

No. 1-14-3561

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. 13 CR 6361
)	
RALPH GRAJEK,)	Honorable
)	Colleen Ann Hyland,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 **Held:** We affirm the dismissal of defendant’s postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). We reject defendant’s contention that he made a substantial showing that his guilty-plea counsel was ineffective for erroneously advising him that he was eligible to acquire day-for-day good-conduct sentencing credit before he entered his guilty plea. Defendant’s retained postconviction counsel rendered reasonable assistance as contemplated by the Act.

¶ 2 Defendant, Ralph Grajek, appeals from an order of the circuit court granting the State’s motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing

Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the circuit court erred in dismissing his petition because he made a substantial showing that his guilty-plea counsel was ineffective. He claims counsel was ineffective for erroneously informing him that he was eligible to acquire day-for-day good-conduct sentencing credit, which, combined with his 194 days of presentence custody credit, would require him to serve no more than two years of his negotiated five-year sentence. Defendant was statutorily required to serve at least 85% of his sentence for aggravated domestic battery. He argues that counsel's advice induced him to enter a guilty plea. Defendant also contends that postconviction counsel did not provide reasonable assistance because the affidavits he filed in support of the petition did not sufficiently show that he would not have pled guilty if not for guilty-plea counsel's inaccurate advice. We affirm.

¶ 3 Defendant was arrested on February 25, 2013, and subsequently charged by indictment with three counts of home invasion, two counts of residential burglary, five counts of aggravated domestic battery, six counts of aggravated battery and one count of criminal damage to property. Defendant, through counsel, initially entered a plea of not guilty. On September 4, 2013, defendant entered into a negotiated plea of guilty to residential burglary and aggravated domestic battery in exchange for two concurrent terms of five years' imprisonment.

¶ 4 At the plea hearing, the court admonished defendant of the possible penalties for each offense. The court also admonished him that in order to plead guilty he must give up his right to a jury and bench trial. Defendant acknowledged understanding those rights and waived them freely and voluntarily. The parties then stipulated to the factual basis for defendant's plea. The court found defendant understood the nature of the charges against him, the possible penalties for each offense, that there was a sufficient factual basis for the plea and that defendant was freely

and voluntarily pleading guilty. Defendant waived his right to a presentence report, and the court sentenced him to concurrent terms of five years' imprisonment. Defendant did not appeal.

¶ 5 On January 31, 2014, defendant filed a postconviction petition under the Act, arguing that his privately retained guilty-plea counsel was ineffective. Specifically, defendant alleged that he was induced by counsel to withdraw his not-guilty plea and enter a plea of guilty upon her representation to him that: he would be sentenced to a term of five years' imprisonment; he would be eligible to receive day-for-day good-conduct sentencing credit; and, as a result of this credit, combined with his presentence custody credit, he would be incarcerated for less than two years. Defendant first learned that he was not eligible for day-for-day sentencing credit when he arrived in prison and met with a counselor, who informed him that he would receive good-conduct sentencing credit at a rate of only 4.5 days per month to be applied to his sentence for aggravated domestic battery, because he was statutorily required to serve at least 85% of that sentence. Upon learning that he was not eligible for the day-for-day credit, defendant contacted his family, who contacted defendant's counsel and asked her to take action by moving to vacate his sentence or file a notice of appeal. Defendant alleged that counsel refused to take any action and advised his family not to file a notice of appeal on his behalf. Defendant also alleged that, had he been properly advised by his counsel regarding the sentencing credit, he would have stood on his plea of not guilty and proceeded to trial.

¶ 6 In support of his petition, defendant attached the affidavits of his wife, Paulette Marie Rossiter, and daughter, Ashley Marie Grajek. Defendant also attached his own affidavit. In her affidavit, Paulette averred that she hired Michelle T. Forbes to represent defendant. Forbes represented defendant from the date of his arrest to the date of his guilty plea, September 4, 2013. On that date, Forbes advised Paulette that, based on her conversations with the assistant

state's attorney and the judge, defendant should enter a guilty plea. Forbes told Paulette that if defendant entered a guilty plea he would: receive a sentence of five years' imprisonment; be eligible for day-for-day good-conduct sentencing credit; receive credit for the days he spent in presentence custody; and, as a result, be released from prison in two years.

