

No. 1-11-1249

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.)	Nos. 05 CR 24288
)	05 CR 8986
)	
MARCUS THOMPSON,)	Honorable
)	John A. Wasilewski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court erred in summarily dismissing defendant's *pro se* postconviction petition where the petition had an arguable basis in law and fact.

¶ 2 Defendant Marcus Thompson appeals from an order summarily dismissing his *pro se* petition for relief under the Post-conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant contends his petition properly alleged an arguable basis in law and fact where his negotiated guilty plea was based upon credit for days in presentence custody which he did not receive. Thus, defendant claims he was denied the benefit of the plea bargain. We reverse and remand.

¶ 3 On December 13, 2007, defendant entered into negotiated guilty plea agreements on two separate charges. First, defendant pled guilty to unlawful use of a weapon (UUW) by a felon (05 CR 8986) where the police found him on March 22, 2005, in possession of a handgun after having been previously convicted of the felony offense of unlawful use of a weapon. Second, defendant pled guilty to aggravated battery with a firearm (05 CR 24288) after he shot Ronald Island on September 14, 2005.

¶ 4 During the plea hearing, the court stated it would sentence defendant to four years in prison for the UUW count, to be served with day-to-day good conduct credit, and nine years in prison on the aggravated battery with a firearm count, to be served at 85% of the sentence. The court read the charges to defendant and advised him as to the respective sentence ranges and penalties associated with the two charges. Defendant confirmed he understood these penalties. The court then explained the second sentence would be imposed consecutively to the UUW sentence, because defendant had been released from custody after being charged with UUW when he committed the aggravated battery with a firearm.

¶ 5 The court then admonished defendant as follows:

"What the Illinois Department of Corrections does, and this is all governed by state law, they add the two sentences together. So, they will add the four and nine together and that would be like a 13-year sentence. Then they will apply whatever the appropriate good time credits are, the day-for-day for the four years and the 85 percent of the nine years and then what they will do is***consider it one sentence. And what they do is they then apply the unduplicated number of days of custody days that you have been in custody, which they tell me is 976 for that amount. And then they apply what they call discretionary good time. And that's your early out date."

The court then asked if defendant still wished to plead guilty, to which defendant responded

"Yes, your Honor." After further admonishing defendant about defendant's right to a jury trial, the court then stated, "Apart from the plea agreement that's been stated in open court has anyone made any other promises?" to which defendant replied, "No your Honor."

¶ 6 The parties stipulated to the factual basis of the charges. The court sentenced defendant to nine years' imprisonment on the aggravated battery with a firearm count to be served consecutively to four years' imprisonment on the UUW charge.

¶ 7 The court then repeated that defendant had 976 days of credit for the UUW offense and asked defense counsel how many days of credit defendant had for the aggravated battery with a firearm offense. When counsel replied that he had not calculated it yet, the court asked him to do so, "[be]cause they add the two together. But if I put too many days for that one I know they will send it back." Defense counsel later informed the court that defendant had 800 days of credit for the aggravated battery with a firearm offense. Defendant's sentencing orders expressly stated defendant was to receive 976 days of credit for the UUW count and 800 days for the aggravated battery with a firearm count. Defendant did not file a motion to withdraw his guilty plea or a direct appeal.

¶ 8 After defendant had completed serving the four-year sentence on the first conviction (UUW), defendant sent three letters to the clerk of the court, noting that the Illinois Department of Corrections (IDOC) was refusing to apply 800 days of credit to the second conviction (aggravated battery with a firearm). Defendant's letter asked for a court order to this effect. Defendant additionally filed two motions "for Order Nunc Pro Tunc" with the clerk for the same purpose. On April 28, 2009, defendant sent a letter directly to the trial court, again asking that he be afforded an additional 800 days credit as he had agreed to as part of his plea agreement.

¶ 9 At a hearing in August 2009, the court addressed the April 2009 letter on the record, noting case law prevented it from giving defendant the "double credit" he sought for presentence days spent in custody. The court then denied defendant's request and additionally filed a written

order in support of this ruling. Defendant appealed the court's order, but the circuit court found the order was not final and thus not appealable.

