2018 IL App (1st) 161400-U

No. 1-16-1400

Order filed May 11, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 14860
	)	
PIERRE JORDAN,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's *pro se* postconviction petition was properly summarily dismissed pursuant to the doctrine of *res judicata*.

¶ 2 Defendant Pierre Jordan appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal, defendant contends that the circuit court erred when it dismissed the petition because it set out the gist of a constitutional claim that he was denied his right to due process and the

protection against self-incrimination when, during closing argument, the State noted that he declined to voluntarily provide a DNA sample and asked the jury to infer his guilt from that fact. We affirm.

¶ 3 Following a jury trial, defendant was found guilty of aggravated criminal sexual assault and sentenced to 25 years in prison. The evidence at defendant's trial established through, *inter alia,* the testimony of the victim J.R., that after the victim invited defendant to her home to watch a movie, defendant hit her in the face and threatened her with a box cutter, and then engaged in oral and vaginal sex with her. The victim further testified that she contacted police and submitted to a sexual assault kit. Detective Peter Maderer testified that after the victim identified defendant in a photographic array, defendant was taken into custody. Maderer further testified that during a conversation with defendant, defendant denied knowing the victim and declined to provide a DNA sample through a buccal swab. Maderer finally testified that the victim identified defendant in a line-up. Defendant later submitted to a buccal swab pursuant to a court order. Semen taken from the victim's vaginal swabs was subjected to DNA testing and was a match to defendant's DNA. During closing argument, the State noted several times that defendant refused to consent to a buccal swab and only submitted DNA pursuant to a court order. The jury found defendant guilty of aggravated criminal sexual assault and he was sentenced to 25 years in prison.

¶ 4 On appeal, defendant contended, *inter alia*, that the State's remarks during closing argument deprived him of a fair trial. Defendant specifically argued that the State told the jury repeatedly to infer that he was guilty because he declined to provide a DNA sample, and thus penalized him for asserting his constitutional right to privacy. *People v. Jordan,* 2011 IL App (1st) 092612-U, ¶ 31. This court rejected this argument as, even assuming that the State's

remarks were improper, "at most, the error was harmless." *Id.* ¶ 36. We noted that any error in the complained-of statements did not contribute to the jury's verdict as the evidence of defendant's guilt was "overwhelming" based upon the testimony at trial and the DNA evidence. *Id.* We further noted that the jury was instructed that it should not consider arguments as evidence and that its verdict should be based upon the evidence presented at trial. *Id.*

¶ 5 In February 2015, defendant filed the instant *pro se* postconviction petition. This handwritten document is over 50 pages long and raises many issues regarding the proceedings before, during and after defendant's trial. The petition alleged, *inter alia,* that during closing argument the State deprived defendant of a fair trial when it "urged" the jury to infer that he was guilty because he exercised his right to privacy and declined to give a DNA sample, that the trial court "improperly" applied the "rape shield law" to prevent defendant from impeaching the victim with evidence that she had engaged in sexual intercourse with her boyfriend and "fully developing and presenting his theory" that the victim lied to cover her infidelity, and that the State erred when it approached a witness without first obtaining the trial court's permission.

¶ 6 On May 8, 2015, the circuit court summarily dismissed the petition as frivolous and patently without merit in a 38-page written order. The court stated that it was "directing the clerk to notify the defendant by certified mail within ten—to mail a copy of this order by certified mail within ten business days." At a March 28, 2016 court date, the trial court stated "there is a note from the clerk's office that they never sent [the court's] written order dismissing [defendant's] post conviction petition." The court then stated that the order of May 8, 2015, was to stand and that the clerk was to send a copy of the written order dismissing defendant's *pro se*

postconviction petition to defendant by certified mail within 10 business days. Defendant now appeals.

¶ 7 Before reaching the merits of defendant's contentions on appeal, we must consider our jurisdiction. "A reviewing court must ascertain its jurisdiction before proceeding in a cause of action, regardless of whether either party has raised the issue." *Secura Insurance Co. v. Illinois Farmers Insurance Co*., 232 Ill. 2d 209, 213 (2009).

