FOURTH DIVISION
January 23, 2014

No. 1-11-1843

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAN ARCHER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County No. 99 CR 26211 Hon. Thomas J. Hennelly, Judge Presiding

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant made a substantial showing that his attorney was ineffective, where counsel's misapprehension of the law regarding aggravated kidnapping led defendant to plead guilty; (2) defendant failed to make a substantial showing that he need not register as a sex offender or that his attorney had a duty to advise him regarding sex offender registration.

¶ 2 Defendant pled guilty to aggravated vehicular hijacking and aggravated kidnapping and was sentenced to concurrent 28-year terms of imprisonment. The circuit court denied his motion

to vacate his guilty plea, and we affirmed. *People v. Archer*, No. 1-01-2712 (2002) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a *pro se* postconviction petition and was appointed counsel. The circuit court granted the State's motion to dismiss his petition, and defendant timely appealed. On appeal, he argues that the circuit court erred in dismissing his postconviction petition, where he made a substantial showing that counsel was ineffective, because her misapprehension of the law regarding aggravated kidnapping led him to plead guilty. He also makes several arguments regarding the Sex Offender Registration Act (SORA).

¶ 3 I. BACKGROUND

¶ 4 A. Guilty Plea

¶ 5 On January 16, 2001, defendant requested a guilty plea conference pursuant to Illinois Supreme Court Rule 402. Ill. S. Ct. R. 402 (eff. July 1, 1997). The court admonished defendant regarding the consequences of a 402 conference, and defendant stated that he understood and wished to proceed.

¶ 6 According to the State's recitation of the facts in the trial court, a mother and father were unloading groceries from their car into their restaurant when defendant approached with a knife, grabbed their car keys, pushed the father to the ground, and drove off in their car. As defendant reversed the car, smashing it into a dumpster, the father heard his daughter screaming from the backseat. The father yelled, "My daughter, my daughter, my daughter is in the car," and grabbed the car's open window. Defendant sliced the father's hand with a box cutter. Defendant drove off and ran into a pole less than two blocks from the restaurant. He fled on foot and was later found

nearby with a head injury, still holding the box cutter. The State asserted that the daughter suffered a broken jaw and clavicle, as well as recurrent nightmares.

¶ 7 The State argued that defendant should serve the maximum term given his criminal background and that the daughter was 12 years old. Defendant's attorney argued that he was intoxicated at the time and was unaware that a child was in the car. Defense counsel further argued that the medical records did not show that the daughter suffered any fractures. Defendant stated, "I didn't know the child was in the car. The man was inside the restaurant when I got in the car." He also contended that some of the information the State set forth regarding his criminal background was inaccurate.

¶ 8 The trial court stated it would not consider anything less than 28 years' imprisonment. After consulting with his attorney, defendant decided to plead guilty and stated that he was doing so freely and voluntarily. The State provided a factual basis, and the trial court sentenced defendant to two concurrent 28-year terms of imprisonment.

¶ 9 B. Motion to Vacate

¶ 10 On February 16, 2001, defendant filed a *pro se* motion to vacate his guilty plea, alleging his attorney's ineffectiveness. He testified at the hearing on his motion that his attorney failed to correct the State's factual misstatements regarding his prior convictions and failed to file an intoxication defense. Defendant further alleged that his attorney failed to contact certain witnesses, but admitted that he could not reach the witnesses either, as they were out of town.

¶ 11 Defense counsel testified that she was the third attorney assigned to defendant's case. She met with defendant six times and attempted to develop a trial strategy, but each time they met,

defendant changed his story. She was prepared for a jury trial on January 16, 2001, but defendant stated that he wanted a 402 conference. She did not pursue an intoxication defense because no evidence, save defendant's own testimony, supported that defense. She further testified that she did not object during the discussion of defendant's prior convictions, because the court said it would not consider them.

¶ 12 The trial court denied defendant's motion to vacate his plea. Defendant timely appealed, and we affirmed. *People v. Archer*, No. 1-01-2712 (2002) (unpublished order under Supreme Court Rule 23).

