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2014 IL App (4th) 120887-U
NO. 4-12-0887

FILED
April 2, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

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|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | McLean County |
| MICHAEL B. BROWN, |) | No. 08CF181 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Robert L. Freitag, |
| |) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* OSAD's motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), is denied and OSAD is ordered to file a brief on defendant's behalf.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), asserting no meritorious issues can be raised in this case. After carefully reviewing the record, we disagree with OSAD's assessment of the merits of this appeal and, for the following reasons, we deny OSAD's motion.

¶ 3 I. BACKGROUND

¶ 4 The facts are well known by all parties and have been extensively recounted by this court in its opinion affirming defendant's conviction on direct appeal. *People v. Brown*, 406

Ill. App. 3d 1068, 952 N.E.2d 32 (2011). Therefore, only those facts necessary for a complete understanding of the issues before this court appear below.

¶ 5 In February 2008, the State charged defendant, Michael B. Brown, with six counts of first degree murder in the deaths of Calvin and David Walls (720 ILCS 5/9-1(a)(1), (a)(2) (2008)), two counts of aggravated battery with a firearm for gunshot wounds to Levar Walls and Montell Jones (720 ILCS 5/12-4.2(a)(1) (West 2008)), and one count of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (2008)). (In March 2009, defendant successfully moved to sever the possession count.)

¶ 6 During the February 2008 arraignment, the trial court admonished defendant as follows regarding the possible punishment he faced:

"THE COURT: Counts 1 through 6 alleging first-degree murder are classified as Class M felonies. It is alleged in these charges that you caused the death of more than one individual. If these charges are proven and that fact is proven, the possible penalties include the maximum sentence that could be imposed could be the death penalty, or you could be sentenced to a term of natural life in prison or you could be sentenced to a term in the Department of Corrections of a minimum term of 20 and a maximum term of 60 years. There are also possible fines of up to \$25,000.

Counts 7 and 8 allege Class X felonies. Those are punishable by prison terms of a minimum of 6 and a maximum of

30 years.

Count 9 is a Class 1 felony with a possible sentence of a minimum of 4 and a maximum of 15 years.

Do you understand these possible penalties, sir?

THE DEFENDANT: Yes.

THE COURT: Do you acknowledge receipt?

[ASSISTANT PUBLIC DEFENDER]: Yes, we acknowledge receipt and waive formal reading.

[ASSISTANT STATE'S ATTORNEY]: Judge, may I just add one admonishment? As to the first-degree murder count, if it's found that the [d]efendant personally discharged the firearm, there is also an additional penalty of 25 to life on top of the sentence. Thank you.

THE COURT: What [the Assistant State's Attorney] has reminded me, [defendant], is that under the statute, one of the other allegations in this charge in the facts here alleges that you discharged a firearm. If that fact is proven, there are additional penalties that could be imposed on top of any other sentence that is imposed on the first-degree murder charges. That would be an additional term of 25 years to natural life in prison.

Do you understand that as well, sir?

THE DEFENDANT: Yes."

¶ 7 In June 2008, the State filed a notice indicating it did not intend to seek the death penalty.

¶ 8 In April 2009, the case proceeded to jury trial. The evidence established defendant was involved in an altercation with Calvin, David, and Levar Walls. During the altercation, defendant fired at least 14 shots, resulting in at least 11 gunshot wounds to the three Walls brothers and Montell Jones. Calvin and David Walls died from multiple gunshot wounds. Levar Walls and Montell Jones, a bystander, each sustained multiple gunshot wounds.

¶ 9 Defendant, testifying on his own behalf, claimed he shot the Walls brothers in self-defense.

¶ 10 During the jury instruction conference, the following colloquy took place regarding whether the jury would be instructed on second degree murder:

"THE COURT: Before we conclude then, let me bring up the subject, because I want again the record to be clear, the defense has requested in this case, and the court has ruled it will give instructions regarding self-defense and defense of a dwelling. Defense has not requested any instructions on second degree murder, and I just want to, for the record, I want to clarify, [defense counsel], that you have considered and consulted with your client on the issue of the tendering of second degree instructions and that you have decided, and the defendant has decided, that you do not wish to tender those instructions.

