

No. 1-11-2042

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 3350
)	
PATRICK THORNTON,)	Honorable
)	Shelley Sutker-Dermer,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's *pro se* post-conviction petition affirmed where issue of the propriety of the admission of defendant's prior DUI convictions was decided on direct appeal and his related ineffectiveness claim based on that issue was barred by *res judicata* and without merit; defendant was subject to a three-year term of MSR as a Class X offender.

¶ 2 Defendant Patrick Thornton appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he made a substantial showing of a claim of ineffective assistance of trial counsel to warrant an evidentiary

hearing. He also contends that the three-year term of mandatory supervised release (MSR) that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 2 offense.

¶ 3 The record shows that defendant was convicted of one count of aggravated driving under the influence of alcohol (DUI) on evidence showing that about 1:45 a.m. on January 25, 2007, a police officer observed him stagger to, and enter, a parked car near 3512 North Clark Street in Chicago. He then started the engine and drove half a car length before being stopped by the officer, who placed the engine in park and removed the keys. A DUI specialist arrived on the scene shortly thereafter and administered numerous sobriety tests, all of which defendant failed. Defendant was arrested and taken to the police station, where another officer administered a breathalyzer test, which revealed that defendant's blood alcohol level was 0.182.

¶ 4 During defendant's bench trial, defense counsel stipulated to the admission of an Illinois Secretary of State certified driver's abstract reflecting defendant's two prior DUI offenses into evidence. Defendant was subsequently sentenced, as a Class X offender, to six years' imprisonment, along with a 3-year term of mandatory supervised release (MSR).

¶ 5 On direct appeal, defendant argued that (1) the evidence was insufficient to sustain his conviction, (2) the trial court erred in admitting evidence of his prior DUI convictions; and (3) his mittimus should be corrected to reflect only one conviction. This court corrected defendant's mittimus and affirmed the circuit court's order in all other respects. *People v. Thornton*, No. 1-08-0195 (2010) (unpublished order under Supreme Court Rule 23). In doing so, this court noted that the State was seeking an enhanced sentence, and although neither the prior conviction nor the State's intention to seek an enhanced sentence is an element of the offense and may not be disclosed to the jury during trial, in this case where defendant was tried by the court, the statute does not preclude the introduction of those facts during trial. Order at 6-7. This court noted the

presumption that the trial court knew and followed the law and disregarded any improper evidence presented to it, and found that nothing in the record contradicted those presumptions. Order at 7.

¶ 6 In reaching this conclusion, this court distinguished *People v. Robinson*, 368 Ill. App. 3d 963 (2006), upon which defendant relied, pointing out that there, unlike the case at bar, the trial court admitted the evidence over defendant's objection and with the specific erroneous finding that the prior DUI violations were elements of the charge on trial before it. Prior to invoking the plain error doctrine, as defendant requested, this court stated that it must first determine "whether any error occurred," and further stated:

After carefully reviewing the record, we find no indication that the trial court improperly considered the prior DUI convictions either as an element of the DUI offenses for which he was on trial or as an indication of the propensity to drive under the influence of alcohol.

Defendant has failed to sustain his burden on appeal of demonstrating error in the record requiring reversal.

¶ 7 Defendant subsequently filed the *pro-se* post-conviction petition at bar in which he alleged, in relevant part, that his trial counsel was ineffective for stipulating to the admission of his prior DUI convictions. Defendant's petition advanced to the second stage of review and he was appointed counsel.

¶ 8 On February 18, 2011, defendant's attorney filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), in which he stated that he did not prepare an amended post-conviction petition on behalf of defendant because defendant's *pro se* petition adequately

states his contentions of a denial of his constitutional rights. The State filed a motion to dismiss defendant's petition, arguing, *inter alia*, that the issues raised in defendant's petition are barred by waiver and *res judicata*. The circuit court orally granted the motion to dismiss on June 24, 2011.

¶ 9 On appeal, defendant challenges the propriety of that dismissal, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). We initially observe that, aside from the MSR claim, which he raises for the first time in this appeal, defendant has concentrated solely on his claim of ineffective assistance of trial counsel based on the DUI stipulation, thereby abandoning the multiple claims raised in his petition and forfeiting them for appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 10 At the second-stage of post-conviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true; however, nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 11 To establish a claim of ineffective assistance of trial counsel warranting further proceedings under the Act, defendant must show that counsel's performance was deficient and that he suffered prejudice as a result, *i.e.*, a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 12 Defendant's ineffectiveness claim is based on trial counsel's stipulation, rather than objection, to the admission of the evidence of his two prior DUI convictions. The State responds

that defendant's claim is barred by the doctrine of *res judicata* because, on direct appeal, this court concluded that the introduction of defendant's prior DUI convictions was not erroneous. We agree.

¶ 13 The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues that have not been, and could not have been, previously adjudicated on direct review. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). In considering a post-conviction petition, issues in the petition that were raised and decided on direct appeal are barred from post-conviction review by *res judicata*, and issues that could have been presented on direct appeal, but were not, are waived. *Taylor*, 237 Ill. 2d at 372.

