

No. 1-09-1583

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).

FIFTH DIVISION
May 13, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 9672
)	
ANTHONY DANIELS,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Epstein concurred in the judgment.

ORDER

HELD: Defendant, by pleading guilty, waived his claim of constitutional deprivation that occurred prior to the entry of his guilty plea; defendant waived for review his claim that trial counsel's ineffectiveness rendered his plea involuntary where he failed to raise it in his post-conviction petition; summary dismissal affirmed.

Defendant Anthony Daniels appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends that the circuit court erred in dismissing his petition because he set forth an ineffective assistance of trial counsel claim that had an arguable basis in law and in fact, and was not barred by *Tollett v. Henderson*, 411 U.S. 258 (1973).

The record shows that defendant was arrested on April 25, 2007, in the "Parking Lot/Garage(Non.Resid.)" at 1085 North Knoll Lane, Schaumburg, Illinois, and charged with armed robbery. On May 31, 2007, defendant was appointed counsel. Defendant subsequently requested new counsel at numerous court proceedings claiming that counsel refused to file a motion to quash arrest and suppress evidence. The court and counsel repeatedly explained to defendant that there must be a legal basis for the motion, but there was none in this case where there was probable cause for his arrest based on identifications of him in a videotape of the incident and a photo array. The court also explained to defendant that motions cannot be used as fishing expeditions.

On March 4, 2008, after defendant again maintained that counsel should file a motion to quash arrest and suppress evidence, counsel informed the court that she explained to defendant that there was no legal basis. She also told him that he had the right to a Supreme Court Rule 402 (eff. July 1, 1997) conference, but if he did not like the State's offer, she was

ready to proceed to trial. The court then explained to defendant that he could have a Rule 402 conference and plead guilty or have a bench or jury trial.

Defendant initially requested a bench trial, but later decided to have a Rule 402 conference. Following that conference, the court allowed the State to amend the charge from armed robbery to aggravated robbery. Defendant entered a negotiated plea of guilty to the reduced charge of aggravated robbery in exchange for a 12-year prison sentence, and the State presented a stipulated factual basis. The trial court then found defendant guilty of aggravated robbery, and sentenced him as a Class X offender to the agreed term of 12 years' imprisonment, noting that defendant had nine prior felony convictions. The court then admonished defendant regarding how to vacate his guilty plea and perfect an appeal.

Defendant indicated his understanding of these admonishments, but did not file any post-plea motions. Instead, on March 24, 2009, defendant filed the instant *pro se* post-conviction petition alleging, in relevant part, that his trial counsel was ineffective for failing to file a motion to suppress the legality of his arrest. Defendant alleged that on April 22, 2007, he was arrested at his place of residence at 1075 Knoll Lane, Hoffman Estates, Illinois, without a warrant.

On April 30, 2009, the circuit court summarily dismissed

defendant's petition. In doing so, the court noted that when a defendant pleads guilty, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea, citing *Tollett*, 411 U.S. at 267. The court found that none of defendant's claims could properly be raised because the alleged constitutional deprivations occurred prior to the entry of his guilty plea, and consequently, no issues remained for review. The court then concluded that the issues defendant raised were frivolous.

Defendant appeals claiming that he set forth a claim of ineffective assistance of trial counsel that had an arguable basis in law and in fact. He maintains that counsel was ineffective for failing to file a motion to quash his arrest where he was illegally seized without a warrant inside his home.

At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the summary dismissal is *de novo*. *People*

v. Coleman, 183 Ill. 2d 366, 388-89 (1998).

Here, the circuit court, in dismissing defendant's petition, found that his claim that trial counsel was ineffective for failing to file a motion to quash arrest was barred by *Tollett* because it involved a matter that occurred prior to the entry of his guilty plea. *Tollett* held that when a defendant has solemnly admitted in open court that he is guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *Tollett*, 411 U.S. at 267. Defendant may only attack the voluntary and intelligent character of the plea by showing that the advice he received was not within the range of competence demanded of attorneys in criminal cases. *Tollett*, 411 U.S. at 266-67.

