

No. 1-12-0377

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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. 07 CR 22408
)	
DOROTA DZIADZIO,)	Honorable
)	Thomas Hennelly,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Where there was no *bona fide* doubt as to defendant's fitness to plead guilty, defendant failed to make a substantial showing that her trial counsel was ineffective for not requesting a fitness hearing or new fitness evaluation; affirmed.

¶ 2 Defendant Dorota Dziadzio¹ appeals from an order of the circuit court granting the State's motion to dismiss her petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). She contends that she made a substantial showing that her trial

¹ Defendant's last name is also spelled "Diazdzio" in the record. Here, we use the spelling on defendant's notice of appeal.

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counsel was ineffective for failing to request a fitness hearing or new fitness evaluation where there was a *bona fide* doubt of her fitness before she entered her guilty plea. We affirm.

¶ 3 The record reveals that defendant was charged with one count of retail theft of merchandise having a value of more than \$150 after she allegedly stole clothing and shoes from a Nordstrom store located at 24 North State Street in Chicago on October 15, 2007. This offense is a Class 3 felony 720 ILCS 5.0/16A-10(3) (West 2006).

¶ 4 On December 21, 2007, her counsel, Christopher Graul, filed an affirmative defense that asserted multiple issues relating to defendant's mental state, including that she suffered from a mental illness. On the same date, the circuit court entered a referral order for an examination of defendant's fitness to stand trial, sanity, and "mental illness at time of occurrence—ability to understand and conform conduct to law."

¶ 5 In a Forensic Clinical Services report dated March 11, 2008 and filed on March 21, 2008, a staff psychiatrist concluded that based on his review, defendant was fit to stand trial with medications. The report stated that defendant demonstrated an adequate understanding of the charge against her and good comprehension of the nature of courtroom proceedings. Additionally, defendant correctly identified the roles of various courtroom personnel and displayed the capacity to assist her counsel in her defense, if she so chose. The report further stated that defendant was currently prescribed a psychotropic regimen of Prozac, Adderall, and Abilify.

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¶ 6 At a proceeding on March 21, 2008, the court ascertained that the report had been submitted and asked, "[A]re we going to set this down for a hearing or are we going to stipulate?"² On this date, defendant was represented by an assistant public defender, who replied that he wanted to speak to defendant's treating physician or treating psychiatrist first, and added that defendant "has been in treatment at Rush Hospital, the psychiatric center there." The court then asked whether defense counsel was asking for a second opinion and warned that the report would "go stale" in 48 days. Defense counsel agreed to next appear in court on April 25, 2008.

¶ 7 The record does not contain a transcript or other indication of what transpired on April 25. However, on May 22, 2008, Graul reported that defendant had been in voluntary confinement at Mercy Hospital for over a week. Graul had been at Mercy the previous day, and defendant had signed a five-day request for release, but the doctor would not permit defendant to leave. The court found that defendant was physically incapacitated and continued that matter on defendant's motion to June 26, 2008.

¶ 8 On June 26, counsel for defendant informed the court that defendant desired to plead guilty. During plea hearing, the court asked defendant, "[A]re you taking your medications now?" Defendant responded, "Yes." Defendant also indicated that she understood that she would receive a sentence of 24 months' probation in exchange for pleading guilty to retail theft, she had gone over the charge with her attorney, and she understood the possible penalties. When asked how she was pleading, defendant replied, "I plead guilty." Defendant also indicated that

² We do not view this statement, as defendant contends, as an indication that the trial court harbored any concerns regarding defendant's fitness to stand trial. Rather, the court's statement merely reflects an inquiry into how counsel wished to proceed.

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she understood the rights she was giving up by pleading guilty, understood what a jury trial was, and stated she had signed a jury waiver and that she wanted to give up her right to a jury trial.

¶ 9 The State then presented the following factual basis for the plea: on the afternoon of October 15, 2007, a Nordstrom security agent observed defendant take three pairs of shoes from a retail display, conceal them in a cloth bag, and leave the store without paying; when the security agent recovered the shoes, she discovered that the bag also contained three unpaid clothing items; the total value of the taken merchandise was \$268.61; after defendant was in custody and turned over to a police officer, defendant stated that she was not able to pay for her medication, takes things, and steals things when she does not take her medication.

