2020 IL App (4th) 170865-U

NOS. 4-17-0865, 4-18-0345 cons.

FILED
June 17, 2020
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JASON C. HAWKINS,	)	No. 16CF193
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment sentencing defendant to three years' imprisonment, concluding defendant forfeited his contentions of error relating to his sentence and that forfeiture could not be excused under the plain-error doctrine. The appellate court also affirmed the trial court's judgment summarily dismissing defendant's postconviction petition, concluding defendant failed to establish dismissal was in error.

¶ 2 Defendant, Jason C. Hawkins, appeals from the trial court's judgments sentencing him to three years' imprisonment (docketed in this court as case No. 4-17-0865) and summarily dismissing his postconviction petition (docketed in this court as case No. 4-18-0345). Defendant's appeals have been consolidated for review. On appeal, defendant argues we should (1) vacate his sentence and remand for a new sentencing hearing because the trial court, in reaching its sentencing decision, erroneously considered information presented by the State through an improper proffer and failed to consider several statutory mitigating factors and (2) reverse the summary dismissal

of his postconviction petition and remand for second-stage proceedings because his petition states the gist of a constitutional claim. We affirm both judgments of the trial court.

¶ 3 I. BACKGROUND

¶ 4 A. Information

¶ 5 In February 2016, the State charged defendant by information with domestic battery (720 ILCS 5/12-32(a)(1) (West 2014)) (count I) and criminal damage to property (720 ILCS 5/21-1(a)(1) (West 2014)) (count II). With respect to count I, the State alleged defendant was eligible for an extended-term sentence as he had a prior domestic battery conviction.

¶ 6 B. Guilty Plea and Probation Sentence

¶ 7 In April 2016, defendant pleaded guilty to count I in exchange for the State dismissing count II and issuing a sentencing recommendation. The factual basis for the plea indicated on February 6, 2016, defendant, who had been previously convicted of domestic battery, struck his paramour, Christine Champagne, in the face with his fist causing her a swollen lip. After accepting the plea, the trial court sentenced defendant, in accordance with the recommendation of the State, to 24 months' probation, which was subject to certain terms and conditions.

¶ 8 C. Petition to Revoke Probation

¶ 9 In July 2017, the State filed a petition to revoke defendant's probation. The State alleged defendant violated the terms and conditions of his probation by (1) failing to report to the court services department during the months of April, May, and June 2017, (2) failing to provide proof of completion of the Partner Abuse Intervention Program, (3) failing to complete public service work, and (4) committing the criminal offense of domestic battery.

¶ 10 D. Probation Revocation

¶ 11 In August 2017, the trial court held a hearing on the State's petition to revoke

defendant's probation. Defense counsel informed the court defendant intended to make an open admission to the first three allegations of the petition. The court reviewed with defendant the first three allegations of the petition, the rights he was giving up if he made an admission, and the possible penalties he faced if his probation was revoked. The court also inquired into the voluntariness of the admission. The State presented a factual basis indicating Dave Cardani, a court services officer assigned to defendant's case, would testify defendant, contrary to the terms and conditions of his probation, failed to (1) report to the court services department during the months of April, May, and June 2017, (2) provide proof of completion of the Partner Abuse Intervention Program, and (3) complete public service work. Defense counsel acknowledged Cardani would testify substantially as indicated. The court accepted defendant's admission, revoked defendant's probation, and ordered the preparation of a presentence investigation report (PSI).

¶ 12 E. PSI

¶ 13 On September 26, 2017, Julie Roesch, a court services officer assigned to defendant's case, filed a PSI with the trial court which she had prepared that same month. The following is gleaned from the PSI.

