2020 IL App (1st) 190811-U

No. 1-19-0811

Order filed February 28, 2020

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.
	)	
v.	)	No. 13 CR 10928
	)	
KEITH MCCULLUM,	)	Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the summary dismissal of defendant's petition for relief under the Post-Conviction Hearing Act.

¶ 2 Defendant Keith McCullum appeals from the trial court's summary dismissal of his petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1, *et seq.* (West 2018)). He contends that the circuit court erred in dismissing his petition because he raised an arguable claim that his trial counsel was ineffective for stipulating that defendant had two

qualifying felony convictions for purposes of an armed habitual criminal (AHC) charge. For the following reasons, we affirm.

¶ 3 Defendant was charged by information with one count of being an armed habitual criminal (AHC), two counts of unlawful use of a weapon by a felon, and six counts of aggravated unlawful use of a weapon. Prior to trial, the State nol-prossed all counts except the AHC count.

¶ 4 Following a 2016 jury trial, defendant was found guilty of AHC (720 ILCS 5/24-1.7 (West 2014)) and sentenced to seven years' imprisonment. On direct appeal, this court affirmed defendant's conviction. *People v. McCullum*, 2018 IL App (1st) 163178-U. Because we set forth the facts on direct appeal, we recite only those facts necessary to resolve the limited issue raised in this appeal.

¶ 5 The record shows that at trial, immediately after opening arguments, the parties stipulated that defendant "has two qualifying offenses" for purposes of the AHC charge. The evidence adduced at trial showed that, during a traffic stop, a police officer observed defendant placing a revolver under his vehicle's driver's seat; the weapon was recovered after defendant was detained.

¶ 6 On January 25, 2019, defendant, through counsel, filed a postconviction petition. The petition primarily contended that trial counsel was ineffective by agreeing to stipulate at trial that defendant had "two qualifying offenses" that could serve as predicate prior felonies supporting an AHC conviction. See 720 ILCS 5/24-1.7 (West 2014) (specifying that the AHC offense is committed when the defendant receives, sells, possesses, or transfers a firearm "after having been convicted a total of 2 or more times" of certain enumerated offenses). In the petition, defendant averred that he "did not have two qualifying convictions" in his background. The petition stated: "While the record * * * is silent as to what felony convictions were in reference in stipulation, a

review of the petitioner's background indicates he did not possess the necessary prior convictions for which to sustain the instant conviction and thus the stipulation entered into by trial counsel was in error, ineffective, and caused the petitioner the ultimate prejudice which is to suffer a conviction on insufficient evidence."

¶ 7 Defendant attached to the petition a certified statement of conviction from Case No. 09 CR 1252701, which reflects his January 2011 conviction for one count of "FELON POSS/USE FIREARM PRIOR" under "720-5/24-1.1(a)" (hereinafter referred to as the "prior UUWF conviction").[1] In the petition, defendant acknowledged that his background included a prior conviction for "Felon in Poss[ession]" under "720-5/24-1.1(a)." However, he claimed that the prior UUWF conviction could not serve as a predicate felony for his AHC conviction, because the prior UUWF conviction "is facially unconstitutional and invalid," in light of our supreme court's decisions in *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387. Defendant argued that the prior UUWF conviction was *void ab initio* and thus "his armed habitual criminal conviction - based on [the] invalid [UUWF] conviction - must accordingly be reversed and vacated." Defendant claimed that his trial counsel provided "ineffective assistance" for "stipulat[ing] to a felony conviction as a predicate for the charged offense when such felony conviction did not exist."

¶ 8 In the petition, defendant additionally alleged that trial counsel was also ineffective for: (1) failing to call a fact witness, Kenyatta Brisco, whose testimony "would have *** corroborated [defendant's] position at trial that it was impossible for the detaining officer to have observed what

[1] Defendant's brief on appeal refers to the prior UUWF conviction in Case No. 09 CR 1252701 as a "2009 conviction." However, the record shows that defendant was not found guilty of UUWF in that case until January 5, 2011.

he claimed to have observed" and (2) failing to introduce evidence to show that the rental vehicle defendant was driving at the time of the incident had tinted windows.

¶ 9 On March 29, 2019, the circuit court entered a written order summarily dismissing the petition. The court first rejected the claim that trial counsel should not have entered into the stipulation regarding defendant's prior convictions. In doing so, the circuit court explained that *Aguilar* did not invalidate the prior UUWF conviction, but concerned an entirely different offense:

> "[A]t the time of trial *** [defendant] did indeed have two qualifying convictions which were a Class 2 felony for Unlawful Use or Possession of a Weapon by a Felon (UUW/F) under case number 09CR-12527 and a Class 2 felony for Possession of a Controlled Substance ***.
>
> [Defendant] now specifically argues that it was error for trial counsel to stipulate to the UUW/F conviction because this charge was invalidated by *People v. Aguilar*, 2013 IL 112116. The *Aguilar* decision focused on the charge of Aggravated Unlawful Use of Weapons (AUUW) per 720 ILCS 5/24-1.6. The charge of UUW/F is found at 720 ILCS 5/24-1.1 and was not addressed by the *Aguilar* court. Thus, the [defendant] is mistaken that the predicate felony of UUW/F used for his conviction of AHC had been invalidated. Given this, his argument that trial counsel was ineffective for stipulating to a valid conviction at the time of trial must fail."

