

No. 1-11-2193

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. 97 CR 14196
)	
DAVID AGUAYO,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held:* Where prosecution reinstated nolled counts within applicable limitations period, trial court had jurisdiction to proceed on those counts, and appellate counsel was not deficient in failing to raise those contentions; the summary dismissal of defendant's *pro se* post-conviction petition was affirmed.

¶ 2 Defendant David Aguayo appeals the circuit court's summary dismissal of his *pro se* post-conviction claim of the ineffectiveness of his appellate counsel. Defendant, who represents himself in this appeal, contends his counsel on direct appeal provided deficient representation by failing to argue that the trial court lacked subject matter jurisdiction to retry him on six counts of his original indictment that were nol-prossed in exchange for his guilty plea. We affirm.

¶ 3 In June 1997, defendant was indicted on eight counts of sex offenses against his stepdaughter, including two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1992)), two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 1992)), and four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(B) (West 1992)). The events underlying those offenses were alleged to have taken place between January 1, 1996, and April 30, 1997.

¶ 4 On November 13, 1998, defendant pled guilty to two counts of predatory criminal sexual assault of a child. The court heard a factual basis for defendant's plea. In exchange for that plea, the State dismissed by *nolle prosequi* the six counts of aggravated criminal sexual assault and aggravated criminal sexual abuse that were contained in the indictment. Defendant was sentenced to 14 years in prison.

¶ 5 In 2001, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2000)), challenging the performance of his counsel at his plea proceedings. In 2002, defendant filed a supplemental *pro se* post-conviction petition asserting that his convictions should be vacated because the Illinois Supreme Court found the statute under which defendant was convicted of predatory criminal sexual assault of a child to be unconstitutional based on a violation of the single-subject rule in *Johnson v. Edgar*, 176 Ill. 2d 499 (1997). In March 2004, the trial court granted defendant's motion to vacate his guilty plea, based on *Johnson*.

¶ 6 In September 2005, the State filed a motion to reinstate the six counts in the indictment that had been nolle. Defendant objected, arguing that to pursue those counts, the State was required to file a new charging instrument. The circuit court granted the State's motion to reinstate the six nolle counts.

¶ 7 In 2008, a jury trial was held on those counts, and defendant was convicted of one count of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse. The trial court sentenced defendant to consecutive terms of 13 and 7 years, respectively, on those counts. On direct appeal, this court affirmed. *People v. Aguayo*, No. 1-08-2411 (2011) (unpublished order under Supreme Court Rule 23). As set out in that order, defendant argued, *inter alia*, that the State was required to file a new indictment against him to reinstate the nolle charges. This court rejected that argument, holding that even though the State did not vacate its nolle prosequi before reinstating the charges, the State could proceed on those six counts because defendant did not establish harassment, bad faith or fundamental unfairness. *Id.* at 14-15.

¶ 8 On March 11, 2011, defendant filed a *pro se* post-conviction petition, alleging he was denied the effective assistance of appellate counsel when counsel did not raise the issue of the trial court's jurisdiction to try him in 2008 and that the State was required to file a new charging instrument against him as opposed to reinstating the charges from the 1997 indictment. Defendant further asserted the six nolle counts could not be reinstated because the statute of limitations had expired by that point.

¶ 9 In April 2011, defendant filed a *pro se* supplemental post-conviction petition asserting that his trial and appellate counsel were ineffective in failing to challenge the imposition of consecutive sentences in his case. In a written order on June 22, 2011, the circuit court summarily dismissed defendant's post-conviction claims. Defendant now appeals that ruling.

¶ 10 At the first stage of post-conviction review, a petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning an assertion that is fantastic

or delusional. *Id.* at 16-17. This court reviews the summary dismissal of a post-conviction petition *de novo*. *Id.* at 9.

¶ 11 Defendant contends the trial court lacked subject matter jurisdiction in 2005 to reinstate the six nolle counts upon the State's motion and that the attorney representing him in his direct appeal refused to raise that issue. To prevail on an ineffective assistance claim, the defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant alleging ineffectiveness of appellate counsel must establish both that appellate counsel's performance was deficient and that a reasonable probability exists that, but for counsel's errors, the appeal would have been successful. *People v. Golden*, 229 Ill. 2d 277, 283 (2008).

¶ 12 The crux of defendant's position is that the entire 1997 indictment, which included eight separate counts, was rendered void because he pled guilty to two counts of one offense (predatory criminal sexual assault of a child) which was later held to be unconstitutional for violating the single-subject rule, and the State had nolle the remaining six counts as part of the plea agreement. Defendant apparently conflates the term "count" with the word "indictment." As explained below, defendant's position has no merit.

¶ 13 The State argues defendant's post-conviction claims are barred by *res judicata*. Defendant's current arguments are similar, but not identical, to his contention raised on direct appeal. This court stated on direct appeal that defendant did not "challenge the trial court's jurisdiction to reinstate the nol-prossed counts" or raise any issues regarding statutes of limitation. *Aguiayo*, No. 1-08-2411, at 11. Rather, at that stage, defendant challenged the action of the prosecution in reinstating the nolle counts. In defendant's current post-conviction petition, he challenges the jurisdiction of the court in permitting that reinstatement. He contends the six nolle counts were defective because they were part of a "defective charging instrument."

