2018 IL App (1st) 161196-U

FOURTH DIVISION
September 20, 2018

No. 1-16-1196

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 02 CR 28514
	)	
RAYMOND BROWN,	)	Honorable
	)	Nicholas R. Ford
Petitioner-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: We reverse the dismissal of the postconviction petition at the second stage and remand for a third-stage hearing where petitioner made a substantial showing that his trial counsel was ineffective for failing to investigate his mental health history or request a fitness evaluation or hearing.

¶ 2 Petitioner Raymond Brown appeals the second-stage dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). On appeal, petitioner argues the circuit court erred in dismissing his postconviction petition without a third-stage evidentiary hearing because he made a substantial showing that he was deprived of

the effective assistance of trial counsel and the reasonable assistance of postconviction counsel. For the following reasons, we reverse the circuit court's order and remand the cause for third-stage proceedings.

¶ 3 I. BACKGROUND

¶ 4 This matter appears before the appellate court from postconviction proceedings for the second time. After the *pro se* petition was dismissed at the first stage and the appellate court affirmed, the Illinois Supreme Court remanded the matter to the circuit court for second-stage proceedings regarding petitioner's claim of ineffective assistance of counsel and any other claims deemed meritorious by postconviction counsel. Upon remand, the circuit court dismissed the petition following second-stage proceedings and petitioner filed the instant appeal. The facts relating to petitioner's trial and first-stage postconviction proceedings are set forth in detail in our supreme court's opinion. *People v. Brown*, 236 Ill. 2d 175 (2010). Therefore, we discuss only those facts which are necessary for the disposition of this appeal.

¶ 5 In 2003, following a bench trial, petitioner was convicted of attempted first degree murder of a police officer. At the sentencing hearing, petitioner read to the court a written statement which he had prepared. Petitioner asserted that he had been depressed and had previously tried to kill himself. He further denied that he intended to harm the police officer, and only wanted the officers at the scene to kill him. Petitioner further stated he was taking "psych medication" and was advised he should have received a psychiatric evaluation prior to his trial, but his trial attorney failed to bring the matter to the circuit court's attention.[1]

¶ 6 The circuit court questioned counsel about petitioner's statements regarding the psychotropic medications he was prescribed. Defense counsel stated he was not aware that petitioner was taking such medication. The circuit court further inquired whether there was any

[1] The record is not clear as to who rendered the advice.

reason for counsel to have a *bona fide* doubt of petitioner's fitness to stand trial. Counsel responded that petitioner "spoke very coherently to me," he "seemed fine," and counsel "had no problem communicating with him." The circuit court noted it had not observed anything in petitioner's conduct or appearance indicating a *bona fide* doubt of his fitness. The circuit court further noted that petitioner's treatment with psychotropic medication, standing alone, failed to raise a presumption of unfitness to stand trial. Accordingly, the circuit court proceeded with the sentencing hearing and imposed a 25-year term in the Illinois Department of Corrections. The circuit court's judgment was affirmed on direct appeal. *People v. Brown*, No. 1-03-2620 (2005) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7 In 2006, petitioner filed a *pro se* postconviction petition alleging, in pertinent part, that his trial counsel was ineffective for failing to investigate his competency to stand trial or request a fitness evaluation or hearing. Petitioner alleged he informed his attorney that he was taking psychotropic medications, including Zoloft, Seroquel, and Sinequan, both before and after his arrest. He further alleged he was prescribed the medications to treat a bipolar disorder and depression. He also informed counsel that he attempted to commit suicide before he was arrested and then again on the day of his arrest. He alleged he was also attempting "suicide by police" on the day of the offense. During his trial he was prescribed "very heavy psych medication" that affected his ability to comprehend the events. Petitioner alleged he "didn't know exactly what was happening at [his] trial and didn't understand everything at his trial," and that the medication made him "feel like [he] could not talk or question a thing at [his] trial."

¶ 8 Petitioner further alleged that at the sentencing hearing his trial counsel misrepresented to the trial judge that he was unaware petitioner had been prescribed psychotropic medications. Petitioner also alleged his attorney visited him for only a few minutes before each hearing and

never discussed the case or a trial strategy. Petitioner believed his attorney was too preoccupied with his own father's death to represent petitioner adequately. Petitioner alleged he stopped taking some of his medications in order to draft his postconviction petition.