¶ 14 Defendant, who was 42 years old at the time, had, in addition to multiple traffic violations and the 2016 domestic battery conviction for which he was being sentenced, two 1995 theft convictions, a 1995 possession of liquor by a minor conviction, a 1998 unlawful possession of a controlled substance conviction, a 1998 damage to property conviction, a 2000 domestic battery conviction, a 2001 possession of drug paraphernalia conviction, a 2002 criminal trespass conviction, a 2006 methamphetamine precursor conviction, and a 2009 theft conviction. For his criminal conduct, defendant received multiple community-based sentences, many of which were revoked, as well as terms of incarceration and imprisonment.

¶ 15 Defendant had two children, who at the time were 20 years old and 14 years old. Defendant's oldest child was a college student living out of state. Defendant reported he spoke with his oldest child about once or twice a month, but they had not visited in about six years. Defendant's youngest child lived with the child's mother. Defendant reported he spoke with his youngest child by telephone, but they had not visited in about four months. Defendant was not court-ordered to pay child support for his children. Defendant reported giving the mother of his youngest child $75 each week.

¶ 16 Defendant reported having been in a relationship with Champagne for nine years. When asked to describe their relationship, defendant commented, " 'It has its ups and downs, but it's fulfilling.' "

¶ 17 Defendant reported receiving a General Education Diploma (GED) while serving a prior term of probation and some college credits while serving a prior term of imprisonment. Defendant reported being employed as a lead carpenter since August 2006.

¶ 18 Defendant reported struggling with mental health issues and substance abuse. As a child, he was hospitalized to address his anger. In 2002, defendant was diagnosed with Post-Traumatic Stress Disorder and prescribed medication for about nine months. Defendant acknowledged taking methamphetamine at the same time he took his prescribed medication. Defendant admitted committing the offense for which he was being sentenced while he was under the influence of alcohol. He acknowledged his use of alcohol was problematic. Defendant also admitted to using various drugs in the past. In August 2017, defendant was diagnosed with "possible anxiety disorder" and prescribed medication.

¶ 19 Defendant reported participating in the Partner Abuse Intervention Program (PAIP). Defendant acknowledged he had to restart the program on three occasions, with the most

recent being about six weeks earlier.

¶ 20 Attached to the PSI was an adjustment report authored by Cardani. According to the report, defendant previously enrolled in the Partner Abuse Intervention Program but was discharged "for having accumulated 4 unexcused absences in December 2016." The report further stated, "It should be noted since July 26, 2017, Mr. Hawkins has been reporting weekly and is actively engaged in the [c]ourt[-]ordered Partner Abuse Intervention Program."

¶ 21 F. Sentencing Hearing

¶ 22 On September 29, 2017, the trial court commenced a sentencing hearing. The court indicated it had received documentation from the defense concerning defendant's participation in the Partner Abuse Intervention Program. The following summary is contained in a September 27, 2017, status report concerning that participation:

> "Jason Hawkins attended on the following dates: 7/31/17 for PAIP Orientation. 8/5/17 at 11-1 P.M. 8/12/17 at 11-1 P.M. 8/26/17 at 11-1 P.M. 9/9/17 at 11 to 1 P.M. All dates are scheduled with our Saturday Men's PAIP groups. Mr. Hawkins contacted us on 9/2/17 stating he is on medication, which made him sick at the time. Mr. Hawkins would have been non-compliant as our rules state there are 2 excused and 2 unexcused absences. Our facility was flexible with him, however, at this point, he would have to restart our program as he had not been here in almost 3 weeks. If any questions, comments, concerns, please contact our facility."

The court also indicated it had received the PSI. The court asked the parties if they had any corrections to the PSI, to which defense counsel noted:

> "Mr. Cardani's [a]djustment [r]eport in the second paragraph it says unfortunately [d]efendant *** was discharged from his Partner Abuse Intervention Program for having accumulated 4 un-excused absences in December[ ] 2016. It reads a little complicated, but Mr. Cardani and speaking with Mr. Hawkins he actually missed four times over the length of the programming, not four times in December, and it should say in December he was excused from the Partner Abuse Intervention Program for having four un-excused absences. It just reads a little difficult, but I wanted the [c]ourt to be aware that wasn't four consecutive absences."

