

**NOTICE**

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2019 IL App (4th) 180111-U

NO. 4-18-0111

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

December 10, 2019  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Morgan County
WAYLON E. MADDEN,	)	No. 15CF28
Defendant-Appellant.	)	
	)	Honorable
	)	Christopher E. Reif,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Turner and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed the trial court’s judgment denying defendant’s petition for postconviction relief and remanded for a third-stage evidentiary hearing.

¶ 2 Defendant, Waylon E. Madden, pleaded guilty to aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)) in exchange for, in relevant part, a recommendation for placement in the Illinois Department of Corrections’ (IDOC) impact incarceration program. The trial court recommended defendant, but IDOC denied him placement in the program. Defendant filed a petition for postconviction relief, alleging he was denied the benefit of his bargain. The trial court denied defendant’s petition following a hearing.

¶ 3 On appeal, defendant argues the trial court erred in dismissing his postconviction petition without an evidentiary hearing. He contends he made a substantial showing (1) his due

process rights were violated because he was denied the benefit of his bargain and (2) he was denied the effective assistance of counsel because counsel allowed him to plead guilty even though he was ineligible for participation in the impact incarceration program. The State asserts the allegations in defendant's petition are affirmatively refuted by the record. Due to the procedural errors committed by the trial court in the underlying postconviction proceedings, we reverse and remand for a third-stage evidentiary hearing.

¶ 4

#### I. BACKGROUND

¶ 5 On March 11, 2015, the State charged defendant by information with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)) (count I) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)) (count II). Count I alleged defendant discharged a .380-caliber handgun in the direction of two individuals in Morgan County.

¶ 6

#### A. The Plea Agreement

¶ 7 On December 13, 2016, defense counsel informed the trial court the parties had reached a potential plea agreement. The State presented the proposed plea agreement to the trial court for the court's consideration:

“MR. NOLL [(ASSISTANT STATE'S ATTORNEY)]: Your Honor, I believe the defendant will be withdrawing his plea of not guilty as to Count 1. Count 2 would be dismissed per plea. The proposed sentence would call for eight years in the Department of Corrections, followed by a two-year period of mandatory supervised release. *There would be an impact incarceration recommendation as this—as part of this plea.* The defendant has 138 days credit awaiting this plea. In the event that the impact incarceration is not completed

successfully, this would be an 85 percent truth-in-sentencing sentence in the Department of Corrections.” (Emphasis added.)

Defense counsel indicated the State had correctly recited the terms of the plea agreement. The trial court then had the following discussion with defendant about placement in the impact incarceration program:

“THE COURT: Have you read through these forms, including the offender’s consent to impact incarceration?”

DEFENDANT: Yes.

THE COURT: Do you have any questions regarding these forms?

DEFENDANT: No.

THE COURT: Do you understand that I do not control the Department of Corrections; it’s solely up to them whether you get in or not?

DEFENDANT: No.

THE COURT: You don’t understand that?

DEFENDANT: I’m sorry, yes. Yes, Your Honor.

THE COURT: Just for clarification, at that time your attorney was talking to you and you didn’t hear, so I want to make sure we’re clear. You understand that I can make the recommendation, but it’s completely up to the Department of Corrections?

DEFENDANT: Yes, Your Honor.”

After the State presented a factual basis for the plea, defense counsel asked to clarify whether defendant was, in fact, eligible for the impact incarceration program:

“MR. HANKINS [(DEFENSE ATTORNEY)]: Your Honor, I think we have it cleared up. I was just—I wanted to make sure that the, the aggravated—the charge, as it is, that would be an automatic disqualification for boot camp. The state’s attorney represents it’s not.

MR. NOLL: That is correct, Your Honor. In reviewing the statute, and on the paperwork that’s in front of the Court, it lists the offenses that are not eligible for impact incarceration. Aggravated discharge of a firearm is not one of those. Obviously still at the discretion of the Department of Corrections, however, it’s not an automatic denial.

THE COURT: *My belief is, then, based upon what the parties are telling me, if the Department of Corrections were to tell us it was an automatic denial, then we would come back to square one and set this plea aside.*

MR. NOLL: I would not object, yes.

MR. HANKINS: Okay. That—yes. Thank you, Your Honor.

