

2017 IL App (1st) 143031-U

No. 1-14-3031

Order filed April 12, 2017

Third Division

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 DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 01 CR 22873 |
| |) | |
| KENNETH DURANT, |) | Honorable |
| |) | Vincent M. Gaughan, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's order granting the State's motion to dismiss defendant's postconviction petition where he failed to make a substantial showing that he was prejudiced by his appellate counsel's failure to challenge the constitutionality of his natural life sentence in his opening brief on direct appeal.

¶ 2 Following a jury trial, defendant Kenneth Durant was found guilty of armed robbery (720 ILCS 5/18-2(a)(2) (West 2000)) and sentenced to natural life imprisonment as the offense was his third Class X felony. After exhausting his direct appeal, defendant filed a *pro se* petition for

relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), which he amended and his appointed counsel subsequently supplemented. He now appeals from an order of the circuit court, which granted the State's motion to dismiss his postconviction petition. Defendant contends that the court erred in dismissing the petition where it made a substantial showing that his appellate counsel on direct appeal was ineffective for failing to challenge the constitutionality of his natural life sentence in his opening brief. We affirm.

¶ 3 The State charged defendant with, and proceeded to trial against him on, two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2000)) and one count of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(4) (West 2000)).

¶ 4 At trial, the evidence showed that, in the early morning hours of September 2, 2001, Kenneth Donner and Annette Donley were in a vehicle driven by Donner. As Donner attempted to make a U-turn, defendant opened the front door and pointed a firearm at his head. Defendant told Donner and Donley to remove their jewelry and get out of the vehicle. They followed defendant's demands, and defendant drove away in the vehicle. Donner and Donley reported what occurred to the police. The following day, a police officer observed defendant in the vehicle and attempted to pull him over. After a police chase, defendant was arrested and later identified by Donner in a lineup as the man who robbed him and Donley. The jury found defendant guilty of all three counts.

¶ 5 Defendant's presentence investigative report (PSI) revealed that he was 32 years old when he committed the instant offenses. The PSI showed that he had multiple prior juvenile adjudications and adult convictions, including an armed robbery committed as a 16-year-old in case number 85 C 6442 for which he was sentenced to 6 years' imprisonment and two additional

armed robberies in case numbers 91 CR 13705 and 91 CR 13706 for which he was sentenced to concurrent terms of 6 years' and 10 years' imprisonment, respectively.

¶ 6 At the sentencing hearing, the State presented certified copies of conviction showing defendant had previously been convicted of armed robbery in case numbers 85 C 6442, 91 CR 13705 and 91 CR 13706, all three following guilty pleas. Based on defendant's criminal background, the State requested that defendant be sentenced to natural life imprisonment pursuant to the Habitual Criminal Act (HCA) (720 ILCS 5/33B-1 (West 2000)). Defense counsel responded that defendant's first armed robbery conviction occurred while he was a juvenile but had been automatically transferred from juvenile court. Counsel noted that the Illinois Supreme Court had held that such convictions may be considered as predicate offenses under the HCA, but wanted to point the fact out "for purposes of the record" and "future action" that might result in defendant's case. Counsel also argued that, while the HCA's language directed that a defendant adjudged a habitual criminal "shall" be sentenced to natural life imprisonment, recent case law, especially federal case law, suggested that the HCA's language should be read as permissive, rather than mandatory.

¶ 7 The trial court stated that it would "not enter judgment" on one of the armed robbery convictions and "merge[d]" the aggravated vehicular hijacking conviction into the remaining armed robbery conviction. The court subsequently sentenced defendant to natural life imprisonment, finding that, "by law," it had to pursuant to the HCA. Defendant unsuccessfully moved the court to reconsider the sentence.

¶ 8 Defendant appealed, contending that: (1) his trial counsel had been ineffective for failing to move for a mistrial when one juror dissented during a jury poll; (2) the trial court erred when

it instructed the jury to continue deliberating without providing additional instructions after the juror dissented; and (3) the State's rebuttal closing argument violated his right to a fair trial.

¶ 9 During the pendency of defendant's direct appeal, he requested leave from this court to file a supplemental brief. In requesting leave, defendant contended that the use of his armed robbery conviction in case number 85 C 6442, an offense he committed as a 16-year-old and to which he had pled guilty, as a predicate offense under the HCA to sentence him to natural life imprisonment was unconstitutional. We denied leave to file a supplemental brief and subsequently affirmed his convictions. *People v. Durant*, No. 1-05-2449 (2008) (unpublished order under Supreme Court Rule 23).

¶ 10 On September 28, 2009, the clerk of the circuit court "received" a *pro se* postconviction petition from defendant, which alleged that his trial counsel had been ineffective in connection with a motion to quash arrest and suppress evidence counsel had filed. The petition was stamped "filed" on October 5, 2009.

¶ 11 On September 29, 2009, the clerk of the circuit court "received" an "amended" *pro se* postconviction petition from defendant, which again alleged ineffective assistance of trial counsel. The amended petition also alleged that his appellate counsel had been ineffective for failing to raise the constitutionality of his sentence in his opening brief on direct appeal. The amended petition did not have a "filed" stamp.

