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2019 IL App (3d) 160414-U

Order filed May 29, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14th Judicial Circuit,
)	Rock Island County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-16-0414
v.)	Circuit No. 07-CF-1134
)	
OSBALDO JOSE-NICOLAS,)	Honorable
)	Walter D. Braud
)	Richard A. Zimmer
Defendant-Appellant.)	Judges, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice McDade concurred in the judgment.
Presiding Justice Schmidt dissented.

ORDER

¶ 1 *Held:* Trial court erred in denying defendant's postconviction petition where defendant suffered a deprivation of his constitutional rights when the trial court provided incorrect admonishments regarding postplea proceedings.

¶ 2 Defendant Osbaldo Jose-Nicolas filed a postconviction petition alleging he was denied his rights to due process and effective assistance of counsel because plea counsel failed to file a motion to withdraw his guilty plea, which Jose-Nicolas contends was involuntary. Following an

evidentiary hearing, the trial court denied Jose-Nicolas's postconviction petition. He appealed. We reverse and remand.

¶ 3

FACTS

¶ 4

In 2007, defendant Osbaldo Jose-Nicolas was charged with two counts of first-degree murder (counts I, II) and one count of concealment of a homicidal death (count III). 720 ILCS 5/9-1(a)(1), 9-3.1(a) (West 2006). He reached an agreement with the State for a partially negotiated guilty plea. Under its terms, the sentence for first-degree murder would be capped at 40 years and the sentence for concealment of a homicidal death would be capped at 5 years, with mandatory consecutive sentences.

¶ 5

On March 24, 2008, a plea hearing took place. Jose-Nicolas was represented by Spanish-speaking counsel and assisted by an interpreter. The assistant state's attorney trying the case was also a fluent Spanish speaker. The State presented a factual basis, which established that Jose-Nicolas argued with the victim, the mother of his two children, and strangled her to death. He then recruited his sister and brother to help him hide the body. He told his friend that he "killed her" and his friend reported the comments to the Rock Island Police Department. Jose-Nicolas was arrested and confessed to murder and concealment of a homicidal death.

¶ 6

The trial court provided Jose-Nicolas the majority of the plea admonishments required under Illinois Supreme Court Rule 402(a) (eff. July 1, 1997) and accepted his plea. The State prompted the court that it did not explain to Jose-Nicolas his status and that he would be subject to deportation as a convicted felon. The court re-accepted Jose-Nicolas's plea and ordered a presentence investigation. The State informed the court that it failed to explain to Jose-Nicolas the applicable penalty ranges and the court instructed him that the

first-degree murder charge carried a sentencing range of 20 to 40 years and concealment of a homicidal death carried a sentencing range of 3 to 5 years. Jose-Nicolas reiterated that he wished to plead guilty and confirmed that no one was forcing him to enter into the plea. The court found the plea to be knowingly and voluntarily made and again accepted it.

¶ 7 A sentencing hearing took place on June 19, 2008. The interpreter read a letter Jose-Nicolas wrote in Spanish where he expressed remorse and accepted responsibility for his actions. The court did not consider the factors in mitigation because it determined the offense was nonprobational. The State sought a sentence in accord with the terms of the plea agreement. The trial court dismissed count II and sentenced Jose-Nicolas according to the plea terms to a 40-year term for murder and a 5-year term for concealment of a homicidal death. The court admonished Jose-Nicolas as follows:

“Mr. Nicolas, you have the right to appeal. However, prior to taking your appeal, if you wish to challenge the sentence imposed or to ask me to reconsider the sentence I imposed or if you wish to attempt to withdraw your plea of guilty and vacate the judgment, you must file the written motion to reconsider and/or the written motion to withdraw your plea of guilty and vacate the judgment within 30 days of today’s date. In each motion you file, you must first set out all issues or claims of error you believe I made in imposing your sentence or in accepting your plea of guilty. Any claims of error not set out in the motions would be waived. If I believe I made an error in your sentence, I would correct the error. If I granted the motion to withdraw your guilty plea, I would vacate both the judgment and sentence, set the guilty plea aside, and set your case for trial. However, any charges that were dismissed or amended as part of the guilty plea would be reinstated and set for trial at the State’s request. If I denied

either or both motions, then within 30 days of that denial if you still wished to appeal you must then file with the clerk of the court or request that I direct the clerk of court to prepare and file for you in the trial court a written notice of appeal. You will be limited on your right to appeal to those issues and claims of error you set forth in your motions.”

