

No. 1-11-3675

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the     |
|                                      | ) | Circuit Court of    |
| Plaintiff-Appellee,                  | ) | Cook County.        |
|                                      | ) |                     |
|                                      | ) | Nos. 09 CR 3441     |
|                                      | ) | 09 CR 3442          |
| v.                                   | ) | 09 CR 3443          |
|                                      | ) | 09 CR 3444          |
|                                      | ) | 09 CR 3445          |
|                                      | ) | 09 CR 3446          |
|                                      | ) |                     |
| JAMES THOMAS,                        | ) | Honorable           |
|                                      | ) | Sharon M. Sullivan, |
| Defendant-Appellant.                 | ) | Judge Presiding.    |

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JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Neville and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed at the second stage of proceedings under the Post-Conviction Hearing Act when defendant's conclusory claim that certain medical records should have alerted his counsel that defendant suffered from a "medical condition" failed to make a substantial showing of a constitutional deprivation.

¶ 2 Defendant James Thomas appeals from the circuit court's denial of relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, he contends that his petition was improperly dismissed because he was denied the effective assistance of counsel at his guilty plea proceeding. Specifically, he alleged that counsel failed to act after being given certain medical records containing the names of witnesses who could have testified defendant was suffering from a medical condition that would have impacted not only "the existence of an affirmative defense but may have formed the basis of significant mitigation." We affirm.

¶ 3 In 2009, Thomas entered pleas of guilty to armed robbery in six separate cases. He was sentenced to six concurrent prison terms of 23 years.

¶ 4 In 2011, Thomas filed, through private counsel, a postconviction petition alleging that he was denied the effective assistance of counsel because trial counsel failed to interview, investigate, and call to testify those witnesses "who could attest to" his mental health and "medical condition." The petition further alleged that Thomas gave counsel certain medical information and the names and addresses of witnesses who could have informed the court he suffered from a medical condition that would have impacted the existence of an affirmative defense and could have served as mitigation evidence. Attached to the petition in support were Thomas's affidavit and certain medical records, including discharge summaries from Chicago Lakeshore Hospital and Hartgrove Hospital, and a Department of Human Services (DHS) assessment.

¶ 5 In his affidavit, Thomas averred that although he gave his attorneys certain medical information, they never discussed how that information might have affected the charges against him. An April 2003 discharge summary from Chicago Lakeshore Hospital indicates that Thomas was brought to the hospital by his mother due to "increased physical aggression" and her belief that

he was using "substances." He was later discharged in a "stable and improved condition and without suicidal or homicidal intent." An August 2003 discharge summary from Hartgrove Hospital indicated that Thomas, who was then 15 years old, was brought to the hospital after he stole a BB gun, shot his cousin, and used the weapon to force people to "bark like dogs." The summary characterized Thomas as conscious and alert at admission, and noted that he denied auditory or visual hallucinations. The results of Thomas' psychological evaluation revealed "persistent aggressive ideation," limited coping skills, and a "low frustration tolerance." Thomas was discharged to the care of his grandmother and was to continue individual and family therapy. The handwritten DHS assessment from 2008 indicated that Thomas was referred after he accidentally cut his wrist during an argument with his girlfriend. Thomas denied any suicidal ideations. He was discharged the same day with a referral for anger and stress management treatment.

¶ 6 The circuit court docketed the petition, and the State filed a motion to dismiss. In the motion to dismiss, the State alleged, *inter alia*, that Thomas's postconviction claims were conclusory and must fail because he did not attach sufficient evidentiary support to the petition or explain the absence of such evidentiary support. Although Thomas filed, through private counsel, an answer to the State's motion to dismiss alleging that the "truth or falsity" of documents attached to a postconviction petition could only be resolved by an evidentiary hearing, the court ultimately granted the State's motion. In dismissing the petition "at the second stage," the court noted that Thomas failed to specify his medical condition or what affirmative defense may have existed; rather, Thomas stated "in a conclusory fashion" that he was suffering from a medical condition that could have impacted the existence of an affirmative defense or mitigation.

