

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).

2016 IL App (3d) 140368-U

Order filed November 8, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

| | |
|--|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS,) | Appeal from the Circuit Court |
| Plaintiff-Appellee,) | of the 14th Judicial Circuit, |
| v.) | Whiteside County, Illinois. |
| MIGUEL A. TAMAYO,) | Appeal No. 3-14-0368 |
| Defendant-Appellant.) | Circuit No. 09-CF-281 |
| | Honorable |
| | Stanley B. Steines |
| | Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held:* Trial court properly dismissed defendant’s postconviction claim of ineffective assistance of counsel where it was rebutted by record. Trial court erred in dismissing defendant’s postconviction claim of deficient translation where defendant, a Spanish-speaker, alleged that translator did not fully interpret what was said during trial.

¶ 2 Defendant Miguel Tamayo, whose native language is Spanish, was charged with first degree murder, mob action, and aggravated battery. Prior to trial, the State offered defendant a plea deal, which he refused. A bench trial was held with an interpreter. Following the trial, the

court found defendant guilty of all charges and sentenced him to 20 years' imprisonment. Defendant filed a postconviction petition alleging ineffective assistance of counsel and denial of his right to a fair trial. At the second stage of postconviction proceedings, the court dismissed defendant's petition. Defendant appeals, arguing that he was entitled to an evidentiary hearing on his claims that (1) his attorney was ineffective for failing to adequately explain the State's plea offer to him, and (2) he was denied his right to a fair trial because the interpreter did not accurately translate the trial proceedings. We affirm the trial court's dismissal of defendant's ineffective assistance claim but reverse its dismissal of defendant's deficient translation claim and remand for an evidentiary hearing on that claim.

¶ 3

FACTS

¶ 4

Defendant's native and primary language is Spanish. On June 20, 2009, defendant was arrested and charged with first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)), mob action (720 ILCS 5/25-1(a)(1) (West 2008)), and aggravated battery (720 ILCS 5/12-4(a) (West 2008)). At the time of defendant's arrest, defendant spoke very little English. In July 2009, the court entered an order appointing an interpreter for defendant after determining that he was "incapable of understanding or expressing himself *** in the English language." Pursuant to that order, an interpreter was always present when defendant appeared in court.

¶ 5

In October 2009, the State offered defendant a plea deal. Pursuant to the deal, defendant would plead guilty to "involuntary homicide" and aggravated battery, which have lesser sentences than first degree murder and would entitle him to day-for-day credit for which he would not be eligible if convicted of murder. Defendant's trial counsel explained the plea deal to defendant, and defendant rejected it.

¶ 6 At pre-trial proceedings in January 2010, defendant stated that he “sometimes” does not understand English. He stated that he wanted the interpreter at his trial to translate “every single word that is said” into Spanish for him. At a hearing two days later, defendant waived his right to a jury trial.

¶ 7 Defendant’s case proceeded to a bench trial. At trial, defendant testified in English. He testified that when he first met defense counsel in June 2009, his English was not “very good” but had become “very good” by the time of trial. An interpreter translated the trial proceedings to defendant in Spanish.

¶ 8 Following the trial, the court found defendant guilty of all of the charges against him. The trial court sentenced defendant to a 20-year term of imprisonment.

¶ 9 Defendant filed a motion for a new trial. At the hearing on the motion, an interpreter was present at defense counsel’s request. Defense counsel stated: “[D]uring the course of my representation of Mr. Tamayo, I always had an interpreter when we were discussing legal issues.” The trial court denied defendant’s motion for a new trial. Defendant appealed, and we affirmed. *People v. Tamayo*, 2012 IL App (3d) 100361.

¶ 10 Defendant filed a postconviction petition alleging ineffective assistance of counsel and denial of his right to a fair trial. In his ineffective assistance claim, defendant alleged that his counsel failed to “properly explain” the State’s plea offer to him due to his “lack of understanding of the English language at the time.” He claimed that no interpreter was present when his trial counsel discussed the plea deal. He asserted that he would have accepted the State’s offer if it “was properly explained to him.” Defendant also alleged that he was denied his right to a fair trial because the interpreter at trial was “not properly interpreting.”

¶ 11 In an affidavit attached to his petition, defendant averred:

“Whenever my attorney would come to visit me he would not bring along an interpreter, my attorney would speak to me, but I would not be understanding him completely.

An interpreter was only provided when I went to court.

And even then the interpreter that was provided would not fully interpret what was being said.

The attorneys would be speaking for a long period of time and then the interpreter would only speak for a short period of time and because of this I did not fully intelligently understand everything that was going on during court.

My attorney came to see me once and told me something about a deal that the state was offering. However, due to the fact that I did not understand English enough to comprehend, I was unable to truly [sic] understand what my lawyer was telling me.

My lawyer did not ensure that I fully understood the state’s offer before he allowed me to waive the state’s offer.

