2024 IL App (1st) 230179-U

FIFTH DIVISION
April 19, 2024

No. 1-23-0179

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 14110
	)	
KERWINN CROSS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Mitchell and Justice Lyle concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's summary dismissal of defendant's postconviction petition is affirmed, where defendant did not make an arguable claim of ineffective assistance of trial or appellate counsel.

¶ 2 Following a jury trial, defendant Kerwinn Cross was convicted of aggravated kidnapping, aggravated criminal sexual assault with a dangerous weapon, and attempted aggravated criminal

sexual assault with a dangerous weapon. He was sentenced to a total of 70 years in prison. On direct appeal, this court vacated one of Mr. Cross's convictions under the one-act, one-crime rule, concluded that two of his prior convictions for aggravated unlawful use of a weapon (AUUW) were void, and remanded for resentencing. *People v. Cross*, 2019 IL App (1st) 162108, ¶ 3. Mr. Cross was resentenced to a total of 50 years in prison, and we recently affirmed that sentence on further direct appeal. *People v. Cross*, 2023 IL App (1st) 221029-U, ¶ 3.

¶ 3 Mr. Cross now appeals from the summary dismissal of his *pro se* postconviction petition, in which he claimed that (1) his counsel on direct appeal was ineffective for failing to challenge the evidence supporting a finding that he displayed a knife during the commission of the sexual assault, (2) his trial counsel was ineffective for failing to subpoena the complaining witness's mental health records for *in camera* review, and (3) his appellate counsel was ineffective for failing to raise his trial counsel's failure to investigate that issue further. The circuit court determined that certain statements Mr. Cross made at resentencing constituted a judicial confession that barred him from bringing these claims. It further concluded that, even if not barred, Mr. Cross had failed to present the gist of a constitutional violation.

¶ 4 We do not view Mr. Cross's statements as a judicial confession but agree with the circuit court that he did not make an arguable claim that his counsel was ineffective. For the reasons that follow, we affirm the summary dismissal of Mr. Cross's petition.

¶ 5 I. BACKGROUND

¶ 6 The State proceeded to trial against Mr. Cross on seven charges: two counts of aggravated kidnapping based on the display, threat, or use of a dangerous weapon (720 ILCS 5/10-2(a)(5) (West 2012)) and the infliction of great bodily harm (*id.* § 10-2(a)(3)); two counts of aggravated criminal sexual assault (penis to vagina contact) based on the display, threat, or use of a dangerous

weapon and the infliction of bodily harm (*id.* § 11-1.30(a)(1), (2)); and two counts of attempted aggravated criminal sexual assault (penis to anus contact) based, respectively, on those same two aggravating factors (*id.* § 11-1.30(a)(1), (2)). The State also charged Mr. Cross with a single count of aggravated criminal sexual abuse (*id.* § 11-1.60(d)).

¶ 7 A. Trial, Sentencing, and Direct Appeal

¶ 8 We have summarized the evidence presented at Mr. Cross's jury trial before and repeat it again here to provide context for Mr. Cross's postconviction claims.

¶ 9 The State first called the complaining witness, C.C. We summarized her testimony as follows in our initial decision on direct appeal:

> "[C.C.] testified that, after spending the day at an amusement park in Waukegan with her best friend, her friend's father drove the girls back to Chicago, returning them to her friend's house at around 1 a.m. on June 25, 2013. The next day, June 26, was C.C.'s sixteenth birthday. C.C.'s friend went inside the home, but C.C. walked toward a gas station to purchase snacks, carrying a bag of clothes that she had had with her at the amusement park. C.C. testified that, while she was walking to the gas station, she 'got stopped' by a vehicle. A passenger in the vehicle started talking to her, asking her name and introducing himself as 'Cool.' The passenger, whom C.C. identified as defendant, asked her if she wanted to smoke marijuana. After saying 'yes, *** it's my birthday,' she entered the backseat of the vehicle, and she and defendant smoked marijuana together and she told him she 'was 15 going on 16.' The driver, who C.C. described as a black man with a thick beard and a bald head, drove them to a house, where defendant exited the vehicle, returning 5 or 10 minutes later. They drove to a restaurant, and defendant asked her what she wanted to eat. The driver and defendant exited the vehicle, returning with three

sandwiches. After eating, they drove to another location, where the driver exited the vehicle and C.C. moved to the front passenger seat and defendant moved [from the front passenger seat] to the driver's seat.

