

No. 1-10-1479

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 99 CR 111
)	
WILLIAM SMITH,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of post-conviction petition affirmed for lack of adequate supporting documentation for claim of ineffective assistance of trial counsel under *Strickland*.

¶ 2 Defendant William Smith, a.k.a. Ricky Harris, appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that the circuit court erred in granting the State's motion to dismiss his petition where he made a substantial showing of ineffective assistance of trial counsel.

¶ 3 The record shows, in relevant part, that in 1998, defendant was charged with multiple counts of first degree murder and aggravated discharge of a firearm in connection with the shooting death of Deon Alexander. Prior to trial, defense counsel filed a motion to suppress statements, including a handwritten statement given by defendant after the incident. In that motion, counsel asserted, *inter alia*, that defendant had not been informed of his *Miranda* rights, and that "due to the physical, physiological, mental, educational and/or psychological state, capacity and condition of the defendant, he was incapable and unable to appreciate and understand the full meaning" of those rights. A hearing was held on the motion, and defendant swore to the truth of the allegations contained therein at the request of the State, who then proceeded to call its witnesses.

¶ 4 As pertinent to defendant's *Miranda* allegations, Detective Steven Konow testified that about 1:30 a.m. on November 14, 1998, he was present when an assistant State's Attorney (ASA) advised defendant of "his rights" and took his handwritten statement. Detective Konow made an in-court identification of that statement, described a preprinted section on the first page setting forth defendant's *Miranda* rights, and testified that he observed defendant sign his name underneath that section, which had been read aloud to him by the ASA.

¶ 5 Detective James Cassidy testified that about 4:30 p.m. on November 13, 1998, he spoke with defendant at Area One headquarters and began the conversation by advising defendant of his *Miranda* rights. Defendant acknowledged his understanding of each separate right. Detective Cassidy was also present when the ASA later advised defendant of his *Miranda* rights, and testified that defendant acknowledged his understanding of his rights at that time as well.

¶ 6 Following the detectives' testimonies, the trial court found that the State had sustained its burden in answering the motion to suppress, and noted that the burden had shifted to defendant. Counsel then informed the court that defendant did not want to testify, and that the defense

would rest on the motion. After brief argument, the court denied defendant's motion to suppress, finding that his statement was "voluntarily given and in full compliance with the Miranda decision." At the ensuing jury trial, defendant was found guilty of first degree murder and aggravated discharge of a firearm, then sentenced to concurrent, respective terms of 28 and 15 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Smith*, No. 1-02-0721 (2003) (unpublished order under Supreme Court Rule 23).

¶ 7 On September 10, 2004, defendant filed a *pro se* petition for post-conviction relief. As pertinent to this appeal, he alleged that trial counsel was ineffective for failing to investigate his history of mental illness despite being made aware of it, claiming that a "minimal investigation" would have revealed that he had been diagnosed as mentally retarded at 12 years old. Defendant further alleged that counsel was ineffective for failing to assert his mental retardation in the motion to suppress statements. He claimed that he did not understand his *Miranda* rights, and although he "did indeed respond affirmative to understanding those rights, one of the traits of the petitioner's particular mental deficiency is that petitioner would often agree or give responses that he thought others wanted to hear, whether it is correct or not."

¶ 8 In support of his claims, defendant attached to his petition a letter from the Social Security Administration (SSA) dated December 5, 1997, regarding a disability redetermination decision. The SSA advised defendant, *inter alia*, that "[a]fter reviewing all the information carefully, we have decided that you no longer qualify for Supplemental Security Income (SSI)." In the same letter, the SSA indicated that defendant's disability claim was rooted in "breathing problems" and a "serious learning disability," but that a physical examination had found "no indication of any lung problems or knee problems;" and further, that a psychological examination found "current I.Q. scores were a verbal I.Q. of 72; a performance I.Q. of 79; and a full-scale I.Q. of 74." Defendant also attached a letter from SSA, dated May 28, 1998, regarding a notice of

reconsideration. Under the headline "Our Decision," the SSA stated, "We find that your disability did not end. Therefore, your payments will continue."¹

¶ 9 Finally, defendant attached a signed statement from Rochella Harris, his mother and designated social security payee, which is titled "AFFIDAVIT." Harris stated, *inter alia*, that SSA diagnosed defendant as mentally retarded at a young age, that defendant is "easily influenced" and "has the tendency of trying to please others and will do and say what they want him to, for their approval," and that people often "try to take advantage of him." She also stated that "if I had been called to testimony [*sic*] in regards to these facts, I'm sure any fair judge would have taken Mr. Harris' mental condition into consideration but I was told at the time that it didn't matter because it had nothing to do with the case." The seal of a notary public appears at the bottom of this statement, but it is not signed by the notary.