The circuit court proceeded to reject as meritless defendant's separate arguments regarding trial counsel's failures to call Brisco or to introduce other evidence. Accordingly, the court found that the issues raised in the petition were "frivolous and patently without merit."

¶ 10 On appeal, defendant solely contends that the court erred in summarily dismissing his petition because he presented an arguable claim that his trial counsel was ineffective for stipulating to the existence of two qualifying offenses for purposes of the AHC charge. He maintains that the prior UUWF conviction is "facially unconstitutional and invalid" and *void ab initio*, such that it could not serve as a predicate felony to support his AHC conviction.

¶ 11 In support of this argument, defendant relies on *Aguilar* and *Burns*. He cites *Aguilar* for the proposition that "the Aggravated Unlawful Use of a Weapon statute (720 ILCS 5/24-1) violated the Second Amendment *** and was therefore unconstitutional." He argues that *Burns* "clarified [that] the *Aguilar* holding extends to the entirety of the AUUW offense in 24-1.6(a)(1), (a)(3)(A)." He asserts that the prior UUWF conviction is "facially unconstitutional and invalid" so that "the *void ab initio* doctrine applies and his [AHC] conviction– based on an invalid conviction – must accordingly be reversed and vacated." He maintains that "[i]t was ineffective assistance of counsel to stipulate to a felony conviction as a predicate for the charged offense when such felony conviction did not exist."

¶ 12 Defendant filed his petition pursuant to the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2018), which provides a method for a criminal defendant to assert that his or her conviction was the result of a "substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 13 "A postconviction proceeding not involving the death penalty contains three distinct stages. [Citations.] At the first stage, the circuit court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether 'the petition is frivolous or is patently without merit.' [Citations]. If the court determines that the

petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2006))." *Hodges*, 234 Ill. 2d at 11. "[U]nder the Act, a petition which is sufficient to avoid summary dismissal is simply one which is *not* frivolous or patently without merit." *Id.* That is, 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." *Id.* at 11-12.

¶ 14 At the first stage, "[t]he allegations in the petition must be taken as true and liberally construed. [Citation.] Nevertheless, 'nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.'" *People v. Reed*, 2014 IL App (1st) 122610, ¶ 39 (quoting *People v. Rissley*, 206 Ill. 2d 403, 412 (2003)). "We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing." *Id.* ¶ 37 (citing *Hodges*, 234 Ill. 2d at 9).

¶ 15 In this case, the appeal turns on whether defendant's petition stated a non-frivolous claim that his trial counsel provided ineffective assistance, when counsel agreed to the stipulation that defendant had two qualifying felony offenses for purposes of the AHC charge.

¶ 16 "To prevail on a claim of ineffective assistance *** a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense. [Citation.] At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d at 17.

¶ 17 Prejudice, in this context, "means that there must be a 'reasonable probability' that, but for defense counsel's deficient performance, the result of the proceeding would have been different." *People v. Campos*, 2019 IL App (1st) 152613, ¶ 46 (quoting *People v. Griffin*, 178 Ill. 2d 65, 74 (1997)). " 'If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient.' " *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 46 (quoting *People v. Buss*, 187 Ill. 2d 144, 213 (1999)).

¶ 18 Here, defendant's claim of ineffective assistance is based on his assertion that trial counsel should not have agreed to the trial stipulation, because counsel conceded a felony (the prior UUWF conviction) that was void and "did not exist." He maintains the "blind stipulation" entered into by trial counsel was ineffective and caused him the ultimate prejudice, *i.e.* an unjustified conviction.

¶ 19 After reviewing the record, we find that the court did not err in summarily dismissing defendant's postconviction petition because he failed to present an arguable claim that he was prejudiced by counsel's stipulation to the prior UUWF conviction. Stated differently, defendant cannot show a reasonable probability that but for counsel's decision to stipulate to the prior UUWF conviction the result of the trial would have been different where *Aguilar* and *Burns* had no impact on his UUWF conviction. Rather, as noted by the circuit court in dismissing defendant's petition, *Aguilar* and *Burns* decided the constitutionality of a *separate* statute (describing a separate offense) from defendant's prior UUWF conviction.

¶ 20 Defendant's petition and appellate brief acknowledges that his prior UUWF conviction was premised upon violation of section 24-1.1(a) of the Criminal Code. That section provides:

> "it is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under

> Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2008).

