

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).

2015 IL App (4th) 130701-U

NO. 4-13-0701

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 19, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
ARTHUR FOSTER,)	No. 04CF1270
Defendant-Appellant.)	
)	Honorable
)	Leo J. Zappa,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted appellate counsel's motion to withdraw and affirmed the trial court's judgment, concluding that defendant's appeal presented no meritorious issues.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel for defendant, Arthur Foster. For the reasons that follow, we grant OSAD's motion and affirm the trial court's second-stage dismissal of defendant's postconviction petition.

¶ 3 I. BACKGROUND

¶ 4 A. Events Preceding Defendant's Guilty Plea and Sentence

¶ 5 In December 2004, a grand jury indicted defendant for (1) aggravated vehicular hijacking (count I) (720 ILCS 5/18-4(a)(1) (West 2004)) and (2) aggravated battery to a senior citizen (count II) (720 ILCS 5/12-4.6(a) (West 2004)).

¶ 6 In February 2005, the trial court ordered Dr. Terry Killian to evaluate defendant with respect to defendant's fitness to stand trial (725 ILCS 5/104-13 (West 2004)) and his sanity at the time of the alleged offense (720 ILCS 5/6-2 (West 2004)). In a December 2005 report, Dr. Killian concluded that defendant (1) was fit to stand trial and (2) appreciated the wrongfulness of his conduct at the time of the alleged offenses. In January 2006, based on Dr. Killian's report, the parties stipulated that defendant was fit to stand trial.

¶ 7 In July 2006, defendant hired attorney Michael Costello (the third attorney to enter his appearance on defendant's behalf in this case). In August 2006, Costello filed six motions on defendant's behalf, including—as pertinent to defendant's postconviction petition at issue in this appeal—a motion to preclude in-court identification of defendant based upon an unduly suggestive "showup" identification at the police station. The trial court denied that motion following a hearing.

¶ 8 In October 2006, Costello informed the trial court that he was "in the process of reviewing records" relating to defendant's possible intention to raise an insanity defense. During the following months, the court granted numerous continuances while Costello represented that he was trying to secure a second psychiatric evaluation of defendant by defendant's former doctor in Chicago, Dr. Ahmed Hussain.

¶ 9 In April 2007, the trial court informed defendant that it would not accept a negotiated plea from that day forward. When Costello told the court that he was still waiting for the evaluation report from Dr. Hussain, which he had requested three months prior, the court informed Costello that it would not grant anymore continuances.

¶ 10 On May 4, 2007, Costello filed on defendant's behalf a "Motion To Continue Trial To Obtain Psychiatric Examination." Costello explained that after months of attempts to arrange

Dr. Hussain's examination of defendant, Dr. Hussain informed Costello that "he could not help." Costello thereafter arranged to have defendant evaluated by a Springfield psychiatrist, Dr. Joseph Bohlen, who agreed to perform the evaluation on May 23, 2007 (at the earliest), and prepare a written opinion 20 days thereafter.

¶ 11 B. Defendant's Guilty Plea and Sentence

¶ 12 On May 7, 2007, the day the case was scheduled for trial, defendant engaged in the following dialogue with the trial court:

"DEFENDANT: I know [Dr. Killian's] decision as far as my case is concerned is not favorable to me. I had asked Mr. Costello to try to acquire an opinion from Dr. Hussain, which is my treating physician from Chicago. I have a large amount of records from my psychiatric history that I need to substantiate with the opinion of not just Dr. Hussain but any psychiatrist that can look over my records and give me an examination, and at this point I would have thought that Mr. Costello would have had at least a backup plan to have someone examine me, if not Dr. Hussain, anyone with a degree. My records are extensive, and I need to be able to substantiate my affirmative defense with the best possible defense I can put forth, and the only way I can do that is with the opinion of expert witness testimony to verify the fact I do have this in my background.

THE COURT: All right, thank you.

DEFENDANT: And Mr. Costello has not done that. I

would like to relieve Mr. Costello and have other representation.

THE COURT: Motion denied. [Defendant], you're on your third lawyer since you've been in custody for over two and a half years. The alleged victim in this case is 93 years old. Have a seat. We're going to trial today."

Costello then requested a short recess so that he and defendant could negotiate further with the State.

¶ 13 Following the recess, Costello confirmed that defendant would be entering an open plea of guilty to count I in exchange for dismissal of count II. The trial court admonished defendant pursuant to Illinois Supreme Court Rule 402(a) (eff. July 1, 1997), including informing defendant that he was charged with a Class X felony, which carried a mandatory prison sentence of 6 to 30 years. Defendant stated that (1) he understood all of the court's admonishments; (2) he was satisfied with Costello's representation of him; (3) no threats or promises had been made to him; and (4) knowing the minimum and maximum penalties that could be imposed, he wished to plead guilty to aggravated vehicular hijacking.

