2013 IL App (2d) 121017-U
No. 2-12-1017
Order filed July 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-289
FRANK D. ATHERTON,	)	Honorable Robert C. Tobin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed the defendant's postconviction petition as the defendant's allegations were not supported by the law or the record.

¶ 2 Following a jury trial, the defendant, Frank Atherton, was convicted of two counts of predatory criminal sexual assault of a child (720 ILCS 5/3-6(j), 5/12-14.1(a)(1) (West 2002)) and was sentenced to a total of 24 years' imprisonment. This court affirmed the defendant's conviction and sentence on direct appeal. See *People v. Atherton*, 406 Ill. App. 3d 598 (2010). On March 17, 2012, the defendant filed a postconviction petition. The defendant alleged that he was deprived of

his constitutional right to the effective representation of both trial and appellate counsel because his attorneys failed to argue that his multiple convictions violated one-act, one-crime principles. On June 20, 2012, the trial court summarily dismissed the defendant's petition. The defendant appeals from that order. We affirm.

¶ 3 BACKGROUND

¶ 4 On October 14, 2005, the defendant was charged by indictment with one count of predatory criminal sexual assault of a child. The indictment alleged that the defendant, who was older than 17, placed his penis in the vagina of the victim, who was younger than 13 years of age. The State subsequently filed a second superseding bill of indictment. The indictment added a second count, alleging that the defendant's sex organ had made contact with the victim's anus. The indictment alleged that all of the defendant's conduct at issue had occurred between September 8, 2002, and November 30, 2002.

¶ 5 Between October 20 and October 27, 2008, the trial court conducted a jury trial on the charges against the defendant. The victim testified that the defendant's penis touched her anus and her vagina. She testified that it happened every time the defendant came over to babysit her while her mother was working. The defendant always touched her in the same place and in the same manner. She stated that it happened around Christmas, and in late winter around Valentine's Day, as well as in summer.

¶ 6 At the close of the trial, the jury convicted the defendant of two counts of predatory criminal sexual assault. The trial court sentenced the defendant to serve consecutive terms of 12 years' imprisonment. The defendant thereafter filed a timely notice of appeal. This court affirmed the

defendant's conviction and sentence. *Id.* Specifically, we rejected the defendant's argument that the evidence was insufficient to establish that his penis had touched the victim's anus.

¶ 7 On March 17, 2012, the defendant filed an amended postconviction petition. The defendant alleged he received the ineffective assistance of trial counsel and appellate counsel resulting in two convictions for predatory criminal sexual assault, even though there was but one act. The defendant further alleged that the evidence as to count II was insufficient because the evidence did not establish that he knowingly touched his penis against the victim's anus. The defendant's petition additionally alleged that: the jurors should have had an instruction defining the mental state of knowing or knowledge; trial counsel should have argued that the touching of the victim's anus was only inadvertent and could not support a conviction; the jurors should have been instructed that counts I and II were separate offenses; the trial court erred in sentencing the defendant on both counts; and appellate counsel should have raised these issues.

¶ 8 The trial court summarily dismissed the defendant's postconviction petition, finding that the issues as to the jury instructions, trial counsel's arguments, and whether the two counts arose out of one overt physical act were all forfeited because the defendant could have raised those issues on direct appeal. The trial court found that the defendant's claim that evidence was insufficient to convict him on count II was barred by *res judicata* because this court had rejected that argument on direct appeal. Further, the trial court found that none of the alleged errors of appellate counsel met the *Strickland* test. The defendant thereafter filed a timely notice of appeal.

¶ 9 ANALYSIS

¶ 10 On appeal, the defendant argues that the trial court erred in summarily dismissing his petition. Specifically, the defendant contends that his petition set forth the potentially meritorious claim of

ineffective assistance of counsel due to trial counsel's and appellate counsel's failure to argue that his two convictions violated the one-act, one-crime doctrine. He also contends that his trial counsel was ineffective for not seeking a jury instruction that the State had to establish that his alleged conduct as to count II was not inadvertent.

