

NOTICE
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2012 IL App (4th) 111015-U

Filed 8/21/12

NO. 4-11-1015

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ANTHONY S. HARRIS,)	No. 05CF1433
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of defendant's postconviction petition because defendant's petition was frivolous and patently without merit.

¶ 2 In August 2007, a jury convicted defendant, Anthony S. Harris, of robbery (720 ILCS 5/18-1(a) (West 2004)) and three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2004)). The following month, the trial court sentenced defendant to 105 years in prison. On direct appeal, this court affirmed defendant's convictions and sentences.

People v. Harris, No. 4-07-0821 (Feb. 3, 2009) (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant filed a petition for leave to appeal with the Illinois Supreme Court. In September 2009, the supreme court denied defendant's petition but also entered a supervisory

order, instructing this court to reconsider its decision in defendant's case in light of *People v. Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401 (2009). *People v. Harris*, 233 Ill. 2d 576, 914 N.E.2d 489 (2009) (nonprecedential supervisory order on denial of petition for leave to appeal).

¶ 4 We vacated our earlier decision in accordance with the supreme court's directive. After reconsidering defendant's case in light of *Glasper*, we concluded a different result was not warranted and thus affirmed the trial court's conviction and sentence. *People v. Harris*, No. 4-07-0821 (July 12, 2010) (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal with the supreme court, which the supreme court denied. *People v. Harris*, 239 Ill. 2d 566, 943 N.E.2d 1104 (2011).

¶ 5 In October 2011, defendant, through counsel, filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). In November 2011, the trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 6 Defendant appeals, arguing (1) a trial court may not *sua sponte* dismiss a post-conviction petition written and filed by counsel as frivolous and patently without merit, and (2) defendant's postconviction petition was not frivolous or patently without merit. We affirm.

¶ 7 I. BACKGROUND

¶ 8 In January 2005, the State charged defendant by information with one count of robbery, a Class 2 felony (720 ILCS 5/18-1(a) (West 2004)), and one count of aggravated criminal sexual assault, a Class X felony, based on defendant placing his penis in the mouth of the victim, E.P. (720 ILCS 5/12-14(a)(1) (West 2004)). On July 30, 2007, the day defendant's trial commenced, the State charged defendant with two additional counts of aggravated criminal sexual assault based on defendant placing his penis in E.P.'s vagina (count III) and placing his

finger in E.P.'s vagina (count IV).

¶ 9 In August 2007, a jury convicted defendant of all four counts. In September 2007, the trial court sentenced defendant to 15 years in prison on the robbery count and 30 years in prison on each aggravated criminal sexual assault count, ordering the sentences to run consecutively for a total of 105 years in prison. That month, defendant filed a motion to reconsider sentence, which the court denied. Defendant appealed, and we affirmed. *People v. Harris*, No. 4-07-0821 (Feb. 3, 2009) (unpublished order under Supreme Court Rule 23).

¶ 10 Defendant filed a petition for leave to appeal with the Illinois Supreme Court. In September 2009, the supreme court denied defendant's petition but also entered a supervisory order directing us to reconsider our decision in defendant's case in light of *People v. Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401 (2009). *People v. Harris*, 233 Ill. 2d 576, 914 N.E.2d 489 (2009) (nonprecedential supervisory order on denial of petition for leave to appeal). We vacated our earlier decision. After reconsidering defendant's case in light of *Glasper*, we concluded a different result was not warranted and again affirmed the trial court's conviction and sentence. *People v. Harris*, No. 4-07-0821 (July 12, 2010) (unpublished order under Supreme Court Rule 23). Defendant again filed a petition for leave to appeal with the supreme court. In January 2011, the supreme court denied defendant's petition.

¶ 11 In October 2011, defendant, through hired counsel, filed a petition for relief under the Act (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant's petition argued he received ineffective assistance of both trial and appellate counsel. Specifically, defendant argued trial counsel provided ineffective assistance when counsel failed to (1) object to or seek reconsideration of the trial court's 105-year sentence as being in excess of the statutorily

authorized consecutive aggregate maximum, (2) object to or seek reconsideration of the trial court's 105-year sentence as violating the "proportionality clause," (3) challenge the constitutionality of the Illinois speedy-trial statute, or (4) object to or request the trial court to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) regarding the four *Zehr* principles (see *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062, 1064 (1984)). Defendant also argued appellate counsel provided ineffective assistance when counsel failed to raise issues (1) through (3) on appeal.

