

No. 1-12-2323

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 16587
)	
RICARDO CONCHA,)	Honorable
)	Rosemary Grant-Higgins,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's post-conviction petition did not state an arguably meritorious claim that his counsel should have moved to suppress evidence of a drug transaction where consent was given by the police informant, and other exceptions allowing a warrantless search applied; defendant could not receive 50% good conduct credit toward his sentence because the statute requiring him to serve 75% of his sentence did not contain an irreconcilable conflict.

¶ 2 Defendant Ricardo Concha appeals from the summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-

1 *et seq.* (West 2012)). On appeal, defendant contends his petition should be remanded for second-stage proceeding under the Act because he stated an arguably meritorious claim that the police search of his office following a controlled drug transaction violated his fourth amendment rights. Defendant further asserts that he is entitled to statutory day-for-day (50%) good conduct credit against his sentence. We affirm the summary dismissal of defendant's petition and reject his sentencing argument.

¶ 3 Defendant was arrested on July 28, 2008, as part of an Illinois State Police sting operation. In August 2008, defendant was charged with seven counts of possession of a controlled substance with intent to deliver, including four counts as to cocaine, two counts as to cannabis and one count as to heroin.

¶ 4 On September 30, 2008, defendant, while represented by counsel, signed a debriefing and consideration agreement ("the agreement") with the Cook County State's Attorney's Office, in which he agreed to aid the State in prosecuting other drug offenders in exchange for a reduction of the charges against him and/or a sentencing recommendation by the State's Attorney's Office. The agreement stated that it was rendered null and void if defendant, *inter alia*, pursued "any contested pretrial motion concerning the current case during the pendency of this agreement." In the 18 months between defendant's arrest and his plea, defendant did not complete any drug transactions with other offenders because he remained in Cook County jail on a "no bond hold" due to his ongoing supervised release status for a federal drug conviction.

¶ 5 On January 28, 2010, a hearing was held at which defendant's plea was taken. The State informed the court it had agreed to reduce Count 2 of the indictment, which charged defendant with possession of more than 400 and less than 900 grams of a controlled substance (cocaine)

with intent to deliver (720 ILCS 570/401(a)(2)(C) (West 2008)). That count was reduced to possession of more than 100 but less than 400 grams of a controlled substance (cocaine) with intent to deliver (720 ILCS 570/401(a)(2)(B) (West 2008)). Defendant agreed to plead guilty to that Class X felony and receive a nine-year sentence, and the State dismissed the six additional counts against defendant.

¶ 6 The State then presented the following factual basis for defendant's plea. Arthur Reyes would have testified that in July 2008, he had been charged in drug cases and was cooperating with the Illinois State Police to arrest other drug offenders. Defendant had sold drugs to Reyes in the past, and the two men had conversations in June and July 2008 that were recorded by police.

¶ 7 On July 28, 2008, Reyes agreed to meet defendant at a graphics company in Chicago where defendant worked. Reyes wore a recording device during that encounter, and after he entered defendant's office building, he and defendant discussed the sale of a half-kilogram of cocaine. Defendant showed Reyes a duffel bag that contained several bags of cocaine. The men agreed on a price of \$14,000 for a half-kilogram. Reyes signaled to the officers waiting outside that they should enter, and Reyes told police where the bag of cocaine was located.¹

¶ 8 An Illinois State police officer would testify that after advising defendant of his *Miranda* rights, defendant admitted the cocaine was his and that he had attempted to sell it to Reyes. The State also would present testimony as to the composition and weight of the recovered cocaine. After hearing that factual basis, the court accepted defendant's plea and sentenced defendant to nine years in prison.

¹ The record includes additional facts that were not contained in the factual basis for defendant's plea, including that the cocaine was recovered from a duffel bag located in a file cabinet and that the police observed the transaction because defendant and Reyes sat near a window.

¶ 9 On February 23, 2012, defendant filed a *pro se* post-conviction petition asserting that his attorneys were ineffective for failing to challenge the warrantless search of his workplace. On April 25, 2012, defendant filed an amended *pro se* post-conviction petition reasserting those claims. Defendant attached to the petition his affidavit and other documents in which he argued, *inter alia*, that his plea agreement was null and void because he ultimately was not able to assist the State in other drug cases, given that he was in jail from the time of his arrest until the time of his plea. Defendant stated that he signed the agreement with the understanding that he would be released on bond. Defendant further asserted his counsel was ineffective in failing to file a motion to suppress the narcotics. He stated that after police recovered the cocaine, he was pressured to sign a form consenting to the search and was forced to sign a written confession.

