2012 IL App (4th) 110127-U

Filed 7/5/12

NO. 4-11-0127

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
CHRISTOPHER J. REED,	)	No. 05CF1248
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where the record contradicts defendant's assertion the State's Attorney failed to sign the information and have proper notarization, the trial court properly *sua sponte* denied defendant's motion to dismiss the information.

¶ 2 Where defendant's arguments were frivolous and patently without merit as they were either barred by *res judicata* or forfeiture, unsupported by affidavit, or contradicted by the record, the trial court properly dismissed defendant's postconviction petition at the first stage.

¶ 3 In December 2010, defendant, Christopher J. Reed, filed a *pro se* motion to dismiss the information or, in the alternative, arrest the judgment under sections 114-1(a)(6) and 116-2 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-1(a)(6), 116-2 (West 2010)). The next month, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)), raising several claims of error. In February 2011, the Macon County circuit court *sua sponte* denied defendant's motion to dismiss

and summarily dismissed defendant's postconviction petition. Defendant filed notices of appeal from the court's orders, and the court appointed the office of the State Appellate Defender (OSAD) to represent defendant.

¶ 4 On appeal, OSAD moves to withdraw its representation of defendant, contending defendant's appeal is frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 On January 5, 2006, the State charged defendant by information with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2004)) for the death of Tywon Renier. After a September 2006 trial, a jury found defendant guilty of first degree murder but answered in the negative a special interrogatory, asking whether the State proved beyond a reasonable doubt defendant had personally discharged a firearm that proximately caused Renier's death. Defendant filed several posttrial motions, including one raising ineffective assistance of counsel, for which defendant was appointed new counsel to represent him. The trial court denied all of defendant's motions. At an August 2007 sentencing hearing, the court sentenced defendant to 50 years' imprisonment. Defendant filed a motion to reconsider and reduce his sentence, which the court also denied.

¶ 7 Defendant appealed, arguing (1) the jury's negative answer to the special interrogatory was fatal to the guilty verdict and (2) the State failed to prove defendant's guilt beyond a reasonable doubt. This court affirmed defendant's first-degree-murder conviction and sentence. *People v. Reed*, 396 Ill. App. 3d 636, 919 N.E.2d 1106 (2009). Thereafter, defendant filed a petition for leave to appeal, which the Supreme Court of Illinois denied in March 2010. *People v. Reed*, 236 Ill. 2d 534, 930 N.E.2d 414 (2010). Defendant also filed a petition for

certiorari with the United States Supreme Court, which it denied in October 2010. *Reed v. Illinois*, ___ U.S. ___, 131 S. Ct. 485 (2010).

¶ 8 A. Motion To Dismiss the Information

¶ 9 In his December 2010 motion to dismiss the information, defendant asserted the prosecutor failed to sign the information for one count of first degree murder and have the signature notarized, and thus the information was void. Defendant also noted the information charged a violation of section 9-1(a)(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(a)(2) (West 2004)), and his sentencing judgment stated the offense was a violation of section 9-1(a)(1) of the Criminal Code (720 ILCS 5/9-1(a)(1) (West 2004)). Defendant attached copies of the third count of first degree murder and his sentencing judgment. On February 1, 2011, the trial court entered a docket entry, denying defendant's motion to dismiss. The court noted (1) the court file contained a signed information, (2) the motion was a pretrial motion filed long after trial, and (3) the court lost jurisdiction several years ago. On February 10, 2011, defendant filed a timely *pro se* notice of appeal from the court's February 1, 2011, denial of his motion to dismiss in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). This court docketed defendant's appeal from the denial of his motion to dismiss as case No. 4-11-0127. We have jurisdiction of the trial court's denial of defendant's motion to dismiss under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 10 B. Postconviction Petition

¶ 11 In his January 2011 postconviction petition, defendant argued he was denied his right to a fair trial by (1) the way the trial court handled the jury's questions and requests and its allowance of the special interrogatory, (2) the court's failure to properly admonish the jurors

under Illinois Supreme Court Rule 431 (eff. May 1, 1997), (3) his trial counsel's failure "to adequately and competently represent him," and (4) the evidence supporting his claim of actual innocence. In a February 3, 2011, written order, the trial court dismissed defendant's petition as frivolous and patently without merit. On February 16, 2011, defendant filed a timely *pro se* notice of appeal from the court's February 3, 2011, dismissal of his petition in sufficient compliance with Rule 606. See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). This court initially docketed defendant's appeal from the dismissal of his postconviction petition as case No. 4-11-0143. Since the State challenges our jurisdiction of the appeal from the dismissal of the postconviction petition, we address that matter in our analysis section.

