2019 IL App (1st) 161579-U

No. 1-16-1579

Order filed April 26, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
	)	Nos. 14 CR 10053
v.	)	14 CR 10054
	)	14 CR 10055
	)	14 CR 10056
JASON GOLLAHON,	)	
	)	Honorable
Defendant-Appellant.	)	Stanley J. Sacks,
	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's summary dismissal of defendant's *pro se* postconviction petition where he forfeited the issue of ineffective assistance of plea counsel by failing to include it in his petition.

¶ 2 Defendant Jason Gollahon appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). He

contends that the trial court erroneously dismissed his petition where he made an arguable claim that (1) he was improperly sentenced as a Class X offender and (2) his plea counsel was ineffective for failing to object to him being sentenced as such. We affirm.

¶ 3 Defendant was charged with various counts of burglary and theft in four separate cases after police pulled over a vehicle inside which defendant was a passenger and the vehicle contained proceeds from four individual burglaries.[1]

¶ 4 On May 6, 2015, pursuant to a negotiated plea, defendant pled guilty to four counts of burglary in exchange for four concurrent eight-year sentences, based on his prior criminal history. At the plea hearing, the court asked the State about defendant's background and the State listed defendant's nine felony convictions. Regarding the relevant convictions, the State told the court defendant had:

> "[STATE]: *** [A] 98 Class X armed robbery, 10 years IDOC; a separate 98 attempt armed robbery, Class 1, 10 years IDOC.
>
> [THE COURT]: Did he serve time?
>
> [THE STATE]: Yes. Two separate offenses, but they ran concurrent to each other. *** 87, Class 2 burglary, three years IDOC; ***
>
> [THE COURT]: [Codefendant] obviously a Class X sentence [*sic*]. Does that also apply to [defendant] or not?
>
> [THE STATE]: Yes."

[1] Defendant was charged with codefendant Michael Edwards, who was also in the vehicle police pulled over. Edwards pled guilty at the same hearing as defendant but is not a party to this appeal.

¶ 5 After reading the relevant charges, the court admonished defendant about being a Class X offender and the lengthier sentences associated with that status. The court further admonished defendant about the rights he would give up by pleading guilty. The State provided a factual basis for the four cases, which the court accepted. The court found defendant freely and voluntarily pled guilty. Defendant waived his right to a presentence investigation report and the State nol-prossed the remaining theft counts. The court thereafter sentenced defendant, as a Class X offender, to four concurrent prison terms of eight years' for each burglary, and admonished him of his appellate rights. Defendant indicated he understood his rights and the requisite steps required postplea in order to file a direct appeal. However, he did not file a motion to withdraw his plea and did not file a direct appeal.

¶ 6 On January 19, 2016, defendant filed a *pro se* postconviction petition under the Act. In his petition, defendant argued that he was improperly sentenced as a Class X offender based on a prior conviction from 1987 (case number "87 C 11637101"). Defendant asserted he was a juvenile in 1987 and was "somehow entered into the adult database" and improperly given " 'adult' probation for a Class 2 offense." At the time of the 1987 conviction, defendant "had no ideal [*sic*]" that he was given adult probation, and claimed in his petition that this constituted "newly discovered material." Defendant further contended he was denied effective assistance of counsel in the 1987 case for allowing him to be given adult probation, despite being a juvenile at the time, "and the right to a fair trial in this case." Finally, defendant requested that the 1987 case be removed from his record and that he be resentenced in the instant case. He did not challenge his guilty plea.

¶ 7 On March 11, 2016, the trial court summarily dismissed defendant's petition, finding the issues raised therein frivolous and patently without merit.

¶ 8 Defendant timely mailed his notice of appeal on April 7, 2016. It was filed in the circuit court on April 20, 2016. On the same date, defendant filed in the circuit court a handwritten letter addressed to "whom it may concern," stating that he enclosed his "appeal for a post-conviction petition." Further, defendant asked whether he could amend his appeal "by adding documents [he] forgot to add to [his] post-conviction and the reasons why it is a violation, along with [his] claim already stated, of the constitution (due process of law)" or, alternatively, whether he had to file a second petition. Defendant stated he left out "some important information" and did not know how to proceed. The letter was dated April 9, 2016. This appeal followed.

¶ 9 On appeal, defendant contends that the court erroneously dismissed his petition because he stated an arguable claim that plea counsel in the instant case was ineffective for failing to object to his sentence because "he was not statutorily eligible for mandatory Class X sentencing."

¶ 10 The Act provides a three-stage process as a means for criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Defendant's petition for postconviction relief was summarily dismissed at the first stage. At the first stage of postconviction proceedings, the trial court independently reviews the petition, taking the allegations as true, and determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016). A 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, 11-12 (2009); *People v. Tate,* 2012 IL 112214, ¶ 9.

¶ 11 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen,* 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges,* 234 Ill. 2d at 9; *People v. Williams,* 364 Ill. App. 3d 1017, 1022 (2006). Nonetheless, section 122-2 requires that a postconviction petition "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2016). At this initial stage of postconviction proceedings, facts alleged in a petition are considered true unless they are positively rebutted by the trial record. *People v. Coleman,* 183 Ill. 2d 366, 385 (1998). "[N]onfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *People v. Rissley,* 206 Ill. 2d 403, 412 (2003) (citing *Coleman,* 183 Ill. 2d at 381). We review *de novo* the summary dismissal of a postconviction petition. *Hodges,* 234 Ill. 2d at 9.

