

No. 1-11-3599

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. 05 CR 19289
)	
WALTER SMITH,)	The Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 Held: Circuit court did not err in dismissing the defendant's postconviction petition.

¶ 2 The defendant, Walter Smith, 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 2006)), contending that he was deprived of his constitutional right to the effective assistance of counsel. For the reasons that follow, we affirm the judgment of the circuit court.

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¶3 Following a November 2006 jury trial, the defendant was convicted of possession of between 15 and 100 grams of cocaine. We affirmed his conviction on appeal. *People v. Smith*, No. 1-07-1258 (October 20, 2009) (unpublished order under Supreme Court Rule 23). Our order disposing of the defendant's direct appeal describes the proceedings at his first trial, including the evidence adduced against him; in lieu of repeating that description, we incorporate it herein.

¶4 On August 20, 2007, the defendant filed a *pro se* postconviction petition alleging, *inter alia*, that his trial counsel was ineffective for failing to interview his nephew, John Wolfe, and call Wolfe as a witness. In an affidavit attached to the defendant's petition, Wolfe attested that the drugs were his and that the defendant had no knowledge of them before they were found by police. Wolfe further stated that he was never contacted by the defendant's trial counsel. The defendant later filed a supplement to his petition, and he attached to the supplement a copy of a letter his trial counsel had written to the Attorney Registration and Disciplinary Commission (ARDC) about the defendant's case. In the ARDC letter, counsel wrote that he informed the defendant that Wolfe's testimony would help his case. He further stated that he made repeated efforts to contact Wolfe, including by using a non-working phone number supplied by the defendant. According to the letter, counsel informed the defendant of the difficulty contacting Wolfe, and the defendant answered that he could prevail without Wolfe's testimony. Counsel wrote that he advised his client to have Wolfe contact him, but the defendant "steadfastly refused" to help with the matter.

¶5 In November 2010, the State filed a motion to dismiss the defendant's petition. The circuit court granted the motion to dismiss and denied the defendant's later motion to reconsider, and the defendant now timely appeals.

¶ 6 On appeal, the defendant argues that the circuit court erred in granting the State's motion to dismiss his postconviction petition. The Act "provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights." *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999 (2006). "To be entitled to postconviction relief, a defendant must show that he has suffered a substantial deprivation of his federal or state constitutional rights." *Pendleton*, 223 Ill. 2d at 471. In non-capital cases, the Act "provides for postconviction proceedings that may consist of as many as three stages." *Pendleton*, 223 Ill. 2d at 472. At the first stage, the circuit court has 90 days to summarily dismiss a frivolous petition; any petition that is not so dismissed advances to the second stage. *Pendleton*, 223 Ill. 2d at 472. At the second stage of proceedings, counsel may be appointed for the defendant, and the State may move to dismiss the petition or answer it. *Pendleton*, 223 Ill. 2d at 472. If the petition is not dismissed at the second stage, it advances to the third stage, wherein the court holds an evidentiary hearing. *Pendleton*, 223 Ill. 2d at 472. In this case, the defendant's petition was dismissed at the second stage, pursuant to a motion from the State.

¶ 7 In determining whether a petition should be dismissed at the second stage, a court must take as true "all well-pleaded facts that are not positively rebutted by the trial record," and determine whether, in that light, the defendant has met his burden to make a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. We review a second-stage dismissal of a postconviction petition *de novo*. *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596 (2005); *People v. Coleman*, 183 Ill.2d 366, 388, 701 N.E.2d 1063 (1998).

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¶ 8 The defendant argues that his petition, taken as true, made a substantial showing that he was deprived of his constitutional right to effective assistance of counsel. In order to succeed on a claim of ineffective assistance of counsel, a defendant must establish both that his trial counsel's representation fell below an objective standard of reasonableness and that the deficiency prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, as the defendant observes in his brief, an attorney "has a duty to conduct both factual and legal investigations on behalf of [his] client." *People v. Montgomery*, 327 Ill. App. 3d 180, 185, 763 N.E.2d 369 (2001).

¶ 9 In arguing that Wolfe's affidavit establishes trial counsel's failure to conduct a proper investigation in this case, the defendant focuses on the fact that Wolfe's affidavit demonstrates that Wolfe would have been a valuable witness for the defendant, as well as the fact that Wolfe said that counsel never contacted him. However, the State does not dispute that counsel failed to contact Wolfe; instead, it offers an explanation for that failure. In a letter that the defendant included in his pleadings in this case, his counsel explained that he tried to contact Wolfe and that the defendant not only refused to help but actually discouraged the effort. The remainder of the defendant's pleadings provide nothing to contradict this account, which we conclude demonstrates counsel's reasonable efforts to contact Wolfe and obtain his testimony. For that reason, we reject the defendant's argument that his postconviction petition established a valid claim of ineffective assistance of counsel, and we agree with the circuit court's decision to dismiss the petition.

¶ 10 Affirmed.