¶ 9 Petitioner appended to his petition medical records documenting his bipolar disorder and his medications to treat it. Additionally, he provided affidavits from his mother and aunt attesting that his mother informed trial counsel that petitioner was prescribed medication to treat his bipolar disorder. Petitioner's mother also averred she informed counsel petitioner had attempted to commit suicide on several occasions. Petitioner's mother and aunt averred trial counsel made a misrepresentation to the circuit court when he denied knowing petitioner had a mental illness and was taking medication.

¶ 10 The circuit court summarily dismissed the petition as being frivolous and patently without merit. Petitioner appealed and this court affirmed the dismissal, holding petitioner failed to state the gist of a claim of ineffective assistance of counsel. *People v. Brown*, No. 1-06-3275 (2008) (unpublished order under Supreme Court Rule 23).

¶ 11 Our supreme court granted petitioner's leave to appeal and remanded the petition for second-stage proceedings. *Brown*, 236 Ill. 2d 175. The court held that the medical records and affidavits supporting the petition corroborated the allegations contained therein, including (1) counsel's knowledge of petitioner's use of psychotropic medications, diagnosis of bipolar disorder and depression, previous suicide attempts, and petitioner's attempt at "suicide by police," and (2) petitioner's allegation that he was prescribed "very heavy" psychotropic medication during his trial and he did not understand the trial proceedings. *Id*. at 185-86. Our supreme court thus concluded that the petition was not frivolous or patently without merit. *Id*. at 186.

¶ 12 Our supreme court further held that, contrary to the State's assertions, petitioner's legal theory—that there was a *bona fide* doubt of his fitness and that his trial counsel unreasonably failed to request a fitness hearing—was not indisputably meritless because it was not completely contradicted by the record. *Id*. at 186-91. In support of this finding, our supreme court noted that defense counsel's statements at the sentencing hearing were called into question by petitioner's allegations and supporting affidavits asserting that counsel had knowledge that petitioner was taking psychotropic medications for bipolar disorder and had attempted suicide. *Id*. at 189. Defense counsel's statements were also undermined by petitioner's allegations that counsel spent only a few minutes with him before each hearing. *Id*. Moreover, counsel's statements at sentencing failed to positively rebut petitioner's allegations regarding his mental illness or that his medications prevented him from understanding the trial proceedings. *Id*. at 189-90.

¶ 13 Additionally, our supreme court found the circuit court's statements at sentencing (that petitioner's conduct and appearance failed to demonstrate a *bona fide* doubt of his fitness) were not determinative of his fitness to stand trial because the observation did not positively rebut petitioner's allegations of his mental illness or failure to understand the trial proceedings. *Id*. at 190. Further, any observations of petitioner's lucidity at sentencing were of limited significance because the sentencing hearing occurred more than one month after the trial and failed to establish his condition at the time of trial. *Id*. Finally, our supreme court found that petitioner's colloquies with the circuit court wherein he waived his right to a jury trial and his right to testify were "essentially brief exchanges" which did not positively rebut petitioner's allegations. *Id*. Accordingly, our supreme court held the petition had an arguable basis in fact and in law and remanded the matter for second-stage proceedings. *Id*. at 194.

¶ 14 Following remand, petitioner filed a lengthy *pro se* amended postconviction petition

wherein he reiterated his prior contentions and raised several new claims. Petitioner was subsequently appointed second-stage counsel who eventually filed a Supreme Court Rule 651(c) certificate stating she declined to file an amended postconviction petition because the *pro se* petition adequately set forth petitioner's claims. Thereafter, petitioner filed a "supplement" to his amended petition. The State moved to strike the *pro se* amended petition and the "supplemental" petition because petitioner was represented by postconviction counsel. The circuit court struck the pleadings, and the State moved to dismiss the initial *pro se* petition. Pertinent to this appeal, the State argued petitioner's use of psychotropic medication failed to create a *bona fide* doubt of his fitness, and the circuit court never observed conduct indicating such a doubt. In response, petitioner contended counsel's knowledge of his mental illness and medications, counsel's subsequent failure to submit petitioner's mental health records or a list of his medications to the court, and counsel's failure to request a fitness evaluation constituted ineffective assistance. The circuit court granted the State's motion to dismiss, observing that the decision to conduct a fitness evaluation is normally "very clear" to the attorneys and the judge, and the absence of a clear reason to conduct the evaluation is strong evidence that there was no articulated doubt as to petitioner's fitness. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, petitioner contends the circuit court erred when it dismissed his postconviction petition at the second stage of proceedings because his petition made a substantial showing of a constitutional violation—specifically that his trial counsel was ineffective for failing to investigate his fitness or request a fitness evaluation or hearing. Alternatively, petitioner argues this matter should be remanded for further second-stage proceedings because his postconviction counsel provided unreasonable assistance when she failed to request a