Had my lawyer helped me to fully understand the state’s offer I would have accepted the offer.”

¶ 12 The State failed to rule on defendant’s postconviction petition within 90 days, so it moved to the second stage of postconviction proceedings. The State then filed a motion to dismiss, which the trial court granted.

¶ 13 ANALYSIS

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a means by which a defendant can challenge his conviction or sentence for violations of federal or

state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). Postconviction proceedings may consist of as many as three stages. *Id.* at 472. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it if it is frivolous and patently without merit. *Id.* If the court does not dismiss the petition within 90 days, the petition proceeds to the second stage of postconviction proceedings. *Id.* At the second stage of postconviction proceedings, counsel is appointed and can make amendments to the petition. *Id.* The State may then move to dismiss the petition. *Id.* If the State does not file a motion to dismiss or the court denies such a motion, the proceeding advances to the third stage, where an evidentiary hearing is held. *Id.* at 472-73.

¶ 15 At the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing that his constitutional rights have been violated. *Id.* at 473. At the second stage of proceedings, all well-pleaded facts that are not rebutted by the record are to be taken as true. *Id.* We review *de novo* a trial court's dismissal of a petition at the second stage of postconviction proceedings. *Id.*

¶ 16 I. Ineffective Assistance Claim

¶ 17 To merit an evidentiary hearing, a postconviction petition must make a substantial showing that defendant's constitutional rights have been violated. *People v. Stein*, 255 Ill. App. 3d 847, 848 (1993). A postconviction petition must contain specific factual allegations, rather than conclusory statements. *Id.* The defendant has the burden of supporting factual allegations by affidavits, the record, or other evidence containing specific facts. *Id.* A defendant's failure to provide evidentiary support for allegations in his postconviction petition warrants dismissal of the petition. *Id.* at 849. Additionally, where the record rebuts allegations in a postconviction petition, dismissal is proper. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 12.

¶ 18 Ineffective assistance of counsel claims arising from the plea-bargaining process are subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Jones*, 144 Ill. 2d 242, 254 (1991). Under *Strickland*, a defendant must establish both that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced by counsel’s substandard performance. *Id.* An attorney is an officer of the court and is under an ongoing obligation to be truthful to the court. *City of Chicago v. Higginbottom*, 219 Ill. App. 3d 602, 628 (1991).

¶ 19 Here, defendant failed to establish the first prong of the *Strickland* test. Defendant claims that his attorney did not act reasonably because he did not have an interpreter present during his discussions with defendant about the State’s plea offer. However, the record rebuts defendant’s assertion that no interpreter was present. At the hearing on defendant’s motion for a new trial, defendant’s attorney stated that he always brought along an interpreter when explaining legal issues, such as the plea deal, to defendant. Because defense counsel is an officer of the court and has a duty to be truthful, we have no reason to question the veracity of this statement. Defendant’s allegation that no attorney was present during plea discussions is rebutted by the record. Thus, the trial court did not err in dismissing defendant’s postconviction ineffective assistance claim. See *Trujillo*, 2012 IL App (1st) 103212, ¶ 12.

¶ 20 II. Deficient Translation Claim

¶ 21 Fundamental due process rights require a court to permit an interpreter to translate courtroom proceedings when a party does not fully understand English. *Figueroa v. Doherty*, 303 Ill. App. 3d 46, 50 (1999). “ ‘This is so because inherent in [the] nature of justice is the notion that those involved in litigation should understand and be understood.’ ” *Id.* (quoting 75 Am. Jur. 2d *Trial* § 230 (1991)). A defendant’s due process rights may be violated if an

interpreter does not fully or completely translate criminal proceedings. *People v. Starling*, 21 Ill. App. 3d 217, 222 (1974).

¶ 22 An interpreter's failure to provide a complete translation deprives a litigant of his right to a fair hearing. *Figueroa*, 303 Ill. App. 3d. at 52. When a defendant provides an affidavit in support of a postconviction petition asserting that he was unable to understand the criminal proceedings against him because of an incomplete translation and nothing in the record refutes that assertion, the defendant is entitled to an evidentiary hearing on his petition. *People v. Alfaro*, 227 Ill. App. 3d 281, 285 (1992).

¶ 23 In *Alfaro*, the defendant filed a postconviction petition alleging that his constitutional rights were violated because "the interpreter used at the [guilty] plea proceedings did not adequately explain what was being said." *Id.* at 282-83. The trial court dismissed defendant's petition, and this court reversed, stating:

"[T]he record before us presents only defendant's affidavits of inability to understand the proceedings despite the assistance of a Spanish translator during court appearances. * * * We may assume otherwise, but where the degree and accuracy of translations has been called into question, such assumption cannot justify the denial of an evidentiary hearing. Defendant alleges that a full translation of the proceedings was not provided, but rather only synopses of what the translator deemed to be of interest to him. Nothing appears in the record before us to refute this charge. Defendant's allegations go to the heart of constitutional due process of law and should not have been summarily dismissed." *Id.* at 285.

