2019 IL App (1st) 162490-U

No. 1-16-2490

June 12, 2019

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 27752
	)	
DONNELL WHITE,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Second-stage dismissal of defendant's postconviction petition was proper where defendant failed to make a substantial showing that he received ineffective assistance of trial counsel.

¶ 2 Defendant Donnell White appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2012). In the petition, defendant claimed that his trial counsel was ineffective for failing to request a fitness hearing prior to trial. On appeal, defendant contends that his petition should have advanced to an

evidentiary hearing because it made a substantial showing of ineffective assistance of trial counsel.[1]

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant was charged by indictment with two counts of aggravated discharge of a firearm, two counts of armed violence, two counts of unlawful use of a weapon by a felon (UUWF), nine counts of aggravated unlawful use of a weapon (AUUW), and one count of possession of a controlled substance (PCS). The State proceeded to trial on the two counts of aggravated discharge of a firearm, the two counts of armed violence, one count of UUWF, one count of AUUW, and the one count of PCS. Defendant elected a jury trial. At one point during jury selection on September 24, 2008, defense counsel paused the proceedings to "consult with my client," then came back on the record and exercised a peremptory challenge to excuse a potential juror.

¶ 5 At trial, which took place over the course of three days on September 24, 25, and 26, 2008, the State introduced evidence that defendant, who had a prior felony conviction, was riding in a car on September 13, 2006, and fired three times at a pursuing vehicle occupied by two Harvey police officers. When the car was stopped and defendant was arrested, he threw a bag containing 2.1 grams of crack cocaine into his car. After defense counsel indicated defendant would not be testifying on his own behalf, the trial court questioned defendant about his choice. Defendant answered "Yes," "Yes, sir," and "No, sir" to the trial court's various questions. When asked whether he had made the decision not to testify after consulting with his lawyer, defendant answered, "Yes, sir." Following closing arguments, the jury found defendant guilty of

[1] We note that defendant also has appeals pending in appeal No. 1-17-0558 and appeal No. 1-17-0909. Briefs have not been filed in either appeal.

aggravated discharge of a firearm, armed violence, UUWF, and AUUW. Defendant's motion for a new trial was denied.

¶ 6 Prior to sentencing, a presentence investigation (PSI) report was prepared. In the section titled "psychological," the probation officer who drafted the report wrote as follows:

> "The subject described his current mental health as good. He stated he has been diagnosed as schizophrenic. He stated he has been seeing a doctor in Roseland {he could not remember his name} for the past couple of years. He stated he has been prescribed medication but when he takes it he feels weird. He stated he tries not to take it and has probably not taken it for the past month."

¶ 7 When the case was called for sentencing on October 24, 2008, about a month after trial, the trial court addressed defense counsel and defendant regarding the PSI report's section on psychological factors as follows:

> "THE COURT: As I was reviewing the Presentence Investigation, under Page 6, counsel, under Psychological, it says your client has been diagnosed with schizophreni[a] in the past.
>
> [DEFENSE COUNSEL]: I noticed that.
>
> THE COURT: They also said that he has been prescribed medication and that he is not taking it for the last - - for the past month I should say.
>
> [DEFENSE COUNSEL]: That's correct.
>
> THE COURT: I will note, for the record, that [defendant] has been in front of me for about the last year and a half. I have never noticed any unusual behavior

by [defendant], nothing out of the ordinary. In fact, when I read this, I was actually surprised. [Defendant], at this time are you taking any medication?

[THE DEFENDANT]: No.

THE COURT: No?

[THE DEFENDANT]: No.

THE COURT: Have you been prescribed any medications?

[THE DEFENDANT]: Yes.

THE COURT: What medication have you been prescribed?

[THE DEFENDANT]: I don't know that name of it.

THE COURT: You don't know the name of it?

[THE DEFENDANT]: (Shaking head.)

THE COURT: Who prescribed the medication for you?

[THE DEFENDANT]: My mother knows.

THE COURT: Who?

[THE DEFENDANT]: My mother knows.

THE COURT: Your mother-in-law?

[THE DEFENDANT]: My mother knows.

[DEFENSE COUNSEL]: No. His mother knows.

THE COURT: Okay.

[DEFENSE COUNSEL]: Mrs. White.

MRS. WHITE: I'm his mother.

THE COURT: I can't hear.

MRS. WHITE: I'm his mother.

THE COURT: What kind of medicine has he been prescribed?

MRS. WHITE: Haldol, Cogentin.

