2017 IL App (1st) 142007-U

FOURTH DIVISION
June 29, 2017

No. 1-14-2007

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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. 95 CR 32820 |
| | ) | |
| JOSE BARAJAS, | ) | Honorable |
| | ) | Joseph M. Claps, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

**ORDER**

*Held*: The circuit court properly dismissed defendant's successive postconviction petition following a third-stage hearing as there was no error in imposing a consecutive sentence for aggravated battery and the circuit court lacked jurisdiction to review his conviction and sentence in a separate case.

¶ 1 Defendant Jose Barajas appeals from the circuit court's dismissal of his successive post-conviction petition following a third-stage evidentiary hearing. On appeal, defendant argues that the circuit court should have granted his request to order that his sentence for aggravated battery

with a firearm was to run concurrently, instead of consecutive to, his sentences for first degree murder and conspiracy to commit murder. He also argues that he should have received 1,498 days credit against his 14-year conspiracy to commit murder sentence as part of his negotiated plea agreement. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On October 20, 1995, three individuals were shot in a gang-related shooting in Chicago and defendant was later charged in case no. 95 CR 32820 under a theory of accountability. Following a bench trial, he was convicted of first degree murder of Enson Rodriguez, aggravated battery with a firearm of Onisimo Reyes, and aggravated battery with a firearm of Alfonso Ruiz. Defendant was sentenced to consecutive terms of 25 years' imprisonment for the murder conviction, 8 years' imprisonment for the aggravated battery of Ruiz, and 6 years' imprisonment for the aggravated battery of Reyes.

¶ 4 i. Bench Trial

¶ 5 The evidence presented at the bench trial on the original charges established that on October 20, 1995, codefendant Rene Amigon picked up Barajas and they drove to Amigon's house. They were both members of the Latin Kings gang. According to what defendant later related to an Assistant State's Attorney, a police officer, and a detective, Amigon went inside the house and when he returned, defendant observed that Amigon had a gun in the pouch of his sweatshirt. Amigon told defendant, "Let's go *** f*** with some Flakes." "Flakes" is a term for members of the rival Two-Six gang. Defendant drove Amigon's red Oldsmobile car to the intersection of 31st Street and Harding and parked in an alley. Defendant saw the outline of a gun in Amigon's sweatshirt and was sure that Amigon was going to look for "some Flakes"; defendant believed Amigon was going to fight them or "f*** up some Flakes." Defendant knew

that Amigon wanted to retaliate because "Flakes" had vandalized Amigon's car. Amigon exited the car while defendant remained in the driver's seat with the engine running. Defendant heard three gunshots a few moments later and he knew that Amigon had probably "lit up" or shot some "Flakes." Amigon ran back down the alley and entered the car, and defendant observed that he had his hand in the front pouch of his shirt which was weighed down by the gun. Amigon instructed him to drive away. Defendant asked, "Did you light up any Flakes?" and Amigon responded that he had shot two of them. Defendant drove to Amigon's house where Amigon hid the gun. Defendant denied knowing that Amigon was going to kill anyone. He admitted that he knew that area was Two-Six gang territory and that Amigon wanted to "box or f*** up some Two-Sixers."

¶ 6 As stated, Amigon shot three individuals.[1] Ruiz and Rodriguez were both Two Six gang members. Ruiz was shot in the neck, severing his spinal cord and rendering him a quadriplegic. Rodriquez was shot and killed from two gunshot wounds. Reyes was parking his car in the vicinity when a bullet came through the windshield and struck him in the shoulder or chest area, requiring medical care at the hospital.

¶ 7 Following the bench trial, the State argued at the sentencing hearing that the sentences should be consecutive because "there was great bodily harm in all instances." The trial court held that, regardless of whether consecutive sentences were statutorily mandated, it was imposing consecutive sentences (as noted above) for a total of 39 years' imprisonment.[2]

¶ 8 ii. Direct Appeal

[1] Amigon's jury trial occurred simultaneously. The testimony of Reyes and other witnesses from Amigon's jury trial was stipulated to at defendant's bench trial.

[2] At the same time, defendant pled guilty to a charge of possession of cannabis in a penal institution and was sentenced to two years' imprisonment, consecutive to the sentences in the other case.

¶ 9 Defendant filed a direct appeal asserting that he was not proven guilty beyond a reasonable doubt and the trial court erred in denying his pretrial motion to quash arrest and suppress evidence. This court affirmed his convictions. *People v. Barajas,* No. 1-98-3159 (2000) (unpublished order under Supreme Court Rule 23).

¶ 10 iii. Post-Conviction Proceedings

¶ 11 Defendant filed his first petition for postconviction relief on December 20, 2000, by private counsel. Defendant asserted that the possibility of consecutive sentences should have been presented to the trier of fact as a charged element pursuant to *Apprendi v. New Jersey*, 540 U.S. 466 (2000), and that his trial counsel rendered defective assistance in failing to present alibi testimony. The circuit court granted the State's motion to dismiss. On appeal, this court affirmed the dismissal and allowed defendant's appellate counsel to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Barajas,* No. 01-4175 (2003) (unpublished order under Supreme Court Rule 23).

