2015 IL App (5th) 130396-U

NO. 5-13-0396

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 07-CF-1435
	)	
HIEN Q. VO,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant's postconviction petition failed to make a substantial showing of a constitutional violation, the circuit court properly dismissed the petition, and the State Appellate Defender's motion to withdraw as counsel on appeal is granted where there is no meritorious argument to the contrary.

¶ 2 The defendant, Hien Q. Vo, appeals the second-stage dismissal of his petition for postconviction relief. The Office of the State Appellate Defender (OSAD) was appointed to represent him. The OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and

granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant did not file a response. We considered the OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant the OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of St. Clair County.

¶ 3 BACKGROUND

¶ 4 On April 21, 2009, the defendant pleaded guilty to unlawful possession of cannabis with intent to deliver. 720 ILCS 550/5(g) (West 2008). The negotiated sentence was for eight years' incarceration and various fines. During the proceedings the following colloquy occurred.

"THE COURT: Mr. Vo, your age, please?

THE DEFENDANT: Thirty.

THE COURT: Do you read and write?

THE DEFENDANT: Yes, sir.

THE COURT: Taking any drug or medication currently?

THE DEFENDANT: Allergy medicine.

THE COURT: Does it affect your ability to understand what we're doing?

THE DEFENDANT: No.

THE COURT: You have been represented by Mr. Kilgore. Have you had enough time to talk to him about your case?

THE DEFENDANT: Yes, sir.

THE COURT: You have been charged with unlawful cannabis, trafficking, and unlawful possession with the intent to deliver.

Do you have any questions about the charges against you?

THE DEFENDANT: No, sir.

THE COURT: If you had been found guilty after a jury trial, Mr. Vo, on each one of those cases, I could have sentenced you to prison for a determinate period of time between six and thirty years, followed by three years of mandatory supervised release. Probation is not an option. You could have been fined up to $25,000–

I also could have run those sentences together or one right after the other, so that it's possible that your maximum sentence could have been as many as sixty years.

Do you have any questions about that?

THE DEFENDANT: No–Oh, yes, sir. What's that twenty-five thousand fine? I didn't hear you, I'm sorry.

THE COURT: What–If you had gone to trial and had been found guilty, those are the options that I would have had to sentence you. I will abide by the negotiations that you and your attorney have entered into, but I need to know whether you understand what could have happened to you had you gone to trial.

THE DEFENDANT: Yes, sir.

THE COURT: So, do you have any questions about the range of sentencing?

THE DEFENDANT: No.

THE COURT: By pleading guilty, Mr. Vo, you will be giving up some constitutional rights available to you. They are as follows:

You have the right to plead not guilty, have a trial, be represented by your attorney at that trial and choose if your trial would be held before a judge or a jury.

Whichever you chose, the State would then call witnesses to testify against you. You have the right to have your attorney confront and cross examine those witnesses, call witness [*sic*] for your case and subpoena them.

You have the right to remain silent and the right to require the State to prove you guilty beyond a reasonable doubt.

Do you understand that by pleading guilty, you'll waive those rights and there will not be a trial.

THE DEFENDANT: Yes. Yes, sir.

THE COURT: Do you have any questions about what your rights are?

THE DEFENDANT: I'm sorry, what?

THE COURT: Do you have any questions about the rights you are giving up?

THE DEFENDANT: No, sir.

THE COURT: You heard the plea negotiations. Except for the promise of what your sentence will be, has anybody made any other promise to you or threatened you to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Factual basis?

MS. SANTELLI [prosecutor]: Your honor, if this case were to proceed to a trial, the People of the State of Illinois would prove beyond a reasonable doubt through the testimony of officer Jay Wilkinson, last name spelled W-I-L-K-I-N-S-O-N, of the Fairmont City Police Department that on Monday, December 3rd, 2007, at approximately 22:10 hours, he observed a [*sic*] RV that was driving north on 55/70. He noticed that the RV did not have a rear registration plate light, and he also noticed the RV drifted over the fog line and began to drive almost completely on the shoulder for about an eighth of a mile.

