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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-311
)	
DAVID O. LEMBKE,)	Honorable
)	John A. Barsanti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly summarily dismissed defendant's postconviction petition, which alleged that his guilty pleas were the product of ineffective assistance of counsel: because defendant did not raise his claim in his motion to withdraw the pleas, which he filed with the assistance of new counsel, the claim was forfeited.
- ¶ 2 Defendant, David O. Lembke, appeals from the trial court's summary dismissal of his petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He alleged that his trial counsel, Fred Morelli, was ineffective for failing to properly advise him of a plea offer and of the maximum possible sentence before he pleaded guilty to unlawful

participation in methamphetamine manufacturing (720 ILCS 646/15(a)(1), (a)(2)(A) (West 2006)), a Class 1 felony; unlawful possession of methamphetamine (720 ILCS 646/60(a), (b)(1) (West 2006)) a Class 3 felony; and two counts of unlawful delivery of methamphetamine (720 ILCS 646/55(a)(1), (a)(2)(A) (West 2006)), both Class 2 felonies. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In October 2007, defendant was charged by information with six counts related to production and possession of methamphetamine, including a Class X charge of aggravated unlawful participation in methamphetamine manufacturing (720 ILCS 646/15(b)(1)(A), (b)(2)(A) (West 2006)). At his arraignment, defendant was admonished that he could receive a sentence of 6 to 30 years' incarceration on the Class X felony charge, 4 to 15 years on the Class 1 felony charge, and an extended 3 to 14 years on the Class 2 felony charges. The possibility of an extended term or Class X sentencing on the Class 1 felony charge of unlawful participation in methamphetamine manufacturing was not discussed.

¶ 5 On March 13, 2008, a conference was held under Illinois Supreme Court Rule 402(d)(2) (eff. July 1, 1997), and a plea offer was discussed, but the details were not put on the record at that time. Also on that date, the defense asked for a five-day continuance. The State said that it would probably keep the plea offer open for one week, but after that it would be off the table. At the State's request, the court also advised defendant that he was eligible for Class X sentencing on the two Class 2 felony charges.

¶ 6 On March 18, 2008, the parties appeared, and the court noted that there had been a Rule 402 conference the week before. Morelli, without providing further explanation, said that everything had changed and he asked for a status date to explain the changes to defendant.

¶7 On April 21, 2008, defendant entered an open plea to two Class 2 counts of unlawful delivery of methamphetamine and to Class 3 possession of methamphetamine. Defendant stated that no promises had been made in exchange for the plea and said that he had discussed the plea with Morelli.

¶8 On June 12, 2008, defendant entered an open plea to the Class 1 charge of unlawful participation in methamphetamine manufacturing, in exchange for the State's dismissal of the remaining charges against him. During the court's admonitions, the court noted that the sentencing range was 4 to 15 years' incarceration, and the State indicated that the offense was subject to an extended term. The court then stated that the range was 4 to 30 years.¹ Defendant stated that he did not realize that, and the court allowed him to speak to Morelli. After returning from that discussion, defendant said he understood that the sentencing range was 4 to 30 years. He then pleaded guilty.

¶9 At sentencing, the State presented evidence about the hazards of methamphetamine production and that defendant had manufactured it in an apartment building, even when his young child was present. The State also noted the presentence report showing that defendant had a long history of addiction and had never undertaken treatment. Defendant had multiple past convictions of drug offenses and, while he was on parole for one of those offenses, he tested positive for

¹Defendant was eligible to be sentenced to an extended term with a maximum of 30 years because he had been convicted of the same or a greater class felony within the previous 10 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2006). He also was subject to sentencing as a Class X offender with a maximum of 30 years because he was over 21 years of age and had twice been convicted of a Class 2 or greater felony. 730 ILCS 5/5-5-3(c)(8) (West 2006).

marijuana, alcohol, and cocaine. The State asked for at least a 20-year sentence. Defendant presented mitigating evidence and asked for a 10-year sentence.

¶ 10 The trial court sentenced defendant to 20 years' incarceration on the charge of unlawful participation in methamphetamine manufacturing. He was sentenced to concurrent terms of 10 years' incarceration on the Class 2 charges and 5 years on the Class 3 charge.

