

NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2024 IL App (4th) 230664-U

NO. 4-23-0664

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 10, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Boone County
IGNACIO ACOSTA,)	No. 15CF206
Defendant-Appellant.)	
)	Honorable
)	C. Robert Tobin III,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Cavanagh and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted the Office of the State Appellate Defender’s motion to withdraw as counsel and affirmed the trial court’s judgment, as no issue of arguable merit could be raised on appeal.

¶ 2 Defendant, Ignacio Acosta, appeals from the trial court’s summary dismissal of his postconviction petition. On appeal, the Office of the State Appellate Defender (OSAD) moves to withdraw as counsel on the ground no issue of arguable merit can be raised. Defendant has filed a response to OSAD’s motion. We grant OSAD’s motion and affirm the court’s judgment.

¶ 3 I. BACKGROUND

¶ 4 On direct appeal, the appellate court has set forth the underlying facts of this case. See *People v. Acosta*, 2020 IL App (2d) 180848-U. Accordingly, we will recite only those facts necessary to resolve the issues presented in this appeal.

¶ 5 In October 2015, a grand jury indicted defendant on one count of aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2014)), six counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2014)), one count of unlawful restraint (720 ILCS 5/10-3(a) (West 2014)), and three counts of unlawful violation of an order of protection (720 ILCS 5/12-3.4(a)(1)(i) (West 2014)). All charges stemmed from a September 18, 2015, incident where defendant strangled Maria Soto, causing bruising to her neck.

¶ 6 On December 15, 2015, defendant entered a partially negotiated plea to aggravated domestic battery, and in exchange, the State agreed to dismiss the remaining charges and recommend a sentence not to exceed 15 years. The trial court admonished defendant he was subject to Class X sentencing due to his prior Class 2 felony convictions. Prior to sentencing, defendant filed a motion to withdraw his guilty plea, alleging his plea was not knowing and voluntary. In March 2016, the court denied defendant's motion and proceeded to sentencing. The presentence investigation report indicated defendant had prior convictions for, *inter alia*, aggravated criminal sexual abuse, domestic battery, and aggravated domestic battery. After argument from the parties, the court sentenced defendant to 15 years in the Illinois Department of Corrections. The court noted the sentence would be served at 85%, followed by four years of mandatory supervised release (MSR).

¶ 7 On January 9, 2017, the appellate court summarily remanded the matter and instructed the trial court to "admonish defendant in strict compliance with [Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001)]." After receiving the appropriate admonishments, defendant filed a motion to withdraw his guilty plea on March 10, 2017. The motion reasserted his plea was not knowingly and voluntarily made. On November 3, 2017, defendant filed an amended motion to withdraw his guilty plea and a motion to reconsider his sentence. The

amended motion to withdraw his guilty plea again reasserted defendant's plea was not knowingly and voluntarily made. Defendant also argued, among other things, he was "improperly admonished as to the possible penalties." Defense counsel noted he "can only surmise that the Defendant is asserting that trial counsel provided ineffective assistance of counsel." In his motion to reconsider his sentence, defendant argued because he was subject to Class X sentencing, he should have been ordered to serve his prison sentence at 50% rather than 85%, and his MSR term should have been three years rather than four years. The court denied defendant's motions on October 1, 2018. Defendant appealed, arguing the trial court erred in denying his motion to withdraw his guilty plea where trial counsel misadvised defendant as to the length of his sentence. The appellate court rejected defendant's argument and affirmed. *Acosta*, 2020 IL App (2d) 180848-U, ¶ 24.

¶ 8 On March 30, 2023, defendant filed a *pro se* postconviction petition, alleging his eighth amendment rights (U.S. Const., amend. VIII) were violated. Defendant argued:

"A normal aggravated domestic battery charge is served at 85% percent [*sic*]. However, because the court elected to sentence this defendant as a Class X offender to a term of 15 years, his sentence has to be at 50% percent [*sic*] because aggravated domestic battery is not listed as one of the enumerated offenses under Class X sentencing that is to be served at 85% [*sic*]."

Therefore, defendant reasoned he should only have served seven and a half years, and thus his sentence "was up in March of 2023." The trial court entered a written order on April 17, 2023, summarily dismissing defendant's petition. In its written order, the court found defendant's petition was "frivolous and patently without merit due to the waiver doctrine." The court noted

its rulings as to “truth-in-sentencing and [MSR] were not appealed. The petitioner has made no allegations that appellate counsel was ineffective for not raising these issues on direct appeal. Therefore, the claims set out in the petition are considered waived.”

