

No. 1-12-2554

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).

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.)	Nos. 08 CR 19299
)	08 CR 19301
)	
STEVEN PODKULSKI,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

- ¶ 1 *Held:* The defendant's assertion that he did not receive the full benefit of his plea agreement because his sentence did not reflect meritorious good time credit was a meritless legal theory, thus warranting summary dismissal of his post-conviction petition.
- ¶ 2 Defendant Steven Podkulski appeals the summary dismissal of his *pro se* post-conviction petition. On appeal, defendant asserts that his petition sufficiently alleged that he did not receive

the benefit of his negotiated plea bargain because the Illinois Department of Corrections (IDOC) was not granting 180 days of Meritorious Good Time (MGT) credit. We affirm.

¶ 3 Defendant was charged with burglary for acting as a lookout on September 8 or 9, 2008, while another man broke into a Schaumburg gas station and stole cigarettes and lottery tickets (case No. 08 CR 19299). Defendant also was charged with burglary of a Hanover Park business on September 9, 2008 (case No. 08 CR 19301). During the pendency of his proceedings in the circuit court, defendant was charged with burglary and theft in Will County.

¶ 4 On August 1, 2011, a hearing was held on defendant's guilty pleas in case Nos. 08 CR 19299 and 08 CR 19301. Defense counsel told the court that defendant would plead guilty in those cases and was "willing to accept the offer made in the [Rule] 402 conference" of two concurrent 10-year sentences. The court noted that a conference had been held pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), in which the facts underlying each charge were presented. The court read the charges from the indictment in each case and informed defendant that he was subject to mandatory Class X sentencing. In response to the court's questioning, defendant said he was not forced to plead guilty or promised anything to induce him to enter a plea.

¶ 5 Defendant pled guilty to two counts of burglary, which is a Class 2 felony (720 ILCS 5/19-1(a) (West 2008)). Defendant was subject to Class X sentencing based on his prior criminal record and agreed to plead guilty in exchange for a 10-year sentence on each count, to be served concurrently. The court imposed sentence and also indicated defendant would be required to serve three years of mandatory supervised release (MSR) due to his Class X sentencing status

but that he would receive credit for 639 days spent in pre-sentencing custody. Defendant did not appeal.

¶ 6 On April 6, 2012, defendant filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The crux of defendant's petition involves the awarding of MGT credit pursuant to section 3-6-3(a)(3) of the Unified Code of Corrections (the Unified Code) (730 ILCS 5/3-6-3(a)(3) (West 2008)).

¶ 7 In defendant's petition, he contended as follows:

"The lawyer, State's Attorney, Judge and [section 3-6-3] has for years accepted that any sentence would receive a lesser [*sic*] period of 180 days MGT from the sentence unless it was one of the precluded offenses [].

This is common knowledge and everyone accepts it as fact. It is even still in the ILCS [Illinois statutes]. This is what I was [led] to believe at the time of my sentence. That I was eligible for []180 MGT days of good time."

¶ 8 Defendant acknowledged the legislature had stopped awarding meritorious good-time credit; however, he asserted in his petition that it should be applied in his case because his crimes were committed in 2008. He further stated in the petition that when he pled guilty, he believed he would serve 4½ years in custody to satisfy his 10-year sentence. The petition stated:

"Everyone from my lawyer, the S.A., court and ILCS gave me every reason to believe not only that I was eligible but that in all likelihood I would receive my 180 days MGT."

¶ 9 Defendant's petition further stated that "I know the court cannot force IDOC to give me the MGT" but asserted the MGT credit should operate similarly to the sentencing credit awarded pursuant to *People v. Whitfield*, 217 Ill. 2d 177, 190 (2005), in which our supreme court held that

if a sentencing court failed to admonish the defendant that an MSR term would be added to his sentence, the sentence would be reduced by the amount of the MSR term. Defendant asked that his 10-year sentence be vacated and a new sentence of 9 years be entered, for which he would have to serve 4½ years in custody.

¶ 10 On April 13, 2012, the circuit court dismissed defendant's petition as frivolous and patently without merit, stating that defendant incorrectly anticipated an automatic 180 days of sentencing credit from the IDOC. The court stated:

"I cannot find anything in the presentation that would indicate that it was promised to him by the judge or prosecutor or anybody else. That's actually a matter between he and the Department of Corrections, additional good time credits, other than the time for credit served [*sic*], which he would have gotten on his plea."

¶ 11 This court allowed defendant's late notice of appeal from that ruling. The summary dismissal of a post-conviction petition is a legal question that is reviewed *de novo*. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010).

