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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 Du Page County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 04-CF-1201
)	
JEFFREY A. McCREE,)	Honorable
)	Daniel P. Guerin,
Defendant-Appellee.)	Judge, Presiding.

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

ORDER

Held: The trial court's second-stage dismissal of the defendant's postconviction petition was affirmed where the defendant did not demonstrate any prejudice from his trial and postconviction counsels' allegedly deficient performance.

¶ 1 Defendant, Jeffrey A. McCree, appeals from an order of the circuit court of Du Page County dismissing his postconviction petition at the second stage without an evidentiary hearing. We affirm.

¶ 2 BACKGROUND

¶ 3 On May 27, 2004, a Grand Jury indicted defendant on five counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2004)), concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2004)), and robbery (720 ILCS 5/18-1(a) (West 2004)). One of the first-degree murder counts alleged felony murder, specifically, that defendant, while committing the forcible felony of robbery, took a 2003 silver Toyota Corolla from the presence of Vida Lamptey McCree by use of force in that he strangled Vida Lamptey McCree, thereby causing her death.

¶ 4 On February 20, 2007, defendant entered a negotiated plea of guilty to one count of first degree murder (intent to do great bodily harm), and the State nol-prossed the remaining counts. Defendant and the State agreed that defendant would be sentenced to a period of 35 years' incarceration with credit for time served.

¶ 5 The trial court ascertained that defendant was 36 years old. The court also ascertained that defendant was not addicted to drugs or alcohol and was not taking prescription medication. Defendant acknowledged that he understood the charge. The court explained the minimum and maximum penalties and the period of mandatory supervised release. The court further explained that defendant could be fined up to \$25,000 and would be ordered to submit to DNA indexing. The court then explained the plea agreement and obtained defendant's agreement that he understood the plea. After hearing a recitation of defendant's extensive criminal history, the court concurred in the plea agreement. The court gave defendant the admonishments, which defendant stated he understood. The court inquired: "Sir, other than [the sentence], has anybody forced you, threatened you or promised you anything else to get you to [plead guilty]?" Defendant replied, "No, sir." The court asked defendant if he was "doing this of [his] own free will," and defendant stated, "Yes."

Defendant stated that he had discussed the plea with his attorneys, and defendant told the court he had no questions.

¶ 6 The State recited the following factual basis for the guilty plea. On April 28, 2004, Joscelyn Nimako was living with the victim, Vida Lamptey McCree, in an apartment in Woodridge, Illinois. Defendant, who had been married to the victim for about three years and was recently released from prison, was having breakfast with the victim and Joscelyn in the apartment on April 28, 2004. At about 10 a.m., when Joscelyn left the apartment, defendant and the victim were still inside the apartment. According to Joscelyn, defendant and the victim had been arguing that day as well as earlier in the week. On April 26, 2004, two days prior to the murder, the victim purchased a silver Toyota, which defendant never drove or used. The car salesman would testify that the victim, alone, purchased the car. On April 28, 2004, when Joscelyn returned to the apartment, she discovered blood in the victim's bedroom and greenish-blue marks on the floor leading out of the apartment. A neighbor, Yolanda Morales, had seen defendant carrying a large greenish-blue suitcase out of the apartment. Yolanda observed that defendant had difficulty loading the suitcase, which appeared heavy, into the back of the silver Toyota. The silver Toyota was discovered abandoned in a parking spot in Chicago on April 29, 2004. Defendant's DNA was found on the steering wheel, and his fingerprint was found on the rear exterior where Yolanda said she saw defendant loading the suitcase. Marcus Turner would testify that defendant picked him up on April 28, 2004, driving a silver Toyota. Defendant told Marcus that he had "merked" the victim, leading Marcus to understand that defendant had killed her. Defendant drove to Ohio Street in Chicago, where he and Marcus went into an alley and opened the trunk. They lifted a heavy suitcase out of the trunk and dumped it into a dumpster. On April 29, 2004, a garbage man found the suitcase and opened it. The

victim's body was inside the suitcase. The cause of death was strangulation, and the victim was beaten at or near the time of death. Mike Harrington, defendant's parole officer, would testify that defendant confessed the murder to him at the Du Page County jail.