C.C. testified that defendant drove to his house and parked, inviting her to come inside his house because he was 'going to be a minute.' *** C.C. left her bag [of clothes] in the vehicle because 'the whole plan with him' was 'we smoke, and he drop me back off.' However, 'something just told' her to ascertain where she was, so she counted six houses from the corner and they entered the sixth house. As they entered the back door of his house, C.C. heard dogs in the house. After heading up the stairs, defendant told her to go to the room on the left, which was his bedroom. They sat on the bed, talking for a while, when defendant suddenly asked if she had 'ever been f*** in the a***.' She felt uncomfortable and did not 'want to do anything with him [like] that,' so she told him no and that she had her period. Then they talked some more, and when she was talking, he said 'shut up, b***' and started choking her with his hands around her neck, and she had trouble breathing. Then he started smacking her around and trying to flip her over, but she resisted that. Defendant ripped off her pants and underwear, while she screamed for help.

C.C. testified that he removed her tampon, placed it on a window ledge, and forced his penis into her vagina, while placing his lips all over her face. Defendant then put 'his finger on [her] bootie hole,' and tried to put his penis in her anus but she fought that off. C.C. testified: 'I just went crazy, and I was fighting back, flipped him over the bed, and I bit his fingers.' While he was trying to anally rape her, defendant said 'say yes to daddy.' After she bit his fingers, he took out a knife that was 6 to 10 inches long and placed it against her back. When the knife was against her back, she vomited. C.C. was screaming,

> and he told her 'shut up, the police [are] coming' and then 'we fitting to go.' On their way out of the house, C.C. grabbed a red jacket out of his room that was not hers because she was wearing only a shirt and was naked from the waist down. So she wrapped the jacket around her waist.
>
> C.C. testified that defendant still had the knife out, and he took her and 'put' her in his vehicle. After driving around a few blocks, defendant stopped his vehicle in front of a church and said 'get out, b***,' while pushing her out of the vehicle. C.C. fell out of the vehicle, landing on the ground and injuring her knee and her foot." *Cross*, 2019 IL App (1st) 162108, ¶¶ 8-11.

¶ 10 C.C. went on to describe how she put on some clothes from her bag and borrowed a bystander's phone to call 911. *Id.* ¶¶ 11-12. On cross-examination, C.C. testified that, "after defendant raped [her] and she bit his fingers, he exited the bed, but he did not leave the room, which was small." *Id.* ¶ 13. He had the knife when they left the house and entered the vehicle. *Id.* C.C. also testified on cross-examination that "when defendant 'was pushing [her] out of his house with the knife,' she thought he was going to let her go." *Id.* ¶ 14. She begged him to let her go, and " '[h]e said if I let you go, will you not trick on me.' " *Id.* She agreed, "but he still 'put' her in his vehicle." *Id.*

¶ 11 The State also presented evidence of two prior crimes, not charged in this case, through the testimony of N.L. and L.F., who each testified that in 2013 the defendant had introduced himself to them as Star, lured them into his car and raped them. Mr. Cross testified that he had consensual sex with C.C., N.L., and L.F. *Id.* ¶ 10.

¶ 12 The jury found Mr. Cross guilty as charged on all seven counts. The trial court merged each of the paired charges into a single count and sentenced Mr. Cross to an aggregate term of 70

years in prison—consecutive sentences of 45 years for aggravated criminal sexual assault with a dangerous weapon (including a mandatory 10-year weapon enhancement), 15 years for aggravated kidnapping, and 10 years for attempted aggravated criminal sexual assault with a dangerous weapon. The court also imposed a concurrent sentence of 7 years for the charge of aggravated criminal sexual abuse.

¶ 13 On direct appeal, this court vacated Mr. Cross's conviction for aggravated criminal sexual abuse under the one-act, one-crime rule. *Cross*, 2019 IL App (1st) 162108, ¶ 3. We also vacated two of his prior convictions for unlawful use of a weapon by a felon and aggravated unlawful use of a weapon, pursuant to *In re N.G.*, 2018 IL 121939. *Cross*, 2019 IL App (1st) 162108, ¶ 3. We affirmed the jury's findings of guilt on Mr. Cross's other charges and remanded for resentencing.