The trial court also informed Jose-Nicolas of his rights to an attorney and to transcripts.

¶ 8 Plea counsel filed a motion to reconsider the sentence in December 2008, arguing that Jose-Nicolas was 23 years old, with no criminal history and expressed remorse for his crimes. A hearing took place on April 20, 2009. In response to the trial court’s concern that the motion was four months late, counsel said he told Jose-Nicolas after the sentencing hearing to contact him within 30 days to inform counsel “how he wanted to proceed on the motion to reconsider” but counsel did not hear from his client until November. No additional facts as to sentencing were offered. The trial court denied the motion to reconsider as untimely and on its merits.

¶ 9 In March 2011, Jose-Nicolas contacted the circuit clerk asking that an appeal be filed on his behalf. In his letter, Jose-Nicolas stated: “I NEED TO FILE FOR AN ‘APPEAL’ when I was sentenced my Lawyer did not File For a ‘late for an appeal’ which I Need copys of my ‘TRANSCRIPTS’ so I can get everything in MOTION. SO I WANT TO File a MOTION FOR AN ‘LATE FOR AN APPEAL.’” The clerk forwarded the letter to this court, which denied his petition to file a late appeal. *People v. Jose-Nicolas*, No. 3-11-0275 (April 20, 2011) (dispositional order). In August 2011, Jose-Nicolas contacted the clerk to inquire about the status of the motion to reconsider his sentence. He asked whether his attorney had filed a notice of appeal, and if not, how Jose-Nicolas could file one now that the time to file had

expired. He further stated that he was unaware if he had had a trial or accepted a plea because he was not proficient in English and had minimal legal knowledge. He asked the clerk to provide him a procedural history of his case and the record. The clerk forwarded the correspondence to the state's attorney and the public defender.

¶ 10 In March 2012, Jose-Nicolas filed a *pro se* postconviction petition, alleging he was denied effective assistance of plea counsel. He claimed that he told his attorney that he wanted to file a motion to withdraw his guilty plea, that his attorney told him not to do so because he would receive a longer sentence, and that he persisted in his desire that counsel file the motion to withdraw. Jose-Nicolas also argued counsel did not inform him of the charges and pressured him into pleading guilty. The trial court summarily dismissed Jose-Nicolas's postconviction petition and he appealed. We reversed and remanded for further postconviction proceedings. *People v. Jose-Nicolas*, 2014 IL App (3d) 120415-U.

¶ 11 On remand, postconviction counsel was appointed and filed an amended postconviction petition, alleging Jose-Nicolas was deprived of his rights to due process and effective assistance of counsel. Jose-Nicolas argued that the trial court should have considered mitigating factors when sentencing him and that plea counsel provided ineffective assistance by failing to file both a motion to withdraw the guilty plea and an Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) certificate. By agreement, the petition advanced to the third stage of postconviction proceedings and an evidentiary hearing took place.

¶ 12 Jose-Nicolas testified. After the sentencing hearing, he told his attorney that he wanted to "retract from [his] guiltiness" and that counsel told him "no" because he would be sentenced to life or to death. Jose-Nicolas insisted he wanted his attorney "to put the

motion in effect to retract.” His attorney said he would contact Jose-Nicolas before he was sent to the Department of Corrections but he never did. Jose-Nicolas never talked to his plea counsel again. He wrote a letter to the public defender to inquire about the progress of the motion counsel was supposed to file; his attorney replied and said the appeal had been denied. He was unaware whether his attorney filed a motion to reconsider and he could not remember if he asked his attorney to file the motion. He did ask counsel about the progress to “retract from [his] guiltiness.” On cross-examination, Jose-Nicolas acknowledged he was instructed on his rights at the guilty plea hearing and he understood those rights. He knew he had 30 days to vacate his plea. He did not understand the sentencing cap and the translator did not tell him about the caps. He did not want his sentence reconsidered; rather, he wanted to vacate his plea.

