

No. 1-11-0367

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).

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 1464
)	
KRISTIAN FREDRICKSON,)	Honorable
)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Court did not err in dismissing defendant's post-conviction petition alleging ineffective assistance of counsel during guilty-plea proceedings. Any misrepresentation by counsel regarding an "under the table" plea agreement, whereby defendant would receive the minimum 20-year sentence for first degree murder, was refuted by the record. Defendant forfeited the argument that he had substantial grounds to withdraw his plea. Further, the grounds presented in his petition were (1) not a valid defense at a trial, and (2) heard by the trial court at sentencing and rejected as an excuse for defendant's actions but considered in mitigation.

¶ 2 Pursuant to a 2004 guilty plea, defendant Kristian Fredrickson was convicted of first degree murder and sentenced to 45 years' imprisonment. His direct appeal was dismissed

because his guilty plea was negotiated but he did not file a motion to withdraw his plea before appealing. Defendant now appeals from the 2011 dismissal, upon the State's motion, of his 2007 post-conviction petition as amended. He contends that his petition made a substantial showing of ineffective assistance of trial or plea counsel by (1) not preserving his direct appeal by filing a motion to withdraw his plea, and (2) misleading him into believing that he would receive the minimum sentence due to an "under the table" deal with the prosecution, with his reliance on the misrepresentation rendering his plea involuntary.

¶ 3 Defendant and codefendant Amanda Fredrickson were charged in December 2001 with first degree murder in the death of 18-month-old James Fredrickson, for allegedly causing his death by knowingly failing to provide nourishment and medical care between June 26, 2000, and December 14, 2001. The indictment also gave notice that the State was seeking an extended term, alleging that James was under 12 years old and his "death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty." In May 2002, the State gave notice of its intent to seek the death penalty against defendant and codefendant based on the aforementioned extended-term allegations.

¶ 4 The pre-trial proceedings included an unsuccessful motion to suppress defendant's post-arrest statements and a successful motion to sever the trials of defendant and codefendant.

¶ 5 Behavioral clinical examinations in 2002 and 2003 by a psychiatrist of the circuit court's Forensic Clinical Services found defendant to be sane, fit to stand trial, able to understand his *Miranda* rights, and not suffering from any mental disorder that would preclude a knowing and intelligent waiver of his rights. Defendant was receiving antidepressant medication and did "not manifest any active symptoms or signs of any specific mental disorder" nor any side-effects of his medication. In his hearing testimony, the court psychiatrist added that he diagnosed defendant with adjustment disorder with a depressed mood and personality disorder with schizoid

features, both characterized by detachment or a tendency towards withdrawal. However, he explained that "it's not possible for me to render an opinion on how [someone with these diagnoses] would respond very specifically in a confrontational situation because that's variable and would need to be directly observed."

¶ 6 On July 9, 2004, the parties informed the court that defendant would plead guilty to Count 2 of the indictment – the count raising the extended-term allegations – in exchange for the State not seeking the death penalty. When the court asked if the State was "recommending any disposition," the State responded that it had no agreement with counsel "to the number of years" and "[c]ounsel has indicated they wish to make a blind plea." The State also noted that "we will have recommendations at the sentencing hearing" and that defendant "has been informed that we do seek extended term sentences." Defense counsel also told the court that the parties "are in substantial agreement about the allegations in Count" 2 but "not in agreement as to what is a fair and just disposition." The State told the court that "we intend on going forward for an extended-term sentence" based on the victim's age and "circumstances that are certainly evidence of cruel and heinous" conduct. When defense counsel tendered to the court a general jury waiver, the court demanded that counsel inform defendant of his *Apprendi* right to a jury trial on extended-term factors as well as guilt or innocence. The case was recessed for counsel to thus inform defendant. When the case was recalled, counsel tendered a signed jury waiver that included language waiving a jury trial to determine applicability of an extended-term sentence. Defendant acknowledged that he signed the waiver and was giving up his right to a jury trial.

