

No. 1-09-2862

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,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 14027
)	
PABLO MENDOZA,)	Honorable
)	Colleen McSweeney-Moore,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition because it failed to make a substantial showing of a constitutional violation.
- ¶ 2 Defendant Pablo Mendoza appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On appeal, he contends that the trial court improperly dismissed his petition because it established that the State failed to prove beyond a reasonable doubt that he was under the influence of alcohol at the time of the car accident and that he was denied effective assistance of appellate counsel where

his attorney did not raise this issue on direct appeal. Defendant seeks a reduction in sentence, asserting that, absent proof of intoxication, he was subject only to a nonextended term of two to five years in prison rather than the 24-year extended term he received. We affirm.

¶ 3 After a bench trial, defendant was convicted of reckless homicide, reckless homicide of an unborn child, and aggravated fleeing and attempting to elude a police officer, and sentenced to 24 years in prison. The evidence at trial established that defendant drove his Suburban through a red light and collided with a vehicle containing Sandra Macabee and Michelle Burton. At the time of the collision, the Suburban was being chased by a police car with its emergency lights and sirens engaged. Macabee, Burton, and Burton's fetus died as a result of the accident.

¶ 4 The parties stipulated that Dr. Alicia Shirakbari, who treated defendant at 6 a.m. on the morning of the accident, was an expert in the field of medicine. Shirakbari ordered a urinalysis, an alcohol-level test, and a toxicology screen. Defendant's blood was drawn within the first 15 minutes of his treatment, and the results indicated that defendant's blood contained .145 grams of alcohol per deciliter. Shirakbari then explained that the blood test was run on defendant's "blood plasma." However, because blood alcohol is the relevant reporting measurement, the plasma result of .145 must be divided by 1.16 in order to obtain the "whole blood" alcohol of .127 grams per deciliter. Defendant's toxicology screen was positive for marijuana and cocaine.

¶ 5 Shirakbari indicated that defendant told her that he did not have anything to drink between 4 and 6 a.m. She explained that knowing a person's blood alcohol at a specific time as well as that person's weight would allow one to extrapolate backward to determine what the person's alcohol level would have been at an earlier time. Shirakbari calculated that defendant, who weighed approximately 160 pounds, had a blood alcohol level of .164 grams per deciliter at 4 a.m., *i.e.*, at the time of the accident.

¶ 6 The trial court found defendant guilty of reckless homicide, reckless homicide of an unborn child, and aggravated fleeing and attempting to elude a police officer. He was ultimately sentenced to 24 years in prison for each of the reckless homicide convictions, 4 years for the reckless homicide of an unborn child, and 2 years for the aggravated fleeing. All sentences were to run concurrently. This court affirmed defendant's convictions on direct appeal. See *People v. Mendoza*, 354 Ill. App. 3d 621 (2004).

¶ 7 In November 2005, defendant filed a *pro se* postconviction petition. The circuit court docketed the petition and counsel was appointed. In 2009, defendant filed a *pro se* amended petition alleging, *inter alia*, that the State failed to prove that he was intoxicated at the time of the accident. The petition highlighted that no witness at trial testified that defendant looked intoxicated or smelled of alcohol. The petition further alleged that defendant received ineffective assistance of appellate counsel because counsel failed to argue on direct appeal that defendant's "whole" blood alcohol level at the time of the accident was never established. The petition finally alleged that defendant's mittimus should be corrected to reflect the proper amount of presentence custody credit.

¶ 8 Postconviction counsel then filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), indicating that he had consulted with defendant and would not be amending the *pro se* amended petition. The State filed a motion to dismiss, which the trial court granted.

¶ 9 The Act provides a mechanism through which a criminal defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2004); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage, it is the defendant's burden to make a substantial showing of a constitutional violation; all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be

true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). This court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 10 The scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated; issues that could have been raised on direct appeal but were not are procedurally defaulted and issues that were previously decided by a reviewing court are barred by the doctrine of *res judicata*. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007); see also *People v. Scott*, 194 Ill. 2d 268, 274 (2000) (rulings on issues that were raised before the trial court or on direct appeal are *res judicata*, and issues that could have been raised in an earlier proceeding but were not are generally waived).

¶ 11 Here, defendant contends that his petition was dismissed in error because he made a substantial showing that the State failed to establish that he was "under the influence" at the time of the collision. He highlights that the sole evidence of his intoxication came two hours after the accident and was never properly converted to a "whole" blood alcohol level, and that no one testified that he was impaired. However, as these claims are based on the evidence presented at trial and could have been raised on direct appeal, they are forfeited for purposes of the instant postconviction proceeding. *Harris*, 224 Ill. 2d at 124. Defendant seeks to avoid the procedural bar of forfeiture by arguing that his failure to make such an argument on direct appeal was due to his appellate counsel's ineffectiveness.

