2013 IL App (4th) 120840-U

NO. 4-12-0840

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 18, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Morgan County
KAYLA J. FRANCIS,	)	No. 06JD14
Defendant-Appellant.	)	
	)	Honorable
	)	Richard T. Mitchell,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's guilty plea and sentences are not void; (2) she was not denied the effective assistance of counsel; (3) the extended jurisdiction juvenile proceedings do not violate Supreme Court precedent; (4) the trial court did not err in summarily dismissing her postconviction petition; and (5) she is entitled to two additional days of sentence credit.

¶ 2 In November 2006, defendant, Kayla J. Francis, pleaded guilty in juvenile court to voluntary manslaughter of an unborn child and three counts of aggravated battery. In the extended jurisdiction juvenile (EJJ) proceedings, the trial court sentenced her to 5 years' juvenile probation, along with a stayed adult term of 12 years in prison. In November 2010, the State filed a petition to revoke the stay of defendant's adult sentence. In February 2011, the court lifted the stay and sentenced her to 12 years in prison. In July 2012, defendant filed a *pro se* postconviction petition, which the court summarily dismissed.

¶ 3 On appeal, defendant argues (1) her guilty plea must be vacated, (2) she was denied the effective assistance of counsel, (3) the EJJ prosecution violated her right to due process, (4) the trial court erred in summarily dismissing her postconviction petition, and (5) she is entitled to two additional days of sentence credit. We affirm as modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In August 2006, the State filed a supplemental petition for adjudication of wardship, alleging defendant, born in June 1990, was a delinquent minor. The petition alleged defendant committed the offense of intentional homicide of an unborn child (720 ILCS 5/9-1.2(a)(2) (West 2006)), claiming she knew Ashliegh Fredericks was pregnant and, without lawful justification and with the knowledge that her acts created a strong probability of great bodily harm to Fredericks, ran over her with a vehicle, thereby causing the death of Fredericks' unborn child. The petition also alleged defendant committed the offense of aggravated battery (720 ILCS 5/12-4 (West 2006)) against Fredericks (two counts), Meltara Childs (one count), and Skiya Finkle (one count). The trial court found probable cause to believe defendant was a delinquent minor and it was a matter of immediate and urgent necessity that she be detained.

¶ 6 On November 2, 2006, the State filed a motion to transfer from juvenile court and to permit prosecution of defendant under the criminal laws. The State also filed a motion to designate the proceedings as an EJJ prosecution pursuant to the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-810 (West 2006)).

¶ 7 On November 27, 2006, the State filed a second supplemental petition for adjudication of wardship, charging the additional offense of voluntary manslaughter of an unborn

child (720 ILCS 5/9-2.1(a) (West 2006)). On that same date, defendant entered into a plea agreement for both a juvenile and an adult sentence. She pleaded guilty to three counts of aggravated battery and one count of voluntary manslaughter of an unborn child.

¶ 8 As part of her juvenile sentence, defendant agreed to five years' probation, house arrest for the duration of the school year, and 30 days' detention with credit for 30 days served. She was also ordered to have no contact with the victim and to comply with all other terms in the juvenile order of probation. Defendant's adult sentence, which would be stayed as long as she remained compliant with juvenile probation, was 12 years in prison for the offense of voluntary manslaughter of an unborn child and concurrent terms of 180 days in jail for the three counts of aggravated battery. The parties agreed defendant would be given credit for time already served in detention.

¶ 9 In November 2010, the State filed a petition to revoke the stay of defendant's previously imposed adult criminal sentence. The State alleged defendant had on numerous occasions made contact with the victims in this case. In particular, the State alleged defendant contacted Fredericks by text message and then threw a shoe at her when Fredericks came over to defendant's residence. The State alleged defendant committed the offenses of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2010)) and endangering the life or health of a child (720 ILCS 5/12-21.6(a) (West 2010) (two counts)).

