2017 IL App (1st) 153027-U

FIFTH DIVISION
October 27, 2017

No. 1-15-3027

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07 CR 18230 (01)
	)	
CHARLES KOEN,	)	
	)	Honorable
Defendant Appellant.	)	Neera Lall Walsh,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Rochford and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County dismissing the defendant's second-stage postconviction petition where the defendant failed to make a substantial showing that his constitutional rights were violated.

¶ 2 Defendant Charles Koen appeals the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, defendant argues the circuit court erred in dismissing his petition without a third-stage

evidentiary hearing because he made a substantial showing that he was deprived of the effective assistance of trial and appellate counsel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In his initial appeal to this court, we recited the details of the offenses committed by defendant. See *People v. Koen*, 2014 IL App (1st) 113082 (*Koen I*). Therefore, we need not repeat those details here. In 2011, following a jury trial, defendant was convicted of theft and forgery. On August 25, 2011, defendant was sentenced to 12 years of imprisonment in the Illinois Department of Corrections. The trial court also found that he was entitled to 83 days of credit for time served on this case awaiting trial. The trial court, however, stayed the issuance of the mittimus for further proceedings as defense counsel had represented to the trial court that prior defense counsel (who had been ordered to withdraw from the case due to a conflict) had filed a motion to withdraw defendant's bond on March 28, 2008, and thus was entitled to 293 days of credit for time served. This was based on the fact that defendant had been placed in custody on separate offenses at the time he was on bond. In considering defense counsel's argument, the trial court stated there was no evidence of the motion in the record or that the motion had ever been ruled upon. The trial court then requested defense counsel to provide a copy of the motion to withdraw the bond and continued the sentencing hearing. On September 1, 2011, defense counsel failed to provide a copy of the requested motion and the trial court entered the sentence, including the 83-day credit.

¶ 5 Initial Appeal

¶ 6 Defendant then appealed to this court asserting, in pertinent part, that his mittimus must be corrected to reflect the proper amount of credit for time he spent in custody. Specifically, defendant argued that he was entitled to a total of 396 days of credit, which included 293 days he

spent in custody on the separate offenses from January 23, 2008 until he was released on bond as to this offense on November 10, 2008. The State responded that he was not entitled to credit for those 293 days because defendant was not in custody as a result of the current offense. Defendant, for the first time in his reply brief, mentioned that he had filed a motion to withdraw his bond after his subsequent charges, and accordingly "he ha[d] made the [trial] court aware of his desire to exonerate or withdraw his bond." Defendant reasoned that he was therefore entitled a credit of 293 days in this particular case and interpreted the sentencing transcript as supporting his point.

¶ 7 This court determined that defendant was not entitled to credit for the 293 days:

> "The additional 293 days of credit Koen seeks relate to time spent in custody as a result of the postbond charges. Per Illinois law, however, 'the offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for [the number of days] spent in custody *as a result of the offense for which the sentence was imposed*.' (Emphasis added.) 730 ILCS 5/5-4.5-100(b) (West 2010); see also, *e.g.*, *People v. Jones*, 241 Ill. App. 3d 262 (1993). As the trial court initially noted, 'there is no reason [Koen] should be given credit for time on other matters,' which are 'separate and distinct' from the case Koen currently appeals. Koen therefore relies on later statements made by the trial court on September 19, 2011, to support his assertion the mittimus should be corrected in this case to include the 293 days of credit. These statements do not stand for that proposition. At the plea hearing on the postbond charges, the trial court stated, '[a]s to these cases, it's 293 additional days,' using 'these cases' to refer to the postbond charges. In so doing, the trial court ordered Koen was entitled to 293 days of credit for time served on his sentence for the postbond

charges, not for the instant case." *Koen I*, 2014 IL App (1st) 113082, ¶ 57.

¶ 8 Petition for Rehearing

¶ 9 In his subsequent petition for rehearing, defendant argued he was entitled to 293 days of credit because he had filed a motion to withdraw the bond after his arrest on the subsequent charges that was never ruled upon through no fault of his own. Defendant noted that the court did not rule on the motion when it was first presented because his initial counsel, who had filed the motion to withdraw the bond, had been disqualified. In addition, while the motion was entered and continued, subsequent assistant public defenders who were appointed to represent him failed to request a ruling on the motion. Defendant reasoned that had trial counsel presented the motion at sentencing as required by the court, he would have been awarded the extra days of credit.

