No. 1-09-2331

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).

FIRST DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the
	) Circuit Court of
Plaintiff-Appellee,	) Cook County.
	)
v.	) No. 01 CR 19064
	)
DAVID HILL,	) Honorable
	) William G. Lacy,
Defendant-Appellant.	) Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

O R D E R

HELD: Postconviction counsel's failure to amend the postconviction petition to include a claim not raised in the defendant's *pro se* petition did not deny the defendant reasonable assistance of counsel. The circuit court's denial of the defendant's postconviction petition following an evidentiary hearing was not against the manifest weight of the evidence. The credible testimony established that defense counsel did not urge the defendant to plead guilty and that the defendant's decision

to plead guilty was not the result of defense counsel's failure to object to the insufficiency of the factual basis for his guilty plea.

Pursuant to a plea agreement, the defendant, David Hill, entered a guilty plea to charges of aggravated kidnaping and aggravated vehicular hijacking and was sentenced to 29 years' imprisonment in the Illinois Department of Corrections. The defendant filed a *pro se* petition for postconviction relief. See 725 ILCS 5/122-1 *et seq.* (West 2002) (the Act). The circuit court dismissed the petition as frivolous and patently without merit. The defendant appealed, and a majority of this court reversed the dismissal and remanded the case for further proceedings. *People v. Hill*, No. 1-04-1581 (June 30, 2006) (Wolfson, J., dissenting).

Following an evidentiary hearing, the circuit court denied the petition. The defendant appeals.

On appeal, the defendant contends as follows: (1) postconviction counsel did not render reasonable assistance, and (2) the trial court's finding that the defendant was not denied the effective assistance of counsel was against the manifest weight of the evidence. We affirm the denial of the defendant's petition for postconviction relief.

I. BACKGROUND

A. *Guilty Plea Proceedings*

The defendant was charged by indictment with multiple offenses including aggravated kidnapping and aggravated vehicular hijacking. The charges stemmed from an incident in which the defendant drove off in the victim's van containing the victim's 23-month old son. Pursued by the police, the defendant crashed the van; subsequently, he was apprehended. The defendant gave a written statement admitting that he took the van. He further admitted that, while he was driving, he heard a baby crying and saw that the baby was in the van, but he continued to drive until he crashed the van.

Following a conference pursuant to Supreme Court Rule 402 (eff. July 1, 1997), the defendant agreed to plead guilty to one count of aggravated vehicular hijacking and one count of aggravated kidnapping in exchange for a sentence of 29 years' imprisonment. As part of the admonishments, the trial court advised the defendant that both offenses were class X felonies and carried a sentencing range of 6 to 30 years' imprisonment. Without specifying the eligibility basis, the court advised the defendant that he was eligible for an extended-term sentence, which increased the penalty range from 30 to 60 years' imprisonment. The defendant acknowledged that he understood the court's admonishments and the terms of the plea agreement and that the agreement was acceptable to him. In entering his plea

of guilty to the two charges, the defendant acknowledged that he was doing so freely and voluntarily.

B. *First-Stage Postconviction Proceedings*

In his *pro se* petition, the defendant claimed that he was denied the effective assistance of counsel. The defendant alleged that defense counsel allowed him to plead guilty to aggravated kidnaping even though the defendant could not have been convicted of that offense and failed to object to the factual basis for the defendant's guilty plea to aggravated kidnaping. The defendant maintained that the use of the child's age both to elevate the offense from kidnaping to aggravated kidnaping and to establish the element of confinement against the victim's will for purposes of the kidnaping statute (720 ILCS 5/10-1(b) (West 2000)) constituted a double enhancement and violated his right to due process. The defendant further asserted that the confinement or asportation of the child was merely incidental to his taking of the van.

In reversing the dismissal of the defendant's petition, this court concluded that the defendant had stated the gist of a violation of his constitutional right to effective representation. *Hill*, slip order at 20. We found that the defendant's factual allegations supported his claim of innocence to the aggravated kidnaping charge. Allowing the defendant to

plead guilty to aggravated kidnapping was objectively unreasonable and that, but for the deficient advice, the defendant would not have pleaded guilty, thus satisfying both prongs of the *Strickland* test. *Hill*, slip order at 20; *Strickland v. Washington*, 466 U.S. 668 (1984).