¶ 14 B. Resentencing and Further Direct Appeal

¶ 15 Mr. Cross was resentenced on May 3, 2022. The presentence investigation report prepared in advance of his initial sentencing was resubmitted to the court.

¶ 16 In aggravation, the State called Detective Johnnie Minter-Edwards, who testified regarding her investigation of two additional alleged criminal sexual assaults, in February and April 2009, in which the victims had both identified Mr. Cross as their assailant. The State also republished C.C.'s original victim impact statement.

¶ 17 Defense counsel presented letters in mitigation from Mr. Cross's mother, Lashawn Cross, and from Nicole Ramel, a licensed clinical professional counselor who treated Mr. Cross in prison between 2016 and 2020. Ms. Cross believed that her son was "very remorse [*sic*] about the situation that he [was] in," and he had told her he wanted to start a program to help people who had made mistakes in their lives change their ways. Ms. Ramel stated in her letter that Mr. Cross had learned while incarcerated that "his behavior was negative in nature," that he had "developed

insight into his behavior and communication," and that, "if given the time and opportunity," she believed Mr. Cross "ha[d] the ability to show remorse for his actions."

¶ 18 Mr. Cross then submitted his own letter. The first part of it he addressed to C.C., saying:

> "I'm deeply sorry for the pain and embarrassment I've caused you. It would be disrespectful for me to attempt to explain myself or make it seem like I'm trying to justify hurting you because of some trauma in my past. However, I believe more than anyone you deserve insight into me. You should know that the person I presented to you was never my true self. All that apparent arrogance and grandiosity was a defense mechanism for how weak, insignificant, and insecure I felt on the inside. I wasn't a woman hater. I projected my hate onto the entire world because I couldn't accept the fact that I hated myself. I hated Kerwinn so I created Star. I've been ashamed of myself since at least the first grade. And now I'm ashamed of the fact I made another human feel as I was made to feel. And I accept punishment for my behavior. I hope it brings you some level of comfort to know that the man you met doesn't exist anymore. I was forced to take a hard look at myself, and I was disgusted by what I saw. I continue to work on myself and make amends the best way I can by putting positivity into the universe. I hope you find peace, and thank you for standing up as a woman and forcing me to change."

¶ 19 In the second half of the letter, Mr. Cross addressed the trial court, saying:

> "I don't mean to come off as someone who's taking this situation lightly. It's just that a tremendous burden has been lifted from me. The shame and guilt I've been carrying since a child was a physical thing and I didn't realize its weight until it was gone. I only wish I would've sought counseling earlier in life. I once read that if you want to change a man, you should show him what he's like. Society held a mirror in front of me and what I

> saw isn't what I wanted to be. So I became something different and I strive to be better with each day. In helping me to see the error of my ways I truly believe you have done a service to humanity because I'm not keeping this work contained within myself. Every time I encounter young men on that road to self-destruction, that I know so well, I talk to them as someone who can relate to their culture, environment and personal struggles. I express to them as best I can that a lot of things we were taught as young men are wrong, especially in regards to our perceptions and dealings with women. If I can reach just one, my life has been worthwhile. I thank the Court for its indulgence."

¶ 20 Mr. Cross also gave a brief statement in allocution. He told the court, "I was raised by a loving mother who did her best for me" and "No one is to blame for the person I was but myself. I take full responsibility." Mr. Cross thanked the court and said nothing further.

¶ 21 The court reduced Mr. Cross's aggregate sentence from 70 years to 50 years in prison—consecutive sentences of 35 years for aggravated criminal sexual assault with a dangerous weapon (including a mandatory 10-year weapon enhancement (720 ILCS 5/11-1.30(d)(1) (West 2016))) and 15 years for aggravated kidnapping, plus a concurrent sentence of 10 years for attempted aggravated criminal sexual assault. We affirmed that sentence on further direct appeal. *Cross*, 2023 IL App (1st) 221029-U, ¶ 3.