¶ 12 A claim of ineffective assistance of appellate counsel is governed by the same rules that apply to claims of ineffective assistance of trial counsel. *People v. Golden*, 229 Ill. 2d 277, 283 (2008); see also *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to succeed on a claim of ineffective assistance of counsel, a defendant must establish that the attorney's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced him). Accordingly, "[a] defendant who contends that appellate counsel rendered

ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed." *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 13 Appellate counsel is not obligated to raise every possible issue on appeal, and it is not incompetence for counsel to choose not to raise an issue which counsel determines is nonmeritorious, unless, of course, counsel's judgment regarding the merits of that issue is patently wrong. *People v. Smith*, 195 Ill. 2d 179, 190 (2000); *People v. Rogers*, 197 Ill. 2d 216, 223 (2001) (when the underlying issue is nonmeritorious, a defendant suffers no prejudice). Appellate counsel's decisions as to which issues to raise on direct appeal are generally entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 14 A person commits reckless homicide when he causes the death of another by driving a motor vehicle recklessly in a manner likely to cause death or great bodily harm. 720 ILCS 5/9-3(a) (West 2000). For the purposes of section 9-3 of the Criminal Code of 1961 a person is "under the influence" of alcohol when the alcohol concentration in the person's blood or breath is .08 or above. 720 ILCS 5/9-3(c)(1) (West 2000); see also 625 ILCS 5/11-501.2(b)(3) (West 2000).

¶ 15 This court cannot say that appellate counsel's failure to raise this issue on appeal was objectively unreasonable (*Griffin*, 178 Ill. 2d at 74), when the evidence at trial established that approximately two hours after the accident defendant's blood alcohol level was .127 grams per deciliter and his blood alcohol at the time of the accident, based upon Shirakbari's calculations, was .164 grams per deciliter. Thus, the State established that defendant was under the influence of alcohol at the time of the collision. See 625 ILCS 5/11-501.2(b)(3) (West 2000) (a person is "under the influence of alcohol" when his alcohol concentration is .08 or above).

¶ 16 Even had appellate counsel argued on direct appeal that the State failed to establish defendant was under the influence of alcohol at the time of the accident, defendant cannot establish, taking the evidence in the record in the light most favorable to the State, that no rational trier of fact could have found him to be under the influence of alcohol (see *People v. Ross*, 229 Ill. 2d 255, 272 (2008)).

¶ 17 Here, a doctor, whom the parties stipulated was an expert witness, relied on the average of the relevant conversion factors to determine defendant's whole blood alcohol level. While defendant is correct that no witness testified that his mental or physical capabilities were "impaired," it was the responsibility of the trier of fact to resolve inconsistencies in the evidence (*People v. Sutherland*, 223 Ill. 2d 187, 242 (2006)); this court will not substitute its judgment for that of the trial court on this matter (*Ross*, 229 Ill. 2d at 272). Defendant was properly determined to be "under the influence of alcohol" at the time of the accident when his blood alcohol level was .127 grams per deciliter two hours after the accident.

¶ 18 This court rejects defendant's argument that his plasma blood alcohol test result cannot be converted to whole blood alcohol because 1.16 is an arbitrary factor. In *People v. Green*, 294 Ill. App. 3d 139, 144-45 (1997), this court found section 11-501.2(a)(5) of the Vehicle Code (625 ILCS 5/11-501.2(a)(5) (West 1996)), defined "alcohol concentration" in terms of whole blood. Accordingly, it was inappropriate to apply the presumption of intoxication to unconverted alcohol levels. *Green*, 294 Ill. App. 3d at 147. In reaching this holding, the court noted in a footnote that 1.16 was the average of the factors used in connection with "different alcohol concentration ratios." *Green*, 294 Ill. App. 3d at 146 n.2. Here, defendant's argument fails because the State presented the testimony of an expert witness who converted defendant's plasma test results into a whole blood measurement. *Green*, 294 Ill. App. 3d at 147; see also *People v. Thoman*, 329 Ill. App. 3d 1216, 1218-19 (2002) (blood serum results are converted into blood

alcohol by dividing by a factor between 1.12 and 1.20, with 1.16 being the average of that range).

¶ 19 Because defendant is unable to show that the evidence at trial was so unreasonable or improbable that reasonable doubt remained as to whether he was under the influence of alcohol at the time of the accident (see *Ross*, 229 Ill. 2d at 272), his claim of ineffective assistance of appellate counsel must fail based on his inability to show a reasonable probability that his conviction for reckless homicide would have been reversed if this issue had been raised on direct appeal. *Griffin*, 178 Ill. 2d at 74. Consequently, because defendant has failed to show that he received ineffective assistance of appellate counsel when counsel did not argue that the State failed to prove defendant was under the influence of alcohol at the time of the accident, even though the issue could have been raised on direct appeal, this issue is forfeited for the purposes of this proceeding (see *Harris*, 224 Ill. 2d at 124), and the circuit court properly dismissed defendant's petition.

¶ 20 Defendant next contends, and the State concedes, that he is entitled to 755 days of presentence custody credit. Accordingly, pursuant to Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the mittimus to reflect that defendant was in custody for 755 days. See *People v. Flores*, 378 Ill. App. 3d 493, 496-97 (2008).

¶ 21 For these reasons, the judgment of the circuit court of Cook County is affirmed, and the mittimus is modified

¶ 22 Affirmed; mittimus modified.