2014 IL App (2d) 121202-U
No. 2-12-1202
Order filed August 25, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 96-CF-467
EDWARD L. TENNEY,	)	Honorable Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of defendant's postconviction petition was affirmed where the trial court's order, though not expressly mentioning one of defendant's 74 claims, dismissed the entire petition, and defendant failed to state the gist of an ineffective-assistance-of-appellate-counsel claim.

¶ 2 On April 16, 1992, Jerry Weber was found shot to death, and his wallet was discovered missing. Following a jury trial, defendant, Edward L. Tenney, was convicted of first-degree murder (Ill. Rev. Stat., Ch. 38, § 9-1(a)(3) (West 1992)) and armed robbery (Ill. Rev. Stat., Ch. 38, § 18-2(a) (West 1992)). On May 3, 2010, defendant was sentenced to death on the first-degree murder conviction and to 60 years' imprisonment on the armed robbery conviction.

¶ 3 The Governor of the State of Illinois subsequently commuted defendant's death sentence to life imprisonment; thus, defendant's direct appeal was transmitted from our supreme court to this court. On direct appeal, defendant argued that: (1) the warrantless search of a storage locker containing evidence of the offenses—including Weber's wallet—violated the fourth amendment; (2) the trial court erred in precluding defendant from arguing to the jury that an unknown person committed the crime; and (3) the trial court failed to conduct an adequate hearing on defendant's *pro se* allegation of ineffective assistance of counsel. We affirmed defendant's convictions. *People v. Tenney*, 2012 IL App (2d) 110335-U.

¶ 4 Thereafter, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), in which he alleged numerous constitutional violations. The trial court summarily dismissed the petition. Defendant argues that the dismissal was error because (1) the trial court failed to rule on one of his allegations, and (2) he stated the gist of an ineffective-assistance-of-appellate-counsel claim related to alleged error in the *voir dire*. Because our order on direct appeal includes a comprehensive recitation of the facts, we will relate only the pertinent facts as they become relevant to our discussion. For the following reasons, we affirm.[1]

¶ 5 The Act provides a method by which a criminal defendant may assert that his or her conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 8. In cases not involving the death penalty, the Act establishes three

[1] In his reply brief, defendant objects to the State's mention of two Kane County murders for which defendant was prosecuted. Defendant asks us either to strike that portion of the State's brief or to ignore it. We reach our resolution based solely on the record on appeal in this case.

stages to the proceedings. *Tate*, 2012 IL 112214, ¶ 9. At the first stage, the trial court must independently review the petition and summarily dismiss it if it "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *Tate*, 2012 IL 112214, ¶ 9. If a petition survives to the second stage, counsel may be appointed to an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4, 122-5 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10-11 (2009). If the court determines that the defendant made a substantial showing of a constitutional violation, the petition advances to the third stage for an evidentiary hearing. 725 ILCS 122-6 (West 2012); *Tate*, 2012 IL 112214, ¶ 10. Because this appeal concerns the dismissal of a petition at the first stage, our review is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 6 Defendant first argues that the trial court failed to rule on one of his postconviction claims. Defendant raised 74 claims in his postconviction petition; the court explicitly addressed 73 of them. Therefore, defendant asserts that the court "effectively entered" a partial summary dismissal. Because partial summary dismissals are not permitted under the Act (*People v. Rivera*, 198 Ill. 2d 364, 374 (2001)), defendant urges that this court must remand for second-stage proceedings (see *People v. Merritte*, 225 Ill. App. 3d 986 (1992) (reversing and remanding for second-stage proceedings where the trial court's first-stage summary dismissal of the postconviction petition was improperly based on the State's premature motion to dismiss)).

¶ 7 Here, the trial court entered its ruling dismissing the petition in a comprehensive 25-page written order. In that order the court explicitly addressed 73 of defendant's 74 claims by grouping them into categories based on the reasons for denying them. After its detailed analysis of the individual claims, the court stated that the "petition is frivolous or patently without merit" and concluded that "defendant's Pro Se Petition for Post-Conviction Relief is hereby dismissed."

