

No. 1-13-0420

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 CR 26256
)	
SALVADOR HERRERA,)	Honorable
)	Michael P. Toomin,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice ROCHFORD concurred in the judgment.

O R D E R

¶ 1 *Held:* The summary dismissal of defendant's postconviction petition affirmed where defendant failed to raise an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Salvador Herrera appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he presented an arguable claim that trial counsel was ineffective for failing to consult with him about the possibility of requesting

instructions for lesser-included offenses where, in light of his custodial statement, he committed only the lesser-included offense of involuntary manslaughter.

¶ 3 After a jury trial, defendant was convicted of first degree murder and sentenced to 50 years' imprisonment. Defendant was convicted on evidence showing, in relevant part, that at approximately 2:45 p.m. on September 28, 2004, he fatally shot David Ortiz near the intersection of 89th Street and Commercial Avenue in Chicago, Illinois. The evidence presented included the eyewitness testimony of Clyde Haynes, a bank security guard, who testified that at the time in question he saw a group of individuals, including defendant, standing in the bank parking lot exchanging profanities and gang signs with another group of individuals standing across the street. After Haynes told defendant's group to disperse, he saw defendant walk into the intersection of 89th Street and Commercial Avenue, pull a gun from his waistband and make an unsuccessful attempt to fire the gun. He then saw defendant chamber a round into the gun, and fire the gun twice in the direction of a group of individuals who were running west on 89th Street.

¶ 4 Nohely Madrano provided eyewitness testimony corroborating Haynes's testimony regarding defendant's unsuccessful initial attempt to fire his gun, as well as his subsequent successful firing of two shots in a westerly direction. Madrano also described an incident that occurred in front of a nearby high school immediately prior to the shooting. During that incident, she saw defendant and his brother Francisco "throwing" gang signs, then saw Francisco retrieve a bat from his vehicle and unsuccessfully attempt to hit someone named Aldo with it. Shortly thereafter school security arrived on the scene and defendant and his brother drove away.

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¶ 5 Jonathan Johnston also provided eyewitness testimony regarding the circumstances of the shooting and testified that at the time of the incident he was a Black Stones gang member. When Johnston saw defendant pull a gun from his waistband, he and Ortiz, with whom he had been walking, began to run away. In the process of doing so, Johnston heard two gunshots, then saw that Ortiz had been hit by one of them. Johnston also corroborated Madrano's account of what transpired at the high school prior to the shooting.

¶ 6 The State also played the videotaped custodial statement which defendant made the day following the incident. In that statement, defendant acknowledged that on the day of the incident he had pulled a gun from his waistband, that his initial attempt to fire the gun at rival gang members had been unsuccessful, and that he then fired two gunshots at a group of people that was running away from him. He also stated that his intent in doing so was to scare them.

¶ 7 Following his conviction, defendant filed a direct appeal in which his sole argument was that the evidence was insufficient to prove him guilty of first degree murder beyond a reasonable doubt. This court rejected that contention and affirmed his conviction. *People v. Herrera*, No. 1-06-0913 (2007) (unpublished order under Supreme Court Rule 23).

¶ 8 On June 25, 2008, defendant filed a postconviction petition. Therein, he alleged that he was deprived of his right to effective assistance of counsel because trial counsel failed to request a lesser-included offense instruction when "it was obvious that a second degree murder charge was appropriate" and that a second degree murder instruction was justified. He also alleged that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal for failure to request a lesser included offense instruction. In his petition, defendant

recounted evidence adduced at trial, including the contents of his videotaped statement wherein he stated that he shot the gun and that his intent in doing so was to scare rival gang members.

¶ 9 In an affidavit filed in support of his petition, defendant averred, *inter alia*, that trial counsel never spoke to him about the possibility of a lesser-included offense instruction, and that had counsel informed him of that possibility, he would have readily accepted a lesser-included instruction for second-degree murder. He further averred that at the time of the incident he was a member of the Latin Dragons gang, which was a sworn enemy of the Latin Kings gang and its allies.

¶ 10 On August 20, 2008, after a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. In doing so, the court found that defendant failed to show that it was an unreasonable decision on the part of counsel to forgo a lesser-included offense instruction, or that he was prejudiced by that decision. The court further found that based on the evidence presented at trial, defendant would not have been entitled to a lesser-included offense instruction for second degree murder. On January 30, 2013, the supreme court entered a supervisory order permitting defendant to file a late notice of appeal from the summary dismissal of his post-conviction petition.

