FILED
May 26, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 140379-U

NO. 4-14-0379

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
TY C. CLINE,	)	No. 09CF149
Defendant-Appellant.	)	
	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding defendant's postconviction petition failed to state the gist of a meritorious constitutional claim.

¶ 2 Following a September 2011 trial, a jury found defendant, Ty C. Cline, guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) for the death of two-year-old Lucas Alberts. In January 2012, the trial court sentenced defendant to 30 years' imprisonment. In March 2014, defendant filed a postconviction petition, which, in April 2014, the court summarily dismissed. Defendant appeals, arguing the trial court's dismissal was in error as his petition set forth the gist of a meritorious constitutional claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2009, the State charged defendant by indictment with first degree

murder (720 ILCS 5/9-1(a)(2) (West 2008)). Specifically, the State alleged, on or about August 22, 2009, defendant, "who had attained the age of 17 years or more and without lawful justification, struck L.A., a minor under 12 years of age, on the head and body, knowing such act created a strong probability of great bodily harm to L.A., a minor, thereby causing the death of L.A., a minor."

¶ 5 In September 2011, the trial court held a jury trial. We have previously set out the evidence adduced at defendant's trial in a Rule 23 order on direct appeal. *People v. Cline*, 2013 IL App (4th) 120036-U, ¶¶ 5-24 (unpublished order under Supreme Court Rule 23). The evidence demonstrated Lucas, while in the care of defendant, suffered from multiple bodily injuries, including a severe brain injury which led to his death. *Cline*, 2013 IL App (4th) 120036-U, ¶¶ 5-17. Defendant maintained Lucas's injuries were caused by Lucas running into rat cages in his apartment. *Cline*, 2013 IL App (4th) 120036-U, ¶ 19. Conversely, the State's evidence demonstrated Lucas suffered moderate to severe nonaccidental blunt force trauma to the head and bruising consistent with fingers being pushing against his cheek. *Cline*, 2013 IL App (4th) 120036-U, ¶¶11-15. Following the presentation of the evidence, the jury found defendant guilty, and in January 2012, the court sentenced him to 30 years' imprisonment.

¶ 6 Defendant filed a direct appeal, asserting the trial court erred in rejecting his proposed jury instructions for the lesser included offense of child endangerment. *Cline*, 2013 IL App (4th) 120036-U, ¶ 27. In support of this position, defendant asserted the instructions were warranted as the jury could have found he endangered Lucas's health by either (1) not taking him to the hospital after he ran into the cages, or (2) striking him. *Cline*, 2013 IL App (4th) 120036-U, ¶¶ 33, 36. As to the first basis in support of his claim, we found the trial court did not abuse

its discretion in rejecting defendant's instructions as the failure to summon medical help was not an element contained in the greater offense of first degree murder but rather conduct separate and distinct from that with which he was charged. *Cline*, 2013 IL App (4th) 120036-U, ¶ 34. As to the second basis in support of his claim, we found defendant forfeited his argument by failing to argue at trial the instruction was warranted on such grounds. *Cline*, 2013 IL App (4th) 120036-U, ¶ 36. Defendant further asserted trial counsel's failure to assert such grounds as a basis in support of his instructions established ineffective assistance. *Cline*, 2013 IL App (4th) 120036-U, ¶¶ 36-37. Given the record presented, we declined defendant's invitation to address his ineffective-assistance-of-counsel claim and indicated such a claim would be better left for defendant to raise in postconviction proceedings. *Cline*, 2013 IL App (4th) 120036-U, ¶ 37.

¶ 7 In March 2014, defendant, through counsel, filed a postconviction petition, alleging, in relevant part, trial counsel provided ineffective assistance by failing to request a jury instruction on the lesser included offense of involuntary manslaughter. In support of this position, defendant asserted the evidence adduced at trial demonstrated he acted recklessly in failing to seek medical attention after Lucas fell and hit his head. Defendant acknowledged the failure to raise a claim that could have been raised on direct appeal generally precluded review of the claim in a postconviction proceeding; however, defendant asserted any forfeiture should be excused as the evidentiary basis in support of his claim was outside the original appellate record.

¶ 8 In April 2014, the trial court summarily dismissed defendant's petition. In its written order, the court found, in relevant part, defendant's petition was patently without merit as his assertion of inaction alleged conduct separate and distinct from that with which he was charged and would not have entitled him to an involuntary manslaughter instruction.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues the trial court's summary dismissal of his postconviction petition was in error as his petition set forth the gist of a meritorious constitutional claim. Specifically, defendant asserts his (1) trial counsel provided ineffective assistance by failing to request a jury instruction on the lesser included offense of involuntary manslaughter; and (2) appellate counsel provided ineffective assistance by failing raise this claim on direct appeal as it was "fully fleshed out within the [c]ommon [l]aw [r]ecord and [r]eport of [p]roceedings from trial," and "[e]verything appellate counsel needed to raise this issue was apparent from the trial record and from Illinois criminal law."

¶ 12 A. The Post-Conviction Hearing Act

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Proceedings under the Act are commenced by filing a petition in the trial court in which the original proceeding took place. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). The Act provides for three stages of proceedings in cases not involving the death penalty. *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1208.

