

No. 1-10-2909

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 18919
	)	
DAMIAN PAGE,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Karnezis concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in summarily dismissing defendant's post-conviction petition where defendant was provided effective assistance of counsel at trial; we affirm the judgment of the circuit court.

¶ 2 Defendant Damian Page appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that he was provided ineffective assistance of counsel where his trial counsel failed to advise him that his allegedly void plea agreement with the State could be

equitably enforced, and to enforce said plea agreement. We affirm.

¶ 3 The record shows that on January 15, 2008, defendant agreed to plead guilty to aggravated battery with a firearm stemming from an incident on July 29, 2006, where he shot Antonio Lopez. In exchange for pleading guilty, the State recommended that defendant be sentenced to 15 years' imprisonment, to be served at 50% good-time credit. The trial court accepted defendant's plea, imposed the agreed-upon sentence, and admonished defendant of his appeal rights in accordance with a negotiated plea under Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

¶ 4 On February 11, 2008, defendant filed a timely motion to withdraw his guilty plea, explaining that the contemplated disposition of a 15-year sentence to be served at 50% was unlawful, and he would be required to serve the 15-year term at 85% under the relevant truth-in-sentencing provision. He further contended that although he requested to set aside his plea because he could not receive the agreed upon sentence, he still wished to negotiate a disposition that would be consistent with the original terms of the contemplated disposition of 15 years' imprisonment at 50% time served.

¶ 5 At the hearing on defendant's motion, the State agreed that the motion to withdraw the guilty plea should be granted. The trial court expressed confusion as to why defendant had not filed a motion for modification of sentence. The following exchange then ensued between the State and defense counsel:

"Ms. COPPLESON [assistant State's Attorney]: At this point we offered nine years on aggravated battery with firearm. That would be modification of sentence if the Defense would cho[o]se to go forward on that. If the Defense does ch[o]ose to go forward as to what-the modification could be and then the motion

should be granted and start anew.

Mr. FAGAN [assistant Public Defender]: I would agree, Judge. Our position would be \*\*\* it wasn't our intent to withdraw guilty plea and reset the matter for trial[,] it was our intent to withdraw guilty plea and I suppose modify the sentence and replead it. We can't do that with current statute, plead guilty to. The State is not in a position to either amend or have him plead on fifteen years fifty percent. Extended offer we feel substantially different than the original one. Not one that [defendant] is in position to plead guilty to. So with that being the case-

Ms. Coppleson: We are staring [*sic*] anew and set down for trial."

¶ 6 The trial court then engaged defendant in the following discussion to be certain he understood the consequences of withdrawing his plea:

"THE COURT: This indictment there were nine counts. Count 1,2,3,4,5,6 were all dismissed by the State. \*\*\* And, count number 7 is the one that you plead to which is aggravated battery with a firearm. And, then the remaining two counts are aggravated battery. Count 8 and 9 were dismissed. You understand that if I grant this motion to withdraw guilty plea that basically what is going to happen back -- all counts are brought back. And that's where you will be standing. In other words all of these counts will be back in play. You understand that?

DEFENDANT: Yes, sir.

THE COURT: So, you will be looking at what the State said minimum thirty-one years to life if being convicted. You have ample opportunity to discuss this with your attorney?

DEFENDANT: Yes, sir.

THE COURT: Is that what you wish to do, withdraw your guilty plea and stand trial?

DEFENDANT: Yes, sir.

THE COURT: Okay. Defendant's motion to withdraw guilty plea is granted. All counts, that's counts 1 through 9 are now active. The plea is withdrawn, sentence and judgment of this Court is vacated."

¶ 7 On April 14, 2008, the day set for trial, defendant entered into a "blind plea" to the charge of aggravated battery with a firearm, and a full sentencing hearing was held on August 25, 2008. During argument, defense counsel noted that defendant had previously reached an agreement with the State, but that agreement came undone "because of certain sentencing issues the State read in the statute." The court advised defense counsel that no agreement existed because the plea before it was a blind plea. Defense counsel then withdrew his argument and the court sentenced defendant to 12 years' imprisonment. Defendant did not file a postplea motion or otherwise attempt to perfect an appeal from it.

