2019 IL App (1st) 161252-U

FOURTH DIVISION
March 7, 2019

No. 1-16-1252

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. FLETCHER WANDICK, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County No. 11 CR 2881 Honorable Brian K. Flaherty, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the order of the circuit court of Cook County dismissing petitioner's petition for postconviction relief where it was (1) in compliance with section 122-2.1(a) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a) (West 2016)) and (2) barred by *res judicata*.

¶ 2 Defendant Fletcher Wandick appeals from the order of the circuit court of Cook County

summarily dismissing his *pro se* postconviction petition at the first stage of proceedings pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). Defendant was convicted by a jury of home invasion and sentenced to 25 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence for home invasion holding in pertinent part that he forfeited his challenge to a jury instruction error and that the plain-error doctrine did not apply. *People v. Wandick*, 2015 IL App (1st) 123096-U, ¶ 31 (unpublished pursuant to Illinois Supreme Court Rule 23 (eff. July 1, 2011)). Defendant then filed a *pro se* postconviction petition with the circuit court, which was dismissed as being frivolous and patently without merit. Defendant appeals the dismissal of his postconviction petition arguing (1) the circuit court did not comply with section 122-2.1(a) of the Act when it failed to issue a written order of its findings and (2) a change in the law following his direct appeal warrants reconsideration of the jury instruction issue. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The following recitation of the facts of the trial comes from our decision on direct appeal, *Wandick*, 2015 IL App (1st) 123096-U, ¶¶ 4-17. Defendant, along with codefendants Daviea Ashley and Reco Holmes, were charged with home invasion, armed robbery, residential burglary, possession of a stolen motor vehicle (PSMV), kidnapping, aggravated unlawful restraint, and theft. Ashley was charged with 12 additional counts of aggravated unlawful use of a weapon. The State elected to proceed against defendant on count 1 of the indictment—the home invasion charge—voluntarily dismissing the remaining charges by means of *nolle prosequi.* Count 1 of the indictment alleged in relevant part that defendants knowingly entered a specified dwelling:

"AND WHILE ARMED WITH A FIREARM, THEY USED FORCE OR THREATENED THE IMMINENT USE OF FORCE, UPON WILLIE LEWIS WITHIN SUCH DWELLING PLACE, WHETHER OR NOT INJURY OCCURRED, IN VIOLATION OF CHAPTER 720 ACT 5, SECTION 12–11(a)(3), OF THE ILLINOIS COMPILED STATUTES 1992, AS AMENDED ***."

¶ 5 At trial, Willie Lewis testified that at approximately 6 p.m. on January 26, 2011, defendant telephoned him and then came to his apartment building on the 14000 block of South Stewart in Riverdale, Illinois, to purchase marijuana. Defendant parked his Chrysler 300 next to Lewis' Buick LeSabre in the parking lot behind the building, then telephoned Lewis to inform that he had arrived. Lewis met defendant outside and they had a conversation in defendant's automobile. Lewis then sold some marijuana to defendant, who then left the premises. Lewis further testified that he had been speaking with defendant over the phone twice a day and personally meeting with him for a month, during which time Lewis became familiar with defendant's voice.

¶ 6 Lewis further testified that he returned home between 9 and 10 p.m., and parked his vehicle in his assigned spot in the parking lot. Lewis walked to the door of the building and was about to insert his key into the lock when a man emerged from the bushes and pointed a .38 caliber chrome handgun in his face. The man grabbed Lewis' skull cap and pulled it down over his face, and told Lewis not to move. Lewis heard him tell someone else "come on" and heard another man rustling through the grass. According to Lewis, the second individual took his keys, opened the building door and pulled him into the hallway. Lewis felt the barrel of a handgun pointed against the back of his neck. When asked the location of his apartment, Lewis claimed he was visiting someone and did not live there. The man then struck Lewis in the back of the

head with the handgun and threatened to shoot him in the head if he continued lying. Lewis told the men he lived in apartment 3E, and they led him up the stairs with one man in front of him and the man with the weapon behind him. When they reached his apartment, Lewis told them which key to use and confirmed that there was no one inside the apartment. The man with the handgun threatened that if anyone was inside, he would kill everyone, including Lewis.

