2019 IL App (2d) 160843-U
No. 2-16-0843
Order filed June 20, 2019



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>PARIS N. WALKER,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Stephenson County.<br><br><br><br>No. 12-CF-55<br><br>Honorable Michael P. Bald, Judge, Presiding. |

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Birkett concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

**ORDER**

¶ 1 *Held*: Defendant forfeited his postconviction claim, as he could have raised it on direct appeal and he did not allege that appellate counsel was ineffective for failing to do so.

¶ 2 Defendant, Paris N. Walker, appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) from his convictions of unlawful delivery of a controlled substance within 1000 feet of a church (720 ILCS 570/407(b)(2) (West 2012)) and criminal drug conspiracy (*id.* § 405.1). Defendant argues that his petition set forth an arguable claim that the trial court violated his due process rights by

refusing to instruct the jury on the heightened scrutiny to which informant testimony ought to be subjected and, further, that his failure to previously raise the claim is not a bar to relief where it resulted from the ineffectiveness of appellate counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of unlawful delivery of a controlled substance within 1000 feet of a church (*id.* § 407(b)(2)) and one count of criminal drug conspiracy (*id.* § 405.1). At defendant's jury trial, testimony established that Felix Rios had agreed to make controlled buys from three drug dealers in exchange for the dismissal of certain charges against him. Rios testified that he bought cocaine from defendant and Sabrina Goldman on four dates while wearing a "button" video camera. The purchases took place in front of Rios's house, where defendant and Goldman would drive up in a car. After each sale, Rios would enter his house and wait for defendant to leave. Rios was under surveillance during each transaction, but not when he entered the house. Rios would then meet up with an undercover officer and turn over the drugs. The videos taken by the button video camera were shown to the jury. The videos did not show the drugs being handed to Rios. During one of the controlled buys, Rios zipped up his coat to block the camera when he entered his house.

¶ 5 On cross-examination, Rios testified that he agreed to cooperate with the police to avoid going to jail. When asked why he blocked the camera on one occasion, he stated that he did not want his mom to be on the video. He testified that the police searched him before and after each controlled buy to make sure that he did not have anything on him. The police did not search his house.

¶ 6 Goldman testified for the defense that she was a prostitute and that defendant arranged dates for her and two other prostitutes. She testified that the videos did not show drug deals;

rather, they showed her and defendant giving Rios, a frequent customer, a location and room number.

¶ 7 During the jury instructions conference, the State successfully sought Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter IPI Criminal 4th), the instruction on accomplice testimony, which states:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."

The jury was also instructed with IPI Criminal 4th No. 1.02, which states:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of this testimony considered in the light of all the evidence in the case."

¶ 8 Defense counsel asked that either of two non-IPI jury instructions be given with respect to Rios's testimony. The first states:

> "An informer who arranges a sale and purchase of narcotics to the police, may or may not be an accomplice, but his testimony must be subjected to the same suspicion. Accordingly, it should be considered by you with caution. It should be carefully examined in the light of the other evidence in the case."

The second states:

> "The testimony of an informant, someone who provides evidence against someone else for money, or to escape punishment for [his][her] own misdeeds or crimes, or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated.
>
> Felix Rios may be considered to be an informant in this case.
>
> The jury must determine whether the informer's testimony has been affected by self-interest, or by the agreement [he][she] has with the government, or (his own)(her own) interest in the outcome of this case, or by prejudice against the defendant."

The trial court refused to give either instruction, stating:

> "there can be arguments made about this individual [Rios] being an accomplice, if you wish. You may—There may be an argument that he is an accomplice. It will be for the jury to decide what evidence is to—or excuse me, what weight is to be given to the testimony of any of the witnesses, obviously. And there's various ways of attacking all of the witnesses is some way or another."

¶ 9 During closing arguments, the State argued that Goldman's testimony was incredible. The State, referring to IPI Criminal 4th No. 3.17, argued that, because Goldman was involved in the commission of a crime with defendant, her testimony was subject to suspicion. The State argued further that Rios was not an accomplice.

¶ 10 In response, defense counsel argued that the issue in the case was whether the source of the cocaine was defendant or Rios. According to defense counsel, because Rios had access to cocaine from other sources, and because he was a convicted felon trying to rid himself of criminal charges and make some money, he was not credible. Defense counsel argued that Rios's testimony was similarly subject to heightened scrutiny, because Rios was "partners in

crime" with defendant, given that he had engaged in a drug deal with defendant. Counsel argued that the camera did not show any drugs and that Rios covered the camera when he entered his house.

¶ 11 In reply, the State argued that Rios was not an accomplice, because purchasing drugs for the police was not a crime, and therefore the instruction dealing with accomplices did not apply to him.

¶ 12 While the jury was deliberating, defendant moved for a mistrial or for reconsideration of the trial court's ruling refusing defendant's proposed instructions concerning informant testimony, given the State's argument that IPI Criminal 4th No. 3.17 did not apply to Rios. The trial court denied the motion.

¶ 13 The jury found defendant guilty of both counts, and the trial court sentenced him to concurrent 14-year prison terms. Defendant timely appealed. On appeal, defendant argued that (1) the trial court erred in instructing the jury on reasonable doubt and (2) his conviction of criminal drug conspiracy should be vacated because he was also found guilty of unlawful delivery of the controlled substance. *People v. Walker*, 2016 IL App (2d) 131282-U, ¶ 2. With respect to defendant's first argument, we found that defendant had forfeited it, by failing to object, and that plain-error review was not warranted, because there had been no error. *Id.* ¶¶ 9-12. We agreed with defendant's second argument and vacated his conviction of criminal drug conspiracy. *Id.* ¶¶ 13-15.