¶ 13 C. Postconviction Petition

¶ 14 On July 9, 2003, defendant filed a *pro se* postconviction petition, alleging several constitutional violations, including counsel's ineffectiveness. He attached an affidavit in which he stated that his attorney did not want to discuss trial strategy and told him he could not prevail at trial.

On September 25, 2009, defendant filed a counseled supplemental petition, alleging (1) trial counsel induced him to plead guilty by erroneously stating that he had no defense to aggravated kidnapping; (2) mandated sex offender registration violated his rights to due process and equal protection; (3) counsel's failure to advise him that he would have to register as a sex offender rendered his plea involuntary; and (4) post-plea and appellate counsel provided ineffective assistance, where they failed to raise these issues. Defendant attached a new affidavit, in which he stated that his attorney had said that "it didn't matter to my defense to aggravated kidnapping whether or not I knew there was a girl inside the car." Defendant further averred that

he did not discover that he would have to register as a sex offender until after he filed his *pro se* postconviction petition and would have insisted on proceeding to trial had his attorney advised him of this requirement.

¶ 15 The State moved to dismiss defendant's petition, arguing that his claims were barred by waiver or *res judicata*, where defendant voluntarily and knowingly pled guilty and therefore waived all errors that were not jurisdictional in nature. The State further argued that counsel's ineffectiveness had already been litigated and defendant's SORA arguments had previously been rejected by Illinois courts.

¶ 16 Following a hearing, the circuit court granted the State's motion to dismiss, holding that "much of what has been raised is waived already or barred by res judicata." The court further stated that, even if these procedural bars were not in place, defendant failed to demonstrate counsel's ineffectiveness. The court likewise found that defendant failed to meet his burden regarding his SORA arguments. Defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues on appeal that he made a substantial showing that (1) defense counsel was ineffective, where she erroneously advised him that he had no defense to aggravated kidnapping or aggravated vehicular hijacking; and (2) he was deprived of due process, where SORA's requirements were not met and, alternatively, defense counsel was ineffective for failing to advise him regarding registration.

¶ 19 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) has three stages. At the first stage, the circuit court must independently review a petition within 90 days

and dismiss petitions that are frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition is not summarily dismissed, it is advanced to the second stage, where counsel is appointed and the State may respond. 725 ILCS 5/122-4, 122-5 (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). If the defendant makes a substantial showing of a constitutional violation at the second stage, the petition is advanced to the third stage for an evidentiary hearing. 725 ILCS 5/122-6 (West 2012); *People v. Gaultney*, 174 Ill. 2d 410, 418-19 (1996).

¶ 20 In this case, the circuit court dismissed defendant's petition at the second stage. When a postconviction petition is dismissed prior to an evidentiary hearing, our review is *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Dismissal is warranted at the second stage, where the defendant's claims, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Id.*; *People v. Turner*, 2012 IL App (2d) 100819, ¶ 21. All factual allegations not positively rebutted by the record must be accepted as true. *Hall*, 217 Ill. 2d at 334.

¶ 21 A. Ineffective Assistance of Counsel

¶ 22 Defendant argues that he made a substantial showing that his attorney was ineffective, where she advised him that his lack of knowledge that a girl was in the car was not a defense to aggravated kidnapping. The sixth amendment right to the effective assistance of counsel extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. __, __ (2012); *People v. Hale*, 2013 IL 113140, ¶ 15. The two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to challenges to a guilty plea based on counsel's ineffective assistance. *Hill v.*

Lockhart, 474 U.S. 52, 58 (1985); *Hale*, 2013 IL 113140, ¶ 15. Under *Strickland*, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced by counsel's substandard performance. *Strickland*, 466 U.S. at 696. We turn first to the State's argument that defendant forfeited this issue.

