2019 IL App (3d) 160679-U

Order filed January 29, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0679
v.	)	Circuit No. 09-CF-426
	)	
MICHAEL WILSON,	)	Honorable Kathy S. Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Schmidt and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's *pro se* postconviction petition.

¶ 2 Defendant, Michael Wilson, appeals from the circuit court's summary dismissal of his *pro se* postconviction petition. Defendant argues the court's dismissal was erroneous because his petition stated the gist of a claim of judicial bias in sentencing and that defendant was subject to a *de facto* life sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 13, 2009, the State filed a juvenile delinquency petition against defendant. At the time, defendant was 14 years old. The State's petition alleged that defendant had committed first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2008)), and armed robbery (*id.* § 18-2(a)). On the same date, the State filed a motion to transfer jurisdiction of the case to the adult criminal court. 705 ILCS 405/5-805(3) (West 2008). The court appointed counsel to represent defendant. Appointed counsel filed a motion objecting to the State's motion for transfer of jurisdiction and moved for the appointment of an expert to evaluate defendant. The court appointed social worker Monica Mahan and psychologist Dr. Paul Pasulka to evaluate defendant regarding the potential transfer.

¶ 5 Pasulka noted in his report defendant was born prematurely and had cocaine in his system at birth. Pasulka observed defendant had intellectual, behavioral and developmental difficulties, and defendant functioned at a second-grade level. Pasulka opined that defendant would benefit from treatment in a juvenile facility and would be put at greater risk if the case were transferred to the adult criminal court.

¶ 6 In her report, Mahan said defendant would benefit from the services offered through the juvenile court and juvenile detention centers. Mahan opined that defendant stood a reasonable chance of rehabilitation in the juvenile court system, and sentencing as an adult would only cause defendant's condition to deteriorate and regress.

¶ 7 The court granted the State's motion to transfer jurisdiction to the adult criminal court. Thereafter, the State filed an indictment that charged defendant with three counts of first degree murder (720 ILCS 5/9-1(a) (West 2008)) and one count of armed robbery (*id.* § 18-2(a)). The case proceeded to a jury trial.

¶ 8 The evidence at defendant's trial established that during the early morning hours of December 27, 2008, defendant, Byron Moore, and Ryan Graefnitz entered an apartment building located at 1512 Chicago Avenue, Kankakee. Defendant and Moore had previously told Graefnitz he could purchase cocaine at the apartment building. While defendant, Moore, and Graefnitz were in the apartment building, several witnesses heard an individual announce that a robbery was taking place. The announcement was followed by two or three gunshots. Joseph Benegas, who was waiting outside the apartment building for Graefnitz, heard the gunshots and saw Graefnitz collapse in front of the building. Benegas then saw defendant and Moore run from the building. After fleeing the scene, defendant told Travis Watson he had just shot a man who wanted to buy cocaine.

¶ 9 The jury found defendant guilty of first degree murder and armed robbery. The jury also found defendant did not personally discharge the weapon that caused Graefnitz's death.

¶ 10 Prior to the sentencing hearing, the State filed a presentence investigation report (PSI). Defendant's PSI included more than 200 pages of reports and supporting documents. The PSI stated defendant was born with cocaine and amphetamines in his system. As a child, defendant was placed in a special education program because of his behavior problems and learning disabilities. When defendant was in third grade, he was diagnosed with attention deficit hyperactivity disorder (ADHD). Later psychological evaluations indicated defendant suffered from oppositional defiant disorder, intermittent explosive disorder, and disruptive behavior disorder. While in school, defendant received several suspensions for verbal abuse, being aggressive with school staff, stealing other students' lunches, and fighting. Defendant never obtained a high school diploma or general educational development certificate.

¶ 11 Defendant reported that he started using alcohol at age 13 and consumed alcohol regularly on the weekends. Defendant also smoked marijuana on a daily basis. Between March and September 2008, four of defendant's drug screenings tested positive for tetrahydrocannabinol (THC). Defendant twice failed to complete substance abuse treatment.