retrospective fitness evaluation, failed to read the necessary portions of the record, and misstated the law in replying to the State's motion to dismiss. For the reasons stated below, we find petitioner made a substantial showing of a claim for ineffective assistance of trial counsel and remand this matter for a third-stage evidentiary hearing. We therefore decline to address petitioner's claim that postconviction counsel provided unreasonable assistance.

¶ 17 We begin by noting the familiar principles regarding postconviction proceedings. The Act provides criminal defendants a remedy to address substantial violations of their federal or state constitutional rights in their original trial or sentencing hearing. 725 ILCS 5/122-1 *et seq*. (West 2006); *People v. Allen*, 2015 IL 113135, ¶ 20. A postconviction action is not a substitute for or an addendum to a direct appeal, but is a collateral attack on a prior conviction and sentence. *People v. Tate*, 2012 IL 112214, ¶ 8. "The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 18 The Act creates a three-stage procedure of postconviction relief in noncapital cases. *Allen*, 2015 IL 113135, ¶ 21. At the first stage, the defendant need only present the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Since most petitions at this stage are drafted by *pro se* defendants, the threshold for survival is low. *Id*. If the circuit court independently determines that the petition is either "frivolous or is patently without merit" it dismisses the petition. 725 ILCS 5/122-2.1(a)(2) (West 2006); *Hodges*, 234 Ill. 2d at 10. If a petition is not summarily dismissed by the circuit court, the petition advances to the second stage. *Id*.

¶ 19 At the second stage of postconviction proceedings, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2006)) and the State is allowed to file a motion to

dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2006)). *Hodges*, 234 Ill. 2d at 10-11. At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a violation of constitutional rights to warrant a third-stage evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶ 33; *People v. English*, 403 Ill. App. 3d 121, 129 (2010). The petitioner, however, is not entitled to an evidentiary hearing as a matter of right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Rather, in order to mandate an evidentiary hearing, allegations in the petition must be supported by the record or by its accompanying affidavits. *Id*. Nonfactual and nonspecific claims that merely amount to conclusions are insufficient to require an evidentiary hearing under the Act. *Id*. Further, at this stage of the proceedings, the circuit court takes all well-pleaded facts that are not positively rebutted by the trial record as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the circuit court determines the petitioner made a substantial showing of a constitutional violation at the second stage, a third-stage evidentiary hearing must follow. 725 ILCS 5/122-6 (West 2006); see *English*, 403 Ill. App. 3d at 129.

¶ 20 At a third-stage evidentiary hearing, the circuit court serves as a fact finder and accordingly, determines the credibility of witnesses, decides the weight to be given the testimony and evidence, and resolves any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34. It is at this stage that the circuit court must determine whether the evidence introduced demonstrates that the petitioner is entitled to relief under the Act. *Id*.

¶ 21 Here, defendant's postconviction petition advanced to the second stage and was dismissed by the circuit court. We review the lower court's dismissal of a postconviction petition without a third-stage evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473. Under *de novo* review, we perform the same analysis that a trial judge would perform. *People v. Tyler*, 2015 IL

App (1st) 123470, ¶ 151. Having set forth our standard of review, we now turn to the substantive issues raised on appeal.

¶ 22 Defendant argues he is entitled to a third-stage evidentiary hearing because he made a substantial showing that he was deprived of the effective assistance of trial counsel for his failure to investigate his fitness or request a fitness evaluation or hearing. A claim of ineffective assistance of counsel is reviewed under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984) (adopting *Strickland*)). Under the *Strickland* test, petitioner must establish that (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced petitioner as to deny him a fair trial. *Strickland*, 466 U.S. at 687-88. We discuss both prongs of the *Strickland* test in more detail below.

