

No. 1-11-0301

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 20768
)	
JONATHAN HERNANDEZ,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant cannot raise the issue of his sex offender registration for the first time on appeal from the summary dismissal of his post-conviction petition.

¶ 2 Defendant Jonathon Hernandez appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He raises no error regarding the dismissal and contends for the first time on appeal that he should not be required to register under the Sex Offender Registration Act (SORA) (730 ILCS 150/1 *et seq.* (West 2006)) because the trial court made no finding that the underlying offenses were

sexually motivated, as required by statute (730 ILCS 150/2(B)(1.6) (West 2006)). He thus maintains that the case must be remanded for such a determination.

¶ 3 Following a bench trial, defendant was found guilty of first degree murder, attempted first degree murder, and two counts of aggravated arson, on evidence showing that he and others set afire a parked vehicle in which the two 17-year-old victims were sleeping. On October 23, 2007, the trial court sentenced defendant to consecutive, respective terms of 75, 30, and 15 years' imprisonment. On direct appeal, defendant solely challenged the propriety of the multiple arson convictions. This court agreed and vacated defendant's conviction for one of the aggravated arson counts and affirmed the judgment of the trial court in all other respects. *People v. Hernandez*, No. 1-08-0014 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 On September 15, 2010, defendant filed the instant post-conviction petition, raising claims not at issue in the instant appeal. The circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 5 In this appeal from that ruling, defendant has abandoned the arguments raised in his post-conviction petition and contends for the first time that he should not be required to register under SORA (730 ILCS 150/1 *et seq.* (West 2006)) where there was no mention at the sentencing hearing of any such requirement and no finding that the underlying offenses were sexually motivated, but the Department of Corrections' web site indicates that "Sex Offender Registry [is] Required" of him. Defendant argues that absent an indication that the offenses were sexually motivated, he should be required to register under the Violent Offender Against Youth Registration Act (VOYRA) (730 ILCS 154/1 *et seq.* (West 2006)), and not SORA. Alternatively, he asks this court to remand the cause to the circuit court for a determination regarding whether the nature of his convictions triggered the requirement that he register as a sex offender under SORA.

¶ 6 The State responds, *inter alia*, that defendant cannot raise the registration issue for the first time on appeal from the dismissal of his post-conviction petition, and that he has thus waived the issue for purposes of appeal. Defendant replies that the application of waiver is inappropriate here, where the conduct at issue concerns the actions of the trial court, and where he is challenging the registration portion of his sentence, which he claims, is void.

¶ 7 We initially observe that where the conduct of the trial court is at issue, the forfeiture rule may be excused only in extraordinary circumstances, *e.g.*, when a judge makes inappropriate remarks to a jury, or relies on social commentary, rather than evidence, in sentencing a defendant to death. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009). Since neither of these factors are present here, defendant's reliance on the trial court's conduct to overcome forfeiture is misplaced.

¶ 8 Moreover, our review is delineated by the procedural posture in which this case has come before us, *i.e.*, an appeal from the dismissal of a post-conviction petition (*People v. Morgan*, 212 Ill. 2d 148, 152-53 (2004); see also *People v. Jones*, 213 Ill. 2d 498, 507 n.2 (2004)), where the plain error rule may not be invoked to save procedurally forfeited claims. *People v. Davis*, 156 Ill. 2d 149, 159 (1993); *People v. Owens*, 129 Ill. 2d 303, 317 (1989). Post-conviction proceedings are governed by the provisions of the Act (*People v. Wright*, 149 Ill. 2d 36, 54 (1992)), and the proper interpretation of the Act is a question of law that we review *de novo* (*People v. Harris*, 224 Ill. 2d 115, 123 (2007)).

¶ 9 Section 122-2 of the Act requires defendant to clearly set forth the respects in which his constitutional rights were violated (725 ILCS 5/122-2 (West 2006); *People v. Torres*, 228 Ill. 2d 382, 394 (2008)), and section 122-3 provides that any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived (725 ILCS 5/122-3 (West 2008); *People v. Ligon*, 239 Ill. 2d 94, 103-04 (2010)). The supreme court has interpreted these provisions to require that any issues to be reviewed must be presented in the petition filed in the

circuit court, and that defendant may not raise an issue for the first time on review. *People v. Jones*, 211 Ill. 2d 140, 148 (2004).