THE COURT: Haldol.

MRS. WHITE: And Cogentin.

THE COURT: Cogentin. [Defense counsel], at this time I will order a BCX [(behavioral clinical examination)] of your client, otherwise we will proceed today.

[DEFENSE COUNSEL]: Excuse me for one moment.

THE COURT: Sure.

[DEFENSE COUNSEL]: We will ask that that be done.

THE COURT: BCX for fitness."

Following this exchange, the trial court ordered a BCX "for purposes of sentencing" and also "for fitness at the time of trial."

¶ 8 Thereafter, a BCX was conducted by a psychiatrist with Forensic Clinical Services, who prepared a report on August 11, 2009. The psychiatrist indicated that she had reviewed various records, including medical records and trial transcripts, and had interviewed defendant for approximately two hours. Defendant reported his correct age to her, but then gave the wrong year for his date of birth after thinking for a while before responding. When asked with whom he had lived prior to his arrest, he stated, "kids, we got three," and also named his girlfriend. Later, when asked about his children's names, he insisted he only had two. Defendant also reported he

had been shot in the head in high school, may have had a couple of seizures, and had been getting medication for a while. However, he deferred to his mother when asked what type of medication he had been prescribed. Defendant said he used to use drugs, stating he would "smoke a lot and drink a lot, marijuana and pills, I don't know what kind, people gave them to me."

¶ 9 Defendant reported that he had been ordered to "go to some classes for drugs" in a court building when he violated his probation, but would not be specific as to which courthouse. Defendant also reported that he stopped taking prescribed psychotropic medications when he started to use drugs and alcohol. When asked about a specific doctor by name, defendant said he "may have been his doctor," but did not know where he would see this doctor or when he last saw him. Defendant reported a history of auditory hallucinations that would tell him to do things he did not want to do and to go places where he did not want to go. Specifically, one voice inside his head continuously told him to do drugs, and he would do what the voice said. The psychiatrist noted that this report was inconsistent with previous reports of hearing multiple voices.

¶ 10 With regard to his trial, defendant told the psychiatrist that he was tried for "something they said I done. I really don't remember." He said he would have to ask his lawyer to remind him what the charge had been and what the outcome of his case was. When asked what the jury found at the end of his trial, he responded, "The who?" Defendant recalled the name of his lawyer but not the judge, denied any recollection of allegations regarding guns being involved, reported no recollection of how many witnesses testified or what they testified to, and, after stating he did not know what it meant with regard to people testifying against him, said it was

only his lawyer who talked in court, although he also said he did not remember what his lawyer talked about. Defendant did not remember when he was arrested, what happened at the police station, or how long a sentence he could be facing. He did remember that his mother, girlfriend, and children had come to the trial to support him.

¶ 11 The psychiatrist reported that defendant had no delay in his responses except when appearing to search for an answer or intending to present as being unable to do so, did not at any time appear to be responding to internal stimuli, and did not display any form of thought disorder. When asked to name five cities, defendant asked, "What are cities?" He did the same when asked to name five states, and, after a long period of thinking about it, reported there were 12 months in a year and named them in order. Defendant reported not being aware of the colors of the United States flag but said he was aware there were "like stars on it." He denied that a banana and an apple could be anything alike, and insisted the same for any similarity between a bird and an airplane.

¶ 12 The psychiatrist indicated that she had spoken with the probation officer who interviewed defendant on September 26, 2008, in order to prepare the PSI report. The officer reported that if defendant had told her he did not remember or did not know something, or if he had advised her to ask his mother for a correct response and that he did not know, she would have put that in her report.

¶ 13 The psychiatrist diagnosed defendant with malingering, a reported history of poly-substance abuse, a reported history of a psychotic disorder, and a provisional diagnosis of a personality disorder not otherwise specified with antisocial features. She also wrote as a diagnosis: "status post gunshot wound injury to right frontal lobe, status post bi-frontal

craniotomy in 1991." The psychiatrist noted that prior psychological testing and examinations performed on November 7, 2008, November 24, 2008, and December 30, 2008, found defendant to be malingering. The psychiatrist concluded as follows:

