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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 02-CF-342
)	
CHARLES W. KING,)	Honorable
)	John S. Lowry,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant’s postconviction petition, which alleged that defense counsel was ineffective for not moving to dismiss subsequent charges as violating defendant’s right to a speedy trial; as the original charges of criminal sexual assault gave defendant adequate notice of the subsequent charges of aggravated criminal sexual assault, the subsequent charges were not “new and additional” and thus did not violate defendant’s speedy-trial right.

¶ 2 At issue in this appeal is whether the postconviction petition of defendant, Charles W. King, was properly dismissed at the second stage. More specifically, we consider whether defendant established that pretrial and appellate counsel were ineffective for failing to argue that defendant’s right to a speedy trial was violated when a superseding indictment charging

defendant with aggravated criminal sexual assault was filed more than 120 days after defendant was arrested and charged with criminal sexual assault. Because we conclude that the aggravated criminal sexual assault charges were not new and additional, we find that counsel was not ineffective for failing to argue that defendant's speedy-trial rights were violated. Accordingly, we affirm the dismissal of defendant's petition.

¶ 3

I. BACKGROUND

¶ 4 On January 31, 2002, defendant was arrested for sexually assaulting D.G., and he never posted bond. On February 20, 2002, he was charged with two counts of criminal sexual assault. Count I of the indictment provided that defendant:

“knowingly and by use of force committed an act of sexual penetration in that the defendant grabbed [D.G.] and would not allow her to leave the area or her vehicle, and then when in her vehicle placed his penis in the mouth of [D.G.], in violation of 720 ILCS 5/12-13(1) [(West 2002) (now 720 ILCS 5/11-1.20(a)(1) (West 2018))].”

Count II differed from count I only in that it charged defendant with “plac[ing] his penis in the vagina of [D.G.]”

¶ 5 On August 14, 2002, the State charged defendant with an additional two counts of aggravated criminal sexual assault. Count III provided that defendant:

“knowingly and by the use of force, committed an act of sexual penetration with [D.G.], in that he grabbed and punched [D.G.] and placed his penis in the mouth of [D.G.], and in the course of this conduct caused bodily harm to [D.G.] in violation of 720 ILCS 5/12-14(a)(2) [(West 2002) (now 720 ILCS 5/11-1.30(a)(2) (West 2018))].”

Count IV differed from count III only in that it charged defendant with “plac[ing] his penis in the vagina of [D.G.]” Defendant, who had pretrial counsel but represented himself at trial, never demanded a speedy trial or claimed that his speedy-trial rights were violated.

¶ 6 Evidence presented at trial revealed that defendant met D.G. in a bar in early January 2002. When the bar closed for the night, D.G. agreed to drive defendant home. While in D.G.’s car, defendant assaulted her in the backseat. Semen collected from the backseat matched defendant’s DNA profile. Defendant claimed at trial that he and D.G. had consensual sex at a house party.

¶ 7 The jury found defendant guilty of two counts of criminal sexual assault and two counts of aggravated criminal sexual assault. The trial court sentenced defendant to consecutive terms of 20 years’ imprisonment on the aggravated criminal sexual assault convictions. Defendant never claimed after trial that his speedy-trial rights were violated. Defendant appealed, and this court affirmed. *People v. King*, Nos. 2-03-1047 & 2-04-0240 cons. (2005) (unpublished order under Illinois Supreme Court Rule 23).

¶ 8 Thereafter, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)). The trial court granted the State’s motion to dismiss the petition, and defendant appealed. The appellate defender moved to withdraw, and this court granted the motion and affirmed the judgment. *People v. King*, No. 2-07-1056 (2009) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 9 In February 2010, defendant petitioned for postconviction relief. The trial court summarily dismissed the petition; defendant appealed; and this court reversed and remanded, because the trial court did not summarily dismiss the petition within 90 days after it was filed. *People v. King*, 2012 IL App (2d) 100801.

¶ 10 Although counsel was appointed on remand, defendant soon proceeded *pro se*. In an amended postconviction petition, defendant essentially claimed that the semen recovered from the backseat of D.G.'s car was manufactured by the State. Defendant acknowledged that his petition was untimely, but he claimed that the delay in filing his petition was due to the fact that the prison had misplaced his legal materials. Attached to his petition was a December 22, 2005, letter from his attorney indicating that an inmate found a box containing defendant's legal files mixed in with the inmate's files. Also attached to the petition was an affidavit from the inmate, who attested that he found transcripts and police reports from defendant's case mixed in with his on February 4, 2009. The State moved to dismiss the petition, arguing that it was untimely and that defendant's claims were forfeited and lacked merit.

¶ 11 Before the court ruled on the motion to dismiss, it allowed defendant to file a supplement to his amended petition. Defendant claimed in this supplement that pretrial and appellate counsel were ineffective for failing to move to dismiss the superseding indictment on speedy-trial grounds. The State filed a response, arguing that defendant never preserved his claim. The State admitted, however, that issues related to the compulsory joinder of the charges were "probably better suited to an evidentiary hearing."

¶ 12 The court granted the State's motion to dismiss. The court found that, even if defendant's claim concerning his missing legal materials were correct, he filed his postconviction petition more than 12 months after those materials were returned to him. The court also noted that defendant never demanded a speedy trial and that, as a *pro se* litigant, he could not claim that he himself was ineffective. This timely appeal followed.