¶ 10 At some point thereafter, counsel was appointed to represent defendant, and his post-conviction petition was advanced to the second stage. On February 26, 2009, counsel filed a Rule 651(c) certificate in which he stated that he had not prepared a supplemental or amended post-conviction petition because defendant's *pro se* petition adequately presented his claims. Counsel further noted, "I have been unable to find additional material which would be of assistance."

¶ 11 On November 12, 2009, the State filed a motion to dismiss defendant's post-conviction petition. The State asserted that counsel's decision not to investigate and introduce defendant's mental health history was a matter of trial strategy insufficient to satisfy the deficient performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984). The State also asserted that defendant could not show that the outcome of the suppression hearing would have been

¹An additional SSA letter provided by defendant states that it did not have certain doctor information defendant had been seeking. It is unclear what purpose this letter serves in the context of defendant's petition.

different if counsel had raised defendant's alleged mental deficiencies. In response, defense counsel asserted, *inter alia*, that there was "no strategic reason not to use the records of [defendant's] mental retardation" in the motion to suppress, and that defendant's mental retardation could have served as a basis for suppression of his statement.

¶ 12 On May 20, 2010, the circuit court entered a written order granting the State's motion to dismiss defendant's post-conviction petition. In doing so, the court noted that there was no indication in the record that defendant did not understand the proceedings such that a *bona fide* doubt of his fitness was raised, and that he provided no prior medical opinion regarding his competence. The court also noted that the letters from SSA showed his limited intellectual ability which, alone, did not render him unfit, or incapable of waiving his constitutional rights and making an inculpatory statement. As to the motion to suppress filed by counsel, the court found that the grounds set forth reflected counsel's strategy and that defendant could not show that the outcome of his suppression hearing would have been different if counsel had raised his alleged mental deficiencies. The court thus concluded that defendant failed to satisfy either prong of *Strickland*, and, further, that defendant had waived his ineffective assistance claim which was not raised on direct appeal, and defendant failed to allege ineffective assistance of appellate counsel so as to trigger the exception to the waiver rule. This appeal follows.

¶ 13 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second-stage of proceedings, defendant has the burden of providing a substantial showing of such a violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are

taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* the dismissal of a petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 Defendant maintains that he set forth a claim of ineffective assistance of trial counsel warranting further proceedings under the Act. To establish a claim of ineffective assistance of trial counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 15 In this court, defendant claims that trial counsel was ineffective for failing to argue in the motion to suppress that he was unable to knowingly and intelligently waive his *Miranda* rights because he is mentally retarded. He claims that counsel's decision in this regard was not a matter of sound trial strategy, and that there is "at least" a reasonable probability that the court would have suppressed his confession.

¶ 16 The State responds that the evidentiary material attached to defendant's petition fails to overcome the presumption that counsel made a competent decision not to raise defendant's alleged mental deficiency in the motion to suppress. The State further responds that it is not reasonably probable that the outcome of the suppression hearing would have been different had the court been informed of defendant's SSI benefit status or his mother's opinion regarding his lack of capacity.

¶ 17 Initially, we note that under the Act, defendant must provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). The purpose for requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). As discussed below, defendant has not provided any such support for his claim.

¶ 18 Here, the evidentiary support for defendant's claim that he is mentally retarded and could not understand his *Miranda* rights consists of two letters from SSA and the signed statement of Rochella Harris. With respect to the SSA letters, the earliest letter dated December 5, 1997, indicates that defendant had been found no longer qualified for SSI based on breathing problems and a serious learning disability, and cited the IQ scores which defendant now claims show that he is mentally retarded as support for its determination. The next SSA letter dated May 28, 1998, found that defendant's "disability did not end," but did not indicate the extent to which that reconsideration was based on his alleged mental deficiency. Read together, these letters merely establish that defendant at one point received SSI based on breathing problems and a serious learning disability, that he was subsequently disqualified from receiving SSI notwithstanding the IQ scores he now cites, and that SSA later found his "disability," in the singular, had not ended.