¶ 10 In February 2011, the trial court held a hearing on the petition to revoke. At the time of the hearing, Ashliegh Fredericks had two children by Quinton Gause, and defendant had two with him with another on the way. Fredericks testified she received text messages from defendant around the time of October 23 and 24, 2010, that defendant had thrown out Gause's

clothes and money. Despite her history with defendant, Fredericks decided to drive by and retrieve the property. Fredericks was in the process of picking up the property in front of defendant's house when she saw defendant running toward her. Defendant threw a shoe, which ended up in the car. Fredericks shut the door. She then saw defendant "in a throwing motion," and Fredericks heard a "big bang" followed by glass shattering.

¶ 11 On cross-examination, Fredericks testified to her history with defendant and stated she had used words to the effect that she was not going to stop until defendant went to prison. She stated she had used the phrase a "dead baby for a dead baby," believing "an eye for an eye." Fredericks stated defendant took her son's life and "she should have to give up her life, either serve it in prison or whatever she needs to do."

¶ 12 Carrie Griffith testified she was out with Fredericks on October 23 and 24, 2010. Griffith had received text messages from defendant about picking up Gause's clothes. Fredericks asked if Griffith would take her by defendant's house to pick up the clothes. Griffith dropped off Fredericks because Griffith did not want to take her by the house. Griffith then drove by and saw clothes on the sidewalk and in the street. Griffith returned to pick up Fredericks and they went to gather the clothes. While Fredericks attempted to pick up the clothes, defendant ran toward her. Fredericks returned to the vehicle, and defendant threw a shoe inside. Defendant threw three other objects that hit the car, including one that broke the window. Griffith left and called the police.

¶ 13 Meltara Childs testified she allowed her sister Carrie Griffith to borrow her car on October 23, 2010. Prior to that night, she had no damage to her vehicle. Later, the car sustained damage to the door and the window was broken out.

¶ 14 Tammy Kemp, mother of Ashliegh Fredericks, testified she came into contact with defendant in the early morning hours of October 24, 2010. As Kemp drove toward her house, she saw defendant carrying two bags. Kemp rolled down her window and told defendant she had no reason to be near her house. She exited the car and told defendant to stay away from the house. She later called the police. Defendant left and threw the property she was carrying into the ditch.

¶ 15 Jacksonville police sergeant Eric Hansell testified he was working in the early morning hours of October 24, 2010, when he received a call of a disturbance involving defendant. Hansell made contact with her, and she stated she was returning from dropping off her ex-boyfriend's property. When another officer arrived, questioning of defendant revealed the possibility that criminal damage had occurred. The officers searched in front of defendant's residence and found automotive glass in the roadway. Defendant denied breaking the window of a car but admitted throwing a shoe. After a determination was made to arrest her, defendant stated she could not leave because her children were inside her residence. Hansell asked her if anyone else was inside, and defendant stated her brother. After Hansell made an attempt to contact someone on the inside without success, he and other officers entered the residence to check on the welfare of the children. Defendant eventually told the officers that her brother was not there and she had left her children unattended. Officers secured the children and contacted defendant's mother. Defendant was arrested.

¶ 16 Jacksonville police officer Craig Wright testified he responded to a call of criminal damage to property. He spoke to two complainants and found their vehicle had the rear passenger window broken out and a "big dent in the door." Wright recovered a shoe from the

vehicle. Wright later received another call and arrived to find defendant. She stated Fredericks and others had come by and caused problems so she threw a shoe at them. Wright observed small pieces of glass in the roadway. Once officers placed defendant under arrest, she became upset and stated she did not want to go to jail because her children were inside.

¶ 17 Jacksonville police investigator Brad Rogers testified he spoke with defendant about the incident after obtaining a waiver of rights. Defendant admitted throwing her shoes but denied breaking the car window. During a second interview, defendant stated her children had been in the house. She also stated she left the house and walked three to five blocks with Gause's belongings.

¶ 18 Defendant testified she was 20 years old. She stated she began receiving text messages from Fredericks that defendant was "going to be jumped" and that she "was going to kill [her] baby." She also stated it stopped being about Gause's clothes and became more about Fredericks wanting to fight defendant. Defendant stated she called Fredericks because she was making threats, including threatening statements toward defendant's children. Defendant stated she heard a vehicle honk between 8:30 and 9 p.m. and then the vehicle left. Defendant later looked outside and saw a man in the street with a flashlight. She learned the man was her neighbor, who stated he was looking at glass in the street that he thought he ran over.