¶ 7 The court told defendant that he was pleading guilty to Count 2 of the indictment, which the court read to defendant. In response to the court's questions, defendant acknowledged that he was pleading guilty to said charge and was giving up his rights to a jury trial, to a bench trial, to confront or cross-examine witnesses, and to remain silent. When asked if anyone forced or

threatened him to plead guilty, or made any promises or offered anything of value to obtain his plea, defendant replied "No, Your Honor," both times. The court told defendant that the count to which he was pleading guilty included an allegation of brutal and heinous conduct rendering him eligible for an extended-term sentence; defendant acknowledged understanding this. The court told him that he faced a general sentence of 20 to 60 years' imprisonment and an extended term of up to 100 years' imprisonment; defendant acknowledged understanding this. The court ascertained from defendant that he was 28 years old, graduated from high school and attended about two years of college, and was not under the influence of drugs or alcohol.

¶ 8 The parties stipulated to the factual basis for the plea: defendant was "the natural father of the victim and was joint caretaker of the victim" with codefendant from the victim's June 2000 birth until his December 2001 death. A police officer would testify to responding on December 14, 2001, to a report of a child not breathing and to finding the deceased victim, "extremely thin *** and pale," in a home "extremely dirty and in disarray with garbage strewn throughout" and "feces on the wall" occupied by defendant and codefendant, who he took first to a hospital and then to the police station. The emergency-room physician would testify that the victim appeared emaciated, smelled of urine, weighed about 10 pounds, and had a body temperature of 84 degrees indicating that he had been dead for over six hours when he arrived at the hospital. The medical examiner would testify that the victim weighed 10.5 pounds, was very thin with prominent or protruding bones and sunken stomach and eye sockets, and had suffered both malnutrition and dehydration as well as skin infections; the medical examiner opined that the victim died of starvation due to neglect and that his death was a homicide.

¶ 9 Arden Duggan would testify at a trial that he lived with defendant and codefendant from June through December of 2001, that the victim "always appeared very thin but got worse as the months passed," that he never saw defendant or codefendant bathe the victim, and that the victim

spent most of his time in a crib wearing only a diaper and could not walk or crawl. Duggan "rarely" saw codefendant feed the victim, so he "did occasionally slip food to the victim, who immediately would gobble the food up." Defendant never sought medical attention for the victim, and neither defendant nor codefendant took the victim out of the home.

¶ 10 Jennifer Manner, a co-worker of defendant from June 2000 to April 2001, would testify that defendant occasionally brought both the victim and his other child Kaylin to work. Both children were dirty and unkempt, and the victim looked thin and his diaper was always soiled.

¶ 11 An assistant State's Attorney would testify that defendant gave a statement on December 16, 2001. Defendant admitted that he could not recall the victim's birthdate and that he never took the victim for medical care. He stated that the victim "was not a good eater at first but later was able to eat solid food like mini hotdogs, pasta, pastry, and waffles." He noticed that the victim was becoming very thin and seemed very ill to the point where "he could die." While he confronted codefendant, he did not take the victim for medical care, explaining that codefendant told him that they would lose custody of the victim if a physician examined him. Defendant last fed the victim about two weeks before his death and was "not sure" that anyone else fed him thereafter, and he did not see the victim at all for the three days before the victim's death though he and the victim were both home the entire time. Defendant found the victim "lying in the bed lifeless" on December 14, and said in his statement that "he always knew in the back of his mind that this day would come."

¶ 12 After the aforementioned factual basis was read aloud, the court ascertained from defendant that he heard and agreed with the stipulated factual basis. The court also ascertained from defendant that he was "satisfied with the representation of each of his attorneys." The court found that defendant's waivers were knowingly and voluntarily made and that there was a factual

basis for the plea, and the court found defendant guilty upon his plea. The State nol prossed Count 1 of the indictment, and the court ordered a presentencing investigation (PSI).

¶ 13 The PSI showed that defendant had two retail theft convictions, in 1996 and 1997, for which he received supervision. He was born in 1977, graduated from high school in 1995, and attended but did not complete college. He married codefendant in 1997 and had two children with her: victim James and older daughter Kaylin. The PSI reflected defendant's mother's statement that she was concerned when codefendant became pregnant with James "because she did not believe the couple could care for both children adequately because *** defendant was having difficulty securing work at the time" and codefendant "fail[ed] to obtain prenatal care or well baby care with either child." The PSI also reflected defendant's statement that he had a good relationship with his mother until he married codefendant as she "did not like his wife and had minimal contact with her in the two years prior to this incident," and defendant's mother's statement concurring that she had no contact with defendant or his family since James's birth. In the PSI, defendant stated that, since May 2001, codefendant would not cook or clean and "would sleep during the day and was up all night." Defendant also said that he and codefendant took in as a tenant Arden Duggan, a friend of codefendant, who he later suspected of having "an affair" with codefendant. At the same time as this accusation, defendant stated, he and codefendant agreed that he would take care of Kaylin and she would take care of James. Defendant claimed that codefendant would respond to his inquiries about James to the effect that he was asleep, and defendant professed to have no knowledge that codefendant was not feeding James. However, he admitted that he was "home for three weeks prior to his arrest" as he was unemployed for that time. The PSI reflected that defendant had undergone psychiatric examination while the instant charges were pending: while he was diagnosed with non-psychotic depression and personality

