

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).

Order filed July 17, 2014

2014 IL App (4th) 130226-U

Modified upon denial of rehearing July 30, 2014

NO. 4-13-0226

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
HASAN A. HARRIS,)	No. 09CF642
Defendant-Appellant.)	
)	Honorable
)	John W. Belz,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* We grant counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), as defendant can raise no colorable argument on appeal the trial court erred in dismissing his postconviction petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because any request for review would be without merit. We agree OSAD can make no colorable argument defendant, Hasan A. Harris, (1) received ineffective assistance of counsel, (2) was improperly sentenced to an extended term in prison, (3) was denied a constitutional right to obtain certain discovery materials, (4) was improperly denied his right to confront witnesses, or (5) was entitled to a substitution of judge. We grant OSAD leave to withdraw as counsel and affirm the second-stage dismissal of defendant's petition.

¶ 3

I. BACKGROUND

¶ 4 In July 2009, the State charged defendant with (1) vehicular hijacking, alleging defendant knowingly took a motor vehicle from Stephanie A. Phelps by force or threat of force (720 ILCS 5/18-3(a) (West 2008)); (2) unlawful possession of a stolen vehicle, alleging he was in possession of Phelps' vehicle knowing it had been stolen (625 ILCS 5/4-103(a)(1) (West 2008)); (3) aggravated battery, alleging defendant struck Phelps in the face (720 ILCS 5/12-4(b)(8) (West 2008)); and (4) unlawful restraint, alleging defendant knowingly detained Phelps by refusing to stop a moving car to let her exit (720 ILCS 5/10-3 (West 2008)). In January 2010, defense counsel moved for a fitness evaluation. Following the evaluation, the trial court found defendant unfit to stand trial, but it found he could potentially be fit within one year. In April 2010, following a March 2010 fitness evaluation, the court found defendant was restored to fitness.

¶ 5 In February 2011, defendant entered a negotiated plea of guilty to the charge of vehicular hijacking. In exchange for the plea, the State dismissed all other charges against defendant and recommended defendant serve a negotiated sentence of 25 years in prison. The trial court sentenced defendant to 25 years, with credit for time served, and two years of mandatory supervised release. When asked if he was satisfied by his attorney's representation, respondent answered, "yeah."

¶ 6 The State described the factual basis for the plea. According to the State, Phelps would testify defendant approached her car in a Walmart parking lot, hit her in the face, pushed her into the passenger seat, hit her six or seven times in the face and head, and drove away while she was in the car. Defendant refused to stop the car to allow Phelps to exit and she jumped from the moving car. A police officer would testify he located defendant the next day near

Phelps' car and her keys were in defendant's possession. Walmart surveillance tapes would show defendant in the store at about the time of the incident.

¶ 7 The trial court admonished defendant of the nature of the charges and his rights, including his right to confront witnesses against him. The court explained defendant would waive these constitutional rights by pleading guilty. The court also admonished defendant he must file a motion to withdraw his guilty plea within 30 days if he wished to exercise his right to appeal. Defendant did not move to withdraw the plea, but on June 7, 2011, he filed a notice of appeal. On August 15, 2011, we dismissed defendant's appeal pursuant to defendant's motion. *People v. Harris*, No. 4-11-0451 (Aug. 12, 2011) (dismissed on appellant's motion).

¶ 8 On December 28, 2011, defendant filed a *pro se* postconviction petition. The trial court appointed counsel to represent defendant. On February 10, 2012, the State filed a motion to dismiss, arguing the allegations in defendant's petition (1) contained no specific facts; (2) stated no grounds which, if established, would constitute a substantial denial of defendant's constitutional rights; (3) raised claims which have been waived; and (4) were not supported by the record. Defense counsel filed a motion to withdraw as postconviction counsel and filed a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984), asserting counsel consulted with defendant in person and by mail to ascertain his allegations of error, examined the trial court record and postconviction pleadings, and made all necessary amendments to the *pro se* petition or concluded no meritorious constitutional issues could be presented. At the February 14, 2013, hearing on the postconviction petition, appointed counsel argued defendant's claims were not meritorious because they were not constitutional in nature and counsel did not find any other constitutional issues to raise in an amended petition. Defendant was given the opportunity to

respond and argued his previous attorney only came to see him twice, he was not provided with discovery materials, and his petition for substitution of judge should have been granted.