[DEFENSE COUNSEL]: Judge, we have had a full

conversation and discussion about the legal ramifications of the decision. I have told [defendant] it is one of the four decisions he has to make as a defendant. He has expressed to me today and on a prior occasion he does not wish the jury to be instructed on second degree.

THE COURT: [Defendant], as your attorney just indicated, sir, you have been charged in the indictment with the offense of first degree murder. There is what is often referred to as a lesser included offense of second degree murder. And at your request based upon the evidence that's been presented in this case, the court would instruct the jury on the offense of second degree murder, that is, that they would have the option of determining whether or not you're guilty of first degree murder and if so then determining whether there was a mitigating factor to reduce it to second degree murder. [Defense counsel] has indicated that you have discussed these issues with your counsel. Is that correct, sir?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Do you feel like you've had enough time to talk to him about that issue?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel that you understand what that issue is?

THE DEFENDANT: I feel it's too confusing of an issue for the jury.

THE COURT: All right. You do feel that you understand the issue of second degree murder after talking to your counsel?

THE DEFENDANT: Yes.

THE COURT: Now, have you decided based on the advice he has given you that you do not want the jury instructed on the issue of second degree murder?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And this is your decision?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions at all at this time about that?

THE DEFENDANT: No sir."

¶ 11 During the April 2009 jury instruction conference, the State tendered an instruction setting forth an initial aggressor's responsibilities before a use of force can be justified. The trial court refused to submit the instruction to the jury, stating, although there was ambiguity in the evidence regarding who initially provoked the use of force, there was no direct testimony by any eyewitnesses as to who threw the first punch.

¶ 12 During deliberations, the jury inquired about the legal justification for an initial aggressor's use of force. The trial court allowed the initial-aggressor instruction to be tendered to the jury over defense counsel's objection. In allowing the instruction, the court stated it had a

duty to appropriately respond to jury questions, and the instruction directly answered the inquiry.

¶ 13 The jury found defendant guilty of two counts of first degree murder for the deaths of Calvin and David Walls and aggravated battery with a firearm for the shooting of Levar Walls. It found defendant not guilty of aggravated battery with a firearm with respect to Montell Jones.

¶ 14 Defense counsel filed a motion for judgment of acquittal notwithstanding the verdict or, in the alternative, acquittal, alleging (1) the jury ignored its instructions and failed to follow two instructions, *i.e.*, use of force in defense of a dwelling and a noninitial aggressor has no duty to retreat before using force against the aggressor; (2) the trial court erred in not properly instructing the jury on the lesser-included offense of second degree murder despite the court's *sua sponte* obligation to do so; and (3) the court erred in instructing the jury mid-deliberation with an instruction refused prior to the start of deliberations. The court found the jury did not ignore the instructions but weighed the evidence in the State's favor. The court further noted it had discretion to instruct the jury on second degree murder. Since defendant objected to so instructing the jury, the court deferred to defendant's trial strategy that his actions were justified. The court further stated it had a duty to respond to the jury's mid-deliberation question by submitting the initial-aggressor instruction. Therefore, the court denied defendant's motion.

¶ 15 The trial court sentenced defendant to natural life in prison for each first-degree-murder conviction, to run concurrently with a 30-year prison term for the aggravated-battery-with-a-firearm conviction. The court admonished defendant of his appeal rights, including the requirement he file a motion to reconsider sentence if he wished to appeal the sentence imposed. Defendant did not file a motion to reconsider sentence.

¶ 16 On direct appeal, defendant argued (1) the trial court erred in submitting the initial-aggressor instruction to the jury mid-deliberation, (2) the evidence was insufficient to convict, and (3) he was entitled to a \$5-per-day credit against fines imposed. In February 2011, this court affirmed the convictions and remanded to the trial court for modification of the credit against fines. *Brown*, 406 Ill. App. 3d at 1084, 952 N.E.2d at 45. In September 2011, a petition for leave to appeal was denied. *People v. Brown*, No. 112245, 955 N.E.2d 473 (2011).

