2012 IL App (4th) 100593-U

Filed 2/23/12

NO. 4-10-0593

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JESSE R. LEE,	)	No. 04CF106
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa K. Righter,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices McCullough and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: We grant appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's judgment where no meritorious issues could be raised on appeal as to whether (1) trial counsel was ineffective for failing to investigate defendant's history of mental illness or (2) the trial court erred in denying defendant's claim his sentence was unconstitutional because it was based on conduct over which he had no control.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case as to whether (1) trial counsel was ineffective for failing to investigate defendant's history of mental illness or (2) the trial court erred in denying defendant's claim his sentence was unconstitutional because it was based on conduct over which he had no control. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2004, the State charged defendant, Jesse R. Lee, by information with (1) predatory criminal sexual assault of a child on or about January 24, 2004 (720 ILCS 5/12-14.1(a)(1) (West 2004)) (count I), (2) criminal sexual assault between December 2003 and January 27, 2004 (720 ILCS 5/12-13(a)(1) (West 2004)) (count II), (3) aggravated criminal sexual assault on or about December 25, 2003 (720 ILCS 5/12-16(d) (West 2004)) (count III), and (4) unlawful failure to register as a sex offender on or about January 26, 2004 (730 ILCS 150/6 (West 2004)) (count IV).

¶ 5 In October 2004, defendant proceeded to trial on count I and a jury convicted defendant of predatory criminal sexual assault of a child. At the November 2004 sentencing hearing, the trial court sentenced defendant to a 60-year extended-term prison sentence, finding such a sentence was "required for the protection of the public, to protect the public from further criminal conduct by the defendant."

¶ 6 Defendant appealed, arguing the trial court erred by (1) failing to *sua sponte* order a fitness hearing; (2) allowing the victim to testify via closed-circuit television; (3) accepting defendant's waiver of counsel at his sentencing hearing; (4) admitting testimony of several witnesses pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2004)); (5) considering an incorrect sentencing range; and (6) abusing its discretion by imposing the maximum 60-year sentence on defendant. *People v. Lee*, No. 4-05-0094 (June 5, 2007) (unpublished order under Supreme Court Rule 23). This court affirmed defendant's conviction and sentence, holding in pertinent part (1) the trial court did not commit error in refusing to order a fitness hearing *sua sponte* and (2) defendant's 60-year sentence was not disproportionate to the seriousness of his offense. *Lee*, No. 4-05-0094, slip order at 12-17,

37-40.

¶ 7 In November 2007, defendant filed a *pro se* petition for postconviction relief, arguing trial counsel was ineffective for failing to investigate defendant's history of mental illness and obtain his mental-health records and he was denied due process because he was not competent to stand trial. In February 2008, the trial court summarily dismissed defendant's petition, finding his allegations frivolous and patently without merit. The court noted there is a presumption of fitness to stand trial and the defendant bears the burden of showing a *bona fide* doubt exists as to his fitness to stand trial. The court pointed out defendant provided no supporting documentation or affidavit as to his unfitness.

¶ 8 On March 7, 2008, defendant filed a *pro se* motion to reconsider the summary dismissal of the postconviction petition, arguing the trial court improperly found he had not provided a basis for his allegations. On March 17, 2008, the court denied defendant's motion to reconsider, finding counsel had asked for a continuance to investigate defendant's "true condition," but the request was denied because the trial court did not have a *bona fide* doubt regarding defendant's fitness. Additionally, the court found the issues defendant raised in his postconviction petition had already been raised and rejected on direct appeal, and thus, were barred by *res judicata*. Defendant appealed; this court affirmed and allowed appellate counsel's motion to withdraw under *Finley*. *People v. Lee*, No. 4-08-0641 (Feb. 5, 2010) (unpublished order under Supreme Court Rule 23).

¶ 9 In April 2010, defendant *pro se* filed a second petition for postconviction relief, again arguing trial counsel was ineffective for failing to investigate his history of mental illness in Georgia and defendant was denied his fourteenth-amendment right to due process because he

was tried and convicted when he was not competent to stand trial. On May 7, 2010, the trial court dismissed this petition because defendant had not sought permission to file a subsequent postconviction petition.

