

¶ 3

I. BACKGROUND

¶ 4

A. The Circumstances That Prompted Defendant's Appeal

¶ 5

In August 2008, the State charged defendant with (1) four counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(2)(E) (West 2008)) and (2) one count of driving while license revoked (DWR) (625 ILCS 5/6-303(d-4) (West 2008)).

¶ 6

In September 2008, the Livingston County State's Attorney sent a letter to defendant's then-court-appointed counsel, James Casson, proposing, as follows:

**** [The State] propose[s] **** the following disposition:

That the defendant pleads guilty to the charges and be sentenced to 15 years in the Illinois Department of Corrections and required to pay all cost[s].

This proposal is contingent upon no further convictions of, nor charges pending against the defendant becoming known to the [State] between today's date and the date of the defendant entering a plea as proposed above. ****

*** It should be understood that [this proposal] does not necessarily reflect the [State's] position regarding any future recommendation that might be made at a sentencing hearing should this cause proceed to trial and the defendant is convicted.

No proposed disposition made herein should be considered final until a written plea agreement has been executed and signed by all parties."

In December 2008, Keith Yard entered his appearance as defendant's attorney.

¶ 7 In March 2009, the trial court conducted a hearing at which the following exchange occurred:

"[THE COURT:] It's [the court's] understanding, Mr. Yard, that [defendant] is going to enter into an open plea of guilty today to these charges?

MR. YARD: That's correct, your honor.

THE COURT: And do you have the signed plea? Okay. So [,defendant,] it's [the court's] understanding that you do not have an agreement with the State on your sentence. Is that correct?

THE DEFENDANT: Yes."

¶ 8 During the hearing, the State dismissed one of the aggravated DUI charges, and defendant stated his intent to plead guilty to the remaining charges. The trial court informed defendant that because of his multiple prior DUI convictions, he faced a possible prison sentence of 6 to 30 years for aggravated DUI pursuant to section 11-501(d)(2)(E) of the Illinois Vehicle Code. See 625 ILCS 5/11-501(d)(2)(E) (West 2008) ("A sixth or subsequent violation of this Section or similar provision is a Class X felony."). The court then inquired as follows:

"[THE COURT:] Any questions about the possible penalties you are facing, [defendant]?"

THE DEFENDANT: No.

THE COURT: Has anyone forced you to plead guilty to these charges today?

THE DEFENDANT: No.

THE COURT: Has anyone promised you anything?

THE DEFENDANT: No.

THE COURT: Have you had a full opportunity to discuss this decision with your attorney?

THE DEFENDANT: Yes."

After determining that a factual basis existed, the court accepted defendant's guilty plea, ordered a presentence investigation report (PSI), and scheduled a sentencing hearing.

¶ 9 At the June 2009 sentencing hearing, the PSI revealed that defendant had six prior DUI convictions. The State then made the following sentencing recommendation:

"After reviewing the [PSI] and based upon this defendant's history, [the State's] recommendation *** is that [defendant] be sentenced in reference to the Class X counts of aggravated [DUI] to a term of 20 years in the Illinois Department of Corrections."

The court, noting defendant's criminal history and the seriousness of the offenses, sentenced defendant to concurrent prison terms of 20 years for aggravated DUI and 5 years for DWR.

¶ 10 B. Defendant's Motion To Withdraw Guilty Plea

¶ 11 On September 1, 2009, defendant filed an amended motion to withdraw his guilty plea and vacate judgment, arguing that (1) the State violated his right to due process by renegeing on its written offer to recommend a 15-year sentence in exchange for defendant's guilty plea, which defendant relied upon; (2) the trial court inappropriately considered defendant's failure to allocute as an aggravating sentencing factor; (3) the court erred by comparing the seriousness of aggravated DUI to murder; (4) the court improperly commented that the sentences imposed for defendant's prior convictions were too lenient; and (5) his 20-year sentence was excessive.

¶ 12 The next day, the trial court conducted a hearing on defendant's amended motion. (Because defendant's appeal concerns only his reliance on the State's guilty-plea offer, we confine our presentation of the evidence to only those facts necessary to provide context for that claim.)

