2016 IL App (1st) 120503-U

FIRST DIVISION
November 28, 2016

No. 1-12-0503

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County,
	)	
v.	)	No. 05 CR 4566
	)	
FAUSTINO BALBUENA,	)	Honorable
	)	Joseph M. Claps,
Petitioner-Appellant.	)	Judge Presiding.
	)	

JUSTICE MIKVA delivered the judgment of the court.
Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment of the circuit court dismissing defendant's postconviction petition at the second stage of proceedings is affirmed where, even if not forfeited, defendant's claim of ineffective assistance of appellate counsel lacks merit. Defendant failed to make a substantial showing that, absent the conduct complained of, there was a reasonable probability that defendant's direct appeal would have been successful.

¶ 2 Defendant Faustino Balbuena appeals the second-stage dismissal of his postconviction petition. Mr. Balbuena, a 65-year-old Spanish speaker, was charged with attempted first degree murder and aggravated domestic battery. With the aid of an interpreter to translate the plea

proceedings, Mr. Balbuena pleaded guilty to attempted murder in exchange for a negotiated sentence of 20 years' imprisonment. Mr. Balbuena subsequently moved to withdraw his guilty plea and vacate his sentence, arguing both that he misunderstood the state's plea agreement offer to be for 20 months, rather than 20 years, and that he was not properly admonished by the circuit court regarding the nature of the charge, the minimum and maximum sentences he could face if he did not plead guilty, or that he had the right to continue his plea of not guilty. Following an evidentiary hearing, the circuit court denied Mr. Balbuena's motion and this court affirmed that ruling on direct appeal.

¶ 3 In his postconviction petition, Mr. Balbuena reiterated that he had misunderstood the plea proceedings due to a faulty translation. The State moved to dismiss the petition, contending that this argument was forfeited because it was not raised on direct appeal. In his response brief, Mr. Balbuena for the first time argued that his appellate counsel was ineffective for failing to raise the purportedly misunderstood or faulty translation in his direct appeal. Following argument, the circuit court granted the State's motion to dismiss Mr. Balbuena's petition. This timely appeal followed.

¶ 4 BACKGROUND

¶ 5 Mr. Balbuena was charged by indictment with one count of attempted first degree murder and one count of aggravated domestic battery in connection with the beating of his wife, Rosalba Balbuena, on January 27, 2005. Mr. Balbuena was evaluated by Dr. Fidel Echaravvia, a staff psychiatrist at Forensic Clinical Services, and was found fit to stand trial. The doctor noted, however, that "[g]iven [Mr. Balbuena's] limited skills with [the] English language, it [wa]s recommended that a Spanish Interpreter be available to foster his understanding and participation in all court proceedings." Dr. Echaravvia recommended that Mr. Balbuena's "counsel should

periodically assess [his] understanding and promote simple explanation if needed."

¶ 6 On August 17, 2005, a conference was held pursuant to Illinois Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)) and Mr. Balbuena pleaded guilty to attempted first degree murder in exchange for a negotiated sentence of 20 years' imprisonment and an order of protection. Ms. Sonia Garcia, a Spanish language interpreter, was present and translated the proceedings for Mr. Balbuena. The circuit court questioned Mr. Balbuena and concluded that he had "knowingly and intelligently withdrawn his plea of not guilty and freely and voluntarily entered a plea of guilty."

¶ 7 In connection with the plea agreement, the parties stipulated to the following facts. Ms. Balbuena would testify that, shortly before 2 a.m. on January 27, 2005, she was awakened by Mr. Balbuena beating her about the head and body with a bag filled with ball bearings. Ms. Balbuena would further testify that, after the bag broke and the ball bearings scattered, Mr. Balbuena struck her numerous times with a plastic and metal hand massager, until their son was awakened by her screams and came to her aid. Ms. Balbuena suffered a fractured jaw and numerous facial cuts and bruises as a result of the beating. The parties further stipulated that Assistant State's Attorney Tom Stinson would testify that he took a hand-written statement from Mr. Balbuena later that same morning, in which Mr. Balbuena admitted to taking these actions against his wife.

