

2012 IL App (1st) 101505-U

SIXTH DIVISION
March 2, 2012

No. 1-10-1505

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. 96 CR 4258
)	
ROOSEVELT KENNEDY,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Second-stage dismissal of defendant's post-conviction petition affirmed where defendant failed to make substantial showing of ineffective assistance of trial counsel; extended-term sentence imposed on defendant's armed robbery conviction vacated and cause remanded for resentencing on that conviction; one-act, one-crime claim raised for the first time on appeal waived.
- ¶ 2 Defendant Roosevelt Kennedy appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that the circuit court erred in granting the State's motion to dismiss his petition where he made a substantial showing of ineffective assistance of trial counsel. He also contends for the

first time on appeal that the extended-term sentence imposed on his armed robbery conviction is void, and that his three first-degree murder convictions for the killing of one person violate the one-act, one-crime rule.

¶ 3 The record shows, in relevant part, that defendant was charged with three counts of first degree murder and armed robbery in connection with the stabbing death of Desmond Grey. Although defendant initially elected a jury trial on those charges, counsel informed the court during jury selection that defendant wished to waive his right to a jury trial and enter a plea of guilty. The court then admonished defendant, *inter alia*, that this was a capital case, apprised him of all the applicable sentencing options and ranges, and defendant waived his right to a jury for the death penalty sentencing hearing.

¶ 4 The State subsequently read into the record the factual basis for defendant's plea of guilty. This included defendant's statement to an assistant State's Attorney that Grey refused to pay him \$2,000 for towing and repair costs which resulted from an incident he was involved in with defendant's car, that he knew Grey "was never going to pay him so he wanted to get even with him," and that he eventually stabbed Grey multiple times. Defense counsel stipulated to the proposed testimony, defendant acknowledged the truth of those facts and pleaded guilty to the charges.

¶ 5 At defendant's sentencing hearing on December 23, 1998, the trial court found defendant eligible for the death penalty, but ultimately sentenced him to concurrent terms of 50 years' imprisonment on three counts of first degree murder (intentional, strong probability of death or great bodily harm, and felony) and one count of armed robbery. The court also admonished defendant that "truth in sentencing" applied, and that he would serve the entire term.

¶ 6 On December 8, 1999, nearly one year after he was sentenced, defendant filed a *pro se* "Petition to Withdraw Guilty Plea and Vacate Sentence" (motion to withdraw plea) pursuant to

Illinois Supreme Court Rule 604(d) (eff. Aug 1, 1992). Defendant alleged, as pertinent to this appeal, that trial counsel had assured him that he would not receive a sentence of more than 40 years due to his lack of a criminal record, and thus did not properly advise him of the maximum sentence he could receive. In support of his petition, defendant attached his own affidavit¹ in which he averred that, after he was sentenced to 50 years' imprisonment, "I was in shock cause of my attorney's assurance that I would not get no more than 40 years, because I did not have a bad record."

¶ 7 Defendant also alleged that counsel failed to interview "my witness" regarding a self-defense claim before advising him to plead guilty. In his affidavit, defendant averred that counsel never spoke with "my potential witness" who would have told counsel "all about the same incident he had with Desmond cause Desmond had pulled a gun and threaten [*sic*] to kill him over his car," and also that "Desmond was hooked up and had to keep a gun twenty four - seven." Defendant further averred that counsel failed to inform him that the witness had called, left a message, and was willing to testify, and that he would not have pleaded guilty had he known that.

¶ 8 The memorandum of orders shows that on December 28, 1999, counsel was appointed to represent defendant by the trial judge who presided over his plea and sentencing hearings. It also shows that a different judge was assigned to that call in 2000, after which defendant made multiple *pro se* requests for transcripts. The clerk informed the court of one such request on July 15, 2002, and the following exchange was had:

¹ Defendant also attached affidavits from his mother and sister which are of no relevance to the issues at hand.

"THE COURT: Is there a post conviction file on this case?

THE CLERK: I have no idea. That's just what she gave me. He wants a transcript of something.

THE COURT: But is he saying he needs a transcript from the time his post conviction was filed?

THE CLERK: I don't know.

THE COURT: All right. I'm going to sign an order for a transcript, even though I don't see anywhere in the file where a post conviction was entered. But it's on call. Maybe it's going to be filed on September 13th."