¶ 9 In May 2023, defendant filed a “petition for leave of court,” wherein defendant requested leave to “withdraw without prejudice” his petition for postconviction relief. Defendant alleged his postconviction petition was incorrectly filed with the trial court. The court denied defendant’s petition for leave to withdraw his postconviction petition on May 12, 2023, concluding it was untimely.

¶ 10 Defendant filed a motion for leave to file a late notice of appeal on July 31, 2023, which this court allowed. OSAD was appointed to represent defendant. This court granted leave to file another late notice of appeal on September 22, 2023.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, OSAD contends no meritorious argument can be made the trial court erred in summarily dismissing defendant’s postconviction petition. We agree.

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2022)) provides a mechanism for a criminal defendant to challenge his conviction or sentence based on a substantial violation of federal or state constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Proceedings under the Act are collateral in nature and not an appeal from the defendant’s conviction or sentence. *People v. English*, 2013 IL 112890, ¶ 21. Issues adjudicated on direct appeal or a previous collateral proceeding are barred by *res judicata*, and issues that could have been raised, but were not, are forfeited. *People v. Tate*, 2012 IL 112214, ¶ 8. At the first stage of proceedings, the trial court must, within 90 days and without seeking or relying on

input from the State, summarily dismiss the petition if it determines the petition is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2022); *People v. Gaultney*, 174 Ill. 2d 410, 419 (1996). At the first stage of proceedings under the Act, all well-pleaded allegations are to be taken as true unless those allegations are positively rebutted by the record. *People v. Brown*, 236 Ill. 2d 175, 189 (2010). We review the trial court’s summary dismissal of a postconviction petition *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

¶ 15 OSAD first asserts it can make no colorable argument the trial court procedurally erred in summarily dismissing defendant’s postconviction petition at the first stage. Defendant filed his postconviction petition on March 30, 2023. The trial court entered its written order on April 17, 2023, well within the 90-day period allotted by the Act, and without input by the State. 725 ILCS 5/122-2.1(a) (West 2022). Accordingly, we agree with OSAD it is not arguable the court procedurally erred in dismissing defendant’s petition.

¶ 16 OSAD next asserts it can make no colorable argument the trial court substantively erred in summarily dismissing defendant’s postconviction petition. In defendant’s November 2017 motion to reconsider his sentence, he claimed he “was sentenced as a Class X offender; therefore, he should receive a sentence within the range of 6-30 years, served at 50%, as nothing in the statute allows for it to be served at 85%.” On direct appeal, defendant specifically challenged the knowing and voluntary nature of his plea because of trial counsel’s ineffectiveness for misinforming him of the amount of good-time credit and MSR he would be required to serve. *Acosta*, 2020 IL App (2d) 180848-U, ¶ 2. In his postconviction petition, defendant argued because the trial court “elected to sentence this defendant as a Class X offender,” his sentence should be served at 50% rather than 85%. Defendant failed to challenge

the *nature* of his sentence on direct appeal; rather, defendant chose to pursue arguments alleging that his plea was not knowing and voluntary because of his trial counsel's ineffectiveness relating to misinformation regarding the good-time credit and MSR he would be required to serve. As a result, defendant's argument challenging his sentence has been forfeited. *Tate*, 2012 IL 112214 ¶ 8 (“[I]ssues that could have been raised but were not are forfeited.”). Accordingly, we agree with OSAD, no colorable argument can be made the trial court erred in dismissing defendant's postconviction petition.

¶ 17 Lastly, OSAD asserts it can make no argument the trial court erred in denying defendant's petition for leave to withdraw his postconviction petition. The Act provides a trial court “may in its discretion grant leave, at any stage of the proceedings *prior to entry of judgment*, to withdraw the petition.” (Emphasis added.) 725 ILCS 5/122-5 (West 2022). Here, the trial court entered its order dismissing defendant's postconviction petition on April 17, 2023. OSAD correctly notes defendant did not seek to withdraw his postconviction petition until at least May 1, 2023, well after the entry of the court's order dismissing the petition. Accordingly, we agree with OSAD, no meritorious argument can be made the court erred in refusing to allow defendant to withdraw his postconviction petition.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 20 Affirmed.