

No. 1-09-1450

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).

SECOND DIVISION
June 7, 2011

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.)	No. 02 CR 21884
)	
ERIC ABRAMS,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in
the judgment.

O R D E R

Held: This court affirmed the circuit court's decision denying defendant's postconviction petition following a third-stage evidentiary hearing. Defendant did not make a substantial showing that defense counsel was constitutionally ineffective for failing to file a notice of appeal or a motion to withdraw his guilty plea.

Defendant Eric Abrams appeals from the third-stage denial of his petition filed under the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends that he made a substantial showing that trial counsel was constitutionally ineffective for failing to challenge defendant's guilty plea. Defendant requests that his case be remanded so that he can withdraw his guilty plea or for further evidentiary proceedings under the Act. We affirm.

In 2006, defendant entered into a negotiated guilty plea to home invasion and murder. Assistant Public Defenders Joseph Kennelly and Christopher Anderson represented defendant at the plea hearing and subsequent sentencing hearing. At the plea hearing, the trial court acknowledged the agreement, that defendant would plead guilty to the offenses in exchange for consecutive-term sentences of 60 years for murder and 30 years for home invasion. Defendant stated the agreement was acceptable. The court then admonished defendant regarding the charges and the potential sentence and stated the death penalty was a possibility. Defendant responded that he understood and wished to plead guilty. The court again stated that defendant was subject to consecutive sentences, meaning "after you do your time on one, you finish it, you start your time on the other." Defendant stated that he still wished to plead guilty and give up his right to a trial by jury or bench. Defendant stated that he had talked to his lawyers about his case and was satisfied with their representation. He was not forced, threatened, or promised

anything in exchange for his guilty plea and was not then under the influence of drugs.

The parties stipulated to the evidence, which showed that defendant unlawfully entered the home of his former girlfriend and observed her paramour, Kenny Perry, asleep in bed next to the couple's six-year-old son. Defendant retrieved kitchen knives and stabbed Perry in the chest, face, back, shoulders, and arms. Shortly thereafter, the police arrived at the scene. Defendant, with a torn shirt and blood on his face, approached them, stating, "I am the one you want." The DNA profile of the blood on defendant's face matched that of Perry. Defendant gave a videotaped confession to an assistant State's Attorney.

At the sentencing hearing held two days after defendant's guilty plea, defense attorney Kennelly stated that they would stand on the agreed sentence. The court asked defendant if he had anything to add before the court imposed the sentence, and defendant responded no. In accordance with the plea agreement, the trial court sentenced defendant to consecutive terms of 60 years for murder and 30 years for home invasion. The court then admonished defendant of his appeal rights, including that he was required to first timely file a written motion to withdraw his guilty plea, stating the grounds in support.

Defendant did not file a motion to withdraw his guilty plea or a direct appeal. In 2008, defendant filed a *pro se*

postconviction petition. He claimed, *inter alia*, that counsel was constitutionally ineffective for failing to file a notice of appeal in his case. Defendant alleged that after signing the plea agreement, he informed defense counsel that he wanted to challenge his sentence, but counsel responded that defendant "couldn't do that." Defendant stated: "Counsel knew the mental status of the defendant and also knew that he did not understand the proceedings before him."

The case proceeded to second-stage review, and defendant was appointed postconviction counsel. Postconviction counsel filed a certificate under Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that he had consulted with defendant to ascertain his claims of constitutional deprivation and examined the record, making any necessary amendments. Counsel, however, did not amend the petition. The State filed a motion to dismiss the petition, which was granted in part, except regarding defendant's direct appeal allegation. An evidentiary hearing followed.

Defendant testified that he was represented by two public defenders, Anderson and Kennelly, during plea proceedings. Defendant testified that he did not understand the plea proceedings, but attorney Anderson told him "to be quiet in the courtroom" and that he would explain the proceedings to defendant later. Immediately after defendant was sentenced, attorney Anderson met him in the lockup. Defendant told Anderson that he

wanted to appeal his case and the sentence because he did not know the sentencing terms would be consecutive. Defendant also stated that he wanted to withdraw his guilty plea. Defendant testified that he knew his sentence was 90 years, but did not understand "the breakdown of how that all was going to run together." Anderson responded that defendant's sentence would be concurrent and that, regardless, it was "too late" to file a notice of appeal.