He conducted a stop on the vehicle; and when he approached the driver, who was a co-defendant in this case, he noticed a strong smell of marijuana coming from the vehicle.

At that point, he contacted Sergeant Frank–Frank Moore, who did a dog sniff around the vehicle. They located one, two, three, four, five–six bags of cannabis inside the vehicle.

The defendant was taken into custody at that time.

The cannabis was sent to the lab, and it tested positive for five thousand three hundred and forty grams of cannabis.

THE COURT: Excuse me. Mr. Kilgore [defense attorney], do you agree that the State has witnesses who would testify as indicated?

MR. KILGORE: I do, Your Honor.

THE COURT: Mr. Vo, I'm going to ask you in a minute how you plead. But before I do that, I want to go over one thing with you.

Your attorney has asked that I postpone the sentencing so that you have time to get your affairs together before you go to the Department of Corrections.

THE DEFENDANT: Yes, sir.

THE COURT: We'll give you that date before you leave here today.

As long as you're back here on that date, then I will concur in your attorney's negotiations and set you as–sentence you as has been negotiated.

If you don't show up, then I could sentence you to the maximum.

THE DEFENDANT: Yes, sir.

THE COURT: So remember that question you said about twenty-five thousand dollars. If you don't–

THE DEFENDANT: Oh, yeah, I'm going to come back for sure."

¶ 5 On May 27, 2009, the court sentenced the defendant to eight years' incarceration.

¶ 6 On June 11, 2009, the Department of Homeland Security commenced removal proceedings against defendant. The Department alleged that defendant was: "a native of Vietnam and a citizen of Vietnam"; "admitted to the United States on or about April 18, 1990"; convicted of unlawful possession of cannabis with the intent to deliver; and sentenced to eight years' incarceration.

¶ 7 On August 29, 2011, the defendant filed a *pro se* petition for postconviction relief. He alleged: he was not told of the immigration consequences of his plea; he was told he could not ask the judge to be sentenced to "bootcamp"; his attorney did not move

to suppress the illegal search of his vehicle; and he was not familiar with the laws of the United States and should have been given an interpreter. In support of his petition he attached the notice to appear he received in the removal proceedings and a copy of his mittimus.

¶ 8 Subsequently, the circuit court entered an order stating that the defendant had "alleged the gist of a constitutional violation." The court appointed counsel to assist defendant. After appointment of counsel, the defendant filed an amended petition for postconviction relief. The petition alleged violations of the defendant's constitutional rights for the following reasons: the court and trial counsel failed to inform the defendant of the immigration consequences of his guilty plea (automatic deportation); despite his lack of comprehension of English, he was not provided an interpreter; and he received ineffective assistance of counsel because his trial counsel did not attempt to suppress the search of his vehicle.

¶ 9 The State filed a motion to dismiss. The court held a hearing on that motion. Ultimately the circuit court granted the motion to dismiss. The court held: at the time of the plea, there was no constitutional requirement that the defendant be advised of the possible immigration consequences of his plea; the record did not reflect any failure to communicate on the part of the defendant; and finally, the defendant failed to show that filing a motion to suppress the search of the RV would have led to a different result at trial.

¶ 10 The defendant filed a timely notice of appeal. The court appointed the OSAD to represent the defendant in this appeal. The OSAD filed a *Finley* motion arguing that there are no meritorious issues to appeal and asking to withdraw.

¶ 11 ANALYSIS

¶ 12 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage the court determines if the petition presents a gist of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition for failing to state the gist of a constitutional violation, the petition moves to second-stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage of the proceeding, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. All facts not rebutted by the record are

accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381. We review the dismissal of a postconviction petition *de novo*. *Id.* at 387-89.

¶ 13 We address each of the allegations of the defendant's amended petition in turn.

¶ 14 I. Failure to Advise of Immigration Consequences

¶ 15 The defendant alleged that his constitutional rights were violated because both his attorney and the court failed to inform him of the immigration consequences of his guilty plea. We now review the constitutional standards associated with guilty pleas and ineffective-assistance-of-counsel claims.