¶ 7 Lewis additionally testified that the men opened his door, immediately threw him to the floor face down, covered him with sheets from his couch, and tied his arms and legs behind him using cords from his receiver. Lewis heard the first man transfer the handgun to the second man and instructed him to shoot Lewis in the head if he moved. According to Lewis, the second man sat on his back and threatened to shoot him if he moved. Lewis testified that he was able to distinguish the voices because the man with the handgun had a deeper, harsher voice, and the other man had a younger sounding voice. Lewis heard his back door open and the first man going down the stairs; a few seconds later, he heard two people enter his apartment. A third man with a different voice kicked Lewis in his side and asked "where's it at?" Lewis was familiar with this voice, but could not identify it at that time. Lewis replied that he did not have anything and did not know what they were looking for. During the next 30 to 40 minutes, Lewis heard the men walking around his apartment, rummaging through the rooms, throwing items around, opening closets, and taking items out. Lewis specifically heard the men remove a set of four 22-inch tire rims from his closet, and heard them repeatedly entering and exiting his apartment.

¶ 8 Lewis testified that he then heard the men try to start his automobile, which was parked directly beneath his bedroom window. He knew it was his automobile because he had three alarms on it, including one in the grill which was extremely loud. Thereafter, Lewis did not hear any more footsteps, raised his head up and saw that everything was gone. He scooted over to a

table, untied his hands and legs, peeked into the hallway, did not hear anything, and exited his apartment. According to Lewis, his neighbor was standing in the hallway and inquired regarding what happened. Lewis went into his neighbor's apartment, where he was told by the neighbor's wife that they heard someone taking his automobile and contacted the police.

¶ 9 Lewis also testified that a Riverdale police officer arrived at his apartment building in approximately 1 minute, and within the next 30 to 40 seconds, Lewis heard a report over the officer's radio that his automobile had been discovered two blocks away. Lewis did not reenter his apartment, but stayed with a nearby relative after spending an hour at the police station. The police telephoned him a couple of hours later and inquired whether he knew what items had been stolen. Lewis identified some of the items that were missing from his living room, but he did not know everything that had been taken. He informed the police that he was missing a black 50-inch Samsung television, a gray Nokia home theater system, and a Sony digital video disc (DVD) player.

¶ 10 Lewis returned to the police station the next morning to identify his automobile, which was parked in the police garage with the tire rims from his closet leaning against it. Lewis then saw defendant's Chrysler 300 parked next to his automobile and his television in the back seat of defendant's vehicle. At that point, Lewis realized that the familiar voice he heard in his apartment during the offense belonged to defendant. Lewis identified defendant's automobile, told police that he knew defendant from the neighborhood and had sold him marijuana. Lewis also identified his computer, a shoe box containing his watches, and his son's water bottle bank containing money; these items were in the front seat of defendant's automobile. On January 28, 2011, Lewis viewed a lineup at the Riverdale police station, where he identified defendant and the gunman. At trial, Lewis identified a handgun as the one used by the gunman.

¶ 11 Riverdale police lieutenant Brad Bailey testified that he was on patrol when he heard the radio call regarding the home invasion. As he proceeded to the address where Lewis resided, Lieutenant Bailey was advised by radio that a blue Buick with license plate number 8756DN had been taken during the commission of the offense. A minute later, Lieutenant Bailey noticed two vehicles parked behind each other in an alley, and three men were removing items from them. He drove into the alley behind the vehicles, turned his spotlight on the license plate of the rear vehicle, and noticed that it was the blue Buick. The three men immediately fled from the alley into the adjacent backyard. Lieutenant Bailey exited his vehicle and observed defendant exit the Chrysler parked in front of the blue Buick. Lieutenant Bailey ordered defendant to raise his hands and approach; after initially complying, defendant fled in the same direction as the other men. Lieutenant Bailey then heard a door open and close, and saw numerous items—including tire rims, compact discs and DVDs—in the backyard by the vehicles. Inside the Chrysler, he observed the television set, computer, and a water bottle used as a bank as described by Lewis.

