

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).

2013 IL App (4th) 120268-U  
NO. 4-12-0268  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
August 9, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
WILLIE F. FORD,	)	No. 07CF1483
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the only issue properly raised on appeal was refuted by the record, the trial court properly dismissed defendant's *pro se* petition.
- ¶ 2 In February 2009, pursuant to a plea agreement, defendant pleaded guilty to unlawful possession of 900 grams or more of cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2006)), with an agreed upon sentence of 34 years' imprisonment and the dismissal of the other charges in this case. In February 2012, defendant filed a *pro se* postconviction petition, asserting (1) ineffective assistance of counsel and (2) disparity in sentencing. That same month, the Macon County circuit court dismissed defendant's petition as frivolous or patently without merit.
- ¶ 3 Defendant appeals, asserting he raised an arguable claim in his postconviction petition that counsel was ineffective for failing to advise him the police recovered 896 grams of

cocaine and not the 900 grams or more alleged in the count to which he pleaded guilty. We affirm.

¶ 4

#### I. BACKGROUND

¶ 5 On October 10, 2007, the State charged defendant by information with (1) one count of unlawful criminal drug conspiracy (720 ILCS 570/405.1(a) (West 2004)) for defendant's alleged actions from July 1, 2005, to October 3, 2007 (count I); (2) one count of unlawful possession of 900 grams or more of cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2006)) for defendant's alleged actions on March 21, 2007 (count II); (3) one count of unlawful delivery of 400 grams or more but less than 900 grams of cocaine (720 ILCS 570/401(a)(2)(C) (West 2006)) for his actions on March 21, 2007 (count III); (4) one count of unlawful delivery of 100 grams or more but less than 400 grams of cocaine (720 ILCS 570/401(a)(2)(B) (West Supp. 2007)) for his actions on September 25, 2007 (count IV); and one count of unlawful possession of 400 grams or more but less than 900 grams of cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(C) (West Supp. 2007)) for his actions on October 3, 2007 (count V). All of the charges noted defendant had a prior conviction for unlawful possession of a controlled substance with the intent to deliver (People v. Ford, No. 99-CF-1349 (Cir. Ct. Macon Co.)). Since defendant's charges were based on various dates in 2007 and before, we note section 3-6-3(a)(2)(v) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(v) (West Supp. 2007) (text of section effective until June 1, 2008)) went into effect on August 13, 2007, and provided a person convicted of delivery of a controlled substance or possession of a controlled substance was limited to no more than 7.5 days of good conduct credit for each month of his or her sentence of imprisonment.

¶ 6 On February 9, 2009, the trial court held defendant's plea hearing. Defense counsel stated defendant would be pleading to count II with an agreed sentence of 34 years and the other counts would be dismissed. Defense counsel further noted count II was important because of when it was committed. Since it was in March, defendant's sentence would be "a day for day sentence." He also explained later offenses would be at "75 percent time." Defense counsel also set forth the mandatory fines. Defendant indicated the plea agreement stated by his counsel was what he understood it to be.

¶ 7 After hearing the plea agreement, the trial court explained the charge to which defendant was pleading guilty. The court stated count II alleges that, "on *March 21, 2007* you knowingly and unlawfully possessed with the intent to deliver *900 grams or more* of a substance containing cocaine, a controlled substance." (Emphases added.) After the court explained the charge, the transcript noted defense counsel and defendant had a discussion off the record. When the discussion was over, the court noted defendant had a prior drug conviction and asked if defendant understood the charge. Defendant replied in the affirmative. The court then explained the sentencing range and possible financial penalties. Defendant indicated he understood the sentencing possibilities and the rights he was giving up by pleading guilty. After he stated he had no questions about the rights he was giving up, another off-the-record discussion took place between defendant and defense counsel. When the second discussion ended, the court asked defendant if he wished to plead guilty to count II, and defendant replied in the affirmative.

¶ 8 The State's factual basis for the plea stated Decatur police Detective Chad Ramey would testify that, on *March 21, 2007*, he and other officers observed defendant arrive and leave from the residence of Kevin Webb. The police conducted a search of Webb's residence that day

and located "a white substance in a powder form and clear plastic bags." Kristin Stiefvater, of the Illinois State Police crime lab, would testify she received the white powder from the Decatur police department and the powder tested positive for cocaine. Webb, who was taken into custody on March 21, 2007, would testify defendant arrived at his residence on March 21, 2007, with "a kilo of cocaine powder." (We note a kilogram is 1,000 grams.) The pair took the cocaine to a back bedroom where they divided it. Defendant left Webb's residence with a part of the initial quantity. The State also asked the trial court to take judicial notice of defendant's prior conviction.

¶ 9 After the factual basis, the trial court continued to ask defendant questions to ensure his plea was knowing and voluntary. The court noted defendant had been asking his counsel questions during the proceeding and asked defendant if counsel had answered defendant's questions to his satisfaction. Defendant responded in the affirmative. The court gave defendant an opportunity to ask it any questions, and defendant had none. Defendant stated he wanted to plead guilty, and the court accepted defendant's guilty plea and sentenced him to 34 years' imprisonment. Defendant did not file any postplea motions or appeal his guilty plea.

