2017 IL App (2d) 150233-U
No. 2-15-0233
Order filed June 27, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUAN HERRERA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 08-CF-2869 Honorable Susan Clancy Boles, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's postconviction petition was properly dismissed at the first-stage as the argument raised on appeal was not raised in the defendant's *pro se* petition and was thus forfeited.

¶ 2 The defendant, Juan Herrera, was convicted of felony murder, armed violence, possession of a controlled substance with intent to distribute, and possession of a controlled substance, and was sentenced to 46 years' imprisonment. We affirmed his conviction and sentence on direct appeal. See *People v. Herrera*, 2013 IL App (2d) 121154-U. The defendant subsequently filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS5/122-1 *et seq*. (West 2014)). The defendant's petition was summarily

dismissed as frivolous and patently without merit by the trial court. The defendant appeals from this order. We affirm.

¶ 3 BACKGROUND

¶ 4 On November 26, 2008, the defendant was charged with four counts of first degree felony murder (720 ILCS 5/9-1(a)(3) (West 2008)), based on the following underlying felonies: armed violence (use of a gun to accomplish possession of a controlled substance with intent to distribute it (720 ILCS 5/33A-2(a), 570/401(a)(2)(D) (West 2008)) (count I); possession with intent to distribute (count II); simple possession (count III); and armed violence (use of a gun to accomplish simple possession) (count IV). The defendant was also charged with the following: armed violence (720 ILCS 5/33A-2 (West 2008)) based on the use of a gun while possessing more than 900 grams of cocaine (count V); possession with intent (720 ILCS 570/401(a)(2)(D) (West 2008)) (count VI); and simple possession (720 ILCS 570/402(a)(2)(D) (West 2008)) (count VII).

¶ 5 The evidence at trial indicated that the defendant was from out of town and was visiting a friend, Raul Saucedo-Cervante. The day before the murder at issue, the defendant and Cervante went to a house in Aurora owned by a man named Ernesto Vasquez and the three sat in the living room, watching TV and drinking beer. The next day, the defendant and Cervante returned to Vasquez's house. Cervante had cocaine in a small safe. The defendant had purchased the safe at Walmart. They went into the basement, cut open a kilo of cocaine and one or more of them sampled it. A short time later, another man, Esteban Rodriguez, arrived. Rodriguez showed them that he had a .45 Ruger and passed the gun around. The defendant did not know anyone except Cervante. Eventually, some other people that the defendant did not know (later identified as Hector Valtierrez and Jorge Diaz) also arrived. Cervante gave Rodriguez's gun to the defendant and asked him to hold it while everyone else went into the basement.

¶ 6 Once in the basement, Valtierrez and Diaz pulled out guns and said it was a robbery. Cervante immediately ran back upstairs and out the front door. The defendant was curious and walked toward the back of the house. Valtierrez ran up the stairs after Cervante. There were shots fired and everyone ran out of the house. Valtierrez was found shot dead on the landing of the basement stairs. A .380 caliber automatic pistol was lying next to Valtierrez's body. All the bullets in the gun had been fired. The autopsy suggested that Valtierrez had been facing the shooter when he was shot and that the shooter was slightly above him. Two bullets removed from Valtierrez's body were from a .45 caliber gun.

¶ 7 The defendant was shot twice and went to the emergency room of a local hospital, initially giving a false identity and claiming that he was shot while walking on a sidewalk. A bullet found in the defendant's hip was a .380 caliber bullet. According to a stipulation, the defendant's hands were checked for gunshot residue while he was in the hospital and they tested positive. Forensic testing indicated that three different guns had been fired at the scene, a .380 caliber and two .45 caliber guns. When he was released from the hospital, the defendant was transported to the police station and gave a video-recorded interview. When speaking with the police, the defendant initially denied firing a weapon, saying that a skinny guy had taken it from him. The defendant later told detectives that he had been shot first and then shot back in self-defense.

¶ 8 On March 18, 2011, following a bench trial, the trial court found the defendant guilty on all counts, and also found that the defendant had personally discharged a firearm, proximately causing the victim's death. All counts merged with count I for sentencing. Following a sentencing hearing, the defendant was sentenced to 46 years' imprisonment (21 years for the felony murder plus a mandatory 25-year add-on because the defendant personally discharged the firearm that resulted in the victim's death).

¶ 9 The defendant filed a direct appeal, arguing that: (1) the evidence was insufficient to support his convictions; (2) his trial counsel should have moved to suppress his statement to the police on the ground that his waiver of his *Miranda* rights was not knowing and voluntary; and (3) his waiver of his right to testify at trial was not knowing and voluntary. This court found these arguments to be without merit and affirmed the defendant's conviction and sentence. *Herrera*, 2013 IL App (2d) 121154-U.