¶ 7 Following the factual basis, the court asked defendant if he still wished to plead guilty. Defendant answered, "Yes." The court accepted the plea. When the court asked defendant if he had anything to say, defendant stated the following:

"The reason why I took this plea because [*sic*] is to put my wife's family and my family, you know, they just started the healing process. It's been a long road for them. Me, myself, I'm at peace. So, you know, this time I can live anywhere. You know, I'm at peace with myself. You know, I fall down on my knees every night and beg for God's forgiveness. But what my hands have sent forth to him, you know."

Defendant then thanked the prosecutors for their diligence "in seeking justice for my wife," and his defense counsel for their help. Defendant expressed his sorrow for what he did and asked for God's mercy.

¶ 8 The trial court sentenced defendant in accordance with the plea agreement and admonished him of his appeal rights and gave defendant the opportunity to ask questions. Defendant stated that he had no questions.

¶ 9 Thereafter, defendant did not file a motion to withdraw his plea or file a direct appeal.

¶ 10 On October 27, 2009, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Stripped of its excess verbiage, the petition alleged the following. From the beginning, defendant maintained to his appointed counsel that his conduct amounted to involuntary manslaughter or, "at the most," second-degree murder, "but

certainly not first degree murder or felony murder.” Defendant intended to defeat the first-degree murder charges “by proving to a jury a mitigating factor of second degree murder” or by proving that the crime was involuntary manslaughter. During his counsel’s visits, defendant repeatedly informed counsel of this intention. Despite defendant’s insistence, his meetings with counsel did not involve investigation of the facts, trial strategy, or discussion of defendant’s theories. Rather, counsel “tried many times during those many meetings to elicit” information from defendant about the location of a person who was wanted by the State. At about 4:30 p.m. two days before defendant’s jury trial was set to commence, defendant engaged in a 20-minute telephone conference with his two attorneys who informed defendant that the State was offering a plea to first-degree murder in exchange for a sentence of 35 years’ incarceration. If defendant would agree to such a plea, the State would drop the remaining charges. If defendant did not agree to take the plea, the State would proceed only on the felony murder charge, which carried a sentence of natural life imprisonment. Counsel informed defendant that he could not “defeat” the robbery charge at trial and that he would be convicted of felony murder and be sentenced to natural life imprisonment. Counsel persuaded defendant that, if the State dropped all charges except the felony murder charge, defendant would not have an opportunity to prove either second-degree murder or involuntary manslaughter. Counsel convinced defendant that his “only option” was “to surrender to the State’s proposition at once.” Because defendant’s family had presented a videotape to the State in which the family cried and begged the prosecutors not to seek the death penalty, defendant believed that the State’s compassion had already been exhausted. The next morning, defendant was escorted to the courtroom where counsel “coached” defendant to answer the judge’s questions “to the effect” that he was not coerced to plead guilty. Defendant went through with the plea as coached, “all after being duped by the court-

appointed attorneys and the state's attorneys." Defendant was "duped," because his counsel knew that the State could not prove the robbery charge that formed the basis for felony murder. The robbery charge was void for failure to state an offense, because the robbery statute excepted the offense of vehicular hijacking. Since the indictment alleged that defendant took the silver Toyota Corolla from the presence of the victim, the alleged violation was not robbery but vehicular hijacking, which did not carry a life sentence.

¶ 11 The trial court did not dismiss the petition but appointed counsel who then withdrew. On May 19, 2010, the court appointed another attorney to represent defendant. On October 25, 2010, the second attorney filed a "petition for postconviction relief" on defendant's behalf. The petition alleged the facts surrounding the 20-minute phone call between defendant and his trial attorneys that defendant had included in his *pro se* petition and the allegation that trial counsel coached defendant to answer the trial court's questions that he was not coerced into pleading guilty when, in fact, he was coerced. The petition concluded that defendant's guilty plea was involuntary due to the ineffective assistance of counsel who had misled defendant into believing that a conviction for felony murder was inevitable. The State filed an amended motion to dismiss the petition.

