

NOTICE

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2016 IL App (4th) 150779-U

NO. 4-15-0779

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 2, 2016

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

DOTTIE BRIGHT,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Clark County

) No. 11CF31

) Honorable

) Tracy W. Resch,

) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court's decision was not manifestly erroneous where defendant failed to make a substantial showing of a constitutional violation.

¶ 2 In March 2013, defendant, Dottie Bright, entered a fully negotiated plea to three counts of aggravated driving under the influence. Pursuant to the negotiations, the trial court sentenced defendant, on each of the Class 2 felony counts of aggravated driving under the influence of alcohol, to a 15-year term in the Illinois Department of Corrections, to be followed by a 5-year period of mandatory supervised release. On the Class 4 felony count of aggravated driving under the influence of alcohol, the trial court imposed the agreed-upon sentence of four years in the Illinois Department of Corrections. As negotiated, all of defendant's sentences were ordered to run concurrently. On May 19, 2014, defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 7 (West 2014)). Eventually,

defendant's petition proceeded to a third-stage hearing. Defendant appeals the trial court's July 2015 denial of her petition at the third stage.

¶ 3 We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2011, defendant was charged by information with one count of reckless homicide, a Class 2 felony (720 ILCS 5/9-3(e-3)(ii) (West 2010)). In May 2011, defendant was charged by information with two counts of aggravated driving under the influence of alcohol, a Class 2 felony (625 ILCS 5/11-501(d)(1)(F) (West 2010)), and one count of aggravated driving under the influence of alcohol, a Class 4 felony (625 ILCS 5/11-501(d)(2)(A) (West 2010)). Each count, on the face of the information, specified the possible penalties. Defendant's mother, Janice Dillinger, secured her daughter's release on bond in May 2011. Eventually, defendant's mother hired attorney Mervin Wolfe to represent defendant. In August 2011, Wolfe filed a motion for a fitness evaluation, which the State did not contest. During a February 2012 hearing, the trial court adjudicated defendant unfit to stand trial. Subsequently, in September 2012, the court entered an order finding defendant restored to fitness. Thereafter, in December 2012, Wolfe filed a motion to suppress. Upon the February 2013 denial of defendant's motion to suppress, the court confirmed the jury trial allotment of March 21, 2013.

¶ 6 On March 7, 2013, defendant entered a fully negotiated plea of guilty to three counts of aggravated driving under the influence of alcohol. During the plea hearing, defendant signed a written acknowledgment indicating her understanding of her rights and her intention to plead guilty. In response to questioning by the trial court, defendant expressed her understanding of the pending charges, the possible penalties, and her rights. In offering a factual basis for the plea, the State indicated, on the date in question, defendant drove a pickup truck around 9 p.m.

after consuming alcohol that afternoon or evening. She approached the intersection of County Road 300 North and Illinois Route 1 at a speed in excess of 80 miles per hour. Due to her intoxication, defendant failed to stop at the stop sign at the intersection and crashed into an ambulance. Defendant's passenger and an ambulance emergency medical technician (EMT) died. Subsequent testing that evening revealed defendant's blood alcohol concentration to be 0.149.

¶ 7 Wolfe stipulated that the prosecution had evidence of the foregoing facts and defendant personally declined the opportunity to offer any changes or corrections to the factual basis. Thereafter, defendant entered into a fully negotiated plea whereby the trial court imposed on each of the Class 2 felony counts of aggravated driving under the influence of alcohol a sentence of 15 years in the Illinois Department of Corrections, to be followed by a 5-year period of mandatory supervised release. On the Class 4 felony count of aggravated driving under the influence of alcohol, the trial court imposed the agreed-upon sentence of four years in the Illinois Department of Corrections. The trial court ordered all of defendant's sentences to run concurrently.

¶ 8 In May 2014, defendant filed a postconviction petition alleging she (1) was denied effective assistance of counsel; and (2) did not knowingly enter her plea. She attached to her petition an affidavit asserting her attorney ignored evidence that she was not the driver. She asserted that, as a result of her attorney's threat that she would "fry" if she did not accept the plea, she believed, if convicted following a trial, she would be electrocuted. Defendant also attached a February 2012 report from Dr. Terry Killian. Although Dr. Killian did not examine defendant, he did find strong evidence that defendant had substantial cognitive impairment, which would cause defendant to process information slowly. In Dr. Killian's opinion, defendant's cognitive

limitation would not keep her from being able to negotiate a plea agreement through her attorney. Finally, defendant also attached an affidavit from her mother (Janice Dillinger), a copy of Dillinger's power of attorney for defendant, and a contract for legal services with her former attorney, Wolfe. Ultimately, in July 2015, over the course of two days, the trial court conducted a third-stage hearing on defendant's petition.