¶ 12 iv. Ruiz's Death and Defendant's Plea Deal in Case No. 02 CR 1722

¶ 13 Ruiz subsequently died from his injuries. The State charged defendant with first degree murder of Ruiz in case number 02 CR 1722. On February 21, 2006, defendant pled guilty to conspiracy to commit first degree murder as part of a negotiated plea deal. The circuit court sentenced defendant to 14 years' imprisonment for the conspiracy conviction, with credit for 1,498 days served. The sentence was ordered to be served "consecutive to 95CR32820."[3]

¶ 14 iv. Successive Post-Conviction Proceedings

[3] At the same time, defendant was also charged with possession of contraband in a penal institution in case number 02CR5644, and he pled guilty to that charge but without an agreement with the State. The circuit court indicated that it would sentence him to 6 years' imprisonment, also with credit for time served, and to run consecutively to case no. 95 CR 32820.

¶ 15 In May 2006, defendant filed a *pro se* "Motion to Correct Void Judgment, Or In The Alternative, For Post-Conviction Relief, Or for Section 2-1401 Relief." Defendant asserted his sentences were void because consecutive sentences were not authorized by statute. Defendant asserted that only one offense (aggravated battery of Ruiz) was a "triggering" offense for consecutive sentencing. Defendant argued that the offenses were part of a single course of conduct, first degree murder was not a Class X or Class 1 felony, and although the aggravated battery of Reyes was a Class X or Class 1 felony, it did not involve the infliction of severe bodily injury. Defendant claimed his trial, appellate, and postconviction counsels were ineffective for failing to raise this issue.

¶ 16 The circuit court appointed postconviction counsel for defendant, who then filed an amended successive petition. Counsel reiterated that section 5-8-4 (730 ILCS 5/5-8-4(a) (West 1995)) as it existed at the time did not authorize a consecutive sentence for the 6-year aggravated battery with a firearm conviction involving Reyes. Counsel also advanced an actual innocence claim.

¶ 17 The State filed a motion to dismiss. The State asserted that the trial judge properly imposed a consecutive sentence for the aggravated battery of Reyes based on the nature and character of defendant and the crimes and the need to protect the public. The State also argued his claims were barred by *res judicata* and waiver. The circuit court granted the motion as to defendant's actual innocence claim, but advanced defendant's sentencing claim to a third-stage evidentiary hearing.

¶ 18 At the evidentiary hearing that eventually occurred on May 29, 2013, the parties reiterated these contentions. The circuit court noted that defendant's conspiracy conviction could not be consecutive to the aggravated battery offense of the same person. The State observed that

in the plea hearing in case no. 02 CR 1722, the prosecutor stated that the conspiracy conviction "obliterated" the 8-year sentence for the aggravated battery of Ruiz. However, the circuit court stated that "saying it and doing it is [sic] apples and oranges" and the judge in the conspiracy case could not have affected the sentence in case no. 98 CR 32820. Defendant's counsel requested, and was granted, leave to amend in order to address the issue regarding removing the 8-year aggravated battery sentence pertaining to Ruiz.[4]

¶ 19 Defendant's counsel then filed an amendment to the amended successive petition arguing that defendant pleaded guilty to the conspiracy charge in case no. 02 CR 1722 with the understanding that he would receive credit against his 14-year sentence for the 1,498 days he served, that the *mittimus* in that case substantiates this assertion, and that the Illinois Department of Corrections (IDOC) has not properly credited his time.

¶ 20 The State filed a motion to strike the amendment on grounds that the trial court lacked jurisdiction over claims relating to his plea conviction in a different case (no. 02 CR 1722), and pointed out that defendant was also convicted of several other offenses and received consecutive sentences in those cases, such as possession of cannabis in a penal institution and bringing contraband in a penal institution. The State argued that defendant was receiving proper credit and had failed to adequately support his argument. It further argued that defendant failed to raise the consecutive sentence issue previously on appeal.

¶ 21 The circuit court denied defendant's petition in a written order on June 12, 2014. It held that the sentencing court did not abuse its discretion in imposing consecutive sentences under section 5-8-4 as it cited the "severity of the injuries to the victims" and the prevalence of gang violence. The circuit court also held that it lacked jurisdiction over defendant's amended claim

[4] The State made the transcript of defendant's guilty plea in case no. 02 CR 1722 part of the record in the instant case, no. 98 CR 32820.

concerning sentencing credit in case no. 02 CR 1722 because defendant never filed a petition under that case number and the circuit court had not imposed the judgment in that case. Accordingly, the circuit court held that defendant failed to establish a substantial deprivation of constitutional rights or a basis for relief under section 2-1401 of the Illinois Code of Civil Procedure (the Code). Defendant filed a notice of appeal from the circuit court's dismissal of his petition.

¶ 22 II. ANALYSIS

¶ 23 A. Standard of Review

¶ 24 Under the Post–Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (West 2000)), a defendant may raise a collateral attack against his convictions or sentences for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). In order to obtain postconviction relief, the defendant must demonstrate that he "suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *Id.* The Act "allows only constitutional claims to be heard that were not presented during trial and could not have been raised on the appeal from the conviction." *People v. Salgado*, 2016 IL App (1st) 133102, ¶ 28 (citing *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007)). "Therefore, *res judicata* bars any issues previously decided at trial or on direct appeal and issues that could have been presented on the appeal from the conviction but were not." *Id.* (citing *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005)).

