

No. 1-09-1439

**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  
March 11, 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.	)	Nos. 02 CR 11158
	)	02 CR 1183
DONALD McCORMICK,	)	
	)	The Honorable
Defendant-Appellant.	)	Michele M. Simmons,
	)	Judge Presiding.

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PRESIDING JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Epstein concurred in the judgment.

**O R D E R**

**HELD:** Post-conviction petition was properly dismissed pursuant to the State's motion where its allegations of ineffective assistance of counsel concerning defendant's mental fitness and other matters, taken as true, did not make a substantial showing of a constitutional violation.

Defendant Donald McCormick entered negotiated guilty pleas to home invasion and aggravated criminal sexual assault, and was sentenced to a 25-year prison term for aggravated criminal sexual assault and a concurrent 10-year prison term for home invasion. Defendant did not file a motion to vacate the pleas, or a direct appeal. Instead, defendant filed a *pro se* petition for post-conviction relief (which post-conviction counsel did not amend), alleging that the guilty pleas were involuntary because defense counsel had rendered ineffective assistance. The circuit court dismissed the post-conviction petition on the State's motion. On appeal, defendant contends that the circuit court erred in dismissing the post-conviction petition because he received ineffective assistance of counsel concerning his mental fitness and other matters. We affirm.

On January 9, 2004, defendant pleaded guilty and signed stipulated facts for the pleas.

In case number 02 CR 11158, at approximately 6:15 a.m. on September 6, 2001, defendant broke into a senior citizen's apartment in Oak Forest, put her in a choke hold, threatened to kill her, forced her into her bedroom, pushed her onto the bed, ripped her shorts off, and sexually assaulted her despite her

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pleas not to rape her and her continuous complaints that he was hurting her. She suffered injuries that included vaginal lacerations and bleeding. When defendant went to the kitchen, the victim ran outside the building and screamed for help. A neighbor heard the victim's cries and saw that she was wearing a bra and was naked from the waist down. The neighbor also saw defendant as he walked past the victim, entered a car, and drove away. Before defendant left the victim's apartment, he left a cigarette butt in an ashtray. Hospital swabs and samples were taken from the victim, and they matched defendant's DNA. The neighbor identified defendant from a photographic array and in a police lineup on September 18, 2001. Defendant's fingerprints were also found on the door to the apartment of the victim's next-door neighbor, and a photograph from the apartment's surveillance camera depicted defendant.

In case number 02 CR 1183, at 4:18 a.m. on October 1, 2001, defendant entered another apartment at the same apartment complex in Oak Forest when the residents, Ignacio Rosales, Alma Atempa, and their three-month old child, Edouarde Rosales, were present. Defendant placed a screwdriver blade to the neck of the infant, made threats, and demanded money. Ignacio Rosales "rushed" defendant and they fought. A second individual entered the

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apartment and helped defendant. Defendant and the second offender fled from the apartment. On December 18, 2001, Ignacio Rosales and Alma Atempa separately viewed a police lineup and identified defendant.

On October 14, 2001, defendant was arrested pursuant to a parole violation warrant.

During allocution, defendant stated:

"DEFENDANT MCCORMICK: I'm just sorry for everything that happened. If I used my head things probably wouldn't [have] happened at all.

I have a three year old and eight year old at home and now they have to grow up without me.

THE COURT: They what?

DEFENDANT MCCORMICK: Now they have to grow up without me.

THE COURT: They have to grow up without you?

DEFENDANT MCCORMICK: Yeah, because of my choices I made.

THE COURT: Whose fault is that?

DEFENDANT MCCORMICK: Mine."

Pursuant to the guilty pleas, a charge of residential burglary in case number 01 CR 27401 was disposed of by means of *nolle prosequi*.

Prior to the guilty pleas, defendant underwent psychiatric and psychological evaluations to determine his sanity at the times of the crimes, and his fitness to stand trial.

In a letter dated December 10, 2002, staff psychiatrist Philip Pan of the court's forensic clinical services informed the court that he had examined defendant on that date and that, in his opinion, defendant was unfit to stand trial and was subject to involuntary psychiatric hospitalization, which Dr. Pan anticipated would restore defendant to fitness within one year. Dr. Pan diagnosed defendant with alcohol dependence, other substance abuse, and a depressive disorder not otherwise specified, and he suggested that malingering, a psychotic disorder not otherwise specified, and a learning disorder not otherwise specified needed to be ruled out.