¶ 14 The State presented a factual basis for defendant's guilty plea, which indicated that on November 17, 2004, defendant approached the victim—who was then 91 years old—in the parking lot of a mall in Springfield. Defendant demanded the victim's keys and then shoved her away from her car. When the victim attempted to reach into the car to retrieve her purse, defendant slammed the door on her hands and arms multiple times. Because of the victim's advanced age, the trauma caused her skin to tear away from her arms, exposing her muscles and causing profuse bleeding. Two eyewitnesses, who were in the parking lot and later identified defendant as the perpetrator, attempted to stop defendant from fleeing the scene in the victim's

car. An officer later spotted defendant driving in the victim's car and arrested him. Defendant subsequently confessed that he committed the crime. The court accepted defendant's guilty plea and entered judgment of conviction against him.

¶ 15 At an August 24, 2007, sentencing hearing, the prosecutor recommended a prison term of 23 years, stating, "[w]hen we were in negotiations with Mr. Costello, we had recommended to him at that time 23 years." The trial court sentenced defendant to 20 years in prison, finding that defendant had inflicted great bodily harm upon the victim.

¶ 16 C. Defendant's Postsentence Motions and Appeals

¶ 17 On August 29, 2007, Costello filed on defendant's behalf a motion to reconsider the sentence, arguing that the court improperly (1) based its finding of great bodily harm on photographs and hearsay evidence, and (2) failed to adequately consider defendant's rehabilitative potential.

¶ 18 On August 31, 2007, defendant *pro se* mailed a letter to the trial court, stating, in pertinent part, that the prosecutor never offered defendant 23 years, but instead made separate offers for 20 years and a subsequent offer for 17 1/2 years. Defendant requested reconsideration of his sentence and withdrawal of his guilty plea.

¶ 19 On September 13, 2007, Costello filed on defendant's behalf an amended motion to reconsider the sentence, which combined the claims in Costello's original motion to reconsider the sentence with the claims in defendant's *pro se* letter. (The parties have referred to the September 13, 2007, motion as defendant's *second amended* motion to reconsider the sentence.) The second amended motion to reconsider the sentence did not seek withdrawal of defendant's guilty plea.

¶ 20 At an October 2007 hearing on defendant's second amended motion to reconsider

the sentence, defendant withdrew his *pro se* motion to withdraw his guilty plea. The trial court heard argument on defendant's second amended motion to reconsider sentence, which the court denied. Thereafter, defendant indicated his desire to appeal.

¶ 21 On defendant's first direct appeal, this court summarily remanded the case for Costello to file a certificate of compliance pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Foster*, No. 4-07-0865 (Feb. 5, 2008) (unpublished order under Supreme Court Rule 23).

¶ 22 In March 2008, on remand, defendant *pro se* filed a motion for the appointment of counsel, which stated, in pertinent part, as follows:

"I would like to be appointed counsel at this time to file a new post-plea motion concerning grave errors and misconceptions in the sentence and the entry of the plea of guilty. I would like to be able to consult with counsel to discuss the errors in my case. Once again, I do wish to file a new post-plea motion and have a new hearing on said motion."

At an April 2008 status hearing, after defendant informed the trial court that he intended to hire a new private attorney, John Madonia, the court allowed Costello to withdraw. However, at a May 2008 status hearing, defendant indicated his desire to rehire Costello as his attorney. Shortly thereafter, Costello reentered his appearance on behalf of defendant.

¶ 23 In July 2008, defendant (through Costello) filed a third amended motion to reconsider the sentence, which was identical to defendant's second amended motion except that it alleged additional facts regarding defendant's mental-health history. Defendant also filed a "Withdrawal of Claim of Ineffective Assistance of Counsel and Agreement and Consent To Retain

Same Counsel To Prosecute Defendant's Motion for Reconsideration of Sentence." That filing stated, in pertinent part, as follows:

"At the last hearing, [defendant] suggested the ineffective assistance of counsel, [Costello]. *** Upon reconsideration, after having been advised of certain facts, defendant withdraws his claim of ineffective assistance of counsel and agrees to retain [Costello] as his counsel to prosecute his motion for reconsideration of sentence."

¶ 24 Later in July 2008, at a hearing on defendant's third amended motion to reconsider the sentence, defendant testified that he had been using drugs and alcohol for three days prior to the offense. Defendant came to Springfield from Chicago because he had been accepted for drug treatment at Gateway Center. However, Gateway Center denied defendant entry because he was under the influence. Unable to pay for tickets to return to Chicago, defendant attempted to take the car from the victim to return to Chicago. Defendant was under the influence of drugs at the time of the offense, which he testified impaired his judgment. Defendant also described his past drug use and his psychiatric history, which included multiple hospitalizations, bipolar disorder, and schizophrenic disorder. (We note that Dr. Killian's December 2005 report extensively chronicled defendant's drug and psychiatric history—including the matters defendant testified to at the July 2008 hearing—and concluded that defendant (1) was fit to stand trial and (2) appreciated the wrongfulness of his conduct.)