¶ 8 On July 26, 2010, defendant filed a *pro se* post-conviction petition, alleging that his trial counsel was ineffective. He maintained, in pertinent part, that defense counsel failed to realize that the original bargained-for recommendation of 15 years' imprisonment was not a legal sentence. He specifically stated in his petition that:

"As for the relief sought under this particular claim, petitioner

seeks a sentence modification from the 12 years at 85% to an equal amount of time to which he was first illegally sentenced to. The State and the judge not only agreed to 15 years at 50% but the trial court imposed this non-servable, illegal sentence upon the Petitioner. Instead of modifying it to 8 years at 85% the Petitioner was forced to submit a blind plea and throw himself at the mercy of the court. Listening to his attorney's advice netted him an illegal sentence for which the Trial Court erred in imposing in the first place. It is our contention that the resulting sentencing hearing violated his constitutional rights and has caused him undue hardship. Modification to an equal sentence under the 85% law is the only just remedy; that is what the Petitioner requests."

¶ 9 On September 3, 2010, the circuit court summarily dismissed defendant's petition. In doing so, the court held that defendant's allegations of ineffective assistance of counsel were baseless because the original sentence had been vacated when the trial court allowed defendant to withdraw his plea. This appeal followed.

¶ 10 On appeal, defendant contends that the summary dismissal of his petition must be reversed where his petition alleged the gist of a claim that his trial counsel was ineffective for failing to advise him that his original plea agreement could be equitably enforced, and to enforce the agreement.

¶ 11 The State initially contends that defendant's claims are procedurally barred because they were never raised in a post-plea motion or on direct appeal. Generally an issue which could have been raised on direct appeal but was not raised is waived. *People v. Ward*, 187 Ill. 2d 249, 257 (1999). Here, defendant's claims clearly are matters of record and could have been raised in a

direct appeal. Defendant, however, failed to perfect a direct appeal from his guilty plea, and, therefore, the issues are not waived in a post-conviction proceeding. *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007). In so finding, we note that the State's invocation of Supreme Court Rule 604(d) (eff. July 1, 2006), is misplaced. Rule 604(d) provides that no appeal from a judgment entered upon a guilty plea shall be taken unless the defendant files a motion to withdraw his plea within 30 days of that judgment. However, a petition filed under the Act is not a direct appeal, but a collateral attack on a prior judgment. *People v. Shroud*, 333 Ill. App. 3d 416, 418 (2002). This court has consistently held that the direct appeal requirements of Rule 604(d) do not apply to post-conviction proceedings. *Id.*

¶ 12 The State also maintains that defendant waived his claims on review because he did not raise them in his post-conviction petition. Despite the State's arguments to the contrary, we find that defendant's petition, when liberally construed (*People v. Jones*, 213 Ill. 2d 498, 505 (2004)), raised the claims at bar. Although defendant's petition does not state his claims as precisely as his brief, it is clear that he was arguing an ineffective assistance claim based on counsel's failure to obtain the sentence for which he bargained. We therefore review the merits of defendant's petition.

¶ 13 We review *de novo* the summary dismissal of defendant's post-conviction petition. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. In order for a defendant to overcome dismissal at the first stage, he must allege the "gist" of a constitutional claim, which is a low threshold. *Hodges*, 234 Ill. 2d at 9-10.

