

No. 1-14-3567

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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.)	Nos. 09 CR 5719
)	09 CR 9362
)	
JAMES BRECKENRIDGE,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 *Held:* We affirm defendant's conviction for being an armed habitual criminal where (1) the circuit court properly dismissed his postconviction petition at the second stage of postconviction proceedings due to his failure to make a substantial showing of ineffective assistance, and (2) defendant's challenge to the constitutionality of the armed habitual criminal statute is forfeited.

¶ 2 Following a negotiated guilty plea, defendant James Breckenridge was convicted of being an armed habitual criminal (AHC) and sentenced to six years' imprisonment.¹ Defendant appeals from the circuit court's dismissal of his postconviction petition at the second stage of proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), contending that (1) he made a substantial showing that counsel's ineffective assistance in failing to introduce evidence at a suppression hearing caused him to enter an involuntary guilty plea, and (2) the AHC statute is facially unconstitutional. We affirm.

¶ 3 Defendant was charged with two counts of AHC, four counts of aggravated unlawful use of a weapon, four counts of unlawful use of a weapon by a felon, and one count of possession of a controlled substance, arising from an incident that occurred in Chicago on February 24, 2009. He filed a motion to quash arrest and suppress evidence, and a hearing on the motion occurred on October 21, 2009.

¶ 4 At the hearing, Officer Torres testified that at approximately 12:40 a.m. on February 24, 2009, near the 4300 block of West Monroe, he and two other officers curbed a van that had driven the wrong way on a one-way street. Officer Torres perceived "movement" inside the van and, with his flashlight, approached the driver's side window. Defendant was in the driver's seat, leaning forward with a "handgun" in his right hand, and appeared to place the firearm "inside the steering wheel." Officer Torres ordered defendant and a rear passenger of the vehicle to exit the van, patted down both individuals, and transferred them to other officers. Afterwards, Officer Torres entered the van and observed that "the whole bottom part of the dashboard was removed"

¹ Defendant also pleaded guilty to one count of possession of a controlled substance in an unrelated case and received two years' imprisonment to be served consecutively to his sentence for AHC. In this appeal, defendant does not challenge his guilty plea for possession of a controlled substance.

to the right of the steering column, exposing metal and wires. The firearm was inside the dashboard, facing downward, with its handle toward Officers Torres. Defense counsel tendered a photograph of a "dashboard," but Officer Torres denied that the photograph depicted the van's dashboard as it appeared during the incident. He stated:

"This whole part here, you can't really tell because it's kind of dark in that area.

But like from what I recall, this whole brown like wood grain piece wasn't there, and this bottom part here wasn't there cause you could see directly into the wires and the steering column coming out where the handgun was placed.

* * *

*** Everything that's underneath the plastic part of the car, your car, my car, was removed and you could see wires and you could see the steering column. So it's right next to the steering column *** right to the right of the steering wheel, steering column, right there."

¶ 5 The trial court denied defendant's motion to quash arrest and suppress evidence. In its findings, the court found that Officer Torres was "extremely, extremely credible" and "very honest." According to the court, Officer Torres had a "reasonable and articulable suspicion" for stopping the van due to the traffic violation, and had observed defendant "in possession of a gun at the time of the stop." Following a recess, defendant entered a negotiated plea of guilty to one count of AHC. The State entered a stipulation between the parties which stated that, as a factual basis for the offense, Officer Torres "observed the defendant with a handgun, placing it into the exposed dashboard of the vehicle that he was driving." The State recommended a sentence of six years' imprisonment. Following admonishments, the court found that defendant's plea was "made

freely and voluntarily" and had a factual basis. The court accepted defendant's guilty plea and imposed the recommended sentence.

¶ 6 On December 28, 2009, defendant filed a motion for extension of time in which to file a "motion to change guilty plea." The court denied defendant's motion on January 5, 2010. This court allowed defendant's late notice of appeal and dismissed his direct appeal, finding, in relevant part, that he failed to file a motion to vacate the judgment and withdraw his guilty plea despite receiving adequate admonishments from the trial court. *People v. Breckenridge*, 2013 IL App (1st) 100414-UB, ¶ 16.

