2018 IL App (4th) 160483-U

NO. 4-16-0483

FILED
October 10, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KEITH L. ROBERSON,	)	No. 11CF1233
Defendant-Appellant.	)	
	)	Honorable
	)	Hugh Finson,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment dismissing defendant's postconviction petition at the first stage of proceedings, where defendant forfeited the only claim raised on appeal by failing to include it in his petition.

¶ 2 In May 2016, defendant, Keith L. Roberson, filed a petition for postconviction relief, raising seven alleged violations of his constitutional rights and alleging appellate counsel was ineffective for raising those seven claims on direct appeal. That same month, the trial court entered an order summarily dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 3 Defendant appeals, arguing the trial court erred by dismissing his postconviction petition at the first stage of postconviction proceedings because the petition stated the gist of a constitutional claim. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2012, defendant entered an open plea of guilty to one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)) in Champaign County case No. 2011-CF-1233. The charge was based on defendant's knowing possession of a .38-caliber handgun after having previously been convicted of unlawful possession with intent to deliver cannabis (Champaign County case No. 2008-CF-784) and unlawful possession with intent to deliver a controlled substance (Champaign County case No. 2004-CF-1265). In exchange for defendant's guilty plea, the State agreed to dismiss Champaign County case No. 2011-CF-897, which charged defendant with one count of armed habitual criminal and one count of aggravated discharge of a firearm. The trial court sentenced defendant to 20 years' imprisonment, followed by a 3-year term of mandatory supervised release. On direct appeal, defendant argued the trial court erred by considering inadmissible hearsay evidence in aggravation at defendant's sentencing hearing. In June 2015, this court affirmed the trial court's judgment. *People v. Roberson*, 2015 IL App (4th) 130739-U.

¶ 6 In May 2016, defendant filed a *pro se* postconviction petition raising eight specific claims. First, defendant alleged waiver or forfeiture did not apply to the remaining claims raised in the postconviction petition because appellate counsel provided ineffective assistance by failing to raise the remaining claims. Second, defendant alleged his armed habitual criminal conviction must be vacated where the underlying offense of aggravated unlawful use of a weapon has been held unconstitutional. Third, defendant argued he was denied a fair sentencing hearing and effective assistance of trial counsel "where defense counsel failed to include in the agreement for the dismissal of [Champaign County] case [No.] 11-CF-897 the exclusion of any evidence thereof." Fourth, defendant claimed he was denied effective assistance of counsel where "defense counsel failed to request a 402 conference or a sentencing

cap" prior to the entry of defendant's open guilty plea. Fifth, defendant alleged he received ineffective assistance of counsel because defense counsel waived a preliminary hearing without defendant's consent. Sixth, defendant asserted he was denied effective assistance of counsel because defense counsel failed to pursue a motion to dismiss the charge in Champaign County case No. 2011-CF-897 "for failing to provide a probable cause hearing." Seventh, defendant claimed his constitutional rights were violated when "several proceedings were had without his right to be present." Finally, eighth, defendant alleged the totality of defense counsel's errors denied him effective assistance of counsel.

¶ 7 Later in May 2016, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. In a lengthy written order, the court addressed each of defendant's second through eighth claims of deprivations of constitutional rights. With respect to defendant's claim that trial counsel was ineffective for failing to request a "402 conference" or a sentencing cap, the court found the claim had no arguable basis. The court noted a conference under Illinois Supreme Court Rule 402(d) (eff. July 1, 2012) required (1) the defendant to request the conference, (2) the State to agree to the conference, and (3) the court to agree to the conference. The court noted defendant's petition contained no allegations that either the State or the court would have agreed to such a conference and any argument "that the prosecutor and court would have agreed to the conference merely on the defendant's asking [was] sheer speculation and fanciful." Similarly, the court found no allegation in defendant's petition that the State would have agreed to a "cap" and any argument that the State would have agreed was speculative and fanciful. Accordingly, the court found this allegation of ineffective assistance frivolous and without merit.

¶ 8 The trial court then considered defendant's first claim that appellate counsel was ineffective for failing to raise the allegations in the postconviction petition on direct appeal. Having found the allegations frivolous and without merit, the court concluded appellate counsel did not render ineffective assistance of counsel by failing to raise those claims on direct appeal. Accordingly, the court dismissed defendant's postconviction petition as frivolous and patently without merit.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant appeals the first-stage dismissal of his postconviction petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-8 (West 2016)) provides a collateral means for a defendant to challenge a conviction or sentence for a violation of a federal or state constitutional right. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). At the first stage of postconviction proceedings, the trial court must determine, without input from the State, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016)). A postconviction petition may be summarily dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 12, 912 N.E.2d 1204, 1209 (2009). "To survive dismissal at this initial stage, the postconviction petition 'need only present the gist of a constitutional claim,' which is 'a low threshold' that requires the petition to contain only a limited amount of detail." *People v. Harris*, 366 Ill. App. 3d 1161, 1166-67, 853 N.E.2d 912, 917 (2006) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). We review *de novo* the summary dismissal of a postconviction petition. *Id.* at 1167.

¶ 12 On appeal, defendant argues his *pro se* postconviction petition presented the gist of a constitutional claim. Specifically, defendant asserts appellate counsel provided ineffective assistance by failing to raise an excessive-sentence claim on direct appeal. The State asserts defendant has forfeited this claim by failing to include it in his postconviction petition. We agree.

