2015 IL App (1st) 132042-U

FOURTH DIVISION
September 10, 2015

No. 1-13-2042

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.	)	Nos. 09 CR 8420
	)	10 CR 0760
GREGORIO RODRIGUEZ,	)	11 CR 5153
	)	
Defendant-Appellant.	)	Honorable
	)	Maura Slattery Boyle,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Defendant failed to argue in his *pro se* postconviction petition that his attorney was ineffective for failing to file posttrial motions in all of his cases and the issue is forfeited on appeal, and the trial court properly dismissed defendant's petition at the first stage. The mittimus is corrected in the 2011 case to reflect the conviction in that case.

¶ 2 Defendant Gregorio Rodriguez appeals the first-stage dismissal of his *pro se* postconviction petition, arguing that the trial court erred in summarily dismissing his petition because he raised the gist of a meritorious claim of ineffective assistance of trial counsel for

failing to file posttrial motions, including notices of appeal and motions to withdraw guilty pleas, in his three cases. Defendant also asserts that the mittimus in his 2011 case should be corrected to properly reflect the offense for which he was convicted, possession of a controlled substance with intent to deliver an amount greater than 100 grams and less than 400 grams.

¶ 3 In April 2009, defendant was charged with delivery of a controlled substance in an amount greater than 15 grams and less than 100 grams under case number 09 CR 8420. Defendant was found guilty following a jury trial.

¶ 4 During the pendency of his 2009 case, defendant failed to appear in court on October 15, 2009, and a bond forfeiture warrant was issued. On November 16, 2009, defendant again failed to appear in court and a judgment was entered on the bond forfeiture warrant.

¶ 5 On March 12, 2011, defendant committed a minor traffic violation. During the traffic stop, defendant was unable to produce a driver's license and was arrested. A subsequent name check revealed the outstanding warrant from the 2009 case. Defendant consented to the search of his home, which revealed approximately 225.4 grams of suspected cocaine. Defendant was then charged with violation of bail bond under case number 10 CR 0760, and for possession of a controlled substance with the intent to deliver under case number 11 CR 5153. Defendant pled guilty on both the 2010 and 2011 cases in May 2012. The trial court sentenced defendant to six years on 2009 case, four years for the 2010 case, and nine years for the 2011 case, to be served consecutively for a total of 19 years in prison.

¶ 6 The 2009 case proceeded to jury trial in February 2012. Prior to trial, the State filed a motion to use evidence of other crimes against defendant, specifically the pending charges of a violation of his bail bond, including his flight in failing to appear in court for over a year, and the

possession of a controlled substance with intent to deliver. The trial court granted the request as to defendant's flight, but denied admission of his other charged offenses.

¶ 7 The following evidence was presented at the trial.

¶ 8 Officer Jose Gonzalez testified that he was assigned to the narcotics unit of the Chicago police department. On April 17, 2009, he was working undercover as part of a team of approximately eight police officers and his role was to try and make a controlled substance purchase. Other officers acted as surveillance and enforcement. Officer Gonzalez was in plain clothes and driving an unmarked vehicle.

¶ 9 Officer Gonzalez arranged to meet with an Hispanic male at around 6:30 p.m. at 48th Street and Hoyne Avenue in Chicago. He later learned this man was Jaime Lopez. He parked his car and was approached by Lopez. They discussed how Officer Gonzalez could buy drugs. Officer Gonzalez stated that he told Lopez he wanted to buy 2.5 ounces of cocaine. Lopez asked if Officer Gonzalez had the money, and the officer said he did. Officer Gonzalez arranged to purchase 2.5 ounces of cocaine for $2,000. Lopez made a phone call and told the officer that "his boy" was coming. About five minutes later, a black truck pulled into the parking lot. Lopez told Officer Gonzalez to follow the truck. Officer Gonzalez identified the driver of the truck as defendant. Lopez entered the passenger seat of the truck. Officer Gonzalez followed the truck to West Side Gyros, located at 754 South Western Avenue. Both vehicles parked in the parking lot.

