

NOTICE
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2015 IL App (5th) 120493-U

NO. 5-12-0493

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,)	St. Clair County.
)	
v.)	Nos. 08-CF-872, 10-CF-930,
)	& 11-CF-1041
JAMAUL HARRIS,)	
)	Honorable Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant presented the gist of a constitutional claim, the order of the circuit court dismissing the defendant's *pro se* postconviction petition is vacated and the matter is remanded for second-stage postconviction proceedings.

¶ 2 The defendant, Jamaul Harris, appeals the first-stage dismissal of his *pro se* postconviction petition pursuant to section 122-1(a)(1) of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1(a)(1) (West 2012)). The State confesses error and agrees with the defendant that the matter must be remanded for a second-stage postconviction hearing with appointed counsel. We find the State's concession and the

defendant's contentions to be well-founded, and remand this matter for further proceedings.

¶ 3

BACKGROUND

¶ 4 There are three different criminal cases involved in this appeal: case number 08-CF-872, case number 10-CF-930, and case number 11-CF-1041. We will discuss only those facts relevant to the disposition of this matter. The facts relevant to case number 08-CF-872 are as follows. On March 26, 2008, the Drug Enforcement Administration (DEA) informed the Metro-East Enforcement Group of Southwestern Illinois that the DEA suspected two packages shipped through a UPS facility in Belleville, Illinois, contained illegal drugs. After obtaining a warrant, the drug enforcement group searched the packages and they were discovered to contain cannabis. The drug enforcement group then planned an undercover operation, wherein an agent would deliver the packages to the listed addresses. One package was addressed to a "Mrs. Harris," at an address in Belleville, Illinois, and the other package was addressed to Shannon Paige at an address in East St. Louis, Illinois. When the first package was delivered to Janeika Harris, officers arrested her. Janeika gave a statement that the defendant was going to pick up the package from her. The other package was then delivered to the East St. Louis address, where two men removed the package from the porch and drove away. When police officers stopped the car, one of the men, Bobby Moore, said that he did not know anything about the package but that the other man in the car, "Smurf," had picked up the package, entered the car, and exited the car with the package at a different location.

¶ 5 On October 17, 2008, the defendant was charged by grand jury indictment. Count II, the relevant count here, read: "Unlawful possession with intent to deliver cannabis *** in that on March 26, 2008, defendant knowingly and unlawfully possessed with intent to deliver more than 5,000 grams of a substance containing cannabis. A class X felony." On October 25, 2010, the defendant was charged by information on the same facts. Count II read: "Unlawful delivery of cannabis *** in that on March 26, 2008, defendant knowingly and unlawfully possessed with the intent to deliver more than 2,000 grams of a substance containing cannabis. A class 1 felony." (Emphasis added.) Following that case, the defendant was charged with unlawful possession of a controlled substance in case number 10-CF-930 and unlawful possession of a controlled substance in case number 11-CF-1041. These subsequent cases were unrelated to the facts giving rise to the charges in 08-CF-872.

¶ 6 At the plea hearing, the State informed the trial court that it would agree to dismiss all of the charges in case number 08-CF-872, except for count II, unlawful possession of cannabis in that defendant knowingly and unlawfully possessed more than 5,000 grams of a substance containing cannabis, a Class X felony, in exchange for the defendant's plea of guilty on that count and a plea of guilty on two of the charges from the 2010 and 2011 cases. During the plea, the State's recitation of facts indicated that the defendant was caught in an undercover operation involving two packages, each containing "multiple pounds of cannabis." The defendant pled guilty to unlawful possession with intent to deliver cannabis, a Class X felony. After determining that the defendant understood the charges against him and understood what constitutional rights he was waiving, the court

accepted the defendant's guilty plea. The defendant did not move to withdraw his guilty plea or file a direct appeal.

