

NOTICE
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2016 IL App (4th) 140117-U
NO. 4-14-0117
IN THE APPELLATE COURT
OF ILLINOIS

FILED
March 31, 2016
Carla Bender
4th District Appellate
Court, IL

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
BRIAN D. WADE,)	No. 09CF815
Defendant-Appellant.)	
)	Honorable
)	John W. Belz,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's second-stage dismissal of defendant's postconviction petition because defendant's claims were either forfeited or contrary to existing law.

¶ 2 This appeal arises from the trial court's January 2014 second-stage dismissal of a petition that defendant, Brian D. Wade, filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant alleged that his trial counsel was ineffective for failing to suppress specific evidence at his June 2010 trial, in which a jury found him guilty of (1) two counts of home invasion (720 ILCS 5/12-11(a)(2), (a)(6) (West 2008)), (2) two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2008)), (3) residential burglary (720 ILCS 5/19-3(a) (West 2008)), and (4) theft (720 ILCS 5/16-1(a)(1) (West 2008)).

¶ 3 Defendant appeals, arguing that the trial court erred by dismissing his postconviction petition. For the reasons that follow, we disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 In June 2010, a jury convicted defendant of (1) two counts of home invasion, (2) two counts of aggravated criminal sexual assault, (3) residential burglary, and (4) theft. In September 2010, the trial court sentenced defendant to serve consecutive prison terms of 15 years for each of his two aggravated criminal sexual assault convictions and 10 years for his home invasion conviction. The court also imposed a 364-day prison term for defendant's theft conviction, which it ordered defendant to serve concurrently to his aggregate 40-year sentence. (The court did not enter judgment on defendant's (1) second conviction for home invasion or (2) conviction for residential burglary.)

¶ 6 Defendant appealed, and this court affirmed, rejecting his only claim that his 40-year sentence was excessive. *People v. Wade*, 2011 IL App (4th) 100789-U.

¶ 7 In August 2012, defendant *pro se* filed a postconviction petition, alleging that his trial counsel was ineffective for failing to suppress what defendant characterized as (1) "inconclusive" deoxyribonucleic acid (DNA) evidence and (2) "suggestive identification procedures." In October 2012, the trial court appointed counsel to represent defendant.

¶ 8 In November 2013, the State filed a motion to dismiss defendant's postconviction petition. That same month, defendant's postconviction counsel filed a 27-page motion for leave to withdraw as postconviction counsel. In his filing, postconviction counsel outlined (1) the pre- and posttrial motions defendant's trial counsel filed and (2) the pertinent evidence presented at defendant's June 2010 trial. As to defendant's claim that his trial counsel was ineffective for failing to move to suppress DNA evidence, postconviction counsel concluded, as follows:

"[T]here is nothing in the record to suggest that the DNA evidence at trial was inconclusive or should not have been before the jury.

In other words, there is no reason to believe that a motion to exclude or suppress the DNA evidence would have been granted[.]

*** In this case, the vaginal swab yielded an incomplete DNA sample which [defendant], along with [1] in 11 black individuals, could not be excluded. If the analysis had stopped there, trial counsel undoubtedly should have brought the reliability and weight of this evidence to the attention of the jury. However, testing of the anal swab yielded a clearer DNA profile from which [defendant], along with just one in 100 billion black individuals, could not be excluded.

Further, [defendant's] trial counsel thoroughly cross-examined *** the forensic scientist who analyzed the DNA samples[.]"

¶ 9 As to defendant's claim that the State used suggestive identification procedures, postconviction counsel concluded, "There is nothing in the record to indicate that suggestive identification procedures were utilized in [defendant's] case, or that any procedure was so impermissibly suggestive that it would produce an irreparable misidentification and warrant exclusion of later identifications."

¶ 10 At a January 2014 hearing, the trial court granted postconviction counsel's motion to withdraw. Defendant then argued that the court should not grant the State's motion to dismiss his postconviction petition for the following reasons:

"I feel like the victim was *** coerced as well as I was coerced. If [the court] look[s] into the postconviction [petition] and *** police

report, there was never *** bruising *** and then when the call was placed, it was placed that it was a battery call. The victim never [identified] me. I was never given a photo lineup[.]"

Thereafter, the court took the matter under advisement.

¶ 11 In February 2014, the trial court granted the State's motion to dismiss, finding that defendant had (1) "alleged no specific facts in his petition and has raised no grounds that if established would constitute a substantial denial of defendant's constitutional rights" and (2) forfeited "any claims of error that could have been raised on direct appeal."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant appeals, arguing that the trial court erred by dismissing his postconviction petition. Defendant's challenge proceeds in two distinct parts. Defendant contends that (1) the court erred by allowing the State to "aggravate [his] criminal sexual assault conviction by [merging] his conviction for residential burglary" and (2) he was denied the reasonable assistance of postconviction counsel. However, because both of defendant's contentions are based on his September 2010 sentencing hearing, we first provide the following brief synopsis to place defendant's separate claims in their proper context.

