

FOURTH DIVISION
January 28, 2016

No. 1-13-3643

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. 04 CR 30616
)	
ROBERT CLARK,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's postconviction petition was proper where defendant forfeited his argument of ineffective assistance of appellate counsel for failure to raise a claim under *People v. Krankel*, 102 Ill. 2d 181 (1984), because he did not raise the claim in his petition.

¶ 2 Following a jury trial, defendant Robert Clark was found guilty of aggravated vehicular hijacking and the first degree felony murder of Leodis Norwood and sentenced to 100 years' incarceration. This court affirmed his conviction on appeal. *People v. Clark*, 2011 IL App (1st) 091942-U. He filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq.* (West 2012)), which the circuit court summarily dismissed. On appeal, defendant contends that his petition set forth an arguably meritorious claim that his appellate counsel was ineffective for failing to raise a claim under *People v. Krankel*, 102 Ill. 2d 181 (1984), on direct appeal. We find that defendant did not raise this claim in his postconviction petition and has therefore forfeited it. Accordingly, we affirm.

¶ 3 The State's evidence established that defendant and Norwood were driving together in Norwood's car on the evening of June 11, 2004. According to two eyewitnesses, the car abruptly stopped and the two men got out while arguing. Norwood reached into the car and pulled out a steering wheel locking device, known as "the Club." When he turned towards defendant, defendant grabbed him by the shirt, took the Club, and struck Norwood in the head multiple times. After Norwood fell to the ground, defendant punched him two to four times and went through his pant pockets. Defendant then returned to the car and sat in the driver's seat. Norwood staggered to his feet and put the upper half of his body through the driver's side window. The two men continued to fight through the window as defendant drove away. Norwood was eventually flung to the ground and lay motionless. Defendant sped away. He later arrived shirtless and agitated at his aunt's house. Once he left, she found Norwood's car parked in her driveway. The next day, defendant called his cousin and said that he had gotten into a fight and needed somewhere to stay until things blew over. The cousin picked defendant up and drove him to Indiana and later Minnesota. Defendant told his cousin that Norwood had tried to hit him with a Club, but defendant took it from him and hit him in the face.

¶ 4 Police officers recovered part of the Club from the fight's location. They recovered the rest of the Club, a T-shirt, and Norwood's car from the home of defendant's aunt. Blood found on

both portions of the Club and the T-shirt, on and within the car, and on the street at the fight's location matched Norwood. The T-shirt also tested positive for defendant's DNA. Norwood's autopsy indicated that his death was caused by multiple injuries from the assault and from being dragged and thrown from a moving vehicle.

¶ 5 Defendant presented expert testimony that Norwood's death resulted not from the fight, but from the fall from the car. He also presented a single witness who stated that Norwood was drunk on June 11, 2004. Defendant did not testify.

¶ 6 The jury found defendant guilty of aggravated vehicular hijacking and first degree murder.

¶ 7 Following the verdict, defendant filed three *pro se* motions claiming ineffective assistance of trial counsel. He argued, *inter alia*, that his attorneys failed to present evidence supporting their opening statement and persuaded him not to testify. The trial court held a *Krangel* hearing and allowed defendant to detail his complaints. One of defendant's attorneys responded that she had advised defendant not to testify, but told him that it was ultimately his choice. She also stated that the decision not to call the potential witnesses was a strategic response to the State's dropping of an intentional murder charge. The court held that it did not need to appoint counsel to represent defendant on his *Krangel* claims and denied all of his motions.

¶ 8 On direct appeal, defendant argued, *inter alia*, that his trial counsel was ineffective for failing to present evidence to support his opening statement. This court affirmed his conviction. *Clark*, 2011 IL App (1st) 091942-U.

¶ 9 Defendant filed a postconviction petition on April 29, 2013, which is the subject of the current appeal. The petition contains numerous claims, including that trial counsel was ineffective for improperly persuading defendant not to testify. He asserted that his trial attorneys repeatedly told him prior to trial that his testimony was central to his defense. Yet during trial, defense counsel informed defendant that they did not "think" defendant should testify, because the State had "holler[ed] and scream[ed]" at the other defense witnesses and that defendant's cross-examination would leave the jury with a bad impression. Defendant then decided not to testify based on his counsel's advice, but that was "against [his] wishes." In the petition, defendant noted that at the post-trial motion hearing, one of his attorneys stated that they had recommended that he not testify. The petition also argues that appellate counsel on direct appeal was ineffective for failing to raise this claim. The trial court summarily dismissed the petition on October 3, 2013. Defendant appeals.

