

No. 1-13-3821

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. 09 CR 17525
)	
STEVEN BIBBS,)	Honorable
)	Timothy J. Chambers,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant is estopped from challenging the timeliness of the trial court's summary dismissal of his postconviction petition because defendant invited the error; defendant's postconviction claim alleging ineffective assistance of counsel during plea bargaining was patently without merit where his allegation was positively rebutted by the record.

¶ 2 During a jury trial while the jury was deliberating, defendant Steven Bibbs pled guilty to first degree murder in exchange for a minimum sentence of 20 years' imprisonment. Defendant

filed a postconviction petition on July 5, 2013, alleging ineffective assistance of trial counsel, which was summarily dismissed by the trial court on November 13, 2013. Defendant appeals from this ruling, alleging the trial court's dismissal is void because the judgment was entered after the mandatory 90-day statutory period required by the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)(2) (West 2012)), or in the alternative, that his petition presented the gist of a constitutional claim alleging ineffective assistance of trial counsel during the plea bargaining process because counsel exerted undue pressure on defendant to accept a plea.

¶ 3 Defendant was charged with first degree murder for stabbing the victim Deshaun Davy with a knife after the two began an altercation about a cracked cell phone screen on September 8, 2009. The State supported its case with the testimony of three eyewitnesses – Shawn Gavriellov, Luke Mhoon, and Darion Daniels, whose testimony was generally consistent regarding the events leading up to the offense. Defendant, the victim, and three other male friends, Gavriellov, Mhoon, and Daniels, were driving around in a vehicle drinking alcohol and smoking marijuana while running errands. At some point during the day, defendant was left in possession of a cell phone belonging to the driver, Gavriellov, while Gavriellov and the victim went into a gas station to buy cigarettes. When Gavriellov returned to the vehicle, his previously undamaged cell phone screen was cracked. Gavriellov became upset and he and defendant began arguing.

¶ 4 During the argument between Gavriellov and defendant, the victim interrupted defendant while he was speaking to ask for a cigarette. Defendant became upset about the interruption and he and the victim began a physical altercation. Gavriellov then stopped the car and the passengers exited the vehicle. The physical altercation between defendant and the victim continued outside

during which defendant stabbed the victim with a knife that he was carrying. The State also presented the testimony of several police officers, a forensic analyst, and a medical examiner whose collective testimony established the victim died from multiple homicidal stab wounds that defendant admitted to inflicting at the scene of the offense.

¶ 5 Defendant testified at trial that he and the victim began fighting in the vehicle and admitted to wildly swinging the knife at this time but stated he did not realize he had the knife in his hand. Defendant also admitted that he and the victim continued to fight once the vehicle was stopped and defendant charged at the victim and pushed him approximately three times. Defendant confirmed he had the knife in his hand when he pushed the victim, but did not realize that he had stabbed him until he heard the victim tell Daniels, "Darion, he stabbed me." Defendant then attempted to administer CPR to the victim until police officers and paramedics arrived at the scene. Defendant claimed he was intoxicated and had been drinking alcohol and smoking marijuana prior to the incident.

¶ 6 During closing arguments, defense counsel argued that the State had not met its burden of proof because the evidence established defendant did not intend to kill or do great bodily harm to the victim or know that his actions would cause death or a strong probability of death or great bodily harm. He also directed the jury to review the jury instructions with regard to intoxication, but did not elaborate further on this instruction during his closing argument.

¶ 7 During jury deliberations, on November 2, 2011 at approximately 9:40 p.m., the jury sent a note to the trial court explaining they were deadlocked and asking what additional information they could consider. The trial court dismissed the jurors for the night and directed them to

reconvene the next morning. The next day while the jury continued their deliberations, the parties concluded a plea agreement which provided a minimum 20-year sentence in exchange for defendant's guilty plea to first degree murder. Defendant notified the trial court of this agreement and a change in plea hearing was held. The trial court ultimately accepted defendant's plea after obtaining a brief factual basis from the State. The trial court stated:

"THE COURT: Is that your signature on the jury waiver, Mr. Bibbs?

DEFENDANT: Yes.

THE COURT: And as you signed that, you understand *** there's not [going to] be any trial at all? *** Do you understand all that?

DEFENDANT: Yes.

THE COURT: Anyone force you, threaten you, or promise you anything in order to get you to plead; are you doing so of your own free will?

DEFENDANT: Yes.