¶ 22 C. Postconviction Proceedings

¶ 23 Mr. Cross's initial petition for postconviction relief, filed in June 2020, was not ruled on within 90 days, and was thus docketed for second-stage proceedings. 725 ILCS 5/122-2.1(a)-(b) (West 2020). On March 4, 2022, just before he was resentenced, the court allowed Mr. Cross to withdraw that petition, with leave to refile.

¶ 24 Mr. Cross refiled his *pro se* postconviction petition that is the subject of this appeal on June

29, 2022. In it he raised several claims of ineffective assistance of trial and appellate counsel. Relevant here, he argued that (1) his counsel on direct appeal was ineffective for failing to argue that there was insufficient evidence to find that he used the knife during the commission of the sexual assault, (2) his trial counsel was ineffective for not investigating C.C.'s mental health history for possible impeachment, and (3) his appellate counsel was ineffective for not raising his trial counsel's failure to investigate the issue further on direct appeal.

¶ 25 The circuit court entered a lengthy written order summarily dismissing Mr. Cross's petition on September 2, 2022. The court *sua sponte* determined that the written and oral statements in allocution that Mr. Cross made at resentencing constituted a binding judicial confession. In the court's view, Mr. Cross had made "an explicit apology to C.C. for having sexually assaulted and kidnapped her" that went beyond a general expression of regret for a life of crime. The court noted that Mr. Cross had made "an admission of guilt and remorse" at resentencing "when it benefited him" and immediately after obtaining a reduced sentence had "recanted" by asserting in several of his postconviction claims that C.C. had lied at trial. The court concluded that Mr. Cross was barred by his judicial confession from asserting any postconviction claims. The court went on to state that, even if this were not the case, each of Mr. Cross's postconviction claims was frivolous and lacked merit.

¶ 26 II. JURISDICTION

¶ 27 The circuit court summarily dismissed Mr. Cross's *pro se* postconviction petition on September 2, 2022, and denied his timely motion for reconsideration on December 30, 2022. Mr. Cross filed his notice of appeal from that order on January 20, 2023. We have jurisdiction over this appeal pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 606 (eff. March 12, 2021) and 651(a) (eff. July 1, 2017),

governing appeals from final judgments in postconviction proceedings.

¶ 28 III. ANALYSIS

¶ 29 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2020)) allows a criminal defendant to challenge his or her conviction by establishing that "in the proceedings which resulted in [the] conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." *Id.* § 122-1(a)(1). Where, as here, a defendant withdraws a postconviction petition and refiles it within one year, it is treated as an initial petition rather than a successive one and begins anew at the first stage of proceedings. See *People v. Simms*, 2018 IL 122378, ¶¶ 46-47 (holding that a petition must be refiled within one year or the litigation is effectively terminated); *People v. Hunt*, 2022 IL App (4th) 210001, ¶ 27 (finding no error in the circuit court's application of a first-stage analysis because a petitioner who refiles within one year is "not entitled to a 'reinstatement' of his original petition and a continuation of those original proceedings," but only "to refile a postconviction petition and have it treated as an original petition under the Act").

¶ 30 At the first stage, the allegations in a petition are taken as true and liberally construed. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A postconviction petition is subject to dismissal at this stage, on the grounds that it is frivolous or patently without merit, "only if the allegations in the petition, taken as true and liberally construed, fail to present the gist of a constitutional claim" (internal quotation marks omitted) (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), *i.e.*, where the petition has "no arguable basis either in law or in fact" because it is "based on an indisputably meritless legal theory or a fanciful factual allegation" (*People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009)). This low threshold is imposed because "most petitions are drafted at this stage by defendants with little legal knowledge or training." *Id.* at 9, 21. *Pro se* petitions must therefore be

reviewed "with a lenient eye, allowing borderline cases to proceed." (Internal quotation marks omitted.) *Id.* Our review of the summary dismissal of a petition is *de novo*. *Brown*, 236 Ill. 2d at 184.

¶ 31 On appeal, Mr. Cross urges us to reverse the summary dismissal of his petition and remand for second-stage proceedings because he raised at least one arguable claim of a violation of his sixth-amendment right to counsel. Before addressing his claims, we will consider the circuit court's determination that he has waived his right to bring a postconviction petition.

