2018 IL App (3d) 160384-U

Order filed February 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-16-0384 Circuit No. 10-CF-2469
CHAKARIS R. EVANS,	)	The Honorable Daniel Rozak,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it dismissed the defendant's postconviction petition as frivolous and patently without merit at the first stage of postconviction proceedings.

¶ 2 The defendant, Chakaris R. Evans, was convicted of home invasion (720 ILCS 5/12-11(a)(1) (West 2010)) and was sentenced to 20 years of imprisonment. This court affirmed his sentence and conviction on direct appeal. *People v. Evans*, 2014 IL App (3d) 130230-U (unpublished order under Supreme Court Rule 23). Subsequently, the defendant filed a

postconviction petition, which the circuit court dismissed at the first stage of postconviction proceedings after finding the motion was frivolous and patently without merit. On appeal, the defendant challenges the first-stage dismissal of his postconviction petition. We affirm.

¶ 3 FACTS

¶ 4 On July 2, 2010, Paul Evans was in his house with his wife, Queenesther Evans, when the doorbell rang at around 7 a.m. Paul Evans answered the door and a young man said he had a book bag for Paul Evans' grandson that he wished to leave at the residence. As Paul Evans opened the door, three masked individuals forced their way inside and knocked him down. Two of those masked individuals began beating Paul Evans with baseball bats. Those two masked individuals then ran toward a bedroom where Queenesther Evans was located. They broke down the locked door and entered the bedroom. Queenesther Evans had a gun in her hand, but she was afraid to use it. The two masked individuals took the gun, her "netbook," her iPhone, and her purse. They exited the bedroom and ran out of the house. Paul Evans could not identify any of the attackers. Queenesther Evans identified a baseball bat found outside of the house, and a latex glove and a roll of tape left by the intruders in the bedroom.

¶ 5 Four individuals were charged with crimes related to this incident—the defendant, Rashid McCarthy, Paul Evans III, and Jeffery Burks. Paul Evans III was victim Paul Evans' grandson. The defendant was not related to Evans III or Paul Evans.

¶ 6 On December 16, 2010, the defendant was charged by indictment with two counts of home invasion (720 ILCS 5/12-11(a)(1), (a)(2) (West 2010)); one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)); one count of aggravated battery of a senior citizen (720 ILCS 5/12-4.6 (West 2010)); one count of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2010)); and two counts of aggravated identity theft (720 ILCS 5/16G-20(a)(1) (West 2010)).

¶ 7 On April 18, 2012, the State filed its list of witnesses, which did not include McCarthy, Evans III, or Burks. The State also filed a notification of reports summarizing the oral statements of witnesses, which did not specifically list any statement given by McCarthy to police. Further, the State also filed a list of its physical evidence, which did not include any recording of McCarthy's police interview.

¶ 8 A superseding bill of indictment was filed on May 3, 2012, which still included all seven of the aforementioned charges.

¶ 9 The case was called for trial on December 5, 2012. Defense counsel informed the court that the prosecutor had just given him a DVD of McCarthy's police interview, so he asked the court for a continuance. The court asked the prosecutor when the interview had taken place. She said that the interview had taken place in May and that while she had previously tendered a report summarizing the interview to defense counsel, she did not obtain the video recording until December 4, 2012. The State also noted that it had several witnesses present, including two in the custody of the Department of Corrections (DOC) and "a third witness that is under subpoena, the third co-defendant in this case." The court then gave defense counsel time to view the approximately 10-minute DVD with the defendant.

¶ 10 After viewing the DVD, defense counsel told the court that it contained statements that were different from what was contained in the police reports such that a continuance was needed. It was noted that the State's plea offer, which was for seven years of imprisonment, was going to expire that day. Accordingly, the court cleared the courtroom to allow defense counsel to discuss the matter with the defendant, who also wanted to talk to his relatives about it. After doing so, defense counsel informed the court that "we are not able to do anything in regards to a negotiation with the State at this point." The court then continued the case.

¶ 11 The circuit court held the bench trial beginning on December 27, 2012. McCarthy testified at the defendant's trial in exchange for a plea of guilty to misdemeanor theft. He testified that he drove the other three males to Paul Evans' house and learned of the robbery plans along the way. According to McCarthy, Burks stayed in the car while he, Evans III, and the defendant committed the robbery while wearing masks. McCarthy said Evans III hit Paul Evans with a baseball bat and that the defendant had gone into the bedroom of the house. McCarthy also said that Burks had entered the house at some point. He also stated that he had told the police that the defendant left his baseball bat at the residence. After the robbery, the four males drove to Burlington Coat Factory in Chicago.

