

No. 2—09—0794
Order filed March 9, 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

<i>In re</i> COMMITMENT of SAMUEL RUTHERFORD)	Appeal from the Circuit Court of Du Page County.
)	
)	No. 07—MR—683
)	
(The People of the State of Illinois, Respondent-Appellee, v. Samuel Rutherford, Petitioner-Appellant).)	Honorable Kenneth L. Popejoy, Judge, Presiding.

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

ORDER

Held: Defense counsel was not ineffective for failing to challenge the State's petition's allegation that defendant had been convicted (as opposed to adjudicated delinquent) of sexually violent offenses and for so stipulating at the probable cause hearing; an exhibit to the State's petition, as well as the stipulation at trial, established that defendant had been adjudicated delinquent, so, had counsel challenged the petition's allegation instead of stipulating to it, the State would have been allowed to either amend the petition before judgment or conform it to the proofs after judgment; thus, the outcome of the proceeding would not have been different.

The State petitioned to have defendant, Samuel Rutherford, committed under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2006)). Defendant admitted the allegations in the petition for purposes of establishing probable cause and for purposes of trial.

Following a dispositional hearing, the trial court ordered defendant committed to a secure facility. Defendant timely appealed. Defendant argues that he received ineffective assistance of counsel when his counsel improperly stipulated that defendant had been convicted of (as opposed to adjudicated delinquent of) two sexually violent offenses and failed to challenge the petition on that basis. We find that defendant cannot establish that he was prejudiced by counsel's alleged errors and thus we affirm.

I. BACKGROUND

On October 21, 2002, in case number 02—JD—578, the circuit court of Du Page County adjudicated defendant, who was 16 years old at the time, a delinquent minor for committing attempted aggravated criminal sexual assault (720 ILCS 5/8—4(a), 12—14(b)(i) (West 2002)) and aggravated criminal sexual abuse (720 ILCS 5/12—16(c)(2)(i) (West 2002)) against an 8-year-old female. The trial court sentenced defendant to five years' probation. In March 2005, defendant admitted to violating the conditions of probation, and the trial court committed him to the Department of Juvenile Justice (DJJ) for an indeterminate term under section 5—750 of the Juvenile Court Act of 1987 (705 ILCS 405/5—750 (West 2004)). In June 2006, defendant was released on parole. Six months later, defendant violated the conditions of parole and was recommitted to the DJJ.

On May 24, 2007, the State petitioned to have defendant civilly committed under the Act, and alleged, in relevant part:

“1. On July 4, 2002, [defendant] was at a family party at the victim's home. The 16 year old [defendant] told the 8 year old female victim that he wanted to show her something. He took her into a room in her home and locked the door. He held her by her wrist and

removed the bottom of her bathing suit. He rubbed her vagina with his fingers. He unzipped his pants and forced her to touch his penis. He rubbed his penis on her genitals and on her buttocks. He also kissed this 8 year old female victim with his tongue. The victim stated that he rubbed his penis on the outside and inside of her vagina. [Defendant] admitted to these offenses and *was convicted of Aggravated Criminal Sexual Abuse and Aggravated Criminal Sexual Assault in DuPage County case number 02 JD 578.* He was sentenced to the Illinois Department of Corrections—Juvenile Division. A certified copy of the conviction is attached as Exhibit ‘A.’ ” (Emphasis added.)

The petition further alleged that defendant had been diagnosed by Dr. Barry Leavitt with several mental disorders that predisposed defendant to commit acts of sexual violence and that created a substantial probability that he would engage in future acts of sexual violence. In support, the State attached as an exhibit Dr. Leavitt’s evaluation. The State requested that the court find that defendant was a sexually violent person under the Act and commit him to the Department of Human Services (DHS) for control, care, and treatment.

On May 29, 2007, the parties stipulated that there was probable cause to believe that defendant was a sexually violent person as defined under section 5 of the Act (725 ILCS 207/5 (West 2006)). They further stipulated that “the records of the Circuit Court of DuPage County*** indicate that [defendant] *has been previously convicted* in 2002 of the offenses of attempt criminal sexual assault and attempt—and aggravated criminal sexual abuse. That both of those offenses are considered sexually violent offenses under the [Act].” (Emphasis added.) The court accepted the stipulation and found that there was probable cause to continue defendant’s detention. The court ordered that defendant be evaluated and continued the matter.

On June 24, 2008, after consulting with his attorney, defendant signed a stipulation in which he agreed, *inter alia*, that (1) “[he] has read and understands the allegations and request for relief contained in the [p]etition”; (2) “[he] has the right to deny the [p]etition or admit the [p]etition”; (3) “[he] waives his right to present evidence at trial”; (4) “[he] understands and waives his right to a trial”; (5) “[he] waives his right to have the People prove that he is a sexually violent person beyond a reasonable doubt”; (6) “[he] has been convicted of *or adjudicated delinquent of* the following sexually violent offenses: 02 JD 578 Aggravated Criminal Sexual Abuse *** [and] Attempt Aggravated Criminal Sexual Assault”; (7) if two experts were called to testify at trial, they would testify that he suffered from several mental disorders that “ma[k]e it substantially probable that he *** will engage in future acts of sexual violence”; and (8) “he [be] committed to the custody of the Illinois [DHS] for control, care and treatment until such time as [he] is no longer a sexually violent person.” (Emphasis added.)

