2018 IL App (4th) 160432-U

NO. 4-16-0432

FILED
October 24, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JOSHUA J. MEFFORD,	)	No. 12CF335
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa K. Righter,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of defendant's postconviction petition.

¶ 2 In May 2013, a Coles County jury found defendant, Joshua Mefford, guilty of first degree murder and robbery. 720 ILCS 5/9-1(a)(2), 18-(1)(a) (West 2012). In March 2016, defendant filed a *pro se* postconviction petition raising eight specific arguments. However, defendant's postconviction petition did not argue that his trial counsel was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of murder. In May 2016, the trial court dismissed defendant's petition at the first stage in a written order, concluding that the petition was frivolous and patently without merit.

¶ 3 Defendant appeals, arguing we "should remand [defendant's] post-conviction petition for second-stage proceedings where, liberally construed, [defendant's] petition set forth the

arguable basis of a claim that his trial counsel was ineffective for failing to explain in closing argument why the jury should find [him] guilty of involuntary manslaughter rather than murder." The State responds that defendant forfeited this argument by failing to raise it in his *pro se* postconviction petition. We agree with the State and affirm the trial court's order.

¶ 4 I. BACKGROUND

¶ 5 A. The Underlying Conviction and First Appeal

¶ 6 In September 2012, the State charged defendant with (1) first degree murder, (2) felony murder, and (3) robbery. 720 ILCS 5/9-1(a)(2), 9-1(a)(3), 18-(1)(a) (West 2012). In May 2013, the jury found defendant guilty of first degree murder and robbery but found defendant not guilty of felony murder. The trial court sentenced defendant to 36 years in prison for his murder conviction with a consecutive 5-year sentence for his robbery conviction.

¶ 7 On direct appeal, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court erred by (a) failing to ensure the jury was properly instructed and (b) preventing the jury from considering impermissible other crimes evidence; and (3) he received ineffective assistance of counsel. *People v. Mefford*, 2015 IL App (4th) 130471, ¶ 2, 44 N.E.3d 616. As relevant here, defendant argued that his attorney was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder. *Id.* ¶ 80. This court affirmed defendant's conviction. *Id.* ¶ 85. However, because the record was not fully developed to consider defendant's ineffective assistance of counsel argument, this court declined to consider that issue. *Id.* ¶¶ 80, 83. Instead, this court suggested that defendant should raise his ineffective assistance of counsel claim in a postconviction petition. See *id.* ¶ 82.

¶ 8 B. The Postconviction Petition

¶ 9 In March 2016, defendant filed a *pro se* postconviction petition arguing that (1) his attorney provided ineffective assistance of counsel and (2) the trial court committed various errors. In his petition, defendant raised the following arguments:

(1) "Trial counsel's ineffectiveness for lack of pretrial investigation."

(2) "Trial counsel's failure to move for a suppression hearing."

(3) "Trial counsel's failure to seek [second] degree murder instructions."

(4) "Trial counsel's refusal to pursue alternative suspects."

(5) "The cumulative effect of *** trial counsel's ineffectiveness."

(6) "Trial counsel/Trial court's allowance of consistent statements."

(7) "Trial court's refusal to conduct a *Krankel* [102 Ill.2d 181, 464 N.E.2d 1045] hearing."

(8) "Ineffective assistance of appellate counsel on direct review."

¶ 10 Defendant did not claim that his trial counsel was ineffective for allegedly failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder. However, defendant did refer to this court's prior opinion in which defendant had raised that argument. See *Mefford*, 2015 IL App (4th) 130471, ¶¶ 80, 83. In May 2016, the trial court dismissed defendant's petition at the first stage in a written order, concluding that the petition was frivolous and patently without merit.

¶ 11 This appeal followed.

¶ 12

¶ 13 II. ANALYSIS

¶ 14 Defendant appeals, arguing we "should remand [defendant's] post-conviction petition for second-stage proceedings where, liberally construed, [defendant's] petition set forth the

arguable basis of a claim that his trial counsel was ineffective for failing to explain in closing argument why the jury should find [him] guilty of involuntary manslaughter rather than murder." The State responds that defendant forfeited this argument by failing to raise it in his *pro se* postconviction petition. We agree with the State and affirm the trial court's order.

¶ 15 A. The Applicable Law

¶ 16 The Post-Conviction Hearing Act (Act) provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). A proceeding under the Act is collateral and not an appeal from the defendant's conviction and sentence. *Crenshaw*, 2015 IL App (4th) 131035, ¶ 23.

¶ 17 The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2016). Within the first 90 days after the petition is filed and docketed, the trial court shall dismiss a petition summarily if the court determines it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Allen*, 2015 IL 113135, ¶ 25. The trial court considers "the petition's substantive virtue rather than its procedural compliance." *People v. Hommerson*, 2014 IL 115638, ¶ 11, 4 N.E.3d 58.

