2016 IL App (2d) 140440-U
Nos. 2-14-0440 & 2-14-1036
Order filed March 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-3551
ALEX CROSSEN,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The 21-year sentence imposed by the trial court is affirmed; the trial court's summary dismissal of defendant's *pro se* post-conviction petition is reversed, and the cause is remanded for second-stage proceedings.

¶ 2 Defendant, Alex Crossen, was convicted and sentenced to a 21-year prison term after entering an open plea of guilty to the charge of aggravated kidnapping. The trial court denied defendant's motion to reconsider sentence, and defendant timely appealed. Thereafter, this court twice remanded the cause to the trial court to afford defendant the opportunity to file a new post-sentencing motion and have it heard in compliance with Illinois Supreme Court Rule 604(d) (eff.

July 1, 2006 and Feb. 6, 2013). Both times defendant filed a new motion to reconsider sentence, the trial court denied the motion, and defendant timely appealed. Between the trial court's second and third denials of defendant's motion to reconsider sentence, defendant filed a *pro se* post-conviction petition alleging that defense counsel had been ineffective in conjunction with the entry of his plea. The trial court summarily dismissed the petition and defendant timely appealed. This court subsequently granted defendant's motion to consolidate the two appeals.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in December 2010 for two counts of aggravated kidnapping, one count of conspiracy to commit aggravated kidnapping, and one count of aggravated battery. He retained private defense counsel. On May 24, 2011, at defendant's request, the trial court conducted a conference with defense counsel and the prosecutor pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). During a brief status hearing that same day, the trial court noted that it had conducted the Rule 402 conference, but did not discuss any details.

¶ 5 During a status hearing on July 27, 2011, the prosecutor commented that the State had "tendered an offer." The parties did not discuss any further plea offers or negotiations on the record until April 10, 2012, when defense counsel informed the trial court that the State had presented a "new offer." On April 16, 2012, defendant informed the trial court that he had decided to reject the State's offer, and the parties agreed that the offer was therefore revoked.

¶ 6 On June 22, 2012, defendant entered an open plea to one count of aggravated kidnapping in exchange for the dismissal of the remaining charges. The parties acknowledged that the agreement was "purely an open plea." The trial court informed defendant that he was pleading guilty to a Class X felony with a possible prison sentence between 6 and 30 years. Defendant

answered that he understood the possible range of his prison sentence. He also answered that no promises had been made beyond the dismissal of the remaining charges.

¶ 7 The prosecutor presented a factual basis for the plea. According to the State, defendant and four co-defendants, Justin Gilbert, Sheldon Baxter, Justin Keenan, and Aaron Clarke, carried out a kidnapping and beating in connection with missing drugs.[1] The co-defendants abducted the victim at a gas station and drove him to a church parking lot. There, they began beating the victim as they transferred him to a van and drove him to a house. Once inside the house, the beating intensified. At one point, it was suggested that the beating should stop before the victim was killed. An attempt was made to force the victim to sniff pepper. A beer bottle was then placed in his anus. The victim was eventually transferred back to the van and dropped off behind a bar. He later identified the co-defendants in photo lineups.

¶ 8 The trial court conducted a sentencing hearing on August 9, 2012. The State introduced the victim's written statement and pictures of the victim's injuries. The State also introduced evidence of two conspiracies aimed at preventing the victim from testifying against the co-defendants. One conspiracy involved causing the victim to overdose on Fentanyl; the other involved paying someone to take him to Chicago and "get rid of him." There was no evidence that defendant was directly involved in either of the conspiracies.

¶ 9 In considering the mitigating factors, the trial court noted that defendant's criminal history was "minimal at best." Defendant had also presented a statement in allocution, which the trial court considered as "some evidence" that defendant was "unlikely to commit another

[1] The record indicates that at least seven people were involved in some way with the kidnapping and beating. However, only five (including defendant) were convicted in connection with the crime. The individuals who were not convicted will not be referenced herein.

crime." The trial court concluded, however, that compared to his co-defendants, defendant's relative level of culpability for the "horrendous" beating justified the imposition of a 21-year prison sentence.

