

NOTICE
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2014 IL App (4th) 121114-U

NO. 4-12-1114

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 18, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
ALVIN COLLINS,)	No. 12CF224
Defendant-Appellant.)	
)	Honorable
)	Patrick W. Kelley,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's first-stage dismissal of defendant's postconviction petition is reversed where defendant presented the gist of a constitutional claim he was provided ineffective assistance of trial counsel.
- ¶ 2 In June 2012, defendant, Alvin Collins, pleaded guilty to one count of manufacture/delivery of a controlled substance (more than 1 gram but less than 15 grams of a substance containing heroin) (720 ILCS 570/401(c)(1) (West 2012)). As part of the fully negotiated plea, the trial court sentenced defendant to eight years' imprisonment. In October 2012, defendant filed a postconviction petition arguing, *inter alia*, his trial counsel provided ineffective assistance where she erroneously advised him to plead guilty even though no evidence existed to support the charge. In November 2012, the court summarily dismissed defendant's petition as patently without merit.

¶ 3 Defendant appeals, arguing the matter should proceed to the second stage because he presented the gist of a constitutional claim. We reverse and remand for second-stage proceedings.

¶ 4 I. BACKGROUND

¶ 5 During the preliminary hearing in this case, Springfield police officer Donald Gillette testified he observed defendant crossing the intersection of Fourth and Jefferson Streets in Springfield at 10:15 a.m. on March 22, 2012, against the "Do Not Walk" signal. As Gillette approached defendant, "[defendant] turned towards [Gillette] and put his right hand to his back for a second or two." When Gillette asked defendant if he had something in his hand defendant started to run away. A second officer tackled defendant along a sidewalk near an area covered with mulch. A balloon, later found to contain 5.7 grams of heroin, was recovered from the mulch. None of the officers saw the balloon come out of defendant's hand. While defendant had a cell phone and wallet, he did not have any cash, drug paraphernalia, or weapons.

¶ 6 Thereafter, the State charged defendant with manufacture/delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)) (count I), possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) (count II), and resisting a peace officer (720 ILCS 5/31-1 (West 2012)) (count III).

¶ 7 On June 8, 2012, pursuant to a fully negotiated plea, defendant pleaded guilty to count I, manufacture/delivery of a controlled substance. In exchange, the State agreed to drop counts II and III. The parties also agreed on an eight-year prison sentence. During the plea hearing, the State offered the following factual basis:

"If this went to trial, evidence would be presented that on or about the 22nd day of March, 2012, the Defendant, who would be identified in open court, knowingly possessed with the intent to deliver heroin. He was stopped by members of the Springfield Police Department and found to have 5.7 grams of heroin on him, which was tested at the Illinois State Police Crime Lab, and all these events happened within Sangamon County."

¶ 8 On October 12, 2012, defendant *pro se* filed a postconviction petition, alleging ineffective assistance of trial counsel. In his petition, defendant argued, *inter alia*, his attorney should not have advised him to plead guilty to count I because there was no evidence to prove he committed the offense of manufacture or delivery of a controlled substance. Defendant also argued his trial counsel was ineffective for not filing a motion to dismiss count I.

¶ 9 On November 9, 2012, the trial court summarily dismissed defendant's petition as "patently without merit," finding defendant "has not pleaded his attorney's performance fell below an objective standard of reasonableness, nor has he adequately alleged he would not have pleaded guilty but for his lawyer's counsel."

¶ 10 This appeal followed.

¶ 11 **II. ANALYSIS**

¶ 12 On appeal, defendant argues the trial court erred by summarily dismissing his postconviction petition. Specifically, defendant contends he sufficiently set forth the gist of a constitutional claim his trial counsel was ineffective. We agree.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) creates a three-stage process for the adjudication of postconviction petitions. *People v. Harris*, 224 Ill. 2d 115, 125, 862 N.E.2d 960, 967 (2007). The Act "provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States or the Illinois Constitution or both." *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). "The summary dismissal of a postconviction petition poses a legal question that is subject to *de novo* review." *Ligon*, 239 Ill. 2d at 104, 940 N.E.2d at 1074.