¶ 12 On February 23, 2011, the trial court granted the State's motion to dismiss, because "defendant failed to demonstrate a deprivation of a substantial constitutional right." The court's written order was accompanied by a 17-page memorandum opinion. Defendant filed a timely appeal and then filed an amended notice of appeal.

¶ 13

DISCUSSION

¶ 14 Defendant raises two arguments on appeal. He first argues that he made a substantial showing that his trial attorneys provided ineffective assistance of counsel when they coerced him

into pleading guilty. His second argument is that his postconviction counsel rendered ineffective assistance by filing a petition that was “incoherent and incomplete.”

¶ 15 We first consider the State’s forfeiture argument. The State contends that defendant’s argument that his guilty plea was involuntary is barred because defendant neither moved to withdraw his plea nor raised the allegation in a direct appeal. According to the State, while the alleged coercion by his trial attorneys is not a matter of record, defendant was aware of the coercion in the days following his guilty plea and had the right to complain of it to the trial court under *People v. Krankel*, 102 Ill. 2d 181, 189 (1984) (defendant who raises ineffective assistance of counsel in motion for new trial is entitled to appointment of other counsel and hearing on issue). The State relies on *People v. Hampton*, 165 Ill. 2d 472 (1995), arguing that it stands for the rule that, in filing a postconviction petition, a defendant forfeits the issue that his guilty plea was involuntary where he neither moved to withdraw the plea nor filed a direct appeal. The State acknowledges that the supreme court in *People v. Stroud*, 208 Ill. 2d 398 (2004), held that a defendant could raise for the first time in a postconviction petition a claim that his plea was not voluntary, but the State asserts that the instant case is more like *Hampton*, which *Stroud* did not overrule.

¶ 16 The State misreads *Hampton*. In *Hampton*, the defendant pleaded guilty to capital murder and other charges, was sentenced to death, and appealed directly to the supreme court, which affirmed his convictions and death sentence. *Hampton*, 165 Ill. 2d at 474-76. The defendant then filed a postconviction petition, claiming his guilty plea was not voluntary because the trial judge gave him inadequate admonishments. *Hampton*, 165 Ill. 2d at 476. The court noted that the defendant did not file a motion to withdraw his plea but held that the issue of the voluntariness of the plea was forfeited because the defendant could have raised it on direct appeal and did not do so.

Hampton, 165 Ill. 2d at 478 (“Because defendant failed to raise this issue in his direct appeal, we find the issue [forfeited]”). Thus, the State is incorrect when it asserts that *Hampton* requires a motion to withdraw the plea to avoid forfeiture. Illinois Supreme Court Rule 604(d) (eff. Jul. 1, 2006), which makes a motion to withdraw a guilty plea a prerequisite to filing a direct appeal, has no applicability to the filing of a postconviction petition. *People v. Brumas*, 142 Ill. App. 3d 178, 180 (1986). The factual difference between *Hampton* and the case at bar is that, here, defendant did not file a direct appeal. Therefore, the doctrine of *res judicata* does not apply. *People v. Flores*, 153 Ill. 2d 264, 274 (1992) (*res judicata* applies where the petitioner has previously taken a direct appeal). Similarly, *Krankel*, which deals with appointment of new counsel when the defendant raises ineffectiveness issues in a *pro se* motion for a new trial, is inapposite. Accordingly, defendant has not forfeited the issue of the involuntariness of his plea due to ineffective assistance of counsel.

