2017 IL App (1st) 152212-U

THIRD DIVISION
August 2, 2017

No. 1-15-2212

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 13003
	)	
MICHAEL SHIVERS,	)	The Honorable
	)	Geary W. Kull,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence for armed violence is not void. In addition, defendant failed to establish sufficient cause and prejudice for his claims of ineffective assistance of appellate counsel. Affirmed.

¶ 2 This appeal arises from the trial court's order summarily dismissing defendant Michael Shivers's *pro se* petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-

1 *et seq.* (West 2014)). On appeal, defendant contends that his 15-year sentence for armed violence, which the trial court ordered him to serve at 85 percent, is void because the court made no finding of great bodily harm. In addition, defendant contends that appellate counsel was ineffective for failing to raise a one-act, one-crime challenge to defendant's aggravated unlawful use of a weapon (AUUW) conviction. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On July 22, 2011, defendant was arrested for allegedly stealing cannabis from a dealer at gunpoint and then unlawfully restraining three of his co-workers. The State charged defendant with armed violence, three-counts of aggravated unlawful restraint, possession of cannabis, and two-counts of AUUW.

¶ 5 At trial, Benjamin Dain, defendant's co-worker at Burger Boss in Elmwood Park, testified that on the day of the incident defendant approached Dain about buying "a large amount of weed." After closing, defendant, Dain, and co-workers Michael Hahn and Bridget Murphy went to meet Dain's dealer Snoop. Bridge drove them to the Village of Bellwood in her tan vehicle and Snoop instructed Dain to park in a back alley. Snoop approached the vehicle, opened the backseat passenger side door, leaned over Dain, and gave defendant a joint to sample the cannabis. Defendant asked Snoop to see "the product" and he showed defendant two large Ziploc bags. The outer bag contained fabric softener and coffee grounds and the inside bag contained a quarter pound of cannabis. Defendant then held Snoop at gunpoint and said, "this is a stick up." Thereafter, defendant pointed the gun at Bridget and told her "to drive." As Bridget pulled out of the ally, Dain heard two gunshots fired at the back of the vehicle. Defendant ordered Dain to throw the bag with the fabric softener and coffee grounds out of the rear

window, which was stuck open. Defendant also threatened to shoot Dain, Bridget and Hahn if they looked at defendant, and insisted they call him "Malcolm X". Defendant then instructed Bridget to pull over at the Marathon gas station near Mannheim Road and Fullerton Avenue. Defendant allowed Dain to exit the vehicle, but threatened to shoot him if he called the police. Dain, however, immediately called the police to report the incident.

¶ 6 In addition, Hahn testified that immediately before Dain exited the vehicle defendant told Hahn that he "got a nice surprise for you too." Hahn thought this meant that defendant "was either going [to] beat [Hahn] up or shoot [him] or something." Hahn then observed a police vehicle driving toward them in the opposite direction turn around on Mannheim Road to follow Bridget's vehicle. This alarmed defendant who instructed Bridget to pull into a BP gas station. Defendant ordered Hahn and Bridget to go inside the gas station and buy something, while defendant remained in the vehicle, laying down in the backseat. A River Grove Police Department officer stopped Hahn and Bridget walking back toward the vehicle and told them to wait while he apprehended defendant. Hahn and Bridget were also handcuffed and detained at the police station because cannabis was discovered in Bridget's vehicle. Bridget corroborated Hahn's testimony and explained that she did not call the police because her cellular phone was dead. She said she did not run because defendant had a gun.

¶ 7 Officer Tony Ikis testified that at 1 a.m. he was driving in an unmarked squad car and heard a radio dispatch from the Franklin Park Police Department about people being held against their will in a tan Toyota with its rear window stuck halfway down. He observed a vehicle matching this description parked near a pump at the BP gas station. When he ran the vehicle's plate it matched the radio dispatch as being registered to a "Bridget." Officer Ikis approached the vehicle and observed defendant hiding in the backseat. Officer Ikis then searched the vehicle

and discovered a large bag containing a plantlike substance, which field tested as cannabis, as well as a small black semiautomatic handgun. His sergeant cleared the handgun and found that it was loaded with four rounds in the magazine.