¶ 8 Here, the circuit court entered an order summarily dismissing the instant petition on May 8, 2015. Pursuant to section 122-2.1(a)(2) of the Act when:

> "the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry." 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 9 The record reflects, however, that notice of the court's order was not mailed to defendant until March 29, 2016 in violation of both section 122-2.1(a)(2) of the Act and Supreme Court Rule 651(b). See Ill. S. Ct. R. 651(b) (eff. Feb. 6, 2013) ("[u]pon the entry of a judgment adverse to a petitioner in a postconviction proceeding, the clerk of the trial court shall at once mail or deliver to the petitioner a notice" of the court's order). Defendant then filed a *pro se* notice of appeal that was stamped "Received" by the circuit court on April 27, 2016. Defendant's notice of appeal from the May 8, 2015 order dismissing the petition was untimely in that it was filed more than 30 days after the entry of the order. See Ill. S. Ct. R 606(b) (eff. Dec. 11, 2014) ("the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the

final judgment appealed from"). Moreover, the record reveals that the clerk's failure to notify defendant of the dismissal was the cause of defendant's failure to file a timely notice of appeal.

¶ 10 In those cases where a defendant is not prejudiced by a violation of section 122-2.1(a)(2) of the Act, he requires no remedy. See *People v. Robinson*, 217 Ill. 2d 43, 60 (2005) (determining that the defendant "require[d] no remedy because he was not prejudiced by" the two-day delay in serving the order dismissing his postconviction petition when he filed his notice of appeal on time). However, in those cases where the defendant is prejudiced, that is, his appeal in untimely because he was not notified of the entry of the challenged order in a timely manner, this court must treat his untimely notice of appeal as a petition for leave to file a late notice of appeal pursuant to Supreme Court Rule 606(c). See *People v. Fikara*, 345 Ill. App. 3d 144, 158 (2003). See also Ill. S. Ct. R. 606(c) (eff. Dec. 11, 2014).

¶ 11 *People v. Fikara*, 345 Ill. App. 3d 144 (2003), is instructive. In that case, the circuit court dismissed four of the allegations contained in the defendant's postconviction filings and granted a new sentencing hearing based on another. The defendant did not file his notice of appeal until after the new sentencing hearing. On appeal, the State argued that the reviewing court did not have jurisdiction to consider the issues raised from the dismissed counts in the postconviction petition because the notice of appeal was not timely filed.

¶ 12 The court first noted that "an order that disposes entirely of a postconviction petition is immediately appealable, even if the order does not ultimately dispose of the criminal proceedings against the defendant." *Id.* at 151. "Such an order, while not necessarily disposing of the criminal proceeding, nonetheless is a final disposition of the petition under the Act." *Id.* In that case, the circuit court's order dismissing the postconviction petition in part and granting a new sentencing

hearing "resolved all issues raised in the postconviction petition and was a final disposition of the petition under the Act." *Id.* at 152. Accordingly, the order was immediately appealable and the defendant was required to file a notice of appeal within 30 days. *Id.* The court therefore concluded that the defendant's failure to file a timely notice of appeal deprived it of jurisdiction. *Id.*

¶ 13 In a supplemental opinion upon denial of rehearing, the court considered the defendant's assertion that the circuit court failed to order the clerk to provide the defendant with immediate notice of the adverse judgment, that is, the dismissal of the certain claims raised in the postconviction petition as required by Supreme Court Rule 651(b), and that this failure should excuse his untimely notice of appeal. *Fikara*, 345 Ill. App. 3d at 157-58. The court noted that "Supreme Court Rule 651(b) requires that, upon the entry of a judgment adverse to a defendant in a postconviction proceeding, the clerk of the trial court 'shall at once mail or deliver' to the defendant a notice advising him of the entry of the order and advising him of his right to appeal. 134 Ill. 2d R. 651(b)." *Id.* at 158. The court's review of the record revealed that the clerk of the circuit court failed to provide the defendant with the required notice of the adverse judgment and that the circuit court also failed to admonish the defendant about the finality of the order and the need to file a notice of appeal within 30 days. *Id.*

¶ 14 The court therefore determined that in those cases where Supreme Court Rule 651(b), has not been complied with, "the reviewing court must treat a defendant's untimely notice of appeal as a petition for leave to file a late notice of appeal within the contemplation of Supreme Court Rule 606(c) (188 Ill. 2d R. 606(c))." *Id*. "The reviewing court must then grant the petition and consider the merits raised in the defendant's appeal." *Id.* In other words, a "reviewing court must

allow the filing of a late notice of appeal even when the six-month period for seeking leave to file a late notice of appeal provided in [Supreme Court] Rule 606(c) has already expired." *Id.* Accordingly, the court held that in light of the circuit court's failure to "ensure compliance" with Rule 651(b), that it must treat the untimely notice of appeal as a petition to file a late notice of appeal and consider the merits of the defendant's postconviction claims. *Id.* See also *People v. Clark*, 374 Ill. App. 3d 50, 57-59 (2007) (following *Fikara*).