¶ 9 On April 11, 2003, the State filed a motion to dismiss defendant's motion to withdraw plea, asserting, *inter alia*, that defendant had provided "no valid affidavits in support of his claims, only hearsay, which cannot be used to support further proceedings under the Act." Although the State did not define the "Act" in its motion, it cited the post-conviction case of *People v. Hysell*, 48 Ill. 2d 522 (1971).

¶ 10 Thereafter, the transcripts show that the parties referred to defendant's motion as a post-conviction petition. At a status hearing on June 24, 2005, the court asked counsel, "Where do we stand on the matter," and counsel responded, *inter alia*, that "Mr. Kennedy filed the PC based on many claims of inassistance [*sic*] of counsel, pursuant to (inaudible) plea on the murder case." On November 18, 2005, counsel again referred to the matter as a post-conviction case, telling the court, "[A]nd for Mr. Kennedy, I have read a copy of his plea. This is a very old post-conviction case. It goes back to 1996." In the years that followed, proceedings were routinely continued so that counsel could prepare and file a supplemental petition.

¶ 11 On July 24, 2009, defense counsel filed a supplemental petition for post-conviction relief, and attached as an exhibit, *inter alia*, a *pro se* document titled "Motion to Amend Petition for

Post-Conviction Relief," and subtitled "In Supplement of Original Motion to Vacate Plea."

Counsel noted therein that the *pro se* document was "prepared" by defendant in April 2003, and the affidavit shows the document was signed by defendant and dated April 30, 2003. However, there is no reference to this document in the memorandum of orders, and it bears no file-stamp.

¶ 12 In that *pro se* motion, defendant noted that his motion to withdraw plea was still pending, and that he "now motions this Honorable Court to allow him to amend said pleading to further plead pursuant to §122-5 of the Code of Criminal Procedure." He then asserted that his right to due process was violated where the trial court failed to properly admonish him of the three-year mandatory supervised release (MSR) term which attached to his sentence. Although defendant stated in his attached memorandum of law that he "wishes to amend his original petition for Post-Conviction Relief," counsel noted in the supplemental petition that defendant was stating "that he wanted to amend his pleading so that it would be treated by this Court as a postconviction petition under 725 ILCS 5/122-5." Counsel also observed that "[s]ince counsel has been appointed, the cause has been treated by all parties as a postconviction proceeding."

¶ 13 With respect to the supplemental petition itself, counsel stated that it was intended to "augment[] the Petitioner's *pro-se* Motion to Amend Petition for Post-Conviction Relief (In Supplement of Original Motion to Vacate Plea) and *pro-se* Petition to Withdraw Guilty Plea and Vacate Sentence." Counsel then argued, solely, that defendant was not properly admonished of the MSR term and was therefore entitled to a three-year sentence reduction pursuant to *People v. Whitfield*, 217 Ill. 2d 177 (2005). Counsel also attached an affidavit from defendant in support of that claim.

¶ 14 The State subsequently filed another motion to dismiss defendant's post-conviction petition, asserting that there was no merit to defendant's *Whitfield* claim. On May 14, 2010, counsel filed his Rule 651(c) certificate, and argument was had on the State's motion before a

judge other than the one who had appointed counsel, or who had presided over the proceedings immediately thereafter. At the conclusion of the hearing, the court dismissed defendant's petition, noting "I don't think he has stated any constitutional violation." Defendant now appeals that dismissal.

¶ 15 Although not addressed by the parties, this chronology raises a question as to our jurisdiction to consider the matter at hand, and also reflects the troubling effect occasioned by long delays in processing and deciding collateral motions. The record in this case shows that defendant was sentenced on his plea of guilty on December 23, 1998. About one year later, he filed a clearly labeled, albeit untimely, *pro se* motion to withdraw his plea pursuant to Rule 604(d).

¶ 16 The supreme court has determined that where more than 30 days have passed since sentence was imposed and no cognizable extension has been allowed, a trial court is divested of jurisdiction to consider a Rule 604(d) motion to vacate judgment or reconsider sentence. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Notwithstanding, the memorandum of orders shows that without record comment, the court appointed counsel to represent defendant a few weeks later. The matter was then variously continued over the ensuing years, and on July 15, 2002, the circuit court granted defendant's request for transcripts, commenting that it did not see anywhere in the file where a post-conviction petition had been entered. The court's observation is substantiated by the memorandum of orders which reflects no such filing or recharacterization of the untimely filed motion to withdraw plea as a petition under the Act.