¶ 13 Vince Lopez testified. He was Jose-Nicolas’s plea counsel. He was fluent in Spanish and always used an interpreter with Jose-Nicolas, although sometimes he would speak to his client at the jail without an interpreter present. He negotiated a partial disposition for Jose-Nicolas, which involved a sentencing cap and plea. Counsel discussed the plea fully with Jose-Nicolas, including the sentencing cap and range. He had no indication Jose-Nicolas did not understand the plea. Jose-Nicolas did not state that he wanted a trial. Jose-Nicolas did not ask him to file a motion to withdraw his plea. Jose-Nicolas never said he did not understand. He believed his client understood the plea and it was knowing and voluntary. After Jose-Nicolas was sentenced, they discussed where Jose-Nicolas would go and what would happen. He heard via a letter several months after sentencing that Jose-Nicolas wanted a motion to reconsider filed so he could get a lesser sentence. Lopez did not

remember if Jose-Nicolas asked him to file an appeal. He filed the notice of appeal late because he was “probably” notified late by Jose-Nicolas.

¶ 14 Norma Kauzlarich testified. She was currently an associate circuit judge but had been the assistant state’s attorney prosecuting Jose-Nicolas. She had a clear recollection of the case. She was fluent in Spanish and made a point to pay attention to the translator to ensure the translations were accurate. She did not hear the translator make any misrepresentations to Jose-Nicolas. She believed his plea was knowing and voluntary.

¶ 15 The trial court denied Jose-Nicolas’s postconviction petition. He appealed.

¶ 16 ANALYSIS

¶ 17 Jose-Nicolas raises three issues on appeal. He challenges the denial of his postconviction petition, the limit on questioning imposed by the trial court at the evidentiary hearing and the effectiveness of postconviction counsel’s representation.

¶ 18 We first consider whether the trial court erred when it denied Jose-Nicolas’s postconviction petition. Jose-Nicolas argues that his petition was improperly denied where the evidence demonstrated that he was deprived of reasonable assistance of counsel. According to Jose-Nicolas, plea counsel did not provide reasonable assistance where he failed to file a postplea motion to preserve Jose-Nicolas’s appeal rights and failed to consult with him about an appeal.

¶ 19 A criminal defendant has a constitutional right to effective assistance of counsel during criminal proceedings, including entry of a guilty plea. U.S. Const., amends. VI, XIV, Ill. Const. 1970, art. I, § 8; *People v. Brown*, 2017 IL 121681, ¶ 25. A defendant alleging ineffective assistance of counsel must demonstrate that the representation he received was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Postconviction proceedings are a proper vehicle to bring a claim that a defendant lost his right to an appeal because of counsel's ineffective assistance. *People v. Moore*, 133 Ill. 2d 331, 339 (1990).

¶ 20 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) allows defendants to challenge their criminal convictions based on constitutional violations. *People v. Domagala*, 2013 IL 113688, ¶ 32. The third stage of postconviction proceedings involves an evidentiary hearing on the petition's merits. 725 ILCS 5/122-6 (West 2016); *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 30 (citing *People v. Marshall*, 375 Ill. App. 3d 670, 683 (2007)). The court must assess the credibility of the witnesses, determine the weight to afford their testimony and resolve any conflicts in the evidence. *People v. Carter*, 2013 IL App (2d) 110703, ¶ 74. The petitioner bears the burden to establish beyond a preponderance of the evidence that his constitutional rights have been violated. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 21 (citing *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)). We will not reverse a trial court's denial of a postconviction petition after an evidentiary hearing unless the court's findings were manifestly erroneous. *People v. Guzman-Ruiz*, 2014 IL App (3d) 120150, ¶ 16.

¶ 21 The trial court must provide the following admonishments to a defendant who submits a partially negotiated plea: (1) he has a right to appeal; (2) before he can appeal, he must move within 30 days to have the conviction vacated and for leave to withdraw his guilty plea, providing the reasons for the motion; (3) if the motion is allowed, the court would vacate the plea, sentence and judgment and set a trial date; (4) that the court on motion of the State may reinstate any charges dismissed as part of the plea; (5) if the defendant cannot afford either transcripts of his plea and sentencing hearing or an attorney, the court will provide them; and

