

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FILED

July 19, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 160388-U

NO. 4-16-0388

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
DEMETRIUS GOLDEN,)	No. 11CF686
Defendant-Appellant.)	
)	Honorable
)	Derek Girton,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in summarily dismissing defendant’s *pro se* postconviction petition.

¶ 2 On February 9, 2016, defendant filed a *pro se* postconviction petition. On May 3, 2016, the trial court summarily dismissed defendant’s postconviction petition. Defendant appeals, arguing the court erred in dismissing his postconviction petition because his petition presented the gist of a judicial misconduct claim because Judge Fahey did not recuse herself from postsentencing proceedings despite being a potential witness in a separate case against defendant. We affirm the summary dismissal of defendant’s postconviction petition.

¶ 3 I. BACKGROUND

¶ 4 In April 2012, the State charged defendant by a second amended information with one count of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010) and one

count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). Defendant's bench trial commenced in July 2012. The trial court found him guilty on both counts.

¶ 5 In September 2012, defendant filed a *pro se* posttrial motion, claiming his trial counsel was ineffective. The trial court appointed new counsel to represent defendant with regard to his motion. In February 2013, defendant's new counsel filed a second amended motion for judgment of acquittal or a new trial. In June 2013, the trial court denied the motion.

¶ 6 That same month, the trial court sentenced defendant to 15 years in prison for aggravated battery with a firearm and a concurrent term of 10 years in prison for aggravated discharge of a firearm. Apparently, while leaving the courtroom, defendant directed a comment at Judge Fahey, who had been the trial judge during defendant's case. The State's Attorney stated on the record that defendant looked at Judge Fahey while leaving the courtroom and said, " 'Bitch, you're gonna die.' " The probation officer reported defendant said the same thing while he was walking out.

¶ 7 In July 2013, defendant filed a motion to reduce his sentence. In August 2013, Judge Fahey denied defendant's motion.

¶ 8 In May 2015, this court affirmed the trial court's judgment. *People v. Golden*, 2015 IL App (4th) 130666-U.

¶ 9 On February 9, 2016, defendant filed a *pro se* postconviction petition. On May 3, 2016, the trial court summarily dismissed defendant's petition.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues the trial court erred in summarily dismissing his *pro se* postconviction petition during the first stage of proceedings under the Post-Conviction

Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)) because his petition established the gist of a constitutional claim. According to defendant's brief to this court, he presented the gist of a claim of judicial misconduct against Judge Fahey because she did not recuse herself from post-sentencing proceedings despite being a potential witness against defendant in another case as a result of his comments after he was sentenced by Judge Fahey. We review the summary dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247, 757 N.E.2d 442, 447 (2001).

¶ 13 At the first stage of postconviction proceedings, the trial court independently reviews the postconviction petition and determines whether, taking the allegations in the petition as true, the petition is frivolous or patently without merit with no arguable basis in either law or in fact. *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. The threshold for surviving the first stage of postconviction proceedings is low. *Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. However, any claim a defendant could have raised in his direct appeal but did not is forfeited for purposes of postconviction review. *Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. Here, defendant's judicial misconduct claim could have been raised on direct appeal. As a result, his claim is forfeited.

¶ 14 Defendant attempts to get around forfeiture by arguing his appellate counsel in his direct appeal was ineffective for not raising this issue. However, defendant did not make this specific claim in his postconviction petition. As a result, this issue is forfeited. See *People v. Pendleton*, 223 Ill. 2d 458, 475, 861 N.E.2d 999, 1009 (2006) (issues not raised in original or amended postconviction petitions are waived).

¶ 15 Even if we could consider this issue, defendant fails to establish how he was prejudiced by his appellate counsel's failure to raise a judicial misconduct claim on appeal. To

establish ineffective assistance of appellate counsel, defendant would have to show appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced defendant.

People v. Childress, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). To demonstrate prejudice, defendant would have to show the underlying issue has merit. *Childress*, 191 Ill. 2d at 175, 730 N.E.2d at 36.

¶ 16 Defendant's underlying claim of judicial misconduct has no merit. According to defendant, Judge Fahey should have recused herself because defendant allegedly cussed at and threatened her. We agree with the State this claim is refuted by our supreme court's decision in *People v. Hall*, 114 Ill. 2d 376, 499 N.E.2d 1335 (1986).

¶ 17 In *Hall*, the defendant struck the trial judge in the conference room and then argued the judge was required to recuse himself because his impartiality could be questioned as a result of defendant's actions. *Hall*, 114 Ill. 2d at 405, 499 N.E.2d at 1346. Our supreme court rejected the defendant's claim, stating:

“The actions of the defendant in striking his attorney and the trial judge were certainly outrageous and called for extraordinary detachment on their part. Despite the gravest of provocations[,] the attorney and the judge, as we have observed, carried out their responsibilities with professional competence and, considering the circumstances, even grace. We cannot presume a failure of impartiality of a trial judge even under extreme provocation. Judges are called upon to preside over the trial of onerous causes and persons. By definition, however, a trial judge is required to ignore provocations and pressures, whether public or from individuals. *** To hold that the law requires a substitution of judges under circumstances similar or comparable to those here would invite

misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial with an undesired judge or lawyer.” *Hall*, 114 Ill. 2d at 406-07, 499 N.E.2d at 1347.

Defendant points to nothing in the record which establishes Judge Fahey was biased against him after his outburst at the sentencing hearing.

¶ 18 In fact, the only thing defendant cites is Judge Fahey’s refusal to accept a plea bargain under which defendant would have been given probation. However, “a defendant does not have an absolute right to have a guilty plea accepted by the circuit court.” *People v. Henderson*, 211 Ill. 2d 90, 103, 809 N.E.2d 1224, 1231 (2004). A trial court has judicial discretion to reject a plea agreement. *Henderson*, 211 Ill. 2d at 103, 809 N.E.2d at 1231.

¶ 19 Even if defendant could establish the trial court abused its discretion in rejecting the plea agreement, this does not establish bias as a trial court’s ruling by itself is almost never a valid basis for a claim of judicial bias. *People v. Burnett*, 2016 IL App (1st) 141033, ¶ 56, 70 N.E.3d 756. As the trial court noted in rejecting defendant’s petition, “[t]here is nothing in the record to suggest that Judge Fahey was doing anything other than exercising her [j]udicial discretion in rejecting a plea that she did not feel served the interests of the community or justice.”

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the trial court’s summary dismissal of defendant’s postconviction petition. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 22 Affirmed.