FIRST DIVISION
April 3, 2017

No. 1-15-0225

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 4735
	)	
DANIEL BEHNING,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order dismissing defendant's post-conviction petition properly dismissed all the claims in the petition. Also, we affirm the trial court's dismissal of defendant's post-conviction petition where defendant voluntarily pled guilty to the charges, and his claims of actual innocence and unfitness during the proceedings are contradicted by the record.

¶ 2 Defendant, Daniel Behning, appeals the order of the circuit court summarily dismissing his post-conviction petition as frivolous and patently without merit. On appeal, defendant contends that the court's order failed to mention two of the three claims he raised in his petition,

and therefore his petition must be remanded for second-stage post-conviction proceedings. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court dismissed defendant's post-conviction petition on December 12, 2014. This court granted defendant leave to file a late notice of appeal, which he filed on February 11, 2015. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013), governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 The following facts are relevant to this appeal. Defendant was charged with the February 9, 2009, aggravated robbery of Stuart Koon, and the home invasion, aggravated criminal sexual assault, and aggravated robbery of E.S that occurred on February 10, 2009. On October 20, 2009, the trial court ordered an evaluation of defendant's fitness to stand trial and his sanity at the time of the offense. Defendant was examined by Dr. Sharon Coleman, a clinical psychologist, and by Dr. Dawna Gutzmann, a psychiatrist, both from Forensic Clinical Services. Dr. Coleman stated that defendant was fit to stand trial and that "[h]e understands the nature and purpose of the proceedings against him and is able to assist counsel in his defense, if he so chooses." She also opined that he was legally sane. Dr. Gutzmann stated that defendant was currently on medication and fit to stand trial on medication. She opined that he needs to stay on his medication and that the "medications do not interfere with the defendant's fitness to stand trial." She also stated, "to a reasonable degree of medical and psychiatric certainty," that defendant was legally sane at the time of the alleged offenses. She concluded that "[i]n my opinion the defendant was not suffering from any mental disease or defect at the time of the alleged offense

that would have substantially impaired his capacity to appreciate the criminality of the alleged acts."

¶ 7 A pre-trial investigation report was filed with the trial court and on August 31, 2010, the court held a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). At the end of the conference, the court informed defendant that if he were to plead guilty, he would receive a sentence of three consecutive terms of 15 years' imprisonment, and concurrent terms of 10 years for home invasion and aggravated robbery. On November 9, 2010, defendant pled guilty to one count of aggravated robbery, and to the aggravated criminal sexual assault/bodily harm charges. The trial court admonished defendant regarding the sentence he would receive. Defendant was informed that he would receive 15 years each for three counts of aggravated criminal sexual assault, to be served consecutively, and a consecutive term of 10 years for home invasion, for a total of 55 years in the Illinois Department of Corrections. Defendant would also receive a four year sentence for aggravated robbery, to be served concurrently "at 50 percent." The trial court ensured that defendant's pleas were knowingly and voluntarily entered. The court also accepted the following facts, stipulated to by defendant:

> "As for Case No. 09 CR 4739, the evidence in that case would show that on February 10th of 2009, at approximately 7:40 p.m., at the apartment building located at 1015 South 7th Avenue, Apartment No. 1 in LaGrange, Cook County, Illinois, the victim in that case was a forty-six year old woman by the name of E.S.
>
> She would testify that she was doing laundry in the laundry room of her building when she heard a knock on the main apartment building door, and saw the Defendant, a man she did not know, standing outside of that door motioning to her.
>
> Miss S. would testify that she believed that the Defendant lived in that apartment building and had left his key. She went and opened that door for him.
>
> At that time the Defendant pushed her into her apartment, and told her that he had a handgun. He forced her inside of her apartment, indicating to her that he wanted sex and money.
>
> He wrapped his hand around her neck, and began to choke her, causing her physical injury to her body. He then ordered her to take off her clothes, calling Miss S. a 'b***h.' 'It would be okay. You want it, b***h? You know that you like it,' and then

> forced the victim into her bedroom where he took off her clothes as well as his own clothes, and began indicating to the victim that he had a gun.
>
> While periodically choking the victim, he forced his penis into her mouth, ordering her to perform oral sex on him, or that he would kill her.
>
> He then flipped the victim onto her stomach, and forced his penis into her vagina for a period of time, and then forced his penis into her anus where he eventually ejaculated.
>
> The Defendant then threatened the victim, "I'll kill you, b***h.' He demanded money from her, and left with approximately one hundred twenty to one hundred fifty dollars in United States currency from that victim before fleeing the apartment.
>
> The victim immediately ran into a neighbor's for safety, where she was able to call the police. She was treated at LaGrange Hospital where a sexual assault kit was administered.
>
> A subsequent analysis of that kit would determine that there was a positive DNA match from semen found on the victim's pants to that of the Defendant.
>
> The police were subsequently notified by a female witness, and flagged down by them. She was a friend of the Defendant's. That [*sic*] he had called her, and told her that he needed a ride out of LaGrange because he was in trouble.
>
> They subsequently were able to apprehend the Defendant as this witness was going to pick up the Defendant to give him that ride.
>
> They also interviewed a friend of the Defendant's who the Defendant had been staying with, who told him [*sic*] that shortly after the rape of the victim, the Defendant had returned to that friend's apartment, and said that he just had sex with a Russian girl, and he was wondering if he had raped her because he had come into her, and had taken money from her.
>
> The Defendant then showed that friend one hundred fifty dollars, approximately, and began laughing."

