

NOTICE  
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2014 IL App (5th) 120445-U

NO. 5-12-0445

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,	)	Marion County.
	)	
v.	)	No. 06-CF-366
	)	
ERIC D. LONG,	)	Honorable
	)	J. Marc Kelly,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.  
Presiding Justice Welch and Justice Stewart concurred in the judgment.

**ORDER**

¶1 *Held*: Where the defendant failed to show a substantial deprivation of his constitutional rights, the circuit court's third-stage dismissal of his postconviction petition is affirmed.

¶2 The defendant, Eric D. Long, appeals the circuit court's dismissal of his postconviction petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)). The State Appellate Defender has been appointed to represent him. The State Appellate Defender has 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). The defendant was given proper notice and was granted an extension of time to file briefs, objections, or any other

documents supporting his appeal. The defendant has filed a response. We have considered the State Appellate Defender's motion to withdraw as counsel on appeal, as well as the defendant's response thereto. 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 State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Marion County.

¶ 3

### BACKGROUND

¶ 4 The defendant was charged by information with one count of criminal sexual assault and two counts of aggravated criminal sexual assault. On September 28, 2006, the defendant entered into an open plea agreement with the State, wherein the defendant pled guilty to one count of criminal sexual assault in exchange for the State's agreement to nol-pros the other two counts.

¶ 5 At the plea hearing, the circuit court admonished the defendant as to the nature of the charges and the possible penalties. When the court asked the defendant if he understood the charges and possible penalties, the defendant said, "Yes, sir." When the circuit court asked the defendant whether he had any questions, the defendant answered, "No, sir." The defendant also indicated that he knew he had a right to plead not guilty and that he had a right to a trial. The defendant pled guilty.

¶ 6 On December 5, 2006, the circuit court sentenced the defendant to 12 years in the Illinois Department of Corrections (IDOC) to be followed by 2 years of mandatory supervised release.

¶ 7 The defendant did not file a motion to withdraw his guilty plea or a motion to reduce

his sentence. On July 10, 2007, the defendant filed a motion for leave to file a late notice of appeal. This court denied that motion. *People v. Long*, No. 5-07-0376 (Sept. 10, 2007) (order).

¶ 8 On January 24, 2008, the defendant filed a *pro se* petition for postconviction relief pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 2006)). In his petition, the defendant argued that he was provided ineffective assistance of trial counsel when counsel (1) failed to file a motion for discovery, (2) failed to investigate the circumstances surrounding his statements to police, (3) failed to file a motion to suppress his statements to police, (4) failed to hire a DNA expert witness to rebut the State's DNA evidence, (5) failed to develop DNA evidence that would have exonerated him, (6) misinformed the defendant about the consequences of pleading guilty, namely that the defendant would be sentenced to probation only if he pled guilty, and (7) refused the defendant's request that counsel file a motion to withdraw the guilty plea and reduce the sentence. The petition also alleged that he did not willingly waive his right to a preliminary hearing and that the sentence he received was more than the sentence he had agreed to in the open plea. He requested that the circuit court grant his request to withdraw his guilty plea and vacate his sentence, and order DNA testing of the defendant to compare it to the DNA taken from the victim.

¶ 9 On March 13, 2008, the circuit court dismissed the defendant's postconviction petition. The defendant appealed, arguing that his petition met all of the pleading and evidentiary requirements for a first-stage postconviction petition. We agreed with the defendant and remanded for further postconviction proceedings. *People v. Long*, No. 5-08-0186 (Aug. 28, 2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 10 On remand, postconviction counsel was appointed for the defendant. Postconviction counsel did not amend the defendant's *pro se* postconviction petition. However, at the evidentiary hearing, counsel stated that he would only proceed on (1) whether the defendant entered into a knowing plea of guilty with the effective assistance of counsel, (2) whether trial counsel appropriately investigated the circumstances surrounding the defendant's statements to law enforcement, and (3) whether trial counsel ignored the defendant's request that she file a motion to withdraw his guilty plea and reduce his sentence.

¶ 11 At the evidentiary hearing, the defendant testified that he told his trial counsel that he felt "a little threatened into giving a statement" to the police and that he had asked defense counsel to investigate the circumstances surrounding his statement to the police. The defendant alleged that the officer who initially interviewed him, Officer Smith, told him that if he did not write down the statement, he would spend "a lot of time" in prison. The defendant said that these threats by Officer Smith "scared and worried" him. He alleged that he wrote down what the police wanted to hear in an effort to "get it over with." When asked whether he specifically requested defense counsel to move to suppress those statements, however, the defendant stated that he could not remember whether he did so, but that he probably did.

¶ 12 Next, the defendant testified that his trial counsel brought him a list of plea options while he was in jail. The defendant chose to plead guilty to a Class 2 felony in exchange for four years in prison. The defendant claimed that trial counsel did not explain what the options meant, but told the defendant that they would go before the circuit court and inform

the court of what the defendant had decided to plead to. Thus, the defendant testified that he was surprised when he was sentenced to 12 years in the IDOC.

