

2012 IL App (2d) 110131-U
No. 2-11-0131
Order filed April 11, 2012
Modified upon denial of rehearing May 8, 2012

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Stephenson County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 93-CF-187
)	
ANTHONY W. EHLERS,)	Honorable
)	Stephen C. Pemberton,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: The claims raised on appeal relating to ineffectiveness of trial counsel were forfeited; trial court correctly dismissed claims relating to ineffectiveness of appellate counsel.

¶ 1 This case involves the postconviction petition filed by the defendant, Anthony Ehlers, challenging certain aspects of his 1996 convictions for armed robbery (720 ILCS 5/18-2(a) (West 1992)) and murder (720 ILCS 5/9-1(a) (West 1992)). The petition was dismissed by the trial court at the second stage of postconviction proceedings, and the defendant appeals. We affirm.

¶ 2 On November 11, 1992, Robert Peters, the owner of a gun store in Freeport, was murdered in his store by being shot twice and stabbed in the throat. Guns and ammunition were taken from the shop. Three men were charged with the crime: the defendant, Michael Hoover, and William Keene. The three were tried separately. In Keene's trial, Hoover testified that the defendant was the shooter. The defendant's trial by jury took place in September of 1996. The State presented evidence including testimony from: an eyewitness who identified the defendant as one of the three men she saw walking together toward the gun shop on the morning of the murder; the defendant's former girlfriend, who testified that the defendant went to Freeport with Keene and Hoover; a handwriting expert who testified that the writing of the person registering at a motel in Freeport the night before the murder was consistent with the defendant's handwriting; and James Whipple, who shared a cell with the defendant and testified that the defendant admitted shooting Peters. The defense did not put on any witnesses. The defendant was found guilty and sentenced to death. The trial court later vacated that sentence due in part to harsh criticism of the defendant's trial attorneys' performance at the sentencing, and a sentence of natural life was imposed instead.

¶ 3 The defendant filed a direct appeal that raised only two issues: trial counsel's alleged ineffectiveness in failing to use the tape recordings of some of the conversations between the defendant and Whipple to impeach Whipple and in mitigation at the sentencing; and a challenge to the sentence of natural life based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This court affirmed the conviction and sentence. *People v. Ehlers*, No. 2-99-1182 (2001) (unpublished order under Supreme Court Rule 23).

¶ 4 The defendant filed a *pro se* postconviction petition and then, after counsel had been appointed, an amended postconviction petition. The amended postconviction petition asserted that

the defendant's trial counsel had been ineffective in dozens of ways. In addition, the defendant attacked: the trial court's handling of his case prior to his first court appearance; the appointment of trial counsel who were allegedly prejudiced against the defendant; his trial counsel's refusal to allow him to testify in his own behalf; the trial court's alleged error in forcing him to wear a stun belt during his trial; his trial counsel's acceptance, without his consent, of a natural life sentence; and his conviction, on the basis that he was actually innocent. The State filed a motion to dismiss the postconviction petition. On September 30, 2009, the defendant filed a document titled "Supplemental Petition for Post-Conviction Relief and Response to Plaintiff-Respondent's Motion to Dismiss." In it, the defendant for the first time alleged that his appellate counsel (whom he mistakenly referred to as "post-conviction counsel" in several places) was ineffective because, after this court affirmed the defendant's conviction, his counsel did not file a petition for leave to appeal with the supreme court. The defendant also generally accused his appellate counsel of "potentially forfeiting any issues that could have been raised only on direct appeal." The defendant did not, however, specify which issues he believed should have been raised.

¶ 5 On September 17, 2010, after a hearing, the trial court granted the State's motion and dismissed the petition on the grounds that all of the claims were either forfeited, procedurally barred, or meritless. The trial court's typewritten dismissal order was 13 pages long and addressed each claim. The defendant filed a timely notice of appeal.

¶ 6 On appeal, the defendant raises at most six issues, all of which concern ineffective assistance of counsel. Two of the issues relate to the effectiveness of the defendant's trial counsel, and the remaining four assert that the defendant's counsel on appeal was ineffective for failing to raise

certain arguments in the defendant's direct appeal. We find that all of these issues are either forfeited or meritless, for the following reasons.

¶ 7 The Post-Conviction Hearing Act (725 ILCS 5/art. 122 (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage, the trial court reviews the petition within 90 days of its filing to determine whether it is either frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the trial court determines that the petition is frivolous or patently without merit, it must dismiss the petition. *Id.* If the petition survives the first stage, the defendant is appointed counsel, who must consult with the defendant, examine the record, and amend the petition as necessary to ensure that the defendant's contentions are adequately presented. *People v. Gerow*, 388 Ill. App. 3d 524, 526 (2009). If the State wishes, within 30 days after the order allowing the petition to proceed was docketed, the State may move to dismiss the petition. *Id.* In considering such a motion to dismiss at this second stage, the trial court must take as true "all well-pleaded facts that are not positively rebutted by the trial record." *Id.* (quoting *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)). We review the dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998).