¶ 8 The circuit court concluded that the stipulated facts supported a finding of guilt and accepted the plea. With Ms. Garcia translating, the following exchanges took place between the court and Mr. Balbuena during the hearing in which the court accepted Mr. Balbuena's plea:

"THE COURT: Mr. Balbuena, do you understand, sir, that

if I accept your plea of guilty and sentence you to 20 years

pursuant to your agreement between yourself, your counsel, and the State, that would actually mean that you would serve 17 years. Are you sure you understand that. In other words, you would have to serve 85 percent of the sentence. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And realizing that do you still wish me to accept your agreement.

THE DEFENDANT: Yes.

THE COURT: State is also asking for an order of protection, prohibiting you from seeing your wife. So for two years—

(Discussion had off the record.)

THE COURT: I'm sorry. That I would accept your agreement and sentence you according to that agreement. Twenty years in the penitentiary, which means you would serve 17 years. *** Are you sure you understand, sir, all the possible consequences?

THE DEFENDANT: Yes.

THE COURT: And realizing all those conditions do you still wish me to accept your plea of guilty?

THE DEFENDANT: Yes.

THE COURT: Pursuant to that agreement, anything you would like to say before I sentence you?

THE DEFENDANT: No, nothing.

THE COURT: Pursuant to your agreement, Mr. Balbuena, I hereby sentence you to a term of 20 years [in the] Illinois Department of Corrections, 85 percent to be served at that time, with 204 days credit for time served. Enter judgment on the finding and the sentence.

* * *

THE COURT: Any questions about what you've done today, sir?

THE DEFENDANT: No.

THE COURT: Have you received the sentence you thought you would receive if I accepted your plea of guilty?

THE DEFENDANT: No.

THE COURT: And how doesn't it comply with your agreement?

THE DEFENDANT: What do you mean?

THE COURT: What I'm asking you did you receive the sentence you thought you would receive if I accepted your plea of guilty. In other words, was this your agreement?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you still wish me to accept that agreement?

THE DEFENDANT: Yes.

THE COURT: And everything you have done today has been done freely and voluntarily; is that correct?

THE DEFENDANT: Yes."

¶ 9 On September 12, 2005, Mr. Balbuena filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. Mr. Balbuena's motion was handwritten in Spanish and accompanied by the affidavit of Nazim Hood, a law clerk at the Danville Correctional Center, where Mr. Balbuena was detained, which stated that, although Mr. Hood assisted Mr. Balbuena to file his motion, he was unable to understand Mr. Balbuena's reasons for seeking to withdraw his guilty plea. As Mr. Hood indicated: "No one here speaks Spanish so we [we]re unable to clearly communicate with Mr. Balbuena to further assist him or the Court in understanding his request." As later translated by an interpreter in open court, Mr. Balbuena's handwritten motion stated: "I did not understand the interpreter very well. I thought that the charges were of domestic battery. That's why I accepted. The interpreter told me to accept the twenty months." The interpreter advised the court that the motion was written "with a lot of mistakes" and in "very poor Spanish language," and that she "did the best [she] could with what was [t]here."

¶ 10 After he was appointed legal representation, Mr. Balbuena filed an amended motion to withdraw his guilty plea that raised two arguments: (1) Mr. Balbuena was not properly admonished by the circuit court, as required by Rule 402, and (2) Mr. Balbuena's acceptance of the plea agreement was not voluntary because he "was not able to properly understand the proceedings through the court-appointed translator." The amended motion stated that "[b]efore entering a plea of guilty, either [Mr. Balbuena's] appointed legal counsel misspoke or [Mr. Balbuena] misunderstood his legal counsel as to the term[s] of the negotiated plea to be presented to the court and agreed to between the parties."

¶ 11 At the evidentiary hearing, the circuit court heard testimony from Mr. Balbuena, the public defender who represented him during plea negotiations, and the interpreter who translated the plea proceedings for him.

¶ 12 Mr. Balbuena testified that he had a second-grade education. He stated that his lawyer, Assistant Public Defender Kristina Yi, visited him in jail on August 15, 2005, with a Spanish language interpreter and "[t]hat's where [he] thought that she told [him] twenty months." Mr. Balbuena further testified that he had trouble understanding the interpreter at that time because she and Ms. Yi "were speaking very far away from [him]."

