

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).

2011 IL App (4th) 110012-U

Filed 9/9/11

NO. 4-11-0012

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
BRADLEY VOLTAIRE,	)	No. 07CF53
Defendant-Appellant.	)	
	)	Honorable
	)	Chris E. Freese,
	)	Judge Presiding.

---

JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Knecht concurred in the judgment.  
Justice Appleton specially concurred.

**ORDER**

¶ 1 *Held:* Where defendant failed to make a substantial showing of a violation of his constitutional rights, the trial court did not err in granting the State's motion to dismiss his postconviction petition.

¶ 2 In August 2008, following a combined motion-to-suppress hearing and bench trial, the trial court denied the motion to suppress and found defendant, Bradley Voltaire, guilty of unlawful possession with intent to deliver a controlled substance. In October 2008, the court sentenced him to 15 years in prison. On appeal, this court affirmed in part, vacated in part, and remanded with directions. In May 2010, defendant filed a postconviction petition. In December 2010, the trial court granted the State's motion to dismiss.

¶ 3 On appeal, defendant argues the trial court erred in dismissing his postconviction petition. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 In May 2007, the State charged defendant by information with one count of unlawful possession with intent to deliver a controlled substance (count I) (720 ILCS 570/401(a)(2)(A) (West 2006)), alleging he knowingly possessed with intent to deliver 15 grams or more but less than 100 grams of a substance containing cocaine. The State also charged defendant with one count of unlawful possession of cannabis (count II) (720 ILCS 550/4(a) (West 2006)), alleging he knowingly and unlawfully possessed less than 2.5 grams of a substance containing cannabis. Defendant pleaded not guilty.

¶ 6 In May 2008, defendant filed a motion to suppress evidence. The motion alleged (1) the traffic stop was pretextual and done only for the purpose of searching the vehicle, (2) the trooper had no legal basis to detain defendant and his vehicle after the stop, (3) the trooper lacked probable cause to conduct a dog sniff of the vehicle, and (4) the trooper had no legal basis to search the engine compartment.

¶ 7 In August 2008, the trial court conducted the bench trial and the hearing on the motion to suppress. The State's Attorney informed the court he would present evidence for the motion to suppress during the bench trial. He then proposed putting on direct examination for the bench trial and then allow defense counsel to ask questions in support of the motion to suppress. Defense counsel offered no objection.

¶ 8 Illinois State Police trooper Brian Wood testified he was observing traffic on Interstate 57 on May 3, 2007, when he saw a green Ford Taurus traveling southbound. His attention was drawn to the vehicle because it was traveling in the left lane with another vehicle traveling behind it. As the Taurus approached, Wood noticed a large group of objects hanging

from the rearview mirror creating a "material obstruction for the driver." Wood followed the Taurus and observed the vehicle behind it passing the Taurus in the right lane. Wood then initiated a traffic stop of the Taurus.

¶ 9 Trooper Wood identified defendant as the sole occupant of the vehicle. While speaking with defendant, Wood noticed "small green particles and seeds" on the floor of the vehicle between the driver's seat and front passenger seat. Based on his training, Wood believed the particles and seeds were consistent with cannabis. Wood also observed the objects hanging from the rearview mirror were 18 air fresheners.

¶ 10 Trooper Wood asked defendant to step out of the vehicle and sit in Wood's squad car. Wood then requested Trooper Chris Owen and his canine to come to the scene to perform a "free-air sniff." Wood began writing a written warning for the obstructed windshield and the improper lane usage.

¶ 11 Within approximately nine minutes of the stop, Trooper Owen arrived while Wood was still writing the warnings. Owen took the dog to the vehicle to conduct a free-air sniff. The dog positively alerted for the odor of narcotics. Wood searched the inside passenger compartment but found nothing other than the suspected cannabis particles and seeds. As was his routine, Wood searched under the hood. After removing the air filter, he found a clear plastic bag containing suspected cocaine and cannabis. Wood gave defendant his *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)) at the scene and later at the jail. Wood asked defendant what was in the small black bag located inside the larger bag with the crack cocaine, and defendant stated it was cannabis.