¶ 19 Defendant put her children to bed and went outside to talk on the phone with her friend. After the call ended, a vehicle pulled up with Fredericks inside. When asked why she was there, Fredericks stated it "was a case of murder, a dead baby for a dead baby, [and] she was going to kill the child that [defendant was] carrying now." Defendant stated she had a phone in her children's bedroom acting as a baby monitor, and she heard her son ask for her. After

Fredericks said something to her, defendant turned around and threw her shoes in the direction of the vehicle. Defendant stated Fredericks exited the car, picked up the shoes, and then left. Defendant went back inside. She then heard a "very loud noise." Defendant put her son to bed and laid down. After Fredericks and Griffith drove by multiple times and honked the horn, defendant wanted them to leave her alone. Defendant left to return Gause's property. She maintained contact with her children through the phone in their room. Defendant stated Kemp came by in a van, hit her foot, and knocked her into the ditch with Gause's belongings. This caused defendant's cell phone to shut off. After Kemp and defendant had an encounter, defendant went back home. Defendant stated she knew she was not supposed to have any contact with Fredericks and did not do so until Fredericks asked for defendant to contact her when she and Gause lived together.

¶ 20 Kirby Kitner testified he lived across the street from defendant. "Sometime in the fall," Kitner ran over something that sounded like glass in the street with his vehicle. He used his flashlight to look in the street and "was accosted by a young lady" asking what he was doing in her front yard. Kitner told her he was looking for glass. The female told him he was in her front yard. He left and went home.

¶ 21 Following closing arguments, the trial court found defendant had made contact with Fredericks. Moreover, the court found by a preponderance of the evidence that defendant endangered the life of a child and criminally damaged property. The court lifted the stay and ordered defendant serve the 12-year prison sentence. The sentencing order indicated defendant was required to serve 85% of her sentence. The court also sentenced defendant to 180 days in jail on the aggravated-battery counts to be served concurrent with her prison sentence. On direct

appeal, defendant argued she was entitled to credit for time served in juvenile detention and jail prior to sentencing. This court affirmed as modified and remanded with directions that defendant be awarded 175 days of sentence credit. *People v. Francis*, No. 4-11-0349 (Mar. 16, 2012) (unpublished order under Supreme Court Rule 23).

¶ 22 In July 2012, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), claiming she was innocent of the charges, she received ineffective assistance of counsel, and she was entitled to an additional two days of sentence credit. In August 2012, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Defendant's Guilty Plea and Sentences

¶ 25 1. *Voidness and Mootness*

¶ 26 Defendant argues her guilty plea should be vacated as void where the agreed-upon sentence, which included three convictions for aggravated battery, was legally impermissible because the sentences were below the authorized term of imprisonment. We disagree the plea should be vacated, finding the specific issue as to the propriety of defendant's guilty plea has been rendered moot.

¶ 27 Our supreme court has held "a sentence that is in conflict with statutory guidelines is void and may be challenged at any time." *People v. Petrenko*, 237 Ill. 2d 490, 503, 931 N.E.2d 1198, 1206 (2010); see also *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004) ("A void order may be attacked at any time or in any court, either directly or collaterally."). "Whether a sentence is void is a question of law subject to *de novo* review." *People v.*

Cortez, 2012 IL App (1st) 102184, ¶ 9, 975 N.E.2d 107.

¶ 28 The supreme court has stated "[a] court does not have authority to impose a sentence that does not conform with statutory guidelines [citations] and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates." *People v. White*, 2011 IL 109616, ¶ 20, 953 N.E.2d 398. Thus, under those circumstances, the sentence is illegal and void. *White*, 2011 IL 109616, ¶ 20, 953 N.E.2d 398. " 'Even when a defendant, prosecutor, and court agreed on a sentence, the court cannot give the sentence effect if it is not authorized by law.' [Citations.] " *White*, 2011 IL 109616, ¶ 23, 953 N.E.2d 398.