¶ 10 Pursuant to Illinois Supreme Court Rule 367 (eff. Dec. 29, 2009), we requested the petition for rehearing be fully briefed. The State responded that defendant forfeited this issue when he failed to raise it in his opening brief. The State further argued that defendant's argument was actually a new point and not the proper subject for a petition for rehearing in violation of Illinois Supreme Court Rule 367(b) (eff. Dec. 29, 2009).

¶ 11 In reply, defendant argued that he did not raise a new point for the first time in his reply, but "simply supplemented the argument advanced in Appellant's opening brief regarding the trial court's intent to grant the additional credit at issue here." In the alternative, defendant requested that we "relax the rule of waiver and reach the merit of this claim." Defendant also noted that future postconviction proceedings would be "entirely illusory" due to the fact that he was scheduled to be released from the penitentiary on June 26, 2017, and thus "even if he were ultimately successful in post-conviction proceedings, the now 68-year-old Mr. Koen would still

be forced to remain incarcerated in this case longer than the law requires. Thus, his only hope for justice is for this Court to grant rehearing on this issue." [1]

¶ 12 We denied defendant's petition for rehearing.

¶ 13 Postconviction Petition

¶ 14 On September 4, 2014, with the assistance of counsel, defendant filed a postconviction petition seeking relief based on various alleged constitutional violations. Pertinent to this appeal, defendant maintained that he received ineffective assistance of trial and appellate counsel. Regarding his trial counsel, defendant alleged counsel was ineffective for failing to present, at sentencing, evidence that he had filed a motion to withdraw his bond for this offense after he was taken into custody for other offenses while out on bond. Additionally, defendant argued his appellate counsel was ineffective for failing to raise the argument of ineffectiveness of trial counsel in its initial brief on direct appeal.

¶ 15 In support of his ineffective assistance of counsel arguments, defendant attached the affidavit of his disqualified trial counsel, Charles J. Koen, Jr. (defendant's son). The affidavit averred that he forwarded defendant's trial counsel a copy of the motion to withdraw the bond he had presented to the court during a pretrial hearing in April 2008. Specifically, he attested, "At Koen's sentencing in September 2011, I emailed a copy of the Motion to Exonerate/Withdraw Bond to Attorney Thedford so that he could provide a copy of the motion to the court in its effort to grant Koen time served credit against his sentence of 12 years."

¶ 16 The State then filed a motion to dismiss defendant's postconviction petition, arguing in part, that defendant's ineffective assistance of trial and appellate counsel arguments were

[1] We note that in his reply to the petition for rehearing, defendant conceded that he was actually only entitled to 232 days of credit, agreeing with the State that he is not entitled to credit prior to the date he presented the motion to withdraw the bond.

(1) barred by *res judicata*; (2) forfeited; and (3) meritless.

¶ 17 After the matter was fully briefed and argued, the trial court dismissed the postconviction petition finding defendant failed to make a substantial showing that a violation of his constitutional rights occurred. The trial court determined that defendant failed to establish he was prejudiced by trial counsel's failure to present the motion to withdraw his bond at the sentencing hearing. The trial court observed that in *Koen I*, this court determined that he was not entitled to 293 days of sentence credit and, thus, the result of the proceedings would not have been different. The trial court further explained that because the underlying claim of trial counsel's ineffectiveness lacks support, his claim of ineffective assistance of appellate counsel also fails.

¶ 18 This appeal follows.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant contends that his postconviction petition warrants third-stage review where he has made a substantial showing that a constitutional violation occurred; namely, that both his trial and appellate counsel were ineffective. According to defendant, his trial counsel was ineffective for failing to present the sentencing court with a copy of the motion to withdraw the bond. Additionally, defendant maintains appellate counsel was ineffective for not raising this argument—that trial counsel was ineffective—in the initial brief.

¶ 21 Initially, the State responds that this appeal is moot because defendant has completed his term of imprisonment. A case becomes moot where the occurrence of events since filing of the appeal makes it impossible for the reviewing court to render effectual relief. *People v. Jackson*, 199 Ill. 2d 286, 294 (2002). "Conversely, an appeal remains viable where a decision could have a direct impact on the rights and duties of the parties." (Internal quotation marks omitted.) *Id.*

(quoting *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 8 (1997); *People ex rel. Bernardi v. City of Highland Park*, 121 Ill. 2d 1, 6-7 (1988)).

