



examinations to evaluate the defendant's sanity at the time of the offense and his ability to knowingly waive his *Miranda* rights. On November 30, 2006, the defendant's attorney, Alexander Wilson, filed a motion to suppress the defendant's confession to the police.

¶ 4 At a May 4, 2007, hearing on the motion, the State's attorney and Wilson indicated to the court that the parties had come to an agreement. On February 13, 2008, a superceding information was filed, charging the defendant with second-degree murder. At a hearing that day, the State informed the court that the defendant had agreed to plead guilty to second-degree murder in exchange for the dismissal of the first-degree murder charge. The State noted that both sides had agreed to waive the presentence investigation report, and the State had agreed to recommend a sentence of 20 years' imprisonment, that truth-in-sentencing would not apply, and that the defendant would be eligible for day-for-day good-time credit on his sentence. The defendant would be given credit for the 737 days that he had already served in pretrial custody in addition to what the statute allows without a truth-in-sentencing-type sentence. Additionally, the defendant had agreed to withdraw the motion to suppress the statements he made to the police. Wilson and the defendant agreed that this was their understanding of the plea negotiations. The court then advised the defendant of the nature of the second-degree murder charge, namely, that while committing first-degree murder, the defendant, while acting under a sudden and intense passion resulting from serious provocation, shot the victim in the head with a shotgun, thereby causing his death. The court then explained the possible sentences for the new charge, as well as the defendant's right to plead not guilty, his right to a trial, his right to confront and obtain witnesses against him, and his privilege against self-incrimination. The court told the defendant that by pleading guilty, he was giving up these rights, as well as his rights in regard to his motion to suppress his statements. The defendant indicated that he understood these admonishments.

¶ 5 The State presented a factual basis indicating that evidence could be shown that on or about January 31, 2006, the defendant shot the victim in the head with a shotgun during an argument. The circumstances amounted to first-degree murder mitigated by serious provocation from the victim, causing a sudden and intense passion in the defendant. The State indicated that this would be established through videotaped statements that the defendant gave to the police in which he admitted shooting the victim, through evidence that while at the police station, the defendant admitted killing the victim to his wife, Danielle Radford, while in the presence of a detective, and through forensic evidence discovered due to the defendant's disclosure to the police, which included a spent shotgun shell matching the shotgun used on the victim that was found in the location described by the defendant. The defense stipulated to the factual basis. The defendant agreed that no one had tried to use force, threats, or intimidation against him or his family members to force him to plead guilty.

¶ 6 The defendant pled guilty, and the court accepted the plea and received a stipulated criminal history for the defendant indicating that he had two prior felony convictions in Indiana for carrying a handgun without a license, a prior aggravated unlawful use of a weapon conviction from St. Clair County, and a juvenile history. The court imposed the agreed-upon sentence and explained to the defendant the proper steps to take if he wished to appeal, which included the defendant filing a motion to withdraw his guilty plea. He noted that if such a motion were granted and the court vacated the defendant's plea of guilty and the sentence, any charges that may have been dismissed against him as a result of plea negotiations could be reinstated. The defendant indicated that he understood.

¶ 7 The defendant did not file a motion to withdraw his plea, nor did he file a direct appeal. On February 11, 2011, the defendant filed *pro se* a petition for postconviction relief alleging a violation of his constitutional right to the effective assistance of counsel. Specifically, the defendant alleged that he had a conversation with his trial counsel, attorney

Wilson, in which Wilson told the defendant that under the negotiated plea agreement, he would only serve six years of his sentence. The defendant thus argued that this erroneous advice regarding the length of time that he would be imprisoned made his guilty plea entry unknowing and involuntary, and that he would not have pled guilty if he had known the true sentence length.<sup>1</sup> The petition also alleged that his counsel coerced the guilty plea where the defendant was depressed, drug dependent, and functioning at a low intellectual level, and that at the time of the plea, he was receiving psychotropic medication and simply parroted back answers given to him by Wilson rather than giving knowing answers to the court. The petition also contained an allegation of ineffective assistance of counsel where Wilson did not pursue the motion to suppress his confession, as it could have led to the suppression of that evidence. Finally, the defendant also alleged that his due process rights were violated where he was not counseled as to the elements of the second-degree murder charge, and therefore he did not know that his intent to kill the victim was an element that had to be proven by the State, rendering his guilty plea unknowing and involuntary.

