2017 IL App (3d) 160052-U

Order filed August 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois.
Plaintiff-Appellant and Cross-Appellee,	)	
v.	)	Appeal Nos. 3-16-0052 3-16-0053
ALTON G. SMITH,	)	Circuit No. 04-CF-378
Defendant-Appellee and Cross-Appellant.	)	Honorable Clark E. Erickson, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's decisions to vacate defendant's conviction for armed violence and the 85% truth-in-sentencing requirements for defendant's home-invasion and armed-robbery convictions were not manifestly erroneous. Further, defendant failed to overcome the presumption that postconviction counsel provided reasonable assistance.

¶ 2 In November 2015, the trial court granted, in part, defendant, Alton G. Smith's, petition for postconviction relief following a third-stage evidentiary hearing pursuant to the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). Specifically, the court vacated (1) defendant's conviction for armed violence after finding trial counsel ineffective for failing to impeach the victim with medical records contradicting his testimony regarding the extent of his injuries, but it held defendant could be retried on that offense, (2) the 85% truth-in-sentencing requirement for the home invasion and armed robbery sentences, subject to reinstatement in the event defendant is retried and convicted of armed violence, and (3) the 15-year add-on sentence for home invasion, which was based on defendant being armed with a firearm, because the issues instruction that went to the jury only stated defendant was "armed with a dangerous weapon."

¶ 3 The State appeals and defendant cross-appeals. The State asserts that the trial court erred in vacating (1) defendant's armed-violence conviction and (2) the 85% requirement for defendant's home invasion and armed robbery convictions because the evidence was sufficient to support a finding of great bodily harm.

¶ 4 Defendant cross-appeals, asserting that postconviction counsel provided unreasonable assistance where she abandoned his *pro se* petitions and, consequently, at least two legally viable claims. Specifically, defendant takes issue with postconviction counsel's failure to pursue a claim of ineffective assistance of trial counsel where trial counsel failed to (1) present optometry records or (2) present mitigating evidence.

¶ 5 We affirm.

¶ 6 FACTS

¶ 7 In August 2004, defendant was charged by indictment with two counts of home invasion (counts I and II) (725 ILCS 5/12-11(a)(2), 11(a)(2) (West 2004)); two counts of armed robbery (counts III and IV) (725 ILCS 5/18-2(a)(2) (Wet 2004)); armed violence (count V) (725 ILCS

5/12-4.6(a)(West 2004)); aggravated battery of a senior citizen (count VI) (725 ILCS 5/12-3 (West 2004)); unlawful possession of a weapon by a felon (count VII) (725 ILCS 5/24-1.1(a) (West 2004)); aggravated unlawful use of a weapon (725 ILCS 5/24-1.6(a)(1)(3)(A) (West 2004)); and aggravated battery (count VIII) (725 ILCS 5/12-4(b)(10) (West 2004)).

¶ 8 Defendant's first trial resulted in convictions for unlawful possession of a weapon by a felon and aggravated unlawful use of a weapon but the trial court declared a mistrial on the remaining counts after the jury was unable to reach a verdict.

¶ 9 The following relevant evidence was presented at defendant's second trial. Seventy-one-year-old Arnold VanLue testified that he and his wife, Roma, traveled from their home in Indiana to Kankakee, Illinois, on August 3, 2004, to show their sheep at the county fair. Later that night, as they slept in their hotel room, VanLue awoke to "a terrible crash." As he tried to roll out of bed, someone kicked him in his right eye causing "terrible pain." That individual then hit him in the head with a semi-automatic pistol resulting in his head "bleeding bad."

¶ 10 VanLue described the individual as a black male, taller than him at 6 feet 1 inch, "not quite as heavy" as himself and "50 years younger." The man was wearing black gloves, a dark blue or black "hood[ed] jacket with the hood up [over his head] *** and an orange-type mask on his face" that "h[u]ng down to his chin." VanLue testified a woman was with the man and she "just kind of stood inside the door." After hitting VanLue in the head, the man then demanded money. Roma gave him her billfold and the man removed her driver's license, credit card, and two $20 bills, all of which he handed to the woman. Next, the man looked through VanLue's billfold and removed a $100 bill and maybe a couple $1 bills. The man then pointed the gun at Roma's and VanLue's heads demanding their pin number. VanLue testified the woman then

told the man, "let's get out of her. We're making too much noise." At that point, the man tore the telephone out of the wall, unscrewed the light bulb and left.

