

NOTICE

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2018 IL App (4th) 0933-U

NO. 4-15-0933

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DEMETRICE C. PHILLIPS,)	No. 06CF1346
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith, Jr.,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted counsel's motion to withdraw as postconviction counsel because no meritorious issue could be raised on appeal.

¶ 2 I. BACKGROUND

¶ 3 A. The First Trial

¶ 4 In October 2006, the State charged defendant, Demetrice C. Phillips, with first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(e) (West 2006)). In June 2008, a jury convicted defendant of first degree murder. In February 2010, we reversed defendant's conviction on a direct appeal because defendant was denied his right to confront a State's witness. See *People v. Phillips*, 395 Ill. App. 3d. 1136, 986 N.E.2d 814 (2010).

¶ 5

B. The Second Trial

¶ 6

In May 2012, on remand, defendant's case proceeded to a bench trial. The following evidence was presented. In September 2006, Stephanie Boyd (the mother of defendant's children) and Breanna Turner (the mother of Shaunessy Grimes' child) got into a physical altercation with Quinishia Frazier and a group of women. During the altercation, Boyd was struck in the face with a brick.

¶ 7

After the fight ended, Boyd and Turner told defendant and Grimes what had occurred. All four agreed to confront the group of women for what they had done. Defendant planned to physically attack Frazier. Grimes had a rifle in his possession with which he was going to prevent other individuals from intervening in the fight.

¶ 8

When the four individuals found Frazier, they observed a crowd of people gathered around them. With the large number of people present, defendant decided to leave the scene to avoid being attacked by the crowd of people. Grimes, outside defendant's sight, fired a single shot from his rifle into the crowd of people. The shot struck and killed a bystander. Grimes and defendant retreated to their car and fled the scene.

¶ 9

In May 2012, the trial court found defendant guilty of (1) first degree murder and (2) unlawful possession of a weapon by a felon. In July 2012, the court sentenced defendant to 35 years in prison for first degree murder and 10 years in prison for aggravated possession of a weapon by a felon, with those sentences to run concurrently. The penalty for first degree murder included a 15-year enhancement because the court found that defendant and Grimes committed the murder while armed with a firearm.

¶ 10

C. Defendant's Second Direct Appeal

¶ 11

Defendant appealed, arguing that (1) Grimes' shooting was an independent act not

done in furtherance of the original plan, (2) defendant had withdrawn from the original plan, and (3) defendant did not share Grimes' intent. This court disagreed, holding that the evidence was sufficient to support his conviction. *People v. Phillips*, 2014 IL App (4th) 120695, ¶¶ 56-57, 14 N.E.3d 1.

¶ 12 D. Defendant's Postconviction Petition

¶ 13 In August 2015, defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). Defendant argued that his constitutional rights were violated because the 15-year firearm enhancement was not set forth in the information and not submitted to the trier of fact. Defendant also argued that the trial court did not make specific findings of fact to support its decision that the State had proved the enhancement beyond a reasonable doubt.

¶ 14 In November 2015, the trial court dismissed the postconviction petition. The court found that (1) the information clearly set forth that defendant committed the offense of first degree murder while armed with a firearm, (2) the information clearly set forth that defendant was subject to the 15-year enhancement, and (3) the original trial court clearly set forth in the record that the State had proven the enhancement beyond a reasonable doubt. The court concluded that the petition was "frivolous and patently without merit."

¶ 15 E. Notice of Appeal, Motion To Withdraw, and Reply Brief

¶ 16 In November 2015, defendant filed a notice of appeal and requested the appointment of counsel. In December 2015, the office of the State Appellate Defender (OSAD) was appointed as counsel. In October 2017, OSAD filed a motion to withdraw, asserting that no meritorious issue could be raised on appeal. In November 2017, defendant filed a response in which he objected to OSAD's motion to withdraw and asserted appellate counsel failed to serve him

with a copy of motion. The record now shows service on defendant. The State's Attorneys Appellate Prosecutor has elected not to respond. This court on its own motion granted defendant until December 28, 2017, to respond. He has not made further filings.

¶ 17

II. ANALYSIS

¶ 18 In OSAD's motion to withdraw, OSAD argues that (1) defendant's postconviction argument is forfeited, or, in the alternative, (2) that the argument is without merit. Defendant responds by arguing that (1) his sentence is "void" and "may be challenged at any time" and (2) that his postconviction claim is meritorious. We address these issues in turn.

¶ 19

A. Defendant Forfeited This Argument

¶ 20 OSAD notes that "issues decided on direct appeal are *res judicata*, and those that could have been presented, but were not, are deemed [forfeited]." Thus, OSAD argues that defendant "could have presented this issue on direct appeal, but did not. As such, *** this issue is [forfeited]." We agree, concluding that defendant forfeited this argument.

