

2014 IL App (1st) 113598-U
No. 1-11-3598
June 18, 2014

THIRD DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 1979
)	
GERARDO MADRID,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed over his contention that he presented an arguable claim of ineffective assistance of appellate counsel.

¶ 2 Defendant Gerardo Madrid appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that the circuit court erred in dismissing his petition because he presented an arguable claim of ineffective assistance of appellate counsel requiring further proceedings under the Act.

¶ 3 Following a 2007 jury trial, defendant was found guilty of attempted first degree murder and aggravated domestic battery in connection with the repeated stabbing of his wife, Patricia Hernandez. He was then sentenced to respective, concurrent terms of 30 and 14 years' imprisonment. On direct appeal, this court initially reversed that judgment and remanded the cause for a new trial because the trial court failed to fully comply with Supreme Court Rule 431(b) (eff. May 1, 2007). *People v. Madrid*, 395 Ill. App. 3d 38 (2009). However, pursuant to a supervisory order from the supreme court to reconsider our decision in light of *People v. Thompson*, 238 Ill. 2d 598 (2010), we vacated that decision and ultimately affirmed defendant's attempted first degree murder conviction and sentence of 30 years' imprisonment, but vacated the judgment entered on his aggravated domestic battery conviction. *People v. Madrid*, No. 1-08-0324 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 On August 3, 2011, defendant filed a *pro se* post-conviction petition alleging, *inter alia*, that his sentence on the aggravated domestic battery conviction was excessive. He maintained that his prior convictions in Mexico and California did not make him eligible for enhanced sentencing, that the sentence fell outside the state's sentencing guidelines, and that the trial court grossly distorted the factual realities of the case where it found that "[h]e basically filleted the whole torso of his wife." Defendant further alleged that although this issue was raised on appeal, "The Appellate Court Reversed on other grounds and did not rule on this issue," and appellate counsel was ineffective for failing to "request the Appellate Court to rule on this issue." Defendant also alleged that because all of the counts filed in his case were predicated upon his physical act of stabbing the victim, and the State did not differentiate between separate stab

wounds in the indictment, it is evident that the State was charging him with a single physical act, which cannot support multiple convictions. He further maintained that appellate counsel was ineffective for failing to obtain a ruling on this issue on direct appeal.

¶ 5 On October 13, 2011, the circuit court summarily dismissed defendant's post-conviction petition, finding the issues raised were waived, or frivolous and patently without merit. Defendant now challenges the propriety of that ruling.

¶ 6 At the first stage of post-conviction proceedings, defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 7 Here, defendant contends that he raised an arguable claim of ineffective assistance of appellate counsel to warrant further proceedings under the Act. He claims that appellate counsel was ineffective for failing to argue on direct appeal that his sentence was excessive where the trial court misapprehended the evidence presented at trial and failed to consider his mitigating factors and substantial potential for rehabilitation. The State responds that defendant forfeited this issue for review because he did not raise it in his post-conviction petition. Defendant replies that the issue of whether appellate counsel was ineffective for failing to raise on direct appeal that his sentence was excessive was "clearly raised" in his petition "under the liberal construction

[standard] required at the first stage."

¶ 8 The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations *in the petition* are sufficient to invoke relief under the Act. (Emphasis in original.) *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010). Allegations that are not raised in the post-conviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Where the argument raised on appeal was not raised in the petition, it is forfeited for review. *People v. Cathey*, 2012 IL 111746, ¶21; *Petrenko*, 237 Ill. 2d at 502; *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006).

¶ 9 Here, defendant contends that appellate counsel was ineffective for failing to raise the issue concerning the excessiveness of his sentence on direct appeal. We are cognizant that petitions filed *pro se* are to be given a liberal construction and viewed with a lenient eye, allowing borderline cases to proceed. *Hodges*, 234 Ill. 2d at 21. However, the pleading must have some relationship to the issue on appeal, and liberal construction does not mean that we distort reality. *People v. Mars*, 2012 IL App (2d) 110695, ¶32.

¶ 10 Even allowing for the "liberal construction" that is afforded *pro se* claims at the summary dismissal stage (*Hodges*, 234 Ill. 2d at 21), it is apparent that defendant did not allege facts which present the claim raised on appeal in his petition, and that he cannot characterize his claim as such where he did not do so in his petition. *People v. Taylor*, 237 Ill. 2d 68, 75-76 (2010). Here, defendant's post-conviction petition alleges that appellate counsel raised the excessive sentence issue with respect to the aggravated domestic battery conviction, on direct appeal, but failed to obtain a ruling on it. The petition contradicts the contention in his brief that appellate counsel

failed, with respect to the attempted murder conviction, to raise the excessive sentencing issue on direct appeal. *Petrenko*, 237 Ill. 2d at 496. Accordingly, we find that the issue raised by defendant for the first time on appeal—whether the maximum sentence for attempted murder was excessive—is waived. *Jones*, 213 Ill. 2d at 508.

¶ 11 Defendant, nonetheless, contends that based on *Hodges* and *Brown* the claim in his petition, that appellate counsel was ineffective for failing to obtain a ruling from this court on his excessive sentence claim, can be liberally construed to include his claim on appeal—that appellate counsel was ineffective for failing to raise on direct appeal that his sentence was excessive. He maintains that the "gravamen" of his factual allegations is the same, namely, that his sentence was excessive and this court would have reduced it had it been given the opportunity to decide the issue on direct appeal. We find, following Taylor and Jones, that we cannot characterize defendant's claim as raising an issue where he did not do so in his petition. *Taylor*, 237 Ill. 2d at 75-76; *Jones*, 213 Ill. 2d at 508.

¶ 12 We note the contention in his petition that his aggravated battery conviction sentence was excessive but find it was resolved on direct appeal when this court vacated the judgment entered on his aggravated domestic battery conviction under the one-act, one-crime doctrine. *People v. Madrid*, No. 1-08-0324 (2011) (unpublished order under Supreme Court Rule 23). Accordingly, with the issue raised in his petition resolved, defendant cannot set forth an arguable claim of ineffective assistance of appellate counsel to warrant further proceedings under the Act. *Hodges*, 234 Ill. 2d at 16-17. We further observe that defendant has raised no issue regarding the other allegations that were raised in his petition, thus waiving them for review. *Pendleton*, 223 Ill. 2d

1-11-3598

at 476.

¶ 13 In light of the foregoing, we affirm the order of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

¶ 14 Affirmed.