¶ 10 Officer Gonzalez testified that after he parked, the men asked him for the money for the cocaine, but he said he needed to see the drugs first. He then followed defendant into the restaurant. Lopez remained outside in the parking lot. They walked up to the counter and approached an Hispanic male, who the officer later learned was Manuel Garcia-Soto. Defendant told Garcia-Soto that they need to see the drugs, and Garcia-Soto produced a brown paper bag

from below the counter. Defendant took the paper bag and handed it to Officer Gonzalez. Officer Gonzalez stated that he looked inside the bag and observed three knotted clear bags containing a white powder. Defendant then asked the officer for the money. Officer Gonzalez told him the money was in his vehicle.

¶ 11 Officer Gonzalez and defendant walked outside to the officer's vehicle. Officer Gonzalez opened the trunk of his car to attempt to look for the money, but he testified that opening the trunk was a signal to his team that a narcotics purchase was about to take place. Officer Gonzalez stated that within a minute, enforcement and surveillance officers were on the scene. They placed Officer Gonzalez, defendant and Lopez into custody. He testified that the officers arrested him because they did not want tip off the other offenders that Officer Gonzalez was working in an undercover role. Officer Gonzalez identified the three plastic bags he received from defendant in court.

¶ 12 Officer John Elsner testified that on April 17, 2009, he participated in the undercover narcotics purchase as an enforcement officer. He stated that he parked approximately one and a half blocks from West Side Gyros and maintained contact with the team via radios. Officer Elsner heard over the radio that Officer Gonzalez had made a narcotics purchase and Officer Elsner drove to the West Side Gyros parking lot. He observed Officer Gonzalez and two Hispanic males in the parking lot. He testified that the men were Lopez and defendant. He later saw Garcia-Soto when he was brought out of the restaurant. Officer Elsner pulled Officer Gonzalez aside and Officer Gonzalez identified Lopez and defendant as the offenders. Officer Elsner placed defendant as well as Officer Gonzalez in handcuffs. Officer Elsner performed a protective pat-down of defendant and recovered $500, a cell phone, and a wallet. He also performed a protective pat-down of Lopez and recovered $320, a cell phone, and a wallet.

Officer Elsner stated that he kept these items within his care and control until they were turned over at the police station to be inventoried.

¶ 13 Officer Isaac Shavers testified that he acted as surveillance during the April 17, 2009, narcotics purchase. He communicated with his team via radio. He was in plain clothes. He stated that around 6:45 p.m., he was near 4758 South Hoyne Avenue when he received a radio call that Officer Gonzalez was leaving that location. He followed Officer Gonzalez, remaining about one car behind Officer Gonzalez and maintaining visual surveillance of his vehicle. He observed a black truck and Officer Gonzalez's vehicle pull into the parking lot at West Side Gyros. Officer Shavers parked his vehicle and set up surveillance in front of West Side Gyros. He was seated at a bus bench and was using his radio like a cell phone. He was able to maintain visual surveillance of Officer Gonzalez and defendant inside the restaurant. He observed Officer Gonzalez and defendant exit the restaurant. He stated the Officer Gonzalez was holding a brown paper bag in his hand. Officer Shavers disclosed his observations to the team. He then saw Officer Gonzalez and defendant walk to Officer Gonzalez's vehicle and Officer Gonzalez opened the trunk, which was a signal that a narcotics transaction was about to occur. He relayed this information to his team, but remained in his surveillance point as the enforcement officers arrived at the scene.

¶ 14 Once the enforcement officers arrived at the scene, Officer Shavers left his position and approached. He met with Officer Srisuth. Officer Srisuth had received the brown paper bag from Officer Gonzalez. Officer Shavers looked inside the bag and observed "three bags of suspect cocaine." He remained with Officer Srisuth at the scene and later at the police station when Officer Srisuth placed the three bags into inventory.