¶ 12 Less than a week later, the trial court summarily dismissed defendant's petition.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues (1) a trial court may not *sua sponte* dismiss a post-conviction petition written and filed by counsel as frivolous and patently without merit, and (2) defendant's postconviction petition was not frivolous or patently without merit. We address each argument in turn.

¶ 16 A. Whether a Petition Filed by Counsel Can Be Dismissed At the First-Stage Proceeding

¶ 17 Defendant first argues a trial court may not *sua sponte* dismiss a postconviction petition written and filed by counsel, but rather, the petition must automatically proceed to the second stage of inquiry under the Act. In support of his argument, defendant contends the Act's language limits the trial court's first-stage inquiry only to *pro se* petitions. We disagree.

¶ 18 We note, initially, defendant relies on an improper reading of the Act to support his claim. Defendant asserts the Act's language states a trial court is to conduct an initial examination upon a petitioner's filing of a "*pro se* petition." He further posits if the legislature

meant to extend the first-stage inquiry to all petitions, including those filed by attorneys, the legislature could have simply eliminated the words "*pro se*" from the statute.

¶ 19 The Act (725 ILCS 5/122-1 to 122-7 (West 2010)), sets forth a three-stage process for postconviction petitions in noncapital cases. *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208 (2009). The first stage is outlined as follows. "Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section." 725 ILCS 5/122-2.1(a) (West 2010). If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. 725 ILCS 5/122-2.1(a)(2) (West 2010).

¶ 20 If the court does not dismiss the petition as frivolous or patently without merit, the petition advances to the second stage, where the court may appoint counsel for an indigent defendant and the State is allowed to file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2010); *Hodges*, 234 Ill. 2d at 10-11, 912 N.E.2d at 1209.

¶ 21 Thus, contrary to defendant's assertion, the Act's language does not limit a trial court's first-stage determination to "*pro se* petitions." Rather, the Act states "[w]ithin 90 days after the filing and docketing of *each* petition, the court shall examine such petition and enter an order thereon pursuant to this Section." (Emphasis added.) 725 ILCS 5/122-2.1(a) (West 2010).

¶ 22 We acknowledge in *People v. Suarez*, 224 Ill. 2d 37, 44, 862 N.E.2d 977, 981 (2007), the Illinois Supreme Court explained the Act's procedure as follows: "Within 90 days of the filing and docketing of a *pro se* petition for postconviction relief, the circuit court is to examine the petition." *Suarez*, 224 Ill. 2d at 44, 862 N.E.2d at 981. We do not interpret the

supreme court's explanation as limiting the first-stage inquiry outlined in the Act solely to *pro se* petitions, however. Rather, the supreme court likely used the words "*pro se*" because (1) generally in postconviction proceedings, petitioners are not represented by attorneys and therefore file *pro se* petitions, and (2) in *Suarez*, the defendant had filed a *pro se* petition.

¶ 23 In *People v. Wright*, 329 Ill. App. 3d 462, 465, 769 N.E.2d 1055, 1058 (2002), the defendant argued because he was represented by counsel, the first-stage proceedings of the Act were nonexistent and second-stage proceedings commenced when counsel filed the postconviction petition. *Wright*, 329 Ill. App. 3d at 465, 769 N.E.2d at 1058. In rejecting the defendant's argument, the Second District noted it did not find any authority in the Act to support defendant's claim. *Id.*

¶ 24 We agree with the *Wright* court. The Act's language does not explicitly limit first-stage inquiries to "*pro se*" petitions. Moreover, section 122-4 of the Act states after conducting a first-stage inquiry, the court shall appoint counsel to represent a petitioner "[i]f the petitioner is without counsel and alleges that he is without means to procure counsel." 725 ILCS 5/122-4 (West 2010). If defendant's contention were correct and the first-stage inquiry applied only to *pro se* petitions, then the court would not later have to determine whether the petitioner was without counsel, because all petitioners would be without counsel. Defendant's interpretation would thus render the Act's language superfluous. See *People v. Jones*, 214 Ill. 2d 187, 193, 824 N.E.2d 239, 242 (2005) ("The statute should be read as a whole and construed so that no part of it is rendered meaningless or superfluous").

