

NOTICE

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2017 IL App (4th) 141048-U

NO. 4-14-1048

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 18, 2017

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
JASON A. ABERNATHY,)	No. 07CF473
Defendant-Appellant.)	
)	Honorable
)	Mitchell K. Shick,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The motion of the office of the State Appellate Defender to withdraw as counsel on appeal is granted and the circuit court's denial of defendant's amended postconviction petition is affirmed.

¶ 2 Defendant, Jason A. Abernathy, appeals the circuit court's denial of his amended postconviction petition after an evidentiary hearing. The office of the State Appellate Defender (OSAD) was appointed to represent defendant on appeal. OSAD filed a motion to withdraw as counsel, asserting an appeal would lack arguable merit. We grant OSAD's motion and affirm the circuit court's order denying defendant postconviction relief.

¶ 3 **I. BACKGROUND**

¶ 4 After a December 2008 jury trial, defendant was convicted of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)) as a result of an October 2007 altercation with his girlfriend, Gina Giberson. According to Giberson's trial testimony, she did not

remember the actual assault, but she remembered waking from a coma in the hospital with breathing and feeding tubes. The emergency-room physician testified defendant told him he assaulted Giberson with a baseball bat. However, defendant denied telling the doctor this. Nevertheless, the jury found defendant guilty, and the trial court sentenced defendant to 20 years in prison. Defendant appealed, raising only an issue regarding the admission of certain other-crimes evidence. This court affirmed. *People v. Abernathy*, 402 Ill. App. 3d 736, 755-56 (2010).

¶ 5 On June 3, 2011, defendant filed a *pro se* postconviction petition, alleging (1) his appellate counsel was ineffective for failing to raise more significant issues on appeal, such as (a) the trial court's error in denying defendant's motion for a change of venue due to pretrial publicity; (b) the court's demonstrated bias toward defendant and sympathy for the victim; (2) the State failed to prove him guilty beyond a reasonable doubt of aggravated domestic battery; (3) the court failed to properly instruct the jurors by failing to ask if they understood and accepted the given principles of law; (4) the court imposed an excessive sentence in violation of defendant's due-process rights; and (5) his trial counsel was ineffective for failing to (a) conduct proper cross-examination to impeach the State's witnesses based on their prior inconsistent statements, (b) file a more specific posttrial motion, and (c) advise defendant he would be entitled to day-for-day good-conduct credit, rather than be required to serve 85% of his sentence. Defendant claims he rejected a plea offer of 15 years due to counsel's erroneous advice. Defendant's petition was supported by his own affidavit, third-party affidavits, and accompanying documents, including but not limited to, copies of e-mail communications with his appellate counsel and several newspaper articles related to the case published before trial.

¶ 6 The circuit court summarily dismissed the petition as frivolous and patently without merit. Defendant appealed and this court reversed, finding defendant had presented

sufficient allegations of ineffective assistance of counsel to survive summary dismissal. *People v. Abernathy*, 2013 IL App (4th) 110689-U, ¶ 2. On remand, defendant, through counsel, filed an amended postconviction petition alleging (1) ineffective assistance of trial counsel for (a) misinforming him he would be required to serve 85% of his sentence and would not be entitled to day-for-day good-conduct credit, causing him to reject a 15-year plea deal, (b) failing to admit evidence of a second fire, and (c) failing to present testimony of Tina Torralba, who heard Giberson say she had a bat and wanted to see defendant; and (2) judicial bias for openly displaying sympathy toward Giberson and disdain toward defendant.

¶ 7 The circuit court conducted a third-stage evidentiary hearing and, after considering the evidence, denied defendant's petition. The court found (1) defendant failed to demonstrate prejudice from trial counsel's conduct, and (2) no evidence of judicial bias.

¶ 8 Defendant filed a timely notice of appeal, and the circuit court appointed OSAD to represent defendant on appeal. OSAD moved to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Notice of OSAD's motion was sent to defendant. This court provided defendant time to file additional points and authorities, which he did. In turn, the State filed a responding brief.

¶ 9 II. ANALYSIS

¶ 10 The circuit court conducted an evidentiary hearing to address the four separate issues raised by defendant in his amended postconviction petition. In the motion to withdraw as counsel on appeal, OSAD addresses each individual claim, as each raises a potential issue that could be addressed on appeal.

¶ 11 First, OSAD addresses defendant's claim that trial counsel was ineffective for informing him he would have to serve 85% of any sentence imposed and he would not be

eligible for day-for-day good-conduct credit, neither of which was true. Defendant insists if he had known those representations were indeed false, he would *not* have rejected a 15-year plea offer.

