

NOTICE  
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2014 IL App (5th) 120385-U

NO. 5-12-0385

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 96-CF-100
	)	
BOBBY O. WILLIAMS,	)	Honorable
	)	Michael N. Cook,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Chapman and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in summarily dismissing defendant's petition for postconviction relief.

¶ 2 Defendant, Bobby O. Williams, appeals from a judgment of the circuit court of St. Clair County dismissing his *pro se* petition for postconviction relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The issue raised in this appeal is whether the trial court erred in dismissing defendant's *pro se* petition for postconviction relief. We affirm.

¶ 3

## BACKGROUND

¶ 4 We are well versed in the facts of this case as this is not the first time it has been before us. For an understanding of this appeal, we need not recite all the facts. Instead we need only give a brief synopsis of the facts and the procedural history of the case. Additional facts necessary for an understanding of this case will be addressed in the analysis portion of this order.

¶ 5 On November 3, 1994, Sharon Bushong was shot to death during a robbery at a convenience store in Belleville where she worked as a clerk. A surveillance videotape recorded by the store's security camera recorded Bushong's murder. A spent cartridge case from a .38-caliber pistol fired during the robbery was retrieved from the scene, and a .38-caliber bullet was recovered from Bushong's body during her autopsy.

¶ 6 On February 15, 1995, defendant was arrested in Washington Park, a town near Belleville, on a charge other than the murder of Bushong. At the time of his arrest, defendant was carrying a .38-caliber pistol. Forensic testing later determined that the gun defendant was carrying at the time of his arrest was the gun used to shoot Bushong. Defendant was later charged with the first-degree murder of Bushong. After a jury trial, defendant was convicted of the first-degree murder of Bushong and found eligible for the death penalty.

¶ 7 A hearing in aggravation and mitigation was conducted, after which the jury found there were no factors sufficient to preclude the imposition of the death penalty and sentenced defendant to death. On direct appeal, our supreme court affirmed defendant's

conviction for first-degree murder, but vacated the death sentence and remanded for resentencing. *People v. Williams*, 193 Ill. 2d 1, 737 N.E.2d 230 (2000).

¶ 8 On November 12, 1997, while the direct appeal was pending, defendant filed a postconviction petition and requested counsel. The trial court allowed the motion to appoint the State Appellate Defender as counsel. Counsel filed extensions of time to file an amended petition. On August 28, 2000, counsel filed a motion to stay the postconviction proceedings due to the fact that the case had been remanded by our supreme court for resentencing. On June 13, 2002, the trial court, *sua sponte*, issued an order requesting the attorney now representing defendant to review case law to determine whether the petition for postconviction relief was premature due to the fact that the case was set for resentencing.

¶ 9 On September 5, 2002, the trial court issued an order in which it dismissed defendant's postconviction petition without prejudice, stating in pertinent part as follows:

"Defendant was previously sentenced to death. The Supreme Court affirmed the findings of guilt and remanded the case for resentencing. Defendant's petition when it was originally filed was timely. As a result of the Supreme Court opinion (*People v. Williams*, 193 Ill. 2d 1 (2000)), the defendant has not been convicted because he has not been sentenced. Defendant's post conviction petition is premature and is dismissed for only that reason."

Defendant appealed, and a panel of this court affirmed the trial court's dismissal of defendant's postconviction petition without prejudice. *People v. Williams*, No. 5-02-0623 (2004) (unpublished order pursuant to Supreme Court Rule 23).

¶ 10 On January 10, 2003, then Governor George Ryan issued a commutation order removing the death penalty as a sentencing option and making natural life in prison without the possibility of parole the maximum sentence which could be imposed. On April 23, 2004, the State filed a notice that it intended to seek an extended-term sentence in this case. On July 28, 2004, defendant filed a motion to bar the imposition of an extended-term sentence. On August 2, 2005, the trial court denied defendant's motion to bar imposition of an extended-term sentence and later denied a motion to reconsider.

¶ 11 Defendant filed a series of other motions. Ultimately, a sentencing eligibility hearing was conducted on April 14-15, 2008, after which the jury found defendant eligible for an extended-term sentence. On June 17, 2008, a sentencing hearing was conducted, and defendant was sentenced to natural life in prison. Defendant appealed his sentence. This court affirmed. *People v. Williams*, No. 5-08-0459 (2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 12 On June 4, 2012, defendant filed the instant postconviction petition in which he alleged he was denied a full and fair hearing on his motion to quash arrest and suppress evidence and that his trial and appellate counsel were ineffective for failing to raise the issue. He also attached an affidavit averring that he was unable to obtain transcripts from the motion hearings to support his "motion to quash" claim. On August 17, 2012, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. Defendant now appeals.