¶ 32 A. Whether Mr. Cross Made a Judicial Confession at Resentencing

¶ 33 The circuit court made a *sua sponte* determination that Mr. Cross was barred from pursuing any postconviction claims because his statements at resentencing constituted a judicial confession that he was guilty of the charged offenses. "A judicial confession is a voluntary acknowledgment of guilt during a judicial proceeding, such as a plea of guilty, testimony at trial, or testimony at some other hearing." *People v. Hunter*, 331 Ill. App. 3d 1017, 1025 (2002). Just like extrajudicial confessions, a judicial confession must be a voluntary acknowledgment either of guilt or "of facts which directly and necessarily imply guilt." *People v. Green*, 17 Ill. 2d 35, 41 (1959).

¶ 34 In its dismissal order, the circuit court relied on our supreme court's decision in *Green*. The defendant in *Green* was found guilty of armed robbery and sentenced to 15 to 30 years in prison. *Id.* at 36. He addressed the court following the pronouncement of his sentence and said, " 'Well, I will tell the truth, your Honor. You see, I committed the crime.' " *Id.* at 39. He went on to make "a lengthy statement to the court in which he recited that he had 'stuck the place up' " and related what he had done with the money he stole. *Id.* Our supreme court concluded that the defendant had "unqualifiedly acknowledged his guilt" and "confessed in open court that he committed the crime charged." *Id.* at 41-42. On that basis, the supreme court refused to consider his claimed

errors that he alleged rendered the evidence in support of the verdict insufficient. *Id* at 42.

¶ 35 The circuit court here believed that Mr. Cross's written and oral statements at resentencing—in which he apologized to C.C. for the "pain and embarrassment" he had caused her, said that he was "ashamed of the fact [that he] made another human feel as [he] was made to feel," and concluded that "it would be disrespectful for [him] to attempt to explain [himself], or, make it seem like [he was] trying to justify hurting [her]"—constituted an unequivocal confession to all of the charges against him like the one in *Green*.

¶ 36 The circuit court distinguished other cases, in which courts had concluded that a defendant's statements were too vague to be considered a judicial confession. In *People v. Watson*, 2012 IL App (2d) 091328, ¶ 35, for example, the defendant made a statement in allocution at sentencing in which "he apologized to those he had harmed, indicated that he understood why the State was asking for the maximum sentence, stated that he could not justify his actions, and commented that any punishment he received would be less than what he deserved." This court found these statements "simply too vague to be considered a confession." *Id.* We explained that while the statements *might* suggest guilt, they could "also be read as referring to [the defendant's] remorse for a life of crime generally, and not specifically [for] this offense, in an attempt to obtain the most lenient sentence possible." *Id.*

¶ 37 The defendant in *Hunter*, 331 Ill. App. 3d at 1019, 1022-23, was convicted of forgery for passing a forged check to a teller through the drive-up window of a bank. At sentencing, he "stated that his 'purpose' in going to the currency exchange was to obtain money in order to be able to get more drugs." *Id.* at 1025. We concluded that this too "was not a judicial confession of [the] defendant's guilt." *Id.* The statement was consistent with his position that he was along for the ride with the two other occupants of the vehicle and was not the one who passed the bogus check. *Id.*

at 1025-26.

¶ 38 The circuit court in this case also distinguished *People v. Redd*, 173 Ill. 2d 1, 29-30 (1996). There, the defendant made statements demonstrating that he had unique knowledge of the crimes charged that only the perpetrator of those offenses would possess. Our supreme court concluded that at most this "allowed the reasonable inference that [he] possessed guilty knowledge of the offenses." *Id.* at 30. Those statements could not be construed, however, as a direct acknowledgment that the defendant committed the charged offenses. *Id.*

¶ 39 We disagree with the circuit court's assessment of where Mr. Cross's statements at resentencing fall within these authorities. In our view, his statements are far more akin to the vague statements of responsibility in *Watson* and *Hunter* and the circumstantial evidence of guilt in *Redd* than to a direct admission of guilt of the sort made in *Green*. What these cases collectively demonstrate is that a defendant's statements must be more than *consistent* with guilt or *suggestive* of guilt to be considered a judicial confession; they must constitute an unequivocal acknowledgement of guilt, or they will not foreclose review of the evidence supporting a conviction.