¶ 13 The defendant further testified that after he was admonished and sentenced, he told trial counsel that he wanted to talk to her about appealing. Trial counsel told the defendant that she would meet with him that day or the next day, before he was sent from jail to prison. The defendant admitted that in his postconviction petition, he mistakenly included an allegation that when he asked trial counsel about having a discussion about appealing, trial counsel responded that she was not required to do so. After sentencing, the defendant asked trial counsel to prepare and file a motion to reduce sentence, but trial counsel stated that she did not have to do so. Once in prison, the defendant did not have contact with trial counsel. He did not write to her or the circuit court and otherwise made no attempt to contact trial counsel.

¶ 14 The State called three witnesses to testify. Officer Smith testified that he did not threaten the defendant in any way and that he did not raise his voice, appear physically aggressive, or tell the defendant that if he did not give a statement, he would go to prison for a long time. He also testified that at each interview when he read the defendant his rights, the defendant stated that he understood his rights. Sheriff Devore also testified about the initial interview with the defendant. His testimony was consistent with that of Officer Smith. He did not coerce the defendant into giving a statement.

¶ 15 The defendant's plea counsel, Ericka Sanders, testified that she remembered a few facts from the police reports in the defendant's case, but did not remember anything else from the case. She could not recall whether the defendant told her that the police had

threatened him into giving a statement; whether the defendant had asked her to use an expert for DNA testing; what, if any, plea offers were made before the defendant entered his plea; or whether the defendant had asked her to prepare a motion to reduce sentence and her response thereto.

¶ 16 Postconviction counsel asked Sanders if she recalled making a notation on her court file that read: "offer 9/5, five years DOC." Sanders testified that she did not specifically remember having a conversation with the defendant regarding that offer, but that it would have been her practice to convey any plea offer to the defendant. She further testified that if the State withdrew an offer, she might not have made a note of the withdrawal in the court file.

¶ 17 The circuit court found that the defendant had failed to meet his burden of showing ineffective assistance of counsel or that his plea was not knowing and voluntary. The court found that the defendant's testimony was not credible because he was repeatedly asked questions by the court during the plea and sentencing hearings and had indicated that he understood what he was pleading to. He was asked whether he had been threatened or forced into pleading guilty, and the defendant stated that he had not. The court also found that the evidence showed that a motion to suppress the defendant's statements would have been without merit. With respect to the defendant's claim that trial counsel failed to file a motion to withdraw guilty plea or a motion to reduce sentence, the court found that the defendant had failed to meet his burden of proof. The court thereafter dismissed the defendant's postconviction petition. From that dismissal, the defendant appeals.

¶ 18

## ANALYSIS

¶ 19 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court has 90 days to independently assess the defendant's petition and summarily dismiss it if the court finds it "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage or if the circuit court fails to rule on it within 90 days, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 20 At the second stage, the circuit court must determine whether the defendant is indigent and, if so, whether he wishes to have counsel appointed to represent him. 725 ILCS 5/122-4 (West 2010). After an appointment, Illinois Supreme Court Rule 651(c) requires counsel (1) to consult with the defendant by mail or in person to ascertain his contentions of deprivation of constitutional rights, (2) to examine the record of the proceedings at the trial, and (3) to make any amendments that are necessary to the petition previously filed by the *pro se* defendant. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 21 After appointed counsel has made any necessary amendments to the petition, the State may file a motion to dismiss it. 725 ILCS 5/122-5 (West 2010); *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13. At the second stage, the circuit court determines whether the defendant has made a substantial showing of a constitutional

violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed.

¶ 22 At the third stage of a postconviction petition, the circuit court must determine whether the defendant has met his burden of showing a substantial deprivation of federal or state constitutional rights. *People v. Lane*, 398 Ill. App. 3d 287, 296 (2010). The circuit court's decision at the third stage will not be reversed unless it was manifestly erroneous. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A decision is manifestly erroneous only if the error is " 'clearly evident, plain, and indisputable.' " *People v. Frieberg*, 305 Ill. App. 3d 840, 847 (1999) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)). "The credibility of the testimony in a post[ ]conviction case, as in other cases tried by the court without a jury, is a matter for the trial judge to determine \*\*\*." *People v. Alden*, 15 Ill. 2d 498, 503 (1959). With these standards in mind, we turn to an analysis of the defendant's claims.

¶ 23 Guilty Plea

¶ 24 The first potential issue identified by the State Appellate Defender is whether the defendant's guilty plea was knowing and voluntary. "For a guilty plea to be constitutionally valid, there must be an affirmative showing that the plea was made voluntarily and intelligently." *People v. Urr*, 321 Ill. App. 3d 544, 547 (2001). "To determine whether a plea is voluntarily and intelligently entered, the Illinois Supreme Court adopted Supreme Court Rule 402 [(eff. July 1, 1997)], which requires the court to admonish defendant on the nature of the crime charged, the sentencing range, and the rights defendant forfeits as a result of pleading guilty." *Urr*, 321 Ill. App. 3d at 547.

Where the record reveals that the defendant was fully admonished in accordance with Rule 402, a presumption arises that the plea was intelligent, knowing, and voluntary. *People v. Daubman*, 190 Ill. App. 3d 684, 693 (1989). When pleading guilty, a defendant is waiving important constitutional rights; thus, it is important that a defendant understands the implications of his guilty plea. *People v. Dennis*, 354 Ill. App. 3d 491, 496 (2004).