¶ 29 In the case *sub judice*, defendant pleaded guilty as part of a fully negotiated agreement to one count of voluntary manslaughter of an unborn child and three counts of aggravated battery. The trial court imposed a 12-year sentence for voluntary manslaughter of an unborn child and 180 days in jail on each of the three counts of aggravated battery. The aggravated-battery counts were to run concurrent to one another and to the voluntary-manslaughter count. The offense of aggravated battery is a Class 3 felony (720 ILCS 5/12-4(e)(1) (West 2006)), which carries with it a term of imprisonment from two to five years (730 ILCS 5/5-8-1(a)(6) (West 2006)). Because the 180-day sentences on the aggravated-battery counts were improper under the sentencing statute, the court's sentences are void.

¶ 30 However, defendant has already served her 180-day sentences for aggravated battery. "Generally, where the relief sought is to set aside a sentence, the question of the validity of its imposition is moot when the sentence has been served." *In re Shelby R.*, 2012 IL App (4th) 110191, ¶ 16, 974 N.E.2d 431; see also *People v. Wiley*, 333 Ill. App. 3d 861, 864, 776 N.E.2d 856, 859 (2002) (stating an issue will be found to be moot where a court cannot grant effective

relief). "The mootness doctrine applies even to a voidness claim." *People v. McNett*, 361 Ill. App. 3d 444, 449, 837 N.E.2d 461, 466 (2005) (citing *People v. Roberson*, 212 Ill. 2d 430, 440, 819 N.E.2d 761, 767 (2004)). "[W]hile the completion of a defendant's sentence renders moot a challenge to the sentence, it does not so render a challenge to the conviction. [Citation.] This is because the nullification of a conviction may hold important consequences for a defendant." *People v. Campbell*, 224 Ill. 2d 80, 83, 862 N.E.2d 933, 936 (2006).

¶ 31 Here, defendant is not calling into question the validity of her aggravated-battery convictions. Instead, she argues her guilty plea should be vacated because her aggravated-battery sentences are void. While it is true the sentences are void, she has already served her 180 days in jail. Thus, the sole reason for claiming her guilty plea should be vacated has been rendered moot. See *People v. Burnett*, 267 Ill. App. 3d 11, 17-18, 640 N.E.2d 1350, 1354 (1994) (finding the defendant's claim he should have received a three-year sentence for conspiracy, rather than a seven-year sentence, was moot as the sentence had already been served).

¶ 32 2. *Presentence Report and Criminal History*

¶ 33 Defendant also argues her guilty plea should be vacated where she pleaded guilty to multiple felonies and the trial court failed to consider a presentence investigation or make a finding on the record of her history of criminality as required by section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2006)). Defendant contends the court's failure to do so rendered her sentences void. We disagree.

¶ 34 "[A] judgment may be void where a court exceeded its jurisdiction, but a court will not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both." *People v. Sims*, 378 Ill. App. 3d 643, 647, 880 N.E.2d 1148, 1151 (2007). Here, the trial

court's failure to state defendant's criminal history on the record did not divest the court of jurisdiction and render defendant's sentences void. Instead, it rendered the sentences voidable. *Sims*, 378 Ill. App. 3d at 650, 880 N.E.2d 1154. A judgment that is voidable is not subject to collateral attack. *Beacham v. Walker*, 231 Ill. 2d 51, 60, 896 N.E.2d 327, 333 (2008). As the trial court's failure to comply with section 5-3-1 did not render defendant's sentences void, defendant is not entitled to postconviction relief.

¶ 35 B. Assistance of Counsel

¶ 36 Defendant argues her postconviction petition set forth sufficient facts showing she was denied the effective assistance of counsel where counsel suffered from a *per se* conflict of interest by representing both her and her "whole family." We disagree.

¶ 37 The Act "provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 38 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit[.]" 725 ILCS 5/122-2.1(a)(2) (West 2012). Our supreme court has held "a *pro se* petition seeking postconviction

relief under the Act for a denial of constitutional rights may be summarily dismissed 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 that is completely contradicted by the record. *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.

