

No. 1-11-2451

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 4057
	)	
MICHAEL MAJOR-FLISK,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Howse and Palmer concurred in the judgment.

**ORDER**

- ¶ 1 **Held:** Summary dismissal of defendant's post-conviction petition affirmed.
- ¶ 2 Defendant Michael Major-Flisk appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the circuit court ignored the gist of his argument of ineffective assistance of counsel, and improperly and erroneously found that it was waived. He asks this court to reverse the circuit court's order, and remand for second stage proceedings before a different judge.

¶ 3 The record shows that a jury found defendant guilty of one count of aggravated criminal sexual assault (penetration of the victim's anus with his finger), and on February 13, 2008, the trial court sentenced him to six years' imprisonment. At trial, the five-year-old victim testified that defendant made him sit on his hand, but denied the defendant touching him in any other way; however, three other witnesses testified to the victim's statements that defendant had placed his finger "up [his] butt." *People v. Major-Flisk*, 398 Ill. App. 3d 491, 493-98 (2010). This testimony was ruled admissible after a reliability hearing.

¶ 4 This court affirmed the judgment of conviction on direct appeal (*Major-Flisk*, 398 Ill. App. 3d 491), where defendant was represented by counsel other than his trial counsel. He claimed, in relevant part, that the trial court erred in admitting the victim's hearsay statements where the victim did not "testify" at trial and was "unavailable" for cross-examination. *Major-Flisk*, 398 Ill. App. 3d at 499. This court found that defendant waived that argument on appeal because he did not raise it during the trial or in his post-trial motion. *Major-Flisk*, 398 Ill. App. 3d at 500.

¶ 5 Notwithstanding, this court further found that this issue goes beyond waiver because defendant took a position on appeal that was inconsistent with his position at trial where he did not ask the trial court to find the victim legally "unavailable" after he testified on direct examination or raise the issue that the victim did not "testify." *Major-Fliski*, 398 Ill. App. 3d at 501. To the contrary, trial counsel specifically agreed with the State that the victim did testify and was available for cross-examination, presented a motion for directed verdict during which he argued that the affirmative testimony from the victim showed that the alleged criminal acts did not occur, and presented a similar argument during closing when he maintained that the victim testified truthfully that the incident did not occur. *Major-Flisk*, 398 Ill. App. 3d at 501. Thus, we concluded that defendant could not argue on appeal that the victim did not "testify," and that the

State was required to present corroborating evidence of the criminal act which was the subject of the statement. *Major-Flisk*, 398 Ill. App. 3d at 502-03. We also noted that even if we were to consider defendant's contention, it was without merit because the admission of the victim's hearsay statements did not violate defendant's rights under the confrontation clause or *Crawford v. Washington*, 541 U.S. 36 (2004) where the victim was present and answered the questions counsel asked of him. *Major-Flisk*, 398 Ill. App. 3d at 506-07.

¶ 6 On August 29, 2011, defendant, through counsel, filed the instant post-conviction petition alleging, in relevant part, that trial counsel was ineffective for failing to request a reliability hearing as to the victim. Defendant also maintained that counsel should have called and investigated the victim's brother, especially where the jury inquired about his absence, and that counsel's failure to investigate his mental abilities and capacity cannot be viewed as viable trial strategy, and only "demonstrates gross error." Defendant also alleged that he had a freestanding claim of "actual innocence," but then argued that the testimony of the witnesses regarding what the victim told them was admitted solely because trial counsel failed to ask for a reliability hearing as to the victim, and that without their testimony there was no evidence supporting his conviction. He finally claimed that trial counsel's failure to object to the claim by the child advocacy worker that the older brother of the victim was a witness, was a clear violation of the confrontation clause.

¶ 7 The circuit court initially determined that all of defendant's claims could be dismissed on procedural grounds since they could have been raised on direct appeal, and are now barred by waiver. Additionally, the court found that the issues raised were frivolous and patently without merit. In reaching those conclusions, the court observed that defendant's actual innocence claim was not based on any new evidence, but rather is a challenge to the sufficiency of the evidence to support his conviction which is inappropriate in post-conviction proceedings. The court also

determined that defendant's ineffective assistance of trial counsel claim was without merit where the record revealed that the victim's hearsay statements to certain individuals were subjected to a reliability hearing, and that it was unclear why counsel would request a reliability hearing as to the victim where his testimony was used to support his defense. As a result, the circuit court summarily dismissed defendant's petition as without merit.

¶ 8 On appeal, defendant claims that the trial court failed to consider the merits, and ignored the gist, of his argument that his counsel was ineffective for failing to seek a reliability hearing as to the victim, and completely ignored his argument that no strategy supported trial counsel's failure to call the victim's older brother. He maintains that if the reliability hearing was held, the victim would have been barred from testifying, and almost all of the hearsay evidence would be barred as testimonial under the confrontation clause where there was no corroborating physical evidence. Defendant thus requests this court to reverse the dismissal order and remand the cause for second stage proceedings before a different judge.