¶ 10 At this point, defense counsel reminded the trial court that it had previously agreed to impose a lesser sentence during the Rule 402 conference. Defense counsel stated, "[Defendant] relied on that number, which I informed him of, prior to pleading." The trial court recalled that the State had offered defendant a 15-year prison sentence during the Rule 402 conference in exchange for his guilty plea. The trial court had informally agreed to accept the plea agreement and treat the 15-year term as a sentencing cap. The trial court concluded, however, that it was no longer bound by any statements made during the Rule 402 conference because the State's 15-year offer had since been revoked. Defense counsel indicated that he was not aware the State's offer had been revoked or that the trial court would be "changing its position in terms of what the sentence would be." The trial court insisted that it was not bound by anything stated during the Rule 402 conference and admonished defendant regarding his right to appeal.

¶ 11 Defense counsel filed a motion to reconsider defendant's sentence, arguing that the trial court failed to properly consider the aggravating and mitigating factors. The trial court denied the motion and defendant timely appealed. However, defense counsel failed to file a certificate in compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). On defendant's motion, this court entered an order remanding the cause to the trial court to afford defendant the opportunity to file a new post-sentencing motion in compliance with Rule 604(d). See *People v. Crossen*, No. 2-12-1043 (July 17, 2013) (minute order).

¶ 12 On remand, defense counsel filed a new motion to reconsider defendant's sentence that was identical to the first, except for an additional paragraph asserting that defendant's 21-year

sentence was not consistent with the remarks made by the trial court during the Rule 402 conference. Defense counsel further asserted that defendant had "relied upon [the trial court's] remarks in entering his plea of guilty on June 22, 2012." The trial court denied the motion on November 26, 2013. Defendant timely appealed.

¶ 13 On March 3, 2014, while his direct appeal was pending, defendant filed a *pro se* post-conviction petition claiming that he had received ineffective assistance of counsel. Defendant alleged that defense counsel did not relay the State's offer of a 15-year prison sentence until the day he entered his guilty plea, at which point the offer had already lapsed. The trial court entered a written order summarily dismissing defendant's petition on April 22, 2014. Defendant timely appealed.

¶ 14 On July 3, 2014, this court entered an order remanding defendant's direct appeal for a second time, directing defense counsel to file a certificate "in full compliance with Rule 604(d)." See *People v. Crossen*, No. 2-13-1240 (July 03, 2014) (minute order). On remand, defense counsel filed a third motion to reconsider defendant's sentence. Similar to the second motion, the third motion included an assertion that defendant relied upon the trial court's remarks from the Rule 402 conference in entering his plea of guilty. The trial court denied the motion on October 7, 2014, and defendant timely appealed. This court subsequently granted defendant's motion to consolidate his direct appeal with the appeal from the summary dismissal of his post-conviction petition.

¶ 15 II. ANALYSIS

¶ 16 On direct appeal (No. 2-14-1036), defendant contends that the trial court abused its discretion by imposing a 21-year sentence. This rests largely on defendant's argument that he was less culpable for the crime than his co-defendants. On appeal in the post-conviction matter

(Case No. 2-14-0440), defendant contends that his *pro se* petition should not have been summarily dismissed because he stated an arguable claim of ineffective assistance of counsel in conjunction with the entry of his guilty plea. For the following reasons, we affirm the trial court's imposition of a 21-year sentence, but we reverse its summary dismissal of defendant's *pro se* petition and remand the cause for second-stage post-conviction proceedings.

¶ 17 A. Direct Appeal (No. 2-14-1036)

¶ 18 Five people were convicted in connection with this case: defendant, Justin Gilbert, Sheldon Baxter, Justin Keenan, and Aaron Clarke. Defendant entered an open plea of guilty to the charge of aggravated kidnapping, a Class X felony punishable by 6 to 30 years in prison. See 720 ILCS 5/10-2(a) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). At defendant's sentencing hearing, the trial court reasoned that defendant's relative culpability for the beating warranted a 21-year prison sentence. Defendant contends that this constituted an abuse of discretion, arguing that, unlike his co-defendants, he took no part in sexually assaulting the victim or subsequently conspiring to kidnap and murder him. Defendant also argues that the trial court failed to properly consider his minimal prior criminal record and potential for rehabilitation.

