2018 IL App (1st) 151739

FIRST DIVISION
September 4, 2018

Nos. 1-15-1739, 1-15-1740 (cons.)

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.	)	Nos. 08 CR 13537
	)	08 CR 13538
JOSEPH THOMAS,	)	
	)	Honorable
Defendant-Appellant.	)	Kenneth J. Wadas,
	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Harris and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's dismissal of defendant's postconviction petitions at the second stage is affirmed. The term-of-years sentence received by defendant, a juvenile at the time of the crimes resulting in his convictions, was not a *de facto* life sentence requiring the court's consideration of specific youth-related sentencing factors. Defendant failed to rebut the presumption, arising from the filing by his appointed counsel of a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), that he received reasonable assistance of postconviction counsel.

¶ 2 Defendant Joseph Thomas appeals the trial court's dismissal at the second stage of proceedings of his petitions for postconviction relief in these consolidated cases, arguing that he

was substantially deprived of his constitutional rights as a juvenile offender under the eighth amendment to the federal Constitution (U.S. Const., amend. VIII) and *Miller v. Alabama*, 567 U.S. 460 (2012). He further argues that he was denied reasonable assistance of postconviction counsel.

¶ 3 We affirm the trial court's dismissal of Mr. Thomas's petitions. Mr. Thomas's aggregate prison sentence of 35 years, pursuant to which he may be eligible for release after 17½ years of incarceration, is neither a *de jure* nor a *de facto* life sentence. The trial court was thus not constitutionally required to consider the youth-specific mitigating factors set out in *Miller* before imposing that sentence on Mr. Thomas. We reject Mr. Thomas's additional argument that postconviction counsel had a duty to either amend one of Mr. Thomas's *pro se* petitions to add a new postconviction claim or to further articulate a claim already adequately presented in one but not both of his petitions. Mr. Thomas has also failed to show that he was prejudiced by counsel's failure to defend a meritless claim from dismissal.

¶ 4 I. BACKGROUND

¶ 5 A. Trial, Plea Agreement, and Sentencing

¶ 6 On March 16, 2011, a jury convicted Mr. Thomas of armed robbery with a firearm, an offense committed on July 7, 2008, when Mr. Thomas was 17 years old. The victim, Rodney Batts, testified that on that day he walked to a currency exchange near East 47th Street and South Vincennes Avenue. After Mr. Batts cashed a check at the currency exchange, a man later identified as Willie Mack approached him from behind, pointed a gun at him, and demanded the money from the cashed check. Mr. Mack ordered Mr. Batts to lie down. While on the ground, Mr. Batts was approached by another man, whom he identified at trial as Mr. Thomas. Mr. Batts testified that Mr. Thomas took the gun and held it on him while Mr. Mack robbed him.

¶ 7 On May 26, 2011, Mr. Thomas pled guilty to a second offense, aggravated vehicular hijacking with a firearm, which occurred on July 6, 2008, one day before the armed robbery. The State submitted, as part of the factual background supporting the plea, that Mr. Thomas, Mr. Mack, and another individual stole the victim's car at gunpoint, and that Mr. Thomas told Mr. Mack to shoot the victim and passengers, though no shooting occurred.

¶ 8 The trial court sentenced Mr. Thomas to 35 years in prison for the armed robbery: 20 years for the offense itself and an additional 15 years because of a mandatory firearm enhancement. The total sentence of 35 years was 14 years longer than the mandatory minimum sentence the judge could have ordered. See 720 ILCS 5/18-2(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Pursuant to the plea deal, Mr. Thomas received a concurrent sentence of 35 years for the vehicular hijacking, which also included a 15-year firearm enhancement. See 720 ILCS 5/18-3(b) (West 2010); 730 ILCS 5/5-4.5-30(a) (West 2010). With good-time credit, Mr. Thomas may be eligible for release after 17½ years incarceration, when he will be just shy of 35 years old. *Offender Search*, Ill. Dep't of Corr., https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx (last visited August 16, 2018).

¶ 9 At the sentencing hearing for the armed robbery, the State submitted Mr. Thomas's criminal history for consideration in aggravation, which included prior findings of juvenile delinquency for robbery, possession of a stolen motor vehicle, and armed robbery. In mitigation, defense counsel noted Mr. Thomas's juvenile status and his efforts to improve his life by attending school while in custody.

¶ 10 In pronouncing the sentence, the court did not mention Mr. Thomas's juvenile status as a factor in mitigation. It did consider relevant, however, both Mr. Thomas's apology to his family and the court, and the fact that his criminal conduct was at least in part—though minimally, the

court found—induced or facilitated by another person.

