

No. 2—09—0859
Order filed May 23, 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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Jo Daviess County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 99—CF—62
)	
ROBERT K. JONES,)	Honorable
)	William A. Kelly,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition: defendant's claim was forfeited, as it was merely a repackaged version of a claim that he could have raised on direct appeal and he did not allege ineffective assistance of appellate counsel; in any event, his claim lacked merit, as any weakness in the State's evidence did not invalidate the indictment.

Defendant, Robert K. Jones, appeals the trial court's order dismissing his petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122—1 *et seq.* (West 2008)). He contends that the petition stated the gist of a meritorious claim that his guilty plea to aggravated criminal sexual assault was involuntary because his trial attorneys were ineffective. We affirm.

In 1999, defendant was charged with six counts of first-degree murder (720 ILCS 5/9—1(a) (West 1998)), four counts of aggravated criminal sexual assault (720 ILCS 5/12—14(a) (West 1998)), and one count each of home invasion (720 ILCS 5/12—11(a) (West 1998)), armed violence (720 ILCS 5/33A—2 (West 1998)), and residential burglary (720 ILCS 5/19—3(a) (West 1998)), in connection with the shooting deaths of Darin Oellerich and Rhonda Wurm. On March 22, 2000, defendant moved to dismiss the aggravated criminal sexual assault charges, alleging that the victim was already dead when he committed the sexual acts and, thus, as a matter of law, he could not have committed a sexual assault. The trial court denied the motion to dismiss.

On August 7, 2000, defendant pleaded guilty to all 13 counts. Defendant was sentenced to death for the murders and to prison terms of 30 years for home invasion, 30 years for armed violence, 15 years for residential burglary, and 30 years for one count of aggravated criminal sexual assault, after merging the aggravated criminal sexual assault counts into a single count.

Defendant moved *pro se* to withdraw his guilty plea, alleging that his attorneys had coerced him into pleading guilty by informing him that he would not be sentenced to death if he pleaded guilty. Newly appointed counsel filed an amended motion to withdraw the plea. There followed numerous additional postplea motions. As pertinent here, defendant filed a second amended “motion for a new trial” in which he argued that he was denied the effective assistance of counsel because his attorneys advised him to plead guilty to counts 8, 9, and 10—alleging aggravated criminal sexual assault—where evidence disclosed that the act of sexual penetration occurred postmortem. The trial court vacated the armed violence conviction, but denied defendant any other relief, finding, as relevant here, that the act of sexual penetration was part of a “continuous criminal act.” The court

found no “evidence one way or another whether she was in fact alive or dead at the time” the sexual penetration took place.

Defendant filed a direct appeal, contending that (1) the indictment alleging aggravated criminal sexual assault failed to state an offense because he could not have used force against the victim, as she was already dead, and (2) the statute mandating life imprisonment for defendant’s crimes was unconstitutional. While the appeal was pending, then-governor George Ryan commuted defendant’s death sentence to one of life. This court affirmed defendant’s convictions and sentences. On the first issue, we noted that defendant’s challenge was really one to the sufficiency of the evidence, a challenge he waived by his guilty plea. *People v. Jones*, No. 2—05—0970, slip order at 4 (2007) (unpublished order under Supreme Court Rule 23) (*Jones I*).

Defendant filed a *pro se* postconviction petition on April 9, 2008. It was styled an amended postconviction petition because defendant had filed one previously. However, the trial court held it in abeyance while the direct appeal was pending. The court appointed counsel, who filed a second amended petition. Counsel argued that defendant was denied due process because his trial attorneys never informed him that he could plead guilty to some of the charges and not guilty to others. Had counsel so informed him, he would have exercised his right to challenge the aggravated criminal sexual assault charges by moving to dismiss those counts of the indictment. Counsel further contended that this court had “never ruled on the substance” of defendant’s allegations that the aggravated criminal sexual assault indictment was insufficient. The trial court dismissed the petition, and defendant timely appeals.

Defendant contends that his guilty plea to aggravated criminal sexual assault was involuntary because his trial attorneys were ineffective for failing to advise him that he could plead guilty to

some of the offenses in the indictment and not others and, had they done so, he could have successfully sought dismissal of the aggravated criminal sexual assault counts of the indictment. He asserts that he could not have been convicted of aggravated criminal sexual assault because he had sex with the victim's body only after she was dead.

The State initially contends that defendant forfeited this contention because he could have raised it on direct appeal, and he does not contend that his appellate counsel was ineffective for not raising the issue at that time. The State further contends that, in any event, defendant's contention fails on the merits because the trial court correctly held that the sexual assault was part of a continuing course of conduct.

