2017 IL App (1st) 150738-U
Order filed: November 9, 2017

FIFTH DIVISION

No. 1-15-0738

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. 08 CR 11453
	)	
ALFONZO CALDWELL,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the summary dismissal of defendant's *pro se* petition for relief under the Post-Conviction Hearing Act and remanded for second-stage proceedings, where defendant presented an arguable claim that appellate counsel was ineffective on direct appeal.

¶ 2 Defendant-appellant, Alfonzo Caldwell, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal defendant contends that the postconviction court erred in dismissing his petition because he presented an arguable claim of ineffective assistance of appellate counsel

based on counsel's failure to raise a meritorious claim on direct appeal. We reverse and remand for second-stage proceedings.

¶ 3 Defendant was charged with armed violence (720 ILCS 5/33A-2(a) (West 2008)); 625 ILCS 5/11-204.1(a)(1) (West 2008)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(A)(2) (West 2008)), and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(A) (West 2008)).

¶ 4 A person commits the offense of armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois law that is not excepted by statute. 720 ILCS 5/33A-2(a) (West 2008). In the case at bar, the indictment charged defendant with armed violence for arming himself with a dangerous weapon while committing the felony offense of aggravated fleeing or attempting to elude a peace officer (aggravated fleeing). A person commits the offense of aggravated fleeing when he, having been given a visual or audible signal to stop by a peace officer in police uniform, flees from or attempts to elude the officer and drives at a rate of speed at least 21 miles per hour (m.p.h.) over the speed limit. 625 ILCS 5/11-204.1(a)(1) (West 2008); 625 ILCS 5/11-204 (West 2008). Aggravated fleeing is a Class 4 felony. 625 ILCS 5/11-204.1(b) (West 2008). Fleeing or attempting to flee a peace officer under 21 m.p.h. is a Class A misdemeanor (625 ILCS 5/11-204(a) (West 2008)) and, thus, may not be used as the predicate crime for an armed violence conviction. 720 ILCS 5/33A-2(a) (West 2008).

¶ 5 At trial, the evidence established that on May 7, 2008, officers were engaged in a field interview in the area of 454 South Lockwood Avenue when they heard gunshots. Officer John Frano testified that he observed a black sports utility vehicle (SUV) following a white vehicle at a "high rate of speed." The vehicles turned from West Congress Parkway southbound on to South Lockwood Avenue. Officer Frano entered his police vehicle and immediately activated the

siren and emergency lights. He then pursued the vehicles as they traveled southbound on Lockwood Avenue and turned westbound on to West Harrison Street. Sergeant Jeff Swiek saw two people in the white vehicle and two people in the SUV, and he estimated that the vehicles were traveling 35 m.p.h. when they turned onto Lockwood Avenue, which had a speed limit of 30 m.p.h. The side streets in the area had a speed limit of 25 m.p.h.

¶ 6 Officer Frano observed the white vehicle pull over at the intersection of Lotus Avenue and Harrison Street. When the SUV pulled up alongside the white vehicle, Officer Frano heard gunshots and observed muzzle flashes in the interior of the SUV. The SUV then fled westbound on Harrison Street, turned southbound on to South Central Avenue, and merged on to westbound Interstate 290. Officer Frano estimated that the SUV was travelling over 50 m.p.h. on Harrison Street between Lotus Avenue and Central Avenue, which had a posted speed limit of 30 m.p.h. Officer Frano testified that he was driving "between 85, 90 miles an hour" to keep up with the SUV on Interstate 290, which had a speed limit of 55 m.p.h. The officers eventually stopped the SUV, and defendant exited from the driver side door.

¶ 7 No one testified to seeing defendant throw the gun from the SUV. However, evidence technician Thomas Pierce testified that he recovered a pistol from the intersection of Harrison Street and Lotus Avenue. He also recovered a fired cartridge case on the floor near the driver's seat of the SUV. Tracy Konior, of the Illinois State Police Forensic Science Laboratory, testified that the cartridge case found in the SUV had been fired by the gun found at the intersection of Harrison Street and Lotus Avenue.