¶ 15 We find the decision in *Fikara* to be well reasoned and agree with its analysis. Here, the circuit court summarily dismissed the instant petition on May 8, 2015, but the clerk of the circuit court did not send notification of this order to defendant until March 29, 2016. Based upon our reading of the record on appeal, the clerk of the circuit court failed to comply with Supreme Court Rule 651(b) (eff. Feb. 6. 2013), by failing to provide defendant with the required notice of an adverse judgment in the instant postconviction proceeding. See *Id.* ("[u]pon the entry of a judgment adverse to a petitioner in a postconviction proceeding, the clerk of the trial court shall at once mail or deliver to the petitioner a notice" of the court's order). As in *Fikara*, we must treat defendant's untimely notice of appeal as a petition to file a late notice of appeal and consider the merits of the issues defendant has raised on appeal. See *Fikara*, 345 Ill. App. 3d at 158.

¶ 16 On appeal, defendant contends that the circuit court erred in dismissing the instant petition when it "contained a gist of a constitutional claim as to at least one issue."[1] Specifically, defendant contends that he was denied due process and the protection of the fifth amendment when he was "compelled" by the State to testify against himself via "his refusal to voluntarily

[1] Although defendant's brief refers to a successive postconviction petition, the record does not contain a successive postconviction petition.

submit to a buccal swab" and when the trial court permitted the State to comment on this refusal thus permitting the jury to consider his refusal as evidence of his guilt. Defendant also contends that the trial court erred when it denied defendant's posttrial motion because it contained "[l]egitimate issues" such as the State's reference to defendant's refusal to give a DNA sample, and its request that the jury consider that fact as evidence of guilt. Defendant finally contends that he was denied the effective assistance of appellate counsel when counsel did not raise this claim on direct appeal.

¶ 17 We note that defendant makes no argument regarding any of the other issues raised in the instant petition, and has therefore waived those issues on appeal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 18 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2014). A proceeding under the Act is a collateral attack on a prior conviction and sentence and is therefore "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). Accordingly, the issues raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*, and those issues that could have been raised, but were not, are forfeited. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). A defendant cannot "avoid the bar of *res judicata* by simply rephrasing issues previously addressed on direct appeal." *People v. Simms*, 192 Ill. 2d 348, 360 (2000). This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 19 Here, defendant's contention that he was denied due process and forced to testify against himself because the State noted during closing argument that he did not voluntarily provide a

DNA sample and used that fact to imply to the jury that he was guilty is barred by the doctrine of *res judicata* because it is the same claim that defendant raised before this court on direct appeal. Specifically, defendant argued on direct appeal that the State "repeatedly told the jury to infer his guilt based on his decision to decline to provide a DNA sample, thus penalizing him for utilizing his constitutional right to privacy." See *Jordan,* 2011 IL App (1st) 092612-U, ¶ 31. We rejected this argument because, even assuming that the State's remarks were improper, any error in the challenged arguments did not contribute to the jury's verdict considering the testimony at trial and the DNA evidence. *Id.*¶ 36. Because defendant raised this issue on direct appeal, it is barred from consideration by the doctrine of *res judicata* in this postconviction proceeding. See *Williams*, 209 Ill. 2d at 233.

¶ 20 Defendant's remaining contentions, that the trial court erred when it denied his posttrial motion because it contained a challenge to the State's reference to defendant's refusal to provide a DNA sample and its request that the jury consider this fact as evidence of his guilt during closing argument, and that he was denied the effective assistance of appellate counsel because counsel failed to raise this claim on direct appeal must also fail.

¶ 21 Initially, we note that defendant cites no legal authority in support of these arguments, and they are therefore forfeited on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. (eff. July 1, 2017) (the argument section of the parties' briefs "shall contain the contentions of the [party] *** with citation of the authorities *** relied on"). Moreover, defendant's contention that the trial court erred in denying his postttrial motion is based upon the fact that it challenged the State's reference to defendant's refusal to provide DNA during closing argument, and is therefore barred by the doctrine of *res judicata* because this argument was raised on direct appeal. See *Williams*,

209 Ill. 2d at 233. Defendant cannot avoid the bar of *res judicata* by simply repackaging or rephrasing an issue that was previously raised and addressed on direct appeal. See *Simms*, 192 Ill. 2d at 348. Finally, defendant's contention that he was denied the effective assistance of appellate counsel for a failure to raise this claim on direct appeal must fail because counsel did, in fact, raise this issue on direct appeal. Accordingly, the circuit court properly summarily dismissed defendant's *pro se* postconviction petition.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.