¶ 9 The trial court took the matter under advisement. On February 20, 2013, the trial court found defendant's case presented no meritorious issues warranting argument in support of postconviction relief. The court granted appointed counsel's motion to withdraw and granted the State's motion to dismiss the postconviction petition.

¶ 10 This appeal followed, and OSAD now moves for leave to withdraw as counsel.

¶ 11 II. ANALYSIS

¶ 12 OSAD argues it should be allowed to withdraw as counsel pursuant to the Supreme Court's decision in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), because defendant's claims lack any arguable merit. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by May 7, 2014. He filed none. After reviewing the record, consistent with our responsibilities under *Finley*, we agree.

¶ 13 A. Standard of Review

¶ 14 For constitutional claims, " 'the Act establishes a three-stage process for adjudicating a postconviction petition.' " *People v. Bowens*, 2013 IL App (4th) 120860, ¶ 10, 1 N.E.3d 638. The trial court may dismiss a postconviction petition at the second stage of the proceedings, as the court did in this case, "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). At the second stage, any factual allegation not positively rebutted by the record must be taken as true. *Id.* In reviewing a dismissal of a postconviction petition before a hearing is held, this court applies a *de novo* standard of review. *Id.*

¶ 15 B. Substantial Showing of a Constitutional Violation

¶ 16 OSAD argues the record demonstrates defendant cannot make a substantial showing of a constitutional violation. We agree, as we find nothing in the record to suggest (1) defendant was afforded ineffective assistance of counsel; (2) defendant's sentence was improperly extended; (3) counsel's refusal to provide defendant with copies of discovery materials violated his constitutional rights; or (4) defendant was denied the right to confront witnesses, as he waived this right by pleading guilty.

¶ 17 1. *Ineffective Assistance of Trial Counsel*

¶ 18 OSAD stated it investigated whether defendant could argue he was denied effective assistance of counsel during his guilty-plea hearing and concluded any such claim was contradicted by the record and must fail. We agree.

¶ 19 A defendant may challenge the voluntariness of a plea by showing the plea was based on ineffective assistance of counsel. *Id. at* 341, 841 N.E.2d at 924. Here, defendant's claim counsel did not adequately consult with him prior to his plea, taken as true, could impact the voluntariness of his plea, triggering a substantial constitutional violation. However, defendant's ineffective-assistance-of-counsel claim is positively rebutted by the record. Defendant indicated he was satisfied with his counsel's performance during the guilty-plea hearing. Thus, OSAD can make no meritorious argument defendant's plea was involuntary because he received ineffective assistance of counsel insofar as the claims here presented.

¶ 20 2. *Extended-Term Sentencing*

¶ 21 In defendant's postconviction petition, he argued he was improperly sentenced to an extended term. OSAD argues it can make no arguments supporting this claim, as defendant was eligible for an extended term of up to 30 years in prison. We agree.

¶ 26 This court has held "a defendant does not have a constitutional right to read discovery materials." *People v. Savage*, 361 Ill. App. 3d 750, 757, 838 N.E.2d 247, 254 (2005). Rather, under Illinois Supreme Court Rule 415(c) (eff. Oct. 1, 1971), "[a]ny materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case***." Rule 415(c) requires an attorney to retain any discovery materials he or she receives and, while the attorney might show the materials to, or discuss their content with, the client, an attorney may not give the discovery materials, or copies of the materials, to the client. Ill. S. Ct. R. 415(c), Committee Comments (adopted Oct. 1, 1971).

