

No. 1-09-3008

**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. 07 CR 14090
	)	
MICHAEL WORKMAN,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice Howse and Justice Epstein concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's post-conviction petition cannot be dismissed at the first stage of proceedings due to the absence of a verification affidavit, pursuant to *People v. Hommerson*, 2014 IL 115638. Moreover, in the petition, defendant raised the gist of a constitutional claim that his counsel was ineffective in failing to seek withdrawal of defendant's guilty plea, thus warranting further post-conviction proceedings.

¶ 2 Defendant Michael Workman appeals from the dismissal of his *pro se* post-conviction petition at the first stage of proceedings. On appeal, defendant contends his petition stated the gist of a claim of the ineffective assistance of counsel by asserting his attorney failed to move to

withdraw his guilty plea, which prevented him from taking a direct appeal from his conviction. Because we agree defendant's petition presented the gist of a constitutional claim, we reverse and remand.

¶ 3 In 2008, defendant pled guilty to failing to register as a sexual predator and was sentenced to three years in prison. In 2009, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). The circuit court dismissed defendant's post-conviction claims as frivolous and patently without merit. In a Rule 23 order on October 28, 2011, we affirmed the circuit court's dismissal of defendant's petition. In that decision, we agreed with the State's position that because defendant submitted an unnotarized affidavit attesting to the petition's veracity, the petition did not satisfy the verification requirement of section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2008)), thus rendering the petition invalid.

¶ 4 On May 3, 2014, the Illinois Supreme Court issued a supervisory order in this case (No. 113576) directing this court to vacate our prior decision and reconsider it in light of *People v. Hommerson*, 2014 IL 115638. In *Hommerson*, the supreme court held that a post-conviction petition could not be dismissed at the first stage of review based on the absence of a verification affidavit. *Id.* at ¶ 11. The supreme court reasoned that at the initial stage of post-conviction proceedings, a petition's "substantive virtue" is to be considered, not the petition's compliance with the Act's procedural requirements. *Id.* In accordance with the supreme court's supervisory order, we vacated our prior order in this case and revisit the additional contentions raised by defendant as to his petition.

¶ 5 Defendant contends his petition was improperly dismissed at the first stage of post-conviction review because it stated the gist of a claim of the ineffective assistance of counsel. The record establishes that on March 12, 2008, defendant and counsel appeared in court on the date set for trial. The court admonished defendant about his right to a jury trial and began to accept defendant's waiver of that right. Defense counsel tendered a written jury waiver and then addressed the court:

"MR. HODGE [defense counsel]: Judge, can I ask a favor of court and counsel? I need to talk to my client. Because of the nature of the indictment in this case and nature of the offense, is there a place we can talk without – not in lockup. Especially since an offer has been made by counsel and that offer is about to be revoked by counsel if we don't accept it, so we need to chat for five minutes.

THE COURT: Counsel, does this concern your client's right to choose the kind of trial he wishes to have?

MR. HODGE: No, Judge."

¶ 6 After additional discussion, the court accepted defendant's jury waiver and passed the case. When defendant's case was recalled, defense counsel stated: "Judge, we have had an extensive conference, and after much deliberation back and forth, we decided to change our plea from not guilty to guilty." After a factual basis for the plea was read, the court asked defendant if he would like to address the court. Defendant stated:

"I do have a lot I would like to say on my behalf, Judge. I made the decision to accept the plea, and it's a decision that I'm going to have to adhere to[]."

¶ 7 The court accepted defendant's guilty plea and sentenced him to three years in prison.

¶ 8 On July 29, 2009, defendant filed his *pro se* post-conviction petition, stating, among other claims, that his counsel "affirmatively misrepresented" to defendant that "he would absolutely be allowed to withdraw his guilty plea." Defendant further asserted his attorney "coerced" him into pleading guilty by promising to move to withdraw the plea within 30 days, during which time counsel would prepare for trial by contacting witnesses and obtaining evidence. Defendant said he told counsel to move to withdraw his plea and was assured that would be done; however, counsel did not do so. The circuit court summarily dismissed the petition as frivolous and patently without merit, stating that defendant's claims were "vague and speculative in nature."

¶ 9 On appeal, defendant argues his petition should proceed past the initial stage of post-conviction review because it states the gist of a claim of the ineffectiveness of his counsel. Defendant points to the allegation in the petition that counsel advised him prior to the plea that if he was to plead guilty, counsel would later move to withdraw the plea and would use the interim period to investigate defendant's case, and he asserts that counsel's failure to seek withdrawal of his guilty plea resulted in his inability to pursue a direct appeal. The State responds that defendant's claims are rebutted by the record and he has not established he was prejudiced by his attorney's performance.