¶ 23 A. First Prong: Deficient Performance

¶ 24 Petitioner contends his trial counsel's performance was deficient because (1) he learned petitioner was prescribed psychotropic medications for a bipolar disorder and depression and that petitioner had attempted to commit suicide on several prior occasions, and (2) counsel failed to investigate petitioner's mental health history or fitness and failed to request a fitness evaluation or hearing. In support of this claim, petitioner appended to his petition affidavits from his mother and his aunt attesting that petitioner's mother informed trial counsel that petitioner was taking medication to treat his bipolar disorder. Petitioner's mother also averred she informed counsel petitioner had attempted to commit suicide on several occasions. Petitioner further appended his own affidavit in which he specified that he, his mother, and his aunt all informed his trial counsel, prior to trial, that he was prescribed psychotropic medications. Moreover, petitioner

averred that his counsel only met with him for two to three minutes before each court date and declined to discuss the case or any trial strategy. According to petitioner, counsel's minimal communication with him was insufficient to assess his fitness. Finally, petitioner appended several medical records, including (1) a psychiatric evaluation from two years prior to his trial stating he suffered hallucinations, delusions, dysphoria, and impaired judgment, (2) a discharge notification from the University of Illinois at Chicago Hospital less than two years prior to his trial indicating a discharge diagnosis of acute psychosis, and (3) prescription forms indicating that at the time of trial, petitioner had been provided various doses of Zoloft, Seroquel, and Sinequan. Petitioner asserts these medications can cause confusion, drowsiness, disorientation, hallucinations, or impaired judgment, thinking, and mental alertness.[2]

¶ 25 Generally, in order to establish his trial counsel's representation was deficient under the first prong of the *Strickalnd* test, petitioner must demonstrate counsel's error was so serious, and his performance so deficient, that he failed to function as the "counsel" guaranteed by the sixth amendment. *People v. Johnson*, 206 Ill. 2d 348, 362 (2002). We measure counsel's performance by an objective standard of competence under prevailing professional norms. *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). We entertain a strong presumption that counsel's performance was a product of sound trial strategy and professional judgment. *People v. Harris*, 206 Ill. 2d 293, 303 (2002). To overcome this presumption, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness. *Id*. at 303-04. Moreover, defense counsel has a duty to make reasonable investigations, and a particular decision not to investigate must be directly assessed for reasonableness considering all of the circumstances. *Strickland*, 466 U.S. at 691.

[2] Petitioner cites to the Physician's Desk Reference, a compilation of manufacturers' prescribing information on prescription drugs. The State does not refute these possible side effects.

¶ 26 Here, petitioner argues his attorney's failure to have his mental health investigated and request a fitness evaluation and fitness hearing was unreasonable. The due process clause of the fourteenth amendment bars the prosecution of a defendant who is not fit to stand trial. *People v. Shum*, 207 Ill. 2d 47, 57 (2003). A defendant is presumed fit to stand trial and is only unfit if he is "unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2006); *People v. Burton*, 184 Ill. 2d 1, 13 (1998). Fitness speaks only to a defendant's ability to function within the context of a trial and does not refer to sanity or competence in other areas. *People v. Easley*, 192 Ill. 2d 307, 320 (2000). "A defendant can be fit for trial although his or her mind may be otherwise unsound." *Id*.

¶ 27 At this stage we must accept as true all well-pleaded facts in the petition and its accompanying affidavits that are not positively rebutted by the record. *Pendleton*, 223 Ill. 2d at 473. Here, petitioner alleged and presented supporting evidence that trial counsel was aware that petitioner was prescribed psychotropic medications to treat a bipolar disorder and depression. It is unrebutted that trial counsel was aware of the "suicide by police" nature of petitioner's offense and that petitioner had attempted to commit suicide on several prior occasions. Further, there is nothing in the record to rebut the allegation that counsel failed to investigate petitioner's mental health history based on this knowledge or whether petitioner had been prescribed medication or how they affected his cognition. An investigation would have revealed petitioner's diagnosis, about two years prior to trial, of acute psychosis and symptoms including hallucinations, delusions, dysphoria, and impaired judgment, and that he was prescribed medications which can cause confusion, drowsiness, disorientation, hallucinations, or impaired judgment, thinking, and mental alertness. The amount of effort needed to investigate would have been minimal, and would have revealed information relevant to determining whether a fitness evaluation and

hearing should have been requested. Moreover, we observe that a third-stage evidentiary hearing is necessary to resolve the factual dispute between petitioner's allegations and supporting affidavits that trial counsel had been informed of petitioner's use of psychotropic medications and counsel's statement at sentencing that he was unaware petitioner was prescribed psychotropic medication.