¶ 14 On July 19, 2016, defendant filed a *pro se* postconviction petition, claiming, *inter alia*, that his due process and equal protection rights were violated when the trial court refused to give the instructions he tendered on informant credibility. Defendant's petition also included additional claims directed specifically at appellate counsel. For instance, he argued that

appellate counsel was ineffective for failing to appeal the trial court's decision to allow testimony of untried charges into evidence, failing to argue the chain of custody of the drugs, failing to argue that the camera was obscured, failing to argue against defendant being assessed $50 for the cost of the appeal, and failing to argue trial counsel's ineffectiveness for not challenging certain rulings made by the trial court with respect to closing argument.

¶ 15 On September 7, 2016, the trial court summarily dismissed the petition as frivolous and patently without merit. Defendant timely appealed.

¶ 16 II. ANALYSIS

¶ 17 Defendant argues that the trial court erred in summarily dismissing his postconviction petition, where the petition set forth an arguable claim that the trial court violated his due process rights by refusing to instruct the jury on the heightened scrutiny to which informant testimony ought to be subjected. We find that this issue has been forfeited.

¶ 18 The Act provides a method to challenge a conviction or sentence based on a substantial violation of constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2016). "[A]ny issues considered by the court on direct appeal are barred by the doctrine of *re judicata*, and issues which could have been considered on direct appeal are deemed procedurally defaulted." *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). Moreover, any claim not raised in the original or amended petition is deemed forfeited. 725 ILCS 5/122-3 (West 2016); *Ligon*, 239 Ill. 2d at 103-04. A defendant in a postconviction proceeding may not raise an issue for the first time on appeal. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Indeed, the appellate court is without authority to excuse a forfeiture caused by the failure to include issues in a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004).

¶ 19 At the first stage of the proceedings, the trial court must independently determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). To be summarily dismissed at the first stage as frivolous or patently without merit, the petition must have no arguable basis either in law or in fact, relying instead on "an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). We review the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 20 Defendant acknowledges that he failed to challenge on direct appeal the trial court's ruling on his proposed jury instructions. As a result, he has forfeited the issue. Nevertheless, defendant argues that his failure to previously raise the issue is not a bar to relief, because any forfeiture stemmed from the ineffective assistance of appellate counsel. Defendant claims that his "petition pled sufficient facts to allege ineffective assistance of appellate counsel for failing to assert the instructional issue on direct appeal." We disagree. To be sure, defendant's petition made numerous claims concerning the ineffective assistance of appellate counsel. However, none of those claims concerned appellate counsel's failure to raise the instructional issue on direct appeal.

¶ 21 In his petition, defendant listed nine separate "Points for Review." The first point, and the only point addressing the instructional issue, stated:

> (1) "Whether during trial the courts [*sic*] refusal to give defense tendered jury instrction [*sic*] to jury denied him 'Due process and Equal Protection' of the law guaranteed by the 6th and 14th amendment rights, by allowing people's jury instructions which denied him a fair trial."

Even under the low threshold a defendant faces at the first stage of postconviction review, we see no allegation directed at appellate counsel. The claim makes very clear that it was the *trial court's* action that deprived defendant of his rights. Indeed, the fact that defendant made express allegations of ineffectiveness of appellate counsel elsewhere in his petition leads us to conclude that, had he intended to do so with respect to counsel's failure to raise the instructional issue on appeal, he would have. In addition, we reject defendant's argument that his citation to the sixth amendment within the context of his claim was sufficient to raise the issue of appellate counsel's ineffectiveness. See *People v. Stockton*, 2018 IL App (2d) 160353, ¶ 14 (holding that a claim of ineffective assistance of appellate counsel does not fall under the sixth amendment). And, although defendant did reference the fourteenth amendment, we find that bare reference insufficient to transform what is clearly an allegation concerning the trial court into one alleging ineffectiveness of appellate counsel; the fourteenth amendment, of course, also guarantees due process and equal protection, which are the rights that he explicitly invoked. Although we must give a petition a "liberal construction," no amount of liberal construction can convert this claim of trial court error into ineffective assistance of counsel. See *id.* ¶ 16.

¶ 22 Based on the foregoing, we find that defendant has forfeited his claim by failing to raise it on direct appeal and further that he cannot avoid forfeiture where he failed to raise the issue of appellate counsel's ineffectiveness in his petition.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the judgment of the circuit court of Stephenson County. As part of our judgment, per the State's request, we assess defendant $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 45-67; *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 25 Affirmed.

¶ 26 JUSTICE McLAREN, concurring in part and dissenting in part:

¶ 27 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 28 However, as I have demonstrated in *People v. Knapp*, 2019 IL App (2d) 160162, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Id*. at ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id*. at ¶ 12 ("The statutory provision that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907 amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2019 IL App (2d) 160162, ¶ 133.

¶ 29 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The *Knapp* majority declined to address *Nicholls*' faulty premise; now the majority here cites to *Knapp* and similarly fails to address, let alone reconcile,

the *Nicholls* counterfactual. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.