¶ 22 Even though any change to defendant's sentence could not affect the length of his MSR term (see *People v. Whitfield*, 217 Ill. 2d 177, 200-01 (2005)), this court has held that a challenge to the length of a prison term is not moot if it is brought before the defendant has completed his or her MSR period. *People v. Montalvo*, 2016 IL App (2d) 140905, ¶ 14; see *People v. Elizalde*, 344 Ill. App. 3d 678, 681 (2003), *overruled in part on other grounds, People v. Graves*, 235 Ill.2d 244 (2009); *People v. Lieberman*, 332 Ill. App. 3d 193, 196 (2002). A defendant who is on MSR is subject to incarceration for a violation of the conditions of such release and, therefore, could be directly impacted by a change in sentencing credit. See *Jackson*, 199 Ill. 2d at 294 (and cases cited therein). Based on that precedent, we conclude that defendant's claim is not moot, and we proceed to consider his postconviction petition.

¶ 23 We begin by noting the familiar principles regarding postconviction proceedings. The Act (725 ILCS 5/122-1 *et seq*. (West 2014)) provides criminal defendants a remedy to address substantial violations of their federal or state constitutional rights in their original trial or sentencing hearing. *People v. Allen*, 2015 IL 113135, ¶ 20. A postconviction action is not a substitute for or an addendum to a direct appeal, but is a collateral attack on a prior conviction and sentence. *People v. Tate*, 2012 IL 112214, ¶ 8. "The purpose of the 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 (2001).

¶ 24 The Act creates a three-stage procedure of postconviction relief in noncapital cases. *Allen*, 2015 IL 113135, ¶ 21. At the first stage, the defendant need only present the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Since most petitions at this stage

are drafted by *pro se* defendants, the threshold for survival is low. *Id.* If the circuit court independently determines that the petition is either "frivolous or is patently without merit" it dismisses the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014); *Hodges*, 234 Ill. 2d at 11. If a petition is not summarily dismissed by the circuit court, the petition advances to the second stage. *Id.*

¶ 25 At the second stage of postconviction proceedings, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2014)) and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2014)). *Id.* at 10-11. At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights to warrant a third-stage evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶ 33; *People v. English*, 403 Ill. App. 3d 121, 129 (2010). The petitioner, however, is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Rather, in order to mandate an evidentiary hearing, allegations in the petition must be supported by the record or by its accompanying affidavits. *Id*. Nonfactual and nonspecific claims that merely amount to conclusions are insufficient to require an evidentiary hearing under the Act. *Id*. Further, at this stage of the proceedings, the circuit court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the circuit court determines the petitioner made a substantial showing of a constitutional violation at the second stage, a third-stage evidentiary hearing must follow. 725 ILCS 5/122-6 (West 2014); see also *English*, 403 Ill. App. 3d at 129.

¶ 26 At a third-stage evidentiary hearing, the circuit court serves as a fact finder and accordingly, determines the credibility of witnesses, decides the weight to be given the testimony

and evidence, and resolves any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34. It is at this stage that the circuit court must determine whether the evidence introduced demonstrates that the petitioner is entitled to relief under the Act. *Id*.

¶ 27 Here, defendant's postconviction petition advanced to the second stage and was dismissed. We review a circuit court's dismissal of a postconviction petition without a third-stage evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473. Under *de novo* review, we perform the same analysis that a trial judge would perform. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151. Having set forth our standard of review, we now turn to the substantive issues raised on appeal.

¶ 28 Defendant argues that he is entitled to a third-stage postconviction petition hearing because he made a substantial showing that he was deprived of the effective assistance of counsel. Defendant argues his trial attorney failed to provide a copy of the motion to withdraw bond to the trial court at sentencing, thus depriving him of 232 days of presentence custody credit. Defendant maintains that this error was compounded when his appellate counsel failed to recognize this issue until the reply brief stage during his initial appeal.

¶ 29 The State maintains that this court already considered the alleged underlying error as it was raised in his initial appeal and in his petition for rehearing. The State thus urges us to find that defendant's ineffective assistance claims are barred by *res judicata*.

