

postconviction petition. The defendant filed a timely appeal arguing that the trial court improperly dismissed his petition because it stated the gist of a constitutional claim. We affirm.

¶ 3

BACKGROUND

¶ 4

On October 8, 2009, the defendant was charged with three counts of unlawful delivery of a controlled substance within 1,000 feet of residential property owned or operated by the Marion County Housing Authority. An amended information was filed on December 31, 2009. In count I, the defendant was charged with a Class 1 felony of unlawful delivery of a controlled substance on March 12, 2009. In count II, the defendant was charged with a Class X felony of unlawful delivery of a controlled substance on March 17, 2009. In count III, the defendant was charged with a Class 1 felony of unlawful delivery of a controlled substance on May 28, 2009. Counts I and III involved the delivery of less than one gram of a substance containing cocaine, and count II involved delivery of more than one gram of a substance containing cocaine. All three deliveries were alleged to have taken place within 1,000 feet of residential property owned or operated by the Marion County Housing Authority.

¶ 5

On February 3, 2010, the defendant filed a motion to suppress evidence illegally obtained. The defendant argued that there was no disclosure to the defense that there was a federally authorized overhear for the purchase of drugs from the defendant on May 28, 2009. He further argued that even if such an authorization existed, there was collusion between federal and state agents to avoid the requirements of the state eavesdropping law. The motion was heard on April 15, 2010. Dan Purcell, a Centralia police department detective, testified that in March 2009, he began an investigation of narcotics trafficking in Centralia, Illinois. Two

individuals were identified as the major suppliers of crack cocaine and heroin in the area. Detective Purcell stated that he located people willing to cooperate with law enforcement to make controlled buys and that he applied for state overhears to use an eavesdropping device for the controlled buys. Controlled buys were made from the defendant on March 12 and March 17, 2009, using a state authorized eavesdropping device.

¶ 6 Detective Purcell testified that he was contacted by Ronnie Almaroad, a task force officer for the southern district of Illinois for the Drug Enforcement Administration, about an ongoing federal investigation concerning one of the suspects identified as a major drug supplier in Centralia. Captain Almaroad informed Detective Purcell that federal authorization was given to utilize overhears. Detective Purcell testified that federal authorizations were used to conduct surveillance through electronic communications in the course of the controlled buys in Centralia from May 2009 until October 2009. Detective Purcell testified that on May 28, 2009, a confidential source wearing an eavesdrop device made a controlled buy from the defendant. Defense counsel argued that state agents colluded with federal agents to utilize federal authority for eavesdrops and videos to broaden the investigation of the major narcotics supplier to the defendant. The trial court found that electronic surveillance evidence gathered pursuant to federal law but in violation of the state eavesdropping statute is admissible absent evidence of collusion between federal and state agents to avoid the requirements of state law. It found that there was a federal investigation in which state and federal agents worked together to target dealers who would hopefully provide information about their suppliers. The court found that such cooperation did not constitute collusion and denied the motion to suppress.

¶ 7 On April 26, 2010, the defendant filed a motion to dismiss on the ground that

he had been denied his right to a speedy trial. The motion was heard the same day, and the trial court denied the motion, finding that the delay was attributable to the defendant. The defendant asked to address the court. The defendant told the court that he had only recently learned that there was authorization for the overhears used in the controlled buys, and he would have accepted a plea offer from the State had he known about it. The defendant and defense counsel never set out the terms of the plea offer to which he was referring, nor did the court ask about the terms. Defense counsel stated that he told the defendant that the overhear authorization was reflected in the police report and that he believed the overhears were "in proper form." The trial court set the matter for a pretrial hearing the next day.

¶ 8 At the pretrial hearing on April 27, 2010, the defense attorney stated that he was told by the State that it would put "yesterday's" offer "back on the table." The offer was "bottom time on a Class X and dismiss the other charges." The court asked if bottom time meant six years, which defense counsel confirmed. The defense then stated that the plea offer was a six-year sentence in exchange for the defendant pleading guilty to count II, the Class X felony, "but the defendant wanted to preserve the motion to suppress issue for appeal by doing a stipulated bench." The parties went off the record. When they returned they presented a document titled "stipulated bench trial" to the court. The document set out the stipulated facts relating to count III. The record contains no additional details about why the plea offer to count II was not consummated and the defendant chose to proceed with a stipulated bench trial on count III.

¶ 9 The court explained to the defendant that count III charged him with unlawful delivery of less than one gram of a substance containing cocaine on May 28, 2009, while within 1,000 feet of residential property owned, operated, or managed by the

Marion County Housing Authority. It informed the defendant of his possible sentences. The defendant indicated that he understood the charge and the possible penalties. The trial court explained to the defendant that because he wanted to proceed to a stipulated bench trial, he waived his right to a sentencing hearing. The defendant stated that he waived his right to a sentencing hearing and that he freely and voluntarily signed the document titled stipulated bench trial. The court stated that it had reviewed the document titled stipulated bench trial, the information, and the contents of the court file; that it had heard an extensive motion to suppress; and that it was aware of all the facts. The court found that the State had proven the defendant guilty beyond a reasonable doubt. A joint recommendation of eight years' imprisonment, plus two years' mandatory supervised release for count III, and the dismissal of counts I and II was presented. The court accepted the joint recommendation and sentenced the defendant accordingly.

¶ 10 The defendant did not file any posttrial motions. He filed an appeal that was dismissed on his motion. On June 18, 2010, the defendant filed a *pro se* postconviction petition. The defendant alleged that he was denied the effective assistance of counsel because his attorney concealed information regarding his case that caused him to turn down a plea offer for four years' imprisonment. The court found the petition frivolous or patently without merit, that it failed to state a gist of a constitutional claim, that it lacked an arguable basis in law or fact, and that it was based on a meritless legal theory or a fanciful factual allegation. The court dismissed the postconviction petition. The defendant filed a timely notice of appeal.