¶ 14 At the first stage of postconviction proceedings, a petition must, among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2014). A defendant need only plead the "gist" of a constitutional claim,

or, in other words, "[S]ection 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208. Although the threshold for survival under this section is low, this does not mean a defendant "is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1208.

¶ 15 The legal standard used by the trial court in evaluating the petition at the first stage of postconviction proceedings is, when taking the allegations as true, whether "the petition is either frivolous or patently without merit." *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). If a court determines a petition "is either frivolous or patently without merit, the court must dismiss the petition in a written order." *Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1209. A petition is either frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212.

¶ 16 As indicated, the trial court dismissed defendant's postconviction petition at the first stage of postconviction proceedings. We review *de novo* a first stage dismissal (*People v. Swamynathan*, 236 Ill. 2d 103, 113, 923 N.E.2d 276, 282 (2010)) and may affirm on any grounds substantiated by the record. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139.

¶ 17 B. Forfeiture

¶ 18 The State contends defendant's claims are forfeited as (1) defendant failed to allege ineffective assistance of appellate counsel in his postconviction petition; and (2) the facts

relating to defendant's claims, as defendant concedes on appeal, appeared on the face of the original appellate record.

¶ 19 In response, defendant asserts we should reject the State's argument as (1) we previously declined to address his claim on direct appeal, and (2) he "implicitly" acknowledged appellate counsel's ineffectiveness in his postconviction petition. Defendant further highlights this court's preference that ineffective-assistance-of counsel claims be brought in postconviction proceedings.

¶ 20 We initially reject defendant's assertion we previously declined to address his claim. On direct appeal, we declined to address defendant's claim regarding trial counsel's failure to present a basis in support of his requested child endangerment instructions. *Cline*, 2013 IL App (4th) 120036-U, ¶ 37. Defendant did not assert, and we did not address, a claim regarding trial counsel's failure to request an involuntary-manslaughter jury instruction.

¶ 21 As defendant acknowledged in his postconviction petition, issues that could have been presented on direct appeal but were not will be deemed forfeited. *People v. Harris*, 206 Ill. 2d 1, 13, 794 N.E.2d 314, 323 (2002). Where forfeiture precludes a defendant from obtaining relief, such a claim is necessarily frivolous or patently without merit. *People v. Alcozer*, 241 Ill. 2d 248, 258-59, 948 N.E.2d 70, 77 (2011). The doctrine of forfeiture may be relaxed where the forfeiture stems from the ineffective assistance of appellate counsel or the facts relating to the claim do not appear on the face of the original appellate record. *People v. Terry*, 2012 IL App (4th) 100205, ¶ 30, 965 N.E.2d 533.

¶ 22 The question raised in an appeal from an order summarily dismissing a postconviction petition is "whether the allegations in the petition, liberally construed and taken

as true, are sufficient to invoke relief under the [Postconviction] Act." *People v. Coleman*, 183 Ill. 2d 366, 388, 701 N.E.2d 1063, 1075 (1998). Any issues to be reviewed must be presented in the petition, and a defendant may not raise an issue for the first time on appeal. *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004); *People v. Pendleton*, 223 Ill. 2d 458, 475, 861 N.E.2d 999, 1009 (2006) (reiterating a claim not raised in a postconviction petition cannot be raised for the first time on appeal); 725 ILCS 5/122-3 (West 2014) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.").

¶ 23 For the first time on appeal, defendant asserts appellate counsel provided ineffective assistance by failing to raise his ineffective-assistance-of-trial-counsel claim on direct appeal. Contrary to defendant's suggestion, defendant's postconviction petition neither directly nor implicitly raised a claim regarding appellate counsel's effectiveness. See, *e.g.*, *People v. Mars*, 2012 IL App (2d) 110695, ¶ 33, 985 N.E.2d 570. Rather, the petition clearly set forth an argument to excuse any forfeiture as the basis of his claim lied outside of the original appellate record, a basis for which this court often (1) declines to address ineffective-assistance-of-counsel claims on direct appeal, and (2) excuses any forfeiture by failing to raise the claim previously. See *People v. Veach*, 2016 IL App (4th) 130888, ¶¶ 74-75 (noting the appellate court in a large percentage of direct appeals raising an ineffective-assistance-of-counsel claim will decline to address the claim given the record presented).

¶ 24 Setting aside defendant's concession the basis of his claim was contained in the original appellate record and any resulting forfeiture, we find the trial court's summary dismissal of defendant's postconviction petition was proper as the claims contained therein were patently without merit.

¶ 25 C. Involuntary-Manslaughter Instruction

¶ 26 Defendant's postconviction petition alleged his trial counsel provided ineffective assistance by failing to request a jury instruction on the lesser included offense of involuntary manslaughter as the evidence adduced at trial supported a finding he acted recklessly in failing to seek medical attention after Lucas fell and hit his head. On appeal, defendant additionally argues trial counsel provided ineffective assistance by failing to request the same instruction as the evidence adduced at trial supported a finding he acted recklessly in striking Lucas. Defendant maintains these claims present the gist of a meritorious constitutional claim.