¶ 16 "The foundations of a valid guilty plea are the defendant's voluntary admission in open court that he committed the acts with which he is charged and his knowing consent that judgment may be entered without trial." *People v. Huante*, 143 Ill. 2d 61, 69 (1991) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010). Because a guilty plea is a waiver of constitutional rights, it must be made voluntarily and intelligently. *People v. Stroud*, 208 Ill. 2d 398, 403 (2004).

¶ 17 An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim.

First, the defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Id.* at 525. Second, the defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* In *People v. Tate*, 2012 IL 112214, the Illinois Supreme Court stated that at the second stage of postconviction proceedings the petitioner must " 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670. It is objectively unreasonable if an "attorney fail[s] to ensure that [a] defendant enter[s] [a] plea voluntarily and intelligently." *Huante*, 143 Ill. 2d at 69. The question here is whether the defendant's counsel ensured that the defendant entered his plea intelligently.

¶ 18 At the time of the defendant's guilty plea, Illinois courts distinguished between direct and collateral consequences of a guilty plea. *People v. Delvillar*, 235 Ill. 2d 507, 520-21 (2009). Direct consequences were considered those consequences that the trial court had the authority to impose. *Id.* All other consequences were considered collateral. *Id.* And a defendant needed only to be informed of the direct consequences of his plea in order to enter the plea knowingly. *Id.* at 520. At that time, the majority of state and

federal appellate courts employed this distinction. *Chaidez v. United States*, ___ U.S. ___, ___, 133 S. Ct. 1103, 1109 (2013). In Illinois, and the majority of the country, immigration consequences of a guilty plea were considered collateral. *Id.* at ___, 133 S. Ct. at 1108-09; *Delvillar*, 235 Ill. 2d at 521. Therefore, at the time the defendant entered his guilty plea, there was no constitutional requirement that he be informed of the immigration consequences of his guilty plea. *Id.*

¶ 19 Subsequent to the defendant's entering his plea, the United States Supreme Court held that the failure to advise a defendant of the immigration consequences of a guilty plea is objectively unreasonable assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356, 368-71 (2010). The decision in *Padilla* announced a new rule, and the United States Supreme Court held in *Chaidez* that the *Padilla* rule does not apply to defendants whose convictions became final prior to *Padilla*. *Chaidez*, ___ U.S. at ___, 133 S. Ct. at 1113.

¶ 20 The rule announced in *Padilla* does not apply to the defendant. At the time of his conviction it was not objectively unreasonable under *Strickland* to fail to inform the defendant of the immigration consequences of his guilty plea.

¶ 21 In regard to the trial court's failure to admonish the defendant of the immigration consequences of his guilty plea, we note that section 113-8 of the Code of Criminal Procedure of 1963 required the court to advise the defendant that a guilty plea may have adverse immigration consequences. 725 ILCS 5/113-8 (West 2008). It is a statutory requirement, not a constitutional right. *Delvillar*, 235 Ill. 2d at 521-22. Therefore, it cannot be the basis for relief under the Act.

¶ 22 As counsel's failure to advise the defendant of the immigration consequences of his plea was not constitutionally deficient, and the circuit court's failure to inform the defendant that it was possible there would be immigration consequences of his guilty plea was not a violation of a constitutional right, the circuit court properly dismissed the claim in the defendant's petition that he was not advised of the immigration consequences of his plea.

¶ 23 II. Failure to Provide an Interpreter

¶ 24 The second issue raised in the defendant's postconviction petition states: "[i]n spite of [the defendant's] clear limitations with regard to comprehension of the English language, no interpreter was provided to him at any stage of the proceedings[.]" The efendant does not attempt to allege any particular constitutional right that was violated, and the affidavit submitted by the defendant does not provide any facts related to this allegation. He left the court to divine a violation of his constitutional rights.

