

NOTICE

Decision filed 06/28/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120126-U

NO. 5-12-0126

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

BYRON E. BLAKE,

Defendant-Appellant.

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Appeal from the
Circuit Court of
Madison County.

No. 08-CF-952

Honorable
Richard L. Tognarelli,
Judge, presiding.

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in summarily dismissing postconviction petition at first stage of proceedings, because allegations in petition were barred by doctrines of *res judicata* and forfeiture and therefore petition was frivolous and/or patently without merit. Order affirmed.

¶ 2 The defendant, Byron E. Blake, appeals the February 15, 2012, summary dismissal, by the circuit court of Madison County, of his postconviction petition. For the reasons that follow, we affirm.

¶ 3 **FACTS**

¶ 4 The facts necessary to our disposition of this appeal are as follows. In 2008, the defendant was indicted on multiple charges resulting from his shooting and wounding of Ryan North. On April 3, 2009, the defendant entered a plea of guilty to a charge of aggravated battery with a firearm, in exchange for the State dropping charges of armed violence, aggravated discharge of a firearm, aggravated battery, and unlawful possession of

a weapon by a felon. The plea deal included a sentence of eight years of imprisonment, followed by three years of mandatory supervised release. The trial judge admonished the defendant that "with the Class X [felony] in this charge you would have to serve 85 percent of the sentence," then asked the defendant if he understood. The defendant stated that he did. Additional admonishments followed, and when the trial judge had assured himself that the defendant's entry into the plea was knowing and voluntary, the judge stated that he would sentence the defendant to eight years of imprisonment, and that the defendant would "have to serve 85 percent of that sentence." He then again asked the defendant if the defendant still wished to enter the plea. The defendant stated that he did. Subsequently, the judge asked the defendant if he understood "the sentences [*sic*] being imposed upon" the defendant, and whether it was the sentence the defendant "negotiated for." The defendant answered affirmatively to both questions.

¶ 5 Approximately four weeks later, the defendant filed a *pro se* motion to withdraw his guilty plea, contending, *inter alia*, that his trial counsel was ineffective because trial counsel had "misrepresented to defendant the amount of time defendant would serve on sentence." At a hearing on the motion, the defendant, by that time represented by postplea counsel, presented evidence in support of some of the allegations made in his motion. However, no evidence was presented to support the defendant's *pro se* allegation that trial counsel was ineffective because trial counsel had "misrepresented to defendant the amount of time defendant would serve on sentence." The trial judge subsequently denied the defendant's motion to withdraw his guilty plea, and the defendant filed a timely direct appeal from that denial. In the direct appeal, appellate counsel for the defendant alleged, *inter alia*, two grounds of ineffective assistance of postplea counsel. However, appellate counsel did not allege that postplea counsel's failure to pursue the defendant's *pro se* claim that trial counsel was ineffective because trial counsel had "misrepresented to defendant the amount of time

defendant would serve on sentence" amounted to ineffective assistance of postplea counsel. This court ruled against the defendant on direct appeal. *People v. Blake*, No. 5-09-0628 (Apr. 5, 2011) (unpublished order under Supreme Court Rule 23).

¶ 6 On January 12, 2012, the defendant filed the postconviction petition that is the subject of the present appeal. Therein, he raised two claims of ineffective assistance of counsel. First, he alleged—as he had in his *pro se* motion to withdraw his guilty plea—that trial counsel was ineffective because trial counsel had misrepresented to him the amount of time he would serve on his sentence, specifically alleging in his postconviction petition that in response to the defendant's questions, trial counsel had told him that he would be eligible for "good conduct credits" that could reduce his sentence to something less than the 85% of the sentence he had been admonished by the trial judge he would have to serve. The defendant alleged that had trial counsel not made this misrepresentation to the defendant, the defendant would not have entered his plea of guilty. The defendant's second allegation of ineffective assistance of counsel was that postplea counsel was ineffective because postplea counsel failed to pursue the defendant's *pro se* claim that trial counsel was ineffective because trial counsel had misrepresented to him that he might be able to serve something less than 85% of his sentence. The defendant specifically alleged that he had informed postplea counsel of trial counsel's misrepresentation, but that postplea counsel declined to pursue this claim, explaining to the defendant that he did not think the claim had merit. The defendant did not allege that appellate counsel in his direct appeal was ineffective for failing to raise this issue on direct appeal.

¶ 7 On February 15, 2012, the trial judge summarily dismissed the defendant's petition, ruling that the claims raised therein had been raised and decided in the defendant's direct appeal from the denial of his motion to withdraw his guilty plea. The trial judge concluded that the defendant had "failed to make a substantial showing that his constitutional right to

counsel was violated." This timely appeal followed.

