2018 IL App (4th) 170259-U

NO. 4-17-0259

FILED
May 24, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
JIMMY L. TILLEY, JR.,	)	Nos. 08CF143
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Harris and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err by dismissing defendant's amended postconviction petition at the second stage of the postconviction proceedings.

(2) Postconviction counsel substantially complied with Rule 651(c) despite counsel's failure to file a certificate indicating his compliance.

(3) The fine improperly imposed by the circuit clerk is vacated.

¶ 2 In April 2009, defendant, Jimmy L. Tilley, Jr., pleaded guilty to multiple felony drug offenses, two of which were Class X felonies. In September 2009, the trial court sentenced defendant to 16 years in prison on count I with lesser concurrent sentences imposed on the remaining counts. Defendant filed neither a motion to withdraw his plea nor a challenge to his sentence. He did not appeal.

¶ 3 In April 2012, defendant filed a postconviction petition, claiming, in part, he received ineffective assistance of counsel. The trial court dismissed the petition as frivolous and

patently without merit. Defendant appealed, and this court reversed and remanded for further proceedings. *People v. Tilley, Jr.*, 2013 IL App (4th) 120607-U, ¶ 19 (Aug. 29, 2013) (unpublished order under Supreme Court Rule 23).

¶ 4 On remand, appointed counsel filed an amended postconviction petition. The State filed a motion to dismiss, which the trial court granted. Defendant appeals, claiming his allegations were sufficient to justify a third-stage evidentiary hearing. Alternatively, defendant argues that his postconviction counsel failed to satisfy the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Guilty Plea

¶ 7 In June 2008, the State charged defendant with eight counts of possession with intent to deliver a controlled substance and one count of disorderly conduct. At defendant's first appearance, the trial court appointed the public defender, Tracy Smith, to represent defendant. In April 2009, defendant entered an open plea of guilty to all charges. In May 2009, Smith advised he had a conflict of interest and asked to withdraw from representation. The court allowed Smith's withdrawal and appointed William Bertram.

¶ 8 The State's factual basis for defendant's April 2009 guilty plea was that the police received an anonymous tip that a pharmacy had been burglarized and a number of medications stolen. They were also notified that a five-gallon bucket of prescription medication, which had purportedly been taken from the pharmacy, was abandoned near a country road. (The pre-sentence report in this case, which is cited in defendant's brief, expands on the circumstances of his initial arrest by pointing out that on the night in question, the police received a tip that someone driving a gold-colored vehicle placed a five-gallon bucket filled with prescription pill

bottles beneath a tree in a rural location and then drove away. That same evening, the police also received a call from defendant reporting his gold-colored vehicle as stolen. The officers placed the bucket of drugs under surveillance, and when defendant and two juveniles arrived at the bucket in a different vehicle and retrieved it, the police arrested them. The approximately 8,000 pills in the bucket were identified as having been stolen from the pharmacy.) Returning to the representations made by the State as part of its factual basis when defendant pleaded guilty, the record contains the following:

> "The defendant was interviewed in reference to those pills. He indicated he had in fact taken those pills from the pharmacy in Grundy County and had transported them down to this location in Livingston County and then indicated that his purpose of taking them was so that he could make some money off of them and that he was going to be selling them in the future, particularly he indicated down in Alabama.
>
> ***
>
> *** [O]n that same night, a call [was made] in to 911 in reference to a theft that occurred in Dwight. The caller identified himself as Jimmy Tilley, and said that his 1997 Oldsmobile Bravado had been stolen.
>
> [An officer] interviewed him subsequent to that report, and at first he indicated that was the case, but then indicated that in fact he had lied, that in fact it was not stolen, it had been parked out in the country."

¶ 9 In September 2009, the trial court sentenced defendant to 16 years in prison on count I (possession with intent to deliver a controlled substance (200 grams or more of hydrocodone) (720 ILCS 570/401(a)(11) (West 2008))). The court also imposed concurrent

sentences on the remaining counts, the maximum of which was eight years in prison. Defendant did not file a motion to withdraw his plea, a motion to challenge his sentence, or an appeal.

¶ 10 B. The First Post Conviction Petition

¶ 11 In April 2012, defendant filed a *pro se* postconviction petition, alleging (1) his trial counsel was ineffective for failing to file a motion to suppress his statements, any postplea and postsentencing motions, or an appeal; (2) the investigating officers violated his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)); and (3) his trial counsel was ineffective for advising him to plead guilty.