¶ 11 On direct appeal, Mr. Thomas argued that the 15-year mandatory firearm enhancement violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). This court disagreed, rejected the other arguments Mr. Thomas made on appeal, and affirmed his conviction and sentence for armed robbery. *People v. Thomas*, 2012 IL App (1st) 111398-U, ¶¶ 26-27, 30. Mr. Thomas did not appeal his conviction for vehicular hijacking.

¶ 12 B. Postconviction Proceedings

¶ 13 Mr. Thomas filed two *pro se* postconviction petitions, seeking relief from each of his convictions. In July 2012, he petitioned for relief from the sentence he received for vehicular hijacking. Echoing the argument he made on direct appeal from his armed robbery conviction, which was still pending, he argued that the 15-year firearm enhancement was unconstitutional based on the proportionate penalties clause.

¶ 14 Approximately one year later, in July 2013, Mr. Thomas also petitioned for relief from the sentence he received for armed robbery, arguing that (a) the Illinois statutory sentencing scheme—which then set a mandatory minimum sentence of 21 years for 17-year-olds convicted of armed robbery with a firearm—violated the eighth amendment, (b) the sentencing scheme violated his right to due process, and (c) his appellate counsel was ineffective for failing to raise these issues on direct appeal.

¶ 15 Mr. Thomas's petitions were advanced to the second stage of proceedings. Appointed postconviction counsel filed a certificate pursuant to Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) in each case, in which he attested to consulting with Mr. Thomas, examining the record, conducting additional investigations and legal research, and concluding, based on that work, that no supplemental or amended petitions were required.

¶ 16 On May 20, 2015, the State moved to dismiss both petitions on the merits, arguing that *Miller* only applied to mandatory life sentences. At a hearing on that same day, Mr. Thomas's appointed counsel said, in reference to the State's motion, "I acknowledge receipt, and I will not need time to respond. And actually, we could proceed right now if your Honor would be amenable to that." He then opted not to respond even orally to the motion. The trial court dismissed both petitions, commenting, "I find that the defendant's petition is without merit, and I agree with the argument and analysis that's outlined in the state's petition."

¶ 17 II. JURISDICTION

¶ 18 Mr. Thomas's postconviction petitions were both dismissed by the trial court on May 20, 2015. Mr. Thomas timely filed notices of appeal on the same day. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 651, governing appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 651(a) (eff. Feb. 26, 2013)).

¶ 19 III. ANALYSIS

¶ 20 Article 5 of the Code of Criminal Procedure of 1963 (the Post-Conviction Hearing Act or Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) establishes procedures by which an incarcerated criminal defendant may challenge a conviction or sentence by establishing that he suffered a substantial deprivation of his state or federal constitutional rights in the proceedings resulting in his conviction. 725 ILCS 5/122-1(a)(1) (West 2012). Postconviction proceedings in non-death penalty cases occur in three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the trial court determines, without input from the State, whether the defendant's petition is frivolous or patently without merit. *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2012). At the second stage, the trial court appoints counsel to represent the defendant and, if necessary, to file an

amended petition; at this stage the State may either move to dismiss or answer the petition. *Gaultney,* 174 Ill. 2d at 418; 725 ILCS 5/122-4, 122-5 (West 2012). Only if the petition and accompanying documentation make a substantial showing of a constitutional violation does the defendant proceed to the third stage, an evidentiary hearing on the merits. *People v. Silagy*, 116 Ill. 2d 357, 365 (1987).

¶ 21 "A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings." *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Its scope is limited to constitutional issues that were not, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Thus, the consideration of issues already decided by a reviewing court is barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal but were not are forfeited. *Id*.

¶ 22 We review the trial court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 23 A. Eighth Amendment Challenge

¶ 24 Mr. Thomas appeals from the dismissal of his postconviction petitions at the second stage. To proceed to a third-stage hearing, the burden was on Mr. Thomas to make a substantial showing of a constitutional violation. *People v. Rivera*, 2014 IL App (2d) 120884, ¶ 7. A substantial showing is a showing, based on the petition and any accompanying documentation (*People v. Domagala*, 2013 IL 113688, ¶ 33), that is "real and weighty as opposed to illusory and trivial" (internal quotation marks omitted) (*People v. Carballido*, 2015 IL App (2d) 140760, ¶ 65). The court does not engage in fact-finding or credibility determinations at this stage but accepts as true all well-pleaded allegations. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 25 Mr. Thomas argues that he has made a substantial showing that his constitutional rights