¶ 10 On January 9, 2015, the defendant filed a *pro se* postconviction petition. In his *pro se* petition the defendant alleged, in relevant part, that his trial and appellate counsel were ineffective in that trial counsel failed to act as an advocate because trial counsel stipulated to most of the critical evidence against the defendant, and in that appellate counsel failed to challenge trial counsel's effectiveness in this respect on direct appeal. Specifically, the defendant noted that trial counsel stipulated to (1) the gunshot residue test results of both the defendant and the victim; (2) the amount of narcotics at issue, namely, 975 grams of cocaine; and (3) the defendant's statements to the police. The defendant further noted that his statements to the police were left uncontested at trial because trial counsel advised him not to testify. Within this claim of ineffective assistance, the defendant also stated:

> "The petitioner's conviction, felony-murder, hinges upon armed violence which is itself dependent upon the narcotics charge. Without the drug charge the petitioner would not have been barred [*sic*] his defense at trial, self-defense. He was not part of any ensuing drug deal. His mere presence at the Rodriguez [*sic*] household alone is insufficient to convict on accountability."

¶ 11 The defendant attached his own affidavit to his *pro se* petition. In his affidavit, the defendant alleged that on October 1, 2008, he was at a Walmart with Cervante. While there, he purchased a safe because he was planning to move to California in the near future and needed the

safe to transport some belongings. He did not know why Cervante asked to use the safe later in the day. When he was at Rodriguez's house on the day of the subject murder, he was aware that cocaine was present because Rodriguez had offered him some and he had accepted. A short while later, he was given a gun and told to stay upstairs while others went into the basement. Moments later shooting started and everyone raced out of the basement. Someone shot him and he discharged the gun only as a matter of self-defense. He left Rodriguez's house through the front door and went to seek medical help. Once at the hospital, he was given pain medication which made him very groggy. While he was sleeping in the hospital, he awoke to an officer rubbing his hand for a gunshot residue test. He did not consent to the test. A detective also questioned him in the hospital. He did not want to give the police a statement or answer questions because he was still very groggy from the medicine. He only gave a statement in the hospital because he was too groggy to resist. He was not permitted to call anyone until he was placed in jail five days later. If he had been allowed to use the phone, he would have called his consulate for help.

¶ 12 On February 18, 2015, the trial court summarily dismissed the petition as frivolous and patently without merit. The trial court concluded that there were no facts or supporting argument presented in the petition that remotely demonstrated ineffective assistance of counsel. Thereafter the defendant filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, the defendant argues that the trial court erred in dismissing his petition. The Act provides a method for a criminal defendant to 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 2014). A petitioner commences

proceedings under the Act by filing a petition in the circuit court in which the original proceeding occurred. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 15 The Act provides for three stages of proceedings in cases not involving the death penalty. *Id.* at 10. At the first stage, a postconviction petition may be summarily dismissed within 90 days of its filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is frivolous or patently without merit if it "has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12. If the petition progresses to the second stage, counsel may be appointed for an indigent defendant, and the State may answer or move to dismiss. 725 ILCS 5/122-4, 122-5 (West 2014). If the defendant makes a "substantial showing" of a constitutional violation at the second stage, then the petition proceeds to a third-stage evidentiary hearing. 725 ILCS 5/122-6 (West 2014).

¶ 16 In this case, the trial court dismissed the defendant's petition at the first stage. We review a first-stage dismissal *de novo*. *Hodges*, 234 Ill. 2d at 9. "Petitions filed *pro se* must be given a liberal construction and are to be viewed with a lenient eye, allowing borderline cases to proceed. Because a *pro se* petitioner will likely be unaware of the precise legal basis for his claim, the threshold for survival is low, and a *pro se* petitioner need allege only enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 48. Nonetheless, section 122-2 of the Act requires that a postconviction petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2014). To survive dismissal at the first stage, a petition need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 17 On appeal, the defendant contends that he stated the gist of a constitutional claim that his trial counsel was ineffective in failing to challenge his felony murder conviction on the basis that

he was not guilty of armed violence. The State charged the defendant with felony murder on the basis that the underlying felony, armed violence predicated upon possession of a controlled substance with intent to deliver, was a forcible felony under the circumstance of the case. At trial, counsel argued that the defendant was not guilty of the drug charge and thus not guilty of felony murder. The defendant now argues on appeal that trial counsel failed to advance the alternate theory that, even if the defendant was guilty of the drug charge, the defendant was not guilty of armed violence because he did not contemplate threatening or using force against any individual, which is a requirement for armed violence to qualify as a forcible felony.