disorder with schizoid features, he was found legally sane, fit to stand trial, and to have no mental disorder that would preclude understanding or knowingly waiving his rights.

¶ 14 On November 19, 2004, the court stated that "this matter is up today for a sentencing hearing" and that defendant pled guilty to Count 2 of the indictment, alleging brutal or heinous conduct indicative of wanton cruelty, "in exchange for the State withdrawing the death penalty as a potential sentence." The parties acknowledged that this "was the sum and substance *** of the agreement." The court also noted, and the parties acknowledged, that defendant could be sentenced to 20 to 100 years' imprisonment so that his plea was "blind" except that he would not be sentenced to death. With some minor amendments, the parties accepted the PSI.

¶ 15 The State presented in aggravation the victim's autopsy report and a police video of the interior of defendant's home taken on the day the victim died. The ASA who took defendant's statement testified to the full content thereof, adding to the stipulated portion from the plea hearing that codefendant primarily cared for the children, that the victim sometimes refused food offered to him, that codefendant would threaten to leave defendant and the children when he confronted her about the victim's thin-ness, and that he understood the difference between malnutrition and merely being underweight when he stated that the victim was very sick and needed medical attention. The State argued in aggravation that the victim starved to death over several months in a well-appointed suburban home and contrasted the usual sacrifices by parents with the defendant's indifferent denial of minimum sustenance to the victim by "simply clos[ing] the door to that room where his son lay on the bare mattress, emaciated." The State argued that the facts supported a finding that defendant's behavior was brutal and heinous so that he could be sentenced to up to 100 years' imprisonment. The State did not ask for a specific sentence, nor expressly request a maximum extended-term sentence, but left it to the court to "fashion a fair and just sentence" for "the man who turned a blind eye to the suffering of his own son."

¶ 16 Patricia Kearnan testified for the defense that she was a friend of defendant's mother for years and also advisor to a high-school Junior Achievement group including defendant. Her impression of defendant was that he was "the brightest student", "a very hard worker," and an award-winning salesman. He was respectful and polite, and he had a "very good relationship" with his mother. He was also shy and somewhat lacked confidence. After high school, Kearnan met defendant only once, at his mother's home with codefendant also present.

¶ 17 Roberta Schwimmer, another friend of defendant's mother, testified that defendant was kind to people and animals and devoted to his mother when she knew him while he was in high school. However, she did not see defendant after high school because he became estranged from his mother.

¶ 18 Fritz Fredrickson, defendant's father, testified that he separated from defendant's mother in 1982 when defendant was five years old. Fritz became concerned when defendant was about five or six years old that he was "detached from reality" and "living in a fantasy world," so defendant was examined by several psychologists and counselors throughout his childhood. When Fritz was not living with defendant and his mother, he participated in activities with him. Defendant went to college but "failed or decided to leave" in the second semester. He met and married codefendant, and they had a daughter, Kaylin. Fritz provided defendant and codefendant financial assistance, including purchasing for them the condominium where they resided from February 2000 onwards. Shortly after that purchase, Fritz felt unwelcome by, or estranged from, defendant and codefendant. He learned of the birth of the victim, James, by a telephone call from someone other than defendant or codefendant. After defendant was arrested for James's death, Fritz visited him in jail once every two weeks – visitation is weekly, and defendant's mother visited him in the alternate weeks – and believed that defendant had "learned to cope" through drawing, writing, and reading. Fritz opined that defendant's guilt for James's death "may have to

be shared by his wife," codefendant and expressed concern that defendant could not be sentenced properly before codefendant was tried and potential mitigating evidence revealed. Fritz described defendant as "a good kid" and "not a threat to society" and urged leniency.

