hawkins, and his brother, Ronald Hunt. All three of the affiants stated that they were present on the day of the plea conference, and that following the conference, counsel spoke with the family in the hallway and informed them that defendant would be required to serve 50% of the seven-year sentence. Defendant's wife and brother further stated that they were both present in court on the day of the plea hearing, and that counsel again told the family that defendant would be required to serve 50% of his sentence. Defendant's wife and sister also stated that after defendant learned he would have to serve 85% of his sentence, they each telephoned trial counsel, who told them there was nothing he could do for defendant.

The circuit court found that defendant's claim was belied by the record, specifically noting that when it asked defendant if

anyone had promised him anything in exchange for his guilty plea, defendant said "[n]o." The court found that it made an adequate inquiry, and that defendant chose not to tell it that his attorney told him he would serve only 50% of the sentence. The court further found that, pursuant to *People v. Curry*, 178 Ill. 2d 509 (1997), defendant's statement that he would not have accepted the plea if he knew he had to serve 85% of the sentence was subjective, self-serving, and insufficient to satisfy an allegation of ineffective assistance of counsel. Consequently, the circuit court summarily dismissed defendant's post-conviction petition as frivolous and patently without merit.

Defendant, through counsel, moved for reconsideration arguing that the allegation in his petition was not belied by the record because counsel's erroneous advice regarding good time credit should not be construed as a promise. Defendant noted that he was not claiming that counsel said the good time credit was part of his bargain. Defendant also argued that the effect of the trial court's admonishments at the plea hearing presented a substantial legal question that should not be decided at the summary dismissal stage. Defendant asserted that summary dismissal of his petition was premature, and that his allegation required additional briefing during subsequent proceedings under the Act.

At a hearing on his motion, defendant argued that our supreme court has made a distinction between failing to advise a defendant about a collateral consequence related to his guilty plea, and giving incorrect advice regarding a collateral consequence. The circuit court first noted that case law has established that time credit is a collateral consequence of a guilty plea. The court then stated that good time credit must be earned, and could be removed; therefore, to promise a defendant that he will receive good time credit when he has not yet earned it does not impact on a defendant's constitutional rights. The court found that there was substantial compliance with the Supreme Court Rules during the plea hearing, and denied defendant's motion to reconsider.

On appeal, defendant contends that the circuit court erred when it summarily dismissed his post-conviction petition because his claim that counsel rendered ineffective assistance when he misadvised him about good-time credit was supported by the record and affidavits from three witnesses. Defendant maintains that counsel told him several times that he would have to serve only 50% of his seven-year sentence, and that erroneous information was an important factor in his decision to plead guilty. Defendant asserts that his petition did not present a meritless legal theory or fanciful factual allegations, and thus, the

circuit court should have advanced his petition to second-stage proceedings under the Act.

Initially, the State argues that defendant forfeited review of his claim because he failed to raise it in a postplea motion or in a direct appeal. The State asserts that defendant should have moved to withdraw his plea under Supreme Court Rule 604(d) (eff. July 1, 2006), then filed a direct appeal from the denial of that motion. Defendant responds that the issue is not forfeited and that he could not have raised it in a postplea motion because he did not learn that counsel's advice was erroneous until more than 30 days after his plea was entered, and the time to file a motion to withdraw his plea under Rule 604(d) had passed.

It has long been recognized that Rule 604(d) does not apply in post-conviction proceedings. *People v. Miranda*, 329 Ill. App. 3d 837, 841 (2002) (and cases cited therein). Consequently, the State's contention that defendant forfeited review of this issue by failing to comply with Rule 604(d) is incorrect. See *id.*

Alternatively, the State contends that defendant failed to meet the standards for first-stage post-conviction proceedings, and that his allegation has no basis in law or fact. The State argues that defendant has failed to show that his plea was involuntary, and that he cannot show that counsel's performance at the plea hearing was deficient.