¶8 On May 26, 2011, the circuit court appointed counsel to the defendant, and on October 19, 2011, postconviction counsel filed an amended petition. The amended petition asserted a violation of the defendant's due process rights where the defendant was not properly admonished by the trial court of his rights and the plea was made under a misunderstanding of the law, where the defendant was taking psychotropic medications at the time of the plea, and where the plea was submitted under threat and duress so he was unable to properly waive his right to a trial. The amended petition also asserted that the factual basis for his plea was insufficient because his confession was improperly obtained, and that the trial court did not

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<sup>1</sup>After applying the "good[-]time" credit at a rate of 50% and the 737 days' credit for time served in the St. Clair County jail, the defendant would serve close to eight years in prison.

sufficiently explain the element of intent in the defendant's second-degree murder charge. Finally, the amended petition asserted that the defendant was denied the effective assistance of counsel where his attorney: told the defendant that he would receive a sentence of six years if he accepted the plea agreement; failed to investigate and inform the defendant of all possible defenses; failed to inform the court of the defendant's treatment and taking of psychotropic medication; failed to request a competency hearing based on the defendant's mental health problems and low comprehension level; failed to pursue the motion to suppress the confession; failed to inform the defendant that intent was an element of second-degree murder; never had the defendant agree to the factual basis; and finally, failed to negotiate for a plea of voluntary or involuntary manslaughter.

¶ 9 On December 16, 2011, the State filed a motion to dismiss the amended petition, asserting that the defendant's postconviction arguments are waived because they should have been made in a motion to withdraw the plea. Alternatively, the motion stated that the record reflects that the trial court properly admonished the defendant and that the defendant's responses were in keeping with an understanding of the proceedings, and that the court properly explained the elements of second-degree murder. The motion stated that even if the defendant's claim that his rights were violated in the taking of his confession were true, it would not necessarily be a basis for setting aside his plea of guilty, that taking psychotropic medication does not necessarily make a defendant unfit to plead guilty, and that his claim that he was under threat and duress was vague, conclusory, and not supported by the facts. The motion also asserted that the record reflected that the defendant received adequate assistance of counsel, as demonstrated by the fact that attorney Wilson was his counsel of choice, that defendant's responses to the court's inquiries were clear and appropriate, and that it did not appear that trial counsel, the court, or the prosecution appeared to have a doubt as to the defendant's mental fitness at the time of the plea.

¶ 10 On January 18, 2012, the court held a hearing on the State's motion to dismiss the amended petition. The State noted that the record clearly reflected the plea's thoroughness, and thus the defendant's allegations had no substance. The defendant's postconviction counsel argued that many of the defendant's allegations were matters outside of the record, and thus properly raised in the postconviction process. Specifically, counsel argued that the defendant was constitutionally deprived of effective assistance of counsel if Wilson indeed told the defendant that he would only serve 6 years of his 20-year sentence, and the matter can only be determined through an evidentiary hearing. The State responded that the defendant specifically and unequivocally agreed that "he would receive 20 years in the Department of Corrections and that it would be served at a rate of 50 percent. He would get day[-]for[-]day good[-]time credit, if he was eligible[.]" The State noted that while the court did not appear to specifically ask about promises, the record reflected that the plea, taken as a whole, was knowing and voluntary. The court agreed with the State that the defendant's plea was knowing and voluntary, and granted the State's motion to dismiss the amended petition. The defendant appeals this dismissal.

¶ 11 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). In order to be entitled to postconviction relief, a petitioner must establish a substantial deprivation of constitutional rights in the proceedings that produced the judgment being challenged. *People v. Morgan*, 187 Ill. 2d 500, 528 (1999). The dismissal of a postconviction petition is warranted at the second stage where the defendant's claims, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). 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 the second-stage dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). On appeal, the defendant argues only that his case should be remanded for an evidentiary hearing because he has made a substantial showing that Wilson's misrepresentation about the consequences of pleading guilty constituted ineffective assistance of counsel, and the defendant's reliance on the incorrect advice rendered his guilty plea unknowing and involuntary. Even assuming that the defendant's allegation is true, in light of the record on appeal, we find that the defendant has not met his burden.

¶ 12 Due process requires that a defendant's guilty plea be knowing and voluntary. *People v. Clark*, 386 Ill. App. 3d 673, 676 (2008). If a defendant receives ineffective assistance of counsel and reasonably relies on the incompetent advice of counsel, his plea is unknowing and involuntary. *People v. Correa*, 108 Ill. 2d 541, 549 (1985). In order to demonstrate ineffective assistance of counsel in the context of a guilty plea, a defendant must show both that (1) counsel's performance in advising the defendant was deficient and (2) but for the erroneous advice, the defendant would have insisted on going to trial rather than pleading guilty. *Clark*, 386 Ill. App. 3d at 676.

