

No. 1-12-0693

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 MC 58131
)	
CHERYL SMITH,)	Honorable
)	Joan O' Brien,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Post-plea counsel was not ineffective in preparing and presenting a motion to withdraw defendant's guilty plea; judgment affirmed.
- ¶ 2 Pursuant to a negotiated plea agreement, defendant Cheryl Smith pleaded guilty to one count of domestic battery and was sentenced to one year of conditional discharge, time considered served of 58 days and a two-year order of protection. Her motion to withdraw her guilty plea was denied, she appealed to this court, and we vacated the judgment and remanded

the cause. *People v. Smith*, No. 1-10-0904 (2011) (unpublished order under Supreme Court Rule 23). Defendant filed a second motion to withdraw her plea, which was denied. Defendant now appeals from that order, contending that she received ineffective assistance of counsel in both the entry of her guilty plea and her second attempt to withdraw her plea. We affirm.

¶ 3 This case resulted from a domestic dispute between defendant and her daughter, Nicole Smith, which occurred at defendant's residence while defendant was feeding Nicole's baby daughter, Bianca. Defendant was accused in a misdemeanor domestic battery complaint with striking Nicole in the face with her open hand and striking her again on the side of the face with a glass jar of baby food. On October 22, 2009, one day after the alleged battery occurred, an order of protection issued against defendant, ordering her to have no contact with her daughter Nicole Smith and nine-month-old granddaughter Bianca Jamson.

¶ 4 Following defendant's arrest, bail was set at \$20,000. At the request of defendant's counsel, Assistant Public Defender (APD) Samantha Blake, the court ordered a psychological evaluation of defendant. On December 3, 2009, a licensed clinical psychologist reported to the court that defendant was fit to stand trial and legally sane. APD Blake asked that defendant's bond be reviewed and the court reduced defendant's bail to \$10,000, but she remained in custody. Defendant told the court she could pay the bond if she could obtain access to her purse, which the police would not let her take with her to the police station.

¶ 5 On December 18, 2009, the court asked defendant if she wanted to plead guilty or not guilty. Defendant replied: "I am guilty. As far as knowingly and intentionally, it was not. But I did not know I did it until the police officer told me that I hit her with that. He didn't tell me where I hit her. I would never want to harm my daughter. I love my daughter." The court read the complaint to defendant and asked her again whether she was pleading guilty or not guilty.

Defendant replied that the complaint allegations were "a lie." The court responded that defendant needed a trial. Defendant's counsel interjected that defendant had called her "numerous times, multiple times daily," saying that she wanted to plead guilty. Defendant told the court, "I would never want to hurt my daughter. I love my daughter. *** I didn't know I hit her until the officer told me outside after I called the police. That is why I apologized. Listen to me. I would never want to hurt my daughter." The court informed defendant "You have the option – some people can still profess their innocence and plead guilty. *** You can still plead guilty saying that it's in your best interest to handle your case that way." Defendant continued to insist both that she wanted to plead guilty and that she did not intend to harm her daughter, whom she loved. Finally, defendant stated, "It was intentional me throwing the baby food jar because I wanted her out of my home. *** I threw the baby jar intentionally, but I didn't know I hit her." "I said I meant to throw the baby food jar because I wanted her out of my home after she did that. She endangered the baby and she shouldn't have done that either, plus she was intoxicated. I just wanted her out of my home. Yes, I plead guilty."

¶ 6 The parties stipulated that Dr. Coleman, a psychologist who examined defendant on December 1, 2009, would testify that defendant was fit to stand trial, understood the nature and purpose of the proceedings against her, was able to assist counsel in her defense, and was not currently prescribed psychotropic medication.

