

NOTICE

Decision filed 07/29/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 130412-U

NO. 5-13-0412

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Randolph County.
)	
v.)	No. 02-CF-160
)	
KELVIN M. LITTLE,)	Honorable
)	Richard A. Aguirre,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant's motion for postconviction relief did not satisfy the *Strickland* elements required to show ineffective assistance of counsel, the circuit court properly dismissed defendant's motion for postconviction relief, and the State Appellate Defender's motion to withdraw as counsel on appeal is granted where there is no meritorious argument to the contrary.

¶ 2 Defendant, Kelvin M. Little, appeals the circuit court's second-stage dismissal of his postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent him. The OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). Defendant was given proper notice

and was granted an extension of time to file briefs, objections, or any other document supporting his appeal. Defendant has not filed a response. We have considered the OSAD's motion to withdraw as counsel on appeal. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Randolph County.

¶ 3

BACKGROUND

¶ 4 Defendant was convicted of battery and attempted escape. He was sentenced to three years' imprisonment for each offense, to be served consecutively. Defendant filed a motion to reconsider sentence that was denied. Defendant then appealed to this court, arguing that his conviction should be reversed due to ineffective assistance of counsel, and that his sentences should not run consecutively. This court affirmed the convictions, but we remanded the case for resentencing because the trial judge did not state on the record his reasons for ordering the sentences to run consecutively. *People v. Little*, No. 5-03-0028 (2004) (unpublished order under Supreme Court Rule 23). On remand, the circuit court again ordered defendant to serve the sentences consecutively, and it stated its reason for doing so was to protect the public from further criminal conduct. No appeal was filed.

¶ 5 Over two years later, defendant inquired concerning the status of his appeal of the consecutive sentences, an appeal that was never filed. Subsequently, defendant filed a petition for postconviction relief. In substance, the petition asserted that defendant was denied effective assistance of counsel because although he requested his trial counsel file

a notice of appeal, no notice of appeal was filed. The court dismissed the petition as untimely filed because it was filed more than three years after the date of his conviction. Defendant filed a timely notice of appeal challenging the dismissal of his petition for postconviction relief.

¶ 6 This court reversed the trial court's dismissal of appellant's postconviction petition, holding that the trial court improperly dismissed the petition on procedural grounds at the first stage of the proceeding. *People v. Little*, No. 5-08-0061 (2008) (unpublished order under Supreme Court Rule 23). The case was remanded to the circuit court for second-stage proceedings. On remand, the circuit court granted the relief sought in the petition: a direct appeal of defendant's consecutive sentences.

¶ 7 In his appeal, defendant argued that there was not a sufficient basis upon which to sentence him to consecutive sentences. This court affirmed the trial court, holding that there was a sufficient basis upon which the trial court could sentence defendant to consecutive terms of imprisonment. *People v. Little*, No. 5-08-0635 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 Subsequently, defendant filed another postconviction petition alleging, in relevant part, that he did not receive a preliminary hearing and that he received ineffective assistance of counsel because his appellate counsel prosecuted his appeal without the benefit of the entire record of the trial proceedings. The trial court treated it as a petition for leave to file a successive postconviction petition and denied the petition. Defendant again filed a notice of appeal.

¶ 9 On appeal, this court held that the circuit court improperly treated defendant's petition as a successive postconviction petition. *People v. Little*, No. 5-10-0547 (2012) (unpublished order under Supreme Court Rule 23). We explained that because the first postconviction petition merely sought to obtain defendant's right to a direct appeal, he had not yet had the chance to make a collateral attack on his conviction. This court remanded the case for second-stage proceedings on the petition.

¶ 10 The trial court then assigned counsel for defendant, who filed an amended petition. The amended petition raised three issues: (1) defendant did not receive a preliminary hearing, (2) neither defendant nor his appellate counsel in his direct appeal received a complete and adequate record of the trial proceedings, and (3) defendant received ineffective assistance of counsel in that his appellate counsel prosecuted his appeal without a complete and adequate record of the trial proceedings. The State filed a motion to dismiss all claims of the petition.

¶ 11 A hearing on the motion to dismiss occurred. At that hearing defendant withdrew his claim that he did not receive a preliminary hearing. The court granted the State's motion to dismiss count II of the amended petition, and it granted defendant leave to amend the third count. It also ordered an evidentiary hearing be held.