¶ 17 It appears, however, that after April 11, 2003, the State and defense counsel treated defendant's Rule 604(d) motion to withdraw plea as a petition for post-conviction relief. On that date, the State filed a motion to dismiss defendant's motion to withdraw plea in which it referred to the "Act" and cited authority relating to the Post-Conviction Hearing Act even though the

record discloses no express recharacterization of defendant's motion by the circuit court, and no substantive filings by defendant. In fact, he recognized in his *pro se* motion to amend, which concluded with his April 30, 2003, affidavit, that his motion to withdraw plea was still pending, and that he sought to "further plead pursuant to §122-5 of the Code of Criminal Procedure." This observation was made by post-conviction counsel, who, in 2009, acknowledged in his supplemental petition that defendant "wanted to amend his pleading so that it would be treated by this Court as a postconviction petition."

¶ 18 In *People v. Stoffel*, 239 Ill. 2d 314, 327 (2010), the supreme court found that the actions of the circuit court, as reflected in the record, showed it had effectively recharacterized defendant's petition as a post-conviction petition and advanced it to second stage review under the Act. Insofar as the record here shows that defendant's *pro se* Rule 604(d) motion to withdraw plea essentially alleged a claim of ineffective assistance of counsel which was cognizable as a post-conviction claim under the Act, that counsel was appointed to represent him on that pleading, that counsel ultimately filed a Rule 651(c) certificate and a supplemental post-conviction petition, we likewise find that defendant's pleading was recharacterized as a petition for post-conviction relief, and that we have jurisdiction to review the dismissal of that petition on the merits. See *Stoffel*, 239 Ill. 2d at 327.

¶ 19 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second-stage of proceedings, defendant has the burden of providing a substantial showing of such violation (*People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)), and a petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing (*People v. Hall*, 217 Ill. 2d 324, 334 (2005)). In making that determination, all well-pleaded facts in the petition and affidavits

are taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* the dismissal of a petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 20 Initially, we observe that of the many allegations raised by defendant in the trial court, the only one he has continued to pursue in this appeal is ineffective assistance of trial counsel. We thus find that all other issues are waived. Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2008).

¶ 21 To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), *i.e.*, a reasonable probability that, but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on proceeding to trial (*People v. Manning*, 227 Ill. 2d 403, 418 (2008)). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 22 With respect to the prejudice prong, the supreme court has noted that a bare assertion that defendant would have pleaded not guilty and insisted on a trial absent counsel's deficient performance is insufficient to establish prejudice. *Hall*, 217 Ill. 2d at 335. Rather, defendant must accompany his claim with a claim of innocence or articulate a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. The question of whether counsel's deficient performance caused defendant to plead guilty thus largely depends on predicting the likelihood of defendant succeeding at trial. *Hall*, 217 Ill. 2d at 336.

¶ 23 In this case, defendant contends that trial counsel's assurance that he would not receive a sentence of more than 40 years' imprisonment was objectively unreasonable, and prejudiced him

because he would not have pleaded guilty and abandoned a plausible self-defense claim but for the erroneous advice. The State responds that defendant has not provided adequate documentary support for his claims, and that they are otherwise refuted by the record.

¶ 24 Under the Act, defendant must provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). The purpose for requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Here, however, defendant has not provided any evidentiary support to establish that counsel assured him of a maximum 40-year sentence.

¶ 25 We recognize that the failure to attach independent corroborating documentation or explain its absence may be excused where the petition allows an inference that the only affidavit defendant could have furnished, other than his own, was that of his attorney. *Hall*, 217 Ill. 2d at 333. However, defendant's claim is refuted by the record which shows that the trial court admonished him of the applicable sentencing ranges, including his eligibility for a sentence of death, that defendant nonetheless proceeded to enter a plea of guilty, and that he said "Thank you" when the court ultimately sentenced him to 50 years' imprisonment and wished him good luck.

¶ 26 Furthermore, defendant's assertion that he would not have pleaded guilty but for counsel's erroneous advice is contradicted by his own pleading, in which he alleged that the court said " I BELIEVE THE STATE MADE A GENEROUS OFFER, I COULD GIVE YOU THE DEATH PENALTY OR LIFE, IF YOU GET FOUND GUILTY[]" - Thus causing petitioner to plead guilty, avoiding the Judge's raft [*sic*] for rejecting the STATE'S offer." In light of the above, we find that defendant's allegations, even liberally construed, fail to make a substantial showing of a constitutional violation of ineffective assistance of counsel. *Hall*, 217 Ill. 2d at 334.

