

No. 1-10-2846

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. 02 CR 4456
)	
ABDUL AL-KABY,)	Honorable
)	Rosemary Grant-Higgins,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed when it failed to make a substantial showing of a constitutional violation. The circuit court did not abuse its discretion when it denied postconviction counsel leave to file a supplemental postconviction petition when counsel sought leave to file almost four years after he filed a Rule 651(c) certificate and the proposed amendment would not have stated a cause of action.

¶ 2 Defendant Abdul Al-Kaby 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 2004)).

Defendant contends the circuit court erred when it dismissed his petition because it made a

substantial showing that his guilty plea was not knowing and intelligent because he did not receive "adequate" advice from counsel. Defendant also contends that the court's refusal to consider his supplemental postconviction petition denied him due process and prevented postconviction counsel from fulfilling counsel's duties under Rule 651(c) (eff. Dec. 1, 1984). We affirm.

¶ 3 Defendant's arrest and prosecution arose out of a January 24, 2002, incident during which the victim Riyadh Al-Dhufari was stabbed and killed. Adnan Al-Dhufari was also stabbed during the incident.

¶ 4 During pretrial proceedings, defendant was evaluated several times to determine his fitness to stand trial. He was ultimately found fit to stand trial with medication.

¶ 5 In August 2004, the trial court held a conference pursuant to Supreme Court Rule 402 (eff. July 1, 1997). Before the conference, the court explained to defendant, through an Arabic interpreter, the purposes of a Rule 402 conference. Defendant indicated that he understood and wanted the court to participate in the conference.

¶ 6 Following the Rule 402 conference, defense counsel indicated to the court that defendant wished to enter a plea of guilty to first degree murder. Defense counsel then stated that because defendant was a citizen of Iraq who had entered the United States illegally, defendant had been informed that there was a strong possibility that he would be deported upon the completion of his prison term. The court then stated that if defendant were to plead guilty, defendant would be sentenced to 20 years in prison and inquired whether defendant had discussed the plea with counsel. Defendant answered in the affirmative. The court then explained to defendant that defendant was charged with first degree murder and by pleading guilty he could be sentenced to between 20 and 60 years in prison. Defendant indicated that he understood the nature of the charges and still wished to plead guilty.

¶ 7 The parties then stipulated to the factual basis for the plea: when the locked door to the victim's room was broken open, witnesses, including Adnan Al-Dhufari, saw defendant stabbing the victim. When Adnan Al-Dhufari tried to stop defendant, defendant stabbed him in the back of the shoulder. The victim died as a result of multiple stab wounds to the face and neck. After hearing the factual basis for the plea and verifying that defendant still wished to enter a guilty plea, the court determined that there was a factual basis for the plea and that defendant was pleading guilty knowingly and voluntarily. The court then accepted the plea and sentenced defendant to 20 years in prison. There is no indication in the record that defendant filed a motion to withdraw the plea.

¶ 8 In May 2005, defendant filed a *pro se* petition for postconviction relief. In his affidavit, defendant averred that his attorney failed to adequately communicate with him and only brought a translator to half of their meetings. Defendant averred that without a translator, he could not understand what counsel said. Defendant further averred that counsel's failure to communicate with him prevented him from grasping "the gravity of the situation," and, consequently, he agreed to a plea because of his ignorance of the law.

¶ 9 The petition was docketed and postconviction counsel was appointed. On November 15, 2006, postconviction counsel filed a certificate pursuant to Rule 651(c) (eff. Dec. 1, 1984), stating that he had consulted with defendant, reviewed the report of proceedings from defendant's plea hearing, and examined trial counsel's case file. Counsel asserted he was not filing a supplemental postconviction petition because defendant's *pro se* petition adequately presented defendant's claims. The State then filed a motion to dismiss.

¶ 10 In March 2010 at the hearing on the State's motion to dismiss, postconviction counsel sought leave to file a supplemental postconviction petition and an amended Rule 651(c) certificate. The supplemental petition alleged that defendant was never informed, in violation of

the Vienna Convention, that he had the right to consular notification and assistance.

Postconviction counsel indicated that he had not discussed the supplemental petition with defendant. Ultimately, the circuit court denied counsel leave to file the supplemental petition.

¶ 11 The court subsequently granted the State's motion to dismiss, finding that the record indicated that defendant's plea was knowing when defendant was informed, through an interpreter, of the nature of the charges against him and the possible sentences associated with pleading guilty to first degree murder, and defendant indicated that he understood and still wished to plead guilty. The court also noted, in pertinent part, the lack of a judicial remedy for an alleged violation of the consular notification provision of the Vienna Convention.

¶ 12 Before addressing the merits of defendant's contentions on appeal, this court must first address the State's argument that defendant waived these claims because he did not raise them on direct appeal. However, defendant did not pursue a direct appeal, and, consequently, he may raise claims of constitutional deprivation in his postconviction petition. See *People v. Brooks*, 371 Ill. App. 3d 482, 485-86 (2007) (finding the rule that a defendant cannot raise an issue in a postconviction petition that he could have raised on direct appeal inapplicable to those situations where the defendant did not take a direct appeal). Accordingly, this court will consider the merits of defendant's claims.

¶ 13 The Act provides a mechanism through which a criminal defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2004); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage, it is the defendant's burden to make a substantial showing of a constitutional violation; all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Hall*, 217 Ill. 2d 324, 334 (2005) (all factual allegations that are not positively rebutted by the record are accepted as true).

This court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 14 Defendant first contends that his plea was not knowing and voluntary because he did not receive "adequate" advice from counsel. Defendant argues that because counsel only utilized the services of an Arabic interpreter during half of their meetings, he did not have a "true grasp" of his situation, could not mount an effective defense, and abandoned a plausible insanity defense.

