2018 IL App (2d) 151009-U
No. 2-15-1009
Order filed March 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LIRIM LUZAJ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-1168 Honorable Robert G. Kleeman, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The doctrines of *res judicata* and forfeiture would not be applied where fundamental fairness required otherwise.

¶ 2 Defendant, Lirim Luzaj, appeals from a judgment summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), from his conviction of possession of cannabis with the intent to deliver (720 ILCS 550/5(g) (West 2010)). Defendant contends that his petition stated the gist of a meritorious claim that trial counsel was ineffective for failing to relay the State's plea offer before trial. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on four counts of cannabis trafficking (720 ILCS 550/5.1(a) (West 2010)), two counts of conspiracy to commit cannabis trafficking (720 ILCS 5/8-2(a), 550/5.1(a) (West 2010)), and two counts of possession of cannabis with the intent to deliver (720 ILCS 550/5(g) (West 2010)). Following a bench trial, at which defendant was represented by private counsel, defendant was found guilty of one count of possession of cannabis with the intent to deliver and not guilty of the other counts. (One count of cannabis trafficking had previously been nol-prossed.)

¶ 5 On October 28, 2011, following a sentencing hearing, the trial court sentenced defendant to 18 years' imprisonment. On November 22, 2011, a new attorney entered an appearance on behalf of defendant. The new attorney moved for reconsideration of defendant's sentence and asked for additional time to review the record and file an amended motion. Thereafter, on December 21, 2011, the attorneys who had represented defendant at trial were granted leave to withdraw. On July 31, 2012, new counsel filed an amended motion for reconsideration of defendant's sentence, arguing, *inter alia*, that defendant's sentence was grossly disproportionate to the sentences imposed on several codefendants who had pleaded guilty to charges stemming from the same investigation.

¶ 6 At the hearing on defendant's motion for reconsideration of his sentence, the parties stipulated that the State had offered defendant during plea negotiations a sentence of 12 years, to be served at 50%, in exchange for defendant's guilty plea to cannabis trafficking. During the course of defendant's testimony at the hearing, defendant was asked by new counsel whether he was aware that, prior to trial, the State had conveyed a plea offer to trial counsel. Defendant responded, "No, nobody told me." Defendant further testified that he recalled being interviewed

by the probation department about the charges and telling the interviewer that he had done nothing wrong.

¶ 7 The trial court denied defendant's motion for reconsideration of his sentence. In so doing, the court stated as follows concerning the State's plea offer:

> "The defense in this case has implied in their testimony that an offer was [not] conveyed.
>
> I don't see that raised in the allegation. Even if it was [not] conveyed, that's not the subject of a motion to reconsider.
>
> *** I don't think it's properly before me.
>
> Perhaps it has relevance in terms of this *Lafler* [*v. Cooper*, 566 U.S. ___, ___, 132 S. Ct. 1376, 1384 (2012),] analysis, but it's not a basis—the fact that an offer may have been conveyed or not conveyed, would not be a basis for me to reconsider the sentence.
>
> And beyond that, I observed the Defendant testify. I don't believe him. I noted what [the State] noted, that the Defendant testified—asserted [in] his pre-sentence investigation that he did nothing wrong.
>
> I observed him while he testified. I don't find him to be credible, and I don't think it's relevant for this motion."

¶ 8 Defendant timely appealed. Defendant argued that, by his testimony at the hearing on his motion for reconsideration of his sentence, he raised a *pro se* claim of ineffective assistance of trial counsel, based on counsel's failure to communicate the State's plea offer to him. According to defendant, the court erred in failing to inquire into the factual basis of defendant's claim against trial counsel, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and he asked that we remand the cause for the requisite hearing. Defendant also argued that, because the court also became aware of a claim of ineffective assistance of postsentencing counsel, based on counsel's

failure to properly raise the issue of trial counsel's ineffectiveness, the court erred in failing to inquire into that claim pursuant to *Krankel*. In the alternative, defendant argued that he received ineffective assistance of postsentencing counsel in that counsel failed to properly present his ineffective-assistance-of-trial-counsel claim. We affirmed. See *People v. Luzaj*, 2014 IL App (2d) 130096-U.

