

2011 IL App (2d) 091357-U  
No. 2—09—1357  
Order filed August 19, 2011

**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  
SECOND DISTRICT

---

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08—CF—244
	)	
ANGEL FACIO,	)	Honorable
	)	Allen M. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE McLAREN delivered the judgment of the court.  
Justices Schostok and Hudson concurred in the judgment.

**ORDER**

*Held:* The trial court properly dismissed defendant’s postconviction petition alleging that his guilty plea was produced by ineffective assistance of counsel: his assertion that counsel did not spend enough time consulting with him did not show that the consultations were insufficient under the circumstances; his assertion that counsel did not “fully” explain the evidence likewise did not show that the explanation was insufficient; his assertion that counsel coerced or intimidated him into pleading guilty was purely conclusory.

¶ 1 Defendant, Angel Facio, appeals from the second-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)). He argues that his petition adequately stated a claim that his counsel had been ineffective in advising him on his guilty

plea and that, consequently, his plea had been neither knowing nor voluntary. The State asserts, among other things, that defendant failed to sufficiently specify counsel's failures. We hold that the petition does not adequately plead unprofessional conduct by counsel. We therefore affirm the dismissal.

¶ 2

## I. BACKGROUND

¶ 3 A grand jury indicted defendant, then a juvenile, on six counts of aggravated criminal sexual assault (720 ILCS 5/12—14(a)(2), 12—14(b)(i), (West 2006)). The indictment stemmed from one incident with an eight-year-old victim. The six counts involved four separate acts of sexual penetration, with alternative theories relating to two of the acts. The grand jury also indicted defendant on two counts of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(2)(i) (West 2006)); which related to two more acts in the same incident, and on four counts of criminal sexual assault (720 ILCS 5/12—13(a)(1) (West 2006)); those counts were based on alternative theories of the four acts of penetration.

¶ 4 During discovery, the State disclosed that testing of samples taken from the victim were inconclusive for the presence of semen. Shortly thereafter, defendant retained private counsel. The State then filed notice that samples taken from the victim would be consumed in DNA testing.

¶ 5 The record shows that defendant was in the custody of either a Cook County or a Kane County juvenile detention facility during the entire time before his guilty plea.

¶ 6 The court scheduled a hearing on the admissibility of out-of-court statements of the victim. On September 16, 2008, the date set for that hearing, the parties requested a conference under Illinois Supreme Court Rule 402(d) (eff. July 1, 1997). The State told the court that the parties had agreed on the details of a plea agreement. Defense counsel then told the court that he “had requested to

have some time to talk to [defendant] in the back there to go over the paperwork.” The court asked counsel if he had explained to defendant what happens at a Rule 402(d) conference, and counsel asked, “Can I explain that to him here briefly, Judge?” The court told counsel, “No, you are going to talk to him anyway. Why don’t you talk to him, I’ll do my other things.” When the court recalled the matter, defense counsel said that he had explained the conference. The conference took place, and, immediately after, the State explained the agreement for the record. Defendant would plead guilty to two counts of criminal sexual assault—two counts not alleging force or the threat of force. He was to be sentenced to eight years’ imprisonment for each—the terms to be consecutive to one another and concurrent with a Cook County juvenile sentence.

¶ 7 Defendant told the court that he had finished ninth grade and could read and write English. He was not surprised by the guilty plea. He was taking Prozac, but it did not interfere with his ability to understand what was happening. He initially said that he did not understand what it meant to be extended-term eligible, but, after the court explained further, he said that he understood. The court asked him if he had discussed the possible sentences with counsel, and he said that he had.

¶ 8 The State gave the factual basis for the plea. Defendant was at the home of the victim when he committed acts of oral and penile penetration of the victim’s vagina. The victim described him as slobbering on her private area. When defendant went to close the curtains of the room, the victim grabbed her clothing, ran out, and told her parents what had happened. The victim’s brother saw her run out of the room, followed by defendant. The victim’s parents confronted defendant; in response, he hung his head. He never made a statement either to the parents or to police. Results from medical examinations were inconclusive.

¶ 9 Defendant agreed with the court's statement that he had discussed the matter with his attorney on more than one occasion. He said that he was satisfied with his attorney personally and with his legal assistance. The court said that it "assume[d]" that defendant had spoken with his family, and defendant agreed. The court showed defendant a plea form and asked him if he had seen one before that day. Defendant responded that he had seen one in his Cook County case. The court asked him about the specific form, and he said that he had seen it for the first time earlier in the day.

¶ 10 The court accepted the plea agreement.

¶ 11 On February 27, 2009, defendant filed a *pro se* "Motion to Vacate Plea Agreement and Request Mistrial." He asserted that counsel had been inadequate and had "terrified and coerced [*sic*]" him into pleading guilty. He also asserted that his use of Prozac during the plea negotiation period had interfered with his ability to make reasonable decisions. Finally, he asserted that his sentence was too severe.