After hearing the correction from the defense, the court continued the sentencing hearing due to the unavailability of a State's witness, that witness being "Angela Vogt from the Urbana Police Department."

¶ 23 On November 20, 2017, the trial court reconvened for sentencing. The court again asked for any corrections to the PSI, to which defense counsel noted defendant had obtained a second form of employment.

¶ 24 In aggravation, the State called Angela Vogt, a police officer with the City of Urbana. Officer Vogt testified she responded to a domestic call on June 30, 2017, where she spoke with Champagne. Champagne reported her boyfriend, defendant, had thrown salad dressing at her during an argument, which landed on her person and a couch. Officer Vogt observed stains on Champagne and the couch. Officer Vogt later arrested defendant, during which time defendant acknowledged an argument occurred between him and Champagne but asserted he did not throw salad dressing at Champagne but rather he tripped and fell causing the salad dressing to land on

her. On cross-examination, Officer Vogt acknowledged Champagne appeared intoxicated and, while she was initially cooperative, she later lost interest in speaking with the officers and asked them to leave.

¶ 25 Following Officer Vogt's testimony, the trial court asked if the State had any other witnesses, to which the State, over no objection, stated:

> "Your Honor, I would just proffer that if the State called Dave Cardani to testify, he would indicate that Mr. Hawkins is not currently engaged in partner abuse intervention, or any sort of treatment at PATS. Also that he missed an office visit within the last two weeks."

¶ 26 In mitigation, the defense presented a notarized July 6, 2017, written statement from Champagne, who had been previously subpoenaed by the defense and was present in the courtroom. In the statement, Champagne asserted defendant did not throw the salad dressing at her. Rather, defendant "accidentally" dropped the salad dressing, which caused Champagne to say hateful things to defendant. Defendant then "tossed" the salad dressing, and it landed on the couch. Champagne called the police "out of anger," and, while waiting for the police to arrive, she got salad dressing on her while cleaning the couch.

¶ 27 The defense also presented testimony from defendant's father, Gentry Hawkins. According to defendant's father, defendant had worked at their family construction business "on and off" for about 12 years. Defendant was a good employee and integral part of the business. The business would be flexible with defendant's work schedule to allow him to seek treatment. Any term of imprisonment would be difficult on defendant's father and a hardship to the business.

¶ 28 The State recommended defendant be sentenced to three years' imprisonment. In

support of its recommendation, the State highlighted defendant's criminal history. Specifically, the State noted the amount of convictions and the fact defendant had received multiple community-based sentences which were later revoked. The State also noted the instant case was not "his first domestic incident." The State stated:

> "He had a prior domestic incident, and then as well as the case that comes before the court today. Also worth noting is that the case that came before the court today, as the court would recall from the factual basis, this case did involve Christine Champagne, and an incident between her and him that started with an altercation. That an argument happened, and then the defendant got physical with her, resulting in injuries."

The State acknowledged defendant had mental-health issues and struggled with substance abuse. The State noted defendant, however, "has continually not reported to his classes like he's needed to, and he can't address the issues *** he has if he doesn't go to the classes and doesn't attend the programming that he's supposed to be attending." The State asserted a community-based sentence would not be appropriate "because he's not taken advantage of the programs and classes and community-based programming that he's gotten in this last probation sentence."

¶ 29 The defense recommended defendant be sentenced to an unspecified term of probation. In support of its recommendation, the defense asserted an applicable statutory mitigating factor was the fact any imprisonment would cause a hardship on defendant's family and employer. The defense highlighted defendant accepted responsibility by pleading guilty and admitting to allegations in the petition to revoke. The defense also highlighted defendant had an education, maintained employment, and was able "to support others." The defense noted defendant

had been seeking treatment for his mental health issues and substance abuse. With respect to his criminal history, the defense noted the time that had passed since defendant's last conviction. The defense suggested this was a case of a toxic relationship where the involved individuals needed help.

¶ 30 Defendant made a statement in allocution, apologizing for his "mistakes" and assuring he would try harder if given another opportunity at probation.