The trial court accepted defendant's plea, sentenced him in accordance with the agreement, and admonished him regarding his right to appeal.

¶ 8 On December 7, 2010, defendant's attorney filed a timely motion to withdraw defendant's guilty plea, alleging that "he is innocent of Aggravated Criminal Sexual Assault." However, at a hearing on the motion, defendant withdrew his motion. Defendant did not file a direct appeal.

¶ 9 On September 29, 2014, defendant mailed his *pro se* petition for post-conviction relief, attaching two affidavits, a motion for appointment of counsel, and five exhibits. The petition raised three claims. First, he alleged ineffective assistance of counsel for failing to "request that the defendant be examined by an outside independent qualified expert before proceeding

further," where defendant's "mental condition" rendered him "unable to understand the nature and purpose of the proceedings against him or to assist in his defense." He also alleged that counsel failed to inform the trial court of defendant's "counteroffer of two (2) years for reduced charges," and incorrectly informed defendant that he was required to accept the plea offer because by agreeing to the 402 conference, defendant placed himself at the "mercy of the Court." Defendant further alleged that his counsel "informed [him] that the only way the judge would allow the defendant to withdraw his guilty plea was if the defendant was physically or verbally threatened or coerced into taking the guilty plea, and that the sentencing transcripts reflect that was not what occurred." Defendant ultimately agreed to withdraw his motion "against [his] better judgment."

¶ 10 Second, defendant alleged that he had newly-discovered evidence of his actual innocence. He alleged that he did not invade E.S.'s home or rape her, but that he "was one of several clients for sex in exchange for money paid to a prostitute working out of her apartment." Defendant stated that he "could not have come forward" with this information earlier "because he was not aware that he was unwillingly drugged until recently" and "defendant cannot force previously-unknown factual evidence to be immediately made available if he is unaware that it ever existed." Defendant's third contention was that the indictment charging him with the offenses was fatally defective because it referred to him by his former name rather than the name he legally adopted in April of 2006, Moshe Ben Levi Liberati.

¶ 11 Defendant attached two affidavits to his petition. In the first affidavit, defendant stated that on February 10, 2009, he was in the hallway of E.S.'s building when "a well-dressed black male" told him he was an acquaintance of a friend and asked defendant if he "would like to share a 1/5 of vodka with him, which [defendant] happily accepted." After drinking the vodka, the man

told defendant that "he had a few women working for him in the area who would show [him] a good time for some money." Defendant was then directed to E.S.'s apartment. Defendant stated that he paid E.S. "$100 for sex" but afterward took back his money because he "was disgusted from noticing all the dried semen on parts of her body and on all the bed sheets from previous sexual partners. Additionally, [defendant] took a diamond ring of hers" that he thought was worth around $25,000. Defendant further stated that "the alleged pimp" drugged him by spiking the vodka with PCP and Ecstasy but he "had no idea" of being drugged "until about June of 2013" when the man admitted it to him and a paralegal named Eugene Norton. Defendant stated that the drugs had a "persistent, prolonged adverse effect" on him throughout the criminal proceedings such that defendant "could not fully understand its nature, or purpose or assist" in his defense.

¶ 12 In the second affidavit, defendant re-alleged the ineffective assistance of counsel claims he set forth in his petition. He further stated that after "reluctantly" taking the plea bargain, he learned that "the state having possession of my DNA evidence only proves that I had engaged in sexual intercourse or a sexual act with the alleged victim." He also learned that by agreeing to the 402 conference defendant did not place himself at the mercy of the court. Therefore, defendant instructed counsel to file a motion to withdraw his plea and counsel complied. Defendant stated that "[d]ue to the erroneous advice of [his] attorney," his plea was involuntary. He stated that his name was not Daniel Behning, but Moshe Ben-Levi Liberati, which his driver's license and social security cart reflect. Defendant had changed his name by court order on April 4, 2006, in Michigan.