¶ 10 Having found a factual basis, the court asked defendant whether she still wanted to plead guilty, to which she replied "Yes." Defendant denied that anyone forced or threatened her to plead guilty or that she was promised anything in exchange for her plea. Defendant did not wish to say anything before she was sentenced. Defendant was sentenced to 24 months of mental health probation. Defendant then affirmed that she wanted the money she had posted for bond to be refunded to her attorney. Lastly, the court asked whether defendant was a citizen of the United States, to which she replied, "No." She then indicated she understood that by pleading guilty, the United States government may or could remove her from the country.

¶ 11 On July 9, 2010, defendant, through Graul, filed a motion to vacate judgment, which was treated as a post-conviction petition because it was filed more than 30 days after defendant's guilty plea. In part, the motion alleged that defendant had a valid defense because she had since

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been diagnosed as having a psychiatric illness, kleptomania, which made her unable to conform her conduct to the requirements of the law. The motion further asserted that failure to present evidence of depression and the effects of medication, and not vigorously pursuing a valid psychiatric defense, was ineffective assistance of counsel. The only material attached to the motion was defendant's affidavit, which stated in conclusory fashion that "prior to," "during" and "after the conclusion of" her case, she was under "heavy medication" for depression, bulimia and "impulse control (leading to kleptomania)", and that these conditions had been diagnosed at unspecified times by unnamed psychiatrists.

¶ 12 On July 19, 2010, Graul filed an amended motion, the substance of which was largely the same as the previous motion.

¶ 13 Subsequently, Graul was replaced by an assistant public defender, Elizabeth Ribbeck, to represent defendant on the post-conviction matter. On July 8, 2011, Ribbeck filed a supplemental petition for post-conviction relief which "augment[ed] the issues" in the previously filed pleadings. The petition alleged that although defendant had been hospitalized and her medications were modified after the Forensic Clinical Services report was filed, a new fitness evaluation was not requested and a fitness hearing was never conducted prior to her guilty plea. The petition asserted that defendant was denied due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article 1, Section 2 of the Illinois Constitution when she entered a plea without first having a fitness hearing to determine whether she was fit to stand trial.

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¶ 14 Attached to the petition was an affidavit from Graul, which, as it related to defendant's mental health, was identical to the conclusory affidavit previously submitted by defendant.

¶ 15 The State filed a motion to dismiss, asserting that defendant could not claim her counsel was ineffective for failing to present a defense that was addressed as part of the plea agreement. Further, the State contended that defendant's mental health history was addressed at the plea hearing and a factor in the plea agreement, as demonstrated by the filing of the Forensic Clinical Services report, the court asking defendant whether she was on her medications, and defendant receiving mental health probation. The State further asserted that the decision not to investigate a defendant's mental health records or introduce them at trial was a strategic decision that could not support a claim of ineffective assistance of counsel.

¶ 16 With her response, defendant submitted a discharge summary from Mercy Hospital where she was voluntarily admitted on May 13, 2008, and released May 22, 2008 (roughly one month prior to her guilty plea). At the time of her admission on Tuesday, May 13, 2008, defendant's chief complaint according to the discharge summary, was that she had "[f]elt sad since last Friday." Defendant also self-reported that she had not taken her medications over the weekend prior to her admission. The primary diagnosis reflected in the discharge summary was "major depressive disorder."

¶ 17 Defendant asserted there was a *bona fide* doubt of her fitness because of her hospitalization, subsequent diagnosis, and modified medication regimen. However, a new fitness evaluation was not requested and a fitness hearing was never conducted prior to her plea,

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which, according to defendant, rendered the proceedings fundamentally unfair. Defendant additionally contended that the mere fact she was taking medications at the time of her plea did not prove she was fit without evaluating the effect of the new medications she took after she was hospitalized.

¶ 18 On January 13, 2012, the court granted the State's motion to dismiss the petition.