¶ 7 On June 4, 2010, defendant filed a *pro se* postconviction petition which alleged, in relevant part, that defense counsel rendered ineffective assistance at the suppression hearing. In the petition, defendant claimed that defense counsel did not investigate the case, test the firearm for fingerprints or DNA, or inform him about the hearing and motion to quash arrest and suppress evidence so that he could secure witnesses. Additionally, defendant alleged that defense counsel "was leading" Officer Torres, withheld evidence that would have impeached the witness, and allowed "impeaching" testimony about defendant, who did not testify at the hearing. The circuit court summarily dismissed defendant's petition. This court reversed, finding that the circuit court had failed to consider a *pro se* amendment to the petition that defendant had filed before the circuit court issued its ruling. *People v. Breckenridge*, 2012 IL App (1st) 102543-U, ¶ 8. As more than 90 days had passed since defendant filed the *pro se* amendment, we remanded for second-stage postconviction proceedings under section 122-2.1(b) of the Act (725 ILCS 5/122-2.1(b) (West 2010)). *Breckenridge*, 2012 IL App (1st) 102543-U, ¶ 12.

¶ 8 On December 23, 2013, through appointed counsel, defendant filed an amended postconviction petition. The amended petition alleged, in relevant part, that defense counsel was

ineffective for failing to present evidence at the suppression hearing to demonstrate that the van's dashboard was intact when defendant was arrested, and for not informing him that such evidence existed. Defendant claimed that his guilty plea was not knowingly and voluntarily made, as he was "not accurately apprised of the strength of the evidence and that there was favorable evidence that could have been used in support of his case."

¶ 9 The amended petition included several exhibits, including a subpoena for records from the Chicago Department of Streets and Sanitation Bureau of Traffic Services and a "motor vehicle inventory report" that described a van received at an impound station at 5:07 a.m. on February 24, 2009. The van was inventoried by a person identified as "EF" and assigned the inventory number "9015447." The report listed the van's vehicle identification number and license plate number, and included a marked box indicating that the dashboard was not "damaged" or "missing" when the van was inventoried.

¶ 10 Defendant also presented sections from the Chicago Municipal Code describing recordkeeping procedures for impounded vehicles, two impound notices for a van with the same vehicle identification number and license plate number as the van described in the inventory report, and exterior and interior photographs of the van.² The exterior photograph depicted the van's rear doors and license plate, while the interior photograph depicted a wood-patterned dashboard with shadows partially obscuring the area between the steering wheel and center console. The latter photograph also depicted the numbers "15447" written across the windshield. In an affidavit, defendant claimed to have taken the photographs "in the auto pound lot while on

² Two versions of the photographs are included in the record: smaller, black and white copies appear with defendant's amended postconviction petition, and larger, color copies appear with the motion to dismiss filed by the State. We have viewed both sets of photographs and base our description on the larger, color copies.

bond[.]" He attested that he provided both photographs to defense counsel, who introduced one of the photographs at the suppression hearing. He also attested that defense counsel did not apprise him of the inventory report and that, had he known about the report, he would not have pled guilty. Defendant's affidavit did not state that defense counsel had a copy of the report, although he alleged such in the amended petition.

¶ 11 The State filed a motion to dismiss defendant's petition. Following argument on the State's motion, the circuit court dismissed the petition as "frivolous and patently without merit." The court found that defendant had waived his claim of ineffective assistance by not raising it in his initial appeal, but that the petition also failed because counsel's failure to produce additional evidence at the suppression hearing was not prejudicial. The court described the inventory report as "far from conclusive," and found that "the presentation that the dashboard was intact at the impound station" would not have negated Officer Torres' testimony that defendant possessed a firearm and placed it between the steering column and dashboard. The court also noted that defendant had stipulated that Officer Torres' testimony was "valid and the factual basis for his conviction."

