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2018 IL App (3d) 160164-U

Order filed January 3, 2018
Modified upon denial of rehearing April 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0164
v.	)	Circuit No. 07-CF-2547
	)	
SYLWESTER GAWLAK,	)	The Honorable
	)	Daniel J. Rozak,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it allowed the defendant to proceed pro se on his postconviction petition or when it dismissed two ineffective assistance of counsel claims at the second stage of postconviction proceedings. However, the circuit court erred when it dismissed the defendant's claim that counsel failed to inform him that he was facing mandatory consecutive sentences. Accordingly, the circuit court's judgment was affirmed in part and reversed in part and remanded for a third-stage postconviction evidentiary hearing.

¶ 2 The defendant, Sylwester Gawlak, was convicted of two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) and one count of aggravated criminal sexual abuse (720 ILCS 5/10-16(c)(1)(i) (West 2006)). The circuit court sentenced Gawlak to consecutive prison terms of six, six, and three years, respectively. This appeal involves Gawlak's *pro se* postconviction petition, which the circuit court dismissed at the second stage. On appeal, Gawlak argues that: (1) he did not knowingly and intelligently waive his right to postconviction counsel; and (2) the circuit court erred when it dismissed his postconviction petition at the second stage. We affirm in part and reverse in part.

¶ 3 FACTS

¶ 4 On January 10, 2008, Gawlak was charged by indictment with two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) and one count of aggravated criminal sexual abuse (720 ILCS 5/10-16(c)(1)(i) (West 2006)). The indictment alleged that Gawlak placed his fingers in the vagina of his minor daughter, placed his tongue on her vagina, and rubbed her buttocks for the purpose of his sexual gratification. At the arraignment on January 14, 2008, defense counsel waived a formal reading of the indictment.

¶ 5 During the trial, the State presented the testimony of three detectives—Revis, Wodka, and Valentine—who commented on Gawlak's demeanor during interrogation. Revis stated, *inter alia*, that while Gawlak denied any wrongdoing at several points during the interrogation, he appeared embarrassed and showed remorse, including by hanging his head. Of particular relevance, Revis testified as follows:

¶ 6

> "Q Did the defendant talk to you at all about any touching or contact that he had with his daughter?

A Yes, he said that he went to his daughter who was sleeping on the couch and he began to rub her back and rub her butt.

Q When he made those statements to you, did you notice anything about his demeanor or actions other than the initial changes?

A I would ask him a little bit more about the crux of the situation and he would show remorse, hang his head, and he was embarrassed by it.

Q Did his indication of his embarrassment by the situation give you a line of questioning to explore with the defendant?

A I asked him what else had happened and he, through his embarrassment, he said that he realized that he treated his daughter wrong by treating her like an 18 year old instead of a 10 year old.

Q After he said that he felt he was wrong that he treated his daughter like an 18 year old as opposed to a 10 year old, did that mean anything of importance to you based on the daughter's age?

A Yes, because the girl was only 10 years old and he said that he was treating her as an 18 year old. I asked him what he meant by that and he said that he shouldn't have been hugging

and kissing her for over 10 minutes and should not have been wearing just underwear.

Q So the members of the jury understands [*sic*] this, the statement that you are telling us now that the defendant was making, this wasn't just a question answer, question answer?

A No. No. No. At times initially he denied the situation and then he slowly would give more information that, yes, I did treat her as an 18 year old instead of a 10 year old and I was in my underwear. I was rubbing her butt. I was rubbing her back. I was kissing her for over 10 minutes.

Q Again, based on your training and experience of having conducted between 50 and 100 sexual crimes investigations, have you found this behavior is consistent with perpetrators?

A It is very consistent. They just give you a little bit at a time until you continue to talk to them and talk to them and then they will develop that rapport with you and begin to open up and get pass [*sic*] their embarrassment and remorsefulness and eventually will tell you truth as to exactly what happened.

Q Do you find that the is [*sic*] sometimes defendants that are not able to get all the way to the full truth?

A Yes.

[DEFENSE COUNSEL]: I will object at this time.

THE COURT: Sustained.

[PROSECUTOR]: Q Do you find that based on your training and experience the way that the defendant was sort of giving a little bit at a time was consistent?