¶ 12 In June 2012, the trial court entered an order summarily dismissing defendant's petition, finding it frivolous and patently without merit. Defendant appealed, and this court reversed and remanded for further proceedings, concluding the court had relied upon too stringent a standard for first-stage review. *Tilley, Jr.*, 2013 IL App (4th) 120607-U, ¶ 16.

¶ 13 C. The Amended Post Conviction Petition

¶ 14 Upon remand, the trial court appointed postconviction counsel. In June 2015, counsel indicated he would stand on defendant's *pro se* petition. In July 2015, the State filed a motion to dismiss, claiming defendant failed to make a substantial showing that his constitutional rights were violated. After several status hearings and continuances, counsel in November 2016 indicated he intended to file an amended postconviction petition. The court allowed counsel to file the amended petition *instanter*. Although the State considered the possibility of adopting its earlier motion to dismiss (since the amended postconviction petition substantially realleged the claims raised in defendant's *pro se* petition), the State never explicitly stated it would do so. However, at the February 2017 hearing, the State argued its motion to dismiss without having

filed any subsequent motion after the filing of defendant's amended postconviction petition. We assume the State implicitly adopted the State's earlier motion to dismiss.

¶ 15 Defendant's November 2016 amended postconviction petition alleged trial counsel was ineffective for failing to (1) file a motion to suppress "at least one statement made during the course of police questioning following the defendant's request for assistance of counsel," (2) advise defendant of the sentencing consequences following his guilty plea, and (3) file any postplea/postsentencing motions or an appeal.

¶ 16 In February 2017, the circuit court conducted a hearing on the State's motion to dismiss. The State argued that although defendant had indeed invoked his *Miranda* rights during police questioning regarding the pharmacy burglary, he had not done so in relation to his report of a stolen vehicle. According to the State, the police did not consider the two incidents to be related because defendant was the suspect in the former but a victim in the latter. However, during police questioning about his vehicle, defendant admitted he burglarized the pharmacy, stole the pills, and falsely reported his vehicle stolen. Defendant admitted he intended to sell the pills to his brother in Alabama.

¶ 17 D. The Trial Court's Ruling

¶ 18 The trial court entered a written order granting the State's motion to dismiss. First, the court found defendant failed to make a substantial showing of a constitutional violation regarding counsel's failure to file a motion to suppress. The court noted that even if counsel had filed a motion to suppress defendant's admission, there was "still considerable evidence that defendant intended to deliver the pills and thus defendant cannot show that he was prejudiced." Defendant was found in possession of " 'literally thousands of pills.' " The court found the

"amount of pills recovered together with the various types of pills [was] strong circumstantial evidence of defendant's intent to deliver."

¶ 19 Second, the trial court addressed defendant's claim regarding his trial counsel's failure to advise he would not be eligible for day-for-day good-conduct credit. The court, noting defendant entered an open plea and was "duly admonished as to the sentencing range," found defendant could not show prejudice because the "sentence he received was within the range he would have contemplated," given his 16-year sentence is approximately the equivalent of a maximum term reduced by good-conduct credit.

¶ 20 Third, the trial court found trial counsel's failure to file any postplea or postsentencing motions or a direct appeal did not prejudice defendant when defendant failed to provide any basis, any defense, or a claim of actual innocence supporting any motion or appeal. In sum, the court found defendant had not demonstrated a substantial violation of his constitutional right to the effective assistance of counsel. The court granted the State's motion to dismiss defendant's amended postconviction petition.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant argues that the trial court erred by denying his postconviction petition because the allegations therein were sufficient to justify a third-stage evidentiary hearing. Alternatively, defendant argues that his postconviction counsel failed to satisfy the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). We will address defendant's contentions in turn.

¶ 24 A. Second-Stage Dismissal

¶ 25 Defendant contends the trial court erred by dismissing his amended postconviction petition on the State's motion at the second stage of the proceedings when he sufficiently demonstrated a substantial showing that his plea counsel, Smith, was ineffective for failing to file a motion to suppress and for advising him to plead guilty after misinforming him he would be eligible for day-for-day good-conduct credit. Defendant further contends his petition sufficiently demonstrated a substantial showing that his postplea counsel, Bertram, was ineffective for failing to file a postplea and postsentencing motion, as well as a notice of appeal.

¶ 26 In response, the State first asserts defendant forfeited the issues related to Smith's representation because those claims were not included in defendant's November 2016 amended postconviction petition. We disagree. Defendant clearly set forth all three arguments in his amended petition, combining issues two and three into what he identified as "ISSUE No. 2" in his amended petition.

