

NOTICE  
Decision filed 11/28/18. 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.

2018 IL App (5th) 150010-U

NO. 5-15-0010

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 10-CF-418
	)	
TRAVARIS M. ROWELL,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CATES delivered the judgment of the court.  
Justices Goldenhersh and Overstreet concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Postconviction counsel failed to render effective assistance of counsel by failing to argue and seek a ruling on defendant’s claim in the amended postconviction petition that defendant’s plea counsel failed to timely communicate defendant’s timely acceptance of the State’s initial plea offer.
- ¶ 2 Defendant, Travaris M. Rowell, appeals from the circuit court’s third-stage denial of his petition for relief under the Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant argues his postconviction counsel did not provide reasonable assistance, in that counsel failed to argue and seek a ruling on the merits of a claim presented in his amended postconviction petition. We reverse and remand for further proceedings consistent with this order.

¶ 3 On December 17, 2012, defendant pled guilty to unlawful possession of a controlled substance with intent to deliver, in exchange for a 15-year sentence and the dismissal of three other counts against him. Defendant did not appeal.

¶ 4 On September 23, 2013, defendant filed a *pro se* postconviction petition seeking to vacate his guilty plea. Defendant raised four claims in the petition: (1) his plea was made involuntarily and without full knowledge of the consequences, (2) the trial court failed to properly admonish him of the consequences of his plea and the maximum sentence permitted, (3) his plea counsel was ineffective for allowing defendant to sign a plea agreement “erroneously waiving his constitutional rights”, and (4) his plea counsel was ineffective for failing to communicate defendant’s acceptance of a more favorable plea agreement and allowing the prosecution’s offer to lapse.

¶ 5 The circuit court appointed postconviction counsel. On October 31, 2014, appointed counsel filed an amended postconviction petition challenging the validity of the plea and plea counsel’s representation. The amended petition included the issues defendant raised in his *pro se* petition, as well as claims that defendant did not enter the plea voluntarily because he was unable to understand the plea of guilty form due to his diminished mental capacity and that his plea counsel misinformed him that he would receive day-for-day credit while serving his sentence. Appointed counsel attached a certificate stating he had complied with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) by consulting with defendant to ascertain defendant’s contentions of deprivation of constitutional rights, reviewing the record, and making the necessary amendments to the *pro se* petition for adequate presentation of defendant’s claims.

¶ 6 In support of the amended petition, appointed counsel attached two affidavits from defendant and defendant's *pro se* posttrial motion for reduction of sentence. In one of the affidavits, defendant averred that on October 9, 2012, plea counsel informed him of an offer by the State to allow defendant to plead guilty to a lesser charge in exchange for an eight-year sentence. Defendant asserted he advised his attorney he wanted to accept the State's offer. Defendant stated he learned on December 17, 2012, the date of the guilty plea, that the State had rescinded the eight-year offer due to plea counsel's failure to respond to the offer within a reasonable time.

¶ 7 The State did not file a motion to dismiss, and the circuit court ordered an evidentiary hearing. On January 2, 2015, the circuit court held a hearing on the amended petition. During the hearing, postconviction counsel and the State elicited evidence and presented argument on defendant's claims regarding the guilty plea proceedings and plea counsel's alleged act of misinforming defendant about his sentencing credit. Neither party introduced any evidence or made any argument as to defendant's claim that plea counsel was ineffective for failing to timely convey defendant's acceptance of the State's initial eight-year plea offer.

¶ 8 The circuit court denied defendant relief on the amended postconviction petition based on the evidence and arguments presented at the hearing. The court made no specific findings or ruling as to defendant's allegation that plea counsel was ineffective for failing to communicate to the State defendant's acceptance of the alleged initial plea offer. Postconviction counsel did not file a motion to reconsider. This appeal follows.

¶ 9 On appeal, defendant argues he was denied reasonable assistance under the Post-Conviction Act where postconviction counsel failed to argue, or to seek a ruling on, the merits of a claim presented in the amended postconviction petition. Defendant contends that, as a result of postconviction counsel's omissions, the circuit court overlooked defendant's claim that plea counsel was ineffective for failing to timely communicate defendant's acceptance of the State's initial offer of eight years. Defendant requests this court remand for a new evidentiary hearing on this claim.

