

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).

2014 IL App (3d) 120214-U

Order filed March 14, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0214
)	Circuit No. 05-CF-510
)	
DAVID BALLER,)	Honorable
)	Amy Bertani-Tomczak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Lytton and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the summary dismissal of defendant's *pro se* postconviction petition. Defendant's petition did not present the gist of a claim that he received ineffective assistance of appellate counsel.

¶ 2 Defendant, David Baller, appeals the trial court's summary dismissal of his first-stage postconviction petition. On appeal, defendant argues that his postconviction petition presented the gist of constitutional claims that he received ineffective assistance of appellate counsel because counsel did not raise on appeal: (1) trial and postplea counsels' ineffectiveness; (2) the

trial court's omission of a mandatory supervised release (MSR) admonition; and (3) the trial court's independent investigation into defendant's postplea claim of ineffective assistance of trial counsel. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged by indictment with one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(8) (West 2004)). At the June 23, 2006, pretrial hearing, defendant appeared with attorney Anderson Ward. Ward stated that he was not ready to set the case for trial because he needed time to arrange a psychiatric evaluation. Ward explained that defendant was charged in separate Will and Cook County cases and "[g]iven the seriousness of these cases, *** should there be convictions on both ***, I believe it would be mandatory life sentencing." The trial court continued the case.

¶ 5 On June 12, 2007, defendant entered an open plea of guilty to aggravated criminal sexual assault. Before accepting the plea, the court advised defendant that he could receive a sentence of 6 to 30 years' imprisonment and the sentence would be consecutive to the term he was currently serving. Defendant acknowledged that he understood the sentencing parameters, and the court accepted his plea.

¶ 6 On August 23, 2007, the case was called for sentencing. Before the sentencing hearing began, the State advised the court that defendant was eligible to receive a 15-year firearm enhancement. According to the State, defendant was not previously admonished of the firearm enhancement and, as a result, defendant was in a position to withdraw his plea. The State also advised the court that a few days before sentencing, this court held that the firearm enhancement statute violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970,

art. I, § 11). *People v. Munoz*, No. 3-06-0050 (2007) (unpublished order under Supreme Court Rule 23). Therefore, defendant was no longer subject to the firearm enhancement. Defendant acknowledged that at the time he pled guilty he was subject to the firearm enhancement, but agreed that it no longer applied. The court asked defendant "[d]id you talk with your attorney about withdrawing your guilty plea or is that what you wish to do, or you wish to proceed to sentencing today?" and defendant responded that he wished to "[c]ontinue on." At the end of the hearing, the trial court sentenced defendant to 30 years' imprisonment.

¶ 7 On September 20, 2007, Ward filed a motion to reconsider sentence. The trial court denied the motion, and defendant appealed. On direct appeal, we remanded the cause to the trial court for the filing of a new postplea motion, a Rule 604(d) certificate, and a *de novo* hearing. *People v. Baller*, No. 3-07-0797 (2008) (unpublished order under Supreme Court Rule 23).

¶ 8 On remand, attorney Chuck Bretz filed an amended motion to withdraw the guilty plea. The motion argued that defendant's guilty plea was not voluntarily entered because Ward told defendant if he took the matter to trial, he could receive a sentence of up to 70 years' imprisonment, whereas if he entered an open plea, the sentencing range was 6 to 30 years' imprisonment. In a footnote, Bretz noted that at the time defendant entered his guilty plea, he was not apprised of the firearm enhancement.

¶ 9 At the hearing on the amended motion, Ward testified that defendant had a Cook County case pending at the same time as the instant case. Ward discussed the sentencing terms with defendant from the beginning of the case until the day defendant pled guilty. Ward was concerned that, at least as a theoretic possibility, the State would attempt to establish sequential attacks on the victim. Ward also advised defendant that a blind plea would result in a lesser

sentence. Ward did not tell defendant that he might be sentenced to 70 years' imprisonment. On cross-examination, Ward agreed that he had not discussed the firearm enhancement with defendant.