¶ 13 On December 12, 2014, the trial court dismissed defendant's post-conviction petition. The court stated it was entering a five-page order finding that "the issues raised and presented by

the petitioner are frivolous and patently without merit." Citing to *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the trial court in its order noted that "a guilty plea represents a break in the chain of events that has preceded it." Therefore, "when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." However, "a petitioner who has pled guilty may still challenge the plea proceedings themselves." The trial court found that defendant's plea was voluntarily and knowingly made, and "[a]s a result, his claims are without merit." The trial court also found that pursuant to the two-pronged test of *Strickland v. Washington*, 104 S. Ct. 2052, 2064 (1984), defendant's counsel did not provide ineffective assistance.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant argues that his petition must be remanded for second-stage post-conviction proceedings because the trial court ruled on only one (ineffective assistance of counsel) of three issues raised in his post-conviction petition. Section 122-2.1(a)(2) of the Post-Conviction Hearing Act (Act), provides that if "the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2014). In *People v. Porter*, 122 Ill. 2d 64, 81 (1988), our supreme court determined that this provision's mandate "does not refer to the contents of the court's order of dismissal itself, but rather to the court's duty to dismiss a petition if it is frivolous or patently without merit." The statute's direction that the trial court's order specify findings of fact or conclusions of law merely "facilitate[s] appellate review of the court's dismissal." *Id.* at 81-82. Our supreme court further noted that nothing in the statute states that "the proceedings should be held void if the trial court

fails to specify its findings" in the written order and therefore, such failure "does not require reversal of the dismissal order." *Id*. at 82.

¶ 16 Here, the trial court entered a five-page order that specifically discussed defendant's ineffective assistance of counsel claim. However, the order also determined that "the issues raised and presented by the petitioner are frivolous and patently without merit." In its order, the trial court found that "a guilty plea represents a break in the chain of events that preceded it" and therefore defendant "may not thereafter raise independent claims" of violation of constitutional rights that occurred prior to the plea. It also determined that defendant's guilty plea was "voluntarily and knowingly made. As a result, his claims are without merit." Although the trial court did not specifically refer to defendant's claim of actual innocence, the order addressed that issue when it determined that his plea was made knowingly and voluntarily. Likewise, the order also addressed defendant's claim regarding the use of his former name in the indictment, which occurred prior to the entry of his plea, even though it did not specifically refer to that issue. As discussed above, there is no requirement that the trial court specifically state its findings on each claim raised in the petition.

¶ 17 As defendant argues, a dismissal may be reversed if the trial court's order fails to state any reason or basis for dismissing the post-conviction petition. See *People v. Mack*, 336 Ill. App. 3d 39, 44-45 (2002). Also, the trial court may not summarily dismiss some claims in a petition but allow other claims to advance to the next stage of post-conviction proceedings. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). Even if the trial court entered an improper partial summary dismissal, remand for further proceedings in the trial court is not necessary if "[t]he record affirmatively shows that defendant was not prejudiced by the entry of the partial summary dismissal under these facts." *Id*. at 375. However, since the trial court's order here specified the

basis of its dismissal and did not dismiss some claims but advance other claims, *Mack* and *Rivera* do not apply.

¶ 18 We next review the trial court's dismissal of defendant's post-conviction petition as frivolous and patently without merit.[1] Although defendant here did not withdraw his guilty plea or file a direct appeal challenging his plea or sentence, he may still assert his constitutional rights through the post-conviction process. *People v. Miranda*, 329 Ill. App. 3d 837, 842-43 (2002). However, a voluntary guilty plea waives all non-jurisdictional errors, including constitutional errors. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). "With certain exceptions, a defendant who has pleaded guilty is limited to structural challenges to the plea proceedings themselves, *i.e.*, whether the plea was entered voluntarily and intelligently based on competent advice from counsel." *People v. Wendt*, 283 Ill. App. 3d 947, 957 (1996) (citing *Tollett*, 411 U.S. at 267).

¶ 19 Defendant's petition alleged that his counsel's ineffective assistance rendered his plea involuntary because but for counsel's errors and "willfully misleading the defendant, a guilty plea would not have occurred." The trial court dismissed defendant's petition at the first stage of post-conviction proceedings. At this stage, if the trial court finds that the petition is frivolous and patently without merit, it must dismiss the petition. 725 ILCS 5/122-2.1(a) (West 2012). A petition is frivolous and patently without merit when the allegations, taken as true and liberally construed, do not present a gist of a constitutional claim. *People v. Edwards* , 197 Ill. 2d 239, 244 (2001). "Gist" is a "low threshold" and defendant "need only present a limited amount of detail" to set forth his claim. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). However, if a