¶ 7 Defendant entered a negotiated plea of guilty, and the court admonished her pursuant to Supreme Court Rule 402 (eff. July 1, 1997). The court read to defendant the charge of domestic battery of which she was accused and asked her whether she was pleading guilty or not guilty. Defendant replied, "Guilty. I did throw the jar." The court asked defendant whether she understood that by pleading guilty, she was giving up her right to a trial, either a trial by the

court or a trial by jury. She replied, "Yes." Defendant also stated she understood that by pleading guilty, she was giving up the right to have the State prove her guilt beyond a reasonable doubt, the right to call witnesses on her behalf, and the right to have her attorney cross-examine the State's witnesses. The court advised defendant that she was charged with domestic battery, a Class A misdemeanor punishable by up to 364 days in jail and a fine up to \$2,500, and that a domestic battery conviction could warrant a greater sentence if she were later convicted on a federal weapons charge. Defendant stated she was not threatened in exchange for her plea and that she was promised nothing except that she could go home and that she could speak with the judge. When asked whether she was pleading freely and voluntarily, defendant replied, "Yes, because I didn't know I did it, but I love my daughter. So I'm pleading guilty." Defendant admitted she did throw the jar at her daughter "to get her out of my home" and placed her hand on her daughter's forehead when defendant "moved her away from the baby."

¶ 8 The parties stipulated to the factual basis for the plea. The court concluded that defendant's plea was given freely and voluntarily, with a sufficient factual basis for the plea. The court also found "that the defendant has given considerable thought to whether or not she wants to plead guilty *** but that she believes it is in her best interest, weighing all of the factors, to plead guilty, is that correct, ma'am?" Defendant replied, "Yes."

¶ 9 When given an opportunity to address the court, defendant gave a rambling account of what happened immediately after the battery incident and complained that because she had no access to the funds, checkbook and credit cards in her purse, she had been unable to post bail. She also complained that her daughter had stolen a large amount of money from a bank account they held jointly and had broken into defendant's home and stolen items.

¶ 10 Pursuant to the negotiated plea agreement, the court sentenced defendant to 12 months of

conditional discharge, with 58 days time considered served. The court also ordered anger management classes and a mental health evaluation, and entered a two-year plenary order of protection which extended the previous order forbidding defendant from contact with her daughter and her granddaughter. Defendant asked, "Why is the grand baby? She has abused the baby and she also tried to commit suicide. *** My daughter needs help with the grand baby. I was taking great care of her. My daughter couldn't even go to her when she was crying."

¶ 11 The court admonished defendant pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Defendant asked whether she could contact the Department of Children and Family Services (DCFS) "to have them watch and look at the baby often." The court cautioned defendant that she had to be careful, as it was a crime to give false information to DCFS. Defendant replied, "No, it's the truth because she has done it in front of me, too, and she has admitted it to the hospital, Palos Hospital."

¶ 12 Subsequent to pleading guilty, defendant retained private counsel, attorney James Ebersohl, who filed a postplea motion to withdraw her guilty plea. The motion asserted that defendant's guilty plea was involuntary because defendant had served 58 days in jail prior to her guilty plea due to her inability to access funds for the bail and that her choice was to plead guilty and get out of jail or wait for a future trial date and remain incarcerated. The motion also argued that defendant had insisted at the time of the plea she was not guilty of the charge; there was no factual basis for the guilty plea; the Rule 402 admonitions were insufficient; and previous counsel was ineffective for failure to ask the court for a recognizance bond.

¶ 13 At the hearing on the motion, defendant testified that she had pleaded guilty to the domestic battery charge only to get out of jail. "I had never been in prison before and it was the only way to get out. And I needed to protect the grandbaby, because she was being abused. And

my daughter committed, wanted to commit suicide, with or without the baby. She was also put into a mental institution. *** This was the only way to get out. *** I had no money."

¶ 14 The trial court noted it had advised defendant that she could plead guilty while maintaining her innocence, but that defendant had not maintained her innocence--she admitted she had thrown the baby food jar at her daughter intentionally and, without admitting it was a slap, placed her hand on her daughter's forehead to move her away. The court also noted that defendant was still in custody at the time of her guilty plea, which was part of defendant's argument that she was coerced into pleading guilty. "But there are many people who are in custody. And I am sure everybody can say they want to plead guilty so they can get out of jail. That is not a basis to withdraw the plea." The court denied defendant's motion to withdraw her guilty plea after finding the plea was given freely and voluntarily, there was a sufficient factual basis for the plea, and defendant knew of the consequences of the plea.