¶ 11 VanLue stated that after the man and woman left, Roma called 911 and he was transported to the hospital by ambulance. VanLue testified that while at the hospital, he had two or three stitches in his right eye and the "socket was busted, cracked or injured." He also had seven stitches in his head and an X-ray revealed "a cracked rib over the deal before it was over." VanLue was unsure how his rib got cracked, but stated he was treated for it at the hospital. VanLue testified that with the help of friends, he was able to show his sheep at the county fair that Friday.

¶ 12 VanLue identified several photographs admitted into evidence, including one of a bed in his hotel room that depicted blood on the sheets, one of the hotel's bathroom floor that showed blood, one taken at the police station which he stated, "this was when—when the socket of my right eye was cracked," one of his head injury "after [he had] been stitched up," and another showing a bruise on the left side of his face.

¶ 13 On cross-examination, VanLue testified he did not know how he broke his rib, but that "it was cracked" and "[w]hen [he] moved around [he] could feel some pain" which was not there earlier that day.

¶ 14 Roma then testified that upon entering the hotel room, the intruder kicked VanLue in the head and "[she] could see blood," and then the man "jumped over the top of [VanLue] and hit him in *** the head." Roma stated she told the man not to hit VanLue, that "[h]e's had a heart attack" and that "he's liable to bleed to death." According to Roma, VanLue "was gushing blood" from his eye and the side of his head. Roma testified the man was wearing "a piece of material" over his face, "from the nose up." She could not see his eyes.

¶ 15 Juanita Patterson testified that she was working at Citgo Apollo Mart on the evening of August 3, 2004, and into the morning of August 4, 2004. She was outside taking a cigarette break around 1:30 or 2 a.m. when she saw a man, whom she later identified as defendant, and a woman near a blue sports utility vehicle. After she returned to the store, defendant entered the store and attempted to purchase a television and radar detector, but the credit card he was using was declined. Defendant then left the store.

¶ 16 Jolenda Gonzales testified that she was working at Citgo Apollo Mart at approximately 2 a.m. on August 4, 2004. She recalled a man and woman coming into the store and purchasing a bottle of water with cash. Jolenda stated that 10 minutes later, the man returned to the store to purchase a television and a radar detector. However, when she ran the credit card he gave her, it was declined.

¶ 17 Fidel Cuevas, an employee at Gilman Shell gas station, testified that at approximately 1:20 a.m. on August 4, 2004, an African American male used Roma VanLue's credit card to buy gas at the pump and then used the same credit card to buy two quarts of Penzoil and a bottle of Peak antifreeze.

¶ 18 Clinton Perzee, a deputy with the Iroquois County sheriff's department, was dispatched to Citgo to investigate the use of a stolen credit card. As he pulled into Citgo's lot, he observed a blue sport utility vehicle leaving the lot. Perzee noticed the license plate light was out so he conducted a traffic stop. According to Perzee, defendant was the driver of the vehicle and Andrea Coleman was the passenger.

¶ 19 Cynthia Hodge-Perkins, an Illinois State Trooper, testified that she arrived to the scene shortly after the traffic stop began. She learned that the vehicle's license plates were stolen and defendant and Coleman were arrested. Roma's driver's license was found on Coleman's person.

¶ 20 During a search of the vehicle, the following items were found (1) an orange handkerchief, (2) a loaded 9-millimeter handgun under the handkerchief, (3) defendant's identification, birth certificate, social security card, and link card in the center console, (4) a $100 bill, a $10 bill, a $5 bill, and seven $1 bills in the center console, (5) two receipts from the Gilman Shell gas station indicating transactions from Roma's credit card, (6) a black hooded sweatshirt and black gloves, (7) a gallon container of antifreeze and a quart container of motor oil, and (8) two blank checks belonging to the VanLues. Upon removing Coleman from the backseat of her squad car, Hodge-Perkins found a receipt near Coleman had been sitting indicating the denial of a withdrawal due to an incorrect pin number.

¶ 21 At the close of evidence, the jury convicted defendant of both counts of home invasion, both counts of armed robbery, armed violence, aggravated battery of a senior citizen, and aggravated battery.