¶ 39 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine 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 2012); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2012). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394 (citing *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754).

¶ 40 In her brief on appeal, defendant makes the claim that plea counsel suffered from a *per se* conflict of interest by representing her and her family in the juvenile proceedings. However, defendant did not claim a conflict of interest in her postconviction petition. It is true she complained about counsel and claimed he lied to her, came to court unprepared, failed to investigate, failed to bring favorable information to the trial court's attention, and forced her to enter into a plea agreement. Now on appeal, defendant claims a conflict of interest existed,

pointing out instances in her petition where she stated "we" hired an attorney, counsel failed to use the defense "we had in court," and counsel refused to "give us receipts."

¶ 41 Our supreme court has noted "any issues to be reviewed must be presented in the petition filed in the circuit court." *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004). Further, a defendant may not raise an issue for the first time on appeal. *Jones*, 211 Ill. 2d at 148, 809 N.E.2d at 1239. In this case, the claims raised by defendant in her petition dealt with counsel's level of assistance and performance. She did not even remotely allege counsel represented her under a conflict of interest. Accordingly, defendant cannot make this claim for the first time on appeal.

¶ 42 C. EJJ Prosecution

¶ 43 Defendant argues the EJJ provision of the Juvenile Court Act (705 ILCS 405/5-810 (West 2006)) violates the ruling set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), wherein the United States Supreme Court held any fact that increases a sentence beyond the maximum allowed for the offense must be submitted to the trier of fact and proved beyond a reasonable doubt, because the statute allows a court to sentence a juvenile to a term of imprisonment that exceeds the standard maximum penalty for juveniles upon a finding by a court that there is probable cause to believe the juvenile committed the offense.

¶ 44 The purpose of designating a case as an EJJ prosecution is to provide additional deterrence by subjecting the minor, if found guilty, to both a juvenile sentence and a conditional adult sentence. *In re Omar M.*, 2012 IL App (1st) 100866, ¶ 24, 974 N.E.2d 874; 705 ILCS 405/5-810(4) (West 2006). The adult sentence is conditional because it is stayed on the condition that the minor does not violate the provisions of her juvenile sentence. *Omar M.*, 2012

IL App (1st) 100866, ¶ 24, 974 N.E.2d 874; 705 ILCS 405/5-810(4) (West 2006). If the minor satisfactorily completes her juvenile sentence, the adult sentence is vacated. 705 ILCS 405/5-810(7) (West 2006).

¶ 45 The first step under the statute is for the State to file a petition, at any time prior to trial, to designate the minor's case as an EJJ prosecution. *Omar M.*, 2012 IL App (1st) 100866, ¶ 25, 974 N.E.2d 874; 705 ILCS 405/5-810(1) (West 2006). The State's petition must allege the minor was 13 years of age or older at the time of the offense and that the offense would be a felony if committed by an adult. *Omar M.*, 2012 IL App (1st) 100866, ¶ 25, 974 N.E.2d 874; 705 ILCS 405/5-810(1) (West 2006). The next step is a determination by the juvenile judge that probable cause exists to believe the allegations in the petition are true. *Omar M.*, 2012 IL App (1st) 100866, ¶ 25, 974 N.E.2d 874; 705 ILCS 405/5-810(1) (West 2006).

¶ 46 Once the judge makes a probable-cause determination, it creates "a rebuttable presumption that the proceeding shall be designated as an extended jurisdiction juvenile proceeding." 705 ILCS 405/5-810(1) (West 2006). The judge must enter an order designating the case an EJJ prosecution unless the court finds, based on clear and convincing evidence, that sentencing the minor as an adult would not be appropriate for the minor. *Omar M.*, 2012 IL App (1st) 100866, ¶ 25, 974 N.E.2d 874; 705 ILCS 405/5-810(1)(b) (West 2006). The EJJ provision of the Juvenile Court Act provides a list of five factors the court must evaluate, including (1) the minor's age; (2) prior history, including her juvenile record, mental and physical health, and her educational and social background; (3) the circumstances and seriousness of the offense; (4) the advantages of treating the minor within the juvenile justice system; and (5) the security needs of the public. *Omar M.*, 2012 IL App (1st) 100866, ¶ 25, 974 N.E.2d 874; 705 ILCS 405/5-

810(1)(b) (West 2006). In considering these factors, the trial court must give greater weight to the seriousness of the alleged offense and the minor's prior record of delinquency than to any other of the listed factors. 705 ILCS 405/5-810(1)(b) (West 2006).

