

No. 1-12-3162

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	09 C2 20253
	)	
INGRID RAFAELOVA,	)	Honorable
	)	Timothy Chambers,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**ORDER**

*HELD:* Postconviction court's dismissal of defendant's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 1 Defendant Ingrid Rafaelova appeals the third-stage dismissal of her petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). For the reasons that follow, we affirm.

¶ 2 The controversy at the center of this appeal concerns the potential risk to defendant of being deported from the United States as a result of pleading guilty to and being convicted of retail theft. In April 2009, defendant was charged by information with one count of retail theft (720 ILCS 5/16A-3(a) (West 2008)) for shoplifting merchandise having a value of over \$150.00, from a Walmart store. The charge was a Class 3 felony. The State presented evidence that defendant shoplifted several items from the store having a total value of \$277.85. On May 19, 2009, defendant pled guilty to the charge of retail theft in exchange for a two-year sentence of imprisonment with a credit for 46 days served, along with various fines and fees.

¶ 3 On November 2, 2009, while defendant was out on parole from the retail-theft conviction, a postconviction petition was filed on her behalf seeking to vacate the conviction. The petition was prepared and filed by privately retained counsel. The petition alleged the trial court violated section 113.8 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113.8 (West 2006))<sup>1</sup>, as well as defendant's due process rights when the court failed to

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<sup>1</sup> Section 113-8 of the Code provides:

"Before the acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or felony offense, the court shall give the following advisement to the defendant in open court:

'If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or

admonish her that she could be deported as a result of pleading guilty to the retail-theft charge. The petition further alleged that the failure of defendant's guilty-plea counsel to advise her that she possibly faced deportation as a consequence of pleading guilty to the retail-theft charge amounted to ineffective assistance.

¶ 4 The petition was supported by affidavits from defendant's brother-in-law, Milan Pavlov, and her mother-in-law, Gotsia Pavlov. Milan Pavlov averred he went to court with defendant on the day she pled guilty and he spoke with her attorney prior to court. Milan claimed he informed the attorney that defendant was not a citizen and asked if she could be deported. According to Milan, the attorney responded that he did not know, but did not think so. In her affidavit, Gotsia Pavlov averred that she was present with defendant on the day defendant pled guilty. She informed defendant's attorney that defendant was not a citizen. Gotsia Pavlov stated the attorney responded that he did not know about extradition, but added "he did not think so." Gotsia Pavlov also informed the attorney that defendant has two children ages 14 months and 4 years' old.

¶ 5 On January 2, 2010, the State filed a motion to dismiss the petition. The State argued the following: (1) defendant failed to support the petition with her own affidavit; (2) the failure to admonish defendant about the possibility of being deported for pleading guilty to the charge of retail theft was a statutory violation of section 113.8 of the Code which did not implicate defendant's constitutional rights; (3) deportation was a collateral consequence of a guilty plea which did not implicate defendant's constitutional rights; (4) the Illinois legislature did not provide a penalty for violation of section 113.8 of the Code; (5) the trial court's failure to admonish defendant regarding the collateral effects of her guilty plea was harmless error; and (6)

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denial of naturalization under the laws of the United States. ' " 725 ILCS 5/113-8  
(West 2006).

defendant failed to satisfy either prong of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in relation to counsel's alleged failure to advise her of the possibility of being deported as a result of pleading guilty to the charge of retail theft.

¶ 6 On March 5, 2010, defendant filed a reply to the State's motion to dismiss. Attached to the reply was an affidavit from defendant averring she was not a US citizen; she spoke and understood very little English; and she understood some Hungarian, but mainly spoke the "Gypsy language." Defendant further averred that she communicated with guilty-plea counsel through an interpreter who spoke Hungarian. Defendant claimed that after she was paroled from state prison, she was retained by the Immigration Department for approximately four months and that the department sought to deport her. Defendant stated her immigration lawyer got her released on bond. She averred that a deportation case remained pending against her.

