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2019 IL App (3d) 160206-U

Order filed April 12, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois.
Respondent-Appellee,)	
v.)	Appeal No. 3-16-0206
MICHAEL W. SMITH,)	Circuit No. 04-CF-629
Petitioner-Appellant.)	Honorable Walter D. Braud, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The second-stage dismissal of the petitioner's successive petition for postconviction relief was affirmed because the petitioner did not make a substantial showing that his trial counsel's failure to inform him of the potential SVP consequences of his plea was deficient performance at the time of the plea.

¶ 2 The petitioner, Michael W. Smith, appealed from a judgment dismissing his successive petition for postconviction relief.

¶ 3 **FACTS**

¶ 4 The petitioner pled guilty to a single count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)) in 2005 and was sentenced to 10 years in prison. Prior to his release, on January 7, 2013, the State filed a petition seeking sexually violent person (SVP) commitment, alleging that the petitioner’s predatory criminal sexual assault of a child conviction was a sexually violent offense under the Sexually Violent Persons Commitment Act (SVP Act) (725 ILCS 207/1 *et seq.* (West 2012)).

¶ 5 The petitioner had previously filed unsuccessful postconviction petitions. However, after the State filed its petition for SVP commitment, the petitioner filed a motion for leave to file a successive postconviction petition, the petition at issue in this appeal. The trial court granted the petitioner leave to file the successive petition. The petitioner alleged that his constitutional right to effective assistance of counsel was denied because his trial counsel failed to advise him that predatory criminal sexual assault of a child was a qualifying conviction under the SVP Act and that pleading guilty to that offense could subject him to SVP civil commitment proceedings in the future. After a second-stage hearing, the trial court dismissed the petition. The trial court found that the petitioner’s trial counsel was deficient for failing to advise the petitioner about the risk of SVP commitment but that the petitioner could not show prejudice. Specifically, the trial court found that there was not “a reasonable other choice *** available to this Defendant other than to plead open with a cap of 12 years.” The trial court denied the petitioner’s motion to reconsider, and the petitioner appealed.

¶ 6 ANALYSIS

¶ 7 The petitioner contends that his successive postconviction petition was erroneously dismissed at the second stage. The petitioner argues that he made a substantial showing that his

trial counsel was ineffective for failing to advise him that pleading guilty to predatory criminal sexual assault of a child would make him susceptible to civil commitment under the SVP Act.

¶ 8 Under the Post-Conviction Hearing Act, individuals convicted of criminal offenses may challenge their convictions on the grounds that their federal or state constitutional rights were substantially violated in the original trial or sentencing hearing. 725 ILCS 5/122-1 *et seq.* (West 2012). The Post-Conviction Hearing Act sets forth three stages of review. At the first stage, the circuit court may dismiss postconviction petitions that are frivolous or patently without merit. *Id.* 122-2.1(a)(2). If the circuit court does not dismiss the petition, proceedings on the petition advance to the second stage. At the second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Id.* 122-4, 122-5; *People v. Domagala*, 2013 IL 113688, ¶ 33. If the petitioner makes the requisite substantial showing that his constitutional rights were violated, he is entitled to a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 9 In this case, the petitioner's postconviction petition was dismissed at the second stage of review. Our review of a second-stage dismissal is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Since second-stage proceedings test the legal sufficiency of the petition, we review the petition to determine if the petitioner alleged a constitutional violation, which if proven at an evidentiary hearing, would entitle the petitioner to relief. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 10 The petitioner challenges his guilty plea, arguing that the constitutional violation was the denial of effective assistance of counsel. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at

687. An attorney's performance is deficient if the attorney failed to ensure that the defendant's guilty plea was voluntarily and intelligently entered. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). The trial court found that trial counsel's failure to inform the petitioner of the SVP consequences of his plea was deficient performance.

¶ 11 The State challenges the finding that trial counsel's performance was deficient, arguing that, in 2005 when the petitioner pled guilty, there was no rule of law requiring an attorney to advise the petitioner regarding the collateral consequences of his plea. The Illinois Supreme Court recognized in *People v. Hughes* that, after *Padilla v. Kentucky*, 559 U.S. 356 (2010), the impact of SVP commitment could not be categorically excluded from a cognizable claim of ineffective assistance of counsel even though SVP proceedings were traditionally categorized as collateral. *Hughes*, 2012 IL 112817, ¶¶ 49, 53.

¶ 12 However, the question of what constituted reasonable representation has to be evaluated at the time of counsel's conduct. *Id.* ¶ 61. The petitioner contends that the SVP Act had been in existence for seven years at the time of the petitioner's plea, and he alleged that his defense counsel did not inform him that his conviction of predatory criminal sexual assault of a child made him eligible for commitment under the SVP Act. 725 ILCS 207/5(e) (West 2004) (defining "Sexually violent offense" to include predatory criminal sexual assault of a child, 720 ILCS 5/12-14.1 (West 2004)). Prior to *Padilla*, though, the governing rule was that the sixth amendment did not require defense counsel to advise a defendant of the "collateral consequences" of a guilty plea (*i.e.*, any consequences that were not part of the criminal penalty for the offense or did not flow directly and automatically from the criminal conviction). *Hughes*, 2012 IL 112817, ¶ 45. As the supreme court pointed out in *Hughes*, although no Illinois court had squarely addressed the issue, cases in other jurisdictions had held that counsel's failure to

advise a defendant about potential civil commitment proceedings did not constitute ineffective assistance because such proceedings were collateral consequences of a criminal conviction. *Id.*; see also *People v. Norris*, 328 Ill. App. 3d 994, 997 (2002) (in the context of whether a guilty plea was knowing and voluntary, SVP commitment was considered a collateral consequence that trial court was not required to include in its admonishments).

¶ 13 Under the principles set out in *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule of law that may not be applied retroactively to postconviction proceedings in cases wherein the conviction and direct appeals were final before *Padilla* was decided. *Chaidez v. United States*, 568 U.S. 342, 344 (2013). Since the petitioner was convicted in 2005 and his direct appeals were concluded before the *Padilla* decision was issued, the petitioner may not avail himself of the new rule announced in *Padilla*.

¶ 14 The trial court based its decision on its finding that the petitioner could not show prejudice. But, we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on that basis. *In re Estate of Sperry*, 2017 IL App (3d) 150703, ¶ 19 n.4. We conclude that the petitioner has not made a substantial showing that his counsel's failure to inform him of the potential SVP consequences of his guilty plea in 2005 was deficient performance and, thus, affirm the second-stage dismissal.

¶ 15 Since we have decided that trial counsel's performance was not deficient, we do not need to reach the issue of prejudice.

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Rock Island County is affirmed.

¶ 18 Affirmed.