¶ 12 C. On Appeal

¶ 13 On April 26, 2011, OSAD filed a motion for leave to file an amended notice of appeal, which listed both of the trial court's February 2011 judgments. This court granted the motion, and the amended notice of appeal was filed in the trial court on April 28, 2011. After the filing of the amended notice of appeal, this court consolidated the two appeals and only used the case number for the appeal from the denial of the motion to dismiss, No. 4-11-0127.

¶ 14 In February 2012, OSAD filed a motion to withdraw as counsel on defendant's appeal from the dismissal of his postconviction petition. OSAD asserts it has thoroughly reviewed the record and concludes the appeal is frivolous. The attached memorandum of law addresses defendant's arguments and sets forth the procedural history of the case. OSAD's proof of service indicates defendant was provided with a copy of the motion, and this court granted defendant to and including March 29, 2012, to file additional points and authorities. Defendant

filed a brief, asserting he did not want the appeal of the denial of his motion to dismiss the information merged with the appeal of the dismissal of his postconviction petition and asks this court to "withdraw his [motion to dismiss the information] without prejudice." Moreover, defendant notes his postconviction petition was incomplete due to a lack of time and legal materials because of lockdowns and segregation. This court, again on its own motion, reinstated the docketing schedule, allowing the State to file an appellee brief and defendant to file a reply brief. In April 2012, the State filed its brief. Defendant did not file a reply brief.

¶ 15 II. ANALYSIS

¶ 16 A. Jurisdiction

¶ 17 The State challenges our jurisdiction of defendant's postconviction petition, asserting OSAD's amended notice of appeal is untimely, and thus defendant can only appeal the motion to dismiss the information in case No. 4-11-0127. Our supreme court has emphasized a reviewing court's duty to ascertain its jurisdiction before considering the appeal's merits. See *People v. Lewis*, 234 Ill. 2d 32, 36-37, 912 N.E.2d 1220, 1223 (2009); *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009); *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). Thus, the State's questioning of our jurisdiction raises a threshold issue. See *Lewis*, 234 Ill. 2d at 37, 912 N.E.2d at 1223.

¶ 18 Regardless of the timeliness of OSAD's motion for leave to file an amended notice of appeal, we have jurisdiction of the postconviction petition based on defendant's *pro se* notice of appeal that was timely filed on February 16, 2011, and sufficiently complies with Rule 606. See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984). After we granted the motion for leave to file the amended notice of appeal, this court consolidated the two appeals and used only the appellate

case number for the motion to dismiss the information (No. 4-11-0127). Whether we should have retained the original case number for the appeal from the dismissal of the postconviction petition in consolidating the two cases is a clerical matter that does not deprive us of jurisdiction over the dismissal of the postconviction petition. Both of the trial court's judgments are properly before us in this case.

¶ 19 B. Standard for Withdrawal of Counsel

¶ 20 In *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), the United States Supreme Court addressed the withdrawal of counsel in collateral postconviction proceedings and held the United States Constitution does not require the full protection of *Anders v. California*, 386 U.S. 738 (1967), with such motions. The Court noted the respondent did not present a due-process violation when her counsel withdrew because her state right to counsel had been satisfied. *Finley*, 481 U.S. at 558. Thus, state law dictates counsel's performance in a postconviction proceeding. The Supreme Court of Illinois has held that, in a postconviction proceeding, the Postconviction Act entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995).

¶ 21 In *People v. McKenney*, 255 Ill. App. 3d 644, 646, 627 N.E.2d 715, 717 (1994), the Second District granted appellate counsel's motion to withdraw as counsel on an appeal from a postconviction petition, finding counsel's representation was reasonable. There, the motion stated counsel had reviewed the record and found no issue that would merit relief. The motion also provided the procedural history of the case and the issues raised in the defendant's petition. *McKenney*, 255 Ill. App. 3d at 645, 627 N.E.2d at 716.

¶ 22 C. Motion To Dismiss Information

¶ 23 In reply to OSAD's *Finley* motion, defendant disagrees with the consolidation of the appeals and requests to withdraw without prejudice his motion to withdraw the information. However, defendant cannot now withdraw his motion to dismiss without prejudice because the trial court made a final judgment on that motion. Moreover, this court cannot dismiss the appeal of the motion to dismiss the information without prejudice. If we dismiss the appeal, the litigation of the motion to dismiss the information terminates. Since we cannot grant the relief defendant seeks, we address the trial court's *sua sponte* denial of defendant's motion to dismiss the appeal on the merits.

