

No. 1-13-1185

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
Respondent-Appellee,)	Cook County
)	
v.)	00 CR 24437
)	
DAVID ALCANTAR,)	Honorable
)	Michael Brown,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing petitioner's postconviction petition where he made a substantial showing that he received ineffective assistance of trial and appellate counsel. An improper aggravating factor was considered at sentencing and trial counsel's failure to correct the error or raise it in the motion to reconsider sentence cannot be considered sound trial strategy. Moreover, it is not clear from the record that consideration of the improper factor was insignificant. The matter is remanded for resentencing instead of a third-stage evidentiary hearing as there remain no factual issues to be resolved regarding petitioner's constitutional claim.

¶ 2 Following a jury trial, petitioner-appellant David Alcantar was convicted of four counts of reckless homicide and ultimately sentenced to 18 years in prison. Alcantar's conviction

and sentence were affirmed on direct appeal. *People v. Alcantar*, Case No. 1-04-1005 (2005) (unpublished order under Supreme Court Rule 23). Alcantar's postconviction petition was dismissed at the second stage of proceedings. On appeal, Alcantar contends that he made a substantial showing that his trial counsel was ineffective for failing to correct and challenge the sentencing judge's reliance on a material misapprehension in aggravation, namely a nonexistent arrest warrant for driving under the influence (DUI), and that his appellate counsel was ineffective for failing to argue on appeal that this reliance entitled him to a new sentencing hearing. He further claims that his postconviction counsel provided unreasonable assistance in failing to argue that ineffective assistance of trial counsel claims may be raised for the first time in a postconviction proceeding where the defendant was represented by the same attorney at trial and on direct appeal. Finding merit in Alcantar's arguments, we reverse the judgment of the circuit court of Cook County and remand for resentencing.

¶ 3

BACKGROUND

¶ 4

At approximately 2 a.m. on September 18, 2000, Alcantar was driving westbound on the 4200 block of West Chicago Avenue at a high rate of speed when he ran into the rear end of a semi-trailer that was legally parked on the right side of the street with its flashers on. The roof of the car was torn off and three individuals who were riding in the car, Alcantar's brother, his best friend and another friend, were ejected from the car and killed. Alcantar and a fourth passenger had to be extricated from the vehicle and were taken to the hospital, where that passenger also died.

¶ 5

Two police officers on the scene observed that Alcantar's eyes were bloodshot, his speech was slurred, and he smelled strongly of alcohol. While being treated in the ambulance, Alcantar told the paramedics and a police officer that he had been drinking and smoking

marijuana that night. He was arrested shortly thereafter and charged with multiple counts of reckless homicide.

¶ 6 The evidence adduced at trial¹ established that Alcantar, who was 19 years old, had recently purchased the car he was driving from his brother-in-law. Alcantar had never obtained a driver's license and did not have vehicle insurance. The speed limit on Chicago Avenue at the location of the crash was 30 mph. Although Alcantar testified that he did not know how fast he was driving (acknowledging that maybe it was 50 mph) and he had only had a few beers and no marijuana, police officers and medical personnel who treated Alcantar both in the ambulance and at the hospital testified that Alcantar told them he had been going 100 mph shortly before the crash, had been drinking "tequila and Cokes" from 8 p.m. to 12:30 a.m., and had smoked marijuana that night.

¶ 7 A toxicologist testified that Alcantar's blood alcohol content approximately one hour after the crash was .10, still over the legal limit of .08. Using mathematical formulas based on both fast and slow metabolism rates, the toxicologist determined that Alcantar's blood alcohol content at the time of the accident was between .108 and .116. A urine sample was also taken and no marijuana was detected, but the toxicologist explained there is a lag time for the absorption of marijuana into the urine. A bag containing marijuana was recovered from the dashboard of the vehicle on the driver's side.

