NOTICE
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2017 IL App (5th) 140547-U

NO. 5-14-0547

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 09-CF-689
	)	
CHIVAS J. DAY,	)	Honorable
	)	Zina Cruse,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing the postconviction sentence-enhancement claim at the second stage where the defendant failed to make a substantial showing of a constitutional violation of his right to effective assistance of counsel.

¶ 2 BACKGROUND

¶ 3 On December 5, 2008, the defendant, Chivas J. Day, was driving westbound on the Martin Luther King Bridge in East St. Louis, Illinois, when he collided, head on, with Matthew Cole's (Cole) vehicle. Cole was pronounced dead at the scene. The defendant sustained extensive injuries and was immediately transported to the hospital where samples of his blood and urine were taken. The urine analysis indicated the presence of

methylenedioxymethamphetamine (MDMA), methylenedioxyamphetamine (MDA), and cannabis.

¶ 4 On October 21, 2009, the defendant was charged with the following four counts: aggravated driving under the influence (DUI) based on his unlawful use or consumption of MDMA (count I) (625 ILCS 5/11-501(d) (West 2006)); aggravated DUI based on his unlawful use or consumption of MDA (count II) (625 ILCS 5/11-501(d) (West 2006)); aggravated DUI based on his unlawful use or consumption of cannabis (count III) (625 ILCS 5/11-501(d) (West 2006)); and reckless homicide (count IV) (720 ILCS 5/9-3(a) (West 2006)).

¶ 5 On April 7, 2010, the defendant entered a plea of guilty to counts I, III, and IV in exchange for the State's dismissal of count II. In providing the circuit court with the factual basis for the charges, the State represented that the evidence would show the following. On December 5, 2008, an Illinois State Police (ISP) officer arrived at the scene of a three-vehicle collision east of the Illinois-Missouri state line on the Martin Luther King Bridge. The crash scene investigation revealed that the defendant was traveling westbound at approximately 100 miles per hour when he passed three vehicles in an attempt to pass another westbound tractor trailer. As the defendant attempted to pass the tractor trailer, his vehicle collided head on with Cole's vehicle. Cole was pronounced dead at the scene. Following the collision, the ISP officer discovered that the defendant had cannabis in his pants pocket. The ISP officer then located a partially burnt cannabis cigarette in the defendant's vehicle. The State would also admit into evidence the defendant's urine analysis results, which indicated the presence of controlled substances, as alleged in the charges. The circuit court informed the defendant

of the possible sentencing range and then accepted the defendant's guilty plea. The court ordered a presentence investigation report and set the matter for a sentencing hearing.

¶ 6 On June 10, 2010, the sentencing hearing took place. The State informed the circuit court that under the one-act, one-crime doctrine, the defendant could only be sentenced to one count as it pertained to counts I, II, and III. The State elected to proceed under count III, aggravated DUI from the unlawful use or consumption of cannabis, a nonprobationable offense with a range of punishment from 3 to 14 years' imprisonment. The court sentenced the defendant to 11 years in prison to be served concurrently on counts III and IV, with one year mandatory supervised release (MSR). However, the Illinois Department of Corrections later revised the mittimus to reflect a two-year MSR period–the correct time period for a Class 2 felony.

¶ 7 Subsequently, the defendant filed a *pro se* motion asking the circuit court to reconsider his sentence. The defendant alleged that his plea counsel, Rodney H. Holmes (Holmes), was incompetent at sentencing because Holmes informed him that he would "get probation or 3 to 5 years." Holmes then moved to withdraw as counsel for the defendant, which the court granted.

¶ 8 On August 9, 2010, appointed counsel for the defendant filed an amended motion to reconsider sentence. The motion alleged ineffective assistance of counsel where Holmes failed to investigate and present evidence in mitigation regarding the defendant's physical and medical conditions; failed to request a continuance for the sentencing hearing to secure attendance of two medical doctors; failed to object to the State's argument at sentencing that

the court should consider the factor in aggravation that the defendant's conduct caused Cole's death; and that the court improperly considered this factor in aggravation.