¶ 24 Here, defendant asserted that the interpreter during his trial failed to fully interpret what was being said in court, which caused him to “not fully intelligently understand everything that was going on during court.” There is no evidence in the record to refute these allegations since the record discloses only the presence of a translator and does not reflect what the translator said. See *id.* Under these circumstances, defendant has made a substantial showing of a constitutional due process violation and is entitled to an evidentiary hearing on his claim. See *id.* We reverse the trial court’s dismissal of the deficient translation claim in defendant’s postconviction petition and remand for an evidentiary hearing on that claim.

¶ 25 The judgment of the circuit court of Whiteside County is affirmed in part, reversed in part, and remanded.

¶ 26 Affirmed in part and reversed in part; cause remanded.

¶ 27 JUSTICE McDADE, concurring in part and dissenting in part.

¶ 28 I agree with the finding that Tamayo has raised a substantial claim of a constitutional violation based on the interpreter’s alleged incomplete and inaccurate translation of the trial proceedings and I, therefore, concur in the decision to remand that issue for a third stage evidentiary hearing.

¶ 29 I, however, dissent from the majority decision to affirm the trial court’s rejection of Tamayo’s claim that because his trial attorney failed to ensure that he fully understood the plea offer that he turned down, his assistance was ineffective. Initially, it is my opinion that the majority can only have reached this conclusion by ignoring two of the controlling procedural standards of the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2014). These include that all well-pled facts that are not *positively* rebutted by the record are taken as true, and

that, at the second stage, the court may not engage in fact-finding. *People v. Coleman*, 183 Ill. 2d 368, 381 (1998).

¶ 30 The State filed a motion to dismiss Tamayo's postconviction petition, the effect of which was to admit the truth of the allegations. *People v. Ward*, 187 Ill. 2d 249, 255 (1999) (holding that when “the State seeks dismissal of a petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency”). This would create a factual dispute that could only be resolved by the presentation and consideration of evidence at a third-stage evidentiary hearing. See, e.g., *People v. Pendleton*, 223 Ill.2d 458, 473 (2006) (holding that the third stage is when the circuit court makes fact-finding and witness credibility determinations).

¶ 31 Thus, we have before us (1) Tamayo’s affidavit asserting, *under oath*, that there was no interpreter present when the plea offer was presented to him, (2) a procedural “admission” by the State that the allegation is true, (3) a statement by trial counsel, probably unsworn, that an interpreter was present at the time he advised Tamayo of the plea offer, and (4) a presumption, necessarily rebuttable,¹ that because attorneys are officers of the court and required to be truthful, “we have no reason to question the veracity of this statement.” The majority concludes that Tamayo’s claim is positively rebutted by the record, however, I do not believe this conclusion is legally sustainable. The failure of compliance with the procedural requirements of the Act ultimately renders the trial court’s decision on this issue and the majority’s affirmance improper. I, therefore, respectfully dissent and urge that this claim of Tamayo’s can only be

¹ The Illinois Supreme Court found mandatory presumptions to be unconstitutional and required that all presumptions be construed as rebuttable in *People v. Pomykala*, 203 Ill. 2d 198, 203-04 (2003).

properly resolved by remand for consideration at a third-stage evidentiary hearing—possibly the same hearing ordered for his other claim.

¶ 32 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 33 I concur with the majority order insofar as it affirms the trial court's dismissal of defendant's postconviction claim of ineffective assistance of counsel. I would affirm the dismissal for different reasons and, therefore, concur only in the result. I dissent from the majority's finding that the trial court erred in dismissing defendant's postconviction claim of deficient translation. In order to survive a motion to dismiss, defendant's postconviction petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Defendant failed to make a substantial showing of a constitutional violation on both issues. I would affirm the dismissal of defendant's postconviction petition outright.

¶ 34 Defendant's ineffective assistance of counsel claim does not allege the offer was not communicated to him. Rather, he asserts that his attorney was ineffective in his explanation of the offer before he rejected it. Defendant cites no authority, and this court has been unable to find any, for the proposition that it is trial counsel's duty to ascertain whether or not a client understands the message communicated to him or her when nothing suggests otherwise.

¶ 35 Defendant admits that his trial counsel presented him with the State's plea bargain offer. Defendant further admits he informed his trial counsel that he rejected the offer and decided to proceed to trial. As pled, defendant's trial counsel cannot have been deficient in performance or provided assistance that fell below an objective standard of reasonableness. Thus, defendant does not satisfy the first prong of *Strickland*. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 8; *Strickland*, 466 U.S. at 687-94.

