

**NOTICE**  
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 220322-U  
NO. 4-22-0322  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

**FILED**  
January 25, 2023  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, ) Appeal from the  
Plaintiff-Appellee, ) Circuit Court of  
v. ) Peoria County  
TYSHAN J. GAYTON, ) No. 19CF751  
Defendant-Appellant. )  
) Honorable  
) Kevin W. Lyons,  
) Judge Presiding.

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JUSTICE CAVANAGH delivered the judgment of the court.  
Presiding Justice DeArmond and Justice Doherty concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed, finding the circuit court erred in summarily dismissing defendant’s *pro se* postconviction petition at the first stage of the proceedings when the petition stated the gist of a constitutional claim.

¶ 2 Defendant, Tyshan J. Gayton, appeals from the circuit court’s dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7) (West 2020)) at the first stage of the proceedings. Defendant claims the petition presented the gist of a meritorious claim of ineffective assistance of counsel. The State concedes error, and we accept the State’s concession.

¶ 3 I. BACKGROUND

¶ 4 In October 2020, a jury found defendant guilty of two counts of reckless discharge of a firearm, Class 4 felonies (720 ILCS 5/24-1.5(a), (c) (West 2018)), and one count of unlawful possession of a weapon by a felon, a Class 2 felony (720 ILCS 5/24-1.1(a), (e) (West 2018)). In

December 2020, the trial court sentenced him to 5 years in prison for the reckless-discharge conviction and 12½ years in prison for the possession-of-a-firearm conviction, with the terms ordered to run consecutively. The court did not explain its justification for the imposition of consecutive terms. Defendant filed no posttrial motion and no direct appeal.

¶ 5 In December 2021, defendant filed a *pro se* postconviction petition, alleging constitutional violations occurred during his sentencing hearing. In particular, defendant alleged his trial counsel was ineffective for, *inter alia*, failing to object to the trial court’s imposition of consecutive prison terms.

¶ 6 On March 28, 2022, the circuit court entered a written order “den[ying]” defendant’s petition. The court noted it had reviewed the transcript of the sentencing hearing and found the trial court “properly considered the statutory factors and then properly discretionarily imposed the consecutive sentences.”

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Under the Act, there is “a three-stage process for an imprisoned person to raise a constitutional challenge to a conviction or sentence.” *People v. Hatter*, 2021 IL 125981, ¶ 22 (citing 725 ILCS 5/122-1 *et seq.* (West 2016)). “At the first stage, the circuit court reviews the petition independently within 90 days after it is filed and docketed.” *Id.* When reviewing the petition, the court should consider its “substantive virtue rather than its procedural compliance.” (Internal quotation marks omitted.) *Id.* The threshold for surviving a first-stage summary dismissal is low, and a petition should only be summarily dismissed “if it is ‘frivolous or is patently without merit.’ ” *Id.* ¶ 23 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2016)).

¶ 10 “A postconviction petition is frivolous or patently without merit if it has no arguable

basis either in law or in fact.” (Internal quotation marks omitted.) *Id.* “A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). “An example of an indisputably meritless legal theory is one which is completely contradicted by the record.” *Id.* “Fanciful factual allegations include those which are fantastic or delusional.” *Id.* at 17.

¶ 11 “The allegations of the petition, taken as true and liberally construed, must present the gist of a constitutional claim.” *Hatter*, 2021 IL 125981, ¶ 24. “[T]o survive summary dismissal, a petitioner is only required to include a limited amount of detail and need not present formal legal arguments or citations to legal authority.” *Id.* “However a ‘limited amount of detail’ does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional deprivation.” *People v. Delton*, 227 Ill. 2d 247, 254 (2008). A postconviction petition must include “some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.” *Id.* at 255. The circuit court’s first-stage dismissal of a postconviction petition is subject to *de novo* review. *Hatter*, 2021 IL 125981, ¶ 24.

¶ 12 Claims alleging ineffective assistance of trial counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hodges*, 234 Ill. 2d at 17. Under the *Strickland* standard, “a defendant must show both that counsel’s performance ‘fell below an objective standard of reasonableness’ and that the deficient performance prejudiced the defense.” *Id.* (quoting *Strickland*, 466 U.S. at 687-88). “At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance 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.” *Id.*

¶ 13 In this appeal, defendant claims the circuit court erred by summarily dismissing his petition when he had sufficiently stated the gist of a constitutional claim, namely, that his trial counsel was ineffective for failing to object to or otherwise challenge the trial court's imposition of consecutive prison terms. Defendant alleged in his *pro se* petition his "sentencing order for consecutive sentences were [*sic*] not statutorily authorized" and "counsel failed to object to the circuit court's impermissible application of Section 5-8-4 \*\*\* or otherwise challenge the sentences \*\*\* and the order that they be served consecutively." Defendant claims these allegations were sufficient to survive first stage scrutiny. The State agrees and concedes error. We accept the State's concession.

¶ 14 Section 5-8-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(a) (West 2018)) establishes a presumption that sentences are to be concurrent "unless otherwise determined by the Illinois court under this Section."

¶ 15 Section 5-8-4(c)(1) of the Code provides the court may impose consecutive sentences if, "having regard to the nature and circumstances of the offense and the history and character of the defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4(c)(1) (West 2018).

¶ 16 "[A] trial court's imposition of consecutive sentences [is] not in and of itself sufficient to imply that the court was of the opinion that the consecutive term was necessary for the protection of the public." *People v. Hicks*, 101 Ill. 2d 366, 374-75 (1984). That said, a trial court "need not recite the language of the statute in reaching its determination. [Citation.] 'What is required is that the record show that the sentencing court is of the opinion that a consecutive

term is necessary for the protection of the public.’ [Citation.]” *Id.* at 375 (quoting *People v. Pittman*, 93 Ill. 2d 169, 178 (1982)).

¶ 17 Defendant’s allegation that his counsel was ineffective for failing to challenge the trial court’s imposition of consecutive terms, taken as true and liberally construed, sufficiently stated a gist of a constitutional deprivation. The allegations contained an arguable basis either in law or in fact that defendant’s right to the effective assistance of counsel was jeopardized to survive first-stage dismissal.

¶ 18 Because a postconviction petition must survive as a whole or be dismissed as a whole, we decline to address the sufficiency of the other allegations set forth in defendant’s *pro se* petition. See *People v. Rivera*, 198 Ill. 2d 364, 374 (2001) (holding “that summary partial dismissals made during the first stage of a postconviction proceeding are not permitted under the Act”).

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we reverse the circuit court’s judgment and remand for further proceedings.

¶ 21 Reversed and remanded.