NOTICE
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2012 IL App (4th) 110629-U

NO. 4-11-0629

FILED
November 28, 2012
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
KETHAN T. GARLICK,	)	No. 08CF1246
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court erred in entering a partial dismissal of defendant's postconviction petition at the first stage, remand is not required because defendant was not prejudiced by the error.

¶ 2 In October 2008, defendant, Kethan T. Garlick, pleaded guilty to one count of predatory criminal sexual assault of a child. In December 2008, the trial court sentenced him to 17 years in prison. In December 2009, defendant filed a postconviction petition, and the court summarily dismissed certain claims. Following an evidentiary hearing on the remaining claims, the court denied the petition.

¶ 3 On appeal, defendant argues the trial court erred in entering a partial summary dismissal of his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2008, a grand jury indicted defendant on two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)), alleging he committed an act of sexual penetration with a minor child by placing his penis in her vagina (count I) and in her anus (count II). The trial court appointed the public defender to represent defendant.

¶ 6 In September 2008 and pursuant to a motion by defense counsel, the trial court appointed Dr. Lawrence Jeckel to examine defendant as to his fitness to stand trial and his sanity at the time of the alleged offenses. In October 2008, Dr. Jeckel filed his report and concluded defendant was fit to stand trial.

¶ 7 Also in October 2008, the trial court conducted a plea hearing. Defendant agreed to plead guilty to count I, and the State agreed to dismiss count II and cap its sentencing recommendation at 25 years in prison. In December 2008, the court sentenced defendant to 17 years in prison.

¶ 8 In January 2009, defense counsel filed a motion to withdraw his guilty plea, which was subsequently withdrawn at defendant's request. In May 2009, defendant filed a *pro se* petition to withdraw his guilty plea and vacate his sentence. Defendant alleged his plea was involuntary due to his diminished mental capacity. The trial court refused to consider the petition as it was untimely. Defendant filed a *pro se* notice of appeal, and the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD filed a motion to dismiss the appeal, which this court granted.

¶ 9 In December 2009, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), alleging, *inter alia*, his public defender failed to suppress his confession and investigate his deteriorating

mental condition at the time of the plea proceedings.

¶ 10 In its written order, the trial court noted Dr. Jeckel's examination and diagnosis of defendant and found defendant's "claims of some mental health disorder at the time of the plea and also at the sentencing hearing are totally without merit." The court dismissed that portion of the postconviction petition dealing with defendant's mental-health problems. However, the court appointed counsel on defendant's claim his attorney should have filed a motion to suppress his confession.

¶ 11 In December 2010, defense counsel filed an amended petition for postconviction relief, alleging, among other things, defendant was denied the effective assistance of counsel where the public defender failed to file a motion to suppress and failed to investigate his deteriorating mental condition prior to the plea and sentencing hearings. The petition also alleged the public defender failed to investigate whether defendant was taking any prescribed psychotropic medications during his pretrial detention, which directly led to his inability to understand the nature and consequences of entering a guilty plea.

¶ 12 In March 2011, the State filed a motion to dismiss, in part, defendant's amended petition. The State argued defendant failed to make a substantial showing his trial counsel was ineffective for failing to investigate whether his mental condition compromised his ability to understand the nature and consequences of his plea. Noting defendant had been found fit to stand trial, the State argued he failed to allege any facts arising after his fitness evaluation that would raise a *bona fide* doubt as to his fitness.

¶ 13 In May 2011, the trial court conducted a hearing on the State's motion to dismiss. On the mental-health issue, the State argued Dr. Jeckel found defendant fit to stand trial and no

affidavit or other evidence suggested otherwise. The court dismissed the ineffective-assistance-of-counsel claim relating to defendant's mental condition at the time of the plea and sentencing hearings. However, the court granted an evidentiary hearing with respect to the claim of ineffective assistance on the failure to file a motion to suppress. Thereafter, the State filed an answer to the amended petition.

¶ 14 In July 2011, the trial court conducted an evidentiary hearing on the remaining allegations in defendant's amended postconviction petition. Matthew Selinger, the former general manager at Cowboy Monkey, a bar where defendant worked on the kitchen staff, testified to defendant's employment. On the date of defendant's arrest, Selinger found defendant was "lucid," did not appear to be under the influence, and acted normal.

¶ 15 Deputy Josh Sapp, a correctional officer with the Champaign County sheriff's department, testified defendant appeared calm and cooperative during the booking process on the day of his arrest. After some questioning, defendant became "emotionally distraught," started crying, and stated he "sodomized [his] daughter." Sapp stated defendant was placed in a suicide prevention cell.

¶ 16 Champaign police detective Robb Morris testified he arrested defendant at the bar. After reading defendant the *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)), Morris conducted an interview. Defendant eventually stated there had been sexual contact between him and his daughter.