¶ 14 The issue raised in this appeal is whether the trial court erred in dismissing defendant's petition for postconviction relief. Defendant first contends the cause should be remanded for additional second stage proceedings on defendant's 1997 postconviction petition on the basis that the trial court's dismissal order was void because the trial court lacked the statutory authority to summarily dismiss the petition or to dismiss the petition as premature or without prejudice. Defendant insists the order was void because there is no provision for summary dismissal of a petition when petitioner is under sentence of death, and the dismissal order was not entered within 90 days of its filing as required by the Act. See 725 ILCS 5/122-2.1(a) (West 1996). The State replies that the propriety of the 2002 order dismissing defendant's postconviction petition as premature and without prejudice is not a proper subject of this appeal because this court lacks jurisdiction, and even assuming *arguendo* that we have jurisdiction, the 1997 pleading was not a postconviction petition subject to the strictures of the Act, and it was properly dismissed by the trial court as premature because there was no "final judgment" against which defendant could mount a collateral attack.

¶ 15 First, we disagree with the State that we do not have jurisdiction over this appeal because defendant is in effect trying to appeal the 2002 dismissal of the initial postconviction petition which has already been the subject of an appeal. Here, the record is clear that on June 4, 2012, defendant filed a postconviction petition that the trial court summarily dismissed. Defendant filed a timely notice of appeal. Accordingly, we have jurisdiction over this appeal. While we disagree with the State regarding jurisdiction, we

nevertheless agree with the State that the 1997 pleading was properly dismissed by the trial court as premature because there was no final judgment against which defendant could mount a collateral attack.

¶ 16 "The Act provides a method by which persons under criminal *sentence* in this [s]tate can assert that their convictions were the result of a substantial denial of their rights under the Unites States Constitution or the Illinois Constitution or both." (Emphasis added.) *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). In the instant case, defendant's initial sentence, which formed the basis of his 1997 postconviction petition, was vacated. Accordingly, he was no longer under criminal sentence and, therefore, was unable to institute a proceeding under the Act. As a result, the trial court correctly dismissed the 1997 petition as premature.

¶ 17 We also agree with the State that defendant cannot have it both ways. Assuming *arguendo* that defendant's 1997 petition was a proper postconviction petition, the postconviction petition that is the subject of this appeal filed by defendant on June 4, 2012, would be a successive postconviction petition. A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605, 903 N.E.2d 437, 444 (2009) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328, 637 N.E.2d 1015, 1017 (1994)). The Act contemplates the filing of only one postconviction petition, and obtaining leave of the court is a condition precedent to the filing of a successive postconviction petition. *Simmons*, 388 Ill. App. 3d at 605, 903 N.E.2d at 444-45.

¶ 18 Pursuant to section 122-1(f) of the Act, leave of court may be granted only if a defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2010). If the 1997 petition was in fact a postconviction petition, any claim not raised therein would be waived, and it would have been necessary for defendant to obtain leave of court to file a successive petition. Here, defendant did not obtain leave of court prior to filing his June 4, 2012, postconviction petition. We agree with the State that in the instant case there is only one properly filed postconviction petition. It was filed by defendant on June 4, 2012. It is not a successive petition because the 1997 petition was filed prematurely.

¶ 19 In defendant's appeal from the dismissal of his 1997 postconviction petition, this court explained that because defendant's original sentence was vacated, there was no longer a "conviction" for him to challenge. Thus, we found the trial court's dismissal of the 1997 petition was proper. *People v. Williams*, No. 5-02-0623 (2004) (unpublished pursuant to Supreme Court Rule 23). We are unconvinced by defendant's arguments to the contrary herein. The circuit court's order with regard to the June 4, 2012, petition is not void and the cause should not be remanded for additional proceedings on defendant's 1997 postconviction petition.

¶ 20 This leads us to the main issue raised in this appeal whether the trial court erred in dismissing defendant's June 4, 2012, *pro se* postconviction petition. Defendant contends that his June 4, 2012, petition stated the gist of a constitutional claim of ineffective assistance of trial and appellate counsel for failure to argue that the trial court should

have allowed a hearing on a motion to quash arrest and suppress evidence because new, important evidence was discovered at trial that had not been presented in the original proceedings on the pretrial motion. The State replies that defendant's arguments are frivolous and without merit because: (1) neither trial counsel nor appellate counsel on direct appeal provided ineffective assistance of counsel, and (2) defendant's claims are either unsupported by the record that does exist, are completely missing from the record, or are issues concerning defendant's other cases from 1995, which are not the subject of the instant appeal. We agree with the State.

¶ 21 The purpose of a postconviction proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not and could not have been determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519, 749 N.E.2d 892, 901 (2001). Therefore, *res judicata* bars consideration of issues that were raised and decided on direct appeal, as well as issues that could have been presented on direct appeal, but were not. *Barrow*, 195 Ill. 2d at 519, 749 N.E.2d at 901. As a way of escaping this obstacle, defendant has raised an ineffective assistance of counsel claim against not only trial counsel, but also appellate counsel.