¶ 21

1. *Withdrawal of Counsel*

¶ 22 The United States Supreme Court has set forth the procedures to be followed for an appellate attorney to withdraw as counsel. *Anders v. State of California*, 386 U.S. 738 (1967); *In re Brazelton*, 237 Ill. App. 3d 269, 270, 604 N.E.2d 376, 377 (1992). Counsel's request to withdraw must be accompanied by a brief referring to anything in the record that could support an appeal. *Brazelton*, 237 Ill. App. 3d at 270. After identifying issues that counsel could conceivably raise, counsel must then explain why these potential arguments are without merit. *Id.* A copy of this motion must be given to the client, who will then be given an opportunity to respond to the motion to withdraw. *Id.* at 270-71. The appellate court will then review the record to determine whether the available arguments are wholly without merit. *Id.* at 271. We hold the

ultimate responsibility to determine whether an argument is without merit. *People v. Teran*, 376 Ill. App. 3d 1, 5, 876 N.E.2d 734, 738 (2007).

¶ 23 *2. Applicable Law and Standard of Review*

¶ 24 The Act provides a remedy to criminal defendants who have suffered substantial violations of their constitutional rights. *People v. Barcik*, 365 Ill. App. 3d 183, 190, 848 N.E.2d 579, 585 (2006). When the death penalty is not implicated, there are three stages to the proceeding. *People v. Taylor*, 405 Ill. App. 3d 421, 422, 938 N.E.2d 1151, 1152 (2010). During the first stage, the trial court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). The court may summarily dismiss the petition if it finds that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is "frivolous or patently without merit" when it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). A dismissal of a postconviction petition at the first stage is reviewed *de novo*. *Taylor*, 405 Ill. App. 3d at 422.

¶ 25 *3. Res Judicata and Waiver*

¶ 26 A postconviction proceeding is a collateral attack on a final judgment. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The extent of review is therefore limited to issues that neither have been, nor could have been, previously adjudicated. *Id.* at ¶ 22. The determinations of the reviewing court on the prior direct appeal are *res judicata* as to those issues actually decided. *Id.* Any issues that could have been presented on direct appeal, but were not, are forfeited. *Id.*

¶ 27 *4. Relaxing The Forfeiture Rule*

¶ 28 The forfeiture rule may be relaxed when (1) fundamental fairness so requires or (2) a defendant can establish cause and prejudice for failing to raise the issue in an earlier proceeding. *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 32, 987 N.E.2d 482. Fundamental fairness is implicated when (1) a defendant sets forth a claim of actual innocence based on newly discovered evidence which could not be discovered through due diligence, (2) a postconviction petition is based on case law which arose after his direct appeal, or (3) the allegation in the petition refers to facts which are not a part of the original record. *People v. Ortiz*, 235 Ill. 2d 319, 332, 919 N.E.2d 941, 949 (2009); *People v. Edmonds*, 79 Ill. App. 3d 33, 37, 398 N.E.2d 230, 233 (1979). A defendant can establish cause and prejudice when an objective factor, external to the defense, impeded defendant's ability to raise a specific claim and the error was so infectious that the resulting conviction violates due process. *Nicholas*, 2013 IL App (1st) 103202, ¶ 33.

¶ 29 5. *Analysis*

¶ 30 OSAD, in its motion to withdraw, simply notes that defendant's argument could have been brought in his prior appeal. OSAD therefore concludes that, because defendant failed to raise this argument previously, "this issue is [forfeited]."

¶ 31 Defendant fails to adequately respond to the issue of forfeiture. Defendant merely argues that his sentence is "void" and can therefore be "challenged at any time." However, this is an incorrect assertion of law. The Illinois Supreme Court has recently confirmed that "only the most fundamental defects, *i.e.*, a lack of personal jurisdiction or lack of subject matter jurisdiction *** warrant declaring a judgment void." *People v. Castleberry*, 2015 IL 116916, ¶ 15, 43 N.E.3d 932. Illinois trial courts have original jurisdiction over all justiciable matters except when the Illinois Supreme Court or some other entity has exclusive jurisdiction. See Ill. Const. 1970, art. VI, § 9. Personal jurisdiction refers to the court's power to bring an individual into its

adjudicative process. *Castleberry*, 2015 IL 116916, ¶ 12. Subject-matter jurisdiction refers to a court's power to hear and determine cases of the general class to which the proceeding in question belongs. *Id.* Failure to comply with a statutory requirement does not negate a trial court's jurisdiction. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 336, 770 N.E.2d 177, 185 (2002).

¶ 32 Defendant does not assert any facts showing that the trial court lacked personal or subject-matter jurisdiction. Rather, defendant merely asserts that the 15-year firearm enhancement was not set forth in the information and that the trial court did not make specific findings of fact to support its decision that the State had proven the enhancement beyond a reasonable doubt. Therefore, defendant fails to demonstrate that he has a "void" sentence which can be challenged at "any time."

¶ 33 Likewise, because this is the only argument defendant makes pertaining to forfeiture, defendant fails to demonstrate that fundamental fairness requires that we relax the rule of forfeiture. Similarly, defendant fails to establish cause and prejudice for failing to raise this issue in his prior appeal. Accordingly, the forfeiture rule precludes defendant from bringing this claim.

¶ 34 B. Merits of Defendant's Argument

¶ 35 Since defendant's argument is forfeited, we need not decide the merits of his argument.

¶ 36 III. CONCLUSION

¶ 37 For reasons stated, we agree with OSAD that no meritorious issue could be raised on direct appeal. We therefore grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment. *Anders*, 386 U.S. at 744.

¶ 38

Affirmed.