¶ 7 The defendant filed a postconviction petition alleging that his plea counsel was ineffective for failing to properly investigate the charges brought against him. The defendant argued that had plea counsel properly investigated the charges, plea counsel would have discovered that the second package, the package addressed and delivered to the home of Shannon Paige, was never in his possession and had nothing to do with him. However, the weight of that second package formed the basis of the Class X felony to which he pled guilty. Neither package weighed 5,000 grams individually, but combined, they did. The defendant attached investigation reports of the 2008 incident to his petition. The defendant argued that plea counsel did not interview the officers with the drug enforcement group. Further, the defendant argued that his guilty plea was not knowingly or voluntarily entered, but was the result of his plea counsel's unreasonable advice, which was given without proper investigation. The court summarily dismissed the postconviction petition. From that dismissal, the defendant now appeals.

¶ 8 ANALYSIS

¶ 9 The Act provides a mechanism by which defendants may challenge their conviction or sentence for violation of the state or federal constitution. *People v. Barrow*, 195 Ill. 2d 506, 518-19 (2001). Postconviction proceedings may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court has 90 days to examine the petition and to determine, without input from the State, whether it is frivolous and patently without merit. *People v. Gulley*, 383 Ill. App.

3d 727, 731 (2008). If the court finds that it is frivolous and patently without merit, it may summarily dismiss it. *Id.* To survive a first-stage dismissal, the defendant need only present the gist of a constitutional claim, which is a low threshold. *Id.* The circuit court must determine if the petition alleges a constitutional violation that is unrebutted by the record. *People v. Turner*, 2012 IL App (2d) 100819, ¶ 18. A meritless legal theory is one that is completely contradicted by the record. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). We review the summary dismissal at the first stage *de novo*. *People v. Little*, 335 Ill. App. 3d 1046, 1050 (2003).

¶ 10 To succeed on a claim of ineffective assistance, a defendant must show that his counsel's performance fell below an objective standard of reasonableness that such performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). In a first-stage postconviction petition, a defendant need only show that it is arguable that his counsel's performance fell below an objective standard of reasonableness and that it is arguable that the defendant was prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 11 Pleading guilty to a Class X felony meant that the defendant was admitting that he had possessed both packages of cannabis, the combined weight of which was more than 5,000 grams. See 720 ILCS 550/5(g) (West 2008). Individually, those packages weighed less than 5,000 grams, but more than 2,000 grams. It is unclear from the transcript of the plea hearing and from the remainder of the record whether the defendant was pleading guilty to count II of the October 17, 2008, indictment or count II of the October 25, 2008, information. This is because the record does not indicate that the State

ever dismissed the indictment, despite the filing of the subsequent information. Furthermore, when the State provided its factual basis, the assistant State's Attorney did not specify the exact amount of cannabis that formed the basis of the plea agreement. And the court only stated that the defendant was pleading guilty to "unlawful possession with intent to deliver," without explaining the amount of cannabis the defendant had possessed. The difference between the amount of cannabis listed in the first indictment, 5,000 grams, and the second information, more than 2,000 grams, is the difference between a Class X felony and a Class 1 felony. It is also unclear from the record whether plea counsel investigated the charges against the defendant. Thus, we agree with both the defendant and the State that the defendant has presented the gist of a constitutional claim regarding the effectiveness of his plea counsel. This case must therefore be remanded for a second-stage postconviction hearing.

¶ 12 The defendant also asks that his mittimus be amended to reflect a conviction for unlawful possession with intent to deliver cannabis. The mittimus shows that the defendant was convicted of violating section 5(g) of the Cannabis Control Act (720 ILCS 550/5(g) (West 2008)), but lists the name of the offense as "Unlawful Poss Con Sub." Ordinarily, this issue should be raised by filing a motion to amend mittimus at the circuit court. *People v. Wren*, 223 Ill. App. 3d 722, 731 (1992). However, we may treat this request on appeal as a motion to amend the mittimus and proceed to consider that motion, because an amended mittimus may be issued at any time, so long as the basis for granting the request is clear and available from the record. *Id.* Here, the defendant pled guilty to

unlawful possession with intent to deliver cannabis. The mittimus should reflect that conviction and is hereby amended to reflect the offense to which he pled guilty.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, the judgment of the circuit court of St. Clair County is reversed and remanded for further proceedings, and the mittimus is amended to reflect defendant's plea to "unlawful possession with intent to deliver."

¶ 15 Reversed and remanded; mittimus amended.