

2012 IL App (1st) 102288-U

SIXTH DIVISION
March 9, 2012

No. 1-10-2288

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. 06 CR 11845
)	
JAMES TYE,)	The Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Palmer concurred in the judgment.

ORDER

¶ 1 **HELD:** The circuit court's summary dismissal of defendant's *pro se* post-conviction petition is affirmed where defendant's allegation that his appellate counsel rendered ineffective assistance when he did not challenge the trial court's compliance with Supreme Court Rule 431(b) on direct appeal was frivolous and patently without merit.

¶ 2 Defendant James Tye appeals from an order of the circuit court summarily dismissing his *pro se* post-conviction petition as frivolous and patently without merit. On appeal, defendant

contends that the circuit court erred in dismissing his petition because it stated a claim with an arguable basis in law and fact that his appellate counsel was ineffective for failing to challenge on direct appeal the trial court's failure to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*. We affirm.

¶ 3 Following a September 2007 jury trial, defendant was convicted of possession with intent to deliver 125.9 grams of cocaine and unlawful use of a weapon by a felon. The trial court sentenced defendant to concurrent prison terms of 20 years and 6 years, respectively.

¶ 4 On direct appeal, defendant argued that the State made improper remarks during its closing argument, and that it improperly used his prior convictions as substantive evidence rather than for impeachment. Defendant also challenged several fines and fees, and argued that his mittimus reflected the incorrect narcotics offense of which he was convicted. This court affirmed defendant's convictions and sentences, modified the fines and fees order, and corrected the offense on his mittimus. *People v. Tye*, No. 1-07-3310 (2009) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Tye*, 236 Ill. 2d 541 (2010).

¶ 5 On April 20, 2010, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2010). Defendant alleged, *inter alia*, that his appellate counsel rendered ineffective assistance on direct appeal when he failed to raise a claim that the trial court failed to comply with Supreme Court Rule 431(b). Defendant argued that the trial court failed to admonish the first panel of potential jurors, from which 11 jurors were chosen, that defendant was not required to present any evidence on his own behalf. He further argued that the trial court failed to ask any of the jurors if they understood and

accepted the four principles stated in Rule 431(b). Defendant asserted that the trial court's violation of Rule 431(b) denied him his right to an impartial jury and a fair trial. Defendant acknowledged that the issue challenging compliance with Rule 431(b) had not been properly preserved for direct appeal because trial counsel did not object during *voir dire*, nor did she raise the issue in the posttrial motion. He argued, however, that the issue could have been reviewed under the plain error doctrine, and that the waiver rule should not be applied where it was the trial court that erred. The circuit court found that defendant's allegations were frivolous and patently without merit, and summarily dismissed his *pro se* post-conviction petition.

¶ 6 On appeal, defendant contends that the circuit court erred in dismissing his petition because it stated a claim with an arguable basis in law and fact that his appellate counsel was ineffective for failing to challenge on direct appeal the trial court's failure to comply with Supreme Court Rule 431(b) during *voir dire*. Defendant maintains that appellate counsel should have raised the issue as plain error. Defendant concedes that our supreme court determined that a claim alleging a violation of Rule 431(b) could not be reviewed under the second prong of the plain error doctrine, which allows challenges to the fairness of the trial and integrity of the judicial process, unless defendant presented evidence that the jury was actually biased. *People v. Thompson*, 238 Ill. 2d 598, 613-15 (2010). He notes, however, that the holding in *Thompson* was rendered four months after the circuit court summarily dismissed his *pro se* petition. He further notes that, at the time his petition was dismissed, several appellate cases had held that such violations constituted plain error. Accordingly, defendant argues that, at the time of dismissal, the supreme court had not yet foreclosed relief for his claim, and his allegation had an arguable basis in fact and law. Consequently, defendant asserts that the circuit court should have

advanced his petition for second-stage post-conviction proceedings.

¶ 7 The State argues that summary dismissal was proper because defendant's claim has no arguable basis in law or fact. The State argues that an extensive body of case law supported the circuit court's dismissal of the petition at that time, and that the subsequent ruling in *Thompson* confirmed that there was no legal or factual basis to support his claim. The State asserts that defendant is requesting remand to raise a claim that has been resolved against him, and that such action would be a waste of judicial resources.