¶ 11 At the first stage of postconviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a petition has no arguable basis in law or fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009).

¶ 12 We review the summary dismissal of a postconviction petition *de novo*. *Id.*, at 9. Because we review the judgment, and not the trial court's reasoning, we may affirm the order based on

any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

Additionally, we note that defendant has concentrated solely on his claim of ineffective assistance of trial counsel based on a failure to consult with him regarding the possibility of an instruction for involuntary manslaughter, thereby abandoning his other ineffective assistance of trial and appellate counsel claims in his petition and thereby forfeiting them for appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 13 Defendant maintains that he set forth a claim of ineffective assistance of counsel warranting further proceedings under the Act. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, at the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶ 19, citing *Hodges*, 234 Ill. 2d at 17. Where an ineffective assistance of counsel claim can be disposed of on the ground that defendant failed to establish that he was arguably prejudiced, we need not determine whether counsel's performance was arguably deficient. *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 14 Here, defendant contends that the allegations in his petition and supporting documents, taken as true, stated the gist of a meritorious claim that trial counsel was ineffective for failing to consult with him about the possibility of an instruction for the lesser-included offense of involuntary manslaughter. The State maintains that this claim is waived because it was not

included in defendant's *pro se* petition, which solely concentrated on the lesser-included offense of second degree murder.

¶ 15 The Act provides that "any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2008). Accordingly, the supreme court has held that any issue to be reviewed must be presented in the petition filed in the circuit court. *People v. Jones*, 211 Ill. 2d 146, 148-49 (2004). The State maintains that defendant limited the ineffective assistance of counsel claim in his petition to trial counsel's failure to consult with him about the possibility of a lesser-included instruction for second degree murder, and thereby waived an ineffectiveness claim related to a lesser-included instruction for involuntary manslaughter.

¶ 16 In his *pro se* petition, defendant alleged that trial counsel was ineffective for failing to "request a lesser-included charge in this case." In his supporting affidavit he averred that counsel never spoke to him "about the possibility of a lesser-included instruction." It is true, as the State points out, and defendant concedes, that the only lesser-included instruction that defendant specified in his petition and supporting affidavit was that of second-degree murder. However, we must review *pro se* petitions with a lenient eye and allow borderline cases to proceed. *Hodges*, 234 Ill. 2d at 21.

¶ 17 Here, in addition to the specific allegations regarding second degree murder, defendant included allegations regarding counsel's failure to consult with him regarding lesser-included instructions in general. In his petition, defendant also pointed out that in his videotaped custodial statement presented at trial, he stated that he had shot the gun and that his intent in doing so was to scare rival gang members. In liberally construing the contents of defendant's petition and

supporting affidavit, we find that the question of whether defendant's petition which focused on second degree murder could be said to have included allegations regarding involuntary manslaughter as a lesser included offense, is the type of borderline question which should be decided in defendant's favor. *Id.*

¶ 18 We now turn to whether defendant presented an arguable claim that counsel was ineffective for failing to consult with him regarding the possibility of requesting an instruction for the lesser-included offense of involuntary manslaughter.

¶ 19 A person commits involuntary manslaughter where he unintentionally kills someone without lawful justification by performing acts that are likely to cause death or great bodily harm to another and he performs those acts recklessly. 720 ILCS 5/9-3 (West 2004); *People v. Salas*, 2011 IL App (1st) 091880, ¶ 92. In turn, a person acts recklessly when they consciously disregard a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in that situation. 720 ILCS 5/4-6 (West 2004).

¶ 20 While a person is entitled to an involuntary manslaughter instruction if there is slight evidence supporting such a theory, there must be some evidence of reckless conduct. *People v. Eason*, 326 Ill. App. 3d 197, 209 (2001). The decision whether to submit an instruction for a lesser-included offense rests with defendant (*People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994)), and in order to make an informed decision in this regard, defendant requires the advice of trial counsel (*People v. Medina*, 221 Ill. 2d 394, 405-06 (2006)).