B. *Amended Petition for Postconviction Relief*

Upon remand, the defendant was appointed counsel, who filed an amended postconviction petition. In the amended petition, the defendant maintained that defense counsel was ineffective for allowing him to plead guilty to aggravated kidnaping and aggravated vehicular hijacking because the State could not prove the offenses beyond a reasonable doubt, and the factual basis for his guilty plea to the specified charges was insufficient.

The defendant further alleged that he would not have pleaded guilty but for defense counsel's urging that he do so. Because the defendant had plausible defenses to both charges, he maintained that defense counsel's erroneous advice prejudiced him.

C. *Evidentiary Hearing*

The defendant testified that on July 24, 2001, he was riding his bicycle down an alley when he saw an unattended van. He rode past the van but came back and got into the van. He noticed a purse on the front seat but did not see the driver of the van.

As he drove away, he heard a woman scream something, but he could not understand what she was saying. He proceeded to drive southbound on Lake Shore Drive. He exited at Roosevelt Road and turned left and proceeded southbound on Michigan Avenue. When he attempted to turn left on 21st Street, he lost control of the van and crashed into a wall. He exited the van through the passenger door and fled the scene. He did not hear or see a child in the backseat.

The defendant further testified that he spoke with defense counsel on two occasions. At the first meeting, the defendant told defense counsel about the incident. Counsel told him it would be a difficult case to take to trial because the defendant had no defenses. After defense counsel had a conference with the trial judge, counsel told the defendant his sentence would be 60 years. The defendant did not agree to accept the 60-year sentence, telling counsel that he did not commit the crimes with which he was charged. When the defendant met with defense counsel a second time, counsel again told him it would be a difficult case to try but that the offer was still 60 years. The defendant decided to plead guilty because he believed he did not have a defense to the charges.

On cross-examination, the defendant maintained that he did not know there was a child in the van. The defendant was then

questioned about the statement he gave to an assistant State's attorney (the ASA) following his arrest in this case. He acknowledged telling the ASA that, at the intersection of Michigan Avenue and Roosevelt Road, he saw a police car proceeding eastbound. He further acknowledged that he saw the police officer use his radio, and that after he turned on Michigan Avenue, he looked back to see where the police car was. He denied that he told the ASA that it was then he saw the baby. He denied telling the ASA that, after he crashed the van, he checked to see if the baby was alright and that the baby did not appear to be bleeding. He denied telling the ASA that he exited the van through the driver's door and then ran away. He denied telling the ASA that, after he realized the baby was in the van, he wanted to escape from the police.

The defendant testified that he told defense counsel that he did not know the baby was inside the van. He denied discussing his written statement with defense counsel. While he did not intend to plead guilty, he asked defense counsel to see what sentence he would receive if he pleaded guilty. The defendant acknowledged that he was willing to plead guilty even though he did not commit the offenses. The defendant maintained that the only sentence defense counsel discussed with him was 60 years.

The defendant initially denied that defense counsel

discussed possible defenses to the charges, such as the defendant's lack of knowledge that a baby was in the van and that no force was used to take the van. However, he then admitted that he had discussed both defenses with counsel. The defendant acknowledged that defense counsel explained that the case was a difficult one because of the baby and that it would be hard to get the jury to focus on the legal issues of knowledge and force. The defendant denied that counsel told him he would be willing to take the case to trial.

The defendant further testified that, on December 5, 2001, he pleaded to guilty aggravated kidnaping and aggravated vehicular hijacking and was sentenced to 29 years, though he never requested such sentence. He did not recall a conference between the attorneys and the trial judge on that day. He acknowledged that he was free to accept or reject the offer and that he could have gone to trial, but he chose to plead guilty.

On redirect examination, the defendant maintained that he did not go to the hospital to be treated for his injuries sustained in the crash until after he signed the statement he gave to the ASA. He could not see to read the statement because he was in pain and his eyes were blurry. He relied on what the ASA told him was in the statement. On re-cross examination, the defendant denied telling the ASA that he had been released from

the hospital prior to talking to him and that the only medication he was taking was regular Tylenol. He acknowledged telling the ASA that he could not read the statement because he did not have his glasses with him, but also because his eyes were blurry from the crash. He denied making any changes to the statement. When questioned about the crossed-out words he had initialed, he stated that he placed his initials where the ASA told him to and that when he signed the statement, nothing was crossed out. After various changes to the statement were pointed out to him, the defendant conceded that he was allowed to make changes.