¶ 25 Defendant also testified that the State made an initial plea offer of 20 years, followed by a subsequent offer of 17 1/2 years after Costello entered his appearance. Defendant never testified, however, that Costello made any statements pertaining to the sentencing recom-

mendation the State would make if defendant entered an open plea of guilty.

¶ 26 The trial court denied defendant's third amended motion to reconsider the sentence. Defendant appealed, arguing that the court erred by considering an element of the charged offense, the victim's age, as an aggravating factor at sentencing. In June 2009, this court affirmed defendant's conviction and sentence. *People v. Foster*, No. 4-08-0547 (June 24, 2009) (unpublished order under Supreme Court Rule 23).

¶ 27 D. Defendant's Postconviction Petition at Issue

¶ 28 In September 2011, defendant *pro se* filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)), alleging that he was denied due process when (1) witnesses identified him by means of an unduly suggestive police-station showup; (2) the trial court denied his motion for a continuance so that he could obtain a second psychiatric evaluation; (3) the court forced him to proceed under incompetent counsel; and (4) he was improperly led to believe that if he pleaded guilty, he would be sentenced to no more than 17 years in prison. Later in September 2011, the court advanced the petition to the second stage of postconviction proceedings and appointed counsel to represent defendant.

¶ 29 In October 2011, the State filed a motion to dismiss defendant's postconviction petition, arguing that (1) the petition was factually insufficient; (2) the petition stated no grounds that, if true, would constitute a substantial denial of defendant's constitutional rights; (3) defendant forfeited the claims in his petition by failing to raise them on direct appeal; and (4) defendant's claims were barred by the doctrine of *res judicata*.

¶ 30 Later in October 2011, court-appointed counsel filed an amended postconviction petition, which claimed that defendant was denied (1) due process when he was subject to an unduly suggestive police-station-showup identification and (2) the effective assistance of counsel

when (a) Costello failed to obtain a second opinion regarding defendant's sanity at the time of the offense, (b) Costello informed defendant that the State would not seek a sentence of more than 17 years, and (c) the trial court allowed Costello to remain as counsel.

¶ 31 Defendant also prepared an affidavit, attached to the amended postconviction petition, in which he stated that Costello (1) failed to diligently pursue and obtain a second opinion regarding defendant's fitness to stand trial; (2) failed to inform defendant of the maximum applicable sentence; and (3) informed defendant that if he pleaded guilty, the State would ask for a prison term of no more than 17 years. Defendant asserted that if he had known the maximum penalty available, he would have either insisted upon a jury trial or accepted the State's 17-year offer.

¶ 32 In August 2013, the trial court entered a written order granting the State's motion to dismiss defendant's postconviction petition. Later that month, defendant filed a notice of appeal and the court appointed OSAD as counsel.

¶ 33 In January 2015, OSAD filed with this court a motion to withdraw as counsel and a brief in support, asserting that defendant's appeal presents no meritorious issues. On its own motion, this court granted defendant leave to file additional points and authorities in response to OSAD's motion, which defendant did. The State filed a brief as well, arguing that the appeal is meritless. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's dismissal of defendant's postconviction petition.

¶ 34 **II. DEFENDANT'S APPEAL IS MERITLESS**

¶ 35 As stated, defendant claimed in his amended postconviction petition that he was denied (1) due process when he was subject to an unduly suggestive police-station-showup identification and (2) the effective assistance of counsel when (a) Costello failed to obtain a second

opinion regarding defendant's sanity at the time of the offense, (b) Costello informed defendant that the State would not seek a sentence of more than 17 years, and (c) the trial court allowed Costello to remain as counsel. We agree with OSAD that these claims are meritless.

¶ 36 A. The Police-Station Showup

¶ 37 Defendant waived his claim that the police-station showup violated his due-process rights by voluntarily pleading guilty to the charged offense. *People v. Townsell*, 209 Ill. 2d 543, 545, 809 N.E.2d 103, 104 (2004) ("It is well established that a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional ones."). Accordingly, we agree with OSAD that this claim is frivolous.