¶ 10 The State maintains that postconviction counsel's failure to argue or seek a ruling on this claim is due to a potential scrivener's error. In the amended postconviction petition, counsel included a paragraph stating, "Upon conferring with the Petitioner, regarding the claims of his Pro Se Petition, the Petitioner requests that Claims Two and Three of his Pro Se Petition be removed." The State notes that, at the evidentiary hearing, postconviction counsel raised and argued the merits of defendant's second *pro se* claim but not his third *pro se* claim. The State posits that postconviction counsel must have mistakenly indicated in the amended petition that defendant's second and third claims were being abandoned when he meant that defendant wanted to abandon his third and fourth claims, the fourth claim being the one raised in this appeal. We reject the State's argument as nothing more than conjecture. It is unclear from the record why postconviction counsel would assert in the amended petition that defendant did not want to pursue some of his *pro se* claims while simultaneously including those claims within the amended petition. Ultimately, the fact that appointed counsel included all of defendant's *pro se* claims in the amended petition, including the one at issue in this

appeal, indicates that counsel intended to preserve these claims for a decision on the merits by the circuit court.

¶ 11 The Post-Conviction Act provides a three-stage procedure through which a defendant can challenge his conviction based on allegations of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 27. At the first stage, the postconviction court reviews the defendant's petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Hotwagner*, 2015 IL App (5th) 130525, ¶ 28. The court may summarily dismiss a petition as frivolous and patently without merit when it has "no arguable basis in either law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009); 725 ILCS 5/122-2.1(a)(2) (West 2012). If a petition is not summarily dismissed during the first stage, it advances to the second stage where the court may appoint counsel for an indigent defendant. *Hotwagner*, 2015 IL App (5th) 130525, ¶ 29.

¶ 12 Pursuant to Rule 651(c), counsel must consult with the defendant to ascertain his contentions of deprivation of constitutional right, examine the record, and amend the petition, if necessary, to ensure that defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012); *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). "Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993); *Pendleton*, 223 Ill. 2d at 472, 475. After counsel has made the necessary amendments to the *pro se* petition, the State may move to dismiss the petition. *Pendleton*, 223 Ill. 2d at 472. If the State's motion to dismiss is denied, or if no motion is filed, the State must

answer the petition, and the proceeding advances to the third stage for an evidentiary hearing. *Pendleton*, 223 Ill. 2d at 472-73.

¶ 13 An evidentiary hearing allows the parties to develop matters not contained in the record. *Hotwagner*, 2015 IL App (5th) 130525, ¶ 30. At the hearing, the defendant may present evidence in support of his petition. *Pendleton*, 223 Ill. 2d at 472-73. “ ‘An attorney at the evidentiary hearing stage must argue the merits of the postconviction petitioner’s claims as presented in the petition following review by counsel at the second stage.’ ” *Hotwagner*, 2015 IL App (5th) 130525, ¶ 30 (quoting *People v. Marshall*, 375 Ill. App. 3d 670, 683 (2007)). In a postconviction proceeding, the defendant is entitled to only a “reasonable” level of assistance, which is less than that afforded by the federal or state constitutions. *Hotwagner*, 2015 IL App (5th) 130525, ¶ 32.

¶ 14 On appeal from a circuit court’s determination following an evidentiary hearing, where fact-finding and credibility determinations were involved, this court will not reverse the circuit court unless that court’s finding was manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473. If no such determinations were necessary and the issues presented were purely questions of law, we review the circuit court’s determination *de novo*, unless the judge presiding over the postconviction proceedings had some “special expertise or familiarity” with defendant’s trial or sentencing and that familiarity had some bearing on the court’s disposition. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 In this case, appointed counsel included in the amended petition defendant’s claim that plea counsel was ineffective for failing to communicate to the State defendant’s acceptance of the State’s initial eight-year plea offer and in allowing the State’s favorable

plea offer to lapse. The parties agree that appointed counsel failed to present any evidence, make any argument, or secure any ruling as to this issue in the circuit court. The defendant argues he was denied reasonable assistance due to postconviction counsel's omissions. The State concedes that, in the absence of a scrivener's error, postconviction counsel did not render reasonable assistance by failing to argue the merits of this issue at the evidentiary hearing. We accept the State's concession of error, and find postconviction counsel failed to provide defendant with reasonable assistance.

¶ 16 Accordingly, we reverse the circuit court's order denying defendant's amended postconviction petition and remand for a third-stage evidentiary hearing on the issue of whether defendant was denied the effective assistance of counsel due to plea counsel's failure to timely communicate defendant's acceptance of the State's initial plea offer.

¶ 17 Reversed and remanded.