¶ 22 Thereafter, the trial court sentenced defendant to 25 years' imprisonment under section 12-11(a)(3) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-11(a)(3) (West 2004)), which included a 15-year enhancement due to defendant being armed with a firearm. That sentence was to be served consecutive to his remaining concurrent prison sentences of 25 years for each armed-robbery conviction, 25 years for armed violence and 5 years for unlawful possession of a weapon by a felon. The court further declared defendant must serve 85% of his sentences for armed robbery and home invasion.

¶ 23 On direct appeal, this court affirmed defendant's convictions and sentences. *People v. Smith*, No. 3-06-0045 (2007) (unpublished order under Supreme Court Rule 23).

¶ 24 In September 2008, defendant filed a *pro se* postconviction petition. In January 2009, he filed a *pro se* first supplemental postconviction petition. Counsel was appointed to represent

defendant in the postconviction proceedings. In July 2012, defendant's counsel filed a first amendment to defendant's postconviction petition followed by a second amendment in February 2014. The second amended petition incorporated defendant's *pro se* petitions and specifically raised eight claims. However, during a July 2012 status hearing, defendant's counsel informed the trial court that she would only be proceeding on the claims raised in her second amended petition.

¶ 25 Defendant's second amended petition asserted that (1) defendant's armed violence sentence, which was ordered to be served consecutive to his sentence for home invasion, was void for failure to comply with statutory requirements, (2) the 15-year firearm enhancement added to defendant's sentence for home invasion was void for failure to comply with statutory requirements, (3) defendant was denied due process of law at his second trial and sentencing proceedings where his conviction for armed violence and judgment ordering him to serve 85% of his sentence were obtained through the use of the victim's false testimony, which went uncorrected by the State, (4) defendant was denied effective assistance of trial counsel at his second trial where counsel failed to impeach the victim's testimony regarding the extent of his injuries, (5) defendant was denied effective assistance of appellate counsel where counsel failed to raise an issue with the 15-year sentence enhancement to defendant's home invasion sentence, (6) defendant was denied effective assistance of trial counsel at his second trial where counsel failed to object or otherwise challenge the victim's false testimony, (7) the armed robbery while armed with a firearm statute under which defendant was sentenced violated the proportionate penalties clause of the Illinois Constitution, and (8) defendant's convictions and sentences for home invasion and armed robbery violated the one-act, one-crime doctrine.

¶ 26 The record contains medical records that contradict VanLue's testimony regarding the extent of his injuries. Specifically, the records revealed that VanLue suffered periorbital trauma and a head laceration, but "no fracture of facial bones." In addition, a chest X-ray indicated that VanLue suffered a "possible old fracture deformity," but "otherwise no definite acute fracture."

¶ 27 In a July 2014 affidavit, VanLue averred that he had reviewed the transcript of his testimony regarding the extent of his injuries. VanLue stated he "did [not] intentionally or knowingly misrepresent the extent of [his] injuries to [his] eye and ribs. Any difference between [his] testimony and medical reports was unintentional and accidental."

¶ 28 Following a third-stage evidentiary hearing, the trial court granted, in part, defendant's petition for postconviction relief. Specifically, the court found that trial counsel was ineffective for failing to impeach the victim with contradicting medical records regarding the extent of his injuries. According to the court, the discrepancy was "readily observable" but counsel "apparently did not bother to read the single page summary sheet of Mr. VanLue's medical records which would have told her all she needed to know in order to attack the weak point in the State's case." Further, the court noted that the issue of whether VanLue suffered great bodily harm was "critical to not only a finding of guilt on two charges, but to the length of sentence on virtually all charges." As a result, the court vacated (1) defendant's conviction for armed violence but held defendant could be retried on that offense and (2) the 85% truth-in-sentencing requirement for the home invasion and armed robbery sentences, subject to reinstatement in the event defendant is retried and convicted of armed violence. In addition, the court vacated the 15-year sentence enhancement for home invasion, which was based on defendant being armed with a firearm, because the issues instruction that went to the jury only stated defendant was "armed with a dangerous weapon."

¶ 29 This appeal and cross-appeal, which have been consolidated, followed.

¶ 30 ANALYSIS

¶ 31 On appeal, the State challenges the trial court's vacation of (1) defendant's armed-violence conviction and (2) the 85% sentence requirement for defendant's home invasion and armed robbery convictions.

