

NOTICE

Decision filed 07/10/13. 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) 110066-U  
NO. 5-11-0066  
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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Monroe County.
	)	
v.	)	No. 99-CF-26
	)	
DEWEY CHAD JOHNSTON,	)	Honorable
	)	Richard A. Aguirre,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WEXSTTEN delivered the judgment of the court.  
Presiding Justice Spomer and Justice Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court properly dismissed the defendant's petition for postconviction relief. The defendant was not denied the effective assistance of counsel because guilty plea counsel's failure to advise the defendant that a conviction for burglary could potentially be used to enhance the sentence of any subsequent federal conviction was not objectively unreasonable, and the defendant's claim that the factual basis did not support the plea was unsupported.

¶ 2 The defendant, Dewey Chad Johnston, appeals *pro se* the summary dismissal of his petition for postconviction relief, arguing (1) that the circuit court erred in summarily dismissing his postconviction petition on timeliness grounds, (2) that his postconviction petition stated the gist of a constitutional claim of ineffective assistance of counsel where guilty plea counsel failed to inform him that a felony conviction could be used to enhance a sentence for a subsequent federal conviction, and (3) that his postconviction petition stated a freestanding claim of actual innocence. For the following reasons, we affirm the judgment of the circuit court of Monroe County.

¶ 3 On October 28, 1999, Johnston pled guilty to burglary and was sentenced to six years' imprisonment. He did not file a motion to withdraw his plea nor did he take a direct appeal. On March 7, 2007, Johnston was arrested and charged in federal court with being a felon in possession of a firearm which had traveled in interstate commerce. He pled guilty and, as a result of his Illinois burglary conviction, received an enhanced sentence of 180 months' imprisonment.

¶ 4 On October 21, 2010, Johnston filed *pro se* a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) arguing (1) that he had been denied the effective assistance of guilty plea counsel where counsel failed to advise him that an Illinois conviction for burglary could serve as the basis for enhancing any sentence imposed as a result of a future conviction for a federal criminal offense, and (2) that he was innocent of the crime for which he had been convicted. The circuit court summarily dismissed Johnston's postconviction petition, finding the claims raised therein to be frivolous and patently without merit. Johnston appeals.

¶ 5 The Act provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). In noncapital cases, proceedings under the Act consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). At the first stage, the circuit court has 90 days to review the postconviction petition and may dismiss the petition if the court finds it to be frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). A postconviction petition is considered frivolous and patently without merit where it has no arguable basis in fact or law. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009). We review *de novo* a circuit court's summary dismissal of a postconviction petition. *People v. Edwards*, 197 Ill. 2d 239, 247

(2001).

¶ 6 Johnston argues first that the circuit court erred in dismissing his postconviction petition on timeliness grounds. He contends that principles of equitable tolling and equitable estoppel precluded summary dismissal on timeliness grounds. Johnston's argument is based on a misapprehension of the basis of the circuit court's judgment, however. The circuit court did not dismiss Johnston's postconviction petition based on timeliness. Indeed, the circuit court noted in its dismissal order that timeliness was not a proper basis for a first-stage dismissal. Instead, the circuit court summarily dismissed Johnston's postconviction petition based on its determination that the claims raised therein were frivolous and patently without merit.

¶ 7 Johnston next argues that he was denied the effective assistance of guilty plea counsel where counsel failed to advise him that an Illinois conviction for burglary could serve as the basis for enhancing any sentence imposed as a result of a future conviction for a federal criminal offense.

