

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).

2019 IL App (4th) 170206-U

NO. 4-17-0206

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 22, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee)	Circuit Court of
v.)	Macon County
SHITAVIOUS J. COOK,)	No. 11CF1257
Defendant-Appellant.)	
)	Honorable
)	James R. Coryell,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court granted counsel’s motion to withdraw because no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as counsel. In December 2016, defendant, Shitavious J. Cook, filed a postconviction petition raising several issues. The trial court summarily dismissed the petition, and defendant appealed. In December 2018, OSAD filed a motion to withdraw. In its brief, OSAD contends that an appeal of this case presents no potentially meritorious issues for review. We agree, grant OSAD’s motion to withdraw as counsel, and affirm the trial court’s judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Procedural History

¶ 5 In September 2011, the State charged defendant with first degree murder, attempted murder, and aggravated battery with a firearm. For the next few years, defendant’s

case was delayed while defendant cooperated as a witness in other cases for the State. In June 2014, the State dismissed the first degree murder charge and added a charge of dismembering a human body.

¶ 6 On January 16, 2015, as part of a negotiated plea agreement, defendant pleaded guilty to attempted murder (720 ILCS 5/8-4(a), 9-1(a) (West 2010)) and dismembering a human body (*id.* § 5/12-20.5(a)) in exchange for a sentence of 12 years and 10 years, respectively, with the sentences to run consecutively. As part of the agreement, the State dismissed all other pending charges against defendant. The trial court admonished defendant that if he wished to appeal, he was required to file a motion in the trial court requesting the court to vacate the judgment and for leave to withdraw the guilty plea within 30 days of the date on which the sentence was imposed and informed him that failure to raise an issue in such a motion would result in waiver of the issue. Defendant stated that he understood these admonishments.

¶ 7 On January 22, 2015, defendant *pro se* filed a “Notice to Appeal.” Then, on February 27, 2015, defendant filed a “Motion to Withdraw Guilty Plea and Appointment of Counsel” in the trial court, claiming he pleaded guilty because his counsel provided him with “incorrect information.” In response, the State filed a motion to dismiss in which it argued defendant’s motion to withdraw was untimely because it was not filed within 30 days of his guilty plea. In December 2015, the trial court granted the State’s motion to dismiss.

¶ 8 B. The Postconviction Petition

¶ 9 In January 2017, defendant filed a postconviction petition which consisted essentially of two arguments: (1) defendant’s attorneys provided ineffective assistance of counsel which deprived him of the opportunity to make an informed decision regarding the plea offer and (2) defendant should have been able to withdraw his guilty plea due to counsel’s errors and the

trial court's improper admonitions. Regarding his ineffective assistance of counsel claims, defendant asserted that his trial counsel failed to (1) adequately investigate his case, (2) adequately communicate with defendant, (3) discuss certain mitigating factors with the State during plea negotiations, and (4) order a psychiatric evaluation. Defendant also claimed that due to his counsel's ineffectiveness, his guilty plea was not knowing and voluntary.

¶ 10 In February 2017, the trial court summarily dismissed defendant's postconviction petition. In its written order, the court explained that defendant did not specify which documents trial counsel should have provided him, which witnesses trial counsel should have interviewed, or which mental health issues affected him. In addition, the court observed that defendant acknowledged in his affidavit that he committed the acts for which he was convicted and that his complaints were due to the fact that "he didn't like the deal his lawyers made." Accordingly, the court concluded that defendant's petition was frivolous and patently without merit.

¶ 11 C. The Current Appeal and OSAD's Motion To Withdraw

¶ 12 In March 2017, defendant filed a notice of appeal, and OSAD was appointed to represent defendant on appeal. In December 2018, OSAD filed a motion to withdraw and served a copy on defendant. Defendant has not filed a response.