¶ 12 Evans III testified that he, McCarthy, and Burks committed the crimes and that the defendant was not involved. Evans III stated that they picked up the defendant in Chicago after the incident and that he and the defendant went to Burlington Coat Factory to buy clothes using his grandmother's (Queenesther Evans') credit card. Evans III admitted that he had told the police that the defendant was involved in the crimes because that was what the police wanted to hear. Evans III was serving a 12-year prison sentence for his involvement in the crimes.

¶ 13 Burks also testified that the defendant was not involved in the crimes and no one carried baseball bats when they entered the house. Burks further stated that the defendant was not with them when they went to Burlington Coat Factory. Burks said that he was one who used the credit card. Further, Burks stated that the police had coerced him into implicating the defendant in the crimes. He was serving a six-year prison sentence for his involvement in the crimes.

¶ 14 Numerous exhibits were entered into evidence at the defendant's trial. One exhibit consisted of a surveillance recording from Burlington Coat Factory, which showed a male in a red baseball cap using a credit card to purchase two items and then two other males using a credit

card to purchase numerous articles of clothing. Three of the other exhibits were recordings of the police interviews given by McCarthy, Evans III, and Burks, all of whom told the police that the defendant was present and involved in committing the crimes. The State and defense counsel stipulated to the admission of those exhibits for impeachment purposes.

¶ 15 At the close of evidence, trial counsel moved for a directed verdict. The circuit court granted the motion regarding the two aggravated identity theft counts but denied it as to the other five counts. Regarding the partial denial of the motion, the court found that the videotaped statements of McCarthy, Evans III, and Burks had not been coerced.

¶ 16 The circuit court found the defendant guilty of the remaining five charges—two counts of home invasion, one count of residential burglary, one count of aggravated battery of a senior citizen, and one count of aggravated battery. The court sentenced the defendant—on one count of home invasion—to 20 years of imprisonment. After his motion to reconsider sentence was denied, the defendant appealed. The appeal was handled by new counsel.

¶ 17 In his direct appeal, the defendant argued that: (1) the circuit court erred when it admitted the surveillance video into evidence because the State failed to lay a proper foundation; (2) the court erred when it considered the three recorded interviews as substantive evidence; (3) trial counsel was ineffective for allowing the admission of the three recorded interviews and for using them as substantive evidence; (4) the evidence was insufficient to prove the defendant guilty beyond a reasonable doubt; and (5) his sentence was excessive. *Evans*, 2014 IL App (3d) 130230-U, ¶ 2 (unpublished order under Supreme Court Rule 23).

¶ 18 This court held, *inter alia*, that any error in the surveillance video's admission was invited by trial counsel (*id.* ¶ 26); trial counsel's decision to use the video was a matter of trial strategy that was insulated from an ineffective assistance of counsel claim (*id.* ¶ 27); the three

recorded interviews were properly admitted as substantive evidence, as well as impeachment evidence (*id.* ¶ 32); because the interviews were properly admissible as substantive evidence, the defendant could not show that the result of his trial would have been any different had trial counsel objected to the admission of the interviews (*id.* ¶ 37); and the defendant's sentence was not excessive (*id*. ¶¶ 47, 50-51). Accordingly, this court affirmed the defendant's conviction and sentence. *Id*. ¶ 53.

¶ 19 The defendant filed a postconviction petition on November 20, 2015, which was later amended on January 21, 2016, in which he raised three arguments. First, the defendant alleged that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in that the State failed to provide notice of its intent to seek an extended-term sentence.

¶ 20 Second, the defendant alleged that he did not knowingly or intelligently waive his right to a jury trial due to the State's failure to provide notice that it was seeking an extended prison term and due to the State's late discovery disclosures. Regarding the latter allegation, the defendant claimed that at the time of his waiver, he was not aware of the recording of McCarthy's police interview or that McCarthy, Evans III, and Burks would be called as witnesses because the State had not disclosed them as such.

¶ 21 Third, the defendant alleged that trial counsel rendered ineffective assistance regarding the State's plea offer. The defendant claimed that trial counsel had incorrectly told him that he was facing a maximum sentence of 30 years and that trial counsel had failed to inform him that: (1) Evans III and Burks could be called as witnesses against him; and (2) the video recordings of McCarthy, Evans III, and Burks' police interviews could be admitted as substantive evidence against him. The defendant concluded that had he known of all of this, he would have accepted the State's plea offer of seven years of imprisonment. Additionally, the defendant argued that

trial counsel should have objected at sentencing when the State announced it was seeking an extended-term sentence.

