2020 IL App (1st) 180302-U

FOURTH DIVISION
December 24, 2020

No. 1-18-0302

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).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Respondent-Appellee,	)	
v.	)	No. 08 CR 12212
KEITH NELSON,	)	
Petitioner-Appellant,	)	Honorable William G. Lacy, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the dismissal of defendant's *pro se* postconviction petition where defendant failed to demonstrate appellate counsel was ineffective for failing to argue the aggregate length of his consecutive sentences exceeded the permissible statutory limit.

¶ 2 Defendant Keith Nelson appeals from the order of the circuit court of Cook County summarily dismissing his *pro se* postconviction petition at the first stage of proceedings pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). Defendant

was convicted by a jury of one count of aggravated kidnaping and three counts of aggravated criminal sexual assault. He was then sentenced to four consecutive 25-year terms in the Illinois Department of Corrections. On appeal, defendant maintains that his petition stated the gist of a claim of ineffective assistance of appellate counsel where counsel failed to argue on direct appeal that the aggregate length of his consecutive sentences violated section 5-8-4(f)(2) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(f)(2) (West 2010)). For the reasons which follow, we affirm.

¶ 3 BACKGROUND

¶ 4 This matter involves a singular issue—whether defendant stated the gist of a constitutional claim that appellate counsel was ineffective in failing to raise the issue on appeal that the trial court improperly sentenced defendant under section 5-8-4(f)(2) of the Code. Accordingly, we will limit the recitation of the facts to those relevant to this claim.

¶ 5 Defendant was charged by indictment with aggravated kidnaping and aggravated criminal sexual assault. The charges arose from a May 26, 2006, incident in which C.G. was forcibly taken to the backyard of a building at 7200 block of South Calumet Avenue in Chicago and was sexually assaulted. He was thereafter convicted by a jury of one count of aggravated kidnaping (720 ILCS 5/10-2 (West 2010)) and three counts of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2010)).

¶ 6 The matter proceeded to a sentencing hearing in July 2010 where the State and defendant offered evidence in aggravation and mitigation. Specifically, the State argued that the three counts of aggravated criminal sexual assault should run consecutively because it was mandated by law and because all four of the counts of which defendant was found guilty were Class X offenses. The State further argued that the severe bodily injury inflicted on C.G. also warranted

consecutive sentencing under section 5-8-4(a)(i) of the Code (730 ILCS 5/5-8-4(a)(i) (West 2010)). Lastly, the State maintained it was in the trial court's discretion to sentence defendant to consecutive terms based on the evidence and that defendant was a predator and the court needed to protect the public with an appropriate sentence. In mitigation, defense counsel argued that defendant's lack of criminal history, military service, and history of steady employment warranted a lesser sentence. Defense counsel further argued that C.G.'s injuries did not constitute severe bodily injury and thus consecutive sentences were not warranted.

¶ 7 In sentencing defendant, the trial court took into consideration the statutory factors in aggravation and mitigation, reviewed the presentence investigation report, and the live testimony and victim impact statements. The trial court observed that the evidence of defendant's guilt was "overwhelming" and that the testimony demonstrated defendant was "a violent, brutal, dangerous human being" the kind that "our city and our communities need to be protected from." The trial court then sentenced defendant to four consecutive 25-year terms (25 years for each of the three aggravated criminal sexual assault counts and 25 years for the aggravated kidnapping count), for an aggregate term of 100 years' imprisonment in the Illinois Department of Corrections. The trial court further found that each of the counts were to be served consecutively as mandated by the statute; however, the trial court made an additional finding as to the aggravated kidnaping count, "regarding the nature of circumstances of the offense and the history and character of the defendant, it is this Court's opinion that consecutive sentencing is [*sic*] required to protect the public from further criminal conduct by the defendant."

¶ 8 Defendant appealed arguing that the trial court erred in allowing the State to introduce other crimes evidence and that his constitutional right to confront witnesses was violated when the State presented certain expert testimony. Defendant did not raise any issues with the

propriety of his sentence. This court affirmed the judgment of the trial court in *People v. Nelson*, 2013 IL App (1st) 102619.

¶ 9 On September 27, 2017, defendant filed a *pro se* postconviction petition. In his petition, defendant raised numerous claims. In the claim pertinent to this appeal, defendant alleged that appellate counsel was ineffective for failing to raise claims regarding trial counsel's ineffectiveness. Specifically, defendant claimed that trial counsel was ineffective for failing to object to the imposition of the 100-year aggregate sentence because his sentence exceeded the sum of the maximum term for the two most serious offenses and as such, his sentence should have been 60 years.

