

**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 McHenry County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04—CF—448
	)	
TYRONE C. DAVID,	)	Honorable
	)	Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

---

JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Bowman and Birkett concurred in the judgment.

**ORDER**

*Held:* The trial court properly dismissed the defendant's amended postconviction petition at the second stage where he failed to make a substantial showing that he received ineffective assistance of counsel or that his plea was not voluntary.

On August 5, 2005, the defendant, Tyrone David, pled guilty to two counts of aggravated criminal sexual abuse and was sentenced to consecutive terms of seven years' imprisonment. The defendant did not file a direct appeal. On May 22, 2009, the trial court denied the defendant's motion to reconsider the second stage dismissal of his amended postconviction petition. The defendant appeals from that order. We affirm.

On May 28, 2004, the defendant was charged by criminal complaint with four counts of criminal sexual assault (720 ILCS 5/12—13(a)(3) (West 2004)). The complaint alleged that the defendant committed acts of sexual penetration with his two minor stepdaughters. On June 9, 2004, the defendant's wife filed a petition for dissolution of marriage, which alleged that the defendant had sexually abused her two daughters. On August 6, 2004, the trial court entered an order of protection against the defendant in the dissolution proceeding. The order of protection indicated that the defendant was denied any visitation because he “ha[d] or [was] likely to[] [a]buse the children during visitation.”

On June 24, 2004, the defendant was indicted in this case on two counts of predatory criminal sexual assault (720 ILCS 5/12—14.1(a)(1) (West 2004)) (counts I and II) and two counts of criminal sexual assault (720 ILCS 5/12—13(a)(3) (West 2004)) (counts III and IV), based on the same allegations. On June 10, 2005, the defendant moved to suppress his oral admissions and a written statement that he had given to the police on May 28, 2004, concerning the subject charges. Following a hearing, the trial court denied the suppression motion.

The parties subsequently negotiated a plea agreement. Accordingly, at a hearing on August 5, 2005, the State moved to amend counts I and IV of the indictment to charge the defendant with the offenses of aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(1)(i), 16(b) (West 2004)) and to *nolle pross* counts II and III. The State indicated that in exchange for pleading guilty to the amended counts, it would recommend that the defendant be sentenced to serve consecutive seven-year sentences on each of the two counts. In response to questions by the trial court, the defendant stated that he understood the terms of the negotiated plea, he agreed to those terms, his plea was not the result of force or threats, and that no one had promised him anything in exchange for the plea.

The trial court admonished the defendant as to the nature of the charges, the minimum and maximum sentences, that in addition to any sentence he would have to serve two years of mandatory supervised release (MSR) on each count, that the negotiated seven-year sentences would be imposed consecutively, that he was entitled to a trial, and that by pleading guilty the defendant was giving up that right. The defendant indicated that he understood these admonitions and that he would be subject to four years of MSR.

Following the presentation of the factual basis for the plea, the trial court accepted the plea agreement and the defendant pled guilty to both counts of aggravated criminal sexual abuse. The parties waived a presentence report and the State acknowledged that the defendant had no prior criminal history. The trial court then sentenced the defendant to seven years' imprisonment on each count. The trial court reiterated that the sentences would run consecutively. Upon inquiry by the defendant, the trial court advised the defendant as to court costs and that the defendant was eligible for day for day credit on his sentence. After the trial court admonished the defendant of his right to appeal, the trial court asked the defendant whether he was a U.S. citizen. The defendant indicated that he was not a citizen but that he did have a green card. Thereafter, the following colloquy ensued:

“THE COURT: I want to tell you and I want you to listen closely to what I'm about to tell you. If you are not a citizen of the United States you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States or denial of naturalization under the law of the United States.

Now with that admonition in mind are you still willing to plead guilty as you earlier did?

THE DEFENDANT: Yeah.

THE COURT: So what I just told you does not change your mind about the advisability of this, is that correct?

THE DEFENDANT: No.”

