

No. 1-12-0047

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|----------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the      |
|                                      | ) | Circuit Court of     |
| Plaintiff-Appellee,                  | ) | Cook County.         |
|                                      | ) |                      |
| v.                                   | ) | No. 02 CR 31003      |
|                                      | ) |                      |
| AARON BENNETT,                       | ) | Honorable            |
|                                      | ) | Noreen Valeria-Love, |
| Defendant-Appellant.                 | ) | Judge Presiding.     |

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PRESIDING JUSTICE QUINN delivered the judgment of the court.  
Justices Harris and Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* In appeal from summary dismissal of post-conviction petition, defendant forfeited claim that appellate counsel was ineffective for failing to raise excessive sentence issue on direct appeal; even if claim was not forfeited, dismissal was proper; affirmed.

¶ 2 Defendant Aaron Bennett appeals from an order of the circuit court summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He asserts the circuit court erred in summarily dismissing his petition because his petition stated an arguable basis in law and fact that his appellate counsel

was ineffective for failing to argue on direct appeal that his 60-year prison sentence was excessive. We affirm.

¶ 3 The record reveals that in December 2002, defendant was indicted on four counts of first degree murder in connection with the shooting death of Shawn Alexander on November 18, 2002 in Maywood, Illinois. At trial, Alexander's uncle, Darryl Watson, testified that on the evening of November 18, he accompanied Alexander to an Auto Zone store so that Alexander could get a tool for his car. While Alexander was kneeling down in the Auto Zone parking lot fixing the front headlight of his car, a man wearing a black "hoody" sweatshirt ran up, shot Alexander in the head, and then ran away. Maywood police officer Arian Wade testified that while he was on patrol on November 18, he received a radio transmission that there was a "man down" in the Auto Zone parking lot. As he drove looking for the offender, he saw a black male wearing a black hood, identified as defendant, who he put in his squad car and drove to the Auto Zone parking lot. Once there, Watson identified defendant as the person who had shot Alexander. Watson also identified defendant as the shooter at a police lineup. Additionally, the State presented a videotaped statement given by defendant, in which he admitted taking a gun from the closet of his bedroom, approaching Alexander, and shooting him in the head. The jury found defendant guilty of first degree murder.

¶ 4 A presentence investigation report (PSI) revealed that defendant, who was 20 years old, lived with his mother, stepfather, and brother prior to the incident. Defendant's father was killed when defendant was two months old, and defendant was raised by his mother and stepfather. Defendant reported good relationships with his family members. After graduating from eighth grade, defendant attended Pace High School, an alternative school, where he completed the tenth grade. Defendant was in special education classes for learning and behavior disabilities, and had been diagnosed with attention deficit disorder and dyslexia. Defendant read at a third grade

level, and his goals were to attend school, work in fast food or obtain a trade in welding, and play some sports. During the summer of 2001, defendant was employed doing clean-up work for the Village of Maywood. In his free time, defendant enjoyed playing basketball, and he had attended Broadview Love Church since he was nine years old. While in custody, defendant enrolled in GED classes and attended worship services and Bible studies.

¶ 5 The PSI also revealed that defendant was first arrested at age 13 for possession of cannabis, but the charge was dropped. The PSI showed that defendant had three prior convictions: (1) an October 2001 conviction for delivery of a controlled substance and possession of cannabis to which he pled guilty and was initially sentenced to 30 months' probation, but was then sentenced to 90 days in jail after he violated his probation; (2) a March 2002 conviction for possession of cannabis to which he pled guilty and was originally sentenced to one year of court supervision, but was then sentenced to 14 days in jail after he violated his supervision; and (3) a May 2002 conviction for possession of cannabis to which he pled guilty and was sentenced to 30 days in jail.

¶ 6 At sentencing, the State presented a victim impact statement from Cynthia Watson, a relative of the victim. The statement described the emotional difficulties experienced by the victim's family, including the victim's mother, younger brother, and four-year-old son. The State then relied on the PSI as further evidence in aggravation.