¶ 23 1. Forfeiture

¶ 24 The State sets forth several arguments regarding forfeiture. Citing *People v. Anderson*, 375 Ill. App. 3d 121, 133 (2007), the State contends that a voluntary guilty plea, such as defendant's, waives all nonjurisdictional errors. Defendant responds that counsel's ineffectiveness rendered his plea involuntary, and thus forfeiture does not apply. We agree with defendant. A defendant who pleads guilty may later raise his attorney's ineffectiveness, where counsel's deficient performance rendered the plea involuntary. See, *e.g.*, *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying *Strickland*, where defendant challenged the performance of the attorney who represented him in his guilty plea proceedings); see also *People v. Mendez*, 336 Ill. App. 3d 935 (2003) (defendant's guilty plea did not result in forfeiture, where he alleged that his attorney's misapprehension of the law rendered his plea involuntary).

¶ 25 Next, the State argues that defendant forfeited this issue by failing to raise it in the motion to vacate his guilty plea or on appeal from the denial of that motion. Defendant responds that he could not have raised this issue, because it concerns matters outside of the record. Defendant's point would be persuasive if his case had proceeded to trial. See *People v. Page*, 193 Ill. 2d 120, 135 (2000) (generally, issues that depend on matters found outside of the record may be raised for the first time in a postconviction petition). Guilty pleas present a different question, however.

In *People v. Stewart*, 123 Ill. 2d 368 (1988), the defendant pled guilty, filed an unsuccessful motion to vacate his plea, and later filed a postconviction petition. He argued, in part, that his postconviction claims could not have been raised earlier because they concerned matters "off-the-record." *Id.* at 373. The Illinois Supreme Court disagreed:

> "Rule 604(d) states that issues not preserved in a motion to vacate a guilty plea are waived. The waiver rule applies to post-conviction proceedings as well as appeals. Also, the rule specifically allows for introduction of extra-record facts by affidavit, so [the] 'off-the-record' argument is unavailing." *People v. Stewart*, 123 Ill. 2d 368 (1988).

Here, as in *Stewart*, defendant's argument that he could not have raised this issue in his motion to vacate his plea because it concerns matters outside of the record is unpersuasive, where matters outside of the record are permissible in such motions.

¶ 26 Nonetheless, we believe defendant did not forfeit this issue by failing to raise it in the motion to vacate his guilty plea. Forfeiture is a rule of administrative convenience, not an absolute bar to reviewing procedurally defaulted claims. *People v. Moore*, 177 Ill. 2d 421, 427 (1997). Thus, the doctrine will be relaxed in postconviction proceedings where fundamental fairness so requires. *Id.*; *People v. English*, 2013 IL 112890, ¶ 22; see also *People v. Hickey*, 204 Ill. 2d 585, 596 (2001) (relaxing forfeiture doctrine on grounds of fundamental fairness).

¶ 27 Defendant claims that, at the time he moved to vacate his guilty plea, his understanding was still clouded by defense counsel's assertion that lack of knowledge was not a defense to aggravated kidnapping. Defendant pled guilty on January 16, 2001, and filed his *pro se* motion to vacate his guilty plea approximately one month later on February 15, 2001. There is no

evidence that defendant was cured of counsel's alleged misadvice during the intervening weeks. The State argues that, even given his failure to raise this issue in the motion to vacate his guilty plea, defendant should have raised this issue on appeal from the denial of that motion. It is well-established, however, that an issue not raised in a defendant's motion to withdraw his guilty plea may not be raised on appeal. See Ill. S. Ct. R. 604 ("Upon appeal any issue not raised by the defendant in the motion to***withdraw the plea of guilty and vacate the judgment shall be deemed waived."); see also *People v. Company*, 376 Ill. App. 3d 846, 848 (2007) (same).

