

2012 IL App (1st) 101148-U

FIRST DIVISION

February 14, 2012

No. 1-10-1148

**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 DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 01932
	)	
ROBERT STEELE,	)	Honorable Thomas Davy,
	)	Judge Presiding.
Defendant-Appellant.	)	

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JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment of the court.

**ORDER**

¶ 1 **Held:** The defendant's postconviction petition was properly dismissed at the first stage of postconviction proceedings on the basis of forfeiture. The defendant's claim of ineffective assistance of appellate counsel was forfeited since it was raised for the first time on appeal.

¶ 2 Defendant Robert Steele appeals from the first-stage dismissal of his postconviction petition. On appeal, defendant Steele contends that prejudicial remarks by the trial court and the prosecutor denied him a fair trial and that the failure of trial counsel to object to these remarks

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denied him the effective assistance of counsel. Defendant Steele further contends that he was not required to set forth an ineffective assistance of appellate counsel claim in his petition since the petition contained a factual basis for such a claim.

¶ 3 Following a jury trial, defendant Steele was found guilty of attempted first degree murder and armed robbery. The victim testified that he was waiting at a gas station when a man, armed with a gun, approached him and demanded money. The victim kept looking at the man's face while he was taking the money out of his pocket. A second man appeared and shot the victim in the hip. The first man then shot the victim in the back and in the chest. The victim identified defendant Steele as the first man, at a lineup and at trial. The trial court imposed concurrent sentences of 35 years on the convictions. On direct appeal, this court affirmed defendant Steele's convictions and sentences. See *People v. Steele*, No. 1-07-1924 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 On January 6, 2010, defendant Steele filed a petition pursuant to the Post-Conviction Hearing Act ( 725 ILCS 5/122.1 *et seq.* (West 2008) (the Act). Relevant to the issues raised on appeal, defendant Steele alleged that he was denied his constitutional right to a fair trial by remarks made by the trial court and by the prosecutor in her rebuttal argument. In addressing prospective members of the jury venire, the trial court stated:

"In terms of evidence and in terms of TV shows if you watch any of the crime shows, miraculously the only crime that they have to solve is the one that comes before them. The crime lab is never doing anything else and they're able to do magic things with computers and TV screens. This is not CSI Miami or CSI Berwyn or whatever any of the

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shows are."

In rebuttal, the prosecutor argued as follows:

"[The victim's] testimony alone is enough to convict the defendant, and we meet that burden every day in this court room,"

¶ 5 Defendant Steele maintains that, due to the respect jurors have for the trial court, the trial court's remark lessened the concern the jury might have had with the lack of physical evidence against him. He maintains that the prosecutor's argument improperly bolstered the victim's testimony and implied to the jury that the State always carried its burden of proof. Defendant Steele argues that these remarks diminished the State's burden of proof in the eyes of the jury. Defendant Steele further maintained that trial counsel's failure to object to these remarks constituted ineffective assistance of counsel.

¶ 6 The circuit court determined that the errors were forfeited because they could have been raised in defendant Steele's direct appeal and summarily dismissed his postconviction petition as frivolous and patently without merit. Defendant Steele appeals.

¶ 7 ANALYSIS

¶ 8 I. Standard of Review

¶ 9 We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 10 II. Discussion

¶ 11 A. *Forfeiture*

¶ 12 "The purpose of a postconviction proceeding is to permit an inquiry into constitutional

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issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Newbolds*, 364 Ill. App. 3d 672, 675 (2006).

At the first stage of postconviction proceedings, the doctrine of forfeiture bars claims that could have been raised on direct appeal but were not. *Newbolds*, 364 Ill. App. 3d at 675. An exception to the forfeiture doctrine allows an otherwise-barred claim to proceed where the facts relating to the claim do not appear on the face of the original appellate record. *Newbolds*, 364 Ill. App. 3d at 676. "[I]t is not so much that the claim could not have been presented or raised by a party on direct appeal, but that such a claim could not have been considered by the reviewing court because the claim's evidentiary basis was *de hors* the record and a reviewing court may not consider matters not of record." *Newbolds*, 364 Ill. App. 3d at 676.