¶ 19 The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence falling within the statutory limits for the corresponding offense will not be disturbed absent an abuse of discretion by the trial court. *People v. Garibay*, 366 Ill. App. 3d 1103, 1108 (2006). An abuse of discretion occurs where the sentence "is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 20 Here, the trial court commented several times on the "horrendous" nature of the beating. It found that defendant was more culpable for the beating than any of his co-defendants, "perhaps with the exception of Juan Gilbert," whom the State alleged was heavily involved in the beating and also participated in the sexual assault.[2] The trial court proceeded to discuss the sentences received by Sheldon Baxter, Justin Keenan, and Aaron Clarke, as well as their relative levels of culpability for the beating.

¶ 21 Baxter entered a fully negotiated plea to the charge of aggravated kidnapping in exchange for a 12-year prison sentence. The State presented evidence that Baxter beat the victim in the church parking lot and participated in at least one of the subsequent conspiracies. The trial court found that defendant's relative culpability for the beating was "certainly much greater" than Baxter's.

¶ 22 Justin Keenan entered a fully negotiated plea to the charge of aggravated kidnapping in exchange for a 14-year prison sentence. The State's evidence showed that Keenan beat the victim at the house, put the beer bottle in his anus, and participated in at least one of the subsequent conspiracies. The trial court noted that, insofar as the beating was concerned, Keenan's involvement was limited to activities that took place inside the house.

[2] Gilbert, who went to trial, was awaiting sentencing at the time of defendant's sentencing hearing. The Department of Corrections website indicates that Gilbert was sentenced to 25 years in prison for aggravated criminal sexual assault. See *People v. McCurry*, 2011 IL App (1st) 093411, ¶ 7, n. 1 (noting that this court may take judicial notice of information on the Department's website).

¶ 23 Following a trial, Aaron Clarke was convicted of aggravated kidnapping and conspiracy to commit aggravated kidnapping. He received a 20-year prison sentence for aggravated kidnapping, to be served concurrently with a 10-year sentence for the conspiracy. The trial court commented that Clarke "wasn't involved hands on in the beating to any extent at all, where [defendant's] involvement, quite frankly, was second to none."

¶ 24 Defendant first argues that the trial court erred in determining that his relative culpability for the beating justified the second highest sentence among all of the co-defendants. He asserts that a proper weighing of the co-defendants' respective backgrounds and levels of culpability justifies a sentence between 14 and 18 years.

¶ 25 To the extent that defendant relies on disparate sentencing principles, we note that these co-defendants were not similarly situated. See *People v. Willis*, 2013 IL App (1st) 110233, ¶ 128 (rejecting a disparate sentencing claim where the trial court did not find the co-defendants to be similarly situated). Whereas defendant pleaded guilty to a single charge of aggravated kidnapping, Clarke went to trial and was found guilty of aggravated kidnapping and conspiracy to commit aggravated kidnapping. See *People v. Caballero*, 179 Ill. 2d 205, 217 (1997) ("A sentence imposed on a co-defendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial."); see also *People v. Martinez*, 372 Ill. App. 3d 750, 760 (2007) (holding that two co-defendants were not similarly situated where one was convicted of an additional crime). Furthermore, defendant's sentence was entered pursuant to an open plea, whereas Baxter and Keenan entered fully negotiated pleas. See *People v. Centanni*, 164 Ill. App. 3d 480, 494 (1987) ("Where a co-defendant's sentence is attributable to his having agreed to enter a plea of guilty, such a sentence does not provide a valid basis of comparison.").

¶ 26 Nonetheless, it remains that the trial court considered the co-defendants' relative levels of culpability for the beating and their respective prison sentences in determining defendant's sentence. This included a decision to focus on defendant's participation in the beating, rather than his apparent lack of participation in the sexual assault and subsequent conspiracies. Defendant maintains that this constituted an abuse of discretion. We disagree.

¶ 27 The prosecutor argued during the sentencing hearing that defendant deserved a harsh sentence because there was "hardly a pause" in his constant beating of the victim, and therefore requested that he be sentenced to a 25-year prison term. Defense counsel countered that defendant should receive a lesser sentence because he was "not a full participant; he [was] a full follower." The trial court expressly rejected defense counsel's argument, noting that, according to the victim's police statement, defendant was the only person who participated during every stage of the beating. Defendant beat the victim in the church parking lot. He beat the victim inside the van as it was being driven to the house. He continually beat the victim while inside the house. He beat the victim inside the van as it was being driven away from the house. For added measure, defendant continued beating the victim after he was released from the van. The trial court read from a portion of the victim's police statement, describing how defendant kicked and punched him in the head while he was "balled up" on the ground behind the bar. The trial court remarked, "[e]veryone else apparently wants to get out of there but this defendant is not through with his business of continuing with the beating."

