

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).

FILED

February 14, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160469-U

NO. 4-16-0469

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
TORI A. STARKS,)	No. 05CF1654
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant raised an as-applied constitutional challenge to his sentence for the first time on appeal, the appellate court found the issue forfeited.

¶ 2 Defendant, Tori A. Starks, appeals from the circuit court’s second-stage dismissal of his postconviction petition. Defendant does not raise any issues from the petition itself, but instead, for the first time, raises a proportionate penalties argument pertaining to his sentence. Following the supreme court’s decision in *People v. Thompson*, 2015 IL 118151, we find defendant has forfeited review of his claim by not properly preserving the issue for purposes of appellate review.

¶ 3 I. BACKGROUND

¶ 4 In February 2006, defendant pleaded guilty to armed robbery “while armed with a dangerous weapon, a baseball bat,” a Class X felony. See 720 ILCS 5/18-2(a)(1) (West 2004).

The trial court sentenced him to 40 years in prison. Defendant filed a direct appeal, claiming his sentence was excessive, but this court affirmed. See *People v. Starks*, 4-06-0327 (Feb. 1, 2008) (unpublished order under Supreme Court Rule 23).

¶ 5 More than four years later, defendant filed a postconviction petition, alleging claims unrelated to the claim presented in this appeal. The circuit court appointed counsel for defendant, who filed an amended petition. At the second stage of the proceedings, the court dismissed defendant's petition on the State's motion, on timeliness grounds. Defendant appealed, claiming his postconviction counsel rendered unreasonable assistance by failing to address the timeliness issue in the amended petition. This court vacated the circuit court's dismissal and remanded for further proceedings. See *People v. Starks*, 2015 IL App (4th) 130673-U, ¶ 25.

¶ 6 On remand, newly appointed counsel filed an amended postconviction petition addressing the timeliness issue and a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). On the State's motion, the circuit court again dismissed defendant's petition as untimely.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 Defendant does not appeal the timeliness issue or the dismissal of his postconviction petition. Instead, he claims, for the first time, his 40-year sentence violates the proportionate penalties clause, causing his sentence to be void *ab initio*, and therefore, not subject to traditional forfeiture principles. In his initial brief, defendant argues the armed robbery statute is facially unconstitutional as violative of the proportionate penalties clause when compared to the armed violence statute. In response, the State contends defendant's claim is *not* a facially unconstitutional challenge, but rather, an as-applied challenge. The State cites the

supreme court's decision in *People v. Hernandez*, 2016 IL 118672, ¶ 16, which held the two statutes do *not* have identical elements and therefore do not violate the proportionate penalties clause. The State then argues defendant must raise his as-applied challenge in a different proceeding, not on appeal from the dismissal of his postconviction petition. In reply, defendant agrees *Hernandez* precludes his facially constitutional challenge, but he claims this court may consider his as-applied argument in this appeal.

¶ 10 Despite his concession, defendant still contends his sentence is void as unconstitutional under an as-applied challenge. Our supreme court recently addressed whether as-applied constitutional challenges can be raised for the first time on appeal. *Thompson*, 2015 IL 118151. There, the defendant raised an as-applied constitutional challenge to his sentence for the first time on appeal upon the denial of his section 2-1401 (735 ILCS 5/2-1401 (West 2010)) petition for relief from judgment. *Thompson*, 2015 IL 118151, ¶ 17. The defendant argued this claim was not subject to the traditional forfeiture doctrine because it rendered the judgment void. *Thompson*, 2015 IL 118151, ¶ 17. Our supreme court disagreed, finding judgments void only where jurisdiction is lacking or where the judgment is based on a facially unconstitutional statute, making it void *ab initio*. *Thompson*, 2015 IL 118151, ¶¶ 31-32, 34. That is, *Thompson* makes clear, it is *only* those two types of cases that are exempt from the typical procedural bar excusing forfeiture. *Thompson*, 2015 IL 118151, ¶ 34. Because as-applied challenges are dependent on the particular circumstances and facts relating to the defendant and his individual case (as opposed to a facial challenge requiring a showing of unconstitutionality under *any* set of facts), it is imperative the defendant preserve the record and the issue for purposes of appellate review. *Thompson*, 2015 IL 118151, ¶ 37. As the *Thompson* court explained, the trial court is the most appropriate tribunal for the type of factual development necessary to adequately address

issues related to a defendant's as-applied challenge. *Thompson*, 2015 IL 118151, ¶ 38. Therefore, following *Thompson*, we find defendant has forfeited his as-applied challenge to his sentence by raising it for the first time on appeal.

¶ 11

III. CONCLUSION

¶ 12 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 13 Affirmed.