¶ 25 Defendant cites *People v. Volkmar*, 363 Ill. App. 3d 668, 843 N.E.2d 402 (2006), a Fifth District case, for the proposition the court must assume counsel, who by signing a

pleading certifies pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994) the pleading is well-grounded in fact and law, will not file a frivolous or patently unmeritorious petition.

Volkmar, 363 Ill. App. 3d at 673, 843 N.E.2d at 406. Defendant further quotes the *Volkmar* court's statement "once counsel has been appointed, any dismissal of the petition should be by adversary process, based on a motion to dismiss filed by the prosecutor, and not done *sua sponte* and summarily by the circuit court." *Volkmar*, 363 Ill. App. 3d at 673, 843 N.E.2d at 406.

¶ 26 *Volkmar* is factually distinguishable from defendant's case. In *Volkmar*, the defendant filed a *pro se* postconviction petition, and after 90 days passed, the trial court appointed counsel to represent the defendant. *Volkmar*, 363 Ill. App. 3d at 669, 843 N.E.2d at 404. The defendant's counsel then filed a *pro se* amended petition. *Volkmar*, 363 Ill. App. 3d at 669-70, 843 N.E.2d at 404. Accordingly, the court in *Volkmar* was faced with the question of whether the court could *sua sponte* dismiss the defendant's amended petition, filed after the 90-day time period and after counsel had been appointed.

¶ 27 Based on the foregoing, we conclude the trial court could properly summarily dismiss defendant's postconviction petition even though it was written and filed by counsel.

¶ 28 B. Whether Defendant's Postconviction Petition Was Frivolous and Patently Without Merit

¶ 29 Having determined the trial court is statutorily authorized to summarily dismiss a postconviction petition written and filed by counsel, we next consider whether defendant's postconviction petition was, in fact, frivolous and patently without merit.

¶ 30 Section 122-2 of the Act requires a postconviction petition to "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West

2010); *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. 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." *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1209. In considering the petition, the trial court may examine the court file of the proceeding in which the defendant was convicted, any transcripts of the proceedings, and any action by the appellate court. 725 ILCS 5/122-2.1(c) (West 2010). All well-pled allegations are taken as true unless contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998).

¶ 31 "[W]hen a postconviction petition is dismissed without an evidentiary hearing, the standard of review is *de novo*." *Suarez*, 224 Ill. 2d at 42, 862 N.E.2d at 979 (citing *Coleman*, 183 Ill. 2d at 388-89, 701 N.E.2d at 1075).

¶ 32 In this case, defendant's petition alleges he was denied effective assistance of both trial and appellate counsel. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, a petition alleging ineffective assistance may not be summarily dismissed at the first stage of postconviction proceedings if it is arguable (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced. *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 33 The State asserts defendant forfeited his arguments by failing to cite any authority in his briefs. Because forfeiture is a restriction on the parties and not the court, however, we decline to address the State's forfeiture contention and instead will address defendant's arguments on the merits. See *In re Estate of Funk*, 221 Ill. 2d 30, 96-97, 849 N.E.2d 366, 403 (2006) ("The rule of waiver *** is an admonition to the parties, not a limitation on the jurisdiction of this

court."). Nevertheless we conclude, on the merits, defendant's petition is frivolous and patently without merit.

¶ 34

1. *Trial Counsel's Assistance*

¶ 35

Defendant first claims trial counsel provided ineffective assistance of counsel when counsel failed to (1) object to or seek reconsideration of defendant's 105-year sentence as being in excess of the maximum aggregate consecutive sentence a trial court is able to impose upon a defendant under section 5-8-4(c)(2) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(c)(2) (West 2006)), (2) object to or seek reconsideration of defendant's 105-year sentence as violating the proportionality clause, (3) challenge the constitutionality of the Illinois speedy-trial statute, and (4) object to or request the trial court to comply with Rule 431(b) regarding the four *Zehr* principles.

¶ 36

a. Excessive Sentence

¶ 37

Defendant first asserts trial counsel provided ineffective assistance when counsel failed to challenge defendant's 105-year sentence as being in excess of the statutorily authorized maximum sentence. We disagree.