¶ 13 II. ANALYSIS

¶ 14 In its brief, OSAD addresses the arguments raised by the defendant that trial counsel was ineffective and that he should have been able to withdraw his guilty plea. In addition, OSAD offers two potential arguments that defendant could raise: (1) the trial court failed to comply with the procedural requirements of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1 (West 2016)) and (2) defendant's guilty plea was involuntary because he was incompetent or unfit. However, OSAD contends that appeal of this case presents no potentially

meritorious issues for review. We agree with OSAD, grant OSAD's motion to withdraw as counsel, and affirm the trial court's judgment.

¶ 15 We proceed first by addressing whether dismissal of defendant's postconviction petition was procedurally proper under the Act. Next, we address whether defendant's guilty plea was involuntary because he was incompetent or unfit. Then, we address whether defendant's trial counsel was arguably ineffective for failure to adequately communicate, adequately investigate, negotiate a more favorable plea, or request a psychiatric evaluation. Finally, we address whether defendant should have been allowed to withdraw his guilty plea due to receiving improper admonishments from the trial court or the ineffectiveness of counsel.

¶ 16 A. The Standard of Review and Applicable Law

¶ 17 The United States Supreme Court has set forth the procedures to be followed for an appellate attorney to withdraw as counsel. *Anders v. California*, 386 U.S. 738 (1967); *People v. Mares*, 2018 IL App (2d) 150565, ¶ 6, 98 N.E.3d 554. Counsel's request to withdraw must be accompanied by a brief referring to anything in the record that could support an appeal. *People v. Meeks*, 2016 IL App (2d) 140509, ¶ 10, 51 N.E.3d 1109. After identifying issues that counsel could conceivably raise, counsel must then explain why these potential arguments are without merit. *Id.* A copy of this motion must be provided to the client, who will then be given an opportunity to respond to the motion to withdraw. *Id.* The appellate court will then review the record to determine whether the available arguments are wholly without merit. *Id.*

¶ 18 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d

615; 725 ILCS 5/122-2.1 (West 2016). At the first stage, the trial court shall, within the first 90 days after the petition is filed and docketed, dismiss a petition summarily if the court determines it is “frivolous or is patently without merit ***.” 725 ILCS 5/122-2.1(a)(2) (West 2016).

¶ 19 A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Allen*, 2015 IL 113135, ¶ 25. Stated another way, “[a] post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the ‘gist of a constitutional claim.’ ” *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). An appellate court reviews the first-stage dismissal of a postconviction petition *de novo*. *People v. Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 20 B. Procedural Error Under the Post-Conviction Hearing Act

¶ 21 In its motion, OSAD first argues that dismissal of the postconviction petition was procedurally proper and any argument to the contrary would be without merit. We agree.

¶ 22 Here, defendant’s postconviction petition was filed and docketed on January 3, 2017, and the trial court dismissed the petition on February 22, 2017, well within the 90 days prescribed by the Act. There is no evidence in the record that the State offered input regarding the merits of the petition. Dismissal of the petition was thus procedurally proper and any argument to the contrary would be without merit.

¶ 23 C. Whether Defendant’s Guilty Plea Was Involuntary
Because He Was Incompetent or Unfit

¶ 24 OSAD next argues that defendant’s postconviction petition provides no arguable basis that his guilty plea was involuntary because he was incompetent or unfit. Defendant argued that he was not competent enough to understand the proceedings and plead guilty. OSAD

contends that defendant's claim is unsupported by the trial record or supplemental information and is thus without merit. We agree.

¶ 25 A defendant is unfit to stand trial if due to a mental or physical condition, he or she is unable to understand the nature and purpose of the proceedings or to assist in the defense. *People v. Brown*, 236 Ill. 2d 175, 186, 923 N.E.2d 748, 755 (2010). If a *bona fide* doubt of the defendant's fitness is raised, the trial court must hold a fitness hearing. *Id.* Several factors may be considered in determining whether a *bona fide* doubt of the defendant's fitness has been raised, including (1) defendant's irrational behavior, (2) defendant's demeanor at trial, (3) prior medical opinions on defendant's competence, and (4) any representations by defense counsel as to defendant's competence. *Id.* at 186-87.