Because defendant now raises a different argument than on direct appeal, *res judicata* does not bar our consideration of his claim.

¶ 14 Defendant contends the trial court lacked subject matter jurisdiction over the six nolle counts from the 1997 indictment. He bases this claim on the argument that the entire indictment was void because the two counts to which he had plead guilty were void and that a void judgment does not confer jurisdiction upon the court.

¶ 15 Defendant specifically argues that an "indictment that charges offenses not in effect on the date of the alleged criminal act is void and the whole charging instrument is fatally defective [and] null and void." Defendant states that "the six nolly counts were defective where they were charged in the same defective charging instrument." For this argument, defendant relies on *People v. Wasson*, 175 Ill. App. 3d 851, 854-55 (1988), in which the defendant was charged with one count of aggravated criminal sexual assault and this court held the indictment was fatally defective because that count alleged an offense that was not yet included in the statute under which the defendant was charged.

¶ 16 The flaw in defendant's position is that the defendant in *Wasson* was charged in a one-count indictment and after that one count was found defective, no counts remained. In stark contrast, defendant here was charged in an eight-count indictment that named three different offenses, and the subsequent lack of two counts that were based on one void offense (predatory criminal sexual assault of a child) does not render the entire indictment void. The State was allowed to reinstate the remaining charges even though defendant successfully challenged his guilty plea as to the two counts of predatory criminal sexual assault. See *People v. McCutcheon*, 68 Ill. 2d 101, 107-08 (1977).

¶ 17 Defendant has not, and indeed cannot, provide any legal authority to support his theory that the court lacked subject matter jurisdiction over the six remaining counts which were

indisputably valid, not void, offenses (aggravated criminal sexual assault and aggravated criminal sexual abuse). The cases on which defendant relies are distinguishable from the facts here. See *People v. Wasson*, 175 Ill. App. 3d 851 (1988) (defendant was convicted based on a one-count indictment; charging instrument found to be invalid because it did not state offense that was in effect on alleged date of crime); see also *People v. Wallace*, 57 Ill. 2d 285 (1974) (indictment void because failed to charge criminal offense); *People v. Edge*, 406 Ill. 490 (1950) (same).

Furthermore, in one instance, defendant has cited the same authority that he unsuccessfully relied upon in his direct appeal. See *Aguayo*, No. 1-08-2411, at 14-15 (distinguishing *People v. Stafford*, 325 Ill. App. 3d 1069 (2001), which involved bench trial as opposed to guilty plea).

¶ 18 Defendant also improperly relies on legal authority that holds an indictment cannot be amended to include new charges after the original charge has been held unconstitutional. See *People v. Tellez-Valencia*, 188 Ill. 2d 523 (1999) (entire charging instrument invalid where defendant charged only with predatory criminal sexual assault under version of statute that was not in effect when alleged offense occurred). The supreme court further held in *Tellez-Valencia* that the indictment could not be amended to cure a substantive defect. *Id.* at 527-28. This principle simply does not apply in the case at bar because defendant's indictment was not amended; rather, the original nolle counts were reinstated.

¶ 19 Defendant further contends that the reinstatement of the 1997 counts of aggravated criminal sexual assault and aggravated criminal sexual abuse counts was barred by the statute of limitations. Our analysis of the applicable limitations period reveals that position to be meritless.

¶ 20 Nolle-prossing a count terminates the charge and requires a new proceeding to prosecute the defendant, and nolle-prossing a count does not toll the statute of limitations, which "imposes a

limit on the length of time in which new charges may be filed." *People v. Totzke*, 2012 IL App (2d) 110823, ¶ 23; see also *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 101-02 (2004).

¶ 21 At the time of the instant offenses, the State was required to commence a prosecution for the offenses alleged within one year of the time when the victim turned 18 years old. The factual basis for defendant's plea indicates that the victim's date of birth was April 19, 1985, and therefore, the victim in this case turned 18 years old on April 19, 2003. Therefore, under that rule, the State had an additional year, or until April 19, 2004, to begin to prosecute defendant on those counts. Though we note that the State moved to reinstate the nolle counts in September 2005, our analysis of the applicable limitations period does not end there.

¶ 22 Defendant is subject to any extensions in the statute of limitations enacted prior to the victim's nineteenth birthday. See *People v. Stone*, 374 Ill. App. 3d 980, 985-86 (2007). As noted above, the victim of defendant's crimes turned 19 years old in 2004. Effective January 1, 2000, the statute of limitations for prosecutions of aggravated criminal sexual assault and aggravated criminal sexual abuse was extended to allow those prosecutions be commenced within 10 years of the victim's eighteenth birthday. 720 ILCS 5/3-6(i) (West 2000). The applicable statute of limitations for the offenses in question therefore extends to April 2013. Thus, the reinstated charges in this case were brought well within the applicable statute of limitations.

¶ 23 Appellate counsel is only required to raise meritorious issues on appeal. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Defendant's appellate counsel therefore cannot be deemed ineffective for failing to raise these meritless issues. Accordingly, because defendant's post-conviction petition sets out an indisputably meritless legal theory, the circuit court's order summarily dismissing the petition is affirmed.

¶ 24 Affirmed.