¶ 8 The jury found Alcantar guilty of four counts of reckless homicide. Alcantar's motion for a new trial was denied and the matter proceeded to sentencing. In addition to the pre-sentence investigation report (PSI) prepared by court services, Alcantar's trial counsel also

¹ We will limit our recitation of the facts to those relevant to the issues raised in this postconviction appeal.

submitted a 13-page "Memorandum of Mitigation," detailing Alcantar's family history, educational background, employment history and medical history. The memorandum contained various attachments, including several letters of reference and supporting documentation. According to the PSI, Alcantar had no juvenile adjudications or adult convictions. The PSI listed one pending case with a charge of "No Valid Driver's License," and a notation that a warrant was issued on September 25, 2000, in DuPage County. Attached to the PSI was confirmation that the warrant was issued for failure to appear in court on the driver's license violation.

¶ 9 At the sentencing hearing, the State pointed out that although Alcantar did not have any prior convictions, the record showed that on at least one other occasion Alcantar drove a car without a valid driver's license. The State asked for the maximum of 28 years based on the magnitude of the loss of life.

¶ 10 The trial court noted that Alcantar did not have a criminal record but then stated:

"[H]owever one thing that bothers me is that there was a warrant issued a few days after the arrest on September 25th in DuPage County because the defendant was arrested for driving under the influence, driving without a valid driver's license at that time. Yet, he continued to drive and not only did he continue to drive without a valid license, but, he continued to drive under the influence of alcohol."

Defense counsel did not challenge these statements. The trial judge went on to explain that he must also consider Alcantar's actions in driving at a high rate of speed and losing control of the automobile, resulting in the loss of four lives. The trial court noted that Alcantar's conduct could have also caused the loss of more lives if other cars had been on the street at the time or if people had been walking in the area. After discussing several factors in

mitigation, the trial court concluded that the maximum sentence of 28 years was not appropriate but that a substantial sentence was necessary. Alcantar was sentenced to 20 years in prison.

¶ 11 Alcantar filed a motion to reconsider sentence, contending the sentencing judge failed to take into consideration his rehabilitative potential. At the hearing on the motion to reconsider, defense counsel pointed out that Alcantar had no prior DUI convictions and that greater sentences were typically imposed on individuals convicted of reckless homicide who had prior DUI convictions. However, defense counsel did not raise the issue of the trial court's misstatement regarding the issuance of a DUI arrest warrant on September 25. The sentencing judge said he would like a week to consider the arguments. When the parties reconvened a week later, the judge simply stated, "I think I'll take a couple of years off of his sentence" and reduced Alcantar's sentence by 2 years, to 18 years in prison.

¶ 12 Alcantar's trial counsel also handled his direct appeal. Alcantar raised numerous issues on direct appeal, including a challenge to his sentence as excessive, again arguing that the trial court failed to adequately consider his rehabilitative potential. No issue was raised regarding the trial court's statement at sentencing regarding an additional DUI arrest warrant. This court affirmed Alcantar's conviction and sentence, noting that a sentencing judge is not required to give greater weight to a defendant's potential for rehabilitation than to the seriousness of the crime, and observing that Alcantar's actions resulted in the deaths of four young men. *People v. Alcantar*, Case No. 1-04-1005, slip op. at 7-8 (2005) (unpublished order under Supreme Court Rule 23).

¶ 13 Alcantar filed a *pro se* postconviction petition on September 27, 2006. The petition alleged, *inter alia*, that Alcantar's fundamental right to liberty was impinged by trial counsel's failure to correct and challenge the trial court's consideration of erroneous information when

imposing sentence, namely, that he had an outstanding DUI warrant that was issued days after his arrest for reckless homicide. The petition further alleged that Alcantar's appellate counsel was ineffective for failing to raise this issue on appeal.

¶ 14 On August 22, 2011, postconviction counsel filed a supplemental petition, adopting Alcantar's petition and further alleging ineffective assistance of trial counsel for failing to consult with Alcantar about or correct the court's misapprehension regarding the DUI arrest warrant. The State filed a motion to dismiss the petition on January 20, 2012.