¶ 28 We are mindful that the trial court was in the best position to view the evidence and determine defendant's punishment. See *Martinez*, 372 Ill. App. 3d at 759. Moreover, "[i]n considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed

the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Here, the trial court acknowledged the mitigating factors that weighed in defendant's favor, but placed more emphasis on the "horrendous" nature of the beating. To that end, the trial court agreed with the prosecutor that defendant deserved a harsh sentence because his role in the beating was "second to none." Given the evidence and the nature of this crime, we find no abuse of discretion in the trial court's reasoning.

¶ 29 B. Post-Conviction Petition (No. 2-14-0440)

¶ 30 Defendant contends that the trial court erred by summarily dismissing his *pro se* post-conviction petition because he presented an arguable claim that he received ineffective assistance of counsel in conjunction with the entry of his guilty plea. Before considering the merits of that contention, we must first address the State's argument that defendant has waived his claim.

¶ 31 The State notes that defendant could have addressed the issue of defense counsel's alleged ineffectiveness on direct appeal, as part of his challenge to the denial of his motion to reconsider sentence. The State further notes that, in an initial post-conviction proceeding, "the common law doctrines of *res judicata* and waiver operate to bar the raising of claims that were or could have been adjudicated on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The State argues, therefore, that defendant waived his ineffective assistance of counsel claim by choosing to address the issue only on appeal from the denial of his post-conviction petition.

¶ 32 While we agree with the State that nothing technically prohibited defendant from raising the issue on direct appeal, we do not believe that application of the waiver rule is appropriate in this case. We also note that the rule of waiver is a limitation on the parties and not the courts. *People v. Carter*, 208 Ill. 2d 309, 322 (2003). We may thus consider issues not properly preserved by the parties to achieve a just result and maintain a uniform body of precedent.

People v. Daniels, 307 Ill. App. 3d 917, 926 (1999). Even if we were to conclude that defendant was required to raise the issue of defense counsel's alleged ineffectiveness on direct appeal, we would nonetheless decline to apply the rule of waiver.

¶ 33 Stating it lightly, defendant's direct appeal did not proceed from the trial court under ideal circumstances. As discussed above, this court twice remanded the cause for defense counsel's compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006 and Feb. 6, 2013). As a result, defense counsel filed three separate motions to reconsider defendant's sentence. The second and third motions included an assertion that, in accepting his guilty plea, defendant relied upon remarks made by the trial court during the Rule 402 conference. See Ill. S. Ct. R. 402(d) (eff. July 1, 1997). However, the second and third motions did not go so far as to allege that defendant's mistaken reliance was based on advice from defense counsel. Defendant acknowledges that this omission is not entirely surprising. See *People v. Lawton*, 212 Ill. 2d 285, 296 (2004) ("An attorney cannot be expected to argue his own ineffectiveness."). He further acknowledges that the issue should have been raised in a motion to withdraw his guilty plea. See *People v. Manning*, 227 Ill. 2d 403, 412 (2008) (noting that a court should permit the withdrawal of a guilty plea where the plea was entered in consequence of counsel's misrepresentations). Thus, although defense counsel repeatedly argued that defendant relied on the 15-year sentence from the Rule 402 conference in accepting his plea, the issue of defense counsel's ineffectiveness was never addressed in any of the various post-sentence proceedings underlying defendant's direct appeal.