¶ 32 On cross-appeal, defendant asserts postconviction counsel provided unreasonable assistance where she abandoned at least two legally viable claims contained in his *pro se* petitions.

¶ 33 I. The State's Appeal

¶ 34 As noted, the State asserts the trial court erred by vacating defendant's (1) conviction for armed violence and (2) 85% sentence requirement for home invasion and armed robbery. Initially, the State also challenged the court's decision to vacate the 15-year sentence enhancement for home invasion, but it subsequently withdrew its argument on this issue in its reply brief.

¶ 35 We review a trial court's fact-finding and credibility determinations at the third-stage of postconviction proceedings for manifest error. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "A decision is manifestly erroneous when the opposite conclusion is clearly evident." *People v. Coleman*, 2013 IL 113307, ¶ 98.

¶ 36 A. Propriety of the Trial Court's Vacation of Defendant's Armed Violence Conviction

¶ 37 The State first challenges the trial court's decision to vacate defendant's armed violence conviction based on its finding that trial counsel was ineffective for failing to impeach the victim's testimony regarding the extent of his injuries. According to the State, the evidence was sufficient to support a finding of great bodily harm, even absent VanLue's erroneous testimony

regarding the extent of his injuries. The defendant asserts that not only was the court's decision appropriate because trial counsel was ineffective, but he also contends that this court may affirm the court's decision based on the State's knowing use of false testimony.

¶ 38 It is well settled that in order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In particular, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437, 473 (2000).

¶ 39 The State concedes defendant's trial counsel provided deficient performance by failing to impeach VanLue's testimony. The record shows that VanLue's testimony regarding the extent of his injuries was exaggerated. In fact, the medical records indicate that VanLue suffered neither a "busted" eye socket nor a cracked rib. With the exception of an old rib fracture that had long ago healed, VanLue's medical records show no recent fractures at all. We, like the trial court before us, do not fault VanLue for his inaccurate testimony. We note, however, that defense counsel had possession of VanLue's medical records, which directly contradicted his testimony, yet she failed to use the records or call one of his treating physicians to impeach him. As the trial court stated, the discrepancy between VanLue's testimony and the medical records "would have been readily observable to anyone who had taken the time to read the medical records" and counsel's failure to do so "is clearly evidence of ineffectiveness, if not abject incompetence."

¶ 40 Having found trial counsel's performance deficient, we next consider whether but for trial counsel's deficient performance, the outcome of the proceedings would have been different. Here, the predicate felony offense supporting the armed violence charge was aggravated battery of a senior citizen. To prove the offense of aggravated battery of a senior citizen, the State must prove that a defendant, "in committing battery, intentionally or knowingly cause[d] great bodily harm or permanent disability or disfigurement to an individual of 60 years of age or older." 720 ILCS 5/12-4.6(a) (West 2004). It is the element of great bodily harm that is at issue here.

¶ 41 Our supreme court has defined bodily harm as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Subsequently, the appellate court has "repeatedly articulated the proposition that 'great bodily harm' is more serious or grave than lacerations, bruises, or abrasions that characterize 'bodily harm.' " *In re J.A.*, 366 Ill. App. 3d 814, 817 (2003). "Whether the victim's injuries rise to the level of great bodily harm is a question for the trier of fact." *People v. Cisneros*, 2013 IL App (3d) 110851, ¶ 12.

¶ 42 The State maintains that defendant was not prejudiced because even absent VanLue's inaccurate testimony, "[r]eview of the pictures of the victim's battered face and head and the blood within the hotel room alone are sufficient to support a finding of great bodily harm." The State also points to VanLue's testimony that he suffered from "terrible pain" and "was bleeding bad," as well as Roma's testimony that VanLue was "gushing blood" and she was afraid he was "liable to bleed to death." In support, the State cites *People v. Mandarino*, 2013 IL App (1st) 111772, and *People v. Anderson*, 95 Ill. App. 3d 143 (1981). In *Mandarino*, great bodily harm was found where the victim sustained "a dozen or so blows" from a police baton that resulted in a mild untreated concussion, a wound to his ear that required seven stitches, and pain in his arm