¶ 12 On appeal, defendant contends that (1) he made a substantial showing that counsel's ineffective assistance in failing to introduce evidence at the suppression hearing caused him to enter an involuntary guilty plea, and (2) the AHC statute is facially unconstitutional. We consider these claims in turn.

¶ 13 First, defendant contends that the circuit court erred in dismissing his amended postconviction petition at the second stage of postconviction proceedings where he made a substantial showing that counsel's ineffective assistance at the suppression hearing caused him to enter an involuntary guilty plea. According to defendant, counsel tried to impeach Officer Torres'

testimony regarding the recovery of the firearm by introducing a photograph of an intact dashboard, but did not establish that the photograph depicted the dashboard in the same condition as when the van arrived at the impound station. Had counsel introduced the inventory report, the other exhibits included with the postconviction petition, and the testimony of the person who created the report or maintained the impound station's records, defendant submits that counsel could have laid foundation for the photograph and used the evidence to suggest that Officer Torres did not view the weapon in plain sight, but rather, recovered it during an unauthorized search. As possession of a firearm is "crucial" to the AHC charge, defendant maintains that he would not have pled guilty but for counsel's failure to introduce the inventory report and secure a different outcome at the suppression hearing.³

¶ 14 The State, in response, contends that defendant failed to make a substantial showing of ineffective assistance where counsel's decisions regarding the use of the dashboard photograph, inventory report, and other available evidence represented sound trial strategy. According to the State, counsel's attempt to impeach Officer Torres with the photograph of the intact dashboard was more reasonable than attempting to create an inference that the dashboard was intact by introducing the inventory report and other evidence. Likewise, the State posits that counsel reasonably decided not to elicit when and by whom the dashboard photograph was taken, as defendant's involvement would suggest that he altered the dashboard. Thus, regardless of whether the inventory report and other evidence was admissible, the State submits that counsel made reasonable decisions regarding what evidence to introduce at the suppression hearing.

³ On appeal, defendant does not contend that counsel was ineffective for not informing him that the inventory report existed, as alleged in his affidavit and amended postconviction petition.

Additionally, the State argues that defendant failed to demonstrate prejudice where his brief did not articulate a plausible defense, advance a claim of actual innocence, or establish that the outcome of the motion to suppress would have been different but for counsel's performance. The State maintains that the inventory report would have been cumulative and not necessarily impeaching, as the court found Officer Torres to be credible and the report did not expressly contradict his testimony.

¶ 15 In reply, defendant argues that second-stage dismissal was inappropriate where the record had not been developed as to why counsel did not introduce the inventory report, which indicated that the dashboard was intact when the van was taken to the impound station and defendant was in jail. According to defendant, the omission of this information allowed the court to infer that he altered the van before taking the dashboard photograph. Because the inventory report contradicted Officer Torres' testimony, defendant submits that an evidentiary hearing on his amended postconviction petition was required. Irrespective of his actual innocence, defendant maintains that he incurred prejudice where he would not have pleaded guilty had counsel introduced the inventory report and succeeded in suppressing Officer Torres' testimony.

¶ 16 The Act provides a three-stage process for a defendant to challenge a conviction based on alleged violations of his constitutional rights "that were not, and could not have been, adjudicated previously on direct appeal." *People v. English*, 2013 IL 112890, ¶¶ 22-23; 725 ILCS 5/122-1 *et seq.* (West 2010). Here, defendant premises his postconviction claim on trial counsel's failure to introduce exhibits and other evidence that were not before the trial court, and, therefore, could not have been addressed on direct appeal. See *People v. Coleman*, 267 Ill. App. 3d 895, 898 (1994). At the first stage of proceedings under the Act, the circuit court may summarily dismiss a petition that it is "frivolous or patently without merit." 725 ILCS 5/122-

2.1(a)(2) (West 2010). If the petition states the “gist of a meritorious claim” or if the circuit court does not rule on the petition within 90 days of filing, the petition advances to the second stage of postconviction proceedings. *People v. Greer*, 212 Ill. 2d 192, 204 (2004); 725 ILCS 5/122-2.1(b) (West 2010). Here, defendant's postconviction petition reached the second stage of proceedings because the circuit court failed to consider an amendment to the petition within the 90-day period. *Breckenridge*, 2012 IL App (1st) 102543-U, ¶ 12.