¶ 40 Given this stringent requirement, we cannot agree that Mr. Cross's apology to C.C. for causing her "pain and embarrassment" and his expression of shame for making "another human feel as [he] was made to feel" constituted a specific and direct acknowledgment that he was guilty of aggravated kidnapping, aggravated criminal sexual assault, and attempted aggravated criminal sexual assault. Mr. Cross's statements, though consistent with guilt, were not an unequivocal confession that he committed the crimes he was charged with.

¶ 41 The State notes that the defendant in *Watson* was apologizing in general for his "life of crime," such that his apology could not be construed as a confession of guilt for the specific offense

he was charged with in that case. In contrast, the State points out that Mr. Cross apologized to C.C. directly, and since his only encounter with her involved the events at issue in this case, it insists that this apology must be viewed as the equivalent of a confession to the offenses charged. But Mr. Cross's theory of the case at trial was that C.C. was a prostitute whom he paid to have consensual sex with him and that she told him she was 19 years old. He could certainly feel remorse for engaging in such conduct with a girl he later learned was 15 years old and believe that the experience caused her pain and hurt her, even if he still maintained that their encounter was consensual.

¶ 42 Finding Mr. Cross did not make a judicial confession, we have no reason to consider whether such a confession would bar him from bringing any postconviction claim, as the circuit court believed, or only those claims that are rooted in challenges to the sufficiency of the evidence, as both the parties in this case appear to believe. Here, there is no confession that would bar any claim, so we will turn to the merits of the ineffective assistance of counsel claims that Mr. Cross has presented.

¶ 43 B. Mr. Cross's Claims of Ineffective Assistance of Counsel

¶ 44 Mr. Cross argues that his petition should have advanced to the second stage because he made the gist of a claim that he received ineffective assistance of trial and appellate counsel.

¶ 45 Claims of ineffective assistance of counsel are governed by the two-prong test set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Johnson*, 206 Ill. 2d 348, 377-78 (2002). To succeed on a claim of ineffective assistance of trial counsel at the first stage of postconviction proceedings, a petitioner must establish that it is arguable that his counsel's performance fell below an objective standard of reasonableness—*i.e.*, "that counsel's errors were so serious, and his performance so deficient, that he did not function

as the 'counsel' guaranteed by the sixth amendment"—and that there is a reasonable probability that, but for those errors, the result of the proceeding would have been different. *Id.* at 362. Although there is a strong presumption that counsel's conduct was the result of sound trial strategy (*People v. Pingelton*, 2021 IL App (4th) 180751, ¶ 42), our supreme court has noted that arguments regarding trial strategy are more appropriately considered at the second stage of postconviction proceedings, where both parties are represented by counsel. *People v. Tate*, 2012 IL 112214, ¶ 22.

¶ 46 As applied to a claim that appellate counsel was ineffective for failing to raise trial counsel's deficient performance on direct appeal, a petitioner must show that it is at least arguable that the failure to raise the issue was objectively unreasonable and that, but for that failure, it was reasonably probable that his sentence or conviction would have been reversed. *Johnson*, 206 Ill. 2d at 362-63. Our supreme court has made clear that "appellate counsel's choices concerning which issues to pursue are entitled to substantial deference." *Id.* at 406. "[C]ounsel on appeal has no obligation to raise every conceivable argument which might be made, and counsel's assessment of what to raise and argue will not be questioned unless it can be said that his judgment in this regard was patently erroneous." *People v. Collins*, 153 Ill. 2d 130, 140 (1992).

¶ 47 1. Sufficiency of the Evidence That a Knife Was Used During the Sexual Assault

¶ 48 Mr. Cross first claims that his counsel on direct appeal was ineffective for failing to challenge the sufficiency of the evidence on the aggravating circumstance of him having displayed a knife during the sexual assault.