While the court did not explicitly refer to claim Z-12, that fact does not warrant reversal because the court summarily dismissed the entire postconviction petition; there was no improper partial summary dismissal.

¶ 8 *People v. Lee*, 344 Ill. App. 3d 851 (2003), is instructive. In *Lee*, the defendant was convicted of murder and attempted murder and sentenced to consecutive sentences of 50 years' and 30 years' imprisonment. His convictions were affirmed on direct appeal. The defendant subsequently filed a *pro se* postconviction petition in which he raised two separate due process claims. The trial court summarily dismissed the petition in a written order in which it addressed only one of the defendant's claims. The appellate court affirmed. *Lee*, 344 Ill. App. 3d at 852.

¶ 9 The appellate court rejected the defendant's argument that reversal was required because the trial court's written order did not address his second postconviction claim. The court distinguished *Rivera*, 198 Ill. 2d 364, in which the supreme court held that the trial court erred in dismissing four of the defendant's six postconviction claims while allowing the remaining two claims to proceed to the second stage of proceedings. Unlike in *Rivera*, the trial court in *Lee* did not advance any claims to the second stage. The court rejected the defendant's invitation to construe the trial court's order as a partial summary dismissal. The fact that the trial court gave no reason for dismissing one of the claims did not dispel its plain intent to dismiss the entire petition. Not only did the trial court's written order state that the petition was dismissed, but also the parties understood the order as a complete dismissal subject to immediate appellate review. *Lee*, 344 Ill. App. 3d at 855.

¶ 10 Here, as in *Lee*, the trial court's written order stated that the "*petition* is frivolous or patently without merit" (emphasis added) and concluded that "defendant's Pro Se *Petition* for Post-Conviction Relief is hereby dismissed" (emphasis added). Also as in *Lee*, and unlike in

Rivera, the trial court here did not advance claim Z-12 to second-stage postconviction proceedings. Thus, despite the fact that the court did not expressly address claim Z-12 in its order, the entire petition was dismissed. Importantly, as in *Lee*, defendant in the present case apparently understood the trial court's order as a final order subject to immediate appellate review since he did immediately appeal the order. Had the order been only a partial dismissal, it would have been appealable only with a Rule 304(a) finding. Ill. S. Ct. R. 304(a) (eff. Feb. 26 2010) ("If *** multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both."). Accordingly, we must reject defendant's characterization of the order as a partial summary dismissal.

¶ 11 Moreover, although defendant makes no argument on appeal that claim Z-12 was not frivolous or patently without merit, it was. In the claim, defendant asserted that trial counsel was ineffective in "agreeing to stipulate to many issues, which in doing so harmed and prejudiced the Defendant in many areas." (Defendant also argued that appellate counsel was ineffective for failing to raise this issue on appeal.) In the petition, defendant did not provide a single example of an improper stipulation. Because defendant's claim Z-12 provided no factual basis, it was patently without merit and summary dismissal was proper. See *People v. Brown*, 236 Ill. 2d 175, 184 (2010) ("A *pro se* petitioner is not excused, however, from providing any factual detail whatsoever on the alleged constitutional deprivation."); *Hodges*, 234 Ill. 2d at 10 (explaining that, although the threshold for surviving the first stage of postconviction proceedings is low, a defendant must provide some factual basis for his claims).

¶ 12 We also note that defendant raised a similar claim in his *pro se* motion for a new trial, for

which the trial court conducted an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). During the inquiry, the court read defendant's allegation that "[c]ounsel committed error by not subjecting the State's case to meaningful testing by agreeing to stipulate to many issues" and asked defendant if he wished to elaborate; defendant declined. Defense counsel acknowledged that defendant "does not like stipulations," but said that defendant had agreed to all but one of the stipulations made. The court properly reasoned that stipulations were a matter of trial strategy and found no ineffective assistance of counsel. See *People v. Beeler*, 2012 IL App (4th) 110217, ¶ 36 (holding that there was nothing unreasonable about trial counsel's strategy to use a stipulation rather than live testimony where the witness could have proved more harmful to the defendant). Accordingly, this claim would have had no merit on appeal, and appellate counsel was not ineffective for failing to raise it. See *People v. Simms*, 192 Ill. 2d 348, 362 (2000) ("[A] defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal.").

