

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).

No. 3--09--0322

Order filed March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Respondent-Appellee,)	
)	
v.)	No. 08--CF--2
)	
GARY BARNETT,)	Honorable
)	Carla Alessio-Policandriotes,
Petitioner-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

Held: Petitioner did not allege the gist of a meritorious constitutional claim in his postconviction petition; the mere allegation of the ingestion of psychotropic medication is insufficient to raise fitness concerns when not supported by other allegations or evidence.

Petitioner, Gary Barnett, pled guilty to armed robbery (720 ILCS 5/18--2 (West 2008)) and was sentenced to eight years and six months in prison. While incarcerated, petitioner filed a postconviction petition (725 ILCS 5/122--2.1 (West 2008)) asserting that his constitutional right to effective assistance

of counsel had been violated. The trial court found the petition to be frivolous and patently without merit and dismissed it. On appeal, petitioner argues that the trial court erred in dismissing his petition because it stated the gist of a claim. We affirm.

FACTS

Petitioner was charged with and pled guilty to armed robbery. The trial court sentenced him to eight years and six months in prison. Almost four months after petitioner's guilty plea, he filed a motion to withdraw the plea. The trial court denied his motion, finding that it no longer had jurisdiction after the expiration of the 30-day deadline. Petitioner appealed this ruling. The appellate court affirmed the trial court's dismissal. *People v. Barnett*, No. 3--08--0861 (2008) (unpublished order under Supreme Court Rule 23). Petitioner then filed a postconviction petition alleging that his trial counsel failed to request an order that he be examined for a fitness hearing after learning that he was taking psychotropic drugs. The trial court denied his petition, finding that it was patently without merit.

At petitioner's first court appearance on the armed robbery charge, the public defender asked the court to inquire as to why the petitioner was dressed in red. Petitioner stated that he was in red because he was taking psychiatric medication. The trial

court then recommended the public defender to consider "motions or requests regarding his mental health status" at the "preliminary hearing." However, no preliminary hearing was held, and petitioner's attorney did not move for a fitness examination.

The court again asked the petitioner about his mental health at the hearing on the plea agreement. At that time, petitioner stated that he was taking two types of medication for psychiatric problems. Petitioner stated that he had been taking these drugs since he was first incarcerated on January 1, 2008. When the trial court asked him if these medications in any way affected his ability to understand the court proceedings or his ability to communicate with his lawyer, petitioner answered "No."

Petitioner also agreed that he was "satisfied with the services of [his] lawyer" at the time of the plea. The trial court then accepted his guilty plea and issued its sentence.

In petitioner's postconviction petition, he claimed his trial counsel had failed to order that he be examined for a fitness hearing after learning that he was taking psychiatric drugs. Petitioner stated that the drugs he was taking at the time of his plea were for schizophrenia. As further proof of his unfitness, he stated that he had been placed in the Dixon Correctional Center's Special Treatment Center, a facility where mentally ill patients are housed.

The trial court found that petitioner's postconviction

petition was frivolous and patently without merit and dismissed it. Petitioner appeals.

ANALYSIS

Petitioner argues that the first-stage dismissal of his postconviction petition was in error because he alleged the gist of a constitutional claim. However, we find that the trial court's dismissal was appropriate because petitioner's allegations did not raise the gist of a meritorious claim and were not supported by affidavits, records or supporting evidence attached to his petition.

We review the trial court's dismissal of petitioner's postconviction motion *de novo*. *People v. Hodges*, 234 Ill. 2d 1 (2009). To avoid a first stage dismissal, a postconviction petitioner must clearly set forth the respects in which the petitioner's constitutional rights were violated, and attach to the petition affidavits, records or other evidence supporting his allegations or state why the same are not attached. 725 ILCS 5/122--2 (West 2008). Failure to attach the "necessary 'affidavits, records, or other evidence' or explain their absence is 'fatal' to a postconviction petition [citation] and by itself justifies the petition's summary dismissal." *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Alternatively, a postconviction petition will be dismissed by the trial court if it is considered "frivolous or patently without merit if the petition's

allegations, taken as true, fail to present the gist of a meritorious constitutional claim." *Collins*, 202 Ill. 2d at 66.