¶ 10 At the conclusion of the hearing, the trial court denied defendant's motion. The court noted that "as far as Mr. Ward, I've had him in other cases, and I've watched him during these proceedings, and I thought he was over and above competent."

¶ 11 Defendant appealed the trial court's denial of his amended posttrial motion, and we remanded the cause to the trial court for the determination of whether defendant's deoxyribonucleic acid (DNA) was registered in the Illinois State Police database. *People v. Baller*, No. 3-10-0279 (2011) (unpublished order under Supreme Court Rule 23).

¶ 12 On November 18, 2011, defendant filed a *pro se* postconviction petition. The petition alleged that defendant received ineffective assistance of trial and appellate counsel. Defendant contended that Ward: (1) failed to consult with him prior to trial; (2) did not retain a DNA expert; (3) failed to obtain a psychiatrist; (4) did not interview potential alibi witnesses; (5) told defendant that he could receive a sentence of 70 years' imprisonment; and (6) failed to file a motion to withdraw his guilty plea. Defendant also argued that appellate counsel was ineffective for not briefing "a number of meritorious issues," including the claims defendant previously raised in his petition.

¶ 13 The trial court summarily dismissed defendant's petition, noting that defendant's claims were addressed during the hearing on defendant's motion to withdraw his guilty plea. Defendant appeals.

¶ 14

ANALYSIS

¶ 15 On appeal, defendant argues that the trial court erred in summarily dismissing his postconviction petition. Defendant contends that his petition stated the gist of constitutional claims of ineffective assistance of appellate counsel because counsel did not raise on appeal: (1) trial and postplea counsels' ineffectiveness; (2) the trial court's failure to advise defendant of the MSR period; and (3) the trial court's unconstitutional independent investigation into his postplea ineffective assistance of counsel claim.

¶ 16 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions. *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." 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). A petition is frivolous if it lacks an arguable basis in law or fact. *Hodges*, 234 Ill. 2d 1. Although the threshold for a first-stage *pro se* petition is low, the defendant must still present a "modest amount of detail." *People v. Jones*, 213 Ill. 2d 498, 504 (2004). A claim that is not raised in the petition cannot be argued for the first time on appeal. *Jones*, 213 Ill. 2d 498. Issues decided on direct appeal are subject to *res judicata*, and issues that could have been presented on direct appeal, but were not, are procedurally forfeited. *People v. Taylor*, 237 Ill. 2d 356 (2010). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 17 Initially, we note that defendant's ineffective assistance of trial counsel arguments, as characterized in this appeal, could have been raised on direct appeal, thereby raising the possibility of waiver of these arguments. However, we relax the waiver rule because defendant

argues that the default resulted from ineffective assistance of appellate counsel. See *People v. Williams*, 209 Ill. 2d 227 (2004) (doctrines of *res judicata* and waiver will be relaxed where the waiver stems from the ineffective assistance of appellate counsel).

¶ 18 I. Ineffective Assistance of Trial Counsel

¶ 19 In his postconviction petition, defendant argues that appellate counsel was ineffective for not raising Ward's ineffectiveness on direct appeal. In this appeal, postconviction appellate counsel clarified that defendant received ineffective assistance when: (1) Ward erroneously told the court at a pretrial hearing that defendant was facing a mandatory life sentence and misadvised defendant that the State would attempt to establish sequential attacks on the victim; and (2) Ward failed to advise defendant of the firearm enhancement.

¶ 20 At the first stage of postconviction proceedings, a petition that alleges ineffective assistance of counsel may not be summarily dismissed if it is arguable that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced. *People v. Tate*, 2012 IL 112214. Appellate counsel is not required to raise every conceivable issue on appeal, and is not incompetent for refraining from raising meritless issues. *People v. Wilborn*, 2011 IL App (1st) 092802.