¶ 15 Soretta Patton testified that she was employed as a forensic scientist with the Illinois State Police crime lab as an expert in forensic testing and narcotics analysis. She received the three inventoried bags of narcotics in this case. She weighed the bags and the total weight was 67.8 grams. She tested one bag for the presence of a controlled substance. She testified that her opinion within a reasonable degree of scientific certainty was that the contents of the bag tested positive for the presence of cocaine.

¶ 16 The parties stipulated that after posting bond, defendant failed to appear in court on October 15, 2009, and a warrant was issued for this arrest. Defendant was arrested on March 12, 2011, and at the time of his arrest, he gave police two false names. When defendant gave his true name, the police executed the warrant for his arrest on March 13, 2011, and defendant was returned to the trial court's jurisdiction.

¶ 17 After the State rested, defendant moved for a directed finding, which the trial court denied. Defendant rested without presenting additional evidence. Following deliberations, the jury found defendant guilty of delivery of a controlled substance.

¶ 18 Defendant filed a motion for a new trial, arguing that the trial court erred in allowing the admission of evidence regarding defendant's violation of his bail bond, defendant was not proven guilty beyond a reasonable doubt, the prosecutor improperly referred to defendant as being "on the lam," and the trial court erred in denying defendant's objections to hearsay testimony.

¶ 19 On March 13, 2012, the parties appeared before the trial court. Defense counsel stated that defendant asked for a Supreme Court Rule 402 conference "to see if maybe we could resolve the other two cases today." The trial court questioned defendant regarding the Rule 402 conference and defendant indicated that he wanted for the conference to take place. After the

conference, the trial court stated that the minimum was 19 years and offered that sentence to defendant. Defense counsel stated that defendant wanted time to consider the offer.

¶ 20 On May 1, 2012, the trial court conducted a sentencing hearing on the 2009 case. The court denied defendant's motion for a new trial. The court then imposed a sentence of six years for his conviction for delivery of a controlled substance. The court then proceeded to the 2010 and 2011 cases. The court informed defendant of the sentencing range for both cases, including mandatory supervised release and fines and fees. Specifically for the 2011 case, the court stated that the offense of possession of a controlled substance more than 100 grams but less than 400 grams was a "Super X" offense with a minimum sentence of nine years and that probation was "not an option in this case." Defendant indicated that he understood. Defendant stated that he wished to plead guilty in both cases. The trial court admonished defendant that he was waiving certain rights by pleading guilty, including that a felony conviction could affect his status in this country because defendant was not a United States citizen. Defendant stated that he wanted to plead guilty.

¶ 21 The State provided factual bases for both offenses and defendant stipulated to the bases. The trial court accepted the factual bases and defendant's guilty pleas, admonished defendant regarding the rights he was waiving, including the ramifications of his guilty pleas on his status in the United States, and found that defendant was pleading guilty knowingly and voluntarily. The court then imposed a four year sentence for violation of the bail bond in the 2010 case, and a nine year sentence for the possession of a controlled substance with intent to deliver in the 2011 case. Defendant received a total sentence in all three cases of 19 years, to be served consecutively.

¶ 22 On March 7, 2013, defendant filed a *pro se* postconviction petition for all three cases. In his petition, defendant argued that he received ineffective assistance of trial counsel because his attorney misled him to plead guilty. Specifically, defendant asserted that: (1) he was lied to by counsel with an off the record promise of a guilty plea that defendant would receive probation and he would go home, (2) counsel repeatedly pressured and threatened defendant that if he did not plead guilty, then the State would seek the maximum on each count and that the State would seek to have the sentences run consecutively, (3) counsel repeatedly pressured and further persuaded defendant to plead guilty "without offering, seeking or investigating, any other form of defense, that would apply to [defendant's] case concerning his innocense [*sic*] of the charges," and (4) counsel also misled defendant's "live-in-girlfriend" with the promise that if defendant pled guilty, then he would be coming home.