THE COURT: [Defendant], you have any questions about what we just went through? If so, you can ask me or talk to your attorney.

DEFENDANT: No, Your Honor.” (Emphasis added.)

The record shows defendant signed an “Offender’s Consent to Impact Incarceration” form, which read, in part, “I understand that I have been recommended by the Court for this program but may *not* be accepted by [IDOC] for participation in the impact incarceration program.” The trial court entered a judgment of conviction on count I, sentenced defendant to eight years’ imprisonment, and approved and recommended defendant for impact incarceration.

¶ 9 On September 12, 2017, defendant, through counsel, filed a petition for postconviction relief. Defendant argued “his constitutional rights to due process of law and the equal protection of the law were violated because [he] did not receive the benefit of his bargain for the plea.” Defendant alleged “his plea of guilty was given in exchange with the promise of impact incarceration” yet IDOC denied him placement in the program. Defendant explicitly “disavow[ed] and waive[d] any challenge to the voluntariness of his plea” and stated he did “not seek the withdrawal of his plea of guilty.” In this same petition, defendant stated he sought only the following relief: “[T]he plea should be vacated and the sentence imposed vacated.”

¶ 10 The same day the petition was filed, the trial court ordered a “hearing on petition for postconviction relief” be set for October 31, 2017. The State did not file a motion to dismiss, nor did it answer the petition. A January 4, 2018, docket entry reads “hearing on defendant’s motion to withdraw plea of guilty is continued to February 20, 2018 \*\*\*.”

¶ 11 C. Hearing on Defendant’s Petition

¶ 12 On February 20, 2018, the trial court conducted the hearing docketed on September 12, 2017, as a “hearing on petition for postconviction relief.” At the outset of the hearing, the court had the following exchange with defense counsel:

“THE COURT: \*\*\* This matter is called for a motion to withdraw plea of guilty; is that correct, Mr. Costello?”

MR. COSTELLO [(DEFENSE ATTORNEY)]: That is correct, and vacate the sentence, Your Honor.

\* \* \*

MR. COSTELLO: I’m sorry, Your Honor. The vehicle being used in this case is a postconviction petition.”

¶ 13 Defendant framed the issue as being whether his denial from the program was “automatic or discretionary.” He argued the aggravated-discharge-of-a-firearm conviction automatically disqualified him from participation in the program and, as a result, he was denied the benefit of his bargain because the trial court had promised him at the plea hearing it would “set th[e] plea aside” if “the Department of Corrections were to tell us it was an automatic denial.” In support of his automatic denial argument, defendant moved to “introduce as Petitioner’s Exhibit 1” an IDOC memorandum dated February 6, 2017, that stated, in its entirety, “You were denied IIP [(impact incarceration)] due to #8-Nature of Offense.” The trial court did not ask if the State objected to the “introduction” of “Petitioner’s Exhibit 1,” and it is unclear whether the trial court considered the document.

¶ 14 Following defendant’s argument, the State orally requested the trial court “deny \*\*\* defendant’s petition for postconviction relief,” arguing defendant received the benefit of his bargain because the trial court recommended him for impact incarceration and admonished him IDOC had the discretion to deny him. The State further contended IDOC exercised that discretion by denying defendant based on the nature of his offense and the bargain only allowed for defendant to withdraw his plea if aggravated discharge of a firearm was listed in the statute as an offense that automatically disqualified him from the program, which it was not.

¶ 15 The trial court agreed with the State, reasoning as follows:

“THE COURT: [T]he Court has reviewed the transcript [of the guilty-plea hearing], and I could not have been more clear and went through more detail to make it certain that it was—whether it was an automatic disqualification or not, and I went through and explained that I do not control Department of Corrections. They have discretionary reasons, and this was not one of them—or this was one

of them that they use, but it was not an automatic disqualification for boot camp based upon the charge, which is what I said in court, which is what is in the transcript. For that reason I will deny the motion.”

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues the trial court erred in dismissing his postconviction petition without an evidentiary hearing. He contends he made a substantial showing (1) his due process rights were violated because he was denied the benefit of his bargain and (2) he was denied the effective assistance of counsel because counsel allowed him to plead guilty even though he was ineligible for participation in the impact incarceration program. For the following reasons, we do not reach the merits of these arguments due to the numerous procedural errors committed in the underlying postconviction proceedings.