¶ 9 First, we found that any argument that the trial court erred in failing to conduct a *Krankel* inquiry as to defendant's alleged ineffectiveness claim against trial counsel, based on counsel's failure to convey the State's plea offer, was moot, because defendant had a new attorney and thus "defendant had already obtained what a *Krankel* inquiry would have afforded him—new counsel to represent him on his claim." *Id.* ¶ 11. We then stated the following:

> "In any event, the record makes clear that the trial court considered defendant's claim and found that it lacked merit. In considering a *pro se* claim of ineffectiveness, a trial court may base its evaluation 'on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. [Citation.] After noting that trial counsel's alleged failure to convey the State's offer to defendant would not be a basis for reconsideration of the sentence, the trial court stated:
>
> > '*And beyond that*, I observed the Defendant testify. *I don't believe him.* I noted what [the State] noted, that the Defendant testified—asserted his pre-sentence investigation that he did nothing wrong.
> >
> > I observed him while he testified. *I don't find him to be credible*, and I don't think it's relevant for this motion.' (Emphases added.)
>
> From these comments, it is clear that the trial court determined that any allegation of ineffectiveness was insufficient to warrant appointment of new counsel. Although the

court did not expressly indicate that it was conducting an inquiry under *Krankel*, there is no requirement that the court do so." *Id.* ¶ 12.

¶ 10 We next rejected defendant's argument that the trial court had a duty to inquire into the factual basis of any claim of ineffective assistance of postsentencing counsel. We stated: "The mere fact that the trial court recognized that postsentencing counsel did not raise a claim of ineffective assistance of trial counsel did not trigger a duty to determine whether this gave rise to a claim of ineffectiveness of postsentencing counsel, particularly in light of the trial court's determination that the underlying ineffectiveness claim against trial counsel was without merit." *Id.* ¶ 13.

¶ 11 Last, we rejected defendant's alternative argument that postsentencing counsel was ineffective for failing to present defendant's ineffectiveness claim against trial counsel in a written motion. Defendant argued that, "[i]f postsentencing counsel had sufficiently raised the issue and had properly presented the issue in a written motion, there was a reasonable probability that the court below would have had a hearing on the issue." *Id.* ¶ 14. We disagreed, stating: "[T]his argument overlooks the fact that, as noted above, although the court found that the issue was not properly before it, the court nevertheless addressed and rejected the claim of ineffectiveness, based on its finding that defendant was not credible." *Id.* We thus concluded that defendant had failed to satisfy the prejudice prong of an ineffectiveness claim.

¶ 12 On July 16, 2015, defendant filed a *pro se* postconviction petition, arguing, *inter alia*, that trial counsel was ineffective for failing to convey the State's 12-year plea offer. He contended that, had the offer been conveyed, he would have accepted it. He asked the trial court to modify his sentence to 12 years.

¶ 13 On September 3, 2015, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. The court found that every claim of error in the petition either was or could have been raised in defendant's appeal.

¶ 14 Defendant timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Defendant argues that the trial court erred in dismissing his *pro se* postconviction petition as frivolous and patently without merit, because he stated an arguable claim that trial counsel was ineffective for failing to convey the State's 12-year plea offer before trial.

¶ 17 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a method by which criminal defendants can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction petition is a collateral attack on the trial court proceedings; it is not an appeal from the judgment of conviction. *People v. Tate*, 2012 IL 112214, ¶ 8. Therefore, issues that were raised and decided on direct appeal are barred by *res judicata*. *Id.* Similarly, issues that were not raised on direct appeal, but could have been, are forfeited. *Id.* The doctrines of *res judicata* and forfeiture are proper bases for first-stage dismissals. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 18 We must, however, bear in mind, that *res judicata* is an equitable doctrine (*Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 890 (2009) and the rule of forfeiture, a rule of judicial procedure, is an admonition to the parties and not a limitation upon the court (*Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 28; *Daley v. License Appeal Comm'n of the City of Chicago*, 311 Ill. App. 3d 194, 200 (1999)). Accordingly, these procedural bars may be relaxed

when fundamental fairness so requires. *People v. Blair*, 215 Ill. 2d 427, 450–51, 831 N.E.2d 604, 619 (2005); see also *People v. Somerville*, 42 Ill. 2d 1, 4 (1969). When necessary to serve the interests of justice, a procedural forfeiture will be disregarded. *Johnson v. Transport International Pool, Inc.*, 345 Ill. App. 3d 471, 474 (2003). Further, *res judicata* does not apply if a party "clearly and convincingly shows that the policies favoring preclusion are overcome for some extraordinary reason." *Altair Corp. v. Grand Premier Trust & Investment, Inc.*, 318 Ill. App. 3d 57, 63 (2000). The unique procedural posture of this case leads us to conclude that such exceptions apply here.