¶ 31 The trial court ruled as follows:

> "Thank you, sir. Well, I've considered the report prepared by [c]ourt [s]ervices. I've considered the comments of counsel, the comments of the defendant. I've considered the testimony presented by the State, as well as the testimony and documentation presented on behalf of the defendant. I've considered the statutory factors in aggravation, as well as the statutory factors in mitigation. There aren't any statutory mitigating factors that apply to this defendant, to this type of an offense. There is mitigation in this record, not necessarily statutory mitigation.
>
> First of all, he initially pled guilty to the original charge of domestic battery. He admitted to the violation of his probation. He's gotten his education as far as his GED, and is gainfully employed. These are all non-statutory mitigating factors.
>
> The two statutory factors in aggravation, we have the defendant's prior criminal history. This is his tenth criminal conviction. Ten. Not mistakes, ten criminal convictions, and most

of them are out of Coles and Moultrie County. He has a theft conviction in ‘95. He has a possession of liquor by minor in Shelby County in ‘95. A theft, which was a felony, in Moultrie County in ‘95. That resulted in a sentence of probation, which ultimately was revoked, and he was sentenced to the Department of Corrections. Then we have unlawful possession of a controlled substance in ‘98 out of Coles County. That was a sentence of probation, and again revoked, sentenced to the Department of Corrections. Ninety-eight, criminal damage, Coles County; 2000, domestic battery, Coles County; 2001, possession of drug paraphernalia, Coles County; 2002, criminal trespass, Coles County; 2006, meth precursor out of Coles County. Again, probation, which resulted in a revocation and four years in the Department of Corrections. Another theft conviction out of Coles County, and now this domestic battery conviction. So the defendant’s criminal history is extensive, and that doesn’t even count the six misdemeanor traffic offenses. The petty traffic offenses aren’t something the court considers.

So his prior criminal history is substantial. But more importantly, the other statutory factor in aggravation is the deterrent factor. The court has to fashion a sentence that will not only deter Mr. Hawkins, but other individuals similarly situated, from committing this type of an offense. And he’s being sentenced again for domestic battery.

He's been given opportunities in the past to deal with the issues in his life which basically involve, looks like alcohol and controlled substances, all to no avail.

Now Ms. Champagne has written a letter to the court which indicates that what Officer Vogt testified to wasn't really correct. Well, quite frankly, Ms. Champagne, I don't believe a word in your letter. What you said to the officer was what happened. You had a fight, and he threw something at you. You're an enabler. Now if you want to go through life getting your brains beaten out by your partners, that's up to you. But basically what you are is an enabler, ma'am, and you're giving him no opportunity to deal with his problems. And that's where the court has to fashion a sentence that's a deterrent to other individuals similarly situated.

The *** offense is probationable, and it was when he pled guilty, and it remains so today, and the court is obligated to consider a community-based sentence as the first alternative. When I look to the circumstances surrounding the offense, again we're getting back to the charge of domestic battery, in that on the 6th of February he caused bodily harm to Christine Champagne, a family or household member, in that he hit her in the face and had been previously convicted of domestic battery.

So he's being resentenced for that offense of domestic battery. We've had testimony that he re-engaged with the victim in

> this case, and was involved in an altercation, as testimony was presented today.
>
> The court has to make a determination, does he need to be incarcerated because he's dangerous, and/or would a sentence of probation or conditional discharge deprecate the seriousness of his conduct, and be inconsistent with the ends of justice. And again, we're looking to that deterrent factor.
>
> Given his prior criminal history, given the opportunities he's had, and the failures he has had in dealing with community-based sentences, I believe a community-based sentence would be inappropriate, it would be inconsistent with the ends of justice, definitely would not pose the appropriate deterrent factor for other individuals similarly situated. Therefore the defendant will be sentenced to a period of [imprisonment] in the Illinois Department of Corrections. It will be for a period of three years."