[1] Defendant's brief does not challenge the substance of the trial court's dismissal of his petition, *i.e.* whether his claims were frivolous or patently without merit, but rather alleges only that the trial court did not specifically address all of his claims in its order. Waiver, however, is a limitation on the parties and not the courts and we choose to address this issue for reasons of judicial economy and fairness. See *People v. Flores*, 153 Ill. 2d 264, 274 (1992).

petition has no arguable basis in law or fact, or is contradicted by the record, it will be deemed frivolous and patently without merit. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). We review the trial court's dismissal of defendant's post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 20 On a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was deficient; and (2) he was prejudiced by counsel's deficient performance. *People v. Hughes*, 2012 IL 112817, ¶ 44. Defendant must establish both prongs and if one prong is not satisfied, this court need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008). Prejudice is shown if there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Hughes*, 2012 IL 112817, ¶ 44. If defendant claims that his guilty plea resulted from counsel's conduct, he does not establish prejudice by a bare allegation that he would have not pled guilty and instead would have gone to trial if not for counsel's deficient performance. *Id*. ¶ 64. Instead, he "must assert either a claim of actual innocence or articulate a plausible defense that could have been raised at trial." *Id*. In guilty plea cases, the prejudice inquiry largely depends on whether defendant would likely have succeeded at trial. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002).

¶ 21 In his petition, defendant alleged "newly-discovered evidence of actual innocence" that he did not invade E.S.'s home or rape her, but rather he was "one of several clients for sex in exchange for money paid to a prostitute." His petition further alleged that he could not come forward with this information sooner because he only recently discovered that the pimp drugged him before the incident. Defendant's affidavit, however, did not state that being drugged prevented him from discovering the allegedly true nature of his interaction with E.S. Rather, he stated in detail that after defendant drank the vodka, the man explained that he had women

working for him in the area who would show defendant "a good time for some money." Defendant stated that he paid E.S. "$100 for sex, but afterward took it all back, along with all of her money, because [he] was disgusted" with her and the evidence of multiple sexual partners on her bed. Defendant had knowledge of this information when the act occurred, and prior to pleading guilty. This evidence was not "newly discovered" and cannot support a claim of actual innocence.

¶ 22 Furthermore, defendant stipulated to the summary of the evidence presented as the factual basis for his plea. "A stipulation is conclusive as to all matters necessarily included in it, and no proof of stipulated facts is necessary, since the stipulation is substituted for proof and dispenses with the need for evidence. Generally speaking, a defendant is precluded from attacking or otherwise contradicting any facts to which he or she stipulated." (Internal quotation marks and citations omitted). *People v. Woods*, 214 Ill. 2d 455, 468-69 (2005). Here, the trial court extensively admonished defendant and he stated that his plea was made voluntarily and knowingly. Defendant stipulated to the summary of facts stating that he forced himself into E.S.'s residence, threatened her that he had a weapon and forced her to engage in sexual acts. He also agreed that before leaving E.S's apartment, he took $150 from her. The factual basis in the record directly contradicts defendant's actual innocence claim in his post-conviction petition that he paid E.S. for consensual sex.

¶ 23 Defendant also alleged in his petition that his guilty plea was not knowingly or voluntarily made because he was drugged by the pimp, which prevented him from coming forward with information and hindered his ability to assist in the proceedings. Defendant alleged that his trial counsel should have requested an independent examination of his fitness during the proceedings. First, defendant was examined for fitness prior to his plea. The record shows that

Dr. Coleman and Dr. Gutzmann separately examined defendant and both found him able to understand the criminality of the conduct alleged against him and fit to stand trial. Furthermore, defendant alleged he only recently discovered, in June of 2013, that he was drugged and he did not have this information when he pled guilty in November of 2010. If defendant did not have this information, his trial counsel could not know of this information either. Defendant's actual innocence claim, and his defense that he did not have the proper mental state to enter his plea knowingly or voluntarily, have no basis in fact and are contradicted by the record. Therefore, defendant cannot show prejudice and we affirm the trial court's dismissal of his petition as frivolous and patently without merit. *Brown*, 236 Ill. 2d at 184.

¶ 24 Defendant next alleged in his petition that his indictment contained a formal defect because it listed his name as "Daniel Behning" instead of "Moshe Ben-Levi Liberati." As a result, "the indictment did not serve to charge him properly because it omitted his name." Defendant was properly admonished by the trial court and pled guilty. As discussed above, a voluntary guilty plea waives all non-jurisdictional errors, including constitutional errors. *Townsell*, 209 Ill. 2d at 545. See also *Wendt*, 283 Ill. App. 3d at 956-57 (a defendant who has pled guilty may not claim that his constitutional rights were violated before the entry of the plea). Exceptions to this general rule include structural challenges to the plea proceedings themselves, *i.e.*, whether the plea was entered voluntarily and intelligently based on competent advice from counsel. *Id*. at 957. Therefore, defendant has waived this alleged error for review.

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.