¶ 10 The circuit court dismissed defendant's petition as frivolous and patently without merit. The court held that a motion to suppress the narcotics would not have succeeded because Reyes viewed the drugs and consented to the search, thus supporting the search's legality under the "consent once removed" doctrine, and the court further held that the decision of defense counsel was not objectively unreasonable due to the existence of the agreement. Defendant now appeals that ruling.

¶ 11 Defendant contends his petition raised an arguably meritorious claim that his counsel was ineffective for not moving to suppress evidence of the narcotics recovered by police. He argues Reyes lacked the authority to consent to the search and that the narcotics were not admissible under any other theory. Defendant further asserts that if the agreement with the State barred his attorneys from filing a motion to suppress the drugs, his counsel was ineffective in advising him to enter into that agreement.

¶ 12 The State responds that defense counsel's performance was not deficient because the decision to file a motion to suppress is rooted in trial strategy and, moreover, the agreement prohibited the filing of such a motion. However, as our supreme court held in *People v. Tate*, 2012 IL 112214, ¶ 22, trial strategy cannot be considered in the first stage of post-conviction proceedings.

¶ 13 At this initial stage, the circuit court may dismiss a *pro se* petition seeking post-conviction relief for a denial of constitutional rights "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). Put another way, the petition may be summarily dismissed if it is "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16-17. This court's review of the summary dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and if it is arguable that he was prejudiced by counsel's deficient performance. *Tate*, 2012 IL 112214, ¶ 19.

¶ 15 Defendant contends his *pro se* petition alleges sufficient facts to state an arguable claim that his counsel was ineffective in failing to file a motion to suppress the cocaine recovered from his office. He argues the police searched the office without consent and that Illinois has not

adopted the doctrine of consent-once-removed, under which consent existed when Reyes, as the police informant, entered at defendant's invitation.

¶ 16 Consent is an exception to the requirement that police need a warrant to enter a residence or other property. *Payton v. New York*, 445 U.S. 573, 589-90 (1980); see also *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-12 (1978) (exceptions to warrantless searches apply to commercial premises as well as homes). The doctrine of consent-once-removed is applicable where the undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers. *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995); see also *People v. Krinitsky*, 2012 IL App (1st) 120016, ¶ 31 (citing *Akinsanya*); *People v. Galdine*, 212 Ill. App. 3d 472, 483-84 (1991), relying on *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986).

¶ 17 Defendant expressly acknowledges that his case is factually similar to *Galdine*, which held that the consent-once-removed doctrine authorized the warrantless entry into the office of the defendant in that case, and in turn, the recovery of the cocaine from a drawer of the defendant's desk. *Galdine*, 212 Ill. App. 3d at 476, 485 (upholding the denial of the defendant's motion to suppress). In *Galdine*, the defendant was arrested while selling drugs to a police informant who had previously purchased from him, and the sale that led to the defendant's arrest took place in the defendant's office. *Id.* at 474-75. After police entered the office upon the informant's report that he had seen the drugs, the informant told police the drugs were in the defendant's desk drawer. *Id.* at 476.

¶ 18 Similarly, in the case at bar, defendant consented to the warrantless entry of police by allowing Reyes into his office to complete the drug transaction. As to the first requirement, defendant invited Reyes into the office. Defendant agreed to meet Reyes, who was wearing a wire, at defendant's office, and Reyes had purchased drugs from defendant in the past. Defendant displayed cocaine on a desk for Reyes to see, and the two men agreed on a price. At that point, probable cause existed to arrest defendant, and Reyes signaled to the officers outside that they should enter the office, thus satisfying the second and third requirements of the consent-once-removed doctrine. Therefore, all three requirements of the doctrine were met here to support the constitutionality of the search.

¶ 19 Notwithstanding this precedent, defendant argues that the consent-once-removed doctrine is unsettled law because the United States Supreme Court, the Illinois Supreme Court and the first district appellate court have not explicitly adopted it. Defendant relies on *dicta* in the *Krinitzky* opinion which stated that the court was expressing "no opinion on whether the doctrine should be adopted" because neither our supreme court nor the United States Supreme Court has expressly adopted it. *Krinitzky*, 2012 IL App (1st) 120016, ¶ 38. However, the *Krinitzky* court addressed the doctrine, held that the State failed to prove two of the three required elements of the doctrine, and held that it did not apply to the factual scenario at issue in that case. *Id.* at ¶¶ 31-37.

