

NOTICE  
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2011 IL App (4th) 100387-U

Filed 12/13/11

NO. 4-10-0387

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
TONY L. HOWELL,	)	No. 05CF256
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

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JUSTICE POPE delivered the judgment of the court.  
Justices Steigmann and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition where defendant failed to demonstrate he was prejudiced by his trial and appellate counsels' alleged ineffectiveness because the trial court did not err in sentencing him to an extended term in prison.

¶ 2 Defendant, Tony L. Howell, appeals the trial court's May 20, 2010, dismissal of his March 15, 2010, postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 24, 2008, a jury convicted defendant of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2004)) and unlawful possession of cannabis (720 ILCS 550/4(b) (West 2004)), based on a February 15, 2005, traffic stop.

¶ 5 During sentencing, the State introduced people's exhibit No. 1, a certified copy of

records from the Department of Corrections (DOC) showing defendant's 1990 conviction for murder and argued, "[b]ecause of the defendant's prior conviction, the sentencing range in this case is 4 to 30 years." The State asked for 30 years' imprisonment. Defendant's trial counsel agreed "the sentencing range is 4 to 30 years" but argued the trial court should sentence defendant for the current conviction and not punish him for what took place in the past. Defendant's counsel recommended a five-year prison sentence.

¶ 6 At the conclusion of the sentencing hearing, the trial court stated it considered the presentence investigation report (PSI), which showed defendant's 1990 conviction, the evidence in aggravation and mitigation, defendant's allocution, and the arguments and recommendations of counsel. The court sentenced defendant to 19 years' imprisonment on the intent to deliver conviction and 6 months in jail on the possession of cannabis conviction.

¶ 7 On direct appeal, defendant, represented by appointed counsel, argued only that he was entitled to additional monetary credit against his fines. This court affirmed the trial court's judgment as modified and remanded for an amended sentencing judgment regarding defendant's additional credit. See *People v. Howell*, No. 4-08-0475 (June 22, 2009) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 8 On July 6, 2009, defendant *pro se* filed a postconviction petition, arguing his appointed counsel failed to raise the following issues on direct appeal: (1) his trial counsel was ineffective for failing to argue a "lesser-included offense exception;" and (2) the trial court erred in sentencing him to an extended term.

¶ 9 On October 13, 2009, the trial court appointed counsel to represent defendant in the postconviction proceeding.

¶ 10 On March 15, 2010, defendant's appointed counsel filed an amended postconviction petition, arguing (1) the trial court failed to make specific findings of the factors in aggravation necessary to impose an extended-term sentence, (2) defendant's trial counsel was ineffective for not challenging the court's failure to make specific findings regarding defendant's extended-term eligibility, and (3) defendant's appellate counsel was ineffective for not raising those issues on appeal.

¶ 11 On April 14, 2010, the State moved to dismiss defendant's petition, arguing, *inter alia*, (1) the trial court considered all of the evidence required to impose an extended-term sentence, (2) trial counsel's agreement as to the potential sentencing range was not ineffective assistance given the information presented at sentencing, and (3) appellate counsel was not ineffective because the claim defendant maintained could have been raised on direct appeal and was clearly contradicted by the record.

¶ 12 Following a May 20, 2010, hearing, the trial court granted the State's motion and dismissed defendant's petition. The court found trial counsel's performance could not have been deficient where the record showed the trial court made the findings necessary to impose an extended-term sentence. The court also found appellate counsel could not have been ineffective for failing to raise a meritless issue on appeal.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court erred in dismissing his postconviction petition where his appellate counsel provided ineffective assistance by failing to argue on direct appeal his trial counsel was ineffective for not challenging the trial court's basis for imposing an

extended-term sentence. Defendant contends the court's failure to specifically enumerate the basis for defendant's extended-term eligibility is "especially prejudicial" because nothing in the record on appeal shows defendant was eligible for an extended-term. We disagree.