¶ 11 Defendant moved to withdraw his pleas and to reconsider the sentence. Those motions were dismissed after Morelli failed to appear for a hearing. Defendant obtained new counsel and filed new motions that alleged that, based on the Rule 402 conference, the court had agreed to sentence him to 10 years' incarceration. He further argued that he was not properly admonished of the term of mandatory supervised release that he would have to serve. He also argued that the court failed to consider mitigating factors when it sentenced him.

¶ 12 At a hearing on the motions, Morelli testified that, before the Rule 402 conference, the State made a plea offer that would have resulted in a recommendation of either 12 or 14 years' incarceration. He testified that the Rule 402 conference resulted in a 10-year offer that was initially presented as available for one day. However, he also recalled that the State said, either at the conference or after it, that the offer would be held open until the following Tuesday. The offer was not accepted, because defendant wanted to discuss it with his family and, on the following Monday, the State changed the offer to 14 years. A new Rule 402 conference was never held. Morelli then recommended that defendant plead guilty to charges to which Morelli felt he did not have a good defense and go to trial on the other charges. Morelli later recommended the guilty plea to the charge of unlawful participation in methamphetamine manufacturing when the State agreed to dismiss a Class X charge. Morelli discussed the nature of a blind plea with defendant and told him that, while

he “certainly didn’t guarantee it,” his expectation was that the judge would probably give defendant the 10-year sentence discussed at the Rule 402 conference. The court denied the motions, defendant appealed, and we affirmed. *People v. Lembke*, No. 2-10-0102 (2011) (unpublished order under Supreme Court Rule 23).

¶ 13 On June 17, 2011, defendant filed a *pro se* postconviction petition, alleging that his plea was involuntary and that Morelli was ineffective. He alleged that Morelli withheld information about the one-day plea offer and improperly advised him to plead guilty based on the expectation that defendant would be sentenced to 10 years’ incarceration. As a result, defendant asked that the court vacate his pleas. Defendant attached a letter from Morelli memorializing the Rule 402 conference. He did not attach any affidavits, and the petition was not notarized or otherwise verified. However, a certificate of service was notarized.²

¶ 14 On July 29, 2011, the trial court dismissed the petition as frivolous and patently without merit. The court additionally noted that defendant failed to attach supporting affidavits to the petition and that defendant had failed to allege sufficient facts to show ineffective assistance of counsel. Defendant’s motion to reconsider was denied, and he appeals.

¶ 15

II. ANALYSIS

¶ 16 Defendant argues that he sufficiently stated a claim that Morelli was ineffective by failing to inform him of the plea offer and the maximum sentence he could receive. We determine,

²The State contends that we should affirm on other grounds based on the lack of a verified petition. Because we determine that defendant forfeited his arguments, we need not address the State’s verification argument.

however, that defendant forfeited his argument when he failed to raise it in his motion to withdraw the pleas.

¶ 17 “Except in cases where the death penalty has been imposed, the Act establishes a three-stage process for adjudicating a postconviction petition.” *People v. Carballido*, 2011 IL App (2d) 090340, ¶ 37 (citing *People v. Jones*, 213 Ill. 2d 498, 503 (2004)). “At the first stage, the trial court must review the petition within 90 days of its filing to determine whether it is either frivolous or patently without merit.” *Id.* (citing 725 ILCS 5/122-2.1(a)(2) (West 2008)). “If the trial court determines that the petition is either frivolous or patently without merit, it must dismiss the petition in a written order.” *Id.*

¶ 18 A *pro se* postconviction petition is frivolous or patently without merit when it has “no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). “A petition has no basis in law when it is based on an ‘indisputably meritless legal theory,’ meaning that the legal theory is ‘completely contradicted by the record.’ ” *Carballido*, 2011 IL App (2d) 090340, ¶ 37 (quoting *Hodges*, 234 Ill. 2d at 16). “A petition has no basis in fact when it is based on ‘fanciful factual allegation[s],’ meaning that the factual allegations are ‘fantastic or delusional.’ ” *Id.* (quoting *Hodges*, 234 Ill. 2d at 17). “We review *de novo* a trial court’s first-stage dismissal.” *Id.*