A Consistent.

* * *

Q Okay. At some point during this do you confront him with the allegation that his daughter has told the police that he was touching her vagina?

A Yes. I asked him why would your daughter make this up and why would she lie about it.

Q Did he respond to that question?

A Yes, he did.

Q What was his response?

A His response was he is probably sure that [his daughter] was not lying but that he was too embarrassed to admit that anything had happened. It would embarrass himself and family, that he couldn't admit to it."

¶ 7 Wodka stated that Gawlak began to hesitate as the interrogation continued and that he got increasingly nervous. Wodka also stated that Gawlak looked down at the floor often during the interrogation and that he appeared embarrassed. Valentine stated that she was present for a second interrogation during which Gawlak stated he had treated his daughter "more like a wife than his daughter and that he was ashamed about the acts that had occurred between the two of

them." Valentine also stated that Gawlak looked down at the floor often and that he appeared embarrassed and even sad. The only objection trial counsel made regarding any of this testimony was the aforementioned quoted objection to the prosecutor's question to Revis regarding defendants not being able "to get all the way to the full truth," which the circuit court sustained.

¶ 8 After the trial, the jury returned guilty verdicts on all four counts.

¶ 9 The case was called for sentencing on July 31, 2009. However, Gawlak had filed a *pro se* motion containing 38 allegations of ineffective assistance of counsel. The circuit court then held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). During the hearing, the prosecutor was allowed to comment on several of Gawlak's allegations, which included several statements that he believed trial counsel had not rendered ineffective assistance. After the hearing, the court denied the motion and set the case for sentencing.

¶ 10 On August 17, 2009, the circuit court sentenced Gawlak to consecutive sentences of six, six, and three years. Gawlak appealed, challenging only the circuit court's imposition of a certain fine. We vacated the imposition of that fine and remanded for the circuit court to recalculate the applicable monetary assessments. *People v. Gawlak*, No. 3-09-0678 (unpublished order under Supreme Court Rule 23).

¶ 11 Gawlak has filed numerous *pro se* motions over the years. Of relevance to this appeal, Gawlak filed a postconviction petition on August 1, 2011, which the circuit court dismissed as frivolous and patently without merit on December 8, 2011. Gawlak appealed, and this court reversed because the circuit court failed to rule on Gawlak's petition within 90 days as required by section 122-2.1(1) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a) (West 2010)).

People v. Gawlak, No. 3-12-0031 (unpublished order under Supreme Court Rule 23). We remanded the case for the circuit court to conduct second-stage postconviction proceedings. *Id.*

¶ 12 After the remand, on September 18, 2013, Gawlak attempted to talk about several motions he had filed, and the circuit court interrupted him, stating that he was confused and that he needed an attorney to clarify matters for him. Accordingly, the court appointed the public defender to represent Gawlak, and assistant public defender Jason Strzelecki was assigned to the case. Gawlak objected to the appointment and expressed his desire to proceed *pro se*, but the court ignored that request.

¶ 13 Strzelecki's representation of Gawlak was addressed again on December 2, 2013. Gawlak stated that he wanted to discuss the case with Strzelecki before he decided if he wanted to proceed *pro se*. The circuit court stated that it was going to deny Gawlak's motion for standby counsel anyway, citing past instances in which it had allowed standby counsel that ended poorly for the defendants.

¶ 14 On March 26, 2014, Strzelecki informed the court that he had reviewed Gawlak's postconviction petition, as well as an amended petition that Gawlak filed *pro se* after Strzelecki's appointment. Strzelecki stated that he was considering filing a *Finley* motion and that Gawlak had again expressed the desire to proceed *pro se*. The court then addressed Gawlak's motion for the appointment of a new attorney. The court explained that Strzelecki was not appointed to the case—he was assigned to it by the public defender's office, which was the entity appointed to the case. The court stated:

> "If you don't want the public defender's officer to represent you, I suppose you can represent yourself. That's a huge mistake but if you want to do that, your motion kind of eludes [*sic*] to that in

> certain parts, but you don't really say it. I would strongly suggest that you not do that but in any event if you want to, I guess you can. I'd have to go through a few things first but right now you have Mr. Strzelecki who is extremely competent in this area of the law."

