2017 IL App (2d) 150797-U
No. 2-15-0797
Order filed December 6, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRUCE G. MARKHAM, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 11-CF-1300 Honorable James C. Hallock, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed defendant's postconviction petition, which alleged that his guilty plea was induced by counsel's false promise: defendant's claim was foreclosed by the record of his plea hearing, during which he assured the court that he had received no promises, and in any event defendant did not show prejudice, as he did not articulate that he would have gone to trial but for the promise, and the circumstances did not suggest that he would have; (2) postconviction counsel did not violate Rule 651(c) by failing to amend and support defendant's petition, as the record confirmed the presumption that counsel tried but failed to find support for defendant's claims, which thus were frivolous.

¶ 2 Defendant, Bruce G. Markham, appeals the second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) in connection

with his conviction of failure to provide notification of no fixed address under the Sex Offender Registration Act (Act) (730 ILCS 150/3(a) (West 2010)). He contends that he made a substantial showing of ineffective assistance of counsel when he asserted that counsel coerced him into pleading guilty by misinforming him that he would receive 180 days of good-time credit. In the alternative, he contends that his postconviction counsel provided unreasonable assistance. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, a convicted sex offender, was indicted in 2011 based on his failure to register, and he entered a negotiated guilty plea. At the plea hearing, defendant stated that his plea was voluntary and that no one coerced him or promised him anything in exchange for it. However, he was not specifically asked or admonished about good-time credit. He stipulated to a factual basis that he was a sex offender, was homeless, and had not registered as required by the Act. He was sentenced to 42 months' incarceration and 1 year of mandatory supervised release.

¶ 5 In January 2013, defendant filed a *pro se* postconviction petition with an unnotarized affidavit, challenging both his original sex-offense conviction and his conviction in the instant case. He alleged in part that he was actually innocent of the underlying sex offense, making him innocent of the failure-to-register charge. He alleged that the victim told another person that she lied about the crime because she wanted attention. He also alleged ineffective assistance of counsel in regard to his plea for failure to register, stating that his trial counsel tricked him into pleading guilty by telling him off the record that he would receive 180 days of good-time credit, when all good-time credit had actually been suspended. When the suspension was lifted, the director of the Department of Corrections (DOC) did not award him the credit. In his prayer for relief, defendant asked that his conviction be reversed. He also asked that the director of the

DOC be ordered to apply the good-time credit. He did not state that he would not have pleaded guilty if he had known that the good-time credit was discretionary. The trial court found that defendant stated the gist of a claim concerning the advice of his counsel about good-time credit and advanced the petition to the second stage. Donald Lorek was appointed to represent defendant.

¶ 6 Lorek wrote two letters to defendant. One letter, dated March 25, 2013, informed defendant that his petition lacked an affidavit describing precisely what his trial counsel told him about the credit and when the conversation occurred. Lorek also expressed concern that, if defendant were successful by withdrawing his plea, he could face a longer sentence. Lorek also inquired about the remedy defendant was seeking, noting that defendant had finished serving his sentence a week earlier. The second letter, dated June 6, 2013, noted that defendant had not replied to the first letter, but had written to Lorek's boss. Thus, Lorek knew that defendant had received the letter. Lorek again expressed concern that defendant risked a longer sentence if he were to successfully withdraw his plea.

¶ 7 On June 17, 2014, Lorek filed a certificate of compliance under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), stating that he examined the court file and consulted with defendant by mail and in person. He stated that he determined, based on the evidence and on investigatory interviews, that he would not be able to file an amended petition. He stated that he interviewed defendant's trial counsel and found nothing that would favor defendant's claim about good-time credit. He also believed that he was obligated to file a motion to withdraw.

¶ 8 That same day, Lorek moved to withdraw. Lorek stated that he interviewed defendant's trial counsel and found that her testimony would not support defendant's claim that she promised him good-time credit. He also spoke to the victim, the victim's brother, and a friend of the

victim and found that there was no reliable evidence to support the actual-innocence claim. Lorek also found no merit to the other claims in the petition. The trial court denied the motion to withdraw.