¶ 27 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Whitfield*, 217 Ill. 2d 177, 183, 840 N.E.2d 658, 663 (2005). To be entitled to postconviction relief, a defendant must show he has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. *Id.* at 183.

¶ 28 The Act provides a three-stage proceeding. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it if the court finds it is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition is not dismissed within that 90-day period, the court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2014).

¶ 29 At the second stage of proceedings, counsel may be appointed for an indigent defendant. 725 ILCS 5/122-4 (West 2014). At the second stage, the trial court must take all well-pleaded facts in the petition and affidavits as true. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071-72 (1998). A petitioner is entitled to a third-stage evidentiary hearing if he makes a substantial showing of a violation of constitutional rights. *Id.* at 381. "To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *Id*. We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Brown*, 2017 IL 121681, ¶ 24.

¶ 30 1. *Ineffective Assistance of Guilty-Plea Counsel*

¶ 31 In *Brown*, the Illinois Supreme Court reviewed the second-stage dismissal of a postconviction petition that alleged the ineffective assistance of counsel related to the petitioner's guilty plea and wrote the following:

> "The sixth amendment guarantees a criminal defendant the right to effective assistance of trial counsel at all critical stages of the criminal proceedings, including the entry of a guilty plea. [Citations.] A claim that a defendant was denied his constitutional right to effective assistance of counsel is generally governed by the familiar two-pronged test established in *Strickland* [*v. Washington*], 466 U.S. 668 [(1984)]. Under *Strickland*, a defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. [Citation.]
>
> The *Strickland* standard also applies to a claim that trial counsel was ineffective during the guilty-plea process. [Citation.] The first prong of *Strickland* remains the same under [*Hill v. Lockhart*, 474 U.S. 52, 58 (1985)),] for guilty-

> plea defendants. [Citation.] For purposes of the second prong, however, a guilty-plea defendant 'must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' [Citation.] This court follows *Hill*'s application of *Strickland* when a guilty-plea defendant raises a claim of ineffective assistance of counsel. [Citations.] We have also held that '[a] conclusory allegation that a defendant would not have pleaded guilty and would have demanded a trial is insufficient to establish prejudice' for purposes of an ineffectiveness claim. [Citations.]" *Brown*, 2017 IL 121681, ¶¶ 25-26 (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985)).

¶ 32 Here, defendant insists Smith's performance was objectively unreasonable when he failed to (1) file a motion to suppress defendant's admission and (2) advise defendant he would not be eligible for day-for-day good-conduct credit. The first of these contentions of error occurred *prior* to the plea proceedings. "[A] defendant may not generally raise claims of deprivation of constitutional rights occurring prior to the entry of the guilty plea." *People v. Ivy*, 313 Ill. App. 3d 1011, 1017, 730 N.E.2d 628, 635 (2000) (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)) (after pleading guilty, a defendant may not generally raise claims of deprivation of constitutional rights occurring prior to the entry of the guilty plea)). In *Tollett*, the Supreme Court explained, as follows:

> " [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the

voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*." *Tollett*, 411 U.S. at 267 (citing *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (to demonstrate that a guilty plea was "unintelligent," defendant must demonstrate that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases")).

¶ 33 Defendant claims there are exceptions to this general rule, citing *Lee v. United States*, 582 U.S. ___, 137 S. Ct. 1958 (2017). In *Lee*, the Court established two categories for claims of attorney error during or before plea proceedings. The first category involved matters of trial strategy and the defendant's prospects of going to trial. *Id.* at ___, 137 S. Ct. at 1965. The second category involved questions regarding the defendant's understanding of the consequences of pleading guilty. *Id.*

¶ 34 With regard to defendant's first claim of error in this case, we consider his claim as one fitting the first of the *Lee* categories. The question is whether defendant would have been better off going to trial with a suppressed confession. *Id.* (the defendant must show he would have been better off going to trial in a situation where his lawyer should have but did not seek to suppress an improperly obtained confession). In so proving, defendant would be required to establish he would have been acquitted or had a viable defense. *Brown*, 2017 IL 121681, ¶ 34 (citing *Lee*, 582 U.S. at ___, 137 S. Ct. at 1965-66).