¶ 16 A. Standard of Review

¶ 17 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) provides a three-stage process by which criminal defendants may allege substantial violations of their state and federal constitutional rights. *People v. Petrenko*, 385 Ill. App. 3d 479, 481, 896 N.E.2d 873, 875 (2008). In this case, the relevant claim was dismissed at the second stage of the proceedings. At the second stage, the trial court must determine whether defendant's petition and documentation "make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001). We review *de novo* the dismissal of a postconviction petition at the second stage. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998). The question is whether the allegations in the petition, when liberally construed and taken as true, are sufficient to justify relief under the Act. *Coleman*, 183 Ill. 2d at 388, 701 N.E.2d at 1075. A third-stage evidentiary hearing is appropriate when the petitioner has made a substantial showing, through the record and supporting documentation and affidavits, that his constitutional rights were violated. *People v. Erickson*, 183 Ill. 2d 213, 222, 700 N.E.2d 1027, 1032 (1998).

¶ 18 B. Defendant's Ineffective-Assistance Claims

¶ 19 Defendant argues although the record "arguably supports" an extended-term finding, his trial counsel was ineffective for failing to challenge the trial court's basis for finding defendant extended-term eligible. However, defendant does *not* claim he was not eligible for

extended-term sentencing. Nor does he offer any documentation to show he was not eligible for an extended term. Instead, defendant merely contends the record fails to show he was eligible for such sentencing. To establish ineffective assistance of counsel, the defendant must establish both prongs of the *Strickland v. Washington*, 466 U.S. 668 (1984) "deficiency and prejudice" test. *People v. Houston*, 226 Ill. 2d 135, 144-45, 874 N.E.2d 23, 30 (2007). The "defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (quoting *Strickland*, 466 U.S. at 687-88).

¶ 20 Defendant also argues his appellate counsel was ineffective for failing to raise on direct appeal the issue of his trial counsel's ineffectiveness regarding the basis for his extended-term sentence. We analyze ineffective-assistance-of-appellate counsel claims under the standard set forth in *Strickland*. See *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1106 (2000) (applying *Strickland* to an ineffective-assistance-of-appellate-counsel claim).

¶ 21 "The failure to satisfy either *Strickland* prong will preclude a finding of ineffective assistance of counsel." *People v. Montgomery*, 373 Ill. App. 3d 1104, 1113, 872 N.E.2d 403, 411 (2007). "Because a defendant must satisfy both prongs of the *Strickland* test, a reviewing court can dispose of a claim of ineffective assistance of counsel solely on the ground that the defendant did not suffer prejudice without deciding whether counsel's performance was constitutionally deficient." *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003). Thus, when "a reviewing court finds that a defendant suffered no or *de minimus* prejudice, it need not decide whether counsel's performance was constitutionally deficient." *People v. McCleary*, 353 Ill. App. 3d 916, 921, 819 N.E.2d 330, 335 (2004). To show prejudice,

a defendant "must show that but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different." *Montgomery*, 373 Ill. App. 3d at 1113, 872 N.E.2d at 411; *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000).

¶ 22 C. Extended-Term Sentencing

¶ 23 Section 5-8-2 of the Unified Code of Corrections (Unified Code) permits an extended-term sentence when factors present in paragraph (b) of section 5-5-3.2 of the Unified Code are present. 730 ILCS 5/5-8-2 (West 2008). According to section 5-5-3.2(b)(1), the following may be considered as a reason to impose an extended-term sentence pursuant to section 5-8-2:

"(1) When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, *excluding time spent in custody*, and such charges are separately brought and tried and arise out of different series of acts." (Emphasis added.)

730 ILCS 5/5-5-3.2(b)(1) (West 2008).

¶ 24 In this case, a PSI was prepared prior to defendant's sentencing hearing. The PSI included defendant's prior criminal history and indicated he had been convicted of "Murder/Intent to Kill/Injure" in Macon County Case No. 89-CF-696 on February 14, 1990, and sentenced to 25 years' imprisonment. A PSI is generally an acceptable and reliable source for the trial court to use in considering a defendant's criminal background. *People v. Johnson*, 372 Ill. App. 3d 772, 781, 867 N.E.2d 49, 56 (2007) (citing *People v. Rivera*, 362 Ill. App. 3d 815,

821, 841 N.E.2d 532, 536-37 (2005)). Moreover, proof beyond a reasonable doubt of a defendant's prior conviction is unnecessary under section 5-5-3.2(b)(1). *People v. James*, 362 Ill. App. 3d 285, 292-93, 838 N.E.2d 1008, 1014 (2005).

