

No. 1-14-1899

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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.)	Nos. 06 CR 14830
)	06 CR 14831
ERIC DURR,)	
)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court’s order, granting the State’s motion to dismiss the defendant’s *pro se* and supplemental post-conviction petitions where he failed to overcome the presumption that post-conviction counsel provided reasonable assistance and failed to make a substantial showing that his trial counsel was ineffective for not investigating his mental health issues and requesting a fitness hearing.

¶ 2 The defendant, Eric Durr, appeals from an order of the circuit court of Cook County, which granted the State’s motion to dismiss his *pro se* and supplemental petitions for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that (1) his post-conviction counsel provided unreasonable assistance and (2) he made a

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substantial showing that his trial counsel was ineffective for failing to investigate his mental health issues and request a fitness hearing. For the following reasons, we affirm.

¶ 3 On December 14, 2007, the defendant entered a negotiated guilty plea to two counts of aggravated criminal sexual assault in case number 06 CR 14830 and two counts of aggravated criminal sexual assault in case number 06 CR 14831. Pursuant to the plea agreement, the trial court sentenced him to consecutive terms of 25 years' imprisonment for each count in each case, for a total of 50 years' imprisonment in each case, to be served concurrently. The defendant did not move to withdraw his guilty plea or file a direct appeal.

¶ 4 On June 8, 2010, the defendant filed a *pro se* petition for a writ of *habeas corpus* under section 10-101 *et seq.* of the Code of Civil Procedure (Code) (735 ILCS 5/10-101 *et seq.* (West 2010)), arguing that the statute of limitations for the offenses had expired before the State charged him. In denying the defendant relief, although the trial court "believe[d]" that such a claim was improper in a petition for a writ of *habeas corpus*, it found that his guilty plea waived any claim that the statute of limitations had expired. The court also found that, on the merits, his claim failed as the record showed the statute of limitations had not expired. The defendant unsuccessfully moved the court to reconsider its denial and this court affirmed the judgment of the trial court. *People v. Durr*, 2011 IL App (1st) 102474-U (granting appellate counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

¶ 5 On September 27, 2010, the defendant filed a *pro se* post-conviction petition, raising several claims. First, the defendant alleged that his original trial counsel had a conflict of interest because counsel "was the prosecutor in [his brother's] case." He further argued that, although he obtained new counsel, he had "reasons to believe" that his new counsel was "from the same office" as his original counsel. Second, the defendant alleged that his trial counsel was

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ineffective for failing to file a motion to dismiss the indictments in both cases against him because the five-year statute of limitations had expired before he was charged. Third, he contended that his trial counsel was ineffective for failing to investigate his “competency” and obtain his medical files before “allowing” him to plead guilty. The defendant additionally alleged that he was improperly denied pre-trial bail, he had “reasons to believe” all the counts against him had been nol-prossed, trial counsel failed to inform him of his “priority status” prior to pleading guilty, and trial counsel failed to make a motion for a speedy trial.

¶ 6 The defendant attached to the petition various sections of the United States Code, various sections of the Illinois Criminal Code, and a copy of the indictments against him. He also attached an unnotarized “verification of certification” that mentioned section 1-109 of the Code (735 ILCS 5/1-109 (West 2010)). The trial court advanced the defendant’s petition for second-stage consideration and appointed him post-conviction counsel.

¶ 7 On August 6, 2013, post-conviction counsel filed a “supplemental” post-conviction petition, which “augment[ed]” the defendant’s *pro se* petition. In the supplemental petition, the defendant, through counsel, alleged that his trial counsel was ineffective for failing to investigate and obtain his medical history and request a fitness hearing, which would have resulted in him being found unfit to plead guilty. In support of this argument, he contended that “[t]rial counsel learned on November 27, 2006, that [the defendant] was receiving psychiatric outpatient treatment” since 1996, and also learned that he had been taking the medication Zyprexa and had been hospitalized because of hearing voices. He further asserted that “[u]pon review of the trial file, [trial counsel] was aware of [the defendant’s] medical history.”

¶ 8 The defendant, through post-conviction counsel, attached several documents to the petition, including his medical records from various hospitalizations and his evaluations from

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2002, and a medical record from the Illinois Department of Corrections (IDOC) from December 31, 2007. Additionally, the defendant attached his own notarized affidavit in which he averred that, during the month of December 2007, he was hearing voices and had difficulty sleeping, and shortly before the day he pled guilty, he was under suicide watch. He further averred that, on the day he pled guilty, he was taking three anti-psychotic medications, which were not working. The defendant stated that, when he pled guilty, he could not understand his trial counsel, the judge, and the court proceedings “so [he] simply answered ‘yes’ ” to all of the questions he was asked.