¶ 13 Mr. Balbuena also testified that two days later, on August 17, 2005, he met with a different assistant public defender and a different interpreter. He recalled being in court that day but testified both that he did not understand that he was there to plead guilty to a crime and that it was not his intention to do so. Mr. Balbuena acknowledged that he had the assistance of a Spanish language interpreter, but said that he "didn't understand very well what she was saying" because "[s]he was a little far away." He recalled telling her at one point: "I don't understand. What are they saying."

¶ 14 Mr. Balbuena stated that he did not have similar difficulties understanding the interpreter present at the hearing on his motion to withdraw because that individual was "speaking to [him] right in [his] ear, practically." Mr. Balbuena further explained that he was hard of hearing "a little bit" in one ear, but that he was given medication at the hospital to treat the problem and was now "healed." He acknowledged that he did not tell anyone of this condition at his plea hearing on August 17, 2005.

¶ 15 The State called Assistant Public Defender Yi, who did not represent Mr. Balbuena at the motion to withdraw the guilty plea. She testified that she had met with Mr. Balbuena in April or

May of 2005, at which time he indicated to her "that he did not want to go to trial and wanted to dispose of the matter as quickly as possible." She testified that their conversation was in Spanish, with the aid of a Spanish language interpreter. Ms. Yi further testified that, on August 15, 2005, she met with Mr. Balbuena and Spanish language interpreter Sonia Garcia in a small interview room at the Cook County jail which measured approximately five feet by six feet. During this meeting, Ms. Yi told Mr. Balbuena that the State tendered an offer for a plea of guilty to attempted murder in exchange for twenty years' imprisonment. According to Ms. Yi, the conversation took approximately 30 minutes and Ms. Garcia interpreted the entire time. The room was quiet because the door was closed and the three were "very close" to one another. Mr. Balbuena had no questions about the offer, but only wanted to know how quickly he could be done with the case. Ms. Yi testified that she never discussed a sentence of 20 months with Mr. Balbuena and he never told her he was having trouble understanding the interpreter. Although Ms. Yi did not speak Spanish, she knew the Spanish words for "year" and "month" and never heard the interpreter say the word for "months" during her conversation with Mr. Balbuena on August 15 but did hear her say the word for "years." Ms. Yi was not present on August 17 for the plea hearing, which was handled by her supervisor, Assistant Public Defender Julie Harmon.

¶ 16 The State also called Sonia Garcia, an employee of the interpreter's office of the Cook County circuit court. Ms. Garcia testified that, although she was not a native speaker, she learned to speak Spanish "[a]t a very young age" and had worked as an interpreter since 1994. Ms. Garcia confirmed that she served as Mr. Balbuena's interpreter during his meeting with Ms. Yi on August 15, 2005. She had no difficulty hearing or understanding Mr. Balbuena and she did not recall him ever telling her that he had trouble hearing or understanding her, or that he was hard of hearing. She remembered relaying to Mr. Balbuena the plea offer that had been tendered

and remembered it as being for either 20 or 30 years. She could not remember Ms. Yi ever indicating that Mr. Balbuena might be able to receive a sentence of 20 months for his guilty plea or Mr. Balbuena ever indicating that he wanted to plead guilty in exchange for 20 months of prison time. Ms. Garcia specifically recalled using "años," the word for "years," and not "meses," the word for "months."

¶ 17 Ms. Garcia stated that, on August 17, 2005, she also served as the Spanish language interpreter assigned to the floor on which Mr. Balbuena's plea hearing was held. She testified that she translated a conversation between Ms. Harmon and Mr. Balbuena before the hearing, during which Ms. Harmon relayed to Mr. Balbuena "the time he'd be getting," which Ms. Garcia again recalled as "either twenty or thirty years." Mr. Balbuena did not tell Ms. Garcia during this conversation that he could not hear or understand her. At the hearing, Ms. Garcia stood about a foot away from Mr. Balbuena and translated everything the judge said, including the offer of 20 years' imprisonment. Mr. Balbuena again did not tell her he could not hear or understand her, and she did not recall him indicating in any way that he was hard of hearing.