¶ 13 The complained of remarks, as well as trial counsel's failure to object to them, were contained in the record on appeal. Defendant Steele's claims of error and ineffective assistance of counsel claim did not depend upon matters outside the record and could have been considered by the reviewing court on defendant Steele's direct appeal. Therefore, these claims are barred by the doctrine of forfeiture.

¶ 14 *B. Ineffective Assistance of Appellate Counsel*

¶ 15 Defendant Steele contends that he was denied the effective assistance of appellate counsel. He does acknowledge that he "did not explicitly couch his claim in terms of the ineffective assistance of appellate counsel."

¶ 16 Another exception to the forfeiture rule is where the alleged forfeiture stems from the incompetence of appellate counsel. *Newbolds*, 364 Ill. App. 3d at 676. Thus, a claim of

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ineffective assistance of appellate counsel alleged in a postconviction petition may not be dismissed on the basis for forfeiture. See *Newbolds*, 364 Ill. App. 3d at 677 (trial court erred by summarily dismissing an ineffective assistance of appellate counsel claim on the basis of forfeiture). However, the claim must be raised in the postconviction petition. See 725 ILCS 5/122.3(West 2008) ("[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived").

¶ 17 In *People v. Jones*, 213 Ill.2d 498 (2004), our supreme court reiterated that claims not raised in a postconviction petition may not be argued for the first time on appeal. *Jones*, 213 Ill. 2d at 505. The court stressed that "our appellate court is not free, as this court is 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 postconviction petition." *Jones*, 213 Ill.2d at 508. While acknowledging the dilemma of appellate counsel where a *pro se* litigant has omitted a claim from the initial petition, the court rejected counsel's solution, namely, to raise the issue even though it was not considered by the circuit court in ruling on the postconviction petition. In such a situation, the court advised that the proper course of action for counsel to take was to file a successive petition properly alleging the newly found claim. *Jones*, 213 Ill. 2d at 509.

¶ 18 Defendant Steele's reliance on *People v. Petrenko*, 237 Ill 2d 490 ( 2010), *People v. Brown*, 236 Ill. 2d 175 (2010), *Hodges* and *People v. Turner*, 187 Ill. 2d 406 (1999) is misplaced. Initially, we note that these are all cases decided by our supreme court. That court's supervisory authority allows it to afford relief to defendants, not available to appellate courts.

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Moreover, in *Petrenko, Brown and Hodges*, the defendants' claims of error were challenged on the basis for the claim or on the sufficiency of the allegations, not whether the claims were raised in their petitions. Review of defendant Steele's petition reveals no claim of ineffective assistance of appellate counsel. *Turner* was a death-penalty case, and the defendant was appointed counsel prior to any ruling as to the sufficiency of his postconviction petition. The court held that appointed counsel failed to make the necessary amendments to the defendant's *pro se* petition to prevent a forfeiture of an ineffective assistance of appellate counsel claim. *Turner*, 187 Ill. 2d at 413. Here, defendant Steele was not entitled to have counsel amend the petition since his petition did not advance to second-stage proceedings. See 725 ILCS 5/122.4 (West 2008).

¶ 19 Defendant Steele's argument that he alleged sufficient facts upon which an ineffective assistance of appellate counsel claim could have been premised would require this court to ignore the plain language of section 122.3 of the Act. The supreme court in *Jones* instructed this court to adhere to the forfeiture language in section 122.3 of the Act. Defendant Steele is not without a remedy as he may seek leave of court to file a successive postconviction petition alleging the ineffective assistance of appellate counsel. See 725 ILCS 5/122.1(f) (West 2008).

¶ 20 We conclude that defendant Steele forfeited his claims of error and ineffective assistance of trial counsel since they could have been raised on direct appeal. His claim of ineffective assistance of appellate counsel, raised for the first time in this appeal, is likewise forfeited.

¶ 21 The order dismissing defendant Steele's postconviction petition as frivolous and patently without merit is affirmed.

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¶ 22 Affirmed.

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