¶ 13 Defendant next contends that summary dismissal of his petition was erroneous because he stated the gist of a constitutional claim—namely, appellate counsel was ineffective for failing to raise on direct appeal either of the following issues: (1) trial court error in denying his motion *in limine* for 20 peremptory challenges or (2) ineffective assistance of trial counsel for failing to renew the motion when "invited" to do so by the trial court.

¶ 14 At the first stage of postconviction proceedings, a defendant must set forth only the gist of a constitutional claim. *People v. Henderson*, 2014 IL App (2d) 121219, ¶ 22. The court must dismiss the petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Brown*, 236 Ill. 2d at 184. A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *Tate*, 2012 IL 112214, ¶ 9 (citing *Hodges*, 234 Ill. 2d

at 11-12). Under *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on an ineffective-assistance-of-counsel claim, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Manning*, 241 Ill. 2d 319, 326 (2011). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel is sufficient if it is "arguable" that both *Strickland* prongs were met. *Brown*, 236 Ill. 2d at 185. The *Strickland* principles apply to appellate counsel. *People v. Mars*, 2012 IL App (2d) 110695, ¶ 15.

¶ 15 Prior to trial, defendant filed a motion seeking 20 peremptory challenges during *voir dire* as provided by section 115-4 of the Code of Criminal Procedure (725 ILCS 5/115-4 (West 2010) (providing 20 peremptory challenges to a defendant tried alone in a capital case)) rather than the 14 peremptory challenges provided under the then-existing version of Illinois Supreme Court Rule 434(d) (eff. May 1, 1985) (providing 14 peremptory challenges to a defendant tried alone in a capital case). The trial court acknowledged the apparent conflict between Rule 434(d) and section 115-4. Relying on *People v. Colclasure*, 200 Ill. App. 3d 1038 (1990), the court ruled that, because the issue was a matter of court procedure, the rule controlled, and the court denied the motion.

¶ 16 Defendant concedes that the trial court correctly ruled that Rule 434(d), limiting him to 14 peremptory challenges, was the applicable law.[2] Defendant argues that the trial court

[2] See *People v. Brown*, 2013 IL App (2d) 111228, ¶ 27 n.1 (explaining that "the appellate court has consistently held that Rule 434 trumps section 115-4" and that the supreme court in *People v. Daniels*, 172 Ill. 2d 154, 160 n.1 (1996), had declined to address the issue).

nonetheless had discretion to allow him additional peremptory challenges. Defendant also maintains that trial counsel should have raised this argument when "invited" to renew the motion for 20 peremptory challenges during *voir dire*. We need not address these arguments because defendant's postconviction ineffective-assistance-of-appellate-counsel claim fails due to lack of prejudice. See *People v. Turner*, 2012 IL App (2d) 100819, ¶ 59 ("A court need not decide whether counsel's performance was deficient before analyzing whether the defendant was prejudiced.").

¶ 17 "Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit." *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109 (citing *People v. Edwards*, 195 Ill.2d 142, 163-64 (2001)). If the underlying issue lacks merit, then a defendant suffers no prejudice from appellate counsel's failure to raise it. *Stephens*, 2012 IL App (1st) 110296, ¶ 109. However, prejudice is established if a defendant demonstrates that it is arguable that, had appellate counsel raised a particular issue on direct appeal, there was a reasonable probability that defendant's sentence or conviction would have been reversed. See *People v. Mack*, 167 Ill. 2d 525, 533-34 (1995).