¶ 13

II. ANALYSIS

¶ 14 At issue in this appeal is the propriety of the second-stage dismissal of defendant's supplemental amended petition alleging that counsel was ineffective for failing to argue that defendant's right to a speedy trial was violated. At the second stage, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). A substantial showing is a measure of the legal sufficiency of the petition's allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. The defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). If the defendant fails to make this showing, the petition must be dismissed. *People v. Cotto*, 2016 IL 119006, ¶ 28. The dismissal of a petition without an evidentiary hearing is reviewed *de novo* (*People v. Sanders*, 2016 IL 118123, ¶ 31), and thus, we may affirm the dismissal of a petition on any basis that the record supports (*People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008)).¹

¶ 15 To survive second-stage review, a postconviction petition alleging that counsel was ineffective must make a substantial showing that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Failure to meet either prong defeats an ineffective assistance of counsel claim. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). If the defendant fails to make a substantial showing that trial counsel was ineffective, appellate counsel cannot be deemed

¹ Accordingly, we do not address whether defendant's claim was untimely or forfeited, as we may affirm on the merits.

ineffective for failing to raise trial counsel's ineffectiveness. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109.

¶ 16 Defendant's ineffective assistance of counsel claim rests on whether he was denied his right to a speedy trial. Defendants have both constitutional and statutory rights to a speedy trial. *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006). Although defendant asserted in his supplemental amended petition both constitutional and statutory violations, he claims on appeal that only his statutory right to a speedy trial was violated. That statutory right mandates that a defendant in custody be brought to trial within 120 days, not counting delays the defendant agreed to or caused. 725 ILCS 5/103-5(a) (West 2002). Although the State may file additional charges, they are subject to the same speedy-trial period if they are subject to compulsory joinder with the original charges.

¶ 17 Charges are subject to compulsory joinder if they arise out of the same conduct and are known to the prosecutor when the case is initiated. See 720 ILCS 5/3-3 (West 2002). If a subsequent charge is subject to compulsory joinder with the original charge, then:

“ ‘the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. Continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when those continuances were obtained.’ ” *People v. Phipps*, 238 Ill. 2d 54, 66 (2010) (quoting *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981)).

Thus, if the State brings a “new and additional” charge that is subject to compulsory joinder with the original charge more than 120 days after first charging the defendant, the “new and

additional” charge must be dismissed as a violation of the defendant’s right to a speedy trial on that charge. *People v. Williams*, 204 Ill. 2d 191, 204-05, 207 (2010).

¶ 18 Here, there is no dispute that the State added two counts of aggravated criminal sexual assault more than 120 days after it charged defendant with two counts of criminal sexual assault.² There is also no real dispute that the two subsequent charges of aggravated criminal sexual assault were subject to compulsory joinder. What is disputed is whether the aggravated criminal sexual assault charges were new and additional charges.

¶ 19 Our supreme court has outlined how to analyze whether charges are new and additional. It said:

“The analysis involves a comparison of the original and subsequent charges. [Citation.] The purpose of the rule set forth in *Williams* is to prevent ‘trial by ambush.’ [Citation.]

The rationale for the rule, therefore, centers on whether the defendant had adequate notice of the subsequent charges to allow preparation of a defense. The focus is on whether the original charging instrument gave the defendant sufficient notice of the subsequent charges to prepare adequately for trial on those charges. If the original charging instrument gives a defendant adequate notice of the subsequent charges, the ability to prepare for trial on those charges is not hindered in any way. Thus, when the State files the subsequent charge, the defendant will not face ‘a Hobson’s choice between a trial without adequate preparation and further pretrial detention to prepare for trial.’ [Citation.] Rather, the defendant may proceed to trial on the subsequent charges with

² Defendant was charged with aggravated criminal sexual assault 195 days after he was arrested and 175 days after he was charged with criminal sexual assault.

adequate preparation instead of being forced to agree to further delay. In those circumstances, the rationale for declining to attribute to the defendant delays in connection with the original charges does not apply.” *Phipps*, 238 Ill. 2d at 67-68.

¶ 20 When we compare the original charges of criminal sexual assault with the subsequent charges of aggravated criminal sexual assault, we see that both sets of charges provide that defendant, “by the use of force,” “grabbed” D.G. in the process of committing a sexual assault. What differs is that the subsequent charges provided that defendant “punched” D.G. and in the process of committing a sexual assault “caused bodily harm to [D.G.]” We cannot conclude that these differences make the subsequent charges new and additional for speedy-trial purposes. Because the original charges of criminal sexual assault gave defendant adequate notice to prepare a defense to the subsequent charges of aggravated criminal sexual assault, we cannot conclude that defendant’s statutory right to a speedy trial was violated. *Id.* at 68-69.³

¶ 21 Defendant’s primary argument is that the subsequent charges were new and additional because the potential penalties of the charges were completely different. Compare 720 ILCS 5/11-1.20(a), (b)(1) (West 2018) (criminal sexual assault is a Class 1 felony) with *id.* § 11-1.30(a)(2), (d)(1) (aggravated criminal sexual assault is a Class X felony). The main problem with defendant’s position is that it is contrary to our supreme court’s express instructions in *Phipps*. Whether the elements or possible penalties of a subsequent charge are different from the original one is simply not dispositive of whether a subsequent charge is “new and additional” for

³ Defendant claimed that the addition of the “bodily-harm” element prevented him from preparing a defense, because adding that element mandated that he obtain hospital records concerning D.G.’s treatment. However, at oral argument, defendant conceded that these materials were tendered to him during discovery.

speedy-trial purposes. Although the supreme court noted that the two charges at issue in *Phipps* “had essentially the same elements and provided the same penalty,” the supreme court also stated that “[t]he critical point for our speedy-trial analysis ***, however, is *** whether the original indictment gave defendant adequate notice to prepare his defense to the subsequent charge.” *Phipps*, 238 Ill. 2d at 68-69. As noted, the original indictment here charging defendant with criminal sexual assault gave him adequate notice to prepare a defense to the subsequent indictment charging him with aggravated criminal sexual assault.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 24 Affirmed.