¶ 7 In mitigation, defense counsel stated that defendant was 20 years old and described him as a young man who has borderline intelligence and a very limited educational background, and noted that defendant had never been convicted or charged with a violent crime. Defendant was enrolled in GED classes, and though he found the classes difficult, "he [continued] to pursue something constructive" while incarcerated. Defendant had a strong bond with his brother and a very good relationship with his stepfather, who had acted as a surrogate father. Defense counsel

further stated that defendant completed his sophomore year at Pace High School, where he was enrolled in special education classes and classes for people with learning disabilities.

Additionally, defendant had behavior disabilities and had been diagnosed with attention deficit disorder and dyslexia. In spite of those "limitations" and "negatives," defense counsel reiterated that defendant had limited contact with the criminal justice system and had never been convicted or charged with a violent crime.

¶ 8 In allocution, defendant stated he was sorry that the victim's family had lost a loved one, he knew "how it hurts" and "how it feels," but he was "not the one that did it." Defendant said he was praying for the victim's family every night and hoped that God would bring them comfort.

¶ 9 In announcing defendant's sentence, the trial court stated it had considered the evidence at the jury trial and suppression hearings, the PSI, evidence and information offered by the parties in aggravation and mitigation, arguments as to sentencing alternatives, defendant's statement in allocution, and the victim impact statement. In mitigation, the trial court stated that defendant had a history of prior delinquency or criminal activity, and had led a law-abiding life for a substantial period of time prior to the present offense. The trial court also noted defendant's prior convictions for drug-related crimes where he violated either probation or supervision conditions, and subsequently was sentenced to jail. The trial court found that defendant's character and attitude indicated he was likely to commit another crime. Additionally, the trial court noted that defendant was 20 years old and had been reportedly diagnosed with attention deficit disorder and dyslexia. In aggravation, the trial court described defendant's conduct as "violent and calculated," and stated the evidence established that defendant, while armed with a firearm, pointed and fired the gun at the victim's head while the victim was kneeling and his back was facing defendant. The trial court stated it had considered the force employed by

defendant, the manner in which the victim's death was brought about, the degree and gravity of defendant's conduct, and the nature and circumstances of the offense. The trial court also weighed defendant's rehabilitation potential and the seriousness of the offense. The trial court further stated it had considered the following additional factors:

"[T]he defendant's age, the nature of the crime, the defendant's educational and family background, the nature and character of the [d]efendant himself, including his criminal background, the defendant's credibility, demeanor, general moral character, mentality, habits[,] and social environment."

The court correctly explained that the general sentencing range for first degree murder is 20 to 60 years. However, where, as here, defendant personally discharged a firearm that caused the victim's death, the court must add on a term of 25 years up to a term of natural life. Defendant was then sentenced to 60 years in prison.

¶ 10 The trial court subsequently denied defendant's motion to reconsider sentence, which alleged, in relevant part, that the court did not give sufficient weight to defendant's age, lack of violent criminal history, and rehabilitative potential. The motion observed that defendant was 18 years old at the time of the offense and 20 years old at sentencing.

¶ 11 On direct appeal, defendant argued the following issues: (1) the circuit court erred in denying his motion to quash his arrest and suppress evidence; (2) the circuit court erred in denying his motion to suppress his statements; and (3) the circuit court erred in barring his expert from presenting certain testimony or, alternatively, in failing to conduct a hearing to assess whether the expert's testing was accepted within the field for purposes of admissibility. This court affirmed the trial court's judgment on September 12, 2007 and defendant's petition for rehearing was denied on October 23, 2007. *People v. Bennett*, 376 Ill. App. 3d 554 (2007).

Defendant's petition for leave to appeal to the supreme court was denied on January 30, 2008.

*People v. Bennett*, 226 Ill. 2d 618 (No. 105649) (2008) (disposition for leave to appeal).