¶ 18 Ms. Garcia acknowledged that she did not at first recall the plea hearing in question, but said that her memory was refreshed when she saw Mr. Balbuena "when he walked in the courtroom" for the hearing on his motion to withdraw his guilty plea. She stated that she "kind of remember[ed] his face, and [she did] remember that in front of Judge Suria that [they] repeated the sentence various times." When later asked if Mr. Balbuena appeared confused in court that day, however, Ms. Garcia said, "[n]ot that I recall, no," but acknowledged that, without reading the court reporter's transcript, she had no independent recollection of what happened that day.

¶ 19 At the conclusion of the hearing, Mr. Balbuena's counsel argued that his guilty plea should be withdrawn because the court could infer from the evidence presented "that Mr.

Balbuena could genuinely have not fairly understood what happened that day." Counsel also argued that the circuit court's admonishments had not been in substantial compliance with Illinois Supreme Court Rule 402, rendering the plea involuntary. In response, the State argued that Mr. Balbuena "understood exactly what he was doing" and was simply having second thoughts about his 20-year sentence. After it was given leave to respond to cases cited by defense counsel regarding the sufficiency of the admonishments, the State argued that Mr. Balbuena's plea was not rendered involuntary by the circuit court's failure to admonish him regarding the minimum and maximum sentences he faced because this was a negotiated plea, the assistant public defender had previously apprised Mr. Balbuena of that information, and the court gave all of the other admonishments required by the rule.

¶ 20 The circuit court denied Mr. Balbuena's motion to withdraw his guilty plea, concluding that the omission of a specific admonishment on the applicable minimum and maximum sentences did not invalidate the plea "because it was a negotiated plea and the defendant knew he was going to get 20 years," and noting that "[n]owhere in the petition or the motion d[id] it indicate that [Mr. Balbuena] didn't think he wasn't [*sic*] going to get 20, that he could have got less."

¶ 21 Mr. Balbuena filed a direct appeal challenging only the circuit court's ruling on the sufficiency of the Rule 402 admonishments and, in an order dated December 28, 2007, this court affirmed the judgment of the circuit court. *People v. Balbuena*, No. 1-07-0061, slip op. at 10 (2007) (unpublished order under Supreme Court Rule 23). Mr. Balbuena's petition for leave to appeal that decision to the Illinois Supreme Court was denied. *People v. Balbuena*, 228 Ill. 2d 537 (2008).

¶ 22 On December 22, 2008, after securing private counsel, Mr. Balbuena filed a

postconviction petition. In the petition, Mr. Balbuena argued that his guilty plea should be vacated, both because he "heard and believed that he was to receive a sentence of twenty months, rather than twenty years, and that the actual time spent incarcerated would be seventeen months," and because the circuit court did not refer to mandatory supervised release by name when describing Mr. Balbuena's sentence. Mr. Balbuena further contended that he "received ineffective assistance of counsel, and was the victim of a faulty translation provided by the Court-designated Spanish interpreter." Had he received a correct translation, Mr. Balbuena maintained, he would not have accepted the plea agreement.

¶ 23 Mr. Balbuena filed an amended postconviction petition on July 21, 2009, in which he again argued that the circuit court failed to properly admonish him as required by Rule 402. Although Mr. Balbuena acknowledged in his amended petition that his argument regarding the faulty translation was omitted from his direct appeal, he pointed out that the appellate court took note of the testimony of Ms. Yi and Ms. Garcia which, he contended, seemed to suggest that it considered and rejected that argument. Mr. Balbuena concluded that "the probability that [he] actually misapprehended the sentence he *** received or otherwise misunderstood the consequences of the plea communicated to him prior thereto [wa]s substantial," such that his guilty plea was "irremediably tainted by this mistaken waiver of, and violation of, his constitutional rights." Mr. Balbuena additionally argued that he received ineffective assistance of counsel due to his lawyer's "failure *** to argue effectively the misunderstanding and poor translation issue" in connection with his motion to withdraw the guilty plea and that the "failure to develop [this argument could not] be explained as tactical."