¶ 12 In 2009, Pasulka diagnosed defendant with mild mental retardation, ADHD, and depressive disorder with atypical features. Records from the juvenile detention center indicated defendant had attempted to choke himself on February 22 and 23, 2010. Defendant also incurred several incident reports for fighting, disobeying staff, deliberate/implied threats toward staff, possession of contraband, damaging facility property, and refusal of lockdown while incarcerated at the detention center.

¶ 13 Additional documents in the PSI establish that defendant had a history of childhood behavioral problems and outbursts. For example, an April 28, 2006, progress report from Aunt Martha's Youth Service Center notes defendant is easily frustrated, very disruptive, displays inappropriate gestures, yells and screams, and hits and throws things. A May 2001 learning environment assessment similarly states that, in addition to reading and writing problems, defendant was often noncompliant in class, and frequently fought with other students. Similarly, an individualized education plan report from May 2008 reports defendant lacked impulse control, had poor interpersonal relationships with his peers and authority figures, was easily frustrated, and had earned 13 referrals for verbal aggression, disrespecting staff, defiance, fighting, and disruptive behavior. During the 2008-09 school year, defendant received 20 disciplinary infractions during the first semester. Documentation from the juvenile detention center noted numerous rule violations and incidents between January 2009 and February 2011.

¶ 14 At the conclusion of the sentencing hearing, the court ruled:

"I'm going to tell you, [defendant], to this report. It's about an inch-and-a-half to two inches. And, normally, when I read a [PSI], normally you can read it and there's some redeeming value, there's something good. You can see some rehabilitation potential. I have to tell you, I started to tag the pages. And page after page after page after page, there is not one page that I can think of in this entire [PSI] that doesn't talk about how bad you are.

Does it mention that you have ADHD? It does. That you have defiance disorder, that you have impulsive behavior, hyperactivity, possibly some mild retardation? It does. And it gives you those labels. But the entire [PSI] talks about how you didn't make it anywhere, quite frankly. And it wasn't because of other people, it was because of yourself. You were basically noncompliant, a bully, disrespectful, in every place you ever ended up. You made certain that everybody there, you know, was—was miserable around you.

There is not one page—I can pick any one page, and it's terrible. Absolutely terrible each and every place that you were at. And these are things that you just did purposely all the time, whether you were in a facility, or whether you were in the school room, or whether you were in an alternate school. Your behavior never was good—never, ever. And so the problem is when I look at you, even though you're young, the past tells you a lot about the future. And this shows you to be a very dangerous person, quite frankly. You don't care. You don't care who you hurt. You don't care what the rules are. And you don't care who's making the rules, because you're not gonna abide by those rules. That's what every one of these pages say, that you simply are not going to abide by the

rules. And I—I don't believe that will change. I know you're young. But, you know, this is a significant—even though you're young—significant account of your young years. And, as I said, each page. I can't pick one page out of here that says one—even one thing good about you. Like I said, from the schools to the rehabilitation to the people that have worked for you.

So I do believe you're a danger to society. I believe you will continue to be a danger to society. I'm not sure there's any rehabilitation factor there that you're gonna follow. I guess you can prove me wrong when you are in prison. But there is nothing in here that says you're going to turn your life around. Everything in here says you basically don't have a conscience, and you're gonna do what you want to do. And if it causes danger to others, you're gonna do that. And we saw that on the night of December 27th when we heard the facts that, you know, you yelled out that it was gonna be a robbery. Ryan Graefnitz turns around and runs away. At that point you could have just let him run. Nothing had happened. But you decided to shoot—you and Byron Moore decided that you're gonna shoot him in the back and leave him for dead and drive off and go talk to your friends and do whatever else you wanted to do and leave him lay in that street. And I can consider that.

So, I am going to sentence you to 40 years on first degree murder with an additional 15. So that's going to be 55 years there. I am going to give you—and the State recommended, and I will do that—on the attempt armed robbery, the minimum on that, other than probation, is 4 years. So I am going to give him 4 years, which is the minimum prison time on that. And the 4 years is at 50 percent.