Specifically, a defendant alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness, and arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 14 Defendant's claim of ineffective assistance of plea counsel has no arguable basis in either fact or law because counsel's actions were not deficient. Plea counsel properly filed, as required by law, a motion to withdraw the negotiated guilty plea because the original agreement, as recognized by both parties and the court, included an invalid 50% potential good-conduct credit rather than the statutorily required 85% credit for the instant crime (730 ILCS 5/3-6-3(a)(2)(ii) (West 2008)). Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 15 Noncompliance with the applicable truth-in-sentencing provision renders a sentence void. *People ex rel Ryan v. Roe*, 201 Ill. 2d 552, 557 (2002). To obtain relief, a defendant who entered into a negotiated guilty plea "may seek to modify the terms of a fully negotiated guilty plea only by withdrawing that plea and vacating the judgment, thereby returning the parties to the status quo ante." *People v. Absher*, 242 Ill. 2d 77, 87 (2011), citing *People v. Evans*, 174 Ill. 2d 320, 332 (1996). Supreme Court Rule 605(c)(2) implements this holding by requiring a postplea challenge to a negotiated guilty plea to be in the form of a "motion asking to have the judgment vacated and for leave to withdraw the plea of guilty." In contrast, an open plea may be challenged by either a motion to vacate the judgment and withdraw the plea *or* a motion to reconsider the sentence. Ill. S. Ct. R. 605(b)(2) (eff. Oct. 1, 2001). The original plea here was indisputably a negotiated guilty plea and plea counsel did exactly what the law provided, *i.e.*, filed a motion to withdraw the guilty plea. The trial court granted defendant's motion so the parties returned to the status quo ante.

¶ 16 Contrary to defendant's contentions on appeal, his counsel could not "equitably enforce" a

void agreement where, as here, the only legal option was to withdraw his plea and vacate the judgment. To be clear, defendant could not file a postplea motion to reconsider or modify the sentence because the original agreement was negotiated, not open. The law clearly provides that a sentence in a negotiated guilty plea cannot be fixed without defendant withdrawing the plea. Ill. S. Ct. R. 605 (eff. Oct. 1, 2001). After the plea is withdrawn, the parties are free to arrange another agreement.

¶ 17 This legal premise is not undermined by the cases relied upon by defendant. In *Roe*, the defendant agreed to plead guilty to the subject offense and received the recommended sentence of eight years with the caveat that the term was not subject to truth-in-sentencing, *i.e.*, 85% good conduct credit. *Roe*, 201 Ill. 2d at 554-55. About three years later, the State filed a *mandamus* complaint seeking to amend the sentence because defendant's crime actually subjected his sentence to the 85% credit rather than the 50% credit. *Id.* at 555. The supreme court agreed, held that the sentence was void because it did not conform to the truth-in-sentencing provision, and awarded the writ. *Id.* at 557. In addition, the supreme court exercised its supervisory authority to reduce the sentence based on the defendant's suggestion and the State's lack of objection. *Id.* at 557-58. The *Roe* decision certainly stands for the principle that noncompliance with the truth-in-sentencing provision renders a sentence void as we found in this case.

However, this court does not possess the supervisory power exercised by the supreme court to reach beyond a void sentence, especially where, as here, the State clearly did not agree with defendant's suggestion as to sentencing.

¶ 18 The supreme court decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005), is factually distinguishable and does not apply to the present case. In *Whitfield*, 217 Ill. 2d at 195, the supreme court found that defendant's due process rights were violated where he pled guilty in exchange for a specific sentence, but received a more onerous one that included a term of

mandatory supervised release (MSR). The supreme court recognized that two forms of relief were available to the defendant, *i.e.*, he could ask to set aside his plea and start anew, or he could seek specific performance of the plea agreement. *Whitfield*, 217 Ill. 2d at 202. The defendant sought specific performance, but because the court was bound by a statute that mandated the term of MSR, it subtracted the MSR term from the defendant's sentence to ensure that he received the benefit of his bargain. *Whitfield*, 217 Ill. 2d at 202-03. In doing so, the court noted that *Whitfield* did not present a scenario where a plea agreement was induced by mutual mistake resulting in a legally unfulfillable promise. *Whitfield*, 217 Ill. 2d at 204-05. In the case at bar, however, we are presented with a scenario where the plea agreement was induced by mutual mistake resulting in a legally unfulfillable promise, *i.e.*, a 15-year prison term to be served at 50% time for aggravated battery with a firearm. Furthermore, defendant, unlike the defendant in *Whitfield*, did not have two forms of relief available to him. Here, defendant could only withdraw his plea to start anew. Ill. S. Ct. R. 605(c)(2) (eff. Oct. 1, 2001).

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.