¶ 19 Peggy Fredrickson, defendant's mother, testified that she became concerned about defendant's behavior when he was about eight years old; he had trouble concentrating and remaining on-task, was not outgoing, and had few friends. Peggy met with defendant's teachers and the school social worker. She also brought him to a neurologist, who found no neurological ailments, and to a psychologist for counseling. Peggy believed that his issues were worsening as he was older. In high school, defendant met codefendant. When defendant went to college out-of-state, codefendant joined him there. When he began working to support codefendant, he "failed" college but remained with codefendant out-of-state. When defendant and codefendant returned to metropolitan Chicago, they were having financial difficulty. When Peggy expressed concern to defendant that they could not properly maintain a household or support a child, she "probably put a wedge in our relationship" and their meetings or visits became much less frequent. Peggy did not know that codefendant was pregnant with the victim James until after he was born, and she learned from Fritz rather than defendant or codefendant. Thereafter, Peggy spoke with defendant by telephone but did not meet defendant in person and never met James. When defendant was receiving medication in jail, his relationship with Peggy improved and she visited him regularly. Peggy opined that defendant and codefendant had been "rejected by their peers" earlier in life and "neither one of them were mentally or emotionally equipped to take on the responsibility they did."

¶ 20 Among other evidence, the defense presented the 2004 report of psychiatrist Dr. Anthony D'Agostino, based on his examinations of defendant and review of his records. Dr. D'Agostino noted defendant's high scores on intelligence tests, discounted the lay theory of defendant's

mother that he has Asperger's disorder, noted his frequent "friction between himself and others" in school and work, and concluded that he has severe personality disorder with "some narcissistic features" and "underlying sadness" but likely not depression. Dr. D'Agostino opined that:

"I can well imagine that he may tend to be oblivious of the needs of an infant and simply not see or allow himself to be aware of the seriousness of his son's condition. There was certainly anger but I would surmise that the anger was not directed at his son but rather at his wife and his perception that she was being unfaithful."

However, Dr. D'Agostino admitted that "a clear understanding of how this tragic event was allowed to happen does not make itself apparent in my examination of" defendant.

¶ 21 In mitigation, counsel argued that defendant was remorseful and had "no excuses or justifications under the law" but also did not act with premeditation or intent to kill. He argued at length against imposing an extended-term sentence and particularly against a finding that defendant's behavior was brutal and heinous. Counsel requested a minimum or near-minimum sentence, reiterating defendant's psychological issues as described by his family, the court psychiatrist, and Dr. D'Agostino and arguing "his complete inability to care for his children and to act in society like a normal young parent would." Counsel admitted that diminished capacity is not a defense, only insanity, but argued that defendant's "psychological makeup and the diagnosis of his mental problems" should serve as mitigation.

¶ 22 Defendant addressed the court, apologizing to his family, the court, and "any and all people who have been saddened by my son James's death." He stated that he "never desired this to happen" and "hope[d] that no one would ever have to experience the amount of pain and loss that I've put myself and my family and all of my friends through." He "replayed the events that led up to this tragedy in my mind more times than I could ever possibly count," but realized that

"possessing hindsight really doesn't correct the errors of the past." He "wanted my son to grow up and lead a normal, healthy life, one where I could have passed on my knowledge and possibly shared my passions with him, but that's no longer possible." Defendant described how he was keeping in contact with his daughter, trying to improve himself in jail by reading, writing, and drawing," and was well-behaved in jail. He accepted responsibility for James's death, and the "only explanation I can offer for why this happened is that I just lacked the knowledge and experience necessary to deal with the weight of responsibilities that fell upon me."

¶ 23 The court noted that it reviewed all the evidence in aggravation and mitigation, including the PSI, in light of the sentencing statutes with a particular focus on defendant's rehabilitative potential. However, defendant's statement "that he lacked experience flies in the face of reason" in light of the victim's condition at death and defendant's admission "that he didn't even see this child for three days prior to discovering the death of the child." While emphasizing that he was making no findings regarding codefendant, as her case was still pending, the court found "shared responsibility here" and questioned whether defendant's acts could be deemed intentional. While the court heard "strong evidence that this defendant suffered some dysfunction as a child growing up" and acknowledged it as mitigation, the court also found that "they're not excuses." The court sentenced defendant to 45 years' imprisonment. It admonished defendant of his appeal rights, including that he had to file a written motion to withdraw his plea within 30 days.