¶ 28 To the extent that this claim should have been raised in the motion to vacate defendant's guilty plea, his forfeiture is excused by post-plea counsel's ineffectiveness in failing to raise this issue. It has long been established that a guilty plea based on counsel's misapprehension of the law may justify withdrawal of that plea. See *People v. Morreale*, 412 Ill. 528 (1952). Given defendant's statement during his 402 conference—"I didn't know the child was in the car"—and the law regarding counsel's misapprehension of the law, post-plea counsel should have raised this issue. Counsel's failure to do so excuses any forfeiture on defendant's part. See *People v. Moore*, 177 Ill. 2d 421, 428 (1997) (where alleged forfeiture stems from appointed counsel's ineffectiveness, the doctrine is relaxed). Accordingly, we hold that defendant has not forfeited his claim that defense counsel was ineffective, where she misadvised him as to the law regarding aggravated kidnapping.

¶ 29 Defendant raises a second, related issue on appeal: he made a substantial showing that counsel was ineffective, where he told her that the girl's father was not near the car at the time he took it, yet counsel stated this was not a defense to aggravated vehicular hijacking. If, as

defendant claims, the girl's father was not near the car at the time he took it, this may have been a defense to aggravated vehicular hijacking. See 720 ILCS 5/18-3 (West 2012) (vehicular hijacking requires taking a vehicle from the "person or the immediate presence of another"); see also *People v. Cooksey*, 309 Ill. App. 3d 839, 848 (1999) (vehicular hijacking conviction reversed, where vehicle not taken from person's immediate presence, because she stood 25 feet away from vehicle). However, defendant raises this issue for the first time on appeal. Accordingly, unlike the claim regarding his lack of knowledge, defendant has forfeited this issue for purposes of appellate review. See Ill. S. Ct. R. 604 ("Upon appeal any issue not raised by the defendant in the motion to***withdraw the plea of guilty and vacate the judgment shall be deemed waived."); see also *People v. Company*, 376 Ill. App. 3d 846, 848 (2007) (same).

¶ 30 2. Misapprehension of the Law

¶ 31 To sustain a conviction for aggravated kidnapping, the State must prove beyond a reasonable doubt that the defendant acted knowingly. See 720 ILCS 5/10-1 (West 2012); 720 ILCS 5/10-2 (West 2012). Thus, if counsel advised defendant that his lack of knowledge of the girl's presence was not a defense to aggravated kidnapping, that advice was erroneous. See, *e.g.*, 1 John F. Decker & Christopher Kopacz, Illinois Criminal Law § 7.02 (5th ed. 2012) ("[I]t would not be viewed as a kidnapping if a person unwittingly locked a person in a building without any knowledge of this person's presence in the building.").

¶ 32 At the second stage, we must take defendant's allegation as true, unless it is positively rebutted by the record. *Hall*, 217 Ill. 2d at 334. Here, defendant's claim is not positively rebutted by the record. Indeed, counsel knew of defendant's claim that he did not see the girl in the car,

where defendant stated during the 402 conference, "I didn't know the child was in the car." We must therefore assume, at this stage, that defense counsel advised defendant that his lack of knowledge was not a defense to aggravated kidnapping. Given this assumption and the law regarding aggravated kidnapping, we must conclude at this stage that defendant has made a substantial showing that counsel was ineffective. See *People v. Pugh*, 157 Ill. 2d 1, 19 (1993) (defense counsel's misapprehension of the law may render counsel's assistance ineffective); See also *People v. Wright*, 111 Ill. 2d 18, 27 (1986) (defense counsel's decision not to raise a defense does not constitute trial strategy, where that decision was based on a misapprehension of the law); *People v. Williams*, 2012 IL App (1st) 100126, ¶ 33 (same).

¶ 33 *People v. Hall* is strikingly similar to the instant case. There, the defendant hijacked a car while its driver was inside a gas station. *Hall*, 217 Ill. 2d at 328. The defendant drove off with the owner's one-year-old daughter in the backseat and crashed the car several blocks away. *Id.* Defendant pled guilty to aggravated kidnapping. *Id.* at 326. He later filed a *pro se* postconviction petition, alleging that he did not know the child was in the backseat and told his attorney this, but counsel advised him that this was not a valid defense to aggravated kidnapping. *Id.* at 328. His petition was dismissed at the second stage. *Id.* at 334.