¶ 15 On March 21, 2013, at a hearing on the motion to dismiss, Alcantar's counsel argued that even though Alcantar's sentence had been reduced by two years, the sentencing judge had still been under the misapprehension at the time that Alcantar had an outstanding DUI warrant.

¶ 16 In announcing its ruling, the trial court began by noting that other evidentiary objections raised in the petition did not rise to the level of a constitutional violation but were the result of trial strategy and did not prejudice Alcantar. Turning to the sentencing issue, the court stated:

"Whether or not there was a DUI warrant out in DuPage County, again, I don't believe is a constitutional issue. It may be a statutory right to make sure that you have an accurate PSI, but I don't know that it [rises] to the level of a constitutional violation. It could have been raised in the Appellate Court, but Counsel chose not to, and whether or not the sentence was proper again was not a constitutional issue, it is more of a statutory right. These are issues that in my view did not necessarily result in prejudice to the Defendant. The Defendant was sentenced within the statutory range of sentencing based on the law as it existed at the time."

The State's motion to dismiss the petition was granted and Alcantar timely filed this appeal.

¶ 17

ANALYSIS

¶ 18

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2006)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there was a substantial denial of a federal or state constitutional right in the proceeding which resulted in his or her conviction. 725 ILCS 5/122–1(a) (West 2006); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Postconviction proceedings may consist of up to three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court is required to dismiss petitions that are frivolous and patently without merit. *Harris*, 224 Ill. 2d at 126. A petition must present "the gist of a constitutional claim" to survive beyond the first stage. *Id.* At stage two, the circuit court may appoint counsel for the defendant and the State may move to dismiss the petition. *Id.*

¶ 19

At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Id.* A petition that is not dismissed at the second stage proceeds to the third stage where the circuit court conducts an evidentiary hearing. *Id.* At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. At the second stage of the proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Id.* The circuit court does not engage in fact-finding or credibility determinations at the dismissal stage; rather, such determinations are made at the evidentiary stage. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Thus, the decision to grant a second stage motion to dismiss is a matter of law and subject to *de novo* review. *Id.* at 387-88; *Pendleton*, 223 Ill. 2d at 473.

¶ 20 Alcantar contends on appeal that his postconviction petition should not have been dismissed at the second stage where he made a substantial showing that trial counsel was ineffective for failing to correct the sentencing judge's reliance on a non-existent and prejudicial aggravating factor. Alcantar further contends that he made a substantial showing that appellate counsel was ineffective for failing to raise this issue on appeal.

¶ 21 Ineffective assistance of counsel claims are measured against the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, a defendant must show both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 687-88, 694; see also *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 22 To establish that trial counsel's performance was deficient, a defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). A reviewing court is highly deferential to trial counsel on matters of trial strategy and must make every effort to consider counsel's performance from his perspective at the time, rather than in hindsight. *People v. Perry*, 224 Ill. 2d 312, 344 (2007). However, because a defendant must satisfy both prongs of the *Strickland* test to prevail on an ineffective assistance claim, a reviewing court need not consider whether counsel's performance was deficient before determining whether defendant was so prejudiced by the alleged deficiency that he is entitled to a new trial. *Perry*, 224 Ill. 2d at 342. The *Strickland* analysis also governs claims of ineffective assistance of appellate counsel. *People v. Wilson*, 191 Ill. 2d 363, 380 (2000).

¶ 23 The version of the reckless homicide statute under which Alcantar was charged and convicted provided that the sentencing range for a person who was under the influence of alcohol and killed two or more people was 6 to 28 years. 720 ILCS 5/9-3(e-5) (West 2000). The comments of the sentencing judge clearly indicated that all factors in mitigation and aggravation had been considered and the judge emphasized that four people lost their lives as a result of Alcantar's actions and more people could have been killed if anyone else had been on the street at the time. Moreover, there is a presumption that a sentence within the statutory guidelines is correct. *People v. Grimes*, 379 Ill. App. 3d 905, 911 (2008). Thus, without the judge's misapprehension related to the outstanding warrant, we would conclude, as this court did on direct appeal, that a sentence at the higher end of the statutory range was not excessive.