¶ 7 On May 7, 2010, postconviction counsel filed a motion to cite as additional authority the United States Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that defense counsel must inform a client whether a plea carried risk of deportation. On August 27, 2010, the postconviction court held a hearing at which it noted that the transcript of the guilty-plea hearing failed to show the trial court admonished defendant concerning the risk of being deported for pleading guilty to the retail-theft charge. As a result, the court advanced the petition for a third-stage evidentiary hearing. Thereafter, the matter was continued several times.

¶ 8 On January 21, 2011, the State filed an answer to the petition. Attached to the answer was an affidavit from guilty-plea counsel. Counsel averred he had known defendant's family for about 17 years and was told by defendant and her family that she was not a U.S. citizen. Counsel claimed he began representing defendant on or about October 2, 2008, in relation to a charge of retail theft. He went on to represent defendant on two other retail theft cases. Counsel claimed

that before defendant pled guilty to any charges, he advised her and her family that the United States Immigration and Customs Enforcement considered the crime of retail theft to be a crime of moral turpitude. Counsel averred he advised defendant that she would likely be deported due to the fact that she had 3 convictions and/or supervisions for crimes involving moral turpitude.

¶ 9 On October 18, 2012, the postconviction court held the third-stage evidentiary hearing on the petition. A Hungarian interpreter was present. Defendant testified that during the guilty-plea hearing, neither the trial court nor her counsel, ever advised her that she risked being deported as a result of pleading guilty to the retail-theft charge. Defendant maintained she would not have pled guilty to the charge if she had known she could be deported.

¶ 10 The State presented no live witnesses at the evidentiary hearing, but instead stated that it wished to submit several exhibits that were part of the motion to dismiss. The exhibits included copies of the preliminary hearing and plea transcript. These exhibits were admitted into evidence. The State also stated that it wished to admit guilty-plea counsel's affidavit which had been included in the answer to the petition. Postconviction counsel objected to admission of the affidavit on hearsay grounds. The State responded that under section 122-6 of the Act (725 ILCS 5/122-6 (West 2002)), during an evidentiary hearing, a postconviction court may receive proof by affidavits, depositions, oral testimony, or other evidence. The postconviction court agreed with the State and allowed guilty-plea counsel's affidavit to become part of the record.

¶ 11 Postconviction counsel then called defendant to testify in rebuttal. Defendant testified that guilty-plea counsel never advised her that she could be deported as a result of pleading guilty to the retail-theft charge. Postconviction counsel then continued his objection to any reliance on guilty-plea counsel's affidavit. Postconviction counsel stated that he wished to cross-examine guilty-plea counsel regarding his claim that he had known defendant's family for

approximately 17 years. Postconviction counsel stated that guilty-plea counsel previously worked for him and that counsel met defendant's family through him, and that counsel had not known the family for as long as he claimed. The postconviction court responded that the essential part of guilty-plea counsel's affidavit was not how long he had known defendant's family, but rather that he averred he advised her of her rights and the possibility of being deported.

¶ 12 After the parties presented their respective arguments, the postconviction court held that the lack of knowledge regarding the possibility of being deported did not relate to a federal constitutional right, but rather to a state statute. The court noted that guilty-plea counsel averred he had informed defendant of the possibility of being deported. With regard to prejudice, the court observed that defendant had "two priors," and had picked up a new case while on probation. The court determined defendant could not show that the outcome of the case would have been any different if she had gone to trial. The court subsequently denied defendant's petition. Defendant appeals.

¶ 13

#### ANALYSIS

¶ 14 Defendant first challenges the performance of postconviction counsel. We find the challenge is meritless.

¶ 15 Although there is a sixth amendment right to counsel at trial, this right has not been found to apply in postconviction proceedings. *People v. Flores*, 153 Ill. 2d 264, 276 (1992); *People v. Guest*, 166 Ill. 2d 381, 412 (1995); *People v. Moore*, 189 Ill. 2d 521, 541 (2000). The right to counsel in postconviction proceedings is wholly statutory. *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (citing section 122-4 of the Act (725 ILCS 5/122-4 (West 1998))). Under the Act, a defendant in a postconviction proceeding is entitled to what has been referred to as a "reasonable

level" of assistance, which our supreme court has determined is less than the level of assistance constitutionally guaranteed to a criminal defendant at trial. *People v. Owens*, 139 Ill. 2d 351, 364-66 (1990).