¶ 24 Defendant timely filed a motion to reconsider his sentence, arguing that the court had not given full consideration to his substantial rehabilitative potential. The motion was heard and denied on December 20, 2004.¹

¹The record includes no transcript for this hearing, and the total substance of the agreed statement of facts is that "[d]efendant's Motion to Reconsider Sentence was heard and denied."

¶ 25 No motion to withdraw defendant's guilty plea was filed before he filed a notice of appeal on January 14, 2005. On appeal, he contended that his plea was involuntary, his sentence was based on an improper aggravating factor, and his pre-sentencing detention credit had to be corrected. We dismissed the appeal for the lack of a motion to withdraw his plea. We found that he entered a negotiated plea, as the State agreed to not seek the death penalty, and that the court properly admonished him of the requirement to timely file a motion to withdraw his plea. *People v. Fredrickson*, No. 1-05-0226 (2006)(unpublished order under Supreme Court Rule 23).

¶ 26 In March 2007, defendant filed his *pro se* post-conviction petition. He alleged that when he told trial or plea counsel to withdraw his plea, counsel instead assured him that "everything would be taken care of" in the post-sentencing motion, thereby prejudicing his direct appeal. He also alleged in relevant part that counsel pressured him to plead guilty by repeatedly opining to him and his parents that his case was unwinnable, "relaying information about the publicity of the case [and] the current political environment," and telling him that the prosecution had vowed to "make an example" of him. Counsel told him "prior to sentencing" that he would receive "the minimal amount of time" if he pled guilty but "the maximum sentence and possibly the death penalty" if he did not plead guilty. Counsel also told defendant that, "if he pled guilty[,] counsel would be able to arrange for [him] to be placed in a lower security prison" nearer his family and with psychological care available; defendant did not realize at the time "that counsel had no influence on where, or what sort of treatment, [he] would receive within the penal system." The petition was supported by defendant's general averment, signed but not notarized.

¶ 27 Post-conviction counsel was appointed, and a supplemental petition was filed by counsel in February 2009. In it, defendant noted that his guilty plea was the result of an agreement that the State would not seek the death penalty, though it would still seek an extended-term sentence, and thus argued that his plea was a negotiated guilty plea. He alleged that he pled guilty because

he believed that plea counsel and the State had an "under the table deal" for a 20-year prison sentence to be served at a lower-security prison near his parents and with mental health care provided. When he was instead sentenced to 45 years, he told trial counsel to withdraw his plea, but counsel did not do so. Instead, counsel filed a motion to reduce sentence that did not preserve his right to a direct appeal. While defendant acknowledged that he had denied during the plea hearing that his guilty plea was the result of any undisclosed promises, he argued that, due to his inexperience in the criminal justice system, it cannot be presumed "that he understood the proceedings independent of the advice of his attorney." Defendant argued that he had a viable defense if a trial was held: that (1) codefendant rather than himself had primary care of victim James, and (2) defendant was "incapacitated by mental illness" rendering him "incapable of complying with ordinary parental duty." The supplemental petition was supported by defendant's affidavits, signed but not notarized, and by reports of psychiatric and psychological examinations of defendant.

¶ 28 The State filed a motion to dismiss the petition as supplemented, arguing that it was untimely filed without a showing of lack of culpable negligence and that the record contradicted defendant's ineffective-assistance claims. Regarding the latter, the State argued in relevant part that (1) defendant's affidavit, to the effect that he instructed counsel to withdraw his plea, is improper because it is not notarized, (2) defendant had an opportunity after his sentencing to seek withdrawal of his plea but did not though he addressed the court at length, (3) plea counsel did not improperly pressure defendant into his plea but properly advised him of the risks involved, including the death penalty, and (4) defendant's professed belief that he would receive 20 years' imprisonment is contradicted by the State's repeated plea-hearing assertion that it was seeking an extended-term sentence and by defendant's denial of any undisclosed agreements or promises.

