

**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).

NO. 4-09-0788

Filed 1/31/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Edgar County
ROBERT STEVEN SIVERLY,	)	No. 04CF114
Defendant-Appellant.	)	
	)	Honorable
	)	Steven L. Garst,
	)	Judge Presiding.

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

**ORDER**

*Held:*Where the sole issue presented on appeal lacks an arguable factual basis, the trial court properly dismissed defendant's *pro se* postconviction petition at the first stage of the proceedings.

In July 2009, defendant, Robert Steven Siverly, filed his *pro se* postconviction petition, arguing, *inter alia*, his constitutional rights were violated by the trial court's use of a higher sentencing range based on felony charges in Indiana that were later dismissed. In September 2009, the Edgar County circuit court dismissed defendant's petition, finding the issues raised by defendant were frivolous or patently without merit. Defendant appeals the dismissal of his petition, asserting it was erroneous because his extended-term-sentencing argument was not frivolous or patently without merit. We affirm.

## I. BACKGROUND

In May 2004, a statewide grand jury charged defendant with (1) calculated criminal drug conspiracy (720 ILCS 570/405(b) (West 2004)) for his actions between September 1, 2003, and March 11, 2004; (2) criminal drug conspiracy (720 ILCS 570/405.1(a) (West 2004)) for his actions between September 1, 2003, and March 11, 2004; (3) unlawful possession of methamphetamine-manufacturing chemicals (720 ILCS 570/401(d-5) (West 2004)) for his actions on March 11, 2004; (4) unlawful possession of a controlled substance (less than 15 grams of methamphetamine) (720 ILCS 570/402(c) (West 2004)) for his actions on March 11, 2004; (5) unlawful manufacture of a controlled substance (between 15 and 100 grams of methamphetamine) (720 ILCS 570/401(a)(6.5)(A) (West 2002)) for his actions on December 2, 2003; (6) unlawful possession of a controlled substance (between 15 and 100 grams of methamphetamine) (720 ILCS 570/402(a)(6.5)(A) (West 2002)) for his actions on December 2, 2003; and (7) drug-related child endangerment (720 ILCS 5/12-4.10(a)(1) (West Supp. 2003)) for his actions on December 2, 2003. Upon the State's request, the trial court dismissed one of the unlawful-possession-of-a-controlled-substance charges (720 ILCS 570/402(a)(6.5)(A) (West 2002)). Around August 14, 2004, defendant escaped from jail. On November 19, 2004, a jury convicted defendant, *in absentia*, of the six remaining charges.

In February 2005, the trial court held defendant's sentencing hearing, and defendant again was not present at the proceedings. Defendant's presentence investigation report showed that, in June 2000, the State of Indiana charged defendant with (1) dealing in a schedule II controlled substance, (2) possession of chemical reagents or precursors with intent to manufacture, and (3) possession of marijuana. People v. Siverly, No. 84D03-0006-CF-404 (Vigo Co., Indiana, Superior Ct.) (case 404). In May 2001, the State of Indiana also charged defendant with (1) dealing in a schedule II controlled substance, (2) unlawful use of a police radio, and (3) invasion of privacy. People v. Siverly, No. 84D03-0105-CF-1187 (Vigo Co., Indiana, Superior Ct.) (case 1187). In December 2001, pursuant to a plea agreement, defendant pleaded guilty to the dealing-in-a-schedule-II-controlled-substance charge in case 1187, and the State dismissed the other two charges in case 1187 and all of the charges in case 404. The Vigo County Indiana superior court accepted the plea and, in accordance with the plea agreement, sentenced defendant to six years' imprisonment with four years being suspended. The superior court's order, which the State submitted at the sentencing hearing, explained that upon completion of the two-year portion of the sentence, defendant would be on formal probation for four years. The presentence investigation report further notes that, on March 25, 2004, the superior court issued a

warrant for defendant's arrest and set bond based on a notice of probation violation in case 1187.

After hearing the evidence and counsels' arguments, the trial court sentenced defendant to concurrent prison terms of 18 years for calculated criminal drug conspiracy, 22 years for criminal drug conspiracy, and 6 years for drug-related child endangerment. The court had vacated the other three of the convictions as lesser-included offenses. In sentencing defendant, the court did note defendant was eligible for extended-term sentencing. As to defendant's criminal history in Indiana, the court simply noted the following: "Could have been an opportunity to turn him back around. It wasn't. Didn't work that way, unfortunately." On March 8, 2005, defense counsel filed a motion to reduce defendant's sentence, which the court denied the next day.