¶ 9 We summarize the evidence adduced during defendant's third-stage hearing. Defendant's mother and her brother, David Wall, both testified. Dillinger testified to the family resolve to take the matter to trial in the absence of a plea bargain for probation. According to Dillinger, subsequent to the plea hearing, defendant informed her that her attorney had told her that she would "fry" if she didn't sign papers. Dillinger further indicated the passenger in the pickup, defendant's boyfriend, Steve Daugherty, frequently drove defendant's truck without permission and "was always demanding and drunk, and he always wanted to be the driver." Defendant's brother testified to defendant being an infrequent driver, whom he never saw driving when she was with Daugherty. He went on to state that defendant, who "drove like a grandma," would never drive in excess of 80 miles per hour and could not drink alcohol due to her medications.

¶ 10 Defendant also testified. According to defendant, although she was found unconscious and had no memory of the accident, through flashbacks, she felt she knew what happened. On the night in question, Daugherty forced her to leave the home of a mutual friend, Steve York, and go to Daugherty's house. Given she did not want to stay at his house, Daugherty wanted to take her back to York's house. Her flashback gave her the feeling she did not drive because she saw herself on her knees, then pulling herself up out of the floorboard. Defendant insisted she told her attorney about recalling that she was not driving, but he did not believe her.

¶ 11 According to defendant, Wolfe told her, in front of his secretary, that a plea "has to be done today" or "this judge will fry you." She took Wolfe's comment to mean that if she were found guilty following a trial, she would be electrocuted. She entered the plea to avoid being put to death. Defendant admitted recalling her attorney advising her that she faced a possible prison term of between 6 and 26 years. Moreover, she agreed she accepted the 15-year sentence to avoid the possibility of a greater sentence. The parties admitted into evidence as joint exhibit No. 1 a transcript of defendant's plea.

¶ 12 James Creswell, the first EMT on the scene, testified that the passenger, Daugherty, was sitting diagonally in the passenger seat, with defendant's back pressed against his chest. Defendant was lying diagonally across the front seat with her lower extremities pinned between the driver's seat and the steering wheel. Daugherty's lower extremities were pinned by the passenger side dashboard. The report of EMT Andrew Hargrave, admitted into evidence as defendant's exhibit No. 6, also identified defendant as the driver.

¶ 13 The trial court admitted Daugherty's autopsy report and the Illinois State Police crash reconstruction report of Steven Colclasure as joint exhibit Nos. 2 and 3, respectively. The autopsy report detailed 44 items of external evidence of injury and 19 items of internal evidence of injury. The autopsy identified cerebral and cervical spinal injuries, a "flail chest deformity," multiple abdominal injuries, and pelvic fractures. According to Colclasure's report, the occupants were not restrained by safety belts. Both occupants were unconscious. Colclasure estimated the pickup's speed reached 82 miles per hour before braking, and impact occurred at 50 miles per hour. Colclasure concluded defendant drove the evening of the crash.

¶ 14 Sheriff Jerry Parsley testified he responded to the crash. He described how the bottom of the steering wheel had to be cut off in order to extricate defendant from the driver's

side. According to the sheriff, there was no evidence of defendant's truck rolling over, as neither the top of the cab nor the front of the hood were crushed down.

¶ 15 Wolfe testified to his systematic review of the voluminous discovery in the case. His review included going over everything with defendant. According to Wolfe, the statements of all of the first responders placed defendant behind the wheel. Additionally, the Illinois State Police reconstruction report found defendant to be the driver. An emergency room nurse consulted by Wolfe determined Daugherty's position in the passenger seat at the point of impact caused him to be crushed to death. The nurse went on to opine defendant's injuries were inconsistent with having been the passenger.

¶ 16 Wolfe also testified about defendant's evolving theories of defense, which he initially attributed to her memory. Later, however, he decided the changes were the result of dishonesty. First, defendant suggested a complete lack of recollection. Then, defendant indicated she was driving because Daugherty was abusive and made her drive. Additionally, at one point, defendant suggested a theory that the truck rolled over, causing her and Daugherty to switch places in the pickup. Although there was a report from Travelers Insurance Company (Travelers) suggesting the pickup rolled, that report identified defendant as the driver.

