

FIRST DIVISION
January 27, 2014

No. 1-12-2772

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. 10 CR 12451
)	
DAVID SHIMON,)	Honorable
)	Kay Marie Hanlon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Dismissal of defendant’s postconviction petition was proper where defendant failed to make a substantial showing that he received ineffective assistance of counsel at his guilty plea hearing.

¶ 2 Defendant David Shimon appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2010). In the petition, defendant alleged that his guilty plea to a charge of possession of cannabis with intent to deliver was

involuntary because the trial court incorrectly advised him as to the immigration consequences of his plea. He also claimed he received ineffective assistance of counsel because his attorney did not advise him as to the mandatory consequence of deportation. On appeal, defendant contends that his petition should have advanced to an evidentiary hearing because he made a substantial showing of ineffective assistance of counsel. We affirm.

¶ 3 In 2010, defendant, a legal permanent resident of the United States and a citizen of Australia, was charged with possession of approximately 4.5 pounds of cannabis with intent to deliver. A guilty plea hearing was held in 2011. At the hearing, the trial court informed defendant, in relevant part, as follows:

“If you’re not a citizen of the United States, you’re hereby admonished that conviction for this offense for which you have been charged may have the consequence of deportation, exclusion from admission or denial of naturalization under the laws of the United States.”

The trial court asked defendant whether, “knowing all these things,” he still wished to plead guilty, and defendant answered, “Yes.”

¶ 4 The parties stipulated that if the case were to proceed to trial, Cook County Sheriff’s investigator John Riggio would have testified that on the evening of June 11, 2010, he was on patrol when he observed defendant driving at high speed in a construction zone. He stopped and spoke with defendant. During the conversation, Investigator Riggio smelled burnt and unburnt cannabis and defendant consented to a search of his vehicle. Investigator Riggio folded down the rear seat and found two clear plastic bags, each containing a large amount of a green leafy substance. He recovered the items, placed defendant under arrest, transported him to the Maybrook police station, and inventoried the bags. The parties further stipulated that a forensic

scientist at the Illinois State Police Crime Laboratory would have testified that the bags tested positive for cannabis. Finally, the parties stipulated that the officer and the scientist would have testified that a proper chain of custody was maintained at all times.

¶ 5 The trial court found that defendant understood the nature of the charge, the possible penalties, and his rights; that defendant had knowingly and voluntarily waived those rights; and that there was a factual basis for the plea. The court accepted defendant's guilty plea and sentenced him to an agreed-upon term of 24 months of probation.

¶ 6 Defendant did not file a motion to withdraw his guilty plea nor a direct appeal.

¶ 7 In 2012, defendant filed an attorney-drafted petition for postconviction relief, alleging that his guilty plea was involuntary because the trial court incorrectly and incompletely advised him as to the mandatory immigration consequences of his plea when it stated that he "may" face deportation, exclusion from admission, or denial of naturalization. Defendant also alleged that his trial counsel was ineffective for failing to advise him as to the mandatory consequence of deportation. Defendant asserted in the petition that had he been correctly advised, he would not have pleaded guilty, but rather, "would have insisted on a different agreement that would not render him deportable without any chance of relief, or he would have insisted on going to trial." Defendant attached his own supporting affidavit, making the same allegations.

¶ 8 Defendant also attached to the petition an affidavit executed by his trial attorney, James Geocaris. In the affidavit, Geocaris stated that when the State offered "straight probation" on the day of the plea hearing, "things progressed very fast that morning and I neglected to discuss in any detail that by the Petitioner accepting this deal he would be deportable and not have any chance of immigration relief once he was placed in deportation proceedings."

¶ 9 The State filed a motion to dismiss. Following argument, the trial court denied the motion and set the case for an evidentiary hearing. The State thereafter filed a motion to

reconsider. After hearing argument from the attorneys, the trial court granted the motion to reconsider and dismissed defendant's postconviction petition.

¶ 10 Defendant filed a motion to reconsider that dismissal or, in the alternative, for leave to file a first amended postconviction petition. Defendant asserted in the motion that the trial court erred in dismissing his petition for failing to allege prejudice. He also stated that in chambers following the initial granting of the evidentiary hearing, one of his postconviction attorneys, Thomas Glasgow,

“told the Court that he had his notes with him from his interviews with the Petitioner and that after speaking to the Petition [sic] and reviewing the police reports he believed the Petitioner had multiple legal defenses that should have been brought before the Court in the form of a Motion to Suppress on Fourth Amendment Search and Seizure grounds.”

Following a hearing, the trial court denied defendant's motion to reconsider and ruled that because the petition had been dismissed, it could not be amended. This appeal follows.

¶ 11 At the outset, we must address issues with respect to defendant's briefs filed with this court. Defendant has attached as an appendix to his brief a copy of the notice of appeal, but not an index to the record on appeal, nor a copy of the order appealed from, as required by Supreme Court Rule 342. See Ill. S. Ct. R. 342 (eff. Jan. 1, 2005). In a footnote in its brief, the State asks that we dismiss this appeal because of these deficiencies.