¶ 9 As an initial matter, we observe that defendant raised no issue in his opening appellate brief regarding the "actual innocence" allegation in his petition, and that the State correctly maintains that he waived this issue for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). In response to the State's waiver argument, defendant argues "actual innocence" in his reply brief. However, issues not raised in the opening brief cannot be argued for the first time in a reply brief, and, accordingly, we find that defendant has forfeited this issue for review. *People v. Burney*, 2011 IL App (4th) 100343, ¶78. Defendant's further claim that it was the responsibility and burden of the State to request the reliability hearing is also forfeited because it was not raised in his opening brief (*Burney*, ¶78) and, additionally, because it was not raised in his post-conviction petition (*People v. Jones*, 213 Ill. 2d 498, 508 (2004)).

¶ 10 As to the remaining issues, we observe that at the first stage of post-conviction proceedings, defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 11 To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that he was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). However, at the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶19.

¶ 12 Defendant maintains, here, that the circuit court erroneously and improperly found that his claim of ineffective assistance of trial counsel was barred by waiver where fundamental fairness required that waiver be relaxed, and that waiver does not preclude ineffective assistance of counsel claims regarding what trial or appellate counsel "ought to have done in representing a criminal defendant." The State responds that the circuit court properly dismissed the petition based on waiver.

¶ 13 A claim of ineffective assistance of counsel is generally waived where it is not raised on direct appeal. *People v. Pearson*, 188 Ill. App. 3d 518, 523 (1989). The rule of waiver will be relaxed where the facts pertaining to defendant's post-conviction claim do not appear on the face

of the trial record (*People v. Taylor*, 237 Ill. 2d 356, 372 (2010)), where fundamental fairness so requires, such as where the counsel who represented defendant at trial represents him on direct appeal (*People v. Wilson*, 307 Ill. App. 3d 140, 146 (1999)), or where the alleged waiver stems from ineffective assistance of appellate counsel (*People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002)).

¶ 14 In this case, defendant was represented on direct appeal by counsel other than trial counsel, and thus, his representation raises no fundamental fairness issue. *People v. Gaines*, 105 Ill. 2d 79, 91 (1985). In addition, defendant did not raise ineffective assistance of appellate counsel in his post-conviction petition, and has thus waived that issue for appeal. *Jones*, 213 Ill. 2d at 508. For the reasons that follow, we find that the remaining factor also provides no basis for relaxing the waiver rule.

¶ 15 Defendant maintains that his trial counsel was ineffective for failing to seek a reliability hearing challenging the victim, and in failing to call the older brother of the victim who allegedly witnessed the incident. He further claims that this court's decision on direct appeal left open to attack in a post-conviction petition the issue of ineffective assistance of trial counsel which was "predicate[d]" on his direct appeal argument that the victim did not "testify" at trial and was "unavailable" for cross-examination, thereby requiring the State to present corroborating evidence. He maintains that a reliability hearing as to the victim would have preserved questions of confrontation and reasonable doubt, and led to "dismissal" of his conviction where the victim's hearsay statements would have been inadmissible as testimonial evidence. The State responds that because defendant could have, but failed to raise his claim of ineffective assistance of counsel on direct appeal, it is barred by waiver.

¶ 16 We agree with the State. The argument raised by defendant is clearly based on facts apparent from the record filed on direct appeal, and thus, defendant could have raised the issue in

that proceeding. *Pearson*, 188 Ill. App. 3d at 523. Defendant appears to acknowledge this reality where he maintains that his ineffective assistance of counsel claim was "predicate[d]" on the argument raised on direct appeal.

¶ 17 Notwithstanding, defendant claims that ineffective assistance of counsel claims are better resolved in post-conviction proceedings than on direct appeal. Although this is so where the disposition of defendant's ineffective assistance of counsel claim is dependent on matters beyond the record filed on direct appeal (*People v. Burns*, 304 Ill. App. 3d 1, 11-12 (1999)), in this case, defendant's allegation that counsel was ineffective for failing to seek a reliability hearing as to the victim was based on matters apparent in the record filed on appeal, and is thus waived (*Pearson*, 188 Ill. App. 3d at 523). Defendant's cursory assertion that his trial counsel was ineffective for failing to investigate his mental capacity, especially where the victim's mother conceded that defendant was "slow," and had the mental capacity of an eight or nine-year-old, also fails because it is based on the record and could have been raised on direct appeal. *Jones*, 213 Ill. 2d at 508.

¶ 18 Defendant's bare allegation that his counsel was ineffective for failing to call the victim's brother is also insufficient to state a cognizable claim of ineffective assistance. Defendant provided no affidavit from the victim's brother attesting to his availability to testify, and what he would have testified to at trial (*People v. Johnson*, 183 Ill. 2d 176, 190 (1998)); and his claim thus fails for lack of supporting documentation or explanation for its absence, as required by the Act (725 ILCS 5/122-2 (West 2010)) (*People v. Delton*, 227 Ill. 2d 247, 253, 257-58 (2008)).

¶ 19 Defendant also takes issue with this court's decision on direct appeal that waiver is only available to the State if it so argued, which it did not, and is not a limitation on this court. This is not the proper forum to contest our appellate decision; the proper remedy was to petition for rehearing or to the supreme court, which, we observe, denied defendant's motion for leave to

1-11-2451

appeal (*People v. Major-Flisk*, leave to appeal denied, No. 109924 (2010)). *Village of Ringwood v. Foster*, 2013 IL App (2d) 111221, ¶32.

¶ 20 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's petition for post-conviction relief.

¶ 21 Affirmed.