¶ 9 On September 29, 2010, the circuit court held a hearing on the defendant's motion to reconsider his sentence. Holmes testified to the following. Holmes told the defendant that "because this was a Strict Liability Statute and substances were in his urine, that he would lose at trial." Given that the evidence showed he had used controlled substances prior to the collision, Holmes advised the defendant to "make a plea to the Court to negate the aggravated DUI [charges] that carried a much higher penalty." Holmes subpoenaed the defendant's medical doctors and obtained his medical records for the sentencing hearing; however, the sentencing hearing was continued several times. The subpoenaed medical doctors failed to appear at the final sentencing hearing. As a result, the defendant was called to testify as to the extent of his injuries. Holmes never promised the defendant a particular sentence because it was a "blind plea," which would be left to the court's discretion as to an appropriate sentence. However, Holmes did inform him that the maximum sentence was 14 years. The court determined that Holmes' representation was not ineffective. The defendant's motion to reconsider sentence was denied. The defendant did not file a direct appeal.

¶ 10 On July 28, 2011, the defendant filed a *pro se* postconviction petition alleging several claims of ineffective assistance of counsel by Holmes. In particular, the defendant argued that he "would not have pled guilty had he known that he would not be automatically subjected to an 'enhancer' as his defense counsel had informed him" because he was under a "clear and evident misapprehension of the facts and law." He also alleged that "defense counsel *** use[d] false information to 'scare' the petitioner by telling him 'go to trial Mr.

Day and you will [lose] on all charges and the time will be enhanced, meaning you will get much more time than the case currently even carries[.]' " Thus, he believed that pleading guilty was his only option. The circuit court determined that the defendant had alleged the gist of a constitutional violation. The court appointed postconviction counsel to represent him at the second stage proceedings.

¶ 11 On April 4, 2012, postconviction counsel filed an amended petition for postconviction relief. The petition alleged that the defendant was denied effective assistance of counsel where Holmes failed to: (1) interview Latoy Williams (Williams), an individual identified as a potential key witness who would have provided the defendant with a viable involuntary intoxication defense based on her knowledge that a dancer at a strip club "slipped a powered drug into Petitioner's drink" right before the collision; (2) file a motion to suppress the blood and urine samples obtained without the defendant's consent; (3) present evidence in mitigation at the sentencing hearing, which included two medical doctors who would have testified that imprisonment would endanger the defendant's life due to the extensive injuries he sustained from the collision; and (4) that he erroneously informed the defendant that he "would automatically be subjected to an 'enhancer' " if he was found guilty at trial. No affidavits were attached to the amended postconviction petition.

¶ 12 The State filed an answer neither admitting nor denying the allegations of ineffective assistance of counsel in the defendant's amended postconviction petition. Shortly thereafter, the circuit court granted the State leave to withdraw its answer and file a motion to dismiss the defendant's amended petition for postconviction relief. In the motion to dismiss, the State asserted that the defendant "knowingly and voluntarily pleaded guilty to the charges of

aggravated driving under the influence" after he was admonished, on the record, of the possible penalties. The State also argued that Holmes' decision not to file a motion to suppress was trial strategy. Alternatively, the State contended that no actual basis supported the motion to suppress the blood and urine samples because the defendant had voluntarily decided to plead guilty following the court's full admonishment of all possible penalties.

¶ 13 On October 22, 2013, following a hearing on the State's motion to dismiss, the circuit court dismissed several of the defendant's claims at the second stage. Specifically, the court dismissed the defendant's allegations regarding the motion to suppress because "[Illinois] law allows for such tests under the circumstances of this case." The court also found that because the "parties [had] stipulated to the medical records," the defendant's allegation was meritless where he argued that testimony from two medical doctors could have been used as mitigation evidence. Additionally, the court determined that the defendant's argument regarding an "enhanced" sentence was unfounded because the court had "announced the range of sentencing to the Defendant and he proceeded to plead on 4-7-10." However, the court determined that "[t]here may be some merit to Defendant's allegation that the mitigation testimony of Latoy Williams may have affected the sentence imposed."