¶ 19 In addition, the record discloses that the SSA letters attached to defendant's petition predate the motion to suppress and his trial by three years. The letters also do not indicate a formal medical diagnosis of "mental retardation," and make no showing of an inability on the part of defendant to function or understand his *Miranda* rights to alert either counsel or the court that his alleged mental condition was an issue. See *People v. Mahaffey*, 165 Ill. 2d 445, 462 (1995). Consequently, this evidence does not corroborate defendant's claim that he could not

understand his *Miranda* rights because he was mentally retarded to further his assertion of ineffective assistance of counsel. *Collins*, 202 Ill. 2d at 67.

¶ 20 Although not raised by the parties, we also observe that the statement of Rochella Harris attached to defendant's petition does not qualify as a proper affidavit under the Act. In *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003), this court held that an affidavit filed in support of a post-conviction petition must be notarized to be valid, and has no legal effect otherwise. Section 6-103 of the Illinois Notary Public Act (5 ILCS 312/6-103(a) (West 2010)) requires that a notarial act be evidenced by a certificate which has been "signed and dated" by a notary public and also affixed with the official seal of office.

¶ 21 Here, Harris' statement concludes with a section entitled "VERIFICATION" which reads that Harris, under penalty of perjury, states that the information contained in her statement is true. Harris signed her own name underneath, and below her signature, the official seal of a notary public has been affixed to the document near the statement, "SUBSCRIBED and SWORN to before me, on this 27 day of July 2004." The signature of the notary public, however, is missing from Harris' statement. In this respect, Harris' statement has not been properly notarized (5 ILCS 312/6-103(a) (West 2010)), and, consequently, it does not qualify as a valid affidavit and has no legal effect on these proceedings (*Niezgoda*, 337 Ill. App. 3d at 597).

¶ 22 Notwithstanding, we also find her statement to be substantively deficient in many respects. In particular, Harris does not indicate that she ever gave any information to counsel regarding defendant's alleged mental retardation. She also does not indicate that defendant's alleged mental condition could have prevented him from understanding his *Miranda* rights. In fact, Harris merely asserted that defendant is "easily influenced," and that she assisted him in "manag[ing] his funds in regards to food, shelter, cosmetics, and various other necessities." Her statement thus fails to address either of the two issues upon which defendant's claim is based,

i.e., his ability to understand his *Miranda* rights and counsel's knowledge of his alleged mental deficiencies.

¶ 23 This leads us to conclude that defendant has failed to show that counsel's decision not to raise his alleged mental retardation in a motion to suppress was objectively unreasonable. To establish the deficient performance prong of *Strickland*, defendant must overcome a strong presumption that counsel's conduct was the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). In addition, we review the conduct of counsel, not in hindsight, but from the time of his challenged conduct, and accord great deference to his decisions. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). The strategic decisions of counsel are, therefore, virtually unchallengeable. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994).

¶ 24 Here, the record shows that counsel filed a motion to suppress defendant's statement on multiple grounds, including that defendant did not understand his *Miranda* rights due to his "physical, physiological, mental, educational and/or psychological state." At the hearing on that motion, defendant swore to this broad assertion, but ultimately declined to testify and provide further detail. Now, he claims more specifically that he was mentally retarded when he gave his statement and could not understand his *Miranda* rights. Similar to the suppression hearing, however, he provides no evidentiary basis for his claim. The record thus fails to support that counsel was aware, or should have been aware, of defendant's alleged mental deficiency. Under these circumstances, we find that defendant has not overcome the strong presumption that counsel exercised sound trial strategy where he merely alleges that counsel failed to make an unsupported argument (*Manning*, 241 Ill. 2d at 327), and his ineffective assistance of counsel claim, therefore, fails (*Flores*, 153 Ill. 2d at 283).

¶ 25 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.

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