¶ 23 In the petition, defendant argued that he pled guilty "without the simplest comprehension, concerning the matter of law and the true consequences of his plea." Defendant also made the following allegations,

> "Petitioner contends that upon accepting his plea of guilty that the Judge offered bias and prejudicial reasoning, in coming to terms and merits of Petitioner sentencing, The Judge was belligerent and demeaning, exposing her personal 'distaste' for Petitioner. Counsel stood mute and did not offer an objection nor did counsel offer any mitigating circumstances that could of possibly swayed the court, to enter any form of a judgment that she had promise Petitioner. Counsel did not file any post-trial motion on Petitioner behalf. [*Sic*.] "

¶ 24 Defendant further asserted that:

> "In the case at bar, counsel's performance was a sham, Where counsel took advantage of Petitioner lack of knowledge of the law, petitioner is a Latino who can barely speak or understand english, nor could petitioner understand the court appointed interpreter, at which point petitioner informed counsel that he could not understand the interpreter. [*Sic.*]"

¶ 25 Defendant attached affidavits from himself and his girlfriend to his petition as well as a letter from the Attorney Registration and Disciplinary Committee in response to communication he sent about one of his trial attorneys. His affidavit simply restated these allegations of ineffective assistance of counsel. His girlfriend's affidavit was written entirely in Spanish.

¶ 26 In May 2013, the trial court entered a written order dismissing defendant's postconviction petition as frivolous and patently without merit. The court noted that although defendant stated that petition was for all three cases, he only raised claims related to guilty pleas for the 2010 and 2011 cases. The court stated that defendant's allegation that the court was demeaning and showed distaste for him lacked any specificity and was a conclusory allegation. The trial court then considered defendant's claims of ineffective assistance of counsel. The court held that defendant's allegations were conclusory, lacked any evidence, and belied by the record. The court observed that defendant received the minimum sentence in all of the cases, defendant was specifically admonished that the sentences would be consecutive, and defendant was given the opportunity to ask if he did not understand the proceedings.

¶ 27 This appeal followed.

¶ 28 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2012)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 29 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory," such as one that is "completely contradicted by the record," or "a fanciful factual allegation," including "those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

¶ 30 If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2012). At the

dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. At this stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations, as all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385.

¶ 31 On appeal, defendant abandons the arguments he raised in his postconviction petition, and now asserts for the first time that his trial counsel was ineffective for failing to file posttrial motions in his cases. Specifically, defendant contends that his attorney was ineffective for failing to file a notice of appeal in his 2009 case and failing to file motions to withdraw guilty pleas or notices of appeal in the 2010 and 2011 cases.

¶ 32 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that

course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 33 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be dismissed if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 34 In his postconviction petition, defendant makes one statement regarding posttrial motions. He simply states, "Counsel did not file any post-trial motion" on his behalf. Defendant does not assert what motions he wanted his attorney to file or that his attorney disregarded his request to file any posttrial motions. He offers no argument in this regard. Defendant's affidavit offers no explanation or mention of the failure to file posttrial motions. Rather, defendant spent the majority of his petition arguing that his trial counsel misled him to plead guilty under the assumption that defendant would receive probation. He now contends that this court should liberally construe this statement as "in essence" a claim of ineffective assistance of counsel for failure to file posttrial motions in all three of his cases.

¶ 35 The supreme court has consistently held that any issue not raised in an original or amended postconviction petition is forfeited and cannot be raised for the first time on appeal. See *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); *People v. Jones*, 213 Ill. 2d 498, 505 (2004); *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993). The supreme court in *Pendleton* held that any claim not raised in a defendant's *pro se* or amended postconviction is forfeited under general principles of procedural default. *Pendleton*, 223 Ill. 2d at 475 (citing *Jones*, 213 Ill. 2d at 505 and *Davis*, 156 Ill. 2d at 158-60. "[A]n issue is not preserved, for purposes of post-

conviction relief, merely by framing it in the context of a constitutional claim." *Davis*, 156 Ill. 2d at 159.