¶ 10 The circuit court dismissed the postconviction petition in a written ruling on December 22, 2018. The circuit court found that defendant's claims regarding the ineffectiveness of appellate and trial counsel regarding his aggregate sentence were meritless because, pursuant to section 5-8-4 of the Code, "the court was required to impose mandatory consecutive sentences for the three counts of aggravated criminal sexual assault." Accordingly, the circuit court dismissed the petition as frivolous and patently without merit. Defendant now appeals.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant maintains that the aggregate length of his consecutive sentences (100 years) exceeded the permissible statutory limit under section 5-8-4(f)(2) of the Code (730 ILCS 5/5-8-4(f)(2) (West 2010)) and, therefore, his postconviction petition stated the gist of a claim of ineffective assistance of appellate counsel where they failed to raise this issue on direct appeal. According to defendant, the maximum aggregate sentence he can receive is 60 years.

¶ 13 In response, the State argues that the circuit court properly dismissed the postconviction

petition where the maximum aggregate term when a defendant is convicted of multiple Class X sentences is 120 years, not 60 years, and thus his 100-year term was proper.

¶ 14 Post-Conviction Hearing Act

¶ 15 We begin our analysis with a discussion of the Act. The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq.* (West 2016). A postconviction proceeding not involving the death penalty contains three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage of a postconviction proceeding, a defendant need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Id.* at 11-12.

¶ 16 The first stage of postconviction proceedings involves the circuit court independently reviewing the petition and, taking the allegations as true, determining if it is frivolous or patently without merit. *Id.* at 10. A petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *Id.* at 11-12. More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Id.* at 16-17. This includes claims that are barred by *res judicata* and forfeiture. *People v. Blair*, 215 Ill. 2d 427, 445 (2005).

¶ 17 "The court is further foreclosed from engaging in any fact finding or any review of matters beyond the allegations of the petition." *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At this stage, a defendant "need only present a limited amount of detail in the petition" and the "threshold for survival" is "low." *Hodges*, 234 Ill. 2d at 9. A *pro se* defendant need only "allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the

Act." *Id.* "Thus, in our past decisions, when we have spoken of a 'gist,' [of a constitutional claim] we meant only that the section 122-2 pleading requirements are met, even if the petition lacks formal legal arguments or citations to legal authority." *Id.* "At the first stage of proceedings, we must accept as true all facts alleged in the postconviction petition, unless the record contradicts those allegations." *People v. Barghouti*, 2013 IL App (1st) 112373, ¶ 16. This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 18 Ineffective Assistance of Counsel

¶ 19 A criminal defendant has a constitutional right to the effective assistance of counsel in an appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 393-97 (1985); *People v. Robinson*, 217 Ill. 2d 43, 61 (2005). "[A] claim of ineffective assistance of counsel on appeal is cognizable under the [Act] [citation]." *People v. Mack*, 167 Ill. 2d 525, 531 (1995). Ordinarily, to prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶ 20 Aggregate Consecutive Sentences

¶ 21 At issue here is whether defendant set forth the gist of a constitutional claim that appellate counsel was ineffective for failing to argue on direct appeal that trial counsel provided deficient representation by not objecting to his aggregate 100-year sentence. Defendant contends that while the court was statutorily mandated to impose consecutive sentences in this case, the aggregate total of the consecutive sentences violated section 5-8-4(f)(2) of the Code, which

prohibits aggregate sentences in excess of the sum of the maximum terms authorized under Article 4.5 of Chapter 5 for the two most serious felonies involved. 730 ILCS 5/5-8-4(f)(2) (West 2010). Defendant asserts he was not eligible for an extended term sentence and thus the maximum authorized term for each Class X offense was 30 years and that his aggregate term could not exceed 60 years. As such, defendant claims that he raised the gist of a constitutional claim in his petition and requests this court remand the cause for second-stage proceedings under the Act.

¶ 22 In response, the State asserts that this court has explicitly rejected defendant's argument in *People v. Woods*, 131 Ill. App. 3d 51, 54-55 (1985), *People v. Beck*, 190 Ill. App. 3d 748, 763 (1989), and *People v. Myrieckes*, 315 Ill. App. 3d 478, 481-82 (2000). The State contends that defendant presents no grounds for overturning these cases and therefore he cannot establish that appellate counsel was ineffective under either prong of *Strickland* and this court, therefore, should affirm the trial court's dismissal of the petition.