A postconviction action is a collateral attack on a prior conviction and sentence. *People v. Brisbon*, 164 Ill. 2d 236, 242 (1995); *People v. Free*, 122 Ill. 2d 367, 377 (1988). The scope of the proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated. Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted (*People v. Ruiz*, 132 Ill. 2d 1, 9 (1989)) and any issues that have previously been decided by a reviewing court are barred by *res judicata* (*People v. Silagy*, 116 Ill. 2d 357, 365 (1987)).

The dismissal of a postconviction petition is warranted only when the petition's allegations of fact, liberally construed in favor of the petitioner and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (2009). On appeal, the trial court's decision to dismiss the petition without an evidentiary hearing is reviewed *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

Initially, we agree with the State that defendant forfeited this issue. Defendant filed an amended postplea motion in which he argued that he was denied the effective assistance of counsel because his attorneys advised him to plead guilty to counts 8, 9, and 10—alleging aggravated criminal sexual assault—where evidence disclosed that the act of sexual penetration occurred postmortem. Thus, defendant could have raised on direct appeal the argument he now presents, which is merely a repackaged version of that same argument. Furthermore, defendant does not contend that appellate counsel was ineffective for failing to raise the argument on direct appeal. See *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005) (postconviction claim will not be held forfeited where the alleged forfeiture resulted from the incompetence of appellate counsel).

In any event, defendant’s claim lacks merit. In *People v. Rissley*, 206 Ill. 2d 403 (2003), the supreme court held that a defendant who claims that, but for his attorney’s faulty advice, he would not have pleaded guilty and would have insisted on going to trial must articulate a “ ‘*plausible defense*’ ” that he could have raised at his hypothetical trial. (Emphasis in original.) *Rissley*, 206 Ill. 2d at 459 (quoting *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev’d on other grounds*, 520 U.S. 751 (1997)). Here, the defense that defendant wished to raise was not plausible.

The only defense that defendant identifies is that he could have successfully sought dismissal of the indictment because the victim was already dead when he sexually assaulted her. However, we rejected this contention in defendant’s direct appeal. Although defendant contended in the trial court that we “never ruled on the substance” of this claim in the direct appeal, implicit in our prior Rule 23 order was that the indictment was sufficient.

Count 8 of the indictment, the count of which defendant was convicted, alleged that on June 19, 1999, in Jo Daviess County “by the use of force the defendant placed his penis in the vagina” of

the victim.¹ See 720 ILCS 5/12—14(a)(1) (West 1998). Section 111—3(a) of the Code of Criminal Procedure of 1963 requires that a charge be in writing and state (1) the name of the offense; (2) the statutory provision alleged to have been violated; (3) the nature and elements of the offense charged; (4) the date and county of the offense; and (5) the name of the accused, if known. 725 ILCS 5/111—3(a) (West 1998).

Defendant does not contend that count 8 of the indictment fails to include any of these elements. Rather, defendant’s second amended petition argued that “the facts in this case fail to bring forth any evidence that ‘a use of force’ was used during the aggravated criminal sexual assault of Rhonda Wurm.” However, as we pointed out on direct appeal, this is not, in reality, a challenge to the sufficiency of the indictment, which contains all the elements required by section 111—3(a). Rather, whether the State could prove the use of force is a challenge to the sufficiency of the State’s evidence. *Jones I*, slip order at 4. As we noted previously, a defendant may not challenge an indictment on the ground that it is not supported by adequate evidence. *Jones I*, slip order at 3 (citing *People v. Myrieckes*, 315 Ill. App. 3d 478, 485 (2000)). Defendant waived such a challenge by pleading guilty.

We note that the trial court explicitly rejected, both before and after the guilty plea, defendant’s claim that he could not be convicted of aggravated criminal sexual assault because the victim was already dead. The court noted that the medical evidence regarding whether the victim

¹Counts 8, 9, 10, and 11 were substantively identical in alleging that defendant committed a criminal sexual assault, but alleged different facts to enhance the offense to aggravated criminal sexual assault.

died before being sexually assaulted was inconclusive and that, in any event, the issue was irrelevant because the sexual assault occurred as part of a continuing course of criminal conduct.

Citing *People v. Gutierrez*, 402 Ill. App. 3d 866, 880 (2010) (quoting *People v. Hendrix*, 250 Ill. App. 3d 88, 103 (1993) (“ ‘we will not draw a bright line which would require the State in all similar cases to establish the precise time of death in order to prove a sexual assault upon a murder victim’ ”)), the State argues that the trial court’s ruling was correct. Notably, defendant does not argue that the trial court’s ruling was wrong or cite any contrary authority. Moreover, he does not suggest what additional evidence he would introduce at his hypothetical trial to more conclusively demonstrate that the victim was dead. Accordingly, the trial court did not err in dismissing the petition.

The judgment of the circuit court of Jo Daviess County is affirmed.

Affirmed.