and back. *Mandarino*, 2013 IL App (1st) 111772, ¶ 22. On appeal, the defendant argued the victim's injuries, which he claimed were limited to a wound behind his ear, did not amount to great bodily harm, but only bodily harm. *Id*. ¶ 62. The appellate court majority disagreed and upheld the finding of great bodily harm, noting that the victim also suffered pain in his arm and back "from the other dozen or so blows" and that a rational trier of fact could conclude that the victim suffered a mild concussion which, according to the testimony of a physician, does not require treatment. *Id*. ¶ 65. In *Anderson*, the defendant argued that it was error to admit nonexpert evidence of the victim's medical condition to support a finding of great bodily harm. *Anderson*, 95 Ill. App. 3d at 148. The appellate court disagreed, finding the testimony of a witness was sufficient to prove great bodily harm where the witness observed the defendant stab the victim in the eye with an umbrella, the victim fall to the ground with blood shooting from the eye, and when she saw the victim a few days later, the eye was gone. *Id*.

¶ 43 Here, however, our task is not to determine whether the *other evidence* presented was sufficient to support a finding of great bodily harm. Rather, we are charged only with determining whether defense counsel's failure to impeach VanLue's testimony that he suffered a broken orbital socket and a fractured rib undermines confidence in the outcome. *Haynes*, 192 Ill. 2d at 473. We find that it does. Any inaccuracies in the victim's testimony were aggravated by the prosecutor's arguments.

¶ 44 During his opening statement at defendant's second trial, the prosecutor stated, "[y]ou'll learn [VanLue] had a fractured eye socket, broke a rib, he had to take stitches to the head, he was bleeding profusely." The evidence presented during trial followed suit. Specifically, VanLue testified that he was kicked in his right eye which caused him "terrible pain" and resulted in a "busted" eye socket and two or three stitches. In addition, VanLue testified he was hit in the side

of his head with a handgun, that he was "bleeding bad," and that the head injury required seven stitches. Further, VanLue stated he suffered "a cracked rib over the deal before it was over," and that he felt pain in the area of his ribs that was not present before the attack. During closing arguments, the prosecutor again referenced VanLue's testimony regarding his "fractured eye socket" and "fractured rib." As noted, however, the medical records clearly contradict VanLue's testimony regarding the extent of his injuries. Without VanLue's inaccurate testimony and the prosecution's improper argument regarding the extent of the injuries, we cannot be confident the jury would have found that VanLue suffered great bodily harm. Accordingly, we find the trial court's decision to vacate defendant's armed violence conviction, subject to retrial, was not manifestly erroneous.

¶ 45 Because we affirm the trial court's decision to vacate defendant's armed violence conviction based on its finding of ineffective assistance of trial counsel, we need not consider defendant's alternative argument that this court may affirm the trial court's decision based on the State's knowing use of false testimony.

¶ 46 B. Propriety of the Trial Court's Vacation of the 85% Sentence Requirement

¶ 47 Next, the State contends the trial court's vacation of the requirement that defendant serve 85% of his sentence for home invasion and armed robbery convictions must be reversed. The State's argument is based on its assertion that defendant's conviction for armed robbery must stand where the evidence was sufficient to support the conviction. However, because we find the trial court's vacation of defendant's armed violence conviction was not manifestly erroneous, we likewise find the court's vacation of the 85% sentence requirement, subject to reinstatement in the event defendant is retried and convicted of armed violence, was appropriate.

¶ 48 II. Defendant's Cross-Appeal

¶ 49 On cross-appeal, defendant asserts that postconviction counsel provided unreasonable assistance where she abandoned at least two legally viable claims contained within his *pro se* petitions.

¶ 50 The Act provides a mechanism by which a criminal defendant may challenge his conviction based on a substantial deprivation of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). In noncapital cases, postconviction proceedings take place in three stages. "At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit.' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2010)). If the circuit court does not dismiss the postconviction petition within 90 days as "frivolous or *** patently without merit," it advances to the second stage. *Id*. ¶ 26.

¶ 51 While a defendant has no constitutional right to postconviction counsel, an indigent defendant is entitled to appointed counsel under the Act where, as is the case here, his postconviction petition advances beyond the first stage. *People v. Lander*, 215 Ill. 2d 577, 583 (2005) (citing 725 ILCS 5/122-4 (West 2000)). "A defendant is entitled only to the level of assistance required by the Act, however, because the right to counsel is wholly statutory and is not mandated by the Constitution." *Id.* "The Act requires postconviction counsel to provide a 'reasonable level of assistance' to a defendant." *Id.* (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)).