¶ 24 In addressing a motion without a responsive pleading, the court deems admitted the well-pleaded facts and considers whether the allegations in the petition entitle the defendant to relief as a matter of law. See *People v. Vincent*, 226 Ill. 2d 1, 9-10, 871 N.E.2d 17, 24 (2007) (addressing the *sua sponte* denial of a defendant's petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002))). The court may consider "the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings." *Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23. This court reviews *de novo* the trial court's *sua sponte* denial of defendant's motion. See *Vincent*, 226 Ill. 2d at 14, 871 N.E.2d at 26.

¶ 25 Defendant's motion to dismiss the information alleges the State's information is invalid because it did not have a signature of the prosecutor with a proper notarization. To the motion, defendant attached a copy of the third count of first degree murder, which has the State's Attorney's name typed for the signature line as well as the name of the notary on the line designated for the notary's signature. The original information for count III is in the record and bears the signature of the Macon County State's Attorney and the signature and stamp of notary

public, Janet L. Johnson. Count III is the last count of the information. Our supreme court has found the signature and verification following the final count was a signature and verification of a single multi-count information. See *People v. Cox*, 53 Ill. 2d 101, 107, 291 N.E.2d 1, 4 (1972), *overruled on other grounds by People v. Davis*, 156 Ill. 2d 149, 159, 619 N.E.2d 750, 756 (1993). Thus, the single three-count information was properly signed and notarized, and defendant's factual allegation is contradicted by the record.

¶ 26 Defendant's motion also notes the information for count III lists a violation of section 9-1(a)(2) of the Criminal Code while the sentencing judgment lists a violation of section 9-1(a)(1) of the Criminal Code. The record indicates the trial court sentenced defendant on count I, which did allege a violation of section 9-1(a)(1). Thus, this allegation is also contradicted by the record.

¶ 27 Accordingly, we find the trial court properly denied defendant's motion to dismiss the information for the above reasons and need not address any other basis for finding the trial court's denial was proper.

¶ 28 D. Postconviction Petition

¶ 29 Defendant also appeals the dismissal of his postconviction petition at the first stage of the proceedings.

¶ 30 The Postconviction Act provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). When a case does not involve the death penalty, the adjudication of a postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must, independently and

without considering any argument by the State, decide whether the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Legal argument or citation to legal authority is not required. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). However, section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2010)) requires the petition to "have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." In analyzing the petition, courts are to take the allegations of the petition as true, as well as liberally construe them. *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 31 Moreover, our supreme court has explained a court may summarily dismiss a *pro se* postconviction petition "as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one the record completely contradicts. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212. Also, our supreme court has found a claim is " 'frivolous' or 'patently without merit' " where *res judicata* and forfeiture bar a defendant from obtaining relief. *People v. Blair*, 215 Ill. 2d 427, 445, 831 N.E.2d 604, 616 (2005) (quoting 725 ILCS 5/122-2.1(a)(2) (West 2002)). We disagree with defendant that OSAD should have raised Justice

Freeman's dissent in *Blair* because this court follows the majority's aforementioned holding in *Blair*, not Justice Freeman's dissent. See *People v. Jackson*, 362 Ill. App. 3d 1196, 1200, 841 N.E.2d 1098, 1102 (2006) (quoting *Blair*, 215 Ill. 2d at 430, 831 N.E.2d at 607). When a postconviction petitioner has directly appealed a conviction, the reviewing court's judgment is *res judicata* as to all issues the reviewing court actually decided. Any other claims that could have been presented to the reviewing court are forfeited. *People v. McDonald*, 364 Ill. App. 3d 390, 392, 846 N.E.2d 960, 963 (2006).

¶ 32 Last, in considering a postconviction petition at the first stage of the proceedings, the court can examine the following: "the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010). We review *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105-06 (2000).

¶ 33 1. *Jury Questions and Requests*

¶ 34 In his postconviction petition, defendant first appears to argue the trial court erred by not (1) answering the jury's questions and (2) allowing the jury to review the trial transcripts. He also seems to challenge the court's allowance of the special interrogatory related to the sentence enhancement contained in section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004), as amended by Pub. Act 94-165, § 5, eff. July 11, 2005 (2005 Ill. Laws 1808, 1819)).