¶ 28 Further, our review of the record does not support the conclusion that counsel's failure to investigate petitioner's medications, medical history, and fitness for trial was the product of trial strategy or professional judgment. See *Harris*, 206 Ill. 2d at 303. At the very least, counsel's knowledge of petitioner's prior suicide attempts, and the "suicide by police" nature of his offense made it unreasonable not to conduct some minimal investigation of petitioner's medical history. The petition makes a substantial showing that counsel's failure to investigate and request a fitness evaluation or hearing constitutes deficient representation. See *Strickland*, 466 U.S. at 691; *Harris*, 206 Ill. 2d at 303-04.

¶ 29 B. Second Prong: Prejudice

¶ 30 Generally, in order to satisfy the second prong of *Strickland*, at the second stage a petitioner must make a substantial showing that absent counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different. *Harris*, 206 Ill. 2d at 303. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id*. at 304. The prejudice prong of *Strickland*, however, entails more than an "outcome-determinative" test. *Easley*, 192 Ill. 2d at 317. Petitioner must demonstrate that counsel's deficient performance rendered the result of the proceeding unreliable or fundamentally unfair. *Id*. at 317-18. At this stage, to establish his trial counsel's deficiency prejudiced him within the meaning of *Strickland*, petitioner must make a substantial showing that

facts existed at the time of his trial that would have raised a *bona fide* doubt of his fitness. See *Harris*, 206 Ill. 2d at 304; *Easley*, 192 Ill. 2d at 319; *People v. Eddmonds*, 143 Ill. 2d 501, 512-13 (1991).

¶ 31 As we noted previously, a defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2006); *Burton*, 184 Ill. 2d at 13. A defendant is only unfit if he is "unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2006); *Burton*, 184 Ill. 2d at 13. Fitness speaks only to a defendant's ability to function within the context of a trial and does not refer to sanity or competence in other areas. *Easley*, 192 Ill. 2d at 320. "A defendant can be fit for trial although his or her mind may be otherwise unsound." *Id*. The critical inquiry, therefore, is whether the facts presented in petitioner's postconviction petition made a substantial showing of a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense. *Easley*, 192 Ill. 2d at 318-19; *People v. Johnson*, 183 Ill. 2d 176, 193 (1998). Factors which are relevant to considering whether there is a *bona fide* doubt of a defendant's fitness include (1) his irrational behavior, (2) his demeanor at trial, (3) any prior medical opinion regarding the defendant's fitness to stand trial, and (4) any representations by defense counsel concerning the defendant's fitness. *Eddmonds*, 143 Ill. 2d at 518. "No fixed or immutable sign, however, invariably indicates the need for further inquiry on a defendant's fitness. Rather, the question is often a difficult one implicating a wide range of manifestations and subtle nuances." *Brown*, 236 Ill. 2d at 187.

¶ 32 Moreover, allegations in the petition must be supported by the record or by its accompanying affidavits in order to mandate an evidentiary hearing. *Coleman*, 183 Ill. 2d at 381. Nonfactual and nonspecific claims that merely amount to conclusions are insufficient to require an evidentiary hearing under the Act. *Id*. Further, we must take all well-pleaded facts that are not

positively rebutted by the record as true. *Pendleton*, 223 Ill. 2d at 473.

¶ 33 With these rules in mind, we now address petitioner's contention that he has made a substantial showing his trial counsel's failure to investigate his fitness and request a fitness evaluation or hearing prejudiced him within the meaning of *Strickland.*

¶ 34 Petitioner argues that he has made a substantial showing he was prejudiced by his trial counsel's deficient representation because facts existed at the time of his trial that raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense. Specifically, petitioner contends (1) the "very heavy psych medication[s]" made him "unable to understand everything" at trial, (2) the medications made him "unable to think and answer everything the way [he] should have and made [him] feel like [he] could not talk or question a thing at [his] trial," which suggests he was unable to assist in his defense, and (3) these facts, coupled with his mental health history, raised a *bona fide* doubt of his fitness. Additionally, petitioner contends that in denying his petition, the circuit court erroneously relied on the record and the lack of a "very clear" sign that a fitness evaluation was necessary—a fact which the Illinois Supreme Court specifically found failed to rebut petitioner's allegation of a *bona fide* doubt of his fitness. *Brown*, 236 Ill. 2d at 190. Moreover, petitioner notes that the sedative effect of the medications explains why the circuit court did not observe any irrational behavior or odd outbursts during the trial. Further, the circuit court ignored the existence of more subtle forms of unfitness exhibited by petitioner.