¶ 25 Proceedings under the Act are divided into three stages. *Salgado*, 2016 IL App (1st) 133102, ¶ 29. Where, as here, a petition advances to a third stage evidentiary hearing where fact-finding and credibility determinations are made, we review the circuit court's decision under the manifestly erroneous standard. *Pendleton*, 223 Ill. 2d at 473. If there was no new evidence presented and the issues involved purely questions of law, we generally apply a *de novo* standard

of review. *Id.* Throughout, the defendant bears the burden of making a substantial showing of a constitutional violation. *Id.*

¶ 26 The Act contemplates the filing of only one petition; any claims not raised therein are deemed waived. *People v. Coleman*, 2013 IL 113307, ¶ 81; *People v. Pitsonbarger*, 205 Ill.2d 444, 459 (2002); 725 ILCS 5/122-1(f), (3) (West 2014)). This statutory bar is relaxed only where fundamental fairness so requires. *Coleman*, 2013 IL 113307, ¶ 81. There are two such exceptions: when defendant raises a claim of actual innocence, or when a defendant satisfies the "cause-and-prejudice" test. *Id.* ¶ 82 (citing *Pitsonbarger*, 205 Ill. 2d at 459; 725 ILCS 5/122-3 (West 2010)). The defendant establishes "cause" by showing "some objective factor external to the defense impeded his ability to raise the claim in the initial postconviction proceeding," and "prejudice" by showing "the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Id.* In seeking leave to file a successive postconviction petition, a defendant bears the burden of pleading "sufficient facts and submit supporting documentation sufficient to allow the circuit court to make its prejudice determination." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. To prevail, a defendant must satisfy both prongs of the test. *People v. Davis*, 2014 IL 115595, ¶ 14. We review a decision regarding a successive petition *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 27 Defendant also styled his petition as a section 2-1401 petition for relief from judgment. Section 2-1401 of the Code of Civil Procedure outlines a procedure for a trial court to vacate or modify a final order or judgment in civil and criminal proceedings more than 30 days after its entry but within two years' of its entry. *People v. Thompson*, 2015 IL 118151, ¶ 28; 735 ILCS 5/2–1401(c) (West 2006). We review the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 28 We also note that this court may "sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct." (Internal quotation marks omitted.) *Beacham v. Walker*, 231 Ill. 2d 51, 61 (2008).

¶ 29 B. Consecutive Sentence Claim

¶ 30 On appeal, defendant argues that his consecutive sentence for aggravated battery with a firearm of Reyes was unauthorized under section 5-8-4 as the offenses involved a single course of conduct and Reyes did not suffer severe bodily injury. Defendant argues that his sentence is void and can be corrected at any time under the void sentence rule. He contends that *People v. Castleberry*, 2015 IL 116916, which abolished the void sentence rule, does not apply retroactively.

¶ 31 The State contends that defendant has procedurally defaulted on his consecutive sentencing claim because he failed to raise it in his direct appeal or prior postconviction petition. Alternatively, the State asserts that defendant's consecutive sentence was proper under section 5-8-5(a) because Reyes suffered severe bodily injury.[5]

¶ 32 i. *People v. Castleberry* and the Void Sentence Rule

¶ 33 In *People v. Arna*, 168 Ill. 2d 107, 113 (1995), the Illinois Supreme Court held that a sentence "which does not conform to a statutory requirement is void" and may be corrected at any time. As defendant acknowledges, our supreme court abolished the "void sentence rule" in *Castleberry*, 2015 IL 116916, ¶ 19, which was decided on November 15, 2015. The *Castleberry* court held that a sentence is merely voidable, not void, where it fails to conform to a statutory

[5] We also note that defendant further defaulted on this claim because he failed to file his section 2-1401 petition within two years of the entry of the final judgment. 735 ILCS 5/2-1401(c) (West 2006).

requirement and was entered by a court with proper jurisdiction, and it is thus subject to procedural rules and restraints such as forfeiture. *Id.*

¶ 34 After the parties filed their briefs on appeal in the present case, our supreme court decided *People v. Price*, 2016 IL 118613, ¶ 27, which held that *Castleberry*'s abolition of the "void sentence rule" applied retroactively to a pending petition for relief from judgment. The *Price* court explained that *Castleberry* established that a sentence which does not conform to statute is merely voidable, not void. *Id.* ¶ 17. As such, the defendant could not rely on the "void sentence rule" to escape the two-year limit for filing a postconviction petition for relief from judgment under section 2-1401. *Id.* Thus, "a defendant may no longer rely on the void sentence rule to overcome forfeiture of a claimed sentencing error or to challenge a statutorily nonconforming sentence in perpetuity." *Id.*

¶ 35 Pursuant to *Castleberry* and *Price*, defendant cannot rely on the void sentence rule to avoid forfeiture. As in *Price*, defendant's petition in the present case was pending when the court decided *Castleberry*. Similar to defendant here, the defendant in *Price* had filed two postconviction petitions under the Act and one section 2-1401 petition for relief from judgment before he filed the untimely section 2-1401 petition that was at issue before the supreme court. *Price*, 2016 IL 118613, ¶¶ 4-5. The defendant argued in the supreme court that even if *Castleberry* applied, it would be unduly harsh for the court not to address the merits of his claim where it merely turned on whether he happened to label his pleading a petition for relief from judgment or a motion for leave to file a successive postconviction petition. *Id.* ¶ 33. The defendant essentially sought to have the supreme court "recharacterize his section 2-1401 petition as a successive postconviction petition that satisfied the 'cause-and-prejudice test.' " *Id.* The supreme court declined do so on appeal and held that the defendant "should not be permitted

to avoid satisfying the cause-and-prejudice test for successive postconviction petitions ***." *Id.* ¶ 34. We thus conclude that defendant has forfeited this claim.

