

NOTICE
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NO. 4-09-0877

Filed 6/7/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macoupin County
LEE A. DODSON,)	No. 98CF62
Defendant-Appellant.)	
)	Honorable
)	Patrick J. Londrigan,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and McCullough concurred in the judgment.

ORDER

Held: Where defendant sufficiently alleged a substantial deprivation of his constitutional rights based on the ineffective assistance of his trial and appellate counsel, he was entitled to an evidentiary hearing on his alleged claims.

In January 1999, defendant, Lee A. Dodson, pleaded guilty to attempt (first-degree murder), home invasion, and aggravated discharge of a firearm in connection with defendant's forced entry into a home where he shot an occupant in the head and chest. The victim survived. This appeal is from the circuit court's second-stage dismissal of defendant's postconviction petition, wherein he alleged the ineffective assistance of trial counsel for (1) counsel's failure to properly advise defendant, prior to the entry of his guilty plea, that he would be required to serve mandatory consecutive sentences, and that he was not eligible for the imposition of concurrent sentences; (2) counsel's failure to file a Supreme Court Rule 604(d) certificate; (3) counsel's failure to move to dismiss a new

charge filed beyond the time applicable to comply with the speedy-trial statute; and (4) allowing defendant to plead guilty to the untimely charge. Defendant also alleged his appellate counsel was ineffective for failing to raise these issues on direct appeal. Defendant ultimately seeks to have his guilty plea withdrawn so that he may plead anew. For the following reasons, we reverse the circuit court's order dismissing defendant's petition and remand for third-stage proceedings.

I. BACKGROUND

In January 1999, as part of an open plea with no agreement as to the length of the sentence to be imposed, defendant pleaded guilty to attempt (first-degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 1998)), home invasion (720 ILCS 5/12-11 (West 1998)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 1998)). The trial court sentenced defendant to consecutive 24-year sentences on the attempt and home-invasion convictions, and a concurrent 6-year sentence on the aggravated-discharge-of-a-firearm conviction. Defendant filed posttrial motions to withdraw his guilty plea and reconsider his sentences, which were denied. He appealed, challenging the constitutionality of the mandatory-consecutive-sentencing provision of section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 1998)) and the amount of sentencing credit awarded. This court affirmed defendant's convictions and sentences but remanded with instructions for the court to amend the sentencing judgment to reflect a total credit of 784 days. *People v. Dodson*, No. 4-00-0920 (August 16, 2002) (unpublished order under Supreme Court Rule 23).

In February 2003, defendant filed a *pro se* postconviction petition alleging ineffective assistance of trial counsel. In April 2003, the circuit court appointed counsel to

represent defendant. It took appointed counsel six years to file an amended petition. During those six years, defendant wrote letters to the trial court and to counsel asking for a status. Apparently, counsel did not initially receive notice that he had been appointed. Finally, in March 2006, counsel appeared at a status hearing and the circuit court allowed him leave to file an amended petition. He did not do so until three years later in May 2009.

Nevertheless, defendant's amended petition alleged ineffective assistance of his retained trial counsel, Richard D. Frazier, on the following grounds: (1) advising defendant he would receive a 20-year sentence if he pleaded guilty; (2) failing to object and/or moving to dismiss the newly filed charges filed at "the proverbial 11th hour prior to trial" on speedy-trial grounds; and (3) failing to advise defendant to enter a conditional plea of guilty pursuant to Illinois Supreme Rule 402(d) (eff. July 1, 1997) until the trial court would indicate its intent with regard to imposing a sentence. Defendant also alleged ineffective assistance of his appointed appellate counsel, the office of the State Appellate Defender (OSAD), on the ground that OSAD failed to raise the issue of ineffective assistance of trial counsel on direct appeal.

In September 2009, after the circuit court allowed an extension of time, the State filed a motion to dismiss. After an October 2009 hearing, of which we are without the benefit of any transcript, bystander's report, or agreed statement of facts pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005), the circuit court took the matter under advisement. One week later, the court entered the following docket entry:

"Hearing held on October 21, 2009, on the State's Motion to Dismiss Petition for Post Conviction Relief. S[tate's] A[ttorney] Moreth present on behalf of the People. Attorney

John Madonia present with defendant. Defendant present in person and in the custody of the Ill. Dept. of Corrections. Arguments heard and considered by the Court. Matter taken under advisement. The Court rules today's date, that the Petition to Dismiss filed by the State is allowed. Petition for Post Conviction Relief is denied. Case closed; cause stricken."

The court entered no written order containing any findings of fact or the basis for its decision. This appeal followed.

II. ANALYSIS

Defendant claims the circuit court erred in dismissing his petition for postconviction relief at the second stage of the proceedings when he had demonstrated a substantial deprivation of his constitutional rights sufficient to warrant an evidentiary hearing with regard to his claims that trial and appellate counsel were both ineffective. We agree.