The court also noted Gawlak's frustration with the time that it took to address matters in the circuit court, and then it gave Gawlak some time to discuss the case with Strzelecki. When the case was recalled, Strzelecki indicated that the representation would continue.

¶ 15 On July 30, 2014, Gawlak filed a *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). The case was called on September 10, 2014, and Strzelecki stated that he was not "involved with [the section 2-1401 petition] in any way." Strzelecki then asked that the court suspend the section 2-1401 matter until the postconviction matter was resolved, as he was concerned that Gawlak might say or do something that would conflict with the postconviction matter. Gawlak stated that the matters were separate, as Strzelecki stated his intention not to raise any of the issues from the section 2-1401 petition in the postconviction matter, so he requested that he be allowed to proceed with the section 2-1401 matter. The court asked if Gawlak wanted to have the public defender appointed for the section 2-1401 matter, but Gawlak declined, as he had been in contact with private counsel about that matter. Regarding the suspension of the section 2-1401 matter, the court told Gawlak that he should consider following Strzelecki's suggestion: "And I understand your argument that they are different issues but still you have to remember it is the same case, and what you think may not overlap may in fact overlap and affect somehow your post-conviction petition." Gawlak again stated that he wanted to proceed *pro se* on the section 2-1401 matter, so

the court allowed him to present an argument on the State's motion to dismiss the section 2-1401 petition. After arguments, the court took the matter under advisement. On September 19, 2014, the circuit court granted the State's motion to dismiss.

¶ 16 On March 6, 2015, Gawlak filed another *pro se* petition pursuant to section 2-1401. Of relevance to this appeal, the petition alleged that his sentence was void because the *Krankel* hearing held before sentencing was improper. Specifically, Gawlak alleged that the circuit court improperly allowed the State to participate in the hearing.

¶ 17 On May 14, 2015, Gawlak appeared with Strzelecki. Private counsel Robert Caplan was also present, and he stated that he was there on the section 2-1401 matter. Gawlak noted that he had filed a new section 2-1401 petition, so the court gave some time for Gawlak and Caplan to discuss the situation. After that discussion, Strzelecki stated that his office "cannot get involved in this type of co-counseling arrangement" and that "[w]e're not going to be checking in with private counsel on a case we've been assigned to." Caplan stated that he currently had a case in Cook County in which he represented his client on one matter and the public defender was simultaneously representing the client in postconviction matters in the same case. He also agreed that Gawlak's section 2-1401 matter could potentially be raised in a postconviction petition, but that he needed to talk to the public defender about it to be sure. He claimed that the public defender's office would not speak with him about the case.

¶ 18 Assistant public defender Gregory DeBord also spoke to the court on the matter. He reiterated that the public defender's office would not co-counsel with a private attorney. He also stated that if Caplan wanted to file an appearance in the case, then the public defender's office would be happy to turn the matter over to him in its entirety and withdraw from the case.

¶ 19 The court stated that it would not allow a co-counsel arrangement, saying:

> "We're not going to have even the slightest possibility of conflicting co-counsel, and *** barring extreme situations Will County is not going to pay for private counsel as a court-appointed counsel. We've done that in the past on very rare occasions, and I don't see that this is a case that would present the situation where that may have to be done."

Caplan then stated that he would recommend to Gawlak that he postpone the section 2-1401 matter so they could talk about what course to take. Caplan closed by saying that "maybe we'll file an appearance, maybe not."

¶ 20 On June 16, 2015, the issue of Strzelecki's representation was addressed again. Gawlak stated that he was being forced to proceed *pro se* because he felt it was more important to proceed on his section 2-1401 petition, rather than the postconviction petition. Gawlak further stated that unless Strzelecki would be willing to allow Gawlak to proceed on the section 2-1401 petition first, he wanted Strzelecki discharged. Strzelecki maintained his position that proceeding with the section 2-1401 petition could jeopardize the postconviction matter. After further discussion, Gawlak reiterated that he wanted to proceed *pro se*. The court then admonished Gawlak, which included informing him that his sentences were mandatorily consecutive. Gawlak eventually stated that he understood the admonishments. The court then addressed representation versus proceeding *pro se*, and Gawlak stated he understood and that he wished to proceed *pro se*. Accordingly, Strzelecki was discharged.