¶ 27 Defendant also alleges that he had a plausible self-defense claim which he abandoned when he pleaded guilty on the faulty advice of counsel. This claim was based on a "potential witness" who would have testified that Grey carried a gun "twenty four - seven" and had once threatened to kill him over his car. However, defendant has not provided the name of this witness, an affidavit from this witness, or an explanation for why he could not obtain an affidavit from the witness. 725 ILCS 5/122-2 (West 2008). Although defendant calls our attention to two documents in the record containing summaries of the oral statements of Veronica Cool and Roosevelt Kennedy Sr., those statements are unsigned, unsworn, and unnotarized, and were filed in 1998 as part of defendant's answer to the State's pre-trial discovery request. As such, they clearly do not meet the requirements of a valid affidavit. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). Moreover, according to defendant's petition, counsel never spoke with his potential self-defense witness, and, thus, the oral statements of Cool and Kennedy Sr., who were clearly interviewed by the defense, are not corroborative of the self-defense claim asserted by defendant in his petition. *Collins*, 202 Ill. 2d at 67.

¶ 28 Notwithstanding, to properly raise a claim of self-defense, defendant must establish some evidence that (1) force was threatened against him; (2) he was not the aggressor; (3) there was imminent danger of harm; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28 (1995). Here, defendant's allegedly plausible self-defense claim is that a potential witness would testify that Grey was "hooked up" and always carried a gun with him, and that Grey had once threatened to kill the witness over his car. This proposed testimony does not establish that force was threatened against defendant, that defendant was not the aggressor, or that there was any imminent danger of harm when he fatally stabbed the victim. *Jeffries*, 164 Ill. 2d at 127-28. Defendant thus failed to

articulate a plausible self-defense claim that could have been raised at trial (*Hall*, 217 Ill. 2d at 335-36); and, therefore, has not demonstrated prejudice resulting from counsel's allegedly erroneous advice (*Strickland*, 466 U.S. at 687), to support his ineffective assistance of counsel claim (*Flores*, 153 Ill. 2d at 283).

¶ 29 Defendant next contends that the extended-term sentence entered on his armed robbery conviction was not statutorily authorized, and is therefore void, because armed robbery was not the highest class offense of which he was convicted. The State acknowledges that defendant "appears to be correct" because the crime was charged as a single course of conduct. We agree that a sentence that does not conform to a statutory requirement is void and may be attacked at any time (*People v. Jackson*, 2011 IL 110615, ¶ 10), and we review such a challenge *de novo* (*People v. Donelson*, 2011 IL App. (1st) 092594, ¶ 7, citing *People v. Hauschild*, 226 Ill. 2d 63, 72 (2007)).

¶ 30 Under section 5-8-2 of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-2(a) (West 1996)), the trial court can impose an extended-term sentence only for offenses within the most serious class of offense of which defendant was convicted. *People v. Jordan*, 103 Ill. 2d 192, 207 (1984). However, the supreme court has noted two exceptions to this rule: (1) if defendant was sentenced to death or natural life, the court can impose an extended-term sentence on the next most serious offense of which defendant was convicted (*People v. Terry*, 183 Ill. 2d 298, 305 (1998)); and (2) the court can impose extended-term sentences on separately charged, differing class offenses which occurred during unrelated courses of conduct (*People v. Coleman*, 166 Ill. 2d 247, 257 (1995)).

¶ 31 In this case, defendant was convicted of three counts of first degree murder and one count of armed robbery, and sentenced to concurrent terms of 50 years' imprisonment on all counts. Although defendant's murder convictions constituted the most serious class offense of which he

was convicted, and neither of the exceptions to section 5-8-2 applied, the trial court sentenced him to a term 20 years above the maximum, non-extended term of imprisonment authorized for an armed robbery conviction. 720 ILCS 5/18-2(b) (West 1996); 730 ILCS 5/5-8-1(a)(3) (West 1996). It is thus apparent that the sentence entered on defendant's armed robbery conviction was not statutorily authorized.

¶ 32 In this court, the parties dispute the proper remedy for this sentencing error. Defendant requests this court to reduce his armed robbery sentence to the statutory maximum for a non-extended-term Class X felony, *i.e.*, 30 years' imprisonment. The State responds, however, that defendant's new sentence will be void unless it is ordered to run consecutive to the murder sentence because he inflicted severe bodily injury during the commission of the armed robbery, citing 730 ILCS 5/5-8-4(a) (West 1996) and *People v. Whitney*, 188 Ill. 2d 91, 99-100 (1999). Defendant replies that the court implicitly found, as a matter of fact, that the severe bodily injury was not inflicted during the commission of the armed robbery because it imposed concurrent sentences.