¶ 8 During closing arguments, the State argued, in pertinent part, that it proved defendant guilty of being armed with a firearm while fleeing from Officer Frano at a speed of at least 21 m.p.h. over the speed limit and, thus, the jury should convict him of armed violence predicated

upon aggravated fleeing. Defendant argued that the jury should acquit him by finding that the gun came from the white vehicle, and that defendant never had the gun in his possession.

¶ 9 After argument, the jury found defendant guilty of armed violence, aggravated discharge of a firearm, and unlawful use of a weapon by a felon. The trial court sentenced defendant to 15 years' imprisonment on the armed violence count, to run consecutively with two concurrent 6-year terms for the aggravated discharge of a firearm and unlawful use of a weapon by a felon counts.

¶ 10 On direct appeal, defendant's appellate counsel challenged his armed violence conviction, arguing that the evidence presented did not establish the requisite elements of the predicate offense of aggravated fleeing, specifically, that the evidence failed to show that Officer Frano was in police uniform when he signaled defendant to stop his vehicle, or that defendant's flight from Officer Frano was at a rate of speed at least 21 m.p.h. over the speed limit. *People v. Alphonso Caldwell*, 2013 IL App (1st) 112999-U, ¶¶ 40-51. Defendant also argued that the trial court erred in instructing the jury on the issue of accountability, and contended that his convictions for aggravated discharge of a firearm and unlawful use of a weapon by a felon violated the one-act one-crime principle. *Id*. ¶¶ 68, 80. This court affirmed defendant's convictions. *Id*. ¶ 90.

¶ 11 On November 7th, 2014, defendant filed a *pro se* postconviction petition alleging that his appellate counsel rendered ineffective assistance on direct appeal by not challenging his armed violence conviction on the basis that the State failed to prove beyond a reasonable doubt that he possessed a firearm while he was committing the underlying felony of aggravated fleeing.

¶ 12 On January 15, 2015, the postconviction court summarily dismissed the petition, stating that the petition was frivolous and patently without merit. Defendant filed a timely notice of appeal.

¶ 13 Where, as here, a postconviction petition does not implicate the death penalty, a circuit court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage of postconviction proceedings, the court may dismiss a petition only if it is " 'frivolous or is patently without merit.' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). A petition is frivolous or patently without merit if it " 'has no arguable basis * * * in law or in fact.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17(2009)). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28.

¶ 14 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688 694 (1984)). The *Strickland* standard applies to claims of ineffective assistance of appellate counsel and a defendant raising such a claim " 'must show both that appellate counsel's performance was deficient and that, but for counsel's errors,

there is a reasonable probability that the appeal would have been successful.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 21 (quoting *People v. Petrenko*, 237 Ill.2d 490, 497 (2010)). At the first stage of postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 15 Defendant contends he has made an arguable claim that his appellate counsel was ineffective on direct appeal for not arguing his innocence of armed violence based on the circumstantial evidence showing that he had abandoned the gun before he committed the underlying predicate felony offense of aggravated fleeing. Specifically, Officer Pierce testified the gun was recovered at the scene of the shooting at Harrison Street and Lotus Avenue. Officer Frano testified that defendant reached a speed of at least 21 m.p.h. over the speed limit only upon driving away from Harrison Street and Lotus Avenue after the shooting. Defendant argues that, taken together, Officer Pierce's and Officer Frano's testimony indicated he was not guilty of armed violence because he had discarded the weapon at Harrison Street and Lotus Avenue, *prior* to driving away from the officers at 21 m.p.h. over the speed limit, *i.e.*, *prior* to the commission of the predicate offense of aggravated fleeing.

¶ 16 Initially, the State argues that defendant's claim is barred by *res judicata*, because defendant raised a sufficiency of the evidence argument on direct appeal. In the context of a postconviction petition, the doctrine of *res judicata* bars relitigation of issues that have been raised and decided on direct appeal. *People v. Tate*, 2012 IL 112214, ¶ 8. Issues that could have been raised, but were not, are forfeited. *Id*. However, "[i]t has long been held that *res judicata* and forfeiture do not apply where fundamental fairness so requires, where the alleged forfeiture

stems from the incompetence of appellate counsel, or where facts relating to the claim do not appear on the face of the original appellate record." *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 37 (citing *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005)).

