

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).

2019 IL App (4th) 160869-U

NO. 4-16-0869

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 21, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DUANE A. WIEDMAN,)	No. 13CF856
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith Jr.,
)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant’s postconviction petition at the first stage of postconviction proceedings when defendant presented the gist of a constitutional claim related to his hearing impairment sufficient to warrant further proceedings.

¶ 2 In November 2013, defendant, Duane A. Wiedman, pleaded guilty to one count of burglary, a Class 2 felony (720 ILCS 5/19-1(a) (West 2012)), and the trial court sentenced him as a Class X offender, due to his criminal history, to 10 years’ imprisonment followed by 3 years of mandatory supervised release. Defendant did not file a direct appeal. In June 2016, he filed a *pro se* postconviction petition, which the trial court summarily dismissed. Defendant appeals the court’s dismissal, arguing the petition stated the gist of a constitutional claim sufficient to warrant further postconviction proceedings. He also contends his guilty plea should be vacated when neither the allegations in the information nor the factual basis indicated he ever entered the

building sufficient to satisfy the entry element of a burglary offense. Further, he claims he is entitled to *per diem* credit toward his eligible fines. Because we conclude the court reached the wrong conclusion on its review of defendant's postconviction petition, we reverse and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 In July 2013, defendant stole several credit cards from the purse of a woman for whom he was performing handiwork. He gave some of the credit cards to his girlfriend, codefendant Veronica Owens. Defendant drove Owens to a gas station where Owens went inside and purchased cigarettes and a can of Fix-a-Flat with one of the stolen credit cards. The State charged defendant with burglary for entering the gas station with the intent to commit theft (720 ILCS 5/19-1(a) (West 2012)) (count I) and theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)) (count II). Defendant pleaded guilty to count I and the State dismissed count II. Based upon defendant's criminal history, the trial court sentenced him on the Class 2 burglary conviction as a Class X offender to 10 years in prison with a term of 3 years of mandatory supervised release. Defendant did not file a direct appeal.

¶ 5 In a June 2016 postconviction petition, defendant alleged (1) the statutory section providing for the imposition of a Class X sentence on a Class 2 offense was void (see 730 ILCS 5/5-5-3(c)(8) (West 2008)) (now 730 ILCS 5/5-4.5-95 (West 2012)); (2) his term of mandatory supervised release (MSR) should have been two years, not three; (3) he was denied due process when the trial court did not make an interpreter available for him at his plea hearing or, in the alternative, his counsel was ineffective for failing to ensure an interpreter's presence; and (4) he received an "improperly disparate" sentence from that of his codefendant.

¶ 6 In September 2016, the trial court, in a written order, summarily dismissed the petition as frivolous and patently without merit. The court found defendant's claims were conclusory and not supported by affidavits, the record, the law, or evidence. Specifically, with regard to defendant's allegations pertaining to his plea hearing, the court found the record demonstrated that defendant "was present in court and understood the charge, the penalties, and his constitutional rights before knowingly, voluntarily, and intelligently entering into his plea agreement." The court also noted (1) defendant stated in his petition that he could read lips and agreed to use his attorney as an interpreter and (2) his codefendant's criminal record "although significant, was much less extensive."

¶ 7 In October 2016, defendant filed a motion asking the trial court to reconsider its summary dismissal. In a written November 4, 2016, order, the court denied defendant's motion.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 At the first stage of a postconviction proceeding, the trial court shall review the defendant's petition within 90 days and, in a written order that specifies findings of fact and conclusions of law, dismiss the petition if the court determines that the petition is frivolous or is patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). Because more often than not the defendant will be filing the petition *pro se*, the defendant's burden at the first stage is lower than at stages later in the proceedings, when the defendant is assisted by counsel. The purpose is to give indigents a meaningful opportunity to be heard. See *People v. Porter*, 122 Ill. 2d 64, 74 (1988). Consequently, a *pro se* petition requires the presentation of only the gist of a constitutional claim. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). The "gist" standard is a "low threshold." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Although a "gist" is something more

than a bare allegation (*People v. Prier*, 245 Ill. App. 3d 1037, 1040 (1993)), it is “something less than a completely pled or fully stated claim” (*People v. Edwards*, 197 Ill. 2d 239, 245 (2001)). To set forth the “gist” of a constitutional claim, the defendant “ ‘need only present a limited amount of detail.’ ” *Edwards*, 197 Ill. 2d at 245 (quoting *Gaultney*, 174 Ill. 2d at 418). It is not necessary for him to form legal arguments or cite to legal authority (*Porter*, 122 Ill. 2d at 74). The term “gist” describes what the defendant must allege; it is not the legal standard by which the trial court evaluates the petition. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). We review the court’s summary dismissal *de novo*. *Id.* at 9.

¶ 11 The question raised on appeal from a first-stage dismissal of a postconviction petition is “ ‘whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the [Post-Conviction Hearing] Act [(Act) (725 ILCS 5/122-1 to 122-7 (West 2014))].’ ” *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (quoting *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)). However, issues that could have been raised on direct appeal but were not are forfeited. *People v. Richardson*, 189 Ill. 2d 401, 407-08 (2000). And, claims not raised in a postconviction petition cannot be argued for the first time on appeal. *Jones*, 213 Ill. 2d at 505. However, when claims are based on errors outside the record, forfeiture does not apply. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005). Instead, the court looks to the allegations in the postconviction petition to determine whether the defendant may be entitled to a hearing on his constitutional claims. *Coleman*, 183 Ill. 2d at 382.