We review the circuit court's summary dismissal of defendant's post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2006); *Coleman*, 183 Ill. 2d at 378-79. A post-conviction petition need only state the gist of a constitutional claim to survive summary dismissal. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our supreme court has held that a petition can be summarily dismissed as frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). The court explained that a petition lacks an arguable basis in law when it is based on "an indisputably meritless legal theory," such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. The court further explained that a petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation," including claims which are "fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

In this case, to determine if defendant's petition had no arguable basis either in law or in fact, we apply the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), to evaluate whether counsel's

assistance was ineffective. *Hodges*, 234 Ill. 2d at 17. To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. Where it is arguable that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced, the post-conviction petition may not be summarily dismissed. *Hodges*, 234 Ill. 2d at 17.

Our supreme court has held that where defense counsel expressly gives a defendant erroneous and misleading advice regarding a collateral consequence of pleading guilty, counsel has rendered ineffective assistance. *People v. Correa*, 108 Ill. 2d 541, 553 (1985). Moreover, where a defendant relies on his counsel's erroneous advice when deciding to plead guilty, the guilty plea is not intelligently and knowingly made, and thus, is not voluntary. *Id.* A post-conviction petition sufficiently states the gist of an ineffective assistance of counsel claim where it includes facts showing that defendant pled guilty based on his counsel's misrepresentation that he was eligible for benefits that would reduce his time in prison. *People v. Clark*, 386 Ill. App. 3d 673, 676-77 (2008) (and cases cited therein).

We find the facts in *People v. Stewart*, 381 Ill. App. 3d 200 (2008) analogous to those in the case at bar. In *Stewart*, the

defendant filed a post-conviction petition alleging that he pled guilty because his counsel erroneously advised him that he was eligible to receive day-for-day good conduct credit and would have to serve only 50% of his sentence when, in fact, he was required to serve 85% of his sentence. *Stewart*, 381 Ill. App. 3d at 201. The circuit court advanced the defendant's petition to second-stage proceedings under the Act, and subsequently granted the State's motion to dismiss the petition. *Id.* at 201-02. On review, the appellate court held that the defendant's contention that he relied on counsel's erroneous advice when deciding to plead guilty was sufficient to avoid dismissal and entitle him to an evidentiary hearing under the Act. *Id.* at 206. See also *People v. Young*, 355 Ill. App. 3d 317, 323-24 (2005) (defendant's post-conviction allegation that he pled guilty based on counsel's erroneous advice that he was entitled to receive sentencing credit was legally sufficient to entitle him to an evidentiary hearing under the Act). *Contra People v. Maury*, 287 Ill. App. 3d 77, 83 (1997) (defendant's eligibility for early release was a collateral issue, and thus, defense counsel's erroneous advice was irrelevant).

Here, we find that defendant's petition presented sufficient factual allegations to establish a constitutional violation that would invoke the Act. Defendant alleged that his constitutional right to the effective assistance of counsel was violated when

counsel repeatedly gave him erroneous information that he would have to serve only 50% of his sentence. Defendant asserted that he relied on that information in deciding to plead guilty. In addition to his own affidavit, defendant attached affidavits from his wife, sister and brother all averring that they heard counsel state that defendant would be required to serve only 50% of his sentence. Defendant thereby satisfied the corroboration requirements of section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). We cannot say that these allegations are fantastic or delusional, and thus, we cannot conclude that defendant's petition lacked an arguable basis in fact.

Moreover, we cannot conclude that defendant's legal theory that counsel rendered ineffective assistance was "indisputably meritless." Based on case law, it is arguable that counsel's erroneous advice fell below an objective standard of reasonableness and prejudiced defendant. Accordingly, we conclude that defendant's petition did not lack an arguable basis in either law or fact, and thus, it should not have been summarily dismissed as frivolous and patently without merit. See *Hodges*, 234 Ill. 2d at 22.

For these reasons, we reverse the judgment of the circuit court of Cook County summarily dismissing defendant's post-conviction petition and remand this case to that court for second-stage proceedings under the Act.

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Reversed and remanded.