¶ 38

Section 5-8-4(c)(2) of the Unified Code provides when a defendant is sentenced for offenses occurring as part of a single course of conduct, the defendant's aggregate sentence cannot exceed the sum of the maximum terms authorized under section 5-8-2 of the Unified Code for the two most serious felonies involved. 730 ILCS 5/5-8-4(c)(2) (West 2006). Here, the jury convicted defendant of three counts of a Class X felony. Section 5-8-2 authorizes a judge, upon finding certain aggravating factors present, to sentence a defendant convicted of a Class X felony to a term of "not less than 30 years and not more than 60 years." 730 ILCS 5/5-8-2(a)(2)

State points out, a person subject to extended-term sentences was not necessarily convicted of an offense with identical elements of defendant's convictions.

¶ 43 Based on the foregoing, defendant's penalty did not violate the proportionality clause; therefore, trial counsel was not ineffective for failing to challenge the constitutionality of defendant's 105-year sentence.

¶ 44 c. Constitutionality of the Illinois Speedy-Trial Statute

¶ 45 Defendant next asserts trial counsel provided ineffective assistance when counsel failed to challenge the constitutionality of Illinois' speedy-trial statute. Specifically, defendant argues because he was taken into custody on an Illinois warrant but served his time in Tennessee, he was not afforded any rights under the speedy-trial statute. Thus, defendant argues, the statute is facially unconstitutional in that it violates the equal-protection clause. The State responds it is incongruous to provide defendant the protection of the speedy-trial provisions when, by refusing to waive extradition, defendant manifested the clear intent to prevent his return for trial in Illinois. We agree with the State.

¶ 46 Section 103-5(a) of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/103-5(a) (West 2006)) provides every person in custody in Illinois for an alleged offense shall be tried within 120 days from the date he was taken into custody unless delay is occasioned by the defendant.

¶ 47 The State charged defendant by information in August 2005. Defendant's presentence report indicates police arrested defendant in Tennessee on August 7, 2006, on the warrant issued in this case. However, when police arrested defendant, he refused to waive extradition. Thus, a governor's warrant was completed. On September 18, 2006, defendant was

sentenced to a term of incarceration in the Tennessee Department of Corrections and was released from custody on May 9, 2007. His trial on the charges in this case began on July 30, 2007.

¶ 48 By refusing to waive extradition, defendant chose to stay in Tennessee rather than return to Illinois on these charges. Accordingly, he cannot now challenge Illinois' speedy-trial statute. See *People v. Uplinger*, 69 Ill. 2d 181, 190, 370 N.E.2d 1054, 1058 (1977) ("The defendant's choice not to waive extradition, we feel, effectively negates the contention that he was anxious to return to Illinois for trial."). The State also notes that under the Interstate Agreement on Detainers Act (IAD), defendant was arguably entitled to be brought to trial in Illinois within 180 days of making a request for final disposition of his charges in Illinois. 730 ILCS 5/3-8-9 (West 2006). Defendant, however, never made such a request.

¶ 49 Defendant argues as a corollary issue any delay attributable to him with respect to counts I and II could not be attributable to him with respect to counts III and IV, because the State did not charge him with counts III and IV until the day of his trial. In support of his contention, defendant cites *People v. Williams*, 204 Ill. 2d 191, 788 N.E.2d 1126 (2003), wherein the Illinois Supreme Court held that if the State brings new and additional charges arising from the same facts as the original charges, any continuances attributable to a defendant with respect to the original charge could not be attributed to the defendant with respect to the new and additional charges. *Williams*, 204 Ill. 2d at 201, 788 N.E.2d at 1133 (citing *People v. Williams*, 94 Ill. App. 3d 241, 248-49, 418 N.E.2d 840, 846 (1981)). The supreme court later narrowed the *Williams* rule, however, concluding it does not apply to situations in which the State is not required to join the additional and original charges in a single prosecution under the principles of

compulsory joinder. *People v. Gooden*, 189 Ill. 2d 209, 217-18, 725 N.E.2d 1248, 1253 (2000).

The compulsory-joinder statute requires a State to join charges when the State knows the defendant committed several offenses based on the same act. 720 ILCS 5/3-3(b) (West 2006).