¶ 8

ANALYSIS

¶ 9 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) "provides a three-stage process for the adjudication of post-conviction petitions." *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). In *People v. Blair*, 215 Ill. 2d 427, 442-45 (2005), the Supreme Court of Illinois held that a trial court may summarily dismiss, at the first stage of proceedings, a postconviction petition on the basis of *res judicata* or forfeiture. That is because "where *res judicata* and forfeiture preclude a defendant from obtaining relief, such a claim is necessarily 'frivolous' or 'patently without merit.'" *Id.* at 445. "The doctrine of *res judicata* bars consideration of issues that were previously raised and decided" in prior proceedings. *Id.* at 443. Issues that could have been raised in a prior proceeding, but were not, are barred by the doctrine of forfeiture. *Id.* at 443-44. At the first stage of proceedings pursuant to the Act, a trial judge may, "on the basis of facts and legal rulings that are ascertainable from the court file, appellate court action, and any transcripts," determine if legal claims have been decided, or could have been raised, in a prior proceeding. *Id.* at 446. An exception to the doctrines of *res judicata* and forfeiture exists in cases in which the defendant has alleged that forfeiture "stems from the incompetence of appellate counsel." *Id.* at 450-51. We review *de novo* the summary dismissal of a postconviction petition. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). When we do so, we are mindful that it is the judgment of the trial court, not its reasoning, that is on appeal, and that we may affirm that judgment "upon any ground warranted, regardless of whether the trial court relied on it." *People v. Everette*, 141 Ill. 2d 147, 158 (1990). Accordingly, we may affirm the trial court's judgment even if we conclude that the trial court's reasoning was incorrect. *Id.* at 159.

¶ 10 In the case at bar, the defendant contends that he "raised the gist of a constitutional claim when he argued that he was denied effective assistance of counsel," and that

accordingly the trial judge erred in summarily dismissing his postconviction petition. As noted above, the first claim of ineffective assistance of counsel raised in the defendant's petition was his claim that trial counsel was ineffective because trial counsel had misrepresented to him the amount of time he would serve on his sentence. Specifically, the defendant alleged in his postconviction petition that in response to the defendant's questions, trial counsel had told him that he would be eligible for "good conduct credits" that could reduce his sentence to something less than the 85% of the sentence he had been admonished by the trial judge he would have to serve. The defendant alleged that had trial counsel not made this misrepresentation to the defendant, the defendant would not have entered his plea of guilty. This claim, however, is barred by the doctrines of *res judicata* and forfeiture, because the defendant could have raised this claim in his motion to withdraw his guilty plea, and thus the trial judge did not err in his summary dismissal of this claim. See *People v. Blair*, 215 Ill. 2d 427, 442-45 (2005) (trial court may summarily dismiss, at the first stage of proceedings, a postconviction petition on the basis of *res judicata* or forfeiture).

¶ 11 The defendant attempts, in his postconviction petition and on appeal, to circumvent the doctrines of *res judicata* and forfeiture by claiming that although he raised this issue in his *pro se* motion to withdraw his guilty plea, postplea counsel was ineffective because postplea counsel failed to pursue the claim at the hearing on the motion. In support of this allegation, the defendant specifically alleged in his postconviction petition that he had informed postplea counsel of trial counsel's misrepresentation, but that postplea counsel declined to pursue this claim, explaining to the defendant that he did not think the claim had merit. The problem for the defendant is that his claim of ineffective assistance of postplea counsel, too, is barred by the doctrine of forfeiture, because it is clear from the face of the defendant's petition—as embodied in his allegation that he had informed postplea counsel of trial counsel's misrepresentation, but that postplea counsel declined to pursue this claim—that

the defendant was aware of this claim at the time of his direct appeal from the denial of his motion to withdraw his guilty plea. Accordingly, this claim is barred by the doctrine of forfeiture because the claim could and should have been brought—as were two other claims of ineffective assistance of postplea counsel—in the defendant's direct appeal from the denial of his motion to withdraw his guilty plea (see *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005) (issues that could have been raised in a prior proceeding, but were not, are barred by the doctrine of forfeiture)), and at no time has the defendant alleged that appellate counsel in his direct appeal was ineffective for failing to raise, on direct appeal, this issue along with the two other claims of ineffective assistance of postplea counsel that appellate counsel did raise. See *id.* at 450-51 (exception to doctrine of forfeiture exists in cases in which the defendant has alleged that forfeiture "stems from the incompetence of appellate counsel"). Accordingly, the trial judge did not err in summarily dismissing the defendant's postconviction petition.

¶ 12 The defendant also contends the trial judge employed an improper standard when assessing the defendant's petition. Specifically, the defendant contends, correctly, that to survive summary dismissal, he need only have presented the "gist" of a constitutional claim, and that in concluding that the defendant had "failed to make a substantial showing that his constitutional right to counsel was violated," the trial judge held him to a higher standard than was appropriate under the Act. The defendant is correct that to the extent the judge required him to make, at the first stage of proceedings, "a substantial showing that his constitutional right to counsel was violated," the trial judge was in error. However, as explained above, we may affirm the trial court's judgment "upon any ground warranted, regardless of whether the trial court relied on it" (*People v. Everette*, 141 Ill. 2d 147, 158 (1990)), and may do so even if we conclude that the trial court's reasoning was incorrect. *Id.* at 159. Accordingly, because our *de novo* review of the summary dismissal reveals, for the

reasons stated above, that summary dismissal was appropriate in this case, it is of no consequence that the trial court employed the improper standard and reasoned incorrectly as to the appropriate basis for summarily dismissing the petition.

¶ 13

CONCLUSION

¶ 14 For the foregoing reasons, we affirm the order of the trial court.

¶ 15 Affirmed.