¶ 10 Under the Act, individuals convicted of criminal offenses may challenge their convictions on grounds of constitutional violations. 725 ILCS 5/122-1 *et seq.* (West 2008). The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the

defendant's original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *People v. Harris*, 206 Ill. 2d 1, 12 (2002).

¶ 11 At the first stage of post-conviction proceedings, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition 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 (2009). A claim has no arguable basis when it is based on an indisputably meritless legal theory (such as one completely contradicted by the record) or a fanciful factual allegation (that is, an allegation that is fantastic or delusional). *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Our review of the summary dismissal of a petition is *de novo*. *People v. Ross*, 2014 IL App (1st) 120089, ¶ 24.

¶ 12 To survive the first stage, a *pro se* litigant's petition need only present the gist of a constitutional claim. 725 ILCS 5/122-2.1 (West 2008). Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of post-conviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill. 2d at 11; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). The allegations in the petition must be taken as true and liberally construed. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 13 At issue is whether defendant's *pro se* petition met this low threshold. The State first contends the record affirmatively rebuts defendant's petition because defense counsel indicated he was ready for trial on the day defendant ultimately entered his guilty plea. We do not find that such a representation by defense counsel constitutes a rebuttal of defendant's post-conviction

claim. More to the point, the record establishes that after defendant waived his right to a jury trial, counsel asked the court for time to consult with defendant after an offer had been made by the State which was "about to be revoked." After defendant and counsel engaged in discussions of the record, defense counsel described that exchange to the court as an "extensive conference" and "after much deliberation back and forth, we decided to change our plea from not guilty to guilty." The record indicates that defendant and counsel discussed the case after receiving a plea offer from the State that was good for a limited time. Therefore, the record supports defendant's contention that he and counsel engaged in an off-the-record discussion that resulted in a decision to enter a guilty plea.

¶ 14 Similarly unavailing is the State's contention that defendant has not established at this initial stage of post-conviction review that he was prejudiced by his attorney's representation. Under *Hodges*, defendant's petition cannot be summarily dismissed if it is *arguable* that counsel's performance fell below an objective standard of reasonableness and it is *arguable* that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. Moreover, this court has held that at the first stage of a post-conviction proceeding, a *pro se* defendant claiming ineffective assistance of counsel based on the failure to file a motion to withdraw a plea "is not required to show that such a motion would have been successful." *People v. Rogers*, 372 Ill. App. 3d 859, 866 (2007), citing *Edwards*, 197 Ill. 2d at 257. Rather, prejudice is presumed from the trial counsel's failure to file a requested motion to withdraw the plea. *Id.* at 253.

¶ 15 Furthermore, we find unpersuasive the State's argument that defendant's petition lacks support because it did not specifically allege that defendant asked counsel to pursue an appeal. When counsel did not move to withdraw defendant's plea within 30 days, as defendant alleges

was promised, defendant lost the ability to appeal those proceedings. See Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013). The sixth amendment of the United States Constitution guarantees a defendant the right to effective assistance of counsel at all critical stages of criminal proceedings, which includes the entry of a guilty plea. U.S. Const., amend. VI; *People v. Hughes*, 2012 IL 112817, ¶ 44. Where a defendant alleges that he was denied the effective aid of counsel during his plea proceeding, no showing of prejudice is required to establish counsel's ineffectiveness because of the breakdown in the attorney-client relationship. *Edwards*, 197 Ill. 2d at 251-52, citing *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) (noting that the defendant is deprived of an appellate proceeding altogether by such allegedly deficient representation).

¶ 16 We conclude that defendant's petition contained an arguable basis both in fact and in law. The petition contained an arguable basis in fact by asserting that defense counsel told defendant he would file a motion to withdraw his guilty plea and did not do so. The petition also contained an arguable basis in law, specifically that his attorney did not preserve defendant's right to challenge his guilty plea on appeal. Whether or not defendant will eventually prevail on his petition is not at issue here; the first stage of post-conviction review looks only at the *arguable* merit of a petition's claims. Accordingly, because defendant raised the gist of a claim of counsel's ineffectiveness in failing to seek withdrawal of his guilty plea, the circuit court's order summarily dismissing defendant's petition is reversed. This case is remanded for further proceedings under the Act.

¶ 17 Reversed and remanded.