Here, defendant pleaded guilty, and subsequently filed a post-conviction petition alleging that his trial counsel was ineffective for failing to file a motion to quash his arrest. Because defendant's claim of ineffective assistance of trial counsel involves an alleged error that occurred prior to the entry of his guilty plea, he voluntarily relinquished the claim when he pleaded guilty, and has thus waived it for review. *People v. Smith*, 383 Ill. App. 3d 1078, 1085-86 (2008); *People v. Ivy*, 313 Ill. App. 3d 1011, 1017 (2000).

Defendant, however, maintains that *Tollett* does not bar his

claim because counsel's failure to file a motion to quash arrest related to the voluntariness of his guilty plea. The State notes that defendant did not indicate in his petition that counsel's actions led him to enter a plea of guilty. Allegations that are not raised in defendant's post-conviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Defendant did not allege in his petition that his plea was involuntary, and thus, forfeited this claim for review. *Jones*, 213 Ill. 2d at 508.

Defendant further maintains that the *Tollett* bar does not apply where his plea relates to counsel's misunderstanding of the applicable law or failure to file and properly litigate a meritorious pre-plea motion, citing *People v. Phipps*, 382 Ill. App. 3d 1047 (2008), *rev'd*, 238 Ill. 2d 54 (2010) (reversed on unrelated grounds); *People v. Miller*, 346 Ill. App. 3d 972 (2004); and *People v. Kempfer*, 194 Ill. App. 3d 521 (1990). These cases do not stand for this proposition, and are also factually inapposite to the case at bar.

In *Phipps*, defendant argued on appeal that his attorney's representation at the guilty plea proceeding was not within the range of competence demanded of attorneys in criminal cases because counsel failed to object to the State's motion to revise his plea agreement, which the trial court granted. *Phipps*, 382 Ill. App. 3d at 1051-52. The reviewing court held that defendant

did not waive this issue for review as it involved counsel's representation *at the plea proceeding*. (Emphasis added.) *Phipps*, 382 Ill. App. 3d at 1052-53. Here, unlike *Phipps*, defendant did not challenge the manner in which counsel represented him at the plea proceeding. Rather, he contested the representation counsel provided him before the plea proceeding. Because the representation defendant complained of was not related to the plea proceeding, *Phipps* is inapplicable.

In *Miller*, the Second District reviewed defendant's claim raised in his post-conviction petition, that his trial counsel's failure to properly litigate his motion to suppress resulted in ineffective assistance of counsel and rendered his plea involuntary. *Miller*, 346 Ill. App. 3d at 975, 981. *Miller* is clearly distinguishable from this case in that defendant did not allege in his petition that counsel's ineffective assistance rendered his plea involuntary.

In *Kempfer*, defendant filed a motion to withdraw his guilty plea alleging that he was afraid that if he did not plead guilty, he and his wife, who was also charged with the same offenses and represented by the same attorney, would both be tried, convicted, and lose their children. *Kempfer*, 194 Ill. App. 3d at 523-24. The motion was denied, and defendant appealed alleging that due to the conflict of interest with his wife his plea was involuntary, and he received ineffective assistance of counsel.

Kempfer, 194 Ill. App. 3d at 525. The reviewing court held that it would address the conflict of interest issue because it went to the voluntariness of the plea. *Kempfer*, 194 Ill. App. 3d at 524-25. After finding that the plea was voluntary, the court held that defendant waived all other questions other than the voluntary and intelligent character of his plea, and that the issues defendant failed to raise in his motion to withdraw were waived. *Kempfer*, 194 Ill. App. 3d at 527.

Here, unlike *Kempfer*, defendant did not raise a conflict of interest argument. Furthermore, defendant did not allege in his post-conviction petition that counsel's actions rendered his plea involuntary, and he cannot raise it for the first time on appeal. *Jones*, 213 Ill. 2d at 508. We thus conclude that the trial court did not err in summarily dismissing defendant's petition where he, by pleading guilty, voluntarily relinquished his constitutional claim that occurred prior to the entry of his guilty plea, namely that trial counsel was ineffective for failing to file a motion to quash arrest. *Smith*, 383 Ill. App. 3d at 1085.

In light of the foregoing, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

Affirmed.