(6) any issue not raised in a postplea motion will be waived on appeal. Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 22 The State asserts this issue is waived because Jose-Nicolas failed to present a viable basis to support a motion to withdraw his plea and preserve his right to appeal. The State points to the plea hearing, the court's admonishments to Jose-Nicolas and Jose-Nicolas's acceptance of the plea as proof the plea was knowing and voluntary, asserting Jose-Nicolas cannot establish a basis to withdraw his plea. However, the admonishments which the State theorizes establishes the validity of Jose-Nicolas's plea cannot support the State's position. The court provided incomplete admonishments during the plea sequence and accepted his plea repeatedly before the court properly informed Jose-Nicolas of all the admonishments necessary before it could accept his plea. First, the court failed to inform Jose-Nicolas that he could be deported due to his status as a convicted felon. The court then failed to detail the sentencing range and had to add that information. While the admonishments were ultimately given in full, they were presented in a confusing and fractured manner. For a defendant like Jose-Nicolas, who had minimal proficiency in English, the admonishments as given would serve to make difficult and foreign legal concepts even harder to understand. In making this observation, we do not question the trial court's finding that Jose-Nicolas's plea was knowing and voluntary as this issue is not before us.

¶ 23 The pattern of imprecise information worsened when the trial court informed Jose-Nicolas of his appeal rights. At sentencing, the admonishments the trial court provided regarding Jose-Nicolas's appeal rights were incorrect. The court instructed Jose-Nicolas that if he wanted to appeal, he had to first either move to reconsider his sentence and/or to withdraw his plea. The court properly told Jose-Nicolas that he had to file any postplea motion within 30 days but erroneously told him that he could preserve his appeal by moving solely to reconsider his

sentence. Jose-Nicolas was required to move to withdraw his plea to preserve his appeal rights. See Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2000) (where there is a negotiated guilty plea, the court must admonish the defendant that he has a right to appeal and must first move, within 30 days after sentencing, to withdraw the plea and vacate the judgment, setting forth the grounds for the motion). We acknowledge that Jose-Nicolas did not file any postplea motions within 30 days but find that under the circumstances, Jose-Nicolas was prejudiced by the improper admonishments. See *People v. Dominguez*, 2012 IL 111336, ¶ 22 (court must advise defendant in a manner that properly informs him of what he must do to preserve his appeal rights). Had Jose-Nicolas followed the court's instructions and timely filed a motion to reconsider his sentence, it would not have preserved his right to appeal. See *People v. Jones*, 2013 IL App (4th) 120300, ¶ 15 (admonishment improper where trial court told defendant she could appeal plea by filing notice of appeal within 30 days without informing her of need to move to withdraw her guilty plea within 30 days).

¶ 24 In addition to the improper admonishments, Jose-Nicolas was further prejudiced by counsel's failure to file the motions necessary to pursue an appeal. According to Jose-Nicolas, he told his attorney at sentencing that he wanted to take further action. Jose-Nicolas asked counsel after the sentencing hearing to "retract from [his] guiltiness" and "to put the motion in effect to retract." Jose-Nicolas relies on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), to support his claim of ineffective assistance. In that case, the defendant sought *habeas* relief on the basis that he received ineffective assistance of trial counsel where counsel failed to file an appeal, depriving him of his right to appeal. *Id.* at 474. Counsel could not remember whether the defendant asked for an appeal. *Id.* at 475. The trial court denied the petition but on appeal, the reviewing court reversed. *Id.* at 475-76. The Supreme Court reversed, rejecting the appeals court's bright-line

rule that counsel must file a notice of appeal unless instructed by the defendant not to appeal. *Id.* In reaching its determination, the *Flores-Ortega* court first considered whether the attorney consulted with the defendant. *Id.* at 478. If he did consult, then counsel’s performance was deficient only if the defendant expressly asked to appeal and counsel failed to follow his instructions. *Id.* If counsel did not consult with the defendant, the court must ask whether the failure to consult constitutes deficient performance. *Id.* Counsel has a duty to consult with the defendant when there is reason to think that a rational defendant would want to appeal, *i.e.*, there are nonfrivolous grounds for an appeal or when the defendant “reasonably demonstrated” to counsel that he wanted to appeal. *Id.* at 480.