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2002)) provides a three-step process in noncapital cases and "establishes a procedure for determining whether a criminal defendant was convicted in substantial violation of his or her constitutional rights." *People v. Collins*, 202 Ill. 2d 59, 65 (2002). At the first stage of the proceedings, the circuit court, without input from the State, examines the petition and determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2002). If it survives first-stage dismissal, at the second stage, the circuit court may appoint an attorney to represent the defendant. 725 ILCS 5/122-4 (West 2002). The State may either move to dismiss or answer the petition. 725 ILCS 5/122-5 (West 2002).

If the circuit court does not grant the State's motion to dismiss or if the State filed an answer, the petition proceeds to the third stage where the defendant may present evidence in support of his petition. 725 ILCS 5/122-6 (West 2002). Here, defendant claims his petition should have proceeded to this third stage. "When a postconviction petition is dismissed without an evidentiary hearing, our review is *de novo*." *People v. Harris*, 224 Ill. 2d 115, 123 (2007).

At a second-stage hearing on the State's motion, the burden is on the defendant to establish a substantial deprivation of constitutional rights. *People v. Williams*, 209 Ill. 2d 227, 242 (2004). The circuit court must examine and rule on the legal sufficiency of each of defendant's claims, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). If the allegations in the petition do not make a substantial showing of a constitutional violation, the petition may be dismissed without an evidentiary hearing. *People v. Orange*, 195 Ill. 2d 437, 448 (2001). To the contrary, if the allegations, when taken as true, allege a substantial violation of the defendant's constitutional rights, the case should proceed to an evidentiary hearing. *People v. Johnson*, 205 Ill. 2d 381, 389 (2002).

A. Ineffective Assistance of Trial and Appellate Counsel

Defendant claims the substantial constitutional violations that he suffered was a denial of the effective assistance of counsel, which caused him to plead guilty involuntarily and to miss an opportunity to effectively contest his plea. First, he alleged counsel erroneously advised him that, after discussing the matter with the trial court, the court had indicated that defendant would be sentenced to a total of approximately 20 years in prison if he pleaded guilty. This erroneous advice was based on counsel's admitted

misunderstanding of the court's comments, and on his erroneous belief that defendant could potentially receive concurrent sentences. Second, defendant alleged his counsel failed to move to dismiss a late-filed charge--one which violated the provisions against his right to a speedy trial. Finally, defendant alleged his appellate counsel was ineffective for failing to raise these issues as well as trial counsel's failure to comply with Illinois Supreme Court Rule 604(d) (eff. Nov. 1, 2000) on direct appeal.

To establish ineffective assistance of counsel, a defendant must prove that (1) the conduct of counsel fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant such that a reasonable probability exists that the result would have been different but for the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). "It is often easier to dispose of an ineffectiveness claim based on the second prong of the test, and counsel's performance need not be evaluated if it can be shown that the defendant suffered no prejudice." *Ward*, 187 Ill. 2d at 256.

"The purpose of a post[]conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. Harris*, 206 Ill. 2d 1, 12 (2002). At the second stage of postconviction proceedings, "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). As we review this case at the second stage, our inquiry is whether the allegations raised by defendant in his petition, supported by the record and other documents, demonstrate a substantial violation of his constitutional rights in the form of the ineffective assistance of counsel. *People v. Edwards*, 197 Ill. 2d 239, 246

(2001).

"When a claim of substantial constitutional denial is based on assertions beyond the record it is contemplated by the Post-Conviction Hearing Act that evidence be taken." *People v. Sigafus*, 39 Ill. 2d 68, 70 (1968). A claim of ineffective assistance of counsel is the type of claim that generally cannot be adjudicated on the pleadings and the record alone. *People v. Holloman*, 304 Ill. App. 3d 177, 186-87 (1999). A hearing to determine the truth or falsity of defendant's claims is most often required. *People v. Nesbitt*, 5 Ill. App. 3d 123, 124 (1972).

1. *Issues Related to Defendant's Consecutive Sentences*

Our review of the record reveals support for defendant's allegations. Telling are counsel's representations to the trial court during the hearing on defendant's motion to withdraw his plea. Attorney Frazier was trying to convince the court that it had indicated in a pretrial conference that it intended to sentence defendant to approximately 20 years in prison if defendant pleaded guilty. Counsel explained to the court that, based on his interpretation of the court's announcement, he had informed defendant of what he heard the court say--that it would most likely sentence defendant to a 20-year sentence. Of course, after sentencing, counsel realized that was not the case. In arguing that defendant should be allowed to withdraw his plea, Attorney Frazier said:

"[O]bviously there was miscommunication between you and myself and my client, and that's probably my fault, Judge. But certainly, [defendant] shouldn't be left to bear the result of it, when, in fact, he fully expected to be sentenced around 20 years, and I, in fact, even told him it could be as much as the

higher 20s, if that's the case. But certainly, the sentence which was imposed was not what he believed he would receive when he pled guilty."