Petitioner argues that he alleged the gist of a constitutional claim because his due process right to be prosecuted only when fit was violated and his counsel was ineffective in not requesting a fitness hearing upon learning that he was taking psychotropic medication. See *People v. Meyers*, 352 Ill. App. 3d 790 (2004). Petitioner contends that his case is similar to *People v. Alberts*, 383 Ill. App. 3d 374 (2008) and *People v. Sawczenko*, 328 Ill. App. 3d 888 (2002), where the appellate courts remanded postconviction petition cases for further proceedings. In both of these cases, the respective petitioners successfully raised postconviction petition claims based on ineffective assistance of counsel. In *Alberts*, 383 Ill. App. 3d 374, the petitioner alleged that his trial counsel was ineffective in not requesting a fitness hearing because he knew the petitioner was taking high doses of psychotropic medication. Similarly, in *Sawczenko*, 328 Ill. App. 3d 888, the petitioner argued that his counsel's failure to request a fitness hearing violated his constitutional rights because counsel knew he was taking psychotropic medication. In comparison to these cases, petitioner argues that he received ineffective assistance of counsel because his attorney did not raise his fitness concerns with the court.

We disagree. Petitioner highlights the facial similarities of *Alberts*, 383 Ill. App. 3d 374, and *Sawczenko*, 328 Ill. App. 3d 888, with his own case while omitting the negative implications of these cases. Specifically, in *Sawczenko* the petitioner's unfitness allegation was supported with statements that went "beyond the bare allegation that he was taking psychotropic medication at the time of his guilty plea." *Sawczenko*, 328 Ill. App. 3d at 898. The court stated that the petitioner's attempted suicide two days before his guilty plea could raise "*bona fide* doubt of his fitness." *Id.* at 898.

In the present case, petitioner argues solely that his allegations are analogous to those in *Sawczenko* because he too was taking psychotropic medications. However, petitioner's argument overlooks the *Sawczenko* court's application of *People v. Mitchell*, 189 Ill. 2d 312 (2000). *Mitchell* held that denial of a "fitness hearing is not in and of itself a constitutional deprivation because the administration of psychotropic medication is not equivalent to a *bona fide* doubt as to the accused's fitness to stand trial." *Sawczenko*, 328 Ill. App. 3d at 898, citing *Mitchell*, 189 Ill. 2d at 327-31. Further, *Sawczenko* addressed Illinois law stating that "a defendant who is receiving psychotropic drugs shall not be presumed to be unfit to stand trial solely by virtue of the receipt of those drugs or medications." 725 ILCS 5/104--21 (West 2008). Here,

petitioner's argument, premised on the mere receipt of psychotropic medication with little other evidentiary or affidavit support of unfitness, fails to allege a gist of a constitutional violation.

Furthermore, petitioner's argument that his postconviction petition was similar to *Alberts*, 383 Ill. App. 3d 374, also fails to persuade. In *Alberts*, 383 Ill. App. 3d 374, the petitioner alleged that he was unfit to stand trial because he was taking psychotropic medication. The *Alberts* petitioner had attached to his petition a psychologist's report opining that he was unfit to stand trial as a result of taking excessive dosages of psychotropic medication which " 'substantially impaired his ability to understand the nature and purpose of the proceedings against him and his ability to assist in his own defense.' " *Alberts*, 383 Ill. App. 3d at 379. In contrast to the *Alberts* petition, petitioner supported his unfitness allegation only with his own affidavit and a copy of a private investigator's report of his mother's recantation of the events leading to his arrest for armed robbery. This lack of support is fatal to petitioner's postconviction petition. See *Collins*, 202 Ill. 2d 59.

Lastly, the record further negates petitioner's assertions that he was unfit to plead guilty. Petitioner told the court that he was able to communicate with his attorney and understand the proceedings. The trial judge questioned defendant and had

the opportunity to observe his behavior and affect. Illinois law also presumes petitioner was fit to stand trial. 725 ILCS 5/104-10 (West 2008).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

Affirmed.