¶ 25 Plea counsel offered no evidence he consulted with Jose-Nicolas about his right to appeal. Counsel testified that he could not remember if Jose-Nicolas asked him to appeal, not that Jose-Nicolas did not ask him to do so. Jose-Nicolas testified that he asked plea counsel to file the motions necessary for him to pursue an appeal and thus his testimony that he wanted an appeal stands un rebutted. In our view, these requests indicate Jose-Nicolas’s desire to challenge his plea. Plea counsel testified that he told Jose-Nicolas to contact him within 30 days if he wanted counsel to file a motion to reconsider his sentence, evidencing that postplea discussions occurred as Jose-Nicolas contends. We conclude his attorney’s failure to file an appeal was not a strategic decision and deprived him of effective assistance of counsel. See *People v. Breedlove*, 213 Ill. 2d 509, 514 (2004) (discussing cases where remand was required because defendants were provided incorrect appeal admonishments).

¶ 26 Jose-Nicolas lost his right to pursue a direct appeal based on improper admonishments and ineffective assistance of plea counsel, who apparently placed the responsibility to begin the appeal process on Jose-Nicolas’s shoulders. We find that because Jose-Nicolas received

improper admonishments and unreasonable assistance of counsel, the denial of his postconviction petition should be reversed. Because the resolution of this issue is determinative, we do not address the other issues Jose-Nicolas raised in the alternative on appeal.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed and the cause remanded.

¶ 29 Reversed and remanded.

¶ 30 JUSTICE SCHMIDT, dissenting:

¶ 31 I respectfully dissent. This matter proceeded to a third stage hearing on defendant's postconviction petition. We have no basis for reversing the trial court.

¶ 32 I. Postconviction Petition

¶ 33 The Act provides a remedy to criminal defendants alleging a substantial violation of their constitutional rights. *People v. Brisbon*, 164 Ill. 2d 236, 242 (1995). A postconviction proceeding is a collateral attack upon a final judgment, not an inquiry into a defendant's guilt or innocence. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). At the third stage, defendant has the opportunity to present evidence showing a substantial deprivation of his constitutional rights during the proceedings leading up to his conviction. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). A trial court's judgment following an evidentiary hearing will not be disturbed absent manifest error. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). An error is manifest when it is " " "clearly evident, plain, and indisputable." ' ' *Id.* (quoting *People v. Johnson*, 206 Ill. 2d 348, 360 (2002), quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 34 Defendant raised a claim of ineffective assistance of counsel. Defendant argues plea counsel was ineffective in failing to file a timely postplea motion to preserve his right to appeal,

as he claims his guilty plea was neither knowing nor voluntary. He alleges he did not understand the penalties he faced for his crimes. He also claims he wanted to go to trial but was prevented from doing so by plea counsel. Defendant maintains the evidence at the third stage hearing showed by a preponderance of the evidence that he asked for an appeal and plea counsel ignored that request. Not so.

¶ 35 A defendant must show plea counsel's performance was (1) so deficient that it fell below an objective standard of reasonableness and (2) counsel's failure prejudiced defendant in order to demonstrate ineffective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant bears the burden of overcoming the strong presumption in favor of counsel's effective advocacy. *People v. Albanese*, 104 Ill. 2d 504 (1984). He must satisfy both prongs to show ineffective assistance. *People v. Caballero*, 126 Ill. 2d 248 (1989). Defendant cannot show prejudice merely by claiming he would have not pled guilty had he received effective assistance of counsel. *People v. Hughes*, 2012 IL 112817, ¶ 63.

¶ 36 Defendant contends plea counsel was ineffective based on the standard articulated in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, the respondent pled guilty to second degree murder. *Id.* at 473. The respondent's plea was unique in that it allowed him to both deny committing the crime and admit the State had sufficient evidence to convict him. *Id.* The respondent could not communicate with counsel for the first 90 days of his sentence as he was undergoing evaluations. *Id.* at 474. His counsel made a note in her file reminding her to "bring appeal papers." *Id.* Counsel never filed an appeal; respondent attempted to file an appeal but the reviewing court rejected it as untimely. *Id.* The Court first noted counsel acts in an unreasonable manner if, after consulting with the respondent about an appeal, she ignores the respondent's specific requests. *Id.* at 480. The Supreme Court held that counsel has a duty to consult with her

clients about an appeal if (1) a rational defendant would want an appeal or (2) the particular defendant demonstrated his desire for an appeal to counsel. *Id.* Relevant to this inquiry is whether the conviction followed a trial or a guilty plea. *Id.* A guilty plea “may indicate that the defendant seeks an end to judicial proceedings.” *Id.* The reviewing court should look at factors like whether the respondent received his bargained for sentence when considering whether counsel had a duty to consult with the respondent. *Id.*

¶ 37 For the reasons that follow, we cannot find manifest error in the trial court’s denial of defendant’s postconviction petition. This case is easily distinguishable from *Flores-Ortega*, but even following that standard, defendant failed to show the facts of his case would lead a rational thinker to believe he wanted to appeal or that he actually articulated such a desire.