¶ 29 Defendant responded to the State's motion to dismiss, arguing that evidence of prison lockdowns and his mental impairment support a lack of culpable negligence for filing his petition "nearly *** on time;" that is, less than two months beyond the limit. He also argued that the lack of notarization on his affidavit should not be fatal to his claims, especially because it is his own affidavit rather than that of a third party. As to the substance of his claims, defendant argued that the record does not preclude or directly contradict his claims. Attached to the response were documents relating to lockdowns at defendant's prison, defendant's notarized affidavits regarding his preparation and filing of his petition, and his notarized affidavit adopting the affidavits attached to the supplemental petition.

¶ 30 On January 21, 2011, the court granted the motion to dismiss following argument by the parties. The court found that whether defendant "may have thought 20 years [is] dispelled very quickly when you read the transcript of the proceedings, particularly the plea" because he was properly admonished. The court also found that defendant was not claiming that he was incapable of understanding the plea proceedings and admonishments but that "because of the nature of the crime, there must be something wrong with" him. However, the court noted, "[t]here is no definition of having mental incapacity other than insanity." The court also noted that it used its discretion to disregard the untimeliness of the petition as a matter of fairness. This appeal timely followed.

¶ 31 On appeal, defendant contends that the dismissal of his petition was erroneous because he made a substantial showing that trial or plea counsel was ineffective for (1) not preserving his direct appeal by filing a motion to withdraw his plea, and (2) misleading him into believing that he would receive the minimum sentence due to an "under the table" deal with the prosecution, with his reliance on the misrepresentation rendering his plea involuntary.

¶ 32 Under section 122-2.1 of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)(2) (West 2010)), the circuit court may summarily dismiss a petition within 90 days of filing if it is frivolous or patently without merit. When a petition is not summarily dismissed, a second stage of proceedings commences: counsel is appointed, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-2.1(b), -4, -5 (West 2010). At the second stage, a defendant must make a substantial showing of a constitutional violation to avoid dismissal, and we review *de novo* such a dismissal. *People v. Gomez*, 409 Ill. App. 3d 335, 338-39 (2011).

¶ 33 On a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice: that (1) counsel's performance was objectively unreasonable under prevailing professional norms, and (2) there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's errors. *People v. Hughes*, 2012 IL 112817, ¶ 44. A defendant's right to effective assistance of counsel encompasses guilty plea proceedings. *Id.*

¶ 34 A defendant has no absolute right to withdraw his guilty plea but must show a manifest injustice, so that withdrawal is appropriate where the plea resulted from a misapprehension of the facts or of the law or where there is doubt as to the defendant's guilt and justice would be better served through a trial. *Id.*, ¶ 32. Where a defendant claims that his guilty plea was the result of counsel's deficient performance, he does not establish prejudice by a bare allegation that he would have pled "not guilty" and insisted on a trial but for the deficiency. *Id.*, ¶ 64. Instead, the defendant must either assert a claim of actual innocence or articulate a plausible defense that could have been raised at trial, so that the issue "will depend largely on predicting whether the defendant would have likely been successful at trial." *Id.*

¶ 35 "It is well settled that a defendant's acknowledgment in open court, at a plea hearing, that there were no agreements or promises regarding his plea serves to contradict a postconviction assertion that he pled guilty in reliance upon an alleged, undisclosed promise by defense counsel regarding sentencing." *People v. Torres*, 228 Ill. 2d 382, 396-97 (2008). In *Torres*, our supreme affirmed the summary dismissal of a post-conviction petition, finding in relevant part that the defendant's claim that "his counsel had promised him that he would receive the minimum sentence of 20 years' imprisonment if he pled guilty" with a blind plea to first degree murder was "belied by the record of the guilty-plea proceeding and is therefore frivolous and patently without merit." *Torres*, 228 Ill. 2d at 396.

¶ 36 Where a defendant makes a post-conviction claim of ineffectiveness of counsel for failing to perfect his direct appeal from a negotiated guilty plea by failing to file a motion to withdraw the plea, prejudice is presumed at the first stage because counsel's alleged error resulted in forfeiture of a proceeding rather than merely a proceeding of questionable reliability. *Gomez*, 409 Ill. App. 3d at 339, citing *People v. Edwards*, 197 Ill. 2d 239 (2001), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). However, at the second stage, prejudice is not presumed and the defendant must explain his grounds for moving to withdraw his plea and establish a reasonable probability that the motion would have been granted. *Gomez*, 409 Ill. App. 3d at 339-40, citing *Edwards*, at 252, 257; see also *People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003), and *People v. Hughes*, 329 Ill. App. 3d 322, 325-26 (2002)(both citing *Edwards*).