¶ 17 We turn now to the substance of defendant’s first contention, that his guilty plea was rendered involuntary because it was coerced by the faulty advice of his trial attorneys. A proceeding brought under the Act is a collateral attack on the judgment of conviction. *People v. Simms*, 192 Ill. 2d 348, 359 (2000). The purpose of the proceeding is to determine whether defendant was substantially denied his rights under either the state or federal constitution. *Simms*, 192 Ill. 2d at 359. At the first stage, the circuit court determines whether the petition is frivolous or is patently without merit. *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Here, defendant’s petition withstood the first-stage scrutiny. In the second stage, the State either answers or moves to dismiss. *Coleman*, 183 Ill. 2d at 381. At the dismissal stage, the trial court is concerned with determining whether the petition’s allegations sufficiently demonstrate a constitutional violation that necessitates relief under the Act. *Coleman*, 183 Ill. 2d at 380. At the dismissal stage, all well-pleaded facts are taken as true.

Coleman, 183 Ill. 2d at 380-81. The petitioner is not entitled to a hearing as a matter of right, but a hearing is required when the petitioner has made a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381. The ultimate question regarding the sufficiency of the allegations in the postconviction petition is a legal one, so our review is *de novo*. *Coleman*, 183 Ill. 2d at 366.

¶ 18 Challenges to guilty pleas that allege ineffective assistance of counsel are subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). An attorney's conduct is deficient under *Strickland* if he or she failed to ensure that the defendant entered a guilty plea voluntarily and intelligently. *Rissley*, 206 Ill. 2d at 457. To establish prejudice, a showing that the ineffective performance affected the outcome is required. *Rissley*, 206 Ill. 2d at 458. However, a mere allegation that had counsel not been ineffective in plea discussions, defendant would have gone to trial is insufficient to establish prejudice. *Rissley*, 206 Ill. 2d at 458. Consequently, the defendant must either make a claim of innocence or articulate a plausible defense that he could have raised had he opted for a trial. *Rissley*, 206 Ill. 2d at 459. Thus, even if defendant's trial counsel were deficient in telling him that a natural life sentence upon conviction for felony murder was mandatory when it was not, defendant still has to show prejudice.

¶ 19 In the postconviction petition filed by defendant's second postconviction counsel, defendant seemingly abandoned his claim that the robbery charge was void because the facts would support a vehicular hijacking charge. Instead, defendant alleged only that the robbery statute did not support the indictment for robbery. On appeal, defendant posits two defenses based upon that allegation. The first is that defendant could not commit a robbery against his wife because the theft statute (720 ILCS 5/16-4(b) (West 2004)) prohibits a prosecution for theft where the property involved is that

of the defendant's spouse unless the parties were not living together as husband and wife and were living in separate abodes at the time of the offense. Based upon the factual basis given by the State to support the guilty plea, defendant asserts that the evidence would show that he was living with the victim at the time he took her Toyota. The second theory defendant advances is that he did not use force to take the Toyota from the victim's presence, because she was already dead and inside the suitcase in the trunk when he took the car.

¶ 20 We first examine defendant's argument that he did not commit robbery because the theft statute prohibits a conviction. "A person commits robbery when he or she takes property, except a motor vehicle covered by section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2004). The succinct disposition of defendant's contention is that the robbery statute says nothing about spousal immunity. Further, defendant cites no authority in support of this argument.

¶ 21 Next, we look at whether defendant could have successfully defended on the theory that he did not use force in taking the Toyota because the victim was already dead at the moment he took her car. Defendant relies on *People v. Tiller*, 94 Ill. 2d 303 (1982). In *Tiller*, the defendant was convicted as an accomplice in the victim's murder and as a principal of armed robbery. *Tiller*, 94 Ill. 2d at 313. The defendant in *Tiller* entered a dry cleaning store with a codefendant but left the scene before the codefendant murdered the victim, a mail carrier. *Tiller*, 94 Ill. 2d at 311. Defendant then returned to the scene and took the murdered mail carrier's Jeep. *Tiller*, 94 Ill. 2d at 311. On appeal, defendant argued that his conviction for armed robbery had to be reversed because no armed robbery was proved. *Tiller*, 94 Ill. 2d at 315-16. The supreme court agreed with the defendant and held that "[t]aking advantage of an existing threat, where that threat was not delivered to persuade

the victim to release control of the property, creates no additional danger of great bodily harm.”