¶ 36 ii. Ineffective Assistance

¶ 37 In the alternative, defendant asserts that, even if he forfeited his consecutive sentencing claim, he has satisfied the cause and prejudice test to overcome forfeiture because his trial, appellate, and initial postconviction counsels rendered deficient assistance in failing to timely raise the sentencing issue and he received an illegally high sentence as a result. The State counters that defendant forfeited his related ineffective assistance of counsel claims.

¶ 38 However, as defendant points out, he did, in fact, raise the deficient assistance argument in his *pro se* postconviction petition, and the circuit court rendered a decision on this claim in denying the petition after the evidentiary hearing. The circuit court held that because defendant's underlying claim lacked merit, defendant could not show his attorneys were ineffective for failing to raise it.

¶ 39 We further note that when defendant's successive postconviction counsel filed the amended successive petition and relied on the void sentence rule therein, *Castleberry* and *Price* had not yet been decided. Counsel raised the alternative cause and prejudice/ineffective assistance argument on appeal after *Castleberry* was decided. In any event, this court may overlook waiver as "[t]he improper imposition of consecutive sentences *** might violate a defendant's fundamental rights." *People v. Alvarez,* 2016 IL App (2d) 140364, ¶ 17 (citing *People v. Durham,* 312 Ill. App. 3d 413, 420 (2000); Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("[D]efects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.").

¶ 40 To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668, 688 (1984) and prove (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) absent counsel's deficient performance, there was a reasonable probability that the outcome would have been different. *People v. Lacy,* 407 Ill. App. 3d 442, 456 (2011). A defendant must establish both prongs to prevail. *Id.* at 457. Constitutionally ineffective assistance of counsel may provide cause, although an attorney error that does not rise to the level of ineffective assistance does not constitute cause. *People v. Jackson*, 205 Ill. 2d 1, 274 (2001).

¶ 41 The same standard is applicable to appellate counsel, where the "defendant must show that the failure to raise a particular issue was objectively unreasonable and that the decision prejudiced the defendant." *People v. Jackson*, 205 Ill. 2d 247, 267 (2001). Appellate counsel need not brief every conceivable issue and may exercise her judgment is determining that certain issues are meritless, " 'unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal.' " *Id.* (quoting *People v. Easley,* 192 Ill. 2d 307, 328-29 (2000)).

¶ 42 In distinction, the right to counsel during postconviction proceedings is a creature of statute which provides for only a "reasonable level" of assistance. *Pendleton*, 223 Ill. 2d at 472; *People v. Groszek*, 2016 IL App (3d) 140455, ¶ 11. Under the Act, the court may appoint counsel for an indigent defendant at the second stage of postconviction proceedings. *Groszek*, 2016 IL App (3d) 140455, ¶ 11 (citing 725 ILCS 5/122-4 (West 2014)). "Alternatively, a defendant may privately retain counsel at the first or later stages of proceedings." *Id.* A petitioner is statutorily entitled to a reasonable level of assistance from counsel, whether counsel is appointed or retained, after the first stage of postconviction proceedings. *People v. Cotto*, 2016 IL 119006, ¶

42. Postconviction counsel has a duty to consult with the defendant, examine the record, and amend the petition, if necessary, to adequately present the defendant's claims. *Pendleton*, 223 Ill. 2d at 472 (citing Ill. S. Ct. R. 651(c)). Counsel is not obligated to advance frivolous claims and he is only required to investigate and present the *petitioner's* claims. *Id.*

¶ 43 Given that our analysis of this claim centers on whether the consecutive term for aggravated battery of Reyes was statutorily authorized, we now turn to section 5-8-4, which provided in pertinent part at the time of the offenses:

> " '(a) *** The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, *** in which event the court shall enter sentences to run consecutively. Sentences shall run concurrently unless otherwise specified by the court.
>
> (b) The court shall not impose a consecutive sentence except as provided for in subsection (a) unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record.'" *People v. Kagan*, 283 Ill. App. 3d 212, 219-20 (1992) (quoting 730 ILCS 5/5-8-4(a), (b) (West 1992)).

¶ 44 In interpreting this statute before it was amended in 1997, our court held that subsection 5-8-4(b) "has been interpreted as applying only where the multiple convictions do not arise out

of a single course of conduct. [Citation.] Where *** the convictions arise out of a single course of conduct during which there was no substantial change in the criminal objective, the trial court's authority to impose consecutive rather than concurrent sentences is determined by section 5-8-4(a) of the Unified Code of Corrections." *People v. Porter*, 277 Ill. App. 3d 194, 198 (citing 730 ILCS 5/5-8-4(a) (West 1992)). See also *Wilder*, 325 Ill. App. 3d at 997-1002 (same); *People v. Whitney*, 188 Ill. 2d 91 (1999) (finding that subsection 5-8-4(a) was the only section under which consecutive sentences could be imposed where crimes were committed as a single course of conduct); *People v. Hartzol*, 222 Ill. App. 3d 631, 649 (1991) (consecutive sentences allowed under subsection (b) where offenses did not involve a single course of conduct and consecutive sentences were necessary to protect the public); *People v. Cooper*, 239 Ill. App. 3d 336, 360 (1992) (subsection (a) mandates consecutive sentences where offenses are part of a single course of conduct and other requirements under subsection (a) are met, and subsection (b) does not provide another avenue for imposing consecutive sentences where a single course of conduct is involved); *People v. Kagan*, 283 Ill. App. 3d 212 (1996) (same).