¶ 18 Defendant argues that the limit on peremptory challenges "became problematic" at two points during *voir dire*. The first related to the State's questions to three potential jurors about how they would view testimony from an "accomplice." Asserting that the term presupposed his guilt, defendant argues that he was forced to "waste[]" two peremptory challenges as a result of the allegedly improper questioning. The second problem defendant raises is that he was "required to accept" juror Porter, who, according to defendant, "most likely was not, by his life experiences, going to be impartial." Based on these two "problematic" areas, defendant urges

that, had appellate counsel raised the issues regarding the number of peremptory challenges, his "sentence or conviction would have been reversed since these failures *** resulted in [defendant's] facing a trial before a biased and partial jury."

¶ 19 By way of background, at the final pretrial case management conference, the trial court explained that *voir dire* would be conducted one potential juror at a time and that jurors would be accepted and sworn in three panels of four. Each potential juror would be questioned by the court and then by the parties immediately thereafter. Once four potential jurors were questioned and not excused for cause, the State would have the opportunity to decide whether to exercise any peremptory challenges or to tender the panel to defendant. After the State tendered a panel to defendant, defendant would decide whether to exercise peremptory challenges. If he did, the panel then became his until there were once again four potential jurors not excused for cause. The process would continue alternating between the parties. The court informed the parties that no back-striking would be permitted. See Judge Clare E. McWilliams, *I Strike, You Strike, We All Strike When We Back-Strike*, 25-Jul CBA Rec. 42, 42 (2011) (defining back-striking as "the exercise of a peremptory challenge against a member of a panel that has already been accepted by you and thereafter broken by opposing counsel and retendered back to you").

¶ 20 During questioning for the first panel of jurors, the State asked three potential jurors if they would treat the testimony of an "accomplice" or a "codefendant" differently than that of any other witness. The question was posed in the context of assessing the testimony of various types of witnesses such as police officers or experts. Shortly after the State's third reference to an accomplice, defendant objected, arguing that the term presupposed defendant's guilt. The State agreed to use the term codefendant instead. Of the three potential jurors who were questioned using the term "accomplice," defendant exercised peremptory challenges to two. The other juror

was accepted onto the first panel, which was sworn.

¶ 21 The second panel of jurors was also sworn. During questioning for the third panel, juror Porter was questioned. Porter said that he understood and accepted the principles that defendant was presumed innocent, that the presumption remained with him unless the State proved him guilty beyond a reasonable doubt, that defendant was not required to offer any evidence, and that defendant's decision not to testify could not be held against him. Porter said that he did not believe that psychology and psychiatry were legitimate sciences. Questioning revealed that he had formerly worked for Brinks and that three of his employees had been killed on the job in armed robberies—two in Chicago in the late 1960s and one in Florida in the early 1990s. Porter explained that it had been difficult to deal with the employees' families in the aftermath of their murders. When asked if these past experiences would interfere with his ability to be impartial in the present case, Porter responded, "I don't think so." When asked if he could view defendant's trial as a clean slate, Porter replied, "I think I can." He said twice that, if the jury found defendant guilty and if the jury found defendant eligible for the death penalty, he would not "automatically" vote either way; he would listen to the factors in aggravation and mitigation before making up his mind. When asked if he could set aside his sympathy for the families of the murdered Brinks' employees, he replied, "I think I can." He then volunteered that while he worked for Brinks, one of his employees was accused of stealing $50,000 from the company. Porter believed that the employee, who was later exonerated, was innocent. Porter said that he believed in "an eye for an eye" but that the concept would not apply until after the final stage of the death penalty proceedings. He elaborated that, at the end of the final phase after considering the mitigation, "[i]f everything is considered correctly and I felt that the gentleman, you know,

was guilty—guilty—guilty—guilty, and the death penalty was either yes or no, I'd probably vote for the death penalty."

¶ 22 Defense counsel moved to excuse Porter for cause, arguing that the questioning revealed that he would not listen to evidence in mitigation during the sentencing phase. The court denied the motion—noting that Porter repeatedly stated that he would wait to make a decision on the death penalty until he heard all of the factors, that he would not be leaning either way in advance, and that, although Porter used "I think I can" language, the court had observed him nod and answer with conviction.