¶ 17 In the present case, *res judicata* does not act as a bar to defendant's postconviction claim because the issues raised on direct appeal and on postconviction are different. In the direct appeal in this case, defendant argued the evidence was insufficient to convict him of armed violence predicated on aggravated fleeing, where the State failed to prove that: (1) Officer Frano was in police uniform when he signaled defendant to stop his vehicle; and (2) defendant's flight from Officer Frano was at a rate of speed of at least 21 m.p.h. over the speed limit, as required by the aggravated fleeing statute. See *Caldwell*, 2013 IL App (1st) 112999-U, ¶¶ 42, 49.

¶ 18 By contrast, in his postconviction petition, defendant does not reargue that the State failed to prove that Officer Frano was in police uniform when he signaled defendant to stop his vehicle and that defendant's flight from Officer Frano was at a rate of speed of at least 21 m.p.h. over the speed limit. Rather, defendant argues his appellate counsel was ineffective on direct appeal for failing to argue that defendant abandoned the gun prior to traveling at least 21 m.p.h. above the speed limit and, thus, did not commit armed violence because he was not armed with a dangerous weapon at the time he was committing the predicate felony of aggravated fleeing.

¶ 19 Defendant's postconviction claim of ineffectiveness of appellate counsel was not raised on direct appeal and, logically, could not have been where the claim of ineffective assistance of appellate counsel would only have become apparent after the appeal was filed, and where appellate counsel cannot be expected to argue his own ineffectiveness. See *People v. Salazar*, 162 Ill. 2d 513, 521 (1994).

¶ 20 As defendant's postconviction claim of ineffectiveness of appellate counsel was not, and could not, have been raised on direct appeal, it is not barred by the doctrines of *res judicata* or forfeiture. See *Tate*, 2012 IL 112214, ¶ 8; *Mabrey*, 2016 IL App (1st) 141359, ¶ 37.

¶ 21 Next, we consider whether the postconviction court erred in summarily dismissing defendant's petition. As discussed, a postconviction claim of ineffective assistance of counsel may not be summarily dismissed where it is arguable that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) defendant was prejudiced.

¶ 22 In his petition, defendant claims his appellate counsel was ineffective on direct appeal for failing to argue for the reversal of his armed violence conviction on the basis that the State did not prove he was in possession of the gun at the time he committed aggravated fleeing. The State counters that defendant was not arguably prejudiced thereby because, even though appellate counsel failed to raise this issue on direct appeal, we addressed it when discussing an alleged error in the giving of an accountability instruction. *Caldwell*, 2013 IL App (1st) 112999-U, ¶ 68.

¶ 23 Specifically, on direct appeal, we determined that we need not address the alleged instructional error if there was sufficient evidence to find defendant guilty as a principal for the offense of armed violence predicated on aggravated fleeing. *Id*. ¶ 70. We set forth the relevant standard of review as whether, after viewing all the evidence and reasonable inferences drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*. (citing *People v. Martin*, 2011 IL 109102, ¶ 15). We proceeded to examine the evidence, noting that Officer Frano saw muzzle flashes and heard gunshots being fired from defendant's SUV, and that defendant subsequently fled from the officer at 21 m.p.h. over the speed limit. *Id*. ¶¶ 73,74. We

held that the "evidence at trial, when viewed in the light most favorable to the prosecution, was *** sufficient for any rational trier of fact to find beyond a reasonable doubt *** that defendant was armed with a handgun at the time he committed the offense of aggravated fleeing." *Id*. ¶ 74.

¶ 24 The State contends that, as we held on direct appeal that defendant possessed the gun at the time he committed the predicate felony offense of aggravated fleeing, he was not arguably prejudiced by his appellate counsel's failure to raise the issue and, therefore, we should affirm the summary dismissal of his postconviction claim of ineffective assistance.