¶ 25 Defendant argues the trial court's reliance on the PSI was misplaced because it does not show the date he was released from DOC. However, the State also introduced into evidence people's exhibit No. 1, certified copies of DOC records, showing defendant's "in custody and release dates" for the "89-CF case that's on the [PSI]." See *People v. Hay*, 362 Ill. App. 3d 459, 468, 840 N.E.2d 735, 743, (2005) (certified copy of the defendant's prior conviction introduced at sentencing sufficient to establish extended-term eligibility); cf., *People v. Wilkins*, 343 Ill. App. 3d 147, 151-52, 797 N.E.2d 231, 235 (2003) (finding the trial court erred in sentencing defendant to an extended term where it relied *only* on the PSI, which did not show the time he spent in custody and thus did not provide a proper basis for an extended term under section 5-5-3.2(b)(1)).

¶ 26 On appeal, the State has supplemented the record with a notarized copy of people's exhibit No. 1, dated May 3, 2006, which shows defendant entered DOC on February 21, 1990, and was released from custody on February 4, 2003. The date of a conviction for purposes of determining the 10-year period for section 5-5-3.2(b)(1) purposes is "the date of entry of the sentencing order." *People v. Robinson*, 89 Ill. 2d 469, 476-77, 433 N.E.2d 674, 678 (1982). The date of sentencing for the instant felony was June 25, 2008. Section 5-5-3.2(b)(1) of the Unified Code explicitly provides the 10-year time limitation does not include time spent in custody. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). Excluding defendant's time in prison, less than 10 years separate the two convictions. Thus, the trial court did not err in sentencing defendant to an

extended term under section 5-5-3.2(b)(1). See *Robinson*, 89 Ill. 2d at 476-77, 433 N.E.2d at 678; See *People v. Rice*, 234 Ill. App. 3d 12, 28, 599 N.E.2d 1253, 1265 (1992).

¶ 27 We note, defendant testified he was released from prison on January 12, 2002. However, even if we were to accept defendant's release date in place of DOC's release date, our result would not change because a January 12, 2002, release date would still place defendant within the requisite 10-year period for purposes of section 5-5-3.2(b)(1). See *People v. Smith*, 199 Ill. App. 3d 839, 857-58, 557 N.E.2d 596, 609-610 (1990).

¶ 28 Moreover, our review of the record shows defendant's extended term was properly based upon defendant's prior conviction. During sentencing, the trial court stated it considered the contents of the PSI, which showed defendant's conviction, as well as "the evidence in aggravation, the evidence in mitigation, defendant's statement in allocution, the arguments and recommendations of counsel, and the statutory factors in mitigation and aggravation." The court specifically referenced defendant's prior murder conviction and stated the following,

"if you look at--uh--the law and you look at [defendant's] record--uh--it becomes apparent that there are some serious factors in aggravation here that the Court cannot ignore, not the least of which is [defendant] has been convicted of murdering another human being, and the Court can't ignore that even though it happened a while ago. Uh--one would hope after an experience like that that the person involved would--uh--do everything in his or her power not to get in any more trouble, but actually once--uh--[defendant] was released from prison, he continued to engage in criminal conduct. It looks

like, including this case, six--uh--criminal offenses since he got released from prison."

Further, the court stated "this is an extremely serious situation where we've reached the point where the protection of the public is the utmost concern of this Court, and I will fashion a sentence to make sure that is done."

¶ 29 In this case, defendant was eligible for an extended term of up to 30 years in prison. See 730 ILCS 5/5-8-2(a)(3) (West 2008). After considering the aggravating and mitigating factors and defendant's prior offenses, the trial court fashioned a 19-year sentence, which is within the extended-term sentencing range for the instant offense. Because we have found no error in defendant's sentence, he is unable to establish he suffered any prejudice. As a result, defendant's ineffective-assistance claims pertaining to his trial and appellate counsel fail.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.