Defense counsel filed a notice of appeal from defendant's convictions and sentences. In March 2007, this court dismissed defendant's appeal because defendant was still a fugitive. On August 15, 2008, defendant was taken into custody. Thereafter, on defendant's motion, we vacated our dismissal order and reinstated defendant's appeal. On December 11, 2008, this court entered an order affirming defendant's convictions and sentences. *People v. Siverly*, No. 4-05-0299 (December 11, 2008) (unpublished order under Supreme Court Rule 23). Defendant filed

a petition for leave to appeal to the supreme court, which that court denied on March 25, 2009. *People v. Siverly*, 231 Ill. 2d 683, 904 N.E.2d 984 (2009).

On July 27, 2009, defendant filed his *pro se* postconviction petition, raising numerous contentions of constitutional error. One of those contentions was based on two December 11, 2008, orders in defendant's Indiana case 1187. Defendant attached a copy of the orders to his postconviction petition. One order simply granted the State of Indiana's motion to dismiss. The other order stated the following:

"The Court having granted the State's Motion to Dismiss, now orders the bond heretofore posted in this matter released and refunded to the bonds person.

The Court further orders the warrant heretofore issued for Defendant's arrest recalled and orders the same be returned to the Court unserved."

Defendant argued his constitutional rights were violated because the trial court sentenced him to a higher sentencing range based upon felony charges in Vigo County, Indiana, which were dismissed in December 2008.

On September 29, 2009, the trial court dismissed defendant's petition as frivolous or patently without merit. On

October 8, 2009, defendant filed a notice of appeal in sufficient compliance with Supreme Court Rule 606 (eff. Mar. 20, 2009) from the court's dismissal of his *pro se* postconviction petition. See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

## II. ANALYSIS

### A. Standard of Review

The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2008)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). When a case does not involve the death penalty, the adjudication of a postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must, independently and without considering any argument by the State, decide whether the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail.

*People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Legal argument or citation to legal authority is not required. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). However, section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2008)) requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." In analyzing the petition, courts are to take the allegations of the petition as true as well as liberally construe them. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

Moreover, our supreme court has recently held a court may summarily dismiss a *pro se* postconviction petition "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 the record completely contradicts. *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.

Last, in considering a postconviction petition at the first stage of the proceedings, the court can examine the follow-

ing: "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). This court reviews *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105-06 (2000).

#### B. Extended-Term Sentencing

In his *pro se* petition, defendant contended his constitutional rights were violated because the trial court sentenced him under the belief he was eligible for extended-term sentencing as a result of felony charges that were later dismissed. We agree with the State that defendant's contention lacks an arguable factual basis.

Defendant's presentence investigation report in this case shows that, in December 2001, defendant was convicted of one count of dealing in a schedule II controlled substance in case 1187 and received a sentence of six years' imprisonment with the final four years being formal probation. All of defendant's other pending charges in Indiana were dismissed. Thus, at the time of defendant's sentencing, no pending charges in Indiana existed. Moreover, in March 2004, based on a notice of a probation violation, the Vigo County Indiana superior court issued a warrant for defendant's arrest and set bond. That information



indicates defendant completed his term of imprisonment and was on probation at the time he committed the offenses in this case. More importantly, it shows the December 2008 orders applied to defendant's probation violation in case 1187, not his actual conviction. The appellate record contains no evidence defendant's Indiana felony conviction was overturned. Accordingly, defendant's factual allegation the superior court's December 2008 orders were (1) a dismissal of felony charges that existed at the time of his sentencing or (2) an overturning of his felony conviction in case 1187 is fanciful and clearly baseless.

Since defendant's extended-term-sentencing argument lacks a factual basis and defendant does not address any of his other postconviction arguments on appeal, we find the trial court did not err by concluding defendant's *pro se* postconviction petition failed to state the gist of a constitutional claim.

### III. CONCLUSION

For the reasons stated, we affirm the Edgar County circuit court's judgment.

Affirmed.