¶ 23 Section 5-8-4(f)(2), as in effect at the time defendant was sentenced, provided that the aggregate maximum of consecutive sentences "shall" be determined as follows:

> "For sentences imposed under the law in effect on or after February 1, 1978, the aggregate of consecutive sentences for offenses that were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective shall not exceed the sum of the *maximum terms authorized under Article 4.5 of Chapter V* for the 2 most serious felonies involved[.]" (Emphasis added.) 730 ILCS 5/5-8-4(f)(2) (West 2010).

It should be noted, as it is relevant to this discussion, that this version of the statute was amended and came into effect in 2010 just prior to defendant's sentencing. Previously, the aggregate

maximum for consecutive sentences could be found in section 5-8-4(c)(2) of the Code, and provided that the aggregate consecutive sentences "shall not exceed the sum of *the maximum terms authorized under Section 5-8-2*." (Emphasis added.) 730 ILCS 5/5-8-4(c)(2) (West 2008). Section 5-8-2, in turn, set forth that a judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless factors in aggravation under the Code were found to be present. 730 ILCS 5/5-8-2 (West 2008).

¶ 24 In *Woods*, this court rejected the argument that the extended term sentences authorized by section 5-8-2 could not be used in computing the maximum aggregate of consecutive sentences allowed in section 5-8-4(c)(2) (the prior version of section 5-8-4(f)(2)), noting the absence of authority supporting this proposition and that "defendant has misread section 5-8-4(c)(2), which refers to section 5-8-2 only as a measuring statute. Defendant need not meet the separate qualifications for an extended-term sentence." *Woods*, 131 Ill. App. 3d at 55. In *Beck*, the Fifth District relied on *Woods* as persuasive authority in concluding that the extended-term statute functions as a measuring statute for the consecutive sentencing statute, adding, "[s]ince the consecutive sentence statute reveals no ambiguity regarding the qualifications for consecutive sentences, it is unnecessary to address the defendant's contention that we must construe section 5-8-4(c)(2) strictly in his favor." *Beck*, 190 Ill. App. 3d at 764. Likewise, in *Myrieckes*, the Third District agreed with this court's interpretation of section 5-8-4(c)(2) in *Woods*, noting that the plain language of the section "refers to the 'maximum terms *authorized*' by section 5-8-2, not the maximum for which a particular defendant is eligible." (Emphasis in original.) *Myrieckes*, 315 Ill. App. 3d at 482. The *Myrieckes* court further noted that in *People v. Tucker*, 167 Ill. 2d

431 (1995) (superseded by statute), our supreme court, in *dicta*, interpreted section 5-8-4(c)(2) consistently with the First District's interpretation stating, " 'We note that section 5-8-4(c)(2) refers to the aggregate of the maximum *extended* terms authorized for the two most serious felonies involved. [Citation.] For example, where a defendant is convicted of a Class X felony, the maximum extended term is 60 years. [Citation.] Thus, a defendant convicted of a number of Class X felonies may be sentenced to consecutive terms of imprisonment not to exceed a total of 120 years. (Emphasis in original.)' " *Id.* at 482 (quoting *Tucker*, 167 Ill. 2d at 437).

¶ 25 Defendant acknowledges that this court in *Woods* found that the maximum extended term sentence is used to calculate the maximum aggregate sentence, even where the defendant is not eligible for an extended term sentence. Defendant further acknowledges that this conclusion was also reached in *Myrieckes*, 315 Ill. App. 3d at 482. Defendant argues, however, that this court should not follow *Woods* and its progeny because the cases interpreted section 5-8-4 prior to its 2010 amendment. Defendant observes that while the previous version of the statute stated that the aggregate sentence "shall not exceed the sum of the maximum terms authorized under Section 5-8-2 for the 2 most serious felonies involved" the 2010 amendment changed the statute to provide that the aggregate sentence "shall not exceed the sum of the maximum terms authorized under Article 4.5 of Chapter V for the 2 most serious felonies involved." Defendant maintains that while section 5-8-2 is entitled "Extended Term" and authorizes extended-term sentencing where certain referenced aggravating factors apply, Article 4.5 of Chapter V is entitled "Standard Sentencing" and does not authorize extended term sentencing. We disagree.

¶ 26 Article 4.5 of Chapter V sets forth the sentencing ranges for criminal offenses. Pertinent to the case at bar is subsection 25 of Article 4.5 of Chapter V, the sentence ranges for Class X felonies. 730 ILCS 5/5-4.5-25 (West 2010). This section provides:

> "The sentence of imprisonment shall be a determinate sentence of not less than 6 years and not more than 30 years. The sentence of imprisonment for an extended term Class X felony, as provided in Section 5-8-2 (730 ILCS 5/5-8-2), shall be not less than 30 years and not more than 60 years." 730 ILCS 5/5-4.5-25 (West 2010).