¶ 17 At the second stage of proceedings, counsel is appointed to represent the defendant, if requested (725 ILCS 5/122-4 (West 2010)), and the State is permitted to file responsive pleadings to the postconviction petition (725 ILCS 5/122-5 (West 2010)). "At this stage, the circuit court must determine whether the petition and any accompanying documentation make a 'substantial showing of a constitutional violation.'" *People v. Domagala*, 2013 IL 113688, ¶ 33 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). A " 'substantial showing' of a constitutional violation *** is a measure of the legal sufficiency of the petition's well-pled allegations," which, if proven at a third-stage evidentiary hearing, would entitle the defendant to relief. *Id.* ¶ 35 (quoting *Edwards*, 197 Ill. 2d at 246); see also *People v. Hall*, 217 Ill. 2d 324, 334 (2005) (at second-stage proceedings, defendant's allegations are "liberally construed in light of the trial record"). Where, as in the case at bar, "the State seeks dismissal of a petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency." *People v. Ward*, 187 Ill. 2d 249, 255 (1999). We review the dismissal of a second-stage postconviction petition *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 18 Generally, "a voluntary guilty plea waives all non-jurisdictional errors or irregularities," including constitutional errors. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). In *Tollet v. Henderson*, 411 U.S. 258 (1973), the Supreme Court explained:

"*** [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Id.* at 267 (citing *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (to demonstrate that a guilty plea was "unintelligent," defendant must demonstrate that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases"))).

¶ 19 Turning to the instant case, we initially observe that defendant has not demonstrated that a connection exists between counsel's performance and the voluntariness of his guilty plea. Although defendant maintains that counsel's alleged ineffective assistance at the hearing on the motion to suppress rendered his guilty plea involuntary, the possibility that defendant would not have pleaded guilty had the motion been granted does not establish that, under the circumstances, his guilty plea was not knowingly and intelligently made. To the contrary, the fact that defendant entered his guilty plea only after the motion to suppress failed suggests that his decision to plead guilty was intentional and well-reasoned, taking into consideration the potential evidence at trial and its effect on the strength of the State and defense's cases. Moreover, prior to pleading guilty, defendant stipulated that Officer Torres observed him place a handgun "into the exposed

dashboard of the vehicle that he was driving." The trial court admonished defendant, found that defendant's plea had a factual basis, and determined that he pleaded guilty "freely and voluntarily." Under *Tollet*, defendant cannot now raise an "independent claim" of alleged ineffective assistance that occurred prior to the entry of his guilty plea. *Tollet*, 411 U.S. at 267; see also *People v. Ivy*, 313 Ill. App. 3d 1011, 1017 (2000) (defendant barred from arguing in postconviction petition that trial counsel was ineffective for failing to file motion to suppress, as the alleged failure "occurred prior to the entry of defendant's guilty plea").

¶ 20 Even if this court accepted the premise that counsel's performance at the hearing on the motion to suppress affected the voluntariness of defendant's guilty plea, however, defendant could not establish a claim for ineffective assistance. To demonstrate a claim of ineffective assistance of counsel at the second stage of postconviction proceedings, a defendant must make a substantial showing that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *People v. Tate*, 2012 IL 112214, ¶¶ 18-19. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 21 Here, defendant has not made a substantial showing that he incurred prejudice from counsel's failure to introduce the inventory report at the suppression hearing. That is, defendant has not demonstrated a "reasonable probability" that, but for counsel's alleged error, the trial court would have suppressed Officer Torres' testimony, and, as a result, defendant would not have pleaded guilty. *People v. Harris*, 206 Ill. 2d 293, 307 (2002) (at second stage of

postconviction proceedings, defendant has the burden to establish "a reasonable probability that the outcome of trial would have been different" but for counsel's performance).

