2018 IL App (3d) 160556-U

Order filed November 2, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0556
v.	)	Circuit No. 12-CF-27
	)	
DEMARIUS L. WILLIAMS,	)	Honorable Paul P. Gilfillan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed the postconviction petition at the first stage where the issue raised could have been raised on direct appeal.

¶ 2 Defendant, Demarius L. Williams, was convicted of unlawful possession of a controlled substance with intent to deliver following a jury trial. After this court affirmed his conviction and sentence (*People v. Williams*, 2015 IL App (3d) 130865-U)), defendant filed a *pro se* postconviction petition. Defendant now appeals the first-stage dismissal of that petition. We affirm.

¶ 3 FACTS

¶ 4 On February 2, 2012, the State charged defendant with unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2012)). At the ensuing jury trial, police officers testified that defendant was under surveillance at his residence on Iowa Street in Peoria when he left and proceeded to a residence on Main Street in East Peoria. Defendant briefly went inside the East Peoria residence then returned to his vehicle. Officers continued to follow defendant as he drove into a Kroger parking lot.

¶ 5 Defendant then exited his vehicle and entered a sport utility vehicle (SUV) that had parked nearby. When defendant exited the SUV, officers arrested him and the driver of the SUV. A substance weighing 15.5 grams and later confirmed to be cocaine was found on defendant. A search of defendant's residence revealed five plastic baggies, as well as a number of torn off corners of plastic baggies. An officer testified that such items are indicative of the packaging and distribution of narcotics. No drugs or other drug paraphernalia was found in defendant's Iowa Street residence.

¶ 6 Richard Houlihan, the driver of the SUV, testified that he was attempting to purchase cannabis from defendant, but defendant told him that he did not have any. After defendant left the SUV, Houlihan noticed "a package" on his seat or console. Assuming it was illegal, Houlihan threw it out of his window before being arrested. He later pled guilty to unlawful possession of a controlled substance.

¶ 7 In closing arguments, the prosecutor opined:

> "We heard about the prior stop on Main Street. We also heard there was no cocaine found back at the residence on Iowa Street. Now why would that be? Because this Defendant had the last of his prior source, his prior packaged source,

had an arrangement with Mr. Houlihan to deliver something to Mr. Houlihan, took the last of his packaged source from his residence, the last of the pre-packaged cocaine, decided to kill 2 birds with 1 stone, stopped at the prior Main Street address and re-upped. And by re-upped, what that means in the drug culture is, he went and got his next stash to go deliver.

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*** [W]hat we do know is that the Defendant was found with this cocaine. There was no cocaine back at the residence. It is clear that what happened was, the Defendant re-upped, made his purchase, decided you know, I am going to take care of that and take care of Mr. Houlihan at the *** same time ***."

¶ 8 The jury found defendant guilty, and the court sentenced him to a term of 20 years' imprisonment. Additionally, the court ordered a $2000 mandatory assessment, a $100 laboratory fee, and a $250 DNA analysis fee.

¶ 9 On direct appeal, defendant argued that the evidence at trial was insufficient to establish his guilt beyond a reasonable doubt. *Williams*, 2015 IL App (3d) 130865-U, ¶ 21. He also raised a number of issues relating to his sentencing. *Id*. This court affirmed defendant's conviction and sentence. *Id*.

¶ 10 On June 6, 2016, defendant filed a *pro se* postconviction petition. In the petition, defendant argued, *inter alia*, that trial counsel had been ineffective for failing to object when the State repeatedly asserted in closing arguments that defendant had "re-upped" at the Main Street residence.[1] Defendant characterized those comments as "pure fiction," pointing out that "there is

[1]Though defendant raised a number of other arguments in his petition, all but the referenced ineffectiveness argument have been waived on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

no evidence of what happened at the Main St. address." The circuit court dismissed defendant's petition at the first stage of proceedings.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant argues that the circuit court erred by dismissing his petition at the first stage because appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal, thus resulting in forfeiture of that issue.[2]

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage of the Act, the circuit court must determine whether the petition's claims are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); *Cotto*, 2016 IL 119006, ¶ 26. Issues previously raised on direct appeal are barred from postconviction consideration by the doctrine of *res judicata*, and those issues that could have been raised, but were not, are considered forfeited. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). The circuit court may summarily dismiss a petition at the first stage based on either of these doctrines. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 14 Defendant's postconviction claim that counsel was ineffective for failing to object to the State's closing argument was wholly based on information available in the record, and thus could have been raised on direct appeal. The claim is therefore considered forfeited for postconviction purposes. *Williams*, 209 Ill. 2d at 233; see also *People v. Simms*, 192 Ill. 2d 348, 365 (2000)

[2]Defendant also argues on appeal that the clerk illegally imposed certain fines after defendant's conviction. He concedes, however, that our supreme court's decision in *People v. Vara*, 2018 IL 121823, ¶ 23, forecloses us from reviewing this claim. Following the issue of the mandate in *Vara*, defendant withdraws his argument.

