

NOTICE

Decision filed 01/31/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0479

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 08-CF-16
)	
JOHN G. MONEY,)	Honorable
)	Walden E. Morris,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Donovan and Spomer concurred in the judgment.

R U L E 2 3 O R D E R

Held: The circuit court properly dismissed the defendant's postconviction petition as frivolous and patently without merit.

The defendant, John G. Money, appeals from the circuit court's summary dismissal of his petition for postconviction relief (725 ILCS 5/122-1 *et seq.* (West 2008)). For the reasons that follow, we affirm.

BACKGROUND

In January 2008, the Saline County State's Attorney filed informations charging the defendant with three felony offenses. In case number 08-CF-15, the defendant was charged with one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2008)), and in case number 08-CF-16, he was charged with one count of attempted home invasion (720 ILCS 5/8-4(a), 12-11(a)(3) (West 2008)) and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2008)). Both cases stemmed from two distinct but related incidents, and the offenses alleged in No. 08-CF-16 were charged under a theory of accountability (720

ILCS 5/5-2(c) (West 2008)). By June 2008, the State was prepared to take both cases to trial and prove the following.

On the evening of January 12, 2008, the defendant and Misty Butler "broke up as boyfriend and girlfriend," and inside the Eldorado residence where they had been living together, the defendant confronted Butler about her having allegedly gone to Michael Smith's house. An argument ensued, and the defendant would not allow Butler to leave despite her repeated attempts to do so. The defendant also threatened to shoot Smith, Butler, and himself, and he called "around to different people trying to get a gun." After the defendant "held [Butler] against her will for approximately three hours," the defendant's mother came by to see him, and he left with her.

In the early morning hours of January 13, 2008, Ashley Chamberlain and Lauren Bolin gave the defendant and Jerred Coonse a ride from a bar in Ridgeway to the residence in Eldorado. Butler, Smith, Matthew Lester, and Wesley Creamer were inside the residence at the time. The defendant had previously advised Coonse that he was going to the residence to "kick [Smith's] ass," and Coonse, who the defendant knew was armed with a .40-caliber automatic pistol, had agreed to back him up. Because Butler did not know Coonse, the defendant's plan was to gain entry into the home by having Coonse knock on the front door. When Butler answered the door, however, she saw the defendant and immediately tried to close it. Coonse then tried to force his way inside, while Butler, Smith, Lester, and Creamer tried to keep the door shut. With one of his feet lodged in the doorway, Coonse ultimately pointed his pistol at the residence and fired three shots. The shots damaged the front door and a cabinet inside the house. Coonse and the defendant subsequently "took off" and "hid the weapon." When they were later apprehended by the police, both men confessed to their involvement in the incident. As the State later noted, "Luckily, nobody was killed." In February 2008, the defendant posted bond and was released from custody.

In May 2008, in Saline County case number 08-CF-139, the defendant was charged with one count of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)) and one count of unlawful violation of an order of protection (720 ILCS 5/12-30(a) (West 2008)). The latter count alleged that the defendant had been a passenger in a vehicle driven by Butler, who had obtained an order of protection against him following the events of January 2008.

In June 2008, the defendant pleaded guilty to the two counts charged in No. 08-CF-16, and on the State's negotiated recommendation, he received concurrent five-year sentences on his resulting convictions. In exchange for his guilty plea in No. 08-CF-16, the State dismissed case Nos. 08-CF-15 and 08-CF-139 "in their entirety." When admonishing the defendant pursuant to Supreme Court Rule 402 (eff. July 1, 1997), the circuit court had advised him, *inter alia*, that each of the offenses charged in No. 08-CF-16 was a Class 1 felony and was punishable by a 4- to 15-year term of imprisonment (730 ILCS 5/5-8-1(a)(4) (West 2008)).

In May 2009, the defendant filed a *pro se* petition for postconviction relief alleging the ineffective assistance of plea counsel. Suggesting that the crime of home invasion must necessarily be committed at "the dwelling place of another" (720 ILCS 5/12-11(a) (West 2008)), the defendant argued, *inter alia*, that his plea attorney should have defended against the State's attempted-home-invasion count on the ground that the charge was based on conduct that had occurred at the defendant's own home.

In August 2009, the circuit court entered a written order summarily dismissing the defendant's postconviction petition as frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)). In its order dismissing the petition, the court stated that the defendant had knowingly, intelligently, and voluntarily entered his plea of guilty and that the judgment and sentence imposed on the plea were "in conformance to the negotiated plea

agreement entered into between the [d]efendant and the State." The present appeal followed.

ANALYSIS

Arguing that the circuit court erred in dismissing his postconviction petition as frivolous and patently without merit, the defendant contends that his plea attorney was ineffective for failing to advise him that there were "possible defenses" to the attempted-home-invasion count to which he pleaded guilty. The defendant further suggests that his plea attorney mismanaged a motion *in limine* that he filed on the defendant's behalf. In response, the State maintains that the defenses cited by the defendant would not have been successful under the facts of his case and that the defendant has forfeited his allegations regarding counsel's handling of the motion *in limine* by failing to raise them in the circuit court. With respect to both issues, we agree with the State.

