2013 IL App (2d) 111202-U
No. 2-11-1202
Order filed March 26, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-1030
STACY L. ELDRIDGE,	)	Honorable Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that trial counsel and appellate counsel were ineffective for failing to raise the trial court's violation of Rule 431(b): because we had found on direct appeal that the violation was not plain error, defendant could not show prejudice to support a claim of ineffective assistance.

¶ 2 Defendant, Stacy L. Eldridge, was charged with burglary (720 ILCS 5/19-1(a) (West 2008)), and he elected to proceed with a jury trial. During *voir dire*, the trial court, in contravention of Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), failed to ask the first panel of potential jurors whether they understood and accepted that defendant was not required to offer any evidence and that

defendant's failure to testify could not be used against him. After receiving verbal and written instructions concerning the Rule 431(b) principles, the jury found defendant guilty of burglary, and he was sentenced to 20 years' imprisonment. At no point during the proceedings in the trial court did defendant challenge the Rule 431(b) admonitions. Defendant appealed, arguing, among other things, that he should receive a new trial because the court failed to comply with Rule 431(b). This court disagreed, holding that defendant failed to establish, pursuant to the plain-error rule, reversible error, in that defendant did not present any evidence that the jury was biased. See *People v. Eldridge*, No. 2-08-1042 (2010) (unpublished order under Supreme Court Rule 23). Soon thereafter, defendant petitioned for postconviction relief, claiming that his trial counsel was ineffective for failing to challenge the faulty Rule 431(b) admonitions and that appellate counsel in the direct appeal was ineffective for failing to raise trial counsel's ineffectiveness. The trial court summarily dismissed the petition, and this timely appeal followed. At issue in this appeal is whether the summary dismissal of defendant's petition was proper. We determine that it was. Thus, we affirm.

¶ 3 "The [Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010))] provides a remedy to defendants who have suffered substantial violations of their constitutional rights." *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). When the death penalty is not involved, there are three stages to the proceedings. *Id.* This appeal concerns the dismissal of a petition at the first stage.

¶ 4 During the first stage, the trial court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). The trial court may summarily dismiss the petition if it finds that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is considered frivolous or patently without merit when the allegations in the petition fail to

present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007); *People v. Little*, 335 Ill. App. 3d 1046, 1050 (2003).

¶ 5 "The 'gist' standard 'is a low threshold.' " *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). Although a 'gist' is something more than a bare allegation of a deprivation of a constitutional right (*People v. Prier*, 245 Ill. App. 3d 1037, 1040 (1993)), it is something less than a completely-pleaded or fully-stated claim (*Edwards*, 197 Ill. 2d at 245). Thus, to set forth the gist of a constitutional claim, the petition need present only a limited amount of detail and need not set forth the claim in its entirety. *Id.* at 244. In resolving whether the petition is frivolous or patently without merit, the court must accept as true all well-pleaded allegations, unless the allegations are positively rebutted by the record. *Little*, 335 Ill. App. 3d at 1050. We review *de novo* the summary dismissal of a petition. *Id.* at 1051.

¶ 6 With these principles in mind, we consider whether defendant presented the gist of a claim that his trial counsel was ineffective for failing to challenge the Rule 431(b) admonitions. A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). At the first stage of postconviction proceedings, a defendant need establish only that it is *arguable* that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced. *People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010). If a defendant fails to establish that he was arguably prejudiced, the second prong of the test, we need not consider whether counsel's

performance arguably fell below an objective standard of reasonableness. *People v. Youngblood*, 389 Ill. App. 209, 214 (2009).

¶ 7 Here, on direct appeal, defendant challenged the Rule 431(b) admonitions. Because he had not preserved the issue in the trial court, this court considered whether the admonitions constituted reversible error pursuant to the plain-error rule. We concluded that they did not. This determination is fatal to defendant's argument in his postconviction petition that trial counsel was ineffective for failing to challenge the admonitions and that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness.

¶ 8 Instructive on this point is *People v. Easley*, 192 Ill. 2d 307 (2000), which the State cites in its brief. There, the defendant appealed following the dismissal of his postconviction petition at the second stage. *Id.* at 315. The defendant claimed in his petition, among other things, that his trial counsel was ineffective for failing to object to the State's cross-examination of various defense witnesses. *Id.* at 332. The defendant also alleged that appellate counsel in the direct appeal was ineffective for failing to raise trial counsel's ineffectiveness. *Id.* Our supreme court affirmed the dismissal of the defendant's petition, noting:

> "[The d]efendant raised these instances of the prosecutor's allegedly improper cross-examination on direct review. This court held that [the] defendant waived review of these issues, and that the prosecutor's conduct did not rise to the level of plain error. [Citation.] Since the actions complained of did not rise to the level of plain error, the failure of [the] defendant's trial counsel to object thereto did not prejudice defendant under *Strickland*. [Citations.] Trial counsel cannot be deemed ineffective for failing to preserve these issues

for review; correspondingly, incompetence cannot be assigned to appellate counsel. The circuit court properly dismissed this claim." *Id.*

¶ 9 As in *Easley*, because we determined on direct appeal that the trial court's actions did not rise to the level of plain error, defendant was not prejudiced when trial counsel failed to challenge the admonitions. Accordingly, defendant's trial counsel cannot be deemed ineffective, and, as a result, appellate counsel was not ineffective for failing to raise trial counsel's alleged ineffectiveness.

¶ 10 In his reply brief, defendant cites to *People v. Tate*, 2012 IL 112214, which he claims controls this appeal. Unlike the situation in *Easley* or in this case, the defendant in *Tate* did not raise in his postconviction petition an error that a reviewing court had found not to be reversible under the plain-error rule. Because of this distinction, we find *Tate* unpersuasive here.

¶ 11 For these reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 12 Affirmed.