¶ 19 In this court, defendant contends she received ineffective assistance of counsel because there was a *bona fide* doubt regarding her fitness when she entered her guilty plea and her counsel never requested a fitness hearing or a new fitness evaluation. Defendant argues that changed circumstances negated the accuracy of her prior fitness evaluation and raised a *bona fide* doubt regarding her fitness—specifically, her treatment at Rush, hospitalization at Mercy, altered medication regimen, and the behavior and diagnosis indicated in her discharge summary. Defendant contends that in light of these changed circumstances, her counsel's performance was deficient because he failed to inform the court of this information and request a new fitness hearing or new evaluation. Additionally, defendant contends that she was prejudiced by her counsel's error because if counsel had informed the court of the new information about her mental health, the court would have ordered a new fitness examination or found a *bona fide* doubt regarding her fitness and ordered a hearing, especially in light of the court's earlier offer to set the matter for a hearing after the Forensic Clinical Services report was filed.

¶ 20 At the second stage of post-conviction proceedings, a defendant must make a substantial showing of a violation of constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

The petition will be dismissed if the factual allegations, liberally construed in favor of the defendant and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *Id.* at 382. All well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review the dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 21 The State contends that defendant has forfeited her claim. The State asserts that defendant's original motion did not raise the issue of fitness, but asserted, rather, that defendant had a valid defense to the retail theft charge and her supplemental petition and response to the State's motion to dismiss raised the failure to conduct a fitness hearing as a due process violation. In response, defendant acknowledges that the fitness issue was raised as a due process claim by post-conviction counsel. Nevertheless, defendant contends that the substantive issue is the same because she still must make a substantial showing that a *bona fide* doubt regarding her fitness existed. Additionally, because only defense counsel could have requested a new evaluation and provided the information to prompt a fitness hearing, defense counsel's deficient performance "is implicit within the post-conviction petition's pleadings."

¶ 22 Generally, a claim not raised in a petition cannot be argued for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). See also 725 ILCS 5/122-3 (West 2010) (any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived). Further, "implicit" claims in a defendant's petition may not be raised for the first time

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on appeal when those issues were never ruled upon by the circuit court. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 13. Defendant's original and amended motions to vacate judgment framed the ineffective assistance of counsel issues as relating to counsel's failure to present a defense, not his failure to request a fitness hearing or a new evaluation. Defendant's supplemental petition and response to the State's motion to dismiss framed the issue in terms of a due process claim. At the hearing on the motion to dismiss, post-conviction counsel alluded to a point when defendant "did not get the proper representation," which suggests an ineffective assistance of counsel claim related to fitness. However, none of defendant's post-conviction pleadings asserted the exact claim defendant now raises on appeal. Defendant's assertion that her ineffective assistance claim is "implicit" suggests that she recognizes that it was not included in her petition. See *People v. Taylor*, 237 Ill. 2d 68, 76 (2010) (defendant's characterization of his statement as an "implicit claim of ineffective assistance of counsel" was an acknowledgment that he did not specifically raise that claim). Therefore, the State's waiver argument is well-taken.

¶ 23 Nonetheless, even if defendant has preserved this claim, we find that she failed to make a substantial showing that her counsel was ineffective. Claims of ineffective assistance of counsel are subject to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): a defendant must show that her counsel's performance was deficient and that the deficient performance prejudiced the defense. A defendant's claim fails if either prong is not met. *People v. Peoples*, 205 Ill. 2d 480, 513 (2002). Further, we need not consider whether counsel's performance was deficient before considering whether the defendant was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342 (2007).

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¶ 24 A defendant is presumed to be fit to plead. 725 ILCS 5/104-10 (West 2008). However, a defendant is unfit if, because of her mental or physical condition, she is unable to understand the nature and purpose of the proceedings against her or assist in her defense. *Id.* A defendant is entitled to a fitness hearing only when a *bona fide* doubt regarding her fitness is raised. 725 ILCS 5/104-11(a) (West 2008). To satisfy the *Strickland* prejudice prong, a defendant must show that facts existed at the time of her trial (or plea) that raised a *bona fide* doubt regarding her ability to understand the nature and purpose of the proceedings and to assist in her defense. *People v. Eddmonds*, 143 Ill. 2d 501, 512-13 (1991). A defendant is entitled to relief only if she shows that the trial court would have found a *bona fide* doubt regarding her fitness and ordered a fitness hearing if it had been apprised of the evidence now offered. *People v. Easley*, 192 Ill. 2d 307, 319 (2000).