¶ 25 As noted above, a guilty plea is constitutionally valid if it is made voluntarily and intelligently. The defendant's petition makes no allegations that his plea was not voluntary or intelligently made. The portion of the transcript of the plea hearing included above leaves no doubt that the defendant pleaded guilty intelligently. We highlight only a couple of portions of that transcript here. When asked his age by the court, the defendant responded with his age. When asked if he was taking any drugs or medication, the defendant responded that he was taking allergy medication. While explaining to the defendant the sentence he could have received if he had gone to trial, the trial court mentioned a possible $25,000 fine. When asked if he had any questions about the

possible sentence, the defendant responded by asking for clarification of the $25,000 fine. The court granted a request by the defendant to postpone his sentencing until he could get his affairs in order. While the court was explaining the possible consequences if the defendant did not return on the date set for sentencing, the defendant cut off the court and stated: "Oh, yeah, I'm going to come back for sure." There is no doubt that the defendant understood English sufficiently for his guilty plea to be intelligently made. With regard to the voluntariness requirement, the trial court asked the defendant if anyone had threatened him to plead guilty, or if he had been promised anything other than the negotiated sentence that was part of the plea. The defendant responded, "No, sir."

¶ 26 The record directly rebuts the conclusory statement made in the petition regarding the need for an interpreter. Therefore, the trial court properly dismissed the claim.

¶ 27 III. Ineffective Assistance of Counsel

¶ 28 The defendant claims he received ineffective assistance of counsel because his trial counsel did not move to suppress the search that found marijuana. We previously discussed the two-prong *Strickland* analysis of ineffective-assistance-of-counsel claims: objectively deficient performance and prejudice. To prevail on a prejudice claim in this context, the defendant "must show that the unargued suppression motion was meritorious and that there is a reasonable probability that the verdict would have been different without the excludable evidence." (Internal quotation marks omitted.) *People v. Bailey*, 232 Ill. 2d 285, 289 (2009). The defendant failed to plead any facts in support of this allegation. He provided nothing to show why the search was improper–why the motion

would have been meritorious. In fact, the only recitation of the facts of the search in the record is found in the factual basis the State provided at the guilty plea hearing.

¶ 29 The United States and Illinois Constitutions prohibit unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. Illinois courts interpret the search and seizure provision of the Illinois Constitution in limited lockstep with the fourth amendment of the United States Constitution. *People v. Caballes*, 221 Ill. 2d 282, 331 (2006); see *People v. Smith*, 214 Ill. 2d 338, 349 (2005), *abrogated on other grounds by People v. Luedemann*, 222 Ill. 2d 530, 548 (2006); *People v. Ramsey*, 362 Ill. App. 3d 610, 614 (2005) (collecting cases). A seizure occurs during a vehicle stop made by a police officer. *People v. Jones*, 215 Ill. 2d 261, 270 (2005). It is not unreasonable to stop a vehicle when an officer observes a traffic violation. *People v. Ramsey*, 362 Ill. App. 3d 610, 615 (2005) (quoting *Whren v. United States*, 517 U.S. 806, 810 (1996)).

¶ 30 According to the record, an officer observed an RV that had no rear registration plate light (a violation of section 12-201(c) of the Illinois Vehicle Code (625 ILCS 5/12-201(c) (West 2008))), and that crossed the fog line and drove almost completely on the shoulder for almost an eighth of a mile (a violation of section 11-709(a) of the Illinois Vehicle Code (625 ILCS 5/11-709(a) (West 2008))). The officer observed two traffic violations, and he properly stopped the vehicle in which the defendant was a passenger.

¶ 31 A warrantless search is not unreasonable "where a trained and experienced police officer detects the odor of cannabis emanating from a defendant's vehicle." *People v. Stout*, 106 Ill. 2d 77, 88 (1985). In this case, the record shows that the officer "noticed a strong smell of marijuana coming from the vehicle." Therefore, he had probable cause to

search the vehicle at that point. Nowhere in his petition did the defendant assert that the officer was not a trained and experienced officer. And it is the defendant's burden to provide evidence that, taken as true, makes a substantial showing of a constitutional violation. The defendant did not show that a motion to suppress would have been meritorious. Therefore, the defendant did not receive ineffective assistance of counsel. The court properly dismissed this claim.

¶ 32 CONCLUSION

¶ 33 Because the constitutional violations alleged by the defendant are either not, as a matter of law, constitutional violations, or are rebutted by the record, the motion of the OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of St. Clair County is affirmed.

¶ 34 Motion granted; judgment affirmed.