¶ 34 However, as was his right, defendant filed his *pro se* post-conviction petition after the trial court denied his second motion to reconsider sentence. See *People v. Harris*, 224 Ill. 2d 115, 127 (2007) (noting that post-conviction proceedings and direct appeals may proceed at the

same time). Thereafter, the trial court summarily dismissed the petition and defendant timely appealed. It is worth noting that these events took place before we remanded the direct appeal for the second time. Thus, when defense counsel filed the third motion to reconsider defendant's sentence, the issue of his own ineffectiveness had already been raised in a post-conviction petition and preserved for an appeal. Yet, in his third attempt at complying with Supreme Court Rule 604(d) (eff. Feb 6, 2013), defense counsel curiously certified that he had "consulted with [defendant] about the possibility of filing a motion to withdraw his guilty plea based upon a mistake of fact." Because his ineffectiveness in conjunction with the entry of defendant's guilty plea had already been alleged in a post-conviction petition, defense counsel's certification presents cause for concern.

¶ 35 For these reasons, we decline to penalize defendant because he did not raise the issue of ineffective assistance of counsel in his direct appeal from the trial court's denial of his motion to reconsider sentence. Given the unfortunate procedural history surrounding the direct appeal, we agree with defendant that the issue is best addressed in the context of the post-conviction proceedings. See *Blair*, 215 Ill. 2d at 447 (observing that a post-conviction proceeding presents an opportunity to examine constitutional issues which escaped earlier review).

¶ 36 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Tate*, 2012 IL 112214, ¶ 8. Relief is available under the Act to all persons "whose liberty is constrained by virtue of a criminal conviction." *People v. Martin-Trigona*, 111 Ill. 2d 295, 301 (1986). It follows that most post-

conviction petitions are filed by individuals who are incarcerated and lack the means to hire their own attorney. *Tate*, 2012 IL 112214 at ¶ 8.

¶ 37 The Act creates a three-stage process for the adjudication of post-conviction petitions in non-capital cases. *Harris*, 224 Ill. 2d at 125. At the first stage, the circuit court must review the petition within 90 days of its filing and determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition is not summarily dismissed at the first stage, it advances to the second stage, where an indigent petitioner is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-4 (West 2014). If the hearing advances to the third stage, the circuit court must conduct an evidentiary hearing and enter any appropriate orders with respect to the judgment or sentence in the former proceedings. 725 ILCS 5/122-6 (West 2014).

¶ 38 Here, the trial court dismissed defendant's *pro se* petition at the first stage of the post-conviction proceedings, finding that it was frivolous and patently without merit. Apart from his contention regarding the merits of his petition, which we will address below, defendant maintains that the trial court was mistaken as to the basis for his allegations. We have reviewed the petition and the record, and we agree with defendant.

¶ 39 In the body of his petition, defendant noted that the State had offered him a 15-year sentence during the Rule 402 conference on May 24, 2011. He alleged that defense counsel did not communicate that offer until the day he entered his open guilty plea, at which point the offer had already lapsed. Defendant also alleged that the record is "void of any evidence" that defense counsel communicated the State's 15-year offer "during the offer window," and that he would have accepted the offer if it had been communicated "when the offer window was open."

¶ 40 Defendant attached an affidavit to his petition in which he attested to the veracity of his allegations.[3] He also attached portions of the transcript from his sentencing hearing as exhibits. Included were the remarks made by defense counsel after the trial court announced that it was imposing a 21-year sentence. Specifically, defense counsel stated as follows:

> "Your Honor, I don't think the Court had considered the fact that [defendant's] case was previously 402d, Your Honor. At that time period the Court indicated a different number much less than you sentenced [defendant] today. [Defendant] relied on that number, which I informed him of, prior to pleading."

¶ 41 The trial court recalled discussing a 15-year offer during the Rule 402 conference and informally agreeing to treat that offer as a sentencing cap. The trial court concluded, however, that the offer had since been revoked, and it was not bound by anything that was discussed during the Rule 402 conference. Defense counsel then replied with the following statement (which is somewhat indecipherable):

> "The fact that the State revoked the offer was never indicated (sic) that because the State revoked the offer the Court would be changing its position in terms of what the sentence would be."