¶ 19 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a three-stage procedure for criminal defendants to collaterally attack their convictions based on a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A defendant commences proceedings under the Act by filing a petition both verified by affidavit (725 ILCS 5/122-1(b) (West 2014)) and supported by “affidavits, records, or other evidence” (725 ILCS 5/122-2 (West 2014)). At the first stage of proceedings, the trial court must, within 90 days and without seeking or relying on input from the State, summarily dismiss the petition if it determines the petition is frivolous or patently without merit, meaning “the petition has no arguable basis either in law or in fact.” *Hodges*, 234 Ill. 2d at 12. See also 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Gaultney*, 174 Ill. 2d 410, 419, 675 N.E.2d 102, 107 (1996). “If the [trial] court finds that the petition is not frivolous or patently

without merit, or if the court does not take action on the petition within 90 days of its filing, the proceedings move to the second stage \*\*\*.” *People v. Kelly*, 2012 IL App (1st) 101521, ¶ 22, 977 N.E.2d 858.

¶ 20 At the second stage of postconviction proceedings, the State may move to dismiss the petition (*People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1008 (2006)), and the trial court may hold a dismissal hearing (*People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998)). Since a dismissal hearing is still part of the second stage, the court is prohibited “from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding.” *Id.* At this stage, the trial court determines “whether the petition and any accompanying documentation make a ‘substantial showing of a constitutional violation.’ ” *People v. Domagala*, 2013 IL 113688, ¶ 33, 987 N.E.2d 767 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001)). “Unless the \*\*\* allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or ‘show’ a constitutional violation.” *Id.* ¶ 35.

¶ 21 “If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition.” *People v. Snow*, 2012 IL App (4th) 110415, ¶ 14, 964 N.E.2d 1139. At the third stage, the trial court determines “whether the evidence introduced demonstrates that the petitioner is, in fact, entitled to relief.” *Domagala*, 2013 IL 113688, ¶ 34. “Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation.” *Pendleton*, 223 Ill. 2d at 473. We review *de novo* the trial court’s dismissal of a postconviction petition at the second stage of proceedings. *Id.* at 473. Where no fact-finding or credibility



determinations are involved at a third-stage evidentiary hearing, we will also apply a *de novo* standard of review. *Id.*

¶ 22 The trial court in this case appears to have treated defendant's petition for postconviction relief as a motion to withdraw guilty plea and, accordingly, failed to comply with the procedural requirements of the Act. A docket entry shows the trial court characterized a hearing on defendant's postconviction petition as a "hearing on defendant's motion to withdraw plea of guilty"; at the outset of the hearing, the trial court stated, "This matter is called for a motion to withdraw plea of guilty"; and, at the conclusion of the same hearing, the trial court "den[ied] the defendant's motion." This apparent mischaracterization led to a number of procedural errors. The trial court did not enter an order pursuant to section 122-2.1 of the Act (725 ILCS 5/122-2.1 (West 2014)); instead, the court simply "[s]et [a] hearing on Petition for Post Conviction Relief" the same day defendant filed the petition. The trial court ostensibly skipped the second stage of postconviction proceedings, as a hearing can only be conducted at the second stage of proceedings when the State files a motion to dismiss, which the State did not do in this case. It is unclear from the record whether the parties believed they were arguing at a second-stage dismissal hearing or a third-stage evidentiary hearing. This confusion is apparent on appeal, as the State argues the trial court properly dismissed defendant's petition at the first stage of proceedings, while defendant argues the trial court erred in dismissing his petition at the second stage of proceedings.

¶ 23 Due to the numerous procedural errors and the confusion of both parties, we believe it is appropriate to remand this cause to the trial court for further proceedings. Because the trial court docketed the matter for a hearing and the State did not file a motion to dismiss, on

remand, the trial court is directed to conduct a third-stage evidentiary hearing at which defendant will have the opportunity to prove the allegations in his postconviction petition.

¶ 24

### III. CONCLUSION

¶ 25 For the reasons stated, we reverse the trial court's judgment and remand for a third-stage evidentiary hearing at which defendant will have the opportunity to prove the allegations in his postconviction petition.

¶ 26 Reversed and remanded.