¶ 12 Supreme court rules are not mere suggestions; they are rules that must be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. “Where an appellant's brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal.” *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005). We recognize, however, that striking a brief

(or as the State requests, dismissing the appeal) for failure to comply with supreme court rules is a harsh sanction. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005); *People v. Thomas*, 364 Ill. App. 3d 91, 97 (2006). Accordingly, since the issue before us is straightforward and the brief is in all other respects adequate, we do not believe that a sanction as harsh as dismissal is warranted in this instance. We therefore deny the State's request to dismiss the appeal. See *Kuzmanich v. Cobb*, 276 Ill. App. 3d 634, 636 (1995).

¶ 13 On the merits, defendant contends that the trial court should not have dismissed his petition without an evidentiary hearing. He argues that the court erred in relying on *People v. Gutierrez*, 2011 IL App (1st) 093499, a case involving a successive postconviction petition, when finding that he had not demonstrated prejudice. He further argues that his trial counsel was ineffective because there was not overwhelming evidence against him and he “had multiple legal defenses that should have been brought before the court in the form of a motion to suppress on Fourth Amendment search and seizure grounds.” Defendant also asserts that his claim of ineffectiveness is supported by “Thomas Glasgow’s affidavit.”

¶ 14 The Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). This case involves the second stage of that process. At this stage, the granting of the State's motion to dismiss is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381. Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 15 The standard for determining whether a defendant was denied the effective assistance of counsel in entering a guilty plea is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hall*, 217 Ill. 2d at 334-35. To establish ineffective assistance of counsel under *Strickland*, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 687. If a claim of ineffectiveness may be disposed of on the ground of lack of sufficient prejudice, a reviewing court need not consider whether counsel's representation was constitutionally deficient. *Strickland*, 466 U.S. at 697.

¶ 16 In the context of a challenge to a guilty plea alleging ineffective assistance of counsel, an attorney's conduct is considered deficient if the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. Prejudice exists if there is a reasonable probability that absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Hall*, 217 Ill. 2d at 335. A bare allegation that the defendant would have pleaded not guilty and insisted on trial is, however, not enough to establish prejudice. *Hall*, 217 Ill. 2d at 335. Rather, such a claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. Whether counsel's deficient representation caused the defendant to plead guilty is a question that largely depends on predicting whether the defendant likely would have been successful at trial. *Hall*, 217 Ill. 2d at 336.

¶ 17 We need not determine whether counsel's performance here fell below an objective standard of reasonableness, because defendant made no substantial showing of prejudice. See *Strickland*, 466 U.S. at 697 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, a reviewing court is not required to address whether counsel's performance was

unreasonable). In his petition and supporting affidavit, defendant asserted that had counsel informed him of the immigration consequences of his plea, he would not have pleaded guilty. However, defendant did not claim that he is innocent of the charges brought against him or specifically articulate any kind of precise defense that he could have presented at a trial. Therefore, he failed to make a substantial showing of prejudice caused by counsel's alleged deficiencies and dismissal of his petition was proper. See *Hall*, 217 Ill. 2d at 335-36; see also *People v. Hughes*, 2012 IL 112817, ¶¶ 64-66 (characterizing the defendant's claim "that had he known of the possibility for civil commitment he would not have pled guilty because he thought that it would resolve the matter" as insufficient to articulate prejudice under *Strickland*); *People v. Pena-Romero*, 2012 IL App (4th), ¶¶ 17, 19 (finding the defendant's "bare allegation" that he would not have pleaded guilty had he known of the deportation consequences of his plea insufficient to establish prejudice).

¶ 18 We are mindful that in his appellate brief, defendant has hinted at a possible defense. He conclusorily asserts that "he had multiple legal defenses that should have been brought before the Court in the form of a motion to suppress on Fourth Amendment search and seizure grounds." Citing the "Thomas Glasgow Affidavit," defendant argues that a "highly experienced criminal defense attorney" is of the opinion that trial counsel should have raised objections to defendant's initial stop by the police, to his detention during the stop of his vehicle, and to the legality of the search of his vehicle. However, no affidavit executed by Thomas Glasgow exists in the record. If defendant is citing to his reference to Thomas Glasgow's opinions in the motion to reconsider the dismissal of his postconviction petition, characterizing those opinions as an "affidavit" is inaccurate and inappropriate.

¶ 19 More important than the lack of an affidavit in the record, defendant gives no factual detail regarding the substance of these proposed Fourth Amendment objections and does not

explain how or why they would have had a possibility of success. The stipulated evidence at the guilty plea hearing was that Investigator Riggio observed defendant speeding in a construction zone, stopped him, and, during an ensuing conversation, smelled burnt and unburnt cannabis. Defendant consented to a search of his vehicle, which resulted in Investigator Riggio finding two bags of a green leafy substance that later tested positive for cannabis. Defendant has not even offered a hint of any competing set of facts. Nor has defendant articulated any legal theory under the undisputed facts whereby this encounter would constitute anything other than a valid stop followed by a consensual search. Under these circumstances, we cannot find that a motion to suppress would have succeeded. Defendant has failed to articulate a plausible defense that could have been raised at trial. See *Hall*, 217 Ill. 2d at 335-36.

¶ 20 Defendant failed to make a substantial showing of ineffective assistance of counsel. Accordingly, the trial court's decision to grant the State's motion to dismiss the postconviction petition was proper.

¶ 21 Affirmed.