In a report dated February 25, 2003, staff psychiatrist Fidel Echevarria of the court's forensic clinical services stated that he had examined defendant on that date and that defendant was receiving a mood-stabilizing medication, Valproic Acid 250

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milligrams; an antipsychotic medication, Zyprexa, 15 milligrams; and a medication to counter the possible side effects of antipsychotic medication and to induce sleep, Diphenhydramine, 25 milligrams. Defendant was tolerating the medications without reporting any side effects. Defendant had tried to commit suicide by hanging in jail. He had experienced chronic auditory hallucinations since age 16 after his friend, Willie, committed suicide. Willie's voice told defendant how to act and commented on his behaviors. In Dr. Echevarria's opinion, defendant was currently unfit to stand trial. He displayed a "severe lack of understanding of either the charges, the nature of the court proceedings or the roles of courtroom personnel" that limited his capacity to work with counsel. Dr. Echevarria postponed expressing an opinion regarding defendant's sanity until he received and reviewed additional treatment records.

In a letter dated May 19, 2003, Dr. Echevarria informed the court that he had examined defendant on May 15, 2003, and that, in his opinion, defendant was currently fit to stand trial with medication. Defendant was taking a mood-stabilizing medication, Depakote; an antipsychotic medication, Olazapine, 15 milligrams; and an antidepressant medication, Zoloft, 150 milligrams per day. Defendant reported tolerating the medications and not

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experiencing any side effects. Dr. Echevarria recommended that those medications be maintained to ensure defendant's fitness to stand trial.

In a letter dated October 15, 2003, licensed clinical psychologist Susan Messina informed the court that she had examined defendant on August 29, 2003, and on October 3, 2003. In Messina's opinion, defendant was legally sane at the times of the crimes and was capable of comprehending his *Miranda* (*Miranda v. Arizona*, 384 U.S. 436, 479 (1966)) warnings. Messina also found "consistent evidence of malingering."

In a letter dated November 13, 2003, forensic clinical psychiatrist Jonathan Kelly informed the court that, in his opinion, defendant was legally sane at the times of the crimes, he was able to understand his *Miranda* rights when he provided a statement to the police, and he was currently able to understand his *Miranda* rights.

On December 2, 2005, defendant filed a *pro se* post-conviction petition that covered both guilty pleas. Defendant alleged in the petition that he had received ineffective assistance of counsel and that his guilty pleas were not made intelligently or voluntarily. Defendant alleged that at the time of the pleas, counsel knew that he was taking "a number of

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psychotropic medications" that prevented him from assisting in his defense but failed to inform the court that defendant had been sent to Elgin Mental Health Center, "where his medications were changed to other psychotropic medications, then switched back weeks later to [a] combination of different medications." Defendant stated that defense counsel said that she could not visit him or prepare for trial due to her caseload, and that because he was an ex-felon, he would not win at trial and she did not have time to explain. Defense counsel told defendant to forget about a trial and to accept the plea if he ever wanted to see his children again. Defense counsel did not investigate contradictory statements, falsified information written by investigators, and false information and testimony given to the grand jury. Defense counsel did not visit defendant while he was incarcerated in Cook County Jail for 750 days from 2001 until 2004, and she failed to investigate the case, including "available exculpatory evidence in her possession," prior to coercing defendant's guilty pleas, which deprived him of due process and effective assistance of counsel. Defense counsel told defendant that he could not testify because of his appearance and "verbal incompetency" from his medications. If defense counsel had correctly advised defendant, defendant would

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have "testified at a trial that it was consensual sex, not forced."

The post-conviction petition was supported by an affidavit of defendant in which he stated the following. Defendant would not have pleaded guilty if he was not on psychotropic medication, which made him unable to communicate and think properly. Defendant informed defense counsel that he was under psychiatric care, and she knew that he had been sent to Elgin Mental Health Center to be treated. Defendant wanted to testify, but defense counsel told him that he could not because of his appearance and "uncommunicability." Defendant told defense counsel in the courtroom to investigate several witnesses and to read several documents listed in his petition, to no avail.