("All of the facts supporting this claim were present in the record and available on direct appeal. The issue is thus waived."). Defendant concedes on appeal that the issue is forfeited.

¶ 15 Nevertheless, defendant argues for the first time on appeal that appellate counsel was also constitutionally ineffective. That is, he contends appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal. This issue, defendant maintains, is sufficient for his petition to be advanced to the second stage of postconviction proceedings.

¶ 16 Of course, defendant did not raise the issue of appellate counsel's ineffectiveness in his postconviction petition. It is well-settled that an issue may not be raised for the first time on appeal from the dismissal of a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Indeed, that rule is explicitly set out in the Act itself. 725 ILCS 5/122-3 (West 2016) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."). Defendant, in essence, is asking this court to advance his petition to the second stage based on the merits of an argument that was not in his petition. We will not do so.

¶ 17 In reaching this result, we necessarily reject defendant's reliance on *People v. Allen*, 2015 IL 113135, and *People v. Turner*, 187 Ill. 2d 406 (1999) for his contention that waiver or forfeiture should be relaxed in the present case. Those cases do not support his position.

¶ 18 In *Allen*, our supreme court held that the failure to have an attached affidavit notarized does not render a postconviction petition frivolous or patently without merit, and thus is not grounds for a first-stage dismissal of the petition. *Allen*, 2015 IL 113135, ¶ 34. The court opined: "Lack of notarization here does not prevent the court from reviewing the petition's 'substantive virtue,' as to whether it 'set[s] forth a constitutional claim for relief.' " *Id*. (quoting *People v. Hommerson*, 2014 IL 115638, ¶ 11).

¶ 19 Defendant, construing that case generously, asserts that *Allen* stands for the proposition that "a *pro se* postconviction claim cannot be summarily dismissed as frivolous due to some defect where the defect is fixable at the second stage." This, to be blunt, was not what the *Allen* court held. The *Allen* court held that a very specific error—the failure to have an affidavit notarized—was not grounds for a first-stage dismissal. By defendant's logic, no petition could ever be dismissed at the first stage as long as it could be fixed by an attorney at a later stage. This would essentially render the first stage of proceedings meaningless, and is clearly not the result intended, or even implied, in *Allen*.

¶ 20 In *Turner*, our supreme court considered the second-stage dismissal of a postconviction petition. *Turner*, 187 Ill. 2d at 409. In that case, the defendant asserted in his petition that trial counsel had been ineffective, a claim that, like in the present case, was forfeited because it could have been raised on direct appeal. *Id*. at 412-13. Appointed postconviction counsel did not amend the defendant's petition. The supreme court found that failure to be unreasonable, pointing out that counsel could have added an argument of ineffective assistance of appellate counsel in order to bypass forfeiture. *Id*. at 413.

¶ 21 Defendant argues that "the salient point [in *Turner*] was that a failure to challenge appellate counsel's performance may be excused because it can be easily rectified at the second stage of proceedings." *Turner*, however, stands for no such thing. As a case dealing with a *second*-stage dismissal, the *Turner* court did not concern itself with *how* that claim survived to the second stage. The court's ruling only concerned the duties of appointed counsel at the second stage. Even the fact that the defendant's claim had proceeded to the appointment of counsel is not persuasive, as postconviction claims can be advanced to the second stage for reasons other than their merits. See 725 ILCS 5/122-2.1(b) (West 2016) (providing that petitions not dismissed

within 90 days be docketed for second-stage proceedings); *People v. Rivera*, 198 Ill. 2d 364, 371 (2001) (holding that "the circuit court must docket the *entire* petition" if even one raised issue satisfies the first stage standard (emphasis in original)).

¶ 22 In short, neither *Allen* nor *Turner* are applicable to the present case. Defendant's claim of trial counsel's ineffectiveness is forfeited because it could have been raised on direct appeal. A potential argument that appellate counsel was also ineffective is forfeited because it was not raised in the original petition. We therefore affirm the circuit court's first-stage dismissal of defendant's postconviction petition.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Tazewell County is affirmed.

¶ 25 Affirmed.