¶ 35 On direct appeal, defendant argued the jury's negative answer to the special interrogatory was fatal to his jury verdict. Defendant's assertions related to the special interroga-

tory are similar to his argument on direct appeal and are barred by the doctrine of *res judicata*. Even if his special-interrogatory allegations are different from the one on direct appeal, he could have raised his postconviction claims on direct appeal, and thus they are forfeited. Defendant also forfeited his arguments related to the trial court's handling of the jury's requests and questions during deliberations as those matters could have been raised on direct appeal. Accordingly, the trial court properly found defendant's arguments related to the special interrogatory and the court's handling of the jury's questions and requests were frivolous and patently without merit.

¶ 36 2. *Rule 431(b)*

¶ 37 Defendant further asserts he was denied a fair trial because the trial court failed to comply with Rule 431(b) (eff. May 1, 1997) by not questioning the potential jurors about whether they understood the principles contained in Rule 431(b). Defendant has forfeited this issue because he could have presented it on direct appeal. Additionally, we note the record contradicts defendant's argument as it shows the trial court did question each juror about the principles contained in Rule 431(b). Accordingly, the trial court properly found this issue was frivolous and patently without merit.

¶ 38 3. *Ineffective Assistance of Trial Counsel*

¶ 39 Defendant also alleged he was denied effective assistance of his trial counsel, Scott Rueter, because (1) Rueter had a conflict of interest as he also represented a potential witness in defendant's case, Marshon Simon; (2) and by failing to investigate and present the testimony of Jon Whittle, Quiana Jackson, and Marketia Davis. At the posttrial hearing on defendant's ineffective-assistance-of-counsel claims, defendant was represented by new counsel,

who called Rueter to testify. During his testimony, Rueter addressed his representation of Simon and his decision not to call Simon to testify. Rueter also explained why he did have Whittle, Jackson, and Davis testify. Thus, a record was established on defendant's ineffective-assistance-counsel claim, and defendant could have raised it on direct appeal. Accordingly, defendant also forfeited this issue.

¶ 40 Additionally, defendant did not attach to his postconviction petitions affidavits from Simon, Whittle, Jackson, and Davis. Our supreme court has held "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1, 13 (2000). Without such an affidavit, a court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and thus further review of the claim is unnecessary. *Enis*, 194 Ill. 2d at 380, 743 N.E.2d at 13. Thus, defendant's ineffective-assistance-of-counsel claim also fails for this reason.

¶ 41 Thus, we conclude the trial court properly found defendant's ineffective-assistance-of-trial-counsel claim was frivolous and patently without merit.

¶ 42 4. *Actual Innocence*

¶ 43 Defendant last alleges actual innocence, noting (1) the evidence showed he had no motive to harm the victim, and (2) Micah Morgan committed perjury at defendant's trial because Morgan had never seen defendant before they were in jail together after the murder and Morgan denied being promised anything in exchange for his testimony when he had received benefits from the State.

¶ 44 A freestanding claim of actual innocence is cognizable under the Postconviction

Act because a wrongful conviction of an innocent person violates due process under the Illinois Constitution. *People v. Barnslater*, 373 Ill. App. 3d 512, 519, 869 N.E.2d 293, 299 (2007). Such a claim must be "based on newly discovered, material, and noncumulative evidence that the defendant is innocent of the crime for which he has been tried, convicted, and sentenced." *People v. Harris*, 206 Ill. 2d 293, 301, 794 N.E.2d 181, 187 (2002). Moreover, an actual-innocence claim only entitles a defendant to relief when "the evidence is of such a conclusive character that it would probably change the result of retrial." *Harris*, 206 Ill. 2d at 301, 794 N.E.2d at 188.

¶ 45 In support of his claim, defendant notes testimony at his trial and fails to attach any material supporting his claim Morgan received deals from the State in exchange for his testimony against defendant. A defendant's failure to either attach the "affidavits, records, or other evidence" required by section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2010)) or explain their absence alone justifies the trial court's summary dismissal of the petition. *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008). Accordingly, defendant has not properly alleged any newly discovered evidence supporting his actual-innocence claim. Thus, the trial court properly found this issue was frivolous and patently without merit.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we agree with OSAD this appeal is frivolous and find OSAD has provided defendant with reasonable representation. Thus, we grant OSAD's motion and affirm the Macon County circuit court's judgments on defendant's motion to dismiss the information and his postconviction petition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 48 Affirmed.