¶ 9 The State moved to dismiss the petition. In regard to the original conviction, the State noted that defendant lacked standing because he had fully served his sentence before filing his petition. The State also noted that defendant failed to provide proper affidavits to support his actual-innocence claim. In regard to ineffective assistance, the State made no argument about the lack of affidavits and instead argued that the provision of good-time credit was discretionary and that defendant stated at the plea hearing that he was making it freely, without any coercion, promises, or threats. Lorek argued that defendant was entitled to a third-stage hearing and suggested that the proper remedy would be to allow him to withdraw his plea. The trial court agreed with the State and dismissed the petition. Defendant appeals.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends that he made a substantial showing of ineffective assistance of counsel in regard to being misinformed about the provision of good-time credit and that his petition should have proceeded to the third stage for an evidentiary hearing. In the alternative, he argues that his postconviction counsel unreasonably failed to amend his petition or provide proper affidavits.

¶ 12 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a three-stage process for the adjudication of a postconviction petition. *People v. Johnson*, 2017 IL 120310, ¶ 14. This appeal concerns a dismissal at the second stage.

¶ 13 At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In assessing whether

that burden has been met, all well-pleaded facts not positively rebutted by the trial record are taken as true. *Id*. If the court finds that the defendant has not met his burden, the petition is dismissed. *People v. Tate*, 2012 IL 112214, ¶ 10. We review *de novo* a dismissal at the second stage. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 14 A postconviction petition must be verified by affidavit. 725 ILCS 5/122-1(b) (West 2012). The allegations in the petition must also be supported by affidavits, records, or other evidence. 725 ILCS 5/122-2 (West 2012). If this documentation is not attached, the petition must explain why it is unavailable. *Id.* Affidavits filed pursuant to the Act must be notarized to be valid. *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011). The failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to postconviction relief. *People v. Hall*, 217 Ill. 2d 324, 332 (2005). However, "[f]ailure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *Id*. at 333. Moreover, the State forfeits arguments challenging unnotarized affidavits by failing to raise the defect in its motion to dismiss. *People v. Cruz*, 2013 IL 113399, ¶ 25. Here, the State concedes that it forfeited any challenge to defendant's affidavit. Accordingly, we proceed as if the affidavit was properly notarized.

¶ 15 To prevail on an ineffective-assistance claim, a defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that his guilty plea was induced by that deficiency. *People v. Robinson*, 157 Ill. App. 3d 622, 627 (1987). Under the first prong, "[a]n attorney's conduct is deficient if

the attorney failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently." *Hall*, 217 Ill. 2d at 335.

¶ 16 As to the first prong, " 'for a guilty plea to be deemed voluntary and intelligent, a defendant must be fully aware of the direct consequences of pleading guilty.' " *People v. Presley*, 2012 IL App (2d) 100617, ¶ 27 (quoting *People v. Hughes*, 2011 IL App (2d) 090992, ¶ 14). Eligibility for good-time credit is a collateral consequence of a plea. See *People v. Frison*, 365 Ill. App. 3d 932, 935 (2006). A defendant's lack of knowledge of the collateral consequences of a plea generally does not bear on the validity of the plea, and the failure to admonish a defendant of collateral consequences will not provide a basis to invalidate the plea. See *Presley*, 2012 IL App (2d) 100617, ¶¶ 27-28. However, while passive conduct of counsel in failing to discuss a collateral consequence would generally not invalidate a plea, counsel's " 'unequivocal, erroneous, misleading representations' about the collateral consequences of the plea" can amount to ineffective assistance that renders the plea involuntary. *People v. Young*, 355 Ill. App. 3d 317, 323 (2005) (quoting *People v. Correa*, 108 Ill. 2d 541, 552 (1985)). Thus, there is a crucial distinction between the failure to advise the defendant of a collateral consequence and actively misrepresenting such a consequence. See *id.*; see also *People v. Stewart*, 381 Ill. App. 3d 200, 206 (2008) (drawing a distinction between failure to give advice about good-time credit and actively giving wrong advice).

¶ 17 Here, defendant asserts that his counsel actively made a false promise of good-time credit. That claim, however, is foreclosed by the record. When he entered his plea, he assured the trial court that he had received no promises. It is well settled that, under such circumstances, a postconviction claim that a plea was induced by a promise cannot succeed. See *People v. Radunz*, 180 Ill. App. 3d 734, 742 (1989); *Robinson*, 157 Ill. App. 3d at 627.

¶ 18 In any event, defendant failed to show prejudice. Under the second prong, "the defendant must show there is a reasonable probability that, absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial." *Hall*, 217 Ill. 2d at 335. Defendant and the State disagree as to the type of allegations necessary to support such a claim.