¶ 15 Defendant appealed the order denying her motion, arguing that postplea counsel (1) failed to file the mandatory certificate of compliance pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and (2) was ineffective for not presenting issues raised in the written motion or evidence in support of the motion. This court vacated the trial court's order for counsel's failure to file a Rule 604(d) certificate. We did not address defendant's ineffective counsel argument when we remanded the cause for counsel to file a Rule 604(d) certificate and have the opportunity to file a new motion to withdraw defendant's plea. *Smith*, No. 1-10-0904. On remand, attorney Ebersohl filed a Rule 604(d) motion, as well as a revised motion to withdraw defendant's plea, which was not presented to the court for a ruling.

¶ 16 Defendant retained another attorney, Jason Danielian, who filed a new motion to withdraw guilty plea (the second motion) and a Rule 604(d) certificate. The second motion

contended that at the time defendant pleaded guilty, she acted under the mistaken belief that she could plead guilty to the act of the crime while preserving the defense of "defense of another," and that afterward she could secure counsel and have a trial on the issue of *mens rea*. Danielian's motion stated that "it took several hours for this attorney of record to decipher exactly what the defendant had been thinking at the time that she had pled and what she continued to believe, procedure-wise, even when this attorney's services were secured." The motion further stated that "defendant's plea followed the tenor of *North Carolina v. Alford*¹, but the defendant simply did not understand that she was pleading not in part, but in whole; she did not fully grasp that there would be no future trial ***." Contending that during the guilty plea process defendant did not admit she had acted without lawful justification, the motion stated that "anyone harboring the defendant's quirky misunderstanding would have left the plea believing that the disputed issues (intent/justified use of force) remained open and would be resolved at the anticipated future trial." The motion concluded with defendant's affidavit stating that the content of the motion was true and correct.

¶ 17 At his first appearance, Danielian was granted leave to file the second motion. Danielian advised the court that the motion "contains certain facts that do not appear in the record that would be supported by affidavit." At Danielian's request at the outset of the hearing, defendant was placed under oath. In response to questions by the court, defendant testified that she had read Danielian's motion to withdraw her guilty plea, Danielian had gone over it with her, she signed the motion at the bottom, and everything contained in the motion was true to the best of her knowledge. Danielian subsequently filed a Rule 604(d) certificate.

¶ 18 On the next court date, defendant again was placed under oath and submitted to

¹ *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

questioning by Danielian. She testified that Danielian had consulted with her about errors or problems with her guilty plea and that those errors were addressed in Danielian's motion to withdraw the plea. Defendant further testified that the transcript of her guilty plea accurately reflected what she had stated at that time but that the interpretation placed on her words was error which was addressed in Danielian's motion. In presenting argument on the motion, Danielian stated that he had spent hours with defendant trying to ascertain what she thought she was doing when she pleaded guilty and concluded that defendant had an affirmative defense to the charge that she acted without lawful justification because she wanted to protect her granddaughter. Danielian advised the court that he asked defendant whether she pleaded guilty to get out of jail or because she was guilty. She replied that she wanted to get out of jail. He then asked her what her reason was for pleading guilty. He stated she told him "that she needed to hire an attorney" and he asked her why, "and she said to be able to go to trial." Danielian explained

"that she thought that she could admit what she did and get out of jail, hire a lawyer, come back to court and prove that she was justified in doing this, in trying to get her daughter --- and an offer of proof, because we're not trying the case today, to get her daughter out of the house to protect her grandchild from her daughter."

¶ 19 The trial court denied the second motion to withdraw defendant's plea of guilty after noting that the plea transcript showed defendant expressly had been told, and acknowledged, that if she pleaded guilty there would be no trial. The court again noted that defendant had admitted she intentionally threw the jar at her daughter and also that she placed her hand on her daughter's

forehead to move her away from the baby.

¶ 20 On appeal, defendant does not assign error to the trial court's ruling on the second motion. However, she contends that both her plea counsel (APD Blake) and her second postplea counsel (Danielian) were ineffective in failing to argue to the trial court the reason why her plea was involuntary--that she pleaded guilty because she wanted to get out of jail to protect her granddaughter from harm, and that under the plea agreement she would get out of jail to do just that.