¶ 37 Here, the record utterly belies the allegations of the petition regarding an "under the table" or secret plea deal whereby defendant would receive a sentence of 20 years' imprisonment, the minimum sentence for first degree murder. In addition to defendant's personal denial that his plea was the result of threats or promises, the plea hearing was replete with statements by the trial court and parties – and acknowledgments by defendant himself – that he could receive an

extended-term sentence and that the only agreement in exchange for his plea was that he would not be sentenced to death. At sentencing, the court again spread of record that defendant entered a blind plea with an extended prison term possible and only a death sentence precluded.

Moreover, the State presented both evidence and spirited argument in aggravation. While the State did not expressly seek a maximum sentence, it clearly argued defendant's eligibility for an extended-term sentence and, most tellingly, did not request a minimum sentence either. To be blunt, any "under the table" agreement stayed under the table, utterly hidden from the trial court's view, during both hearings (plea and sentencing) where any such agreement would have to be manifested either explicitly or implicitly (by the State seeking a minimum sentence) to be of any effect. Under such circumstances, no reasonable person could believe that defense counsel and the State had an agreement whereby defendant would receive only 20 years' imprisonment.

¶ 38 As to the claim that trial counsel was ineffective for failing to file a motion to withdraw his guilty plea, thus depriving him of his direct appeal, defendant argues at length that counsel should have, but did not, file a withdrawal motion. Regarding prejudice, he argues in his initial brief that his prejudice arises from the dismissal of his direct appeal. Importantly, defendant does not present in his initial brief any argument regarding his basis for withdrawing his plea, as required to survive second-stage dismissal by *Edwards* and *Gomez*. An argument not made in an appellant's brief is deemed waived or forfeited, and an argument not made in an initial brief may not be raised in a reply brief. Ill. Sup. Ct. Rs. 341(h)(7), 612(i) (eff. Feb. 6, 2013). Accordingly, as defendant has failed to explain his grounds for moving to withdraw his plea and establish a reasonable probability that the motion would have been granted, this claim fails.

¶ 39 Defendant argues in his reply brief that his petition as supplemented did raise grounds for a withdrawal motion: that codefendant had primary care of the victim and that defendant had "documented psychiatric problems" that would "interfere with his ability to recognize the needs

of an infant or severity of his son's medical condition." In a similar vein, he argues that these same factors create "a reasonable probability that trial counsel could have challenged the State's ability to prove beyond a reasonable doubt the 'exceptionally brutal or heinous' element" and thus "could have affected [defendant's] sentence because it concerns the State's ability to seek an extended term." Even if we were to ignore defendant's waiver of this argument by raising it only in his reply brief, we would find that it fails to satisfy the requirements of *Gomez*. Essentially, the defendant here has raised the defense of diminished capacity.

"The doctrine of diminished capacity, also known as the doctrine of diminished or partial responsibility, allows a defendant to offer evidence of her mental condition in relation to her capacity to form the *mens rea* or intent required for commission of the charged offense. [Citation omitted.] Similar to the insanity defense in that it calls into question the mental abnormality of a defendant, it differs in that it may be raised by a defendant who is legally sane." *People v. Hulitt*, 361 Ill. App. 3d 634, 640-41 (2005).

Diminished capacity "is a defense often deemed limited to specific intent crimes" and, as trial counsel noted at sentencing, Illinois law does not recognize diminished capacity as a defense. *Hulitt*, 361 Ill. App. 3d at 641. Thus, this issue does not raise the specter of a manifest injustice that would require vacatur of the guilty plea. Moreover, trial counsel presented considerable evidence and argument on this point at sentencing, and the trial court expressly found that it did not excuse defendant's conduct, but did consider it in mitigation. We also note that the trial court did not sentence defendant to an extended-term sentence, as 45 years is in the middle of the unextended 20- to 60-year range for first degree murder. For all of the above reasons, we find that there was not a reasonable probability that a motion to withdraw this guilty plea would have been successful had it been filed.

1-11-0367

¶ 40 Accordingly, the petition did not make a substantial showing of a meritorious claim and its dismissal was proper. The judgment of the circuit court is affirmed.

¶ 41 Affirmed.