¶ 9 The State filed a motion to dismiss both the defendant’s *pro se* petition and the supplemental petition. The State argued that the *pro se* petition and its claims were insufficient because they were neither verified by affidavit nor supported by affidavits, records, or other evidence. Concerning the supplemental petition, the State contended that the defendant failed to make a substantial showing that his constitutional rights were violated because the medical records attached to the petition predated his guilty plea by five years and the IDOC medical record, which was generated after his guilty plea, only contained self-reported mental health issues. The State also asserted that the petition failed to establish that the defendant’s trial counsel was ineffective because it made no claim that the defendant told counsel that he could not understand the court proceedings.

¶ 10 After the State filed its motion to dismiss, post-conviction counsel filed a certificate indicating her compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) and noting that she had filed an “amended” post-conviction petition.

¶ 11 Three months later, the trial court granted the State’s motion to dismiss. In dismissing the claims raised in the defendant’s *pro se* petition, the court agreed with the State that the petition was deficient because it was not verified by affidavit and the allegations therein were not

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supported by affidavits, records, or other evidence. In dismissing the claims raised in the supplemental petition, the court observed that the supporting evidence did not establish that the defendant was unfit on the day he pled guilty because that evidence predated his guilty plea. The court further noted that mental health issues did not necessarily raise a *bona fide* doubt as to an individual's fitness and the record showed that the defendant understood the court proceedings. Additionally, the court found that the defendant did not "attach any records to corroborate that his [trial] counsel had knowledge of any of his mental impairments, o[r] he was using psychotropic medicine at the time of entering the guilty plea or if [he] was using psychotropic medicine that hindered his comprehension of the proceedings." The court also noted that the defendant's affidavit failed to indicate the same. This appeal followed.

¶ 12 On appeal, the defendant first contends that his post-conviction counsel failed to provide reasonable assistance where she failed to remedy the lack of a notarized verification affidavit in his *pro se* petition and failed to provide evidentiary support for key allegations in the supplemental petition.

¶ 13 The Act provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. The defendant's post-conviction petitions in this case were dismissed at the second stage. At that stage, indigent defendants have a statutory right to appointed post-conviction counsel. 725 ILCS 5/122-4 (West 2010). This right entitles defendants to a "reasonable" level of assistance (*Cotto*, 2016 IL 119006, ¶ 30), which is less than the level of assistance that the constitution guarantees to defendants at trial. *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990). To ensure that defendants receive reasonable assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes three specific duties on post-conviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42

(2007). Under Rule 651(c), counsel is required to: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights; (2) examine the record of the trial court proceedings; and (3) make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant’s] contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Here, the defendant only claims that counsel was unreasonable with regard to the third requirement of Rule 651(c).

¶ 14 Under this requirement, counsel must present the defendant’s claims to the trial court in “appropriate legal form” (*People v. Johnson*, 154 Ill. 2d 227, 245 (1993)), which includes attempting to overcome any procedural bars that would result in the petition’s dismissal if not rebutted. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). However, counsel need not “advance frivolous or spurious claims” on the defendant’s behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Furthermore, “counsel’s decision not to amend a defendant’s *pro se* petition has been held not to constitute a deprivation of adequate representation where his claim lacks a sufficient factual basis.” *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 21. Substantial compliance with Rule 651(c) is sufficient, and we review counsel’s compliance *de novo*. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15. Where, as here, post-conviction counsel files a Rule 651(c) certificate asserting her compliance with the rule, a presumption exists that she provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It is the defendant’s burden to overcome this presumption by showing that post-conviction counsel has failed to substantially comply with the duties mandated by Rule 651(c). *Id.*

¶ 15 In the instant case, the defendant argues that post-conviction counsel provided unreasonable assistance because she failed to remedy his *pro se* petition’s lack of a notarized verification affidavit. Under section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2010)), a

post-conviction petition must be “verified by affidavit.” During second-stage proceedings, a petition may be dismissed for its failure to comply with this requirement. *People v. Hommerson*, 2014 IL 115638, ¶ 14. The defendant contends that, because his post-conviction counsel did not remedy the *pro se* petition’s lack of a notarized verification affidavit, the claims raised in this petition were procedurally deficient and, in fact, were dismissed based on this deficiency.