¶ 22 Claims of ineffective assistance are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court set forth a two-prong test for evaluating whether a defendant has been denied the effective assistance of counsel in violation of the sixth amendment (U.S. Const., amend. VI). It requires a defendant to demonstrate that (1) counsel's performance was deficient, and (2) such deficient performance prejudiced defendant. *Strickland*, 466 U.S. at 687. In

order to demonstrate that counsel's performance was deficient, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163, 745 N.E.2d 1212, 1223 (2001). Scrutiny of counsel's performance is highly deferential, and we are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 694. In order to prove prejudice, the defendant must show that but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different. *Edwards*, 195 Ill. 2d at 163, 745 N.E.2d at 1223.

¶ 23 A postconviction proceeding involves three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). In the instant case, the trial court dismissed the petition at the first stage. At the first stage, the circuit court must, within 90 days of filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445; 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition lacks an arguable basis in law or fact if the claim is based upon an "indisputably meritless legal theory," meaning the theory is contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 11-12, 912 N.E.2d at 1212.

¶ 24 If the court does not dismiss the petition as either frivolous or patently without merit, then the petition advances to the second stage, where counsel may be appointed for an indigent defendant (725 ILCS 5/122-4 (West 2010)) and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2010)).

*Edwards*, 197 Ill. 2d at 245-46, 757 N.E.2d at 446. A trial court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *Edwards*, 197 Ill. 2d at 247, 757 N.E.2d at 447.

¶ 25 The case here deals with the murder of Sharon Bushong. However, defendant was also involved in other cases around the same time as the murder of Bushong, but those cases are not the subject of this appeal. In No. 95-CF-203, defendant was charged with the first-degree murder of Carlos Robertson. A mistrial was declared after the jury was unable to reach a unanimous verdict. In No. 95-CF-204, defendant was charged with and convicted of the offense of unlawful use of weapons. In his June 4, 2012, postconviction petition, defendant raises issues based upon what took place during motion hearings in those cases which are not subject to this appeal.

¶ 26 In his postconviction petition, defendant alleged that Illinois State Police Troopers Gregory Fernandez and Calvin Dye said that Michael Cook was not a suspect when he acted as their informant and told them defendant was in possession of the gun used to kill Bushong. Defendant also alleged that directly contrary to this testimony, Cook said he was a suspect in the case, and, therefore, Cook's testimony was new evidence that would have directly called into question the credibility of the officers. Defendant contends he cannot locate the transcripts of the testimony taken during the motion to suppress hearing; however, as the State points out there are no transcripts of officer testimony because the parties proceeded by way of argument only and no testimony was taken. Simply put, there is no officer testimony that says Cook was a suspect in this case when he wore a wire, and Cook himself testified that he thought he was a suspect. We agree

with the State that the fact that Cook thought he was a suspect is not of constitutional magnitude and does not constitute the type of new evidence required to proceed to the second stage.

¶ 27 Furthermore, during the course of the instant litigation, defendant filed a motion to suppress and quash. The State argued that collateral estoppel applied because the legality of the stop and seizure of the murder weapon was already argued and decided against defendant in No. 95-CF-204. The trial court agreed. The same trial judge presided over the motion to suppress in No. 95-CF-204 and the instant case. In denying defendant's motion in the instant case, the trial court noted that No. 95-CF-204 had been appealed and the reviewing court found that the seizure of the gun was lawful, so defendant was "bound with that."

¶ 28 In the instant case, trial counsel filed a motion to suppress and quash evidence and properly raised the issue of the trial court's denial of the motion to suppress and quash in the motion for a new trial, thereby properly preserving the issue for appeal. *People v. Cosby*, 231 Ill. 2d 262, 271-72, 898 N.E.2d 603, 609 (2008). Nevertheless, defendant argues trial counsel should have halted the jury trial and reargued the motion to suppress. We disagree. Trial counsel did what was necessary to properly preserve the issue for appeal. Accordingly, we find defendant's argument that trial counsel was ineffective is a meritless claim and fails to state the gist of a constitutional claim.

¶ 29 We also find that appellate counsel was not ineffective for failing to raise the propriety of the trial court's ruling on the motion to suppress on direct appeal. A defendant who argues that appellate counsel rendered ineffective assistance by failing to

raise an issue must show that the failure to raise the issue was objectively unreasonable and that the decision prejudiced the defendant. *People v. Easley*, 192 Ill. 2d 307, 328-29, 736 N.E.2d 975, 991 (2000). Appellate counsel is under no obligation to brief every conceivable issue on appeal, and it is not incompetence to refrain from raising an issue which in his or her judgment is meritless, unless, of course, the underlying issue is meritorious. *Easley*, 192 Ill. 2d at 329, 736 N.E.2d at 991. We fail to see how raising the issue concerning the motion to suppress would have been beneficial in light of the fact that the issue had already been appealed and decided to the contrary in No. 95-CF-204. Therefore, we find defendant's contentions patently without merit.

¶ 30 For the foregoing reasons, the order of the circuit court of St. Clair County summarily dismissing defendant's petition for postconviction relief is affirmed.

¶ 31 Affirmed.