¶ 7 In her affidavit, Ashley averred that she was present during conversations between Paulette and Forbes at the courthouse. On the date of defendant's guilty plea, Forbes told Paulette and Ashley that she had spoken to the assistant state's attorney and the judge and would advise defendant to enter a guilty plea. Forbes also told Paulette and Ashley that, if defendant pled guilty, he would receive a five-year sentence, day-for-day good-conduct sentencing credit, and credit for the days he spent in presentence custody.

¶ 8 In his affidavit, defendant averred that Forbes told him that she "would not go to trial with [him]" and that it would not be in his best interest to go to trial because he would lose and be sentenced to 18 years' imprisonment. Defendant also averred that Forbes failed to contact potential witnesses, whose names and addresses he provided to her. Defendant further averred that, on the date of his guilty plea, Forbes told him that it was in his best interest to plead guilty and accept the State's offer of five years' imprisonment. She also told him that he would receive day-for-day sentencing credit and that because of this credit, combined with his credit for the time he spent in presentence custody, he would be released from prison in two years. After learning that he was statutorily required to serve at least 85% of his sentence for aggravated domestic battery, defendant contacted Paulette and instructed her to contact his attorney to "take some action as necessary to bring [his] case back to court to get the sentence [he] agreed to." Counsel refused to do so and told Paulette not to file a notice of appeal.

¶ 9 On April 4, 2014, the trial court advanced defendant's petition for further proceedings under the Act. On July 11, 2014, the State filed a motion to dismiss the petition, arguing, in relevant part, that defendant's claim of ineffective assistance of trial counsel failed under both prongs of the *Strickland* analysis. Specifically, the State argued that defendant's claim fails because counsel's alleged misstatements regarding the day-for-day sentencing credit do not implicate constitutional protections that are cognizable during postconviction proceedings.

¶ 10 In his response to the State's motion, defendant argued that, as a result of counsel's ineffective assistance, he was denied "the shield and protection of the 6th Amendment to the Constitution of the United States" because counsel failed to interview potential witnesses and was unaware of the law regarding the nature of defendant's sentence.

¶ 11 After hearing arguments from the parties, the court granted the State's motion to dismiss. In its written order, the court, relying on *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), found that defendant was barred from raising an independent claim of a deprivation of a constitutional right that occurred prior to the entry of his guilty plea because a plea represents a break in the chain of events that preceded it.

¶ 12 On appeal, defendant first contends that his postconviction petition made a substantial showing that his guilty-plea counsel was ineffective for providing him with inaccurate legal advice regarding the day-for-day good-conduct sentencing credit and the amount of his agreed-upon sentence that he would have to serve. Defendant argues that counsel's advice induced him to plead guilty.

¶ 13 The Act generally establishes a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). At the first stage, the court may summarily dismiss the petition

without any responsive pleading by the State. *Id.* at 379. If a petition is not summarily dismissed, it proceeds to the second-stage where it is docketed by the court and the State must either answer or move to dismiss the petition. *Id.*

¶ 14 The case at bar involves the second-stage of postconviction proceedings. The dismissal of a petition at this stage is warranted only when the allegations in the petition, liberally construed in favor of defendant and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *Id.* at 382. We review *de novo* the circuit court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Id.* at 389.

¶ 15 It is well-established that a guilty plea represents "a break in the chain of events which has preceded it in the criminal process," and therefore a defendant "may only attack the voluntary and intelligent character of the guilty plea." *Tollett*, 411 U.S. at 267. Here, defendant essentially argues that, as a result of counsel's advice regarding the day-for-day credit, his plea was not entered voluntarily and intelligently.

¶ 16 A challenge to a guilty plea which alleges ineffective assistance of counsel is subject to the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). First, counsel's conduct is deficient under *Strickland* if she failed to ensure that the defendant entered the guilty plea voluntarily and intelligently. *Rissley*, 206 Ill. 2d at 457. Second, to establish prejudice from counsel's deficient performance, the defendant must show that there is a " 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " *Id.* (quoting *Hill*, 474 U.S. at 59). Unless the defendant can show both deficient performance and prejudice, we cannot conclude that he received ineffective assistance of counsel. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). As such, if a claim of ineffective assistance can be disposed of because the

defendant cannot show prejudice, we need not determine whether counsel's performance was deficient. *Id.*

¶ 17 To establish prejudice under these circumstances, the defendant must show that there is a reasonable probability that, absent counsel's error, he would have pleaded not guilty and insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). However, a bare allegation that the defendant would have pled not guilty and insisted on going to trial if counsel had not been deficient is not enough to establish prejudice. *Id.* Rather, "the defendant's claim must be accompanied by a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36. Under *Hill*, the question of whether counsel's deficient performance caused the defendant to plead guilty depends to a large extent on predicting whether the defendant likely would have been successful at trial. *Id.* at 336; see also *Hill*, 474 U.S. at 59.