That provision explicitly bars firearm possession by convicted felons but does not impose a categorial ban on firearm possession by all persons.

¶ 21 Defendant's brief suggests that our supreme court's decisions in *Aguilar* and *Burns* rendered section 24-1.1(a) of the Criminal Code unconstitutional, such that his prior UUWF conviction was *void ab initio* and, in turn, could not serve as a predicate felony for his AHC conviction. However, *Aguilar* and *Burns* concerned a separate provision of the Criminal Code regarding a separate offense—aggravated unlawful use of a weapon (AUUW). Specifically, those decisions discussed the constitutionality of section 24-1.6(a)(1), (a)(3)(a), which provided that: "[a] person commits the offense of [AUUW] when he or she knowingly" "[c]arries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm" and "the firearm possessed was uncased, loaded and immediately accessible at the time of the offense." 720 ILCS 5/24-1.6(a)(1), (a)(3)(a) (West 2008). In *Aguilar*, 2013 IL 112116, ¶ 21, our supreme court concluded that this provision violated the second amendment, as it "categorially prohibits the possession and use of an operable firearm for self-defense outside the home" amounting to "a wholesale statutory ban" on the exercise of a right guaranteed by the United States Constitution. Accordingly, our supreme court in *Aguilar* found that "on its face, the Class 4 form of section 24-1.6(a)(1), (a)(3)(a), (d)" was unconstitutional. *Id.* ¶ 22.

¶ 22 In *Burns*, our supreme court noted that *Aguilar* improperly included language indicating that its holding was limited to the "Class 4" form of the AUUW offense. *Burns*, 2015 IL 117387, ¶ 22 ("No such offense exists. There is no 'Class 4 form' or 'Class 2 form' of aggravated unlawful use of a weapon."). *Burns* recognized that *Aguilar* "improperly placed limiting language on our holding that section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute is facially unconstitutional" but otherwise reiterated its holding that a categorial ban on gun possession is unconstitutional:

> "We now clarify that section 24-1.6(a)(1), (a)(3)(A) of the statute is facially unconstitutional, without limitation. * * * On its face, this statutory provision constitutes a flat ban on carrying ready-to-use guns outside the home. * * * It is precisely because the prohibition is not limited to a particular subset of persons, such as felons, that the statute, *as written*, is unconstitutional on its face. [Citation.]" (Emphasis in original.) *Burns*, 2015 IL 117387, ¶ 25.

¶ 23 Thus, *Aguilar* and *Burns* invalidated a statutory provision concerning the offense of AUUW that is entirely separate from the statutory provision that is the basis of defendant's prior UUWF conviction. The reason for the distinction is apparent: the UUWF provision is limited to felons; it is not an unqualified ban on gun possession. Indeed, *Burns* expressly noted that its holding *did not* preclude a ban on gun possession by felons, referencing the UUWF statute at issue in this case. *Burns*, 2015 IL 117387, ¶ 29 ("It would appear *** that the legislature *could* constitutionally prohibit felons from carrying readily accessible guns outside the home. [Citations.] In fact, Illinois already has legislation which prohibits felons from possessing guns at all. See 720 ILCS 5/24-1.1 (West 2008) (Unlawful Use of a Weapon by a Felon))." Thus, our supreme court

explicitly indicated that its holdings did not undermine the constitutionality of the very same provision that served as the basis for defendant's prior UUWF conviction.

¶ 24 *Aguilar* and *Burns* clearly *do not* undermine the validity of the statute underlying defendant's prior UUWF conviction. Rather, it is apparent that, as recognized by the trial court, defendant's petition is simply mistaken in failing to distinguish between the separate AUUW and UUWF statutory provisions at issue. Given this, there is no merit to defendant's claim that his prior UUWF conviction was void. In turn, there is no arguable merit to his suggestion that trial counsel's agreement to stipulate to that prior conviction resulted in arguable prejudice. See *People v. Hodges*, 234 Ill. 2d at 17. Accordingly, defendant's claim of ineffective assistance fails and the court did not err in dismissing defendant's petition as frivolous and patently without merit.

¶ 25 Finally, we note that in his reply brief, defendant points out that the State's response brief did not address the petition's claims that trial counsel was otherwise ineffective for failing to call Brisco as a witness or failing to elicit evidence that defendant's vehicle windows were tinted. However, defendant's opening brief in this appeal failed to include any argument regarding those claims. Thus, those arguments were forfeited and cannot be raised for the first time in his reply brief. See Ill. S. Ct. R. 341(h) (eff. May 25, 2018) ("Points not argued [in appellant's brief] are forfeited and shall not be raised in the reply brief"); Ill. S. Ct. R. 612(b)(9) (eff. July 1, 2017) (incorporating Illinois Supreme Court Rule 341 for purposes of criminal appeals).

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

¶ 27 Affirmed.