¶ 42 In its written order dismissing defendant's petition, the trial court first explained that a Rule 402 conference was conducted on May 24, 2011. Thereafter, the case was continued several times and the parties prepared for trial. On April 10, 2012, the parties "represented that

[3] In his petition and affidavit, defendant mistakenly references the day that he accepted his guilty plea as August 9, 2012, which was actually the day of his sentencing hearing. This discrepancy does not change our analysis.

the State recently tendered an offer to the defense." The trial court noted that defendant rejected the State's offer in open court on April 16, 2012, and concluded as follows:

> "The defendant apparently claims in this Petition either that he was never made aware of the offer made by the State and/or that it had been revoked by the State. Clearly, the record indicates that is not the case. Specifically, on April 16, 2012 the State's offer was rejected by the defendant and the offer was revoked by the State once rejected. Subsequently, the defendant's open plea on June 22, 2012 was just that... an open plea. Clearly there is no basis in which this defendant can claim that he expected to be sentenced to the State's offer that the defendant had rejected and the offer was then revoked. And again, on June 22, 2012 at the time of the guilty plea, defendant was admonished as to the potential range of sentence. The fact that he was sentenced by this court to a term of imprisonment greater than the State's offer does not make his trial counsel ineffective when the defendant himself rejected the offer and the State then revoked that offer."

¶ 43 As seen above, the trial court reasoned that defendant could not have expected to be sentenced according to the terms of the April 2012 offer after he had rejected that same offer in open court. Defendant acknowledges that he rejected the April 2012 offer, but points out that the allegations in his petition related to defense counsel's communication of the offer from the Rule 402 conference, which took place in May 2011. Thus, we agree with defendant that the trial court mistakenly interpreted the allegations in his petition. For that matter, we also agree with defendant that the State has repeated the trial court's error. In its brief, the State simply summarizes the trial court's analysis and adopts its mistaken conclusion that defendant cannot claim he expected to be sentenced pursuant to the terms of the April 2012 offer.

¶ 44 Having identified the flaw in the reasoning employed by the trial court and the State, we must consider whether summary dismissal of defendant's *pro se* post-conviction petition was nonetheless appropriate. See *People v. Pankhurst*, 365 Ill. App. 3d 248, 258 (2006) (noting that an appellate court may affirm the circuit court's judgment on any basis contained in the record). The summary dismissal of a post-conviction petition is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 45 As explained above, the Act provides that the circuit court may dismiss a petition at the first stage of the post-conviction proceedings where it finds that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A post-conviction petition is considered "frivolous or patently without merit" only if the allegations stated therein, taken as true and liberally construed, fail to present the "gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); see also *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). "If a petition alleges sufficient facts to state the gist of a constitutional claim, even where the petition lacks formal legal argument or citations to authority, first-stage dismissal is inappropriate." *People v. Allen*, 2015 IL 113135, ¶ 24.

¶ 46 In *People v. Hodges*, 234 Ill. 2d 1, 11 (2009), our supreme court explained that the phrase "gist of a constitutional claim" is not the legal standard for evaluating a petition; rather, it simply describes what must be alleged at the first stage. However, this low threshold does not mean that a *pro se* petitioner "is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Id*. at 10. Under the Act, the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014). Thus, although a *pro se* petitioner is not required to provide formal legal arguments or citations to legal authority, he or she must, at the very least,

provide some facts that are capable of independent corroboration or an explanation of why those facts are absent. *Hodges*, 234 Ill. 2d at 10; see also *Allen*, 2015 IL 113135, ¶ 24.

¶ 47 The *Hodges* court further explained that the phrase "gist of a constitutional claim" must be viewed within the framework of the " 'frivolous or * * * patently without merit' " test. *Hodges*, 234 Ill. 2d at 11. A petition may be dismissed as "frivolous" or "patently without merit" only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition lacks an arguable basis either in law or in fact if it is based on an "indisputably meritless legal theory" or a "fanciful factual allegation." *Id.* "An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.* "Fanciful factual allegations include those which are fantastic or delusional." *Id.* at 17.

¶ 48 Here, defendant claimed in his *pro se* petition that he received ineffective assistance of counsel with respect to his plea negotiations. See U.S. Const., amend. VI; *People v. Hale*, 2013 IL 113140, ¶ 15 ("The sixth amendment right to the effective assistance of counsel applies to the plea-bargaining process."). A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Under *Strickland*, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's performance was prejudicial, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. Pursuant to *Hodges*, a post-conviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings if: (1) counsel's performance "arguably" fell below an objective standard of reasonableness; and (2) defendant was "arguably" prejudiced. See *Brown*, 236 Ill. 2d at 185. This means that first-stage post-

conviction petitions alleging ineffective assistance of counsel "are judged by a lower pleading standard than are such petitions at the second stage of the proceeding." *Tate*, 2012 IL 112214, ¶ 20; see *People v. Domagala*, 2013 IL 113688, ¶ 35 ("During the second stage, the petitioner bears the burden of making a substantial showing of a constitutional violation.").