¶ 38 In *Flores-Ortega*, the respondent’s plea did not include any admission of guilt. Here, defendant admitted the crime to his friend, confessed to the police, and expressed deep regret over his actions at sentencing. Defendant’s guilt is beyond question. The plea agreement shaved 20 years off of his possible maximum sentence. The respondent in *Flores-Ortega* did not have the ability to reach out to his counsel from the time his sentence began till well after the appeal window. Here, defendant was not restricted from communicating with plea counsel. The trial court was free to reject defendant’s testimony that he asked his counsel to move to withdraw his plea after the sentencing hearing. Respondent’s counsel’s notes in *Flores-Ortega* showed she believed an appeal was the necessary next step. Here, plea counsel stated he did not believe, and defendant did not indicate to him, that defendant wanted an appeal. Defendant, at sentencing, told the court he was “here to face this situation.” He said “[y]ou don’t know how sorry I am, repentant, and I cry at night saying ‘my God, why is it not me who is asleep, not her?’ ” His actions and words indicated a desire for finality. They are not the words of a defendant wanting

to go to trial. It is hard to imagine a defendant, who has previously confessed to the crime and then making these statements to the trial court, would walk into the next room minutes later and tell his attorney that he wanted to withdraw his plea and go to trial.

¶ 39 The trial court's denial of defendant's postconviction petition was not manifestly erroneous based on the testimony presented at the evidentiary hearing. Defendant and Lopez testified in contradiction to one another concerning the holding cell conversation. It is within the province of the trier of fact "to determine the credibility of witnesses, to weigh evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The majority reweighs the evidence and finds that defendant asked his trial counsel to file an appeal. *Supra* ¶¶ 24-25. The trial court found Lopez credible. His testimony was bolstered by Judge Kauzlarich's testimony regarding defendant's sentencing hearing. Defendant committed a heinous crime. He admitted guilt soon thereafter. He expressed remorse, a desire to take accountability for his actions, and the desire to end the judicial proceedings by pleading guilty. The mere fact that defendant received the maximum sentence allowed by his partially negotiated plea is insufficient to show plea counsel acted unreasonably in failing to move to withdraw defendant's guilty plea. Defendant's plea maximum was 40 years for first degree murder as opposed to the statutory maximum of 60 years defendant faced if he proceeded to trial. The concealment charge carried a statutory maximum of five years' imprisonment. Since there was no showing that the performance of defendant's plea counsel was objectively unreasonable, the trial court did not err in denying the petition.

¶ 40 II. Trial Court's Limiting of Defendant's Testimony

¶ 41 In the alternative, defendant argues the trial court erred in limiting his testimony at the evidentiary hearing to conversations with plea counsel postsentencing. However, defendant did

not make an offer of proof at the evidentiary hearing in regard to presentencing conversations. It is well recognized that the key to saving an error in the exclusion of evidence review is an adequate offer of proof in the trial court.” *People v. Andrews*, 146 Ill. 2d 413, 420-21 (1992). Where a defendant fails to make an offer of proof, he forfeits the issue. *Id.* at 421. I would not reach the issue; there is no way of knowing whether the exclusion of this evidence prejudiced defendant.

¶ 42 III. Reasonableness of Postconviction Counsel’s Representation

¶ 43 Again in the alternative, defendant seeks relief arguing postconviction counsel provided unreasonable assistance in failing to incorporate viable claims into the amended petition.

¶ 44 While a defendant has no constitutional right to postconviction counsel, an indigent defendant is entitled to appointed counsel under the Act when his petition advances past the first stage. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). The Act requires appointed counsel to provide a “ ‘reasonable level of assistance’ ” to defendant. *Id.* (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). We review the reasonableness of postconviction counsel’s assistance *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 45 Rule 651(c) requires three things of postconviction counsel to demonstrate reasonable assistance. It requires postconviction counsel to file a certificate affirming counsel (1) consulted with defendant concerning his alleged constitutional deprivations, (2) examined the record, and (3) made any amendments to defendant’s *pro se* petition necessary for adequate representation. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that counsel provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Defendant can overcome the presumption with a showing that counsel failed to comply with these duties. *Id.* ¶ 17.