¶ 12 Defendant filed the instant untimely *pro se* post-conviction petition on October 5, 2011. In relevant part, on the top of page nine of the petition, defendant wrote, "The [petitioner's] Sixth and Fourteenth amendments [*sic*] were violated when he was denied effective assistance of counsel, by his assistant appellate defender\*\*\*\*" Defendant contended his appellate counsel failed to raise issues that were included in his trial counsel's motion for a new trial and failed to raise meritorious issues on direct appeal. Defendant listed the three issues that were presented on direct appeal, and then listed the following issues from the motion for a new trial that he asserted should have been part of the direct appeal: (1) the court erred in denying the defense the opportunity to voir dire the jury regarding the issue of suggestibility; (2) the court abused its discretion when it denied defendant's request for a basis for a ruling on an objection as to a particular prosecution witness; and (3) the court abused its discretion when it refused to allow counsel to make a report during a court-ordered sidebar. The petition asserted that appellate counsel was ineffective in preparing his appellate brief and then cited to a rule that when a claim of ineffective assistance of counsel is based on a failure to raise or argue certain issues on appeal, the court must determine whether appellate counsel failed to present significant and obvious issues on appeal.

¶ 13 On the top of page 14 of the petition, defendant wrote, "The petitioner\*\*\*was denied his constitutional right to due process and equal protection rights guaranteed by the Eighth, Fourteenth, and Sixth amendments of the United States Constitution." The petition then asserted that defendant's sentence was excessive and should be reduced in light of the nature of the offense and the mitigating factors. Defendant contended he had no previous criminal history, he was a very young man at the time of his arrest, and nothing in the record indicated violent

behavior in his past. Defendant asserted that based on his age and lack of criminal background, his sentence was excessive. Beginning on page 18, defendant raised other claims relating to various evidentiary issues, the sufficiency of the evidence, and the prosecutor's closing argument. These claims are not the subject of this appeal.

¶ 14 On December 2, 2011, the circuit court summarily dismissed the petition, stating that it was frivolous and patently without merit.

¶ 15 In this court, defendant argues his petition stated the gist of a meritorious constitutional claim that his appellate counsel was ineffective for failing to argue on direct appeal that his 60-year prison sentence was excessive. According to defendant, had appellate counsel challenged the excessiveness of his sentence, there is a reasonable probability his sentence would have been reduced or his case remanded for resentencing. Defendant contends that in light of his background, the sentence was unduly excessive and did not reflect his rehabilitative potential. According to defendant, in particular, the trial court failed to give adequate consideration to his youth and still-developing brain. Defendant asserts that although he was legally an adult at the time of the offense, he possessed an adolescent brain with its corresponding underdeveloped sense of responsibility and lack of maturity.

¶ 16 The Act provides a process for a defendant to challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1—122-7 (West 2010); *People v. Pendleton*, 223 Ill. 2d 458, 471-73 (2006). Proceedings begin with the filing of a petition in the circuit court in which the original proceeding took place. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At this first stage, the circuit court may summarily dismiss the petition if it is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). The threshold for survival is low (*Hodges*, 234 Ill. 2d at 9) and the petition need only present a limited amount of detail and need not present the claim in its entirety (*People v. Edwards*, 197 Ill. 2d 239, 244

(2001)). A petition is considered frivolous and patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the "gist of a constitutional claim." *Id.* Put another way, a petition is frivolous and patently without merit only if the petition has no arguable basis either in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-12, 16. We review the summary dismissal of a post-conviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 17 As an initial matter, the State argues that defendant has forfeited review of the issue of whether his appellate counsel was ineffective for failing to raise an excessive sentence claim because this issue was not raised in defendant's post-conviction petition. Defendant asserts that construing his claim liberally, defendant sufficiently incorporated his challenge to his sentence under his challenge to his appellate counsel's effectiveness. Further, according to defendant, the ineffective assistance of appellate counsel claim is implicit in defendant's claim that the trial court imposed an excessive sentence and defendant's petition alleged enough facts to make a claim that his appellate counsel was ineffective for failing to raise an excessive sentence claim.

