

No. 1-11-2378

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. 07 CR 4556
)	
TERRENCE KENDRICK,)	Honorable
)	Domenica A. Stephenson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

ORDER

- ¶ 1 Held: Summary dismissal of defendant's post-conviction petition affirmed where claim of ineffective assistance of appellate counsel, raised for the first time on appeal, was forfeited.
- ¶ 2 Defendant, Terrence Kendrick, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122 *et seq.* (West 2010)). He contends that this court should remand his petition for second stage proceedings where he set forth a claim of ineffective assistance of appellate counsel which had an arguable basis in law and in fact.

¶ 3 Following a jury trial, defendant was convicted of aggravated criminal sexual assault and sentenced to 45 years' imprisonment. This court affirmed that judgment on direct appeal, over defendant's contention, *inter alia*, that the trial court failed to adequately question prospective jurors pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). *People v. Kendrick*, No. 1-09-0120 (2010) (unpublished order under Supreme Court Rule 23). Defendant acknowledged that he had not properly preserved the issue for appeal, but maintained that the court's omission was reversible under the second prong of the plain error doctrine, *i.e.*, the error was so serious that it affected the integrity of the judicial process.

¶ 4 Defendant filed a petition for leave to appeal to the Illinois Supreme Court which was denied on January 30, 2013. However, the supreme court entered a supervisory order instructing this court to reconsider our decision in light of its decision in *People v. Leach*, 2012 IL 111534. *People v. Kendrick*, No. 111705 (Ill. Jan. 30, 2013) (supervisory order).

¶ 5 In accordance with that directive, we vacated our earlier decision, and on May 7, 2013, again affirmed defendant's convictions. *People v. Kendrick*, 2013 IL App (1st) 090120-B. In doing so, we found, in pertinent part, that the court had violated Rule 431(b), but that the error was not structural, and "absent evidence of a biased jury, a violation of 431(b) is not reversible under the second prong of plain-error review." *Kendrick*, 2013 IL App (1st) 090120-B, ¶ 19, citing *People v. Thompson*, 238 Ill. 2d 598, 611, 615 (2010). We noted that defendant had not argued on appeal that he was tried before a biased jury, and concluded that defendant failed to show reversible error on this issue. *Kendrick*, 2013 IL App (1st) 090120-B, ¶ 19.

¶ 6 On May 2, 2011, defendant filed the *pro se* post-conviction petition at bar. In his petition, defendant alleged that both his trial and appellate counsel provided ineffective assistance by failing to argue that he was not "proven guilty beyond a reasonable doubt." He also alleged that the indictment did not properly apprise him of the offenses with which he was

charged, that his trial counsel was ineffective for failing to challenge the faulty indictment, and that a witness provided false testimony to the grand jury.

¶ 7 On June 16, 2011, the circuit court entered an order summarily dismissing defendant's petition as frivolous and patently without merit. The court found that sufficiency of the evidence was not a proper inquiry for post-conviction review, and that defendant failed to make an arguable claim that the performance of trial or appellate counsel fell below an objective standard of reasonableness.

¶ 8 In this appeal from that ruling, defendant contends that his petition should advance to second stage proceedings because he raised an arguable constitutional claim of ineffective assistance of appellate counsel based on counsel's failure to argue that the court's 431(b) violation constituted plain error under the closely balanced prong of plain error analysis. Because defendant has concentrated his arguments solely on this claim, we initially find that he has abandoned the remaining claims set forth in his post-conviction petition and forfeited them for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 9 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). Proceedings are commenced by the filing of a petition in the circuit court in which the original proceedings took place. *People v. Rivera*, 158 Ill. 2d 364, 368 (2001). Section 122-2 of the Act requires that defendant clearly set forth in the petition the respects in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting those allegations or explain their absence. *People v. Rogers*, 197 Ill. 2d 216, 221 (2001).