¶ 36 Defendant's single statement that his trial counsel did not file posttrial motions without any further discussion is not sufficient to preserve this issue for review on appeal. This statement did not raise a claim of ineffective assistance of trial counsel for failure to file posttrial motions. Defendant offers no factual background or explanation of why his counsel's decision not to file any motions constituted ineffective assistance. Defendant does not assert that he wanted his attorney to file any motion, let alone mention a specific motion that his counsel should have filed.

¶ 37 Defendant relies on the supreme court's decision in *Edwards* for support for his contention that failure to file posttrial motions can constitute ineffective assistance. However, in that case, the defendant specifically argued in his postconviction petition that he asked his attorney to file a notice of appeal, but the attorney declined to do so. *Edwards*, 195 Ill. 2d at 242. The *Edwards* court observed that under the Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), "a *pro se* defendant, even if he pled guilty, cannot be required to demonstrate how his appeal would have been successful in order to establish that he was prejudiced by his attorney's failure to pursue a requested appeal." (Emphasis omitted.) *Id.* at 253. However, *Edwards* did not suggest that a cognizable claim of ineffective assistance of trial counsel for failure to file relevant posttrial motions can be done in a single statement without any argument or allegations that counsel failed to consult with defendant on this issue.

¶ 38 Defendant made no such allegation in his postconviction petition. In his brief, defendant concedes that he "did not allege that he explicitly instructed defense counsel" to file posttrial motions, but he asserts that a "rational defendant in his position" would want to appeal the 2009

case and would have filed a motion to withdraw his guilty pleas or notices of appeal in the 2010 and 2011 cases. Defendant then proceeds to speculate on what grounds these motions would be based. Defendant has cited no authority holding that what a "rational defendant" in defendant's position would have wanted to do provides a sufficient basis to allege a claim of ineffective assistance of counsel. Defendant's speculative arguments are unpersuasive.

¶ 39 Defendant has offered no relevant case law to support his argument that this court should deviate from the supreme court's clear holding that any issue not raised in an original or amended postconviction petition is forfeited and cannot be raised for the first time on appeal. See *Pendleton*, 223 Ill. 2d at 475; *Jones*, 213 Ill. 2d at 505; *Davis*, 156 Ill. 2d at 158-60. Accordingly, we find that defendant's statement in his postconviction that his attorney did not file posttrial motions without any detail or argument is insufficient to preserve this claim for review on appeal and is forfeited. Since defendant has not raised any other claims from his postconviction petition on appeal, we hold that the trial court did not err in dismissing his postconviction petition at the first stage of postconviction review.

¶ 40 Defendant also asks this court to order the mittimus to be corrected in the 2011 case. The mittimus in that case currently states that defendant was convicted of "MFG/DEL 100<400 GR COCA/ANLG" under section 401(a)(2)(B) of the Illinois Controlled Substances Act. 720 ILCS 570/401(a)(2)(B) (West 2010). Although the statute is correct, the State agrees that the mittimus should be corrected to reflect that defendant was convicted of possession of a controlled substance with intent to deliver.

¶ 41 Under Supreme Court Rule 615(b)(1), this court has the authority to order a correction of the mittimus. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999). Accordingly, we order the mittimus to be corrected to reflect defendant's conviction in case number 11 CR 5153 of possession of a

controlled substance with intent to deliver more than 100 grams or more but less than 400 grams of a substance containing cocaine or an analog thereof. 720 ILCS 570/401(a)(2)(B) (West 2010).

¶ 42 Based on the foregoing reasons, we affirm the trial court's dismissal of defendant's *pro se* postconviction petition and the mittimus is corrected as ordered.

¶ 43 Affirmed; mittimus corrected.