The court entered a written judgment sentencing defendant to three years' imprisonment followed by four years' mandatory supervised release (MSR). Defendant thereafter filed a timely notice of appeal from the sentence imposed against him.

¶ 32 G. *Pro se* Postconviction Petition

¶ 33 In March 2018, defendant, while his appeal was pending, mailed to the Champaign County circuit clerk various *pro se* documents, including, *inter alia*, a postconviction petition, a personal affidavit, and a written explanation why certain affidavits were not attached to his postconviction petition. In his postconviction petition, defendant alleged, in part, his trial counsel

(1) "abandoned" her role as his attorney by advising Champagne during the sentencing hearing "she did not have to testify due to being nervous," (2) rendered ineffective assistance by advising Champagne to "not testify at the sentencing hearing to mitigating evidence," and (3) rendered ineffective assistance by erroneously advising him the June 30, 2017, domestic battery allegation would not be presented to the court if he admitted to other allegations in the petition to revoke and, but for that erroneous advice, he would not have admitted to any of the allegations in the petition to revoke.

¶ 34 H. Summary Dismissal

¶ 35 In April 2018, the trial court entered an order summarily dismissing defendant's postconviction petition, finding it to be frivolous and patently without merit. With respect to the revocation of defendant's probation, the court noted had defendant not stipulated to the allegations in the petition to revoke, it would have held a hearing where the State could have easily proven defendant violated the terms and conditions of his probation. With respect to the sentence rendered, the court noted a community-based sentence "would have been totally inappropriate" given defendant's "extensive criminal history." Defendant thereafter filed a timely notice of appeal from the summary dismissal of his postconviction petition.

¶ 36 II. ANALYSIS

¶ 37 In this consolidated appeal, defendant argues we should (1) vacate his sentence and remand for a new sentencing hearing because the trial court in reaching its sentencing decision erroneously considered information presented by the State through an improper proffer and failed to consider several statutory mitigating factors and (2) reverse the summary dismissal of his postconviction petition and remand for second-stage proceedings because his petition states the gist of a constitutional claim.

¶ 38 A. Mootness

¶ 39 At the outset, the State asserts, citing *People v. McNulty*, 383 Ill. App. 3d 553, 892 N.E.2d 73 (2008), the issues defendant raises relating to his sentence are moot because it would be impossible for this court to grant defendant any effectual relief where he has already been released from prison. In response, defendant contends, citing *People v. Jackson*, 199 Ill. 2d 286, 769 N.E.2d 21 (2002) and *People v. Montalvo*, 2016 IL App (2d) 140905, ¶ 14, 64 N.E.3d 84, the issues relating to his sentence are not moot because this court could grant him effectual relief, as he is still serving his MSR term and the vacatur of his sentence followed by a proper sentencing hearing could result in a reduction of his prison sentence which would affect how long he could be imprisoned if he ever violated MSR.

¶ 40 As a general rule, Illinois courts will not consider moot issues. *In re Christopher K.*, 217 Ill. 2d 348, 359, 841 N.E.2d 945, 952 (2005). "An issue on appeal becomes moot where events occurring after the filing of the appeal render it impossible for the reviewing court to grant effectual relief to the complaining party." (Internal quotation marks omitted.) *Id.* at 358-59.

¶ 41 In *Jackson*, 199 Ill. 2d at 292-93, the defendant requested the supreme court to vacate his extended-term sentence as it was imposed in violation of the requirements set out in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The supreme court first considered whether the issue was moot as the defendant had been released from prison. *Id.* at 294. The court found, because the defendant was still serving an MSR term, the vacatur of the extended-term sentence would affect how long the defendant could be reimprisoned for a violation of MSR. *Id.* (citing 730 ILCS 5/3-3-9(a)(3)(i)(B) (West 1996)). Therefore, the court found the issue was not moot. *Id.*

¶ 42 In *Montalvo*, 2016 IL App (2d) 140905, ¶ 12, the defendant requested the appellate

court to accord him sentencing credit as the trial court failed to do so. The appellate court first considered whether the issue was moot as the defendant had been released from prison. *Id.* ¶ 14. The court found, because the defendant was still serving an MSR term, the award of any sentence credit would affect how long the defendant could be reimprisoned for a violation of MSR. *Id.* ¶¶ 14-15. Therefore, the court found the issue was not moot. *Id.* ¶ 15.

