NOTICE
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2019 IL App (4th) 160357-U

NO. 4-16-0357

FILED
January 17, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br>Plaintiff-Appellee,<br>v.<br>PETRO J. SIMPSON,<br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>Macon County<br>No. 10CF1336<br><br>Honorable<br>Thomas E. Griffith Jr.,<br>Judge Presiding. |

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, granting the office of the State Appellate Defender's motion to withdraw as postconviction counsel.

¶ 2 In September 2010, the State charged defendant, Petro J. Simpson, by information with two counts of attempt (first degree murder), two counts of armed violence, one count of aggravated unlawful use of a weapon, one count of unlawful possession of a weapon by a felon, one count of aggravated fleeing and eluding, one count of armed robbery, and one count of aggravated resisting a peace officer. In November 2011, defendant pleaded guilty to attempt (armed violence) in exchange for the State agreeing to drop all other charges. The trial court sentenced him to 15 years' imprisonment. The court also appointed the office of the State Appellate Defender (OSAD) to represent defendant on appeal.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant, citing to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending any appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In September 2010, Edgar Browning went to Officer Steven Hagemeyer, who was sitting in a marked police car, and stated defendant, who was in a black GMC Yukon, attempted to rob Browning at gunpoint. Based on the statement, Officer Hagemeyer pursued the GMC Yukon and stopped the vehicle. Defendant stepped out of his vehicle but, as the officer told him to stop walking, defendant got back into the vehicle and drove through the yard of a residence. Officer Hagemeyer had his lights and sirens on when he attempted to stop defendant's vehicle the first time. After defendant got back into his car and drove away, Officer Hagemeyer chased defendant for 11 minutes covering approximately 45 blocks. Defendant ran approximately seven stop signs and four traffic signals, at certain points reaching speeds of 78 miles per hour in a 30 mile per hour zone. Eventually the vehicle was stopped using stop sticks, and defendant was arrested. Pursuant to a search incident to arrest, Officer Hagemeyer located a 9-millimeter semi automatic pistol magazine and a search of the route of where the chase occurred revealed a 9-millimeter Luger handgun. The prosecutor, as part of the factual basis, indicated the handgun was loaded when it was found lying along the roadway. Defendant admitted throwing the handgun during the pursuit and deoxyribonucleic acid (DNA) testing of the gun's handle confirmed the presence of defendant's DNA.

¶ 6 In September 2010, defendant was charged by information with two counts of attempt (first degree murder) (counts I and II) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), two count of armed violence (counts III and IV) (720 ILCS 5/33A-2(a) (West 2010)), a count of

aggravated unlawful use of a weapon (count V) (720 ILCS 5/24-1.6(a)(1)(3)(B) (West 2010)), a count of unlawful possession of a weapon by a felon (count VI) (720 ILCS 5/24-1.1(a) (West 2010)), a count of aggravated fleeing and eluding (count VII) (625 ILCS 5/11-204.1 (West 2010)), a count of aggravated resisting a peace officer (count VIII) (720 ILCS 5/31-1(a-7) (West 2010)), and a count of armed robbery (count IX) (720 ILCS 5/18-2(a)(2) (West 2010)). In exchange for defendant's plea of guilty to a new count of attempt (armed violence) (count X) (720 ILCS 5/8-4(a), 33A-2 (West 2010)), the State dropped all other counts. The trial court sentenced defendant to 15 years' imprisonment in the Illinois Department of Corrections, eligible to be served at 50%, to be followed by 2 years of mandatory supervised release.

¶ 7 Defendant filed a postconviction petition alleging that his due process rights were violated and he was denied effective assistance of counsel when he pleaded guilty based on assurances by his trial counsel he would be given additional sentencing credit for educational endeavors undertaken while in prison. Defendant sought as relief a reduction in his sentence to reflect the credits he believed he was entitled to receive. The trial court advanced the petition for second stage proceedings and appointed postconviction counsel.

¶ 8 In April 2016, the trial court conducted an evidentiary hearing on the petition. At the hearing, defendant said he told his attorney, "the only way I was gonna um—cop out was if I was eligible for work release, good time. And um—earned income—I mean earned income credit or whatever school time credit." He said his attorney told him he would get a Class 1 felony since it was his first time and he did not have any Class X felonies in his background, so defendant pleaded guilty. However, upon entering prison, defendant realized he was not eligible to receive those credits because his Class 1 felony was based on an attempt of a Class X felony. He stated that had he known he would not be eligible for those credits, he would not have taken

the plea deal. His attorney testified she had no independent recollection of her conversations with defendant, but from her notes she could tell she talked to defendant about school credits and believed she may have told him he was eligible. She was confident she would have told him there was no guarantee he would obtain that credit because it was at the discretion of the Illinois Department of Corrections. The court denied the petition, stating both the school credit and the work release were collateral issues, solely at the discretion of the Illinois Department of Corrections, and, in the court's opinion, defendant received a good deal since some of the charges he was otherwise facing were serious offenses for which he could be required to serve 85% of his sentence instead of the 15-year sentence, leaving him eligible for day-for-day credit. The court also did not believe defendant pleaded guilty solely on the promise of the additional credits.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 OSAD has filed a motion to withdraw its representation of defendant and a supporting memorandum of law. The record shows proof of service on defendant. This court granted defendant leave to file a response by September 20, 2018. He has not done so. Based on our examination of the record, we conclude, as has OSAD, an appeal in this cause would be without arguable merit.