¶ 18 The felony murder statute provides that a defendant is guilty of first-degree murder where, without lawful justification, he performs an act that causes death as "he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(3) (West 2008). While armed violence is not one of the enumerated felonies that qualify as forcible, the statute contains a catch-all provision which includes "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2008). Thus, whether a non-enumerated felony qualifies as forcible under the catch-all provision depends on whether, under the particular facts of a case, the defendant contemplated the use or threat of force against an individual might be necessary to accomplish the forcible felony. *People v. Belk*, 203 Ill. 2d 187, 195 (2003).

¶ 19 The State argues that the defendant's contention on appeal is forfeited because it was not specifically raised in the defendant's *pro se* postconviction petition. 725 ILCS 5/122-3 (West 2008); *People v. Jones*, 211 Ill. 2d 140, 146-47 (2004) (holding that claims not raised in a *pro se* postconviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition). The State points out that, in his petition, the defendant never argued that his conviction for armed violence was not a forcible felony. Rather, the defendant argued

only that his conviction for felony murder hinged on the armed violence charge, which was then dependent on the narcotics charge, and that there was not enough evidence to support the narcotics charge.

¶ 20 The defendant argues that his claim on appeal is not forfeited. In so arguing, the defendant relies on this court's ruling in *People v. Thomas*, 2014 IL App (2d) 121001. In *Thomas*, the defendant, Marquis Thomas, was convicted of murder. *Id.* ¶ 1. On direct appeal, Thomas unsuccessfully argued that the trial court erred in excluding the confession of an incarcerated minor to the murder at issue. The minor had told detectives that "[he] did it" but later recanted the statement in a video-recorded interview. We held that the trial court did not err in excluding the statement as unreliable, in part because it was not corroborated by other evidence. *Id.* Appellate counsel did not challenge the exclusion of the minor's confession to a jailhouse chaplain, which the trial court excluded based on clergy-penitent privilege, or argue that the chaplain's testimony would have provided corroboration for the minor's statements to the detectives. *Id.* ¶¶ 33, 39.

¶ 21 In a *pro se* postconviction petition, Thomas alleged that appellate counsel was ineffective because he did not argue that trial counsel erred in failing to investigate and present evidence of the minor's confession. Thomas noted in his petition that the minor confessed to a jailhouse chaplain. *Id.* ¶ 2. The petition alleged that, had the minor's statements to the detectives been corroborated by other evidence, the result of the proceedings would have been different. *Id.* ¶ 61. Thomas's petition was dismissed as frivolous and patently without merit. *Id.* ¶ 3.

¶ 22 On appeal from the summary dismissal, Thomas argued that the trial court erred in suppressing the minor's statements to detectives and the jailhouse chaplain and that appellate counsel erred in failing to argue that the minor's confession to the chaplain provided sufficient corroboration for the admission of the minor's statements to the detectives. *Id.* The State argued

that Thomas's arguments on appeal were forfeited as they differed from the arguments raised in his *pro se* petition. *Id.* ¶ 4. This court held that Thomas had not forfeited his arguments raised on appeal. This court determined that both the argument in the petition and the postconviction appellate argument alleged the ineffectiveness of appellate counsel for mishandling the admissibility of the minor's confessions to the detectives and the chaplain. *Id.* ¶ 5. Accordingly, the court rejected the State's forfeiture argument and ultimately concluded the petition stated the gist of a constitutional claim. *Id.* ¶ 63.

¶ 23 The defendant's reliance on *Thomas* is unpersuasive. In *Thomas*, both the arguments in the *pro se* petition and on appeal were related to the same subject matter: whether the minor's statements were improperly excluded and whether appellate counsel erred in not arguing that the minor's confession to the chaplain was sufficient corroboration for the minor's statements to the detectives. While the argument in the *pro se* petition was framed slightly differently, the allegations in the petition were sufficient to support the arguments as set forth on appeal. *Id.* ¶ 62.

¶ 24 In the present case, the argument in the petition and the argument raised on appeal do not share the same underlying subject matter. In his petition, the defendant argued that his conviction for armed violence, which was predicated on unlawful possession of a controlled substance, was improper because there was no evidence linking him to the underlying drug deal. Because there was no evidence supporting the predicate offense, he could not be guilty of armed violence or felony murder. On appeal, the defendant argues that his conviction for felony murder was improper because his armed violence conviction did not qualify as a forcible felony as he possessed a gun but did not contemplate the use or threat of force against any individual. While both arguments ultimately attack the defendant's conviction for felony murder, the arguments are based on completely different legal theories. Further, the allegations in the

defendant's petition do not support the argument he now raises on appeal. In his petition, the defendant stated that he was not part of the drug deal. However, nowhere in his petition does the defendant state that, even if he was part of the drug deal, he had no intention of using the gun. The defendant's claim that he was not part of the ensuing drug deal cannot be liberally construed as a claim that, even if he was part of the drug deal, he did not contemplate the use or threat of force against any individual. Accordingly, we affirm the summary dismissal of defendant's petition.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 27 Affirmed.