¶ 15 A defendant's challenge to a guilty plea based upon ineffective assistance of counsel is subject the standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and therefore, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that this substandard performance prejudiced the defendant. *Hall*, 217 Ill. 2d at 334-35.

Counsel's performance is deficient when he fails to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. To establish prejudice, the defendant must show that there was a reasonable probability that, absent counsel's alleged errors, the defendant would have chosen not to plead guilty and insisted upon proceeding to trial. *Hall*, 217 Ill. 2d at 335. However, a defendant's "bare allegation" that he would not have entered a guilty plea and would have instead insisted upon going to trial absent counsel's deficient performance is not enough to establish prejudice; rather, the claim must be accompanied either by a claim of innocence or the articulation of a plausible defense that could have been presented at trial. *People v. Rissley*, 206 Ill. 2d 403, 458-60 (2003); see also *People v. Pugh*, 157 Ill. 2d 1, 15 (1993), citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (whether counsel's deficient representation caused a defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial).

¶ 16 Initially, this court notes that defendant does not contend that counsel failed to communicate with him; rather, defendant contends that the fact that counsel only used an Arabic

interpreter during half of their meetings prevented him from understanding the situation or mounting an effective defense. However, the record reveals that an Arabic interpreter was present at defendant's plea hearing. There, through an interpreter, defendant indicated that he wanted the trial court to participate in a Rule 402 conference, that he had discussed his guilty plea with counsel, and that he understood the nature of the charges against him. After hearing the factual basis for the plea, defendant was again asked if he wished to plead guilty and defendant told the court that he did. Defendant's claims that he did not understand the seriousness of the situation and entered a guilty plea based upon ignorance of the law are rebutted by the record when defendant stated, through an interpreter, at the plea hearing that he had discussed the plea with counsel, understood the charges against him and wished to enter a plea. See *Pendleton*, 223 Ill. 2d at 473 (at the second stage, this court accepts as true all well-pled facts in the petition that are not positively rebutted by the trial record).

¶ 17 Even were this court to assume that counsel's failure to use an interpreter during every meeting with defendant was objectively unreasonable, defendant's claim that his plea was unknowing based upon inadequate communication with counsel must still fail, as defendant cannot establish how he was prejudiced by the complained-of action (see *Hall*, 217 Ill. 2d at 335), when, if defendant had rejected the plea and chosen to proceed to trial, witnesses, including the victim's brother Adnan Al-Dhufari, would have testified that they saw defendant stabbing the victim. Adnan Al-Dhufari would also have testified that when he attempted to stop defendant, defendant stabbed him in the back of the shoulder. Considering the factual basis presented for the plea, this court rejects defendant's allegation that if he had better understood his situation, he would have chosen to reject the plea and proceed to trial. Moreover, there is nothing in the record to support an insanity defense and defendant pled no facts which would do so in his postconviction petition. Accordingly, because defendant has failed to establish how he was

prejudiced by counsel's failure to bring an Arabic interpreter to every meeting, his claim of ineffective assistance of counsel must fail. See *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim). As defendant has failed to meet his burden to make a substantial showing of a constitutional violation, his claim must fail. See *Pendleton*, 223 Ill. 2d at 473.

¶ 18 Defendant next contends that the circuit court's refusal to consider the supplemental postconviction petition denied him due process and prevented postconviction counsel from fulfilling the obligations of Supreme Court Rule 651(c).

¶ 19 The Act provides that the court, in its discretion, may allow the amendment of petitions "as shall be appropriate, just and reasonable and as is generally provided in civil cases." 725 ILCS 5/122-5 (West 2004). Generally, the circuit court abuses its discretion if it refuses to allow a plaintiff to amend his complaint when a cause of action can be stated through the amendment. *People v. Brown*, 336 Ill. App. 3d 711, 716 (2002). In other words, the amendment of a defective pleading should be permitted unless it is clear that the defect cannot be cured through the amendment. *Brown*, 336 Ill. App. 3d at 717.

¶ 20 Here, the circuit court did not abuse its discretion in denying counsel leave to file the supplemental postconviction when postconviction counsel attempted to file the supplemental petition almost four years after filing a Rule 651(c) certificate, the matter had been set for argument on the motion to dismiss, and postconviction counsel admitted to the court that he had not discussed the supplemental petition with defendant. *Brown*, 336 Ill. App. 3d at 716. Furthermore, although the amendment of a defective pleading should be permitted when the amendment can cure the defect, there is no indication that the claim raised in the supplemental petition, that defendant was denied his right to consular notification in violation of the Vienna Convention, would have stated a cause of action. The Vienna Convention does not generally

provide any rights enforceable by an individual defendant, and, to the extent that defendant might have been able to claim such a judicial remedy in this case, his guilty plea waived that right. See *People v. Najera*, 371 Ill. App. 3d 1144, 1146-47 (2007) (a guilty plea waives all nonjurisdictional issues); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347, 359-60 (2006) (holding that the Vienna Convention does not explicitly provide for a judicial remedy, and determining that such a violation was subject to state procedural default rules). Accordingly, because the only remedies for the failure of consular notification under the Vienna Convention are " 'diplomatic, political, or exist between [signatory] states under international law, ' " (*People v. Montano*, 365 Ill. App. 3d 195, 201 (2006), quoting *United States v. Li*, 206 F.3d 56, 63 (1st Cir. 2000)), the circuit court did not abuse its discretion when it denied postconviction counsel leave to file the supplemental petition. *Brown*, 336 Ill. App. 3d at 716-17.

¶ 21 For the reasons stated above, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.