

No. 1-10-0324

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).

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.)	Nos. 09 CR 4134
)	09 CR 6566
)	
REGINALD SLAUGHTER,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice McBride concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the trial court did not modify defendant's plea agreement, it was neither void nor involuntary, and defendant's petition did not allege a claim of ineffective assistance of trial counsel sufficient to withstand summary dismissal.
- ¶ 2 Defendant Reginald Slaughter 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). On appeal, defendant contends that the trial court modified his fully negotiated plea rendering it void and involuntary. Defendant further maintains that his petition presented the gist of an ineffective assistance of counsel claim. We affirm.

¶ 3 On July 22, 2009, defendant pleaded guilty to burglary (09 CR 4134) and theft (09 CR 6566) and was sentenced to respective, consecutive terms of three and five years' imprisonment.

During the plea proceedings, the following colloquy occurred:

"THE COURT: The agreement is for three years in the Illinois Department of Corrections on the burglary charge, 09-4134; five years consecutive on the -

MR. SIMMONDS [Assistant Public Defender]: Judge, I believe it's concurrent.

THE COURT: Total of eight years.

MR. SIMMONDS: No. I thought it was concurrent.

THE COURT: No.

MR. SIMMONDS: Did you think it was concurrent?

MS. DYER [Assistant Attorney General]: That was my understanding.

MR. DENO [Assistant State's Attorney]: That was my understanding also, Judge.

THE COURT: No. Eight years on an extended term. I thought it was five plus three.

MR. SIMMONDS: There was a misunderstanding, Judge. We all thought it was concurrent.

THE COURT: The offer is five plus three; eight years. Five on the one case, three on the other. That's the minimum. You have a Class 2.

MR. DENO: Correct.

THE COURT: And a Class-

MS. DYER: Mine is a Class 2.

THE COURT: They're both 2. So you're looking at twenty-eight years on an extended term; fourteen plus fourteen. My offer at the 402, I said ten, your attorney asked today to go lower than ten, and I said five plus three for eight. They're two totally separate crimes. One is theft and the other is a burglary. They're not running together.

MR. SIMMONDS. I apologize. That's my mistake.

THE COURT: I'm sorry if there was a misunderstanding. If you want to talk with your lawyer, I'll certainly pass the case and give you all the time you want.

MR. SIMMONDS: Can we pass it.

THE COURT: Sure. We'll pass the case. Talk with your lawyer and decide what you want to do."

¶ 4 After the case was passed, the court asked defendant if he agreed to an aggregate sentence of eight years' imprisonment for the two charged offenses, and defendant responded affirmatively. The trial court admonished defendant of the rights he would waive by pleading guilty, including his right to a trial. The court further stated:

"These are both Class 2 felonies normally carrying up to seven years in the Illinois Department of Corrections each. Because of your background you're extendable for fourteen years in the Illinois Department of Corrections on each of these cases, for a total of twenty-eight years. The agreement is for three years in the Illinois Department of Corrections on the burglary, and five years on the theft, to run consecutively."

The court ultimately accepted the plea, found defendant guilty of burglary and theft, and sentenced him to an aggregate term of eight years' imprisonment. Defendant did not attempt to perfect an appeal from the judgment entered on his plea.

¶ 5 On December 15, 2009, defendant filed a *pro se* post-conviction petition alleging that his sentences should run concurrent pursuant to statute and the agreement of all counsel. On December 29, 2009, the circuit court dismissed defendant's petition as frivolous and patently without merit.

¶ 6 We review *de novo* the summary dismissal of defendant's post-conviction petition to determine whether the petition has stated an arguable basis in law and in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition cannot pass the summary stage where it is based on a fanciful factual allegation, which includes ones that are fantastic or delusional, or is based on an indisputably meritless legal theory, which is defined as one which is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. In making our assessment, we must look to the actual allegation in the petition. *People v. Jones*, 213 Ill. 2d 498, 505 (2004).

¶ 7 In his petition, defendant specifically alleged that his sentences should be concurrent under section 5-8-4(b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 2008)), which provides:

"Except in cases where consecutive sentences are mandated, the court shall impose concurrent sentences unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." (Emphasis added by defendant in his petition).

Relying on this statute, defendant then alleged that "the trial court did not state on the record the reason for consecutive sentences" and also alleged that he did "not fit any of the required consecutive sentencing provision as set forth in" section 5-8-4. Defendant also alleged that all counsel agreed that his sentence would be concurrent. As relief, defendant requested that his sentences run concurrent not consecutive.

¶ 8 In addition, defendant stated in his petition that during sentencing he has the right to due process and is entitled to the effective assistance of counsel.

¶ 9 In his petition and on appeal, defendant's underlying complaint is the trial court's imposition of consecutive rather than concurrent sentences. Based on this complaint, defendant alleged in his petition that consecutive sentences were not mandated by statute, that the trial court failed to state the reasons for consecutive sentences, and that the remedy should be the imposition of concurrent sentences.

¶ 10 On appeal, defendant diverges from the allegations in his petition and now claims that his guilty plea should be vacated, arguing for the first time on appeal, that it is void and involuntary based on the actions of the trial court. According to defendant, the trial court improperly modified his fully negotiated plea in violation of Supreme Court Rule 402 (eff. July 1, 1997) and he pled guilty based on a coercive offer from the judge. In addition, defendant submits that his petition should be construed to include an ineffective assistance of counsel claim based on trial counsel's failure to object to the trial court's imposition of consecutive sentences even though this claim is not presented in the petition. Defendant's arguments on appeal are procedurally barred and completely without merit.