> "In summary, records from around the time of his trial in September 2008 do not suggest that [defendant] was either psychotic or demented. He was not prescribed psychotropic medications, nor is there indication that he required this type of intervention in order to be considered fit for trial. His criminal history record would further support that he would have had an understanding of court proceedings, also of court personnel, and his consultation with defense counsel during jury selection and his trial would suggest that he had the ability to assist counsel in his defense.
>
> FORENSIC FORMULATION AND SUMMARY:
>
> Pursuant to Your Honor's Order, I evaluated the defendant, Donnell White, at Forensic Clinical Services on 12-20-08 and August 11, 2009 in order to render an opinion regarding his fitness for trial at the time of his trial. Based upon my review of the available records and my clinical examination it is my opinion, within a reasonable degree of medical/psychiatric certainty, that [defendant] was MENTALLY FIT TO STAND TRIAL AT THE TIME OF HIS TRIAL on September 24, 25 and 26, 2008. There was no indication that he was suffering from a mental disease which would have compromised his ability to understand the nature of the charges against him, the purpose of the proceedings against him, nor his ability to assist counsel in his defense."

¶ 14 When the case was called on September 10, 2009, the trial court indicated that it had received the psychiatric report, in which the psychiatrist opined defendant was fit to stand trial at the time of trial. The court then engaged in the following exchange with defense counsel:

> "THE COURT: As far as I'm concerned, since you did not make any motions and did not make a motion to have a psychiatric examination, I don't think there is a *bona fide* issue of fitness.
>
> [DEFENSE COUNSEL]: I disagree with the Court, because the fact that medication was brought up and things that arose since that time.
>
> THE COURT: The issue seems to be whether or not he was fit at the time of trial. And you're a veteran criminal defense attorney. You have probably been involved with tens of thousands of cases. You did not ask for fitness. I assume you did not ask for fitness because you were able to communicate with your client, and your client was able to understand the nature of the charges against him.
>
> I made the motion [for a BCX] based on medication he was on. Now that I have the report from the psychiatric institute, I see no reason we should delay this any further.
>
> [DEFENSE COUNSEL]: Again, the fact that he was on medication, that he's had a prior condition that I wasn't aware of at that time. He did have an incident where he was shot in the head, which was the precipitating factor for one of the treatments that he's gone through. I think the issue is there. And I think the jury has to decide whether or not he is mentally capable to do this, Judge.

THE COURT: I disagree with you. If you want to take that up to the Appellate Court, you can do that. But, you have been practicing as long as I can remember, and I have been a lawyer since 1980. And you did not ask for the motion.

One of the things I based my opinion on is that you didn't ask for a BCX evaluation because you have been able to communicate with your client. There's nothing that happened during the trial or any time he's been here, when it comes to communicating with your client, that leads me to believe he was not fit for trial.

[DEFENSE COUNSEL]: I have certain confidential relationships with my client which prevent me from saying certain things. The question of competency is a different thing. I might have to excuse myself and testify in the hearing. But if the Court is prohibiting us from doing that, then, that, in fact, will be depriving [defendant] - -

THE COURT: Are you withdrawing from the case, then?

[DEFENSE COUNSEL]: I might have to.

THE COURT: Yes or no? So, you're going to withdraw from the case and testify at the hearing?

[DEFENSE COUNSEL]: Yes.

THE COURT: And you're going to testify about these things even though you didn't ask for a BCX?

[DEFENSE COUNSEL]: That's correct. Because we waited for psychiatric testimony to be given, I didn't think that was my obligation to do that.

THE COURT: Let's go back. He was on trial September 24th, 25th and 26th of '08. We have been waiting a whole year to get an evaluation. Any time prior to that, did you have a question whether or not he was fit for trial?

[DEFENSE COUNSEL]: Your Honor, I can't answer that right now.

THE COURT: Sure, you have to. And it - -

[DEFENSE COUNSEL]: I can't. If I withdraw and testify, then I'm obviating - -

THE COURT: You went to trial with a doubt of whether or not your client was fit for trial?

[DEFENSE COUNSEL]: I never said that.

THE COURT: What are you saying?

[DEFENSE COUNSEL]: I'm saying that because of things that have come up now - -

THE COURT: Not now. I'm talking about back then.

[DEFENSE COUNSEL]: I don't know if those issues were viable and apparent at that time, but based on what I have learned since that time, maybe there were certain things that came out that I should have been aware of; but, because we did not know the psychiatric problems, and the fact he did have medication, maybe that was the reason that he wasn't competent at that time.

THE COURT: Do you have any expert testimony?

[DEFENSE COUNSEL]: I don't have it at this time.

THE COURT: What lawyer are you going to get to represent him?

[DEFENSE COUNSEL]: I can talk to my client.

THE COURT: Talk to your client. The jury is going to be here within a week or so.