Questioned by the circuit court, the defendant acknowledged that the sentence he received was 31 years less than the original offer of 60 years. The defendant further acknowledged that, at the time he entered his guilty plea, he stipulated to the factual basis for his plea, which included his admission that while he was driving the van, he heard the baby crying but continued to flee.

Defense counsel testified that he represented the defendant in this case, leading up to the entry of his guilty plea. The defendant requested defense counsel to find out what offer the State would make on his case. The offer was 60 years. Defense counsel reviewed with the defendant his options, based on the indictment, the discovery and the sentencing range of 6 to 30

years, and how his sentence would be affected by truth-in-sentencing. Counsel also reviewed extended-term sentencing with the defendant because the defendant was eligible for an extended-term sentence.

Defense counsel testified that he also discussed possible defenses to the charges with the defendant. The defendant acknowledged to him that he did not initially notice the baby when he took the van, but he finally looked around and saw the baby. He did not stop the van because he did not want to be caught by the police and sent back to prison. Counsel further testified that he advised the defendant that if he wished to go to trial, a bench trial would be preferable because of the issues in the case. He advised the defendant that they could use the fact that he did not know the baby was in the van when he took it and that there was nothing in the police reports or the defendant's own statement that he had used force when he took the van. The defendant told him to request a conference with the trial judge to see if a disposition favorable to the defendant could be worked out.

Defense counsel testified that he met with the trial judge and the prosecutor. He set forth the facts of the case and what defenses he would present. He requested a reduction of the charges because the State could not prove all the elements of

either charge. The prosecutor refused to reduce the charges, and the trial judge agreed that the evidence, as presented, was sufficient to convict the defendant on the charged offenses. However, the trial judge believed the offer of 60 years was too high and recommended a sentence of 30 years.

Defense counsel met with the defendant and, based on the trial judge's comment on the evidence, counsel now recommended a jury trial rather than a bench trial. The other option was for the defendant to accept the plea offer. The defendant expressed concern about testifying at a trial because of his prior convictions and his understanding from his cell-mates that the trial judge imposed lengthy sentences. Defense counsel advised the defendant that, if convicted after a trial, he was looking at substantially more time than the 30 years he had been offered. The defendant remained reluctant to accept a 30-year sentence.

Defense counsel testified further that, on December 5, 2001, the trial judge agreed to reduce the sentence to 29 years. The defendant was not comfortable with a 29-year sentence. Counsel advised the defendant that he thought 29 years was high; if the defendant elected to go to trial, he had a *bona fide* defense on the issues of knowledge and force. If he was convicted at trial, the issues could raised on appeal. After further discussion, the defendant accepted the offer of a 29-year sentence.

During the plea proceedings in court, the defendant hesitated prior to changing his plea from not guilty to guilty and asked defense counsel whether he thought the defendant would get a lower sentence if he went to trial. Counsel advised him that in all likelihood he would not get a lesser sentence but that if the defendant wished to try the case, they would proceed to trial. The defendant did not want to risk a higher sentence and entered a guilty plea.

On cross-examination, defense counsel testified that the issue of an extended-term sentence was discussed at the conferences with the trial judge. The defendant was eligible for an extended-term sentence because of the baby's age, not his prior convictions. He maintained that he had advised the defendant of all of the defenses he had to the charges, including that the kidnaping was incidental to the taking of the van. He did not recall whether the factual basis established the use of force to take the van.

In denying the defendant's petition, the circuit court first addressed credibility, finding the defendant "wholly incredible," whereas defense counsel testified in a "highly credible fashion." The court further found that the defendant participated in the negotiations and was present in court and heard the factual basis, including his admission that he knew there was a baby in

the van but continued to flee. The court next found that defense counsel advised the defendant as to the possible defenses and the consequences if the defenses were unsuccessful. The court concluded that the defendant had made a choice to plead guilty but, after being in the penitentiary for a length of time, he regretted pleading guilty.

From the denial of his postconviction petition, the defendant brings this timely appeal.