The State called defense counsel Kennelly, the lead attorney in defendant's murder case. Kennelly testified that the State had sought the death penalty against defendant, but Kennelly negotiated a plea bargain excluding such punishment. Kennelly testified that prior to the plea, he and Anderson "talked to [defendant] at length about" the negotiated sentence of 60 years for murder and 30 years for home invasion, to be served consecutively. He explained consecutive meant the sentences "do not run together," and defendant stated he understood the sentence. Prior to the plea, Kennelly and Anderson also explained that defendant must first file a motion to withdraw the plea agreement, stating grounds in support, before filing an appeal. They explained that defendant could not simply challenge his sentence absent the motion. Kennelly was present with defendant when he pleaded guilty and at sentencing, but defendant never expressed any misunderstanding regarding the proceedings.

Although defendant made several telephone calls to Kennelly during the case, he did not express a desire to appeal his sentence or to file a motion to withdraw his guilty plea. Kennelly testified that because he was lead attorney, Anderson would have informed him if defendant had wanted to withdraw his guilty plea.

The trial court found defendant had not established a substantial violation of his constitutional rights because he did not request to withdraw his guilty plea. The trial court added that defendant failed to establish that his plea was entered into involuntarily and thus there were no grounds to file the motion to withdraw the plea. The court found defense counsel Kennelly credible in that he fully explained the negotiated agreement and sentence to defendant. The court noted that it had overseen the plea proceeding, but did not recall defendant expressing confusion regarding the plea proceedings or recall hearing the claimed interchange between defendant and Anderson. Given the absence of grounds to challenge the plea, the court denied defendant's petition.

Defendant now challenges that denial. At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. English*, 406 Ill. App. 3d 943, 951-52 (2010). Where, as here, the third-stage

evidentiary hearing involves fact-finding and credibility determinations, we will not reverse a circuit court's decision unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473; *English*, 406 Ill. App. 3d at 952. A ruling is manifestly erroneous if it contains error that is clearly evident, plain, and indisputable. *People v. Hughes*, 329 Ill. App. 3d 322, 325 (2002).

Defendant contends that he made a substantial showing that second-chair defense counsel Anderson was constitutionally ineffective for failing to challenge defendant's guilty plea, as directed. He contends he should be permitted to withdraw his guilty plea.

The State, initially, responds that defendant forfeited review of his claim because he did not raise it in his petition. The State notes that supreme court rules require a defendant who appeals from a negotiated guilty plea or who wishes to challenge his sentence to first file a motion to withdraw the guilty plea and vacate the judgment, and in the motion, state grounds in support of withdrawal. Ill. S. Ct. Rs. 604(d) (eff. July 1, 2006), 605(c) (eff. Oct. 1, 2001). Defendant acknowledges the "letter" of his claim is that defense counsel was ineffective because he failed to file a direct appeal. However, he argues the "substance of the claim" is that defense counsel was ineffective because he failed to challenge his guilty plea.

Defendant's petition specifically stated:

"After signing the plea agreement the defendant advised his counsel that he wished to appeal the sentencing of the agreement. Counsel advised defendant that he couldn't do that even after the trial judge ask[ed] the counsel and the defendant if he wished to appeal. Counsel knew the mental status of the defendant and also knew that he did not understand the proceedings before him."

In support of his contention that his petition must be liberally construed, defendant cites *People v. Rogers*, 372 Ill. App. 3d 859 (2007), wherein this court reversed the first-stage summary dismissal of the defendant's *pro se* postconviction petition. We held that the petition, although "not couched specifically in terms of the failure to file a motion to withdraw," stated facts in support of that claim. *Rogers*, 372 Ill. App. 3d at 865.