¶ 10 On May 17, 2010, defendant filed a "Late Motion to Obtain Leave of Court" alleging mental-health records from Dalton, Georgia, would show he had mental-health problems in 2002. Defendant attached his affidavit claiming his doctor and psychiatrist believed he should be in a mental hospital for sex offenders rather than in prison. In June 2010, the trial court denied defendant's motion, noting "[t]he [s]econd [p]etition for [p]ost-[c]onviction relief is virtually identical to the first except it attaches various mental health records that pre-date the events alleged in the information and for treatment received in [prison]." Further, the court found defendant's late motion to obtain leave of court, including the attached affidavit and other documents, failed to state a new claim not addressed in the original postconviction petition, nor did it state an objective factor impeding defendant's ability to address the specific claims raised.

¶ 11 In July 2010, defendant filed a "Response/Answer" to the denial of his "Late Motion to Obtain Leave of Court," including a "new" motion to reconsider and a "new" claim of a constitutional-rights violation. Defendant again argued had trial counsel obtained his mental-health records from Georgia as he requested, they would have shown he was previously found mentally ill, suffered from aural and visual hallucinations, was "being chased by ghosts" who told him what to do, and suffered from intense anxiety and panic attacks as a result of the hallucinations. Defendant stated he had been on medication to control the hallucinations, but upon returning to Illinois he no longer had medical insurance or money to see a physician or refill his medications, which led him to self-medicate with alcohol. Additionally, defendant stated he

was placed on "suicide watch" while in the county jail and physicians at Graham Correctional Center and Pontiac Correctional Center believed defendant should be in a mental hospital.

¶ 12 Defendant's "new" constitutional claim was that his 60-year sentence was constitutionally improper. Defendant claimed he should have been sentenced to 30 years in prison because the crime he committed "should have been a simple case of statutory rape rather than predatory criminal sexual assault[,] because having been found to be mentally ill, he could not have been "capable of 'Predatory' thought." Additionally, defendant asserted the trial court improperly considered the threats he made against deputies during his arrest in fashioning his sentence.

¶ 13 In July 2010, the trial court denied defendant's motion to reconsider for the same reasons it denied his May 2010 "Late Motion to Obtain Leave of Court."

¶ 14 In August 2010, defendant filed a timely *pro se* notice of appeal and OSAD was appointed to represent him. In August 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant, who is currently in prison. On its own motion, this court granted defendant leave to file additional points and authorities by September 2, 2011. Defendant timely filed additional points and authorities. The State responded. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 15 II. ANALYSIS

¶ 16 OSAD moves for leave to withdraw as counsel on appeal, concluding any request for review would be frivolous and without merit. We agree.

¶ 17 A. Standard of Review

¶ 18 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010) (citing *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998). "To be entitled to post-conviction relief, a defendant must demonstrate a substantial deprivation of federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged." *People v. McNeal*, 194 Ill. 2d 135, 140, 742 N.E.2d 269, 272 (2000).

¶ 19 At the first stage of a postconviction proceeding, a *pro se* defendant must allege sufficient facts to make out the "gist" of a constitutional claim, although the petition need not contain formal legal arguments or citations to legal authority. 725 ILCS 5/122-1(a) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A *pro se* defendant must however, "set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254-55, 882 N.E.2d 516, 520 (2008). A postconviction petition must "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). At the dismissal stage of a postconviction petition, all well-pleaded facts not positively rebutted by the record are taken as true. *Coleman*, 183 Ill. 2d at 385, 701 N.E.2d at 1073.

¶ 20 If a trial court "determines that the [postconviction] petition is frivolous or is patently without merit, it [must] dismiss the petition in a written order." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). A claim is "frivolous or patently without merit" if it lacks an arguable basis in law or fact. *People*

v. Alcozer, 241 Ill. 2d 248, 257-58, 948 N.E.2d 70, 77 (2011). "Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act." *Coleman*, 183 Ill. 2d at 381, 701 N.E.2d at 1072.

¶ 21 B. Ineffective Assistance of Counsel–Competency To Stand Trial

¶ 22 In defendant's second petition for postconviction relief, he argues trial counsel was ineffective for failing to investigate his history of mental illness and he was tried and convicted when he was not competent to stand trial. In his "late motion to obtain leave of court," he argues his "2002 medical records from Dalton[,] Georgia show that [his] attorney was ineffective and violated [his] rights to allow [him] to be subjected to trial while unfit." Defendant further elaborates on this claim in his "new" motion to reconsider, asserting he told his appointed counsel about his mental-health history, but counsel did not procure these documents, which would have shown he was mentally ill and on prescription medication for hallucinations "prior to the events in which [he] was charged and convicted."