¶ 10 Defendant subsequently filed a *pro se* postconviction petition on December 23, 2010. In the petition, defendant alleged, *inter alia*, he was "led to believe that he would receive credit for a total of 1776 days served in presentencing custody," with 1,776 days representing 976 added to 800. Defendant alleged this promise by the State took place at a plea conference. Instead of 1,776 days of credit, defendant noted he only received 976. He argued his plea was therefore involuntary and unknowing and that he was denied the benefit of the bargain he made with the State.

¶ 11 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 12 On appeal, defendant contends his postconviction petition properly stated the arguable basis of a meritorious constitutional claim. Specifically, he argues he properly alleged his due process rights were violated because he received 976, and not 1,776, days of presentence credit, and thus did not receive the benefit for which he bargained in his negotiated plea.

¶ 13 As a threshold matter, we reject the State's argument that defendant waived this issue. Where, as here, a defendant failed to file a direct appeal, the waiver rule does not apply to bar him from raising a constitutional claim in a postconviction petition under the Act. *People v. Brooks*, 371 Ill. App. 3d 482, 484-86 (2007) (and cases cited therein). We thus will consider the merits of defendant's claims.

¶ 14 The Act allows a defendant to assert that his conviction was the result of a substantial denial of rights under the United States or Illinois constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). A postconviction proceeding under the Act contains three stages. *People v. Tate*, 2012 IL 112214, ¶ 9 (2012). At the first stage, the circuit court must independently review the petition, taking the defendant's allegations

as true, and determine if the petition is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); 725 ILCS 5/122-2.1(a)(2) (West 2010). A postconviction petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12. A petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. An example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Id.* We review petitions of *pro se* defendants leniently and allow borderline cases to proceed. *Id.* at 21.

¶ 15 The supreme court recently revisited the standard for summary dismissal in *People v. Tate*, 2012 IL 112214, and re-emphasized the low threshold applicable to pro se petitions drafted by defendants with little legal knowledge or education. *Tate*, 2012 IL 112214 at ¶ 9. The court stated that first-stage review allows the circuit court "to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *Id.* (quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001)). Where the allegations in the petition are not wholly without merit, it will advance to the second stage, where counsel is appointed for defendant and the State enters the litigation. *Id.* at ¶ 10. "It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel." *Id.* Our review of the summary dismissal of a postconviction petition is *de novo*. *Id.*

¶ 16 Defendant argues that his petition has an arguable basis in both law and fact and should have survived summary dismissal. He maintains that the court's admonishments regarding how much presentence custody credit he would receive were at the very least open to interpretation, resulting in an arguable factual basis for his claim that is not positively rebutted by the record. As to the legal basis, defendant acknowledges that under *People v. Latona*, 184 Ill. 2d 260, 270-72 (1998), he cannot receive the double credit he claims he was promised but maintains that

other forms of relief are possible, such as reducing the actual sentence. He cites *People v. Whitfield*, 217 Ill. 2d 177 (2005), as an example, where the supreme court reduced the defendant's sentence rather than striking a term of mandatory supervised release. *Whitfield*, 217 Ill. 2d at 205. The State responds that defendant's claim is positively rebutted by the record because the court referred to "the unduplicated number of days of custody" when admonishing him and nowhere stated that defendant would receive credit for both 976 and 800 days. We recently held in *People v. Cortez*, 2012 IL App (1st) 102184, ¶ 19, that a plea bargain based on an unlawful promise to grant double credit on concurrent sentences was void.

¶ 17 Given the low threshold applicable to *pro se* petitions, we believe this petition should not have been summarily dismissed. It is true that the court used the term "unduplicated" when referring to presentence custody credit, but it also explained to defendant that his consecutive sentences would be added together. It is not "fanciful" to argue that defendant may have believed that his presentence custody credit for the two cases would also be added together. Also, although the trial court mentioned only 976 days of credit, the record shows that neither the court nor the parties had yet calculated the amount of credit defendant was to receive on the second offense, which may have provided a reason for its omission. The sentencing orders that were issued show that defendant was to serve the sentences consecutively, and each states a separate number of days to be credited, without indicating that the days would be unduplicated.

¶ 18 In remanding this case, we express no opinion on whether defendant's petition ultimately will support a substantial showing that his guilty pleas were involuntary. We find only that defendant's petition was sufficient to warrant the appointment of counsel, who could ascertain whether defendant's claim has merit.

¶ 19 The judgment of the circuit court of Cook County is reversed.

¶ 20 Reversed and remanded.