> Now, on the Class 1 attempt robbery, that will be followed by 2 years mandatory supervised release, possible fine up to $25,000. As to the first degree murder, the 40 years plus the add-on of 15. When you get out of prison, it will—but you're gonna be a very old man. So—you know, and I hope sitting in prison will change your ways. I'm just afraid it won't. I'm afraid you're gonna get out and still be dangerous and still have no conscience. I hope I'm wrong. But after you serve that 55 years, 40 plus 15, it will be followed by 2 years mandatory supervised release, or what used to be called parole. As I said, so the record's real clear, there's no such thing as probation, obviously, on a first degree murder, which is served at 100 percent. I could give you probation on the attempt armed robbery. However, I'm not. I'm giving you the 4 years, which is 50 percent. But I just wanted to—I just want to make known to the higher courts that I know I could give you probation."

¶ 15 Defendant retained private counsel to represent him during the posttrial proceedings. Private counsel filed a motion for a new trial. Counsel argued defendant was entitled to a new trial because: (1) the court erroneously transferred the case to the adult criminal court, (2) the evidence did not support the guilty verdict based on an accountability theory, (3) the jury verdicts were factually and legally inconsistent, and (4) the State failed to prove defendant's guilt beyond a reasonable doubt. The court denied the motion.

¶ 16 Defendant appealed the circuit court's denial and argued: (1) the court erred when it transferred his case from juvenile to adult criminal court, (2) the jury should not have received an accountability instruction, (3) the State failed to prove defendant's guilt beyond a reasonable doubt, (4) the court erred by admitting prior consistent statements of the prosecution's witness,

(5) the court erred when it restricted cross-examination of a prosecution witness, and (6) the court erroneously sentenced defendant to 55 years' imprisonment. *People v. Wilson*, 2015 IL App (3d) 130606-U, ¶ 2. Relevant to this appeal, defendant argued that the court "failed to consider mitigating factors in sentencing him, including his age, history of neglect, developmental delay, mental health history and lack of violent criminal history" when it entered his sentences. *Id.* ¶ 66. We affirmed defendant's convictions and sentences. *Id.* ¶ 71. In doing so, we noted that the circuit court had considered the mitigating and aggravating factors and "found that the aggravating factors far outweighed the mitigating ones because of defendant's conduct, including his behavior in juvenile detention, which showed a pattern of aggressiveness and violence." *Id.* ¶ 69.

¶ 17 Following defendant's direct appeal, defendant filed a *pro se* postconviction petition. Defendant's petition raised three claims. First, defendant received ineffective assistance of appellate counsel where counsel did not argue that posttrial counsel was ineffective. Specifically, posttrial counsel did not argue that: (1) at the time of the incident defendant was "a retarded" 14-year-old with an intelligence quotient of 64, and (2) the guilty verdict that was based on an accountability theory was unconstitutional and fundamentally unfair to "retared [*sic*] juveniles." Defendant's second claim alleged that the court's comments during the sentencing hearing established that it was biased against defendant, and the sentence imposed violated the eighth amendment's prohibition against cruel and unusual punishment. Defendant's third claim alleged that the court's comments during the sentencing hearing indicated that it was biased against defendant.

¶ 18 The court summarily dismissed defendant's petition in a written order. The court found: (1) the accountability issue was addressed on defendant's direct appeal, and therefore, was

barred by *res judicata*; (2) the court's comments at sentencing about defendant were derived entirely from the factual information contained in the PSI; and (3) the court's statement that "you and Byron Moore decided that you're gonna shoot him in the back and leave him for dead" was intended to convey that either defendant or Moore had shot Graefnitz under an accountability theory. The court also said that it had not based its sentencing decision on its accountability statement. The court had considered defendant's psychological issues and history of poor behavior and concluded that the PSI showed defendant was a "very dangerous person." Defendant appeals the court's dismissal of his postconviction petition.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues the court erred by summarily dismissing his *pro se* postconviction petition because the petition presented the gist of claims that the court exhibited bias against defendant at sentencing and the court had violated the eighth amendment prohibition against cruel and unusual punishment. Upon review, we find the court did not err by dismissing defendant's petition because his claims were barred by *res judicata*, forfeiture, and are meritless.