¶ 8 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). More specifically, the defendant must demonstrate (1) that counsel's performance was objectively unreasonable under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Harris*, 225 Ill. 2d 1, 20 (2007). In the context of a guilty plea proceeding, the defendant must show that counsel failed to ensure that the defendant entered the plea knowingly and intelligently, and that

there is a reasonable probability that, but for counsel's unprofessional errors, the defendant would have gone to trial. *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). For a plea to be voluntary and intelligent, the defendant must be aware of all the direct consequences of pleading guilty. *People v. Presley*, 2012 IL App (2d) 100617, ¶ 25. Direct consequences of a guilty plea are those which have immediate, direct, and largely automatic effect on the defendant's sentence. *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009). Collateral consequences are those which are unrelated to the length or nature of the defendant's sentence and are outside the circuit court's control. *People v. Williams*, 188 Ill. 2d 365, 372 (1999). Generally, a guilty plea is not rendered involuntary because the defendant was not informed of the collateral consequences of the plea. *People v. Castano*, 392 Ill. App. 3d 956, 958-59 (2009).

¶ 9 The enhanced federal sentence Johnston received as a consequence of his burglary conviction was clearly a collateral consequence of his guilty plea. At the time Johnston pled guilty to burglary, neither defense counsel, the circuit court, nor Johnston himself knew that he would subsequently commit a federal crime and receive an enhanced sentence for that crime as a result of his burglary conviction. The imposition of the enhanced federal sentence was solely the result of Johnston's subsequent criminal activity and was beyond the circuit court's control.

¶ 10 Johnston suggests that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), removed the distinction between direct and collateral consequences. We disagree. In *Padilla*, the defendant pled guilty to several drug-related offenses. His attorney did not advise him that as a result of his guilty plea, he would likely be deported. The supreme court of Kentucky rejected the defendant's ineffective-assistance-of-counsel claim on the basis that deportation was merely a collateral consequence of his conviction. The Supreme Court reversed, holding that counsel's failure to advise the defendant that he might be deported as

a result of his guilty plea fell below an objective standard of reasonableness. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1486-87.

¶ 11 The Court explained that it had never applied the collateral consequences rule "to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Id.* at \_\_\_, 130 S. Ct. at 1481. The Court found it unnecessary to consider whether the rule was appropriate in the context of ineffective-assistance-of-counsel claims, however, reasoning that because deportation was uniquely difficult to categorize as a direct or collateral consequence, the distinction was ill-suited to evaluate an ineffective-assistance-of-counsel claim concerning the risk of deportation. *Id.* at \_\_\_, 130 S. Ct. at 1481-82. The Court concluded that although deportation was a civil consequence of a guilty plea, it should not be categorically eliminated from defense counsel's duties because it is a "particularly severe 'penalty,' " "intimately related to the criminal process," and "nearly an automatic result" because of recent changes to immigration law, which have "enmeshed" the conviction with the penalty of deportation. *Id.*

¶ 12 *Padilla* did not eliminate the distinction between direct and collateral consequences in the context of sixth amendment claims. Rather, it suggests that certain consequences of a guilty plea may be so certain and so severe that they should not be "categorically removed from the ambit of the Sixth Amendment right to counsel" regardless of whether such consequence is traditionally considered direct or collateral. *Id.*

¶ 13 Our supreme court recently addressed the question of whether *Padilla* requires defense counsel to advise a defendant that his guilty plea could potentially subject him to involuntary commitment under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 to 99 (West 2006)). In *People v. Hughes*, 2012 IL 112817, the defendant pled guilty to aggravated criminal sexual abuse. Citing *Padilla*, he argued on appeal that he had been denied the effective assistance of counsel where defense counsel failed to advise him

of the possibility that the State would file a petition for involuntary commitment under the Act. Our supreme court rejected the defendant's argument, finding that while a reasonable attorney would so advise a defendant prior to entering a guilty plea, the defendant failed to establish that his attorney had failed to discuss a sexually violent person petition with him or that he was prejudiced by the alleged failure. *Id.* ¶¶ 65, 66. In reaching its conclusion that defense attorneys have a duty to advise clients who are pleading guilty to a triggering offense that the State might file a sexually violent person petition, our supreme court held:

"*Padilla* commands that where consequences are severe, certain to occur, 'enmeshed' in the criminal process, and are of predictable importance to a defendant's calculus, they are not categorically excluded from *Strickland's* purview despite being traditionally categorized as collateral.