¶ 19 Here, as the trial court ruled, defendant's postconviction claim that trial counsel was ineffective for failing to convey the State's 12-year plea offer before trial would be barred by a strict application of *res judicata* and forfeiture. See *People v. Johnson*, 2016 IL App (5th) 130554, ¶¶ 28-32 (allegations of ineffective assistance of counsel contained in the defendant's *pro se* postconviction petition, which had been considered and rejected by the trial court after a *Krankel* hearing and which were subsequently raised, or could have been raised, on appeal should have been dismissed under the doctrines of *res judicata* and forfeiture). There is no question that the trial court considered this claim. Although the court noted that counsel's alleged failure to convey the plea offer would not be a basis upon which to reconsider defendant's sentence, the court heard defendant's testimony on the issue. The court rejected defendant's testimony as incredible and thus rejected his ineffectiveness claim on the merits. We acknowledged the court's ruling on direct appeal. See *Luzaj*, 2014 IL App (2d) 130096-U, ¶ 12 ("[T]he record makes clear that the trial court considered defendant's claim and found that it lacked merit."). Defendant could have, but did not, challenge that ruling on direct appeal. Instead, he argued that the trial court failed to inquire into the factual basis of his claim and that

postsentencing counsel was ineffective for failing to present the claim in a written motion. In sum, defendant raised his present claim during the postsentencing proceeding, the trial court rejected it on the merits, and defendant did not challenge that ruling on direct appeal. Absent equitable considerations, defendants arguments would be procedurally barred.

¶ 20 However, under these unique circumstances, we find that it would be fundamentally unfair to deem defendant's claim barred. See *Somerville*, 42 Ill. 2d at 4. Although defendant did raise the claim during the postsentencing proceeding, the issue was raised somewhat inadvertently. He did not raise it in a written motion; instead it came up during his testimony. And although the trial court did address the claim on the merits, it did so almost in passing, after previously stating that the claim was irrelevant to the matter at hand. Finally, although the trial court was not required to conduct a *Krankel* inquiry—as defendant already had new counsel to present the claim—the court's examination of the claim turned out to be less thorough, ironically, than a *Krankel* inquiry likely would have been. Indeed, had defendant presented the claim *pro se*, the court almost certainly would have asked trial counsel whether they had conveyed the offer to defendant. See *People v. Robinson*, 2017 IL App (1st) 161595, ¶¶ 65-72 (during a *Krankel* inquiry, the trial court allowed counsel to respond to each claim raised by the defendant). However, because defendant happened to have new counsel already, and because new counsel did not introduce any testimony by trial counsel,[1] the court simply discredited

[1] Of course, had new counsel introduced such testimony, trial counsel might well have refuted defendant's testimony. Thus, we do not imply that new counsel was ineffective for failing to introduce trial counsel's testimony.

defendant's testimony. As a result, defendant has never obtained a meaningful review of the merits of his ineffective assistance claim.

¶ 21 Thus, under these unique circumstances, we choose not to apply the doctrines of *res judicata* and forfeiture. We choose instead to allow defendant to pursue this claim anew via his petition under the Act.

¶ 22 In so doing, we observe that the State does not present a discrete argument that defendant's claim is otherwise insufficient to survive first-stage review. The State briefly asserts that, if we do not apply *res judicata*, we should deem the claim rebutted by the record, in that the trial court discredited defendant's testimony. This, to us, is simply a reiteration of the argument that the claim is barred because the trial court already rejected it, *i.e.*, the claim is barred by *res judicata*. Again, we acknowledge that the trial court rejected it and that the doctrine of *res judicata* could be applied. However, because of the circumstances under which the trial court rejected it, we choose not to give that rejection preclusive effect.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, the judgment of the circuit court of Du Page County is reversed, and the cause is remanded for further proceedings under the Act.

¶ 25 Reversed and remanded.