¶ 17 Randall Rosenbaum, defendant's public defender, testified he met with defendant on three or four occasions prior to the plea hearing. Rosenbaum stated he asked for a fitness exam because defendant "seemed to be very despondent and depressed." Rosenbaum decided

against filing a motion to suppress, believing it would be groundless.

¶ 18 Defendant testified to his belief that his guilty plea would include his placement in sex-offender treatment. Defendant acknowledged Rosenbaum did not promise he would receive treatment. He also stated he had not applied for sex-offender treatment while in prison.

¶ 19 The trial court denied defendant's postconviction petition. The court stated a motion to suppress would have been "fruitless" and any treatment programs would have been up to the Department of Corrections. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues the trial court erred in entering a partial summary dismissal of his *pro se* petition for postconviction relief. We agree but find remand is not necessary as the error did not prejudice defendant.

¶ 22 The Act "provides a method by which defendants may assert that, in the proceedings which resulted in their convictions, there was a substantial denial of their federal and/or state constitutional rights." *People v. Wrice*, 2012 IL 111860, ¶ 47, 962 N.E.2d 934, 945-46. A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 23 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition is not dismissed at the

first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2008).

¶ 24 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-4, 122-5 (West 2008). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a substantial showing of a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007).

¶ 25 In his postconviction petition, defendant alleged he was denied the effective assistance of counsel where the public defender failed to file a motion to suppress his confession and ignored his deteriorating mental condition at the time of his plea and sentencing proceedings. The trial court found the mental-health claims were without merit and dismissed them. The court also appointed counsel to represent defendant on the remaining claims. Defendant argues the trial court erred by selecting specific postconviction claims for second-stage review, while dismissing the remaining claims at the first stage.

¶ 26 Our supreme court has noted "the Act does not speak in terms of dismissing individual claims that are either frivolous or patently without merit." *People v. Rivera*, 198 Ill. 2d 364, 371, 763 N.E.2d 306, 310 (2001). Thus, "summary partial dismissals made during the first stage of a post-conviction proceeding are not permitted under the Act." *Rivera*, 198 Ill. 2d at 374, 763 N.E.2d at 311-12. "[I]f some claims are subject to a dismissal at the first stage while

others are not, the entire postconviction petition must be docketed for second-stage proceedings." *People v. Johnson*, 377 Ill. App. 3d 854, 858, 879 N.E.2d 977, 981 (2007) (citing *Rivera*, 198 Ill. 2d at 370-71, 763 N.E.2d at 310).

¶ 27 We agree with defendant that the trial court erred in its partial dismissal of the mental-health claims at the first stage of the postconviction proceedings. The State also concedes the error, but argues the erroneous ruling was harmless and did not result in any prejudice to defendant. See *People v. Simmons*, 388 Ill. App. 3d 599, 613, 903 N.E.2d 437, 451 (2009) (stating a partial summary dismissal is subject to harmless-error analysis under *Rivera*).

¶ 28 In the case *sub judice* and despite the trial court's ruling, defendant was able to raise the dismissed issues in the amended postconviction petition filed by counsel. The question of defendant's fitness to enter a guilty plea was raised in the amended petition. Further, at the hearing on the State's motion to dismiss, defense counsel argued the public defender's failure to investigate defendant's psychological and psychiatric history and suicide watch indicated defendant did not understand the consequences of his plea. The court dismissed this claim on the State's motion and set other claims based on ineffective assistance of counsel for an evidentiary hearing. See *People v. Cabrera*, 326 Ill. App. 3d 555, 564, 764 N.E.2d 532, 538-39 (2001) (finding a partial summary dismissal at the second stage was proper). The transcript of the hearing and the amended petition indicate defendant had the opportunity to present his mental-health claims, even after it was dismissed at the first stage, and he did so. Thus, any error in entering a partial summary dismissal was harmless and remand for further proceedings is unnecessary.

¶ 29 Moreover, dismissal of the mental-health claims was proper. Dr. Jeckel inter-

viewed defendant in September 2008 and ultimately found him fit to stand trial. At the plea hearing in October 2008 and the sentencing hearing in December 2008, defendant's conduct indicated he was rational and aware of what was going on. At the plea hearing, defendant indicated he understood the charge, the possible penalties, and his right to a bench or jury trial. The trial court accepted his guilty plea. At the sentencing hearing, defendant gave a lengthy statement where he apologized for his actions and believed his plea was the right course of action to take. Defendant's conduct in these proceedings indicate his mental condition had not deteriorated since Dr. Jeckel's opinion that he was fit to stand trial. Any claim that defendant was unfit to stand trial or enter a plea was without merit and remand for further proceedings would be unnecessary.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.