This case is distinguishable from *Rogers*. The petition was not summarily dismissed during first-stage proceedings, but denied after a third-stage evidentiary hearing. For a defendant to even merit a third-stage evidentiary hearing, he must "explain the grounds that could have been presented in the motion to withdraw the plea." See *People v. Edwards*, 197 Ill. 2d 239, 257-

58 (2001); see also *People v. Gomez*, No. 2-09-0766, slip op. at 6 (March 28, 2011) (holding same). Defendant was represented by counsel, yet his petition did not allege (a) that defendant wished to withdraw his guilty plea or (b) that he had sufficient grounds for withdrawing the guilty plea. Defendant thus did not state a legally viable claim. Because counsel apparently chose not to add the present claim to defendant's amended petition, we might well infer that counsel had no reason to pursue it. See *Pendleton*, 223 Ill. 2d at 474-75. Indeed, the trial court limited the evidentiary hearing to the issue of whether defendant wished to file a notice of appeal, and defense counsel did not object. At this stage, liberally construing defendant's petition would simply be inappropriate. Our supreme court has held that a claim not raised in a petition cannot be argued for the first time on appeal. *Pendleton*, 223 Ill. 2d at 474-75; *People v. Jones*, 213 Ill. 2d 498, 505 (2004). In light of that clear directive, we agree with the State that forfeiture applies in this case.

Moreover, even if we were to construe defendant's petition liberally to avoid forfeiture, his claim still fails because he cannot establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a defendant must show both that counsel's performance "fell below an objective standard of reasonableness" and that the

deficient performance prejudiced the defense. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009), quoting *Strickland*, 466 U.S. at 687-88.

Defendant argues that his claim satisfies the *Strickland* deficiency prong because, at the evidentiary hearing, he testified that co-defense counsel Anderson failed to honor his directive to file a motion to withdraw his guilty plea and file an appeal. Defendant argues that because Anderson did not testify as a witness at the hearing, defendant's assertions stand "unrebutted and must be accepted as fact."

Defendant once again confuses the standards required at the various stages under the Act. It is true that at first and second stage of postconviction proceedings, all well-pleaded facts not positively rebutted by the original trial record are taken as true. *Pendleton*, 223 Ill. 2d at 473; *People v. Carballido*, No. 2-09-0340, slip op. at 19-20 (March 17, 2011). However, this case comes to us following a third-stage evidentiary hearing. At such a hearing, the judge is not required to take defendant's allegations or testimony as true, but must weigh the evidence and the credibility of the witnesses to determine whether the defendant, indeed, has fulfilled his burden of proving a constitutional deprivation. *Pendleton*, 223 Ill. 2d at 473; *Coleman*, 183 Ill. 2d 366, 384-85 (1998).

The circuit court determined that defendant had not met that burden because he failed to demonstrate that counsel was

constitutionally ineffective for failing to challenge his plea. At the hearing, defendant testified that co-defense counsel Anderson essentially shushed him when he expressed confusion during plea proceedings and, when defendant later stated he did not understand the consecutive nature of the sentence, Anderson responded that an appeal was not possible. The court noted it had overseen the original plea proceedings in defendant's case, but did not recall any interchange between defendant and Anderson or recall defendant's confusion with respect to the plea. The court thus found defendant's testimony in support of his claim incredible.

The court found defense counsel Kennelly, on the other hand, credible. Kennelly, as lead attorney, argued all significant motions for defendant at the trial level and represented him on the record during plea proceedings. The court specifically noted Kennelly's testimony that he and Anderson "talked to [defendant] at length about" his sentence and explained the consecutive nature of the negotiated sentence of 60 years for murder and 30 years for home invasion. Kennelly testified that defendant did not express any desire to challenge his guilty plea or sentence. He testified that had defendant told Anderson to challenge his plea, Anderson would have informed Kennelly. While the court did not specifically find defendant's testimony, that he told Anderson he wished to challenge his plea, incredible, such a

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finding was implicit given the court's credibility determinations and statements. In light of the strong evidence showing defendant's plea was proper, evidence that defense counsel zealously represented him, thereby averting a death sentence, and the evidence presented at the evidentiary hearing, we conclude that the findings of the court were not against the manifest weight of the evidence. See *People v. Rovito*, 327 Ill. App. 3d 164, 176 (2001).

Based on the foregoing, defendant has failed to show that his counsel's representation was deficient. Because defendant has failed to establish the first prong of *Strickland*, we need not consider the second prong, whether he suffered prejudice.

We affirm the judgment of the circuit court of Cook County denying defendant's petition.

Affirmed.