¶ 35 Defendant cannot carry that burden. Assuming defendant's confession (that he intended to sell the pills to his brother in Alabama) had been suppressed as a violation of his *Miranda* rights, defendant claims he could have proceeded to trial and presented a defense to the lesser-included offense of unlawful possession of a controlled substance, without the intent-to-

deliver element. However, as *Lee* instructs, in order to demonstrate ineffective assistance of counsel for the first category of cases, defendant would be required to show either "he would have been acquitted or had a viable defense." *Brown*, 2017 IL 121681, ¶ 34. Defendant can demonstrate neither, as he was found in possession of "literally thousands of pills" (more than 200 grams of hydrocodone alone)—a quantity not reasonably viewed as being for personal consumption. Thus, defendant's allegations of his first claim of alleged constitutional deprivation were insufficient to justify third-stage proceedings. Defendant failed to make a substantial showing of a constitutional violation on the ground Smith rendered ineffective assistance of counsel by failing to file a motion to suppress defendant's confession.

¶ 36 Next, defendant claims Smith was ineffective for failing to advise he would not be eligible for day-for-day good-conduct credit if he pleaded guilty. Defendant contends he would not have pleaded guilty had he known he would be required to serve 75% of his sentence. Because this claim affected defendant's understanding of the consequences of his plea, this issue falls into the second category of ineffective-assistance-of-counsel claims set forth in *Lee*. *Id.* at ___, 137 S. Ct. at 1965-66. "[W]hen a defendant's claim of ineffective assistance of plea counsel involves a consequence of pleading guilty, it is appropriate to compare the consequences of a defendant's conviction following a trial to the consequences of the defendant entering the guilty plea." *Brown*, 2017 IL 121681, ¶ 36. The *Lee* Court explained, as follows:

> "When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Lee*, 582 U.S. at ___, 137 S. Ct. at 1966-67.

¶ 37 Applying the *Strickland* second-prong prejudice test, as set forth in *Hill* relating to claims of ineffective assistance of guilty-plea counsel, this court must examine the circumstances surrounding defendant's plea. See *Brown*, 2017 IL 121681, ¶ 49 (citing *People v. Valdez*, 2016 IL 119860, ¶ 29, 67 N.E.2d 233, and *People v. Hughes*, 2012 IL 112817, ¶ 65, 983 N.E.2d 439). As *Hill* instructs, to " 'establish prejudice in the guilty-plea context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ' " *Brown*, 2017 IL 121681, ¶ 28 (quoting *Valdez*, 2016 IL 119860 at ¶ 29, quoting *Hill*, 474 U.S. at 59). For a guilty-plea defendant to successfully demonstrate he relied on counsel's erroneous advice about a consequence of his plea, the defendant " ' "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." ' " *Brown*, 2017 IL 121681, ¶ 48 (quoting *Valdez*, 2016 IL 119860, ¶ 29, quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). That is, for the purpose of analyzing an ineffective-assistance claim, the defendant's decision whether to plead guilty "involves assessing the respective consequences of a conviction after trial and by plea." *Lee*, 582 U.S. at ___, 137 S. Ct. at 1966.

¶ 38 Here, defendant was charged with eight counts of unlawful possession of various controlled substances with intent to deliver. The most serious offenses (two counts) alleged he possessed and intended to deliver over 200 grams of a Schedule-II controlled substance, the equivalent of two Class X felonies. See 720 ILCS 570/401(a)(11) (West 2008). The Class X felonies carried a potential sentencing range of 6 to 30 years in prison (730 ILCS 5/5-8-1(a)(3) (West 2008)). Defendant pleaded guilty to all charged offenses without any consideration from the State—no sentencing agreement and no agreement to dismiss any of the charges in exchange for his plea. In his amended postconviction petition, defendant alleged he would not have

pleaded guilty had he been admonished his Class-X sentence was not subject to day-for-day good-conduct credit. We note defendant filed no supporting affidavit for this assertion. Because of defendant's criminal history and for the purposes of deterring others from committing the same crime, the trial court sentenced defendant to the midrange sentence of 16 years on count I, a Class X felony. The court found *no* mitigating factors, not even defendant's acknowledgement of guilt. There is little doubt defendant would have been convicted of all counts had he decided to go to trial. Because the court accorded no leniency in light of defendant's plea, it is not likely his sentence would have been different had he gone to trial.