¶ 23 After the court denied defendant's motion to strike Porter for cause, he was on a panel the State tendered to defendant. At that point, defendant had exercised 7 of his 14 peremptory challenges. Defendant used two more peremptory strikes on that panel, but did not strike Porter.

¶ 24 After two more potential jurors were questioned, defense counsel exercised a peremptory challenge to one of them. Another potential juror was questioned. Defendant accepted and tendered a panel, which still included Porter. Having accepted and tendered a panel including Porter, defendant was precluded from exercising a peremptory challenge against him because the court had prohibited back-striking. At the time defendant accepted this panel he had exercised only 10 of his 14 peremptory challenges.

¶ 25 After several days of continued *voir dire*, the State accepted and tendered a panel to defendant. Defendant exercised one peremptory challenge, leaving him with one remaining. At that point, the following colloquy ensued:

> "THE COURT: All right. [Defense counsel], defense did file a motion regarding the number of peremptories at the beginning of this whole case where you asked for 20, and I ruled it will be 14. I want to you [*sic*] remind you of that. I don't know if you want

to renew your motion on that for the record or what did you want to do? My count is you have one more left.

[DEFENSE COUNSEL]: Correct.

THE COURT: The ruling stands, you get 14. I don't know if you wanted to bring it up again for the record.

[DEFENSE COUNSEL]: Only if you are going to change your mind.

THE COURT: No.

[DEFENSE COUNSEL]: We know exactly where we are at."

¶ 26 Several more potential jurors were questioned. Defendant exercised his last peremptory challenge without first moving to excuse that potential juror for cause. Another potential juror was questioned. Defendant moved to excuse him for cause. With no objection, the trial court granted the motion. Another potential juror was questioned. Defendant accepted and tendered a panel, and the State accepted it. The third panel of jurors was sworn.

¶ 27 Turning to the merit of defendant's argument, the record clearly refutes defendant's contention that he suffered any prejudice as a result of being limited to 14 peremptory challenges. Defendant contends that "[h]ad more than 14 challenges been available to counsel, there would have been challenges available to compensate for the two challenges 'wasted' on the jurors improperly questioned" with the term "accomplice." Defendant reasons that counsel then would have been able to peremptorily challenge Porter after the trial court denied the motion to excuse him for cause, instead of being "required to accept" Porter. However, at the time that defense counsel accepted and tendered the panel with Porter, defendant had used only 10 of his 14 peremptory challenges. Thus, defendant's argument that he was "required to accept" juror Porter is belied by the record.

¶ 28 Moreover, the record reflects that defendant exercised his final peremptory challenge without first moving to excuse that juror for cause. After defendant used his final peremptory challenge, only two additional potential jurors were questioned. Defendant moved to excuse one for cause, and the trial court granted the motion. With respect to the other, defendant did not move to excuse her for cause and does not argue that she had any bias or prejudice toward him. On this record, defendant has not established that he suffered any arguable prejudice from being limited to 14 peremptory challenges. See *People v. McCormick*, 328 Ill. App. 3d 378, 382 (2002) ("The right to peremptory challenges is not denied or impaired if the procedure affords both parties a fair opportunity to detect bias or hostility and to excuse any objectionable venire member." (citing *Daniels*, 172 Ill. 2d at 165)).

¶ 29 Because the record shows that defendant suffered no arguable prejudice from being limited to 14 peremptory challenges, appellate counsel was not ineffective for failing to raise either trial court error in denying his motion for 20 peremptory challenges or ineffectiveness of trial counsel for failure to renew the motion. See *Stephens*, 2012 IL App (1st) 110296, ¶ 109 (stating that, unless an underlying issue has merit, there can be no prejudice from appellate counsel's failure to raise it on appeal). Accordingly, defendant failed to state the gist of a constitutional claim, and the trial court properly dismissed his postconviction petition at the first stage.

¶ 30 For the reasons stated, the judgment of the circuit court of Du Page County summarily dismissing defendant's postconviction petition is affirmed.

¶ 31 Affirmed.