¶ 14 At the first stage of postconviction proceedings, the trial court may summarily dismiss a petition only "if it determines that the petition is 'frivolous or is patently without merit.' " *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). "[A] petition is frivolous or patently without merit only if it has no 'arguable basis either in law or in fact.' [Citation]." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1202 (2010). A petition lacks an arguable basis in law or in fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). "An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 15 In this case, the trial court, citing *People v. Giampaolo*, 385 Ill. App. 3d 999, 1002, 898 N.E.2d 130, 134 (2008), summarily dismissed defendant's petition as "patently without merit." However, *Giampaolo* dealt with a second-stage dismissal of the defendant's postconviction petition. *Giampaolo*, 385 Ill. App. 3d at 1002, 898 N.E.2d at 133-34. If a

petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). At the second stage, a defendant must make a "substantial showing" of a constitutional violation. *People v. Addison*, 371 Ill. App. 3d 941, 946, 864 N.E.2d 831, 837 (2007). In *Giampaolo*, the trial court found the defendant did not make a "substantial showing of ineffective assistance of counsel." *Giampaolo*, 385 Ill. App. 3d at 1003, 898 N.E.2d at 134.

¶ 16 Here, however, all defendant was required to do at the first stage was to present the "gist" of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001); *Ligon*, 239 Ill. 2d at 104, 940 N.E.2d at 1073 (to survive a first-stage dismissal, "a *pro se* litigant need only present the gist of a constitutional claim"). The "gist" of a constitutional claim means the essence, the main point or part (Merriam-Webster's Collegiate Dictionary 492 (10th ed. 2000)), as opposed to a factually complete statement of the claim (*Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445). By requiring only the gist of a constitutional claim at the first stage, the supreme court has set " 'a low threshold.' " *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445 (quoting *Gaultney*, 174 Ill. 2d at 418, 675 N.E.2d at 106); *People v. Tate*, 2012 IL 112214, ¶ 20, 980 N.E.2d 1100 (there is a relatively low standard of pleading at the first stage). Thus, only a limited amount of detail is required, and the petition need not make any legal arguments or cite any legal authority. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445.

¶ 17 We find defendant's petition in this case states the "gist" of a constitutional claim. Generally, to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient in that it fell below an objective standard of

reasonableness; and (2) the deficient performance prejudiced the defense, meaning that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). However, in first-stage postconviction proceedings, where a lower pleading standard applies, a petition alleging ineffective assistance may not be summarily dismissed if it is *arguable* (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19, 980 N.E.2d 1100.

¶ 18 Here, it is arguable defendant received ineffective assistance of counsel when advised to plead guilty to manufacture/delivery of a controlled substance given the evidence contained in the record and the limited factual basis provided by the State. Courts have considered the following factors as probative of an intent to deliver:

"(1) whether the quantity of controlled substance is too large to be viewed as being for personal consumption; (2) high purity of drug confiscated; (3) possession of weapons; (4) possession of large amounts of cash; (5) possession of police scanners, beepers, or cellular phones; (6) possession of drug paraphernalia; and (7) the manner in which the substance is packaged." *People v. Williams*, 358 Ill. App 3d 1098, 1101, 833 N.E.2d 10, 13 (2005) (citing *People v. Robinson*, 167 Ill. 2d 397, 408, 657 N.E.2d 1020, 1026-27 (1995)).

¶ 19 However, none of these factors were present in this case. For example, nothing in the record suggests the amount of heroin recovered was inconsistent with personal use. See *People v. Chapple*, 291 Ill. App. 3d 574, 581, 683 N.E.2d 1001, 1007 (1997). Instead, in its

factual basis, the State simply recited the fact defendant had "5.7 grams of heroin on him." The record also does not show the heroin was individually packaged for sale. Police did not recover any drug-trafficking paraphernalia like plastic bags or tinfoil used to separate the drugs for sale. See *People v. Green*, 256 Ill. App. 3d 496, 501, 628 N.E.2d 586, 589 (1993). All the record shows is police recovered a single balloon containing 5.7 grams of heroin.

¶ 20 Further, defendant was not in possession of any cash or weapons. (While defendant had a cellular phone, we question the continued relevance of this factor, by itself, to show intent to deliver in a time where virtually everyone possesses such a phone.) Finally, the record before us does not show defendant was observed selling heroin. Instead, police initially observed him crossing the street. Thus, the record is devoid of evidence defendant intended to manufacture or deliver heroin. As such, counsel's advice to plead guilty instead of proceeding to trial on count I was arguably prejudicial. The trial court erred in dismissing defendant's petition at the first stage. Accordingly, we remand the matter for second-stage proceedings, for appointment of counsel and amendment of the *pro se* petition, if appropriate.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we reverse the trial court's judgment and remand for further postconviction proceedings.

¶ 23 Reversed and remanded.