

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).

2015 IL App (4th) 130361-U

NO. 4-13-0361

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 8, 2015

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
LEONARD E. STUMP,)	No. 07CF20
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's denial of defendant's postconviction petition where defendant failed to prove a substantial denial of his constitutional rights and no meritorious issue can be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In May 2007, after a jury trial, defendant, Leonard E. Stump, was convicted of one count of unlawful possession with intent to deliver a controlled substance (720 ILCS 570/401(d) (West 2006)). The trial court sentenced defendant as a Class X offender (due to his

criminal history pursuant to 730 ILCS 5/5-5-3(c)(8) (West 2006)) to 18 years in prison. He appealed, arguing (1) the court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007)) during *voir dire*, and (2) his sentence was excessive. This court affirmed. *People v. Stump*, No. 4-07-0565 (May 21, 2010) (unpublished order under Supreme Court Rule 23).

¶ 5 On June 8, 2011, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of trial and appellate counsel. The petition survived first-stage review and the circuit court appointed counsel to represent defendant. In December 2011, counsel filed a "supplemental" petition, "adopt[ing] and reassert[ing]" defendant's *pro se* allegations. On April 26, 2013, after several procedural motions, the court conducted a third-stage evidentiary hearing on defendant's petitions. The court denied defendant's petition, finding either defendant (1) failed to substantiate his claims of error with factual or legal support, (2) made "vague and generalized conclusions," or (3) alleged errors regarding counsel's conduct that would be considered strategic.

¶ 6 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In September 2014, OSAD filed a motion to withdraw as appellate counsel, including in its motion a brief analyzing potential meritorious issues. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities, which he did on December 9, 2014. The State has responded.

¶ 7 II. ANALYSIS

¶ 8 On appeal, OSAD contends no meritorious issues can be raised for review. Specifically, OSAD contends no colorable argument can be made that the circuit court erred in denying defendant postconviction relief. In other words, OSAD contends no colorable argument

can be made to show that defendant's constitutional rights were violated due to trial counsel's or appellate counsel's conduct.

¶ 9 In his postconviction petition, defendant alleged his trial counsel rendered ineffective assistance by failing to (1) file a motion to suppress, (2) challenge the canine's conduct at the traffic stop, (3) effectively cross-examine police investigators, (4) highlight for the jury the police officers' inconsistent testimony, (5) call the co-defendant as a witness, (6) request fingerprint analysis on the drug package, (7) request substance-abuse treatment, (8) object to the State's assertion at sentencing that defendant had been previously convicted of selling narcotics, (9) advise the jury defendant was addicted to drugs, (10) object to the State's "wingspan" theory, and (11) poll the jury after the trial. Defendant also alleged his appellate counsel was ineffective for failing to raise these issues on appeal.

¶ 10 In light of OSAD's motion to withdraw, we must determine whether defendant could present any colorable issue on appeal. To do so, we will examine, as did OSAD, the potential arguments to determine whether any have merit. The circuit court concluded defendant had failed to demonstrate ineffective assistance of either trial or appellate counsel. OSAD asserts it cannot fashion any meritorious arguments on appeal with regard to that ruling, and, after a review of the record before us, we agree.

¶ 11 On appeal from the denial of a third-stage evidentiary hearing, the reviewing court must determine whether the circuit court's decision was against the manifest weight of the evidence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). The circuit court determined defendant had failed to demonstrate a substantial denial of his constitutional rights as it related to trial and appellate counsel's conduct. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006) (at the third stage, defendant has the burden of proving a substantial showing of a constitutional violation).

To prevail, defendant was required to demonstrate that counsels' conduct was deficient, falling below an objective standard of reasonableness *and* that defendant was prejudiced by counsels' errors. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellate counsel will not be found to be ineffective for failing to raise frivolous or otherwise nonmeritorious issues on appeal because the defendant suffers no prejudice. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 12 Defendant challenged trial counsel's conduct, which, for the most part, could be characterized as conduct involving strategic decisions. Defendant challenged counsel's (1) failure to file a motion to suppress, (2) manner of cross-examination, (3) failure to call certain witnesses, (4) decision not to request fingerprint analysis on the drugs found, (5) failure to tell the jury defendant was a drug addict, (6) failure to object to the State's "wingspan" theory, and (7) decision not to poll the jury. All of these decisions are considered strategic.

¶ 13 Decisions concerning which witnesses to call at trial and what evidence to present are for defense counsel to make and, as matters of trial strategy, are generally immune from ineffective-assistance-of-counsel claims. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003). Likewise, "the decision whether to file a motion to suppress is generally 'a matter of trial strategy, which is entitled to great deference.' " *People v. Bew*, 228 Ill. 2d 122, 128 (2008) (quoting *People v. White*, 221 Ill. 2d 1, 21 (2006)). Counsel's representation is not rendered incompetent even where a mistake in trial strategy or in judgment is made by counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). "In fact, counsel's strategic choices are virtually unchallengeable." *Palmer*, 162 Ill. 2d at 476.

¶ 14 Further, defendant failed to demonstrate how he was prejudiced by counsel's conduct. Defendant presented no evidence at the evidentiary hearing sufficient to demonstrate

prejudice. Without prejudice, defendant has no claim. *People v. Pitsonbarger*, 205 Ill. 2d 444, 465 (2002).

¶ 15 The remaining contentions of error are likewise without merit. For example, defendant's complaint that counsel failed to request drug treatment can provide no basis for an ineffective-assistance-of-counsel claim. Defendant was sentenced as a Class X offender and was not eligible for probation or entry to a drug-treatment facility. Additionally, his prior convictions were plainly set forth in his presentence investigation report, so any objection to the prosecutor's reference to those convictions would likely have been overruled. Finally, because none of defendant's claims are arguably meritorious, appellate counsel did not render ineffective assistance for not raising those claims on direct appeal. See *People v. Douglas*, 296 Ill. App. 3d 192, 203 (1998) ("Further, unless the underlying issues are meritorious, the defendant obviously suffered no prejudice due to appellate counsel's failure to raise them on direct appeal.")

¶ 16 In sum, OSAD contends no colorable argument can be made as to any of defendant's potential claims on appeal. After a careful review of the entire record on appeal, including the pretrial, trial, and sentencing proceedings, we agree.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment. As part of our judgment, we award the State \$50 against defendant as costs of this appeal.

¶ 19 Affirmed.