

2012 IL App (2d) 110985-U  
No. 2-11-0985  
Order filed June 15, 2012

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04-CF-1265
	)	
GREGORY TOMBERG,	)	Honorable
	)	Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Burke and Hudson concurred in the judgment.

**ORDER**

*Held:* The trial court properly summarily dismissed defendant's postconviction petition alleging ineffective assistance of appellate counsel: the primary claim that counsel allegedly should have raised—that the trial court considered facts outside the record at sentencing—was without merit, and defendant forfeited other claims by failing to argue how they had merit.

¶ 1 Defendant, Gregory Tomberg, appeals from the summary dismissal of his postconviction petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Following a jury trial, defendant was convicted of eight counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1996)) and four counts of aggravated criminal sexual assault (720 ILCS 5/12-14(b)(i) (West 1994)). He was sentenced to an aggregate term of 100 years' imprisonment. Defendant raised numerous issues on direct appeal, including that the trial court abused its discretion in sentencing him. We affirmed. *People v. Tomberg*, No. 2-08-0182 (2009) (unpublished order under Supreme Court Rule 23). On June 29, 2011, defendant filed a postconviction petition. In the petition, he alleged that he received the ineffective assistance of appellate counsel in that appellate counsel failed to challenge the severity of defendant's sentence, the trial court's failure to consider defendant's rehabilitative potential, the trial court's failure to note on the record the basis for its imposition of an extended-term sentence, the trial court's failure to adequately consider the mitigating evidence in choosing to impose an extended-term sentence, and the trial court's consideration of facts outside the record. The trial court summarily dismissed defendant's petition, and defendant filed this timely appeal.

¶ 4

#### ANALYSIS

¶ 5 On appeal, defendant contends that the trial court erred in summarily dismissing his petition, because it stated the gist of a claim of ineffective assistance of appellate counsel. The Act provides a remedy to criminal 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. *Barcik*, 365 Ill. App. 3d at 190. 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). A petition is “frivolous or patently without merit” if it does not state the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). “We review *de novo* the first-stage dismissal of a postconviction petition.” *Barcik*, 365 Ill. App. 3d at 190.

¶ 6 Claims of ineffective assistance of appellate counsel are governed by the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). “A petitioner must show [1] that appellate counsel’s performance fell below an objective standard of reasonableness and [2] that this substandard performance caused prejudice, *i.e.*, there is a reasonable probability that, but for appellate counsel’s errors, the appeal would have been successful.” *People v. Golden*, 229 Ill. 2d 277, 283 (2008). The failure to establish either of these prongs is fatal to a defendant’s claim of ineffective assistance. *People v. Hayden*, 338 Ill. App. 3d 298, 305 (2003). Where the underlying claim lacks merit, a defendant cannot be said to have received ineffective assistance of appellate counsel for appellate counsel’s failure to raise the claim on appeal. *People v. Johnson*, 206 Ill. 2d 348, 378 (2002).

¶ 7 Defendant argues that he received the ineffective assistance of appellate counsel primarily because appellate counsel did not argue on direct appeal that the trial court erred in considering facts outside the record when it sentenced defendant. According to defendant, the trial court found that defendant abused more than three children although the evidence presented at trial and sentencing indicated that defendant abused only three—D.M. (the victim of the charged offenses), D.N., and S.W. Because the underlying claim—that the trial court took into consideration evidence outside the record—is without merit, defendant has failed to state the gist of a claim of ineffective assistance of appellate counsel.

¶ 8 In support of his claim, defendant points to several comments made by the trial court during sentencing and at the hearing on defendant's motion to reconsider the sentence. The comments at sentencing, in their full context, are as follows.