¶ 18 Because most postconviction petitions are drafted by *pro se* defendants, the threshold for a petition to survive the first stage of review is low. *Allen*, 2015 IL 113135, ¶ 24. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is inappropriate. *Id.* If the petition is not dismissed as being frivolous or patently without merit, then the trial court orders the petition to be docketed for further consideration. 725 ILCS 5/122.-

2.1(b) (West 2016). When the trial court dismisses a petition at the first stage, its ruling is reviewed *de novo*. *People v. Bowens*, 2013 IL App (4th) 120860, ¶ 11, 1 N.E.3d 638.

¶ 19 An argument raised on appeal which was not raised in the original postconviction petition is forfeited. *People v. Young*, 2018 IL 122598, ¶ 16; *People v. Dorsey*, 404 Ill. App. 3d 829, 838, 942 N.E.2d 535, 543 (2010); 725 ILCS 5/122-3 (West 2016). "The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 388, 701 N.E.2d 1063, 1075 (1998). "Thus, 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) (*Jones I)*.

¶ 20 In *People v. Jones*, 213 Ill. 2d 498, 508, 821 N.E.2d 1093, 1099 (2004) (*Jones II*), the supreme court stated that the "appellate court is not free, as this court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate [forfeiture] caused by the failure of a defendant to include issues in his or her postconviction petition."

¶ 21 B. This Case

¶ 22 In this case, defendant raised the following arguments in his postconviction petition:

(1) "Trial counsel's ineffectiveness for lack of pretrial investigation."

(2) "Trial counsel's failure to move for a suppression hearing."

(3) "Trial counsel's failure to seek [second] degree murder instructions."

(4) "Trial counsel's refusal to pursue alternative suspects."

(5) "The cumulative effect of *** trial counsel's ineffectiveness."

(6) "Trial counsel/Trial court's allowance of consistent statements."

(7) "Trial court's refusal to conduct a *Krankel* hearing."

(8) "Ineffective assistance of appellate counsel on direct review."

¶ 23 On appeal, defendant argues that "liberally construed, [defendant's] petition sets forth the arguable basis of a claim that his trial counsel was ineffective for failing to explain in closing argument why the jury should find [him] guilty of involuntary manslaughter rather than murder." Defendant argues that he set forth this claim by referring to this court's prior opinion in which he argued that his attorney was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder. See *Mefford*, 2015 IL App (4th) 130471, ¶¶ 80, 83. The State argues that defendant forfeited this argument by failing to raise it in his *pro se* postconviction petition. We agree with the State and affirm the trial court's order.

¶ 24 In this case, defendant wrote an 8-page petition for postconviction relief and a 44-page memorandum of law. Within his statement of facts, defendant did mention his direct appeal in which he argued that his attorney was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder. However, defendant was merely describing the procedural history of his case rather than reincorporating his prior argument.

¶ 25 Within his argument section, defendant only raised the eight arguments set forth earlier. Defendant did not include a specific argument that his trial counsel was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter rather than murder.

¶ 26 Moreover, within his eight arguments, defendant did not argue that his trial counsel was ineffective for failing to explain in closing argument why he should be found guilty of

manslaughter instead of murder. Simply put, his first, second, third, fourth, and sixth argument have absolutely nothing to do with his current appeal.

¶ 27 In his fifth argument, which dealt with the cumulative effect of trial counsel's error, defendant argues only that counsel was ineffective for (1) failing to object to various statements, (2) failing to conduct a reasonable pre-trial investigation, (3) abandoning defendant's "only viable defense of [second] degree murder[,]" (4) failing to pursue alternative suspects, and (5) failing to pursue alternative defense strategies. Defendant does not argue that his attorney was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder.

¶ 28 In his seventh argument, defendant argues that the trial should have conducted a *Krankel* hearing. However, defendant did not argue that he was entitled to a *Krankel* hearing because his trial counsel was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder.

¶ 29 In his eighth argument, defendant argues that his appellate counsel was ineffective because "the [appellate] court lacked a fully developed record" and because appellate counsel failed to make various arguments on appeal. This final argument does mention this court's prior opinion in which he argued that his attorney was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree-murder. However, this final argument merely mentions this court's prior opinion—it does not reincorporate the argument he made during his direct appeal.

¶ 30 Although this court must liberally construe defendant's petition, liberal construction is not without limitation. Defendant made numerous arguments within his petition for postconviction relief and his memorandum of law. However, he never argued that his attorney

was ineffective for failing to explain in closing argument why the jury should find him guilty of involuntary manslaughter instead of first degree murder. Defendant's mere mentioning of this court's prior opinion is not an "*allegation*[] *in the petition*" that we can review. (Emphasis added.) *Coleman*, 183 Ill. 2d at 388; see also *Jones I*, 211 Ill. 2d at 148 ("any issues to be reviewed must be presented in the petition filed in the circuit court.")

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's judgment.

¶ 33 Affirmed.