¶ 24 The State moved to dismiss Mr. Balbuena's petition, arguing that Mr. Balbuena's arguments regarding the circuit court's admonishments were either not preserved or were barred

by the doctrine of *res judicata* and, in the alternative, that the admonishments substantially complied with Rule 402. The State further argued that Mr. Balbuena had forfeited any argument that his misunderstanding or a faulty translation prevented him from understanding the length of the sentence he agreed to as part of his guilty plea by failing to raise it on direct appeal. Even if the issue was not forfeited, the State contended, the circuit court properly considered all of the competing evidence and correctly determined that Mr. Balbuena understood what he was agreeing to. Finally, the State argued that Mr. Balbuena provided no basis for a finding that his trial counsel provided ineffective assistance.

¶ 25 In his response to the State's motion to dismiss his postconviction petition, Mr. Balbuena asserted for the first time that "[t]he failure of [his] appellate counsel to even raise the issue [of the faulty translation] [wa]s deficient performance at the Appellate Court phase." Mr. Balbuena added: "[i]f and to the extent that these issues have not been developed by the First Amended Post-Conviction Petition, Defendant requests an opportunity to amend the petition to develop them more fully."

¶ 26 Following argument, the circuit court issued an order granting the State's motion and dismissing Mr. Balbuena's petition. The court agreed with the State that Mr. Balbuena's arguments regarding the sufficiency of the admonishments he received were barred by *res judicata*. It furthermore rejected Mr. Balbuena's argument that he received ineffective assistance of trial counsel, instead concluding that his counsel "adequately argued that [Mr. Balbuena] misunderstood the interpreter's statements," but that the weight of the evidence supported the opposite conclusion. The circuit court addressed neither Mr. Balbuena's argument that he received ineffective assistance of appellate counsel nor his request for leave to amend his postconviction petition to include such an argument. Nothing in the record indicates that Mr.

Balbuena sought a ruling on that request from the circuit court after his petition was dismissed.

¶ 27 JURISDICTION

¶ 28 The circuit court issued its order granting the State's motion to dismiss Mr. Balbuena's amended postconviction petition on January 6, 2012, and Mr. Balbuena timely filed his notice of appeal on January 27, 2012. Jurisdiction is thus proper pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009); R. 651(a) (eff. Dec. 1, 1984)).

¶ 29 ANALYSIS

¶ 30 On appeal, Mr. Balbuena maintains that his guilty plea was not voluntary because he incorrectly believed he was agreeing to a sentence of 20 months, rather than 20 years. Mr. Balbuena acknowledges that this issue was not raised on direct appeal but argues that he made a substantial showing in postconviction proceedings that his appellate counsel was ineffective for failing to raise it. Mr. Balbuena now asks us to reverse the circuit court's second-stage dismissal of his postconviction petition on this basis.

¶ 31 Much of the parties' briefing concerns issues of forfeiture. The State argues that Mr. Balbuena forfeited any argument that his appellate counsel provided ineffective assistance by raising it for the first time in his response to the State's motion to dismiss his postconviction petition. Mr. Balbuena acknowledges that the argument was not raised in either his initial or amended petitions but contends that, when he did raise it, he asked for an opportunity to amend his petition accordingly. Although Mr. Balbuena did not file a formal motion for leave to amend his petition, he argues that language in his response brief should have been construed and treated as such by the circuit court because his response contained all of the factual allegations necessary

to support an amended claim of ineffective assistance of appellate counsel. According to Mr. Balbuena, by denying his petition without ever addressing the performance of his appellate counsel, the circuit court implicitly—and erroneously—denied his request for leave to amend, a result that Mr. Balbuena contends is not in keeping with public policy favoring the liberal allowance of amendments.

¶ 32 Mr. Balbuena additionally contends that the State forfeited its forfeiture argument by failing to object in the circuit court to Mr. Balbuena raising the effectiveness of his appellate counsel for the first time in response to the motion to dismiss. The State, in response, takes the position that it had no obligation to raise any such objection where Mr. Balbuena failed to secure a ruling on his alternative request for leave to amend his postconviction petition.

¶ 33 Mr. Balbuena alternatively argues, in a supplemental brief, that, if we agree with the State that he forfeited his argument that his appellate counsel provided ineffective assistance, he has a claim that he did not receive reasonable assistance from his postconviction counsel. In response to this, the State argues in its supplemental response brief that the presumption of reasonable assistance by postconviction counsel cannot be overcome where the record indicates that the forfeited claim was substantively meritless.