¶ 10 On February 14, 2012, defendant filed his *pro se* postconviction petition, asserting (1) ineffective assistance of counsel and (2) disparity in sentencing because his codefendant had a worse criminal record and received a lighter sentence. Defendant raised three bases for ineffective assistance of counsel but only the second one is argued on appeal. It alleged the following:

"Allowed access to the States pre-trial discovery, the petitioner would have informed counsel that the States claim that at the time of his arrest, the petitioner was in possession of over 900 gram of

cocain was false. This is proven by an article in the Herald Review, where its reported that Detective Chad Ramey stated they recovered 896 grams of cocain from the petitioner on the day of his arrest. Had the petitioner been charged for the appropriate amount of cocain, he would have been sentenced under (A)(2)(c) of (720 ILCS 570/401) (From Ch. 56 1/2, Par 1401)." (Spelling, capitalization, and grammar as in the original.)

¶ 11 Attached to his petition was a newspaper article that stated defendant was arrested on October 3, 2007, and 896 grams of cocaine were found in defendant's truck. He also attached letters from his family members and his own affidavit. Defendant's affidavit detailed the various plea offers, of which counsel informed him. It also noted his defense counsel confused him throughout the proceedings and encouraged him not to raise his confusion during the plea hearing. However, the letter noted counsel did eventually make him aware of the "new drug law's" impact on the State's plea offers in his case. Specifically, counsel told him he had three options: 28 years at 75%, 34 years at 50%, or be left on his own.

¶ 12 On February 21, 2012, the trial court dismissed the petition at the first stage of the proceedings. On March 22, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). 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 Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 13

## II. ANALYSIS

¶ 14 In this appeal, defendant challenges the trial court's dismissal of his *pro se* postconviction petition at the first stage of the proceedings. We review *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).

¶ 15 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2012)) 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 2012). 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 2012)) 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. Generally, any issue not raised in the postconviction petition is forfeited and will not be addressed on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475, 861 N.E.2d 999,

1009 (2006).

¶ 16 Moreover, our supreme court has explained 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.

¶ 17 On appeal, defendant asserts he established the gist of a constitutional claim based on ineffective assistance of counsel during the plea bargaining process. He only raises his second contention of ineffective assistance of counsel, which was based on the amount of cocaine discovered on the day of his arrest. Accordingly, that is the only issue we will address. With regard to ineffective-assistance-of-counsel claims, our supreme court has stated that, "[a]t the first stage of proceedings under the [Postconviction] Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 18 We begin by pointing out the State clearly and properly charged defendant with two separate counts of unlawful possession of a controlled substance with the intent to deliver. Count II was based on defendant's alleged possession of 900 or more grams of cocaine (720 ILCS 570/401(a)(2)(D) (West 2006)) on March 21, 2007; and count V was based on defendant's

alleged possession of 400 to 900 grams of cocaine (720 ILCS 570/401(a)(2)(C) (West Supp. 2007)) on October 3, 2007, which was the day of defendant's arrest. The police recovered the 896 grams from defendant's truck after his arrest on October 3, 2007. Thus, the 896 grams of cocaine clearly related to count V (no other count could have applied), in which the State did charge defendant under section 401(a)(2)(C) of the Illinois Controlled Substances Act (720 ILCS 570/401(a)(2)(C) (West Supp. 2007)). As to count II, the State's factual basis stated Webb would testify defendant brought a "kilo" (1,000 grams) of cocaine to his residence on March 21, 2007. Further, the portion of that powder recovered from Webb's residence tested positive for cocaine. The fact the State did not obtain, weigh, and test the portion of the cocaine that remained with defendant on March 21, 2007, does not mean the charge is not supported by evidence. Thus, the State properly charged defendant under section 401(a)(2)(D) of the Illinois Controlled Substances Act (720 ILCS 570/401(a)(2)(D) (West 2006)) for his actions on March 21, 2007. Accordingly, defendant's claims in his postconviction petition (1) the State alleged he possessed 900 grams of cocaine on the day of his arrest and (2) the State should have charged him under section 401(a)(2)(C) for his possession of cocaine on the day of his arrest have no factual or legal basis because the record shows the State did not allege he possessed 900 grams on the day of his arrest and it did charge him under section 401(a)(2)(C) for his possession of cocaine on the day of his arrest. The 896 grams of cocaine recovered by the police on October 3, 2007, was clearly unrelated to the charge to which defendant pleaded guilty. Thus, we find the trial court properly dismissed defendant's postconviction petition at the first stage of the proceedings.

¶ 19

### III. CONCLUSION

¶ 20 For the reasons stated, we affirm the Macon County circuit court's judgment. As

part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 21           Affirmed.