

No. 1-12-0285

**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(3)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	06 CR 7494
	)	
ROBERTO VELAZQUEZ,	)	Honorable
	)	Gregory Robert Ginex,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Mason concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the appellate court on the direct appeal held that the trial court did not err in its questioning of the venire, the defendant could not show that the failure to argue plain error in that questioning amounted to ineffective assistance of appellate counsel.
- ¶ 2 This case involves an appeal from a dismissal of a postconviction petition at the first stage of postconviction proceedings. A jury found Roberto Velazquez guilty of murder. This court affirmed the conviction on the direct appeal. *People v. Velazquez*, No. 1-08-2154 (2010)

(unpublished order under Supreme Court Rule 23). Roberto then filed a postconviction petition in which he contended that he did not receive effective assistance of counsel on the direct appeal. The trial court dismissed the petition as patently without merit.

¶ 3 In this appeal, Roberto argues that his counsel for the direct appeal provided ineffective assistance when he failed to argue that the trial court committed plain error in its questioning of the venire about the fundamental principles of criminal law set out in Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012)). We find that the appellate court decision on the direct appeal shows what would have occurred in that appeal if Roberto's appellate counsel had argued for plain error review. The appellate court expressly held that if Roberto had sought plain error review, the court would have found no error and therefore no plain error. *Velazquez*, No. 1-08-2154 at 14-15. Without any viable claim that the failure to make a plain error argument had any prejudicial effect, we find that Roberto has not stated the gist of a claim for deprivation of his constitutional right to effective assistance of appellate counsel. Therefore, we affirm the dismissal of the postconviction petition.

¶ 4 BACKGROUND

¶ 5 On February 27, 2006, Miguel Escalante-Mendoza and his brother, Jesus Escalante-Mendoza went to a bar in Cicero where they sat at a table near one where Roberto Velazquez sat with his brother, Juan Velazquez. Roberto wore all white clothes and a white cap. Jesus asked one of the Velazquezes if he knew where Jesus could buy some drugs. The men argued. Jesus and Miguel left the bar and headed to their van. Roberto and Juan left the bar shortly thereafter.

¶ 6 Flavio Almansza, who was working as a bartender in the bar that night, watched a monitor

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that showed the parking lot next to the bar. Almansza saw a man dressed in white approach Jesus and Miguel, and then a flash appeared to come from the hand of the man in white. Almansza called the bar's owner, Clara Guerra, over to the monitor. They both saw more flashes from the hand of the man in white. Guerra immediately locked the bar. Miguel went across the street to call for police. A Cicero police officer arrived a few minutes later and found Jesus dead from gunshot wounds.

¶ 7 Miguel, who spoke only Spanish, gestured to the officer, who spoke only English, to go into the bar. In the bar, Miguel pointed to Almansza. Police officers arrested Almansza, and they also handcuffed Miguel. The officers brought Almansza, Guerra, and Miguel to the police station. Based on statements from the three witnesses and further investigation, Cicero police put out a bulletin asking officers to stop a white Cadillac truck with Illinois license plates heading to New York. A New Jersey state trooper saw a truck matching the description around 8:30 p.m. on February 28, 2006. The trooper caught up to the truck and ordered the driver to stop. Velazquez and his girlfriend, Gainer Perez, got out of the truck. The trooper arrested Velazquez. Prosecutors charged him with first degree murder.

¶ 8 The trial judge explained to the venire trial procedures and what to expect. In the course of his extended monologue, the trial judge listed the principles of Rule 431(b). The trial judge told the venire members that they must presume the defendant innocent, the State bore the burden of proving the defendant guilty, and the defendant need not prove his innocence or present any evidence. When the judge addressed individual members of the venire, the judge referred back to all of the principles of law he mentioned in his monologue. The judge asked several venire members whether they had "any questions about the general principles of law" he had listed before. Others, he asked whether

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they had "any quarrel" with those same principle. Some he asked whether they had "any quarrel or question" about the general principles. All members of the venire answered "No" to the judge's questions about the general principles.

¶ 9 At the trial, Miguel, Guerra and Almansza identified Roberto as the man they saw shooting Jesus. Guerra admitted that Juan also wore white, but Juan's outfit had a blue stripe and a different hat. Guerra's video equipment for monitoring the parking lot did not record its images.

¶ 10 Francisco Barajas, a nephew of Guerra, testified that he socialized at the bar with Roberto on several occasions. Late on February 27, 2006, Roberto telephoned Barajas and said he had shot someone in the parking lot next to Guerra's bar. Roberto asked Barajas to destroy the recording from the video camera covering the parking lot for that night. On cross-examination, Barajas admitted that Roberto did not identify himself on the telephone. Barajas testified that he recognized Roberto's voice.

¶ 11 An investigator testified for the defense that he interviewed Barajas and Guerra. Barajas told the investigator he was not sure who called him and asked him to destroy the video recording. Guerra said she feared Cicero police, who threatened to shut down her bar. She said that she saw the flashes of gunshots on her monitor in the bar, but she could not see who fired the shots. She told the investigator the image on the monitor was unclear.

¶ 12 Roberto testified that he worked in construction, but he had no job on February 26, 2006. He arranged for work in New York City and he planned to drive there on February 28, 2006. Juan helped Roberto pack his car and prepare his apartment on February 27, and then they went to the bar. Juan, who also wore all white, got into an argument when a man in the bar asked him for drugs.

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Roberto said goodbye to Juan outside the bar and headed for home. Roberto heard what sounded like a shot, and when he looked back he saw Juan standing by a truck. As Roberto saw nothing unusual, he went home. He and Perez drove to New York the next day. Roberto swore he did not call Barajas on February 27, 2006.