¶ 12 On December 15, 2009, the circuit court dismissed defendant's original petition, finding the claim of ineffective assistance of trial counsel barred by the doctrines of waiver and *res judicata*. The court did not mention the amended petition.

¶ 13 Defendant filed a motion to reconsider the dismissal, arguing that, although the circuit court addressed the original petition, it failed to address his amended petition. On January 29, 2010, the court denied the motion to reconsider without comment.

¶ 14 Defendant appealed, arguing that his amended petition had superseded his original petition and therefore, the circuit court's failure to dispose of the amended petition within 90 days mandated that the matter be remanded back to the circuit court for further consideration. We agreed, finding that the amended petition had apparently not been docketed by the clerk of the circuit court and thus was never considered by the circuit court. *People v. Durant*, No. 1-10-0371 (2011) (unpublished summary order). We accordingly reversed the court's order and remanded for second-stage proceedings. *Id.*

¶ 15 Upon remand, the circuit court appointed defendant postconviction counsel. On December 12, 2013, postconviction counsel filed a supplemental postconviction petition, which raised various claims of ineffective assistance of both trial and direct appellate counsel, but none specifically related to defendant's natural life sentence. The petition did state that it "adopt[ed] and incorporate[d] by reference the issues and arguments raised in *** [defendant's] Supplemental Brief *** as leave to file the Supplemental Brief was denied and the legal issues raised therein [had] not been litigated in this cause." The petition further stated that it "incorporate[d]" defendant's amended petition "by reference" and did "NOT waive any claims or arguments made therein." (Emphasis in original.)

¶ 16 The State filed a motion to dismiss the petition, arguing in relevant part that direct appellate counsel had not been ineffective for failing to challenge defendant's natural life sentence. It asserted that recidivist statutes, such as the HCA, were not unconstitutional merely

because one of the predicate offenses occurred while an offender was a juvenile. Rather, the State posited, the HCA imposed severe punishments for those offenders who, despite being given previous opportunities for rehabilitation, were impervious to rehabilitation. The State concluded that the petition failed to show the appellate court would have vacated defendant's sentence on direct appeal had the constitutionality issue been raised and therefore the petition failed to demonstrate defendant suffered prejudice from appellate counsel's failure to raise the claim in the opening brief.

¶ 17 Defendant responded to the State's motion, but did not address the sentencing issue.

¶ 18 On September 10, 2014, the circuit court granted the State's motion to dismiss defendant's petition, finding that the petition had failed to establish that either defendant's trial counsel or direct appellate counsel had been ineffective. The court did not directly address the sentencing issue. This timely appeal followed.

¶ 19 Defendant contends that his postconviction petition made a substantial showing that his direct appellate counsel was ineffective for failing to raise the constitutionality of his natural life sentence in his opening brief. Specifically, he argues that, as applied to him, his natural life sentence under the HCA violates the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution because he committed the first predicate offense used to mandate his natural life sentence—a 1985 armed robbery—as a 16-year-old. Defendant asserts that, had his appellate counsel raised the constitutionality of his sentence in his opening brief, there is a reasonable probability that the argument would have succeeded.

¶ 20 The Act provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. Defendant's petition was dismissed at the second stage. At this stage, the defendant's postconviction petition and accompanying documentation must make a substantial showing of a violation of his constitutional rights to receive an evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶¶ 33-34. A substantial showing is a measure of the legal sufficiency of the petition's allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *Id.* ¶ 35. We review the circuit court's decision to dismiss a petition without an evidentiary hearing *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 21 To establish that appellate counsel was ineffective, the defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010). Under this standard, he must show that his counsel's performance was deficient and the deficiency prejudiced him. *Id.* Appellate counsel is not required to brief every possible issue. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). "[I]t is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Id.* Consequently, if the underlying issue lacks merit, the defendant cannot show he suffered prejudice from counsel's failure to raise the issue on appeal. *Id.* Both elements of the *Strickland* test must be met, and we may analyze them in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109. We address the prejudice element first.

¶ 22 Under the HCA, a defendant "who has been twice convicted" of any offense containing the same elements as an offense now classified as a Class X felony in Illinois and is thereafter

convicted of another Class X felony within the 20-year prescribed time period “shall be adjudged an habitual criminal.” 720 ILCS 5/33B-1 (West 2000). And “anyone adjudged an habitual criminal shall be sentenced” to natural life imprisonment. 720 ILCS 5/33B-1(e) (West 2000). Defendant does not dispute that, once he was convicted of the instant armed robbery, a Class X felony (see 720 ILCS 5/18-2(b) (West 2000)), he became a habitual criminal pursuant to the HCA due to his prior armed robbery convictions.