¶ 14 On August 27, 2014, the circuit court held a third stage evidentiary hearing concerning the defendant's allegations regarding Williams' testimony as possible mitigation evidence. The defendant testified that he had informed Holmes that Williams saw a stripper put a "powder-like substance and so-called to be Ecstasy" in his drink prior to the collision. The defendant believed that Williams' testimony would have made a difference in the outcome of his case because he was involuntarily intoxicated.

¶ 15 Holmes testified to the following. Holmes was "100% certain" that the defendant had never informed him that Williams was a possible key witness and that they had never discussed any alleged events that would support an involuntary intoxication defense. In fact, the defendant told him on several occasions that he had not consumed any substances immediately prior to the collision. Holmes and the defendant had multiple discussions before trial on the "theory that he was not intoxicated at the time of the accident [because there were] no drugs or alcohol in his blood work, the indication was that he was not under the influence *** of a substance at that time ***." However, there were "metabolites for marijuana," MDMA, and MDA in his urine, which provided a sufficient basis to convict him. Holmes indicated that he did not threaten or coerce the defendant to plead guilty.

¶ 16 On October 9, 2014, the circuit court denied the defendant's amended postconviction petition at the third stage evidentiary hearing. The court found that Holmes' representation was not deficient; the defendant was not prejudiced; and there was no reasonable probability that the outcome would have been different but for Holmes' conduct. In particular, the court determined that:

> "a. Under the One Act One Crime Doctrine, the Defendant could only be sentenced on one of the three counts to which he plead [*sic*] and he was sentenced on Count III (Aggravated DUI).
>
> b. The testimony that Defense counsel had no knowledge of the supposed key witness is credible considering this issue was not raised in the motion(s) to reconsider the sentencing due to ineffective assistance of counsel[.]

c. The testimony of the supposed key witness would have had nothing to do with the allegations in Count III."

The court concluded that the defendant had not been denied his constitutional right to counsel given that Holmes' representation was not ineffective. The defendant filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 The defendant's sole contention on appeal is that the circuit court erred in dismissing his postconviction sentence-enhancement petition at the second stage where he made a substantial showing of a constitutional violation. We disagree.

¶ 19 Under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)), the circuit court follows a three-stage process to determine whether a defendant suffered a substantial violation of his constitutional rights at trial, and if so, the appropriate remedy. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). At the first stage, the circuit court may summarily dismiss a petition if it finds that the petition is frivolous and patently without merit. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). "If the petition states the gist of a claim, the court advances it to the second stage where counsel may be appointed for the petitioner, appointed counsel may file an amended petition, and the State may file responsive pleadings." *People v. Stewart*, 381 Ill. App. 3d 200, 203 (2008) (citing 725 ILCS 5/122-2.1(a)(2), 122-4, 122-5 (West 2006)). At the second stage, it is the defendant's burden to "make a substantial showing of a constitutional violation," and the State may move to dismiss the petition if the defendant fails to meet this burden. *Pendleton*, 223 Ill. 2d at 472-73. In determining whether the defendant has made a substantial showing of a constitutional

violation, all well-pleaded facts in the petition that are not positively rebutted by the record are to be taken as true. *Id.* at 473. If defendant has made a substantial showing of a constitutional violation, the petition advances to the third stage, at which point the court holds an evidentiary hearing. *Id.* Where the court dismisses a postconviction petition without an evidentiary hearing, our review is *de novo*. *Id*.

¶ 20 The defendant contends that he made a substantial showing that he was denied his constitutional right to counsel. Specifically, the defendant claims that he received ineffective assistance of counsel during the plea process where "his guilty plea was based upon his reliance on plea counsel's erroneous advice" that he would be "automatically subjected to an 'enhancer' " if he was convicted at trial. Thus, we must determine whether the defendant met his burden in showing that he was denied effective assistance of counsel during the plea process.