¶ 18 We agree with the State that defendant has forfeited review of his claim that his appellate counsel was ineffective for failing to raise on direct appeal that his sentence was excessive. Generally, a claim not raised in a petition cannot be argued for the first time on appeal. 725 ILCS 5/122-3 (West 2010); *People v. Jones*, 213 Ill. 2d 498, 505 (2004). Further, "implicit" claims of ineffective assistance of counsel do not fall within the "liberal construction" mandate for review of post-conviction petitions. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 14. Here, defendant's petition kept his claims about his appellate counsel separate from his excessive sentence claim. After writing on page nine that "he was denied effective assistance of counsel, by his assistant appellate defender," defendant listed three specific issues that he believed his



appellate counsel should have argued on direct appeal. On page 14, defendant wrote that he was "denied his constitutional right to due process and equal protection rights," and then raised his excessive sentence claim. Although defendant mentions the Sixth Amendment, nowhere from page 14 onward does the petition mention his appellate counsel, and we are not required to infer allegations that are not made. *People v. Mackins*, 222 Ill. App. 3d 1063, 1067 (1991). We read defendant's petition to consist of separate sections, including one section devoted to a claim that his appellate counsel was ineffective, and one section devoted to an excessive sentence claim. Defendant organized his petition clearly, and if he had intended to allege that his appellate counsel was ineffective to failing to argue that his sentence was excessive, he would have included this claim in the section of his petition that was exclusively devoted to his appellate counsel. See *People v. Mars*, 2012 IL App (2d) 110695, ¶ 11, 13, 33 (where petition was organized and coherent, and referred to errors of appellate and trial counsel, the defendant could not claim on appeal that appellate counsel was ineffective for a reason that was attributed to trial counsel in petition).

¶ 19 Even if we were to find that defendant's claim was not forfeited, we would find that the claim is frivolous and patently without merit. Claims of ineffective assistance of appellate counsel are measured against the same standard as claims of ineffective assistance of trial counsel. *People v. Paleologos*, 345 Ill. App. 3d 700, 703 (2003). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As to the prejudice prong, a defendant must show a reasonable probability that the proceeding would have been different but for counsel's errors. *People v. Cathey*, 2012 IL 111746, ¶ 23. At the first stage of post-conviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if: (1) it is arguable that

counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. Appellate counsel need not brief every conceivable issue on appeal, and counsel is not incompetent for not raising issues which, in his judgment, are without merit, unless his appraisal of the merits is patently wrong. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Accordingly, unless the underlying issues are meritorious, defendant has not suffered prejudice from counsel's failure to raise them on appeal. *Id.*

¶ 20 Here, defendant's claim of ineffective assistance of appellate counsel fails because it is not arguable that defendant was prejudiced by a failure to raise an excessive sentencing claim on direct appeal. The trial court has broad discretionary powers in choosing a defendant's sentence because it is generally in a better position to determine the appropriate sentence, having had the opportunity to weigh such factors as the defendant's age, habits, mentality, credibility, general moral character, and social environment. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Further, a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Id.* at 210. Although the sentencing court may not disregard mitigating evidence, it may determine the weight to attribute to such evidence. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993).

¶ 21 Here, the trial court explicitly considered defendant's age and other mitigating factors during the sentencing proceeding. In announcing the sentence, the trial court noted defendant's age twice—once when recalling the mitigating evidence and once when listing the additional factors it had considered. Age was among numerous factors the court considered, which included defendant's credibility, demeanor, moral character, mentality, social environment, and educational and family background. We presume that the trial court considered all of this evidence, absent some contradictory indication other than the sentence itself (*Id.*), which

defendant has failed to provide. Here, the mitigating factors may have been outweighed by other factors, such as the trial court's findings that defendant was likely to commit another crime and defendant's actions were violent and calculated, or the seriousness of the crime, which is the most important factor in determining an appropriate sentence. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002).

¶ 22 Further, the sentencing range for defendant's offense was 45 years to natural life, which includes a mandatory 25-year to natural life sentencing enhancement for personally discharging a firearm that proximately caused death to another person. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002). The trial court had the option of sentencing defendant to a natural life sentence and declined to do so, which suggests that the trial court considered mitigating evidence. Defendant would have his appellate counsel ask the reviewing court to substitute its judgment for the trial court and re-weigh the relevant factors, which the reviewing court may not do. *People v. Streit*, 142 Ill. 2d 13, 19 (1991). Because the trial court considered defendant's age and other mitigating evidence, it is not arguable that raising an excessive sentence claim would have changed the result on appeal. Accordingly, it is not arguable that defendant was prejudiced by his appellate counsel's failure to raise an excessive sentence claim on direct appeal and his post-conviction claim is indisputably meritless.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 24 Affirmed.