¶ 21 We find that defendant's ineffective assistance of appellate counsel arguments were properly dismissed, as the underlying issues were meritless.

¶ 22 A. Sentence Advice

¶ 23 Defendant has not established that he suffered prejudice from Ward's statement to the trial court that defendant might receive a mandatory life sentence and advice that the State might attempt to establish sequential attacks on the victim. Ward's statement regarding the sentencing

range was advocatory, not advisory, and was ultimately successful in securing a continuance. Moreover, defendant was advised of the correct sentencing range before he pled guilty. Similarly, defendant did not allege that Ward's posttrial testimony, indicating that he told defendant that the State might attempt to establish sequential attacks on the victim, altered the outcome of the proceeding. Ward explained that he was speaking theoretically to defendant. At the time defendant pled guilty, the State could not establish sequential attacks on the victim because the indictment alleged one instance of aggravated sexual assault. However, prior to defendant's plea, the State could have theoretically amended the indictment to include other instances of aggravated criminal sexual assault. Thus, Ward's statement was advisory of the possible outcomes.

¶ 24

B. Firearm Enhancement

¶ 25 Defendant did not specifically allege in his postconviction petition that he suffered prejudice as a result of Ward's failure to advise him of the firearm enhancement. Defendant cannot show that he would not have pled guilty if he had been apprised of the firearm enhancement because the State brought the issue to light before sentencing. At that time, the court informed defendant of the firearm enhancement, and defendant elected not to withdraw his plea. Additionally, defendant was never subject to the firearm enhancement because the State informed the court of our decision in *Munoz*, which held the firearm enhancement unconstitutional.

¶ 26

II. Mandatory Supervised Release Admonition

¶ 27 Defendant argues that postplea and appellate counsel were ineffective for failing to argue that defendant's guilty plea was not entered knowingly because he was not apprised of the MSR

term. This argument is made for the first time on appeal and does not appear in defendant's postconviction petition. As a result, defendant has waived review of this issue. See *Jones*, 213 Ill. 2d 498. Unlike our supreme court, we do not possess supervisory powers that would allow us to reach postconviction claims that were not raised in defendant's initial petition. *Id.* As a result, defendant may only seek review of this issue through a successive postconviction petition. *Id.*

¶ 28

III. Independent Investigation

¶ 29 Defendant argues that appellate counsel was ineffective because he did not challenge on appeal the trial court's purported independent investigation into defendant's posttrial claims of ineffective assistance of counsel. Defendant relies on *People v. Steidl*, 177 Ill. 2d 239 (1997) in support of his claim. In *Steidl*, our supreme court remanded a postconviction petition that alleged the trial court conducted an independent investigation into trial counsel's performance. In support of its remand, the supreme court cited the trial court's comments that:

" [p]etitioner's trial counsel has appeared before [the court] on numerous other occasions involving both criminal and civil cases and has effectively represented clients. In a serious felony case tried before this Court, the Court recalls a defendant being found not guilty by a jury although the evidence against the defendant was substantial. The result was probably attributable to counsel's tactics in presenting the case to the jury.

The court is also aware of a homicide case tried by petitioner's trial counsel to a jury in Vermilion County, Illinois. In that case, the defendant was found not guilty by jury in spite of

eyewitness testimony. A result, again, probably attributable to trial counsel's tactics.' " *Id.* at 265.

¶ 30 In contrast, the trial court stated in this case that it had Ward "in other cases, and [it] watched him during these proceedings, and [the court] thought he was over and above competent." The reference to Ward's appearance in other proceedings was limited and non-specific and did not constitute an independent investigation. As a result, it would have been a meritless issue on appeal.

¶ 31 As each of the issues defendant raises are without merit, appellate counsel was not ineffective for deciding not to raise them on direct appeal. We agree with the trial court that defendant's postconviction allegations were frivolous and without merit, and we affirm its summary dismissal.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 34 Affirmed.