¶ 23 1. *Failure To Attach Supporting Evidence*

¶ 24 OSAD first asserts defendant's claims are not supported by the record, affidavits, or other documentation as required by section 122-2 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-2 (West 2010)). We agree.

¶ 25 Defendant attached his own affidavit to his petition and subsequent motions, stating the contents of the documents were true; however, defendant failed to attach any other documents, affidavits, or evidence to support his claim of ineffective assistance of counsel for failure to investigate his history of mental illness. In the dismissal of defendant's original postconviction petition, the trial court specifically noted "[t]his defendant has provided no

supporting documentation or affidavit as to his non-fitness." Further, defendant failed to explain the absence of such supporting evidence. The trial court noted in its denial of defendant's late motion to obtain leave of court to file a successive postconviction petition, defendant attached "various mental health records that pre-date" the crime of which defendant was convicted. However, the record before us contains no such mental-health documents. "[Th]e failure to either attach the necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a postconviction petition [citation] and by itself justifies the petition's summary dismissal." *People v. Lee*, No. 4-08-0641, slip order at 5 (citing *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002)). In his additional points and authorities, defendant responds the "[r]eason these records were not attached was because I'm indigent and have no way to make copies." As we have previously stated, "this court will not examine defendant's explanation on appeal without it first being made to the trial court in his postconviction petition for initial scrutiny and evaluation at the trial court level." *Lee*, No. 4-08-0641, slip order at 6 (citing *People v. Anderson*, 375 Ill. App. 3d 121, 138-39, 872 N.E.2d 581, 597 (2007); *People v. Montgomery*, 327 Ill. App. 3d 180, 186, 763 N.E.2d 369, 375 (2001)).

¶ 26 Defendant's claims constitute nothing more than mere conclusions, unsupported by evidence. Therefore, the trial court did not err in dismissing defendant's second postconviction petition, the "late motion to obtain leave of court," or the "new" motion to reconsider for failure to attach supporting evidence or explain their absence.

¶ 27 2. *Res Judicat*a

¶ 28 OSAD next asserts defendant's claims of ineffective assistance of counsel and competency to stand trial are barred by the principle of *res judicata*. We agree.

¶ 29 A postconviction proceeding is a "collateral attack on a prior conviction and sentence, and the scope of such a proceeding is generally limited to constitutional matters that have not been, or could not have been, previously adjudicated." *People v. Cummings*, 375 Ill. App. 3d 513, 518, 873 N.E.2d 996, 1001 (2007). Any issues which could have been raised on direct appeal are procedurally defaulted and any issues that were raised are barred by the doctrine of *res judicata*. *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073. In initial postconviction petitions, *res judicata* and waiver are principles of administrative convenience, but in successive petitions, they are "an express requirement of the statute" and "only when fundamental fairness so requires will the strict application of this statutory bar be relaxed." *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 620-21 (2002).

¶ 30 Here, defendant first raised the issue of his competency to stand trial on direct appeal, then again in his first postconviction petition, in the successive postconviction petition, and finally in the "new" motion to reconsider. This court has already held, on direct appeal, the trial court did not commit error by refusing to *sua sponte* order a fitness hearing because the trial court "clearly concluded that defendant was fit to stand trial." *Lee*, No. 4-05-0094, slip order at 12-13. On appeal from the trial court's dismissal of his first postconviction petition, this court allowed OSAD's motion to withdraw, holding defendant failed to attach supporting evidence to his petition and did not explain its absence until defendant filed his additional points and authorities on appeal. *Lee*, No. 4-08-0641, slip order at 5-6. The issue of defendant's competency to stand trial was previously raised and found to be without merit. Defendant has failed to show, either in his successive postconviction petition or in his motion to reconsider, *res judicata* should be relaxed as a matter of fundamental fairness. Thus, any consideration of the issue of

defendant's competency to stand trial is barred by *res judicata*.

¶ 31 C. Defendant's Unconstitutional Sentence Claim

¶ 32 Defendant next asserted, for the first time in his "new" motion to reconsider the dismissal of his successive postconviction petition, his 60-year sentence is unconstitutionally improper and he was sentenced to 60 years' imprisonment, rather than 30 years' imprisonment, based on "threats made to deputies durring [*sic*] his arrest."