¶ 16 As previously noted, the defendant’s *pro se* petition raised several claims. Only one claim from that petition was amended and presented in the supplemental petition filed by post-conviction counsel: the allegation that trial counsel was ineffective for failing to investigate the defendant’s mental health issues and request a fitness hearing. By not remedying the *pro se* petition’s lack of a notarized verification affidavit, counsel left the remaining claims in the *pro se* petition subject to dismissal based upon this procedural defect. *Id.*

¶ 17 However, when the trial court dismissed the claims raised in the defendant’s *pro se* petition, it did so not only on the lack of a notarized verification affidavit, but also because the petition did not have any affidavits or evidence attached to support the claims raised therein. Under the Act, a petition must “have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” 725 ILCS 5/122-2 (West 2010). This requirement ensures that a petition’s allegations have the capability to be objectively or independently corroborated. *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). The failure to meet this requirement justifies, by itself, the dismissal of a petition. *Id.* at 255. Accordingly, although the trial court mentioned the *pro se* petition’s lack of a notarized verification affidavit, the court had an independent and sufficient basis to dismiss the petition’s claims, therefore rendering post-conviction counsel’s failure to remedy the lack of a notarized verification

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affidavit inconsequential. Given this, we find that the defendant has not rebutted the presumption that counsel provided reasonable assistance.

¶ 18 The defendant next argues that post-conviction counsel provided unreasonable assistance where she failed to provide evidence in support of the supplemental petition's claim that trial counsel was ineffective for failing to investigate his mental health issues and request a fitness hearing. Specifically, the defendant asserts that counsel should have attached evidence showing that: (1) he had mental health issues at the time he pled guilty; and (2) trial counsel knew of these issues.

¶ 19 Concerning evidence supporting the defendant's mental health issues at the time he pled guilty, the defendant points to no affirmative evidence in the record to show that post-conviction counsel did not seek out and examine all available evidence relevant to this claim. In fact, the record conveys that the opposite is true. As shown from the attachments to the supplemental petition and the trial court proceedings, post-conviction counsel attempted to and did obtain several of the defendant's mental health records. Although most of those records were from 2002, we may reasonably presume, unless "flatly contradicted by the record," that counsel made a concerted effort to find medical records more contemporaneous with the defendant's guilty plea, but was unsuccessful. *Johnson*, 154 Ill. 2d at 241. This presumption is supported by the record, specifically the transcript of the many trial court proceedings prior to the filing of the supplemental petition, in which post-conviction counsel explained to the court her difficulty in obtaining medical records from a particular mental health center that had closed. Furthermore, counsel obtained the IDOC medical record, which was created only two weeks after the defendant's guilty plea. The defendant, therefore, has not rebutted the presumption that counsel provided reasonable assistance.

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¶ 20 The defendant's related argument that post-conviction counsel failed to respond to the State's motion to dismiss, in which it argued the supplemental petition lacked evidence supporting a claim of unfitness at the time the defendant pled guilty, is unavailing for the same reasons.

¶ 21 The defendant contends that post-conviction counsel provided unreasonable assistance where the supplemental petition stated that "[u]pon review of the trial file, [trial counsel] was aware of [the defendant's] medical history," but counsel failed to support this statement with any evidence. We note that the supplemental petition also alleged that "[t]rial counsel learned on November 27, 2006, that [the defendant] was receiving psychiatric outpatient treatment" since 1996, and also learned that he had been taking the medication Zyprexa and had been hospitalized because he was hearing voices. Despite these two statements from post-conviction counsel, after filing the supplemental petition, she filed a Rule 651(c) certificate, asserting compliance with the duties mandated by the rule. We do not find that these isolated statements rebut the presumption that post-conviction counsel substantially complied with the duties mandated by Rule 651(c), especially in light of her efforts, as previously noted, to find evidentiary support for the supplemental petition's claim regarding trial counsel's ineffectiveness and the defendant's unfitness to plead guilty.

¶ 22 Accordingly, the defendant's various claims of unreasonable assistance of post-conviction counsel fail.

¶ 23 The defendant next argues that the trial court erred in dismissing his supplemental petition where he made a substantial showing that his trial counsel was ineffective for failing to investigate his mental health issues and request a fitness hearing.

¶ 24 At the second stage of the Act, the defendant’s petition and accompanying documentation must make a substantial showing of a violation of his constitutional rights to receive an evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶¶ 33-34. A substantial showing is a measure of the legal sufficiency of the petition’s allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *Id.* ¶ 35. All well-pled facts that are not positively rebutted by the trial record must be accepted as true. *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). We review the trial court’s decision to dismiss a petition without an evidentiary hearing *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 25 To establish that trial counsel was ineffective, a defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36. Under this standard, a defendant must show that his counsel’s performance was deficient, *i.e.*, objectively unreasonable, and that this deficiency prejudiced him. *Id.* Both elements of the *Strickland* test must be met, and we may analyze them in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109. We address the prejudice element first.