The defendant did not file a direct appeal. On February 22, 2007, the defendant filed a *pro se* petition for postconviction relief. The trial court found that the petition presented a facially valid complaint and appointed postconviction counsel. On December 5, 2008, postconviction counsel filed an amended petition for postconviction relief. In that amended petition, the defendant alleged in relevant part that (1) he was not advised that his term of MSR would be in addition to his consecutive seven-year sentences; (2) the trial court failed to consider his lack of criminal history when it accepted his plea; (3) he failed to understand the trial court’s admonishments concerning the deportation consequences of his guilty plea; (4) he received ineffective assistance of counsel because counsel failed to ensure that he fully understood the negotiated plea agreement, failed to file a motion for a fitness hearing and failed to file a motion for substitution of judge; (5) the trial court judge should have recused himself from the defendant’s criminal case because the trial court judge also presided in the defendant’s dissolution proceedings and entered an order of protection against the defendant; and (6) the trial court erred in denying his motion to suppress.

On December 22, 2008, the State filed a motion to dismiss the defendant’s amended postconviction petition. The State argued that the record demonstrated that (1) the defendant’s plea was voluntary; (2) he was clearly admonished about MSR; (3) he was advised of the deportation

consequences of his plea by the trial court; and (4) there was no reason to question his fitness or request a fitness hearing. The State further argued that the defendant failed to establish that counsel was ineffective in failing to file a motion for substitution of judge because the trial judge was not required to recuse from the case and the defendant failed to provide any evidence of actual prejudice. Finally, the State argued that, by pleading guilty, the defendant waived any challenges to the denial of his suppression motion.

On February 10, 2009, the defendant filed a *pro se* memorandum and an affidavit in support of his amended postconviction petition. In the memorandum, the defendant alleged ineffective assistance of counsel in that trial counsel failed to appeal the denial of his motion to suppress, explain the full extent of the plea agreement, object to his sentences being consecutive, or file a motion for a substitution of judge. The defendant further alleged that trial counsel did not discuss the evidence against him, told him that he would never get a fair trial, and advised him to plead guilty.

The parties waived oral argument on the State's motion to dismiss and stood on their written filings. The State did not object to the trial court considering the defendant's February 2009 *pro se* memorandum. On April 22, 2009, the trial court entered its written decision and order. The trial court found that the record refuted the defendant's claims. Specifically, the trial court noted that the record showed that the court, although not required to, had advised the defendant of the deportation consequences of his plea. The record also reflected that the defendant's guilty plea was voluntary and that there was no reason to question the defendant's fitness. The trial court noted that adverse rulings in the dissolution proceeding did not disqualify it from presiding in this criminal matter and that the defendant had failed to allege any facts showing actual bias. Finally, the trial court found

that, by pleading guilty, the defendant had forfeited any argument as to error in the denial of his motion to suppress. Following the May 22, 2009, denial of his motion to reconsider, the defendant filed a timely notice of appeal.

On appeal, the defendant argues that the trial court erred in granting the State's motion to dismiss and that he is entitled to an evidentiary hearing to determine whether trial counsel was ineffective in failing to (1) move for a substitution of judge; (2) advise him of the deportation consequences of his guilty plea; and (3) explain the terms of his plea agreement. Additionally, the defendant argues that in light of trial counsel's incompetence, he is entitled to an evidentiary hearing on the issue of whether his plea was knowing and voluntary.

The Post-Conviction Hearing Act (725 ILCS 5/122—1 *et seq.* (West 2006)) creates a three-stage process for the adjudication of postconviction petitions and permits a defendant to mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Giampaolo*, 385 Ill. App. 3d 999, 1002 (2008). At the first stage, the defendant files a petition and the trial court may dismiss it if it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the petition is not dismissed, it advances to the second stage where the trial court may appoint counsel for an indigent defendant, the petition may be amended, and the State may answer or move to dismiss the petition. *Giampaolo*, 385 Ill. App. 3d at 1002. If the amended petition is not dismissed or denied, it advances to the third stage for an evidentiary hearing. *Gaultney*, 174 Ill. 2d at 418.

A defendant is entitled to an evidentiary hearing if the allegations set forth in his postconviction petition, as supported by the trial record or accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Bouzidi*, 332 Ill. App. 3d 87, 91 (2002).