¶ 8 After closing arguments, the trial court found defendant guilty of armed violence (Count 1), aggravated unlawful restraint regarding Bridget (Count 2), aggravated unlawful restraint regarding Hahn (Count 3), aggravated unlawful restraint regarding Dain (Count 4), possession of cannabis (Count 5), AUUW in a vehicle, the weapon being uncased, loaded and immediately accessible (Count 6), and AUUW on or about his person (Count 7). Subsequently, the trial court denied defendant's motion for judgment notwithstanding the verdict or in the alternative a motion for a new trial. At the sentencing hearing, the trial court sentenced defendant to concurrent terms of 15-years imprisonment at 85 percent for armed violence, five-years with a one-year mandatory supervised release period (MSR) at 50 percent for three counts of aggravated unlawful restraints, and three-years with a one-year MSR for two counts of AUUW at 50 percent. Defendant then filed a direct appeal challenging his conviction and sentencing, which this court denied. *People v. Shivers*, 2014 IL App (1st) 121951-U. We did, however, correct the *mittimus* to reflect only one AUUW conviction based upon the State's concession that the act of possessing a weapon was the same in each AUUW count.

¶ 9 On December 8, 2014, defendant filed a *pro se* petition for postconviction relief alleging that appellate counsel was ineffective for failing to raise claims made by trial counsel in defendant's posttrial motion. In addition, defendant appears to allege that his appellate counsel was ineffective for failing to raise a challenge on appeal that defendant's armed violence conviction arose out of the same physical act as his other convictions. The trial court denied defendant's petition finding it frivolous and patently without merit. The trial court noted that

"the armed violence was based on witness testimony of [defendant] taking possession of the cannabis at gunpoint from another individual during the course of events that they were witness to." Defendant now appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, the Act allows review of a petitioner's claim where there was a "substantial denial of his * * * rights" under either, or both, the Illinois Constitution or United States Constitution in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2014). Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues that have previously been decided by a reviewing court are barred by *res judicata*. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). At the first stage, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). The petition may only be dismissed as frivolous or patently without merit if the petition has no arguable basis either in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. This standard presents a low threshold requiring only that the defendant plead significant facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). In considering the petition, the trial court may examine the court file of the criminal proceeding, any transcripts of the proceeding, any action by the appellate court, and affidavits or records attached to the petition. 725 ILCS 5/122-2.1(c) (West 2012); *Brown*, 236 Ill. 2d at 185. The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 12 Defendant initially contends that his 15-year sentence for armed violence is void where the trial court ordered defendant to serve his sentence at 85 percent despite no finding by the

court of great bodily harm. The State agrees that the trial court should have ordered defendant to serve his sentence at 50 percent, but contends defendant failed to raise this contention in his postconviction petition, and thus, is unable to raise it for the first time on appeal. We agree.

¶ 13 In *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-18, our supreme court declared that a statutorily nonconforming sentence is not void; it is merely voidable and subject to the usual rules of forfeiture or other procedural restraints. In a postconviction proceeding any issues to be reviewed must be presented in the petition filed in the trial court and a defendant may not raise an issue for the first time while the matter is on review. *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010). Therefore, since defendant failed to raise this challenge in his 2-1401 petition, he has forfeited the issue on appeal. See also *People v. Thompson*, 2015 IL 118151, ¶ 39 (as *Castleberry* abolished the void sentence rule, a defendant forfeits a challenge to his sentence by raising it for the first time on appeal). Furthermore, although defendant argues that *Castleberry* does not apply retroactively, we disagree. In *People v. Price*, 2016 IL 118613, ¶ 31, our supreme court held that as the defendant's 2-1401 petition was pending in the appellate court when *Castleberry* was announced, the general rule of retroactivity applied, meaning the court's decisions apply to all cases that are pending. *Id.* at ¶ 27. Thus, "the *Teague* [v. Lane, 489 U.S. 288 (1989)] retroactivity analysis [did] not apply." *Id.* at ¶ 27; See *People v. Cashaw*, 2016 IL App (4th) 140759, ¶ 39, ("defendant cannot rely on the framework of *Teague* to argue that a new rule should not apply, when the defendant is seeking to overturn an old judgment"). Accordingly, as defendant's case was pending in this court when *Castleberry* was announced, we find defendant has forfeited his challenge to his sentence by raising it for the first time on appeal. Consequently, defendant's ineffective assistance of trial and appellate counsel claim in regards to his void sentence challenge is without merit as defendant failed to raise this issue in his petition