¶ 12 Lieutenant Bailey further testified that numerous police officers from several departments arrived in the alley. According to Lieutenant Bailey, a K-9 dog followed the path taken by the fleeing men and stopped at the corner of a house on the 14000 block of Normal Avenue in Riverdale.[1] Police surrounded the house and over an hour later, defendant and the other men exited the house and were taken into custody.

¶ 13 Riverdale police officer Mark Kozeluh testified that on the night of the offense he recovered two loaded chrome handguns from a planter outside the door of the building at the 14000 block of Normal Avenue while defendant and codefendants were secluded inside.

[1] Carmen Coleman, who dated defendant for approximately six months in 2010, testified that defendant lived on Atlantic Street, but defendant occasionally stayed at his mother's home on Normal Avenue.

Forensic fingerprint examiner Kerianne Cortese testified that she received fingerprint impressions collected by investigators in this case, but the two prints suitable for comparison and analysis did not match those of defendant or codefendants.

¶ 14 After the State rested its case, the defense moved for a directed verdict, which the trial court denied. The State also informed the trial court of its intention to proceed only on the home invasion charge. Prior to the defense case, the trial court conducted a jury instructions conference, during which the court accepted without objection the pattern jury instructions defining the offense of home invasion and stating the issues to be proved to find defendant guilty of home invasion. Illinois Pattern Jury Instructions, Criminal Nos. 11.53, 11.54 (4th ed. 2000).

¶ 15 During the defense's case in chief, defendant's mother, Shavette Wandick, testified that on the night in question, defendant was at home playing cards with her and some out-of-town guests when he received a telephone call from codefendant Ashley. Shortly thereafter, Ashley arrived at the house and defendant went outside to speak with him. Defendant reentered the house and requested money to purchase a television, to which Shavette replied that she did not have any money. Defendant again exited from the house, then returned and stated that the police were outside. Moments later, codefendants Ashley and Holmes pounded on the front door of his residence and Wandick allowed them to enter. Ashley and Holmes went to the basement and watched television while Wandick, defendant and her guests continued playing cards. At approximately 1 a.m., hundreds of police officers surrounded the house and ordered everyone to come outside. Wandick acknowledged she never told the police that defendant was at home playing cards with her that evening, and she made that statement for the first time at trial.

¶ 16 The parties presented closing arguments. In accordance with the written instructions, and without objection by the defense, the trial court then instructed the jury in relevant part that to

sustain the charge of home invasion, the State must prove that "the defendant or one for whose conduct he is legally responsible was armed with a dangerous weapon," and that "while armed with a dangerous weapon the defendant or one for whose conduct he is legally responsible used force or threatened the imminent use of force on Willie Lewis a person within the dwelling place." Following deliberations, the jury found defendant guilty of home invasion.

¶ 17 On July 31, 2012, defendant filed his posttrial motion for a new trial. The posttrial motion alleged in part that the State failed to prove every material allegation of the offense beyond a reasonable doubt, and "[t]he court erred in giving instruction [*sic*] on behalf of the State over the defendant's objection." On August 17, 2012, the trial court denied defendant's posttrial motion for a new trial, and proceeded to a sentencing hearing. During the hearing, the State noted this case involved the use of a firearm, and represented the minimum sentence would be 21 years' imprisonment once the 15-year statutory enhancement for use of a firearm was added to the 6-year minimum sentence for home invasion. Defense counsel observed that defendant was found guilty on the theory of accountability and requested the court to impose the statutory minimum sentence. The trial court noted that defendant had five prior felony convictions, including two for armed robbery, one for manufacturing and delivery of a controlled substance, and unlawful use of a weapon by a felon. The trial court, also noting the nature of the offense, defendant's recidivism and paucity of mitigating factors, sentenced defendant to 25 years' imprisonment.