¶ 39 During his guilty plea hearing, defendant was asked by the trial court if he was "promised anything to get [him] to plead guilty to these charges." Defendant answered "No, Your Honor." The court asked defendant if he had "been threatened with anything other than the maximum penalties to get you to plead guilty to these charges." Defendant responded, "No, Your Honor." Nothing in the record indicates defendant focused on receiving day-for-day good-conduct credit. See *Brown*, 2017 IL 121681, ¶ 51 ("[U]nlike the defendant in *Lee*, nothing in defendant's plea colloquy demonstrates that his primary focus when pleading guilty was serving 50% of his sentence.") (quoting *Lee*, 582 U.S. at ___, 137 S. Ct. at 1968). Further, defendant does not allege Smith *erroneously* advised him he would receive the good-conduct credit. Instead, defendant alleges Smith was ineffective for *failing* to advise him of the same. That is, Smith did not make an affirmative misrepresentation upon which defendant relied.

¶ 40 Given the record before us, we conclude defendant has failed to sufficiently establish prejudice, in that he has not demonstrated that a decision to proceed to trial, rather than plead guilty, would have been rational under the circumstances. See *Brown*, 2017 IL 121681, ¶ 52 (citing *Valdez*, 2016 IL 119860, ¶ 29). Defendant cannot now argue that his counsel's failure

to inform him that he would not be subject to day-for-day good-conduct credit caused him to forgo a trial when the outcome of which would not have been different. The evidence against defendant was overwhelming and the trial court sentenced defendant without consideration of his guilty plea. See *Valdez*, 2016 IL 119860, ¶ 32. Defendant has failed to make a substantial showing of a constitutional violation.

¶ 41 2. *Ineffective Assistance of Postplea Counsel*

¶ 42 Defendant also argues that Bertram rendered ineffective assistance of counsel when, despite defendant's requests, he failed to file any postplea or postsentencing motion or a direct appeal. This court has recently addressed the issue of determining whether the defendant who pleaded guilty made a substantial showing of a constitutional violation in his postconviction petition to warrant an evidentiary hearing when he alleged trial counsel failed to file any postplea motions. See *People v. Beasley*, 2017 IL (4th) 150291, ¶ 30, 85 N.E.3d 568. We held that to establish prejudice at the second stage under the *Strickland* standard, a defendant must not only allege grounds that could have been presented in a postplea motion, but he must additionally demonstrate a reasonable probability the motion would have been granted on those grounds. *Beasley*, 2017 IL (4th) 150291, ¶ 30 (citing *People v. Gomez*, 409 Ill. App. 3d 335, 340, 947 N.E.2d 343, 348 (2011) (narrowing the requisite proof for a "substantial showing" as previously set forth in *People v. Edwards*, 197 Ill. 2d 239, 257, 757 N.E.2d 442, 452 (2001), to include an allegation that, not only had the defendant told counsel to file a postplea motion, but a demonstration that there existed a reasonable probability that the motion would have been successful). We held this requirement does not impose an unreasonable burden on a defendant because at the second stage of the postconviction proceedings, the defendant will be represented by counsel. *Beasley*, 2017 IL (4th) 150291, ¶ 30.

¶ 43 In light of our analyses above, we conclude that defendant has not sufficiently alleged grounds to demonstrate that it would be reasonably probable he would have been allowed to withdraw his plea had Bertram filed a motion requesting the same. We reiterate what we stated in *Beasley*:

> "A defendant has no absolute right to withdraw a plea of guilty. [Citation.] 'Rather, he must show "a manifest injustice under the facts involved" to obtain leave to withdraw his plea.' *People v. Jamison*, 197 Ill. 2d 135, 163, 756 N.E.2d 788, 802 (2001) (quoting *People v. Pullen*, 192 Ill. 2d 36, 39-40, 733 N.E.2d 1235, 1237 (2000)). 'In considering such a motion, the court shall evaluate whether the guilty plea was entered through a misapprehension of the facts or of the law, or if there is doubt of the guilt of the accused and the ends of justice would better be served by submitting the case to a trial.' [Citation.] 'A defendant may enter a guilty plea because of some erroneous advice by counsel, but that fact alone does not destroy the voluntary nature of the plea ***.' *People v. Cunningham*, 286 Ill. App. 3d 346, 349, 676 N.E.2d 998, 1001 (1997)). Rather, the defendant must establish he was provided ineffective assistance to demonstrate the plea was involuntary. [Citations.] Again, under *Strickland*, a defendant must show (1) counsel's performance was objectively unreasonable and (2) the deficient performance resulted in prejudice. [Citations.]" *Beasley*, 2017 IL App (4th) 150291, ¶ 32.

¶ 44 Defendant's claim he would not have pleaded guilty had Smith filed a motion to suppress his admission did not affect the voluntariness of his plea when defendant specifically told the trial court he was pleading guilty as a knowing and voluntary act. Smith's failure to file a

motion to suppress was at most harmless error because the evidence of defendant's intent to deliver was overwhelming.