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[DEFENSE COUNSEL]: I have talked to [defendant], and he's asking if you can hold this case on until Tuesday. There is a possibility we will just proceed with the sentencing on that date. I need a few minutes in the jail to talk to him, and see if another lawyer is available or not. We want to make some finality to this. I'm asking to hold it on until Tuesday.

THE COURT: Are you going to be back here on Tuesday?

[ASSISTANT STATE'S ATTORNEY]: I can be back here on Tuesday. I don't think it's necessary, looking over the case law since we broke. It's at your discretion.

THE COURT: Counsel is telling me he has this confidential information that he can't - - even though he didn't make his own motion for BCX based on this confidential information, which nobody asks why you make a motion for BCX. I will allow him to have one more visit to him, continue this case to September 15th."

¶ 15 When the case was called on September 15, 2009, defense counsel reported to the trial court that he had met with defendant, who had made a decision to go ahead with sentencing. Counsel asked defendant if that was correct, and defendant answered, "Yes." The court then stated, "just so the record is clear," that it was of the opinion there had never been a *bona fide*

issue regarding fitness; that defendant's "veteran criminal defense attorney of many years" had never indicated defendant did not understand what was happening, did not understand the nature of the charges against him, or was unable to cooperate in his defense; and that the court ordered the evaluation *sua sponte* only based on the psychological history listed in the PSI report.

¶ 16 The trial court thereafter heard the State's arguments in aggravation. The State highlighted the facts of the case and reviewed defendant's criminal history, which was set forth in the PSI report and included delinquency findings for PCS in 1991, PCS in 1994, and aggravated battery in 1994; and convictions for delivery of cannabis in 1995, delivery of a controlled substance in 1998, PCS in 2005, and driving on a suspended / revoked license in 2007.

¶ 17 In mitigation, defense counsel called defendant's girlfriend, Keturah Maynie. She testified that she and defendant have two children together and defendant helped with raising her third child, who was born before she met defendant. Maynie related that defendant had been shot in the head in 1991 and was given medication. When asked whether the injury had caused any change in defendant's behavior, Maynie said he became a little more quiet, and sometimes a little more hyper. Defendant then spoke at length in allocution, apologizing for "what happened," insisting that he had never been a bad person in life and would not hurt anyone, stating that everyone makes wrong decisions that make one a better person, relating how he had raised three children, detailing his work habits, and asking for forgiveness. Defense counsel added that although defendant had had prior "brushes with the law," nothing in his background showed a history of violence.

¶ 18 The court sentenced to concurrent terms of 25 years for aggravated discharge of a firearm, 25 years for armed violence, 10 years for UUWF, and 3 years for AUUW.

¶ 19 On direct appeal, defendant contended that his 25-year sentences were excessive. We rejected his arguments and affirmed. *People v. White*, 2011 IL App (1st) 092544-U.

¶ 20 Defendant filed a *pro se* postconviction petition on May 17, 2012, alleging ineffective assistance of trial counsel. Specifically, defendant asserted that defense counsel knew he "suffered from a history of *** schizophrenia," but made no effort to apprise the trial court of defendant's condition and failed to request a fitness evaluation prior to trial. Defendant alleged that counsel should have requested a fitness hearing where there was a *bona fide* doubt of his fitness to stand trial, as he "was not able to conduct a simple conversation on the day of trial." Defendant argued that he was prejudiced by counsel's failure, because if such an evaluation had been conducted, he would have been found unfit for trial. Defendant attached two affidavits to his petition: one from his mother, Bobbie White, and the other from Maynie, who was now his fiancée.

¶ 21 White averred in her affidavit that in the mid 1990s, defendant had been diagnosed with schizophrenia, with which she had also been diagnosed. According to White, defendant was prescribed Olanzine, but stopped taking his medication about two years before his trial, and as a result, he would leave the apartment he shared with Maynie and "was always wandering the streets." White stated that on September 23, 2008, the day before trial began, she and Maynie drove around Harvey, looking for defendant. They found him and brought him home, but around 11 p.m. he tried to leave, so White gave him "a couple of my pills," specifically, Haldol and

Cogentin. White wrote, "The pills helped to subdue him, but it affected his ability to understand simple conversations."

