

NOTICE
Decision filed 10/07/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140333-U

NO. 5-14-0333

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Christian County.
)	
v.)	No. 08-CF-98
)	
DOUGLAS A. FORD,)	Honorable
)	Kimberly G. Koester,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Schwarm and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's postconviction petition was properly denied by the circuit court where the defendant failed to prove a substantial violation of his constitutional rights.

¶ 2 The defendant, Douglas A. Ford, appeals the third-stage dismissal of his postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other

document supporting his appeal. The defendant filed a response. We considered OSAD's motion to withdraw as counsel on appeal and the defendant's response. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Christian County.

¶ 3

BACKGROUND

¶ 4 The State charged the defendant with multiple counts of sex-related crimes. After a bench trial, the court entered guilty verdicts on count I and count X. Count I alleged aggravated criminal sexual abuse in that the defendant committed an act of sexual penetration with a victim between 13 and 17 years of age while the defendant was more than five years older than the victim. Count X charged the defendant with criminal sexual assault in that while the defendant was more than five years older than the victim who was between 13 and 17, the defendant placed his penis in the vagina of the victim, and, at that time, the defendant was in a position of trust, supervision, or authority over the victim.

¶ 5 A full recitation of the facts presented at the defendant's bench trial is found in our decision on direct appeal (*People v. Ford*, 2012 IL App (5th) 090525-U). We need not rehash the trial here. It suffices to state that the victim offered extended testimony of sexual acts she engaged in with the defendant while she was under the age of 18. Included in the victim's testimony is her observation that the defendant wore "tighty-whitey" underwear. During the trial, defense counsel presented a video recording of an interview of the victim. The recording was provided for impeachment of the victim's

testimony at trial. The trial court ordered a 1-hour-and-15-minute lunch recess during which it was going to watch the recording, of which defense counsel stated the court only needed to watch one hour. Upon reconvening, the trial court indicated it watched the recording.

¶ 6 In announcing its verdict, the trial court made a number of statements relevant to this appeal. First, the court found that the victim "exaggerated certain portions of her testimony, [and] lacked specificity on other portions of her testimony." Second, the court found that an eyewitness to the crime, Anthony Mollet, was credible and unimpeached. Third, the court found DNA evidence probative of the crime. Fourth, the court found the defendant's testimony to not be credible. Fifth, the court found testimony by a third party that the defendant told her that he was involved in a relationship with an underage girl credible.

¶ 7 The defendant filed a motion for a new trial that the circuit court denied. The circuit court sentenced the defendant to four years' imprisonment on count X and seven years' imprisonment on count I, sentences to be served consecutively.

¶ 8 The defendant filed a direct appeal to this court. The defendant raised a number of issues on direct appeal, none that are relevant to this appeal. We affirmed the defendant's conviction and remanded to remedy various issues regarding fees and the term of mandatory supervised release. *People v. Ford*, 2012 IL App (5th) 090525-U.

¶ 9 On July 1, 2013, the defendant filed a petition for postconviction relief. The defendant raised three issues in his petition: (1) the trial judge lied about viewing a video of the victim's interview; (2) trial counsel provided ineffective assistance because he

failed to object to the trial judge's failure to watch the video; and (3) trial counsel was ineffective because he failed to offer impeaching testimony of Duane A. Ford, who was willing to testify and present at the trial. The petition proceeded to a third-stage evidentiary hearing, after which the trial court denied the petition.

¶ 10 In support of his petition, the defendant provided several affidavits. Douglas McGee stated that he was in attendance at the morning and afternoon sessions of the defendant's trial. Laura Powell affirmed that she was present on the second day of the defendant's trial and that the lunch break lasted 1 hour and 15 minutes. She also said that she saw the trial judge leave the courthouse 15 minutes after the break started and return to the courthouse 15 minutes before the trial restarted after the lunch recess. Patricia Ford's affidavit stated that she was present at the defendant's trial and heard the trial judge call for an hour recess for lunch. Her affidavit further states that court resumed one hour later. Duane Ford stated that the video in question was at least two hours long and he was surprised when the trial judge announced a one-hour recess during which he was going to watch the video. Finally, his affidavit states that he observed the trial judge leave the courthouse 15 minutes after the recess began. In a second affidavit, Duane Ford declared that between the defendant's arrest and conviction he lived with the defendant. He observed that the defendant wore colored boxer shorts, not "tightey whities." Ford further stated that he had seen the video of the victim's interview where she claimed the defendant wore the "tightey-whitey" underwear.

¶ 11 The court advanced the defendant's petition to third-stage proceedings and held a hearing on the petition. Having previously watched the video in question, the court found

that the video was 1 hour and 20 minutes long, and that a significant portion of the video did not relate to the defendant's case. At the hearing the following testimony was presented. Phillip McGuire, a friend of the defendant, testified that he was present on both days of the defendant's trial. He was in the courthouse prior to the lunch recess. McGuire was outside the courthouse 5 to 10 minutes after the recess began. He saw the trial court judge outside of the courthouse near a car. He did not see the judge get into a car, but five minutes later he observed that the judge and car were gone. He later observed the judge enter the courtroom about 10 minutes before the recess ended. On cross-examination, McGuire admitted that he did not know where the judge was during the recess. Laura Smith testified that the recess was supposed to be "about an hour." She saw the judge leave the courthouse headed towards a line of cars about 15 minutes after the recess began. A few minutes later she noticed that the judge was gone, and it appeared that a vehicle had moved. She was present for another 10 minutes in front of the courthouse and never saw the judge reenter the courthouse. She later saw the judge headed toward the courtroom. On cross-examination, she admitted that she did not know if the recess lasted 1 hour or 1 hour and 15 minutes. She also admitted that she had no idea where the judge spent the recess.