On November 21, 2008, post-conviction counsel filed two certificates pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), one for case number 02 CR 1183 and one for case number 02 CR 11158.

The State filed a motion to dismiss the post-conviction petition because it lacked supporting documentation and failed to make a substantial showing of a constitutional violation.

The circuit court observed that nothing had been attached to the petition to validate the allegations and that there was no

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constitutional violation. The court dismissed the petition as to both cases pursuant to the State's motion.

On appeal, defendant contends that the circuit court erred in dismissing the post-conviction petition because he made a substantial showing that he had received ineffective assistance of counsel. He maintains that he made a substantial showing that defense counsel either knew or should have known that he (defendant) was not fit to plead guilty and that she also told him that he could not testify at trial. Specifically, defendant alleged that defense counsel was ineffective because she failed to inform the court that his medications were changed after he was found fit to stand trial with medication and before he pleaded guilty. Defendant suggests that his fitness depended on his continued use of the same medication he was using at the time of the fitness evaluation. Defendant alleged further that defense counsel was ineffective because she suggested that he could not testify at trial due to "his criminal background and his inability to communicate effectively," and that even if he could, he would never see his children again if he testified. He argues that counsel essentially incorrectly told him that he could not testify at trial. Defendant argues that he would not have entered a guilty plea but for the negative effects from the

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change in his medication. He argues further that he would have testified that the sexual conduct was consensual. He requests remandment for a third-stage, evidentiary post-conviction hearing.

Post-conviction proceedings which do not involve the death penalty have three separate stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage of the post-conviction process, within 90 days after the post-conviction petition is filed and docketed, the circuit court considers whether the petition is frivolous or patently without merit. *Edwards*, 197 Ill. 2d at 244; 725 ILCS 5/122-2.1(a)(2) (West 2008). At the second stage, the petition is set for further proceedings and the State must file either an answer or a motion to dismiss. *People v. Johnson*, 206 Ill. 2d 348, 356 (2002). If the State files a motion to dismiss, the court must rule on the legal sufficiency of each of the defendant's claims, treating as true all well-pleaded facts. *Johnson*, 206 Ill. 2d at 356-57. The court may dismiss the post-conviction petition if the petition, the trial record, and the accompanying affidavits fail to make a substantial showing of a constitutional violation. *Johnson*, 206 Ill. 2d at 357. If there is a substantial showing, the court holds a hearing on the merits of the defendant's claims.

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*Johnson*, 206 Ill. 2d at 357. The petition must be verified by affidavit and supported by affidavits, records, or other evidence, or the petition must explain their absence. 725 ILCS 5/122-1(b), 5/122-2 (West 2008); *People v. Hall*, 217 Ill. 2d 324, 332 (2005). Only well-pleaded facts which are not positively rebutted by the record are treated as true on review of the dismissal of a post-conviction petition. See *Hall*, 217 Ill. 2d at 334; *People v. Coleman*, 183 Ill. 2d 366, 381-82, 385, 388, 407 (1998). The Illinois Supreme Court has "consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings." *Coleman*, 183 Ill. 2d at 382. The applicable standard of review for dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. See *Hall*, 217 Ill. 2d at 334; *People v. West*, 187 Ill. 2d 418, 426 (1999); *Coleman*, 183 Ill. 2d at 388-89.

In this case, the circuit court dismissed the petition pursuant to the State's motion. Thus, this case is at the second stage of the post-conviction process. We conclude that defendant failed to present a substantial showing of a constitutional violation.

Defendant claims that his affidavit was the sole affidavit

that he could provide, because his attorney would not likely have attested to her own ineffective assistance. We do not base our decision on defendant's failure to present an affidavit from defense counsel. An allegation of ineffective assistance of counsel is a "narrow exception" to compliance with the documentation requirements, if the affidavit of the allegedly ineffective attorney is the sole affidavit that the defendant could have presented, except for the defendant's own affidavit. *Hall*, 217 Ill. 2d at 333. The obvious difficulty of obtaining an affidavit from an attorney whom the defendant alleges was ineffective excuses the defendant from presenting such supporting documentation or an explanation for its absence. *Hall*, 217 Ill. 2d at 333-34. Here, however, defendant could have, but did not, provide other supporting documentation, such as medical records, pharmacy records, jail records, records from Elgin Mental Health Center, or the names and doses of the medications he received and the dates he received them. Therefore, defendant failed to make a substantial showing that the alleged change in his medication raised a *bona fide* doubt about his fitness for his guilty pleas. See *People v. Hall*, 186 Ill. App. 3d 123, 134 (1989).

