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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06—CF—341
)	
ATANACIO MEDINA,)	Honorable
)	Fernando L. Engelsma,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed the defendant's postconviction petition because the defendant's allegations did not demonstrate that he was deprived of his due process rights or that his defense counsel was ineffective.

¶ 1 Following a bench trial, the defendant, Atanacio Medina, was convicted of armed violence (720 ILCS 5/33A—2(a) (West 2006)) and was sentenced to 10 years' imprisonment. This court affirmed the defendant's conviction and sentence on direct appeal. See *People v. Medina*, No. 2—07—0566 (2009) (unpublished order under Supreme court Rule 23). On March 10, 2010, the defendant filed a postconviction petition. The defendant alleged that his constitutional rights to due

process were violated when defense counsel did not allow his mother to be present when he waived his right to a jury. In support of his petition, the defendant attached the affidavit of his mother. The State filed a motion to dismiss the defendant's petition, which the trial court granted. The defendant appeals from that order.

¶ 2 On appeal, the defendant argues that the trial court erred in dismissing his postconviction petition. The defendant contends that his due process right to a public trial was violated when his defense counsel told the defendant's mother that she could not be present when the defendant waived his right to a jury trial. The defendant further contends that his defense counsel's actions in preventing his mother from attending the jury waiver hearing constituted ineffective assistance of counsel. The defendant additionally argues that because defense counsel deprived him of a public trial at an important stage of the proceedings, he does not need to prove that he was prejudiced in order to be entitled to relief.

¶ 3 The Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2006)) provides a remedy to criminal defendants who have had substantial violations of their constitutional rights during their criminal trial. See *People v. Vernon*, 276 Ill. App. 3d 386, 391 (1995). A postconviction proceeding is not an appeal *per se*, but a collateral attack upon a final judgment. See *People v. Lester*, 261 Ill. App. 3d 1075, 1077 (1994). The trial court must review the petition within 90 days, and may summarily dismiss it if the court finds that it is frivolous and patently without merit. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). If the petition is not dismissed during this period, the trial court will docket it for further proceedings. *Id.*

¶ 4 Once a petition reaches the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002).

Also at the second stage, all well-pleaded facts are taken as true unless they are positively rebutted by the trial record. *Pendleton*, 223 Ill. 2d at 473. Mere conclusions cannot serve as the basis for postconviction relief. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998).

¶ 5 The defendant's constitutional right to public trial, which extends to all criminal proceedings, is set forth in the sixth amendment to the United States Constitution, which is made applicable to the States through the due process clause of the fourteenth amendment. *People v. Webb*, 267 Ill. App. 3d 954, 957 (1994). The due process clause protects individuals from actions by the State, not actions by individuals. *Rosewell v. Hanrahan*, 168 Ill. App. 3d 329, 331 (1988). The question to ask in determining whether there has been State action to trigger a due process claim is whether the State is significantly involved in the action which induced the complaint. *Id.* at 331-32.

¶ 6 Here, the defendant does not allege that either the State or the trial court prevented his mother from attending the hearing where he waived his right to a jury trial. Rather, the defendant only alleges that his defense counsel prevented the defendant's mother from attending the hearing. As defense counsel cannot deprive someone of his due process rights, the defendant's claim that his due process rights were violated is without merit. See *id.*

¶ 7 Turning to the defendant's claim that he was deprived the effective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To succeed on such a claim, a defendant must show both that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, 466 U.S. at 694). To satisfy the first portion of the *Strickland* test, a defendant must show that his attorney's performance fell below an

objective standard as measured by prevailing professional norms. *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). There is a strong presumption, which a defendant must overcome, that counsel's performance "falls within the wide range of reasonable professional assistance." *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 8 Generally, a reviewing court may dispose of an ineffectiveness claim on the prejudice prong alone by determining that the defendant was not prejudiced by counsel's representation. *People v. Munson*, 171 Ill. 2d 158, 184 (1996). However, the Supreme Court also held that there are some circumstances "where prejudice is presumed." *Strickland*, 466 U.S. at 692. In *United States v. Cronin*, 466 U.S. 648, 656-57 (1984), the Supreme Court explained "[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. *** But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Cronin*, 466 U.S. at 656-57. Our supreme court adopted this principle in *People v. Hattery*, 109 Ill. 2d 449, 464-65 (1985). In order for a defendant to avoid the two parts of the *Strickland* test, he must bear the high burden of demonstrating a complete breakdown in the adversarial process. Only if the defendant can shoulder this burden will prejudice be presumed. *People v. Kozlowski*, 266 Ill. App. 3d 595, 601 (1994); see also *Bell v. Cone*, 535 U.S. 685 (2002) and *People v. Metcalfe*, 202 Ill. 2d 544 (2002).

¶ 9 In *Bell*, a death-penalty case, the defendant argued that prejudice was presumed because the defendant's counsel entirely failed to subject the prosecution's case to meaningful adversarial testing when counsel failed to mount a case for life after the prosecutor had presented evidence in aggravation in a sentencing hearing and gave a closing argument. *Bell*, 535 U.S. at 696. The

Supreme Court rejected the argument, holding that, for “the possibility of presuming prejudice based on an attorney’s failure to test the prosecutor’s case” to arise, “the attorney’s failure must be complete.” *Id.* at 697, citing *Cronic*, 466 U.S. at 659. In *Bell*, the “respondent’s argument [was] not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points.” *Id.* The Court concluded that the defense counsel’s failure to adduce evidence in mitigation and the waiver of closing argument in the sentencing hearing were specific attorney errors to be analyzed under the *Strickland* performance and prejudice test, and prejudice could not be presumed. *Id.* at 697-98.

¶ 10 In *Metcalfe*, the defendant argued that prejudice must be presumed where his counsel failed to peremptorily strike a specific potential juror. *Metcalfe*, 202 Ill. 2d at 559-60. Our supreme court rejected the contention based on *Bell*. *Id.* at 560-61. The court held that, “as in *Bell*, [the] defendant [did] not contend that his counsel failed to oppose the prosecution throughout the *voir dire* proceeding as a whole, but that his counsel failed to do so with regard to [the] juror.” *Id.* at 561. The court noted that the defense counsel had exercised five peremptory challenges against other potential jurors and concluded that “any alleged failure to test the prosecution’s case here was not complete, as required under *Cronic*.” The court rejected the presumption of prejudice and reviewed the ineffectiveness claim for deficient performance and the accrual of prejudice under the *Strickland* rubric. *Id.*

¶ 11 The defendant insists that because his defense counsel prevented his mother from attending the jury waiver hearing, his right to a public trial was denied, and he therefore need not show prejudice. We disagree. As set forth in *Bell* and *Metcalfe*, in order for defense counsel’s representation to be presumed prejudicial, his ineffectiveness must have lasted throughout the

proceedings. Here, the defendant points to only one instance where his counsel was allegedly ineffective—at the hearing on the jury waiver. As this purported error did not result in a breakdown of the entire adversarial process, we will not presume that defense counsel’s representation was prejudicial. As such, because the defendant did not allege that he was prejudiced by defense counsel’s representation, the defendant’s postconviction petition was without merit and the trial court properly dismissed it. See *Munson*, 171 Ill. 2d at 184.

¶ 12 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 13 Affirmed.