¶ 13 Defendant testified that in a holding room just prior to his March 2009 guilty-plea hearing, Yard informed him about an earlier conversation Yard had with the Livingston County State's Attorney. The following exchange occurred:

"[YARD]: [Can] you relate to the Court the nature of that conversation?

* * *

[DEFENDANT]: That the State wouldn't be asking for any more than 15 years."

¶ 14 On cross-examination, defendant acknowledged that he received the State's September 2008 letter from his then-court-appointed attorney, Casson. Defendant then provided the following clarification regarding his earlier direct testimony:

"[STATE]: *** [Y]our guilty plea was made on ***
March 13 of 2009?

[DEFENDANT]: Right.

[STATE]: Prior to the guilty plea, *** what discussion did you have with Mr. Yard in which this 15 [years] came up?

[DEFENDANT]: That *** was what the State [was] asking for and they weren't [*sic*] coming down from that.

[STATE]: *** Nobody ever told you that *** was the

most [the State] would ask for; did they?

[DEFENDANT]: As far as I recall, Mr. Yard had said that he had talked to the State; and they had not indicated to him they were going to go anything over that.

[STATE]: Had not indicated to him they were going to go over that?

[DEFENDANT]: Which to me meant that [the State was not] going to ask for any more.

[STATE]: When the [trial court] ask[ed] you in court on March 13[, 2009,] *** whether you'd been promised anything in exchange for your plea and you answered[, 'No,'] that was correct and *** truthful?

[DEFENDANT]: Correct."

Defendant concluded his testimony by stating that in March 2009, he pleaded guilty without relying on the State's promise to recommend a prison sentence of 15 years or less.

¶ 15 The trial court denied defendant's amended motion to withdraw his guilty plea and vacate judgment, finding no evidence existed to support defendant's claim that he pleaded guilty in reliance of the State's 15-year offer.

¶ 16 Defendant appealed, and this court affirmed defendant's conviction and sentence. *People v. Wissmiller*, No. 4-09-0742 (Sept. 14, 2010) (unpublished order under Supreme Court Rule 23). In so concluding, we rejected defendant's arguments that the trial court abused its discretion by (1) considering defendant's failure to allocute as an aggravating sentencing factor, (2) comparing the seriousness of aggravated DUI to murder, and (3) imposing a 20-year sentence.

(Appellate counsel did not raise defendant's argument concerning the State's 15-year offer.)

¶ 17 C. Defendant's Petition for Postconviction Relief

¶ 18 In December 2012, defendant *pro se* filed a petition for postconviction relief under the Act, claiming a violation of his right to due process. Specifically, defendant contended that (1) the State reneged on its written offer to recommend a 15-year prison sentence in exchange for defendant's guilty plea by recommending a 20-year sentence and (2) he received ineffective assistance of trial and appellate counsel because they failed to raise that issue.

¶ 19 In January 2013, the trial court entered a written order, finding that the record did not support defendant's claim. Thereafter, the court dismissed defendant postconviction petition.

¶ 20 This appeal followed.

¶ 21 II. THE TRIAL COURT'S FIRST-STAGE DISMISSAL OF DEFENDANT'S
PETITION FOR POSTCONVICTION RELIEF

¶ 22 A. Proceedings Under the Act and the Standard of Review

¶ 23 A defendant may proceed under the Act by alleging that "in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 to 122-7 (West 2010); *People v. Jones*, 213 Ill. 2d 498, 503, 821 N.E.2d 1093, 1096 (2004). At the first stage, "the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit." (Emphasis in original.) *People v. Phyfiher*, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005). "Section 122-2.1 [of the Act] directs that if the defendant is sentenced to imprisonment *** and the circuit court determines that the petition is frivolous or patently without merit, it shall be dismissed in a written

order. 725 ILCS 5/122-2.1(a)(2) (West 2004)." *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 99-100 (2008).

¶ 24 A postconviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the " 'gist' of a constitutional claim." *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). The gist standard is a low threshold that can be satisfied by presenting only a limited amount of detail instead of setting forth the claim in its entirety. *People v. Williams*, 364 Ill. App. 3d 1017, 1022, 848 N.E.2d 254, 258 (2006).