¶ 21 On June 30, 2015, the case was called on several matters. Of relevance to this appeal, during the hearing, Gawlak asked a question about whether the new or old version of the

criminal statutes applied to him. The circuit court told him that the choice was his. In response, Gawlak stated:

> "I would like to consider the old law, which is the 2007, which is the time of the alleged offense. And at that time, your Honor also told me that Class X's are consecutive mandatory, but I was never informed of how is the Class 2 considered in respect to Class X."

¶ 22 A hearing was held on July 24, 2015, at which Gawlak expressed his desire to have Caplan represent him on the section 2-1401 petition and for him to proceed *pro se* on the postconviction petition. The court stated that Gawlak had to choose to proceed *pro se* on both matters or to have Caplan represent him. The hearing was continued to August 28, 2015, when the court ultimately allowed Caplan to represent Gawlak on the section 2-1401 petition only.

¶ 23 Also on August 28, 2015, Gawlak filed an amended *pro se* petition for postconviction relief in which he alleged, *inter alia*, that trial counsel had rendered ineffective assistance by failing to inform him that he was facing mandatory consecutive sentences and by failing to object to improper opinion testimony that was tantamount to "human lie detector" testimony from detectives.[1] In addition, Gawlak alleged that appellate counsel had rendered ineffective assistance by failing to raise an issue regarding the State's participation in the *Krankel* hearing.

¶ 24 Ultimately, the postconviction matter was addressed first, with Gawlak representing himself. On January 28, 2016, the circuit court heard arguments on the State's second-stage motion to dismiss. The court announced its decision in court on March 3, 2016. The court

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[1] Gawlak also included a claim that appellate counsel had rendered ineffective assistance by failing to raise any of his postconviction claims on direct appeal.

stated: "[i]n a nutshell, these issues all were or could have been addressed on direct appeal and/or they do not raise a constitutional issue; they are matters of evidence and so forth. That's the simplest way I can give my ruling without drafting a 50-page order[.]"

¶ 25 Gawlak appealed.

¶ 26 ANALYSIS

¶ 27 Gawlak's first argument on appeal is that he did not knowingly and intelligently waive his right to postconviction counsel. Specifically, he contends that the circuit court incorrectly advised him that he was required to waive his right to postconviction counsel if he wanted to retain private counsel on the separate 2-1401 matter.

¶ 28 A defendant may represent himself or herself only after knowingly and intelligently waiving the right to counsel. *People v. Baez*, 241 Ill. 2d 44, 115 (2011). It is presumed that a defendant does not intend to waive the right to counsel; waiver will be found only when the request to proceed *pro se* is clear and unequivocal. *Id.* at 116. The determination of whether a defendant has knowingly and intelligently waived the right to counsel is contextual, which includes consideration of the accused's background, experience, and conduct. *Id.*

¶ 29 "Although a court may consider a defendant's decision to represent himself unwise, if his decision is freely, knowingly, and intelligently made, it must be accepted." *Id.* However, it is incumbent upon the court to inform the defendant of the dangers and disadvantages of proceeding *pro se*. *Id.* at 117. We review the circuit court's decision regarding a defendant's waiver of the right to counsel for an abuse of discretion. *Id.* at 116. An abuse of discretion occurs when "the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 30 The circumstances confronting the circuit court relevant to this issue were as follows. Gawlak, acting *pro se*, had filed two petitions. The first, a postconviction petition, alleged that his constitutional right to counsel had been violated when the court "allowed both trial counsel and the State to argue against [his] claims" at the *Krankel* hearing. The second, a civil section 2-1401 petition, claimed that his sentence was void because the circuit court conducted an improper *Krankel* hearing when it allowed the State to participate in the argument. He was represented by the public defender on the postconviction petition proceeding and had hired private counsel for the section 2-1401 action.

¶ 31 Strzelecki, Gawlak's public defender, advised the court that his office could not handle the section 2-1401 matter and that a co-counsel arrangement with private counsel was neither viable nor acceptable to the public defender. Caplan, the retained counsel who had only been hired for the section 2-1401 claim, suggested he might enter his appearance in the postconviction proceeding, but he never did. This may have been because Gawlak indicated that he was unable to pay Caplan to handle both matters.

