

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).

2013 IL App (4th) 120607-U  
NO. 4-12-0607  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
August 29, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
JIMMY L. TILLEY, JR.,	)	No. 08CF143
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

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PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.  
Justices Pope and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court accepted the State's concession that the trial court erred by dismissing the defendant's postconviction petition at the first stage; the appellate court concluded that the petition set forth the gist of a claim of ineffective assistance of counsel.

¶ 2 In April 2012, defendant, Jimmy L. Tilley, Jr., who was convicted of multiple felony drug offenses pursuant to a guilty plea, filed a postconviction petition under the Post Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2012)). In June 2012, the trial court entered an order dismissing that petition, concluding that it was frivolous and patently without merit.

¶ 3 Defendant appeals, and the State concedes that the trial court erred by dismissing his petition at the first stage of the postconviction proceedings. We accept the State's concession and reverse and remand for further proceedings.

¶ 4

## I. BACKGROUND

¶ 5 In June 2008, the State charged defendant with eight counts of possession with intent to deliver a controlled substance and one count of disorderly conduct. In April 2009, defendant entered into an open plea of guilty to all charges. In September 2009, the trial court sentenced defendant to the following concurrent prison sentences: (1) 16 years on count I (possession with intent to deliver a controlled substance (200 grams or more of hydrocodone) (720 ILCS 570/401(a)(11) (West 2008))); (2) 8 years on count II (possession with intent to deliver a controlled substance (50 grams or more of codeine) (720 ILCS 570/401(c)(11) (West 2008))); (3) 4 years on counts III through VIII (possession with intent to deliver a controlled substance (alprazolam, lorazepam, diazepam, flurazepam, clonazepam, and clorazepate), all in violation of statute (720 ILCS 570/401(g) (West 2008))); and 2 years on count IX (disorderly conduct (false crime report) (720 ILCS 5/26-1(a)(4) (West 2008))). After being admonished in accordance with Supreme Court Rule 605 (eff. October 1, 2001), defendant failed to file a petition to withdraw his guilty plea or appeal.

¶ 6 In April 2012, defendant filed a postconviction petition, asserting, in part, that he received ineffective assistance of counsel from his court-appointed lawyers. He also sought the appointment of counsel. In his petition, defendant claimed that even though the police improperly continued to question him after his arrest despite his saying that he wished to consult with an attorney, his lawyers failed to file a motion to suppress the statements he subsequently made while in custody. Defendant also asserted that he told his lawyers that he wished to file a motion to withdraw his guilty plea, but that they failed to file such a motion.

¶ 7 In June 2012, the trial court entered an order dismissing defendant's petition

pursuant to section 122-2.1 of the Act (725 ILCS 5/122-2.1 (West 2012)), concluding that the petition was frivolous and patently without merit. The court explained its doing so, in part, as follows:

"5. In support of defendant's claim of ineffective assistance of counsel, defendant contends that his attorney should have filed a motion to suppress, gave him bad advice and failed to file a motion to withdraw the guilty plea and/or reconsider the sentence.

Although defendant cites to *Strickland [v. Washington, 466 U.S. 668 (1984),]* in his petition, he fails to meet the two-prong[ed] test of *Strickland*. Specifically, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) that this substantial performance caused prejudice.

6. In support of his claim concerning a motion to suppress the statements, the defendant does set forth a number of facts which he contends show that he had the basis to proceed with a motion to suppress. Defendant has not shown, though, that counsel's failure to file said motion fell below an objective standard of reasonableness and further that this caused him prejudice. In fact, defendant pled guilty to the charges. The statements did not come in during the course of a trial. Thus, defendant cannot show prejudice.

7. In regards to defendant's claims that counsel failed to

file an appeal, or other post-conviction motion, defendant's statements are conclusory at best. He references his affidavit in the petition but fails to give specific times or dates when he had these conversations with [defense counsel]. Further, again, defendant cannot show that counsel's failure to file any such motion caused prejudice.

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9. In sum, the [c]ourt finds that defendant's post-conviction petition fails to set forth the gist of a constitutional claim on the basis of ineffective assistance of counsel. The petition is found to be frivolous and patently without merit and should be dismissed."

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Proceedings Under the Act and the Standard of Review

¶ 11 A defendant may proceed under the Act by alleging that "in the proceedings which resulted in his or her conviction[,], there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]" 725 ILCS 5/122-1(a)(1) (West 2010). "In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition." *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010).

¶ 12 "At the first stage, 'the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record,

rendering the petition neither frivolous nor patently without merit.' " (Emphasis in original.) *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 652 (quoting *People v. Phyfiher*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005)). To withstand dismissal at the first stage, the petition need only state the gist of a constitutional claim for relief. *People v. Henderson*, 2011 IL App (1st) 090923, ¶6, 961 N.E.2d 407. The "gist" standard is a low threshold that does not require a petitioner to set forth the constitutional claim in its entirety but instead, only a limited amount of detail. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 24, 958 N.E.2d 1046. In *People v. Patton*, 315 Ill. App. 3d 968, 972, 735 N.E.2d 185, 189 (2000), this court wrote that to state the gist of a claim, a defendant need not construct legal arguments nor even understand what legal arguments the facts presented in his postconviction petition might support.

¶ 13 "[I]n considering a postconviction petition at the first stage of the proceedings, the court can examine the following: 'the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding.' " *People v. Dorsey*, 404 Ill. App. 3d 829, 833, 942 N.E.2d 535, 539 (2010) (quoting 725 ILCS 5/122–2.1(c) (West 2008)). If a defendant has been sentenced to imprisonment and the trial court determines that his postconviction petition is frivolous or patently without merit, the court shall dismiss the petition by written order. 725 ILCS 5/122-2.1(a)(2) (West 2010). This court reviews *de novo* a first-stage dismissal of a petition under the Act. *Dorsey*, 404 Ill. App. 3d at 833, 942 N.E.2d at 539.

¶ 14 B. The Trial Court's First Stage Dismissal of Defendant's  
Petition for Postconviction Relief

¶ 15 On appeal, defendant asserts that his petition contains several claims of ineffective

assistance of trial counsel, including that (1) his second attorney failed to file motions to withdraw his guilty plea, reconsider sentence, or give notice of appeal despite defendant's repeated request to do so; (2) his trial counsel misled him into pleading guilty by incorrectly promising that he would receive up to only eight years of prison time, versus up to 30 years if he went to trial; and (3) both of his lawyers failed to move to suppress his statements to the police, "which were obtained in clear violation of his constitutional rights."

¶ 16 In response, the State concedes that the trial court applied too stringent a standard in dismissing defendant's first-stage petition on the ground that he had not established ineffective performance and prejudice under *Strickland*. Nonetheless, the State asserts that some of defendant's claims are deficient, even though the State concedes that the court's dismissal must be reversed and the case remand for further proceedings. We accept the State's concession but decline to parse the claims defendant made in his petition.

¶ 17 As this court held in *Patton*, if any part of a postconviction petition has an arguable basis either fact or law, the entire petition must survive to the second stage of proceedings, where appointed counsel may amend the petition. *Patton*, 315 Ill. App. 3d at 974, 735 N.E.2d at 190. See also *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009), holding that if the trial court erred in dismissing a defendant's postconviction petition because any portion of it presented the gist of a constitutional claim for relief, then the court of review must reverse the trial court entirely so as to allow the whole petition to advance to the second stage.

¶ 18

### III. CONCLUSION

¶ 19 For the reasons stated, we reverse the judgment of the trial court and remand for

further proceedings.

¶ 20            Reversed and remanded for further proceedings.