¶ 18 Here, defendant's bare allegation in his postconviction petition that, had counsel properly advised him of the sentencing credit, he would have pled not guilty and insisted on going to trial is insufficient to establish prejudice. Initially, we observe that although in his petition defendant alleges that, had he been properly advised by his counsel regarding the sentencing credit, he would have persisted with his plea of not guilty and proceeded to trial, in his affidavit defendant does not aver that he would have gone to trial had counsel properly advised him of the sentencing credit. Rather, in his affidavit, defendant stated that, upon learning he was not eligible for day-for-day sentencing credit, he contacted his wife and instructed her to contact his attorney "to take some action as necessary to bring [his] case back to court to get the sentence [he] agreed to." This statement is not synonymous with a reasonable probability that, absent counsel's error, he would have pleaded not guilty and insisted on going to trial.

¶ 19 More importantly, defendant's allegation of ineffective assistance of counsel is not accompanied by a claim of innocence or an articulation of a plausible defense that could have been raised at trial. This is not surprising, given the stipulated to facts supporting defendant's guilty plea, which show defendant likely would not have been successful at trial. These facts established that on February 17, 2003, defendant forcefully entered the home of Karen Walton, his ex-girlfriend, and punched her, causing her to fall down and injure her shoulder.

¶ 20 According to the stipulated facts, on the night in question, Walton and her friend, Linda Oboikovitz, arrived at Walton's house located at 6049 West 128th Street and saw defendant seated inside his truck which was parked in the driveway of the house. Walton and Oboikovitz went inside the house. Shortly thereafter, defendant knocked on the front door. After Walton refused to open the door, defendant forced the door open with his shoulder, damaging the frame of the doorway.

¶ 21 Once inside the house, defendant ran towards Walton, who was standing in the kitchen reaching for a telephone. Defendant pulled the phone off the wall and hit Walton with his fist causing her to fall to the ground and injure her shoulder. Walton received treatment for the injury at a hospital and her medical records would show that she suffered great bodily harm as a result of being struck by defendant. Walton and Oboikovitz provided an assistant state's attorney with a handwritten statement of the incident. Defendant admitted to responding officers that he broke through the door and "ripped" the phone off the wall. In addition, defendant left voice mails for Walton in which he discussed breaking down the front door. Given these facts, and defendant's failure to articulate a plausible defense, we cannot say that defendant would have been likely successful at trial. Accordingly, defendant cannot establish that he was

prejudiced as a result of counsel's allegedly deficient performance and thus he has failed to make a substantial showing of ineffective assistance of guilty-plea counsel.

¶ 22 Anticipating our reliance on *Hall*, defendant argues that the rule announced therein, regarding the requirements for establishing prejudice, should be confined to the facts presented in that case, where counsel's deficient performance caused the defendant to erroneously believe that his case was weak if he proceeded to trial. Defendant argues that where, as here, counsel's inaccurate advice concerned a collateral sentencing consequence, not the strength of his case at trial, there is no need for this court to predict a winning trial strategy because any such strategy was not the reason that he accepted the plea offer. Defendant states that "this court need not hold [him] to the strictures of *Hall* where his allegations and the record bear little relation to any potential trial strategy." In support of this proposition, defendant maintains that "such a deviation from the rigid requirements of *Hall* is not new to this court" and cites to Justice Holdridge's special concurrence in part and dissent in part in *People v. Guzman*, 2014 IL App (3rd) 090464, ¶ 80, and this district's decision in *People v. Dodds*, 2014 IL App (1st) 122268. See *People v. Guzman*, 2015 IL 118749 (affirming this court's judgment upholding the denial on direct appeal of the defendant's motion to withdraw his guilty plea because failure to admonish the defendant of potential immigration consequences did not affect the voluntariness of the plea or violate due process).