¶ 17 Wolfe cited ethical constraints that applied once defendant told him she was driving. Moreover, none of defendant's witnesses saw defendant or Daugherty drive on the day in question and could only substantiate defendant's claims of abuse by Daugherty. Given the inability to establish defendant did not drive, Wolfe focused on suppressing the blood-test evidence, which was ultimately unsuccessful. Wolfe estimated defendant had a 99.99% likelihood of being convicted at trial. He recommended defendant enter the plea because in his view, doing so would save defendant six or seven years off of her prison sentence. Wolfe

indicated that prior to the plea, a third person had recently died from injuries sustained during the crash, and this increased his concern regarding the possible sentence defendant would receive in the absence of a plea. Wolfe denied ever using the word "fry" with defendant or suggesting in any way that she faced the death penalty.

¶ 18 Jennifer Kuhn, the former legal assistant of Wolfe, testified that while she did hear Wolfe explain the possible penalties to defendant on more than one occasion, she denied ever hearing Wolfe tell defendant that she could be "fried" or put to death. Kuhn described defendant as "willing to accept" the negotiated plea. Following the presentation of evidence, the trial court directed the parties to file memoranda of law and appear for closing arguments. During a September 2015 hearing, the court heard closing arguments, and thereafter, in a detailed oral pronouncement, it denied defendant's petition.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant appeals the third-stage dismissal of her postconviction petition. On appeal, defendant raises the following issues: (1) she was denied effective assistance of counsel; and (2) her plea was not knowingly entered.

¶ 22 A. Standard of Review

¶ 23 The Post-Conviction Hearing Act allows a criminal defendant to raise a claim his or her conviction resulted from a substantial violation of his or her constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2014). "Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal." *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002).

¶ 24 "Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). At the third stage, postconviction petition proceedings advance to an evidentiary hearing, where fact-finding and credibility determinations are involved. *Id.* In such cases, we only reverse the trial court's decision if it is manifestly erroneous. *Id.* A decision is manifestly erroneous when the error is clearly evident, plain, and indisputable. *People v. Kelley*, 2013 IL App. (4th) 110874, ¶14, 986 N.E. 2d 770.

¶ 25 B. Ineffective Assistance of Counsel

¶ 26 We evaluate a defendant's claims of ineffective assistance of counsel under the two-part test the United States Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The defendant must also show a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient representation. *Id.* at 694. Here, that means defendant must show a reasonable probability that, absent counsel's errors, she would have pleaded not guilty and insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324, 335, 841 N.E. 2d 913, 920, (2005).

¶ 27 Defendant appeals the trial court's finding that she failed to make a substantial showing of a constitutional violation. Defendant argues the evidence presented during the postconviction hearing established she received ineffective assistance of counsel. Specifically, defendant claims she received ineffective assistance of counsel due to her counsel's failure to investigate and pursue a defense asserting defendant was not the driver of the pickup. Defendant maintains Wolfe simply accepted that she was driving and failed to engage in the necessary

investigation to show otherwise. According to defendant, ample evidence existed demonstrating or suggesting she did not drive the pickup.

¶ 28 The State asserts there is a strong presumption that defense counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment. The State further contends defendant failed to establish that Wolfe could have gone to trial with a plausible defense contesting whether defendant drove the pickup at the time of the crash. Finally, the State argues defendant cannot show prejudice because success at trial with such a defense would have been unlikely.

¶ 29 Every witness who observed the bodies of Daugherty and defendant in the truck after the crash placed defendant in the driver's seat. Sheriff Parsley testified to a portion of the steering wheel being removed in order to extract defendant from the driver's seat. Moreover, as testified to by EMT Creswell, the nature of the injuries incurred by Daugherty and defendant corroborated the State's position that defendant drove that night. Also, the written report of EMT Hargrave, admitted as exhibit No. 6, refers to a female driver. Moreover, the traffic crash reconstruction report prepared by Trooper Steven Colclasure, admitted into evidence as joint exhibit No. 3, identified defendant as the driver. During the hearing, defendant failed to present any testimony, expert or otherwise, challenging Colclasure's report. The report from Travelers, which was not admitted into evidence, opined defendant's truck rolled over but failed to suggest the occupants switched positions due to the rollover. Travelers also identified defendant as the driver. Although the coroner did not testify, the autopsy report, admitted into evidence as joint exhibit No. 2, failed to indicate that Daugherty suffered any injuries attributable to the steering wheel or defendant's head. Aside from Wolfe's legitimate determination that a defense asserting

defendant did not drive would be implausible, the evidence showed Wolfe did talk to witnesses regarding whether defendant drove on the night in question.