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2008). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2008). To survive the first stage, "a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If, however, a petition's allegations fail to present the gist of a constitutional claim, the petition is considered frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and

the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2008). At the second stage, the circuit court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

To succeed on a claim of ineffective assistance of trial counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), *i.e.*, a defendant must show "(1) that his attorney's performance fell below an objective standard of reasonableness and (2) that the attorney's deficient performance resulted in prejudice." *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). To establish prejudice where a defendant has entered a plea of guilty, "the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *People v. Hall*, 217 Ill. 2d 324, 335 (2005). To that end, "[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Hall*, 217 Ill. 2d at 335. "Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Hall*, 217 Ill. 2d at 335-36.

Alleged Defenses

The defendant contends that his plea attorney was ineffective for failing to advise him that there were "possible defenses" to the attempted-home-invasion count to which he was pleading guilty. In support of this contention, the defendant first argues that he would not have pleaded guilty to attempted home invasion had he known that it was not a crime to

invade his own home.

Because the crime of home invasion entails criminal conduct occurring at "the dwelling place of another" (720 ILCS 5/12-11(a) (West 2008)), a defendant cannot generally be found guilty of a home invasion based on conduct occurring at his own home (see *People v. Reid*, 179 Ill. 2d 297, 316-17 (1997); *People v. Howard*, 374 Ill. App. 3d 705, 711-12 (2007)). Here, however, the defendant was never charged with attempting to invade his own home. Rather, he was charged as being legally accountable for Coonse's criminal conduct, and Coonse was not trying to invade his own home. The State's attempted-home-invasion charge was thus valid, and the defendant could not have defended against it on the ground that the conduct in question did not occur at the dwelling place of another. See *People v. Baugh*, 358 Ill. App. 3d 718, 727-30 (2005).

The defendant next suggests that even assuming he was properly charged with attempted home invasion, he could have defended against the charge by asserting that he did not have "a concurrent, specific intent to promote or facilitate the commission of the offense." The defendant's argument on this point ignores that for accountability purposes, "[t]o prove that the defendant possessed the intent to promote or facilitate the crime, the State may present evidence which establishes beyond a reasonable doubt that (1) the defendant shared the criminal intent of the principal *or* (2) there was a common criminal design." (Emphasis added.) *People v. Williams*, 193 Ill. 2d 306, 338 (2000). "Under the common-design rule, if 'two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts.'" *Williams*, 193 Ill. 2d at 338-39 (quoting *In re W.C.*, 167 Ill. 2d 307, 337 (1995)).

Here, the defendant recruited Coonse for a common criminal design, *i.e.*, to help the

defendant gain entry into the Eldorado residence so that he could "kick [Smith's] ass." The defendant also knew that Coonse was armed with a handgun. When the defendant's plan to enter the home when Butler opened the door for Coonse failed, the defendant might not have been able to anticipate how Coonse would react, but he was nevertheless accountable for Coonse's actions under the common-design rule. See *Williams*, 193 Ill. 2d at 339; *Baugh*, 358 Ill. App. 3d at 729-30. The defendant's suggestion that his lack of intent would have been a defense to the State's charges in No. 08-CF-16 is therefore without merit.

A defense attorney's failure to advise his client of a valid defense to a charged offense can form the basis for an ineffective-assistance-of-counsel claim. See *Hall*, 217 Ill. 2d at 335. Here, however, the "possible defenses" that the defendant advances are invalid under the circumstances, and the circuit court properly rejected the defendant's claim that his plea attorney was ineffective for failing to advise him otherwise.

Motion *In Limine*

The defendant suggests, for the first time on appeal, that his plea attorney mismanaged a motion *in limine* that he filed on the defendant's behalf. Specifically, the defendant faults plea counsel for failing to cite authority in support of the motion and for failing to request a hearing on the motion. As the State maintains, however, because these contentions are raised for the first time on appeal, we cannot consider them.

Under general principles of procedural default, a defendant forfeits appellate review of any issue not raised in his petition for postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). Moreover, "[o]ur supreme court has held that although it has the power to excuse an appellate waiver resulting from a failure to include an issue in a postconviction petition, the appellate courts do not." *People v. Ligon*, 392 Ill. App. 3d 988, 995 (2009) (citing *People v. Jones*, 213 Ill. 2d 498, 505 (2004)), *aff'd*, No. 108855 (Nov. 10, 2010). As a result, we are precluded from addressing the defendant's allegation that his plea attorney

mishandled the motion *in limine* that he filed on the defendant's behalf. *Ligon*, 392 Ill. App. 3d at 995. We note, however, that the circuit court never ruled on the defendant's motion *in limine* because the defendant entered his plea of guilty before the court had the occasion to do so. We also note that having reviewed the record on appeal, we agree with the State's observation that given the evidence of the defendant's guilt and the plea bargain offered by the State, the defendant "received effective assistance of counsel because the decision to plead guilty was a reasonable one in this case."

CONCLUSION

"Summary dismissal is a process that exists to cull petitions that are frivolous in nature or patently without merit" (*People v. Johnson*, 312 Ill. App. 3d 532, 534 (2000), *aff'd sub nom. People v. Bocclair*, 202 Ill. 2d 89 (2002)), and for the foregoing reasons, we hereby affirm the trial court's summary dismissal of the defendant's petition for postconviction relief.

Affirmed.