¶ 22 The defendant attached several affidavits[1] to his postconviction petition in support of his claims. In his affidavit, the defendant stated that when he agreed to waive his right to a jury trial, he did not know that: (1) McCarthy, Evans III, and Burks could be called as witnesses at his trial; (2) McCarthy had agreed to testify against him; (3) the videotaped interviews could be used at his trial; and (4) he was facing up to 60 years in prison. The defendant stated that while he did see the recording of McCarthy's police interview, he did not see the bulk of the discovery. In addition, he stated that trial counsel told him that the maximum sentence he was facing was 30 years, to be served at 85%. The defendant also said that the State's offer was for seven years.

¶ 23 On February 10, 2016, the circuit court summarily dismissed the defendant's postconviction petition. The court ruled that: (1) the claims were either raised or should have been raised on direct appeal; (2) the defendant was not sentenced to an extended term; (3) he did not attempt to withdraw his jury waiver and he was given a continuance to consider any last-minute discovery; and (4) ineffective assistance of counsel had been addressed in the direct appeal.

¶ 24 After his motion to reconsider was denied, the defendant appealed.

¶ 25 ANALYSIS

[1] Affidavits were also included from the defendant's father, grandfather, and grandmother, all of whom were present on December 5, 2012, when trial counsel discussed the State's plea offer with the defendant. All three affidavits stated, *inter alia*, that the affiants did not recall trial counsel telling the defendant that he was facing up to 30 years in prison.

¶ 26 On appeal, the defendant argues that the circuit court erred when it dismissed his postconviction petition as frivolous and patently without merit at the first stage.

¶ 27 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a means for defendants to collaterally challenge their convictions and sentences by asserting a deprivation of state or federal constitutional rights. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). The postconviction process allows defendants to raise only constitutional claims that were neither raised on direct appeal nor could have been so raised. *Id.* at 456. Issues that were raised are barred by *res judicata* and issues that could have been raised are waived. *Id.*

¶ 28 At the first stage of postconviction proceedings, the circuit court has 90 days from the filing date of the postconviction petition either to summarily dismiss the petition or docket it for further proceedings. 725 ILCS 5/122-2.1(a), (b) (West 2014). A petition will be summarily dismissed if the court finds it to be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). At this stage, the court is prohibited from engaging in fact-finding and must accept as true all well-pled facts. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998).

¶ 29 To survive summary dismissal, a postconviction petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2014). The summary dismissal of a postconviction petition is appropriate if the record positively rebuts the petition's claims. *Coleman*, 183 Ill. 2d at 382. However, if the petition's claims are based on matters outside of the trial court record, summary dismissal is not appropriate. *Id.*

¶ 30 Before we address the appropriate standard of review, we note that the defendant claims the circuit court applied an incorrect legal standard because it found that the petition's claims "fail[ed] to raise a sufficient constitutional question upon which relief [could] be granted." The defendant claims that this is the standard for second-stage postconviction proceedings; rather, at

the first stage, all he was required to show was "the gist of a constitutional claim." The defendant's claim is incorrect for several reasons.

¶ 31 First, the circuit court's order stated the appropriate standard of review in the same sentence the defendant partially quoted. The fifth paragraph of the court's order stated in full "that the allegations in the petition are therefore frivolous, patently without merit, and fail to raise a sufficient constitutional question upon which relief can be granted." Thus, the inclusion of the last clause refutes the defendant's claim that the circuit court in fact applied an incorrect legal standard.

¶ 32 Second, it is misleading to state that a defendant must only present "the gist of a constitutional claim" at the first stage. Our supreme court has clarified that "in our past decisions, when we have spoken of a 'gist,' we meant only that the section 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Further, the *Hodges* court stated, "our use of the term 'gist' describes what the defendant must allege at the first stage; *it is not the legal standard used by the circuit court to evaluate the petition*[.]" (Emphasis added.) *Id.* at 11. The *Hodges* court clarified that the correct legal standard for first-stage postconviction proceedings is as follows:

> "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or fact." *Id.* at 11-12.