¶ 21 An ineffective assistance of counsel claim involving a challenge to a guilty plea is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005); *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). Counsel's conduct is deficient under *Strickland* if counsel failed to ensure that the defendant entered the guilty plea voluntarily and intelligently. *Id.* Under the *Strickland* test, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by the substandard performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). As to the first prong of *Strickland*, a reviewing court must indulge in a strong presumption that counsel's performance was competent and that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004), citing *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). To establish prejudice under the second prong, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *Id.*, citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if his counsel had not been deficient is not enough to establish prejudice; the defendant's claim must be accompanied by either a claim of innocence or

the articulation of a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffectiveness of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010).

¶ 22 A defendant has no absolute right to withdraw a plea of guilty. *People v. Jamison*, 197 Ill. 2d 135, 163 (2001); *People v. Mercado*, 356 Ill. App. 3d 487, 494 (2005). Rather, in order to withdraw a guilty plea, a defendant must establish a recognized basis for such plea withdrawal. *People v. Wilson*, 295 Ill. App. 3d 228, 235 (1998). Thus, a defendant may withdraw a guilty plea where it appears that the plea of guilty was entered on a misapprehension of the facts or the law, or in consequence of misrepresentations by counsel or the prosecutor or someone else in authority, or the case is one where there is doubt of the accused, or where the accused has a defense worthy of consideration by a factfinder, or where the ends of justice would be better served by submitting the case to a factfinder at a trial. *Mercado*, 356 Ill. App. 3d at 494; see *People v. Pullen*, 192 Ill. 2d 36, 40 (2000). For a guilty plea to be constitutionally valid, the record must affirmatively show that it was made voluntarily and intelligently. *People v. St. Pierre*, 146 Ill. 2d 494, 506 (1992). This requirement is satisfied through substantial compliance with Supreme Court Rule 402(b) (eff. July 1, 1997). *Wilson*, 295 Ill. App. 3d at 235.

¶ 23 We find that defendant has waived her claim that she was deprived of the effective assistance of counsel by assistant APD Blake at the time of the entry of her guilty plea. Supreme Court Rule 341(h)(7) (eff. July 1, 2008) mandates that an appellant provide the citation of authorities and the pages of the record relied on in support of an argument on appeal. Here, defendant's opening brief merely references Blake, without detail or elucidation, in asserting that: defendant was deprived of the effective assistance of counsel in the entry of her plea; none of defendant's attorneys presented to any judge the issue of whether her plea was involuntary; and

only the actions of APD Blake and attorney Danielian are "relevant to an ineffectiveness analysis." Defendant's reply brief states only that attorney Danielian should have argued Blake's ineffectiveness. These bare contentions, without citation to either pertinent portions of the record or legal authority, do not merit consideration on appeal. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000).

¶ 24 For the following reasons, we reject defendant's claim that second postplea counsel Danielian was ineffective for failing to apprise the court of what defendant now claims was the basis for her guilty plea being involuntary, that she pleaded guilty only to get out of jail to protect her granddaughter.

¶ 25 First, defendant has not established a recognized basis for withdrawal of her guilty plea. Defendant cites no authority in support of her assertion that her desire to get out of jail due to her alleged concern for her grandchild constituted duress sufficient to render her plea involuntary. As the trial court noted in denying her first motion, defendant's desire to get out of jail was not a basis for withdrawing her plea.

¶ 26 Second, our examination of the record forces the conclusion that defendant's claim on appeal as to her given reason for pleading guilty is inaccurate. Defendant claims in this appeal that she pleaded guilty under duress to get out of jail to protect her grandchild, and that Danielian failed to argue her guilty plea was the product of that duress. According to the record, however, this claim was not the claim that defendant presented to Danielian. The second motion that he prepared and his oral argument to the court in support of the motion contended that, while defendant's desire to protect her grandchild was the reason why she threw the jar at her daughter's face and slapped or pushed her daughter, it was not the reason why she pleaded guilty. Defendant led Danielian to believe she pleaded guilty to get out of jail to hire an attorney so she

could go to trial and establish that she was lawfully justified in committing the battery.