¶ 35 In response, the State argues that the factors for determining whether a *bona fide* doubt of fitness exists were not present in this case. Specifically, the State maintains (1) petitioner did not exhibit irrational behavior at trial, (2) there were no prior medical opinions as to petitioner's competence, and (3) when questioned by the circuit court regarding petitioner's fitness, defense

counsel stated he was not aware petitioner had been prescribed psychotropic medications, he had no problem communicating with petitioner, and petitioner "spoke very coherently" and "seemed fine." As further evidence that petitioner was fit, the State observes that petitioner stated he understood his right to a jury trial and his right not to testify, cooperated with his probation officer who prepared his presentence investigation report, and during his sentencing hearing he read from a statement he had written.

¶ 36 We observe, as our supreme court did when analyzing the State's nearly identical arguments on appeal from petitioner's first-stage dismissal, that the State's contentions do not rebut petitioner's allegations that his psychotropic medications prevented him from understanding the trial proceedings or assisting in his defense. *Id*. at 189-91. Petitioner's allegations must therefore be taken as true. *Pendleton*, 223 Ill. 2d at 473. While the factors relevant to considering a defendant's fitness are not present here, those factors are not exhaustive and our inquiry is not complete. See *Brown*, 236 Ill. 2d at 187; *Eddmonds*, 143 Ill. 2d at 518. We must also take into account the "wide range of manifestations and subtle nuances" which pertain to a defendant's fitness (*Brown*, 236 Ill. 2d at 187) to determine whether petitioner's allegations, taken as true, demonstrate that facts existed at the time of trial that would have raised a *bona fide* doubt of his fitness to stand trial (*Easley*, 192 Ill. 2d at 318-19).

¶ 37 The State argues that our Supreme Court's holdings in *Shum*, 207 Ill. 2d 47, *Johnson*, 206 Ill. 2d at 366-74, *Harris*, 206 Ill. 2d at 302-05, *Burt*, 205 Ill. 2d at 38-44, *Mitchell*, 189 Ill. 2d at 330-37, *Moore*, 189 Ill. 2d at 536, *Easley*, 192 Ill. 2d at 317-23, and *Johnson*, 183 Ill. 2d at 192-95, are dispositive of whether petitioner established a *bona fide* doubt of his fitness. [3] Each of these cases, however, involves facts which clearly rebut a *bona fide* doubt of the defendant's

[3] We observe that the Seventh Circuit determined our supreme court in *Burt* unreasonably applied *Strickland* to the facts of the case and remanded the matter. *Burt v. Uchtman*, 422 F. 3d 557 (7th Cir. 2005). We therefore decline to discuss *Burt* in our analysis here.

fitness and which are not present in the case at bar.

¶ 38 In *Harris*, for example, the record "clearly illustrate[d]" that the defendant understood the nature and purpose of the proceedings where he participated in his defense; communicated and conferred with his trial counsel; expressed to the court his understanding of the proceedings, including his decisions to litigate rather than agree to a plea, waive his right to testify, and waive his right to a jury at the sentencing hearing; and articulated a clear statement in allocution during the mitigation phase of his sentencing hearing. *Harris*, 206 Ill. 2d at 305. Here, petitioner, unlike the defendant in *Harris*, alleged he did not participate in his defense and had a minimal number of communications of short duration with his trial counsel. *Id*. We acknowledge that petitioner in this case, like the defendant in *Harris*, expressed to the circuit court his understanding of his decision to waive his right to a jury and right to testify. *Id*. Our supreme court in *Brown*, however, specifically found such waivers to be "brief exchanges" that "do not conclusively demonstrate an ability to understand the proceedings or assist in the defense." *Brown*, 236 Ill. 2d at 190-91. *Harris*, therefore, is inapposite. See *Harris*, 206 Ill. 2d at 305.

¶ 39 Notably, in *Shum*, the defendant was examined by a psychiatrist contemporaneously with his trial, and the defendant in *Johnson* was examined by a psychiatrist immediately prior to the entry of his guilty plea, and both defendants were found fit to stand trial. *Shum*, 207 Ill. 2d at 60; *Johnson*, 206 Ill. 2d at 364. These cases are therefore inapposite where here, petitioner was never found fit or evaluated by a medical professional for the purpose of determining his fitness. See *Shum*, 207 Ill. 2d at 60; *Johnson*, 206 Ill. 2d at 364.