¶ 52 Rule 651(c) imposes three duties on appointed postconviction counsel. Specifically, the rule requires postconviction counsel to (1) consult with the defendant to ascertain his allegations of deprivation of constitutional rights, (2) examine the record of the trial proceedings, and (3) make any amendments to defendant's *pro se* petition(s) necessary for an adequate presentation of defendant's claims. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). "The duties imposed

on postconviction counsel serve to ensure that the complaints of a prisoner are adequately presented." *People v. Suarez*, 224 Ill. 2d 37, 46 (2007).

¶ 53 "The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. A defendant may overcome this presumption by demonstrating postconviction counsel failed to substantially comply with the duties mandated by the rule. *Id.* We review *de novo* the issue of whether an attorney complied with the requirements of Rule 651(c). *Id.* ¶ 17.

¶ 54 Here, postconviction counsel filed a Rule 651(c) certificate which raises a rebuttable presumption that she provided defendant with the reasonable level of assistance to which he was entitled under the Act. Defendant attempts to overcome this presumption by arguing postconviction counsel failed to "adequately advance" two of his *pro se* claims regarding ineffective assistance of trial counsel. Specifically, defendant's *pro se* claims alleged that trial counsel was ineffective for failing to present (1) optometry records to show he was visually impaired to such an extent that he could not have worn the cloth over his face and committed the offenses or (2) mitigating evidence at his sentencing hearing regarding his IDOC employment history. Defendant maintains that postconviction counsel's failure to comply with the rule requires remand, regardless of the underlying merit of his claims. See *Suarez*, 224 Ill. 2d at 47.

¶ 55 Initially, we note that Rule 651(c) "does not require counsel to advance frivolous or spurious claims on defendant's behalf." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Here, the record shows that postconviction counsel chose to proceed only on the eight claims she specifically argued in the second amended postconviction petition. Presumptively, then, counsel found defendant's *pro se* claims relating to optometry records and Illinois Department of

Corrections' (DOC) employment records lacked merit. Defendant fails to overcome this presumption.

¶ 56 Regarding the optometry records, defendant essentially argues that trial counsel's failure to present these records *could have been prejudicial* because the evidence would have shown defendant had been prescribed eyeglasses for myopia, or nearsightedness, which *could have strengthened* the defense's theory of misidentification. According to defendant, his visual impairment would have made it "practically impossible" for him to wear a cover over his eyes and still commit the crimes at issue. However, we fail to see how the optometry records, which merely indicate that defendant had been prescribed glasses because he is nearsighted would prove he was not the person who committed these crimes.

¶ 57 Defendant also asserts that trial counsel was ineffective for failing to present his DOC employment records as mitigating evidence at his sentencing hearing. Defendant stands convicted of a vicious attack on a senior citizen after previously serving time for armed robbery. He argues that his trial counsel should have reminded the judge at sentencing of this evidence of "rehabilitative potential." Our review of the record reveals that the supporting documentation submitted with defendant's *pro se* petition regarding his work history is not exactly "concrete evidence that would have illustrated his rehabilitative potential" as he posits. To say this argument lacks merit is to give more credit than is due. He was not a civilian employee of the DOC; he worked while serving time for crimes including armed robbery. The documentation defendant submits shows he held at least three different jobs (maintenance, commissary, and janitor) between May 29, 2001, and February 26, 2001. His employment as a janitor was terminated on February 27, 2002, and he remained unemployed for at least the next two years. In addition, the same document also lists a number of times where defendant lost privileges

during his incarceration. This evidence is aggravating, not mitigating. It establishes that he is not even a good prisoner, let alone a good citizen. It shows he most likely has no rehabilitative potential.

¶ 58 Because we find the *pro se* claims that defendant takes issue with lack merit, postconviction counsel was not required to advance the claims on defendant's behalf. As such, defendant failed to overcome the presumption that postconviction counsel provided reasonable assistance.

¶ 59 CONCLUSION

¶ 60 For the foregoing reasons, we affirm the judgment of circuit court of Kankakee County.

¶ 61 Affirmed.