¶ 34 Although we acknowledge the significant procedural hurdles identified by the State and discussed at length by the parties, it is unnecessary for us to resolve these issues because, for the reasons discussed below, we agree with the State that dismissal of Mr. Balbuena's postconviction petition would have been warranted even if the petition properly raised the issue of ineffective assistance by the counsel that represented Mr. Balbuena on his direct appeal based on the fact that the appellate lawyer did not present the claim that Mr. Balbuena did not understand the terms of his guilty plea.

¶ 35 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) establishes procedures by which an incarcerated criminal defendant may challenge his conviction or sentence for violations of his state or federal constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2008); *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). "A postconviction proceeding is not a[ ] [direct] appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings." *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Its scope is limited to constitutional issues that were not, and could not have been, previously adjudicated. *Whitfield*, 217 Ill. 2d at 183. Issues that were already decided by a reviewing court are barred by the doctrine of *res judicata* and issues that could have been raised on direct appeal but were not are forfeited. *Id.* To obtain postconviction relief, a defendant must establish that he suffered a substantial deprivation of his constitutional rights in the proceedings resulting in the conviction or sentence he seeks to challenge. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008).

¶ 36 Postconviction proceedings occur in three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the circuit court determines, without any input from the State, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(2) (West 2008); *Gaultney*, 174 Ill. 2d at 418. "To survive dismissal at this stage, a petition need only present the gist of a constitutional claim." *Id.* At the second stage, the circuit court may appoint counsel to represent the defendant and file an amended petition, and the State may file a motion to dismiss the petition. 725 ILCS 5/122-4, 5 (West 2008); *Gaultney*, 174 Ill. 2d at 418. Only if the petition makes a substantial showing of a constitutional violation—*i.e.*, the allegations are supported by the record or by accompanying affidavits—will the defendant proceed to the third stage, an evidentiary hearing on the merits. 725 ILCS 5/122-6 (West 2008); *People v. Silagy*, 116 Ill. 2d 357, 365 (1987). In determining whether to grant a third-stage hearing, the circuit court

takes all well-pleaded facts in the petition and in any accompanying affidavits as true, unless positively rebutted by the record (*People v. Evans*, 186 Ill. 2d 83, 89 (1999)) and does not make findings of fact or credibility determinations (*People v. Childress*, 191 Ill. 2d 168, 174 (2000)). "Nonfactual and nonspecific assertions which merely amount to conclusions," however, "are not sufficient to require a hearing under the Act." *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 37 We review the dismissal of a postconviction petition without an evidentiary hearing *de novo* (*People v. Sanders*, 2016 IL 118123, ¶ 31) and may affirm on any basis supported by the record (*People v. Jones*, 399 Ill. App. 3d 341, 359 (2010)). The question on appeal is "whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act." *Sanders*, 2016 IL 118123, ¶ 31.

¶ 38 Ineffective assistance of counsel can be a proper basis for postconviction relief. See *People v. Kunze*, 193 Ill. App. 3d 708, 726 (1990) (explaining why such claims are best made in postconviction proceedings). Criminal defendants are guaranteed the right to a fair trial, including the right to effective assistance of counsel, by both the federal and Illinois constitutions. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8. The test for ineffective assistance of counsel, which was articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984), has two parts. A defendant must demonstrate both that his counsel's representation, evaluated from the counsel's perspective at the time and not with the benefit of hindsight, "fell below an objective standard of reasonableness" and that " 'there is a reasonable probability that, but for [the] counsel's unprofessional errors, the result of the proceeding would have been different.' " *Albanese*, 104 Ill. 2d at 526 (quoting *Strickland*, 466 U.S. at 693). As the defendant must satisfy both parts of the test to sustain an ineffective

assistance of counsel claim, a court need not address both parts where it finds that one is lacking. As the *Strickland* court noted: "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

¶ 39 Here we conclude that, even if Mr. Balbuena properly raised in his postconviction petition the argument that he received ineffective assistance from his appellate counsel, that argument lacks merit because the second prong of the *Strickland* test is not met. Nothing in the record supports the proposition that Mr. Balbuena would have had a reasonable probability of success on direct appeal had his appellate counsel raised the argument that Mr. Balbuena misunderstood the length of the sentence he agreed to as part of his plea agreement.