¶ 26 The record does not provide any indication that defendant was unfit outside of defendant's postconviction petition. As noted by OSAD, defendant did not provide any medical records or affidavits from doctors or others indicating that he suffered from mental illness, nor did he specifically describe in his petition what mental illness, if any, actually affected him. There is nothing in the record to suggest that defendant acted irrationally or otherwise displayed a demeanor suggesting lack of fitness. Further, in his petition defendant merely suggested that due to his age at the time of the offense (15 years old), his lack of education, his experiencing "extremely emotional and mental stress from the case," and his being intimidated by his older co-defendants, trial counsel should have ordered a psychiatric evaluation into his fitness. None of these assertions support a claim that defendant was unfit to stand trial.

¶ 27 D. Ineffective Assistance of Counsel

¶ 28 OSAD next argues that defendant's postconviction petition provided no arguable basis that trial counsel was ineffective. Claims of ineffective assistance of counsel in the guilty-

plea context are analyzed under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), “which requires a defendant to demonstrate both a deficient performance by trial counsel and prejudice arising therefrom.” *People v. Akins*, 2016 IL App (4th) 150539, ¶ 38, 64 N.E.3d 69. “To show prejudice in the plea context, the defendant must demonstrate that but for trial counsel’s error, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial.” (Internal quotation marks omitted.) *Id.* Allegations under the Act must be supported by affidavits or by the record; nonspecific or conclusory assertions are insufficient. *People v. Patterson*, 2013 IL App (2d) 120359, ¶ 19, 997 N.E.2d 673; see also 725 ILCS § 5/122-2 (West 2016). A mere “ ‘catalogue of failures on the part of counsel for the defense’ ” will not be sufficient. *People v. Fernandez*, 222 Ill. App. 3d 80, 83, 583 N.E.2d 627, 630 (1991) (quoting *People v. Browry*, 8 Ill. App. 3d 599, 605, 290 N.E.2d 650, 655 (1972)).

¶ 29 OSAD sets forth four possible bases for concluding that trial counsel was ineffective: (1) trial counsel did not adequately communicate with defendant, thus depriving him of information needed to make an informed choice, (2) trial counsel did not adequately investigate potential witnesses, (3) trial counsel failed to negotiate a more favorable plea agreement, and (4) trial counsel failed to order a psychiatric evaluation. OSAD concludes that each of these grounds was without merit. We agree.

¶ 30 *1. Inadequate Communication*

¶ 31 In his postconviction petition, defendant first argued his trial counsel failed to provide him with documents he requested, communicate with him, and become familiar with his case. However, as OSAD explains in its brief, defendant’s claims were not specific or supported and defendant is unable to show prejudice as a result.

¶ 32 Specifically, defendant did not explain what documents he requested or what

necessary information was kept from him by counsel. Nor did he explain how access to this information would have altered his decision to plead guilty. Further, defendant essentially admitted his guilt to the crimes charged in the affidavit attached to his postconviction petition. Although this admission was not in the State's hands at the time the State made its plea offer, it suggests a low likelihood that any information trial counsel could have provided defendant would have persuaded him to turn down a plea offer. Because defendant's claims were nonspecific and unsupported, he failed to demonstrate prejudice, and the trial court properly found they were without merit.

¶ 33

2. Inadequate Investigation

¶ 34

Second, defendant claimed his trial counsel failed to investigate potential witnesses whose testimony would have helped defendant, "especially Joshua Anderson." Defendant claimed Joshua Anderson "wrote an affidavit on [defendant's] behalf." According to OSAD, defendant was referring to a declaration from Anderson stating that Anderson "will not pursue any charges against [defendant]" and "do[es] not wish to show up in court for any reason." Defendant did not name any other potential witnesses or explain what prejudice resulted from trial counsel's failure to investigate any potential witnesses. OSAD contends defendant's claims are nonspecific and unsupported and that defendant is unable to show prejudice. We agree.

