

No. 1-08-0578

**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).

FIFTH DIVISION  
February 18, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 8735
	)	
MARCUS CRAWFORD,	)	Honorable
	)	Thomas R. Sumner,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE JOSEPH GORDON delivered the judgment of the court. Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

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**ORDER**

*Held:* Defendant filed a *pro se* postconviction petition alleging that his counsel was constitutionally ineffective for failing to request a fitness hearing prior to trial. The trial court summarily dismissed the petition. This court affirmed, finding defendant's claim indisputably meritless because it was contradicted by the record.

Defendant Marcus Crawford appeals from the summary dismissal of his *pro se* petition filed pursuant to the Post-Conviction

Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that the court erred in dismissing his petition because he stated a claim of arguable merit that his counsel was constitutionally ineffective for failing to request a fitness hearing prior to trial. We affirm.

Defendant is currently serving a 20-year term of imprisonment imposed on his 2005 burglary conviction. The evidence at his bench trial showed that a police officer observed defendant force his way through a liquor store security gate, enter through the store window, then exit the window carrying a black duffel bag. Defendant ran away, but was eventually detained and identified as the offender. Inside the black duffel bag police discovered packs of cigarettes, lighters, and two bottles of liquor. The items matched those missing from the store.

Defendant denied committing the burglary. He testified that he was working "security" for drug dealers when two men approached him, offering merchandise. Defendant traded \$100 worth of narcotics for cigarettes, lighters, and liquor, which he placed in his duffel bag.

Following argument, the trial court found defendant guilty of the offense. Defendant filed a *pro se* motion for a new trial. Defendant argued, as he had prior to trial, that his counsel was ineffective for failing to call a police officer who allegedly

was present at his show-up identification. The trial court did not inquire of defense counsel or otherwise directly address defendant's motion for a new trial. Instead, the court proceeded to sentencing. Based on defendant's criminal history, the court sentenced him as a Class X offender to 20 years' imprisonment.

Defendant filed a direct appeal in which he argued that the trial court failed to adequately inquire into his pretrial and posttrial claims of ineffective assistance of counsel. This court rejected his contention and affirmed defendant's conviction. *People v. Crawford*, No. 1-06-1273 (2007) (unpublished order under Supreme Court Rule 23).

On October 9, 2007, defendant filed the present postconviction petition. He alleged, *inter alia*, that his counsel was constitutionally ineffective for failing to request a fitness hearing prior to trial "based upon the fact that [defendant] was taking several psychological medications at the time of his criminal proceeding." Defendant alleged he had told defense counsel he was taking psychotropic medications, and counsel replied he would request a fitness hearing. When assigned new counsel, defendant informed her that his former counsel intended to request a fitness hearing. New defense counsel, according to defendant, responded, "[w]e are not here for that today."

Defendant asserted that between June 2004 and May 2005, under a psychiatrist's direction, he took a number of psychotropic medications. A prescription order attached to his petition shows that, for weeks at a time and over the course of the year, he was prescribed several psychotropic medications.

Defendant further alleged that he was diagnosed with bipolar disorder, depression subject to mood swings, and deemed a danger to himself and others, and that as a result, he was placed in a stripped cell on suicide watch.

In support of his allegations, defendant attached Stateville Center outpatient progress notes, dated September 8, 2004. In the document, the doctor noted that defendant reported feeling depressed, anxious, and frustrated and displayed "lots of anger." The doctor noted that defendant, who had not been through the formal "psych process," had threatened "his cellie," was poorly cooperative, had poor insight and judgment, and was on a hunger strike. The doctor diagnosed defendant with depression, "danger to self and others." The doctor ordered: a 10 minute suicide watch; that defendant continue his medications; and that he wear only a paper gown.

Defendant also attached a Stateville Correctional Center psychiatric evaluation, dated October 16, 2004. The doctor noted, under the "subjective" line, that defendant was referred based on his feelings of anxiety and nervousness and "severe

anger outburst." Defendant reported that he had been diagnosed with bipolar disorder and ADHD and treated with lithium, but was currently taking a different psychiatric drug. Defendant reported feeling depressed and requested a different medication. The doctor noted defendant's "significant history of impulsivity and multiple incarcerations." The doctor noted, under the "objective" line, that defendant was cooperative, his affect and mood were anxious and nervous, his speech was loud, but that there was no evidence of suicidal, homicidal or psychotic ideation. The doctor diagnosed defendant with "impulse control D/O nos vs. Bipolar Disorder[,] polysubstance depression" and prescribed defendant a new medication.

Defendant alleged the medications made him unable to assist in his defense or understand the proceedings and there was a reasonable likelihood he would have been found unfit to stand trial.

On November 26, 2007, the trial court dismissed defendant's petition as frivolous and patently without merit. Defendant now challenges that dismissal under the Act.

The Act provides a method by which persons under criminal sentence in this State can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. Hodges*, 234 Ill. 2d

1, 9 (2009). At the first stage of proceedings, the circuit court must timely review the petition, taking the allegations as true, and determine whether it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. A *pro se* petition may be summarily dismissed as frivolous or patently without merit if the allegations have no arguable basis in law or fact, *i.e.* if it is based on an indisputably meritless legal theory or a fanciful factual allegation. 725 ILCS 5/122-2.1 (West 2008); *Hodges*, 234 Ill. 2d at 11-12, 16. Our review of such a dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

Defendant contends that his petition set forth a claim of arguable merit that his counsel was constitutionally ineffective for failing to request a fitness hearing prior to trial.