¶ 18 Defendant appealed, arguing that the State failed to prove him guilty of home invasion beyond a reasonable doubt because the jury was not instructed to determine whether he was "armed with a firearm" as charged in the indictment. *Wandick*, 2015 IL App (1st) 123096-U, ¶ 19. Defendant acknowledged that he failed to preserve the issue for review because he did not

object to the jury instructions during the instructions conference and did not raise the issue in his posttrial motion, but requested this court review his claim under the plain-error doctrine. *Id.* ¶ 23.

¶ 19 This court first examined whether the failure to provide the proper jury instruction was error. *Id.* ¶ 25. Based on similar cases involving outdated jury instructions, we concluded that the jury instructions provided in this case were "based on the pre-amended version of the home invasion statute, which required the jury to find that defendant was 'armed with a dangerous weapon,' rather than 'armed with a firearm' " and thus constituted error. *Id.* ¶ 28.

¶ 20 We then turned to consider whether the error rose to the level of plain error under both prongs of the plain-error doctrine. *Id.* ¶ 29. Regarding the first prong, whether the evidence was closely balanced, we concluded that it was not. This court found that there was strong evidence of defendant's participation in the offense and there was "overwhelming evidence that a firearm was used during the commission of the offense." *Id.* ¶ 30. Regarding the second prong of the plain-error doctrine, whether the error is so serious that it undermined the fairness of the trial, we concluded it also was not. *Id.* ¶ 31. We ultimately affirmed defendant's conviction and sentence. Id. ¶ 42. Defendant subsequently filed a petition for leave to appeal, which was denied on May 27, 2015. *People v. Wandick*, No. 118964 (May 27, 2015).

¶ 21 On December 6, 2015, defendant filed his *pro se* postconviction petition in which he raised numerous arguments. First, defendant alleged the State failed to prove him guilty beyond a reasonable doubt of home invasion while armed with a firearm. Second, that appellate counsel was ineffective for failing to raise his argument in his postconviction petition that the State failed to prove beyond a reasonable doubt that he was the individual who committed the offense charged. Third, that the trial court erred when it affirmed defendant's conviction based on the

State's theory of accountability which was not proven beyond a reasonable doubt and appellate counsel was ineffective for failing to raise this issue on appeal. Fourth, the trial court erred in denying his motion for a directed verdict. Fifth, his 25-year sentence violated the fourteenth amendment where his codefendant received an 18-year sentence. Sixth, that trial counsel provided ineffective assistance of counsel when he failed to object to the inappropriate jury instruction and raise the issue in a posttrial motion. According to defendant, had trial counsel preserved this issue the possible outcome of the appeal would have been different. Seventh, trial counsel was ineffective where he failed to object during sentencing regarding the applicability of the firearm enhancement statute where the jury was never instructed on defendant being armed with a firearm.

¶ 22 On February 24, 2016, the trial court denied defendant's postconviction petition, stating on the record the following:

> "Mr. Wandick filed a petition, a post conviction petition. He alleges a number of different arguments.
>
> Argument No. 1 is that the State failed to prove him guilty beyond a reasonable doubt. He sets forth 16 paragraphs why he believes he was not proven guilty beyond a reasonable doubt. These issues could have been raised on appeal. They weren't – actually, some of it was raised on appeal regarding beyond a reasonable doubt.
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> Argument No. 2 is appellate counsel was ineffective for failing to raise Argument No. 1 on appeal. Again, it's speculation at best whether or not he would have been successful. And also, what issues to be raised on appeal is left to the discretion of the appellate attorneys, and he did not.
>
> He raises an issue on accountability. I think that issue could have been raised on

appeal.

I denied the motion for directed verdict. Again, that issue could have been raised on appeal.

Error occurred when he was sentenced to a 25-year term and a co-defendant received an 18-year term. Again, I certainly sentenced him within the sentencing range set forth by the statute. Again, that could have been raised by appeal.