¶ 19 Relying on *Stewart*, defendant contends that merely alleging that, had he been correctly informed, he would not have pleaded guilty is sufficient to show prejudice. In *Stewart*, the Fourth District held that misinforming the defendant about good-time credit was error. The court then, without analysis or discussion of other cases, stated that a substantial showing of prejudice was made when the defendant alleged that (1) guilty-plea counsel gave him erroneous advice, (2) based on the erroneous advice he pleaded guilty, and (3) he would not have pleaded guilty but for the misinformation. *Stewart*, 381 Ill. App. 3d at 206. The court stated that the "[d]efendant's contention that counsel gave him wrong advice and he relied on that advice is sufficient under the [Post-Conviction Hearing] Act to entitle him to an evidentiary hearing—even though the advice involved a collateral consequence of his guilty plea." *Id.*; see also *People v. Kitchell*, 2015 IL App (5th) 120548, ¶ 13 (relying on *Stewart*).

¶ 20 Citing the Fourth District case of *People v Brown*, 2016 IL App (4th) 140760, ¶ 11, *aff'd*, 2017 IL 121681, the State contends that *Stewart* and *Kitchell* are irreconcilable with our supreme court's opinion in *People v. Rissley*, 206 Ill. 2d 403 (2003). There, the supreme court held that, in the context of a guilty plea, to establish prejudice, the defendant had to present more than a bare allegation that, had counsel not been deficient, he would have pleaded not guilty and gone to trial. *Id*. at 458. The court stated that a defendant's bare assertion that, but for plea counsel's bad advice, he would have not pleaded guilty—unaccompanied by either a claim of innocence or the statement of any plausible defense that he could have raised had he opted for a trial—failed

to show prejudice. *Id*. at 459; see also *Hall*, 217 Ill. 2d at 335-36 (requiring a claim of innocence or plausible defense)

¶ 21 To distinguish *Rissley* and *Hall*, defendant relies heavily on the recent United States Supreme Court case of *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958 (2017). In *Lee*, the defendant, a permanent resident, pleaded guilty after being misinformed that he would not be deported. *Id*. at ___, 137 S. Ct. at 1963. When the defendant learned that he was subject to deportation, he filed a motion to withdraw his plea and, at an evidentiary hearing, made clear that deportation was the determinative issue in his decision whether to accept the plea. *Id*. The defendant was denied relief, and the court of appeals affirmed based on the defendant's lack of any defense, holding that he had nothing to gain from going to trial other than more prison time. *Id*. at ___, 137 S. Ct. at 1964.

¶ 22 On appeal, the United States Supreme Court stated that, when a defendant alleges that his counsel's deficient performance led him to accept a guilty plea rather than go to trial, it would not ask whether, had the defendant gone to trial, the result of that trial would have been different from the result of the plea bargain. *Id*. at ___, 137 S. Ct. at 1965. The Court reasoned that, while it ordinarily applied a strong presumption of reliability to judicial proceedings, it could not accord such a presumption to judicial proceedings that never took place. *Id*. Instead, the Court considered whether the defendant was prejudiced by the denial of an entire judicial proceeding to which he had a right. *Id*.

¶ 23 In determining whether the defendant showed a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial, the Court declined to adopt "a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial." *Id*. at ___, 137 S. Ct. at 1966. Rather, the Court

found that a defendant assesses the consequences of a conviction after trial and by plea when deciding whether to plead guilty. *Id*. The Court noted that, "[w]hen those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive." *Id*. Cautioning against disturbing guilty pleas simply "because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," the Court stated that courts should look to contemporaneous evidence showing a defendant's preferences. *Id*. at ___, 137 S. Ct. at 1967. The Court noted the severity of deportation and that there was no reason to doubt the paramount importance that the defendant placed on avoiding it. *Id*. at ___, 137 S. Ct. at 1968. Indeed, the defendant's claim that he would not have accepted the plea was backed by "substantial and uncontroverted evidence." *Id*. at ___, 137 S. Ct. at 1969. Thus, the Court found that, in "the unusual circumstances of this case," the defendant showed a reasonable probability that he would have rejected the plea deal if he had known that it would result in mandatory deportation. *Id*. at ___, 137 S. Ct. at 1967.