¶ 12 On appeal, defendant contends his petition raised an arguable constitutional claim that he did not receive the full benefit of his plea agreement. Defendant contends he was "[led] to believe" at the Rule 402 conference that he would only need to serve 4½ years to satisfy his 10-year sentence. He further argues his claims are based on conversations that would not be part of the record.

¶ 13 The State responds that, in the time since the circuit court ruled on defendant's petition, the argument that defendant now raises was rejected by the Third District appellate court in his

case in Will County. The State thus contends defendant is collaterally estopped from raising this issue again.

¶ 14 Collateral estoppel, or issue preclusion, is a proper basis for the summary dismissal of a post-conviction petition. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 30; see also *People v. Hackman*, 209 Ill. App. 3d 779, 781 (1991) (the doctrine applies to criminal cases as well as civil cases). Collateral estoppel is an equitable doctrine that prevents a party from relitigating an issue that has been decided in a prior case. *Gallaher v. Hasbrouk*, 2013 IL App (1st) 122969, ¶ 21; see also *People v. Tenner*, 206 Ill. 2d 381, 396 (2002).

¶ 15 Collateral estoppel applies when a party "participates in two separate and consecutive cases arising on *different* causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction." (Emphasis in original.) *Id.* The doctrine has three requirements: (1) the court rendered a final judgment in the prior case; (2) the party against whom estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical to the issue presented in the instant case. *Tenner*, 206 Ill. 2d at 396. The application of collateral estoppel must be determined on a case-by-case basis and only when equity requires. *People v. Moreno*, 319 Ill. App. 2d 445, 450 (2001).

¶ 16 The State bases its collateral estoppel argument on *People v. Podkulski*, 2013 IL App (3d) 120375-U (unpublished order under Supreme Court Rule 23 filed on Oct. 17, 2013). There, the Third District addressed defendant's 2011 guilty plea to charges of burglary and theft in Will County in exchange for a sentence of 10 years in prison. As in the instant case, defendant asserted in a *pro se* post-conviction petition that he pled guilty based on the belief that he would

receive 180 days of MGT credit and only serve 4½ years of his 10-year sentence. *Id.* at ¶ 7.

Defendant alleged his "attorney, the State, the trial court and section 3-6-3 of the Unified Code of Corrections" gave him "every reason to believe" that he was "eligible for and would actually receive" 180 days of MGT credit. *Id.*

¶ 17 Defendant argued to the Third District that pursuant to *Whitfield*, his sentence should be reduced by one year because he did not receive the benefit of his plea agreement with the State. *Id.* at ¶ 13. The Third District rejected defendant's contention, finding *Whitfield* did not apply to his case because "defendant had no agreement with the State to receive MGT credit as part of his plea agreement." *Id.* at ¶ 14. The court noted that defendant was asserting his belief that he would receive MGT credit, as opposed to claiming that he had been promised MGT credit. *Id.* at ¶ 15. The court further held that the awarding of MGT was not in the purview of the courts and thus could not be part of a plea agreement. *Id.*

¶ 18 We agree with the State that the first two elements of collateral estoppel are met here. First, the Will County court rendered a final judgment on the appeal of defendant's post-conviction petition in that jurisdiction. Second, the party against whom estoppel is asserted here is defendant, who was a party in the Will County case.

¶ 19 As to the third element, defendant now raises the exact issue and argument, indeed employing much of the same language, that he presented in the Will County case. In both cases, defendant asserted his post-conviction petition presented the gist of a constitutional claim that he did not receive the benefit of his plea bargain because he believed he should receive 180 days of MGT credit.

¶ 20 Defendant contends, however, that collateral estoppel should not bar his current claim for two reasons. First, he argues collateral estoppel should not be applied because there has been a change in the law in his case, citing *People v. Lenoir*, 2013 IL App (1st) 113615. In *Lenoir*, the defendant pled guilty and was sentenced for two felonies in separate hearings within a month's time. *Id.* at ¶¶ 3-4. At the defendant's second sentencing, he entered a negotiated plea in exchange for a 7-year sentence and was advised, *inter alia*, that he would be given 309 days of credit toward his sentence for time spent in custody prior to sentencing. *Id.* at ¶ 4. After the defendant began serving his sentence, he learned he would not receive the 309 days of that sentencing credit because he was instead receiving that credit against the sentence imposed in his first case. *Id.* at ¶ 8. On appeal, this court reduced the defendant's sentence by 309 days, noting there was "no dispute" that the State and the defendant agreed as a term of the plea agreement that he would receive 309 days credit. *Id.* at ¶ 12.