¶ 49 In his *pro se* petition, defendant specifically alleged that defense counsel was ineffective because he failed to communicate the 15-year offer from the Rule 402 conference until the day he entered his guilty plea, thereby allowing the offer to lapse. See *Missouri v. Frye*, 566 U.S. ___, ___, 132 S. Ct. 1399, 1408 (2012) (holding that, as a general rule, defense counsel has a duty to communicate formal plea offers from the State). Appellate counsel has not discussed this allegation in defendant's brief, except to suggest that it "may appear contrary to the record." Instead, appellate counsel argues that the record reflects defendant may have been misled into believing the trial court would be bound by its informal agreement from the Rule 402 conference to treat the 15-year term as a sentencing cap. See *People v. Curry*, 178 Ill. 2d 509, 528 (1997) ("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). Appellate counsel's argument appears to draw from defendant's allegation that he was "under the impression that he was pleading to 15 years but he was unaware that the offer had expired ***." However, this marks the only connection between the allegations in defendant's petition and the argument that has been raised by appellate counsel, which focuses on the knowing and voluntary nature of defendant's plea. See *Hall*, 217 Ill. 2d at 335 ("An attorney's conduct is deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently.").

¶ 50 Claims not raised in a post-conviction petition cannot generally be argued for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004); see also *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32 (holding that a post-conviction petition must "clearly set forth" the respects in which the petitioner's constitutional rights were violated, and that "liberal construction" does not mean the reviewing court will "distort reality"). Here, even if we were to conclude that appellate counsel's argument is sufficiently related to the allegations in defendant's petition, we would decline to consider its merits, as we believe this case can be resolved on a separate basis. Defendant alleged in his *pro se* petition that the record "is void of any evidence of any effort by trial counsel to communicate the prosecution (sic) offer [from the Rule 402 conference] to [defendant] during the offer window." Although appellate counsel suggests that this "may appear contrary to the record," we have thoroughly reviewed the record and we agree with defendant.

¶ 51 The Rule 402 conference was conducted on May 24, 2011. A status hearing was held later that same day. The record reflects that defendant was present, but there was no discussion on the record regarding any details from the conference. Defendant was also present on July 27, 2011, when the prosecutor noted that the State had "tendered an offer." However, it is not clear whether the prosecutor was referencing the same offer from the Rule 402 conference or an entirely different offer. And even if the prosecutor was referencing the offer from the Rule 402 conference, there is nothing in the record showing that defense counsel communicated the terms of the offer before it expired or was revoked by the State. To be certain, we have found no reference to the offer from the Rule 402 conference in the record prior to the exchange between defense counsel and the trial court during the sentencing hearing on August 9, 2012.

¶ 52 A similar situation was addressed in *People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 10, where appellate counsel declined to raise all of the issues presented in the defendant's *pro se* post-conviction petition. The *Barghouti* court concluded that it was not bound to determining whether the parts of the *pro se* petition argued on appeal were sufficient to survive summary dismissal. To the contrary, a reviewing court has a duty to "review the entire post-conviction petition, in light of the trial record, to determine whether it states the gist of a constitutional claim." *Id*. ¶ 14. We agree with the *Barghouti* court's reasoning and conclusion. We believe that we have an obligation in this case to determine whether the allegation that formed the basis for defendant's petition was sufficient to survive summary dismissal. *Barghouti* is also instructive in guiding this aspect of our analysis.

