2012 IL App (2d) 110889-U
No. 2-11-0889
Order filed December 26, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 04-CF-2576
WILLIE S. WALKER, JR.,	)	Honorable Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that his guilty plea was invalid: because defendant had not timely moved to withdraw his plea, his postconviction claim was forfeited.

¶ 2 Defendant, Willie S. Walker, Jr., pleaded guilty to unlawful delivery of a controlled substance (720 ILCS 570/401(a)(2) (West 2004)). In exchange for the plea, the State agreed not to seek a life sentence (see 720 ILCS 5/33B-1(a), (e) (West 2004)) and recommended an extended term of 60 years' imprisonment (see 730 ILCS 5/5-5-3.2(b)(1), 5-8-2(a)(2) (West 2004)). After receiving a factual basis for the plea and finding that the plea was knowingly and voluntarily entered, the trial

court accepted the plea and imposed the agreed-upon 60-year sentence. The court then admonished defendant about his right to appeal, explicitly informing defendant that, if he wished to appeal, he needed to file a motion to withdraw his guilty plea first. Instead of doing so, defendant filed a postconviction petition, claiming, among other things, that his counsel was ineffective for failing to move for a substitution of judge. The trial court summarily dismissed the petition, finding the petition frivolous and patently without merit. This timely appeal followed. Because we find defendant's claim forfeited, we affirm.

¶ 3 The facts relevant to resolving the issue raised in this appeal are as follows. Following this court's reversal of defendant's conviction and remand for a new trial (see *People v. Walker*, No. 2-06-0701 (2007) (unpublished order under Supreme Court Rule 23)), defendant pleaded guilty to unlawful delivery of a controlled substance. At the hearing on the guilty plea, the State outlined the terms of the plea agreement, the trial court advised defendant about the minimum and maximum penalties and defendant's right to pursue a trial, the parties stipulated to the factual basis to support the plea, and the court admonished defendant.

¶ 4 In admonishing defendant, the following colloquy occurred:

> "THE COURT: ***
>
> [Defendant], is anyone forcing you to plead guilty today?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Are you doing this of your free will?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Have any threats or promises been made to you to get you to do this?
>
> THE DEFENDANT: No, Your Honor.

THE COURT: All right. And have you talked over all your options with [counsel]?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And this is your decision?

THE DEFENDANT: Yes, Your Honor.

THE COURT: No one is forcing you to do this?

THE DEFENDANT: No, Your Honor."

¶ 5 The trial court asked defendant whether, knowing the nature of the charges against him, the possible penalties, and his legal rights, he still wished to plead guilty. Defendant indicated that he did. The court asked defendant to read through the waiver of rights and plea-of-guilty form, asked defendant whether he understood those rights, and then had defendant sign the form. Defendant complied, advising the court that he wished to persist in his guilty plea. Based on all of that, the court found defendant's plea knowingly and voluntarily entered and imposed the agreed-upon sentence of 60 years' imprisonment.

¶ 6 The trial court then advised defendant about his right to appeal. In doing so, the court told defendant that he had entered a "negotiated plea." Because of that, the court told defendant, "[b]efore [he could] appeal[, he had to] file in this court within thirty days of today's date a written notice asking to have the judgment vacated and for leave to withdraw, or take back, [his] plea of guilty setting forth the grounds for the motion." The court explained what would happen if that motion were granted. Defendant asserted that he understood what he needed to do. The court told defendant, "[i]n any appeal taken from a judgment on a plea of guilty, any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed

waived or given up." Defendant advised the court that he understood "everything [the court] said" and did not have any questions.

¶ 7 After discussing whether the trial court could recommend defendant for drug treatment while in custody, the court asked defendant whether he had "been satisfied with the representation [he] received from [counsel] in this case." Defendant said, "Yes, Your Honor." The court asked whether defendant "underst[oo]d that [these] decisions have been [defendant's] decisions ultimately." Defendant responded that he did.

¶ 8 More than five months later, defendant filed a petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). In his petition, defendant alleged, among other things, that "[the trial court] was prejudice[d] when it sentence[d] defendant to the max extended term of 60 years imprisonment." Defendant explained that "[counsel] stipulated to defendant that the choices defendant had were 6 years to 60 years extended term because [counsel] advised defendant that [the trial court] was infact [*sic*] prejudice[d] against three (3) types of crimes, 1) *murder* 2) *sex crimes* 3) *drug crimes*." (Emphases in original.) Defendant alleged that "[he] filed a *pro se* change of venue for substitut[ion] of Judge [and counsel] refused to adopt said motion." Defendant asserted that the "[m]otion filed by defendant for substitut[ion] of Judge was yanked out of the court docket without a hearing by [counsel]."