¶ 12 After considering the testimony of defendant's two trial attorneys at the evidentiary hearing, the circuit court found counsels' representation indeed fell below an objective standard of reasonableness, but defendant failed to prove he had suffered prejudice from counsels' deficient performance. The court considered counsels' testimony more credible than defendant's with respect to defendant's position of refusing any and all plea offers. According to his attorneys, defendant insisted he would never plead guilty to the crime; they were hired to try the case; and defendant's family specifically chose them because they were not part of the "plea machine" of Coles County.

¶ 13 Because resolution of this claim depended entirely upon the credibility of the witnesses, and the circuit court is allowed great deference regarding such claims (*People v. Domagala*, 2013 IL 113688, ¶ 34), OSAD believes there is no basis on this record to challenge the circuit court's credibility finding. We agree.

¶ 14 Second, defendant and two of his witnesses testified they saw the trial judge, not the judge presiding over the evidentiary hearing, openly demonstrate bias toward defendant by walking behind the court reporter and putting his arm around Giberson during her testimony in the jury's presence. The trial attorneys testified they did not see any such conduct and, if they would have, they would have immediately moved for a mistrial. The court reporter testified, disputing defendant's claim and explaining she would have seen any interaction between the judge and the witness. She did not see the judge leave the bench to touch Giberson. Defendant's remaining claims of judicial bias relating to the judge's failure to control Giberson's outbursts,

allowing the State extra time for closing argument, and openly displaying hostility toward defendant were all disputed by the testimony presented at the evidentiary hearing.

¶ 15 As such, the resolution of this second issue also hinged on the credibility of witnesses. Our review of the record supports OSAD's opinion that potential claims relating to judicial bias would be unsuccessful and would not justify disturbing the circuit court's credibility finding. See *Domagala*, 2013 IL 113688, ¶ 34 ("At [a third stage evidentiary] hearing, the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts.").

¶ 16 Third, OSAD addresses defendant's claim his trial attorneys were ineffective for failing to admit evidence of a second fire that occurred on the night of the incident, while defendant was in custody. Defendant's trial attorney testified he avoided discussion of any fire as a trial strategy. Counsel feared if he opened the door to such a discussion, the State would argue defendant had asked someone else to set the fire while he was in jail to cover up evidence of the crime. As this court held in defendant's direct appeal, evidence of the first fire was properly introduced to describe the chain of events and to show defendant's consciousness of guilt. *Abernathy*, 402 Ill. App. 3d at 755. The presentation of any evidence relating to a second fire would not have changed the circumstances regarding the admission of evidence relating to the first fire. Defendant was unable to show counsels' strategy was unreasonable, and therefore, it is not worthy of an argument on appeal.

¶ 17 Finally, OSAD addresses a potential argument relating to defendant's claim that trial counsel was ineffective for failing to present the testimony of Tina Torralba, who allegedly overheard a conversation between Giberson and her son, in which Giberson explained to her son

that she had obtained a baseball bat and had encouraged defendant to come to the house. Defendant claims Torralba's testimony would have corroborated his self-defense claim. Counsel testified he chose not to call Torralba as a witness because he was concerned about her credibility and truthfulness. Not only did counsel's decision involve reasonable strategy (see *People v. Flores*, 128 Ill. 2d 66, 106 (1989) ("the decision to call particular witnesses is a matter of trial strategy, and that defense counsel need not call a witness if he reasonably believes that under the circumstances the individual's testimony is unreliable or would likely have been harmful to the defendant")), but any such testimony would have been inadmissible as hearsay. Thus, the issue of ineffective assistance of counsel for counsel's failure to call Torralba as a witness lacks merit.

¶ 18 Additionally, OSAD addresses the issue of whether postconviction counsel complied with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Although counsel failed to file a certificate demonstrating compliance, OSAD notes the record reveals counsel spoke to defendant, read the record, and amended defendant's postconviction petition, thereby demonstrating affirmative compliance with Rule 651(c). See *People v. Lander*, 215 Ill. 2d 577, 584 (2005) (When counsel fails to file a Rule 651(c) certificate, a court may deem the error harmless if the record includes a clear and affirmative showing that counsel satisfied the rule's requirements.). We accept OSAD's representation.

¶ 19 We note, in his points and authorities, defendant raises issues that were not raised in his amended postconviction petition, and therefore, not addressed at the third-stage evidentiary hearing. As such, they are not issues that could potentially be raised by OSAD in this appeal.

¶ 20 After reviewing the trial court record, we find the circuit court properly denied defendant's amended postconviction petition. Because we also find any appeal in this matter would be without merit, we grant OSAD's motion to withdraw as counsel.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we grant OSAD's motion to withdraw as counsel and affirm the circuit court's judgment. As part of our judgment, we award the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 23 Affirmed.