¶ 50 Here, defendant's charges were based on four separate acts—robbing E.P., inserting his penis in E.P.'s mouth, inserting his finger in E.P.'s vagina, and inserting his penis in E.P.'s vagina. Accordingly, compulsory joinder did not apply, and any delay attributable to defendant with respect to counts I and II is also attributable to defendant with respect to counts III and IV.

¶ 51 d. The *Zehr* Principles

¶ 52 Finally, defendant argues trial counsel provided ineffective assistance when counsel failed to object to or request the trial court comply with Rule 431(b) regarding the four *Zehr* principles. Defendant asserts that by failing to object at trial, counsel forfeited the issue on direct appeal, causing this court to review the trial court's noncompliance with the *Zehr* principles under a plain-error analysis rather than a harmless-error analysis, under which defendant carried the burden of proof. The State responds because the evidence of defendant's guilt was overwhelming, defendant would not have been able to succeed under a harmless-error analysis, either. We agree with the State.

¶ 53 Under plain-error analysis, a reviewing court may consider forfeited error when (1) a clear or obvious error occurs and the evidence is closely balanced, or (2) a clear or obvious error occurs and that error is so serious it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Sargent*, 239 Ill. 2d 166, 189, 940

N.E.2d 1045, 1058 (2010). Under either prong of the plain-error analysis, defendant carries the burden of persuasion. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). By contrast, under harmless-error analysis, the State has the burden of persuasion with respect to prejudice. *People v. McLaurin*, 235 Ill. 2d 478, 495, 922 N.E.2d 344, 355 (2009).

¶ 54 On direct appeal, defendant argued under the second prong of the plain-error analysis, contending the trial court erred by failing to question the jurors during *voir dire* in compliance with Rule 431(b), thereby depriving defendant of a fair trial. This court concluded the trial court erred by (1) failing to question the jurors as to whether the jurors understood and accepted the four *Zehr* principles, and (2) failing to instruct the jury on its understanding of defendant's right not to testify; however, this court further concluded the trial court's error was not so serious that it deprived defendant of a fair trial. *People v. Harris*, No. 4-07-0821 (July 12, 2010) (unpublished order under Supreme Court Rule 23).

¶ 55 Defendant argues if trial counsel had not failed to object at trial to the court's error concerning the *Zehr* principles, then the appellate court would have addressed the court's error under harmless-error analysis, under which defendant would have been able to succeed. We disagree.

¶ 56 In *Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401, the supreme court applied harmless-error analysis to a *Zehr* issue, concluding the evidence of defendant's guilt was overwhelming and thus any error was harmless. *Glasper*, 234 Ill. 2d at 202-03, 917 N.E.2d at 419. Likewise, we find in this case the evidence of defendant's guilty was overwhelming. Specifically, E.P.'s testimony was corroborated by her roommate, her roommate's friend, and Officer Allen Johnston, all of whom testified to witnessing E.P. extremely upset shortly after the assault. E.P.'s

roommate and friend also both testified they saw an African-American male leaving E.P.'s apartment on the morning of the assault. Nurse Lisa Guthrie testified she treated E.P. on the day of the assault and E.P. exhibited vaginal tissue trauma.

¶ 57 E.P.'s testimony was further corroborated by the fact defendant's deoxyribonucleic acid (DNA) was found on the jeans E.P. wore on the day of the assault. Moreover, defendant's changing story throughout the proceedings further supported a finding of his guilt. Officer Duane Maxey testified he interviewed defendant and defendant initially denied ever having sex with E.P.; however, defendant testified at trial he had sex with E.P. but it was consensual.

¶ 58 Based on the foregoing, we conclude the evidence of defendant's guilt was overwhelming and defendant would have been unable to succeed on appeal under harmless-error analysis. Accordingly, we conclude trial counsel did not provide ineffective assistance by failing to object at trial to the court's error concerning the *Zehr* principles.

¶ 59 *2. Appellate Counsel's Assistance*

¶ 60 Defendant next argues he received ineffective assistance of appellate counsel because on appeal counsel did not "raise the issues" set forth above. Because we have already concluded the underlying issues defendant raised are without merit, we conclude appellate counsel did not provide ineffective assistance when counsel failed to raise the issues on appeal. See *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000) (Unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise the issues on appeal.).

¶ 61 III. CONCLUSION

¶ 62 We affirm the trial court's dismissal of defendant's postconviction petition. As

part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 63 Affirmed.