¶ 9 Attached to defendant's petition was defendant's certificate prepared pursuant to section 1-109 of the Code of Civil Procedure (the Code) (735 ILCS 5/1-109 (West 2010)). Also attached to the petition was a *pro se* motion for a substitution of judge that was mailed to the court, the circuit clerk, and the State's Attorney on July 1, 2009, six months before defendant pleaded guilty. Although defendant claimed in this motion that the court was prejudiced against him, he claimed that

that prejudice was based on the court's alleged refusal to grant defendant's motion to retest the cocaine seized and "all motions that would help defendant in his defense[.]" We note that the motion is not file-stamped and appears nowhere else in the record.

¶ 10 Within 90 days after the postconviction petition was filed (see 725 ILCS 5/122-2.1(a) (West 2010)), the trial court dismissed it, finding it "patently frivolous and without merit." In making that finding, the court noted that "[it] was and is able to give the defendant a fair hearing and due consideration with out [*sic*] prejudice." This timely appeal followed.

¶ 11 At issue in this appeal is whether the summary dismissal of defendant's petition was proper. "The Act provides a remedy to defendants who have suffered substantial violations of their constitutional rights." *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). When the death penalty is not involved, there are three stages to the proceedings. *Id.* This appeal concerns the dismissal of the petition at the first stage.

¶ 12 During the first stage, the trial court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). The trial court may summarily dismiss the petition if it finds that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). In addition, the court may summarily dismiss a petition if it finds that the defendant's claims are forfeited. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). "[Forfeiture] operate[s] to bar the raising of claims that *** could have been adjudicated on direct appeal." *Id.* However, where a defendant relies on matters outside the record, forfeiture does not apply. *People v. Munson*, 206 Ill. 2d 104, 118 (2002).

¶ 13 We review *de novo* the summary dismissal of a petition. *People v. Little*, 335 Ill. App. 3d 1046, 1051 (2003). In doing so, because we review the trial court's judgment and not the reasons the trial court gave for its ruling, we may affirm on any basis the record supports. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 14 Prior to considering defendant's contention of error, we briefly address the State's claim that defendant's petition is a nullity because he certified the veracity of his petition instead of filing a notarized affidavit in support of his petition, which is required by section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2010)). Consistent with our decisions in *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 27-28, and *People v. Turner*, 2012 IL App (2d) 100819, ¶¶ 43-44, we decline to resolve this matter based on a procedural defect that was not addressed by the lower court prior to appellate review.

¶ 15 Defendant argues on appeal that he "set forth an arguable constitutional claim that he was denied effective assistance of counsel because of [counsel's] failure to act on knowledge about the judge's bias." In presenting this claim, defendant asserts that "[f]or an attorney to tell his client that the judge will most certainly impose a maximum sentence, but not make any effort to change the inevitable, is not sound strategy." Defendant then contends that "[c]ounsel's failure to fully protect [defendant's] rights [by filing a motion to substitute judge] affected the voluntariness of the plea."

¶ 16 In response, the State argues that defendant forfeited his claim by failing to move to withdraw his guilty plea. Alternatively, the State argues that, assuming the claim is not forfeited, the record rebuts any contention that defendant's guilty plea was not voluntary.

¶ 17 Having reviewed the record on appeal and the arguments the parties advance, we conclude that defendant forfeited the claim he raised in his petition, because defendant never timely moved to withdraw his guilty plea. Instructive on this point is *People v. Vilces*, 321 Ill. App. 3d 937 (2001).

¶ 18 In *Vilces*, the defendant pleaded guilty to two drug offenses. *Id.* at 938. In exchange for his guilty plea, the State agreed to a 28-year term of imprisonment. *Id.* The trial court imposed the agreed-upon sentence and advised the defendant that, if he wished to appeal, he needed to move to withdraw his guilty plea first. See *id.* at 938, 940. Instead of doing so, the defendant filed a postconviction petition, alleging that his guilty plea was involuntary and coerced because his attorney incorrectly advised him that, if he did not plead guilty and went to trial, he would receive at least 40 years' imprisonment. *Id.* at 939. The trial court summarily dismissed the petition, finding it frivolous and patently without merit, and the defendant appealed. *Id.* at 938-39.

¶ 19 On appeal, this court found the defendant's claim forfeited for two reasons. *Id.* at 939. With regard to the second reason, we noted that, if the defendant wished to contest the voluntariness of his guilty plea, he had to first file a motion to withdraw his guilty plea. *Id.* at 940. The defendant's failure to do so precluded this court from addressing his claim. *Id.* at 940-41.