¶ 25 At the guilty plea hearing, the circuit court asked the defendant whether he understood that he was pleading guilty to a Class 1 felony that carried a maximum sentence of 15 years of imprisonment plus 2 years of mandatory supervised release. The defendant responded that he understood. In fact, when the court went through all of the Rule 402 admonishments, the defendant indicated, *inter alia*, that he understood what he was pleading to, what rights he was giving up, and that no one had made any threats or promises to coerce him into pleading guilty. Thus, it is clear that the defendant's plea was knowing and voluntary.

¶ 26 Ineffective Assistance/Motion to Reduce Sentence

¶ 27 The second potential issue identified by the State Appellate Defender is whether trial counsel was ineffective because the defendant asked her to file a motion to withdraw his guilty plea and reduce his sentence, but she did not.

¶ 28 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial.

*People v. Cordell*, 223 Ill. 2d 380, 385 (2006). More specifically, the defendant must demonstrate (1) that counsel's performance was objectively unreasonable under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Harris*, 225 Ill. 2d 1, 20 (2007). A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Because a defendant's ineffective-assistance-of-counsel claim will fail if either prong of the *Strickland* test is not met, a reviewing court need not determine whether counsel's performance was deficient before determining whether he was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342 (2007). There is a strong presumption that counsel's action or inaction was a matter of trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). Counsel's strategic choices are virtually unchallengeable (*Harris*, 225 Ill. 2d at 49 (citing *Strickland*, 466 U.S. at 690) and generally are not subject to scrutiny under *Strickland* (*People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002))). Counsel's strategic decisions will not support a claim of ineffective assistance of counsel unless counsel's strategy is so unsound that he or she entirely fails to conduct any meaningful adversarial testing of the State's case. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005).

¶ 29 Here, the defendant gave contradictory testimony at the evidentiary hearing. First, he indicated that he never spoke to his attorney after he pled guilty. Then, he stated that sometime after he was sentenced, he asked his attorney to prepare a motion and she replied that she did not have to do so. In another instance while giving his testimony, the

defendant stated that he had mistakenly included an allegation in his petition that his trial attorney responded to a request to discuss filing an appeal by telling the defendant that she was not required to do so. It was well within the court's province to determine that the defendant's testimony regarding trial counsel was not credible. *People v. Jackson*, 19 Ill. App. 3d 404, 407 (1974). It is also clear that the defendant failed to establish that his counsel's assistance was objectively unreasonable and, but for the counsel's performance, the result of the proceedings would have been different. Trial counsel indicated that she met with the defendant multiple times and explained the proceedings, charges, and penalties to him. In light of the charges and the evidence against the defendant, counsel's representation of the defendant was reasonable.

¶ 30                    Ineffective Assistance/Motion to Suppress Statements

¶ 31    The final potential issue identified by the State Appellate Defender is whether trial counsel failed to appropriately investigate the circumstances surrounding the defendant's statements to police. The circuit court is in the best position to assess the credibility of witnesses. *People v. Taylor*, 237 Ill. 2d 356, 378 (2010). Trial counsel is not required to file frivolous motions. *People v. Miszkiewicz*, 236 Ill. App. 3d 411, 429 (1992). When dismissing the defendant's petition, the court noted that a motion to suppress would have been frivolous and without merit because, at the evidentiary hearing, two officers who questioned the defendant contradicted that testimony. We agree. The defendant's assertions that he was coerced into giving a statement are not supported by the record. The court believed the testimony of the officer and the sheriff, and doing so was not manifest error. Thus, the court's determination that it would have been frivolous for

counsel to file a motion to suppress was also not erroneous.

¶ 32

#### Plea Offer

¶ 33 In his response to the State Appellate Defender's motion, the defendant argues that his plea counsel was ineffective for failing to convey a five-year plea offer to him prior to his entering the guilty plea. Plea counsel has a duty to communicate formal plea offers from the State to the defendant. *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 14. To satisfy *Strickland* with respect to plea counsel, a defendant must show that absent his plea counsel's deficient advice, he would have accepted the plea offer. *People v. Hale*, 2013 IL 113140, ¶ 18. The defendant must show that he would have accepted an earlier plea had he been afforded effective assistance of counsel. *Id.* ¶ 21. Here, the only information the defendant has to support his claim that plea counsel did not convey a five-year plea offer to him was a notation counsel made in the court file. When plea counsel testified at the postconviction hearing, she said that it would have been her normal practice to convey all plea offers to the defendant. Further, she testified that if the State withdrew an offer, she may not have made a note of it in the court file. The court weighed the testimony of plea counsel and the defendant, and determined that plea counsel's testimony regarding the five-year plea should receive more weight.

¶ 34 The defendant has failed to establish that there was any substantial deprivation of his constitutional rights. The circuit court did not commit manifest error when it dismissed the defendant's petition at the third stage.

¶ 35

#### CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Marion County is

affirmed.

¶ 37 Affirmed.