¶ 14 As set forth above, defendant argued on direct appeal that the trial court erred in admitting evidence of his prior DUI convictions because they were not an element of the DUI for which he was on trial and may have allowed the trial court to improperly conclude that he had a propensity to commit the offense. In addressing the issue, this court first found that nothing in the record contradicted the presumption that the trial judge knew and followed the law; specifically that defendant's prior DUI convictions did not constitute an element of the offense for which he was on trial, and that evidence of other crimes is inadmissible if relevant merely to establish a propensity to commit criminal acts.

¶ 15 This court distinguished *Robinson*, 368 Ill. App. 3d at 976, upon which defendant relied, where the aforementioned presumptions were negated because the record reflected that the trial court expressly stated its erroneous belief that defendant's prior DUI convictions were elements of the charge on trial before it. This court noted that in this case, unlike *Robinson*, defense counsel stipulated to the evidence at issue, and found that nothing in the record contradicted the presumptions regarding that evidence. *Thornton*, Order at 8-9. This court also found that,

because the record gave no indication that the trial court improperly considered defendant's prior DUI convictions, no error had occurred. Order at 9.

¶ 16 Based on the foregoing, it is evident that on direct appeal, this court addressed and resolved the issue of whether the admission of defendant's prior DUI convictions was erroneous, and found that it was not. Any attempt on the part of defendant to re-litigate this issue is barred by *res judicata*. *Taylor*, 237 Ill. 2d at 372. Although defendant maintains that *res judicata* does not apply to his claim because "appellate counsel did not argue that trial counsel was ineffective for stipulating to the improper evidence, so this Court never reached the issue," the actions forming the basis of the claim are reflected in the trial record, and thus the claim could have been raised on direct appeal; since it was not, the claim is barred by waiver. *Taylor*, 237 Ill. 2d at 372.

¶ 17 Moreover, although this court did not address his present ineffective assistance of counsel argument on direct appeal, it did resolve an issue upon which the ineffectiveness claim depends, *i.e.*, the propriety of the admission of evidence of defendant's prior DUI convictions. Defendant cannot avoid the procedural bar of *res judicata* by simply rephrasing issues that have already been raised or by "adding an additional allegation that is encompassed by a previously adjudicated issue." *People v. Kimble*, 348 Ill. App. 3d 1031, 1034 (2004).

¶ 18 Since this court has already determined that the admission of the evidence of defendant's prior DUI convictions was not erroneous, trial counsel cannot be deemed ineffective for stipulating to, rather than objecting to, that evidence. See *People v. Ward*, 187 Ill. 2d 249, 259-60 (1999). Because defendant's underlying claim, that trial counsel was ineffective based on this stipulation, lacks merit, he suffered no prejudice due to appellate counsel's failure to raise an ineffectiveness claim on this basis on direct appeal. *Ward*, 187 Ill. 2d at 260, see also *People v. Johnson*, 183 Ill. 2d 176, 187 (1998).

¶ 19 Moreover, the Act requires that post-conviction counsel provide a reasonable level of assistance to defendants. 725 ILCS 5/122-4 (West 2008); *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To ensure that defendants receive this level of assistance, Illinois Supreme Court Rule 651(c) imposes certain duties on post-conviction counsel, including making any necessary amendments to a *pro se* petition in order to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Suarez*, 224 Ill. 2d at 42. Rule 651(c) does not, however, require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Accordingly, post-conviction counsel's failure to amend defendant's *pro se* petition to include the meritless claim of ineffective assistance of appellate counsel for failing to raise an ineffectiveness claim on direct appeal based on trial counsel's stipulation to the DUI evidence, did not render post-conviction counsel's assistance unreasonable. See *Pendleton*, 223 Ill. 2d at 472; *Greer*, 212 Ill. 2d at 205.

¶ 20 Defendant also maintains that the three-year term of MSR that attached to his Class X sentence is void and should be reduced to two years because he was convicted of a Class 2 offense. Although a void sentence can be challenged at any time, we review the sentence to determine whether it is actually void. *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008). For the following reasons, we find that it is not.

¶ 21 Section 5-8-1(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d) (West 2008)), provides that the MSR term for a Class X felony and for a Class 2 felony is three years and two years, respectively. Because defendant was convicted of a Class 2 felony, he maintains that he is only subject to a two-year term of MSR, relying on *People v. Pullen*, 192 Ill. 2d 36 (2000).

¶ 22 Defendant's reliance on *Pullen*, however, is misplaced. This court has repeatedly addressed *Pullen* and found that it does not change the conclusion that a defendant sentenced as a

Class X offender shall receive the same three-year MSR term imposed on defendants convicted of Class X felonies. See *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 62; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); and *People v. McKinney*, 399 Ill. App. 3d 77, 83 (2010). We agree with these decisions and likewise conclude that the three-year MSR term was correctly applied in this case.

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 24 Affirmed.