for postconviction relief. See *People v. Jones*, 211 Ill. 2d 140, 144 (2004) ("a defendant may not raise an issue for the first time while the matter is on review").

¶ 14 Defendant next contends that appellate counsel was ineffective for failing to raise a one-act, one-crime challenge to his AUUW conviction. Specifically, defendant argues that his AUUW convictions were based on the same act of possession of the same firearm as his armed violence conviction. We review a claim of ineffective assistance of appellate counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on such a claim, defendant "must show that counsel's failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him." *People v. Jones*, 219 Ill. 2d 1, 23 (2006). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Consequently, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 15 We first observe that even if we liberally construe defendant's petition as we must, defendant failed to raise a one-act, one-crime challenge to his AUUW conviction, as it was based on the same act of possession as the armed violence. Defendant in fact contradicts himself by stating that he was convicted of "[t]hree counts of aggravated unlawful restraint, and two counts of aggravated unlawful use of a weapon," "[n]one of which the armed violence charge [had] been predicated on." Defendant specifically laments that his "charge of armed violence is predicated [] on cannabis possession while armed with a dangerous weapon." Further, defendant's petition more accurately seems to argue that his appellate counsel was ineffective for failing to address

the claims made in his motion for a new trial on direct appeal. Thus, defendant never clearly raised the claim at issue in his postconviction petition. See *People v. Cathey*, 2012 IL 111746, ¶ 21 (any issues to be reviewed in a postconviction proceeding must be presented in the petition filed in the trial court).

¶ 16 Additionally, the record demonstrates that appellate counsel did wage a one-act, one-crime challenge on defendant's behalf on direct appeal, where counsel argued that defendant's "conviction for armed violence must be vacated when it [arose] out of the same physical act as his *remaining convictions*." *People v. Shivers*, 2014 IL App (1st) 121951-U, ¶ 20 (emphasis added). As defendant's convictions for AUUW were part of defendant's remaining convictions, we already reviewed this contention when we determined that "defendant's conviction of armed violence was predicated on the offense of possession of cannabis, and the [trial] court did not enter a conviction on that offense." *Id.*; See *People v. Fair*, 193 Ill. 2d 256, 267 (2000) (*res judicata* precludes issues that were raised on direct appeal from being raised again in postconviction petition). Moreover, the armed violence conviction where defendant was armed with a firearm taking possession of cannabis from a dealer was based on a distinct physical act, separate from possessing an uncased, loaded and immediately accessible firearm in a vehicle which was the basis for the AUUW conviction. See (720 ILCS 5/24–1.6(a)(3)(A) (West 2014)) *People v. White*, 311 Ill. App. 3d 374, 386 (2003) (where the reviewing court concluded that "[a]lthough both offenses shared the common act of possession of a weapon, armed violence required the additional act of possession of the drugs, and unlawful possession of a weapon by a felon required the additional element of status as a felon"). Accordingly, appellate counsel was not ineffective and the trial court properly dismissed defendant's postconviciton petition as frivolous and patently without merit.

¶ 17 CONCLUSION

¶ 18 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.