were violated under *Miller v. Alabama*, 567 U.S. 460 (2012), and that forfeiture should not bar him from raising this claim for the first time in a postconviction petition because his appellate counsel was ineffective for failing to raise the issue on direct appeal. In *Miller*, the U.S. Supreme Court mandated that judges be given the opportunity to exercise discretion—and that they use that discretion to consider particular youth-related mitigating factors—before sentencing juvenile offenders to life sentences. *Miller*, 567 U.S. at 489. Although a growing body of jurisprudence in Illinois has expanded on the protections afforded to juvenile offenders by *Miller*, Mr. Thomas's clearly survivable sentence situates him outside of *Miller*'s sweep.

¶ 26 *Miller* held that it is unconstitutional for the government to require judges to sentence juveniles convicted of homicide to life without the possibility of parole (*id*. at 489), noting that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children" (*id*. at 474). Juvenile offenders differ significantly from adult offenders; they lack maturity, are more likely to take risks, are more susceptible to negative influences, have only limited control over their environments, and are frequently unable to remove themselves from settings where crime is likely to occur. *Id*. at 471. Their character traits are less well-formed than those of adults, and their conduct is less indicative of their capacity for change. *Id*. The Supreme Court recognized in *Miller* that the "diminished culpability and greater prospects for reform" of juveniles correspond with diminished penological justifications for imposing the most severe punishments on them. *Id*.

¶ 27 *Miller* does not categorically prohibit life sentences for juvenile offenders. *Id*. at 483. Rather, *Miller* prohibits *mandatory* life sentences and requires that certain mitigating factors be given consideration by the court prior to the imposition of a life sentence on a juvenile offender. The mitigating factors as outlined by the court are "(1) the juvenile defendant's chronological

age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the [offense] and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *People v. Holman*, 2017 IL 120655, ¶ 46 (citing *Miller*, 567 U.S. at 477-78).

¶ 28 Our supreme court has expanded the holding in *Miller* in two key respects. In *Holman*, the court recognized that the considerations in *Miller* are not limited to mandatory life sentences and that the *Miller* factors must be applied even where a juvenile is given a discretionary life sentence. *Holman*, 2017 IL 120655, ¶ 40. And in *People v. Reyes*, 2016 IL 119271, ¶ 10, the court broadened the definition of a life sentence to include term-of-years sentences amounting to *de facto* life sentences. The *Reyes* court held that the sentence imposed on the defendant in that case, pursuant to which he would be imprisoned until the age of 105 years, was a *de facto* life sentence triggering *Miller*'s protections. *Id*. Notably, however, the court did not specifically define what constitutes a *de facto* life sentence, leaving the lower courts to do so on a case-by-case basis.

¶ 29 Since *Reyes*, this court has wrestled with the question of how to differentiate a lengthy but survivable sentence from a *de facto* life sentence. In a split decision in *People v.Rodriguez*, 2018 IL App (1st) 141379-B, for example, where the defendant was sentenced to 50 years in prison, we expressed two differing views. The majority held that because a juvenile offender could possibly survive a sentence in the range of 45 to 52 years, such sentences are not *de facto* life sentences. *Id*. ¶¶ 7, 73. The dissent, in contrast, reasoned that if a defendant's age at the end

of his sentence would be beyond a recognized life expectancy for incarcerated individuals, it should be considered a *de facto* life sentence. *Id*. ¶¶ 99-100. (Mikva, J., dissenting).

¶ 30 Under either rationale, Mr. Thomas's sentence falls far short of a *de facto* life sentence. He will be only 34 years old when he has served 17½ years of his 35-year sentence and first becomes eligible for release. As we explained in *People v. Evans*, 2017 IL App (1st) 143562, ¶ 14, the reduction of a term-of-years sentence resulting from day-for-day credit for good conduct is properly considered when determining if a sentence is a *de facto* life sentence.

¶ 31 Mr. Thomas acknowledges this, but argues that the constitutional concerns driving the decision in *Miller* apply to lengthy term-of-years sentences that are "less-than life sentence[s]." We are aware of no constitutional support for such an argument. A third-stage evidentiary hearing is appropriate where the defendant's substantial showing of a constitutional deprivation demands a review of the facts to determine if his or her constitutional rights were violated. Mr. Thomas's claim fails as a matter of law. Mr. Thomas cites no Illinois case applying *Miller* to a sentence as short as 17½ years, or even to a sentence of 35 years. Indeed, our supreme court indicated in *Reyes*, that sentences of this length do not implicate an analysis under *Miller*. See *Reyes*, 2016 IL 119271, ¶ 12 (noting that a minimum aggregate sentence of 32 years would not be a *de facto* life sentence). See also *People v. Patterson*, 2014 IL 115102, ¶ 110 (holding a sentence of 36 years insufficient to invoke *Miller*'s protections).