¶ 10 The supreme court has also repeatedly reminded the appellate court that it is not free to disregard the clear language of the Act regarding waiver (*People v. Coleman*, 2011 IL App (1st) 091005, ¶ 16 (citing *Davis*, 156 Ill. 2d at 158-60), and that we have no authority to review an issue not raised in defendant's post-conviction petition under the fundamental fairness doctrine (*Coleman*, 2011 IL App (1st) 091005, ¶ 17). Rather, only the supreme court, in the exercise of its supervisory authority, may excuse an appellate waiver caused by the failure of defendant to include an issue in his post-conviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004).

¶ 11 Correspondingly, appellate counsel may not raise a claim on appeal from the first-stage dismissal of a post-conviction petition that is not raised in the petition itself. *Coleman*, 2011 IL App (1st) 091005, ¶ 18. Because the registration issue that defendant seeks to raise on appeal was not included in his post-conviction petition, it may not be considered by this court on appeal. *People v. Cummings*, 375 Ill. App. 3d 513, 517 (2007) (citing *Jones*, 213 Ill. 2d at 505; *Jones*, 211 Ill. 2d at 148).

¶ 12 Defendant nonetheless maintains that the issue may be considered by this court, citing *People v. Black*, 394 Ill. App. 3d 935 (2009), where the registration issue was raised and considered for the first time on direct appeal from the defendant's conviction and sentence. In that case, we observed that even though the issue had not been properly preserved for direct review, "a void sentence can be corrected at any time" and "a sentencing error can affect a defendant's substantial rights and can be reviewed for plain error." *Black*, 394 Ill. App. 3d at 939.

¶ 13 We find defendant's reliance on *Black* misplaced as he is seeking review of a procedurally defaulted claim in the context of a post-conviction proceeding, rather than a direct appeal of a

judgment of conviction. As noted above, in *Davis*, 156 Ill. 2d at 159, the supreme court made it clear that the plain error rule may not be invoked to save procedurally defaulted claims in post-conviction proceedings, and given the rulings of the supreme court interpreting the provisions of the Act and the procedural posture of this case, we may not reach the registration issue which was not included in defendant's post-conviction petition (*Jones*, 213 Ill. 2d at 507-08 & n.2; *People v. Bean*, 137 Ill. 2d 65, 114 (1990)).

¶ 14 Although *People v. Arna*, 168 Ill. 2d 107, 113 (1995), is oft-cited for the general proposition that a sentence unauthorized by statute is void (see, e.g., *Black*, 394 Ill. App. 3d at 939), we observe that "*Arna* should not be construed as allowing collateral attack of any sentencing error a trial court makes in applying provisions of the Unified Code, especially where—as here—the provisions at issue address matters of an administrative nature rather than the deprivation of liberty" (*People v. Davis*, 344 Ill. App. 3d 400, 406). The alleged error by omission does not serve to divest the circuit court of its jurisdiction so as to render its judgment void. *Jones*, 213 Ill. 2d at 509 (citing *Davis*, 156 Ill. 2d at 156). Moreover, the relevant registration statutes do not provide that defendant must register as a sex offender by default when the sentencing judge either fails to decide the sexual motivation issue or withholds that decision (*Black*, 394 Ill. App. 3d at 942-43), and, as the State points out, there is an administrative remedy for transfer from SORA to VOYRA (*People v. Johnson*, 225 Ill. 2d 573, 583-84 (2007)).

¶ 15 For the reasons stated, we conclude that defendant has forfeited the registration issue by failing to raise it in his post-conviction petition (*Jones*, 213 Ill. 2d at 508), and we affirm the judgment of the circuit court of Cook County summarily dismissing his petition.

¶ 16 Affirmed.