II. ANALYSIS

A. *Failure of Postconviction Counsel to Raise Extended-Term Sentence Claim*

The defendant contends that the failure of postconviction counsel to amend his postconviction petition to allege that his guilty plea was involuntary because it was based on his erroneous belief that he was eligible for an extended-term sentence denied him effective representation.

The right to the assistance of counsel in a postconviction proceeding is not constitutionally mandated but is wholly statutory. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977 (2007). Under the Act, a defendant is entitled only to a reasonable level of assistance. *Suarez*, 224 Ill. 2d at 42. "To ensure that postconviction petitioners receive this level of assistance, [Supreme Court] Rule 651(c) imposes specific duties

on postconviction counsel." *Suarez*, 224 Ill. 2d at 42.

1. Standard of Review

Where the issue concerns compliance with a supreme court rule, the court's review is *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384, 788 N.E.2d 1169 (2003).

2. Discussion

Pertinent to the issue in this case, Rule 651(c) requires the record to show that postconviction counsel has:

> "consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

Postconviction counsel has no obligation to raise issues not raised by the defendant's *pro se* petition. *People v. Pendleton*, 223 Ill. 2d 458, 476, 861 N.E.2d 999 (2006). Postconviction counsel's failure to amend the defendant's *pro se* petition to include a claim that the erroneous advice as to his eligibility for an extended-term sentence rendered his plea involuntary, did not constitute noncompliance with Rule 651(c), if that claim was not raised in the defendant's *pro se* petition.

In his *pro se* petition, the defendant maintained that defense counsel was ineffective because he allowed the defendant to plead guilty to aggravated kidnaping even though the defendant could not have been convicted of that offense. The defendant did not claim that counsel was ineffective for allowing the defendant to plead guilty because he was advised by defense counsel and improperly admonished by the trial judge that he was eligible for an extended-term sentence. Therefore, that claim could not properly be raised by an amendment of the petition. See *People v. Vasquez,* 356 Ill. App. 3d 420, 824 N.E.2d 1071 (2005) (postconviction counsel could not amend petition to include a new basis for the defendant's allegation of ineffective assistance not raised in the defendant's *pro se* petition).

Moreover, this court lacks the authority to address claims that are forfeited for failure to raise them in the initial petition. In *People v. Jones*, 213 Ill. 2d 498, 508, 821 N.E.2d 1093 (2004), our supreme court explained that appellate courts are not free to overlook the waiver language of section 122-3 of the Act (725 ILCS 5/122-3 (West 2000)) on the grounds of fundamental fairness. Only the supreme court had the authority to reach waived issues through the exercise of its supervisory authority, which the appellate court did not possess. *Jones*, 213 Ill. 2d at 506-07. We conclude that postconviction counsel

rendered reasonable assistance to the defendant.

The defendant is not without a remedy. The defendant may seek relief under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2002)), which provides the procedure for filing a successive petition for postconviction relief. See *Jones*, 213 Ill. 2d at 509

B. *Ineffective Assistance of Defense Counsel*

The defendant contends that defense counsel was ineffective in that (1) he urged the defendant to plead guilty to aggravated kidnaping and aggravated vehicular hijacking even though the State could not prove all of the elements of those offenses, and (2) he failed to raise an objection to the insufficient factual basis for the defendant's guilty plea.

1. Standard of Review

Where a petition for postconviction relief is advanced to a third-stage evidentiary hearing, involving fact-finding and credibility determinations, the circuit court's decision will not be reversed unless it is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. "Manifest error is error that is clearly evident, plain and indisputable." *People v. Marshall*, 375 Ill. App. 3d 670, 675, 873 N.E.2d 978 (2007). It is the defendant's burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473.

2. Discussion

Where a defendant challenges the validity of his guilty plea by alleging ineffective assistance of counsel, the court applies the two-prong test set forth in *Strickland*, 466 U.S. 668. The defendant must establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's substandard performance. *People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E.2d 913 (2005). To succeed on an ineffective assistance of counsel claim, the defendant must satisfy both prongs of the *Strickland* test. *People v. Palmer*, 162 Ill. 2d 465, 475-76, 643 N.E.2d 797 (1994).