¶ 21 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) provides a three-stage process for a defendant to challenge his conviction based on an alleged deprivation of defendant's constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. When a defendant files a *pro se* postconviction petition, the court must determine whether defendant's claims are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2016); *Cotto*, 2016 IL 119006, ¶ 26. That is, the court must determine if defendant alleged enough facts to make out a claim that is arguably constitutional, or state the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010). Additionally,

a claim that was raised on direct appeal is barred from consideration by the doctrine of *res judicata*. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). An issue that could have been raised on direct appeal, but was not, is forfeited. *Id.* Claims barred by *res judicata* or forfeiture are subject to summary dismissal. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). We review *de novo* the court's summary dismissal of defendant's postconviction petition. *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010).

¶ 22 Defendant's *pro se* postconviction petition alleged three claims: (1) ineffective assistance of appellate counsel for failing to raise an issue regarding posttrial counsel's representation, (2) judicial bias in sentencing, and (3) defendant's sentence constituted cruel and unusual punishment. On appeal, defendant solely argues that he has "presented the gist of a constitutional claim of judicial bias and a corresponding gist of a constitutional claim that his *de facto* life sentence violates the eighth amendment." Accordingly, we limit our analysis to these claims.

¶ 23 Defendant argues that his sentencing hearing was fundamentally unfair and constituted a denial of due process because the circuit court "showed a great deal of animosity, hostility, and ill will towards Defendant." At the outset, we note that this claim is subject to forfeiture as defendant could have raised it in his direct appeal. See *Blair*, 215 Ill. 2d at 442. Additionally, defendant did not seek to have the forfeiture doctrine relaxed by alleging in his petition that the failure to raise this issue on direct appeal was the result of ineffective assistance of appellate counsel. *People v. English*, 2013 IL 112890, ¶ 22. Instead, defendant asks for the first time on appeal that we relax the forfeiture doctrine because fundamental fairness so requires. See *id.* However, even if we relaxed the forfeiture doctrine, we would find that defendant did not state the gist of a claim of judicial bias.

¶ 24 To prevail on a claim of judicial bias, defendant must allege more "than an unfavorable result." *People v. Rademacher*, 2016 IL App (3d) 130881, ¶ 47. Defendant argues that the court's lengthy comments about defendant's PSI exhibited a bias against defendant. However, we find the court's comments were derived from the information contained in defendant's PSI. Defendant's PSI repeatedly indicated that defendant suffered from psychological issues and routinely engaged in inappropriate behavior throughout the majority of his life. The court, in its ruling, acknowledged these prevailing issues, and concluded that they warranted a lengthy sentence. *Supra* ¶ 14. After reviewing the court's sentencing comments in context with the PSI, we conclude defendant's petition did not allege the gist of a claim of bias because the court's comments were derived entirely from defendant's history of misbehavior.

¶ 25 Next, defendant argues his 55-year sentence for first degree murder is an unconstitutional *de facto* life sentence for a juvenile. Defendant has also forfeited review of this issue because he could have raised it on direct appeal and does not allege that the failure to do so was the result of ineffective assistance of appellate counsel. *Williams*, 209 Ill. 2d at 233. Moreover, the *de facto* life sentence argument does not appear on the face of defendant's *pro se* postconviction petition. Instead, appellate counsel attempts to extrapolate this claim from defendant's claim of judicial bias. Appellate counsel argues that the Act permits such a liberal review of defendant's *pro se* petition. While we acknowledge that the Act provides a low threshold for survival for first-stage petitions, we note that even given this low threshold, the petition must " 'clearly set forth' " the manner in which defendant's constitutional rights were violated. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009) (quoting 725 ILCS 5/122-2 (West 2006)). Moreover, any issue not raised in defendant's postconviction petition is subject to forfeiture and cannot be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Defendant's petition set forth claims of

ineffective assistance, judicial bias, and cruel and unusual punishment. It did not, however, " 'clearly set forth' " a claim of an impermissible *de facto* life sentence. *Id.* Therefore, this issue is forfeited.

¶ 26 III. CONCLUSION

¶ 27 The judgment of the circuit court of Kankakee County is affirmed.

¶ 28 Affirmed.