¶ 40 In *Mitchell*, the defendant testified extensively and coherently on his own behalf, demonstrating both an understanding of the proceedings and his ability to assist in his defense. *Mitchell*, 189 Ill. 2d at 334-35. Similarly, in *Moore*, the defendant provided detailed and coherent

testimony during a hearing on his motion to suppress, and was responsive to questions. *Moore*, 189 Ill. 2d at 536. In *Johnson*, the defendant demonstrated his ability to assist in his defense by withdrawing his guilty plea when he disputed the State's factual basis. *Johnson*, 206 Ill. 2d at 365. Here, by contrast, petitioner declined to testify at his trial and the record does not contain facts which demonstrate his ability to assist in his defense. *Mitchell*, *Moore*, and *Johnson* are therefore inapposite. See *Johnson*, 206 Ill. 2d at 365; *Mitchell*, 189 Ill. 2d at 334-35; *Moore*, 189 Ill. 2d at 536.

¶ 41 Finally, in each case cited by the State, the defendants alleged that they suffered from various mental impairments, experienced side effects of their medication, or had a limited intellectual ability, and then conclusively alleged there was a *bona fide* doubt of their fitness stand trial without offering any persuasive supporting facts. *Shum*, 207 Ill. 2d at 58-60; *Johnson*, 206 Ill. 2d at 368-72; *Harris*, 206 Ill. 2d at 302, 305; *Mitchell*, 189 Ill. 2d at 335-37; *Moore*, 189 Ill. 2d at 535-36; *Easley*, 192 Ill. 2d at 319-23; *Johnson*, 183 Ill. 2d at 194. In each case, in stark contrast to the case at bar, the defendants did not allege they were unable to understand the trial proceedings as a result of their various impairments. *Id*. Our supreme court therefore held the allegations in each case failed to raise a *bona fide* doubt that the defendants were unable to understand the nature or purpose of the proceedings or assist in their defense. *Id*.

¶ 42 Here, petitioner did not merely allege he had mental impairments or experienced symptoms of his medications, and that he was therefore unfit. He specifically alleged that as a result of the "very heavy psych" medications, he was unable to understand the trial proceedings, unable to think or talk, and unable to answer questions or question the events at his trial. These allegations are factual and specific assertions, and do not "merely amount to conclusions [which] are not sufficient to require a hearing under the Act." *Coleman*, 183 Ill. 2d at 381. Moreover,

petitioner's allegations are supported by the affidavits and medical records accompanying his petition. See *id*. Specifically, we find (1) petitioner's diagnosis of acute psychosis, (2) petitioner's psychiatric evaluation indicating he suffered hallucinations, delusions, dysphoria, and impaired judgment, (3) petitioner's history of suicide attempts and the "suicide by police" nature of his offense, and (4) petitioner's use of three psychotropic medications which can cause confusion, drowsiness, disorientation, hallucinations, or impaired judgment, thinking, and mental alertness, support petitioner's allegations that, as a result of his medications, he did not know exactly what was happening at his trial, he was unable to understand the proceedings, he was unable to think and answer questions the way he should have, and he felt like he could not talk or question anything at his trial.

¶ 43 We conclude that the petition and its supporting evidence make a substantial showing of a *bona fide* doubt of petitioner's ability to understand the nature and purpose of the proceedings and to assist in his defense. See *Easley*, 192 Ill. 2d at 318-19. Consequently, petitioner was prejudiced by his trial counsel's failure to request a fitness hearing. See *id*.

¶ 44 Petitioner has thus made a substantial showing of a claim for ineffective assistance of counsel under both prongs of the *Strickland* test where he made a substantial showing that counsel provided deficient representation by failing to investigate petitioner's fitness or request a fitness evaluation or hearing and that he was thereby prejudiced. See *Strickland*, 466 U.S. at 687-88. Accordingly, we remand this matter for a third-stage evidentiary hearing and therefore decline to discuss petitioner's claim of unreasonable assistance of postconviction counsel.

¶ 45 CONCLUSION

¶ 46 For the reasons stated above, we reverse the judgment of the circuit court of Cook County and remand for a third-stage evidentiary hearing.

¶ 47 Reversed and remanded.