

No. 1-10-1100

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. 06 CR 11351
)	
SHAWN ROSS,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred with the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed where defendant did not accompany his allegation of ineffective assistance of trial counsel with either a claim of innocence or the articulation of a plausible defense, and failed to provide adequate supporting documentation.

¶ 2 Defendant, Shawn Ross, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends the circuit court erred in dismissing his petition at the first stage of proceedings because he set forth a cognizable claim of ineffective assistance of trial counsel that warrants further proceedings under the Act. We affirm.

¶ 3 In 2007, defendant pleaded guilty to four counts of aggravated driving under the influence of alcohol (aggravated DUI) in exchange for a sentence of 12 years' imprisonment. The stipulation supporting his plea of guilty established, in relevant part, that in the early morning hours of July 31,

No. 1-10-1100

2005, defendant was driving a black Nissan Altima northbound on Mannheim Road when he struck a Plymouth Voyager driven by co-defendant, Zeferino Galvez, who was attempting to turn off southbound Mannheim Road and onto eastbound Madison Avenue. The van driven by Mr. Galvez contained a number of passengers, four of whom died in the collision: Alexis Alpazar (age 16 months), Jose Mendez (age 24), Jovita Orocio (age 34), and Marvel Orocio (age 13).

¶ 4 Defendant subsequently told police he had been driving to a strip bar in Stone Park, Illinois, and admitted he had consumed alcohol prior to the incident. A blood draw taken from him at the hospital revealed a .107 blood-alcohol content, and showed a positive result for the presence of THC, the active ingredient in *cannabis*. It was further stipulated there was evidence establishing defendant was driving between 58 and 70 miles per hour at the beginning of the skid marks left on the street by his vehicle, he was traveling 44 miles per hour when his vehicle struck the van, and the speed limit on Mannheim Road at that location was 35 miles per hour.

¶ 5 One year after entering his guilty plea, defendant filed a *pro se* motion for reduction of sentence in light of an alleged "re-creation report" obtained by his co-defendant which identified the latter as the cause of the collision. Defendant maintained he accepted his plea agreement based on statements designating him as the cause of the collision, and claimed "[a]ny report showing diminished culpability on my behalf should lend itself to a reduction commensurate with the plea arrangement initially offered to [co-defendant]." The trial court denied his motion.

¶ 6 On February 23, 2010, defendant filed the post-conviction petition at bar alleging, in pertinent part, that he was denied the effective assistance of trial counsel. Defendant maintains counsel's knowledge of the "Illinois Right of Way" law was deficient, and, as a consequence, he failed to provide defendant with "valid information to impact Petitioner's decision to avoid trial." Defendant pointed out, *inter alia*, that co-defendant was cited for failure to yield the right-of-way, and asserted counsel should have argued co-defendant's failure to yield to oncoming traffic broke the right-of-way laws and, ultimately, caused the collision and its after-effects. Accordingly, had

No. 1-10-1100

counsel been "well-versed in the law" and properly advised him of such, he "would have insisted on proceeding to trial with the full confidence in receiving [sic] the six years at eighty-five percent secured by the co-defendant."

¶ 7 On April 2, 2010, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit, noting, *inter alia*, defendant admitted in his petition he was driving under the influence of alcohol, and any claim in his petition would therefore "not be successful in law." This appeal follows.

¶ 8 The Act provides a mechanism by which a criminal defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant need only set forth the "gist of a constitutional claim". *Id.* at 254. However, the circuit court must dismiss the petition if it finds the petition is frivolous or patently without merit, *i.e.*, it has no arguable basis either in law or in fact. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *Id.* at 9.

