

No. 1-09-2829

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.)	No. 05 CR 3620
)	
DELAURENCE ROBINSON,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice KARNEZIS concurred in the judgment.

ORDER

¶ 1 *Held:* First-stage dismissal of defendant's post-conviction petition affirmed where he forfeited his fitness claim for appellate review.

¶ 2 Defendant Delaurence Robinson 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)). He contends that the circuit court erred in dismissing his petition by applying the wrong standard for evaluating his petition at the first stage

of post-conviction proceedings and because he stated a fitness claim with an arguable basis in law and fact.

¶ 3 The record shows that in 2008, the trial court found defendant guilty of first degree murder in the January 11, 2001, fatal shooting of Tajuan Brown and sentenced him to 70 years' imprisonment with a 25-year firearm enhancement. On direct appeal, this court affirmed defendant's conviction, but remanded the cause for clarification of the sentencing enhancement and the count under which conviction was to be entered. *People v. Robinson*, No. 1-08-2262 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 While his direct appeal was pending, defendant filed the subject *pro se* post-conviction petition alleging, *inter alia*, that the trial court erred in failing to order a psychiatric evaluation despite knowledge that he was taking psychotropic medication. In support, defendant cited trial counsel's unsuccessful, posttrial request for a psychiatric evaluation based on the presentence investigation report (PSI) which indicated that defendant was taking psychotropic medication for depression. The circuit court summarily dismissed the petition as frivolous and patently without merit in a written order entered on August 17, 2009. This appeal follows.

¶ 5 In this court, defendant contends that we must vacate the dismissal order and remand the cause for further proceedings under the Act because the circuit court required him to meet a higher standard than is required to survive the summary dismissal stage and because his "mental health issue as evidenced by the ingestion of psychotropic medication," has an arguable basis in fact and law. Defendant particularly claims that the circuit court erroneously applied standards generally reserved for rulings on the propriety of a motion to dismiss, or a denial of a petition following a third stage evidentiary hearing, when it "overlooked its own language which stated that the ingestion of psychotropic medication is an important fact in determining the existence of

a *bona fide* doubt of fitness and seem[ed] to hold that for this issue to survive first stage scrutiny there must be an affidavit from a psychiatrist that the petitioner was insane."

¶ 6 The basis for this assertion arises from defendant's reading of the circuit court's written dismissal order, in which it noted the trial court's statement, in denying the necessity of a fitness hearing, to wit, "At this time I will not—I see no need to order any kind of fitness hearing based solely on the pre-sentence investigation stating that he is on antidepressants, and no further indications of him being anything but fit for trial." The circuit court's review of the trial record is proper under *People v. Rogers*, 197 Ill. 2d 216, 222 (2001), and defendant's suggestion that in quoting the trial court's statement, the circuit court was requiring him to provide a psychiatrist's affidavit that he was insane in order to avoid a first-stage dismissal, is without foundation or merit. Notwithstanding, our review of the dismissal order entered by the circuit court is *de novo* (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)), and regardless of the reasons and opinions expressed by the circuit court regarding what occurred during the underlying proceedings, we may affirm a summary dismissal of a post-conviction petition on any proper ground (*People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006)).

¶ 7 Turning to the merits, the State asserts, and we agree, that defendant has forfeited the "mental health issue" because it is premised entirely on the record and could have been, but was not, raised on direct appeal. "Claims that were raised and decided on direct appeal are barred by *res judicata* and those claims that could have been raised, but were not, are considered waived." *People v. Sanders*, 238 Ill. 2d 391, 398 (2010) (quoted in *People v. Gacho*, 2012 IL App (1st) 091675, ¶ 24). "[P]ost-conviction petitions dismissed on principles of forfeiture or *res judicata* are, necessarily, both frivolous and patently without merit." *People v. Alcozer*, 241 Ill. 2d 248, 258 (2011) (citing *People v. Blair*, 215 Ill. 2d 427, 445 (2005)).

¶ 8 Given defendant's reliance on matters appearing in the original trial record, namely, the PSI indicating that he was taking psychotropic medication for depression diagnosed in 2005, and the trial court's denial of defense counsel's posttrial request for a psychiatric evaluation after reviewing the available facts, it is clear that defendant could have raised his mental health claim on direct appeal. *People v. Gale*, 376 Ill. App. 3d 344, 349 (2007). Having raised this error for the first time in his post-conviction petition, defendant has forfeited the contention for our review. *Gale*, 376 Ill. App. 3d at 349.

¶ 9 We recognize that the procedural bar of waiver may be relaxed in certain circumstances: where fundamental fairness dictates, where the facts underlying the claim do not appear on the face of the original appellate record, and where the alleged waiver stems from the incompetence of appellate counsel. *Gale*, 376 Ill. App. 3d at 350. Here, however, defendant has not argued that any of these exceptions apply to his situation, and, consequently, a claim that his forfeiture of the mental health issue should be excused is itself forfeited. *Gale*, 376 Ill. App. 3d at 350.

¶ 10 We are also not persuaded by defendant's attempts to analogize his case to *People v. Brown*, 236 Ill. 2d 175, 186 (2010), where the ineffective assistance claim was actually raised in the post-conviction petition with supporting documentation. Defendant may not frame his mental health issue in the context of ineffective assistance of trial counsel, for the first time on appeal, to circumvent the application of forfeiture. *People v. Jones*, 213 Ill. 2d 498, 508 (2004).

¶ 11 Moreover, defendant's mental health issue, as presented in his petition, is not a cognizable constitutional deprivation for purposes of post-conviction review. *People v. Jones*, 321 Ill. App. 3d 515, 518 (2001) (citing *People v. Jones*, 191 Ill. 2d 194, 199 (2000)). In *People v. Mitchell*, 189 Ill. 2d 312, 328-29 (2000), the supreme court held that an allegation that the trial court violated defendant's due process rights when it failed to conduct a fitness hearing under section 104-21(a) of the Code of Criminal Procedure (725 ILCS 5/104-21(a) (West 2008)), based on his

ingestion of psychotropic medication, is not a cognizable constitutional claim in a post-conviction proceeding. Accord *Jones*, 191 Ill. 2d at 199; *People v. Jones*, 191 Ill. 2d 354, 359 (2000). Although the statutory provisions providing for fitness hearings implicate the constitutional right not to be tried while unfit (see *Mitchell*, 189 Ill. 2d at 360 (Miller, J., specially concurring)), there is a distinction between a constitutional deprivation and the violation of rights under a statutory procedure designed to implement broad constitutional provisions (*People v. Fuca*, 43 Ill. 2d 182, 185 (1969)). Because post-conviction proceedings are confined to allegations of constitutional deprivations, the denial of a purely statutory right cannot provide a basis for post-conviction relief (*Mitchell*, 189 Ill. 2d at 329), and defendant's assertion of that right here was not cognizable under the Act.

¶ 12 For the reasons stated, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's post-conviction petition as frivolous and patently without merit.

¶ 13 Affirmed.