¶ 23 We find *Guzman* and *Dodds* readily distinguishable from the case at bar. In *Guzman*, Justice Holdridge in his special concurrence in part and dissent in part noted that it made little sense to require a defendant, who was faced with the prospect of deportation as a result of his guilty plea, to articulate a plausible defense at trial in order to establish prejudice from guilty-plea counsel's failure to admonish him of the deportation consequence. See *Guzman*, 2014 IL

App (3rd) 090464, ¶¶ 78-80 (Holdridge, J., specially concurring in part and dissenting in part). Justice Holdridge reasoned that such a defendant may be willing to risk a longer sentence following a trial if there was even a slim chance that he would be acquitted and avoid deportation altogether. *Id.* Here, however, unlike *Guzman*, defendant was not facing potential deportation as a result of his plea and had no reason to risk a longer prison sentence so as to excuse his failure to articulate a plausible defense at trial.

¶ 24 In *Dodds*, this court, while noting that it was persuaded by Justice Holdridge’s rationale and “believe[d] that it would equally apply to a defendant faced with the prospect of lifetime registration as a sex offender pursuant to the [Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2000))],” found that it was nevertheless bound by the dictates of our supreme court in *Hall*. *Dodds*, 2014 IL App (1st) 122268, ¶¶ 41-46. Here, not only are we bound by the dictates of our supreme court in *Hall*, but defendant has also failed to identify any potential collateral consequence of his guilty plea so as to invoke the rationale employed by Justice Holdridge and justify relaxing *Hall*’s prejudice requirements.

¶ 25 Defendant nevertheless argues that *Hall* does not foreclose a finding of a substantial constitutional violation in this case because adherence to the rule announced in *Hall* would result in fundamental unfairness to defendant’s plea bargaining process and be counter to United States Supreme Court precedent requiring a less stringent standard to establish a claim of ineffective assistance of guilty-plea counsel. In support of this argument, defendant cites *Missouri v. Frye*, 132 S. Ct. 1399 (2012) and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). In doing so, defendant acknowledges that both *Frye* and *Cooper* involved plea scenarios different than his own, but argues that both cases caution against a rigid consideration of what could have been had plea negotiations proceeded with competent advice from counsel.

¶ 26 We are not persuaded by *Frye* and *Cooper*, where the Supreme Court’s standard for determining counsel’s effectiveness is not applicable to the case at bar given that we are not considering prejudice in the context of a plea offer lapsing or being rejected by defendant as a result of counsel’s deficient performance. See *Frye*, 132 S. Ct. at 1404 (finding counsel deficient for failing to advise defendant of the prosecutor’s plea offers, one to a felony and one to a misdemeanor, causing the defendant to proceed with an open plea); *Cooper*, 132 S. Ct. 1390-91 (finding the defendant was prejudiced by counsel’s deficient performance in advising him to reject a plea offer and go to trial). Rather, here, unlike in *Frye* and *Cooper*, the operative consideration with regard to prejudice was whether, absent counsel’s alleged advice regarding the sentencing credit, defendant would have insisted on going to trial. As mentioned, in order to establish this, defendant was required to articulate a plausible defense that could have been raised at trial thus aiding this court in predicting whether he likely would have been successful at trial. Defendant’s failure to do so defeats his claim of ineffective assistance.

¶ 27 In reaching this conclusion, we decline defendant’s invitation to employ the “rational under the circumstances” standard for determining prejudice, which he claims is the new standard set forth by the Supreme Court in *Padilla v. Kentucky*, 599 U.S. 356 (2010). Initially, and most importantly, we note that in *Padilla*, unlike here, the Supreme Court was analyzing a claim of ineffective assistance of guilty-plea counsel in the context of counsel’s failure to advise the defendant of the deportation consequences of his plea. *Padilla*, 599 U.S. at 366-68. This aside, in *Padilla*, the Supreme Court specifically declined to consider whether the defendant had shown prejudice as a result of his guilty-plea counsel’s erroneous advice regarding the deportation consequences of his guilty plea. See *Id.* at 369, 374-75. Rather, the Supreme Court remanded the matter and left the prejudice determination to the state courts of Kentucky. *Id.* In

doing so, the *Padilla* court noted that in order to succeed on his claim the defendant would have to show that it would have been rational for him, under the circumstances, to reject his plea. *Id.* at 371-72. We again point out that those circumstances in *Padilla* were the deportation consequences of the defendant's plea.