¶ 12 On cross-examination by defense counsel, Trooper Wood testified he did not seize

the suspected cannabis particles from the floor of the vehicle. After the stop, Wood spoke to defendant, contacted Owen, and took four to five minutes to write the warnings.

¶ 13 Trooper Owen testified his canine alerted on the vehicle. Contraband weighing approximately 26 grams, including packaging, was found under the hood. On cross-examination, Owen testified his canine was trained to alert for cannabis, crack cocaine, heroin, and methamphetamine. The dog alerted at the front of the driver's side door and the front passenger side door.

¶ 14 The State moved to admit exhibit No. 1 and a stipulation regarding foundation and chain of custody. Defense counsel had no objection. The stipulation indicated 21.1 grams of a substance containing cocaine in seven plastic bags were seized from defendant.

¶ 15 Following the testimony of Wood and Owen and the admission of the stipulation and exhibit No. 1, defense counsel informed the trial court that it had heard "whatever evidence that will be presented as regards to the motion [to suppress]." Defense counsel then argued Wood lacked probable cause to stop the vehicle and the stop was a pretext to search it. The State responded Wood had an objective reason to stop the vehicle—the material obstruction and violation of the left-lane law. The court denied the motion to suppress.

¶ 16 The State then called Douglas County sheriff's deputy Wes Fleener who testified he and Inspector Scott Standerfer interviewed defendant on May 3, 2007. After reading defendant his *Miranda* rights, defendant stated he was taking approximately 26 grams of cocaine to a man in Rantoul. Defendant expected to be paid \$1,000 for the trip down from Chicago.

¶ 17 Deputy Fleener also testified that, in his experience, an amount over 15 grams is typically more than for personal consumption. He stated the amount of cocaine and the packag-

ing was typical for delivery as opposed to personal consumption.

¶ 18 The State rested. The defense rested without presenting any evidence. The trial court found defendant guilty on count I. The State then moved to dismiss count II, which the court granted. Defendant filed a motion to reconsider and for a new trial, which the court denied.

¶ 19 In October 2008, the trial court sentenced defendant to 15 years in prison. The court also ordered defendant to receive no good-conduct credit until he participated in and completed a substance–abuse treatment program. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 20 Defendant appealed, arguing (1) the trial court erred in denying his motion to suppress, (2) his sixth-amendment right to confrontation was violated by the admission of the stipulation at trial, and (3) the court lacked the authority to order that he be denied good-conduct credit unless he participated in and completed the treatment program.

¶ 21 In *People v. Voltaire*, No. 4-08-0770 (September 15, 2009) (unpublished order under Supreme Court Rule 23), this court affirmed in part, finding the trial court did not err in denying the motion to suppress and found no sixth-amendment violation. This court also found the trial court's sentencing condition void, vacated it, and remanded the cause with directions to modify the sentencing order.

¶ 22 In May 2010, defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)), alleging ineffective assistance of counsel. Defendant claimed his trial counsel was ineffective because he failed to (1) present evidence showing Trooper Wood lacked probable cause to believe a traffic violation had occurred, (2) present evidence to support his burden on the motion to suppress

thereby forfeiting his rights on appeal, (3) request discovery regarding the training log or "hits" logs of the canine thereby inhibiting cross-examination of Trooper Owen, (4) file or argue a motion to quash his postarrest statements to the police, (5) make any closing argument regarding "knowing possession" which amounted to an admission of knowing possession with intent to distribute cocaine, and (6) raise any and all issues in the posttrial motion to preserve the issues for appeal. Defendant also alleged appellate counsel was ineffective for failing to raise all issues on appeal.

¶ 23 In July 2010, the State filed a motion to dismiss defendant's postconviction petition pursuant to section 122-5 of the Act (725 ILCS 5/122-5 (West 2008)). In August 2010, defendant filed his response to the State's motion. In December 2010, the trial court granted the State's motion to dismiss. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A postconviction proceeding is a collateral attack on a defendant's conviction and sentence and not an appeal from the underlying judgment. *People v. Taylor*, 237 Ill. 2d 356, 372, 930 N.E.2d 959, 969 (2010). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 26 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently

without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2008).