¶ 53 In *Barghouti*, the defendant was found guilty following a bench trial and was sentenced to serve 35 years in prison. *Barghouti*, 2013 IL App (1st) 112373, ¶ 6. The issue that was not briefed by appellate counsel involved the defendant's allegation in his *pro se* petition that his trial attorney failed to advise him regarding the possible length of his prison sentence. The defendant claimed that the State had made a 12-year plea offer, and that he would have accepted the offer if he had been properly advised. *Id*. ¶¶ 8, 10. The trial court dismissed the petition as frivolous and patently without merit. *Id*. ¶ 10. However, the *Barghouti* court determined that the defendant's claim was not contradicted by the record, and therefore held that defendant's petition stated the gist of a claim that trial counsel provided ineffective assistance. *Id*. ¶ 15. In so holding, the *Barghouti* court concluded that the defendant "adequately alleged that he arguably suffered prejudice because he would have accepted the plea bargain if he had known the sentencing range applicable to the crimes charged." *Id*. ¶ 18.

¶ 54 Similar to the defendant in *Barghouti*, defendant alleged facts here showing that, arguably, defense counsel performed ineffectively by failing to communicate the offer from the Rule 402 conference. See *Frye*, 566 U.S. ___ at ___, 132 S. Ct. at 1408 ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). Because defendant alleged that he would have accepted the offer if it had been timely communicated, he has also shown that he arguably suffered prejudice due to this aspect of defense counsel's ineffectiveness. See *Barghouti*, 2013 IL App (1st) 112373, ¶ 18 (citing *Lafler v. Cooper*, 566 U.S. ——, ——, 132 S.Ct. 1376, 1391 (2012)). This is not an indisputably meritless theory, as these allegations are not completely contradicted by the record. See *Hodges*, 234 Ill. 2d at 16. Furthermore, considering that defense counsel appears to have been under the mistaken impression that the trial court was bound by the offer from the Rule 402 conference when defendant accepted his plea, we believe it is arguable that defense counsel could have failed to timely inform defendant of the offer in the first instance. In other words, we cannot say that defendant's allegations are fantastic or delusional. See *Hodges*, 234 Ill. 2d at 17.

¶ 55 One final case guides our analysis. In *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 2, defendant was found guilty following a jury trial and was sentenced to an aggregate term of 12 years in prison. He alleged in a *pro se* post-conviction petition that his trial attorney failed to inform him of a six-year plea offer from the State, adding that would have accepted the offer if it been communicated before trial. The defendant attached a copy of a letter from the attorney to the Attorney Registration and Disciplinary Commission (ARDC), wherein the attorney claimed that he advised the defendant to accept the six-year offer. Defendant alleged in his petition that the attorney lied in the ARDC letter, but the circuit court nonetheless dismissed the petition. *Id.*

¶¶ 4, 5. However, the *Trujillo* court held that the factual basis for the defendant's claim was neither fantastical nor delusional, noting that the attorney's letter supported the defendant's allegation that the six-year offer had been made prior to trial. *Id*. ¶11. Although the letter also contradicted the defendant's allegations, it was outside the actual trial record, and the *Trujillo* court concluded that any credibility determinations would be improper at the first stage of the proceedings. *Id*. ¶¶ 12, 13. Accordingly, the case was remanded for second-stage proceedings. *Id*. ¶14.

¶ 56 The takeaway from *Trujillo* is that, where a *pro se* petitioner's claims of ineffective assistance of counsel are not contradicted by the record, and they are not based on fanciful factual allegations, they will likely require credibility determinations, which are inappropriate at the first-stage of post-conviction proceedings. See *Hodges*, 234 Ill. 2d at 16, 17; and *Trujillo*, 2012 IL App (1st) 103212, ¶ 13 (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). This case will likely require that credibility determinations be made pertaining to defense counsel's communication of the offer from the Rule 402 conference. We therefore hold that the trial court was incorrect to summarily dismiss defendant's *pro se* post-conviction petition, and we remand the cause for second-stage post-conviction proceedings.

¶ 57 In so holding, we note that defendant will be permitted to amend his petition as necessary with the assistance of counsel. See 725 ILCS 5/122-4 (West 2014); Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Whether appointed or retained, post-conviction counsel will have the duty pursuant to Rule 651(c) to ensure that defendant's contentions are adequately presented. See *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Thus, defendant will have an opportunity to pursue the argument that has been made by appellate counsel if he so chooses.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm defendant's sentence on direct appeal. We reverse the trial court's summary dismissal of defendant's *pro se* post-conviction petition and remand the cause for second-stage proceedings consistent with this disposition.

¶ 60 No. 2-14-0440, Reversed and remanded.

¶ 61 No. 2-14-1036, Affirmed.