¶ 17 In June 2011, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). In his petition, defendant alleged ineffective assistance of counsel for counsel's failure to inform defendant he would be subject to a natural life sentence if found guilty of both counts of first degree murder. Specifically, defendant states:

"Here, prior to the jury instruction conference, trial counsel informed the defendant that he could tender an instruction for second degree murder to the jury which would allow the jury to consider whether he committed first degree murder or second degree murder, but it would also give the jury a way to find him guilty of murder. Further, trial counsel advised that because the State withdrew the death penalty and due to the fact that the defendant didn't have a prior conviction for first degree murder[,] he faced concurrent sentences of 20-60 years of imprisonment if he was found guilty of both first degree murder charges because the deaths were simultaneous. However, trial counsel never informed

the defendant that a natural life sentence of imprisonment was *mandated* if he was found guilty of both charges[,] nor that the trial court would be allowed to rely on two sentencing factors that required the imposition of a natural life sentence." (Emphasis added.)

Attached to the petition was a letter written to defendant by his counsel dated April 17, 2009, the date of the guilty verdicts, wherein counsel stated, in relevant part:

"Sentencing will occur after the posttrial motion. First degree murder is punishable by 20 to 60 years in prison at 100% time. Personal discharge of weapon which causes the death carries an additional 25 years at 85% time. For the court to impose natural life, it would have to find a prior conviction for first degree murder[,] which does not exist as these convictions are simultaneous. Further, I do not believe the first degree murder sentences can be imposed consecutively. It would be unrealistic to expect a sentence less than 45 years (minimum on murder and the enhancement for discharge of the firearm[]). What may be problematic is the aggravated battery conviction can be run consecutive (6 to 30) and probably will as the [S]tate will argue it is mandatory that it does."

Defendant avers had he known he would face natural life in prison he would not have agreed with counsel's advice during his jury trial to forego tendering of a second-degree-murder

instruction to the jury.

¶ 18 In August 2012, in a written order, the trial court dismissed the petition as frivolous and patently without merit. The court found the decision to forego the second-degree-murder instruction was not objectively deficient based on the court's admonishments and the fact defendant clearly preferred, as a matter of trial strategy, to give the jury only the options of guilty of first degree murder or acquittal of first degree murder on the grounds of self-defense. The court further found, even though counsel may have been incorrect in advising defendant of the maximum penalty he faced if found guilty of first degree murder of both victims, the record reflected at the arraignment the court had fully advised defendant of the potential penalties he faced, including natural life in prison.

¶ 19 Defendant filed a timely notice of appeal. The trial court appointed OSAD to represent defendant. OSAD moved to withdraw as counsel under *Finley*, 481 U.S. 551. Notice of OSAD's motion was sent to defendant. This court granted defendant time to file additional points and authorities, which he did. The State filed a brief, to which defendant responded with a reply brief.

¶ 20 After carefully reviewing the record, we disagree with OSAD's assessment of the merits of this appeal and, for the following reasons, we deny OSAD's motion.

¶ 21 II. ANALYSIS

¶ 22 As an initial matter, we will address the State's claim defendant has forfeited this issue for review by failing to raise this claim on direct appeal.

"The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues involved in the original

conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. [Citations.] Issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. [Citations.] Issues that could have been presented on direct appeal, but were not, are waived. [Citations.] However, the doctrines of *res judicata* and waiver are relaxed in three situations: where fundamental fairness so requires, where the alleged waiver stems from the incompetence of appellate counsel, or where the facts relating to the claim do not appear on the face of the original appellate record. [Citations.]" *People v. Harris*, 206 Ill. 2d 1, 12-13, 794 N.E.2d 314, 323 (2002).

¶ 23 Here, the State maintains "[a]ll the facts alleged in support of petitioner's claim were present and known to petitioner at the time he filed his direct appeal," and "yet, petitioner failed to raise the argument in a post-sentencing motion or in his direct appeal." Postconviction claims dependent upon matters outside the record are not ordinarily subject to forfeiture because such matters may not be raised on direct appeal. *People v. Youngblood*, 389 Ill. App. 3d 209, 214, 906 N.E.2d 720, 725 (2009). Defendant's claim he received erroneous advice from his attorney about the potential penalties he faced could not have been raised on direct appeal as the claim is based on off-the-record communications between defendant and his counsel. Accordingly, the forfeiture rule does not bar consideration of defendant's claim.

¶ 24 The Act (725 ILCS 5/122-1 to 122-7 (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890

N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the first stage of postconviction proceedings. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable basis either in law or in fact where it "is based on an indisputably meritless legal theory *** which is completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212.