These statements in the record support defendant's claim that his trial counsel gave him erroneous advice. Whether that erroneous advice constituted substandard performance and prejudiced him is a question for the circuit court, after a full evidentiary hearing, analyzed under the standards set forth in *Strickland*. At this point in the proceedings, we find defendant's allegations that he suffered a substantial deprivation of his constitutional rights relating to the entry of his plea were sufficient to survive second-stage dismissal.

2. *Speedy-Trial Issue*

Defendant also claims his trial counsel was ineffective for failing to move to dismiss and allowing him to plead guilty to the late-filed charge of aggravated discharge of a firearm (count VI)--a charge filed against defendant, according to him, in violation of the speedy-trial statute. Defendant also claims counsel was ineffective for failing to raise the issue in defendant's motion to withdraw his guilty plea. Further, defendant claims his appellate counsel was ineffective for failing to recognize and raise the error on direct appeal.

The State originally charged defendant with attempt (first-degree murder) (count I), home invasion (count II), unlawful possession of a weapon by a felon (count III), and aggravated discharge of a firearm (count IV). Ten months later, the State sought to amend the home-invasion and aggravated-discharge-of-a-firearm counts. The trial court granted the State leave to do so, and the court dismissed the original count II and count IV. The State filed an amended count II, as well as additional counts of aggravated discharge of a firearm (count V and VI). Less than a week after the new charges were filed, defendant

pleaded guilty to count I (attempt (first-degree murder)), amended count II (home invasion), and count VI (aggravated discharge of a firearm).

Section 103-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-5(a) (West 1998)) provides, in pertinent part:

"Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant ***. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record."

Our supreme court recently addressed the application of the speedy-trial statute to new charges filed beyond the allowable time frame. See *People v. Phipps*, 238 Ill. 2d 54, 64-70 (2010). The court noted:

"Where new and additional charges arise from the same facts as did the original charges and the State had knowledge of these facts at the commencement of the prosecution, the time within which trial is to begin on the new and additional charges is subject to the same statutory limitation that is applied to the original charges. Continuances obtained in connection with the trial of the original charges cannot be attributed to defendants with respect to the new and additional charges because these new and additional charges were not before the court when

those continuances were obtained.'" *Phipps*, 238 Ill. 2d at 66 (quoting *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981)).

This rule applies only when the original and subsequent charges are subject to compulsory joinder. *Phipps*, 238 Ill. 2d at 67.

In response to defendant's argument, the State claims that any motion to dismiss count VI on speedy-trial grounds would have been futile, as the charge did not constitute a "new and additional" charge. Citing *Woodrum*, the State contends that defendant agreed to the delay on the original charges and the late-filed charge cannot be considered "new and additional," but merely a subsequent charge relating to the same conduct as alleged in the original charges. Accordingly, defendant could not have been surprised by the new charge. See *People v. Woodrum*, 223 Ill. 2d 286, 300-01 (2006).

The issue of whether count VI was a "new and additional" charge has not been fully litigated before the trial court. Though, the record before us indicates the court did make the following comment at sentencing: "And that's why the Court finds there are no lesser[-]included offenses. Aggravated discharge of a firearm is not a lesser[-]included offense of attempt murder or home invasion." An indictment alleging a specific offense serves as an indictment for all lesser-included offenses, even though those lesser-included offenses are not specifically set forth in the indictment. *People v. Dressler*, 317 Ill. App. 3d 379, 387 (2000).

In his amended postconviction petition, defendant alleged (1) the newly filed charge set forth in count VI was not a lesser-included offense (a claim supported by the record in the form of the trial court's comment as quoted above), (2) it should have been

dismissed as a "new and additional" charge filed beyond the statutory limitation period, and (3) counsel's failure to seek dismissal constituted ineffective assistance. Taking these allegations as true, as we must do at this stage in the proceedings, we find defendant has sufficiently alleged that he suffered a substantial violation of his constitutional rights related to the speedy-trial issue. Thus, defendant should be given the opportunity to present his claim to the circuit court in a third-stage evidentiary hearing.