¶ 32 There was also Strzelecki's argument that Gawlak's testimony in the section 2-1401 action could jeopardize his postconviction claim and that the latter needed to be resolved first. Gawlak, however, disputed this assessment, asserting the petitions presented distinct legal challenges to the *Krankel* hearing. He insisted his section 2-1401 claim be addressed first.

¶ 33 In addition to the competing arguments and Gawlak's persistent long-term wavering on whether he wanted to represent himself on the postconviction petition, the circuit court had an additional concern. Gawlak suggested the appointment of standby counsel. Citing previous instances in which such representation had ended poorly for other defendants, the court declined to make that appointment.

¶ 34 The circuit court then fully admonished Gawlak about the risks and disadvantages of self-representation. *Supra* ¶ 19. Thereafter, Gawlak elected to proceed *pro se* on the postconviction petition and to be represented by his retained counsel Caplan on the section 2-1401 petition.

¶ 35 Given the totality of these circumstances, we cannot say that the circuit court's ruling—that Gawlak's options for representation in the situation he had created were limited—was "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Hall*, 195 Ill. 2d at 20. We find no abuse of discretion and hold that Gawlak's waiver of counsel was made knowingly and intelligently.

¶ 36 Gawlak's second argument on appeal is that the circuit court erred when it dismissed his postconviction petition at the second stage. Specifically, he contends that the court should have advanced three arguments to a third-stage evidentiary hearing: (1) ineffective assistance of trial counsel for failing to inform him of the mandatory consecutive sentences; (2) ineffective assistance of appellate counsel for failing to raise an issue related to improper opinion testimony from the State's witnesses; and (3) ineffective assistance of appellate counsel for failing to raise an issue about the State's participation in the *Krankel* hearing. We will address these arguments in turn.

¶ 37 **Ineffective Assistance of Trial Counsel—Mandatory Consecutive Sentences**

¶ 38 Gawlak argues that he was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to inform him that he was facing mandatory consecutive sentences. Gawlak contends that had he known he was facing mandatory consecutive sentences, he would have accepted the State's plea offer of six years of imprisonment.

¶ 39 At the second stage of postconviction proceedings, the circuit court must determine whether a petitioner has made a substantial showing that his or her constitutional rights have

been violated. *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). At this stage, "[a]ll well-pleaded facts in the petition and accompanying affidavits, if any, are taken as true for the purpose of determining whether to grant [a third-stage] evidentiary hearing." *Id.* at 547. We review a circuit court's second-stage dismissal of a postconviction petition *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 40 Our review of the record reveals that Gawlak's claim should have been advanced to a third-stage evidentiary hearing. Initially, we note that while Gawlak did not raise this argument on direct appeal, there is no forfeiture issue. Our supreme court has recently stated that there is no prohibition on bringing ineffective assistance of counsel claims on direct appeal. *People v. Veach*, 2017 IL 120649, ¶ 45. However, collateral proceedings such as postconviction proceedings are better suited for addressing ineffective assistance of counsel claims "when the record is incomplete or inadequate for resolving the claim." *Id.* ¶ 46. Here, contrary to the State's claim, the record contains nothing to rebut Gawlak's contention that trial counsel failed to inform him that he was facing consecutive sentences.

¶ 41 We acknowledge that on June 30, 2015, while asking the circuit court about whether the new or old version of the criminal statutes applied to him, Gawlak stated, "I would like to consider the old law, which is the 2007, which is the time of the alleged offense. And *at that time*, your Honor also told me that Class X's are consecutive mandatory, but I was never informed of how is the Class 2 considered in respect to Class X." (Emphasis added.) Gawlak's statement is clear that the circuit court admonished him about mandatory consecutive sentencing at an early stage of the criminal proceedings. That fact does not, however, rebut his challenge. Gawlak claims he did not know at the time he rejected the State's plea offer that he faced mandatory consecutive sentences because his attorney had not told him. There is nothing in the

record to show he was provided that information by the court or counsel before taking that critical step.