¶ 12 The court, noting that defendant was still a minor, appointed the public defender's office to advise defendant on whether to ask for characterization of the "Motion" as a petition under the Act.

¶ 13 The court gave defendant warnings in a form similar to those set out in *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005). The court asked defendant if he understood the warnings, and defendant said that he did not. The court asked counsel to further explain what it meant to file a petition under the Act. Counsel replied that, because defendant's "functioning might not be as acute as let's say half the clients that appear in front of [the court]," counsel needed more than a brief recess to talk to defendant. The court continued the matter. On the next court date, defendant, still assisted by counsel, elected to have the court treat the "Motion" as a petition under the Act.

¶ 14 The court ruled that the petition stated the gist of a claim and reappointed the public defender's office for the postconviction proceedings.

¶ 15 Defendant filed an amended petition. He alleged that he was 16 years old when the court accepted the plea agreement. He was taking Prozac and Zoloft at the time. Further, trial counsel met with him only twice "prior to the presentation of the plea agreement on September 18, 2008"—the length of those meetings was unspecified. Defendant learned of the proposed plea agreement during a telephone call from counsel two days before it was presented to the court. Defendant "felt intimidated by his attorney to accept the plea agreement." Counsel never explained the nature of the scientific evidence. Counsel's failure to discuss this evidence had a deceptive effect.

¶ 16 The petition was accompanied by defendant's affidavit. The affidavit added that defendant had a diagnosis of major depressive disorder. Defendant averred that counsel "did not *fully* discuss with [him] \*\*\* the significance of the medical examination \*\*\* or the results of the DNA comparisons." (Emphasis added.) Further, counsel "did not discuss the results of laboratory tests and comparisons which were done with a swab of [his] saliva." He averred that counsel "exerted pressure on [him] to accept the plea agreement."

¶ 17 With the amended petition, counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 18 The State moved to dismiss the petition. It argued that defendant had failed to allege facts suggesting a mental state that made him incapable of understanding the agreement. Further, he failed to plead that the failure to explain the evidence would have had any effect on defendant's decision. At the hearing on the motion, the State emphasized the lack of specificity, particularly with respect to the asserted pressure to accept the plea agreement. Postconviction counsel conceded to the court

that, under the rule in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant asserting that trial counsel was ineffective must show prejudice from counsel’s unprofessional conduct. However, he suggested that the sparse record generated by a guilty-plea hearing made the existence of prejudice nearly unknowable.

¶ 19 The court granted the motion to dismiss. It agreed that the petition lacked sufficient specificity. Defendant timely appealed.

¶ 20 II. ANALYSIS

¶ 21 A petition under the Act should survive the State’s second-stage motion to dismiss only if a defendant has made a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Our review of the dismissal is *de novo*. *People v. Gomez*, 409 Ill. App. 3d 335, 338-39 (2011).

¶ 22 Defendant asserts that he did make a substantial showing of a violation of the right to counsel. We disagree. The petition failed to set out with sufficient specificity how trial counsel’s “representation fell below an objective standard of reasonableness” (*Strickland*, 466 U.S. at 688). “Nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.” *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 23 *People v. Algee*, 228 Ill. App. 3d 401, 404 (1992), a case on which defendant relies, can stand as representative of sufficient, albeit less-than-ideal, specificity:

“In defendant’s motion to withdraw his guilty plea, defendant claimed defense counsel refused to prepare a defense, refused to give defendant all discovery materials supplied by the State, refused to accept many of defendant’s phone calls, refused to withdraw as counsel when requested, failed to object to inappropriate conduct by the State’s Attorney toward

defendant, and coerced defendant's plea by relating misinformation and/or threats designed to encourage defendant to plead guilty. We initially note defense counsel admitted he did not turn over all discovery material to defendant although he did give defendant copies of statements of the State's four main witnesses. Defense counsel further admitted he did not accept all of defendant's calls and on one occasion did hang up on defendant after telling him he was not going to 'hold [his] g-damn hand.' Furthermore, defense counsel, believing the State had or would request a continuance, was not prepared for trial on the day defendant's plea was entered, a fact of which defendant was made aware. More importantly, according to defendant, defense counsel informed defendant the morning of his trial that the judge was going to sentence defendant to 120 years on his drug charges if he did not accept the plea offered by the State that day."

¶ 24 The petition in *Algee* describes particular incidents and threats; defendant's deals entirely in generalities.

¶ 25 Defendant claimed that trial counsel did not spend enough time with him, did not explain the evidence "fully," and pressured him to plead guilty. We explain, in order, why each of these claims was inadequately supported.