¶ 36 Given the record before this court, this is the only logical conclusion. Ruling otherwise suggests that trial counsel must read their client’s mind in offering effective assistance. Defendant claims he did not have the same command of the English language that he had at trial when presented with the State’s plea offer approximately 11 weeks earlier. Highlighting that trial counsel deliberately sought the assistance of an interpreter to explain complicated legal concepts to defendant during pretrial and trial does not demonstrate that defendant did not understand the State’s plea offer before he told his trial counsel he rejected it. Defendant has failed to make a substantial showing of a constitutional violation and his petition was properly dismissed. Therefore, I concur with the majority’s result on this issue.

¶ 37 I further disagree with the majority’s finding that the trial court erred in dismissing defendant’s deficient translation claim. Defendant’s final petition asserts “[t]hat the interpreter that was being used for the Defendant was not properly interpreting, therefore Defendant was not provided his Constitutional right to a fair trial.” This assertion’s only support is defendant’s supporting affidavit to his original postconviction petition, wherein defendant states: “the attorney’s [*sic*] would be speaking for a long period of time and then the interpreter would only speak for a short period of time.” This is insufficient to establish a substantial showing of a constitutional violation, even after we accept defendant’s assertion as true.

¶ 38 The majority emphasizes defendant’s take on the results stemming from his professed allegation of deficient translation—that he failed fully comprehend the proceedings. *Supra* ¶ 24. His claim that the interpreter did not take as long speaking to him in Spanish as others were speaking English in court is not a legally sufficient claim of inadequate translation. Thus, defendant is not entitled to an evidentiary hearing. His postconviction petition fails to “ ‘call[] into question’ ” “ ‘the degree and accuracy of translations’ ” at his trial. *Supra* ¶ 23 (quoting

People v. Alfaro, 227 Ill. App. 3d 281, 285 (1992)). Ergo, he has failed to allege facts supporting his claim that he failed to comprehend the proceedings.

¶ 39 Criminal defendants must be provided with an interpreter if they are in need of one and the trial court may not deny them one. 725 ILCS 140/1 (West 2012); *People v. Raczkowski*, 359 Ill. App. 3d 494, 498 (2005). Under Illinois law, however, translations need not be literal. *Seniuta v. Seniuta*, 31 Ill. App. 3d 408, 417 (1975) (citing *Schnier v. People*, 23 Ill. 17 (1859)); see also *People v. Carmona-Olvara*, 363 Ill. App. 3d 162, 167 (2005). Defendants are only prejudiced at trial if their interpreter is intentionally unfair or their interpretations are unfair to the defendant. *People v. Murphy*, 276 Ill. 304, 320-21 (1916).

¶ 40 Under federal law, the general standard for adequate interpretation is a word for word translation. 18 U.S.C. § 1827; *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990). Defendants, however, do not have a constitutional right to flawless, word for word translations. *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990) (citing *United States v. Joshi*, 896 F.2d at 1309). While the goal is for interpreters to translate exactly what is said, and courts should discourage interpreters from “ ‘ embellishing ’ ” or “ ‘ summarizing ’ ” live testimony, doing so does not automatically render the trial “ ‘ fundamentally unfair. ’ ” *Id.*

¶ 41 There is no constitutional right to verbatim translations of trial proceedings. “The Post-Conviction Hearing Act (Act) [citation] provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. [Citations.]” *People v. Tate*, 2012 IL 112214, ¶ 8. Defendant’s claim does not allege a constitutional violation but a statutory one. Statutory violations have no remedy under the Post-Conviction Hearing Act.

People v. Harper, 345 Ill. App. 3d 276, 280 (2003). As such, the trial court properly dismissed defendant's claim.

¶ 42 Defendant's statements regarding his interpreter do not even allege the interpreter was unfair, summarized, or embellished the trial proceedings. He merely asserts that they took less time for the interpreter to articulate. Asserting that an interpreter's Spanish translations were shorter than the English phrases they interpreted does not allege a constitutional violation.

¶ 43 Furthermore, during pretrial proceedings, defendant explained in English that he would prefer an interpreter simultaneously interpret into Spanish what was being said in court in English. The trial court accommodated this request. Through an interpreter, defendant stated to the trial court: "I can testify in English but if I don't understand I will ask [the interpreter]." He did no such thing, although he certainly could have at trial. Instead, after being convicted and having his conviction affirmed on direct appeal, defendant asserts in a postconviction petition that his trial counsel and interpreter violated his constitutional rights. Defendant's timing in raising this issue is a factor we give significant weight. See *People v. Cruz*, 372 Ill. App. 3d 556, 560-61 (2007) (quoting *United States v. Paz*, 981 F.2d 199, 201 n.2 (5th Cir. 1992) (quoting *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989))) (" ' "To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse." ' ").

¶ 44 For the foregoing reasons, I would affirm the judgment of the circuit court of Whiteside County.