NOTICE
Decision filed 01/30/12. 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.

2012 IL App (5th) 100570-U

NO. 5-10-0570

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
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 10-CF-148
	)	
CRAIG A. WALKER,	)	Honorable
	)	E. Dan Kimmel,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Welch and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant was misinformed regarding his plea agreement by the State, his attorney, and the court, the defendant has presented the gist of a constitutional claim and the circuit court's summary dismissal of his postconviction petition is reversed and the cause is remanded to the circuit court.

¶ 2 The defendant, Craig A. Walker, appeals the circuit court's summary dismissal of his postconviction petition. For the following reasons, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 The defendant was charged with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2) (West 2010)), unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2010)), and aggravated unlawful use of weapons (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2010)). On July 29, 2010, the defendant pled guilty to unlawful possession of a controlled substance with

intent to deliver in exchange for the State recommending a 10-year sentence of imprisonment with day-for-day good-conduct credit. The State also agreed to dismiss both other charges and not submit the case for federal prosecution. The agreement also provided that the defendant's bond money would be applied to his fines, costs, and assessments and that the defendant would agree to forfeiture of the property that was seized at the time of the defendant's arrest.

¶ 5 The circuit court accepted the terms of the agreement and sentenced the defendant to 10 years of imprisonment. Specifically the court stated as follows: "The Court will sentence you to the Illinois Department of Corrections for a period of ten years, credit for 134 days served. It's a day-for-day sentence." The court then admonished the defendant that he had 30 days to withdraw his plea if he so chose. The defendant's sentence was also recorded in a written order as a 10-year sentence with day-for-day good-conduct credit.

¶ 6 On November 4, 2010, the defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)). In the petition, the defendant argued that he did not receive the benefit of his bargain because the Department of Corrections (DOC) said that he was not entitled to day-for-day good-conduct credit and that he was required to serve 75% of his sentence. He argued that he was misinformed by the State, his attorney, and the court. The defendant also attached a document entitled "Counseling Summary" from a correctional counselor at the DOC. The document stated as follows:

"This is a case that falls under the truth in sentencing guidelines. Your msr date of 9/15/2017 will be your release date, no good conduct time can be awarded. If you want further clarification on this, you can write the record office supervisor. This should have been explained to you in court and you always have the option of

contacting the law library because you can only change your situation through Jackson county–not Menard."

The defendant also attached a sentence calculation worksheet from the DOC that indicates that the defendant would serve 75% of his sentence.

¶ 7 On November 15, 2010, the circuit court dismissed the postconviction petition for failing to clearly state the constitutional rights that had been violated. The defendant filed this timely appeal.

¶ 8 ANALYSIS

¶ 9 On appeal, the defendant argues that his plea was not entered knowingly and voluntarily because he did not receive the benefit of the bargain he made with the State. He asks this court to order specific performance of his plea agreement, or in the alternative, he asks that the circuit court's summary dismissal of his postconviction petition be reversed and the case be remanded for further proceedings.

¶ 10 In response, the State confesses error regarding the defendant's claim that he was misinformed about his plea agreement, but it does not agree with the defendant's prayer for relief. The State argues that a better remedy would be to modify the defendant's sentence so that it is closer to the sentence included in the agreement.

¶ 11 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 (West 2010). "[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.

¶ 12 In the instant case, the defendant's postconviction petition argued that he had been misinformed regarding the terms of his plea agreement by the State, his attorney, and the court, which induced him to plead guilty. By asserting that the plea bargain was misrepresented to him, the defendant was claiming a violation of his due process rights, which is a constitutional claim. Furthermore, in *People v. Stewart*, 381 Ill. App. 3d 200, 206 (2008), the court held that where counsel gave the defendant erroneous advice regarding the plea agreement and the defendant relied upon that erroneous advice, the defendant had presented the gist of a constitutional claim and was entitled to a evidentiary hearing. Here, the record supports that the defendant was misinformed regarding the day-for-day good conduct by his attorney, the State, and the court. Accordingly, we hold that the defendant has presented a gist of a constitutional claim, and we remand for further postconviction proceedings.

¶ 13 CONCLUSION

¶ 14 In conclusion, the defendant's contentions and the State's concession are well-taken, and we reverse the circuit court's summary dismissal of the defendant's postconviction petition and remand the cause for further proceedings.

¶ 15 Reversed; cause remanded.