¶ 45 At sentencing in the present case, the State argued that the sentences should all be consecutive because there was "great bodily harm [*sic*] in all instances," although it noted that a new case had possibly been decided by the appellate court "that questioned that."[6] Defendant's trial counsel stated that he was unaware of such a case and stated that "the status of the law prior last week though wouldn't require a sentence of consecutive time when there is great bodily harm. I don't know if that has been returned or modified in any way. I guess we can find out in

[6] We note that the State acknowledges that at the sentencing hearing and in the instant appeal, the State took the position that Reyes's injury rose to the level of severe bodily injury, but the State took the opposite position during defendant's successive post-conviction proceedings in the circuit court, where the State represented that Reyes's injury did not constitute severe bodily injury. Regardless, we are not bound by the position taken by the State in the successive post-conviction proceedings in the circuit court. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

the next day or two if there is any change in the law and if there is come back and address the Court on that issue before the time for any notice of appeal would expire."

¶ 46 Having considered the mitigating and aggravating evidence, the sentencing court held that it was imposing consecutive sentences regardless of whether the statute mandated it. The court noted that defendant was convicted under a theory of accountability and "went to the scene with full knowledge that a criminal enterprise was about to be undertaken," and that "not only did a death occur to one victim but that a second victim is a quadriplegic" for life. Further, the court cited that "not only do we have three victims in this case who in fact were struck by bullets, we have your entire family and girlfriend who likewise are paying the penalty for your conduct." The court expressed hope that defendant now understood "the insanity" of the gang violence afflicting Chicago. The court ruled that "whether the statute mandates it or not I will sentence as follows to consecutive sentences, so I'm taking the position that it is not mandated but because of the facts of this case I am doing so." Thus, the sentencing court essentially relied on section 5-8-4(b) in imposing consecutive sentences in finding it was not statutorily mandated but it was necessary to protect the public given the circumstances involved.

¶ 47 However, as stated, section 5-8-4(b) "has been interpreted as applying only where the multiple convictions do not arise out of a single course of conduct." *Porter*, 277 Ill. App. 3d at 198. As such, if the "convictions arise out of a single course of conduct during which there was no substantial change in the criminal objective, the trial court's authority to impose consecutive rather than concurrent sentences is determined by section 5-8-4(a) of the Unified Code of Corrections." *Id.* (citing 730 ILCS 5/5-8-4(a) (West 1992)).

¶ 48 In the case at bar, the State does not dispute on appeal that the offenses were part of a single course of conduct. Under the "independent motivation" test, offenses are part of a single

course of conduct if there was not " 'a substantial change in the nature of the criminal objective.' " *Wilder*, 325 Ill. App. 3d at 1001 (quoting *People v. Bell*, 196 Il. 2d 342, 355 (2001)). We agree that the offenses were all committed as part of a single course of conduct, *i.e.*, during Amigon's shooting spree in rival gang territory. Accordingly, consecutive sentencing pursuant to subsection (b) was not available, and we must determine whether defendant's consecutive sentence was authorized under subsection (a).

¶ 49 Aggravated battery with a firearm is a Class X offense. 720 ILCS 5/12-4.2(b) (West 1995). It qualifies as a triggering offense under the statute so long as defendant inflicted severe bodily injury on Reyes.[7] "Whether a particular injury is 'severe' is a question of fact ***." *People v. Alvarez*, 2016 IL App (2d) 140364, ¶ 19 (citing *People v. Deleon*, 227 Ill. 2d 322, 332 (2008)). "[A] trial court's determination that an injury is severe for purposes of consecutive sentencing may be reversed only if it is against the manifest weight of the evidence." *Id.* (citing *Deleon*, 227 Ill. 2d at 332). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on the evidence presented." *Id.* (citing *Deleon*, 227 Ill.2d at 332).

¶ 50 The State likens this case to *Deleon*, 227 Ill. 2d at 332-33, where the supreme court affirmed a finding of severe bodily injury to a victim who sustained a gunshot wound to the left center of his chest while at a distance of three feet from the gun, and the victim felt burning in his chest and testified that the bullet exited through his back. The court found no abuse of

[7] We observe that defendant's first degree murder conviction could not have served as a triggering offense at the time. *Wilder*, 325 Ill. App. 3d at 1003. The parties do not dispute that aggravated battery with a firearm of Ruiz constituted a triggering offense which inflicted severe bodily injury. Defendant contends that he should serve the aggravated battery of Ruiz sentence first, and then serve the sentences for the murder conviction and aggravated battery of Reyes concurrently after that. " '[S]ection 5-8-4(a) must be construed so that any consecutive sentences imposed for triggering offenses be served prior to, and independent of, any sentences imposed for nontriggering offenses. Sentences for multiple nontriggering offenses may be served concurrently to one another after any consecutive sentences for triggering offenses have been discharged.' " *Wilder*, 325 Ill. App. 3d at 1001 (quoting *People v. Curry*, 178 Ill. 2d 509, 538-39 (1997)).

discretion despite the defendant's argument that the victim's post-injury behavior showed lack of severe injury in that the victim testified that the bullet was caught by his sweater after passing through his body and he caught it in his hand, he was able to drive away from the scene, notice an ice cream truck, drive to a nearby gas station to ask for help, and was then taken to the hospital, and no information was given as to his length of stay, treatment, or pain experienced. *Id.* at 333-34.