¶ 27 At the second stage, the trial court may appoint counsel, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-4, 122-5 (West 2008). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). We review the trial court's second-stage dismissal *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 28 Claims of ineffective assistance of counsel may be raised in a postconviction petition. See *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland*

standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010). Claims that appellate counsel was ineffective are also evaluated under *Strickland*. *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203.

¶ 29 A. Probable Cause for Traffic Stop

¶ 30 Defendant argues trial counsel failed to present evidence at the motion to suppress hearing to support his claim that Trooper Wood lacked probable cause to believe a traffic violation had occurred. Defendant contends his counsel was ineffective for not producing evidence on the alleged material obstruction basis for the stop as well as the left-lane violation.

¶ 31 The State argues defendant failed to support his allegations with a notarized affidavit or other evidence. Defendant's initial postconviction petition filed in May 2010 did not include any affidavits or other evidence. In June 2010, defendant filed a motion to supplement the petition with various transcripts of the reports of proceedings, the appellate court order, and the appellate court briefs. It is unclear whether these documents were ever attached to the petition as they do not appear in the common-law record. After the State noted in its motion to dismiss that defendant had not filed any affidavits, defendant filed a response and later an affidavit that was signed by him but not notarized. In the affidavit, defendant states only one air freshener hung from the rearview mirror and it was not large enough to constitute a material obstruction. Defendant also stated he was in the left lane solely to pass a truck in the right lane.

¶ 32 To make a substantial showing of a violation of constitutional rights, "the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). "[A]n

affidavit filed pursuant to the Act must be notarized to be valid." *People v. Niezgoda*, 337 Ill. App. 3d 593, 597, 786 N.E.2d 256, 259 (2003).

¶ 33 In the case *sub judice*, defendant did not properly support his petition to make a substantial showing of a constitutional violation. Nothing attached to the petition established that any photographs existed of the air fresheners or a video recording existed showing defendant driving in the left lane. The affidavit filed by defendant attesting to the alleged facts was not notarized and therefore had no legal effect. *Niezgoda*, 337 Ill. App. 3d at 597, 786 N.E.2d at 260; see also *People v. Carr*, 407 Ill. App. 3d 513, 516, 944 N.E.2d 859, 861 (2011). Defendant has not satisfied his burden entitling him to an evidentiary hearing.

¶ 34 Defendant also argues Trooper Wood searched the air filter in the engine compartment without probable cause. However, defendant did not raise this issue in his postconviction petition and cannot do so now on appeal. *Petrenko*, 237 Ill. 2d at 502, 931 N.E.2d at 1206 (in a postconviction setting, "a defendant may not raise an issue for the first time while the matter is on review").

¶ 35 B. Motion To Suppress

¶ 36 Defendant argues trial counsel's failure to present evidence to support his burden on the motion to suppress forfeited his rights on appeal and thereby prejudiced him. In two sentences, defendant fails to develop his argument and does not cite any authority.

¶ 37 Supreme Court Rule 341(h)(7) requires appellant's brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006).

" 'A reviewing court is entitled to have the issues clearly defined with pertinent authority cited

and is not simply a depository into which the appealing party may dump the burden of argument and research.' " *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720, 941 N.E.2d 257, 264 (2010) (quoting *People v. Hood*, 210 Ill. App. 3d 743, 746, 569 N.E.2d 228, 230 (1991)). " 'Mere contentions, without argument or citation of authority, do not merit consideration on appeal.' " *Progressive Universal Insurance Co. of Illinois v. Taylor*, 375 Ill. App. 3d 495, 501, 874 N.E.2d 910, 915 (2007) (quoting *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001)). We find this issue forfeited.

