

No. 1-14-2131

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
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	
)	
MARC LEON,)	No. 07 CR 12223
)	
Defendant-Appellant.)	The Honorable
)	Domenica A. Stephenson,
)	Judge Presiding.
)	

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* This court reversed the circuit court's judgment summarily dismissing defendant's postconviction petition because his claim was not frivolous or patently without merit.
- ¶ 2 Defendant Marc Leon appeals from the trial court's judgment dismissing his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant contends his negotiated guilty plea included 841 days of presentence credit, which he is now entitled to be awarded. We reverse and remand for further proceedings under the Act.

¶ 3

BACKGROUND

¶ 4 On September 16, 2009, defendant entered into a negotiated guilty plea to unlawful use of a weapon by a felon (UUWF) in exchange for a seven-year prison term (07 CR 12223). The facts underlying the plea showed that in 2007, defendant shot a seven-year-old child in the arm while out on bond for a 2005 attempted murder. As to the attempted murder, he was found guilty and sentenced to 20 years in prison (05 CR 2498) and awarded 91 days' presentence credit.¹

¶ 5 At the 2009 plea hearing for the UUWF offense, the State noted at the outset that the tendered offer was seven years' imprisonment in exchange for a guilty plea on count 19, UUWF. Defense counsel affirmed this fact while further noting that defendant wished to withdraw his plea of not guilty. The court then requested defendant's criminal background and, following that, stated it would "go along with the agreement" provided the victims also agreed with the disposition. The court admonished defendant of the charge, stating UUWF was a Class 2 felony carrying a sentencing range of three to seven years with a possible extended term and fine, as well as two years' mandatory supervised release. Defendant stated he understood he was giving up his right to a trial and he was pleading guilty of his own free will. The State then recited the factual basis for the plea on the record. The court accepted the guilty plea, announcing there would be a finding of guilty on the UUWF charge. The court noted there was an "agreed-upon disposition" and proceeded to sentencing, where it requested aggravation and mitigation. The parties, however, rested on the "agreement."

¶ 6 In sentencing defendant for the 2007 UUWF offense pursuant to the negotiated guilty plea, the court stated:

¹ He also had a federal case for heroin distribution (3106424) from 1992.

"[Y]ou shall be sentenced to seven years in the Illinois Department of Corrections. Mandatory supervised release of two years. That sentence shall run consecutive to the sentence you're serving under 05 CR 23498 [*sic*] [the attempted murder conviction]. You will be given credit for 841 days. Fines, fees and costs satisfied by time in custody."

The mittimus also reflected 841 days' credit and a seven-year term for UUWF. Therefore, 27 years' imprisonment was the total aggregate sentence for both the prior attempted murder conviction (carrying 91 days' presentence credit) and the UUWF conviction (carrying 841 days' presentence credit). Due to the consecutive nature of the sentence, defendant should have only received one presentence credit, as will be explained later. See *People v. Latona*, 184 Ill. 2d 260, 271 (1998),

¶ 7 Defendant did not file a motion to withdraw his guilty plea or a direct appeal. Rather, in March 2013 he filed a *pro se* "petition for relief from void judgment," alleging ineffective assistance of trial counsel and trial error where he was misled regarding presentence credit at his plea hearing. He also alleged an MSR admonishment violation. The State moved to dismiss the 2-1401 petition as untimely and meritless.

¶ 8 The circuit court appointed a defense attorney who, instead, ultimately filed a postconviction petition on defendant's behalf. At a hearing on April 8, 2014, postconviction counsel sought to recharacterize defendant's section 2-1401 petition as a postconviction petition and supplement the recharacterized petition. After some confusion expressed on the record between the State, postconviction counsel, and the court as to what stage of postconviction proceedings they were operating under, the court declared that the new postconviction petition would be considered filed that day. The court specifically said, "it's re-characterized to a post-

conviction petition. But now it puts it in the first 90 days, because it's filed today." The court essentially held the parties were operating under first-stage proceedings. The State asserted that the petition was in the first stage of proceedings.

¶ 9 In the postconviction petition, defendant contended he was entitled to 841 days of presentence credit as part of his negotiated guilty plea. Yet, according to defendant, the records of the Department of Corrections (DOC) regarding defendant's credits did not reflect the 841 days, and the DOC informed him that he would not receive the 841-day credit because of his previous 2005 conviction (05 CR 2498). Defendant contended failure to grant him the 841 days violated his due process rights because the presentence credit was a term of his guilty plea and therefore he was not afforded the benefit of his bargain under *People v. Whitfield*, 217 Ill. 2d 177 (2005). He asked that his sentence be reduced by 841 days.

¶ 10 The circuit court dismissed the petition as frivolous and patently without merit. In doing so, the court largely focused on assertions in defendant's previously filed section 2-1401 petition rather than his postconviction petition. This was so even though the April 2014 hearing, wherein defense counsel filed the postconviction petition, did not make clear whether the original section 2-1401 petition was in fact made part of the new postconviction petition. Following the court's summary dismissal, defendant filed this appeal.

¶ 11 ANALYSIS

¶ 12 Defendant now raises the same benefit-of-the-bargain argument as to his sentence credit. The Act provides a means for a criminal defendant to assert that, in the proceedings resulting in his conviction, there was a substantial denial of his or her rights under the Constitution of the United States or the State of Illinois or both. 725 ILCS 5/122-1(a)(1) (West 2014); *People v. Evans*, 2013 IL 113471, ¶ 10. The Act provides a three-stage process for adjudicating petitions.