¶ 43 In *McNulty*, 383 Ill. App. 3d at 556, the defendant requested the appellate court to vacate his sentence and remand for " 'further proceedings' " under the Alcoholism and Other Drug Abuse and Dependency Act (20 ILCS 301/1-1 *et seq.* (West 2006)), as he was denied his right to a substance abuse evaluation and consideration for a treatment program instead of a traditional sentence. The appellate court, after first finding the issue was forfeited, considered whether the issue was also moot as the defendant had been released from prison. *Id.* at 556-59. The court found it was impossible for it to grant the defendant any effectual relief because, even if it vacated the defendant's sentence and remanded for further proceedings, it would have been impossible for the trial court to sentence the defendant to probation with drug treatment in lieu of imprisonment where the defendant had already completed his term of imprisonment. *Id.* at 558. Therefore, the court found the issue was moot. *Id.*

¶ 44 We find the instant case is analogous to *Jackson* and *Montalvo* as opposed to *McNulty*. It is undisputed defendant has been released from prison and is serving his MSR term. See also *Illinois Department of Corrections-Inmate Search*, Ill. Dep't of Corrs., https://www2.illinois.gov/idoc/Offender/pages/inmatesearch.aspx (last visited May 20, 2020) (indicating defendant has a "Parole Date" of May 3, 2019, and a "Projected Discharge Date" of May 5, 2023). Despite his release from prison, defendant, in this consolidated appeal, raises the following issues relating to his sentence: (1) whether the trial court in reaching its sentencing

decision erroneously considered information presented by the State through an improper proffer and failed to consider several statutory mitigating factors and (2) whether his trial counsel created a *per se* conflict of interest by, or was at least ineffective for, improperly advising Champagne she did not need to testify during the sentencing hearing. The issues defendant pursues effectively challenge the length of his prison sentence. That is, defendant suggests, but for the alleged errors, he would have received a lower sentence. Because the vacatur of defendant's sentence followed by a new sentencing hearing free from the alleged errors could result in a reduced sentence and thus the possibility of a shorter period of imprisonment if defendant ever violated MSR, we find the issues relating to his sentence are not moot.

¶ 45 B. Sentencing Decision

¶ 46 Defendant asserts the trial court, in reaching its sentencing decision erroneously, considered information presented by the State through an improper proffer and failed to consider several statutory mitigating factors. In response, the State contends defendant forfeited his contentions of error by failing to raise them before the trial court and that forfeiture may not be excused under the plain-error doctrine.

¶ 47 Defendant initially disputes the State's argument suggesting he forfeited his contentions of error by failing to raise them before the trial court. In support, defendant cites *People v. Lappin,* 335 Ill. App. 3d 418, 420, 780 N.E.2d 744, 746 (2002), for the proposition a defendant is not required to file a post-sentence motion to reconsider pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017) before a reviewing court can consider the merits of an argument on appeal from an admission to a probation violation. Apart from Rule 604(d), however, "there is a common law rule that issues never raised in the trial court are deemed, on appeal, to be procedurally forfeited." *People v. Hammons,* 2018 IL App (4th) 160385, ¶ 14, 138 N.E.3d 31.

Having raised no objection in the trial court, we find defendant's contentions of error are forfeited for purposes of appeal. See also *People v. Rathbone*, 345 Ill. App. 3d 305, 309, 802 N.E.2d 333, 336 (2003) (concluding the defendant forfeited his contention of error relating to the sentence imposed following the revocation of his probation by failing to raise the issue before the trial court in a postsentencing motion).