¶ 45 Defendant's claim that Smith should have advised him that a conviction on count I, a Class X felony, was not subject to day-for-day good-conduct credit also did not affect the voluntariness of his plea because counsel did not affirmatively misrepresent the consequences of pleading guilty. Defendant cannot show a reasonable probability a motion to withdraw his guilty plea would have been granted. The same can be said for a motion challenging his sentence or a direct appeal. Defendant provides no grounds to demonstrate he was prejudiced.

¶ 46 Accordingly, we conclude that defendant's amended postconviction petition failed to establish the necessary showing of prejudice. See *Beasley*, 2017 IL App (4th) 150291, ¶¶ 34-35 (the defendant failed to allege grounds by which it was reasonably probable he would have been allowed to withdraw his guilty plea, his claim of ineffective assistance of counsel's failure to file a motion to withdraw his guilty plea must also fail). Thus, we conclude that the trial court properly dismissed defendant's amended postconviction petition because it failed to make a substantial showing of a constitutional violation.

¶ 47 B. Postconviction Counsel's Performance

¶ 48 Alternatively, defendant argues that his postconviction counsel failed to satisfy the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 49 "[T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *People v. Perkins*, 229 Ill. 2d 34, 44, 890 N.E.2d 398, 403 (2007). At the second stage of postconviction proceedings, the task "is to move the process forward by cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication." *People v. Kuehner*, 2015 IL 117695, ¶ 20, 32 N.E.3d 655.

Although strict compliance is not necessary, postconviction counsel must substantially comply with Rule 651(c). *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19. Whether an attorney complied with Rule 651(c) is a question we review *de novo*. *Id.* ¶ 19.

¶ 50 The rule provides as follows:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 51 Here, counsel did not file a certificate, but the record clearly demonstrates that counsel otherwise substantially complied with the requirements of the rule. At various status hearings, counsel informed the circuit court he had met with defendant in person, he had communicated with defendant by mail, he was combing the record, he was gathering factual information, and was "looking into" information. Ultimately, counsel filed an amended postconviction petition but, in counsel's words, he did not believe "the issues ha[d] changed tremendously" between the *pro se* petition and the amended petition. Counsel indicated he "streamlined quite a bit of what [was] in the actual petition versus maybe what is argument for hearing[.]" In other words, counsel made amendments to the *pro se* petition that he believed were "necessary for an adequate presentation of petitioner's contention." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). He made the amendments after consulting with defendant to "ascertain his ***

contentions of deprivation of constitutional rights" and after examining the record. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 52 Defendant has presented no claim of merit or a potential claim of merit that would justify remand for further proceedings. If postconviction counsel fails to fulfill his duties under Rule 651(c), then a remand for additional postconviction proceedings is required. *People v. Ross*, 2015 IL App (3d) 130077, ¶ 15, 40 N.E.3d 461. The Illinois Supreme Court "has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit." *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007). Here, based upon our review of the record before us, we conclude postconviction counsel substantially complied with the requirements of Rule 651(c) despite the absence of a certificate.

¶ 53 In closing, we note that the better practice would be for a trial court in all cases to require postconviction counsel to file a Rule 651(c) certificate. Counsel's doing so would obviate the need for appellate counsel or this court to comb the record to ascertain whether Rule 651 has been complied with.

¶ 54 C. Clerk-Imposed Fine

¶ 55 Last, defendant contends the circuit clerk improperly imposed a $50 "court" fine against him. We agree that the circuit clerk is without such authority and such assessment does indeed constitute a fine (see *People v. Hible*, 2016 IL App (4th) 131096, ¶ 16, 53 N.E.3d 319). The State concedes defendant's claim, and we accept the State's concession. We vacate this fine pursuant to our line of precedent on the issue. *People v. Daily*, 2016 IL App (4th) 150588, ¶¶ 29-30, 74 N.E.3d 15; *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54, 18 N.E.3d 912; *People v.*

Larue, 2014 IL App (4th) 120595, ¶ 57, 10 N.E.3d 959; *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 129, 55 N.E.3d 117; *People v. Jones*, 397 Ill. App. 3d 651, 660-61, 921 N.E.2d 768, 775 (2009); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the trial court's judgment, which dismissed defendant's postconviction petition at the second stage, and we vacate the $50 "court" fine improperly imposed by the circuit clerk. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 58 Affirmed in part and vacated in part.