¶ 30 Ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, a court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007)

(citing *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *Colon*, 225 Ill. 2d at 135.

¶ 31 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *Id.*; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must demonstrate that, "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant was prejudiced by his or her attorney's performance.

¶ 32 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. Thus, we do not need to consider the second prong of the *Strickland* test when the first prong cannot be satisfied. See *People v. Cunningham*, 376 Ill. App. 3d 298, 304 (2007). Since an attorney's performance is ineffective only if it falls below an objective standard of reasonableness (*Evans*, 209 Ill. 2d at 220), counsel cannot be deficient if counsel's failure does not constitute error. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005).

¶ 33 We initially acknowledge that defendant's ineffective assistance of trial counsel claim has been forfeited due to the fact it was not expressly raised in his initial appeal, but could have

been. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010) (issues that could have been raised in his initial appeal, but were not, are considered forfeited and therefore barred from consideration in a postconviction proceeding); *People v. Veach*, 2017 IL 120649, ¶ 47 ("a defendant must generally raise a constitutional claim alleging ineffective assistance of counsel on direct review or risk forfeiting the claim").

¶ 34 That being said, the alleged errors at the core of both of defendant's ineffective assistance claims—that counsel failed to provide the trial court with a copy of his motion to withdraw the bond at sentencing, thus preventing defendant from receiving additional credit for time served—was raised in *Koen I*. Defendant's claims of ineffective assistance of counsel are thus barred by *res judicata*, as we have already considered the alleged error and rejected it. See *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). In *Koen I*, this court examined defendant's contention that he was entitled to more sentencing credit and found that he was not. *Koen I*, 2014 IL App (1st) 113082, ¶¶ 56-59. The specific argument regarding the motion to withdraw the bond in support of additional credit was raised in his reply brief and the petition for rehearing. Moreover, the motion to withdraw the bond, the transcript of the hearing where the motion was first presented, and the transcripts of the sentencing hearing (over multiple days) were included in the record on appeal. Although defendant suggests otherwise, we did consider the record in its entirety and his arguments as to the motion to withdraw the bond when rendering our determination. This is particularly true where he raised this error again in his petition for rehearing, which was fully briefed and then denied by this court.

¶ 35 In rendering this determination, we find it necessary to emphasize that appellate counsel argued the underlying error to this court. Although defendant did not raise this issue until his reply, forfeiture is a limitation on the parties and not the court. See *People v. Hamilton*, 179 Ill.

2d 319, 323 (1997). Therefore, the fact the issue was raised in the reply for the first time does not automatically mean that this court did not consider it. See *People v. Williams*, 193 Ill. 2d 306, 348 (2000) (and cases cited therein) (considering a plain-error argument raised for the first time in defendant's reply brief).

¶ 36 Second, appellate counsel raised these contentions in defendant's petition for rehearing. Notably, our supreme court rules require that a petition for rehearing "shall state briefly the points *claimed to have been overlooked* or misapprehended by the court." (Emphasis added.) Ill. S. Ct. R. 367(b) (eff. Dec. 29, 2009). We note that much of defendant's postconviction petition appeal is verbatim from his petition for rehearing—defendant raises the same arguments and cites the same case law now as he did when he requested rehearing of his initial appeal. In addition, defendant argued in his petition for rehearing that he "did not raise a new 'point' for the first time in his reply, but simply supplemented the argument advanced in Appellant's opening brief regarding the trial court's intent to grant the additional credit at issue." We find it to be disingenuous for defendant to now argue that appellate counsel did not raise this error. See *People v. Harvey*, 221 Ill. 2d 368, 385 (2004).

¶ 37 In that the claim that defendant was entitled to additional credit for time served had been raised and rejected by this court on direct appeal, *res judicata* bars defendant from recasting the claim as one of ineffectiveness of counsel. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 24.

¶ 38 In sum, defendant's postconviction claim that trial counsel was ineffective for failing to present the motion to withdraw bond at sentencing was forfeited as it was not raised on direct appeal. Further, the underlying error of which defendant complains was raised by appellate counsel in the reply brief and in the fully-briefed petition for rehearing and decided by this court in *Koen I*. Accordingly, we conclude defendant has failed to make a substantial showing that his

constitutional rights were violated to warrant a third-stage evidentiary hearing.

¶ 39 CONCLUSION

¶ 40 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 41 Affirmed.