¶ 38 C. Request of Training or "Hits" Logs

¶ 39 Defendant argues trial counsel's failure to request discovery regarding the canine's training or "hits" logs made it impossible for counsel to effectively cross-examine Trooper Owen. However, defendant has failed to attach to his postconviction petition any information about the canine's training performance and/or record of reliability. Instead, defendant's claim of prejudice is based on sheer speculation. "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135, 886 N.E.2d 1002, 1010 (2008). Thus, defendant has failed to make a substantial showing of a violation of his constitutional rights.

¶ 40 D. Motion To Quash Statements

¶ 41 Defendant argues counsel's failure to file or argue a motion to quash his postarrest statements to police prejudiced him on the issue of "knowing possession." Defendant, however, failed to attach any evidence to his petition to support his claim and the affidavit he submitted was not notarized. Thus, he failed to meet his burden.

¶ 42 E. Closing Argument

¶ 43 Defendant argues counsel's failure to make any closing argument regarding "knowing possession" coupled with his failure to argue to suppress his postarrest statements amounted to an admission of "knowing possession" with intent to distribute cocaine. Defendant claims counsel's statement in closing argument amounted to an admission of guilt. Counsel stated as follows:

"Your Honor, we, we had believed that and we contested this matter on the basis of the illegal stop. We're not contesting the, or we, at this point, we have no comment as to the evidence of any possession."

¶ 44 Defendant contends that when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of sixth amendment rights that makes the adversary process itself presumptively unreliable' and the defendant need not demonstrate actual prejudice." (Emphasis omitted.) *People v. Bloomingburg*, 346 Ill. App. 3d 308, 317, 804 N.E.2d 638, 645 (2004) (quoting *People v. Jones*, 322 Ill. App. 3d 675, 680, 749 N.E.2d 1021, 1027 (2001)). However, "a defendant must still meet the *Strickland* test unless the case involves a complete failure to subject the State's case to meaningful adversarial testing." *People v. Nieves*, 192 Ill. 2d 487, 500, 737 N.E.2d 150, 157 (2000).

¶ 45 Defendant has not shown prejudice in his argument now on appeal. Moreover, defendant could not show prejudice given the overwhelming evidence of his guilt in light of his confession. Defendant failed to make a showing of a substantial violation of his constitutional rights.

¶ 46 F. Failure To Preserve Issues

¶ 47 Defendant argues counsel's failure to raise any and all issues at trial or in a posttrial motion failed to preserve them for appeal. However, "on a claim of ineffective assistance of counsel for failing to properly preserve issues for review, defendant's rights are protected by Supreme Court Rule 615(a), which allows a court to review unpreserved claims of plain error that could reasonably have affected the verdict." *People v. Coleman*, 158 Ill. 2d 319, 349–50, 633 N.E.2d 654, 670 (1994). Defendant has not shown the result of his direct appeal would have been different had counsel preserved any issues in the posttrial motion.

¶ 48 G. Appellate Counsel

¶ 49 Defendant argues counsel's failure to raise all issues on appeal forfeited those issues. Defendant, however, has not shown any issues would have been meritorious had they been raised on direct appeal. In analyzing whether appellate counsel was ineffective, a defendant "must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the defendant." *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1107 (2000). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *Simms*, 192 Ill. 2d at 362, 736 N.E.2d at 1107.

¶ 50 Here, defendant has failed to show any of his claims of ineffective assistance of counsel have any merit. As he cannot establish prejudice from the failure to raise any of these issues on direct appeal, his postconviction petition was properly dismissed.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, we affirm the trial court's judgment. As part of our

judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 53            Affirmed.

¶ 54 JUSTICE APPLETON, specially concurring:

¶ 55 While I agree that the law commands the result reached by the majority, I write separately to acknowledge the inadequacy of the various counsel who represented defendant at trial, on appeal, and in the first postconviction proceeding. The trial judge should have recognized the deficiency in those performances and, in the interests of both justice and the integrity of our criminal justice system, taken greater control of the proceedings to ensure public confidence in the result in this case. Such public confidence in our system of justice requires competent advocacy on the part of the State and the defense. When one side is lacking, the public's trust in our criminal justice system erodes to the detriment of all.