¶ 51 The *Deleon* court cited similar post-shooting behavior by the victim in *People v. Johnson,* 149 Ill. 2d 118 (1992), where the victim was shot in the shoulder as he left the apartment where a robbery and murder was occurring, flagged down a passing car, informed the driver there had been a robbery and shooting, and had the motorist drive him to the hospital.

¶ 52 On the other hand, defendant contends this case is more similar to *People v. Ruiz,* 312 Ill. App. 3d 49, 63 (2000), where the appellate court found no severe bodily injury where victim did not immediately realize he had been shot, there was a barely visible wound on victim's knee, no evidence was presented that the bullet entered his body, and victim did not seek immediate treatment but went to a meeting first. Defendant also relies on *People v. Durham,* 312 Ill. App. 3d 413, 420-21 (2000), in which the court found no severe bodily injury where the bullet wound was described as " 'a small nick or cut' " and the victim refused medical treatment.

¶ 53 The present case presents a close question in light of the above cases discussed by the parties. The State asserted at sentencing that severe bodily injury was inflicted upon all three victims under subsection (a). In ruling, the sentencing court stated that all "three victims in this case who in fact were struck by bullets ***" and the court spoke extensively about the violence inflicted by defendant's actions. The trial evidence showed that Reyes was parking his car in a parking lot when he heard gunshots and looked up to see the shooter shoot Rodriguez and Ruiz.

Reyes testified that he heard a bullet come through his windshield and he realized that he had been struck. He immediately felt paint and he could not feel his hand. His injury required medical care and he was taken to the hospital, with no apparent delay, where he was treated and received an X-ray. The X-Ray showed that no bones were broken, but he sustained a red mark on his chest area from the bullet. One bullet fragment became embedded in his jacket.

¶ 54 Based on the facts and circumstances presented, we conclude that a consecutive sentence for the aggravated battery of Reyes was not an abuse of discretion. The facts showed a more serious injury than those at issue in either *Durham* or *Ruiz*, even if it was not as significant as the through-and-through gunshot wound in *Deleon*. On the record, we cannot say that a finding of severe bodily injury was against the manifest weight of the evidence. Indeed, the sentencing court's appreciation of the gravity of the injuries sustained by all three shooting victims is evidenced by the fact that it recited the facts of the case, including the injuries involved and the fact that three victims were struck by bullets, and emphatically stated that it would impose consecutive sentences regardless of whether they were mandatory.

¶ 55 At bottom, the sentencing court's decision does not strike this court as unreasonable or arbitrary, nor can we say that it was clearly evident that the opposite conclusion was in order. As our supreme court recognized in *Deleon*, lack of evidence regarding medical treatment, post-injury behavior, or intensity of a victim's pain does not prohibit a sentencing court from finding severe bodily injury. *Deleon*, 227 Ill. 2d at 334. While comparison to other cases is helpful, and we recognize that not every gunshot wound is severe, "[w]e have to look at the extent of the harm done by the gunshot in the particular case." *People v. Williams*, 335 Ill. App. 3d 596, 599–601 (2002). "The problem with this comparative approach is that our standard of review is deferential." *People v. Witherspoon*, 379 Ill. App. 3d 298, 310 (2008) (Stating that "[j]ust

because the appellate court found no abuse of discretion in the finding that a particular injury was not severe, it does not follow that the opposite finding would have been an abuse of discretion either. Both findings could have been rationally defensible.") See also *People v. Primm*, 319 Ill. App. 3d 411, 414, 427 (2000) (affirming finding of severe bodily injury where the victim was shot in the back of the thigh as he was running away and he continued running, then returned to the scene and approached an officer to report that he had been shot and described the incident, before he went to the hospital).

¶ 56 As we find no error in imposing a consecutive sentence for the aggravated battery with a firearm of Reyes, we likewise find that there is no merit to defendant's claims of ineffective assistance of trial, appellate, and postconviction counsels. Defendant has not demonstrated that his counsels' performance was deficient, or that he suffered any prejudice as a result of his attorneys' allegedly deficient performances in failing to challenge this issue. *People v. Irwin*, 2017 IL App (1st) 150054, ¶ 31. Defendant has not shown a reasonable probability that an objection to consecutive sentences would have resulted in a lesser sentence, particularly in light of the sentencing court's emphatic statements in support of consecutive sentences and condemnation of defendant's actions. The mere possibility of a lesser sentence is insufficient to establish actual prejudice as pure speculation or conjecture "falls short of the demonstration of actual prejudice required by *Strickland*." *People v. Olinger*, 176 Ill. 2d 326, 363 (1997).