¶ 33 In *Whitney*, 188 Ill. 2d at 98-99, the supreme court held that section 5-8-4(a) of the Code mandates consecutive sentencing where defendant was convicted of either a Class X or Class 1 felony, and he inflicted severe bodily injury during the commission of that felony. This court has subsequently noted that when determining whether to impose a consecutive sentence in a particular case, the trial court must make certain factual determinations, including, *inter alia*, whether a given offense is a "triggering offense" (*People v. Sergeant*, 326 Ill. App. 3d 974, 990-91 (2001)), *i.e.*, a Class X or Class 1 felony where defendant inflicted severe bodily injury to the victim of that felony during its commission (*People v. Carney*, 327 Ill. App. 3d 998, 1001 (2002)). See *People v. Sample*, 326 Ill. App. 3d 914, 927-30 (2001) (for a discussion of the phrase "during the commission of" as meaning "essentially simultaneously").

¶ 34 Here, the trial court did not make any specific findings at sentencing regarding whether defendant's armed robbery conviction constituted a triggering offense for purposes of consecutive sentencing. Rather, after the death penalty eligibility phase of proceedings, the parties presented arguments in aggravation and mitigation, and the trial court imposed sentence without ever addressing whether defendant had killed Grey during the commission of the armed robbery.

¶ 35 We are also unable to infer from the factual basis for defendant's plea whether his armed robbery conviction constituted the triggering offense for purposes of consecutive sentencing. The factual basis established that defendant had "wanted to get even" with Grey and planned to stab him, which, in defendant's words, could allow the court to reasonably conclude that murder was the "primary objective" and the robbery "merely an afterthought." However, defendant had also long sought \$2,000 from Grey and took money from him at the time of the stabbing, which could indicate that the armed robbery was the ultimate goal. In any event, we believe a factual determination of this matter is appropriately made by the trial court on remand, and therefore reject the State's suggestion to simply reduce defendant's armed robbery sentence to the statutory maximum and order it to run consecutive to his murder conviction. Accordingly, we vacate the sentence imposed on defendant's armed robbery conviction, and remand the cause to the trial court for findings of fact, and resentencing on that conviction in light of *Whitney* and its progeny. *People v. Sterling*, 357 Ill. App. 3d 235, 255 (2005).

¶ 36 Defendant finally contends that his three murder convictions for the death of one person violate the one-act, one-crime rule, and requests that two of his "superfluous" convictions be vacated. Although defendant acknowledges that he forfeited this claim by not raising it on direct appeal or in his post-conviction petition, he claims that his forfeiture should be excused by this court where such forfeiture would not serve the ends of administrative convenience, and where

post-conviction counsel was ineffective for failing to raise the issue in a supplemental post-conviction petition.

¶ 37 However, as the State correctly observes, a post-conviction defendant may not raise an issue for the first time on appeal (*People v. Petrenko*, 237 Ill. 2d 490, 502 (2010), and, here, the one-act, one-crime claim raised by defendant was not included in his post-conviction petition or addressed by the circuit court. Under similar circumstances, the supreme court has expressly cautioned that this court is not free to excuse an appellate waiver caused by the failure of defendant to include issues in his post-conviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). We therefore adhere to that advisement now, and decline to address the one-act, one-crime claim raised by defendant for the first time in this appeal.

¶ 38 In doing so, we agree with the State that defendant's allegation of ineffective assistance of post-conviction counsel does not provide a basis for excusing his forfeiture. Notwithstanding defendant's failure to cite any authority permitting this court to overlook his forfeiture on that basis, we observe that Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) only requires post-conviction counsel to make those amendments to defendant's *pro se* petition "that are necessary for an adequate presentation of petitioner's contentions." (Emphasis added). Here, defendant never raised a one-act, one-crime issue in his post-conviction petition, and thus counsel cannot be found ineffective for failing to *sua sponte* present that contention in a supplemental petition. Ill. S. Ct. R. 651(c). We further find that *People v. Farmer*, 165 Ill. 2d 194 (1995) is distinguishable from the case at bar because that case did not arise in the context of post-conviction proceedings.

¶ 39 For the reasons stated, we affirm the dismissal of defendant's *pro se* post-conviction petition by the circuit court of Cook County. However, we vacate the sentence entered on defendant's armed robbery conviction and remand the cause to the circuit court for resentencing on that conviction.

1-10-1505

¶ 40 Affirmed in part and vacated in part; cause remanded.