NOTICE
Decision filed 01/17/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 090566-U

NO. 5-09-0566

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Montgomery County.
	)	
v.	)	No. 07-CF-136
	)	
CHARLES E. HORN,	)	Honorable
	)	Kelly D. Long,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction petition failed to state the gist of a constitutional claim where it alleged that counsel was ineffective for incorrectly advising the defendant that he would be eligible for certain credits against his sentence if he pled guilty and that the defendant's negotiated 15-year sentence was disparate to the sentences of his codefendants.

¶ 2 The defendant, Charles E. Horn, filed a postconviction petition alleging that (1) he received ineffective assistance of counsel at his guilty plea hearing because counsel incorrectly advised him that if he pled guilty, he would be eligible for day-to-day good-time credit and additional credit for participating in drug rehabilitation programs and (2) his sentence was disparate to those imposed on his codefendants. The court summarily dismissed the petition, finding that it failed to state even the gist of a constitutional claim. The defendant appeals that ruling, arguing that his petition stated a claim as to each of these two claims. We affirm.

¶ 3 The defendant pled guilty to a charge of participation in methamphetamine

manufacturing (720 ILCS 646/15(a)(2)(B) (West 2006)). The court accepted his plea and sentenced him to 15 years in the Illinois Department of Corrections (IDOC). He did not file a motion to withdraw his guilty plea or a direct appeal.

¶ 4 Subsequently, the defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)). The petition raised two issues. First, it alleged that defense counsel was ineffective for advising the defendant that his guilty plea "would afford him the right to [participate in] various programs in IDOC that would allow him earned good time credits/drug programs etc. because this was an issue of concern for the petitioner prior to his plea of guilty." The petition further alleged that the defendant's sentence was disparate to the sentences imposed on three codefendants. They were sentenced to terms of 8½ years in the IDOC, 3 years in the IDOC, and probation. The defendant alleged that "no single defendant was more culpably responsible" than the others. Although he acknowledged that his previous criminal record had an impact on his sentence, he alleged that the "same can be said about one of the co-defendants[,] Diane Bloome[,] who received a sentence of three years aside from [*sic*] her extensive criminal record."

¶ 5 The defendant attached an affidavit in which he stated that counsel told him that pleading guilty to the charge "would still make [him] fully eligible for earned good time credits through a[n] institutional drug program, a factor that help[ed] promote and induce the decision to plea[d] guilty." He also stated that his attorney "had full knowledge of all negotiated matters related to two co-defendants" who received lighter sentences than "the 15-year sentence offered [to the defendant] by the prosecution" but did not disclose this to the defendant before telling him about the State's offer.

¶ 6 The court dismissed the defendant's petition, finding that it failed to state the gist of a constitutional claim. This appeal followed.

¶ 7 The defendant's petition was dismissed at the first stage of postconviction proceedings. At this stage, we take all well-pleaded facts in the defendant's petition as true. In order to survive a first-stage dismissal, a defendant must present only the "gist of a constitutional claim." *People v. Clark*, 386 Ill. App. 3d 673, 675, 899 N.E.2d 342, 345 (2008). Because most defendants are acting *pro se* at this stage, Illinois courts have held that this standard is a very low threshold. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1073 (2010). Our review is *de novo*. *Clark*, 386 Ill. App. 3d at 675, 899 N.E.2d at 345.

¶ 8 As previously noted, the first allegation in the defendant's petition is that his guilty plea was not voluntary because counsel incorrectly advised him that if he pled guilty he would be eligible for day-for-day good-time credit and additional credit for participating in drug programs. In arguing that this allegation states the gist of a constitutional claim, the defendant emphasizes the low threshold and the fact that the allegations of his petition must be taken as true. We are not persuaded.

¶ 9 Due process requires that a defendant's guilty plea be knowing and voluntary. *Clark*, 386 Ill. App. 3d at 676, 899 N.E.2d at 345. If a defendant receives ineffective assistance of counsel and reasonably relies on the incompetent advice of counsel, his plea is not knowing and voluntary. *People v. Correa*, 108 Ill. 2d 541, 549, 485 N.E.2d 307, 310 (1985). In order to demonstrate ineffective assistance of counsel in the context of a guilty plea, a defendant must show both that (1) counsel's performance in advising the defendant was deficient and (2) but for the erroneous advice, the defendant would have insisted on going to trial rather than pleading guilty. *Clark*, 386 Ill. App. 3d at 676, 899 N.E.2d at 345-46.

¶ 10 Before applying these principles to the allegations of the defendant's petition, we must note that he alleged that counsel advised him that he would be eligible for two different types of credit against his sentence–day-for-day good-time credit and additional credit for participation in drug programs. This distinction is important because counsel's advice regarding day-for-day credit was not erroneous. The law in effect at the time the defendant was sentenced provided that the defendant was eligible to earn this credit. See 730 ILCS 5/3-6-3(a)(2.1) (West 2006). Defense counsel cannot be found ineffective for giving advice that is correct when given. *People v. Corby*, 139 Ill. App. 3d 214, 220, 487 N.E.2d 374, 377 (1985).