¶ 47 The question of whether section 5-810(1) violates *Apprendi* has been considered and rejected by our sister courts. See *Omar M.*, 2012 IL App (1st) 100866, ¶¶ 48-65, 974 N.E.2d 874; *In re Christopher K.*, 348 Ill. App. 3d 130, 143, 810 N.E.2d 145, 157-58 (2004); *In re Matthew M.*, 335 Ill. App. 3d 276, 290, 780 N.E.2d 723, 734 (2002). Recently, our supreme court agreed with those cases. *In re M.I.*, 2013 IL 113776, ¶ 44, 989 N.E.2d 173. The court found as follows:

> "The *Apprendi* decision requires that 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.] Nothing in the EJJ statute runs afoul of *Apprendi*. An EJJ designation merely assigns the case a status of being serious enough that an adult sentence can be imposed if the juvenile defendant pleads or is found guilty. There is nothing in the EJJ statute that allows a defendant to be sentenced above the statutory maximum based on factors not proven to a trier of fact beyond a reasonable doubt. The statute even provides that, unlike in other juvenile cases, a defendant is eligible to have his or her case determined by a jury. 705 ILCS 405/5-810(3) (West 2008). The judge merely determines, in relation to the EJJ designation, whether the case

> qualifies for the EJJ. The adjudicatory determination of guilt is made by the trier of fact, who must determine whether the State has proven the required elements of the offense beyond a reasonable doubt. When the trial judge imposes the adult sentence following the determination of guilt, he only does so in accordance and pursuant to the Unified Code of Corrections. [Citation.] Whatever stayed adult sentence is imposed on the juvenile defendant is based on the criminal offense for which the juvenile was convicted by the finder of fact. The length of the sentence is only determined *after* the trial at the standard sentencing hearing and is based on the crime for which the juvenile defendant was convicted beyond a reasonable doubt by the trier of fact. The EJJ statute decides which forum will hear a juvenile defendant's case, but it does not determine a juvenile defendant's guilt or the specific sentence." (Emphasis in original.) *M.I.*, 2013 IL 113776, ¶ 44, 989 N.E.2d 173.

¶ 48 Defendant acknowledges the supreme court's ruling in her reply brief. Along with disagreeing with the decision and those of the appellate court, defendant argues the holdings are in contrast with the United States Supreme Court's even more recent decision in *Alleyne v. United States*, 570 U.S. __, 133 S. Ct. 2151 (2013). In that case, the Supreme Court held that any fact that increases the mandatory minimum sentence for a crime is an element of the crime that must be submitted to the jury and proved beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2155. Defendant states that if the trial court found probable cause, she was prosecuted and sentenced as

both a juvenile and an adult. As the adult minimum sentence was four years in prison, and the minimum sentence under the Juvenile Court Act was court supervision, defendant contends the EJJ provision violates *Apprendi*.

¶ 49 We find defendant's argument without merit. Our supreme court found "for the purposes of *Apprendi*, the statutory maximum is not the juvenile sentence under the Juvenile Court Act, but rather the maximum sentence allowed by the offense committed." *M.I.*, 2013 IL 113776, ¶ 46, 989 N.E.2d 173. We see no reason why the same reasoning would not apply to the minimum sentence. Thus, we find the EJJ provision of the Juvenile Court Act does not violate due process under *Apprendi* or *Alleyne*.

¶ 50 D. Postconviction Petition

¶ 51 Defendant argues the trial court improperly dismissed her postconviction petition, claiming she raised the gist of a constitutional claim that she received ineffective assistance of counsel. We disagree.