¶ 26 The petition gives no indication of the total amount of time that trial counsel spent with defendant. It apparently alleges that defendant had only two face-to-face meetings with trial counsel outside the courthouse before the day of his guilty plea. The wording is vague on that point; however, we assume that, if the two meetings included the discussion with counsel on the day of the plea, the petition would have said so. Defendant's affidavit states that he also had at least one telephone call from counsel to discuss the plea agreement. Defendant says nothing about the length

of the meetings or the number of phone calls. With this level of detail, we cannot find a showing that the consultation was insufficient. The *number* of meetings and phone calls is not determinative; the total time would be far more informative.

¶ 27 Further, the two days that defendant says he had to consider whether he would accept the plea agreement was not clearly too little time. Provided that counsel had properly explained the agreement, we see no reason that more than two days would be necessary or even useful.

¶ 28 Before we turn to defendant's allegation that trial counsel did not adequately explain the evidence to him, we first must consider what that evidence was. The record contains an initial report that shows that tests for the presence of semen were inconclusive. When the State received that report, it requested that the court order defendant to provide a comparison sample for DNA testing. At the same time, it gave notice that it expected DNA testing of a sample taken from the victim to consume the entire sample. However, nothing in the record shows that that testing ever occurred. Thus, defendant's assertion that trial counsel failed to discuss the results of the DNA testing makes a factual assumption that is supported by neither the record nor any exhibit. Of course, had defendant chosen to go to trial, all unfinished testing likely would have been completed. Therefore, trial counsel, in advising defendant on the merits of the plea agreement, would have needed to explain how the yet-unknown results might affect the weight of the evidence. The circumstances suggested by the record called for trial counsel to explain the degree of uncertainty, not for him to give a technical explanation of existing results.

¶ 29 Because identity was not an issue here, barring a real surprise, any new test results could only hurt defendant. The challenge for the State was to prove defendant's specific acts against the victim. Under the circumstances that the State described in its statement of the factual basis for the plea, that

proof was likely to be heavily dependent on the victim's testimony and admissible out-of-court statements. The absence of medical findings or DNA results would not necessarily cast the victim's reports into doubt. However, if the lab had been able to detect semen, saliva, or defendant's DNA in any sample taken from the victim internally, the proof's dependance on statements or testimony of the victim would be much reduced.

¶ 30 Based upon this record, we do not believe defendant adequately supported his assertion that trial counsel did not give him an acceptable explanation of the medical evidence. First, given defendant's assumption that DNA testing had occurred, we suspect that his vague assertion that trial counsel failed to explain the evidence "fully" is partly a complaint that counsel failed to discuss evidence that likely did not exist. That problem aside, the petition gives us no idea of the extent of trial counsel's discussion of the evidence with defendant. A full explanation, in the normal sense of "full," would include technical detail unlikely to be helpful to defendant. However, if we understand defendant's claim to mean that counsel did not explain the evidence sufficiently or reasonably, the claim is a bare assertion. Finally, as we have suggested, counsel could have conveyed the gist of the situation by explaining that the State's proof was likely to be reliant on the victim's testimony and other statements, but that some possibility existed that further results might strengthen its case. Nothing in the petition or associated affidavit suggests that counsel did not give such a sufficient explanation of the State's evidence.

¶ 31 Defendant contended that counsel coerced or intimidated him into accepting the plea agreement. That contention is purely conclusory. This distinguished defendant's petition from that at issue in *Algee*, in which the defendant was able to point to a specific statement of counsel's, that the defendant would receive a 120-year sentence if he went to trial. *Algee*, 228 Ill. App. 3d at 404.

Defendant, in his *pro se* filing, said that counsel “terrified” him. For all we can tell from the petition, the statements that terrified defendant may have been nothing more than counsel’s accurate explanation of the maximum sentence that defendant faced.

¶ 32 In his appellate brief, defendant also suggests that the record shows that counsel did not give defendant effective assistance. We disagree. First, defendant points out that trial counsel had not explained the purpose of a Rule 402(d) conference to defendant before joining with the State in asking for one. Absent some suggestion that trial counsel’s explanation of the conference was deficient as a result of time pressure, we see no reason that the explanation should not come just before the conference. Unlike, perhaps, the decision to accept a plea agreement, the decision to have a Rule 402(d) conference should not necessarily require extended reflection. Defendant also suggests that counsel acted ineffectively by not showing defendant the guilty-plea form before the day of the hearing. We do not see a defendant’s familiarity with a county’s specific form as any kind of measure of familiarity with his or her rights. Moreover, the record overall suggests that counsel was generally prepared and was accustomed to criminal proceedings.

¶ 33

### III. CONCLUSION

¶ 34 For the reasons stated, we affirm the dismissal of defendant’s petition under the Act.

¶ 35 Affirmed.