Claims of ineffective assistance of counsel are evaluated under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that defendant show both deficient performance by counsel and resultant prejudice. *People v. Coleman*, 168 Ill. 2d 509, 523 (1995). To prevail, a defendant must satisfy both the performance and prejudice prongs of the *Strickland* test. *People v. Harris*, 206 Ill. 2d 293, 304 (2002). However, if this court concludes that defendant did not suffer prejudice, the court need not decide whether counsel's performance was constitutionally deficient. *Harris*, 206 Ill. 2d at 304.

To establish *Strickland* prejudice from an attorney's failure to request a fitness hearing, a defendant must show that, at trial, facts existed that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings against him or to assist in his defense because of his mental or physical condition. 725 ILCS 5/104-10 (West 2008); *Harris*, 206 Ill. 2d at 304. A defendant is entitled to relief only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered. *Harris*, 206 Ill. 2d at 304. Significantly, fitness speaks only to the defendant's ability to function within the context of trial; it does not refer to sanity or competence in other areas. *Harris*, 206 Ill. 2d at 305.

Defendant's petition alleged that he was unfit to stand trial because he was taking psychotropic medications at that time. Defendant argues that this raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings against him, and *Strickland* prejudice resulted.

The determination of whether there is a *bona fide* doubt of fitness for trial is necessarily a fact-based inquiry. *People v. Murphy*, 72 Ill. 2d 421, 435 (1978). We observe that in Illinois a defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2008); *People v. Easley*, 192 Ill. 2d 307, 318 (2000). By

extension, a defendant receiving psychotropic medication is not presumed unfit to stand trial solely by virtue of the receipt of the medications. 725 ILCS 5/104-21(a) (West 2008); *People v. Mitchell*, 189 Ill. 2d 312, 331 (2000).

With those principles in mind, and viewing defendant's allegations as true and liberally construed, we conclude that any assertion of unfitness is belied by the record. Defendant's exchanges with the trial judge and attorneys do not display any confusion about the nature of the proceedings. Immediately prior to trial, defendant articulately requested a continuance to call the additional witness he claimed was present at his show-up identification. After the court denied the request, defendant waived his right to a jury trial and proceeded by bench trial. He assisted in his defense by testifying on his own behalf that he was working "security" for drug dealers when two men approached him, offering merchandise. Defendant's trial testimony was consistent with that given at his pretrial motion to suppress hearing. At both, he stated that he was waiting for the bus when officers, without any apparent reason and absent his consent, searched his duffel bag, then detained him and eventually physically abused him. Defendant's clear and cogent testimony over some 15 pages of the report of proceedings at trial does not disclose any signs of confusion regarding the nature or purpose of the proceedings. See *Harris*, 206 Ill. 2d at

305.

Defendant nonetheless argues that *People v. Sawczenko*, 328 Ill. App. 3d 888 (2002) and *People v. Brown*, 236 Ill. 2d 175 (2010), mandate reversal in this case. In both cases, the courts reversed the first-stage summary dismissal of the defendants' postconviction petitions, in which they alleged ineffective assistance of counsel for failure to request a fitness hearing.

In *Sawczenko*, the defendant alleged in his postconviction petition that he had attempted suicide two days before he pleaded guilty. In *Brown*, the defendant, who was convicted of attempted murder for brandishing a butcher knife at a police officer, alleged in his postconviction petition that he had told his attorney he was taking psychotropic medication around his arrest to treat depression and bipolar disorders and also had attempted suicide then. He further alleged that he was attempting "suicide by police" on the day of the offense, by wielding the knife in order to provoke a shooting, and, during trial, was taking "very heavy psych medication" that affected his ability to comprehend the events. *Brown*, 236 Ill. 2d at 181. In each case, the court found the allegations could support a *bona fide* doubt of the defendant's fitness to stand trial and were sufficient to survive summary dismissal.

We find defendant's reliance on *Sawczenko* and *Brown*, misplaced. In each case, the court specifically noted that the

defendant had gone beyond making bare allegations that psychotropic medication rendered him unfit for trial. See *Brown*, 236 Ill. 2d at 187; *Sawczenko*, 328 Ill. App. 3d at 898. Such is not the case here. While defendant alleged, with supporting documentation, that he was placed on suicide watch after being declared a danger to himself and others on September 4, 2004, there is nothing to indicate that defendant was on suicide watch at or near his January 6, 2005, trial. In fact, his psychiatric evaluation, dated October 16, 2004, indicates that at that time, defendant displayed no evidence of suicidal, homicidal or psychotic ideation. Defendant's case is therefore distinguishable from *Sawczenko*. It is also distinguishable from *Brown* for two notable reasons. First, unlike in *Brown*, defendant alleges no history of suicidal behavior or overall mental instability specifically relating to his offense or trial. Second, and of greater significance, defendant competently and consistently testified at both his pretrial motion to suppress hearing and at trial. The defendant in *Brown*, by contrast, had only brief exchanges with the judge, which the court found were insufficient to rebut the defendant's postconviction allegations.

We are left, then, only with defendant's bare allegation that he was prescribed certain psychotropic medications at or near trial. As *Brown* and *Sawczenko* demonstrate, this falls short of the evidence needed to establish a question of fitness.

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Again, the issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense. See *Easley*, 192 Ill. 2d at 323. The record demonstrates that he could do so in spite of the medications administered.

We therefore find defendant's legal theory that there was a *bona fide* doubt of his fitness at trial contradicted by the record and indisputably meritless. See *Hodges*, 234 Ill. 2d at 16. Consequently, defendant has failed to establish the *Strickland* prejudice necessary to survive first-stage dismissal of his postconviction petition.

Based on the foregoing, we affirm the circuit court's summary dismissal of defendant's postconviction petition.

Affirmed.