Tiller, 94 Ill. 2d at 316. The court continued in its reasoning:

“It is not clear from the record what transpired in the cleaners, but there is no evidence to show that the force exerted against [the victim] was for the purpose of depriving her of the mail truck or the mail in it. We conclude that the conviction for the armed robbery of [the victim] must be reversed.” *Tiller*, 94 Ill. 2d at 316.

Here, defendant argues that, as in *Tiller*, the force he used against the victim—strangling her—was not for the purpose of obtaining her vehicle.

¶ 22 Defendant ignores that *Tiller* is not sound authority on this point. In *People v. Strickland*, 154 Ill. 2d 489, 523 (1993), our supreme court repudiated the above language, holding that it was inconsistent with *People v. Jordan*, 303 Ill. 316 (1922), where the court held:

“If, as the result of a quarrel, a fight occurs, in which one of the parties is overcome, and the other then, without having formed the intention before the fight began, takes [the property] of the vanquished one, the offense committed is robbery.” *Jordan*, 303 Ill. at 319.

Again, in *People v. Lewis*, 165 Ill. 2d 305, 338 (1995), our supreme court reiterated that it had repudiated the above-quoted statement in *Tiller* as unnecessary to *Tiller*’s holding and because it was at odds with *Jordan*. In the present case, the facts, as recited in the factual basis for the plea, are akin to the scenario set forth in *Jordan*, which would support a robbery conviction. Defendant and the victim had been fighting the day of the murder; defendant, by his own admission, killed the victim; and he then took her property, the Toyota Corolla. Because defendant has not shown that he has a defense to the charge of robbery, he cannot show prejudice even if we assume the ineffectiveness

of his counsel in advising him that a natural-life sentence was inevitable. Accordingly, the trial court did not err in dismissing the postconviction petition¹ without an evidentiary hearing.

¶ 23 Defendant's second contention is that he should receive new second-stage proceedings, because his postconviction counsel failed to provide reasonable assistance. Specifically, defendant asserts that the two-page petition filed by counsel was so abbreviated (defendant's *pro se* petition was 30 typewritten pages) that it was "incoherent and incomplete." Because the right to counsel in postconviction proceedings is wholly statutory (see 725 ILCS 5/122-4 (West 2010)), the petitioner is entitled only to the level of assistance provided by the Act, which is a reasonable level of assistance. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires that the record in postconviction proceedings demonstrate that counsel consulted with the petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights; that counsel examined the record of the trial proceedings; and that counsel made any amendments to the petitioner's *pro se* petition that are necessary for adequate presentation of the petitioner's contentions. *Turner*, 187 Ill. 2d at 410.

¶ 24 Here, postconviction counsel filed his certificate, which recited that he had examined defendant's *pro se* petition, "consisting of 252 pages"; that he had received discovery and transcripts; and that he had met with defendant in person to determine defendant's claims of error, examined the record, and filed any amendments to defendant's *pro se* petition that were necessary for an adequate presentation of defendant's contentions. Defendant concludes from the certificate's obvious mistake, that his *pro se* petition consisted of 252 pages, that counsel did not read defendant's *pro se* petition

¹Actually, the trial court considered both defendant's *pro se* petition and the later one filed by his second postconviction counsel.

carefully enough to adequately present defendant's contentions. Whatever shortcomings counsel's amended postconviction petition may have, the record is clear that the trial court considered, and ruled on, not only the sufficiency of the allegations in the amended petition but those in defendant's *pro se* petition as well. Therefore, the trial court considered all of defendant's contentions of constitutional error, and we cannot see how defendant was prejudiced by counsel's performance, even assuming—without deciding—that defendant is correct that counsel's performance was inadequate. In this appeal, defendant concedes that the theory of defense he advanced in his *pro se* petition—that he may have been guilty of vehicular hijacking but not robbery—is without merit. Moreover, this court has considered defendant's new defense theories advanced by appellate counsel and has determined them to be without merit as well.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 26 Affirmed.