

**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).

2014 IL App (3d) 120062-U

Order filed May 5, 2014

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois.
Respondent-Appellee,	)	
v.	)	Appeal No. 3-12-0062
	)	Circuit No. 04-CF-346
JERRY MABRY,	)	
Petitioner-Appellant.	)	The Honorable James B. Stewart, Judge, presiding.

---

JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

---

**ORDER**

¶ 1 *Held:* The summary dismissal of a petition for postconviction relief was upheld on appeal because the petitioner's arguments that appellate counsel was ineffective for failing to challenge a defective attempted murder charge and for failing to raise a sufficiency of the evidence challenge with respect to the attempted murder charge were not raised in the postconviction petition and were therefore waived. The petitioner failed to show prejudice to support his posttrial challenge to the defective aggravated criminal sexual assault information.

¶ 2 The petitioner, Jerry Mabry, filed a petition for postconviction relief after we affirmed, on direct appeal, his convictions for attempted first degree murder, unlawful

restraint, and aggravated criminal sexual assault. The trial court summarily dismissed the petition, finding that it was frivolous and patently without merit. The petitioner was granted leave to file a late notice of appeal.

¶ 3

#### FACTS

¶ 4

Following a jury trial, the petitioner was found guilty of attempted first degree murder, aggravated battery, unlawful restraint, and aggravated criminal sexual assault. The petitioner's convictions were affirmed on direct appeal. *People v. Mabry*, No. 3-05-0213 (2006) (unpublished order under Supreme Court Rule 23). Upon the petitioner's postconviction petition, the circuit court vacated the jury verdict following a finding of jury misconduct during deliberations. After a second jury trial, in which the petitioner acted *pro se*, the petitioner was convicted of the same four charges. At the petitioner's request, counsel was appointed, and that counsel filed a motion for a new trial, which raised a number of issues not relevant to this appeal. A supplemental motion for a new trial raised the issue that the aggravated criminal sexual assault charge was defective.

¶ 5

The motion for a new trial was denied. The petitioner was sentenced to 12 years for attempted first degree murder, a consecutive term of 10 years for aggravated criminal sexual assault, and a concurrent term of 2 years and 6 months for unlawful restraint. The aggravated battery conviction was vacated because it was a lesser offense of attempted murder.

¶ 6

On direct appeal from the second jury trial, the petitioner, represented by appellate counsel, argued that his convictions should be vacated because of improper admonishments. He also argued that the trial court erred in allowing the testimony of an emergency room nurse. This court affirmed the petitioner's convictions. *People v. Mabry*, 2012 IL App (3d) 090546-U.

¶ 7 The petitioner filed a *pro se* postconviction petition, arguing that the aggravated criminal sexual assault charge was defective because the information failed to allege the essential element that the petitioner cause bodily harm to the victim. The petitioner also argued that the aggravated criminal sexual assault charge was an included offense of attempted first degree murder, which violated the one act/one crime principles, and that his confrontation rights were violated when he was not given the name of the hospital personnel who took a rectal swab from the victim. The petitioner alleged that appellate counsel was ineffective for failing to raise these issues. The trial court dismissed the petition, finding the claims frivolous and patently without merit. The petitioner appealed the summary dismissal.

¶ 8 ANALYSIS

¶ 9 The petitioner argues that his appellate counsel was ineffective for failing to raise issues on direct appeal regarding defective informations charging aggravated criminal sexual assault and attempted murder, and failing to raise a sufficiency of the evidence challenge with respect to the attempted murder charge. The petitioner argues that these claims raise the gist of a constitutional claim with an arguable basis in both law and fact, requiring reversal of the trial court's summary dismissal order.

¶ 10 As an initial matter, the State argues that, by failing to include such in his petition for postconviction relief, the petitioner waived two of the three issues. Specifically, the State argues that the petitioner raised neither the sufficiency of the information nor the sufficiency of the evidence with respect to the attempted first degree murder conviction. The petitioner argues that the issues should be considered because any waiver stemmed from the ineffective assistance of appellate counsel.