¶ 13 During deliberations, the jury asked the judge, "Is there a legal reason why Roberto's brother was never a witness or any information was provided about his participation in the events?" Defense counsel asked the judge to remind the jurors that "the defense need not prove anything." The judge denied defense counsel's request, and instead he answered the jury's question by saying, "You have all the evidence, continue to deliberate."

¶ 14 The jury found Roberto guilty of first degree murder. The trial court sentenced him to 60 years in prison. On the direct appeal, Roberto's appellate counsel argued that the court failed to comply with Supreme Court Rule 431(b), and the court erred by refusing to answer the jury's question in the way defense counsel suggested.

¶ 15 The appellate court held that trial counsel failed to object to the questions posed to the venire, so Roberto forfeited the issue of whether the trial court sufficiently complied with Rule 431(b). *Velazquez*, No. 1-08-2154 at 8-9. The appellate court noted that appellate counsel failed to argue for plain error review of the forfeited issue, but the court proceeded to resolve the issue as though counsel had argued that the alleged violation of Rule 431(b) amounted to plain error. *Velazquez*, No. 1-08-2154 at 9.

¶ 16 The appellate court found that the trial court had informed the venire about the pertinent Rule 431(b) principles and asked the prospective jurors individually either whether they had any questions

about the principles or whether they had any quarrel with the principles. *Velazquez*, No. 1-08-2154 at 14. The appellate court held that the trial court had sufficiently complied with Rule 431(b). *Velazquez*, No. 1-08-2154 at 15. Because the appellate court found no error, it found no plain error. *Velazquez*, No. 1-08-2154 at 15.

¶ 17 In November 2011, Roberto filed the postconviction petition at issue in this appeal. He argued that his appellate counsel provided ineffective assistance when counsel failed to argue that the alleged violation of Rule 431(b) amounted to plain error, the trial court violated his constitutional rights when it refused to answer the jury's question with the correct response defense counsel suggested, his trial counsel provided ineffective assistance by agreeing to numerous delays, and the prosecution did not prove him guilty. The trial court dismissed the petition as frivolous and patently without merit. Roberto now appeals.

¶ 18 ANALYSIS

¶ 19 We review *de novo* the dismissal of a postconviction petition at the first stage of postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998). At this stage of proceedings, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). We assume the truth of all facts alleged in the postconviction petition, unless the record contradicts the allegations. *Coleman*, 183 Ill. 2d at 385.

¶ 20 In this appeal, Roberto argues only that he received ineffective assistance of counsel because counsel failed to argue that the alleged violation of Rule 431(b) amounted to plain error. He argues

that if the appellate court had correctly understood *People v. Thompson*, 238 Ill. 2d 598, 607 (2010), the court should have found plain error, reversed the conviction and remanded for a new trial.

¶ 21 The appellate court cited *Thompson* in support of its decision. *Velazquez*, No. 1-08-2154 at 9. After *Thompson*, the appellate court held, in *People v. Digby*, 405 Ill. App. 3d 544, 548 (2010), that a recitation of the Rule 431(b) principles, followed by asking venire members whether they have any quarrel with the principles, sufficiently met the requirements of the rule. Thus, the appellate court's decision on the direct appeal here comported with the appellate court's understanding of Rule 431(b) as reflected in *Digby*.

¶ 22 In *People v. Wilmington*, 2013 IL 112938, the trial court recited the Rule 431(b) principles and asked the jurors whether they "disagree[d]" with those principles. *Wilmington*, 2013 IL 112938,

¶ 28. Our supreme court said, "While it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." (Emphasis in original). *Wilmington*, 2013 IL 112938, ¶ 32. We see no significant difference between asking prospective jurors whether they disagree with the principles, and asking whether they have any quarrel with the principles. Thus, if Roberto brought his direct appeal from the conviction today, we would find error, and we would then need to address the issue of whether the evidence of guilt balanced so closely against the evidence in favor of Roberto that the error might have tipped the scales of justice against Roberto.

¶ 23 However, on this appeal, we must confine our review to the issue of whether Roberto has raised an arguable claim for ineffective assistance of appellate counsel, and for that claim, he must

show that counsel's failure to argue plain error in the direct appeal, decided in 2010, had prejudicial effect. In light of *Digby* (2010), and because the appellate court decided Roberto's appeal before our supreme court decided *Wilmington* (2013), we find that Roberto suffered no prejudice from his counsel's failure to argue that the violation of Rule 431(b) amounted to plain error. See *People v. English*, 2013 IL 112890, ¶31-35 (Appellate counsel not ineffective for failing to predict later decided precedent). Accordingly, we affirm the trial court's judgment dismissing Roberto's postconviction petition as patently without merit.

¶ 24 Roberto also asks us to correct the mittimus to reflect correctly the number of days he spent in custody before sentencing. The State agrees that the mittimus understated the presentencing credit by one day. Accordingly, we order the clerk of the circuit court to amend the mittimus to show credit for 804 days in custody before sentencing.

¶ 25 CONCLUSION

¶ 26 The appellate court's decision on the direct appeal shows that if Roberto's appellate counsel had argued that the trial court committed plain error in its Rule 431(b) questions to the venire, the appellate court would have found no error and thus no plain error. Because Roberto cannot show any prejudicial effect of the failure to raise the plain error argument on the direct appeal, we affirm the dismissal of Roberto's postconviction petition. We order the clerk to amend the mittimus to give Roberto credit for 804 days spent in custody before sentencing.

¶ 27 Affirmed; mittimus amended.