Accordingly, contrary to defendant's argument, subsection 25 of Article 4.5 of Chapter V does authorize extended term sentencing for Class X felonies. See *id.*

¶ 27 Defendant further argues that even if the 2010 amendment did not change the law, *Woods* still contradicts the plain language of the statute because it ignores the word "authorized" in section 5-8-4(f)(2). According to defendant, the previous version of this statute referred to section 5-8-2, which expressly prohibits the imposition of an extended term where, as here, the eligibility factors have not been found. Thus, where extended term sentencing is prohibited, "the maximum terms authorized" are the unenhanced maximum sentences. We disagree with defendant's reading of the statute. As previously discussed, the *Myrieckes* court agreed with the *Woods* court's interpretation and expressly stated that the plain language of this section refers to the "maximum terms *authorized*" by section 5-8-2 and not the maximum for which a particular defendant is eligible. *Myrieckes*, 315 Ill. App. 3d at 482.

¶ 28 Defendant also urges us to read section 5-8-4(f)(2) in light of section 5-8-2 of the Code entitled "Extended Term." Defendant argues that when reading these two sections together, it is evident that the maximum term authorized under Article 4.5 of Chapter V is only the maximum non-extended term sentence. We disagree.

¶ 29 As previously discussed, section 5-8-4(f)(2) of the Code provides that a defendant's sentence shall not exceed the sum of "the *maximum terms authorized* under Article 4.5 of Chapter V for the 2 most serious felonies involved." (Emphasis added.) 730 ILCS 5/5-8-4(f)(2)

(West 2010). Subsection 25 of Article 4.5 of Chapter 5 sets forth the term of imprisonment for a Class X felony as being "a determinate sentence of not less than 6 years and not more than 30 years" and further provides that the sentence of imprisonment for an "extended term Class X felony, as provided in Section 5-8-2 (730 ILCS 5/5-8-2), shall be not less than 30 years and not more than 60 years." 730 ILCS 5/5-4.5-25 (West 2010). In turn, section 5-8-2(a) sets forth that a "judge shall not sentence an offender to a term of imprisonment in excess of the *maximum sentence authorized* by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 *** were found to be present." (Emphasis added.) 730 ILCS 5/5-8-2(a) (West 2010). If the proceedings below were proper, then the judge "may sentence an offender to an extended term as provided in Article 4.5 of Chapter V." *Id.* We decline to find the language utilized in section 5-8-4(f)(2) and 5-8-2(a) of the Code are so identical as to inform an interpretation of the other as defendant suggests. This case charges us to consider the phrase "maximum terms authorized" not "maximum sentence authorized" as provided in section 5-8-2(a). The words "terms" and "sentence" are clearly distinct. See *People v. Russell*, 143 Ill. App. 3d 296, 303 (1986) ("One of the canons of statutory construction is that where the legislature uses certain words in one instance and different words in another, different results were intended."). Moreover, we observe that in the decade since the statute was amended no court has taken this position and defendant cites to no case law in support of his proposition. Accordingly, we decline to depart from our well-established case law that interprets the phrase "maximum terms authorized" as including the sentencing ranges for extended term sentences. See *Woods*, 131 Ill. App. 3d at 55; *Beck*, 190 Ill. App. 3d at 763; *Myrieckes*, 315 Ill. App. 3d at 482.

¶ 30 In sum, without referencing any authority developed in the case law over the decade

since the statutory amendment, defendant surmises that the legislature intended to abolish the maximum aggregate sentence of 120 years that section 5-8-4(f)(2) once permitted. The fatal flaw in defendant's unsupported argument is his assertion that Article 4.5 of Chapter V refers only to section 5-4.5-5, which is entitled "Standard Sentencing" and omits sentencing ranges. Contrary to defendant's position, Article 4.5 of Chapter V "sets forth the various classes of criminal offenses and the sentences authorized *** for each class." *People v. Fretch*, 2017 IL App (2d) 151107, ¶ 144; 730 ILCS 5/5-4.5 *et seq.* (West 2010)). Subsection 25 of Article 4.5 of Chapter V clearly includes extended term sentences of "not less than 30 years and not more than 60 years" for Class X felonies. 730 ILCS 5/5-4.5-25 (West 2010). After an exhaustive review, we find defendant's sentences comport with these statutory sentencing provisions and therefore affirm the judgment of the circuit court.

¶ 31 CONCLUSION

¶ 32 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.