¶ 12 On appeal, defendant contends the allegations in his postconviction petition were sufficient to satisfy the first-stage pleading requirements of the Act. In his petition, defendant stated as follows:

“The petitioner, [defendant,] contends he is legally deaf and the court and trial counsel were both fully aware of this which is evident by a translator-interpreter being present at his preliminary hearing but then he was denied having an interpreter at his plea hearing in violation of the federal Americans with Disabilities Act of 1990 [(42 U.S.C. §§ 12101 to 12213 (2012) and 725 ILCS 140/1 (West 2012))], and his right to have meaningful access to the courts. The petitioner can ‘read lips’ to a degree on a one-on-one situation but the petitioner wears prescription glasses and could not understand what was being said. [Defense counsel] told the petitioner he would act as an interpreter and tell the petitioner what to say when asked. This petitioner contends that once the court knew he was deaf and provided him an interpreter at any hearing, he should have had an interpreter at all further proceedings without a specific determination of the court[.] *** The petitioner did not hear any of the admonishments and one of these may have been three [] years [mandatory supervised release]. *** This violated the petitioner’s due process, equal protection and effective counsel rights.”

¶ 13 We find that the trial court erred in summarily dismissing defendant’s *pro se* postconviction petition on the basis of defendant’s allegations related to his hearing impairment. The allegations met the low threshold of stating the gist of the constitutional claims of ineffective assistance of counsel and/or a due-process violation. Taking the allegations as true, it is conceivable that counsel’s performance fell below an objective standard of reasonableness when he failed to secure the presence of an interpreter for his hearing-impaired client. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Likewise, it is conceivable that defendant’s due-process

rights were violated when he was unable to hear and fully understand what was being said during his plea hearing. If such allegations are supported by evidence in future proceedings, it is also conceivable that defendant was prejudiced as a result. See *People v. Brown*, 236 Ill. 2d 175, 185 (2010) (citing *Strickland*, 466 U.S. at 694).

¶ 14 In its order summarily dismissing defendant’s petition, the trial court indicated nothing in the record supported defendant’s contention that he could not hear the proceedings. The court also found defendant stated in his petition that he had *agreed* to have his attorney act as an interpreter. This overstates defendant’s affirmation in his petition. Defendant wrote only that defense counsel “told the petitioner he would act as an interpreter and tell the petitioner what to say when asked.” Defendant did not allege he had agreed to this arrangement.

¶ 15 When a defendant has a hearing impairment, “it is within the trial judge’s discretion to determine what reasonable measures are necessary” to assist the defendant. *People v. Kelley*, 237 Ill. App. 3d 829, 831 (1992). “The exact manner chosen depends on the circumstances of each case.” *Id.* The record before us indicates an interpreter was present at defendant’s September 4, 2013, preliminary hearing. At a hearing on November 7, 2013, defense counsel informed the trial court that defendant intended to waive his right to a jury trial but counsel asked for a continuance because he believed defendant would “need a sign interpreter.” Counsel stated: “He understands, and he reads lips very well. My conversations with him, I have no doubt about his ability to do that. It’s just my concern is later on, I don’t want it to come back.” The trial judge indicated he understood.

¶ 16 Later that day, the judge conducted defendant’s plea hearing *without* an interpreter present. Although defendant repeatedly stated he could hear and understand the court, it is impossible on this record to determine whether his hearing impairment indeed left gaps in

his understanding of the admonitions and his subsequent guilty plea or if the current allegations are nothing more than self-serving accusations. The trial court, not this court, must determine, based upon evidence presented, which scenario is more likely to be true. See *People v. Kirchner*, 2012 IL App (2d) 110255, ¶ 11 (it is the trier of fact's role to determine the credibility of witnesses).

¶ 17 We provide no opinion as to whether defendant's constitutional rights were in fact violated based upon his hearing impairment and conversations with defense counsel. We find only that this allegation is not indisputably meritless and that it is arguable, based on the facts alleged in the petition, that plea counsel's performance was deficient or that defendant's due-process rights were violated. See *Hodges*, 234 Ill. 2d at 16; *Brown*, 236 Ill. 2d at 185. Thus, we reverse the trial court's order summarily dismissing defendant's postconviction petition.

¶ 18 Defendant also argues in this appeal that his guilty plea should be vacated because he never entered the building so as to satisfy one of the essential elements of a burglary offense. Based upon this court's decision above, we decline to address any argument related to the propriety of defendant's guilty plea when the validity of that plea has been questioned.

¶ 19 Finally, defendant claims he did not receive the \$5-per-day credit against his fines pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2012)). Our supreme court recently promulgated rules addressing calculation, application, or imposition errors related to sentencing judgments. In accordance with these rules, specifically Illinois Supreme Court Rule 472(c) (eff. March 1, 2019) (certain alleged sentencing errors must first be raised in the circuit court before considered on appeal), we defer to the circuit court to consider defendant's argument and to correct any error it deems appropriate.

¶ 20

III. CONCLUSION

¶ 21 For the reasons stated, we reverse the trial court's order summarily dismissing defendant's postconviction petition and remand for further proceedings.

¶ 22 Reversed and remanded for further proceedings.