¶ 22 White averred that the following morning, she and Maynie took defendant to court and spoke to defense counsel, outlining defendant's history of mental illness and the previous day's events. According to White, counsel assured them that he would speak to the judge before trial about defendant's mental illness, as well as about "the events that occurred within the last 48 hours, to prevent us from reliving the events of the past few days." White stated that at the conclusion of the first day of trial, counsel had not informed the court of defendant's mental illness, "so we had to take him home." Back at the apartment, White gave defendant two more of her pills "to keep him subdued for the second day of trial." White concluded her affidavit by stating she was confident that had counsel spoken to the judge about defendant's mental illness and "inability to understand basic conversations while he was on my pills," the judge would have ordered a psychological evaluation before trial.

¶ 23 Maynie averred in her affidavit that on and before the first day of trial, defendant was hearing voices and was not cognizant of his upcoming trial date. She stated that she and White had to drive around the streets of Harvey to locate defendant and bring him home. Late on the night before trial began, defendant tried to leave their apartment several times. As a result, White gave him several of her pills "to help control the voices in his head." According to Maynie, defendant "started to calm down, but he could not think clear enough to conduct a simple conversation; as a result, it was difficult to converse with him because he would ask questions which were quite infantile in nature."

¶ 24 Maynie wrote that the following morning, when she and White took defendant to court, they told counsel about defendant's mental illness and the problems they were having with him over the past few days. Counsel assured Maynie and White that he would speak to the judge about defendant's mental illness so they would not have to relive the events of the past few days. However, according to Maynie, by the end of the first day of trial, counsel still had not mentioned defendant's illness to the judge, and "as a result, we had to take [defendant] home and give him a couple of Ms. White's medication to keep him subdued for the second day of trial." Maynie concluded, "If [defense counsel] had spoken to the trial judge about [defendant's] mental illness before trial, the trial judge would have ordered that he undergo a psychological evaluation before trial, rather than at sentencing."

¶ 25 The trial court docketed the petition for second-stage proceedings and appointed the public defender.

¶ 26 Postconviction counsel filed an amended petition, arguing that trial counsel was ineffective for failing to request a fitness hearing prior to trial. Referencing White's and Maynie's affidavits, which were attached, postconviction counsel asserted that in light of the information they related to trial counsel, there was a *bona fide* doubt as to defendant's fitness, and that trial counsel acted deficiently in failing to request a fitness hearing. Postconviction counsel further asserted that defendant was prejudiced by this failing because had trial counsel requested a fitness hearing and apprised the trial court that defendant was schizophrenic, given medication, and hearing voices, the court would have had a *bona fide* doubt regarding defendant's fitness and ordered a hearing. Postconviction counsel wrote, "The fact that the trial court would have ordered a fitness hearing is evidenced by the trial court's reliance on the

information contained in the PSI which revealed that [defendant] was on medication. Based upon the information, the trial court, on its own motion ordered a retrospective fitness evaluation."

¶ 27 The State filed a motion to dismiss, arguing that even taking defendant's factual allegations as true, they did not establish he was unfit for trial. The State asserted that trial counsel's performance was not deficient, and that defendant had not shown how he was prejudiced by the lack of a pretrial request for a fitness hearing.

¶ 28 Following a hearing, the trial court granted the State's motion to dismiss. In the course of doing so, the court observed that if it were to deny the motion to dismiss, one of the things it would have to do is order a BCX to determine whether defendant was fit at the time of trial, but that it had already ordered such an examination prior to sentencing. The court also recalled that when defendant appeared before it, "there was no indication whatsoever that he had any mental illness." Emphasizing that a psychiatrist had found defendant was mentally fit to stand trial at the time of his trial and that "there is no indication otherwise," the court concluded, "So I think this issue has been dealt with before. I can't even imagine counsel, that's trial counsel, being derelict in his representation of defendant."

¶ 29 This appeal followed.

¶ 30 On appeal, defendant contends that his petition should have advanced to an evidentiary hearing because it made a substantial showing of ineffective assistance of trial counsel where counsel failed to raise and properly advance a fitness claim. He argues that the record failed to contradict his well-pled allegations, supported by two affidavits and trial counsel's posttrial remarks, that counsel knew of his questionable mental condition before trial but did nothing to alert the judge or the examining psychiatrist of his concerns. Defendant asserts that the trial