His trial counsel failed to object to improper jury instructions. That issue was raised on appeal. The appellate court said I was incorrect, but they did not reverse it based on that.

And Issue No. 7, he was sentenced to a 15-year add-on. Again, the appellate court ruled on that.

It seems to me in this case the defendant is second guessing what the jury did. Certainly sufficient evidence of being convicted of home invasion beyond a reasonable doubt. He may not like the results, but as far as I am concerned, the post conviction is frivolous and patently without merit. It will be dismissed."

The dismissal of defendant's postconviction petition was recorded on the half-sheet as well as the criminal disposition sheet on February 24, 2016. This appeal followed.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues (1) the circuit court did not comply with section 122-2.1(a) of the Act when it failed to issue a written order of its findings and (2) a change in the law following his direct appeal warrants reconsideration of the jury instruction issue.[2]

¶ 25 We first address defendant's contention that the circuit court violated the Act when it

[2] We observe that while defendant raised seven distinct claims in his postconviction petition, only one claim is raised on appeal regarding the jury instruction issue.

summarily dismissed his petition without issuing a written order as required by section 122-2.1(a) and therefore the matter must be remanded for second-stage proceedings. In response, the State maintains that the finding of the circuit court was recorded in the record of proceedings for February 24, 2016, and was documented by the half-sheet entry of dismissal as well as a certified report of disposition which were entered the same day and therefore complied with the Act pursuant to *People v. Porter*, 122 Ill. 2d 64 (1988), and *People v. Cooper*, 2015 IL App (1st) 132971.

¶ 26 The Act provides a criminal defendant with a remedy for a substantial violation of constitutional rights at trial or at sentencing. *People v. Allen*, 2015 IL 113135, ¶ 20. The circuit court can summarily dismiss the petition within that period if the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016). Pertinent to defendant's argument on appeal, section 122-2.1(a)(2) of the Act, which governs first-stage postconviction proceedings, provides in relevant part:

> "(a) Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section.
>
> * * *
>
> (2) If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." *Id.*

Although the term "shall" generally denotes a mandatory obligation (*People v. Reed*, 177 Ill. 2d 389, 393 (1997)), our supreme court has interpreted the use of "shall" in section 122-2.1(a)(2) to be directory. *Porter*, 122 Ill. 2d at 81 (the use of "shall" is mandatory only as it applies to "the

court's duty to dismiss a petition if it is frivolous or patently without merit"). Thus, the absence of a written order setting out findings of fact and conclusions of law does not invalidate a petition's dismissal. *Id.* at 82.

¶ 27 Defendant, however, maintains that our supreme court's decision *People v. Perez*, 2014 IL 115927, renders *Porter* "a dead letter on the written-order requirement." Defendant contends that *Perez* "revived the [written order] requirement, holding that a trial court's late entry of a dismissal order violated the statute." In doing so, defendant asserts the *Perez* court "made clear, repeatedly, that the written-order requirement was mandatory."

¶ 28 We do not find that *Perez* supports his position; rather, *Perez* supports a conclusion that the court's oral ruling constituted a valid summary dismissal. The issue in *Perez* was whether a first-stage dismissal was timely where the circuit court signed a written dismissal order on the ninetieth day, but the clerk did not enter the dismissal order until the following day. *Id.* ¶ 1. Specifically, *Perez* addressed the issue of when the written dismissal order was "entered" and, thus, made final for purposes of the 90-day requirement of section 122-2.1(a). *Id.* ¶ 10. After examining the language of section 122-2.1(a) and analyzing at length Illinois Supreme Court Rule 272 (Ill. S. Ct. R. 272 (eff. Nov. 1, 1990)), the court found that the dismissal order was not entered at the time the circuit court signed it, but when it was entered on the record. *Perez*, 2014 IL 115927, ¶¶ 11-25.