¶ 12 Subsequently, defendant filed a second amended petition. In that petition defendant alleged that he received ineffective assistance of counsel on both of his direct appeals because his appellate counsels prosecuted the appeals without the aid of a complete record of the trial proceedings. The second amended petition referenced a number of letters sent from defendant's appellate counsels to the circuit court clerk stating

that the records were incomplete and requesting missing portions of the record. Each letter stated that the requested materials should be sent directly to the OSAD, or to either the OSAD or this court. There is no indication in the record as to whether the requested materials were ever received. There is also no indication that the requested materials were not received. The second amended petition contained no assertion that the result of his direct appeals would have been any different if defendant's appellate counsels had received the requested materials. The State did not file an answer to the second amended petition.

¶ 13 Defendant failed to appear on the date of the hearing, and the court denied defendant's motion for a continuance. No evidence was offered in support of defendant's second amended petition. The court stated that it reviewed defendant's second amended complaint and found it raised no questions of fact. It then dismissed the second amended petition.

¶ 14 A timely notice of appeal was filed resulting in this appeal. The circuit court appointed the OSAD to represent defendant in this appeal of the dismissal of his second amended petition. The OSAD filed a motion to withdraw, and filed a *Finley* brief in support of said motion. The motion to withdraw asserts that there is no arguable merit to the appeal, and the only potential issue that could be raised is an ineffective assistance of counsel argument that the OSAD believes is without merit.

¶ 15 Defendant was given time to file an objection or other response with this court in regard to the OSAD's motion to withdraw. Defendant filed nothing with this court.

¶ 17 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Id.* at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. "[A] hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Id.* at 381. We review the dismissal of a postconviction petition *de novo*. *Id.* at 387-88.

¶ 18 We recognize that the trial court said that it would hold an evidentiary hearing, which would entail a more deferential standard of review from this court, but the circuit court ultimately dismissed the second amended petition without an answer from the State, and without taking any evidence. Therefore, we review the trial court's decision *de novo*.

¶ 19 The only potential issue identified by the OSAD, and this court's review of the record, is an ineffective assistance of counsel claim predicated on the assertion that appellate counsel in both direct appeals prosecuted the appeals without the aid of a complete record of the trial proceedings. In order to prevail on this issue, defendant must show that his second amended petition made "a substantial showing of a violation of constitutional rights." *Id.* at 381.

¶ 20 An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two parts, both of which must be satisfied for a defendant to prevail on an ineffective assistance of counsel claim. First, defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Id.* at 525. Second, defendant must show "that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* The Illinois Supreme Court in *People v. Tate*, 2012 IL 112214, stated that at the second stage the petitioner must " 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. A failure to satisfy either element of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both issues. See *Strickland*, 466 U.S. at 670. In this case, defendant's second amended petition fails both prongs of the *Strickland* analysis.

¶ 21 Defendant did not show that his representation by each of his appellate counsels fell below an objectively reasonable standard. He alleges that each appellate counsel did not receive the record of the entire trial proceedings while prosecuting their respective appeals. His allegations are supported by his affidavit and the record on appeal.

Defendant's affidavit asserts that his appellate counsels did not have access to a record of the entire proceedings. He does not allege any personal knowledge of this fact; he merely recites what is found in the record. Therefore, his affidavit does not support a finding that his appellate counsels' representation fell below an objectively reasonable level.

¶ 22 Additionally the record on appeal does not support defendant's allegation that his appellate counsels did not have a complete copy of the trial court proceedings. Defendant relies on correspondence contained in the record on appeal that shows his appellate counsel in both appeals determined that the record that had been provided to them was incomplete. In both appeals this correspondence is in the form of letters sent from the OSAD to the circuit court clerk requesting additional portions of the trial record. In each instance the letters ask the circuit court clerk that the missing portions of the record be sent either directly to the OSAD, or to either the OSAD or this court. In either case, it is possible, if not likely, that the materials were sent directly to the OSAD, in which case there would be no indication of the requested materials being received in the appellate record. Defendant also did not provide a supporting affidavit from the appellate counsel in each appeal that they had not received the entire record of the trial court proceedings.

¶ 23 Defendant's petition fails to show how the representation of his appellate counsel in each appeal fell below an objectively reasonable standard. The dismissal of defendant's appeal is proper due to the fact that he failed to allege with supporting affidavit or record citation that his appellate counsels failed to meet an objectively reasonable standard of representation.

¶ 24 Additionally, defendant's petition made no attempt to allege a failure of the second element of the *Strickland* test. He made no assertion that but for objectively deficient representation, the outcome of his appeal would have been different. Defendant must make such a showing to properly assert that he received ineffective assistance in each of his direct appeals. Defendant's claim of a violation of his constitutional right to effective assistance of counsel fails because defendant did not show, or even allege, a reasonable probability that but for appellate counsels' errors the result of his appeals would have been different.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the motion of the OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Randolph County is affirmed.

¶ 27 Motion granted; judgment affirmed.