¶ 11 Moreover, the State asks us to take judicial notice of IDOC records indicating that the defendant is actually receiving day-for-day good-time credit against his sentence. See Illinois Department of Corrections, Inmate Search, Charles E. Horn, http://www.idoc.state.il.us (last visited Dec. 22, 2011) (showing a projected release date of December 1, 2014, 7½ years after the defendant was taken into custody); see *People v. Steward*, 406 Ill. App. 3d 82, 93, 940 N.E.2d 140, 150 (2010) (noting that we may take judicial notice of IDOC records because they are public records). To the extent the defendant relies on counsel's advice regarding day-for-day good-time credit, his argument is moot, he has suffered no prejudice, and, as previously explained, counsel's performance was not deficient.

¶ 12 The defendant also alleged, however, that counsel incorrectly advised him that he could receive additional credit for participating in various programs, including drug rehabilitation programs. This advice was not correct. Because the defendant pled guilty to a Class X felony, he is not eligible to receive this type of additional credit (730 ILCS 5/3-6-3 (a)(4) (West 2006)). However, for the reasons that follow, we find that the defendant's petition also fails to state the gist of a constitutional claim

with respect to this component of his allegation.

¶ 13 A defendant must allege that he would not have pled guilty had counsel given him correct advice and would have insisted on going to trial instead. *Clark*, 386 Ill. App. 3d 676, 899 N.E.2d at 345-46. Here, the petition alleges generally that sentence credit "was an issue of concern" to the defendant. He also states in his supporting affidavit that the information provided to him by counsel "induced" his guilty plea. He does not, however, allege anywhere that had he known that he would not be eligible to receive additional credit for participating in drug programs in prison, he would not have pled guilty.

¶ 14 It is worth noting the minimal impact this additional credit could have had on the defendant's sentence were it available to him. The relevant statute provides that participation in certain programs, including drug rehabilitation programs, increases the day-for-day good- time credit a prisoner receives from 1 to 1.25 for time spent in that program. 730 ILCS 5/3-6-3(a)(4) (West 2006). This is only available if there is space open in a program and only applies to the time the prisoner is actually enrolled in such a program. Thus, the benefit to the defendant of participation in such a program is speculative at best, and–unlike day-for-day credit–the extent to which any credit earned would actually reduce his term appears to be quite limited. We cannot presume that such an insignificant factor would have changed the defendant's plea absent a specific allegation to that effect. Thus, we conclude that the defendant failed to state even the gist of a constitutional claim as to this issue.

¶ 15 The defendant next contends that his petition states the gist of a constitutional claim related to his allegation that he received a sentence that was disparate and disproportionate to those of his codefendants. We disagree.

¶ 16 In order to state a disparate sentencing claim, a defendant must allege that his

sentence was "grossly disparate" to the sentences imposed on "similarly situated" codefendants. *People v. Kline*, 92 Ill. 2d 490, 507, 442 N.E.2d 154, 162 (1982). Here, the defendant alleges that his sentence was disparate to those imposed on his three codefendants. Although he does allege that he believes all four were equally culpable, he does not allege facts demonstrating that all are similarly situated to him in other relevant respects.

¶ 17 As the State points out, two of the codefendants received sentences below the minimum six-year sentence for a Class X felony. See 720 ILCS 646/15(a)(2)(B) (West 2006). This indicates that at least those two defendants were not charged with the same offense as the defendant. A disparate sentencing claim cannot be based on a comparison to a defendant charged with a different offense. See *People v. Spriggle*, 358 Ill. App. 3d 447, 456, 831 N.E.2d 696, 704 (2005).

¶ 18 In addition, the defendant acknowledges that his sentence was impacted by his prior criminal record. He does allege that one codefendant (Diane Bloome) also has an extensive criminal record; however, he also alleges that Bloome was sentenced to three years. As previously discussed, this necessarily indicates that she was charged with a different offense than the defendant. The only other codefendant who could possibly have been charged with the same offense as the defendant received a sentence of 8½ years. The defendant does not name this codefendant, and he does not allege that the codefendant was charged with the same offense or has a less extensive criminal record than the defendant. Thus, he has not alleged facts that would allow a court to conclude that he was similarly situated to any of his codefendants. See *Spriggle*, 358 Ill. App. 3d at 455, 831 N.E.2d at 704 (explaining that a more serious criminal history justifies a harsher sentence); *People v. Wolfe*, 156 Ill. App. 3d 1023, 1028, 510 N.E.2d 145, 149-50 (1987) (same). Thus, we do not find that the

defendant's allegations state even the gist of a claim regarding disparate sentencing.

¶ 19 For the foregoing reasons, we affirm the court's order dismissing the defendant's petition.

¶ 20 Affirmed.