¶ 29 In so holding, our supreme court addressed the defendant's hypothetical argument that the circuit court would have met the 90-day requirement if it had announced in court that it was dismissing the petition, relying on the public expression doctrine. *Id.* ¶ 23. Our supreme court noted that the defendant's reliance on the public expression doctrine was misguided, and that a simple announcement of a dismissal by the court would not have met the requirements of section

122-2.1(a) that a dismissal be "entered." *Id.* Our supreme court did not consider whether the lack of an order of dismissal with written findings within 90 days required the advancement of the petition to second-stage proceedings, as is the issue here. Indeed, in deciding *Perez*, our supreme court did not address or consider its earlier holding in *Porter*. Consequently, we conclude that defendant's reliance on *Perez* is misplaced.

¶ 30 We acknowledge that the *Perez* opinion indicated that the mere announcement of a dismissal in open court within 90 days may not be sufficient under section 122-2.1(a). *Id.* ¶ 23. This case, however, does not concern a simple oral pronouncement of a dismissal; the circuit court stated its findings when it dismissed the petition on the record in open court and the dismissal was entered and memorialized by the entry on the half-sheet and by the disposition sheet. See *Cooper*, 2015 IL App (1st) 132971, ¶ 14 ("a written order of summary dismissal is not required." Instead, "a court summarily dismisses a postconviction petition when its decision is entered of record." A dismissal is "entered" on the date documented by the half-sheet entry of dismissal and the disposition sheet).

¶ 31 In sum, while a written order with findings is advisable, the circuit court's oral dismissal was entered of record on February 24, 2016, and the circuit court made detailed findings on the record to facilitate appellate review of the dismissal. Moreover, the dismissal was entered on the half-sheet as well as the disposition sheet. See *id.* As such, the reversal of the circuit court's dismissal is not required by section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2016)).

¶ 32 We now turn to the merits of defendant's primary contention on appeal, namely that the circuit court erred in summarily dismissing his petition because he presented an arguable claim that the home invasion jury instruction misstated the element as to the weapon used. Defendant

observes that he was charged with being armed with a firearm, but because the jury was instructed on a dangerous weapon, the instructions were error.

¶ 33 In response, the State maintains that the jury instruction issue, couched as an ineffective assistance of counsel claim, is barred by *res judicata* where this court previously determined that while an error occurred with regard to the jury instruction for home invasion, the error did not rise to the level of plain error.

¶ 34 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq.* (West 2016). A postconviction proceeding not involving the death penalty contains three distinct stages. *People v. Hodges,* 234 Ill. 2d 1, 10 (2009). At the first stage of a postconviction proceeding, a defendant need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Id. at* 11-12.

¶ 35 At the first stage of a postconviction proceeding, the trial court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *Id.* at 10. A petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *Id.* at 11-12. More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Id.* at 16-17. This includes claims that are barred by *res judicata* and forfeiture. *People v. Blair*, 215 Ill. 2d 427, 445 (2005).

¶ 36 "The court is further foreclosed from engaging in any fact finding or any review of matters beyond the allegations of the petition." *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, a defendant "need only present a limited amount of detail in the petition" and the

"threshold for survival" is "low." *Hodges*, 234 Ill. 2d at 9. A *pro se* defendant need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Id.* "Thus, in our past decisions, when we have spoken of a 'gist,' [of a constitutional claim] 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." *Id.* "At the first stage of proceedings, we must accept as true all facts alleged in the postconviction petition, unless the record contradicts those allegations." *People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 16. This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 37 Defendant admits that "normally" he would be precluded from relitigating the jury instruction issue in a postconviction petition, but argues this court should relax the rules of *res judicata* based on fairness concerns where the basis of his claim is predicated upon case law which was developed after the affirmance of his conviction on direct appeal. See *People v. Cowherd*, 114 Ill. App. 3d 894, 898 (1983). Defendant maintains that our holding on direct appeal, that the error in the jury instruction did not amount to a structural error, "has been swept away by subsequent Supreme Court caselaw [*sic*]" namely, *People v. Clark*, 2016 IL 118845. According to defendant, our supreme court in *Clark* did not limit second-prong errors to only structural errors (*id.* ¶ 46) and thus this court applied "the wrong approach" in our decision on defendant's direct appeal.