Our supreme court has further clarified that a petition has no arguable basis either in law or fact if (1) it is "based on an indisputably meritless legal theory or a fanciful factual allegation" (*id.* at

16); or (2) lacks a "sufficient factual basis to show the allegations in the petition are 'capable of objective or independent corroboration' " (*People v. Allen*, 2015 IL 113135, ¶ 24 (quoting *People v. Collins*, 202 Ill. 2d 59, 67 (2002)). Notably, while the defendant's petition in this case was not filed *pro se*, but rather through counsel, the same standard applies. *People v. Tate*, 2012 IL 112214, ¶¶ 11-12. For these reasons, the defendant's invocation of the "gist" language is unpersuasive.

¶ 33 Third, and most importantly, the legal standard applied by the circuit court is technically irrelevant for the purposes of this appeal, as we review a circuit court's summary dismissal of a postconviction petition *de novo* (*People v. Shipp*, 2015 IL App (2d) 131309, ¶ 7). While we do not mean to minimize the importance of the circuit court applying the correct legal standard in all matters before it, our task in this appeal is to perform the same analysis that the circuit court would apply in ruling on the motion (*People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 12). With this standard in mind, we turn to the merits of the defendant's argument on appeal.

¶ 34 The defendant argues that his three postconviction claims had arguable bases in law and fact and were not raised on direct appeal, nor could they have been so raised. For the following reasons, we disagree.

¶ 35 First, we find the defendant's argument that he could not have raised these claims on direct appeal because they were not properly preserved by trial counsel unpersuasive. Regarding unpreserved claims, it is well established that:

> "the general rule is that where a question is not raised or reserved in the trial court, or where, though raised in the lower court, it is not urged or argued on appeal, it will not be considered and will be deemed to have been waived. However, this is a rule of

> administration and not of jurisdiction or power, and it will not operate to deprive an accused of his constitutional rights of due process. 'The court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved or the question is imperfectly presented.' " *People v. Burson*, 11 Ill. 2d 360, 307-71 (1957) (quoting 3 Am. Jur. *Appeal & Error* § 248, at 33 (1936)); see also *People v. Carter*, 208 Ill. 2d 309, 318-19 (2003) (holding that waiver is a limitation on the parties, rather than the court's jurisdiction).

Further, a party can seek to have unpreserved errors considered by a reviewing court under the plain error doctrine "when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Thus, it is disingenuous now for the defendant to claim that trial counsel's failure to preserve certain claims absolutely prohibited appellate counsel from attempting to raise those claims on direct appeal, including through claims of ineffective assistance of trial counsel. As our supreme court has recently emphasized, there is no prohibition on bringing ineffective assistance of counsel claims on direct appeal. *People v. Veach*, 2017 IL 120649, ¶ 45. The *Veach* court stated: "ineffective assistance of counsel claims may sometimes be better suited to

collateral proceedings but only when the record is incomplete or inadequate for resolving the claim. The reason is that in Illinois, defendants are required to raise ineffective assistance of counsel claims on direct review if apparent on the record." *Id.* ¶ 46.

¶ 36 Second, for the following reasons, we also disagree with the defendant's contention that his claims had arguable bases in law and fact and referenced matters outside of the record such that they could not have been raised on direct appeal.

¶ 37 The defendant's first claim in his postconviction petition was that his sentence violated *Apprendi* in that the State failed to inform him of its intent to seek an extended-term sentence. The defendant's argument is actually that his sentence violated section 111-3(c-5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c-5) (West 2016)), which codified the rule from *Apprendi*:

> "Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt. Failure to prove the fact beyond a reasonable doubt is not a bar to a conviction for commission of the offense, but is a bar to increasing, based on that fact, the range of penalties

> for the offense beyond the statutory maximum that could otherwise be imposed for that offense. Nothing in this subsection (c-5) requires the imposition of a sentence that increases the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense if the imposition of that sentence is not required by law." *Id.*

Here, the defendant claimed that even though he was not sentenced to an extended term, his sentence nevertheless violated the notice provision of section 111-3(c-5).

¶ 38 Contrary to the defendant's assertion, this claim involves matters readily apparent from the record—namely, the indictment itself and whether the State provided adequate notice to the defendant under section 111-3(c-5) that he was facing a potential extended-term sentence if convicted. Accordingly, we hold that the defendant's first postconviction claim could have been raised on direct appeal and was therefore properly dismissed by the circuit court. See *Pitsonbarger*, 205 Ill. 2d at 456.

¶ 39 The defendant's second postconviction claim was that he did not knowingly or intelligently waive his right to a jury trial due to the State's failure to provide notice that it was seeking an extended prison term and due to the State's late discovery disclosures; *i.e.*, the failure to disclose McCarthy, Evans III, and Burks as witnesses and the late disclosure of the recording of McCarthy's police interview.