¶ 10 Defendant solely contends that his post-conviction petition established an arguably meritorious claim that appellate counsel was ineffective for failing to raise a claim on direct appeal that the trial court should have appointed counsel to represent him at his *Krankel* hearing. Acknowledging that his petition "did not specifically argue *** that appellate counsel was ineffective for not raising a *Krankel* issue," defendant argues that his claim that trial counsel improperly persuaded him not to testify "bear[s] a relationship" to the *Krankel* claim he now advances on appeal, and thus he has not forfeited that claim. The State responds that defendant's petition did not raise a *Krankel* issue, and therefore defendant cannot raise a new claim on appeal.

¶ 11 The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). Proceedings under the Act are collateral in nature and are not a substitute for an appeal. *People v. Williams*, 186 Ill. 2d 55, 62 (1999). Accordingly, any issues which could have been raised on direct appeal, but were not, are procedurally defaulted. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005).

¶ 12 At the initial stage of proceedings a postconviction petition may be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A post-conviction petition is frivolous or patently without merit only if the allegations in the petition, liberally construed in favor of the petitioner, do not form the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). All factual allegations in the petition must be taken as true, unless they are contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). Petitioners are not required to include legal argument or citation to legal authority. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). However, *pro se* petitioners are not excused "from providing any factual detail whatsoever on the alleged constitutional deprivation." *Id.* We review the first stage dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 13 On appeal from the dismissal of a postconviction petition, the reviewing court must determine "whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act." (Emphasis in original.) *People v. Jones*, 211 Ill. 2d 140, 148 (2004). A petitioner forfeits any claim he or she fails to raise in the original or an amended petition. 725 ILCS 5/122-3 (West 2012). Therefore, we may only review those claims

that were presented in the postconviction petition before the trial court. *Jones*, 211 Ill. 2d at 148; see also *People v. McNeal*, 194 Ill. 2d 135, 148-49 (2000).

¶ 14 Under *Krankel* and its progeny, a trial court must make an inquiry into a defendant's *pro se* post-trial claims of ineffective assistance of trial counsel. *People v. Moore*, 207 Ill. 2d 68, 77-79 (2003). The court need not appoint new counsel to represent the defendant on his claim unless it determines that "the allegations show possible neglect of the case." *Id.*

¶ 15 On appeal, defendant argues that his *Krankel* hearing was procedurally insufficient because the trial court refused to appoint new counsel and that appellate counsel was ineffective for failing to raise this issue on direct appeal. Because we can only address claims present in the postconviction petition, we may only consider this claim if defendant's petition similarly set forth allegations that he was entitled to a new lawyer and that his appellate counsel failed to raise the issue. Defendant's postconviction petition does not do so, and thus, he has forfeited the issue on appeal. In his petition, defendant does not claim that he was entitled to representation at the posttrial hearing. He does not describe the *Krankel* hearing's procedure at all and asserts no complaints about the hearing. He references statements made at the *Krankel* hearing only twice in the petition. In the first reference, he quotes defense counsel's explanation for why she advised defendant not to testify and notes that the statements were made "during defendant's motion hearing." In the second reference, he repeats a portion of defense counsel's statements without referring to the hearing. He does not mention the hearing anywhere else in the petition. While defendant specifically names several claims which he asserts appellate counsel should have raised on direct appeal, he does not identify a *Krankel* issue by name or by description. Even

under a lenient eye, defendant's petition cannot be reasonably construed to raise a claim that appellate counsel was ineffective for failing to raise a *Krankel* issue on direct appeal.

¶ 16 Defendant argues that he has not forfeited his claim because his petition did set forth a claim that trial counsel was ineffective for persuading him to testify and appellate counsel was ineffective for failing to raise that claim. He asserts that because the facts relevant to those claims were brought out at the *Krankel* hearing, those claims bear some relationship to a *Krankel* claim and therefore preserve the issue. We do not believe this tenuous connection between the claims asserted in the petition and the claim now argued on appeal can resurrect the procedurally defaulted claim. Despite a low threshold for *pro se* petitions, a petitioner "must 'clearly set forth' the respects in which [his or her] constitutional rights were violated." *People v. Mars*, 2012 IL App (2d) 110695, ¶ 32, quoting *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Even under a liberal construction, defendant's petition cannot be read to clearly set forth an allegation that he was entitled to representation at his *Krankel* hearing and that his appellate counsel was ineffective for failing to raise the issue on appeal. Therefore defendant has forfeited the issue on appeal, and this court lacks the authority to address his claim. *People v. Ligon*, 392 Ill. App. 3d 988, 995 (2009) *aff'd*, 239 Ill. 2d 94, 940 (2010).

¶ 17 In accordance with *Jones*, we find that defendant has forfeited his sole argument on appeal. As defendant raises no further arguments, we find that the trial court did not err in dismissing his *pro se* postconviction petition. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 18 Affirmed.