THE COURT: Let the record reflect defendant understands the nature of the charges against him and the possible penalties, his rights under the law. He's waived those rights freely and voluntarily. A factual basis exists. The plea will be accepted.

There will be a finding of guilty. Judgment on the finding."

The trial court sentenced defendant in accordance with the plea agreement and credited him for 788 days of presentence incarceration time served. Shortly after the trial court entered the sentence, defendant's trial counsel stated:

"MR. WALSH [trial counsel]: Judge, just for the record, I did speak at length with [defendant] along with his family about this decision –

THE COURT: Well over an hour.

[TRIAL COUNSEL]: – and part of it was based on what developments had occurred overnight and this morning and relayed that information that was –

THE COURT: All right. I appreciate that.

[TRIAL COUNSEL]: But he [defendant] did want to say something.

THE COURT: What did you want to say, Mr. Bibbs?

DEFENDANT: Your Honor, I apologize.

DEFENDANT: I want to apologize for everything that happened. I never meant for that to happen. Never meant for that to happen."

¶ 8 Defendant subsequently filed a motion to withdraw his guilty plea, which the trial court denied. Defendant's appointed appellate counsel filed a motion for leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), and defendant did not respond. This court granted counsel's motion and affirmed the trial court's judgment, finding no issues of arguable merit. *People v. Bibbs*, 2013 IL App (1st) 120233-U.

¶ 9 On July 5, 2013, defendant, with the assistance of private counsel, filed a postconviction petition alleging ineffective assistance of trial counsel based on counsel's exertion of undue pressure on defendant to accept a plea "in the final moments of a jury trial *** where the jury had already indicated it was hopelessly deadlocked." Defendant attached three unsworn

"affidavits" to his petition from defendant himself, his mother, and his aunt, alleging trial counsel was in a hurry to accept the plea agreement and that defendant would not have agreed to a plea bargain absent counsel's forceful insistence.

¶ 10 The affidavit from defendant's mother asserted that counsel was in a rush to complete the plea agreement and that it happened very quickly. She also stated that counsel told her she was unable to speak with defendant regarding his decision to accept a plea, but had she been able to speak with him she would have told him not to accept the offer. She also stated she does not believe defendant's guilty plea was voluntarily made. The affidavit from defendant's aunt stated she wanted her sister to speak with defendant about the decision to plead guilty, but was told by counsel this was not possible because the agreement needed to be completed as soon as possible. The affidavit from defendant stated that he did not want to plead guilty and only did so due to extreme pressure from counsel, who also told him that he was unable to speak with his mother regarding the decision. Defendant also argues that his plea of guilty was not freely or voluntarily made.

¶ 11 Defendant's case was called on July 11, 2013, six days after defendant filed his postconviction petition, but was continued to September 18, 2013. On this date, substitute postconviction counsel appeared and requested a continuance until November 13, 2013, because defendant's attorney was unavailable. Counsel stated:

"[POSTCONVICTION COUNSEL]: Judge, I'm William P. Murphy. One of the attorneys in my office is Scott Frankel who's the attorney on this case. And he's *** on

trial in federal court. And ask if your Honor would consider resetting it for November 13.

It's a PC.

THE COURT: Motion Defendant, 11/13/13. We'll see you on that day.

[POSTCONVICTION COUNSEL]: You won't see me, Judge, but somebody will be here."

¶ 12 On November 13, 2013, the trial court summarily dismissed defendant's postconviction petition finding the petition failed to state a claim and was patently without merit because defendant's guilty plea was knowingly and voluntarily made and occurred while the jury was deliberating but had not yet been declared deadlocked. On the written order, the trial court crossed out the original type-written judgment date of September 5, 2013, and replaced it with the handwritten date of November 13, 2013.

¶ 13 Defendant appeals from this ruling alleging the trial court's dismissal was improper because the dismissal order was entered outside the 90-day mandatory statutory period and is therefore void; or in the alternative, that his petition presents the gist of a constitutional claim. He requests that this court remand his cause for a second stage postconviction hearing. The State contends defendant is estopped from arguing timeliness and dismissal of defendant's petition was proper because his claim is meritless and completely rebutted by the record; or alternatively, that

defendant's failure to attach sworn affidavits in accordance with section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2) (West 2012)) warrants summary dismissal¹.