¶ 19 The scope of postconviction review is limited by the doctrines of *res judicata* and forfeiture. *People v. Stewart*, 123 Ill. 2d 368, 372 (1988). “In essence, post-conviction proceedings are limited to issues which have not been, and could not have been, previously adjudicated.” *Id.* Thus, all issues actually decided on direct appeal are *res judicata*, and all those that could have been presented but were not are forfeited. See *id.* “To excuse forfeiture in the context of postconviction proceedings, it must be determined that (1) fundamental fairness so requires, (2) the alleged

forfeiture stems from the incompetence of appellate counsel, or (3) facts relating to the claim do not appear on the face of the original appellate record.” *People v. Newman*, 365 Ill. App. 3d 285, 288 (2006).

¶ 20 Here, after he pleaded guilty, defendant obtained new counsel and filed a motion to withdraw his pleas. However, he failed to include his argument concerning Morelli’s advice to him about the maximum sentence and the plea offer.

¶ 21 Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), which relates to appeals from judgments entered upon pleas of guilty, provides in part:

“No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court *** a motion to withdraw the plea of guilty and vacate the judgment. *** The motion shall be in writing and shall state the grounds therefor. When the motion is based on facts that do not appear of record it shall be supported by affidavit. *** Upon appeal any issue not raised by the defendant in the motion to withdraw the plea of guilty and vacate the judgment shall be deemed waived.”

¶ 22 By its explicit terms, Rule 604(d) states that issues not preserved in a motion to withdraw a guilty plea are forfeited. *Stewart*, 123 Ill. 2d at 374. The rule applies to postconviction proceedings as well as to appeals. *Id.* The rule also applies to claims of ineffective assistance of counsel in connection with the plea when the defendant obtains new counsel and files a motion to withdraw the plea. See *id.*

¶ 23 In this case, defendant obtained new counsel and filed a motion to withdraw his guilty pleas. He did not include his present claim, and nothing suggests any reason why he could not have done

so. Defendant does not assert any facts that were not known at the time of the motion to withdraw the pleas and, with new counsel, he could have asserted any ineffective-assistance claims in connection with the pleas at that time. Accordingly, the matter is forfeited. See *id.*; see also *People v. Jackson*, 213 Ill. App. 3d 806, 810 (1991) (defendant knew of inaccurate advice concerning an extended-term sentence when sentencing occurred and could have raised the matter in a posttrial motion); *People v. Ramsey*, 137 Ill. App. 3d 443, 448 (1985) (noting the effect of defendant having new counsel for the motion to withdraw the plea).

¶ 24 As noted, forfeiture does not apply when fundamental fairness so requires, the forfeiture stems from the incompetence of appellate counsel, or facts relating to the claim do not appear on the face of the original appellate record. Defendant does not make arguments in connection with any of these recognized exceptions, nor do any apply. Fundamental fairness requires “cause for failing to raise the claim (*People v. Pitsonbarger*, 205 Ill. 2d 444, 458-59 (2002)), and defendant has none. The other two categories excuse a failure to raise a claim on direct appeal, but not a failure to raise it in a motion to withdraw a plea. In any event, there were additional valid reasons for the trial court’s dismissal of defendant’s petition. For example, defendant failed to attach any affidavits to his petition, including his own, as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). Further, defendant did not sufficiently allege prejudice. To establish the prejudice prong of an ineffective-assistance claim in these circumstances, the defendant must show a reasonable probability that, absent counsel’s errors, the defendant would have pleaded not guilty and insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). “A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice.” *Id.* “Rather, the defendant’s claim must be accompanied by either a claim

of innocence or the articulation of a plausible defense that could have been raised at trial.” *Id.* at 335-36. Defendant made no such allegations.

¶ 25

III. CONCLUSION

¶ 26 Defendant forfeited his postconviction claim. Accordingly, the judgment of the circuit court of Kendall County is affirmed.

¶ 27 Affirmed.