

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).

2013 IL App (4th) 110676-U

NO. 4-11-0676

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 27, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
JOHN N. ALLEN,)	No. 07CF1682
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's order dismissing defendant's postconviction petition as frivolous and patently without merit is affirmed. Trial court's notice to Department of Corrections to revoke good conduct credits for filing frivolous postjudgment petition is vacated.

¶ 2 On May 12, 2011, defendant filed a *pro se* postconviction petition. The trial court dismissed it as frivolous and patently without merit on June 23, 2011. Defendant appeals. We affirm but remand with directions to vacate the notice to the Department of Corrections (DOC) regarding the filing of a frivolous pleading.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with two counts of home invasion, a Class X felony, in September 2007 under alternate theories. In addition to knowing entry without authority, count I alleged defendant, while armed with a handgun, struck the victim, and count II alleged he

intentionally caused injury by striking the victim. A jury found defendant not guilty of count I and guilty of count II.

¶ 5 On May 20, 2008, the trial court sentenced defendant to 24 years' imprisonment. Defendant appealed, arguing the prosecutor committed reversible error when he made prejudicial remarks during closing argument. This court affirmed defendant's conviction in an order filed pursuant to Supreme Court Rule 23. *People v. Allen*, No. 4-09-0076 (May 21, 2010) (unpublished order under Supreme Court Rule 23).

¶ 6 In May 2011, defendant filed his *pro se* postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)). His claims included ineffectiveness of both trial and appellate counsel, failure to instruct the grand jury and jury on accountability, improper jury selection for failing to ask potential jurors about prior government employment, failure to prove the defendant guilty beyond a reasonable doubt, and improper denial of the motion to reconsider his sentence.

¶ 7 On June 23, 2011, the trial court entered a very thorough seven-page order, finding even if it liberally construed defendant's petition, defendant's allegations did not support a claim of deprivation of constitutional rights or the gist of a constitutional claim. Accordingly, the court dismissed the petition as frivolous and patently without merit. On that same date, the court sent a letter to the warden of the prison where defendant was housed, informing him of the dismissal of defendant's petition on the basis it was frivolous. The court's letter stated, "I am informing you of this pursuant to 730 ILCS 5/3-6-3(d) with regard to the inmate's good conduct credits."

¶ 8 Defendant filed his notice of appeal on July 29, 2011. This court entered an order

allowing the filing of a late notice of appeal on October 7, 2011, and the office of the State Appellate Defender filed a late notice of appeal on defendant's behalf on October 11, 2011.

¶ 9

II. ANALYSIS

¶ 10 On appeal, defendant argues he was denied effective assistance of counsel at trial and on direct appeal. He also argues the trial court's notice to the warden regarding defendant's frivolous filing should be vacated.

¶ 11 We review a first-stage dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A *pro se* postconviction petition may be summarily dismissed as frivolous or patently without merit unless the allegations in the petition, taken as true and liberally construed, present the "gist" of a constitutional claim. (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001).

¶ 12

A. Ineffective-Assistance-of-Counsel Claims

¶ 13 Ineffective-assistance-of-counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Reversal under *Strickland* requires defendant to prove (1) the conduct of trial counsel fell below an objective standard of reasonableness (*Strickland*, 466 U.S. at 687-88), and (2) the deficient performance prejudiced defendant such that a "reasonable probability" exists the result would have been different but for the deficient performance (*Strickland*, 466 U.S. at 694). If it is easier to dispose of a claim for lack of sufficient prejudice accruing to defendant, that course should be taken. *Strickland*, 466 U.S. at 697.

¶ 14

Claims of ineffective assistance of appellate counsel are judged under the same standards. See *People v. Salazar*, 162 Ill. 2d 513, 521, 643 N.E.2d 698, 703 (1994). To establish

ineffective assistance of appellate counsel, defendant must demonstrate (1) the failure to raise an issue was objectively unreasonable, and (2) but for the failure to raise the issue, the trial court's ruling would have been reversed. *People v. Flores*, 153 Ill. 2d 264, 283, 606 N.E.2d 1078, 1087 (1992).

