

THIRD DIVISION  
June 15, 2011

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No. 1-09-1514

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 14560
	)	
GEORGE BUTLER,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE QUINN delivered the judgment of the court.  
Justices Murphy and Steele concurred in the judgment.

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**O R D E R**

*HELD:* Summary dismissal of post-conviction petition affirmed where defendant's claim of ineffective assistance of appellate counsel had no arguable basis in law or in fact.

Defendant George Butler appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 et seq. (West 2008). He

contends that the circuit court erred in dismissing his petition at the first stage of proceedings because he set forth a cognizable claim of ineffective assistance of appellate counsel.

The record shows, in relevant part, that a jury found defendant and his son, Jerome Butler, guilty of two counts of theft by deception of over \$100,000. This reflected the value of the land and building at 1516-18 East Marquette Road, in Chicago, which was owned by the victim, Willie Pearl Parker, who was over 60 years of age. 720 ILCS 5/16-1(a)(2) (West 2000). At sentencing, the court merged defendant's convictions and sentenced him to an extended term of 15 years' imprisonment. 730 ILCS 5/5-8-2 (West 2004). This court affirmed that judgment on direct appeal. *People v. Butler*, Nos. 1-05-3432, 1-05-3433 (cons.) (2008) (unpublished order under Supreme Court Rule 23).

On February 20, 2009, defendant filed a *pro se* petition for post-conviction relief alleging, as pertinent to this appeal, that appellate counsel was ineffective for failing to challenge his sentence as excessive on direct appeal. He claimed that the trial court had abused its discretion in imposing a 15-year sentence, citing, *inter alia*, his relatively clean criminal record, stable work history, and community involvement, as well as the fact that he did not subject the victim to, or threaten her with, bodily harm.

On March 13, 2009, the circuit court timely reviewed defendant's petition and found, *inter alia*, that the decision of appellate counsel not to raise the issues asserted by defendant was not "patently erroneous." The court also found that defendant had failed to establish that he was prejudiced by appellate counsel's failure to raise those issues, and summarily dismissed his petition as frivolous and patently without merit. Defendant now challenges the propriety of that dismissal on appeal.

The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings under the Act are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2008).

At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

Defendant maintains that he set forth a claim of ineffective assistance of appellate counsel warranting further proceedings under the Act. His claim is based on counsel's failure to challenge his 15-year sentence as excessive.

We initially observe that an allegation that a sentence within the statutory limits was excessive raises no constitutional issue that can serve as a basis for post-conviction relief (*People v. Boyd*, 347 Ill. App. 3d 321, 331 (2004)), and that on direct appeal, appellate counsel raised a proportionate penalties issue regarding defendant's sentence. To avoid the adverse consequences arising from these facts, defendant couched his sentencing claim in the context of ineffective assistance of appellate counsel. *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992). Notwithstanding defendant's motivation, we will consider defendant's claim of ineffective assistance of appellate counsel. *Flores*, 153 Ill. 2d at 282.

To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been

different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground that defendant did not suffer prejudice, the court need not consider the performance prong. *Flores*, 153 Ill. 2d at 283-84.

Appellate counsel is generally afforded substantial deference in deciding which issues to pursue on appeal. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). In fact, appellate counsel has no obligation to brief every conceivable issue, nor is counsel incompetent for choosing not to raise issues which, in his or her judgment, lack merit, unless that judgment was patently wrong. *People v. Smith*, 195 Ill. 2d 179, 190 (2000).

To demonstrate prejudice resulting from counsel's failure to raise a particular issue, defendant must show that but for that failure, his sentence would have been reversed. *Flores*, 153 Ill. 2d at 283, and cases cited therein. Unless the underlying issue is meritorious, defendant has suffered no prejudice from counsel's omission. *People v. Foster*, 168 Ill. 2d 465, 474 (1995).

Here, defendant was convicted of theft by deception of more than \$100,000, a Class 1 felony. 720 ILCS 5/16-1(b)(6) (West 2000). Because the victim was over 60 years of age, he was eligible for an extended term sentence (730 ILCS 5/5-5-

3.2(b)(4)(ii) (West 2004)), and the statutory sentencing range was between 4 and 30 years' imprisonment (730 ILCS 5/5-8-1(a)(4), 5/5-8-2(a)(3) (West 2004)).

The record shows that the trial court received a copy of defendant's presentence investigation report, and heard arguments in aggravation and mitigation from the State and defense counsel. The court noted, *inter alia*, that the evidence showed that "[the defendants] left \*\*\* an 80-year-old woman at the time, who owned a place outright, with nothing." Although the court stated that it would not impose a 30-year sentence because it was "a lot of time," it also recognized that both defendants were "pretty young men" and would only serve half of the sentence imposed. The court further noted, "[T]he law takes special consideration for older people because older people cannot protect themselves as well as younger people can. Especially older people that rely on you and trust you to do things for them, not like steal their houses from them." In the end, the court sentenced defendant to a 15-year, extended-term.

That sentence clearly fell within the statutory range provided for the offense committed (730 ILCS 5/5-8-2(a)(3) (West 2004)), and was not disproportionate to that offense or at variance with the spirit and purpose of the theft by deception statute in light of defendant's eligibility for an extended-term sentence due to the victim's age (*People v. Cabrera*, 116 Ill. 2d

474, 493-94 (1987)). Defendant, therefore, failed to show that the trial court abused its sentencing discretion by imposing the 15-year term (*Cabrera*, 116 Ill. 2d at 494), which formed the basis of his ineffective assistance of appellate counsel claim. Since his underlying sentencing claim is without merit, defendant cannot show prejudice resulting from counsel's failure to raise the issue on appeal. *Foster*, 168 Ill. 2d at 480.

Defendant, nonetheless, takes issue with the fact that the trial court did not mention any mitigating evidence when imposing sentence. Contrary to defendant's claim, the record shows that the trial court referred to defendants' young ages and alleged "good works" in helping out the victim before they took advantage of her. Moreover, the sentencing court need not detail for the record the process by which it determined the appropriate sentence (*People v. Laliberte*, 246 Ill. App. 3d 159, 178 (1993)), and is presumed to have considered any mitigating evidence presented at sentencing absent an indication to the contrary, other than the sentence itself (*People v. Heider*, 231 Ill. 2d 1, 44 (2008)). The fact that the court did not mention additional mitigating evidence when imposing sentence does not amount to an abuse of discretion (*Laliberte*, 246 Ill. App. 3d at 178), and, therefore, would not provide a basis for the relief sought.

Accordingly, we find that defendant failed to set forth a cognizable claim of ineffective assistance of appellate counsel

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(*Flores*, 153 Ill. 2d at 283), to warrant further proceedings under the Act, and affirm the summary dismissal of his post-conviction petition by the circuit court of Cook County.

Affirmed.