¶ 40 Before we consider the likely outcome of an argument that could have been, but was not, made on direct appeal, we must consider the standard that this court would have applied. "[T]he general rule is that it is within the sound discretion of the trial court to determine whether a guilty plea may be withdrawn, and, on appeal, th[at] decision will not be disturbed unless the decision is an abuse of that discretion." *People v. Davis*, 145 Ill. 2d 240, 244 (1991). An abuse of discretion will only be found where a court's decision is "arbitrary, fanciful or unreasonable or where no reasonable [person] would take the view adopted by the trial court." (Internal quotation marks omitted.) *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). The circuit court is in a superior position to observe the defendant's demeanor and evaluate his conduct. *People v. Pugh*, 157 Ill. 2d 1, 24 (1993). It should permit withdrawal whenever "it appears that [a] plea of guilty was entered on a misapprehension of the facts or of the law, or in consequence of misrepresentations by counsel *** or someone else in authority." (Internal quotation marks omitted.) *Davis*, 145 Ill. 2d at 244. "In the absence of substantial objective proof showing that a defendant's mistaken

impressions were reasonably justified," however, "subjective impressions alone are not sufficient grounds on which to vacate a guilty plea. Further, the burden is on the defendant to establish that the circumstances existing at the time of the plea, judged by objective standards, justified the mistaken impression." *Id.*

¶ 41 Mr. Balbuena argues that, following the evidentiary hearing, the circuit court erroneously observed that "nowhere in the petition or motion does it indicate that [Mr. Balbuena] didn't think he wasn't going to get 20, that he could have got less" and abused its discretion by relying on that to reject his claim that he misunderstood the terms of his plea agreement. However, this statement is taken out of context. The circuit court made this statement not while considering whether Mr. Balbuena understood the terms of his plea agreement, but while discussing Mr. Balbuena's argument that the court failed to properly admonish him regarding the minimum and maximum sentences he faced. The circuit court found that, because the plea agreement was fully negotiated and not based on any potential sentence Mr. Balbuena could have received, any failure by the court to provide a sentencing range during its admonishment did not invalidate the agreement. As to Mr. Balbuena's argument that he misunderstood the sentence he agreed to in his plea agreement, the record indicates that the court considered that as well, and found that "the defendant knew he was going to get 20 years." But even if the court's statement reflected a misreading of Mr. Balbuena's petition, it would have been of little relevance on his direct appeal. This court "review[s] the trial court's decision, not its reasoning, and, if the decision is correct, we may affirm the trial court on any basis in the record." *In re Marriage of Heindl*, 2014 IL App (2d) 130198, ¶ 31.

¶ 42 The record here reveals that, during the hearing on his motion to vacate his guilty plea, Mr. Balbuena failed to present "substantial objective proof showing that [his] mistaken

impressions were reasonably justified." *Davis*, 145 Ill. 2d at 244. As evidenced by the portion of the hearing transcript reproduced above, to conclude that Mr. Balbuena's guilty plea was the result of his objectively mistaken impression that he would receive a sentence of 20 months rather than 20 years, the circuit court would have had to find that the word "years" was either mistranslated as "meses" at least five times during the portion of the Rule 402 conference quoted above, or that it was translated correctly and Mr. Balbuena misheard it at least those five times, due to an unidentified hearing impairment in one ear that was later cured by an unidentified medication. Of course the five times that Mr. Balbuena was told the plea agreement was for a sentence of years and not months that are quoted above were in addition to the times that Public Defender Yi, as confirmed by Ms. Garcia, testified that she explained the terms of the plea deal to Mr. Balbuena. On this record, it is far from "reasonably probable" that this court would have held that the circuit court abused its discretion when it denied Mr. Balbuena's motion to withdraw his guilty plea.

¶ 43 Mr. Balbuena nevertheless contends that Ms. Yi's testimony that he told her he wanted to dispose of the case quickly "suggested [that Mr.] Balbuena may have been rushing through the proceedings and not paying attention to the details of what the interpreter was telling him." He argues that he never would have knowingly agreed to a sentence pursuant to which he would not be released from prison until the age of 82. Even accepting these assertions as true, they do not provide "substantial objective proof" that Mr. Balbuena's mistaken impression was justified.