¶ 12 Ultimately, the court denied the defendant's postconviction petition. The court found that the video was only 55 minutes long, with only 50 minutes related to the case at issue. It further found: there was no direct evidence that the trial judge did not view the evidence; the trial judge specifically stated that he viewed the tape; the trial judge found some of the victim's testimony unreliable; the trial judge did not find the defendant

credible; and the trial judge weighed the evidence as shown by the fact the defendant was acquitted on many counts. Ultimately, the postconviction court ruled that: (1) the trial judge did view the evidence in question; and (2) even if the trial judge did not view the video, the record shows that the court recognized that the victim's testimony was impeached, so the desired result of the video—to impeach the victim—was obtained.

¶ 13 The defendant filed a notice of appeal. After reviewing the case, OSAD filed a *Finley* motion alleging there was no merit to the appeal and seeking to withdraw.

¶ 14 ANALYSIS

¶ 15 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage the court determines if the petition presents the gist of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition for failing to state the gist of a constitutional violation, the petition moves to second-stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage of the proceeding, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. When confronted with a motion to dismiss a postconviction petition, "the circuit court is

concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. All facts not rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381. After an evidentiary hearing where fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23 (citing *People v. Beaman*, 229 Ill. 2d 56, 72 (2008)). "Manifest error is defined as error which is clearly evident, plain, and indisputable. [Citations.]" (Internal quotation marks omitted.) *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 16 An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, a defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Id.* at 525. Second, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* In *People*

v. Tate, 2012 IL 112214, the Illinois Supreme Court stated that at the second stage of postconviction proceedings the petitioner must " 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670. It is objectively unreasonable if an "attorney fail[s] to ensure that [a] defendant enter[s] [a] plea voluntarily and intelligently." *People v. Huante*, 143 Ill. 2d 61, 69 (1991).

¶ 17 We first turn to the defendant's claim that the trial judge did not watch the video offered to impeach the victim's testimony. The defendant supported this claim by providing affidavits and testimony of people who claimed to have seen the trial judge outside the courthouse both at the beginning and end of the lunch recess. The defendant provided no evidence that showed the trial judge left the immediate vicinity of the courthouse, or that he was out of his chambers for more than a few minutes during the lunch recess. The video in question begins with an interview of the victim regarding this case that lasts less than 53 minutes. There is then a roughly 20-minute interview regarding a different case. Then, at the end of the video, there is a two-minute discussion regarding a freezer in the defendant's home which had no relevance to any testimony given at trial. Prior to the recess, defense counsel requested that the judge watch the video, indicating that the video was about an hour. It is possible, even likely, that the trial judge did not see the two-minute clip at the end of the video. The judge would not have

known to skip to the end of the video and could not have watched the entire video to come across this clip in the length of the recess. The trial judge could have reasonably stopped watching the video after 53 minutes, roughly the length of time required by defense counsel. This left plenty of time for the trial judge to be outside of his chambers both before and after watching the relevant part of the video. We cannot find that the postconviction court erred in determining that the trial judge watched the video. Given the finding that the trial judge watched the video, there is no error on the part of trial counsel for failing to object that the court did not watch the video. Consequently, we cannot find that the circuit court's decision to deny the defendant's postconviction claim with respect to the video was manifestly erroneous.

¶ 18 We now turn to the defendant's claim that his trial counsel failed to impeach the victim's testimony that the defendant wore "tighty-whitey" underwear with the defendant's father's testimony that while he lived with the defendant following the defendant's arrest, the defendant wore boxer briefs. The circuit court made no findings with regard to this allegation, and there was no testimony given regarding this issue at the evidentiary hearing. We will assume, without deciding, that this issue was not waived by failure to present evidence at the evidentiary hearing. Ford's affidavit did not state that he ever told the defendant's trial attorney about the discrepancy between the types of underwear referenced in the video and his observations. Trial counsel cannot be found to have acted objectively unreasonably by not impeaching the victim with facts he was not made aware of. And even if trial counsel's actions were objectively unreasonable, it would not have changed the outcome of the trial. While the trial judge stated that he had

reservations about the victim's testimony, he found the eyewitness testimony to be unimpeached. This one bit of impeachment, even if it were considered probative of what happened before the defendant lived with Ford, would not be enough to overcome the eyewitness testimony of the crime.

¶ 19

CONCLUSION

¶ 20 The circuit court properly denied the defendant's postconviction petition. OSAD's motion for leave to withdraw is granted, and the circuit court of Christian County's order is affirmed.

¶ 21 Motion granted; affirmed.