¶ 9 Defendant maintains he set forth claims of ineffective assistance of counsel warranting further proceedings under the Act. To establish a claim of ineffective assistance of counsel, defendant must first show counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Second, defendant must show counsel's deficient performance resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), *i.e.*, a reasonable probability that, but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on proceeding to trial. See *People v. Manning*, 227 Ill. 2d 403, 418 (2008). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 10 With respect to the prejudice prong, the supreme court has noted, a bare assertion that

No. 1-10-1100

defendant would have pleaded not guilty and insisted on a trial absent counsel's deficient performance is insufficient to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, defendant must accompany his claim with a claim of innocence or articulate a plausible defense that could have been raised at trial. *Id.* at 335-36. The question of whether counsel's deficient performance caused defendant to plead guilty, thus, largely depends on predicting the likelihood of defendant succeeding at trial. *Id.* at 336.

¶ 11 In this case, defendant contends, if his counsel had been versed in the law of right of way and advised him his co-defendant was cited for failure to yield to oncoming traffic, "indicating a shared level of culpability" as to the collision, he would not have pleaded guilty and would have insisted on a trial to obtain a sentence comparable to the one offered to his co-defendant.

¶ 12 We observe defendant's claim is based on a faulty premise, *i.e.*, his co-defendant's "level of culpability" as to the collision itself somehow affects or correlates to defendant's level of guilt for the aggravated DUI offenses. In a criminal case, the State must establish each element of the charged offense beyond a reasonable doubt. *People v. Lucas*, 231 Ill. 2d 169,178 (2008) (citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979)).

¶ 13 In this case, defendant's guilty plea was supported by the stipulation as to the evidentiary basis for the plead. Defendant was driving at an excessive rate of speed with a .107 blood alcohol content and *cannabis* in his system when he struck the vehicle occupied by the victims. Defendant has not challenged the facts in this stipulation or denied his culpability for the collision, but rather claims, if counsel had better advised him, he would have insisted on a trial to obtain a different sentence, namely "the six years at eighty-five percent" offered to the co-defendant. Thus, defendant has not set forth a claim of innocence or presented a plausible defense to the charges, to establish prejudice resulting from counsel's representation. To the contrary, the record reflects defendant is primarily concerned with the length of his incarceration. Since he would have been subject to the same sentencing range should he have proceeded to trial, defendant has failed to demonstrate

No. 1-10-1100

prejudice resulting from his alleged lack of knowledge regarding the citation issued to his co-defendant. *Manning*, 227 Ill. 2d at 421.

¶ 14 Moreover, in his petition, defendant refers to the discussions he had with his counsel prior to the plea conference, which show his awareness of co-defendant's culpability for the crash, the liabilities for which co-defendant was responsible, and that tickets were issued to both drivers. Thus, to the extent defendant claims he was ignorant of the culpability of his co-defendant at the time he entered his plea, we find that claim has no basis in fact. *Hodges*, 234 Ill. 2d at 16.

¶ 15 We also observe, as the State points out, defendant was required to provide affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials, and he has not done so. 725 ILCS 5/122-2 *et seq.* (West 2010). Although, as defendant points out, the failure to attach independent corroborating documentation or explain its absence may be excused where the only affidavit he could have furnished, other than his own, was that of his attorney, such is not the case here where defendant failed to provide a copy of the citation allegedly issued to his co-defendant, or support his claim of counsel's deficient knowledge of the applicable law. *Hall*, 217 Ill. 2d at 333. As presented, defendant's claims amounted to nothing more than speculative conclusions which were insufficient to set forth the gist of a constitutional claim. *Delton*, 227 Ill. 2d at 254-55.

¶ 16 In sum, we find defendant's alleged "defense," that his co-defendant had a greater level of culpability as to the collision, does not constitute a plausible defense to the charges (*Hall*, 217 Ill. 2d at 335-36), and conclude defendant has failed to establish prejudice resulting from counsel's alleged deficient performance. *Manning*, 227 Ill. 2d at 418. Defendant's ineffective-assistance-of-counsel claim therefore fails and, thus, subjected his petition to dismissal at the first stage of proceedings. *Flores*, 153 Ill. 2d at 283; *Hodges*, 234 Ill. 2d at 16.

¶ 17 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.

No. 1-10-1100