¶ 38 B. The Right to Effective Assistance of Counsel

¶ 39 Defendant also waived his claim that Costello was ineffective by filing his July 2008 "Withdrawal of Claim of Ineffective Assistance of Counsel and Agreement and Consent To Retain Same Counsel To Prosecute Defendant's Motion for Reconsideration of Sentence." See *People v. Houston*, 229 Ill. 2d 1, 9-10, n.3 890 N.E.2d 424, 429, n.3 (2008) ("[W]aiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right."). By affirmatively and explicitly waiving his claim that Costello was ineffective, defendant cannot now raise the same claim in his postconviction petition. Failure to raise an issue in a motion to reconsider a sentence or a motion to withdraw a guilty plea results in procedural default. Ill. S. Ct. R. 604(d) (eff. July 1, 2006). "[A] main purpose of Rule 604(d) is to ensure that any improper conduct or other alleged improprieties that may have produced a guilty plea are brought to the trial court's attention *before* an appeal is taken, thus enabling the trial court to address them at a time when witnesses are still available and memories are fresh." (Emphasis in original.) *People v. Tousignant*, 2014 IL 115329, ¶ 16, 5 N.E.3d 176.

¶ 40 Through his postconviction petition, defendant seeks the very same relief that he knowingly and voluntarily waived in the trial court—namely, the opportunity to present evidence at a hearing in support of his claim that Costello was ineffective. Had defendant persisted with his motion to withdraw his guilty plea, he could have obtained this same relief nearly seven years ago, when memories were fresh. Instead, defendant affirmatively chose to rehire Costello to represent him in challenging the trial court's sentence. The ineffective-assistance-of-counsel claim in defendant's postconviction petition does not allege any new information that was not known to defendant when he affirmatively waived his claim that Costello was ineffective. Although the Act provides a means to obtain judicial review of claims that "escaped earlier review" (*People v. Blair*, 215 Ill. 2d 427, 447, 831 N.E.2d 604, 617 (2005)), this function does not apply when the claims at issue escaped earlier review because the defendant affirmatively withdrew them.

¶ 41 Further, even if defendant had not waived his ineffective-assistance-of-counsel claim, we would still conclude that the claim is meritless. According to Costello's May 4, 2007, motion for a continuance to obtain a second psychiatric opinion, Dr. Hussain informed Costello on May 1, 2007, that "he could not help." This was after Costello's repeated attempts over many months to secure an evaluation from Dr. Hussain, whom defendant specifically requested to render a second opinion. Dr. Hussain's refusal to provide a second opinion came one week before the trial was scheduled to commence. Upon learning that Dr. Hussain would not be able to help, Costello (1) arranged an evaluation from a different psychiatrist, Dr. Bohlen; and (2) filed a motion to continue the trial, explaining that a continuance was necessary to allow Dr. Bohlen to evaluate defendant. Although the trial court denied the continuance, defendant has failed to explain (1) what Costello should have done differently or (2) how Costello's actions were unreasonable.

¶ 42 After the trial court denied the motion for a continuance, Costello was powerless to obtain a second opinion as to defendant's sanity at the time of the offense. Defendant alleged in the *pro se* version of his postconviction petition that the court violated his due-process rights by denying the continuance. However, as already stated, a voluntary guilty plea waives all non-jurisdictional errors and irregularities. *Townsell*, 209 Ill. 2d at 545, 809 N.E.2d at 104. Further, defendant forfeited this claim by failing to raise it on direct appeal. See *People v. English*, 2013 IL 112890, ¶ 22, 987 N.E.2d 371 ("[I]ssues that could have been raised on direct appeal, but were not, are forfeited.").

¶ 43 We further note that the record affirmatively rebuts defendant's claims that he was misled as to the applicable sentencing range. At the guilty plea hearing, the trial court admonished defendant that he was facing a sentence of between 6 and 30 years, and defendant stated that he understood. When the court asked defendant if any promises had been made to him, defendant answered in the negative. "It is well settled that a defendant's acknowledgment in open court, at a plea hearing, that there were no agreements or promises regarding his plea serves to contradict a postconviction assertion that he pled guilty in reliance upon an alleged, undisclosed promise by defense counsel regarding sentencing." *People v. Torres*, 228 Ill. 2d 382, 396-97, 888 N.E.2d 91, 101 (2008).

¶ 44 As a final matter, we note that defendant's postconviction filings—specifically, his *pro se* postconviction petition, amended postconviction petition, postconviction affidavit, and points and authorities in response to OSAD's motion to withdraw—have collectively presented OSAD, the State, and this court with a hodgepodge of constitutional claims in the nature of either due process, the right to counsel, or some combination of the two. Because defendant's claims differ slightly from one postconviction filing to the next, it is somewhat difficult to distinguish

one claim from another. Accordingly, instead of addressing defendant's individual claims exactly as they appear in his amended postconviction petition, we have generously construed defendant's multiple filings to capture the collective gist of his postconviction claims. However, after thorough review of both the record and defendant's collective filings, we conclude that defendant has not provided a substantial showing of a constitutional deprivation. Accordingly, defendant's appeal is meritless. We therefore grant OSAD's motion to withdraw and affirm the trial court's second-stage dismissal of defendant's postconviction petition.

¶ 45

III. CONCLUSION

¶ 46 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 47 Affirmed.