¶ 21 Defendant argues that *Lenoir* stands for the proposition that the trial court had the authority to modify his sentence to reflect the MGT credit. *Lenoir* involved the awarding of statutory credit for time spent in pre-sentence custody, and this court noted that it was without dispute that the credit was part of the agreed sentence. As a matter of law, defendant's analogy of pre-sentencing credit in *Lenoir* to MGT credit in the present case is without merit. Pre-sentence custody credit is awarded by the court for the time spent in custody before a sentence is imposed. MGT is a discretionary credit awarded by IDOC after a defendant has been sentenced.

¶ 22 The Unified Code permits the Director of the DOC, and not the trial court or the prosecutor, to use his or her sole discretion in awarding MGT credit, and that credit is permissive, not mandatory. 730 ILCS 5/3-6-3(a)(3) (West 2012) ("the Director may award up to

180 days additional sentence credit for good conduct in specific instances as the Director deems proper"); see also *Helm v. Washington*, 308 Ill. App. 3d 255, 257 (1999) (the Director "is not required to grant the credit or even consider it"). Therefore, unlike the pre-sentence custody credit at issue in *Lenoir*, the MGT credit that defendant alleges he was promised could not automatically be applied to his sentence. "The award of any good-conduct credit is contingent upon a defendant's behavior in prison." *People v. Davis*, 405 Ill. App. 3d 585, 603 (2010). Therefore, MGT credit could not be part of defendant's plea agreement.

¶ 23 Also, defendant's contention that a "change in the law" supports his position is disingenuous because that change, which defendant concedes, does not operate in his favor. In his April 2012 petition, defendant stated the "IDOC [is] not applying the enacted statute" on MGT and the rules that were in effect at the time of his crime (2008) should apply. Defendant's acknowledgement comports with the actual suspension of the MGT program in 2009 and the reinstatement of the statute in 2012. See Pub. Act 97-697, § 5 (eff. June 22, 2012). Thus, the change in the law demonstrated that MGT credit was not in effect when defendant pled guilty in 2011 or when he filed his petition in 2012. At those times, IDOC was precluded from awarding MGT credit.

¶ 24 Defendant's second argument is that the application of collateral estoppel here would be unjust because the two cases involved separate guilty pleas with separate prosecutors and judges in separate jurisdictions. Defendant is correct that he has raised the same legal issue in two different factual situations and that he should not be prevented from doing so.

¶ 25 Collateral estoppel bars the re-adjudication of an issue of ultimate fact. *People v. Kondo*, 51 Ill. App. 3d 874, 878 (1977). Here, the same facts are not being relitigated; rather, the same

legal theory is being applied to different sets of facts. Nevertheless, defendant's claim has no arguable merit.

¶ 26 A post-conviction petition is frivolous or patently without merit and can be dismissed at the first stage of review if it has no arguable basis in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition lacks an arguable basis in law if it is based on an indisputably meritless legal theory, *i.e.*, one which is completely contradicted by the record. *Id.* at 16-17.

¶ 27 The record here contradicts defendant's allegation that MGT credit was a part of the agreement. At the guilty plea hearing, defense counsel informed the court that defendant was "willing to accept the offer made in the 402 conference." The court then explained:

"the offer extended to [defendant] at the conference I will spread of record at this time, and that was that if you were to plead guilty to the two charges of burglary that are pending before me, you would be sentenced on both of those to a concurrent term of ten years in the Illinois Department of Corrections. *** The ten-year sentence would also carry with it a period of three years mandatory supervised release."

¶ 28 The court then asked defendant, "Is that your understanding of the agreement that was reached here, sir?" Defendant replied, "Yes." Defense counsel then calculated the amount of pre-sentence custody credit to be awarded (639 days). After stipulating to the factual basis of the charges, the court asked defendant: "Other than the offer extended to you by the Court, has anybody promised you anything to get you to plead guilty to either of these charges?" Defendant replied, "No." The plea agreement, as spread of record by the court, establishes that MGT credit was not a part of the agreement, and defendant also confirmed that no other promises were made to him that were not included in the stated plea agreement. See *People v. Torres*, 228 Ill. 2d 382,

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396-97 (2008) (finding that defendant's acknowledgment at a plea hearing that there were no promises regarding his plea served to contradict defendant's allegation in petition that he pled guilty in reliance upon an alleged, undisclosed promise by his counsel regarding his sentence).

¶ 29 We do not doubt defendant's familiarity with the MGT program given his lengthy criminal record and repeated incarcerations. Nevertheless, his subjective belief that he would receive the discretionary award from IDOC after he was sentenced does not support his allegation that it was part of the plea agreement. MGT credit cannot be awarded by the court, and the record refutes his contention that it was part of the agreement. Even without the application of collateral estoppel, defendant's contention as to his MGT credit, considered on its own, represents an indisputably meritless legal theory.

¶ 30 Accordingly, the summary dismissal of defendant's post-conviction petition is affirmed.

¶ 31 Affirmed.