¶ 21 Defendant maintains that it is at least arguable that trial counsel should have consulted with him regarding the possibility of offering an instruction on the lesser-included offense of

involuntary manslaughter because his custodial statement provided more than the necessary slight evidence supporting an involuntary manslaughter theory. Defendant points out that in his custodial statement, he stated that although he shot the gun twice down 89th Street, he did not mean to shoot anyone, but rather, just wanted to scare them. Defendant maintains that because he stated that his mental state was merely to scare people, his actions were reckless, thereby warranting an instruction for involuntary manslaughter.

¶ 22 As the State points out, and defendant concedes, in *People v. Sipp*, this court observed that Illinois courts have consistently held that when defendant intends to fire a gun, points it in the general direction of his or her intended victim, and shoots, such conduct is not merely reckless and does not warrant an involuntary manslaughter instruction, regardless of defendant's assertion that he or she did not intend to kill anyone. *People v. Sipp*, 378 Ill. App. 3d 157, 164 (2007), and cases cited therein.

¶ 23 Defendant's videotaped statement was played for the jury and is part of the record on appeal. We have watched the video statement, and note that therein defendant did not merely state that he "shot twice down 89th Street," but rather, that he shot the gun twice at a group of people as they ran away from him. Accordingly, in his statement, defendant acknowledged that he intentionally fired the gun and that in doing so, he pointed it in the direction of a particular group of people. Pursuant to *Sipp*, defendant's actions were not reckless, and thus an involuntary manslaughter instruction was not warranted. *Id.* In turn, because defendant was not entitled to an instruction for involuntary manslaughter due to the lack of evidence of recklessness, he was not prejudiced by trial counsel's alleged failure to consult with him regarding the possibility of

tendering such an instruction, and his ineffective assistance of counsel claim fails. *Salas*, 2011 IL App (1st) 091880, ¶ 93.

¶ 24 In reaching this conclusion we have considered *People v. Hines*, 31 Ill. App. 3d 295 (1975) and *People v. Kelly*, 24 Ill. App. 3d 1018 (1975), upon which defendant relies. In *Hines*, which pre-dates *Sipp*, this court found that the trial court erred in refusing to submit an involuntary manslaughter instruction to the jury because the jury could have believed the defendant's testimony that he only intended to scare the victim, and did not intend to shoot him. *Hines*, 31 Ill. App. 3d at 302. In so finding, this court noted that it has been held that pointing a loaded pistol at another constitutes recklessness, and reasoned that as such, "surely" then the firing of a pistol at an individual in an attempt to scare them is also recklessness. *Id.* We find the reasoning in *Hines* to be lacking, given that no discussion was given to why "surely" the act of firing a loaded gun directly at someone would constitute recklessness merely because the act of pointing, and not shooting, a loaded gun at an individual is deemed to be reckless conduct. We decline to follow such an unsupported leap in logic, particularly in light of this court's subsequent finding to the contrary in *Sipp*.

¶ 25 In *Kelly*, which also pre-dates *Sipp*, the defendant was convicted of involuntary manslaughter. *Kelly*, 24 Ill. App. 3d at 1022. At trial, the defendant testified that his gun did not discharge when he fired two warning shots that were aimed at the road, but that his next warning shot struck the victim in the forehead. *Id.* Defendant further testified that he did not know the gun was pointed at the victim, whom he did not intend to kill. *Id.* A ballistics expert testified that the rifling in the barrel of defendant's gun was so poor that bullets came tumbling out of the barrel, and that tests conducted on the gun revealed that shots aimed between a subject's eyes

would not strike any portion of the subject's body. *Id.* at 1022-23. On appeal, the reviewing court found that an involuntary manslaughter instruction was properly submitted to the jury because sufficient evidence supported such a theory where the jury could believe defendant's testimony that he did not intend to kill the victim. *Id.* at 1024. Here, unlike *Kelly*, defendant testified that he intentionally aimed the gun at the group which included Ortiz. Further, in *Kelly*, there was evidence supporting the theory that the defendant did not actually aim at the victim, given the testimony provided by the ballistics expert that a shot aimed directly between a subject's eyes, the same general area where the actual victim was shot, would not strike any portion of the subject's body. No such evidence was presented in the case at bar. Accordingly, *Kelly* is inapplicable here.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.