NO. 4-09-0723 Filed 1/18/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SETH A. WEAVER, Defendant-Appellant.	)))))))	Appeal from Circuit Court of Champaign County No. 06CF1481 Honorable Thomas J. Difanis, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

Held: Where the trial court properly admonished defendant at the guilty-plea hearing as to the appropriate term of mandatory supervised release (MSR), the court did not err in summarily dismissing his postconviction petition.

In December 2006, defendant, Seth A. Weaver, pleaded guilty to aggravated criminal sexual assault. In January 2007, the trial court sentenced him to 20 years in prison. In April 2008, the court denied his motion to withdraw guilty plea, and this court affirmed. In September 2009, defendant filed a *pro se* petition for postconviction relief, which the trial court summarily dismissed.

On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

I. BACKGROUND

In September 2006, the State charged defendant with one count of aggravated criminal sexual assault (count I) (720 ILCS 5/12-14(a)(2) (West 2006)), alleging he committed a criminal sexual assault against P.S. in that by the use of force he placed his finger in her sex organ and in doing so caused bodily harm. The State also charged defendant with one count of domestic battery with a prior domestic-battery conviction (count II) (720 ILCS 5/12-3.2(a)(1) (West 2006)), alleging he knowingly caused bodily harm to P.S., a family or household member, in that he repeatedly punched, kicked, and bit P.S.

In December 2006, defendant indicated his desire to plead guilty to count I in exchange for the State dismissing count II and the State's recommendation of a sentence no greater than 20 years in prison. The trial court and defendant then engaged in the following exchange:

> "THE COURT: Possible sentence would be 6 to 30 years in the penitentiary, a fine from one dollar to $25,000, or some combination of time in prison and fine within those ranges.
>
> Any time in prison would be followed by three years of mandatory supervised release, and a community-based sentence is not an available sentencing option.

You understand the possible sentences involved here, sir?

THE DEFENDANT: Yes, I do, Your Honor.

* * *

THE COURT: If you plead guilty, my understanding is there is no joint recommendation as to what sentence should be imposed. Instead, there would be a separate sentencing hearing.

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At the hearing, the State's Attorney's representative could present evidence as to what an appropriate sentence should be. Although, it is my understanding that as part of the agreement is that they will recommend no more than 20 years['] incarceration in the Department of Corrections.

[Defense counsel] could present evidence on your behalf, and then the [c]ourt would select some order within the range of possibilities that I described to you a few moments ago.

Do you understand that that's the situation, sir?

THE DEFENDANT: Yes, I do, Your Honor."

Following the State's factual basis, the court accepted defendant's guilty plea.

In January 2007, the trial court conducted the sentencing hearing. The State recommended a sentence of 20 years, and the court sentenced defendant as stated. No mention of MSR was made at the hearing.

In February 2007, defendant filed a motion to withdraw his guilty plea and vacate the judgment, claiming he was pressured into pleading guilty and he believed he would receive a sentence of less than 20 years. Defense counsel moved to withdraw, citing a conflict of interest. The court granted the motion to withdraw.

In July 2007, newly appointed counsel filed a motion to withdraw guilty plea. Defendant claimed he felt forced into pleading guilty, his trial counsel did not discuss possible defenses with him, and counsel did not present mitigation evidence at the sentencing hearing.

In December 2007, defense counsel moved to withdraw as counsel. At the hearing on the motion to withdraw guilty plea in February 2008, defendant proceeded *pro se*. In April 2008, the trial court entered a written order denying the motion to withdraw guilty plea.

Defendant appealed, arguing (1) he was not provided a

transcript of his guilty-plea hearing prior to the hearing on the motion to withdraw guilty plea and (2) he did not knowingly and intelligently waive his right to counsel. This court affirmed. *People v. Weaver*, No. 4-08-0340 (December 4, 2008) (unpublished order under Supreme Court Rule 23).

In September 2009, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)). Defendant alleged he was denied the effective assistance of counsel at trial and on direct appeal because neither counsel raised a claim regarding his three years of MSR. Relying on *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005), he argued he did not receive the benefit of the bargain in his guilty plea because the 20-year sentence and the 3-year MSR term were more than he agreed to.