¶ 49 Section 11-1.30(a)(1) of the Criminal Code of 2012 (Code) provides that "[a] person commits aggravated criminal sexual assault if that person commits criminal sexual assault and any of [ten enumerated] aggravating circumstances exist *during the* commission *of the offense*." 720 ILCS 5/11-1.30(a)(1) (West 2016). The first of these is that "the person displays, threatens to use,

or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon." *Id.* If a defendant is convicted of aggravated criminal sexual assault based on this aggravating circumstance, a mandatory 10-year sentencing enhancement applies. See *id.* § 11-1.30(d)(1) (providing that "[a] violation of subsection (a)(1) is a Class X felony for which 10 years *shall be added* to the term of imprisonment imposed by the court" (emphasis added)).

¶ 50 Mr. Cross points to the fact that C.C. testified that he "displayed the knife only after he withdrew his penis from C.C.'s vagina, after he attempted to penetrate C.C.'s anus with his penis, and after she bit his fingers and he got off the bed." The State does not dispute any of this but insists that "[i]n this context, [Mr. Cross's] use of the knife was part of the continuous use of force he sought to exert over C.C. to accomplish a sexual assault."

¶ 51 The State urges us to construe the words "during the commission of the offense" to include the display of a weapon after the offense of criminal sexual assault is complete, so long as that display is "part of a continuing use of force and sufficiently close in time to the sexual assault." As support for this argument, the State relies on *People v. Colley*, 188 Ill. App. 3d 817 (1989), and cases following it. The evidence in *Colley* showed that after forcing the victim to have intercourse and submit to and perform oral sex, the defendant in that case began rummaging through the victim's dresser. *Colley*, 188 Ill. App. 3d at 818. He then hit her in the eye and told her he would kill her if she did not give him some money. *Id.* The defendant went with the victim downstairs to her kitchen, where he took a pocketknife out of her purse, cut her with it, and told her he would continue to hurt her if she did not give him some money. *Id.* at 819. In deciding whether the aggravating circumstance of bodily harm was present "during the commission" of the sexual assault, this court declined to "draw a bright line between the ending of the sexual acts and the

bodily harm occurring afterward." *Id.* at 820. To do so, we reasoned, "would defeat the statutory purpose of protecting victims from sex offenders." *Id.* Because "the stab wounds occurred sufficiently close in time to the sexual acts," we concluded "that they [could] be said to have been committed during the course of the sexual assault." *Id.*

¶ 52 Mr. Cross urges us not to follow *Colley*, arguing that its holding is at odds with the plain language of section 11-1.30. He points out that in 1998, well after *Colley* was decided, the aggravated criminal sexual assault statute was amended to state that the aggravating circumstance may occur not just "during the commission of the offense," but, "for purposes of paragraph (7)"—the delivery of a controlled substance to the victim—may also occur "as part of *the same course of conduct* as the commission of the offense." (Emphasis added.) Pub. Act 90-735 (eff. Aug. 11, 1998) (amending 720 ILCS 5/12-14); see Pub. Act 1551 (eff. July 1, 2011) (renumbering 720 ILCS 5/12-14 to 720 ILCS 5/11-1.30). Mr. Cross argues that "during the commission of the offense" cannot be read broadly to mean within the same course of conduct as the commission of the offense because that would render the amendment superfluous.

¶ 53 We must consider whether it was objectively unreasonable for appellate counsel not to have made the argument that Mr. Cross suggests. It was not. As the State points out, courts have continued to follow the holding in *Colley* even after the aggravated criminal sexual assault statute was amended. See, *e.g.*, *People v. Lamon*, 346 Ill. App. 3d 1082, 1091 (2004). They have done so not only in published opinions but in a number of unpublished orders entered pursuant to Illinois Supreme Court Rule 23(b) as well. See, *e.g.*, *People v. Calderon*, 2022 IL App (2d) 200029-U, ¶¶ 40, 44; *People v. Rokita*, 2020 IL App (5th) 170339-U, ¶¶ 61-62; *People v. Floyd*, 2013 IL App (1st) 111319-U, ¶¶ 16-17; *People v. Hunt*, 2012 IL App (1st) 100590-U, ¶¶ 28-29). These unpublished orders would only further suggest to objectively reasonable appellate counsel that the

issue was a settled one on which he could not prevail. See Ill. S. Ct. R. 23(a)-(b) (providing that a case may be disposed of by nonprecedential order rather than by opinion where the decision establishes no new rule of law and does not resolve, create, or avoid an apparent conflict of authority). At oral argument in this appeal, defense counsel was unable to point to any countervailing case questioning or refusing to follow *Colley*, either before or after the statutory amendment. Our own research has likewise revealed none.