¶ 40 The defendant's second postconviction claim also involves matters readily apparent from the record. We have already stated that the notice issue was apparent from the record from the direct appeal. *Supra* ¶ 38. Further, the State's witness disclosure and other evidentiary disclosure filings are of record. Under these circumstances, we hold that the defendant's second

postconviction claim could have been raised on direct appeal and was therefore properly dismissed by the circuit court. See *Pitsonbarger*, 205 Ill. 2d at 456.

¶ 41 The defendant's third claim in his postconviction petition was that trial counsel rendered ineffective assistance by incorrectly informing him that he faced at most 30 years in prison and by failing to inform him that: (1) Evans III and Burks could be called as witnesses against him; and (2) the video recordings of McCarthy, Evans III, and Burks' police interviews could be admitted as substantive evidence against him. He claims that had he known all of this, he would have accepted the State's plea offer.

¶ 42 At the first stage of postconviction proceedings, a claim alleging ineffective assistance of counsel may be summarily dismissed if it is not arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. Here, there is no arguable basis that the defendant was prejudiced by trial counsel's performance. The State's offer was for the defendant to plead guilty to one count of home invasion in exchange for a seven-year prison sentence. As it was charged in this case, home invasion was a Class X felony (720 ILCS 5/12-11(c) (West 2010)), which carried a non-extended sentencing range of 6 to 30 years of imprisonment (730 ILCS 5/5-4.5-25(a) (West 2010)). While an extended term increased the possible sentencing range to 30 to 60 years (*id.*), it is important to note that the imposition of an extended-term sentence was not mandatory in this case. 725 ILCS 5/111-3(c-5) (West 2010); 730 ILCS 5/5-8-2(a) (West 2010). The record clearly shows that the defendant was not misinformed about the non-extended range, yet he still chose to reject the State's offer and risk going to trial, being convicted, and receiving a sentence substantially longer than seven years. The circuit court in fact did not sentence the defendant to an extended term for home invasion, choosing instead to sentence him to a non-extended term of 20 years. Absent some objective evidence that the defendant rejected the State's offer solely due

to erroneous advice of counsel, the defendant's claim is nothing more than a subjective, self-serving statement, which is insufficient to establish an arguable basis for prejudice. See *People v. Miller*, 393 Ill. App. 3d 629, 639-40 (2009).

¶ 43 Moreover, the defendant's argument regarding the witnesses and evidence is also self-serving. He does not point to any objective indication that he rejected the State's plea offer based on trial counsel's alleged failure to tell him about the evidence. Moreover, the record indicates that he was aware of at least the potential for this evidence to be used at his trial. The State's evidentiary disclosures in April 2012 included the recordings of the police interviews of Evans III and Burks. Prior to the defendant consulting with trial counsel and his family members on December 5, 2012, regarding the plea offer, the State announced in open court that it had two witnesses present in the custody of the DOC and another under subpoena who was the third codefendant. The defendant then viewed the recording of McCarthy's police interview before rejecting the State's plea offer. Further, when Evans III and Burks were called at the defendant's trial, they testified that the defendant was not even involved in the robbery. Under these circumstances, we find the defendant's allegations on this matter to be self-serving and insufficient to establish an arguable basis for ineffective assistance of counsel. See *Miller*, 393 Ill. App. 3d at 639-40.

¶ 44 We further reject the defendant's claim that even if he could have brought his claims on direct appeal, we should ignore the waiver based on fundamental fairness grounds. The defendant has not supported this argument with citation to any authority; accordingly, it is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 45 Lastly, we address the defendant's argument that the circuit court erred when it implied that if ineffective assistance of counsel is raised in a direct appeal, even a new ineffective assistance argument cannot be raised in a postconviction petition.

¶ 46 We note that although the circuit court stated that one of the bases for its decision was that "the issue of ineffective assistance of trial counsel was specifically addressed on direct appeal[,]" the defendant has provided no authority to support his argument. Pursuant to Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), this argument is forfeited. Even if it had not been forfeited, not only is it speculation that the court's statement meant what the defendant claims it did, but also as we previously explained above, the defendant's ineffective assistance of counsel argument was properly dismissed (*supra* ¶ 43).

¶ 47

¶ 48 CONCLUSION

¶ 49 The judgment of the circuit court of Will County is affirmed.

¶ 50 Affirmed.