¶ 24 While this appeal was pending, our supreme court decided *Brown*, 2017 IL 121681. There, the court held that, when an allegation involves a defendant's understanding of the consequences of his guilty plea, the standard from *Rissley* and *Hall* is not applicable. *Id*. ¶ 46. Instead, consistent with *Lee*, when a claim involves counsel's failure to advise a defendant of the consequences of his guilty plea, a defendant must show that a decision to reject a plea bargain would have been rational under the circumstances. *Id*. ¶¶ 40, 46. Under *Rissley* and *Hall*, it is when a defendant makes an ineffective-assistance claim related to defense strategy or chance of acquittal that he must make a claim of innocence or state a plausible defense. *Id*. ¶ 45. However, even though *Rissley* and *Hall* may be inapplicable, the inquiry is not over. *Id*. ¶ 47. The court noted that neither any of its decisions nor *Lee* allows an ineffective-assistance claim to

satisfy the prejudice prong based solely on the bare allegation that the defendant would have rejected the plea bargain if his counsel had provided accurate advice. *Id.* To the extent that *Stewart* and *Kitchell* conflicted with that principle, the court overruled them. *Id.*

¶ 25 Here, defendant never asserted that, had he been properly advised about good-time credit, he would not have pleaded guilty. And, indeed, there is no reason to think that he would have risked facing a longer sentence. In *Lee*, it was reasonable that the defendant would risk a greater prison term in hopes of avoiding deportation. Here, defendant did not face a consequence nearly as "dire." Thus, under *Lee* and *Brown*, he failed to assert sufficient allegations to satisfy the prejudice prong.

¶ 26 Defendant next argues that his postconviction counsel was unreasonable for failing to amend the petition and provide proper affidavits to support his claims.

¶ 27 " 'There is no constitutional right to counsel in postconviction proceedings.' " *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 18 (quoting *People v. Daniels*, 388 Ill. App. 3d 952, 960 (2009)). However, when the trial court does not summarily dismiss the petition, the Post-Conviction Hearing Act affords indigent defendants a statutory right to counsel. *Id.* Counsel must then provide "reasonable assistance," in compliance with Rule 651(c). *Id.*; *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 18. Rule 651(c) provides that the record on appeal must "contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney 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." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 28 Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel has fulfilled his or her duties. *Kirk*, 2012 IL App (1st) 101606, ¶ 19. The filing of the certificate gives rise to the presumption that the defendant received the required representation during second-stage proceedings. *Id*. However, the presumption may be rebutted by the record. *Id*.

¶ 29 "Under Rule 651(c), postconviction counsel has an obligation to present a defendant's postconviction claims in the appropriate legal form, and the failure to do so constitutes unreasonable assistance." *Nitz*, 2011 IL App (2d) 100031, ¶ 18 (citing *People v. Waldrop*, 353 Ill. App. 3d 244, 251 (2004)). However, "counsel is not required to advance frivolous or spurious claims." *Kirk*, 2012 IL App (1st) 101606, ¶ 21. "In fact, counsel's decision not to amend a defendant's *pro se* petition has been held not to constitute a deprivation of adequate representation where his claim lacks a sufficient factual basis." *Id*. (citing *People v. Johnson*, 17 Ill. App. 3d 277, 279 (1974)). Further, "[in] the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so" unless the presumption is flatly contradicted by the record. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993).

¶ 30 Here, the record shows that Lorek sought cooperation from defendant and did not receive it. Lorek then filed a Rule 651(c) certificate that outlined his inability to substantiate defendant's claims. As a result, Lorek felt obligated to file a motion to withdraw and could not amend the petition. Lorek was not required to present frivolous claims, and nothing in the record rebuts the presumption that Lorek made a concerted effort to obtain necessary affidavits. Instead, the

record supports the conclusion that he was unable to do so.[1] Accordingly, defendant has not shown unreasonable assistance of postconviction counsel.

¶ 31 III. CONCLUSION

¶ 32 Defendant did not make a substantial showing to support his ineffective-assistance claim, and his postconviction counsel did not provide unreasonable assistance. Accordingly, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 33 Affirmed.

[1] We note that, although Lorek could have had defendant's own affidavit notarized, that affidavit would not have satisfied section 122-2 in any event. See *People v. Teran*, 376 Ill. App. 3d 1, 5-6 (2007).