¶ 13 The Postconviction Act does not provide for the assistance of counsel at the first stage of postconviction proceedings and appeals of first-stage dismissals often present "a moving target as to defendant's allegations of constitutional deprivations." *People v. Boyd*, 347 Ill. App. 3d 321, 332, 807 N.E.2d 639, 649 (2004). "On a regular and consistent basis the inarticulate allegations of constitutional deprivation presented by a *pro se* petitioner to the trial court take on a completely different meaning in both form and substance once appellate litigators become involved during the appeal of *pro se* petitions dismissed at the first stage." *Id.* at 332-33. However, section 122-3 of the Postconviction Act provides, "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2016)). A defendant's claims of constitutional error not raised in the original postconviction petition are forfeited and may not be raised for the first time on appeal from the trial court's first-stage dismissal of the petition. *Jones*, 211 Ill. 2d at 149-50.

¶ 14 In this case, as in *Boyd*, the trial court meticulously addressed each of defendant's eight claims raised in his postconviction petition. *Boyd*, 347 Ill. App. 3d at 333. However, the trial court did not have the opportunity to address the new allegation on appeal that appellate counsel was ineffective for failing to raise an excessive-sentence claim on direct appeal. *Id.* ("Such a procedure frustrates the very purpose of first-stage review as articulated by section 122-2.1(a)(2), which provides the mechanism by which the circuit court judge is to determine

whether the petition substantively is frivolous or patently without merit because the record rebuts the alleged constitutional deprivation.").

¶ 15 Defendant argues his petition must be liberally construed and a liberal construction shows his petition contained the facts underlying an excessive-sentence claim. We disagree. Defendant's *pro se* postconviction petition alleged, in part, his trial counsel was ineffective for failing to request (1) a conference under Rule 402 (Ill. S. Ct. R. 402(d) (eff. July 1, 2012)), and (2) a sentence "cap." These facts, even liberally construed, do not support a claim for ineffective assistance of appellate counsel for failing to raise an excessive-sentence claim. See *People v. Shief*, 2016 IL App (1st) 141022, ¶ 54, 62 N.E.3d 1154 (Even when liberally construed, the defendant forfeited his argument raising, for the first time on appeal, distinct reasons for appellate counsel's ineffectiveness from those raised in his postconviction petition.).

¶ 16 In his reply brief, defendant asserts the State failed to address his "claim that the conduct for which he was convicted—possessing a gun—was actually determined to be constitutional conduct for non-felons in *People v. Aguilar*, 2013 IL 112116." First, this misrepresents defendant's conviction—armed habitual criminal—which *Aguilar* did not address. Second, this distorts defendant's actual claim from his postconviction petition, which was that one of his underlying felony convictions (used to support the armed habitual criminal charge) was unconstitutional under *Aguilar*. Third, nothing about this argument supports a liberal construction of his petition as having raised an excessive-sentence claim.

¶ 17 Finally, defendant contends that this court may excuse his forfeiture of this issue and consider his excessive-sentence claim because fundamental fairness and concerns of judicial economy warrant an exception to the forfeiture rule. For this proposition, defendant cites *People v. Jones*, 213 Ill. 2d 498, 821 N.E.2d 1093 (2004). It appears defendant has misread the *Jones*

case. While *Jones* acknowledged that section 122-3 of the Postconviction Act has not been viewed as an "ironclad bar" to forfeited claims, the court noted it had allowed for the filing of successive petitions when fundamental fairness required an exception be made to the forfeiture language in section 122-3. *Id.* at 505. The supreme court observed:

> "Notwithstanding the holdings in *McNeal* and *Davis*, *i.e.*, claims not raised in a petition cannot be argued for the first time on appeal, and notwithstanding the fact that this court has *only* provided for successive petitions as the *sole* exception to the waiver language of section 122-3, our appellate court has repeatedly overlooked the waiver language of section 122-3 and has addressed claims raised for the first time on appeal for various and sundry reasons." (Emphases added.) *Id.* at 505-06.

Following this language, the supreme court acknowledged it had addressed, on occasion, forfeited issues under its supervisory authority. *Id.* at 506-07. The supreme court stressed that the appellate court does *not* enjoy the supervisory powers the supreme court enjoys, "and cannot, therefore, reach postconviction claims not raised in the initial petition in the manner that [the supreme court] did in cases" invoking its supervisory authority. *Id.* at 507. The supreme court then discussed an appellate court opinion that reached forfeited issues on the basis of fundamental fairness and an appellate court opinion that raised a forfeited issue *sua sponte*. *Id.* at 507-08. The supreme court concluded as follows:

> "Under the clear language of the [Postconviction] Act and under this court's own case law, the appellate court should not have acted in such manner. *** Our detailed discussion of this issue is

> intended to stress that our appellate court is not free, as this court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *Id.* at 508.

¶ 18 Accordingly, we heed the supreme court's warning in *Jones* and decline to address defendant's forfeited claim of appellate counsel's ineffective assistance for failure to raise an excessive-sentence claim. We note, however, that defendant is not without recourse and may raise this issue in a successive petition. *Id.* at 508-09.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the trial court's judgment.

¶ 21 Affirmed.