¶ 27 Claims of ineffective assistance of counsel are governed by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In applying a variation of this test to first-stage dismissals of postconviction petitions, our supreme court has stated "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17, 912 N.E.2d at 1212. To avoid summary dismissal, a defendant must satisfy both the arguably deficient and the arguably prejudiced prongs. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76, 962 N.E.2d 528.

¶ 28 1. *Failure To Seek Medical Attention*

¶ 29 Defendant contends trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of involuntary manslaughter as the evidence supported a finding he acted recklessly in failing to seek medical attention.

¶ 30 "In appropriate cases, a defendant is entitled to have the jury instructed concerning less serious offenses that are included in the charged offense." *People v. Landwer*,

166 Ill. 2d 475, 485-86, 655 N.E.2d 848, 854 (1995). Such a practice provides the jury with an important "third option" because "[i]f a jury believes that a defendant is guilty of something, but uncertain whether the charged offense has been proved, the jury might convict the defendant of the lesser offense rather than convict or acquit the defendant of the greater offense." *People v. Ceja*, 204 Ill. 2d 332, 359, 789 N.E.2d 1228, 1246 (2003). Under the charging-instrument approach, an instruction should be allowed only if (1) the uncharged offense is a lesser included offenses of the crime as charged, and (2) the evidence presented at trial is sufficient to uphold a conviction for the lesser included offense. *People v. Willett*, 2015 IL App (4th) 130702, ¶¶ 62, 65, 37 N.E.3d 469; see also *People v. Kennebrew*, 2013 IL 113998, ¶ 32, 990 N.E.2d 197 (explaining the charging-instrument approach).

¶ 31 Defendant asserts his failure to seek medical services was sufficient to warrant an involuntary-manslaughter instruction. Defendant was charged with first degree murder based on the act of striking Lucas. The factual dispute at trial was whether defendant struck Lucas. While the failure to seek medical attention may have supported a separate offense for which the State could have charged defendant, said conduct was merely incidental to that with which he was actually charged. See *People v. Rivera*, 262 Ill. App. 3d 16, 23, 634 N.E.2d 347, 352 (1994). Further, defendant, rather than the State, supplied the evidence he contends supports the uncharged conduct for which the instruction is sought. See *Rivera*, 262 Ill. App. 3d at 26, 634 N.E.2d at 354. Defendant would not have been entitled to an instruction on these grounds, and thus he cannot demonstrate he was arguably prejudiced by trial counsel's failure to make such an argument. The trial court properly rejected defendant's claim as meritless.

¶ 32 2. *Striking Lucas*

¶ 33 For the first time on appeal, defendant argues his trial counsel provided ineffective assistance by failing to request a jury instruction on the lesser included offense of involuntary manslaughter as the evidence adduced at trial supported a finding he acted recklessly in striking Lucas. Defendant failed to present this basis in support of his claim in his postconviction petition. See *Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004) (a defendant may not raise an issue for the first time on appeal from the summary dismissal of his postconviction petition). Even if we allowed defendant to assert an alternative basis in support of his claim for the first time on appeal, defendant's claim fails to demonstrate he was arguably prejudiced.

¶ 34 As previously indicated, a defendant is entitled to an instruction on a lesser included offense only if the evidence adduced at trial is sufficient to uphold a conviction for that offense. *Willett*, 2015 IL App (4th) 130702, ¶ 65, 37 N.E.3d 469. Defendant contends the State's evidence was sufficient to warrant such an instruction. We disagree. The State's evidence demonstrated Lucas suffered multiple bodily injuries, including moderate to severe non-accidental blunt force trauma to the head and bruising consistent with fingers being pushing against his cheek. *Cline*, 2013 IL App (4th) 120036-U, ¶¶11-15. Given the severity of Lucas's injuries, his defenselessness, and the disparity in size, the State's evidence did not demonstrate defendant could have acted recklessly in striking Lucas. See *People v. DiVincenzo*, 183 Ill. 2d 239, 251, 700 N.E.2d 981, 988 (1998) ("an involuntary manslaughter instruction is generally not warranted where the nature of the killing, shown by either multiple wounds or the victim's defenselessness, shows that defendant did not act recklessly"); *People v. Jones*, 219 Ill. 2d 1, 32, 845 N.E.2d 598, 615 (2006) ("In order to require an instruction of involuntary manslaughter,

defendant must be able to point to some evidence in the record that he acted recklessly."); *People v. Ward*, 101 Ill. 2d 443, 451, 463 N.E.2d 696, 700 (1984). "[A] defendant is not entitled to reduce first degree murder to [involuntary manslaughter] by a hidden mental state known only to him and unsupported by the facts." *People v. Jackson*, 372 Ill. App. 3d 605, 614, 874 N.E.2d 123, 131 (2007). Defendant would not have been entitled to an instruction on these grounds, and thus he cannot demonstrate he was arguably prejudiced by trial counsel's failure to make such an argument.

¶ 35 III. CONCLUSION

¶ 36 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).

¶ 37 Affirmed.