Based on the stipulation, the trial court found defendant’s admission and waiver of rights to be knowing, intelligent, and voluntary. Accordingly, the trial court found that defendant was a sexually violent person and committed him to the custody of the DHS until he is no longer a sexually violent person. The court ordered the DHS to prepare a predisposition report.

On July 1, 2009, after hearing evidence at a dispositional hearing, including testimony from two psychologists and defendant, the trial court ordered defendant civilly committed. Defendant timely appealed.

II. ANALYSIS

Defendant’s sole argument on appeal is that he received ineffective assistance of counsel. Defendant argues that counsel was ineffective for erroneously stipulating at the probable cause

hearing that defendant had been convicted of the two sexually violent offenses when defendant had instead been adjudicated delinquent of said offenses. (We note that counsel stipulated correctly at the trial on the petition that defendant had been “convicted of or adjudicated delinquent of the *** sexually violent offenses.”) Although not entirely clear, defendant’s argument seems to be that counsel should have challenged the sufficiency of the petition. According to defendant, “had said attorney not stipulated and admitted that [defendant] had been convicted of the instant offenses, the State would, as a matter of law, not [have] been able to prove that [defendant] was [a sexually violent person].” According to defendant, there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. We disagree.

Persons committed under the Act are entitled to the effective assistance of counsel. *In re Commitment of Bushong*, 351 Ill. App. 3d 807, 817 (2004). Counsel’s effectiveness is measured by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* Under *Strickland’s* two-prong test, a defendant claiming ineffective assistance of counsel must show that his counsel’s performance “fell below an objective standard of reasonableness” and that the deficient performance was prejudicial in that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694. “[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel’s deficient performance rendered the result of the trial unreliable or fundamentally unfair. [Citation.] A reasonable probability of a different result is not merely a possibility of a different result. [Citation.]” *People v. Evans*, 209 Ill. 2d 194, 220 (2004). “If it is easier to dispose of an ineffective assistance claim on the ground that it lacks sufficient prejudice, then a court may proceed directly

to the second prong and need not determine whether counsel's performance was deficient." *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

The Act defines "sexually violent person" as "a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2006). Here, although the petition erroneously provided that defendant had been *convicted* of two sexually violent offenses, the document attached to the petition, and the stipulation at trial, nevertheless established that defendant had been *adjudicated delinquent* for those offenses. Thus, defendant fell under the definition of a sexually violent person on that basis. Had defense counsel challenged the petition based on the erroneous allegation, the State could have requested leave to amend the petition. Contrary to defendant's claim, we have no reason to believe that leave would not have been granted.

The Act expressly provides: "The proceedings under this Act shall be civil in nature. The provisions of the Civil Practice Law *** shall apply to all proceedings hereunder except as otherwise provided in this Act." 725 ILCS 207/20 (West 2006). Under section 2—616 of the Code of Civil Procedure (Code) (735 ILCS 5/2—616(a), (c) (West 2006)), the State had the right to amend the petition at any time before final judgment to correct the technical defect or at any time after judgment to conform the pleadings to the proof. Here, the proof was by way of stipulation, and the stipulation at trial (as opposed to the stipulation at the probable cause hearing) correctly stated that "[defendant] has been convicted of *or adjudicated delinquent of* *** Aggravated Criminal Sexual Abuse *** [and] Attempt Aggravated Criminal Sexual Assault." (Emphasis added.) Thus, even if counsel had

challenged the sufficiency of the petition, we have no reason to believe that the State would not have been allowed to amend the petition before judgment or to conform the petition after. See *Cordts v. Chicago Tribune Co.*, 369 Ill. App. 3d 601, 612-13 (2006) (“[H]ad defendants properly challenged the sufficiency of [the plaintiff’s] claim *** through a section 2—615 motion, [the plaintiff] would have been entitled [to] an opportunity to amend his complaint.”).

Contrary to defendant’s assertion, such an amendment would not have been untimely. The amended petition would have related back to the original filing date, because it would have corrected a technical defect without altering the cause of action asserted in the original petition, and defendant would not have been prejudiced, because the exhibit attached to the petition clearly established the basis for the petition. See 735 ILCS 5/2—616(b) (West 2006); *Wolf v. Meister-Neiberg, Inc.*, 143 Ill. 2d 44, 47-48 (1991) (where the plaintiff amended his complaint to correct the location of the slip-and-fall occurrence at issue after the statute of limitations had run, the complaint related back to the original timely-filed complaint, because the defendants were on notice of the correct location prior to the running of the limitations period and were not prejudiced).

Accordingly, we find that defendant has not established that, but for defense counsel’s erroneous stipulation and his failure to challenge the petition, there is a reasonable probability that the result of the proceedings under the Act would have been different. Thus, his ineffective-assistance claim must fail.

III. CONCLUSION

Based on the foregoing, we affirm the judgment of the circuit court of Du Page County.

Affirmed.