¶ 7 On appeal, Thomas contends that the circuit court erred when it dismissed his postconviction petition because he was denied the effective assistance of counsel as a result of

counsel's failure to investigate and present evidence of his medical condition. Thomas argues that the medical records attached to his petition contain the names and addresses of witnesses who should have been investigated and could have testified that he suffered from a medical condition that would have impacted an affirmative defense and could have served as significant mitigation. Thomas does not claim that his guilty pleas were involuntary or unintelligent, only that he never discussed how the information contained in the medical records attached to his postconviction petition might have affected the charges against him with his attorneys.

¶ 8 Before reaching the merits of Thomas' contentions on appeal, we first address his argument that the circuit court did not apply the "appropriate standard" to determine whether the petition advanced to a third-stage evidentiary hearing. Thomas argues that the court improperly required him to "prove all of his allegations at the first stage" of proceedings under the Act and that the issues raised in his petition were not frivolous. However, the record reveals that Thomas' petition was dismissed at the second stage of proceedings under the Act.

¶ 9 During the first stage of proceedings, the trial court independently examines the petition and summarily dismisses it, within 90 days after it is filed, if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it proceeds to the second stage. At the second stage of proceedings under the Act, the State is authorized to file a motion to dismiss the petition (725 ILCS 5/122-5 (West 2010)), which the court may grant if defendant fails to make a substantial showing of a constitutional violation (*People v. Coleman*, 183 Ill. 2d 366, 381 (1998)).

¶ 10 Here, the circuit court dismissed Thomas' petition after the State filed a motion to dismiss and Thomas filed a response to that motion. Therefore, the petition was dismissed at the second stage of the proceedings. See *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996) (at the first stage of proceedings under the Act, the circuit court examines the petition independently, without input

from the parties). Consequently, the issue before this court on appeal is whether Thomas made a substantial showing of a constitutional deprivation, not whether the petition had an arguable basis in fact and law. Compare *People v. Domagala*, 2013 IL 113688, ¶ 35 (a "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation), with *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009) (a petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law).

¶ 11 A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *Domagala*, 2013 IL 113688, ¶ 35. Therefore, 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). If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third stage evidentiary hearing where the circuit court serves as a fact-finder and resolves evidentiary conflicts, weighs credibility, and determines the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, ¶¶ 34, 46. This court reviews the dismissal of a petition at the second stage of proceedings under the Act *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 12 In order to succeed on an ineffective assistance of counsel claim at the second stage of proceedings under the Act, a defendant must demonstrate that counsel's performance was deficient, and that this deficient performance prejudiced the defense. *Coleman*, 183 Ill. 2d at 397, citing *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 13 Here, although Thomas argues that he was denied effective assistance of counsel by counsel's failure, once given the medical documents attached to the postconviction petition, to interview and present the testimony of witnesses who could attest to his mental health and

medical condition, Thomas does not identify the specific medical condition from which he suffered or specific witnesses who would have testified regarding such a condition. Thomas further does not articulate how his unspecified medical condition would have given rise to an unnamed affirmative defense or served as mitigation at sentencing.

¶ 14 In determining whether a defendant has made a substantial showing of a constitutional violation, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). To sustain this burden, a defendant must offer more than broad conclusory allegations in his petition and must support those allegations with affidavits, records or other evidence, or explain their absence. See *Coleman*, 183 Ill. 2d at 381 (to make a substantial showing of a constitutional violation, the petition's allegations must be supported by the record or by accompanying affidavits; nonfactual and nonspecific assertions that merely amount to conclusions are insufficient to require a hearing under the Act).