¶ 22 At the suppression hearing, Officer Torres testified that he curbed the van that defendant was driving after observing it drive the wrong way on a one-way street. He approached the driver's side window with a flashlight and observed defendant in the driver's seat, leaning forward with a firearm in his right hand, and appear to place the firearm "inside the steering wheel." After detaining defendant, Officer Torres entered the van and observed that the "bottom part of the dashboard had been removed" to the right of the steering column, exposing metal and wires. The firearm was inside the dashboard, facing downward, with its handle toward Officers Torres. He denied that the photograph of an intact dashboard tendered by defense counsel depicted the van's dashboard as it appeared on the night of the incident, and provided a detailed explanation of how the photograph differed from his observations. The trial court found that Officer Torres was "extremely, extremely credible" and "very honest."

¶ 23 In view of Officer Torres' testimony, the inventory report, at most, would have created a conflict in the evidence for the trial court to resolve in ruling on the motion to suppress. See *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001) (at a hearing on a motion to suppress, the trial court "is in a superior position to determine and weigh the credibility of witnesses, observe the witnesses' demeanor, and resolve conflicts in the witnesses' testimony"). However, we cannot say that this conflict would have produced a different outcome at the suppression hearing. Notably, the inventory report does not indicate whether the term "dashboard" refers to the same area of the van that Officer Torres described. Although Officer Torres used the term "dashboard," he specifically referred to a "bottom" area to the right of the steering column. In the photographs submitted by defendant, which this court has viewed, that portion of the vehicle is

partially obscured by shadows. Moreover, although defendant speculates that the testimony of the person who created the report or maintained the impound station's records could have been useful in admitting the report into evidence or explaining its content, he has not proffered either individual's affidavit. Based on the foregoing, it is not apparent that the trial court would have granted defendant's motion to suppress Officer Torres' testimony but for defense counsel's failure to introduce the inventory report at the hearing. Therefore, defendant has not demonstrated a reasonable probability that he would not have pleaded guilty had counsel introduced the inventory report, and the trial court did not err in dismissing his postconviction claim.

¶ 24 Next, defendant contends that the AHC statute violates due process and is facially unconstitutional because it punishes possession of a firearm regardless of whether the offender has a Firearm Owners Identification (FOID) card. According to defendant, possession of a firearm is unlawful only if an individual lacks a FOID Card. Because it is possible that, under the FOID Card Act (430 ILCS 65/1 *et seq.* (West 2008)), an applicant might obtain a FOID card despite having predicate convictions under the AHC statute, defendant reasons that the AHC statute criminalizes both the lawful and unlawful possession of firearms. Consequently, he maintains that the offense of AHC neither requires a culpable mental state nor describes a criminal act, and, therefore, does not rationally serve the purpose of punishing recidivist offenders for committing firearm crimes.

¶ 25 Defendant raises his constitutional challenge for the first time on appeal from the trial court's dismissal of his postconviction petition, and, therefore, has forfeited this claim. *People v. Jones*, 211 Ill. 2d 140, 149-50 (2004) ("defendant's contentions of constitutional error, not raised in her original [postconviction] petition, were forfeited on appeal"). As our supreme court has explained, "our appellate court is not free, as [the supreme] court is under its supervisory

authority, to excuse, in the context of postconviction proceedings, an appellate waiver cause by the failure of a defendant to include issues in his or her postconviction petition." *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Even if defendant had not forfeited this issue, however, his argument would fail on the merits. In *People v. Fulton*, 2016 IL App (1st) 141765 and *People v. Johnson*, 2015 IL App (1st) 133663, this court rejected identical challenges to the AHC statute and we find no reason to depart from either holding in the case at bar.

¶ 26 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 27 Affirmed.