¶ 12 In this court, defendant argues plea counsel was ineffective for failing to object to his sentence as a Class X offender. Defendant maintains he did not qualify for Class X sentencing in the instant case because his 1987 conviction was actually a juvenile adjudication mistakenly designated as a Class 2 "adult" offense, and he therefore did not have the requisite two qualifying convictions to trigger Class X sentencing.

¶ 13 The State responds that defendant has forfeited this claim because he failed to raise it in his petition, instead arguing that counsel in his 1987 case was ineffective for allowing him to be sentenced as an adult while he was 16 years old. We agree with the State.

¶ 14 "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); see also *People v. Pendleton,* 223 Ill. 2d 458, 475 (2006) (reiterating that a claim not raised in a postconviction petition cannot be raised for the first time on appeal). This court lacks the authority to excuse the forfeiture caused by defendant's failure to include issues in his postconviction petition. *People v. Reed*, 2014 IL App (1st) 122610, ¶ 43 (citing *People v. Jones*, 213 Ill. 2d 498, 507-08 (2004)). The Illinois Supreme Court has criticized this court for improperly overlooking the waiver provision of the Act and addressing " 'claims raised for the first time on appeal for various and sundry reasons.' " *Pendleton,* 223 Ill. 2d at 475 (quoting *Jones,* 213 Ill .2d at 506).

¶ 15 In *Reed*, we acknowledged that our supreme court has previously noted that attempts by appellate counsel to raise claims for the first time on appeal from the first-stage dismissal of a postconviction petition, while understandable, are impermissible under the Act:

> " '[T]he typical *pro se* litigant will draft an inartful pleading which does not survive scrutiny under the 'frivolity/patently without merit' standard of section 122-2.1, and it is only during the appellate process, when the discerning eyes of an attorney are reviewing the record, that the more complex errors that a nonattorney cannot glean are discovered. The appellate attorney, not wishing to be remiss in his or her duty, then adds the newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling. * * * [T]he attorney is zealously guarding the client's rights and is attempting to conserve judicial resources by raising the claim expeditiously at the first available chance. These goals are laudable,

but they nonetheless conflict with the nature of appellate review and the strictures of the Act.' " *Reed*, 2014 IL App (1st) 122610, ¶ 43 (*Jones,* 213 Ill.2d at 504-05).

¶ 16 Here, defendant failed to raise in his petition any issue regarding the ineffectiveness of plea counsel in the instant case. Rather, in his petition, defendant argued that he was improperly sentenced as a Class X offender based on a prior conviction from 1987. Defendant challenged that 1987 conviction by asserting that he was a juvenile in 1987 and was "somehow entered into the adult database" and improperly given " 'adult' probation for a Class 2 offense." Defendant also contended he was denied effective assistance of counsel in the 1987 case for allowing him to be placed on adult probation, despite being a juvenile at the time. He requested that the 1987 case be removed from his record and that he be resentenced in the instant case. However, because defendant did not argue that his plea counsel was ineffective for failing to object to his eligibility as a Class X offender he has forfeited this claim. *Jones,* 213 Ill. 2d at 507-08.

¶ 17 In his reply, defendant argues that liberally construed, his petition sets forth the necessary facts underlying his ineffectiveness claim, thus overcoming any forfeiture of the issue. Although defendant points out that a *pro se* litigant need not cite legal authority, include legal arguments, or set forth entire claims in his postconviction petition, we note that defendant explicitly challenged the effectiveness of counsel in the 1987 case, demonstrating he also could have raised an ineffectiveness claim against plea counsel, yet chose not to do so. Accordingly, because defendant failed to raise the ineffectiveness claim with respect to plea counsel in his petition, he is precluded from raising it for the first time on appeal.

¶ 18 With regard to his claim regarding his Class X sentencing eligibility, defendant is essentially attempting to attack his 1987 conviction through a collateral challenge to his 2015

convictions. We question whether this claim is cognizable under the Act, *i.e.* whether this is an error occurring in the 2015 proceeding as required by section 122-1 of the Act. 725 ILCS 122-1(a) (West 2016) "[a]ny person imprisoned in the penitentiary who asserts that *in the proceedings which resulted in his or her conviction* there was a substantial denial of his or her rights *** may institute a proceeding under this article." (emphasis added); see also *People v. Steward*, 406 Ill. App. 3d 82, 90 (In the context of the Act, a person serving a new sentence enhanced by a previous conviction does not have standing to challenge that previous conviction). Although he now claims his 1987 conviction was improperly designated a Class 2 offense, nothing in the record shows that any error occurred in the proceedings which resulted in his 2015 convictions. In other words, if, as defendant claims, there was an error in his 1987 conviction, neither plea counsel nor the trial court could be expected to know about such an error. The record shows that at the time of his plea, defendant had the requisite two prior convictions to mandate Class X sentencing in the case at bar. As such, defendant cannot show, based on this claim, a substantial violation of his constitutional rights in the 2015 proceeding.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.