Furthermore, the test of a defendant's fitness to stand trial (or to plead guilty (*Johnson*, 206 Ill. 2d at 361-62)) is

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his ability to understand the nature and purpose of the prosecution and to assist in his own defense (*Johnson*, 206 Ill. 2d at 361-62; see *People v. Wilson*, 124 Ill. App. 3d 831, 836 (1984)).

In this case, the record demonstrates defendant's understanding of the proceedings and his ability to participate. *Johnson*, 206 Ill. 2d at 372. For example, during allocution (see *People v. Shum*, 207 Ill. 2d 47, 59 (2003) (the clear speech of the defendant during allocution demonstrated his ability to participate in his defense)), defendant coherently expressed remorse, remarked that his children would have to grow up without him, and accepted responsibility that his choices had led to those consequences. He did not complain about counsel. During the court's admonishments, he responded to the court's questions and indicated that he had not been threatened or forced to plead guilty. Taking his mental illness and suicide attempts as true (see, e.g., *People v. Stevens*, 188 Ill. App. 3d 865 (1989) (the defendant can be fit to stand trial despite a history of mental illness and suicide attempts)), we find that the record rebuts his claim that he was not fit to plead guilty (*Johnson*, 206 Ill. 2d at 373).

The record also rebuts any plausible claim of consensual

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intercourse. Pursuant to the factual basis for the guilty plea to aggravated criminal sexual assault, defendant admitted that he violently attacked and raped the victim despite her pleas not to rape her and her continuous complaints that he was hurting her. He admitted that he caused lacerations to her vagina and caused it to bleed. Defendant never spoke up to deny that the factual basis was true. Under these circumstances, the record rebuts any claim of consensual intercourse.

Next, there was no constitutional deprivation of defendant's right to testify. He alleges that he would have testified that his sexual encounter with the senior citizen was consensual. The record rebuts that allegation. This case does not involve a mere credibility contest between defendant and the victim on the issue of consent. The stipulated evidence shows that defendant broke into the apartment of the 68-year-old victim. She suffered vaginal lacerations from defendant's sexual assault and ran screaming from the apartment. A neighbor heard the victim's cries and saw that she was wearing only a bra and was naked from the waist down. Given this strong corroborative evidence of sexual assault, defendant's testimony that the victim consented is not, in our view, the type of plausible defense contemplated by the supreme court in *Hall*, 217 Ill. 2d at 335-36.

The cases cited by defendant are distinguishable. For example, in *People v. Jackson*, 57 Ill. App. 3d 809, 814 (1978), there was a *bona fide* doubt as to the defendant's fitness to be sentenced because the defendant had not received his medication at sentencing and the trial court indicated concern about the defendant's fitness. In *Brown v. Sternes*, 304 F.3d 677, 695-96 (7th Cir. 2002), defense counsel failed to investigate the defendant's documented history of severe schizophrenia despite his outbursts in her presence. In *People v. Murphy*, 160 Ill. App. 3d 781, 783, 789 (1987), defense counsel was ineffective for failure to investigate the defendant's fitness because defense counsel knew that the defendant had tried to commit suicide during the trial, was in a mental ward, and had difficulty communicating. In *People v. Brown*, 236 Ill. 2d 175, 191-92 (2010), which was not cited, the standards applied were those appropriate for first-stage post-conviction proceedings, in which the defendant bears a lesser burden.

In the present case, which is a second-stage post-conviction case, defendant's burden was to make a substantial showing of a constitutional violation, and the circumstances were different from the circumstances in the foregoing cases. Defendant's ability to communicate coherently and responsively during

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allocution belied his claim that a change in his medication caused him to be unfit. Defendant denied that anyone had threatened him or forced him to plead guilty. See *People v. Fields*, 331 Ill. App. 3d 323, 331 (2002). There is no indication that defendant, even if mentally disturbed, failed to understand the charges against him or was unable to assist in his defense.

We have considered and rejected all of defendant's arguments on appeal.

The judgment of the circuit court is affirmed.

Affirmed.