C. Case No. 02 CR 1722

¶ 57 In his other issue on appeal, defendant contends that the circuit court erred when it held that it lacked jurisdiction to review defendant's claim that he never received credit for 1,498 days served against his guilty plea conviction of conspiracy to commit murder of Ruiz in case no. 02 CR 1722, which he argues was a part of the plea agreement. He asserts that the IDOC has

refused to give him the credit based on *People v. Latona*, 184 Ill. 2d 260 (1998), which stands for the proposition that a defendant is not entitled to double credit. He contends that the circuit court gave him permission to amend the amended successive postconviction petition to address this issue, but the court ultimately, and erroneously, held it did not have jurisdiction. Defendant alternatively argues that his successive postconviction counsel rendered ineffective assistance in failing to amend the heading of the petition to include case number 02 CR 1722. He argues that the plea transcript and *mittimus* from case number 02 CR 1722 are part of the record. Defendant contends that he did not know that he could not receive double credit on his consecutive sentences and this court should reduce his 14-year sentence for conspiracy by 1,498 days to approximate the agreed-on sentence.

¶ 58 The State asserts that the circuit court lacked jurisdiction over defendant's claim regarding case no. 02 CR 1722 as defendant never listed that case number in his petitions and never addressed the conspiracy conviction until the parties were already conducting a third stage evidentiary hearing in the instant successive postconviction proceedings under case no. 95 CR 32820. The State contends that defendant is arguing for the first time on appeal that his amendment to his amended successive petition constituted a new petition in the plea case. Further, claims involving sentencing credit do not fall under the Act's jurisdiction as they do not implicate a substantial denial of constitutional rights. The State also contends that defendant has not shown that credit for 1,498 days was the basis for his bargain to plead guilty. The plea agreement was that defendant would receive a sentence of 14 years' imprisonment to run consecutive to the sentences in 95 CR 32820 in exchange for pleading to conspiracy. The State argues that the sentencing court did not indicate that defendant would receive double credit, but that he would receive credit for the time he had served from the time of the indictment, *i.e.*, from

the time Ruiz passed away and defendant was indicted for his murder under 02 CR 1722. The State contends that even if defendant did not receive the benefit of his plea bargain, the record contains insufficient information to determine whether he completed his prior consecutive sentences in other cases, and he would only be entitled to a remand for a hearing, but not a reduction of his plea sentence by this court. As to defendant's ineffective assistance claim, the State contends that counsel amended the amended successive petition pursuant to the circuit court's direction regarding the sentence for the aggravated battery of Ruiz. The State argues that defendant failed to provide supporting documentation showing that the IDOC refused him credit or why it chose to refuse credit.

¶ 59 We review *de novo* a circuit court's determination regarding whether it has lawful jurisdiction over a case. *In re Marriage of Kuyk*, 2015 IL App (2d) 140733, ¶ 10 (citing *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.,* 2011 IL 111611, ¶ 26). In addition, this court has an independent duty to consider its jurisdiction over an appeal and must dismiss if jurisdiction is lacking. *People v. Garcia*, 2015 IL App (1st) 131180, ¶ 65; *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill.2d 209, 213 (2009).

¶ 60 We find that the trial court incorrectly concluded that it did not have jurisdiction to review defendant's amended claim regarding sentencing credit attributable to his conspiracy conviction.[8] See 725 ILCS 5/122-1 (West 2006). However, as we discuss below the court properly denied the relief requested for the reasons that follow.

[8] In turn, we note that a notice of appeal confers jurisdiction on this court to consider the judgments or parts thereof specified in the notice of appeal. *People v. Smith*, 228 Ill. 2d 95 (2008). We liberally construe a notice so as not to defeat jurisdiction and consider it as a whole. *Id.* It is sufficient if it fairly and adequately sets forth the judgment complained of and the relief sought, so as to advise appellee of the nature of the appeal. *Id.* "Appeals shall be perfected by filing a notice of appeal with the clerk of the trial court." Ill. S. Ct. R. 606 (eff. Mar. 20, 2009)). Rule 651 provides: "An appeal from a final judgment of the circuit court in any post-conviction proceeding shall lie to the Appellate Court in the district in which the circuit court is located." Ill. S. Ct. R. 651(a) (eff.Dec.1, 1984).

¶ 61 "The Post-Conviction Hearing Act allows a criminal defendant to assert that 'in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.' " *People v. Coleman*, 2013 IL 113307, ¶ 81 (quoting 725 ILCS 5/122–1(a) (West 2010)). As stated, however, we may disregard the circuit court's reasoning and affirm the circuit court on any grounds "called for by the record ***." *Beacham*, 231 Ill. 2d at 61.

¶ 62 The pertinent issue in this matter is whether the circuit court had the statutory authority to grant the requested relief. To that end, a defendant may not raise a statutory claim under the Act, *i.e.*, courts have held that "postconviction petitioners were barred from seeking additional sentencing credit—a statutory claim—under the Act." *People v. Nelson*, 2016 IL App (4th) 140168, ¶ 28 (citing *People v. Bates*, 179 Ill. App. 3d 705 (1989), *People v. Uran*, 196 Ill. App. 3d 293 (1990), *People v. Reed*, 335 Ill.App.3d 1038 (2003).