¶ 32 Mr. Thomas also insists that because the State's only argument in the trial court for why *Miller* did not apply was that Mr. Thomas's 35-year sentence was neither mandatory nor a *de jure* life sentence—two limitations on *Miller*'s applicability that our supreme court later rejected in *Holman* and *Reyes* (*Holman*, 2017 IL 120655, ¶ 40; *Reyes*, 2016 IL 119271, ¶10)—the State forfeited any other arguments for why *Miller* should not apply. Although it is true that "[t]he

doctrine of forfeiture applies to the State as well as to the defendant" (*People v. Lucas*, 231 Ill. 2d 169, 175 (2008)), our review here is *de novo* and we "may affirm a trial court's dismissal at the second stage on any grounds substantiated by the record" (*People v. Snow*, 2012 IL App (4th) 110415, ¶ 17).

¶ 33 We recognize that our legislature recently amended the sentencing guidelines to require that courts consider the *Miller* factors before imposing *any* sentence on a juvenile defendant in criminal court. 730 ILCS 5/5-4.5-105 (West Supp. 2017). While this policy change was designed to give relief to juvenile offenders going forward, our supreme court made clear in *People v. Hunter*, 2017 IL 121306, ¶ 1, that the amendment does not apply retroactively to individuals, like Mr. Thomas, whose cases were not still pending in the trial court when the amended law took effect. And, for the reasons discussed above, Mr. Thomas's sentence simply does not mandate consideration of the *Miller* factors as a matter of constitutional right.

¶ 34 Because his *Miller*-based claim lacks merit, Mr. Thomas suffered no prejudice as a result of any forfeiture resulting from his appellate counsel's failure to raise the claim on direct appeal. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 465 (2002) (noting that "if the underlying claim has no merit, no prejudice result[s], and [the] petitioner's claims of ineffective assistance of counsel *** on direct appeal must fail").

¶ 35 B. Unreasonable Assistance of Postconviction Counsel

¶ 36 Mr. Thomas's second claim is that he was denied the reasonable assistance of postconviction counsel because his appointed attorney failed to amend his petition to make a *Miller*-based challenge to his sentence for aggravated vehicular hijacking, so that the claim was only set forth in his *pro se* petition in the armed robbery case. He also argues that his counsel was unreasonable in electing not to substantively respond to the State's dismissal arguments

regarding this claim.

¶ 37 The sixth amendment to the United States Constitution guarantees a criminal defendant the "effective" assistance of counsel at trial and on direct appeal from a conviction. *Evitts v. Lucey*, 469 U.S. 387, 394-96 (1985). A defendant establishes that his counsel's assistance was ineffective by showing both that it "fell below an objective standard of reasonableness," (*Strickland v. Washington*, 466 U.S. 668, 688 (1984)) and, notably, that he was prejudiced by the deficiency, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694).

¶ 38 The assistance of postconviction counsel, by contrast, is not a constitutional right but "a matter of legislative grace." *People v. Hardin*, 217 Ill. 2d 289, 299 (2005). Section 122–4 of the Post-Conviction Hearing Act (725 ILCS 5/122-4 (West 2012)) and Supreme Court Rule 651 (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), taken together, guarantee a "reasonable" level of assistance, but not the same level of assistance to which defendants are constitutionally guaranteed at trial. *People v. Owens*, 139 Ill. 2d 351, 364 (1990). "This distinction is rational, because trial counsel plays a different role than counsel in post-conviction proceedings." *Id.*

¶ 39 Although our supreme court has yet to articulate a clear definition of "reasonable assistance" (see *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 58), Rule 651(c), which applies to counsel appointed or retained after a *pro se* petition is filed (*People v. Cotto*, 2016 IL 119006, ¶ 41), sets out certain specific requirements (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). Pursuant to that rule, the record must contain a showing, made by certificate or otherwise, that postconviction counsel consulted with the defendant, reviewed the record, and "made any amendments necessary *** for an adequate presentation of [the] petitioner's contentions." *Id.*

¶ 40 Relying on *People v. Suarez*, Mr. Thomas argues that, regardless of the merits of his

Miller-based claim, we should remand based on his counsel's failure to amend his petition or otherwise contest the state's motion to dismiss. The court in *Suarez* held that a failure by postconviction counsel to comply with Rule 651(c) means that counsel has not provided "reasonable assistance" and warrants remand on appeal, whether or not the defendant put forth meritorious claims. *Suarez*, 224 Ill. 2d at 47.