¶ 11

ANALYSIS

¶ 12

The defendant argues that the trial court erred in dismissing his petition for

postconviction relief at the first stage because he stated the gist of a constitutional claim. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) provides an opportunity for a defendant to assert that his conviction was the result of a substantial deprivation of his constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). In postconviction proceedings, the adjudication of the postconviction petition follows a three-stage process. *Edwards*, 197 Ill. 2d at 244. At the first stage, the trial court must review the postconviction petition within 90 days of its filing and determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). "A post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.'" *Edwards*, 197 Ill. 2d at 244. Our review of a trial court's dismissal of a defendant's postconviction petition at the first stage is *de novo*. *Id.* at 247.

¶ 13 The defendant argues that he was denied his constitutional right to effective assistance of counsel because his counsel kept important information from him that resulted in his rejection of a four-year plea offered by the State. In his postconviction petition, the defendant stated that on April 14, 2010, the day before the hearing on his motion to suppress, his attorney came to the Marion County jail to "discuss with [him] legal matters regarding" the hearing and "surely addressed the 4 year deal that the State was willing to consider." He then stated that, "[On] April 15th, I went through with the motion [to suppress] thinking it was such a coincidence that the State was now willing to consider a deal after the motion was filed." The motion was denied. The defendant stated that a few days before his next court date, his attorney told him the State's offer had been rescinded. His attorney also showed him a packet of papers authorizing Detective Purcell "to perform an eavesdropping on [him] through a C/S."

He stated that the packet of papers contained the documents he had been requesting from his attorney since the attorney started working on his case. The defendant argued that his counsel never showed him the documentation authorizing the overheard or told him it existed until after the motion to suppress was denied and "the 4 year deal was off the table." He alleged: "If I had known my counsel had these documents in his possession, I would have immediately taken the 4 year sentence. I'd be a fool not to."

¶ 14 There is no evidence of a four-year plea offer in the record. Additionally, the defendant only broadly states that he was offered a four-year sentence in exchange for a guilty plea without specifying to what count the guilty plea would relate. The record does indicate that the defendant was offered a six-year sentence in exchange for a plea of guilty to count II.

¶ 15 The defendant's postconviction petition failed to state the gist of a constitutional claim. The defendant alleges that his counsel was ineffective because his counsel did not fully advise him whether he should accept the State's plea offer. A defendant does not have a constitutional right to a plea bargain, but if the State chooses to bargain, then the defendant has the right to effective assistance of counsel during those negotiations. *People v. Guerrero*, 2011 IL App (2d) 090972, ¶ 61. "As part of a defendant's right to effective assistance of counsel during plea negotiations, a defendant has a right to be reasonably informed with respect to the direct consequences of accepting or rejecting a plea offer." *Id.*

¶ 16 Claims of ineffective assistance of counsel are reviewed under the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Curry*, 178 Ill. 2d 509, 518 (1997). To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must show both that counsel's performance fell below

an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88. "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). To prove that defense counsel's performance was deficient, the defendant must show that the record demonstrates that his attorney did not provide effective assistance of counsel based on prevailing professional norms. *People v. Gordon*, 378 Ill. App. 3d 626, 639 (2007). There is a strong presumption that the challenged action or lack of action might be the product of sound trial strategy, and a reviewing court must give great deference to the performance of counsel. *Id.* To establish prejudice, the defendant must demonstrate that there is a reasonable probability that, absent this attorney's deficient advice, he would have accepted the plea offer. *Curry*, 178 Ill. 2d at 531. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

¶ 17 The defendant argues in his postconviction petition that his attorney kept the documentation authorizing the overhears from him and had he seen it before the hearing on the motion to suppress, he would have accepted the State's plea offer. He argues on appeal that his counsel kept important information from him including the strength of the motion to suppress and the evidence against him and did not fully advise him whether he should accept the State's plea offer. At the preliminary hearing held November 3, 2009, the defendant was present with counsel. Detective Purcell testified that on March 12, 2009, he obtained a state court authorization for an overhear to utilize in an attempted controlled buy from the defendant. A confidential

source then bought a controlled substance from the defendant on that date. Detective Purcell further testified that on March 17, 2009, utilizing a state authorized overhear, he fitted a confidential source with an audio-recording device for a controlled purchase of cocaine from the defendant. He stated that, in addition to the audio surveillance, he videotaped the transaction from his car pursuant to state authorization. He testified that on May 28, 2009, he met with a confidential source to fit an audio and video device authorized by a federal overhear for a controlled purchase of cocaine from the defendant. At a hearing on December 8, 2009, defense counsel told the court: [We] just received the audio and video recordings yesterday morning. We did go over the audio and videos at the jail yesterday." The motion to suppress was not filed until February 3, 2010, and was not heard until April 15, 2010. The defendant was aware of the state and federal authorized overhears and reviewed the audio and video tapes with defense counsel well before the motion to suppress was filed.

¶ 18 The defendant failed to state the gist of a constitutional claim that his attorney's performance fell below a reasonable standard. The defendant knew of the authorization for the state and federal overhears as of November 3, 2009, and reviewed the audio and video tapes of the controlled buys. It is not arguable that defense counsel's performance fell below prevailing professional norms because there is nothing to show that he kept important information and evidence from the defendant that would have influenced the defendant's decision whether to accept a plea offer.

¶ 19 The defendant likens his case to *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012), where the Court found: "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that