¶ 20 In reaching our conclusion, we found unavailing the defendant's contention that the forfeiture rule should be relaxed because the defendant's claim centered around a private conversation, which did not appear in the record, that the defendant had with his attorney. *Id.* at 941. Citing our supreme court's decision in *People v. Stewart*, 123 Ill. 2d 368 (1988), we asserted:

> " '[B]y its explicit terms, Rule 604(d) states that issues not preserved in a motion to vacate a guilty plea are waived. The waiver rule applies to post-conviction proceedings as well as

> to appeals. [Citation.] Also, the rule specifically allows for introduction of extra-record facts by affidavit, so the defendant's 'off-the-record' argument is unavailing.
>
> Any allegations relating to the defendant's subjective confusion or lack of understanding could have been supported by affidavits at the motion-to-vacate stage. Because they were not, we find that the issue has been waived.' " *Vilces*, 321 Ill. App. 3d at 941 (quoting *Stewart*, 123 Ill. 2d at 374).

¶ 21 Because the defendant's allegations regarding his attorney's alleged coercion to get the defendant to plead guilty were within the defendant's knowledge and could have been raised in a motion to withdraw his guilty plea, we found that the defendant waived, or forfeited for purposes of the Act, that claim in his postconviction petition. *Id.*

¶ 22 Moreover, we noted that the defendant's failure to file a direct appeal did not mandate that he could raise his claim of coercion in a postconviction petition. *Id.* at 942. Rather, we determined that, if the defendant wished to challenge in a postconviction petition the voluntariness of his plea, he had to claim in his petition that he wished to file a timely motion to withdraw his plea as involuntary and that his counsel was ineffective for failing to file that motion. *Id.* The only valid excuse for the failure to do so would be that the basis for the involuntariness of the defendant's plea was not available to the defendant when he should have moved to withdraw his plea. *Id.* at 943.

¶ 23 Here, as in *Vilces*, defendant was admonished that he had to first file a motion to withdraw his plea before he could appeal and that any claims not raised in that motion would be waived. Despite that admonition and a concession that he understood the admonition, defendant never moved to withdraw his plea. Rather, like in *Vilces*, defendant attempts to make a postconviction claim that his plea is somehow invalid because his trial counsel never moved to substitute judges. Because,

as in *Vilces*, defendant in the present case never timely moved to withdraw his plea based on that claim and defendant was aware of the facts that would have supported a timely motion, his claim now is forfeited.

¶ 24 In his reply brief, defendant cites *People v. Wilk*, 124 Ill. 2d 93 (1988), and *People v. Flowers*, 208 Ill. 2d 291 (2003), in support of his position that he may bring a claim under the Act even if he never filed a proper motion to withdraw his guilty plea in the trial court. Neither case supports defendant's position.

¶ 25 This court addressed *Wilk* in *Vilces*, noting that, pursuant to *Wilk*, a defendant who pleads guilty may challenge the voluntariness of his plea in a postconviction petition if the claim that the plea was involuntary was based on a claim that counsel was ineffective for failing to move to withdraw the plea. *Vilces*, 321 Ill. App. 3d at 942; see also *Wilk*, 124 Ill. 2d at 107-08 ("Under the circumstances such as those involved in these cases in a post-conviction petition, the defendant *pro se* needs only to allege a violation of his sixth amendment right to effective assistance of counsel, due to the attorney's failure to preserve appeal rights [by filing a motion to withdraw the guilty plea], and allege whatever grounds he or she would have had to withdraw his or her plea of guilty had a proper motion to withdraw been filed by defendant's counsel prior to the filing of a notice of appeal.").

¶ 26 Similarly, in *Flowers*, where the defendant entered an open plea of guilty, the defendant alleged in the postconviction petition that she filed and later withdrew that "she had not had an adequate opportunity to confer with her lawyer regarding her sentence, was 'not given a chance to argue sentence,' and was denied effective assistance of counsel when her attorney failed to move for reconsideration [of her sentence] after the trial court imposed a sentence in excess of what she

thought she should receive." *Flowers*, 208 Ill. 2d at 296. Although *Flowers* did not concern an appeal following the dismissal of a postconviction petition, our supreme court nevertheless observed that the defendant's claims challenging her sentence could have been brought and "[h]ad those proceedings simply moved forward, the case would have been routine and unremarkable, at least from a procedural standpoint." *Id.* at 302.

¶ 27 What makes *Wilk* and *Flowers* inapplicable here is that, as we noted in *Vilces*, a defendant's failure to move to withdraw a guilty plea in the trial court does not prevent that defendant from arguing in a postconviction petition that his counsel was ineffective for failing to preserve his appeal rights by filing a proper motion, which is what the defendants alleged in *Wilk* and *Flowers*. However, that did not happen here. Rather, as noted, defendant argued here that his counsel was ineffective for failing to move for a substitution of judges. Unlike the scenarios presented in *Wilk* and *Flowers*, the present case has nothing to do with defendant being unable to challenge the voluntariness of his plea because his counsel failed to preserve his right to appeal by filing a motion to withdraw his guilty plea.

¶ 28 Because we determine that defendant forfeited the issue he raised in his petition by failing to move to withdraw his guilty plea, we need not consider the other issue raised.

¶ 29 For these reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 30 Affirmed.