THIRD DIVISION
March 31, 2011

No. 1-08-2531

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES WILLIAMS, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County, Illinois. No. 04 CR 11153 Honorable Daniel P. Darcy, Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Neville and Steele, JJ., concurred in the judgment.

O R D E R

HELD: Second-stage dismissal of a post-conviction petition affirmed over claims of ineffective assistance of trial counsel and an improper jury instruction.

Defendant James Williams appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that he made a substantial showing of constitutional violations with respect to his claims of ineffective assistance of trial counsel and an improper jury instruction which warrant an evidentiary hearing.

The record shows, in relevant part, that defendant was convicted by jury of possession of between 15 and 100 grams of a controlled substance containing cocaine with intent to deliver

(720 ILCS 570/401(a)(2)(A) (West 2004), then sentenced to natural life in prison under the Habitual Criminal Act (720 ILCS 5/33B-1 (West 2004). This court affirmed that judgment on direct appeal. *People v. Williams*, No. 1-05-2773 (2007) (unpublished order under Supreme Court Rule 23).

On June 6, 2007, defendant, through private counsel, filed a petition for post-conviction relief alleging ineffective assistance of trial counsel. Defendant specifically claimed that prior to trial, the State proffered a plea deal for a sentence "substantially less than natural life," but that counsel never informed him, prior to his decision to reject that offer, that he was subject to a mandatory life sentence if convicted. He claims that he would have accepted the State's plea offer if he was aware of that possibility. Defendant further alleged that he was denied due process and effective assistance of counsel, citing an Illinois Pattern Jury Instruction given by the trial court, which, he claimed, was improper.

In support of his allegations, defendant attached to his petition his unnotarized, signed statement labeled "affidavit," in which he stated, in relevant part, that his trial counsel informed him that the State made a plea offer that was "not for a substantial sentence," that prior to rejecting that offer his attorney had not advised him that he faced a mandatory life sentence if convicted, and that he would have accepted the plea offer had he been so advised. Defendant also attached to his petition, the State's motion to have him adjudged a habitual criminal, a copy of the Rule 23 order disposing of his direct appeal, and a copy of *Moore v. Bryant*, 348 F.3d 238 (7th Cir. 2003). On August 3, 2007, defendant amended his post-conviction petition with his *pro se* "Motion to Dismiss Indictment," alleging a defect in the charging instrument.

On December 5, 2007, the State filed a motion to dismiss defendant's petition. The State asserted that defendant waived his claims of ineffective assistance of counsel and an improper jury instruction that he could not establish the prejudice prong of his ineffective assistance of counsel claim, and that the jury instruction at issue was proper. Defendant filed a response to the

State's motion to dismiss, and attached trial transcripts showing that the court held a Supreme Court Rule 402 conference in 2004 and that defendant rejected the State's ensuing offer.

Argument was presented on the motion, and, on July 30, 2008, the post-conviction court granted the State's motion to dismiss. Defendant now appeals that decision, contending that he did not waive his claims of ineffective assistance of counsel and an improper jury instruction, that trial counsel rendered ineffective assistance in pretrial discussions, and that he was prejudiced by counsel's actions regarding the plea offer.

Although defendant initially cites the gist standard for evaluating his claims, we note that this is a second-stage dismissal where defendant has the burden of providing a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). The dismissal of a petition without an evidentiary hearing is subject to plenary review. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

Defendant first contends that trial counsel was ineffective for failing to inform him prior to rejecting the State's plea deal that he would be subject to a sentence of natural life if convicted. The State responds that defendant has failed to provide proper evidentiary support for his claim, and that, in any event, defendant cannot establish prejudice as required under *Strickland v. Washington*, 466 U.S. 668 (1984).

Under the Act, defendant must clearly set forth the alleged constitutional violations in his petition and provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2008). Here, defendant attached a transcript showing that plea negotiations took place and that

he rejected the offer. No details concerning the offer appear in this document. To cure this deficiency, defendant tendered his own signed statement that counsel had not advised him, prior to his rejection of the State's plea offer, that he faced a mandatory life sentence if convicted, and that he would have accepted the plea offer had he been so advised. However, this statement was not notarized and, therefore, cannot be considered a valid affidavit, no matter its label. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). The record is thus devoid of support for defendant's ineffective assistance of trial counsel claim regarding the tendered plea.

We observe, as defendant points out, that the failure to obtain an affidavit from trial counsel will be overlooked due to the difficulty or impossibility of obtaining such an affidavit, though it is not clear that defendant has made any such attempt. *Hall*, 217 Ill. 2d at 333-34. Here, however, where defendant failed to attach even his own valid affidavit to his petition, let alone *any* affidavits, records, or other supporting evidence, or an explanation for the absence of such, dismissal was appropriate (*People v. Collins*, 202 Ill. 2d 59, 66 (2002)), for he failed to make a substantial showing of a constitutional violation requiring further proceedings.

However, even if a plea was tendered for a lesser sentence, the trial court did not have authority to impose it because defendant was subject to the mandatory sentence of natural life under the Habitual Criminal Act. *People v. Caban*, 318 Ill. App. 3d 1082, 1090 (2001) (citing *City of Chicago v. Roman*, 184 Ill. 2d 504, 510 (1998)). Defendant seeks to overcome this impediment by speculating that he could have negotiated a plea for a lesser offense to avoid a life sentence. However, considering the lack of any indication in the record that this was ever a possibility, we find defendant's claim to be nothing more than a subjective, self-serving allegation insufficient to show prejudice under *Strickland*. *People v. Miller*, 393 Ill. App. 3d 629, 639 (2009) (quoting *People v. Curry*, 178 Ill. 2d 509, 531 (1997)).

We have also examined the cases defendant cites in support of his claim, *i.e.*, *Moore v. Bryant*, 348 F.3d 238 (7th Cir. 2003) and *People v. Paleologos*, 345 Ill. App. 3d 700 (2003), and

find them unavailing. In *Moore*, 348 F.3d at 240, defendant claimed that he received inaccurate information as to the sentence to be imposed by the trial court and pleaded guilty because of it. In addition, defendant's claim was supported by his affidavit and that of his counsel. *Moore*, 348 F.3d at 241. Here, defendant did not provide any valid affidavit or supporting material, and the lower federal court case relied upon, though informative, does not bind this court. *People v. Johnson*, No. 1-09-0518, slip op. at 17 (Ill. App. Dec. 23, 2010).

In *Paleologos*, 345 Ill. App. 3d at 706-07, a first-stage proceeding, defendant's claim that counsel provided incorrect information on the maximum sentence which could be imposed was supported by his own affidavit and not rebutted by the record. Under the less rigorous "gist" standard, the case was docketed for second-stage proceedings. *Paleologos*, 345 Ill. App. 3d at 706-07. Here, defendant failed to substantiate his claim under the more rigorous second-stage standard to require further proceedings. Thus, where defendant failed to meet the prejudice requirement, his ineffective assistance of counsel claim necessarily fails. *People v. Flores*, 153 Ill. 2d 264, 283 (1992), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Defendant secondly contends that he was denied due process and effective assistance of counsel based on an allegedly improper jury instruction given by the trial court. The State responds that defendant has forfeited this issue because he did not object to it at trial, raise it in a post-trial motion, or raise it on direct appeal. We agree. Defendant's failure to raise the alleged impropriety of the jury instruction at trial or on direct appeal precludes consideration under the principles of waiver and forfeiture. *People v. Blair*, 215 Ill. 2d 427, 447 (2005).

For the reasons stated, we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

Affirmed.