¶ 34 As to the first *Strickland* prong, our supreme court stated that an attorney's conduct is deficient, where he or she fails to ensure that the defendant enters a guilty plea voluntarily and intelligently. *Id.* at 335. The court concluded that defendant had met the first prong:

> "Taken as true, defendant's factual allegation that he did not know the child was inside the vehicle constitutes a defense to the charge of aggravated kidnapping. The alleged advice

> of defendant's attorney to the contrary was clearly erroneous. Thus, defendant's petition establishes a substantial showing that his attorney's advice was objectively unreasonable." *Id.*

Turning to the prejudice prong, the *Hall* court stated that a defendant must show that there is a reasonable probability that, absent counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Id.* A bare assertion to that effect is insufficient, however. Rather, a defendant must be accompanied by a claim of actual innocence or the articulation of a plausible defense. *Id.* The *Hall* court held that defendant's allegations, taken as true, constitute a plausible defense to aggravated kidnapping. *Id.* at 336. The court added that defendant's allegations supported a claim that the he was actually innocent of aggravated kidnapping. *Id.* The court concluded that there was a reasonable probability that the defendant would have pleaded not guilty and proceeded to trial absent counsel's deficient performance. *Id.* The court remanded the cause for an evidentiary hearing. *Id.* at 341.

¶ 35 This case is nearly indistinguishable from *Hall*. Here, as there, defendant hijacked a car, which he crashed several blocks away. As in *Hall*, the driver's daughter was in the backseat at the time. Defendant pled guilty to aggravated kidnapping, but later filed a *pro se* postconviction petition, alleging that he told his attorney that he did not know the child was in the backseat, but counsel advised him that this was not a valid defense to aggravated kidnapping. His petition, like the one in *Hall*, was dismissed at the second stage.

¶ 36 Defendant has made a substantial showing that counsel's performance was deficient, where she failed to ensure that the defendant entered his guilty plea voluntarily and intelligently.

Taken as true, defendant's claim that he did not know the girl was in the car would constitute a valid defense to aggravated kidnapping. If the claim is true, as we must presume at this stage, counsel's alleged advice was clearly erroneous. Defendant has also made a substantial showing that he was prejudiced by counsel's deficient performance. A defendant must show that there is a reasonable probability that, absent counsel's errors, he would not have pled guilty and would have proceeded to trial instead. *Hall*, 217 Ill. 2d at 335. Assuming, as we must, the truth of defendant's allegations, there is a reasonable probability that, given the defense that he lacked knowledge of the girl's presence, defendant would have proceeded to trial. As in *Hall*, defendant's allegations also support a claim of actual innocence as to the aggravated kidnapping charge. *Id.* at 336. Thus, defendant has made a substantial showing that his attorney was ineffective.

¶ 37 B. SORA

¶ 38 Defendant raises several arguments regarding SORA. Illinois courts have repeatedly upheld SORA as constitutional. See *People v. Malchow*, 193 Ill. 2d 413 (2000) (SORA does not violate due process); *People v. Johnson*, 225 Ill. 2d 573 (2007) (same); *People v. Doll*, 371 Ill. App. 3d 1131 (2007) (same). Defendant concedes that, generally, the registry of persons convicted of aggravated kidnapping as sex offenders does not violate due process. *Johnson*, 225 Ill. 2d at 591-92. He argues, however, that he was denied due process, where he was neither charged nor convicted of a sex offense.

¶ 39 The relevant version of SORA states that the phrase " 'sex offense' " includes "aggravated kidnapping" if "the victim is a person under 18 years of age, the defendant is not a parent of the

victim, and the offense was committed on or after January 1, 1996." 730 ILCS 150/2(b)(1.5) (West 2001). Defendant admits that he was charged with aggravated kidnapping, but argues that it was not a sex offense as charged, because it relied on his use of a weapon, not the age of the girl whom he kidnaped. Specifically, he contends that he was charged and convicted under subsection (a)(5), in which the aggravating factor is being armed with a dangerous weapon, not (a)(2), in which the aggravating factor is a victim under the age of 13. See 720 ILCS 5/10-2(a)(2)-(a)(5) (West 2001).