¶ 23 Defendant, however, argues that sentencing him to natural life imprisonment under the HCA (see 720 ILCS 5/33B-1(e) (West 2000)), based on a predicate offense he committed as a 16-year-old “is cruel, degrading, and grossly disproportionate.” In support of his argument, defendant primarily relies on the United States Supreme Court’s decisions in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (holding that sentencing schemes that mandate sentences of natural life imprisonment without parole for juveniles convicted of homicides violated the eighth amendment), *Graham v. Florida*, 560 U.S. 48 (2010) (holding that sentencing juveniles convicted of non-homicide offenses to natural life imprisonment without parole violated the eighth amendment), and *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that sentencing juveniles to death violated the eighth amendment).

¶ 24 Although defendant acknowledges he was not a juvenile at the time he committed the instant armed robbery, he argues the reasoning of *Miller*, *Graham* and *Roper* applies to his situation because his natural life sentence was, in part, based on his actions as a 16-year-old when he committed his first armed robbery. He contends that, because of the HCA’s mandatory sentencing scheme, the trial court could not consider his potential for rehabilitation or his youthfulness at the time of the first predicate offense. He alleges this is improper because, in

Graham, 560 U.S. at 76, the United States Supreme Court stated “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.” Defendant concludes that his natural life sentence based, in part, on conduct he committed as a 16-year-old is too harsh and therefore unconstitutional.

¶ 25 The eighth amendment of the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*” (Emphasis added.) U.S. Const., amend. VIII. The amendment applies to the states through the fourteenth amendment. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). The eighth amendment’s cruel and unusual punishments clause “prohibits the imposition of inherently barbaric punishments under all circumstances.” *Graham*, 560 U.S. at 59. The proportionate penalties clause of the Illinois Constitution states that “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. The proportionate penalties clause, which is “co-extensive” with the cruel and unusual punishments clause, “similarly bars the imposition of unreasonable sentences.” *People v. Patterson*, 2014 IL 115102, ¶¶ 101, 106.

¶ 26 In *People v. Lawson*, 2015 IL App (1st) 120751, we rejected the same argument that defendant makes here. In *Lawson*, after a defendant was convicted of home invasion and aggravated kidnaping, he was sentenced to natural life imprisonment pursuant to the HCA. *Id.* ¶¶ 23, 44. The first of the defendant’s two predicate offenses was an armed robbery he committed as a 17-year-old. *Id.* ¶¶ 23, 50. On appeal, relying on the reasoning of *Miller*, *Graham* and *Roper*, he argued his sentence was unconstitutional, as applied to him, due to his first predicate offense occurring when he was 17 years old. *Id.* ¶¶ 47-49.

¶ 27 In addressing the constitutionality of his sentence, we observed that, in enacting the HCA, “the legislature considered the rehabilitative potential of the offenders by limiting the application of this statute to those offenders who have a third serious felony conviction within a prescribed time period.” *Id.* ¶ 52 (citing *People v. Dunigan*, 165 Ill. 2d 235, 246 (1995)). This court further observed that defendants sentenced under the HCA already had the opportunity to present mitigating evidence and demonstrate their potential for rehabilitation during the sentencing hearings on their predicate offenses. *Id.* Thus, we found that the HCA “‘unquestionably represents a careful legislative consideration of both the seriousness of the offense and the rehabilitative potential of offenders subject to its terms.’” *Id.* (quoting *Dunigan*, 165 Ill. 2d at 246-47). This court noted that the defendant had not been sentenced to natural life imprisonment due to the crime he committed as a 17-year-old. *Id.* ¶ 53. Rather, he had been adjudged a habitual criminal under the HCA due to committing his third Class X felony as an adult and punished accordingly for the “new and separate crime.” *Id.* Given these circumstances, we held that the defendant’s natural life sentence under the HCA was not unconstitutional. *Id.*

¶ 28 Defendant acknowledges the holding in *Lawson*, but urges us to find it was incorrectly decided. We, however, see no reason to depart from its well-reasoned analysis. Just as in *Lawson*, defendant was an adult when he committed his third Class X felony. At the sentencing hearings on his two predicate Class X felonies, defendant had the opportunity to present mitigating evidence and demonstrate his potential for rehabilitation. Although defendant’s prior Class X felonies “aggravate or enhance the penalty imposed for the third and most recent offense,” he is being punished “for the most recent offense only.” *Dunigan*, 165 Ill. 2d at 242; see also *Lawson*, 2015 IL App (1st) 120751, ¶ 53. Consequently, the HCA, as applied to him, is

not unconstitutional under either the eighth amendment of the United States Constitution or the proportionate penalties clause of the Illinois Constitution.

¶ 29 Given that defendant's natural life sentence under the HCA is not unconstitutional as applied to him, had the claim been raised on direct appeal, it would have been meritless. Therefore, defendant's petition has not made a substantial showing of prejudice (see *Easley*, 192 Ill. 2d at 329), and its claim of ineffective assistance of appellate counsel fails. See *Kirklin*, 2015 IL App (1st) 131420, ¶ 109. Accordingly, the circuit court properly granted the State's motion to dismiss defendant's postconviction petition.

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

¶ 31 Affirmed.