¶ 42 Accordingly, we reverse the circuit court's decision that dismissed this claim and remand this issue for third-stage proceedings. See *People v. Williams*, 2016 IL App (4th) 140502, ¶ 44.

¶ 43 **Ineffective Assistance of Appellate Counsel—Improper Opinion Testimony**

¶ 44 Gawlak argues that appellate counsel was ineffective for failing to argue on direct appeal that trial counsel failed to object to the "human lie detector" testimony of detectives Revis, Wodka, and Valentine.

¶ 45 Ineffective assistance of appellate counsel claims are governed by the two-pronged test from *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). "A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant." *Id.* A defendant cannot satisfy the prejudice prong if the underlying issue is without merit. *Id.* Also, appellate counsel is not required to brief every conceivable issue, and if counsel decided that a particular issue was without merit, that decision is not evidence of incompetence "unless counsel's appraisal of the merits [was] patently wrong." *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 46 Gawlak's argument on this issue is predicated on *United States v. Williams*, 133 F. 3d 1048 (7th Cir. 1998) and *People v. Henderson*, 394 Ill. App. 3d 747 (2009). In both of those cases, law enforcement officers were allowed to testify regarding the demeanors of defendants during interrogations. *Williams*, 133 F. 3d at 1050; *Henderson*, 394 Ill. App. 3d at 749-51. In *Williams*, a federal agent testified about the defendant's demeanor and reaction after he was told that he was a suspect in a bank robbery. *Williams*, 133 F. 3d at 1052-53. The agent testified that

the defendant "began avoiding eye contact with us, kind of lowered his head, and he thought about it for a moment and then said that he didn't rob a bank." *Id.* at 1052. The agent also testified that he used certain interrogation tactics to minimize and sympathize with the defendant and that the defendant kept his head down and nodded "as if in agreement with these statements." *Id.* at 1053. The Seventh Circuit held that the agent purported to be a "human lie detector" and his "observations [were] improper characterizations of the defendant and useless in the determination of innocence or guilt, and in fact, they tend to prejudice the jury." *Id.*

¶ 47 In *Henderson*, a detective testified that the defendant denied any involvement in an aggravated criminal sexual assault. *Henderson*, 394 Ill. App. 3d at 749. The detective further testified that he was trained in detecting deceptive responses to questions and that the defendant's responses indicated he was being deceptive. *Id*. at 749-51. The Fourth District cited to *Williams* and found that the testimony was useless in the determination of guilt or innocence, but because the evidence of the defendant's guilt was overwhelming, the detective's testimony was harmless error. *Id*. at 753.

¶ 48 Significantly, the testimony given by Revis, Wodka, and Valentine in this case did not in fact comment on Gawlak's veracity when they described Gawlak's demeanor at various times during the interrogation. While it is true that Gawlak denied any wrongdoing at several points during the interrogation, he also made numerous statements that are properly characterized as at least partial confessions. For example, Revis testified that Gawlak said he had treated his daughter like an 18-year-old, rather than a 10-year-old; that he should not have been hugging and kissing his daughter for over 10 minutes and he should not have been wearing only his underwear; that he was rubbing his daughter's back and butt; that he kissed his daughter's face, arms, and shoulder; and that he was too embarrassed to admit that anything had happened and

that he would embarrass his himself and family by admitting anything. Thus, the portions of the testimony given by Revis, Wodka, and Valentine to which Gawlak objects were consistent with statements Gawlak actually made during the interrogation and were not like the characterizations and conclusions in *Williams* and *Henderson* that were used to infer the defendants' deception.

¶ 49 We further note that while some of Revis' testimony may have verged on opinion, defense counsel's objection to the most objectionable portion of that testimony—the question regarding whether "sometimes defendants *** are not able to get all the way to the full truth"—was sustained. Moreover, the testimony to which Gawlak strongly objects, namely, that Gawlak's behavior during the interrogation was consistent with perpetrators, was relevant to give context to the manner in which Gawlak responded to questions and acted during the interrogation. He teetered on the brink of confessing, offering details in pieces to indicate his culpability, yet he specifically stated that his daughter was not likely lying about her allegations and that "he was too embarrassed to admit that anything had happened" because it would embarrass himself and his family. Further, Revis never specifically testified that he believed Gawlak was guilty. Thus, we disagree with Gawlak's claim on appeal that Revis' testimony was improper opinion testimony and that its admission deprived him of a fair trial. See *People v. Hanson*, 238 Ill. 2d 74, 101-03 (2010).