¶ 38 Postconviction petitions are generally subject to the doctrine of *res judicata*, which bars consideration of issues that have previously been raised and decided on direct appeal. *Blair*, 215 Ill. 2d at 443. There is, however, an exception to this doctrine if the law has changed since the defendant's direct appeal was decided, then fundamental fairness dictates that defendant may

raise issues in his postconviction petition that were rejected on direct appeal. *People v. Partee*, 268 Ill. App. 3d 857, 864 (1994) (defendant allowed to re-raise *Batson* issue in his postconviction petition that had been rejected on direct appeal because the law on the issue had changed).

¶ 39 We disagree that *Clark* represents a change in the law that would warrant reconsideration of the issue defendant already raised in his direct appeal. In *Clark,* our supreme court was clear that while its decisions in *People v. Glasper*, 234 Ill. 2d 173 (2009), and *People v. Thompson*, 238 Ill. 2d 598 (2010), equated second-prong plain error with structural error, "we did not restrict plain error to the six types of structural error that have been recognized by the [United States] Supreme Court." *Clark*, 2016 IL 118845, ¶ 46. The *Clark* court specifically noted its prior decisions *In re Samantha V.*, 234 Ill. 2d 359, 372-79 (2009), *People v. Artis*, 232 Ill. 2d 156, 166-67 (2009), and *People v. Harvey*, 211 Ill. 2d 368, 389 (2004), wherein the court did not limit second-prong plain error review to only those structural errors recognized by the Supreme Court. *Clark*, 2016 IL 118845, ¶ 46. Our supreme court was thus express in its view that *Clark* did not change the law in regards to what constitutes second-prong plain error.

¶ 40 We observe defendant cites to no new law that has expressly held an error in jury instructions similar to that in the instant matter equated to second-prong plain error. To the contrary, the reviewing court in *People v. Mister*, 2016 IL App (4th) 130180-B, which was decided after *Clark*, held the opposite. *Id.* ¶ 89 ("The error did not create a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. Indeed, Illinois case law indicates that a gun is a dangerous weapon per se ***." (Internal quotation marks omitted.) (quoting *People v. Ross*, 229 Ill. 2d 255, 273 (2008))). Accordingly, we decline to apply the fundamental fairness exception

of the *res judicata* doctrine to this case.

¶ 41 We further observe that this court did not merely hold in its decision on direct appeal that defendant failed to satisfy the second prong of the plain-error doctrine because the jury instruction error was not one of the six structural errors recognized by the United States Supreme Court. See *Wandick*, 2015 IL App (1st) 123096-U, ¶ 31. Indeed, this court concluded that defendant failed to meet his burden under the second prong of the plain-error doctrine because "the error does not fall within the class of structural errors *or rise to the level of an error so serious that it affected the fairness of the defendant's trial or challenged the integrity of the judicial process*." (Emphasis added.) *Id.* We also acknowledge that our decision relied on the authority of *Watt* wherein the court concluded that while a jury instruction error is not a "structural error," the error in that case did not amount to second-prong plain error because it "did not create a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Watt*, 2013 IL App (2d) 120183, ¶ 39. We also relied on *People v. Ware*, 2014 IL App (1st) 120485, which in turn relied on *Watt* in reaching its conclusion that the jury instruction error did not amount to second-prong plain error. *Id.* ¶¶ 20, 21.

¶ 42 Because defendant's argument on appeal is barred by the doctrine of *res judicata*, we affirm the judgment of the circuit court dismissing defendant's postconviction petition as frivolous and patently without merit. See *Blair*, 215 Ill. 2d at 445 (holding the legislature intended that the phrase "frivolous or patently without merit" encompasses *res judicata*).

¶ 43 CONCLUSION

¶ 44 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.