

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).

2012 IL App (3d) 110137-U

Order filed November 9, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
)	Rock Island County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-11-0137
v.)	Circuit No. 06-CF-1107
)	
JESSIE L. BREWER,)	Honorable
)	Charles H. Stengel,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court's dismissal of defendant's postconviction petition is affirmed.
(2) The \$200 DNA analysis fee is vacated as defendant's DNA is on file in connection with a prior conviction.

¶ 2 Following a jury trial, defendant, Jessie L. Brewer, was found guilty of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)) and sentenced to 20 years' imprisonment.

Defendant appeals the denial of his postconviction petition, arguing that: (1) he presented the gist of a constitutional claim for ineffective assistance of appellate counsel; and (2) the requirement

that he pay a \$200 deoxyribonucleic acid (DNA) analysis fee should be vacated because he submitted a sample for a previous conviction. We affirm as modified.

¶ 3

FACTS

¶ 4 On June 1, 2006, defendant was arrested and charged with deceptive practices in an unrelated case, No. 06-CF-517. 720 ILCS 5/17-1 (West 2006). On June 5, 2006, defendant made a speedy trial demand. On June 6, 2006, defendant was released on bond. There is no indication that defendant demanded trial once he was released on bond.

¶ 5 On November 22, 2006, while out on bond in case No. 06-CF-517, defendant was arrested and charged with three counts of aggravated battery of a child in the current case, No. 06-CF-1107. 720 ILCS 5/12-4.3(a) (West 2006). Defendant did not post bond in this case, and there is no indication that defendant's bond in case No. 06-CF-517 was ever withdrawn or revoked once defendant was placed in custody in this current case.

¶ 6 On May 22, 2007, defendant pled guilty in case No. 06-CF-517. On June 22, 2007, defendant filed a motion to dismiss the instant case on speedy trial grounds. Defendant alleged that more than 120 days of delay not attributed to defendant had passed since he was taken into custody on November 22, 2006. See 725 ILCS 5/103-5(a) (West 2006). The trial court held a hearing on defendant's motion. The trial court agreed with the State and denied the motion. The court determined that section 103-5(e) of the Code of Criminal Procedure of 1963 (the Code) applied to defendant; therefore, the State had 160 days, instead of 120 days, from the date defendant pled guilty in case No. 06-CF-517, May 22, 2007, in which to try defendant in this case. See 725 ILCS 5/103-5(e) (West 2006).

¶ 7 This cause proceeded to a jury trial on January 14, 2008. The jury found defendant guilty

on one count of aggravated battery of a child, but not guilty on the remaining counts. Defendant filed a posttrial motion alleging that the trial court erred in denying his motion to dismiss for a speedy trial violation. The trial court denied the motion. Defendant was subsequently sentenced to 20 years' imprisonment and ordered to submit a DNA sample and pay a \$200 analysis fee. On direct appeal, defendant argued that his sentence was excessive. This court affirmed defendant's conviction and sentence. *People v. Brewer*, No. 3-08-0352 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 On November 4, 2010, defendant filed a *pro se* postconviction petition, alleging that he was denied his right to a speedy trial pursuant to section 103-5(a) of the Code, because the State failed to bring him to trial within 120 days from the date he was taken into custody. The trial court summarily dismissed defendant's petition as frivolous and patently without merit.

Defendant appeals.

¶ 9

ANALYSIS

¶ 10

I. Ineffective Assistance of Counsel

¶ 11 On appeal, defendant first argues that his postconviction petition should not have been dismissed at the first stage, because he stated the gist of a constitutional claim. Defendant claims that his appellate counsel was ineffective for failing to raise the violation of defendant's statutory right to a speedy trial on direct appeal.¹

¶ 12 The Post-Conviction Hearing Act provides for a three-stage review process in noncapital

¹Defendant does not argue the alleged speedy trial violation raised in his *pro se* postconviction petition, only that his appellate counsel was constitutionally ineffective for failure to raise it.

cases. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit," and based on that finding, either summarily dismiss the petition or docket it for further review. 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). To state the gist of a constitutional claim, the defendant must plead some facts from which a valid claim can be discerned. *People v. Edwards*, 197 Ill. 2d 239 (2001). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 13 Initially, we must address the State's contention that defendant has forfeited his claim of ineffective assistance of counsel for purposes of appeal by failing to raise it in his postconviction petition. In defendant's *pro se* petition, he alleged only that he was denied his right to a speedy trial. On appeal, defendant asserts for the first time a claim of ineffective assistance of appellate counsel for failing to raise the speedy trial issue on direct appeal. Defendant admits that he did not specifically raise a claim of ineffective assistance of counsel in his petition, but argues that in liberally construing his petition, he has alleged sufficient facts to support such a claim.

¶ 14 Issues not raised in a dismissed postconviction petition cannot be raised for the first time on appeal. See 725 ILCS 5/122-3 (West 2010); *People v. Jones*, 213 Ill. 2d 498 (2004). We acknowledge that a defendant at the first stage need only plead sufficient facts from which the trial court could find a valid claim of deprivation of a constitutional right. See *Edwards*, 197 Ill. 2d 239. Here, however, even a liberal reading of defendant's petition reveals no reference to a claim of ineffective assistance of counsel.

¶ 15 Similarly, in *People v. Cole*, 2012 IL App (1st) 102499, the court found that defendant forfeited a claim of ineffective assistance of appellate counsel where he made no reference in his petition to appellate counsel's performance on direct appeal. Although it is arguable that the postconviction petition in that case was prematurely filed, we agree with the court's analysis regarding forfeiture. The court noted the clear language in *Jones*, 213 Ill. 2d 498, that this court, unlike our supreme court, does not have supervisory authority to review claims that have been forfeited by failing to raise them in a postconviction petition. *Cole*, 2012 IL App (1st) 102499. The court then rejected defendant's argument that asserting a trial error in a postconviction petition gives rise to an implicit claim of ineffective assistance of appellate counsel. *Cole*, 2012 IL App (1st) 102499.

¶ 16 Consequently, we find that defendant has forfeited his claim of ineffective assistance of appellate counsel by failing to raise it in his petition; therefore, we affirm the trial court's summary dismissal of the petition. See *Jones*, 213 Ill. 2d 498.

¶ 17 II. DNA Analysis

¶ 18 Defendant next argues that this court should vacate the portion of the trial court's sentencing order requiring him to pay a \$200 DNA analysis fee because he provided a DNA sample following a prior conviction.

¶ 19 Any individual convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, is required to submit to the taking, analysis, and indexing of the offender's DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2008). However, a defendant is only required to submit and pay for a DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 20 Here, the presentence investigation report indicated that defendant had been convicted of a felony since 1998, and defendant submitted documentation indicating that his DNA had been on file since 2006. The State agrees. We therefore vacate the portion of the sentencing order that directed defendant to pay for a second DNA analysis. See *Marshall*, 242 Ill. 2d 285.

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, we vacate the requirement that defendant pay for a DNA analysis, and the judgment of the circuit court of Rock Island County is otherwise affirmed.

¶ 23 Affirmed as modified.