¶ 27 The record shows defense counsel received discovery materials from the State and discussed the materials with defendant. At a status hearing in July 2010, defendant claimed his counsel was ineffective because he did not personally receive any discovery materials. Counsel informed the trial court defendant wanted him to make copies of the discovery materials, but counsel informed defendant he was not able to give defendant the documents. Counsel further stated he watched a surveillance video, placing defendant at the scene of the crime, with defendant, and he and defendant had an "in-depth" conversation about the status of the evidence. Rule 415(c) expressly prohibited counsel from giving defendant actual copies of the discovery materials, as defendant requested. We agree OSAD can make no colorable argument counsel's failure to provide defendant with copies of discovery materials violated defendant's constitutional rights.

¶ 28 *4. Defendant's Right To Confront Witnesses*

¶ 29 Defendant, in his postconviction petition, raised an issue regarding his right to confront the State's witness in this case. OSAD argues it cannot claim defendant was denied his right to confront witnesses because defendant waived the right by pleading guilty. We agree.

¶ 30 The trial court must admonish the defendant of his right to a trial by jury and his right to confront the witnesses against him, and it must admonish the defendant he waives both by pleading guilty. *People v. Bolden*, 7 Ill. App. 3d 730, 732, 288 N.E.2d 541, 542 (1972).

Defendant, at his guilty-plea hearing, was fully admonished of his right to confront witnesses and indicated he understood he would waive his right to confront the State's witnesses by pleading guilty. After these admonishments, defendant entered a voluntary guilty plea. OSAD can make no colorable argument defendant was denied his right to confront witnesses, as he waived this right by pleading guilty.

¶ 31 C. Defendant's Request for Substitution of Judge

¶ 32 We also agree OSAD can make no colorable argument the trial court erred in denying defendant's request for substitution of judge. "There is no absolute right to a substitution of judge at a postconviction proceeding." *People v. Reyes*, 369 Ill. App. 3d 1, 25, 860 N.E.2d 488, 510 (2006). "[T]he same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced." *Id.* Defendant objected to Judge Belz because he presided over defendant's guilty plea, but he did not claim Judge Belz was substantially prejudiced. Nothing in the record indicates Judge Belz was prejudiced. Without an allegation Judge Belz was prejudiced against defendant, defendant was not entitled to a different judge. We agree OSAD can make no colorable argument otherwise.

¶ 33 D. Reasonable Assistance of Postconviction Counsel

¶ 34 OSAD stated it investigated whether defendant could argue he was denied effective assistance of postconviction counsel and concluded any such argument must fail. We agree.

¶ 35 In postconviction proceedings, the defendant has a statutory right to reasonable assistance of counsel, which does not guarantee the same level of assistance the Constitution guarantees defendants at trial. *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990). To provide reasonable assistance, counsel must perform specific duties outlined in Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). *People v. Greer*, 212 Ill. 2d 192, 204-05, 817 N.E.2d 511, 519 (2004). Specifically, the record in postconviction proceedings must demonstrate "appointed counsel 'has consulted with petitioner either by mail or in person to ascertain his 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.'" *Id.* at 205, 817 N.E.2d at 519 (quoting Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

¶ 36 "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf." *Id.* Frivolous or patently nonmeritorious claims are not " 'necessary' " within the meaning of Rule 651(c) and advancing them is clearly prohibited by counsel's ethical obligation. *Id.* at 205, 209, 817 N.E.2d at 519, 522. Counsel may withdraw when the record supports counsel's assessment defendant's postconviction claims were frivolous and without merit. *Id.* at 212, 817 N.E.2d at 523.

¶ 37 Here, postconviction counsel filed a Rule 651(c) certificate asserting he consulted with the defendant in person and by mail to ascertain his allegation of constitutional deprivations, examined the record of the proceedings, and determined no meritorious constitutional issues could be presented in an amended petition. Counsel then filed a motion to withdraw as counsel. At the hearing on the motion, defendant was given an opportunity to

respond and the trial court took the matter under advisement. A few weeks later, the court found "no issues of merit exist warranting argument in support of post[]conviction relief," and granted counsel's motion to withdraw. The record supports both counsel's and the trial court's assessment defendant's claims lack colorable merit. Thus, counsel appropriately moved to withdraw and OSAD cannot argue defendant was denied reasonable assistance by postconviction counsel.

¶ 38

III. CONCLUSION

¶ 39 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 40 Affirmed.