¶ 25 Ineffective-assistance-of-counsel claims are reviewed under the two-pronged standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must prove (1) his attorney's actions constitute errors so serious as to fall below an objective standard of reasonableness; and (2) the deficient performance prejudiced defendant in that, but for the deficient performance, a reasonable probability exists the trial would have resulted in a different outcome. *People v. Evans*, 209 Ill. 2d 194, 219-220, 808 N.E.2d 939, 953 (2004). Defendant must prove both prongs of the *Strickland* test in order to prevail. *Evans*, 209 Ill. 2d at 220, 808 N.E.2d at 954.

¶ 26 In the case *sub judice*, once the State chose not to pursue the death penalty, defendant was subject to: (1) 20 to 60 years in prison on a single first-degree-murder conviction (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)), or mandatory natural life sentences on the first-degree-murder convictions for having caused the death of more than one person (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2008)); (2) an enhanced sentence of an additional 25 years to natural life for

having discharged a firearm, which caused the deaths (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)); and (3) 6 to 30 years in prison for the aggravated-battery-with-a-firearm conviction (720 ILCS 5/12-4.2(a)(1), (b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008)).

¶ 27 Defendant arguably has satisfied the first prong of the *Strickland* test by alleging when he and his counsel discussed submitting a second-degree-murder instruction his counsel incorrectly advised defendant about the potential sentences he faced on the two convictions for first degree murder. In support of this allegation, defendant attached to his postconviction petition a letter he had received from counsel after the jury verdict which states the incorrect sentencing range, *i.e.*, concurrent sentences of 20 to 60 years in prison at 100% for the first-degree-murder convictions with an additional 25 years at 85% for discharge of the weapon.

¶ 28 Moreover, defendant alleges had he known a natural life sentence was mandatory if he was convicted of two murders, he would have asked the jury to be instructed on second degree murder. OSAD contends the record clearly contradicts defendant's assertion because defendant was correctly admonished by the trial court at his arraignment. However, OSAD states in its brief, on page 8, "because the State decided not to seek the death penalty, the trial court was authorized to impose either a natural life sentence or a term of between 20 and 60 years' imprisonment." This appears to be an incorrect statement of the law because a natural life sentence is mandated where a defendant is convicted of murdering more than one person. 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2008). Moreover, at the arraignment, the trial court specifically admonished defendant regarding the first degree murder counts, stating "the maximum sentence that could be imposed [for causing the death of more than one individual] could be the death penalty, or you could be sentenced to a term of natural life in prison[,] or you could be sentenced

to a term in the Department of Corrections of a minimum of 20 and a maximum of 60 years."

The court further admonished defendant if it was proved he had discharged a firearm in the commission of the murders "there are additional penalties that could be imposed on top of any other sentence that is imposed on the first degree murder charges" which would be "an additional term of 25 years to natural life in prison."

¶ 29 The critical question is "whether the trial court's admonitions were sufficiently related to counsel's erroneous advice to overcome the prejudice created by that advice." *People v. Hall*, 217 Ill. 2d 324, 339, 841 N.E.2d 913, 922 (2005). Here, the trial court never admonished defendant a natural life sentence was mandatory if he was convicted of two murders and further told defendant a sentence of 20 to 60 years was possible under those circumstances.

¶ 30 For the reasons stated, we disagree with OSAD's assessment no colorable argument can be made on appeal respondent was denied effective assistance of counsel. We conclude this issue would be best resolved by the advocacy process. Therefore, we deny OSAD's motion and direct OSAD to file a brief on defendant's behalf addressing whether (1) defense counsel's actions constitute errors so serious as to fall below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced defendant because a reasonable probability exists that, but for counsel's performance, the trial outcome would have been different.

¶ 31 The questions raised in this order do not imply a position on the merits of the issues involved. However, a motion to withdraw asserts the absence of any arguable issues. Without further exploration of the issues we identify herein, we cannot agree with OSAD that no colorable issue can be raised. Our denial is without prejudice. Within 28 days, OSAD shall file

a brief addressing the concerns raised in this order.

¶ 32

III. CONCLUSION

¶ 33 For the foregoing reasons, we deny without prejudice OSAD's motion to withdraw and direct OSAD to file a brief on defendant's behalf within 28 days hereof.

¶ 34 Motion denied without prejudice and with directions.