

NOTICE

Decision filed 01/20/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0504

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Effingham County.
v.)	
)	Nos. 08-CF-131 & 08-CF-223
CHARLES YODER,)	
Defendant-Appellant.)	Honorable
)	Kimberly G. Koester,
)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Goldenhersh and Welch concurred in the judgment.

RULE 23 ORDER

Held: Where a negotiated agreement is not fulfilled, the circuit court's dismissal of the postconviction petition is vacated and the cause is remanded to the circuit court for further proceedings under the Post-Conviction Hearing Act.

The defendant, Charles Yoder, appeals the dismissal of his postconviction petition. On appeal, he argues that his postconviction petition should not have been dismissed because he stated the gist of a constitutional claim in his argument that he pled guilty in reliance on a promise by the State that he would get credit for time served on both of his consecutive sentences. Yoder asks this court to grant his postconviction petition and remand the case for a new trial. The State confesses error in regards to Yoder stating the gist of a constitutional claim but does not agree with the prayer for relief requested by Yoder. The State argues that a better remedy would be to remand the case to allow it to respond to Yoder's postconviction petition.

The defendant's contentions and the State's concession are well-taken. Thus, we remand the cause to the circuit court for further postconviction proceedings.

BACKGROUND

Yoder pled guilty to aggravated battery and intimidation in exchange for the State recommending to the court consecutive prison sentences of five and two years with credit for time served applied to both sentences. The court accepted the negotiations and Yoder was sentenced accordingly. The mittimus in both cases showed that time served was to be credited to each sentence separately.

After sentencing, Yoder filed a *pro se* postconviction petition in which he argued that after arriving at the jail, he was given credit against only one of his sentences. He argued that he relied on the State's promise when he pled guilty and since that promise was not fulfilled, his plea was involuntary. The circuit court dismissed the postconviction petition, stating that consecutive sentences were treated as one sentence. Yoder filed this timely appeal.

ANALYSIS

On appeal, Yoder argues that he pleaded guilty in reliance on his negotiated agreement with the State and that no one explained to him that consecutive sentences are treated as a single term where he would only get one credit for time served. See *People v. Latona*, 184 Ill. 2d 260 (1998). He asserts that since the agreement was not fulfilled, his plea was involuntary and he should be allowed to plead anew. The State agrees that Yoder stated a gist of a constitutional claim in his postconviction petition, but it argues that the relief granted should be a remand for further postconviction proceedings.

A circuit court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Post-Conviction Hearing Act (the Act) governs the filing of postconviction petitions. 725 ILCS 5/122-1 *et seq.* (West 2004). "[A] *pro se* petition seeking postconviction relief under the Act may be summarily dismissed as 'frivolous or *** patently without merit' pursuant to

section 122-2.1(a)(2) only if the petition has no arguable basis either in law or in fact. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). At the first stage of postconviction proceedings, all a defendant is required to present are "enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Id.* at 9.

In the instant case, Yoder's postconviction petition argued that he had been promised credit for time served on both of his sentences, which induced him to plead guilty. By asserting that his plea was involuntary, Yoder was claiming a violation of his due process rights, which is a constitutional claim. Accordingly, we hold that Yoder presented enough of a gist of a constitutional claim to be allowed to proceed in postconviction proceedings. Therefore, we remand the cause to the circuit court to allow the State an opportunity to respond to the petition and for the cause to go on to an evidentiary hearing if the circuit court deems it necessary.

CONCLUSION

For the foregoing reasons, the dismissal of the postconviction petition is reversed, and the cause is remanded for further proceedings under the Post-Conviction Hearing Act.

Reversed; cause remanded.