



¶ 3 Defendant appeals, arguing that the trial court erred by dismissing his petition for postconviction relief. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 A. Procedural History

¶ 6 This case is before this court for the third time. In April 2009—when defendant's case was set for trial—the State filed a motion to admit the statements of defendant's alleged co-conspirator. The trial court later denied the State's motion. The State appealed, and this court reversed and remanded for further proceedings. *People v. Coleman*, 399 Ill. App. 3d 1198, 931 N.E.2d 268 (2010).

¶ 7 Following a May 2011 bench trial, the trial court found defendant guilty of possession of a controlled substance (100 grams or more but less than 400 grams of a substance containing cocaine) with the intent to deliver.

¶ 8 At defendant's September 2011 sentencing hearing, the trial court made the following remarks before imposing a prison sentence of 11 years:

"[Defendant] did not testify, which is very significant to the [c]ourt. [In] the [c]ourt's opinion, this was a very strong circumstantial case. \*\*\* [The court does not] know what [defendant] was doing in Chicago, but in this particular case [defendant] was trying to make himself a few extra bucks, and he was down here in Decatur watching his mule, because he's not familiar with Decatur and Decatur's people, and so on and so forth, and he got caught. [The court does not] think it's any more or any less than that."

¶ 9 Defendant later appealed, arguing, in pertinent part, that the trial court improperly

considered his decision not to testify at his May 2011 bench trial as an aggravating factor at his later sentencing hearing. *People v. Coleman*, 2013 IL App (4th) 120032-U, ¶ 3. In rejecting defendant's argument, we (1) noted that defendant had forfeited his claim by failing to properly preserve the issue for this court's review and (2) declined to consider his argument under the plain-error doctrine. *Id.* ¶ 35. In so concluding, this court noted, as follows:

"While a trial judge should not consider, much less comment negatively on, a defendant's exercise of his constitutional right not to testify, if defendant here had included this argument in his postsentencing motion, the trial judge would have had an opportunity to clarify or disavow his statement." *Id.* ¶ 36.

This court also noted, in passing, that defendant's conviction carried a sentencing range of 9 to 60 years in prison. In imposing a prison sentence of 11 years—far lower than the court could have imposed—this court commented that "[i]t is not clear to us exactly how much lower defendant thinks the trial court could have gone in imposing a sentence in this case or could go if we were to reverse and remand for a new sentencing hearing." *Id.* ¶ 37.

¶ 10 B. Defendant's Postconviction Petition

¶ 11 In February 2014, defendant *pro se* filed a postconviction petition, alleging that his appellate counsel was ineffective. Specifically, defendant claimed that appellate counsel should have argued that trial counsel provided ineffective assistance by not preserving the claim concerning the trial court's improper consideration of defendant's right not to testify at his trial.

¶ 12 In May 2014, the trial court entered a written order, in which the court addressed defendant's specific claim (among others), as follows:

"Contrary to \*\*\* defendant's assertions, and although this court did

not make [i]t perfectly clear on the record, this court considered the fact that \*\*\* defendant did not testify during the course of his trial to be a factor in \*\*\* defendant's favor in that \*\*\* defendant did not perjure himself and was part of the reason why the defendant received a sentence of only two years above the statutory minimum and a sentence 71 years under that he could have received."

Thereafter, the court dismissed defendant's postconviction petition.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Proceedings Under the Act and the Standard of Review

¶ 16 In *People v. Tate*, 2012 IL 112214, ¶¶ 9-10, 980 N.E.2d 1100, the supreme court outlined the following three-stage process contemplated under the Act:

"In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or is patently without merit. [Citations.] 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. [Citation.] This first stage in the proceeding allows the circuit court to act strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit. \*\*\*

If the circuit court does not dismiss the petition as frivolous

or \*\*\* patently without merit [citation], the petition advances to the second stage, where counsel may be appointed to an indigent defendant [citation], and where the State, as respondent, enters the litigation [citation]. It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel. [Citation.] At this second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. [Citations.] If no such showing is made, the petition is dismissed. [Citation.] If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing." (Internal quotations marks omitted.)

At the first stage of postconviction proceedings, "the court considers solely the petition's *substantive* virtue, dismissing only where the petition is frivolous or patently without merit." (Emphasis in original.) *People v. Allen*, 2015 IL 113135, ¶ 33, 32 N.E.3d 615. "We review *de novo* a trial court's first-stage dismissal of a postconviction petition." *People v. Shipp*, 2015 IL App (2d) 131309, ¶ 7.

¶ 17                    B. Defendant's Challenge to the Trial Court's First-Stage  
Dismissal of His Postconviction Petition

¶ 18                    In support of his challenge to the trial court's first-stage dismissal of his postconviction petition, defendant contends that the court "ventured beyond its screening function." (We note that the trial judge who convicted and sentenced defendant considered defendant's postconviction petition.) Specifically, defendant asserts that the court provided a subjective

explanation to rebut the basis of his postconviction claim concerning the trial judge's improper consideration of defendant's decision not to testify during his bench trial. Defendant posits that by doing so, the court impermissibly added new facts to the record and then used those additional facts to dismiss his postconviction petition instead of considering solely the substantive virtue of his postconviction petition, as the first stage of postconviction proceedings requires. We agree.

¶ 19 Because most petitions filed under the Act are drafted by defendants with limited legal knowledge, a defendant need only present a limited amount of detail at the first stage of postconviction proceedings to survive summary dismissal by the trial court. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). Illinois courts have often used the term "gist" to describe the low factual threshold a petitioner must satisfy to substantiate an arguably constitutional claim for purposes of invoking the Act. See *Allen*, 2015 IL 113135, ¶ 24, 32 N.E.3d 615 ("If a petition alleges sufficient facts to state the gist of a constitutional claim, \*\*\* first-stage dismissal is inappropriate."). In other words, the "gist" of an arguably constitutional claim means that the petitioner satisfied the pleading requirements in that his postconviction petition is not frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 11, 912 N.E.2d at 1209.

¶ 20 Applying the aforementioned standard, we conclude that defendant presented the "gist" of an arguably constitutional claim in his February 2014 *pro se* postconviction petition to survive summary dismissal at the first stage of postconviction proceedings. The trial court erred by determining otherwise because the court engaged in fact-finding. Specifically, the court considered the rationale underlying the trial judge's comments regarding defendant's decision not to testify at his bench trial and then summarily dismissed defendant's claim based on that rationale, which—as we have noted—is not permitted at the first stage of postconviction proceedings. We

reiterate that the first stage of postconviction proceedings prohibits an analysis into the ultimate merits of the claims raised in a postconviction petition. See *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 99, 18 N.E.3d 577 ("At the first stage of postconviction proceedings, the petition must be liberally construed and taken as true, and the postconviction court may not engage in fact-finding."). Because we conclude that the court erred by engaging in such an analysis, we reverse and remand with directions that the court advance defendant's *pro se* petition to the second stage of postconviction proceeding in accordance with sections 122-4 to 122-6 of the Act (725 ILCS 5/122-4 to 122-6 (West 2014)). In so doing, we express no view regarding the merits of any of defendant's claims.

¶ 21

### III. CONCLUSION

¶ 22 For the foregoing reasons, we reverse the trial court's judgment and remand with directions.

¶ 23 Reversed; cause remanded with directions.