¶ 21 The standard for determining whether a defendant has received ineffective assistance of counsel hinges on two components: incompetence and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant alleging a violation of his right to effective assistance of counsel must meet the two-pronged test set out in *Strickland*, 466 U.S. at 687. Under *Strickland*, the defendant must allege facts demonstrating that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance so prejudiced the defendant that he was denied a fair trial. *Id.* at 687-88.

¶ 22 In establishing substandard performance, the defendant must overcome the strong presumption that his attorney's actions were the product of sound trial strategy and not incompetence. *People v. Barrow*, 195 Ill. 2d 506, 520 (2001). A defendant is entitled to

competent, not perfect, representation, and "mistakes in trial strategy or judgment will not, of themselves, render the representation incompetent." *People v. Nowicki*, 385 Ill. App. 3d 53, 82 (2008).

¶ 23 In establishing the prejudice prong, the defendant must show that there is a reasonable probability that, but for his attorney's deficient performance, the result of the proceedings would have been different. *Barrow*, 195 Ill. 2d at 520. A reasonable probability is one that sufficiently undermines confidence in the outcome of the proceeding. *Id.* Moreover, the question of whether counsel's deficient representation caused defendant to plead guilty depends in large part on predicting whether defendant would have been successful at trial. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). To prevail, both prongs of *Strickland* must be satisfied. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998).

¶ 24 The defendant contends that his petition set forth sufficient allegations to meet both *Strickland* prongs. He maintains that Holmes' performance was deficient where Holmes erroneously advised the defendant that he would be subjected to an "enhancer" if he was convicted at trial. The defendant further claims that he was prejudiced because he would not have pled guilty if he knew that Holmes' advice was false.

¶ 25 As previously addressed, unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true. *Pendleton*, 223 Ill. 2d at 473. Here, we are hesitant to consider the defendant's allegation well-pled where his only explanation of the term "enhancer" was his understanding that he would "get much more time than the case currently even carries." We note that this allegation is positively refuted by the record where Holmes' testimony indicated that he never promised the defendant a specific sentence. Instead, he

advised the defendant that he faced a possible punishment of 3 to 14 years' imprisonment. The record evidences that Holmes informed the defendant that he would likely lose at trial because he had controlled substances in his urine at the time of the collision and was subject to a strict liability statute. Because of this evidence, he advised the defendant to plead guilty to the aggravated DUI to demonstrate his acceptance of responsibility and remorse, which would potentially place him in a more favorable position to receive a lesser sentence. We conclude that the record refutes the defendant's assertion that Holmes erroneously advised him that he would be subject to an "enhancer" if he went to trial, where the maximum sentence he faced was 14 years, a punishment he was informed of prior to the plea proceedings. Thus, his petition failed to establish the first prong of *Strickland*.

¶ 26 Assuming, *arguendo*, that the defendant could successfully demonstrate substandard representation on the part of Holmes, the defendant's postconviction petition failed to establish the requisite prejudice under *Strickland*. Based on the strength of the State's evidence, Holmes recommended that the defendant enter a guilty plea and forego trial. Although the defendant asserted in his *pro se* postconviction petition that he understood Holmes' use of the term "enhancer" to mean that he would "get much more time than the case even currently carries," the record shows that Holmes informed him of the possible sentencing range prior to the plea proceedings. Moreover, the circuit court informed the defendant of the possible sentencing range during the plea proceedings and the defendant affirmatively acknowledged–prior to the entry of his guilty plea–that he understood that the maximum sentence was 14 years. Thus, his claim that he entered a guilty plea because of his mistaken belief that he would receive a much higher sentence is positively refuted by the

record. Accordingly, the defendant's allegations similarly fail to establish prejudice. Therefore, we conclude that the defendant failed to make a substantial showing of a violation of his right to effective assistance of counsel. The dismissal of the defendant's postconviction sentence-enhancement claim without an evidentiary hearing was proper.

¶ 27 CONCLUSION

¶ 28 The order of the circuit court of St. Clair County is hereby affirmed where the defendant's postconviction sentence-enhancement claim was dismissed at the second stage for failure to make a substantial showing of a violation of his right to effective assistance of counsel.

¶ 29 Affirmed.