¶ 15 Defendant argues on appeal he was denied effective assistance of counsel because (a) the victim denied any injury from being slapped, and (b) the prosecutor argued strict liability to the jury where there was no evidence of intent to cause injury. We fail to see how these two arguments even relate to *defense* counsel's purported ineffectiveness. Further, defendant's representation the victim denied injury is belied by the record. The victim testified she was shocked when defendant struck her in the face and it hurt. Another eyewitness also testified about the force of the hit and stated it must have hurt. Defense counsel appropriately argued to the jury the victim's lack of medical treatment as evidence she was not injured. He also effectively cross-examined the victim, and succeeded in getting her to say she was not "injured." The jury found otherwise. This does not mean counsel was ineffective. In fact, the record shows counsel was effective. Moreover, the prosecutor did not argue strict liability to the jury. The evidence was defendant kicked in the door to the victim's apartment and struck her in the face. The jury certainly could infer intent to injure under these circumstances. The court properly instructed the jury they had to find defendant intentionally caused an injury to a person inside the dwelling. Defendant's argument has no merit.

¶ 16 Defendant further argues counsel was ineffective for failing to impeach one of the State's witnesses with a pending forgery charge. Defendant failed to assert this claim in his postconviction petition, and he may not now raise this argument on appeal. See *People v. Jones*,

213 Ill. 2d 498, 508, 821 N.E.2d 1093, 1099 (2004).

¶ 17 Next, defendant contends his sentencing hearing was unfair because the trial court considered hearsay evidence of crimes and other bad acts at sentencing. He does not attempt to link his argument to a claim of ineffectiveness of trial or appellate counsel. Clearly defendant is attempting to raise an issue that could have been raised on direct appeal. "Issues that could have been presented on direct appeal, but were not, are waived." *People v. Harris*, 206 Ill. 2d 1, 13, 794 N.E.2d 314, 323 (2002). Assuming defendant is contending counsel was ineffective for raising this issue on direct appeal, he cannot show but for counsel's failure to raise the issue the trial court's decision would have been reversed. Defendant complains of hearsay testimony of police officers who investigated various incidents. Defendant never denied the accuracy of their testimony. Hearsay is admissible at sentencing. See *People v. LaPointe*, 88 Ill. 2d 482, 495-98, 431 N.E.2d 344, 350-51 (1981); *People v. Varghese*, 391 Ill. App. 3d 866, 873-74, 909 N.E.2d 939, 945-47 (2009). Further, defendant failed to raise this issue in his postconviction petition, and he may not now raise it on appeal. See *Jones*, 213 Ill. 2d at 508, 821 N.E.2d at 1099.

¶ 18 Last, defendant contends the trial court erroneously informed DOC defendant had filed a frivolous lawsuit, so that DOC could revoke his good-conduct credit pursuant to section 3-6-3(d) of the Unified Code of Corrections (730 ILCS 5/3-6-3(d) (West 2010)). Section 3-6-3(d) provides where a lawsuit is filed by a prisoner and a court makes a specific finding that a pleading or other paper filed by the prisoner is frivolous, DOC is authorized to conduct a hearing and revoke up to 180 days of good-conduct credit. "Lawsuit" is defined as, *inter alia*, "a second or subsequent petition for post-conviction relief under Article 122 of the Code of Criminal Procedure of 1963 ***." 730 ILCS 5/3-6-3(d)(2) (West 2010). The State concedes defendant

should not suffer a loss of good-time credit because initial postconviction petitions are exempt from the application of this statute, pursuant to an amendment that became effective June 1, 2008. See Pub. Act 95-585, § 5 (eff. June 1, 2008) (2007 Ill. Laws 7717, 7726). We agree with defendant and accept the State's concession.

¶ 19

III. CONCLUSION

¶ 20 We affirm the trial court's dismissal of defendant's postconviction petition as frivolous and patently without merit. We remand this matter to the trial court to vacate its notice to DOC regarding defendant's good-conduct credit.

¶ 21 Because the State successfully defended a portion of this appeal, we award the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 22 Affirmed as modified, cause remanded with directions.