¶ 48 Defendant alternatively contends his forfeiture may be excused under the plain-error doctrine. To obtain relief under the plain-error doctrine, "a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* The defendant bears the burden of persuasion in establishing plain error. *Id.*

¶ 49 We turn first to whether defendant has shown a clear or obvious error occurred. *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. On review, "[t]here is a strong presumption that the trial court based its sentencing determination on proper legal reasoning." *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. We further presume "the trial court properly considered all mitigating factors and rehabilitative potential before it." *People v. Barnes*, 2017 IL App (1st) 143902, ¶ 95, 90 N.E.3d 1117. The burden rests with defendant to affirmatively rebut these presumptions. *People v. Dowding*, 388 Ill. App. 3d 936, 943, 904 N.E.2d 1022, 1028 (2009); *Barnes*, 2017 IL App (1st) 143902, ¶ 95.

¶ 50 First, defendant contends the trial court in reaching its sentencing decision erroneously considered information presented by the State through an improper proffer. Through the proffer, the State provided information indicating Cardani, the author of the adjustment report

attached to the September 2017 PSI, would testify at the November 2017 sentencing hearing defendant was "not currently engaged in partner abuse intervention, or any sort of treatment at PATS[,] [and] he missed an office visit within the last two weeks." Defendant suggests the State's comment in issuing its sentencing recommendation indicating defendant did not report to the classes or programming he needed and the court's statement indicating it considered the State's comments shows the court considered the information presented through the proffer. The State's comment, however, does not specifically reference defendant's lack of participation in classes and programming shortly before the sentencing hearing. Rather, the State appears to comment on defendant's failure to report to classes and programming as part of his previous probation sentence. Defendant also suggests the court's comments referencing his opportunities to address his issues shows the court considered the information presented through the proffer. The court's comments, however, do not specifically reference defendant's alleged lack of participation in classes and programming shortly before the sentencing hearing. Rather, the court's comments appear to indicate it was rejecting another community-based sentence given defendant's failure to take advantage of the opportunities to address his issues during his prior community-based sentences. Even if the proffer was improper, defendant has not shown the court relied on information obtained therefrom in reaching its sentencing decision.

¶ 51 Second, defendant contends the trial court in reaching its sentencing decision failed to consider several statutory mitigating factors, including the hardship to his family, his mental health condition, and the substantial period of time he spent as a law-abiding citizen. In issuing its sentencing recommendation, the defense asserted imprisonment would cause a hardship on defendant's family and noted defendant's mental health issues and the period of time he spent as a law-abiding citizen. The court stated it considered the "comments of counsel." The court also

stated it considered "the statutory factors in mitigation." Defendant suggests the court's subsequent statement that "[t]here aren't any statutory mitigating factors that apply to this defendant, to this type of an offense," shows the court failed to consider all mitigating factors. A statement that no statutory mitigating factors apply, however, does not indicate a court failed to consider the statutory mitigating factors. See *People v. Newbill*, 374 Ill. App. 3d 847, 854, 873 N.E.2d 408, 415 (2007) ("[S]tating that no statutory factors in mitigation *apply* is different than stating that the trial court did not *consider* a mitigating factor." (Emphases in original.)). Defendant has not shown the court failed to consider all statutory mitigating factors in reaching its sentencing decision.

¶ 52 Defendant, who undisputedly faced up to six years in prison, has failed to show the trial court committed clear or obvious error in reaching its decision to sentence him to three years' imprisonment. Because defendant has failed to establish clear or obvious error, we hold defendant to his forfeiture.

¶ 53 C. Summary Dismissal

¶ 54 Defendant asserts his postconviction petition states the gist of a constitutional claim. The State disagrees.

¶ 55 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2016)) "provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both." *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The adjudication of a postconviction petition follows a three-stage process. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615. In this case, defendant's postconviction petition was dismissed at the first stage. We review a first-stage dismissal *de novo*. *People v. Boykins*, 2017 IL 121365, ¶ 9, 93 N.E.3d 504.