¶ 16 In an attempt to ensure a reasonable level of assistance as required by the Act, Illinois Supreme Court Rule 651(c), imposes specific duties on appointed counsel in postconviction proceedings. *Turner*, 187 Ill. 2d at 410. Rule 651(c) requires appointed counsel to demonstrate that counsel "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). Counsel may file a certificate showing that the requirements of the rule were complied with, or the record as a whole may demonstrate that counsel complied with the requirements. *People v. Richmond*, 188 Ill. 2d 376, 380 (1999). The purpose of this mandatory rule is to ensure that postconviction counsel shapes the defendant's claims into proper legal form to be presented to the court. *People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007).

¶ 17 In the instant case, there is no indication that postconviction counsel filed a Rule 651(c) certificate. However, our courts have determined that this rule applies only when the defendant files his or her initial postconviction petition *pro se*, and not when the initial petition was filed by privately retained counsel like in the present case. See *People v. Richmond*, 188 Ill. 2d 376, 382-83 (1999); *People v. Csaszar*, 2013 IL App (1st) 100467, ¶ 16; *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 25. Here, Rule 651(c) does not apply because defendant's initial petition was prepared and filed by privately retained counsel as opposed to being filed *pro se*. Therefore,

postconviction counsel's failure to file a certificate of compliance pursuant to Rule 651(c) does not warrant reversing the dismissal of defendant's postconviction petition on this ground.

¶ 18 Defendant next contends the postconviction court improperly credited guilty-plea counsel's affidavit testimony over her live courtroom testimony in regard to the factual dispute as to whether counsel advised her of the immigration consequences of her guilty plea. Defendant argues the court's dismissal of her postconviction petition based on the erroneous use of counsel's affidavit was error. We must disagree.

¶ 19 The admission of evidence during an evidentiary hearing on a postconviction petition is within the sound discretion of the postconviction court, whose decision will not be overturned absent an abuse of that discretion. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 52. A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Baez*, 241 Ill. 2d 44, 106 (2011).

¶ 20 In the instant case, defendant's postconviction petition was dismissed following a third-stage evidentiary hearing. At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). To facilitate defendant's burden, section 122-6 of the Act gives the postconviction court wide latitude as to the types of evidence it may receive in ruling upon the allegations in the petition. *People v. Hayes*, 29 Ill. App. 3d 756, 761 (1975); *People v. Ruiz*, 177 Ill. 2d 368, 383 (1997). Section 122-6 of the Act provides: "The court may receive proof by affidavits, depositions, oral testimony, or other evidence." 725 ILCS 5/122-6 (West 2002). Pursuant to section 122-6 of the Act, the postconviction court may also properly consider affidavits in lieu of oral testimony in determining controverted issues of fact. *People v.*

*Ferguson*, 31 Ill. App. 3d 886 (1975) (abstract of op.). Accordingly, the postconviction court did not abuse its discretion by crediting guilty-plea counsel's affidavit testimony over defendant's courtroom testimony in regard to the factual dispute as to whether counsel advised defendant of the immigration consequences of her guilty plea.

¶ 21 We also reject defendant's alternative argument that she was denied the opportunity to call or cross-examine guilty-plea counsel as a witness during the evidentiary hearing. A review of the record shows the postconviction court never prevented postconviction counsel from calling or cross-examining guilty-plea counsel as a witness.

¶ 22 The record of the evidentiary hearing shows that shortly after the court allowed guilty-plea counsel's affidavit to become part of the record, postconviction counsel informed the court that he wished to cross-examine guilty-plea counsel regarding counsel's claim that he had known defendant's family for approximately 17 years. According to postconviction counsel, guilty-plea counsel had not known defendant's family for as long as he claimed. In response, the court stated that the essential nature of guilty-plea counsel's affidavit testimony was not how long he had known defendant's family, but rather that he claimed he advised defendant of the possibility of being deported. Following the court's comments, postconviction counsel did not make a request to call guilty-plea counsel as a witness. Under these circumstances, we cannot say that defendant was denied the opportunity to call or cross-examine guilty-plea counsel as a witness.

