2017 IL App (2d) 151090-U
No. 2-15-1090
Order filed April 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GLEN A. YAWORSKI, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 05-CF-661 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition: defendant did not make a substantial showing that trial counsel's failure to challenge the PSI resulted in a greater classification of his offense, and, to the extent that such failure resulted in a greater sentence, that issue was moot.

¶ 2 Following a jury trial in the circuit court of De Kalb County, defendant, Glenn A. Yaworski, was found guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2004)).[1] The offense occurred on October 30, 2005. The trial court imposed a

[1] Defendant was also convicted of driving while his license was revoked (DWLR) (625

Class 2 felony sentence of 3½ years' imprisonment pursuant to section 11-501(c-1)(3) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501(c-1)(3) (West 2004)). During the relevant time frame, section 11-501(c-1)(3) enhanced a fourth or subsequent DUI to a nonprobationable Class 2 felony if the offense occurred when the offender's driving privileges were suspended or revoked for a violation of section 11-501(a). We affirmed defendant's conviction on direct appeal. *People v. Yaworski*, 2011 IL App (2d) 090785. In 2012, while on mandatory supervised release (MSR) following completion of the prison term, defendant filed a *pro se* postconviction petition, alleging that he had "discovered documentation *** that several of what were listed in his presentence [investigation] report [(PSI)] as being prior convictions of his were in fact attributable to other individuals." Defendant claimed that the documentation established that he was denied his right to the effective assistance of counsel. The trial court appointed the public defender to represent defendant, the State moved to dismiss the petition (which counsel had not amended), and the trial court granted the motion. We reversed the dismissal and remanded for further proceedings, holding that postconviction counsel labored under a conflict of interest. *People v. Yaworski*, 2014 IL App (2d) 130327, ¶¶ 8-10 (*Yaworski II*). The trial court appointed different counsel for defendant on remand. Defendant's new attorney filed an amended postconviction petition on defendant's behalf. The State moved to dismiss the amended petition, the trial court granted the motion, and this appeal followed. We affirm.

¶ 3 We begin with a brief review of the legal principles governing proceedings under the Act:

> "The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit.' [Citation.] The court makes an independent assessment as to

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ILCS 5/6-303(a) (West 2004)), but that conviction is not at issue in this appeal.

> whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. [Citation.] The court considers the petition's 'substantive virtue' rather than its procedural compliance. [Citation.] If the court determines the petition is frivolous or patently without merit, the court dismisses the petition. [Citation.] If the petition is not dismissed, it will proceed to the second stage. [Citation.]
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> At the second stage, the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary. [Citation.] The State may then file a motion to dismiss the petition. [Citation.] If the State does not file a motion to dismiss or if the court denies the State's motion, the petition will proceed to the third stage and the court will conduct an evidentiary hearing on the merits of the petition. [Citation.]" *People v. Hommerson*, 2014 IL 115638, ¶¶ 7-8.

To survive a second-stage motion to dismiss, the petition must make a substantial showing of a constitutional violation. *People v. York*, 2016 IL App (5th) 130579, ¶ 16.

¶ 4 Defendant's amended petition alleged that trial counsel should have investigated the accuracy of the criminal history recited in the PSI. According to the amended petition, had trial counsel done so, he would have been able to document errors in the PSI and to present a "valid defense sentencing argument." The amended petition thus alleged that trial counsel was ineffective. Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984), which requires a showing that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

¶ 5 At this juncture, we note that, in *Yaworski II*, we rejected the State's argument that, because defendant had fully served his sentence, his appeal was moot. The State maintained that " '[t]he only ultimate relief possible here for defendant would be a reduction of his sentence, but having already served that sentence, no court could give defendant effectual relief.' " *Yaworski II*, 2014 IL App (2d) 130327, ¶ 4. We disagreed, reasoning that "[f]urther postconviction proceedings could conceivably result in reduction of the degree of the offense, which stands now as a Class 2 felony." *Id.* We noted that an exception to the mootness doctrine permits appellate review of an order where " 'collateral consequences of the order could return to plague the [defendant] in some future proceeding or could affect other aspects of the [defendant's] life.' " *Id.* (quoting *In re Dawn H.*, 2012 IL App (2d) 111013, ¶ 13). We further noted that defendant's conviction of a Class 2 felony "could 'plague' [him] in some future proceeding. For example, it might make him eligible for an extended-term sentence if he is convicted of a criminal offense in the future." *Id.* Having concluded that defendant did not receive conflict-free representation in the postconviction proceedings, we declined to consider whether defendant's *pro se* petition made a substantial showing of a constitutional violation. *Id.* ¶ 14.

¶ 6 Defendant has now had the benefit of conflict-free counsel and has failed to make a substantial showing that ineffective assistance of trial counsel led to the enhancement of his offense to a Class 2 felony. The section of the PSI detailing defendant's criminal history consisted of 41 entries and recited numerous convictions, including six DUI convictions prior to October 30, 2005. At his sentencing hearing, defendant contended that 24 of the entries either did not pertain to him at all or were otherwise inaccurate. It is undisputed that one of the six DUI convictions was reversed. In addition, defendant questioned whether two other DUI convictions were correct. But the number of DUI convictions remaining—three—was still

sufficient to enhance the October 30, 2005, DUI to a nonprobationable Class 2 felony. To avoid that outcome, trial counsel would have needed to successfully challenge at least *four* of the six prior DUI convictions. The amended petition indicates that, had he investigated defendant's criminal history, trial counsel "would have discovered that *several* of the listed crimes should not have been included in the [PSI]." (Emphasis added.) The amended petition does not specify *which* crimes should not have been included in the PSI. Without a specific and properly supported allegation that at least four prior DUI offenses were listed in error (which would support defendant's only nonmoot claim), the amended petition would not make a substantial showing of prejudice under *Strickland, i.e.* that there is a reasonable probability that trial counsel's allegedly deficient performance led to the enhancement of the offense to a Class 2 felony.[2]

¶ 7 Thus, what the State argued in *Yaworski II* is *now* clearly correct. Assuming, *arguendo*, that the amended petition makes a substantial showing of a violation of defendant's right to the effective assistance of counsel at sentencing, only moot questions are presented. More than five years ago, defendant had completed his prison term and was serving a two-year MSR term. It is evident that defendant has now completed his term of MSR. Accordingly, any question concerning the length of defendant's sentence is moot.

¶ 8 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as

[2] We hasten to add that postconviction counsel's failure to include such an allegation does not establish that counsel's performance was inadequate. Rather, we must presume that there was no basis for such an allegation. See *People v. Malone*, 2017 IL App (3d) 140165, ¶¶ 10-11.

costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 9 Affirmed.