Danielian apprised the court that, after several hours of conversation with defendant "to decipher exactly what [defendant] had been thinking" when she pleaded guilty, he finally gleaned that her plea was driven by a desire for vindication, that defendant had thought if she pleaded guilty to performing the alleged acts, she would later have a trial where she could establish that she had performed the acts lawfully in defense of another. In presenting the motion, Danielian argued that defendant "thought that she could admit what she did and get out of jail, hire a lawyer, come back to court and prove that she was justified in doing this *** to get her daughter out of the house to protect her grandchild from her daughter." Defendant correctly argues on appeal that there are numerous instances in the record where defendant expressed concern for her grandchild. As the second motion clearly indicates, however, defendant's concern for her grandchild's welfare related more to her defense to the charge of domestic battery than her immediate reason for pleading guilty and get out of jail. Defendant testified under oath that the substance of the second motion was true to the best of her knowledge, and she testified at a subsequent court date that the errors or problems she assigned to her guilty plea were addressed by that motion. This was not a claim concocted by Danielian, but the explanation defendant expressed to him. Based on what defendant told him, Danielian argued in the second motion that neither defendant's guilty plea nor the factual basis given for the plea established that she had acted "without legal authority."

¶ 27 Third, Danielian's decision to present a claim other than duress was a matter of strategy which was immune from a claim of ineffective assistance of counsel. *Martinez*, 348 Ill. App. 3d at 537. The second motion set forth recognized bases for withdrawal of defendant's guilty plea, namely, that the plea was entered on a misapprehension of the law, that defendant had a defense

worthy of consideration by a factfinder, and that the ends of justice would be better served by submitting defendant's case to a factfinder at a trial. See *Mercado*, 356 Ill. App. 3d at 494.

Defendant has failed to overcome the presumption that Danielian's decision to present a new claim, recognized by legal authority and based on defendant's communication with him, was strategy that was immune from a claim of ineffective assistance of counsel. Moreover, Danielian made a sound tactical decision in abandoning the claim of duress that defendant now espouses in this appeal, where that claim was previously rejected by the trial court. Defendant concedes attorney Ebersohl's first motion to withdraw did argue that she pleaded guilty to get out of jail, but she asserts the motion did not go far enough to explain *why* she wanted to get out of jail. However, at the hearing on the first motion, defendant testified under oath that pleading guilty "was the only way to get out [of jail]. And I needed to protect the grandbaby, because she was being abused." Thus, defendant's claim of pleading guilty to get out of jail to protect her grandchild was squarely before the trial court, and was rejected, when the court denied her first motion to withdraw her plea. Danielian told the trial court that, in preparing the second motion, he read "everything," "each and every transcript." Consequently, he must have been aware that the claim of duress had been rejected previously by the court. For Danielian to have repeated such a motion, knowing it would be denied, would have been to adopt a failing strategy.

¶ 28 Defendant claims that because Danielian argued that defendant's mistaken concept of the result of her plea eluded both the trial court and her previous counsel, Danielian was placing the onus on defendant. This ignores the record, which presents defendant as excessively loquacious with wandering attention, unable to focus on questions put to her or to give responsive answers, an individual who was required frequently to be told by the court or sheriff's deputy to remain silent and whose initial attorney requested a behavioral examination at the outset of the

proceedings below. In asserting that neither the court nor previous counsel were at fault for failing to discern defendant's claim, Danielian's argument was simply that defendant previously did not, perhaps could not, articulate her mistaken perception of the results of her plea.

¶ 29 Defendant also asserts that Danielian did not know the law because, in arguing that defendant had entered an *Alford* plea, Danielian was conceding defendant's plea was entered voluntarily. Defendant's characterization of Danielian's reference to *Alford* is mistaken. The record demonstrates he argued that, while defendant's guilty plea had the tenor of an *Alford* plea, nevertheless it was not intelligently made because, beyond merely believing she was innocent, defendant mistakenly thought she was not giving up her right to a later trial where she could present her theory of defense of another, *i.e.*, that she committed the charged acts but was justified in doing so.

¶ 30 As to the first prong of *Strickland*, we conclude that defendant has failed to overcome the strong presumption that Danielian's performance was competent and that the arguments presented to the trial court in the second motion were the product of sound strategy. We agree with the State that defendant has been unable to demonstrate under the second prong of *Strickland* that, but for Danielian's performance, there was a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). The claim defendant raises now was the same claim raised in the first motion and the testimony on that motion, and rejected by the trial court.

¶ 31 For all the above reasons, we affirm the judgment of the trial court.

¶ 32 Affirmed.