¶ 15 A. Defendant's Sentencing Hearing

¶ 16 As previously noted, in June 2010, a jury convicted defendant of (1) two counts of home invasion, (2) two counts of aggravated criminal sexual assault, (3) residential burglary, and (4) theft. At defendant's September 2010 sentencing hearing, the following exchange occurred:

"THE COURT: The [court] will only enter convictions on one of the home invasion counts. Criminal sexual assault counts

will merge into the aggravated criminal sexual assault counts, and the residential burglary *** and the theft [counts] will stand.

So essentially, what the court is contemplating [is] sentencing [defendant to] one count of home invasion, one count of residential burglary, two counts of aggravated criminal sexual assault, and the misdemeanor theft [charge]."

Thereafter, defendant's counsel informed the trial court that the residential burglary conviction should merge into one of the aggravated criminal sexual assault convictions. Counsel stated further that one of defendant's "ag[gravated] sexual assault [convictions] is enhanced as a result of the residential burglary [conviction]." The State responded that "the residential burglary [conviction] would merge into the aggravated criminal sexual assault. So [defendant] would not be sentenced on that [conviction]." The court then sentenced defendant as previously stated.

¶ 17 B. Defendant's Separate Challenges to the Trial Court's Second-Stage Dismissal of His Postconviction Petition

¶ 18 1. *Defendant's Claim Concerning His Aggravated Criminal Sexual Assault Convictions*

¶ 19 Defendant contends for the first time that the trial court erred by allowing the State to "aggravate [his] criminal sexual assault conviction by [merging] his conviction for residential burglary." Specifically, defendant asserts that his residential burglary conviction should have merged into his home invasion conviction because both of those convictions were based on the same physical act—that is, a single entry into the residence at issue. In support of his contention, defendant claims, as follows:

"Residential burglary as charged in this case consists of one physical act: an unlawful entry into a dwelling. *** Home invasion [as

charged] in this case consists of two physical acts: an unlawful entry into a dwelling and infliction of an injury. *** Thus, the gravamen of both residential burglary and home invasion is an unlawful entry into a home. The additional criminal act of causing an injury inside a home is only an aggravating element which elevates a burglary into a home invasion. As a result, the physical act of entering [a] residence could not be used to both satisfy an element of home invasion and aggravate [the] conviction for criminal sexual assault."

Based on this purported error, defendant urges this court to reduce his aggravated criminal sexual assault convictions to criminal sexual assault and remand his case to the trial court for resentencing. The State responds that defendant has forfeited this issue by not raising it in his postconviction petition. We agree with the State.

¶ 20 Section 122-3 of the Act, provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is [forfeited]." 725 ILCS 5/122-3 (West 2012). See *People v. Coleman*, 183 Ill. 2d 366, 388, 701 N.E.2d 1063, 1075 (1998)) ("The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act." (Emphasis added.)

¶ 21 In his August 2012 postconviction petition, defendant did not raise a claim concerning his aggravated criminal sexual assault convictions. Thus, pursuant to section 122-3 of the Act, defendant has forfeited that claim, and we decline to consider it as a basis to reverse the trial court's judgment.

¶ 22

2. *Reasonable Assistance of Postconviction Counsel*

¶ 23

Defendant also contends that he was denied the reasonable assistance of postconviction counsel. See *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005) ("The Act requires postconviction counsel to provide a 'reasonable level of assistance' to a defendant."). Defendant claims that postconviction counsel should have amended his *pro se* petition to add the allegation that "trial and appellate attorneys were ineffective for not arguing that his criminal sexual assault convictions were improperly aggravated with his [residential] burglary conviction." As previously discussed, defendant asserts that his residential burglary conviction should have merged into his home invasion conviction because both of those convictions were based on the same physical act—that is, a single entry into the residence at issue.

¶ 24

In *People v. Price*, 2011 IL App (4th) 100311, ¶ 30, 958 N.E.2d 341, this court rejected this argument, holding that the offenses of home invasion and residential burglary were not carved out of the same physical act because the home invasion offense required a second overt act—that is, the intentional infliction of an injury to a person within the dwelling—not present in the residential burglary offense, which is complete upon entry into the home. In so holding, we distinguished the supreme court's decision in *People v. McLaurin*, 184 Ill. 2d 58, 106, 703 N.E.2d 11, 34 (1998), which held that the offenses of home invasion and residential burglary had been carved from the same physical act of the defendant's entering the victim's dwelling.

¶ 25

In his brief to this court, defendant acknowledges *Price* but nonetheless urges this court to abandon that holding in favor of *McLaurin*. We decline to do so and adhere to our holding in *Price* that because the offenses of home invasion and residential burglary share only the act of entry into a dwelling, and home invasion requires the additional act of causing injury to a resident, those offenses are not carved out of the same physical act. *Price*, 2011 IL App (4th)

100311, ¶ 30, 958 N.E.2d 341.

¶ 26 We reject defendant's contention that his postconviction counsel's representation was unreasonable because he should have amended his *pro se* petition to add the argument that "trial and appellate attorneys were ineffective for not arguing that his criminal sexual assault convictions were improperly aggravated with his burglary conviction." Simply stated, it is legally impossible for postconviction counsel's performance to be unreasonable for failing to raise a claim that this court has rejected.

¶ 27 In so concluding, we commend postconviction counsel for his extraordinary representation of defendant, which we note also assisted the trial court.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 30 Affirmed.