Our supreme court has held that an attorney's conduct is deficient if the attorney fails to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *Hall*, 217 Ill. 2d at 335. To establish the prejudice prong, the defendant must show that there was a reasonable probability that, absent counsel's errors, the defendant would have persisted in his plea of not guilty and insisted on a trial. *Hall*, 217 Ill. 2d at 335.

a. *Urging the Defendant to Plead Guilty*

As our recitation of the testimony from the evidentiary hearing reveals, the testimony of the defendant concerning the events leading up to the entry of his guilty plea was completely contradictory to that of defense counsel. Those contradictions

were properly resolved by the circuit court. As our supreme court noted in *People v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998), "the postconviction trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a 'position of advantage in a search for the truth' which 'is infinitely superior to that of a tribunal where the sole guide is the printed record.' " *Coleman*, 183 Ill. 2d at 384 (quoting *Johnson v. Fulkerson*, 12 Ill. 2d 69, 75, 145 N.E.2d 31 (1957)). In this case, the circuit court found defense counsel to be a credible witness while finding the defendant "wholly incredible."

As the testimony at the evidentiary hearing established, far from urging the defendant to plead guilty, defense counsel discussed with the defendant the possible defenses he had to the charges and remained prepared to take the case to trial. Even during the guilty plea proceedings, when the defendant hesitated to change his not guilty plea to a guilty plea, defense counsel advised the defendant he could still chose to go to trial rather than plead guilty. Finally, defense counsel told the defendant that even if they lost at trial, they could pursue an appeal.

There was no credible evidence that defense counsel urged the defendant to plead guilty to offenses of which he could not have been convicted. Therefore, defense counsel's performance

was not deficient in this respect.[1]

b. *Lack of a Factual Basis*

The defendant contends that defense counsel's performance was deficient because he failed to object to the insufficient factual basis for the defendant's guilty plea. The defendant's reliance on *People v. Andretich*, 244 Ill. App. 3d 558, 614 N.E.2d 489 (1993), is misplaced. In that case, the trial court found that counsel was ineffective because he failed to present evidence establishing that the defendant was innocent of vehicle theft. See *Andretich*, 244 Ill. App. 3d at 562-63 (the defendant's father's affidavit established that there was no theft of the vehicle).

There are certain ultimate decisions involving fundamental rights which can only be made by the defendant, regardless of competent counsel's advice, one of which is the right to plead guilty. *People v. Anderson*, 266 Ill. App. 3d 947, 956, 641

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[1]The defendant points out that this court previously determined that defense counsel acted unreasonably. *Hill*, slip order at 20. The defendant overlooks the posture of the case in the prior appeal. Our review was limited to determining whether, at the first stage of postconviction proceedings, the defendant's allegations, without considering their credibility, were sufficient to state the gist of a constitutional claim.

N.E.2d 59 (1994) (citing *People v. Whitfield*, 40 Ill. 2d 308, 239 N.E.2d 850 (1968)). After advising the defendant that the case could be defended and that he was prepared to take the case not only to trial but to an appeal as well, defense counsel could not insist that the defendant plead not guilty.[2]

We determine the defense counsel's representation of the defendant was not deficient. In any event, the defendant could not satisfy the prejudice prong of the *Strickland* test. The credible testimony established that the defendant's decision to plead guilty ultimately was based on the defendant's fear of receiving a longer sentence if he went to trial. The defendant himself acknowledged in his testimony that he was prepared to plead guilty even though he did not commit the offenses. The defendant failed to establish that, but for defense counsel's failure to object to the lack of a factual basis, he would have persisted in his plea of not guilty and gone to trial.

We conclude that the circuit court's denial of the defendant's postconviction petition was not manifestly erroneous.

III. CONCLUSION

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[2]However, a defendant does not have a due process right to plead guilty. See *People v. Ferenetti*, 117 Ill. App. 3d 44, 51, 452 N.E.2d 790 (1983), *reversed on other grounds* 104 Ill. 2d 19, 470 N.E.2d 501 (1984).

Postconviction counsel's failure to amend the postconviction petition to include a claim not raised in the defendant's *pro se* petition did not deny the defendant reasonable assistance of counsel. The circuit court's denial of the defendant's postconviction petition following an evidentiary hearing was not against the manifest weight of the evidence. The credible testimony established that defense counsel did not urge the defendant to plead guilty and that the defendant's decision to plead guilty was not the result of defense counsel's failure to object to the insufficiency of the factual basis.

Affirmed.