“In making that determination, all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing under the Act.” *Id.* If the defendant has failed to make a substantial showing of a constitutional violation, the petition may be dismissed at the second stage. *Id.* We review a second stage dismissal of a postconviction petition *de novo*. *Id.*

To prove ineffective assistance of counsel, a defendant must establish that (1) his attorney’s performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Giampaolo*, 385 Ill. App. 3d at 1002. The failure to satisfy either prong of this test precludes a finding of ineffective assistance of counsel. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). Accordingly, if a defendant fails to allege that he was prejudiced, the second prong of the test, a court need not consider whether the attorney’s performance fell below an objective standard of reasonableness. *Giampaolo*, 385 Ill. App. 3d at 1002. In guilty plea proceedings, a defendant was prejudiced if he can establish a reasonable probability that, but for the alleged ineffective assistance of counsel, he would not have pled guilty and would have insisted on proceeding with a trial. *Id.*

The defendant first contends that trial counsel was ineffective in failing to move for substitution of judge. Specifically, the defendant notes that the trial court had entered an order of protection against him in his dissolution proceedings on the basis that he had or was likely to abuse his two stepdaughters. The defendant contends that this appearance of bias was sufficient to cause a reasonably competent attorney to move for substitution of the trial judge. Moreover, the defendant contends that he was prejudiced because the decision on his motion to suppress was left in the hands of a judge that probably believed he was guilty.

At the outset, we note that the defendant has forfeited any claim that counsel was ineffective in failing to file a motion for substitution of judge. A guilty plea, voluntarily and understandingly made, waives all non-jurisdictional defects and errors. *People v. Smith*, 383 Ill. App. 3d 1078, 1085 (2008) (once a defendant pleads guilty, he cannot thereafter raise independent claims that prior to entry of the guilty plea he was deprived of statutory or constitutional rights). Even if it were not forfeited, the defendant's contention is without merit. The defendant has failed to make a substantial showing that the failure to file a motion for substitution of judge was objectively unreasonable or that he suffered prejudice.

Regarding the former, our supreme court has held that “the fact that a judge has ruled adversely to a defendant in either a civil or a criminal case does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party.” *People v. Vance*, 76 Ill. 2d 171, 178 (1979). Opinions formed by the trial court on the basis of facts gathered in prior proceedings do not constitute a basis for a substitution of judge unless the judge has displayed a “deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). Absent circumstances that mandate recusal, actual prejudice is generally required to warrant a substitution of judge for cause. *In re Marriage of O'Brien*, 393 Ill. App. 3d 364, 373 (2009). Here, the trial court was not required to recuse himself and the defendant has not alleged actual prejudice or argued that the trial court displayed a “deep-seated favoritism or antagonism.” Accordingly, we cannot say that the failure to file a motion for substitution of judge was objectively unreasonable.

Although the failure to establish deficient attorney performance precludes a finding of ineffective assistance, we nonetheless note that the defendant has also failed to establish prejudice.

Even if the trial court had a preconceived notion of the defendant's guilt, the defendant has failed to show that it influenced the proceedings. The trial court's ruling on the motion to suppress turned on whether the defendant's statements were voluntary, not on whether the defendant was guilty. Additionally, the trial court did not ultimately determine the defendant's guilt or innocence; rather, the defendant entered a fully negotiated guilty plea which the trial court merely accepted.

The defendant next argues that trial counsel was ineffective in failing to advise him of the deportation consequences of his plea. At the outset, we note that this issue has been forfeited because it was not raised in the defendant's amended postconviction petition. In his petition, the defendant argued only that he failed to understand the trial court's admonishments regarding deportation and that counsel was ineffective in failing to ensure that he understood the plea agreement. The defendant did not specifically allege that his attorney failed to explain the deportation consequences of his plea. The failure to direct the trial court's attention to the specific issue raised on appeal, and thus depriving the trial court of an opportunity to review any alleged errors, forfeits such issues for purposes of appeal. *People v. McFarland*, 93 Ill. App. 3d 136, 139 (1981).

Even absent forfeiture, the defendant's claim would fail because he has not established any prejudice. The defendant never alleged in his amended postconviction petition or in his February 2009 *pro se* memorandum that he would not have pleaded guilty and would have insisted on going to trial if counsel had admonished him concerning the deportation consequences of his plea. This failure to allege prejudice alone defeats the defendant's claim of ineffective assistance. See *Peeples*, 205 Ill. 2d at 513; *Giampaolo*, 385 Ill. App. 3d at 1002. Furthermore, the trial court admonished the defendant of the deportation consequences of his guilty plea and the defendant stated in open court

that he still wanted to plead guilty. As such, any allegation that he would not have pleaded guilty had trial counsel properly advised him regarding deportation would have been refuted by the record.