¶ 13 Here, the defendant cannot show that his counsel's performance was deficient based on the advice given, as that advice, at best, could only have predicted the amount of time the defendant would serve under the terms of the plea bargain. As the defendant's claim relates to the defendant's good-conduct credit, the advice concerned a collateral consequence of the defendant's sentence. See *People v. Stewart*, 381 Ill. App. 3d 200, 204 (2008). A defendant's reliance on defense counsel's erroneous advice of a collateral consequence of a plea may render the plea involuntary; the distinction between a deficient performance and a sufficient one lies within the counsel's passive failure to give advice regarding collateral consequences

and the counsel's unequivocal, misleading representations regarding collateral consequences. *Stewart*, 381 Ill. App. 3d at 205-06; see also *Correa*, 108 Ill. 2d at 553. However, where a defendant claims that he is induced to plea bargain, this court has distinguished between unfulfilled promises of leniency and estimating a sentence to be expected. "[A] guilty plea made in reliance upon advice of counsel estimating a sentence to be expected is a voluntary plea." *People v. Corby*, 139 Ill. App. 3d 214, 218 (1985). A plea based upon a prediction rather than a promise is not rendered involuntary when such a prediction is unfulfilled. *Id.* at 219.

¶ 14 The defendant relies on *People v. Stewart*, wherein the defendant alleged that he pled guilty because his counsel erroneously advised him that he was eligible to receive day-for-day good-conduct credit and would only have to serve 50% of his sentence, when in fact he was required to serve 85% of his sentence due to the applicability of the truth-in-sentencing law. 381 Ill. App. 3d at 201. The appellate court held that the allegation was sufficient to entitle the defendant to an evidentiary hearing, as expressly erroneous and misleading advice regarding a collateral consequence of pleading guilty can amount to ineffective assistance of counsel. *Id.* at 206. However, we find the facts in *Stewart* to be distinguishable, as that defendant was actively misinformed that he was eligible for more good-conduct credit than that for which he was statutorily eligible. Here, whether or not Wilson indeed told the defendant that he would serve six years, the trial court explicitly informed the defendant at his plea hearing that he would serve his sentence at a rate of 50% and receive day-for-day good-time credit *if he were eligible*. As truth-in-sentencing did not apply, the defendant was legally eligible for all aspects of his bargain, but that does not mean he was entitled to all of them—the contingency inherent in the awarding of good-time credit was communicated to the defendant at his plea hearing. Knowing this, the defendant was aware that at best, Wilson could only advise the defendant with a prediction of the amount of time he would serve; the

defendant's compliance with the Department of Corrections' regulations while incarcerated, not the sentencing court, ultimately determines whether he will receive the day-for-day credit for which he bargained. Even if Wilson's prediction turned out to be inaccurate, the award of good-time credit "lies within the discretion of the Department of Corrections and rests upon factors occurring after the defendant's incarceration that necessarily cannot be foreseen at the time of conviction and sentence," and as such, counsel's statements regarding length of time to be served "must be regarded as a prediction only, rather than a promise that could be fulfilled as part of the plea agreement." *People v. Corby*, 139 Ill. App. 3d 214, 219 (1985).

¶ 15 Finally, we note that because the defendant's ultimate goal, if he were to receive an evidentiary hearing, would be the withdrawal of his guilty plea, "[a] misapprehension as to sentencing alternatives may render the guilty plea involuntary if the defendant was actually unaware of the possible punishment," but if "a defendant has been admonished thoroughly, a guilty plea is not revocable merely because the defendant subjectively believed that he or she would receive a certain sentence but did not." *People v. Kraus*, 122 Ill. App. 3d 882, 888 (1984). While the defendant's admonishments during the plea hearing did not make a specific reference to promises, we find that the plea was nevertheless extremely thorough, and the defendant clearly expressed his understanding and agreement to its terms. Overall, the record reflects that the plea, taken as a whole, was knowing and voluntary.

¶ 16 In sum, the defendant has not made a substantial showing of a constitutional violation, as the supposedly deficient advice given by his counsel would be considered a prediction of his sentence's collateral consequences, not a promise regarding length of time to be served. The defendant was fully admonished as to his sentence and its collateral consequences at his plea hearing, and he clearly indicated his understanding and agreement to those terms. For these reasons, we affirm the dismissal of the defendant's amended postconviction petition.

¶ 17 Affirmed.