¶ 11 The Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (West 2010), provides a method for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143 (2004). At the initial pleading stage of a postconviction proceeding, a petitioner is required to clearly set forth how his constitutional rights were violated, to plead the gist of a constitutional violation. *People v. Delton*, 227 Ill. 2d 247 (2008). Then, the trial court, at the first stage of the proceedings, independently reviews the petition, and taking the allegations as true, determines whether it was frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is frivolous or patently without merit if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1 (2009). We review a first-stage summary dismissal of a postconviction petition *de novo*. *People v. Petrenko*, 237 Ill. 2d 490 (2010).

¶ 12 Under the Post-Conviction Hearing Act, claims not raised by a petitioner in his petition for postconviction relief are waived. 725 ILCS 5/122-3 (West 2010); *People v. Jones*, 211 Ill.2d 140 (2004). The petitioner's argument that appellate counsel's failure to raise the issues on direct appeal bars the application of waiver misses the mark. The waiver does not stem from appellate counsel's failure to raise the issues on direct appeal, but the petitioner's own failure to raise the issues in his postconviction petition. Since the petitioner did not raise the issues of the sufficiency of the information nor the sufficiency of the evidence with respect to the attempted first degree murder conviction in his petition for postconviction relief, they are waived.

¶ 13 The petitioner's argument that the aggravated criminal sexual assault information was defective because it failed to allege that the petitioner caused bodily harm to the victim was raised in the petition for postconviction relief, so it was not waived. The State

acknowledges that the charge was defective, but it argues that the petitioner was not prejudiced by the defect, and appellate counsel was not ineffective for failing to raise this issue on direct appeal.

¶ 14 The timing of a challenge to a charging instrument is significant. When the sufficiency of an information is challenged in a pretrial motion to dismiss, the trial court is to determine whether there has been strict compliance with the pleading requirements of section 111-3(a) of the Code of Criminal Procedure (725 ILCS 5/111-3(a) (West 2010)). The remedy for failure to strictly comply with the pleading requirements is dismissal. *People v. Cuadrado*, 214 Ill. 2d 79 (2005). A posttrial attack to the sufficiency of the charging instrument, however, is subject to a prejudice standard. *Cuadrado*, 214 Ill. 2d at 86. Under this standard, the charging instrument is sufficient if it apprised the accused of the offense charged with sufficient specificity so as to allow him to prepare his defense and bar to future prosecutions arising out of the same conduct. *Cuadrado*, 214 Ill. 2d at 86-7; *People v. Gilmore*, 63 Ill. 2d 23 (1976).

¶ 15 A defendant is guaranteed effective assistance of counsel on appeal, and the doctrine of waiver should not bar claims that were not raised on appeal due to the incompetence of appellate counsel. *People v. Coleman*, 168 Ill. 2d 509 (1995). Ineffective assistance of appellate counsel is measured against the same standards as ineffective assistance of trial counsel. *Coleman*, 168 Ill. 2d at 523. Thus, the petitioner must show that appellate counsel's failure to raise an issue was objectively unreasonable and that the decision not to raise the issue prejudiced the petitioner. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Appellate counsel is not required to raise every conceivable argument; rather, he is expected to exercise his professional judgment in selecting issues for review. *People v. English*, 2013 IL 112890. Unless the underlying issue is

meritorious, a petitioner suffers no prejudice from counsel's failure to raise the issue on appeal. *Smith*, 195 Ill. 2d at 190.

¶ 16 Applying the prejudice standard applicable to posttrial challenges to charging instruments, the petitioner was not denied effective assistance of appellate counsel because the underlying issue was not meritorious. The charge of aggravated criminal sexual assault sufficiently apprised the petitioner of the precise offense charged, specific enough to allow him to prepare his defense. The charge specified the statute allegedly violated (720 ILCS 5/12-14(a)(2) (West 2010)), which is entitled aggravated criminal sexual assault, and included detailed, specific acts. Also, the jury was instructed to find that the petitioner caused bodily harm to the victim. Thus, this posttrial attack on the information lacked an arguable basis in law, making summary dismissal proper.

¶ 17 CONCLUSION

¶ 18 The judgment of the circuit court of Knox County is affirmed.

¶ 19 Affirmed.