¶ 35

Defendant named only one potential witness who his counsel should have investigated: Joshua Anderson. Contrary to defendant's assertion that Anderson would have helped his case, Anderson indicated in his declaration that he was unwilling to testify "for any reason." Further, defendant admitted in his postconviction affidavit that he shot Anderson, suggesting that Anderson's testimony would have in fact hurt defendant's case.

¶ 36 Defendant also failed to explain what prejudice resulted from counsel’s failure to investigate the witnesses. He did not explain how, or even which, additional witnesses would have helped his case or prevented his pleading guilty. Accordingly, defendant’s claims were nonspecific and unsupported, and thus do not constitute a claim with merit.

¶ 37 *3. Inadequate Plea Negotiations*

¶ 38 Third, defendant argued trial counsel was ineffective because counsel failed to discuss certain factors during plea negotiations with the State that would have enabled him to obtain a more favorable offer. Defendant claimed “[c]ounsel could have argued meritorious issues such as the defendant’s age, mental state of mind and the defendant fully cooperated with authority.” Further, defendant claimed that “there was clearly grounds for a lesser charge, reduce [sic] sentence, or probation or a short sentence in juvenile detention.” OSAD contends defendant’s claims are not supported and that defendant is unable to show prejudice. We agree.

¶ 39 As noted by OSAD, defendant’s age appears in the record and his cooperation was discussed in hearings with prosecutors present throughout the proceedings below, so prosecutors were presumably aware of these facts. Indeed, the record suggests defendant’s case was delayed for three years in part because defendant was a cooperating witness testifying in other cases for the State. Further, defendant’s argument that his “mental state” should have been taken into consideration is not supported by affidavits, medical records, or other evidence suggesting he had any mental health issues. Thus, defendant’s claims were unsupported.

¶ 40 In addition, defendant did not show prejudice because he did not demonstrate that, assuming counsel did not discuss defendant’s age, cooperation with law enforcement, and his “mental state,” the State would have offered a more favorable plea agreement had these facts been discussed. See *Missouri v. Frye*, 566 U.S. 134, 147-48 (2012) (to show prejudice under

Strickland a defendant must demonstrate a reasonable probability that he would have accepted an uncommunicated, lapsed plea offer but for counsel's deficiency and also show there is a reasonable probability that the prosecution would not have prevented the offer from being accepted or implemented). Certainly, if a defendant would be required to demonstrate that the prosecution would not renege on a plea offer to demonstrate prejudice, a defendant would also be required to demonstrate that the prosecution would have made an offer in the first place. Although defendant had a right to effective assistance of counsel during plea negotiations, he did not have a right to a plea agreement. *Id.* at 148. Accordingly, defendant's arguments were unsupported and without merit.

¶ 41 *4. Failure to Order a Psychiatric Evaluation*

¶ 42 Fourth, defendant claimed that trial counsel was ineffective because (1) they did not adequately investigate whether he was "competent enough to understand" the proceedings and (2) they should have obtained a psychiatric evaluation of defendant due to his emotional and mental stress. As noted above, there is no indication in the record that defendant was unfit to stand trial and, therefore, such a claim is without merit. For the same reasons, trial counsel could not have concluded that a psychiatric evaluation was necessary, so trial counsel's failure to order one did not arguably show deficient performance. Defendant's claim is thus unsupported and without merit.

¶ 43 *E. Whether Defendant Should Have Been Allowed to Withdraw His Guilty Plea*

¶ 44 In his postconviction petition, defendant raised two grounds for concluding that he should have been allowed to withdraw his guilty plea. First, defendant claimed that his failure to timely move to withdraw his plea should have been excused because he was not properly admonished. Second, defendant claimed he should have been excused because trial counsel

provided ineffective assistance in failing to timely file after he so requested. OSAD contends that defendant's arguments are without merit. We agree with OSAD.