¶ 50 Under these circumstances, we hold that trial counsel's decision not to object to the testimony given by Revis, Wodka, and Valentine did not constitute deficient performance. Because the underlying conduct did not constitute ineffective assistance, appellate counsel likewise did not render ineffective assistance by choosing not to raise the issue on direct appeal. See *Rogers*, 197 Ill. 2d at 223. Accordingly, we hold that the circuit court did not err when it dismissed this claim at the second stage of postconviction proceedings.

¶ 51 **Ineffective Assistance of Appellate Counsel—*Krankel* Hearing**

¶ 52 Gawlak argues that appellate counsel was ineffective for failing to argue on direct appeal that the State was allowed to participate in the *Krankel* hearing, thereby improperly creating an adversarial situation.

¶ 53 When a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel, the circuit court must conduct a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny. *People v. Patrick*, 2011 IL 111666, ¶ 29. The defendant is not automatically entitled to the appointment of new counsel. *Id.* ¶ 32. Rather:

> "when a defendant presents a *pro se* posttrial claim of ineffective assistance of counsel, the trial court should first examine the factual basis of the defendant's claim. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. However, if the allegations show possible neglect of the case, new counsel should be appointed." *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003).

¶ 54 At this hearing, the court may discuss the defendant's allegations with both the defendant and trial counsel. *Id*. at 78. In addition, while the State may also participate in the hearing, such participation should be *de minimis* because the hearing must not become adversarial. *People v. Jolly*, 2014 IL 117142, ¶ 38; *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40.

¶ 55 As stated above, ineffective assistance of appellate counsel claims are governed by the *Strickland* standard. *Rogers*, 197 Ill. 2d at 223.

¶ 56 Even if we were to find that appellate counsel's decision not to raise this issue was objectively unreasonable, Gawlak could not satisfy *Strickland*'s prejudice prong. We reiterate that satisfying the prejudice prong in ineffective assistance of appellate counsel claims requires a showing that "there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). Our supreme court has also stated that this means the petitioner must show a reasonable probability that his or her *sentence* or *conviction* would have been reversed. *People v. Mack*, 167 Ill. 2d 525, 532 (1995). Thus, even if appellate counsel had raised this issue and even if we had found the existence of a *Krankel* violation, the case would only have been remanded for a new *Krankel* inquiry. See, *e.g.*, *Moore*, 207 Ill. 2d at 79. It follows, then, that finding prejudice on this issue would require us to speculate regarding the outcome of the new *Krankel* inquiry—*i.e.*, we would have to hold that the new inquiry would uncover a valid ineffective assistance of counsel claim such that his conviction would have been reversed. "Proof of prejudice, however, cannot be based on mere conjecture or speculation as to outcome." *People v. Palmer*, 162 Ill. 2d 465, 481 (1994). Accordingly, we hold that the circuit court did not err when it dismissed Gawlak's *Krankel*-based argument at the second stage of postconviction proceedings.

¶ 57 In sum, we hold that the circuit court did not err when it: (1) allowed Gawlak to proceed *pro se* on the postconviction matter; (2) dismissed Gawlak's ineffective assistance claim regarding the "human lie detector" testimony; and (3) dismissed Gawlak's ineffective assistance claim regarding the *Krankel* hearing. However, we also hold that the circuit court erred when it dismissed Gawlak's ineffective assistance claim regarding notice of mandatory consecutive sentences; accordingly, we remand for further proceedings on that claim. Lastly, we note that

Gawlak has also argued that this court should further rule that a different judge should conduct the proceedings on remand. This issue is moot, however, as Judge Rozak has retired.

¶ 58 CONCLUSION

¶ 59 The judgment of the circuit court of Will County is affirmed in part and reversed in part, and the cause is remanded for further proceedings.

¶ 60 Affirmed in part and reversed in part; cause remanded.