¶ 24 However, the sentencing judge did not merely refer in passing to the warrant as one for a DUI rather than driving without a license (a comment that might be attributable to an inadvertent misstatement), but prefaced his comments with the observation that it bothered him that Alcantar *not only* continued to drive without a license but also continued to drive under the influence of alcohol after September 18. But Alcantar was arrested on September 18, was taken into custody after his release from the hospital, and remained in custody until trial. Thus, it is apparent that the PSI's reference to a warrant issued on September 25 related to a citation for driving without a license that Alcantar received before September 18 and the warrant was issued when Alcantar failed to appear in court on September 25. The sentencing judge evidently believed that Alcantar both drove and drove under the influence after September 18, facts which, if true, would be serious aggravating factors. Even if the sentencing judge misspoke and meant to convey that he believed Alcantar was cited for driving under the influence before September 18 and then continued to drive under the

influence at the time of the accident, this fact, if true, would also be considered an aggravating factor.

¶ 25 The State points out that immediately after making the comments related to the outstanding warrant, the sentencing judge acknowledged that Alcantar did not have any prior DUI convictions. If Alcantar did in fact have a prior conviction for a DUI, it would have justified a higher sentence within the statutory range. See *People v. Robinson*, 368 Ill. App. 3d 963, 977 (2006) (prior DUI relevant as factor in aggravation at sentencing). See also 625 ILCS 5/11-501(d)(2)(B)-(E) (West 2012) (providing for higher sentencing ranges for third, fourth, fifth and sixth DUI violations). But we do not agree with the State that the sentencing judge's acknowledgment that there were no prior DUI convictions indicates that he did not improperly consider the outstanding warrant as an aggravating factor. Indeed, the fact that the acknowledgement came immediately after the erroneous comments related to the warrant merely indicates that although the judge was aware there were no prior DUI convictions, he considered the outstanding warrant as evidence that Alcantar had driven under the influence of alcohol on at least one other occasion.

¶ 26 "[W]here a trial court mentions an improper or incorrect factor in sentencing, we must reverse and remand for the trial court to determine whether the improper factor affected the sentence defendant received unless we can conclude from the record that the weight placed on such an improperly considered aggravating factor was so insignificant it resulted in no increase in defendant's sentence." (Internal quotation marks omitted.) *People v. Ross*, 303 Ill. App. 3d 966, 984 (1999). See also *People v. Conover*, 84 Ill. 2d 400, 405 (1981) (remanding for resentencing because the reviewing court was unable to determine how much weight was given to an improperly considered aggravating factor); *People v. Holloman*, 304

Ill. App. 3d 177, 185 (1999) (remanding for resentencing where trial court specifically referred to an erroneously listed conviction in the PSI).

¶ 27 We note that although Alcantar's *pro se* postconviction petition states that a DUI warrant was listed in the PSI and his postconviction counsel argued the same at the hearing on the State's motion to dismiss, the supplemental petition filed by postconviction counsel correctly notes that the PSI contained only the outstanding charge for driving without a license and the attached criminal history denoted that the September 25 warrant was issued for "failure to appear" with regard to that charge.

¶ 28 Nothing in the record supports the sentencing judge's statement that Alcantar not only continued to drive without a license but also continued to drive under the influence of alcohol. Moreover, the State specifically noted at sentencing that although Alcantar did not have any prior DUIs, he had driven *without a license* on at least one other occasion. Thus, there was nothing in the record to explain how the sentencing judge could have reached the erroneous conclusion that Alcantar had driven *under the influence of alcohol* on more than one occasion. Further, we cannot determine from the record how much weight was given to this factor but must presume that it influenced the sentence imposed because the sentencing judge specifically mentioned it as "one thing that bother[ed]" him.