¶ 20 Furthermore, the absence of an explicit holding about the doctrine in either the United States or Illinois supreme courts does not defeat its application by rendering it "unsettled law." The consent-once-removed doctrine originated nearly 30 years ago in *Paul* in 1986 and the doctrine announced in *Paul* was essentially "*adopted* by the court in *Galdine*." (Emphasis

added.) *People v. Finley*, 293 Ill. App. 3d 377, 382 (1997) (holding that the doctrine did not apply based on the specific facts before the court in *Finley*). In light of the legal precedent established in *Galdine* and the admitted factual similarity with *Galdine*, defendant has not shown even an arguable basis for his ineffective assistance of counsel claim to withstand summary dismissal.

¶ 21 Defendant argues that even if the consent-once-removed doctrine is applied here, it does not justify the search and the seizure of the drugs from the file cabinet in his office because the doctrine is based on "consent to enter the home or office to make an arrest" and "does not allow a general search." He also contends the search was not incident to a lawful arrest because he was "in another room at the time of the arrest." Defendant's position is misplaced, because the police here did not undertake a general search of the office but instead were informed by Reyes as to where defendant had hidden the drugs. See *Galdine*, 212 Ill. App. 3d at 476 (drugs recovered from a desk drawer).

¶ 22 Defendant raises additional challenges to the constitutionality of the police's actions but provides no analysis or legal support for his cursory claims. He contends the search was unconstitutional because the cocaine was not in plain view when the police entered the office is also unavailing. The drugs were in plain view of the informant as they discussed the transaction. See *Paul*, 808 F.2d at 648 (police can enter without warrant upon prearranged signal because informant who entered with consent saw drugs in plain view). Defendant also contends, without explanation, that no exigent circumstances existed for the search. We need not consider these undeveloped assertions. See *People v. Ford*, 301 Ill. App. 3d 56, 59 (1998) (reviewing courts

need not address arguments that lack citation to relevant authority); see also Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (argument must be supported by citation to authority).

¶ 23 Defendant has not raised an arguably meritorious claim that a motion to suppress would have succeeded. Thus, he also cannot establish that his counsel was ineffective in advising him to sign the agreement in which he relinquished the right to bring that motion. Indeed, the record shows that defendant benefitted from the agreement. Courts have analogized such cooperation agreements to plea agreements that contain cooperation clauses and have analyzed these agreements using standards of contract law, treating them as enforceable contracts. *People v. Hughes*, 2012 IL 112817, ¶ 68; see also *People v. Dasaky*, 303 Ill. App. 3d 986, 992 (1999). Defendant signed the agreement after being charged with seven counts of drug possession with intent to deliver. The State agreed that it would give consideration to defendant on the multiple charges providing defendant satisfied "all conditions" required of him as set out in the agreement. In exchange, defendant agreed to assist the State in other drug arrests or prosecutions. Even though defendant apparently did not aid in any drug cases, the State ultimately dismissed six of the seven counts against defendant and reduced the charge on the remaining count. In conclusion on this point, defendant did not state an arguably meritorious claim that his counsel was ineffective in failing to file a motion to suppress evidence or in representing defendant in the signing of the agreement to cooperate with police.

¶ 24 Defendant's remaining contention on appeal is that he was erroneously ordered to serve a mandatory minimum of 75% of his sentence under a statutory section applying to sentences for various drug offenses. Although defendant has not previously raised this issue, a sentence that does not comply with statutory guidelines regarding sentencing credit is void and may be

challenged at any time. See *People v. Roberson*, 212 Ill. 2d 430, 440 (2004), citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995). The instant offense occurred on July 28, 2008, and defendant entered into a negotiated guilty plea on January 28, 2010.

¶ 25 The trial court ordered defendant to serve 75% of his sentence pursuant to the "truth-in-sentencing" provision of section 3-6-3(a)(2)(v) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(v) (West 2008)). Subsections 3-6-3(a)(2)(i) through (v) set out the sentencing credit for various enumerated offenses. 730 ILCS 5/3-6-3(a)(2)(i)-(v) (West 2008). The next section provides that prisoners serving their sentences for offenses other than those enumerated in the subsections of (a)(2) are entitled to one day of good conduct credit for each day of his or her sentence of imprisonment and that each day of good conduct credit would reduce the prisoner's sentence by one day, thus representing a 50% credit against a sentence. 730 ILCS 5/3-6-3(a)(2.1) (West 2008).