“The evidence in this case in my opinion is beyond any doubt that Mr. Tomberg engaged in similar conduct with others. I heard and weighed the evidence in regard to [S.W.] that was talked about today. I've considered the exhibit that the state pointed out that related to him in what can only be categorized as sexual poses that were clearly taken by someone, presumptively by Mr. Tomberg. And so it's clear and also I've considered the evidence from the trial. There is no doubt. That doubt that there are other people that Mr. Tomberg, other children that Mr. Tomberg has engaged in this conduct with.

Based on the evidence I've heard, [D.M.] would be at least the third person that would have been victimized by Mr. Tomberg. There are other photos that have been introduced into evidence of [S.W.] and other people. And there is no evidence per se that there was any sexual contact between Mr. Tomberg and those people. But I think it does give some indication as to his rehabilitative potential.”

At the hearing on defendant's motion to reconsider, the trial court made the following statements:

“The evidence both at the trial and at the sentencing show that at least with three different minors there is some type of contact. I am, I guess, finding that the evidence that's been presented indicated to me that there was contact with [S.W.], understanding that it's clear from the evidence presented at the sentencing hearing that [S.W.] denies that contact. No question [S.W.] denies that contact.

The photographs that were admitted from—that were found at the Tomberg home of [S.W.] are—and the record will reflect those photographs or exhibits, they’ve been entered into evidence. It’s difficult to—it’s difficult to think of more firm evidence of some type of sexual conduct, even if it’s just as Mr. Ryan [defense counsel] was alluding to, that he was victimized, if you will, by being made subject of those photographs. Those photographs are graphic. Those photographs are explicit.

And based on that, based on the evidence with [D.M.] and based on the evidence with the victim in this case, it’s clear to me that Mr. Tomberg’s rehabilitative potential is limited or nonexistent.”

¶ 9 Although defendant contends that the trial court’s references to “other children” and “at least” three children indicate that the trial court believed that defendant abused children other than just D.M., D.N., and S.W., the context of the trial court’s comments makes apparent that the trial court was referring only to the abuse of D.M., D.N., and S.W. Specifically, the trial court’s references to “other children” were directly followed by discussions of the evidence indicating that defendant abused S.W. In addition, the trial court’s statement that the evidence indicated that defendant abused “at least” three children does not in any way suggest that the trial court made a finding that defendant abused more than three children. By its very terms, the phrase “at least” indicates a minimum without defining a maximum. Because evidence was presented that defendant abused three children—D.M., D.N., and S.W.—the trial court’s statement that defendant abused “at least” three children was entirely accurate and based on the evidence in the record. As the underlying claim is without merit, defendant has not stated the gist of a claim of ineffective assistance of appellate counsel for failure to raise this issue. See *Johnson*, 206 Ill. 2d at 378 (where

the underlying claim lacks merit, the defendant did not receive ineffective assistance of appellate counsel).

¶ 10 Defendant also contends on appeal that he stated the gist of a claim of ineffective assistance of appellate counsel because appellate counsel failed to raise the following issues on direct appeal: (1) the trial court's opinion that defendant lacked rehabilitative potential was "speculative and unsupported by evidence," (2) the trial court ignored the evidence presented in mitigation, and (3) the trial court did not offer any "overwhelming factors in aggravation to offset the compelling mitigation presented." As the State points out in its brief, defendant does not in any way explain how appellate counsel's failure to raise these claims on direct appeal constituted ineffective assistance. Nor does he cite any authority that would suggest that such issues would have been successful if raised on direct appeal. Rather, he simply makes the conclusory assertion that, had the issues been raised on direct appeal, a new sentencing hearing would have been awarded. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) requires that the appellant's brief include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Thus, when submitting briefs to this court, appellants must clearly define the issues raised and cite relevant authority, as this court is not a repository into which appellants may dump the burden of research. *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993). Defendant has failed to do so here, and absent argument or authority supporting his contention that the failure to raise these issues on direct appeal constituted ineffective assistance of appellate counsel, defendant has forfeited review of this claim.

¶ 11

#### CONCLUSION

¶ 12 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 13 Affirmed.