¶ 25 If a petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed (725 ILCS 5/122-4 (West 2010)). At the second stage, the State has the opportunity to answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2010)). The relevant question raised during a second-stage postconviction hearing is whether the allegations in the petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates a stage-three evidentiary hearing. *People v. Cheers*, 389 Ill. App. 3d 1016, 1024, 907 N.E.2d 37, 44 (2009). "We review *de novo* a first-stage dismissal of a petition under the Act." *People v. Foster*, 391 Ill. App. 3d 487, 491, 909 N.E.2d 372, 377 (2009).

¶ 26 B. Defendant's Claim That His Postconviction Petition Stated
the Gist of a Constitutional Claim

¶ 27 In support of his argument that his December 2012 petition stated the gist of a constitutional claim, defendant contends that the State reneged on its written offer to recommend a 15-year prison sentence in exchange for defendant's guilty plea by recommending a 20-year prison sentence. We agree.

¶ 28 In *People v. Robinson*, 2012 IL App (4th) 101048, ¶ 36, 974 N.E.2d 978, this court noted that "[p]lea negotiations are generally governed by the principles of contract law." " 'Although the application of contract law principles to plea agreements may require "tempering in some instances" in order to satisfy concerns for due process, plea agreements are nonetheless subject to traditional principles of contract law absent such concerns.' " *Id.* (quoting *People v. Henderson*, 211 Ill. 2d 90, 103, 809 N.E.2d 1224, 1232 (2004)).

¶ 29 As we have previously outlined, our *de novo* review concerns whether defendant's December 2012 postconviction petition provided sufficient detail to allege the gist of a constitutional claim to survive dismissal at the first stage of postconviction proceedings. To satisfy that low burden, defendant provided the State's September 2008 letter that he received from Casson in which the State proposed recommending a 15-year sentence in exchange for defendant's guilty plea. On March 13, 2009—just prior to his guilty-plea hearing—Yard informed defendant that the State intended to honor its written offer. Immediately thereafter, defendant pleaded guilty to the State's charges. At defendant's June 2009 sentencing hearing, the State recommended that the court impose a 20-year sentence.

¶ 30 The State responds by claiming that "defendant's legal theory that the State promised to recommend no more than 15 years' imprisonment is completely contradicted by the record." In support of that claim, the State relies, in part, on the following sentence contained in its September 2008 offer to defendant: "It should be understood that [this proposal] does not necessarily reflect the [State's] position regarding any future recommendation that might be made at a sentencing hearing should this cause proceed to trial and the defendant is convicted." We view that statement, however, as the State's position that if defendant opted to go to trial—instead of pleading guilty—and was later convicted of the charges, the State would not be bound by its 15-

year offer and could recommend a higher sentence at a subsequent sentencing hearing. Obviously, that situation did not happen in this case.

¶ 31 The State also relies on testimony defendant provided at the September 2009 hearing on his amended motion to withdraw his guilty plea and vacate judgment. Specifically, the State directs our attention to defendant's statement that he pleaded guilty without relying on the State's promise for a sentence of 15 years or less. However, as defendant asserts in his reply brief to this court, his testimony that he did not plead guilty in reliance on a 15-year sentencing cap is not mutually exclusive to his claim that he relied on the State's contractual offer to *recommend* no more than a 15-year prison term. Defendant's position is neither frivolous nor patently without merit, given that a trial court is not bound by the State's recommendation. See *People v. Streit*, 142 Ill. 2d 13, 21-22, 566 N.E.2d 1351, 1354 (1991) (a trial court is not bound by the State's sentencing recommendation).

¶ 32 We agree with defendant that the issue before us is whether defendant stated the gist of a constitutional claim that the State reneged on its contractual offer to recommend a sentence of no more than 15 years. See *People v. Whitfield*, 217 Ill. 2d 177, 185, 840 N.E.2d 658, 664 (2005) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.")). Based on defendant's allegation contained in his December 2012 petition for postconviction relief, we conclude that defendant has sufficiently satisfied his low burden of stating the gist of a constitutional claim. In so concluding, we express no opinion as to the merits of defendant's ineffective assistance of trial and appellate counsel claims.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we reverse the trial court's judgment and remand with directions that the court (1) appoint counsel to represent defendant and (2) proceed to the second stage of postconviction proceedings.

¶ 35 Reversed and remanded with directions.