¶ 45

1. *Improper Admonishments*

¶ 46

Defendant argued that he did not receive proper admonishments under Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001), and therefore his failure to timely move to withdraw the plea should have been excused. A court must strictly comply with the admonishment requirements under Rule 605(c), and failure to so comply requires remand to properly admonish the defendant. *People v. Dominguez*, 2012 IL 111336, ¶ 11, 976 N.E.2d 983 (2012). The admonishments need not be read aloud verbatim, but a defendant must be “substantially” advised of the content of the Rule. *Id.*

¶ 47

Rule 605(c) provides as follows:

“In all cases in which a judgment is entered upon a negotiated plea of guilty, at the time of imposing sentence, the trial court shall advise the defendant substantially as follows:

(1) that the defendant has a right to appeal;

(2) that prior to taking an appeal the defendant must file in the trial court, within 30 days of the date on which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea of guilty, setting forth the grounds for the motion;

(3) that if the motion is allowed, the plea of guilty, sentence and judgment will be vacated and a trial date will be set on the charges to which the plea of guilty was made;

(4) that upon the request of the State any charges that may have been dismissed as a part of a plea agreement will be reinstated and will also be set for trial;

(5) that if the defendant is indigent, a copy of the transcript of the proceedings at the time of the defendant's plea of guilty and sentence will be provided without cost to the defendant and counsel will be appointed to assist the defendant with the preparation of the motions; and

(6) that in any appeal taken from the judgment on the plea of guilty any issue or claim of error not raised in the motion to vacate the judgment and to withdraw the plea of guilty shall be deemed waived." Ill. S. Ct. R. 605(c) (eff. Oct. 1, 2001).

¶ 48

The trial court admonished defendant as follows:

"Okay. [Defendant], you have a right to appeal. Prior to taking an appeal, you must file in the trial court within 30 days on the date which the sentence is imposed, which is today, a written motion asking to have the judgment vacated for leave to withdraw the plea of guilty, setting forth the grounds for your motion.

If the motion is allowed, the plea of guilty, sentence, and judgment will be vacated and the trial date will be set on the charges to which the guilty plea was made.

Upon request of the State any charges may have been dismissed as a result of the plea agreement will be re-instated and then will also be set for trial.

If you are indigent, a copy of the transcript of the proceedings at the time of your plea of guilty and sentence will be provided without cost to you and

counsel will be appointed to [assist you with] the preparation of the motion.

In any appeal taken from the judgment on the plea of guilty, any issue or claim of error not raised in the motion to vacate the judgment and withdraw your plea of guilty shall be deemed waived.”

¶ 49 When asked if he understood the admonishments, defendant replied, “Yes, sir.”

¶ 50 In his postconviction petition, defendant contended “the court did not verbally tell him that he had to file a motion to withdraw his plea of guilty within 30 days” and that he did not understand when the court referred to having the motion “vacated.” The record of the trial judge’s admonitions and defendant’s response affirming that he understood rebut this claim. Therefore, defendant’s claim that he was not properly admonished is without merit.

¶ 51 *2. Ineffective Assistance*

¶ 52 Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016) provides that a defendant must file in the trial court, within 30 days of the date on which a sentence is imposed, a motion to withdraw a guilty plea and vacate the judgment. An attorney may provide ineffective assistance of counsel by failing to file a motion to withdraw a guilty plea under Rule 604(d). *People v. Wilk*, 124 Ill. 2d 93, 105-06, 529 N.E.2d 218, 222 (1988). The *Strickland* standard applies when a defendant alleges that his attorney was ineffective for failing to move to withdraw a guilty plea. *Id.* at 108. First, a defendant must show that he requested counsel to file a motion to withdraw. *People v. Fern*, 240 Ill. App. 3d 1031, 1043, 607 N.E.2d 951, 961 (1993). Next, the defendant must show the necessity of withdrawing a guilty plea. *Id.* “The withdrawal of a guilty plea may be allowed in circumstances where the plea resulted from a misapprehension of law or fact, or in cases where it appears the plea was entered as a result of a misrepresentation by counsel, the State’s Attorney, or someone else in authority.” *Id.* Where a Rule 604(d) motion is dismissed

raised on appeal. We therefore grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment. See *Anders*, 386 U.S. at 744. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 59 Affirmed.