The trial court found defendant had been informed of the proper sentencing range for a Class X felony along with the appropriate MSR term. The court dismissed the petition, finding it frivolous and patently without merit. This appeal followed.

II. ANALYSIS

Defendant argues the trial court erred in summarily dismissing his postconviction petition, arguing the petition presented the gist of a constitutional due-process claim when he did not receive the benefit of the bargain he made with the State

in exchange for his guilty plea. We disagree.

A. Postconviction Petition

The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an

arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

"In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2008); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2008). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. King*, 395 Ill. App. 3d 985, 987, 919 N.E.2d 958, 960 (2009).

B. Assistance of Counsel

Defendant concedes the MSR issue could have been raised in a posttrial motion and on direct appeal. By failing to do so, the issue is forfeited. *People v. Taylor*, 237 Ill. 2d 356, 372, 930 N.E.2d 959, 969 (2010) (issues that could have been raised on

direct appeal, but were not, are considered forfeited). Defendant, however, argues the issue in his postconviction petition should not be forfeited because his appellate counsel was ineffective for not raising it in his direct appeal.

Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754 (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). In the petition, a defendant "must show counsel's performance was deficient and that prejudice resulted from the deficient performance." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. A petition alleging ineffective assistance of counsel may not be dismissed at the first stage "if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. Claims that appellate counsel was ineffective are also evaluated under *Strickland*. *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000).

C. MSR Term

"A defendant's due-process rights may be violated where the defendant did not receive the 'benefit of the bargain' of his plea agreement with the State." *People v. Holt*, 372 Ill. App. 3d 650, 652, 867 N.E.2d 1192, 1194 (2007) (quoting *Whitfield*, 217 Ill. 2d at 186, 840 N.E.2d at 664). Prior to accepting a guilty

plea, the trial court must admonish the defendant, *inter alia*, as to the nature of the charge and the minimum and maximum sentence prescribed by law. Ill. S. Ct. R. 402(a) (eff. July 1, 1997). Although substantial compliance is sufficient to establish due process, "there is no substantial compliance with Rule 402 and due process is violated when a defendant pleads guilty in exchange for a specific sentence and the trial court fails to advise the defendant, prior to accepting his plea, that a mandatory supervised release term will be added to that sentence." *Whitfield*, 217 Ill. 2d at 195, 840 N.E.2d at 669.

In the case *sub judice*, defendant alleged in his petition that the trial court failed to inform him of the three-year MSR term in addition to his sentence. Defendant's allegation is completely contradicted by the record. At the guilty-plea hearing, the court admonished defendant that he was subject to a term of 6 to 30 years in prison and any prison sentence would be followed by 3 years of MSR. Defendant indicated he understood. The court then noted the State had agreed to recommend no more than 20 years in prison and the court could select an order within the range of possibilities that it had described to defendant. Defendant again indicated he understood. As defendant was admonished as to the MSR term prior to pleading guilty, his postconviction claim is positively rebutted by the record. Thus, as no error occurred, defendant cannot establish

ineffective assistance of counsel.

Even if it could be said that the trial court's admonishments as to MSR were deficient, defendant was not prejudiced. "Where the State only promises to recommend a sentence and the total sentence imposed, including subsequent [MSR] periods, is substantially less than the maximum sentence authorized by law, the court's failure to admonish defendant of the subsequent [MSR] period is not of a 'constitutional dimension.'" *Holt*, 372 Ill. App. 3d at 653, 867 N.E.2d at 1195 (quoting *Whitfield*, 217 Ill. 2d at 191, 840 N.E.2d at 667).

Here, the trial court informed defendant he could receive up to 30 years in prison plus 3 years of MSR regardless of the State's promise to recommend a maximum of 20 years. The State fulfilled its end of the bargain by recommending a 20-year sentence. The court's 20-year sentence plus the 3-year MSR term is 7 years below the 30-year maximum defendant could have received. As defendant cannot show a constitutional deprivation, his postconviction petition was frivolous and patently without merit.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

Affirmed.