¶ 30 In her brief, defendant posits a multiplicity of speculative propositions that, according to her, raised reasonable doubt and, thus, should have been investigated or adopted by Wolfe. Specifically, defendant asserts there was evidence to establish that (1) she always "drove like a grandma"; (2) Daugherty routinely drove her pickup at high speeds while intoxicated; (3) Daugherty always drove when they were together; and (4) defendant would not drive to Daugherty's residence because she thought his residence was evil. Defendant asserts this evidence, had it been put before a jury, would have raised reasonable doubt. We disagree.

¶ 31 Ultimately, the jury would need to be convinced, beyond a reasonable doubt, that at the time of the crash, the driver of the pickup was defendant. During the hearing, defendant failed to present any evidence to overcome the overwhelming evidence proving her to be the driver. To suggest the jury would be convinced by speculation and purported habit evidence, if deemed admissible, and choose to ignore the testimony of witnesses on the scene as well as medical and professional reconstruction evidence, is a serious stretch.

¶ 32 In ruling on this claim, the trial court noted, "other than defendant's own testimony, no evidence was presented at the postconviction hearing showing Mr. Wolfe knew of, or upon due inquiry, might have discovered evidence that defendant was not driving." The court found it incredible that defendant claimed to have no memory of the accident but was persuaded by a flashback that she did not drive the truck. The court's observation is fully supported by the evidence at the hearing. As previously stated, when alleging ineffective assistance of counsel, defendant must first show deficient performance by counsel. The trial court, in assessing the evidence and determining the credibility of the witnesses, found no deficiency in counsel's

performance. Our review of the evidence precludes us from finding the trial court's decision manifestly erroneous. To the contrary, defendant failed to make a substantial showing that she was denied effective assistance of counsel due to Wolfe's investigation and recommendation based on his assessment of the identification of the driver. Given our approval of the trial court's resolution of the performance prong of defendant's ineffective assistance of counsel claim, her claim is defeated. A defendant's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *Strickland*, 466 U.S. at 687.

¶ 33

C. Guilty Plea

¶ 34 A defendant who pleads guilty waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Due process of law requires that this waiver be voluntary and knowing. If a defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and, therefore, is void. See, e.g., *Boykin v. State of Alabama*, 395 U.S. 238, 243 (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). A defendant must be advised of the direct consequences of a guilty plea. A direct consequence of a guilty plea, of which a defendant must be informed, “represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.” *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir. 1973).

¶ 35 On appeal, defendant concedes the voluntariness of her plea. Defendant fails to allege any infirmity in the manner in which the trial court conducted the plea. However, defendant challenges the knowingness of her plea in light of Wolfe's alleged statement that defendant would "fry." Defendant asserts Wolfe's use of the word "fry" forced her to enter a plea

of guilty as she believed a plea to be the only way to avoid the possibility of death by electrocution.

¶ 36 The State argues defendant was well aware of the possible penalties and accepted the plea to avoid a longer sentence. Additionally, the State urges us to consider that Wolfe and his legal secretary denied Wolfe ever used the word "fry" in his conversations with defendant. According to the State, the trial court properly resolved this credibility dispute in favor of Wolfe. We agree with the State.

¶ 37 The transcript of the guilty plea reflects the proper admonishment of the defendant. In fact, defendant testified to being admonished by the court and did not challenge the adequacy of the admonishment. During the plea of guilty, defendant represented to the court that she understood the penalty range.

¶ 38 In ruling on the postconviction petition, the trial court found this claim incredible. In recalling the plea, the trial court indicated a firm conviction that defendant understood exactly the possible penalties, and she never suffered any confusion as to the possible penalties. The court went on to note, in spite of multiple opportunities during the plea to ask questions or correct statements made in court, defendant declined to do so.

¶ 39 As to whether Wolfe ever used the word "fry," the trial court heard and saw all of the witnesses. Defendant offered no independent witness to corroborate her rather implausible claim. Under these circumstances, we are in no position to second-guess the court's credibility determination. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Based on the evidence presented, the trial court rejected defendant's claim of being forced to plead guilty due to her perception she faced death by electrocution. As such, defendant failed to make a substantial

showing that her plea was unknowing. Thus, defendant fails to persuade us that the trial court's decision was manifestly erroneous.

¶ 40

III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.