¶ 46 Here, postconviction counsel filed a Rule 651(c) certificate, creating the rebuttable presumption that his assistance was reasonable. Defendant attempts to overcome that presumption by arguing postconviction counsel should have included claims that (1) defendant's plea was involuntary for lack of proper admonishments, (2) plea counsel was ineffective for failing to secure defendant's right to an appeal, and (3) the trial court should have considered the statutory factors in mitigation.

¶ 47 Rule 651(c) "does not require counsel to advance frivolous or spurious claims on defendant's behalf." *People v. Pendleton*, 223 Ill. 2d at 472.

¶ 48 Regarding the admonishments at sentencing, defendant argues his guilty plea was involuntary because the trial court did not perfectly comply with Rule 402 admonishments. The record rebuts this argument. Reversible error occurs where improper admonishments deny the defendant "real justice." *Whitfield*, 217 Ill. 2d at 195. Defendant cannot show that here. After the trial court made most of the admonishments, the State reminded the court to admonish defendant of the potential penalties. The trial court made the necessary remaining admonishments. It then asked defendant to reaffirm that it was still his intention to plead guilty after hearing the range of potential sentences. The majority states that because of defendant's limited ability to speak English, he was no doubt confused. This is clearly wrong for two reasons. First, defense counsel spoke fluent Spanish, as did the prosecutor and (obviously) the interpreter. Second, breaking up the admonishments could have only highlighted the additional admonishments once given. Defendant reaffirmed his desire to plead guilty. The trial court made all of the proper admonishments at defendant's sentencing hearing. Defendant does not argue that the trial court prejudiced him by admonishing him later in the hearing regarding sentencing ranges. Rather, defendant argues he did not understand the implication of the range of sentences. The trial court

gave defendant the opportunity to express this when it inquired, after the range of sentences admonishment, whether it was still his intention to plead guilty. Defendant had an interpreter present. The record belies defendant's argument that he did not understand the potential range of sentences.

¶ 49 As for defendant's argument that plea counsel should have filed a timely postplea motion, I addressed this argument above. The evidence establishes this argument is without merit.

¶ 50 Finally, defendant argues postconviction counsel provided insufficient support for the argument the sentencing court improperly refused to consider statutory factors in mitigation. Defendant seeks reconsideration of his sentence only. Rule 604(d) states:

“No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending.” Ill. S. Ct. R. 604(d) (eff. July 1, 2017).

Defendant contends that postconviction counsel should have included *People v. Johnson*, 2017 IL App (4th) 160920, and *People v. Palmer-Smith*, 2015 IL App (4th) 130451, in the petition as authoritative support. These cases stood for the proposition that a defendant may challenge his sentence alone in a negotiated plea if his claim is the sentence was “improper” rather than “excessive.” In *People v. Rademacher*, 2016 IL App (3d) 130881, ¶¶ 57-60, this court specifically rejected the reasoning of *Palmer-Smith*. This court said, “[v]irtually any excessive

sentencing argument could be easily converted to an improper sentencing argument.” *Id.* ¶ 59. The supreme court reversed *Johnson* (2019 IL 122956). In doing so, it implicitly reversed *Palmer-Smith*. Clearly, postconviction counsel did not err in failing to include *Palmer-Smith* and *Johnson* in his framing of the mitigation argument. Defendant could not seek reconsideration of his sentence without withdrawing his guilty plea. *Johnson*, 2019 IL 122956, ¶ 43.

¶ 51 Additionally, a reading of the amended petition shows postconviction counsel did craft an argument with authoritative support. Defendants receiving the assistance of postconviction counsel are not “entitled to the advocacy of counsel for purposes of exploration, investigation and formulation of potential claims.” *People v. Davis*, 156 Ill. 2d 149, 163 (1993). The Act does not require postconviction counsel to search out any available claim but, rather, to shape defendant’s *pro se* petition. *Id.* at 163-64. Defendant did not include this argument in his *pro se* petition; postconviction counsel included the claim on his own initiative. As stated above, the argument was a loser regardless of how counsel presented it.

¶ 52 Unlike the majority, I would not reweigh the evidence and would affirm the trial court.