¶ 8 A postconviction proceeding is not a second chance to appeal the defendant's underlying judgment; it is a collateral attack on that judgment that is limited in scope. "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Issues that were raised and decided on direct appeal are *res judicata* and may not be raised again in a postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009).

Issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* Further, an issue that was not raised in the postconviction petition cannot be considered by the appellate court. *Jones*, 213 Ill. 2d at 507.

¶9 Here, the defendant's claims related to the performance of his trial counsel are forfeited. One of those claims is so general, alleging an overall lack of capability and effort by trial counsel that "infected each and every aspect of the petitioner's defense," that it is unclear to us whether it really is intended to be a claim, or if so, what its precise nature is. In this section of his brief, the defendant makes much of the affidavit submitted by Dr. David Randall, whom the trial court appointed as a special investigator and mitigation expert in connection with the State's request that the defendant receive the death penalty. In his affidavit, Dr. Randall detailed the extensive nature of his own investigation into and preparation of mitigation evidence, and excoriated the defendant's trial attorneys as unfamiliar with the relevant issues and evidence and unprepared to participate in a death-penalty sentencing hearing. Dr. Randall concluded that he had "no hesitation in stating that [the defendant's] attorneys were [wholly] and totally ineffective in the sentencing phase." The trial court subsequently vacated the death sentence imposed by the jury, and instead imposed a sentence of natural life. In his appeal, the defendant cites Dr. Randall's affidavit to support his contentions that his counsel's performance *at trial* was also deficient. However, in this portion of his appeal, the defendant never points to any specific acts or omissions by counsel as being deficient. Nor does the defendant include any citations to particular portions of the record that he contends show deficient performance by his trial attorneys. A court will decline to consider an ineffectiveness-of-counsel argument when the defendant has not supported that argument with specific examples and citations to the record and relevant authority. *People v. Sanchez*, 169 Ill. 2d 472, 496 (1996); see also Ill. S.

Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Accordingly, lacking guidance as to exactly which aspects of his trial counsel's performance were deficient, we do not consider the argument raised in this portion of the defendant's brief.

¶ 10 The remaining claim regarding the effectiveness of the defendant's trial counsel involves counsel's failure to call as a witness at trial, or even investigate the possibility of calling, co-defendant Michael Hoover. On March 19, 1995 (over a year before the defendant's trial), Hoover, already in prison as a result of his conviction for his own role in the murder of Peters, wrote the defendant a letter. In it, Hoover stated that he was willing to testify on the defendant's behalf and that the defendant should tell his lawyers to contact Hoover so Hoover could tell them why he "breached [his] agreement with the State by refusing to testify against" the defendant. In the defendant's postconviction affidavit, the defendant stated that, prior to trial, he "attempted to provide a copy of *** Hoover's letter to appointed counsel and request that appointed counsel interview *** Hoover," but his request was met by the response "We know what he's going to say." The defendant also states that his trial counsel never met with Hoover.

¶ 11 This claim of ineffective assistance of trial counsel is forfeited because it could have been raised on direct appeal. All of the pertinent facts were known to the defendant, and he had Hoover's letter in hand. Nevertheless, the claim was not raised on direct appeal. Accordingly, it is forfeited (*Ortiz*, 235 Ill. 2d at 328) and cannot be raised now.

¶ 12 The four remaining issues raised in this appeal charge that the defendant's appellate counsel was ineffective for failing to raise certain issues in the direct appeal. The defendant initially failed to assert *any* claims relating to the effectiveness of appellate counsel in his petition and amended petition for postconviction relief. His "supplemental petition," filed after the State filed its motion

to dismiss, raised only the barest of arguments about appellate counsel's alleged shortcomings. The trial court correctly found that the defendant's argument that appellate counsel was ineffective by failing to file a petition for leave to appeal to the supreme court was not supported by any affidavits, as required. In addition, the defendant's general argument that appellate counsel was ineffective because he should have included more arguments in the direct appeal failed because the defendant did not identify the arguments that should have been included. These findings by the trial court were correct. On appeal, the defendant attempts to remedy some of these failings by now identifying the arguments that he contends appellate counsel should have included in the direct appeal. However, we cannot consider on appeal arguments that were omitted in the postconviction petition. See *Jones*, 213 Ill. 2d at 507 (appellate court not permitted to consider claims of error that were not included in the postconviction petition). As the trial court was correct to dismiss the claims of ineffective assistance of appellate counsel because they were not supported, and the defendant cannot remedy this lack of support for the first time on appeal, his arguments relating to these claims cannot prevail.

¶ 13 For all of the foregoing reasons, we affirm the judgment of the circuit court of Stephenson County.

¶ 14 Affirmed.