\* \* \*

[W]here a serious liberty interest is potentially at stake, where it is certain that those convicted of sexually violent offenses will definitely be considered for commitment prior to release from imprisonment, and where the proceedings, if instituted, will impact a defendant's term of mandatory supervised release, we find this particular consequence, like deportation, should not be categorically excluded from a cognizable claim of ineffective assistance of counsel and a defendant's sixth amendment rights." *Id.* ¶¶ 49, 53.

¶ 14 The question before us, then, is whether the possibility of receiving an enhanced sentence for a subsequent federal conviction as a result of pleading guilty to a state offense is one of those consequences which, although traditionally categorized as collateral, is so "severe, certain to occur, 'enmeshed' in the criminal process, and [is] of predictable importance to a defendant's calculus" that it should not be categorically excluded from *Strickland's* purview. We hold that it is not. In reaching this conclusion, we find *U.S. v.*

*Reeves*, 695 F.3d 637 (7th Cir. 2012), persuasive.

¶ 15 In *Reeves*, the defendant was convicted in federal court of several drug offenses. He received an enhanced sentence as a result of a previous Illinois conviction for possession and sale of cocaine. On appeal, he argued that the Illinois conviction could not be used to enhance his federal sentence because the Illinois conviction had been obtained in violation of *Strickland*. More specifically, he argued that when he pled guilty to the Illinois offense, counsel had failed to advise him that a conviction could have an effect on the potential sentence for any future crimes. The defendant cited *Padilla* in support of his position. The court in *Reeves* rejected the defendant's argument, finding that the enhanced sentence was not an automatic consequence of the Illinois guilty plea and that any risk present when the defendant pled guilty was entirely contingent on his deciding to commit more crimes in the future. *Reeves*, 695 F.3d at 640.

¶ 16 As in *Reeves*, the enhanced sentence Johnston received for his federal conviction was not an automatic consequence of his guilty plea, and any risk that the conviction could result in a more severe sentence for any future crimes was entirely and necessarily contingent on Johnston's decision to commit those future crimes. Consequently, we find that Johnston was not denied the effective assistance of guilty plea counsel because counsel's failure to advise him that a conviction could be used to enhance the sentence of a subsequent offense was not objectively unreasonable.

¶ 17 Finally, Johnston argues that his postconviction petition stated a viable claim of actual innocence. Specifically, he maintains that although he was found in possession of stolen property, there was no evidence that he entered the property which was burglarized.

¶ 18 To prevail on a freestanding claim of actual innocence, a postconviction petitioner must show that the claim is based on newly discovered evidence which is material and noncumulative, and that the new evidence is of such conclusive character that it would

probably change the result on retrial. *People v. Harris*, 206 Ill. 2d 293, 301-02 (2002). Newly discovered evidence is evidence which has been discovered since the trial and which the defendant could not have discovered sooner through the exercise of due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 19 Johnston's postconviction petition did not set forth a proper freestanding claim of actual innocence because he did not allege the discovery of any new evidence. Instead, he essentially argued that the factual basis was insufficient to support the guilty plea. A defendant's due process rights are violated, entitling him to postconviction relief, where the factual basis does not support the guilty plea. *People v. Andretich*, 244 Ill. App. 3d 558, 562 (1993). However, Johnston failed to attach to his postconviction petition any affidavits, records, or other evidence supporting this claim, as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)). The failure to provide the required affidavits, records, or other supporting evidence or explain their absence is fatal to a postconviction petition and will justify its summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Because Johnston did not attach the transcript of the guilty plea hearing or other documentation to support his insufficient-factual-basis claim to his postconviction petition, the circuit court did not err in summarily dismissing it.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Monroe County summarily dismissing Johnston's postconviction petition is affirmed.

¶ 21 Affirmed.