¶ 28 After *Padilla*, this court has considered similar claims of ineffective assistance of guilty-plea counsel based on counsel's failure to advise a defendant of the deportation consequences of a guilty plea. See, e.g., *People v. Pena-Romero*, 2012 IL App (4th) 110780; *People v. Deltoro*, 2015 IL App (3d) 130381. Defendant cites these cases to encourage us to adopt the "rational under the circumstances" standard announced in *Padilla* and apply it to this case. However, as mentioned, these cases, like *Padilla*, deal with the narrow question of whether guilty-plea counsel is required to advise a defendant of the potential deportation consequences of a guilty plea, and therefore have no instructive value to this case.

¶ 29 Defendant next contends that his postconviction counsel did not provide reasonable assistance because he filed affidavits that did not sufficiently show that defendant would not have pled guilty and would have insisted on going to trial had his guilty-plea counsel given him accurate advice regarding the day-for-day sentencing credit.

¶ 30 There is no constitutional right to the assistance of counsel during postconviction proceedings. *People v. Cotto*, 2016 IL 119006, ¶ 29. Rather, our supreme court has explained that "[t]he right to assistance of counsel in postconviction proceedings is a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided by the Post-Conviction Hearing Act." *Id.* (quoting *People v. Hardin*, 217 Ill. 2d 289, 299 (2005)). Our supreme court has labeled that level as "reasonable" assistance of postconviction counsel. *Id.* at ¶ 30; see also

Hardin, 217 Ill. 2d at 299 and *People v. Owens*, 139 Ill. 2d 351, 358-59 (1990). This standard applies to both retained and appointed counsel. *Cotto*, 2016 IL 119006, ¶ 42.

¶ 31 Because there is no constitutional right to effective assistance of postconviction counsel the reasonable level of assistance provided for by the Act is “less than that afforded by the federal or state constitutions.” *Id.* at ¶ 45 (quoting *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)). At a minimum, postconviction counsel’s reasonable assistance includes the duty to ensure that a defendant’s claims are adequately presented to the circuit court. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18.

¶ 32 After examining the record in this case, we find defendant’s retained postconviction counsel provided the requisite reasonable assistance contemplated by the Act. The record shows that counsel drafted a petition raising detailed claims of ineffective assistance of guilty-plea counsel based on counsel’s alleged failure to communicate with defendant, contact witnesses and independently investigate the facts forming the basis of defendant’s indictment. Postconviction counsel also alleged that guilty-plea counsel erroneously advised defendant that he would be eligible for day-for-day good-conduct sentencing credit, and that, as a result of this credit, combined with his presentence custody credit, defendant would be incarcerated for less than two years. Postconviction counsel argued that guilty-plea counsel’s advice induced defendant to enter the guilty plea. In support of this claim, postconviction counsel attached three affidavits to defendant’s petition. These affidavits showed that guilty-plea counsel informed defendant that he would be eligible for day-for-day sentencing credit and that defendant did not learn that he was statutorily required to serve at least 85% of his sentence until he arrived in prison.

¶ 33 The circuit court did not dismiss defendant’s petition for lack of supporting documentation or postconviction counsel’s alleged failure to include in defendant’s affidavit the

claim that defendant would have insisted on going to trial had his guilty-plea counsel given him accurate advice regarding the day-for-day sentencing credit. Rather, the court, relying on *Tollett*, 411 U.S. at 267, dismissed the petition because it found that defendant was barred from raising an independent claim of a deprivation of a constitutional right that occurred prior to the entry of his guilty plea given that a plea represents a break in the chain of events that preceded it. Under these circumstances, we cannot say that postconviction counsel was in any way deficient in his performance. Accordingly, we conclude that defendant received the reasonable assistance of counsel afforded to him by the Act.

¶ 34 Defendant nevertheless, essentially, argues that postconviction counsel did not provide reasonable assistance because he should have filed affidavits that were legally sufficient to show that guilty-plea counsel's performance prejudiced defendant and thus resulted in a violation of his constitutional rights. Defendant's speculative argument that, had postconviction counsel filed such affidavits the outcome of the postconviction proceeding would have been different, rests on the self-serving and unsupported premise that defendant informed counsel that he would have insisted on going to trial, despite his inability to articulate any potential defense. We will not reverse the circuit court on this basis. As such, we find that the court did not err in granting the State's motion to dismiss defendant's petition for failure to make a substantial showing of ineffective assistance of guilty-plea counsel.

¶ 35 We affirm the second-stage dismissal of defendant's postconviction petition.

¶ 36 Affirmed.