¶ 54 Although we agree with Mr. Cross that the statutory language and the amendment in 1998 would support an argument that questions the continued viability of *Colley* and its progeny, the weight of the relevant authorities at the time of Mr. Cross's direct appeal simply did not support that argument. We cannot conclude that Mr. Cross's appellate counsel was objectively unreasonable for not challenging the sufficiency of the State's evidence regarding the use of the knife during the commission of the sexual assault in this case.

¶ 55 2. The Complaining Witness's Mental Health Records

¶ 56 Mr. Cross also alleged in his petition that his trial counsel was ineffective for failing to investigate C.C.'s mental health history for information that could possibly have been used to impeach her credibility. As this court has noted, "the mental health history of a witness is relevant as it relates to his or her credibility, and is thus a permissible area of impeachment." *People v. Helton*, 153 Ill. App. 3d 726, 733 (1987). "Such evidence may be introduced for the purpose of attacking the perception and memory of a witness as to events about which he or she testified." *Id.* The burden is on the party seeking to introduce this line of questioning, however, to establish that it is relevant. *Id.*

¶ 57 Here, the hospital where C.C. was treated for sexual assault apparently learned, either from C.C. or from her mother, that C.C. was reported to be bipolar, that she had been admitted to a

psychiatric hospital for behavioral issues, and that she had not been prescribed any psychiatric medication for over a year. The State argued in a motion *in limine* that C.C.'s mental health history was not relevant and sought to prevent defense counsel from raising the issue at trial. Defense counsel noted that "[w]ith regard to the credibility of the witness, there [might] be issues," but made no further argument. The court disagreed and granted the State's motion. Mr. Cross argues his attorney should have done more; that at the very least he should have subpoenaed records relating to C.C.'s mental health for an *in camera* review.

¶ 58 The State argues that Mr. Cross forfeited any claim that his trial counsel was ineffective for not subpoenaing these records by not raising it on direct appeal. Because a postconviction petition is a collateral attack on a judgment of conviction, "any issues which were decided on direct appeal are barred by *res judicata*," and "any issues which could have been raised on direct appeal are forfeited." *People v. Rogers*, 197 Ill. 2d 216, 221 (2001). The State is correct that, as presented, Mr. Cross's claim is based on nothing but the above exchange at the pretrial hearing in this matter. Because it is based on nothing outside of the record on appeal, this same claim could have been brought on direct appeal. We agree with the State that it is forfeited.

¶ 59 We may consider the claim, however, as one of ineffective assistance of appellate counsel. But Mr. Cross has not stated the gist of such a claim. Although counsel on direct appeal *could* have raised a claim of ineffective assistance of trial counsel based on the exchange quoted above in the trial record, that claim would have been doomed to fail. All that appellate counsel could have argued on appeal was that C.C.'s records *might* have contained impeaching evidence that *might* have altered the jury's view of C.C.'s credibility.

¶ 60 Our supreme court has made clear that satisfying *Strickland*'s prejudice prong "necessitates a showing of actual prejudice, not simply speculation that defendant *may* have been prejudiced."

(Emphasis added.) *People v. Johnson*, 2021 IL 126291, ¶ 55. It is not enough, in other words, for a defendant to show that his attorney's purported errors had "some conceivable effect" on the outcome of the proceedings. *Id.* That is all that appellate counsel could have offered here.

¶ 61 This court would almost certainly have rejected such a claim of ineffective assistance of trial counsel on direct appeal. Appellate counsel has no obligation to raise an argument on appeal that lacks merit. *Pingleton*, 2022 IL 127680, ¶ 64. Mr. Cross has failed to make an arguable claim of ineffective assistance of appellate counsel based on not raising this claim.

¶ 62 IV. CONCLUSION

¶ 63 For all of the above reasons, we affirm the circuit court's summary dismissal of Mr. Cross's postconviction petition.

¶ 64 Affirmed.