¶ 56 At the first stage of postconviction proceedings, a postconviction petition must,

among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2016). Stated differently, a postconviction petition must allege sufficient facts to state the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). While a defendant at the first stage need only present a limited amount of detail, that "does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation." *Id.* at 10.

¶ 57 The legal standard to evaluate a postconviction petition at the first stage 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); see also 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition is frivolous or patently without merit where it has "no arguable basis either in law or in fact, relying instead on an indisputably meritless legal theory or a fanciful factual allegation." (Internal quotation marks omitted.) *Boykins*, 2017 IL 121365, ¶ 9. In evaluating the petition, "the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2016).

¶ 58 "Criminal defendants have a constitutional right to the effective assistance of counsel." *People v. Gayden*, 2020 IL 123505, ¶ 27 (citing U.S. Const., amends. VI, XIV and Ill. Const. 1970, art. I, § 8). That right "includes the right to conflict-free representation." *People v. Green*, 2020 IL 125005, ¶ 20. A postconviction petition alleging ineffective assistance of counsel "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." *People v. Cathey*, 2012 IL 111746, ¶ 23, 965 N.E.2d 1109.

¶ 59 First, defendant contends his postconviction petition states the gist of a

constitutional claim of ineffective assistance of counsel based on counsel erroneously advising him to admit to the probation violations to avoid evidence of the domestic battery allegation from being presented at sentencing. We disagree. Defendant on appeal asserts his petition shows he was arguably prejudiced by counsel's erroneous advice because it would have been rational under the circumstances for him to not admit to the allegations in the State's petition and proceed to a revocation hearing where he would have had the opportunity "to contest the domestic battery allegation." Defendant fails to recognize, however, the State was not required to proceed on the domestic battery allegation, the fourth allegation in its petition. If defendant did not make an admission, the State could have proceeded to a hearing on any of the first three allegations of its petition, allegations which defendant does not dispute could have been easily proven. Further, even if the State declined to proceed on the domestic battery allegation for revocation purposes, it still, as it did in this case, could introduce evidence of the domestic battery allegation at sentencing to show defendant's lack of rehabilitative potential. See *People v. Risley*, 359 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005) ("The court may consider the defendant's conduct while on probation in reassessing his rehabilitative potential."). Even if his counsel's advice was erroneous, defendant's petition fails to show he was arguably prejudiced by that advice.

¶ 60 Second, defendant contends his postconviction petition states the gist of a constitutional claim that his trial counsel created a *per se* conflict of interest by, or was at least ineffective for, improperly advising Champagne she did not need to testify during the sentencing hearing. We disagree. Defendant's suggestion in his petition that his counsel took on some improper role is based on the factual allegation that his counsel "advis[ed]" Champagne at the sentencing hearing "she did not have to testify due to being nervous." We find that allegation, by itself, is insufficient to support defendant's claim on appeal suggesting his counsel arguably

created a *per se* conflict of interest "by providing contemporaneous representation to the victim." We also cannot say, based on the allegations in defendant's petition as well as the record presented, counsel's decision not to call Champagne to testify at the sentencing hearing arguably fell below an objective standard of reasonableness. Defendant did not allege what he believed Champagne would have testified to had she been called as a witness. Even if Champagne would have provided testimony refuting the domestic battery allegation, we cannot say counsel's decision not to call her as a witness arguably fell below an objective standard of reasonableness where counsel was (1) able to effectively cross-examine the State's witness concerning the domestic battery allegation, (2) able to introduce a notarized affidavit from Champagne refuting the domestic battery allegation, and (3) aware Champagne was nervous and would be subject to cross-examination if she testified.

¶ 61 Defendant has failed to show the trial court's summary dismissal of his postconviction petition was in error.

¶ 62 III. CONCLUSION

¶ 63 We affirm the trial court's judgments sentencing defendant to three years' imprisonment and summarily dismissing defendant's postconviction petition.

¶ 64 Affirmed.