¶ 10 Defendant need only set forth the “gist” of a constitutional claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122–2.1(a)(2) (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). A petition is frivolous or patently without merit if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16. We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 11 In this case, defendant contends that he set forth an arguable claim that his right to the effective assistance of counsel was violated because, in challenging the trial court's 431(b) admonitions as plain error, his appellate counsel failed to argue that reversal was required because the evidence was closely balanced. As a preliminary matter, the State contends that defendant did not raise this issue in his post conviction petition, and has thus forfeited it for review. The State points out that in his petition, defendant raised counsel's failure to challenge the sufficiency of the evidence on appeal, not counsel's failure to argue that the court's 431(b) violation was plain error under the closely balanced prong. Since defendant did not include this issue in his petition, the State urges that we find it forfeited.

¶ 12 The supreme court has made it clear that claims not raised in the post-conviction petition may not be raised for the first time on appeal from the circuit court's dismissal of that petition. *People v. Jones*, 213 Ill. 2d 498, 504-05 (2004). In that case, the supreme court observed:

"Stated bluntly, the typical *pro se* litigant will draft an inartful pleading which does not survive scrutiny under the 'frivolity/patently without merit' standard of section 122-2.1, and it is only during the appellate process, when the discerning eyes of an attorney are reviewing the record, that the more complex errors

that a nonattorney cannot glean are discovered. The appellate attorney, not wishing to be remiss in his or her duty, then adds the newly discovered error to the appeal despite the fact that the claim was never considered by the trial court in the course of its ruling. * * * [T]he attorney is zealously guarding the client's rights and is attempting to conserve judicial resources by raising the claim expeditiously at the first available chance. These goals are laudable, but they nonetheless conflict with the nature of appellate review and the strictures of the Act." *Jones*, 213 Ill. 2d at 504 (2004).

The supreme court then explained that "when appellate counsel discover errors not raised by their clients during the summary, first-stage postconviction proceedings, the proper course of action for counsel to take is to file a successive petition in which the newly found claim is properly alleged." *Jones*, 213 Ill. 2d at 509; accord, *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) ("claims not raised in a postconviction petition cannot be argued for the first time on appeal").

¶ 13 Here, defendant alleged in his post-conviction petition that he was denied effective assistance of counsel when his appellate counsel failed to claim that "the State's evidence was insufficient to prove him guilty beyond a reasonable doubt on direct appeal." In this appeal from the denial of his petition, defendant claims that counsel was ineffective for failing to argue that the evidence was closely balanced such that the court's violation of 431(b) was plain error. This claim was not raised in the petition or considered by the circuit court. As such, we conclude that it was not properly preserved for review, and is forfeited. *Pendleton*, 223 Ill. 2d at 474; *Jones*, 213 Ill. 2d at 508.

¶ 14 Defendant disagrees, pointing out that because a *pro se* petitioner often has little legal knowledge or training, the threshold for survival of his claims is low, and we must construe his petition liberally, "allowing borderline cases to proceed." *People v. Hodges*, 234 Ill. 2d 1, 9, 21, quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2nd Cir. 1983). He further alleges that as a *pro se* complainant, he should not be expected to know the "fine legal distinction" between the "closely balanced" standard used in analyzing plain error, and the "beyond a reasonable doubt" standard used in analyzing the sufficiency of the evidence.

¶ 15 We are mindful of the low threshold set for survival at the first stage of post-conviction proceedings; however, we are also mindful of the limits of our authority. In *Jones*, 213 Ill. 2d at 508, the supreme court reminded "our appellate court [that we are] not free, as [our supreme court] is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition."

¶ 16 This is consistent with the supreme court's prior decision in *Jones*, 211 Ill. 2d 140, 148 (2004), citing *People v. Coleman*, 183 Ill. 2d 366, 388 (1998), where the supreme court explained that the question on appeal is "whether the allegations, *in the petition*, liberally construed and taken as true are sufficient to invoke relief under the Act." Thus, any issues to be reviewed must first be presented in the petition filed in the circuit court. *Jones*, 211 Ill. 2d at 148; 725 ILCS 122-1(b) (West 2010). Here, the issue raised on appeal was not included in defendant's petition. We therefore find that the issue has been forfeited for review and warrants no further discussion. *Jones*, 213 Ill. 2d at 508.

¶ 17 For the reasons stated, we affirm the dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 18 Affirmed.

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