

2017 IL App (1st) 152722-U

No. 1-15-2722

Order filed July 24, 2017

First 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. 11 CR 13729
)	
FAREED JACKSON,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) is affirmed where defendant forfeited review of his claim that his trial counsel was ineffective for failing to enter the pants defendant was wearing at the time of the offense into evidence to contradict the testimony of the State's witnesses that he was carrying a gun.

¶ 2 Defendant Fareed Jackson appeals from the summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)).

He contends that the trial court erred in summarily dismissing his petition because he presented an arguable claim that his trial counsel was ineffective for failing to enter the pants defendant was wearing at the time of the offense into evidence to contradict the testimony of the State's witnesses that he was carrying a gun. For the following reasons, we affirm.

¶ 3 Following a 2012 jury trial, defendant was found guilty of being an armed habitual criminal (AHC) and unlawful use or possession of a weapon by a felon. Defendant's conviction was based on the testimony of two police officers, who, approached defendant because they suspected a narcotics transaction was in progress. As the officers did so, they saw defendant remove a handgun from his right side, place the gun in his back pants pocket and jump over a fence. After a brief chase, the officers apprehended defendant and recovered a loaded gun from defendant's back pocket. Defendant testified that he did not have a gun on his person and that he was running away from an unidentified man, who had a gun in his hand.

¶ 4 In addition to defense counsel's motion for a new trial, defendant filed a *pro se* motion for a new trial alleging, in relevant part, "Defendant attorney did fail to subpoena defendant pants from inventory that would have proven he would not have placed a gun in his back rear pocket." The trial court discussed the factual nature of defendant's *pro se* claims with defendant and subsequently found that his allegations against trial counsel lacked any basis in fact or law. After denying both motions, the court merged the counts and sentenced defendant to 10 years' imprisonment for the Class X felony of being an AHC.

¶ 5 On direct appeal, we granted defendant's "agreed motion for summary disposition," and directed the clerk of the circuit court to correct defendant's mittimus and the fines and fees order. *People v. Jackson*, No. 1-12-3289 (2013) (dispositional order).

¶ 6 Defendant subsequently filed the *pro se* postconviction petition at bar, alleging various deprivations of his constitutional rights, including, in relevant part, ineffective assistance of trial counsel based on counsel's failure to "present exculpatory evidence. 1) Pants which officers testified gun was found but pants did not have pockets to make true. Trial counsel should have had pants at trial which were available." The circuit court summarily dismissed the petition on July 25, 2014.

¶ 7 On September 10, 2015, defendant sought leave to file a late notice of appeal from the summary dismissal of his petition. Although on October 9, 2015, we granted defendant's motion for leave to file a late notice of appeal, we issued an order on March 31, 2017, finding that we lacked jurisdiction to grant his request. See *People v. Jackson*, 2017 IL App (1st) 152722-U (vacating our order granting defendant leave to file a late notice of appeal and dismissing the appeal).

¶ 8 On June 21, 2017, our supreme court granted defendant's motion for a supervisory order. The supreme court directed us to vacate our previous order dismissing the appeal (*People v. Jackson*, 2017 IL App (1st) 152722-U); and, to treat the late notice of appeal as a properly perfected appeal from the circuit court's July 25, 2014, summary dismissal.

¶ 9 On appeal, defendant contends that he stated an arguable claim of ineffective assistance of counsel because his trial attorney failed to enter the pants he was wearing at the time of the offense into evidence to contradict the testimony of the State's witnesses that he was carrying a gun. The State initially responds that defendant has forfeited this claim by failing to raise it on direct appeal. We agree with the State.

¶ 10 The Act provides a criminal defendant with a collateral mechanism to seek redress for substantial violations of his constitutional rights in his original trial or sentencing. *People v.*

Allen, 2015 IL 113135, ¶ 20. However, “the scope of the proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated. Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues that have previously been decided by a reviewing court are barred by *res judicata*.” *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007).

¶ 11 Here, we find that defendant has forfeited his claim of ineffective assistance of trial counsel based on counsel’s failure to present defendant’s pants as potentially exculpatory evidence. The record shows that defendant, in a *pro se* posttrial motion, raised the issue of trial counsel’s failure to present his pants as evidence to show that he could not have had a gun in his pocket. After the trial court conducted an inquiry into the factual nature of defendant’s *pro se* claims, it found that defendant’s allegations against trial counsel lacked any basis in fact or law. As such, defendant could have challenged the trial court’s denial of his *pro se* posttrial allegations against his attorney in his direct appeal. However, defendant failed to do so. Rather, in his direct appeal, defendant agreed to a motion for summary disposition and only raised issues concerning his presentence custody credit and the order imposing fines, fees, and costs. Accordingly, we find defendant’s *pro se* postconviction claim of ineffective assistance of trial counsel based on the failure to present his pants at trial to show he was not carrying a gun has been procedurally defaulted. See *People v. Mabrey*, 2016 IL App (1st) 141359, ¶¶ 35, 36 (finding that the defendant’s coerced confession claim in his postconviction petition was barred because he failed to challenge the trial court’s denial of his motion to suppress his confession in his direct appeal).

¶ 12 In reaching this conclusion, we note that there are exceptions to forfeiture that may allow otherwise barred claims to proceed. For example, forfeiture does not apply where fundamental

fairness so requires, where the alleged forfeiture stems from the incompetence of appellate counsel (*People v. Blair*, 215 Ill. 2d 427, 450-51 (2005)), or where a defendant's postconviction claim relies on evidence *dehors* the record (*People v. Enis*, 194 Ill. 2d 361, 375-76 (2000)). In this appeal, defendant does not make any argument based on the above exceptions to forfeiture and our review of the record does not show any of these exceptions apply. As such, defendant's instant claim of ineffective assistance of trial counsel is procedurally defaulted.

¶ 13 For the reasons stated, we vacate our March 31, 2017, order dismissing defendant's appeal (*People v. Jackson*, 2017 IL App (1st) 152722-U) and affirm the July 25, 2014, judgment of the circuit court of Cook County.

¶ 14 Order vacated; judgment affirmed.