People v. Hommerson, 2014 IL 115638, ¶ 7. At the first stage, the circuit court makes an independent determination of whether the allegations in the petition, liberally construed and taken as true, are frivolous or patently without merit. *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2014). If not dismissed, the petition proceeds to the second stage, where the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary to show a substantial constitutional violation. *Hommerson*, 2014 IL 115638, ¶¶ 7-8; *People v. Henderson*, 171 Ill. 2d 124, 140 (1996). The State may then answer or file a motion to dismiss the petition. *Id.* ¶ 8; 725 ILCS 5/122-5 (West 2014). If the State does not file a motion to dismiss or if the court denies the State's motion, the petition will proceed to the third stage, and the court will conduct an evidentiary hearing on the merits of the petition. *Hommerson*, 2014 IL 115638, ¶ 8; 725 ILCS 5/122-6 (West 2014).

¶ 13 Initially, the State asserts the present petition was dismissed at second-stage proceedings, while defendant asserts it was dismissed at first-stage proceedings. In this case, the procedural components of the Act were not cleanly applied. The record makes clear that the trial court treated this as a first-stage petition, yet postconviction counsel shouldn't have been appointed until the second stage of proceedings. And, with counsel's appointment, the State should have been afforded an opportunity to answer the petition or move to dismiss it. The State, instead, only moved to dismiss the previous section 2-1401 petition, which was substantively different from the postconviction petition. Moreover, at the second stage, postconviction counsel would have had the opportunity to file a Rule 651(c) (eff. Feb. 6, 2013) certificate establishing she had appropriately ascertained defendant's contentions of constitutional error.

¶ 14 In spite of this muddled procedure, at the April 2014 hearing on the petition, the State did not simply concede the petition was at the first stage, but argued that this was the case. Given

that the State invited this characterization and the circuit court accepted it, we cannot now credit the State's contention on appeal that the petition reached second-stage proceedings, which would require defendant to meet the more stringent standard of showing a substantial constitutional violation. See *People v. Harvey*, 211 Ill. 2d 368, 385-86 (2004) (invited error goes beyond mere waiver); *Henderson*, 171 Ill. 2d at 140.

¶ 15 Therefore, we proceed in our review noting that the threshold inquiry at the first-stage of proceedings is whether the allegations contained in the petition have no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-13, 16 (2009). 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. *Id.* at 16. An indisputably meritless legal theory, for example, is one which is completely contradicted by the record, while fanciful factual allegations include those which are fantastic or delusional. *Id.* at 16-17.

¶ 16 The parties do not dispute that defendant did not receive 841 days of credit from the DOC and also that he was in fact not legally entitled to the credit. In *Latona*, 184 Ill. 2d at 271, our supreme court held that where "an offender sentenced to consecutive sentences had been incarcerated prior thereto on more than one offense simultaneously, he should be given credit only once for actual days served." See also 730 ILCS 5/5-8-4(e)(4) (West 2004). However, the rule against double credit is not the exact issue at hand in this case. Rather, it is whether defendant was promised the sentence credit as a term of his negotiated guilty plea, thus presenting a *Whitfield*-type violation of his due process rights in the event he's denied the benefit of his bargain. The rule has evolved that when a specified amount of sentence credit is included within the terms of the defendant's plea agreement with the State, the defendant is entitled to the amount of sentence credit promised. *People v. McDermott*, 2014 IL App (4th) 120655, ¶ 27;

People v. Lenoir, 2013 IL App (1st) 113615, ¶ 21; *People v. Clark*, 2011 IL App (2d) 091116, ¶ 5. This is true even if the agreement violates *Latona. McDermott*, 2014 IL App (4th) 120655, ¶ 27.

¶ 17 Defendant argues the presentence credit of 841 days was a term of his plea agreement, while the State argues this claim is "directly rebutted by the record."

¶ 18 Here, the plea hearing record positively shows that both the State and defendant agreed to a seven-year sentence for the UUWF offense. It also shows that the trial court, when imposing the agreed-upon sentence after accepting defendant's guilty plea, stated defendant would be subject to two years of MSR and entitled to 841 days of presentence credit. The mittimus also reflects that credit. The record is thus inconclusive as to whether the 841 days' credit was in fact a term of the plea agreement. While inconclusive, it also does not rebut defendant's factual assertion that the 841 days' credit was a term of the plea agreement. See *People v. Reeves*, 2015 IL App (4th) 130707, ¶ 14 (the terms of the plea agreement are set at the plea hearing). At the first stage of postconviction proceedings, the circuit court must take allegations as true and liberally construe them. See *People v. Allen*, 2015 IL 113135, ¶25. Given that standard, we conclude defendant has stated the gist of a claim that he was denied the benefit of his bargain because the DOC denied him presentence custody credit that was a term of his negotiated plea agreement. See *id.* (where a petition presents legal points arguable on their merits, it is not frivolous). His contention is not fanciful nor is it legally meritless since it is not rebutted by the record and the record in fact provides some support for his liberally construed claim.

¶ 19 In that sense, the State's reliance on *Reeves*, wherein this court denied the defendant's same presentence credit claim, is misplaced. That case involved a partially negotiated, rather than fully negotiated, guilty plea and "[n]o one addressed sentencing credit at any time during

the hearing on the guilty plea." *Id.* ¶¶ 5, 14-15. Moreover, the sentencing hearing that followed in *Reeves* showed that the credit was not in fact part of the plea agreement.

¶ 20

CONCLUSION

¶ 21 Based on the foregoing, we remand the case for further proceedings consistent with the Act. At second-stage proceedings, defendant should have an opportunity to file an amended pleading with the aid of appointed counsel. Counsel should have an opportunity to file a 651(c) certificate. The State should have an opportunity to answer the petition or move to dismiss it.

¶ 22 Reversed.