¶ 25 Hence, the question is whether the changed circumstances defendant notes—her treatment at Rush, her admission to Mercy, her subsequent diagnosis, the behavior noted in her discharge summary, and her altered medication regimen—raised a *bona fide* doubt regarding her fitness to plead. Some of the factors relevant to whether there was a *bona fide* doubt regarding a defendant's fitness include: (1) the rationality of the defendant's behavior and demeanor at trial; (2) counsel's statements concerning the defendant's competence; and (3) any prior medical opinions on the issue of the defendant's fitness. *People v. Hanson*, 212 Ill. 2d 212, 223 (2004). Further, fitness speaks only to a person's ability to function within the context of a trial and does not refer to sanity or competence in other areas. *People v. Harris*, 206 Ill. 2d 293, 305 (2002).

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¶ 26 Here, there is nothing to indicate that defendant became unable to understand the nature and purpose of the proceedings and assist in her defense between the date the Forensic Clinical Services report declared her to be fit with medications and the date she entered her plea. Although defendant was voluntarily confined at Mercy on May 22, 2008, counsel stated he was trying to secure her release. Moreover, the transcript of the plea hearing does not suggest that defendant was unable to understand the proceedings or participate. She responded in a coherent and appropriate manner to all of the court's questions about her plea. The Mercy discharge summary, although it noted a diagnosis of major depressive disorder, also stated that defendant's thought process was logical, though vague, tangential, and circumstantial, and that her thought contents were normal. Ultimately, she was released to her home in stable condition after her stay, with a treatment plan. The mere fact that a defendant suffers from mental disturbances or requires psychiatric treatment does not necessarily raise a *bona fide* doubt regarding the defendant's ability to consult with counsel. *Eddmonds*, 143 Ill. 2d at 519. Further, a defendant may be competent to stand trial even though her mind is otherwise unsound. *People v. Sandham*, 174 Ill. 2d 379, 388-89 (1996). That defendant needed treatment for her mental illness and voluntarily confined herself to a hospital after she stopped taking her medications for a brief period does not indicate a *bona fide* doubt regarding her fitness, particularly when the record shows that she was taking her medications at the time of her guilty plea.

¶ 27 Defendant stresses the difference in the medications listed in the initial Forensic Clinical Services report (Prozac, Adderall, Abilify) and the Mercy discharge summary (Synthroid, Abilify, Prozac, Depo-Provera). To the extent that both parties advance arguments about the

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characteristics of the various medications prescribed for defendant, we do not consider them because these arguments cite sources that were not attached to the post-conviction petition or evaluated by the circuit court. See *People v. Anderson*, 375 Ill. App. 3d 121, 138-39 (2007) (reviewing court would not consider a report for the first time on appeal where it was not attached to the defendant's post-conviction petition for initial scrutiny and evaluation at the trial court level). Further, the Mercy discharge summary does not reflect "new" medications prescribed for defendant, but, rather, it lists medications defendant had at home. Given that it was defendant's burden to make a "substantial showing" of a violation of her constitutional rights, it is inappropriate for her to advance on appeal new information designed to satisfy that requirement. Defendant stated at the plea hearing that she was taking her medication, and based on her responses at the rest of the hearing, there is nothing to suggest that her regimen, even if it changed, rendered her unfit. Because defendant has not shown there was a *bona fide* doubt regarding her fitness, there was no likelihood that the court would have held a fitness hearing even if it had the new information. See *People v. Weeks*, 393 Ill. App. 3d 1004, 1012 (2009). Consequently, because defendant cannot satisfy the prejudice prong of *Strickland*, her ineffective assistance claim fails and her post-conviction petition was, therefore, properly dismissed.

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.