

NOTICE
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2013 IL App (4th) 110514-U

NO. 4-11-0514

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 8, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
JEFFREY L. MARCRUM,)	No. 10CF47
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The summary dismissal of defendant’s *pro se* postconviction petition was affirmed because defendant failed to sufficiently allege an arguable claim of ineffective assistance of counsel in relation to plea negotiations based on his counsel’s erroneous advice.

¶ 2 Defendant, Jeffrey L. Marcrum, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 to 122-7 (West 2010). On appeal, defendant contends at least one allegation in the petition presented an arguable claim of ineffective assistance of counsel. However, because we find defendant is unable to demonstrate an arguable claim that his counsel rendered ineffective assistance, we affirm the circuit court's summary dismissal.

¶ 3 I. BACKGROUND

¶ 4 In February 2010, defendant and the State entered into a fully negotiated plea

agreement in which defendant pleaded guilty to burglary, a Class 2 felony, and agreed to be sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3(c)(8) (West 2008)) in exchange for the State's recommendation of a seven-year prison sentence. Additionally, the State agreed to dismiss defendant's pending theft and obstruction-of-justice charges.

¶ 5 In March 2010, defendant filed a *pro se* motion to withdraw his plea, alleging he was "pressured" into entering the plea and "confused" about the "stage and nature of the proceedings" at the time the plea was introduced to the trial court. He claimed he was under "extreme duress" and was suffering from serious medical conditions on the date the plea was entered. He also filed a *pro se* motion to reconsider his sentence. However, at a May 2010 hearing on defendant's motions, defendant's counsel advised defendant wished to withdraw his *pro se* motions.

¶ 6 In April 2011, defendant filed a *pro se* postconviction petition, alleging (1) the State violated his due-process rights by failing to produce exculpatory evidence, and (2) his trial counsel was ineffective for (a) advising that a motion to dismiss the charges would have no merit, (b) failing to request supplemental discovery, (c) advising that a motion to suppress a confession had no merit, (d) coercing him into pleading guilty, (e) advising that a motion to withdraw had no merit, (f) filing an inaccurate Supreme Court Rule 604(d) certificate (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)), and (g) advising defendant he would only be required to serve three years of his seven-year sentence upon pleading guilty. It is only this last allegation that defendant raises in this appeal. He claimed counsel advised him he would likely only have to serve three years of his seven-year sentence after the sentence was reduced by (1) 50% based on the truth-in-sentencing provisions, and (2) an additional six months of "meritorious good time." However, the governor ordered the "meritorious

good time" credit suspended. Defendant stated: "If not for counsel's errors, the defendant would [not have] pled guilty, but would have insisted on trial." Defendant's petition was supported by his own affidavit.

¶ 7 On May 4, 2011, the circuit court entered a written order of dismissal, finding defendant's petition frivolous and patently without merit. Defendant filed a motion to reconsider, which the court denied. This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Defendant appeals, claiming the circuit court erred in summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit because he insists he alleged the gist of a constitutional claim of ineffective assistance of trial counsel. We disagree.

¶ 10 The Act provides a defendant with a means of challenging his conviction or sentences for violations of his constitutional rights that could not have been raised on direct appeal. 725 ILCS 5/122-1 to 7 (West 2010). The Act establishes a three-stage process for adjudication of a postconviction petition. At the first stage, the circuit court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief, and it may summarily dismiss the petition upon finding it is frivolous and patently without merit. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998); 725 ILCS 5/122-2.1(a)(2) (West 2010). All well-pled allegations are to be taken as true and liberally construed, unless contradicted by the record. *Coleman*, 183 Ill. 2d at 381-82. A petition is considered frivolous and patently without merit where its allegations fail to present the gist of a meritorious constitutional claim (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), or if it has "no arguable basis either in law or in fact." (*People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). This court reviews the summary dismissal of a petition for

postconviction relief *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 11 A first-stage petition claiming ineffective assistance of counsel must show it is arguable that counsel's performance fell below an objective standard of reasonableness, and that it is arguable that the defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17. The Illinois Supreme Court has found that "[a] criminal defendant has the constitutional right to be *reasonably* informed with respect to the direct consequences of accepting or rejecting a plea offer." (Emphasis in original.) *People v. Curry*, 178 Ill. 2d 509, 528 (1997). Thus, for example, our supreme court in *Curry* found ineffective assistance of counsel where defense counsel incorrectly informed the defendant during plea negotiations about mandatory consecutive sentencing and the minimum sentence possible at trial. *Curry*, 178 Ill. 2d at 529. As a result of the defense attorney's misleading information, the defendant's conviction and sentence were reversed and the defendant was given a new trial. *Curry*, 178 Ill. 2d at 536-37.