¶ 29 The State argues that Alcantar has not shown prejudice because Alcantar's motion to reconsider his sentence was, in fact, successful. At the hearing on the motion to reconsider sentence, trial counsel argued that Alcantar's sentence should be reduced because the judge had failed to consider his rehabilitative potential. As part of this argument, trial counsel pointed out that higher sentences were typically imposed on individuals with prior DUI convictions, but failed to note that the sentencing judge had mistakenly stated that Alcantar had an outstanding DUI warrant. After considering the parties' arguments, the court reduced

the sentence by two years, but stated no reason for the reduction. Therefore, we cannot assume that the reduction in sentence reflects any recognition of the improper aggravating factor considered at the sentencing hearing and must presume the reduction in sentence was based on trial counsel's arguments related to Alcantar's rehabilitative potential.

¶ 30 We cannot conclude from the record before us that the trial court's consideration of the improper aggravating factor was insignificant. Similarly, because the error was not raised in the motion to reconsider sentence and no reason was given for the reduction in sentence, we cannot conclude that the reduction reflected any awareness of the erroneous aggravating factor. Therefore, Alcantar has made a substantial showing that trial counsel's failure to challenge this error at sentencing or raise it in the motion to reconsider sentence is sufficient to undermine confidence in the sentence imposed.

¶ 31 Because Alcantar has satisfied the prejudice prong under *Strickland*, we must consider whether trial counsel's representation fell below an objective standard of reasonableness. Although there is a strong presumption that trial counsel's action or inaction was the result of sound trial strategy, there is nothing in the record to support an argument that the failure to call this error to the court's attention either at sentencing or in the motion to reconsider sentence was a strategic decision. Indeed, in arguing the motion to reconsider sentence, trial counsel pointed out that sentences at the higher end of the sentencing range, even in incidents involving multiple victims, were usually imposed on individuals who had more than one DUI. Counsel was undoubtedly aware that the trial judge's belief that Alcantar had an outstanding DUI warrant would have a negative impact on the sentence imposed. Thus, there is no explanation for trial counsel's failure to correct the trial court's erroneous conclusion that Alcantar (1) drove after September 18, (2) drove under the influence of alcohol after September 18 or, in the alternative, on more than one occasion, (3) had another DUI citation,

and (4) was wanted on a warrant on a DUI charge. Therefore, Alcantar has made a substantial showing that trial counsel was ineffective.

¶ 32 Similarly, Alcantar has made a substantial showing that he received ineffective assistance of appellate counsel because this issue was not raised in his direct appeal. As previously noted, if a reviewing court cannot conclude from the record that the weight placed on an improperly considered aggravating factor was so insignificant it resulted in no increase in defendant's sentence, remand for resentencing is required. *Supra* ¶ 25. Had this issue been raised on appeal, it is likely that it would have prompted a remand for resentencing. Thus, the trial court erred in dismissing Alcantar's postconviction petition.

¶ 33 Ordinarily, we would remand for a third-stage evidentiary hearing. However, this issue does not involve any factual dispute for which an evidentiary hearing would be required. We cannot conclude from the record that the weight placed on the improperly considered aggravating factor was so insignificant it resulted in no increase in defendant's sentence; therefore, Alcantar is entitled to a new sentencing hearing. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we vacate Alcantar's sentence for reckless homicide and remand for resentencing. See *People v. Wilburn*, 338 Ill. App. 3d 1075, 1078 (2003) (remanding for resentencing where sentence was void and there was no factual dispute to be resolved at a third-stage evidentiary hearing).

¶ 34 **CONCLUSION**

¶ 35 Because Alcantar made a substantial showing that he received ineffective assistance of trial and appellate counsel for failure to raise the issue of the trial court's consideration of an improper aggravating factor at sentencing, and because there is no factual dispute to be

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resolved at an evidentiary hearing, we reverse the trial court's dismissal of Alcantar's postconviction petition, vacate Alcantar's sentence, and remand for resentencing.

¶ 36 Reversed and remanded.