¶ 8 In his reply brief, defendant maintains his argument that his claim had merit at the time of dismissal. In addition, he argues for the first time that his claim can be reviewed under the first prong of the plain error doctrine because the evidence in his case was closely balanced.

¶ 9 We review the circuit court's summary dismissal of defendant's *pro se* post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *Coleman*, 183 Ill. 2d at 378-79. A *pro se* post-conviction petition need only state the gist of a constitutional claim to survive summary dismissal. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.*

¶ 10 Under plenary review, this court is required to make our own independent assessment of the allegations raised in the post-conviction petition, and we are "free to substitute [our] judgment for that of the circuit court in order to formulate the legally correct answer." *Coleman*, 183 Ill. 2d at 388. This court may affirm the circuit court's dismissal of a post-conviction petition on any basis shown in the record. *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008).

¶ 11 Claims of ineffective assistance of appellate counsel are reviewed under the two-prong test announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Harris*, 206 Ill. 2d 293, 326 (2002). To succeed, defendant must show that counsel's failure to raise the issue on direct appeal was objectively unreasonable, and that he was prejudiced by this decision. *Id.* In other words, defendant must establish that, but for counsel's error, there is a reasonable probability that his appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Appellate counsel is not required to raise every conceivable issue on direct appeal, and if counsel concludes that an issue is without merit, then counsel's decision to refrain from raising it is not incompetence. *People v. Barrow*, 195 Ill. 2d 506, 522-23 (2001). Generally, counsel's decision not to raise an issue on appeal is given substantial deference (*Harris*, 206 Ill. 2d at 326), and unless the underlying issue is meritorious, defendant was not prejudiced by counsel's failure to raise it on direct appeal (*Barrow*, 195 Ill. 2d at 523).

¶ 12 In this case, under our *de novo* review, we find that defendant's allegation that his appellate counsel was ineffective for failing to challenge the trial court's failure to comply with Supreme Court Rule 431(b) has no arguable basis in law. In his *pro se* post-conviction petition, defendant asserted that the trial court's violation of Rule 431(b) denied him his right to an

impartial jury and a fair trial. On that basis, he alleged that his claim could have been reviewed on direct appeal under the second prong of the plain error doctrine. However, before this court, defendant concedes that our supreme court has foreclosed relief for defendants who challenge a trial court's violation of Rule 431(b) under the second prong of the plain error doctrine without presenting evidence that the violation resulted in a biased jury. *Thompson*, 238 Ill. 2d at 613-15. Here, as in *Thompson*, defendant presented no evidence of jury bias. Accordingly, defendant cannot claim relief under the plain error doctrine. It therefore follows that, because there is no merit to defendant's claim, he was not prejudiced by counsel's failure to raise it on direct appeal, and thus, appellate counsel did not render ineffective assistance.

¶ 13 We reject defendant's argument that the circuit court erred in dismissing his petition because the ruling in *Thompson* was issued four months after his petition was dismissed. Under our *de novo* review, this court independently assesses the allegations in defendant's post-conviction petition and we substitute our judgment for that of the circuit court to render a legally correct disposition. *Coleman*, 183 Ill. 2d at 388. It is well established that supreme court holdings are binding on this court, and therefore, we are required to apply the *Thompson* ruling to this case. *People v. Artis*, 232 Ill. 2d 156, 164 (2009) (the appellate court lacks authority to disregard supreme court holdings). We evaluate defendant's allegations under the state of the law at the time of our review, not as of the date of the circuit court's review, as suggested by defendant.

¶ 14 In addition, we decline to consider defendant's argument that his claim can be reviewed under the first prong of the plain error doctrine because the evidence in his case was closely balanced. Defendant raised this argument for the first time in his reply brief to this court. It has

long been established that arguments raised for the first time in a reply brief on appeal are waived. Supreme Court Rule 341(j) (eff. July 1, 2008); *People v. Anderson*, 375 Ill. App. 3d 121, 135 (2007). Accordingly, we conclude that the circuit court's summary dismissal of defendant's *pro se* post-conviction petition was proper.

¶ 15 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition.

¶ 16 Affirmed.