¶ 11 The State incorrectly contends that defendant has waived these issues on appeal for failing to raise them in a direct appeal. Generally an issue which could have been raised on direct appeal but was not raised is waived. *People v. Ward*, 187 Ill. 2d 249, 257 (1999). Here,

the sentencing issues clearly are matters of record and could have been raised in a direct appeal. Defendant, however, failed to perfect a direct appeal from his guilty plea and, therefore, the issues are not waived in a post-conviction proceeding. *People v. Brooks*, 371 Ill. App. 3d 482, 486 (2007).

¶ 12 The State correctly asserts that defendant forfeited his issues on appeal by failing to include them in his post-conviction petition. The supreme court has repeatedly stated that the question raised on appeal from an order dismissing a post-conviction petition is whether the allegations "in the petition," are sufficient to invoke relief under the Act. *Jones*, 213 Ill. 2d at 505; see also *People v. Coleman*, 2011 IL App (1st) 091005, ¶16. Thus, a claim not raised in the original post-conviction petition cannot be argued for the first time on appeal. *Jones*, 213 Ill. 2d at 505. As applied here, we find that defendant's claims are forfeited on appeal. *People v. Jones*, 211 Ill. 2d 140, 149-50 (2004).

¶ 13 Defendant attempts to circumvent his procedural default by arguing that his plea was void and involuntary. These attempts are, at best, disingenuous.

¶ 14 Defendant argues that forfeiture does not apply because his guilty plea is void based on the trial court's violation of Rule 402(d)(1) (eff. July 1, 1997), which provides that a "trial judge shall not initiate plea discussions." Defendant is both factually and legally wrong. Factually, the record clearly shows that the trial court did not initiate plea discussions but, rather, articulated its position that the plea negotiations resulted in the agreement of an aggregate eight-year sentence. To the extent counsel believed otherwise, the court allowed defendant and counsel to consider an agreement with consecutive sentences, to which defendant then agreed. A trial court is never required to accept a guilty plea simply because the parties seek to arrange one. *E.g., People v. Dilger*, 125 Ill. App. 3d 277, 282 (1984); Ill. S. Ct. R. 402(d)(2),(3) (eff. July 1, 1997).

¶ 15 Legally, contrary to defendant's argument, this court has held that Rule 402 is a procedural rule and even a violation of Rule 402 does not render the plea void. We specifically held that, "a violation of Rule 402, a procedural rule, does not defeat the trial court's jurisdiction to enter convictions based on a defendant's pleas and such violation, even if constitutional in dimension, renders a conviction merely voidable." *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010), citing *People v. Speed*, 318 Ill. App. 3d 910, 916-17 (2001). The court in *Smith* further found that a violation of Rule 402 based on the court's allegedly improper involvement in the plea agreement did not "oust the court's jurisdiction or render the judgment void." *Smith*, 406 Ill. App. 3d at 887. Accordingly, defendant's "void" argument is meritless.

¶ 16 Next, defendant unsuccessfully posits that his due process rights were violated and his guilty pleas were rendered involuntary and not knowing, arguing that the trial court (1) abandoned its neutral function to assume the role of defendant's adversary and (2) misled defendant to believe that consecutive sentences were mandatory. Again, defendant's argument lacks any factual or legal basis.

¶ 17 Rule 402 prohibits the trial court from initiating plea negotiations but contemplates the trial court's limited participation in negotiations. *People v. Fox*, 38 Ill. App. 3d 257, 260 (1975). Whether the court's action renders a plea involuntary must be determined on a case by case basis. *Smith*, 406 Ill. App. 3d at 888. In order to show that the trial court's participation in negotiations rendered the guilty plea involuntary, a defendant must present facts which reasonably demonstrate that the court strayed from its judicial function and participated in the negotiation process to the extent that improper influence was exerted upon the defendant to plead guilty, or that the defendant reasonably believes that unless he accepts the plea he will not receive an impartial trial. *Smith*, 406 Ill. App. 3d at 888.

¶ 18 Here, as in *Smith*, defendant failed to show even a "wisp of evidence" of improper conduct by the trial court. The record shows that following a Rule 402 conference, the parties and the trial court realized that a misunderstanding occurred regarding the nature of defendant's sentence, *i.e.*, both parties thought the sentences would be served concurrently whereas the court stated the sentences would be consecutive to each other. After the court clarified why it would not concur with the imposition of concurrent sentences, the defense counsel stated that he was "mistaken" about the agreement. The trial court then passed the case so that defense counsel and defendant could decide whether to accept or deny the plea agreement. Defendant ultimately decided to agree to the consecutive sentences. Despite defendant's contentions to the contrary on appeal, the trial court gave defendant every opportunity to disavow the plea agreement and proceed to trial. Defendant cannot now reasonably claim that his plea was involuntary when the trial court allowed him to take time to reconsider the plea and then fully admonished him of the consequences of the plea.

¶ 19 Finally, we reject defendant's specious assertion that his post-conviction petition should be construed as including an allegation that his trial counsel provided ineffective assistance by failing to object to the trial court's imposition of consecutive sentences. In fact, the petition alleged as follows:

"Granted the defendant has no substantive right to a particular sentence within the range authorized by statute [*sic*], the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel."

Even under a liberal interpretation, defendant's generic statement that he is "entitled to the effective assistance of counsel," without actually stating why counsel was deficient or even *that* he was deficient, cannot be morphed into preserving the ineffective assistance of counsel claim

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now raised for the first time on appeal. Defendant fails to grasp the need for an issue to actually be raised in a post-conviction petition to warrant review on appeal rather than the opposite, *i.e.*, raising an issue for the first time on appeal and declaring it should be construed as being in the petition where it is not remotely stated.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.