

No. 1-09-1520

**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).

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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 1019
	)	
KEVIN WILLIAMS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Quinn and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Second-stage dismissal of post-conviction petition affirmed where defendant forfeited his allegation of ineffective assistance of appellate counsel raised for the first time on appeal.

¶ 2 Defendant Kevin Williams appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq* (West 2006)) without an evidentiary hearing. He contends that his petition should be remanded for third-stage proceedings because he made a substantial showing that he was denied effective assistance of appellate counsel who failed to challenge, on

direct appeal, inflammatory and prejudicial remarks made by the prosecutor during closing arguments.

¶ 3 This court affirmed defendant's jury convictions for first degree murder and concealment of a homicidal death, and his consecutive 60- and 5-year terms of imprisonment, on direct appeal. *People v. Williams*, No. 1-04-1088, slip op. at 21 (2006) (unpublished order under Supreme Court Rule 23). In that proceeding, defendant challenged the sufficiency of the evidence to establish his guilt of the 2000 murder and dismemberment of the victim Traci Todd, and the propriety of the sentence imposed. We also dismissed, for lack of jurisdiction, defendant's subsequent appeal of the dismissal of his petition for writ of *habeas corpus*. *People v. Williams*, No. 07-0656 (July 28, 2008) (dispositional order).

¶ 4 On October 5, 2006, defendant filed the instant *pro se* post-conviction petition, claiming that he was deprived of the effective assistance of trial counsel who included in his opening statement that the victim was murdered; and, further, that he was actually innocent of any acts causing her death. As pertinent to this appeal, defendant also claimed that he was denied effective assistance of appellate counsel where:

"[a]lthough there were a total of thirty (30) points of merit raised in defendant's post-trial motion for new trial the Office of State Appellate Defender unreasonably [*sic*] ignored the preserved issues on the briefing at the appeal [*sic*] level."

In support of his petition, defendant appended his motion for new trial.

¶ 5 The post-conviction court failed to make an initial ruling on defendant's petition within the statutory timeframe and counsel was appointed to represent defendant. Counsel subsequently filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), in which she advised the court that no amendments were necessary to adequately present

defendant's contentions. Counsel also filed, as exhibits, a copy of the transcript of trial counsel's opening statement and the State's opening closing argument, and a copy of the order entered on direct appeal.

¶ 6 The State filed a motion to dismiss defendant's petition on February 5, 2008. As pertinent to this appeal, the State asserted that appellate counsel could not be deemed incompetent for failing to raise all the claims asserted in the motion for new trial or to pursue motions and arguments deemed without merit.

¶ 7 On March 24, 2009, arguments were presented by respective counsel and the post-conviction court took the matter under advisement. On June 30, 2009, the court entered a written order granting the State's motion to dismiss, finding, *inter alia*, no grounds for defendant's claims of ineffective assistance of appellate counsel. The court specifically noted that defendant "fail[ed] to actually specify which claims but merely states that his motion for a new trial contained 30 issues and he only raised 2 on appeal."

¶ 8 In this appeal from that order, defendant has abandoned his claims of actual innocence and ineffective assistance of trial counsel. *People v. Pendleton*, 223 Ill. 2d 458, 469 (2006). He solely contends that he made a substantial showing that he was denied effective assistance of appellate counsel based on counsel's failure to challenge on direct appeal the prosecutor's allegedly inflammatory and prejudicial remarks made during closing argument, which warrants a third-stage evidentiary hearing.

¶ 9 To be entitled to post-conviction relief, defendant must clearly set forth the respects in which his federal or State constitutional rights were violated in the proceeding that produced the judgment challenged. *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). Where as here, defendant appeals from an order dismissing his post-conviction petition, the question is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief

under the Act. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). A post-conviction petitioner is not entitled to an evidentiary hearing as a matter of right, but only where he makes a substantial showing that his constitutional rights were violated and the record or accompanying affidavits support the allegations in the petition. *People v. Owens*, 129 Ill. 2d 303, 308 (1989).

¶ 10 In determining whether to grant an evidentiary hearing, all well pleaded facts in the petition and affidavits are to be taken as true. *Haynes*, 192 Ill. 2d at 465. Our review of the circuit court's determinations regarding the sufficiency of the allegations in a post-conviction petition is *de novo*. *People v. Harris*, 206 Ill. 2d 1, 13 (2002).

¶ 11 In this case, our review discloses that defendant did not raise, in his petition, any issue regarding the closing arguments that he so vehemently protests on appeal. Defendant claimed generally that appellate counsel failed to raise each of the 30 claims from his motion for new trial on direct appeal, without delineating any of them. Post-conviction counsel did not supplement the petition with any claims related to closing arguments, nor did the State refer to the issue in its motion to dismiss. At the hearing on the State's motion, post-conviction counsel argued, at length, the merits of defendant's petition without raising the issue, and the court did not refer to it in its considerable written order granting the State's motion.

¶ 12 In *People v. Jones*, 213 Ill. 2d 498, 505-06 (2004), our supreme court held that "claims not raised in a petition cannot be argued for the first time on appeal." Here, our review discloses that defendant did not raise in his petition any claim of ineffective assistance of appellate counsel for failing to challenge the prosecutor's closing argument on direct appeal. Because defendant failed to do so, he forfeited the issue for review. *Pendleton*, 223 Ill. 2d at 475.

¶ 13 In reaching that conclusion, we observe that this court is not free, as is the supreme court under its supervisory authority, "to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her

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postconviction petition." *Jones*, 213 Ill. 2d at 508. Rather, the proper forum for his claim is a successive post-conviction action. *Jones*, 213 Ill. 2d at 508-09.

¶ 14 Accordingly, we affirm the order of the circuit court of Cook County dismissing defendant's post-conviction petition at the second stage of proceedings.

¶ 15 Affirmed.