¶ 14 Defendant first argues that the summary dismissal of his postconviction petition is void because the trial court failed to file the order within the mandatory 90-day statutory period.

¶ 15 The trial court's summary dismissal of a defendant's postconviction petition is reviewed *de novo*. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); see also *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 16 At the first stage of the postconviction process, the trial court must review the postconviction petition within 90 days from the date of its filing and independently make a determination whether the "petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court determines the petition is frivolous or patently without merit, the court must dismiss the petition in a written order. *Edwards*, 197 Ill. 2d at 244. The 90-day time requirement is mandatory; if the trial court fails to comply within this time period, its summary dismissal is void and remand for a second stage hearing is required. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006); see *People v. Perez*, 2013 IL App (2d) 110306, ¶ 28, *aff'd* 2014 IL 115927.

¶ 17 However, the invited error doctrine provides that an accused may not request to proceed in one manner then later challenge this course of action on appeal. *People v. Carter*, 208 Ill. 2d 309, 319 (2003). This doctrine applies in postconviction proceedings. See *People v. Kane*, 2013

¹ We note that after the State filed its brief, this issue was addressed by our supreme court in *People v. Allen*, 2015 IL 113135 (May 21, 2015). However, we need not address this issue further because we find the State's other argument dispositive.

IL App (2d) 110594, ¶ 20 (applying invited error doctrine to the defendant's postconviction evidentiary claim on appeal).

¶ 18 Defendant filed his petition on July 5, 2013, giving the trial court until October 3, 2013, to issue its ruling on the matter in order to comply with the statute. The original unedited typewritten order dismissing defendant's postconviction petition was dated September 5, 2013. Defendant's case had been continued until September 18, 2013. Therefore, the record makes clear that the trial court was prepared to issue its ruling well within the required statutory period.

¶ 19 However, on September 18, 2013, defendant's substitute postconviction counsel specifically requested the matter be continued until November 13, 2013, because defendant's counsel was "on trial in federal court." Due to counsel's request, the trial court's dismissal order was not entered until November 13, 2013 – 131 days after defendant filed his postconviction petition. Consequently, defendant prompted the error he now challenges. According to the invited error doctrine, defendant was therefore estopped from challenging the timeliness of the trial court's ruling and cannot use this claim as a basis for relief on appeal. See *Kane*, 2013 IL App (2d) 110594, ¶ 20.

¶ 20 Defendant next contends the trial court erred by summarily dismissing defendant's postconviction petition because it presented the general gist of a constitutional claim by alleging that defendant's constitutional right to effective assistance was violated during plea bargaining based upon counsel's exertion of undue pressure on defendant to accept a plea when the jury was deadlocked.

¶ 21 A postconviction petition is considered frivolous or patently without merit if the allegations in the petition, liberally construed and taken as true, fail to allege the "gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996) (citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988)). In other words, a postconviction petition may be found frivolous or patently without merit, if it contains no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12. A petition based on an "indisputably meritless legal theory – such as one that is completely contradicted by the record – or based on a fanciful factual allegation, lacks an arguable basis in law or fact." *Id.* at 16-17.

¶ 22 Defendant argues that the affidavits attached to his postconviction petition allege he was pressured by trial counsel to accept a plea "where the jury had already indicated it was hopelessly deadlocked" and the plea was not freely or voluntarily made, sufficiently establishing the gist of a constitutional claim to warrant a second stage hearing.

¶ 23 A review of the record indicates defendant pled guilty while the jury was deliberating and had not yet been declared deadlocked. Prior to accepting defendant's plea, the trial court determined there was a factual basis for the finding, properly admonished defendant of his rights and the consequences of pleading guilty, and properly ascertained that defendant's plea was voluntary and not coerced by force, threat, or promises other than the plea agreement itself, in accordance with Illinois Supreme Court Rule 402 (eff. July 1, 2012). Defendant confirmed on the record that it was his signature on the jury waiver, that he understood there would be no trial, and denied any coercion or force. Furthermore, defendant's trial counsel stated that he spoke at length with both defendant and his family regarding defendant's decision to plead guilty, and

when defendant was given the opportunity to address the court immediately following this exchange, he apologized to the victim's family but made no attempt to contest the validity of counsel's statement or bring this issue before the court. Therefore, defendant's postconviction claim was indisputably meritless because the record completely rebuts the allegations in defendant's postconviction petition. See *Hodges*, 234 Ill. 2d at 16-17.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.