¶ 26 A defendant is presumed fit to plead guilty. 725 ILCS 5/104-10 (West 2006). He will be found unfit if, because of a mental or physical condition, “he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense.” *Id.* The defendant is entitled to a fitness hearing when a *bona fide* doubt regarding his fitness is raised. 725 ILCS 5/104-11(a) (West 2006). To satisfy the *Strickland* prejudice prong, he must show that facts existed at the time of his plea that raised a *bona fide* doubt concerning his ability to understand the nature and purpose of the proceedings and to assist in his defense. *People v. Eddmonds*, 143 Ill. 2d 501, 512-13 (1991). The defendant is entitled to relief only if he shows that the trial court would have found a *bona fide* doubt regarding his fitness and ordered a fitness hearing had it

known of the evidence raised in the post-conviction petition. *People v. Easley*, 192 Ill. 2d 307, 319 (2000).

¶ 27 A *bona fide* doubt is a “real, substantial and legitimate doubt,” and the test is an objective one (*Eddmonds*, 143 Ill. 2d at 518), based on the specific facts of the case. *People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 87. However, the fitness to plead guilty and mental illness are not synonymous. *Id.* ¶ 89. “Fitness speaks only to a person’s ability to function within the context of a [plea]. It does not refer to sanity or competence in other areas.” *Easley*, 192 Ill. 2d at 320. “[T]he existence of a mental disturbance or the need for psychiatric care does not necessitate a finding of *bona fide* doubt since ‘[a] defendant may be competent to [to plead guilty] even though his mind is otherwise unsound.’ ” *People v. Hanson*, 212 Ill. 2d 212, 224-25 (2004) (quoting *Eddmonds*, 143 Ill. 2d at 519). The critical question is whether the defendant could understand the proceedings, not whether he was mentally ill. *Easley*, 192 Ill. 2d at 323.

¶ 28 In this case, the supplemental petition’s evidence supporting the defendant’s alleged lack of fitness to plead guilty came from two sources: medical records, which detailed various mental health issues the defendant had, and his affidavit. Regarding the medical records, most of the records are from 2002, which predated the defendant’s guilty plea by five years. The fact that the defendant had various mental health issues in 2002 does not establish that he lacked the ability to understand the proceedings against him in 2007, when he pled guilty. See *People v. Haynes*, 192 Ill. 2d 437, 475 (2000) (finding evidence that the defendant had been “diagnosed with schizophrenia in 1982 was not particularly relevant to the question of defendant’s mental state in 1994, when he was tried”); *Eddmonds*, 143 Ill. 2d at 522 (finding evidence that the defendant had been diagnosed “as schizophrenic in 1973 was not particularly relevant to the question of the defendant’s mental state in 1980, when he was tried”).

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¶ 29 The only document contemporaneous with his guilty plea was the IDOC medical record created two weeks after his guilty plea, which indicated that the defendant heard voices and had hallucinations. However, these conditions do not demonstrate that he lacked the ability to understand the proceedings. See *People v. Hill*, 308 Ill. App. 3d 691, 706 (1999) (medical records stating that a defendant had suicidal ideations, and a history of visual and auditory hallucinations did not demonstrate that he lacked the capacity to understand the proceedings). While, as the defendant notes, the IDOC record states that he should have a “routine” “mental health referral,” this fact does little to show he lacked the ability to understand the proceedings when he pled guilty.

¶ 30 The remaining evidence of the defendant’s alleged unfitness to plead guilty came from his affidavit, in which he alleged that he was under suicide watch, hearing voices, and taking three anti-psychotic medications that were not working in December 2007, when he pled guilty. However, as previously mentioned, these conditions do not demonstrate that he lacked the capacity to understand the proceedings (*id.*), and he will not be found unfit merely because he was taking psychotropic medications. 725 ILCS 5/104-21(a) (West 2006); *People v. Mitchell*, 189 Ill. 2d 312, 330-31 (2000). The critical question is whether the defendant could understand the proceedings, not whether he was mentally ill. *Easley*, 192 Ill. 2d at 323. While in his affidavit, the defendant alleged that he had difficulty understanding his trial counsel, the judge, and the court proceedings on the date he pled guilty, these assertions are rebutted by the record. See *Domagala*, 2013 IL 113688, ¶ 35 (allegations rebutted by the record do not have to be accepted as true). The transcript from the plea hearing shows that the defendant was able to understand the proceedings and participate. He responded in a coherent and appropriate manner to all of the trial court’s questions concerning his understanding of the plea agreement. At the

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end of the hearing, when asked by the trial court whether he had any questions, the defendant, in no uncertain terms, stated that he did not.

¶ 31 In light of these facts, although the defendant may have had mental health issues at the time he pled guilty, he has not shown that, at that time, there were facts in existence raising “a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense.” *Eddmonds*, 143 Ill. 2d at 512-13. Consequently, the defendant has not made a substantial showing that he was prejudiced by trial counsel’s alleged failure to investigate his mental health issues and request a fitness hearing. Accordingly, his claim of ineffective assistance of counsel must fail, and the trial court, therefore, properly dismissed his supplemental post-conviction petition.

¶ 32 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 33 Affirmed.