¶ 12 The importance of defense counsel's effective representation in the context of plea negotiations was recently reinforced by the United States Supreme Court. See *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) (holding that a defendant can succeed on an ineffective-assistance-of-counsel claim where that defendant rejects a plea offer based on counsel's erroneous advice and can show that, but for the erroneous advice, he would have accepted the plea offer and the ultimate outcome of the plea process would have been different). The Court held the two-part *Strickland* test (*Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)) applies to challenges to guilty pleas based on ineffective assistance of counsel. *Lafler*, ___ U.S. ___, 132 S. Ct. at 1384. Thus, to demonstrate counsel's ineffectiveness sufficient to survive summary dismissal, a defendant must show counsel's performance fell below a reasonable standard of representation and defendant was prejudiced by

counsel's actions. *Hodges*, 234 Ill. 2d at 17.

¶ 13 A postconviction 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). Indeed, this court has previously held that a defendant sufficiently alleged a constitutional violation under the Act when he claimed he relied on counsel's affirmative misrepresentations of the collateral consequences of pleading guilty when he entered his plea. *People v. Stewart*, 381 Ill. App. 3d 200, 204 (2008) (the defendant sufficiently alleged a constitutional violation sufficient to advance to a third-stage evidentiary hearing when he alleged he pleaded guilty based upon counsel's erroneous advice that he was eligible for day-for-day good-conduct credit, when actually, he was required to serve 85% of his sentence).

¶ 14 Relying on *Stewart*, defendant claims his allegation of ineffective assistance of trial counsel was sufficient to survive first-stage dismissal when he alleged counsel erroneously advised him he would only serve three years of his agreed upon seven-year prison term, when actually, at the time he pleaded guilty, he was required to serve a minimum three and a half years. His attorney had allegedly advised him he would only serve 50% and would likely receive an additional six months of "meritorious good time." Defendant alleged the "meritorious good time" had been "suspended" by the governor before defendant pleaded guilty. He claimed his attorney rendered ineffective assistance and should have known of the governor's action. He further claimed, had he known he would not receive the additional six-month reduction, he would not have pleaded guilty and would have proceeded to trial.

¶ 15 The Unified Code provides that the Illinois Department of Corrections (DOC) "shall

prescribe rules and regulations for the early release on account of good conduct of persons committed to [DOC]." 730 ILCS 5/3-6-3(a)(1) (West 2010). "The rules and regulations shall also provide that the Director may award up to 180 days additional good conduct credit for meritorious service in specific instances as the Director deems proper; except that no more than 90 days of good conduct credit for meritorious service shall be awarded to any prisoner who is serving a sentence for conviction of [certain specified felonies]." 730 ILCS 5/3-6-3(a)(3) (West 2010).

¶ 16 "The decision to award meritorious good conduct credit to qualifying prisoners is discretionary under section 3-6-3(a)(3)" of the Unified Code and DOC's Director "is not required to grant the credit or even consider it." *Helm v. Washington*, 308 Ill. App. 3d 255, 257 (1999). In fact, courts have affirmed the dismissal of petitions for *mandamus* relief based upon allegations concerning the failure to award discretionary good-conduct credit. See *Helm*, 308 Ill. App. 3d at 258-59 (Third District) (Inmate's *mandamus* petition, alleging only that he qualified for consideration of discretionary good-conduct credit, failed to allege a clear duty to act on the part of the defendant and was correctly dismissed by the trial court); *Brewer v. Peters*, 262 Ill. App. 3d 610, 613 (1994) (Fifth District) (The defendants do not have a clear duty to act where the award of good-conduct time and the decision to consider granting good-conduct time are discretionary under the statute).

¶ 17 Nevertheless, according to defendant, on December 18, 2009, a few months before defendant pleaded guilty as part of a fully negotiated plea, the governor's office announced it had "ordered the suspension of the meritorious good time effort after some concerns regarding the program surfaced." This suspension was, in fact, temporary, as DOC has resumed awarding meritorious credit under a revamped statute. See Pub. Act 97-697, § 5 (eff. June 22, 2012); 730 ILCS 5/3-6-3 (West 2010). Although counsel's advice at the time of defendant's plea was erroneous

due to the temporary suspension, defendant cannot demonstrate prejudice based on this erroneous advice since the suspension has been lifted. Defendant could still receive an award "up to 180 days additional credit." Therefore, even though counsel's advice at the time of the plea was erroneous, defendant cannot demonstrate a constitutional violation based upon that erroneous advice. In other words, defendant's allegation does not present an arguable claim of ineffective assistance of counsel sufficient to survive first-stage dismissal, when it is possible defendant may receive the meritorious-good-time credit as represented by counsel.

¶ 18

III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm the circuit court's order dismissing defendant's postconviction petition as frivolous and patently without merit. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 20 Affirmed.