¶ 15 In this case, rather than identifying a specific medical condition, Thomas merely contends that the discharge reports and the DHS assessment should have indicated to counsel the existence of a medical condition which could have created an affirmative defense and served as mitigation evidence. These conclusory allegations are insufficient. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1019 (2000) (allegations in a postconviction petition must be based on factual allegations and not mere conclusory statements). Ultimately, it is unclear what "medical condition" these documents are meant to illustrate. None of the discharge summaries indicate that Thomas was diagnosed with any condition – medical, psychological, or psychiatric – that would have served as the basis for an affirmative defense to the armed robbery charges or as mitigation in connection with sentencing. Absent any well-pled facts supporting Thomas' allegation that he suffered from a "medical condition," he has failed to make a substantial showing that his

constitutional rights were violated. *Coleman*, 183 Ill. 2d at 381. See also *People v. Smith*, 136 Ill. App. 3d 300, 302 (1985) ("conclusory allegations that constitutional rights have been violated are insufficient" to entitle a defendant to an evidentiary hearing).

¶ 16 With regard to Thomas' contention that the medical records contain the names and addresses of witnesses who could have testified regarding his medical condition, Thomas fails to identify any proposed witnesses, indicate what they could testify to, or include affidavits from these individuals. Our supreme court has held that a claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from that proposed witness. *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Without such an affidavit, this court cannot determine whether the proposed witness could have provided testimony or information that was beneficial to the defendant, and "further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380. Here, as Thomas has failed to identify any potential witnesses or include their affidavits in support of his claims, this court is unable to determine whether these witnesses would have provided testimony or information beneficial to him (*Enis*, 194 Ill. 2d at 380), and, thus, no further analysis is warranted.

¶ 17 This court is unpersuaded by Thomas' reliance on *People v. Brown*, 236 Ill. 2d 175 (2010). In that case, the defendant alleged in his postconviction petition that trial counsel was ineffective when counsel failed to request a fitness hearing because defendant had a history of attempted suicide and had been prescribed psychotropic medication to treat bipolar disorder and depression. The petition also alleged that due to this psychotropic medication, the defendant was unable to understand the proceedings at trial, and that trial counsel knew about the defendant's prior suicide attempts and medication. Attached to the petition in support were medical records documenting the defendant's bipolar disorder and medications as well as affidavits from family

members averring that trial counsel had been informed of the defendant's prior suicide attempts and medication.

¶ 18 Under those facts, our supreme court determined that the petition had an arguable basis in fact when the medical records and affidavits corroborated the allegations in the defendant's petition. *Brown*, 236 Ill. 2d at 186. The petition also had an arguable basis in law when defendant's claim of ineffective assistance of counsel based upon a failure to request a fitness hearing was not contradicted by the record and was arguably supported by the allegations in the petition and the supporting affidavits. *Brown*, 236 Ill. 2d at 191.

¶ 19 Initially, this court notes that *Brown* dealt with the summary dismissal of a petition at the first stage. In other words, the *Brown* defendant was only required to set forth the "gist" of a constitutional claim in order to proceed to the second stage of proceedings under the Act. See *Brown*, 236 Ill. 2d at 184 (allegations in the petition, taken as true and liberally construed, "need only present the gist of a constitutional claim"). Here, on the other hand, Thomas' petition was dismissed at the second stage of proceedings and it was his burden to make a substantial showing of a constitutional violation. In any event, *Brown* is distinguishable because the *Brown* defendant specifically alleged that he was taking psychotropic medication at trial which interfered with his ability to understand the proceedings, and supported this claim with medical records documenting his bipolar condition and medications as well as affidavits from family members who averred that they had shared this information with counsel. Here, however, Thomas merely alleged that certain medical records should have alerted counsel to a "medical condition" without identifying a specific condition or articulating how that condition impacted his ineffective assistance claim.

¶ 20 Ultimately, Thomas's nonfactual and nonspecific assertions regarding his medical condition (*Rissley*, 206 Ill. 2d at 412), were insufficient to make a substantial showing of a

1-11-3675

constitutional violation (*Domagala*, 2013 IL 113688, ¶ 35), and the trial court properly granted the State's motion to dismiss.

¶ 21 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 22 Affirmed.