¶ 12 A. Evidentiary Hearing

¶ 13 A defendant may not enter into a negotiated plea agreement and then seek to keep part of the bargain by only challenging his sentence. *People v. Evans*, 174 Ill. 2d 320, 327-28, 673 N.E.2d 244, 247-48 (1996). Seeking a reduction in his sentence was legally impermissible, unless defendant withdrew his plea. While defendant did not request to withdraw his plea in an

amended petition, his attorney presented that argument before the trial judge. Regardless of whether the request was properly brought before the court, defendant's argument still fails.

¶ 14 "Where a trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on disputed issues of fact that requires credibility determinations, we will reverse that decision only if it is manifestly erroneous." *People v. Phillips*, 2017 IL App (4th) 160557, ¶ 55, 92 N.E.3d 544. "However, where a trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on undisputed facts, we will generally review that decision *de novo*." *Phillips*, 2017 IL App (4th) 160557, ¶ 55.

¶ 15 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). " 'Effective assistance of counsel refers to competent, not perfect representation.' " *Evans*, 209 Ill. 2d at 220 (quoting *People v. Stewart*, 104 Ill. 2d 463, 491-92, 473 N.E.2d 1227, 1240 (1984)). "Mistakes in trial strategy or tactics do not necessarily render counsel's representation defective." *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 10, 93 N.E.3d 664.

¶ 16 "A conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice." *People v. Valdez*, 2016 IL 119860, ¶ 29, 67 N.E.3d 233. "Courts should not upset a plea solely because of *post hoc*

assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 582 U.S.__, 137 S. Ct. 1958, 1967 (2017). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

¶ 17 As to the first count of attempt (first degree murder), if convicted, defendant would have been facing a minimum sentence of 20 years with a possible maximum sentence of 80 years' imprisonment at 85% because the victim was a peace officer. Additionally, his charge for armed violence carried a minimum sentence of 15 years' imprisonment. Defendant indicated he proposed an alternate plea during negotiations. He now contends eligibility for school credits and "earned income credit" were factors; however, none of the plea discussions specifically included any reference to them. Thus, it is highly suspect defendant would have rejected the plea and gone to trial, exposing himself to substantially more prison time, solely over the issue of earned educational credits. This is the sort of *post hoc* assertion of which the Supreme Court has asked us to be suspicious and is not one which would have been rational under the circumstances confronting defendant. See *Lee*, 582 U.S.__, 137 S. Ct. at 1967. It was not as if defendant had a viable defense to the allegations or some reasonable basis for believing he might not be convicted. According to his own testimony, he offered to plead guilty for a 10-year sentence in the first place. Defendant has not sought to withdraw his plea or contended he was in some way wrongfully convicted; it has always been about the sentence he would serve.

¶ 18 B. Illinois Supreme Court Rule 651(c) Certificate

¶ 19 Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires the record filed in the trial court to contain a showing the appointed postconviction counsel "has consulted with

petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." "[T]he certificate requirement in Rule 651(c) is not a rule of strict compliance. Counsel's failure to file an affidavit certifying compliance with Rule 651(c) is harmless error if 'the record demonstrates that counsel adequately fulfilled his duties as post-conviction counsel.' " *People v. Williams*, 186 Ill. 2d 55, 59 n.1, 708 N.E.2d 1152, 1154 (1999) (quoting *People v. Johnson*, 154 Ill. 2d 227, 238, 609 N.E.2d 304, 309 (1993)).

¶ 20 Here, defendant's counsel, Tim Tighe, filed a "Response to Motion to Dismiss and Certification Pursuant to Supreme Court Rule 651(c)" in response to the State's motion to dismiss defendant's postconviction petition. Within the response, counsel set forth the language of Rule 651(c) as part of the factual basis underlying the response to the motion, rather than filing the more frequently seen separate certificate pursuant to Rule 651(c). We need not rule on the propriety of placing the certification inside a response to a motion but would note it would alleviate the possibility of being overlooked in the record if filed as a separate document. Nonetheless, the record affirmatively shows Tighe " 'adequately fulfilled his duties.' " *Williams*, 186 Ill. 2d at 59 n.1 (quoting *Johnson*, 154 Ill. 2d at 238). He wrote defendant in December 2015 and was awaiting a response; however, by the time of the March 2016 hearing, he stated he spoke with his client and learned the nature of his contentions. Additionally, counsel, when questioned by the trial court, felt he had enough to proceed without the transcript of the plea hearing because defendant's contentions were about communications he had with his attorney *dehors* the record and Tighe had reviewed everything and corresponded with his client. See *People v. Garcia*, 405 Ill. App. 3d 608, 625, 939 N.E.2d 972, 988 (2010) ("[T]he rule focuses on

working in collaboration with the defendant and the record."). Further, Tighe called defendant's trial attorney as a defense witness in the ultimate evidentiary hearing. Tighe did not amend the petition to clearly set out his client was requesting to withdraw his plea in its entirety, but he argued it in front of the court. It was clear the court in its ruling evaluated this argument, not focusing on the lack of a written amendment. Therefore, the record demonstrates defendant's postconviction counsel adequately fulfilled his duty, and if there was any failure to comply with the Rule 651(c) certificate requirement, it was harmless. Thus, an appeal in this case would be without arguable merit.

¶ 21 III. CONCLUSION

¶ 22 We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 23 Affirmed.