¶ 63 In *Nelson*, the defendant asserted for the first time on appeal from the dismissal of his postconviction petition that he was entitled to an additional 14 days' credit for time spent in custody pursuant to section 5-8-7(b) of the Unified Code of Corrections. *Nelson*, 2016 IL App (4th) 140168, ¶ 27 (citing 730 ILCS 5/5-8-7(b) (West 2006)). Although the Fourth District Appellate Court agreed that the defendant was entitled to the additional credit, the court observed that

> "the issue is whether this court has the power to grant defendant the credit he seeks. According to the Supreme Court of Illinois, the Act, by which defendant pursues this claim, is 'jurisdictional in nature,' limiting 'the subject matter reviewable under that Act.' *People v. Ferree*, 40 Ill. 2d 483, 484 (1968). The jurisdiction granted by the Act is limited to situations in which 'a

> substantial denial of rights under the Constitution of the United States or of the State of Illinois' is alleged.' *People v. Owens,* 34 Ill. 2d 149, 150 (1966) [citations]. More recently, in *People v. Mitchell,* 189 Ill. 2d 312, 329 (2000), the court did not use the term 'jurisdiction,' but recognized 'the allegation of a deprivation of a statutory right is not a proper claim under the Act.' " *Nelson,* 2016 IL App (4th) 140168, ¶ 29.

¶ 64 In rejecting the defendant's sentencing credit claim, the court held that defendant had "not established this court has jurisdiction over his statutory claim" and found that, in line with precedent, "we cannot grant him the relief he seeks." *Id.* ¶ 39. The court noted, however, that defendant could seek a remedy by petitioning the trial court "to correct the simple error in arithmetic, as trial courts retain jurisdiction to correct nonsubstantial matters of inadvertence or mistake.' *Id.* (citing *Baker v. Department of Corrections,* 106 Ill. 2d 100 (1985)). Based on *Nelson,* we conclude that there was no statutory authority to grant defendant the relief requested in his amendment to his amended successive postconviction petition that he was entitled to additional sentencing credit.

¶ 65 In any event, we agree with the State that defendant failed to show a substantial deprivation of constitutional rights. As the parties recognize, the *mittimus* of the guilty plea conspiracy conviction in case no. 02 CR 1722 correctly reflects that defendant was given credit for 1,498 days. There is no indication that defendant was supposed to receive "double credit," as he maintains. The court and the parties did not mention double credit in the transcript of the guilty plea hearing. Rather, at the plea hearing, the court informed defendant that in exchange for the guilty plea, the State would recommend a sentence of 14 years, dismissal of another charge, and defendant would "be credited for the time that you've served from the time of the indictment

and this case would be consecutive to the sentences that was imposed in 95CR328[20]." Defendant affirmed that this was also his understanding. In addition, defendant agreed to withdraw his federal *habeas* petition related to the case at bar (no. 95CR32820) as part of the agreement with the State to "reduce what would otherwise be a mandatory minimum natural life case down to a conspiracy to commit murder." The court asked defendant, "Do you understand that these sentences are to run consecutive?" defendant responded, "Yes, Your Honor."

¶ 66 The court sentenced defendant to 14 years' imprisonment for the conspiracy conviction, stating the "the defendant will be credited for time that he's served." The court stated that the sentence was "consecutive to 95CR32820" and that defendant agreed to withdraw his *habeas* petition. The State noted that, "just so there's no confusion later, under 95CR32820, this defendant was sentenced for aggravated battery with a firearm. I believed under the one act/one crime and the fact that would be, that sentence would then be replaced by the 14. He won't get both. Under that case the eight years will be eviscerated and 14 will take its place." After a brief recess for defense counsel to calculate defendant's credit, the parties came back on the record and defense counsel stated that defendant should receive credit for 1,498 days, which the court so ordered.

¶ 67 The February 21, 2006, order of commitment and sentence for the conspiracy conviction in case no. 02 CR 1722 stated that the 14 year sentence is "consecutive to the sentences imposed in case number(s) 98 CR 1447801 95 CR 3282001 02 CR 0564401," and further provided that "sent replaces the sent handed down in cts. of [*sic*] case # 98-3282002."

¶ 68 Moreover, defendant requests that this court reduce his sentence by the number of days' credit he was supposed to receive because the IDOC refuses to give him "double credit." Although defendant relies on *People v. Whitfield*, 217 Ill. 2d 177 (2005), in asserting that the

court should reduce his sentence to approximate the parties' agreement of 1,498 days' credit, we find *Whitfield* inapposite here. That case, in contrast to the circumstances in 02 CR 1722, involved the failure to properly admonish the defendant about mandatory supervised release. *Id.* at 202.

¶ 69 Where, as here, a defendant and the State enter into a negotiated guilty plea with an agreed-upon sentence, it is governed by contract law principles. *People v. Absher,* 242 Ill. 2d 77, 87 (2011). As such, a defendant can only attempt to modify the terms of the plea by withdrawing that plea and vacating the judgment as this would return the parties to the *status quo* before the agreement. *Id.* at 87. Our supreme court explained "that to allow a defendant to unilaterally modify the terms of a fully negotiated plea agreement while holding the State to its part of the bargain 'flies in the face of contract law principles' [citation], because 'the guilty plea and the sentence "go hand in hand" as material elements of the plea bargain' [citation]." *Id*.

¶ 70 III. CONCLUSION

¶ 71 For the reasons stated above, we affirm the circuit court's order dismissing defendant's successive postconviction petition.

¶ 72 Affirmed.