¶ 33 OSAD maintains the propriety of an extended-term sentence is not properly raised for the first time in a motion to reconsider the dismissal of a postconviction petition. Where a sentence falls within the statutory range, allegations the sentence is excessive raises no issue cognizable under the Post-Conviction Hearing Act. *People v. Ballinger*, 53 Ill. 2d 388, 390, 292 N.E.2d 400, 401 (1973); see also *People v. Vilces*, 321 Ill. App. 3d 937, 748 N.E.2d 1219 (2001) (Appellate court refused to examine the merits of defendant's claim argued in his motion to reconsider the denial of his postconviction petition because defendant did not raise this issue in the postconviction claim itself. The court also noted the issue could have been raised on direct appeal and was not). As in *Vilces*, defendant raises his excessive-sentence claim for the first time in his motion to reconsider the dismissal of his subsequent postconviction petition. Defendant could have raised this claim on direct appeal but failed to do so. Thus, defendant's assertion his sentence is unconstitutional is procedurally defaulted. See *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073.

¶ 34 OSAD further contends even if the issue was properly raised in a motion to reconsider, defendant's argument fails on the merits. We agree.

¶ 35 "A trial court is given great deference when making sentencing decisions, and if a

sentence falls within the statutory limits, it will not be disturbed on review unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008) (citing *People v. Grace*, 365 Ill. App. 3d 508, 512, 849 N.E.2d 1090, 1093-94 (2006)). It is not the function of the reviewing court to substitute its own judgment for that of the trial court, even if it determines it would have imposed a different sentence had the function been delegated to it. *People v. Perruquet*, 68 Ill. 2d 149, 156, 368 N.E.2d 882, 885 (1977).

¶ 36 In 2004, when the instant crime was charged, predatory criminal sexual assault of a child was punishable as a Class X felony, with a prison sentence ranging from 6 to 30 years. 720 ILCS 5/12-14.1(b)(1) (West 2004); 730 ILCS 5/5-8-1(a)(3) (West 2004). An extended term of not less than 30 years nor more than 60 years could be imposed upon a defendant convicted of predatory criminal sexual assault of a child if his record qualified him for extended-term sentencing. 730 ILCS 5/5-5-3.2(c), 5-8-2(a)(2) (West 2004). Thus, the 60-year prison sentence imposed on defendant was within the statutorily permissible range.

¶ 37 Defendant argues, in his additional points and authorities, the trial judge contemplated sentencing him to 20 years in prison, but after hearing evidence defendant threatened to kill the deputy from Illinois who came to pick him up in Nebraska, the judge enhanced the sentence to 60 years. The record shows, however, the trial court considered a variety of factors at defendant's sentencing hearing in fashioning the 60-year sentence, none of which were improper. The court stated as follows:

> "I have considered the evidence received at trial. I have considered the evidence received at this hearing.

> I have considered the pre-sentence report and its attachments, including Dr. Levine's report and his testimony. I have considered the financial impact of incarceration[.] ***
>
> I have considered evidence and information and argument offered by the parties in aggravation and mitigation. I have considered the arguments offered regarding sentencing alternatives and the defendant's statement made in his own behalf.
>
> I have considered the victim impact statement and the effect [defendant's conduct] has had on this seven-year-old child."

Additionally, the court noted defendant failed to comply with almost every other sentence imposed on him by a court, in both juvenile and criminal matters. The court also considered defendant neither showed remorse nor accepted responsibility for his actions, reliable evidence showed defendant had abused other children, and defendant threatened to kill several police officers. Further, the court stated "an enhanced sentence is required for the protection of the public, to protect the public from further criminal conduct by the defendant" and defendant was "incapable of being a law-abiding citizen" because he was violent and threatening to children and adults alike and was "an extremely high risk, a dangerous risk to re-offend." Based on the factors considered by the court at sentencing, no meritorious argument can be made defendant's sentence was unconstitutional. Moreover, the State notes we affirmed defendant's sentence in *Lee*, No. 4-05-0094, slip order at 37-40, so consideration of this issue is barred by *res judicata*.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we grant OSAD’s motion to withdraw as counsel for defendant and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.