¶ 41 *Suarez* does contain language suggesting that courts are to determine whether counsel has fulfilled the requirements of Rule 651(c) without considering the merits of the defendant's claims. *Id.* at 51. But in *Suarez* postconviction counsel failed to certify compliance with Rule 651(c) through an affidavit. In a string of cases since *Suarez*, this court has held that when, as in this case, a facially valid Rule 651(c) certificate is filed, there arises "a rebuttable presumption that postconviction counsel acted reasonably and, in order to overcome this presumption, defendant must 'demonstrat[e] his attorney's failure to substantially comply with the duties mandated by Rule 651(c).' " *E.g.*, *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 26 (quoting *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19). To show unreasonable assistance of postconviction counsel, then, Mr. Thomas had to rebut a presumption that counsel took necessary steps to ensure an adequate presentation of his claims. He did not do so.

¶ 42 We can first dispense with Mr. Thomas's argument that his counsel's failure to add a new *Miller*-based claim challenging his sentence on the vehicular hijacking charge constituted unreasonable assistance. In *People v. Davis*, 156 Ill. 2d 149, 163-64 (1993), our supreme court made clear that reasonable assistance only demands that counsel assist in the presentation of claims already included by the defendant. "Had the legislature intended otherwise, it would, logically, have provided for the appointment of counsel prior to the filing of the original petition." *Id.* at 164. Thus, the failure to add this as a new claim cannot be deemed unreasonable

assistance.

¶ 43 Even if—under the somewhat unusual circumstances of this case, in which two postconviction petitions were advanced simultaneously—we consider the *Miller*-based claim to be one already raised by Mr. Thomas because he included it in one but not both of his petitions, under Rule 651(c), postconviction counsel only has a duty to make amendments that are "necessary for an adequate presentation of petitioner's contentions." (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). Here, Mr. Thomas's *Miller*-based claim was already adequately presented. It was a purely legal claim based on undisputed facts regarding his age and the length of his sentence, and the relevant cases were already cited. As the basis of the claim was clear, no amendments were necessary to better articulate the claim before the trial court ruled on it.

¶ 44 Mr. Thomas's second contention, that his postconviction counsel provided unreasonable assistance by failing to respond to the State's motion to dismiss his *Miller*-based claim, similarly fails. As we noted in *Zareski*, the holding in *Suarez*—that remand is necessary regardless of the merits of a claim—does not apply outside a failure by postconviction counsel to comply with the specific requirements of Rule 651(c). *Zareski*, 2017 IL App (1st) 150836, ¶ 55. Rule 651(c) assigns three tasks to appointed counsel: to consult with the defendant, to examine the record, and to make necessary amendments to the petition. It makes no mention of a duty by postconviction counsel to defend claims that are already adequately presented. Assistance of postconviction counsel not specifically outlined in Rule 651(c) falls within a general requirement that counsel provide reasonable assistance, and to make a claim that such assistance is unreasonable a defendant must show that he suffered prejudice as a result of his counsel's deficiency. *Id.* ¶ 59 (finding "a *Strickland*-like analysis," including "an evaluation of prejudice" appropriate for claims of unreasonable assistance not amounting to rule violations). Mr. Thomas

simply cannot show that he was prejudiced by counsel's failure to defend a claim that we have just found to be without merit.

¶ 45 None of this is to endorse the hands-off approach taken by Mr. Thomas's postconviction counsel in this case. It would have been a simple matter to amend Mr. Thomas's petition in his aggravated vehicular hijacking case to specifically include the *Miller*-based claim. And, through their briefs submitted on his behalf in this court, Mr. Thomas's appellate counsel has demonstrated that cogent, though ultimately unpersuasive, arguments could have been made in opposition to the State's motion to dismiss his *Miller*-based claim. Mr. Thomas has nevertheless failed to rebut the presumption that his counsel's performance satisfies the reasonable assistance standard that is applicable here.

¶ 46 IV. CONCLUSION

¶ 47 Mr. Thomas's claim that his 35-year sentence constitutionally required the trial court to consider the mitigating factors set out in *Miller v. Alabama*, 567 U.S. 460 (2012), is without merit. His claim of unreasonable assistance of postconviction counsel also fails. For these reasons, we affirm the trial court's dismissal of Mr. Thomas's postconviction petition at the second stage.

¶ 48 Affirmed.