Moreover, we note that the question of whether the alleged error prejudiced the defendant by causing him to plead guilty rather than go to trial depends in large part on a prediction of whether the defendant likely would have succeeded at trial. See *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). The record should demonstrate a “reasonable probability” that but for the error, the defendant would have rejected the plea arrangement. *Id.* Here, in light of the defendant’s oral admission and written statement, and the potential testimony as revealed in the factual basis for his guilty plea, it is unlikely that the defendant would have succeeded at trial or that he would have rejected the plea agreement. Thus, the defendant has failed to make a substantial showing of ineffective assistance on this issue.

In so ruling, we note that the defendant correctly relies on *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473, 1483 (2010), for the proposition that counsel must inform a client whether his plea carries a risk of deportation. However, the *Padilla* court also made clear that whether a defendant is entitled to relief for any failure to so advise depends on whether he has been prejudiced. *Id.* Here, the defendant has not shown prejudice.

The defendant’s final claim of ineffective assistance is that trial counsel was incompetent for failing to discuss the full terms of his plea agreement. Specifically, the defendant argues that based on the “various representations by the State and the trial court, [he] reasonably could have concluded he was facing a maximum prison term of seven years because, despite the imposition of consecutive terms, he would get day for day credit.” Additionally, the defendant argues that because he had no prior criminal record, his attorney should never have negotiated consecutive sentences.

Again, the defendant failed to plead either in his amended postconviction petition or in his *pro se* memorandum that had counsel informed him of the full terms of the plea agreement he would not have pled guilty and would have insisted on proceeding with a trial. This failure to allege prejudice defeats his claim for ineffective assistance. See *Peeples*, 205 Ill. 2d at 513; *Giampaolo*, 385 Ill. App. 3d at 1002. Furthermore, the defendant's claim that he did not understand the plea agreement or its potential consequences is refuted by the record. After the State set forth the terms of the plea agreement at the plea hearing, the trial court asked the defendant whether he understood the terms of the agreement and the defendant responded affirmatively. The defendant also indicated that he had not been threatened or forced to plead guilty, and had not received any promises in exchange for the plea. The trial court properly admonished the defendant pursuant to Supreme Court Rule 402(a) (eff. July 1, 1997). The defendant indicated that he understood he was being sentenced to two consecutive seven-year terms of imprisonment and that, in addition, each term would require two years' MSR for a total of four years MSR. The record demonstrates that the defendant was not mistaken as to the length of his sentence or confused by his eligibility for day for day credit. Although the defendant argues that trial counsel should not have agreed to consecutive sentences, we note that in the absence of the plea agreement the defendant would have faced trial on four counts with much higher sentencing requirements. Accordingly, the defendant's claim that he failed to understand the full terms of plea agreement are unsupported by the record and the defendant failed to make a substantial showing of ineffective assistance of counsel.

The defendant's final contention on appeal is that an evidentiary hearing is required to determine whether his plea was knowing and voluntary in light of his claims for ineffective assistance. However, as explained above, the defendant has failed to make a substantial showing

of ineffective assistance and the record demonstrates that the defendant understood the terms of the plea agreement and its consequences. In his *pro se* memorandum, the defendant asserted that trial counsel told him that he would “never get a fair trial.” However, the record shows that the defendant was properly admonished pursuant to Rule 402. Those admonishments “are intended to protect those accused of crime by ensuring that they have not pled guilty by mistake or under a misapprehension and that they have not been coerced or improperly advised to plead to crimes they did not commit.” *People v. Hammonds*, 210 Ill. App. 3d 854, 859 (1991). Accordingly, the defendant has failed to make a substantial showing that his plea was not voluntary and he is therefore not entitled to an evidentiary hearing on this issue.

For the foregoing reasons, we affirm the judgment of the circuit court of McHenry County granting the State’s motion to dismiss the defendant’s petition.

Affirmed.