¶ 52 In her petition, defendant complained of her treatment by appellate counsel and claims counsel failed to correct an error as to sentence credit. She alleged she told counsel she was taken into custody on June 7, 2006, not June 9, 2006, as counsel had submitted. Defendant argued she was entitled to two additional days of credit. Now on appeal, defendant argues counsel was ineffective for failing to request sentence credit for the time defendant served on house arrest. However, defendant did not raise a claim of entitlement to credit for time served on home confinement. Thus, as this claim was not raised in her postconviction petition, it is forfeited. *People v. Jones*, 399 Ill. App. 3d 341, 368, 927 N.E.2d 710, 731-32 (2010); see also *People v. Jones*, 213 Ill. 2d 498, 507-08, 821 N.E.2d 1093, 1098 (2004) (issues not raised in a

dismissed postconviction petition cannot be raised for the first time on appeal). The issue defendant did raise pertaining to the two additional days of credit will be addressed in Part E below.

¶ 53 Defendant also claims counsel was ineffective for failing to properly impeach Fredericks with testimony that showed Fredericks' bias or motivation to testify falsely against her. Claims of ineffective assistance of counsel are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In the petition, a defendant "must show counsel's performance was deficient and that prejudice resulted from the deficient performance." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. A petition alleging ineffective assistance of counsel may not be dismissed at the first stage "if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *Brown*, 236 Ill. 2d at 185, 923 N.E.2d at 754. A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Houston*, 226 Ill. 2d 135, 144-45, 874 N.E.2d 23, 30 (2007).

¶ 54 Here, defendant cannot satisfy the prejudice prong of the *Strickland* standard. At the revocation hearing, the trial court was well aware of the history between Fredericks and defendant, and the evidence showed statements made by Fredericks indicating her desire for revenge after the loss of her baby. During closing arguments, counsel posited that Fredericks and Griffith damaged their car in hopes of pinning it on defendant. Thus, counsel clearly showed and argued Fredericks' possible bias. Proof of an alleged false report would have added little to an impeachment of Fredericks. Moreover, the evidence also showed defendant had contact with Fredericks in violation of the probation order. Defendant threw something at the car Fredericks

was riding in, and the car sustained damage. Further, it is undisputed defendant left her young children alone while she left the house. Considering the evidence and lack of prejudice, defendant cannot establish she received ineffective assistance of counsel.

¶ 55 E. Sentence Credit

¶ 56 Defendant argues she is entitled to two additional days of credit for time spent in presentence custody. Section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2006)) provides an offender shall be given credit on her sentence "for time spent in custody as a result of the offense for which the sentence was imposed." A "defendant is entitled to one day of credit for each day (or portion thereof) that he spends in custody prior to sentencing, including the day he was taken into custody." *People v. Ligons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). A claim of error in the calculation of mandatory sentence credit cannot be waived. *People v. Whitmore*, 313 Ill. App. 3d 117, 121, 728 NE.2d 1267, 1270 (2000); see also *Caballero*, 228 Ill. 2d at 87-88, 885 N.E.2d at 1048.

¶ 57 On direct appeal, this court found defendant was entitled to credit from June 9, 2006, to November 27, 2006, which amounted to 172 days. We also found she was entitled to credit for time spent in custody between her arrest on October 24, 2010, and her release on October 26, 2010. Thus, we affirmed as modified to reflect 175 additional days of sentence credit and remanded for the issuance of an amended sentencing judgment. *Francis*, No. 4-11-0349, ¶ 18 (Mar. 16, 2012) (unpublished order under Supreme Court Rule 23).

¶ 58 Now in this appeal, defendant argues she is entitled to two additional days of credit as the record indicates she was actually arrested on June 7, 2006, rather than June 9. The State agrees the correct arrest date is June 7, 2006, and thus defendant is entitled to two addi-

tional days of credit.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm as modified to reflect two additional days of sentence credit and remand for issuance of an amended judgment of sentence so reflecting.

¶ 61 Affirmed as modified; cause remanded with directions.