¶ 26 Two versions of subsection (a)(2)(v) are the subject of defendant's argument. The first version, created by Public Act 95-134, provided that a defendant convicted of gunrunning or certain enumerated drug offenses, including a Class X felony conviction of possession of a controlled substance with intent to manufacture or deliver, could receive "no more than 7.5 days" of good conduct credit for each month of imprisonment. Pub. Act 95-134, eff. Aug. 13, 2007. The second version of subsection (a)(2)(v), created by Public Act 95-625, provided that a prisoner serving a sentence for a second or subsequent offense of luring a minor could receive "no more than 4.5 days" of good conduct credit for each month of imprisonment. Pub. Act. 95-625, eff. June 1, 2008. Therefore, on June 1, 2008, two versions of subsection (a)(2)(v) were in effect.

¶ 27 Defendant argues that an irreconcilable conflict is created by the co-existence of those two public acts, and that accordingly, he should receive 50% good conduct credit against his sentence. He contends that if the version set out in Public Act 95-134 is applied together with section (a)(2.1), he is required to serve 75% of his sentence due to the enumeration of his offense in subsection (a)(2)(v). However, if the language set out in Public Act 95-625 is applied, the only enumerated crime is the second or subsequent offense of luring a minor, and therefore, section (a)(2.1) allows him to receive 50% good conduct credit. Defendant argues that because the version created by Public Act 95-625 was acted upon last (in final legislative action on September 18, 2007), that version is controlling, and because that version did not enumerate his drug offense as being ineligible for 50% good conduct credit, such credit should now be applied to his case.

¶ 28 The State responds that no irreconcilable conflict exists because effect can be given to both enactments, and the State cites cases in which the adoption of various public acts addressing the same topic has not created such a conflict. The State points out that the legislature subsequently combined the enumerated drug offenses and the "luring a minor" offense when it enacted a revised version of the statute in Public Act 95-773, effective Jan. 1, 2009.

¶ 29 Section 6 of the Illinois Statute on Statutes provides that "[t]wo or more Acts which relate to same subject matter and which are enacted by the same General Assembly shall be construed together in such manner as to give full effect to each Act except in case of an irreconcilable conflict." 5 ILCS 70/6 (West 2008). Section 6 further states that an "irreconcilable conflict between 2 or more Acts which amend the same section of an Act exists only if the amendatory Acts make inconsistent changes in the section as it theretofore existed." *Id.*

¶ 30 Our supreme court has stated that if it is possible to construe two acts so that both may stand, a court must do so. *People ex rel. Dickey v. Southern Ry. Co.*, 17 Ill. 2d 550, 555 (1959); see also *People v. Benton*, 126 Ill. App. 3d 386, 390-91 (1970) ("[t]wo acts passed at the same session of the legislature are not to be construed as inconsistent if it is possible to construe them otherwise"). The *Benton* court also observed that the "last-acted-upon" rule relied upon by defendant in this case "becomes operative only if it is impossible to give effect to both amendments." *Id.*; see also *People v. Harper*, 392 Ill. App. 3d 809, 814-15 (2009).

¶ 31 We find that this law supports the State's position, because it is possible to give effect to the contents of both Public Act 95-134 and Public Act 95-635. The enactments set out different offenses that are subject to truth in sentencing, and each can be applied along with section (a)(2.1) to determine if a defendant should receive 50% good conduct credit.

¶ 32 Although defendant insists that the two provisions cannot both be enforced at the same time, his position is based upon the reading of the two provisions without the existence of the other, as opposed to considering the enactments together. No conflict exists if the provisions in both Public Act 95-134 and Public Act 95-635 are enforced. Moreover, while defendant contends that the legislature "did not intend these two amendments to build upon each other," the legislature ultimately combined the offenses in a later version of the statute. For those reasons, we reject defendant's contention that an irreconcilable conflict exists that requires modification of his sentencing credit.

¶ 33 In conclusion, defendant did not raise an arguably meritorious claim that his counsel was ineffective in failing to file a motion to suppress the cocaine recovered after defendant's

1-12-2323

transaction with a police informant. In addition, defendant is not entitled to day-for-day (50%) good conduct credit.

¶ 34 Accordingly, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.