¶ 40 SORA draws no such distinction. See 730 ILCS 150/1, *et seq.* (2001). As the language above shows, it requires only that (1) the victim is under 18 years of age; (2) the defendant is not the parent of the victim; and (3) the offense was committed on or after January 1, 1996. 730 ILCS 150/2(b)(1.5) (West 2001). There is no indication that the General Assembly intended to tie sex offender registration solely to subsection (a)(2). Indeed, SORA requires registration where the victim is under 18, while subsection (a)(2) requires a victim under 13, suggesting that there is no such connection. See *People v. Beard*, 366 Ill. App. 3d 197 (2006) (concluding that this court may not override the General Assembly where it has a rational basis for SORA, even though only subsection (a)(2) out of the eight subsections references the victim's age). Defendant was charged and convicted of a sex offense under the plain language of the statute.

¶ 41 Alternatively, defendant argues that his attorney was ineffective, where she failed to inform him that he would be required to register under SORA. Under *Strickland*, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced by counsel's substandard performance. *Strickland*, 466 U.S. at

696. Defendant has failed to make a substantial showing regarding the first prong, because his attorney had no duty to advise him regarding sex offender registration.

¶ 42 Sex offender registration is not part of a defendant's sentence, but is rather a collateral consequence. *In re J.W.*, 204 Ill. 2d 50, 73 (2003); *In re T.C.*, 384 Ill. App. 3d 870, 877 (2008). Relying on *Padilla v. Kentucky*, 559 U.S. 356 (2010), defendant argues that, where collateral consequences of a plea agreement are "intimately related to the criminal process," counsel may have a duty to advise the defendant of those consequences. *Padilla*, however, concerned the collateral consequence of deportation, not sex offender registration. *Padilla*, 559 U.S. at 359. Even if this case concerned deportation, *Padilla* would not apply, as the United States Supreme Court has held that *Padilla* does not apply retroactively. See *Chaidez v. United States*, __ U.S. __, 133 S. Ct. 1103 (2013). This case became final in 2002, seven years prior to the Supreme Court's 2009 decision in *Padilla*. *People v. Archer*, No. 1-01-2712 (2002) (unpublished order under Supreme Court Rule 23). Prior to *Padilla*, defense attorneys in Illinois had no duty to advise clients regarding the collateral consequences of a guilty plea. *People v. Presley*, 2012 Ill App (2d) 100617, ¶ 28. Thus, counsel in this case had no duty to advise defendant that he would be required to register as a sex offender.

¶ 43 Defendant briefly sets forth a related argument regarding the Violent Offender Against Youth Registration Act (VOYRA), which contains requirements similar to SORA. See 730 ILCS 154/5 (West 2012). Defendant has not asserted that he has been required to register under VOYRA. Even if he had, we would reject his argument under the same rationale we apply to his SORA argument.

¶ 44 Finally, defendant argues that section 11 of VOYRA, which concerns transfer from SORA to VOYRA, violates his right to due process, because "the decision whether to label him a sex offender or violent offender against youth is entirely up to the unreviewable discretion of the State's Attorney's Office." See 730 ILCS 154/11 (West 2012). We agree with the State that section 11 concerns an administrative transfer and defendant's argument is not cognizable as a constitutional claim. See *People v. Coleman*, 183 Ill. 2d 366, 380 (1998) (postconviction petitions are a vehicle for challenging constitutional deprivations).

¶ 45 III. CONCLUSION

¶ 46 For the foregoing reasons, we reverse the circuit court's order granting the State's motion to dismiss defendant's postconviction petition and remand this cause to the circuit court for an evidentiary hearing.

¶ 47 Judgment reversed; cause remanded.