¶ 23 Defendant finally contends that postconviction counsel failed to provide her with a reasonable level of assistance as required by Supreme Court Rule 651(c). Defendant claims that counsel's representation was unreasonable for the following reasons: (1) he failed to call her brother-in-law, Milan Pavlov, and her mother-in-law, Gotsia Pavlov, as witnesses at the evidentiary hearing to support her claim that guilty-plea counsel did not advise her regarding the

immigration consequences of her guilty plea; (2) he failed to request a continuance to call guilty-plea counsel as a witness; and (3) he failed to recuse himself after it became evident he was a potential witness in the case once he discovered guilty-plea counsel's allegedly untruthful statement as to how long counsel had known defendant's family.

¶ 24 Defendant's arguments are primarily based on the reasonable-level-of-assistance standard embodied in Rule 651(c). However, as we have already determined, this supreme court rule does not apply in this case because defendant's initial petition was prepared and filed by privately retained counsel as opposed to being filed *pro se*.

¶ 25 Alternatively, defendant raises a freestanding reasonable-level-of-assistance claim. Defendant argues that postconviction counsel failed to provide a reasonable level of assistance, independent of the requirements of Rule 651(c). In support of this argument, defendant relies on the decision in *People v. Anguiano*, 2013 IL App (1st) 113458. In *Anguiano*, the reviewing court determined that even in cases where Rule 651(c) does not apply because the initial petition was filed by retained counsel, all defendants represented by counsel should still have the right to a reasonable level of assistance at the second stage of a postconviction proceeding. *Anguiano*, 2013 IL App (1st) 113458, ¶¶ 27-31.

¶ 26 The decision in *Anguiano* does not support defendant's position because we find that postconviction counsel provided defendant with a reasonable level of assistance where he succeeded in having the petition proceed to a third-stage evidentiary hearing.

¶ 27 A postconviction action is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). In a noncapital case such as this, the Act provides a three-stage process by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their

constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). In the instant case, defendant's petition advanced to a third-stage evidentiary hearing. If a petition is dismissed following a third-stage evidentiary hearing at which fact-finding and credibility determinations were made, the dismissal is reviewed for manifest error. *Beaman*, 229 Ill. 2d at 72. "Manifest error is that which is 'clearly evident, plain, and indisputable.'" *People v. Johnson*, 206 Ill. 2d 348, 360 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 28 A challenge to a guilty plea alleging ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome of the trial would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001). A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need not determine whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 29 Applying these principles to the instant case, we hold that even if postconviction counsel's performance was deficient, which we find it was not, defendant has failed to demonstrate how she was prejudiced by any alleged deficiencies. At the evidentiary hearing, the postconviction court determined that defendant could not show she was prejudiced where she

had "two priors," and picked up a new case while on probation. The court determined defendant could not show that the outcome of the case would have been any different if she had gone to trial. The court stated:

"She cannot show -- any prejudice show that the outcome of the case would have been different had she gone to trial. She cannot come in now today after all this time and claim that had she known that she would not have pled. I don't think that that is appropriate grounds. I don't think it's risen to the level to sustain her motion for a postconviction petition."

¶ 30 Moreover, defendant's bare allegation that she would not have pled guilty to the retail-theft charge if she had known that she could be deported, was insufficient to establish the requisite prejudice under *Strickland*. See, e.g., *People v. Hall*, 217 Ill. 2d 324, 335 (2005); *People v. Hughs*, 2012 IL 112817, ¶ 64. Under such circumstances, a defendant must either assert a claim of actual innocence or articulate a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36; *Hughs*, 2012 IL 112817, ¶ 64. In this case, defendant's petition lacked any claims of actual innocence or any plausible defenses that could have been raised at trial. Counsel is not required to raise futile or disingenuous arguments. *People v. Haynie*, 347 Ill. App. 3d 650, 654 (2004). In sum, defendant was denied postconviction relief not because of any deficiencies in postconviction counsel's representation, but rather because her claims were meritless. Accordingly, the postconviction court's dismissal of defendant's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 31 For the foregoing reasons, we affirm the postconviction court's dismissal of defendant's postconviction petition.

¶ 32 Affirmed.