B. Rule 402(a) Admonishments

Defendant also challenges the propriety of the admonishments he received from the trial court at his guilty-plea hearing. He contends, and the record supports this contention, that the court advised him that his "sentences may be imposed concurrently or consecutively." This was incorrect, as defendant's sentences were required to be served consecutively. See 730 ILCS 5/8-4(b) (West 1998). Thus, independent from his ineffective-assistance-of-counsel argument related to whether his attorney knew or reasonably should have known defendant was only eligible for consecutive sentences, not concurrent sentences, defendant claims for the first time that he should be allowed to withdraw his guilty plea and plead anew based on the trial court's erroneous Rule 402(a) admonishments. Defendant did not include this contention of error in his original or amended postconviction petition.

Generally speaking, a claim that is not raised in a postconviction petition or an amended postconviction petition may not be raised on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). However, Illinois courts have repeatedly overlooked the waiver language contained in section 122-3 of the Act (725 ILCS 5/122-3 (West 2006)) and considered claims raised for the first time on appeal in the interest of fundamental fairness.

See *Jones*, 213 Ill. 2d at 505-06. Here, we note though that the court's admonishment, taken in context, sufficiently put defendant on notice that his sentences would be ordered to run consecutively. The court informed defendant as follows: "[T]here is a very strong likelihood, based on the law in effect today, that if you plead guilty ***, you will be sentenced consecutively." Later, the court told defendant: "As I said, the law at this time appears to be that count I and count II will be imposed consecutively, so you will do them one after the other." Defendant acknowledged he understood.

It appears from the record that the trial court's admonishment concerning the possibility of the imposition of concurrent sentences stemmed directly from defense counsel's assertion that, at sentencing, he would argue the application of concurrent sentences. (We note that counsel's assertion should be addressed and evaluated for reasonableness and prejudicial effect upon remand at a third-stage evidentiary hearing.) Counsel also asserted that defendant fully understood "there is a possibility that those counts *** can be run consecutively." At this point, given the entire context of the admonishments, we find the court's misstatement regarding the *possibility* of the imposition of concurrent sentences, when combined with the court's other admonishments, did not constitute reversible error.

C. Rule 604(d) Compliance

Finally, defendant complains his appellate counsel was ineffective for failing to raise on direct appeal the fact that trial counsel had failed to comply with the certificate requirements of Rule 604(d). The State responds that the failure to comply with Rule 604(d) is not cognizable under the Act, as no constitutional rights are implicated. While we agree with that statement, we note that whether defendant received the effective

assistance of appellate counsel *does* implicate constitutional rights and is cognizable under the Act. And, it is that issue of ineffective assistance that defendant raises here.

In his *pro se* postconviction petition, defendant alleged his trial counsel was ineffective for failing to comply with Rule 604(d) and in his amended postconviction petition, defendant alleged the ineffective assistance of appellate counsel for his failure to raise "significant and obvious" issues on direct appeal. Here, defendant claims trial counsel's failure to file a Rule 604(d) certificate is just one of those alleged errors. Although trial counsel may not be found to be ineffective for his failure to file the required certificate (see *People v. Tinsley*, 54 Ill. App. 3d 880, 882-83 (1977)), Illinois courts regularly remand for further proceedings when such an omission occurs. See *People v. Lindsay*, 239 Ill. 2d 522, 531 (2011) ("when defense counsel neglects to file a Rule 604(d) certificate, the appropriate remedy is a remand for (1) the filing of a Rule 604(d) certificate; (2) the opportunity to file a new motion to withdraw the guilty plea and/or reconsider the sentence, if counsel concludes that a new motion is necessary; and (3) a new motion hearing"). Therefore, it is possible that had appellate counsel raised the issue on direct appeal, this court may have remanded the cause for further proceedings on defendant's motion to withdraw his guilty plea. Due to the potential prejudice to defendant, we reverse the trial court's dismissal and remand this cause for further proceedings related to defendant's claim under the standards set forth in *Strickland*.

D. Summary

With this disposition, we do not find that either trial or appellate counsel was ineffective, that his respective representation fell below a standard of reasonableness, or that defendant suffered prejudice as a result of the alleged errors. We find only that

defendant has, at a minimum, sufficiently alleged a substantial deprivation of a constitutional right and, as a result, his postconviction petition should proceed to a third-stage inquiry. At the evidentiary hearing, defendant should have the opportunity to inquire as to whether trial counsel knew or reasonably should have known that defendant would be required to serve consecutive sentences and how that knowledge affected defendant's other claims of substandard performance of both trial and appellate counsel. Based on the evidence presented, the circuit court may then be able to determine whether defendant entered his plea knowingly and voluntarily.

As an afterward, we observe that the postconviction proceedings in this case constitute an embarrassment to our court system. From February 2003 to October 2009 is an unconscionable lag of time within which to adjudicate this matter and is the fault of every court officer involved.

III. CONCLUSION

For the foregoing reasons, we reverse the circuit court's second-stage dismissal of defendant's postconviction petition and remand for further proceedings pursuant to the Act.

Reversed and remanded.