¶ 11 The Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)) provides a remedy to criminal defendants who have had substantial violations of their constitutional rights during their criminal trial. See *People v. Vernon*, 276 Ill. App. 3d 386, 391 (1995). A postconviction proceeding is not an appeal *per se*, but a collateral attack upon a final judgment. See *People v. Lester*, 261 Ill. App. 3d 1075, 1077 (1994). A *pro se* petitioner is entitled to an evidentiary hearing for his postconviction petition only when he presents the "gist" of a meritorious constitutional claim (*People v. Porter*, 122 Ill. 2d 64, 74 (1988)), and the record or accompanying affidavits support the allegations in the petition. (*Vernon*, 276 Ill. App. 3d at 391). The "gist" standard represents a "low threshold," and during the summary dismissal stage the allegations in the petition must be taken as true and liberally construed. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The question whether the allegations in postconviction pleadings are sufficient to avert summary dismissal without an evidentiary hearing is a legal inquiry, subject to *de novo* review. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 12 As the defendant's claim alleges the ineffective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To succeed on such a claim, a defendant must show both that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different" (*id.* at 694). To satisfy the first portion of the *Strickland* test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms. *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). There is a strong presumption, which a defendant must overcome, that counsel's performance "falls within the wide range of reasonable professional assistance." *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 13 The defendant's contention that his counsel was ineffective is premised on his claim that trial counsel and appellate counsel should have argued that his multiple convictions violated the one-act, one-crime doctrine. The one-act one-crime doctrine, articulated in *People v. King*, 66 Ill. 2d 551, 566 (1977), provides that multiple convictions are not proper where (1) only one physical act was manifested, or (2) multiple acts were manifested, but some of the convictions are for included offenses. In *King*, the supreme court held:

> "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses. Multiple convictions and concurrent sentences should be permitted in all other cases where a defendant has committed several acts, despite the interrelationship of those acts." *Id.* at 566.

¶ 14 The one-act, one-crime rule articulated in *King* requires a two-part analysis. A court must first determine whether a defendant's conduct consisted of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). An "act" is " 'any overt or outward manifestation

which will support a different offense.' " *Id.* at 188 (quoting *King*, 66 Ill. 2d at 566). If only one physical act was undertaken, multiple convictions are improper. If separate acts were undertaken, a court must then ask whether any of the offenses are included offenses. If so, multiple convictions are improper. *Rodriguez*, 169 Ill. 2d at 186. Whether multiple convictions must be vacated under the one-act, one-crime doctrine is a question of law subject to *de novo* review. *People v. Daniels*, 187 Ill. 2d 301, 307 (1999).

¶ 15 Here, we need not parse the victim's testimony, as the defendant suggests, to determine whether it was possible that he committed only one physical act "whereby his penis may have touched [the victim's] anus enroute to penetrating her vagina." This is because the victim clearly testified that the defendant assaulted her on multiple occasions in the same manner. Thus, even if the defendant's actions the first time he assaulted the victim were sufficient only to support one conviction (count I), his identical conduct at a later time was sufficient to support a second conviction (count II). *Cf. People v. Csaszar*, 375 Ill. App. 3d 929, 945 (2007) (defendant's two convictions for solicitation of murder did not violate the one-act, one-crime doctrine; there were two solicitations on different dates, of different people, to murder the intended victim). As neither count II nor count I was a lesser included offense of the other charged offense, the defendant was properly convicted of multiple offenses. See *Rodriguez*, 169 Ill. 2d at 186. Thus, neither trial counsel nor appellate counsel was ineffective for not raising an argument based on the one-crime, one-act doctrine. See *Albanese*, 104 Ill. 2d at 527.

¶ 16 We also reject the defendant's argument that his trial counsel was ineffective for not seeking a jury instruction that count II of the indictment required proof of intentional touching as opposed to inadvertent touching. The jury was instructed that a person commits the act of predatory criminal

sexual assault of a child when he "knowingly" commits an act of sexual penetration. The jury was informed that "sexual penetration" is defined as any contact, however slight, between the sex organ or anus of one person and the sex organ of another person. The jury was thus instructed that the defendant's contact with the victim's anus had to be knowing and, hence, intentional. For trial counsel to have sought a jury instruction that the State must prove that the defendant's conduct was not inadvertent would have been redundant to the other instructions, and therefore unnecessary. See *People v. Craig*, 79 Ill. App. 3d 584, 589 (1979) (trial court did not err in refusing to give jury instruction that was redundant to other instructions that had been given to the jury).

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 19 Affirmed.