court's review of his petition "fell off the tracks for three reasons": (1) the court was looking for immutable mental deficiency markers that the law recognizes do not exist; (2) the court appeared to rely almost exclusively on defense counsel's duty to inform it of any fitness concerns that he might have had prior to trial and "utterly omitted trial counsel's palpable unease revealed posttrial that he was conflicted and might have to withdraw as counsel since he 'had confidential information' on the issue"; and (3) the court wholly ignored the affidavits in which White and Maynie averred that prior to trial, they informed counsel of defendant's mental illness, that counsel promised to convey this information to the court, and that counsel did not fulfill this promise. Defendant also asserts that the court improperly and inappropriately relied on three untrustworthy factors in granting the motion to dismiss, *i.e.*, its own observations of defendant, a lack of information of unfitness from trial counsel, and the existence of the psychiatrist's report finding defendant fit. Defendant maintains that the record demonstrates he was unfit at the time of trial, as White and Maynie averred that he exhibited erratic behavior on the days immediately prior to trial and "displayed a profound inability to communicate or understand simple conversation after his mother gave him her psychotropic medication." He also argues that the record strongly suggests trial counsel had "confidential information" regarding his fitness prior to trial but failed to apprise the trial court of those concerns either pretrial or posttrial, even though counsel had an ongoing obligation to inform the court of any mental disability defendant had. Finally, defendant questions the psychiatrist's findings that he was fit and malingering, asserting that her report "reveals a number of disturbing findings that undermined her finding of fitness," and noting that the psychiatrist did not have the information included in White's and Maynie's affidavits.

¶ 31 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9-10 (2009). The instant case involves the second stage, where counsel is appointed to indigent defendants and the State is allowed to move to dismiss. *Hodges*, 234 Ill. 2d at 10-11. At this stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The granting of the State's motion to dismiss is warranted if the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). In other words, a defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Id*. at 381. Our review at the second stage is *de novo*. *Id*. at 388, 389.

¶ 32 The standard for determining whether a defendant was denied the effective assistance of counsel is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *Hall*, 217 Ill. 2d at 334-35. To establish ineffective assistance of counsel under *Strickland*, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 687.

¶ 33 In the instant case, we need not determine whether counsel's performance fell below an objective standard of reasonableness. This is because defendant has not made a substantial showing of prejudice. See *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91 (if a claim of

ineffectiveness may be disposed of due to lack of prejudice, this court is not required to address whether counsel's performance was objectively reasonable).

¶ 34 On appeal, defendant argues he was prejudiced because had counsel apprised the court of his doubts about defendant's fitness, "there is no doubt that a fitness hearing would have been ordered." However, that is not the test in cases such as this one. Rather, when a defendant alleges ineffectiveness based on failure to request a fitness hearing, the relevant prejudice inquiry is whether there is a reasonable probability that the outcome of a fitness hearing would have been favorable to the defendant; that is, that the defendant would have been found unfit to stand trial. *People v. Mitchell*, 189 Ill. 2d 312, 333-34 (2000).

¶ 35 A defendant is presumed to be fit to stand trial, and is considered unfit only 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 2008). Here, a psychiatrist examined defendant and concluded he was fit to stand trial at the time of trial. The trial court, based on the psychiatrist's report and its own observations of defendant at trial, determined there was no *bona fide* issue as to defendant's fitness so as to justify holding a fitness hearing. Given these circumstances, there is no reasonable probability that defendant would have been found unfit at a fitness hearing, even if counsel had requested one prior to trial. See *People v. Smith*, 2017 IL App (1st) 143728, ¶ 86 (factors on which a fitness determination may be based include expert's report and trial court's own observations of the defendant).

¶ 36 We are mindful of defendant's argument that the psychiatrist's report "reveals a number of disturbing findings that undermined her finding of fitness," including that he told her he could not remember his birth year, the number of children that he had, the name of his prescribing

physician, the reason for his prosecution, whether it was a bench or jury, whether he was found guilty, who the witnesses were, what his attorney told him about the case, how much time he was facing, or where he attended drug classes. However, we disagree with defendant's position. In our view, these factors did not undermine the psychiatrist's conclusion of fitness, but rather, informed the psychiatrist's determination that defendant was malingering.

¶ 37 In light of the psychiatrist's report and the court's own observations of defendant's behavior at trial, we cannot conclude that there was a reasonable probability that, but for defense counsel's failure to request a fitness hearing prior to trial, he would have been found unfit. *Strickland*, 466 U.S. at 694; *Mitchell*, 189 Ill. 2d at 333-34. Defendant has failed to make a substantial showing of ineffective assistance of counsel. See *Coleman*, 183 Ill. 2d at 381-82. Accordingly, the trial court did not err in granting the State's motion to dismiss defendant's postconviction petition.

¶ 38 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 39 Affirmed.