¶ 44 Mr. Balbuena also cites *People v. Shanklin*, 351 Ill. App. 3d 303 (2004), for the proposition that "his rote responses to the court's questions about his understanding of the terms of the agreement [cannot] be relied on as proof that his plea was knowing and voluntary." The defendant in *Shanklin*, however, was diagnosed by psychiatric and social-work personnel as

being "in the mildly mentally retarded range" with "difficulty receiving and retaining verbal information." *Shanklin*, 351 Ill. App. 3d at 306. Under those circumstances, the court concluded that, on their own, the defendant's "affirmative answers to rote questions" could not be relied on to conclude that he understood the proceedings. *Id.* at 307. Here, by contrast, the record does not indicate that Mr. Balbuena has ever suffered from a mental disability and, as the portion of the hearing transcript excerpted above indicates, he did not routinely give affirmative answers to rote questions, but gave both yes and no answers to the circuit court's questions, consistent with the responses of someone who generally understood what he was being asked.

¶ 45 Mr. Balbuena finally asserts that even if—on its own—the argument based on his purported misunderstanding of his sentence would not have caused a panel of this court to reverse the circuit court's denial of his motion to withdraw his guilty plea, it would have been successful in combination with Mr. Balbuena's other argument that he received insufficient Rule 402 admonishments. Mr. Balbuena relies on *People v. Davis*, 145 Ill. 2d 240 (1991), for the proposition that, "had appellate counsel raised both issues in conjunction with each other, there is a reasonable probability that the outcome of the appeal would have been different." The defendant in *Davis* pled guilty to burglary and received a 10-year prison sentence. *Davis*, 145 Ill. 2d at 242-43. He moved to withdraw his guilty plea because he claimed it was based on the misunderstanding, shared by his counsel, that he would be eligible for TASC probation. *Id.* at 243-44. The appellate court reversed the denial of the motion on this basis but the supreme court affirmed for a different reason, finding the circuit court failed to properly admonish the defendant regarding the minimum and maximum sentences he actually faced and this error, "coupled with" the defendant's claimed misunderstanding, required reversal. *Id.* at 247, 250.

¶ 46 Mr. Balbuena acknowledges that *Davis* involved an open plea, rather than a plea to a

negotiated sentence like the one in this case, but insists that the distinction makes no difference. We do not agree. As this court noted in its order resolving Mr. Balbuena's direct appeal, *Davis* is distinguishable on this basis. *People v. Balbuena*, No. 1-07-0061, slip op. at 8 (2007). Our supreme court held in *People v. Krantz*, 58 Ill. 2d 187, 195 (1974), that a defendant receives substantially compliant admonishments when he is advised by the circuit court of the sentence that may be imposed if his plea is accepted. For an open plea, it stands to reason that the admonishments should inform the defendant of the minimum and maximum sentences that could be imposed at a subsequent sentencing hearing. For a negotiated plea like the one that Mr. Balbuena received, however, this court has held that it is sufficient for the defendant to be told, as Mr. Balbuena was in this case, the specific sentence that he will receive if the plea is accepted. *People v. Davis*, 24 Ill. App. 3d 758, 761 (1974).

¶ 47 We conclude then, that even had his appellate counsel raised on direct appeal the issue of Mr. Balbuena's misunderstanding regarding the length of the sentence he would receive if he pleaded guilty, this argument would not have resulted in reversal of the circuit court's order denying Mr. Balbuena's motion to withdraw his guilty plea and vacate his sentence. Mr. Balbuena thus suffered no prejudice as a result of his appellate counsel's failure to raise this issue on direct appeal.

¶ 48 CONCLUSION

¶ 49 In sum, even if the issue of his appellate counsel's performance was properly raised in postconviction proceedings, Mr. Balbuena's inability to demonstrate prejudice satisfying the second prong of the *Strickland* test prevents him from making a substantial showing that his appellate counsel's failure to raise his purported misunderstanding of the plea agreement on direct appeal caused him to suffer a deprivation of his constitutional rights. Accordingly, we

affirm the circuit court's dismissal of Mr. Balbuena's postconviction petition at the second stage.

¶ 50 Affirmed.