¶ 25 We disagree. As discussed earlier in this order, no argument was made, either at trial or on direct appeal, that defendant possessed the gun, but had discarded it prior to committing aggravated fleeing. Thus, when considering the sufficiency of the evidence, we focused only on the arguments presented, *i.e.*, whether defendant was ever in possession of the gun and whether he ever traveled at least 21 m.p.h. away from Officer Frano. Any issue regarding the alleged discarding of the gun was forfeited on direct appeal where it was not raised and, therefore, it has never been addressed by this court. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) and *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) ("the failure to argue a point in the appellant's opening brief results in forfeiture of the issue").

¶ 26 Appellate counsel was arguably ineffective for failing to argue on direct appeal that Officer Pierce's and Officer Frano's testimony indicated defendant discarded the gun prior to committing the predicate offense of aggravated fleeing. Had appellate counsel made that argument on direct appeal, we arguably would have found that no rational trier of fact would have determined that defendant possessed the gun at the time he committed aggravated fleeing and, thus, reversed defendant's conviction for armed violence. See *Martin*, 2011 IL 109102, ¶ 15.

¶ 27 As defendant has made an arguable claim that his appellate counsel provided ineffective assistance on direct appeal, we reverse the order summarily dismissing his postconviction claim and remand for second-stage proceedings.

¶ 28 In reaching this conclusion, we are not persuaded by the State's reliance on *People v. Brown*, 362 Ill. App. 3d 374 (2005), in support of its argument that defendant was not prejudiced by his appellate counsel's alleged ineffectiveness on direct appeal for failing to raise the issue of his disposal of the gun, where his conviction would have been affirmed even if the issue had been so raised. The defendant in *Brown* was convicted of armed violence predicated on aggravated fleeing. *Id*. at 377-78. The defendant appealed, arguing that the State failed to prove beyond a reasonable doubt that he was armed with the gun while he was committing the offense of aggravating fleeing because he had thrown the gun out of the window before he was arrested. *Id*. at 375. This court affirmed his conviction, noting that the evidence was clear that "although [the defendant] did throw the loaded handgun away before he stopped and was arrested, he had it in his immediate possession and control while he was fleeing from police northbound on Mackinaw at over 21 miles per hour after being given the signals to stop." (Emphasis added.) *Id*. at 381. Here, unlike *Brown*, the evidence arguably suggests that defendant disposed of the gun before he reached a speed of 21 m.p.h. over the speed limit and, therefore, did not commit armed violence as he did not possess the gun while he committed the predicate felony offense of aggravated fleeing. Accordingly, appellate counsel's failure on direct appeal to raise the issue of defendant's disposal of the gun was arguably objectively unreasonable and prejudicial.

¶ 29 We are, likewise, not persuaded by the State's reliance on *People v. Batterman*, 355 Ill. App. 3d 766 (2005), for the proposition that defendant's act of fleeing from the police was "a single, continuous offense," and that the timing of his disposal of the gun is of no consequence.

Unlike in *Batterman*, the issue in the instant case is not whether defendant's prosecution in two counties for one continuous police chase would violate the double jeopardy clause. *Id*. Rather, the issue here is whether the evidence presented at trial was sufficient to support his armed violence conviction.

¶ 30 As discussed, the armed violence statute requires that defendant be armed with a firearm while committing a felony offense. See 720 ILCS 5/33A-2(a) (West 2008). Fleeing or attempting to elude a peace officer is a misdemeanor offense, and a defendant does not commit the felony offense of aggravated fleeing unless or until he travels 21 m.p.h. over the speed limit. See 625 ILCS 5/11-204(a) (West 2008); 625 ILCS 5/11-204.1(a)(1) (West 2008). The evidence suggests that he did not reach this speed until after he abandoned the gun. Thus, it is arguable that appellate counsel was ineffective on direct appeal for failing to challenge defendant's armed violence conviction on the basis that defendant did not possess the gun while he was committing a felony offense, as required by the armed violence statute.

¶ 31 For the reasons stated, we reverse the judgment of the circuit court of Cook County and remand for second-stage proceedings under the Act.

¶ 32 Reversed and remanded.