

NOTICE  
Decision filed 05/09/19. 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.

2019 IL App (5th) 160278-U

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).

NO. 5-16-0278

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 14-CF-239
	)	
	)	
THEODORE R. GLEGHORN,	)	Honorable
	)	Richard A. Brown,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's denial of the defendant's postconviction petition is affirmed because the circuit court's finding that the defendant lacked credibility is not contrary to the manifest weight of the evidence.

¶ 2 The defendant, Theodore R. Gleghorn, appeals the circuit court's denial of his postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other

document supporting his appeal. The defendant did not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Randolph County.

¶ 3

### BACKGROUND

¶ 4 While investigating the theft of a television, the police received a tip that the defendant may have stolen the television. The police went to the house where the defendant lived with his grandmother. The defendant was not home. The police explained to the defendant's grandmother why they were there and asked for permission to search the house. She gave permission to search the home. When the officers proceeded upstairs they found that the doors to all of the rooms but one were open. Concerned for their safety, they quickly opened the door to the bedroom to check for occupants. There was no one in the room, but they did see what looked like a television under an afghan.

¶ 5 The officers returned to the grandmother, told her what they had found, and indicated they were going to obtain a search warrant. After obtaining the search warrant, the officers returned to the bedroom and uncovered the television. They found it had the same serial number as the television reported stolen.

¶ 6 The State charged the defendant with residential burglary, a nonprobationable offense. Subsequently, the defendant filed a motion to suppress the evidence from what he alleged was an illegal search. The State offered to amend the charges to regular

burglary, an offense that is eligible for parole but carries a maximum sentence of seven years' incarceration followed by two years of mandatory supervised release (MSR), in exchange for the defendant's entering an open plea of guilty. The defendant accepted the offer. At the plea hearing, the circuit court advised defendant, among other things, of the maximum and minimum sentence he could receive and explained that, while the court would take suggestions from the State and plea counsel, the court alone would determine his sentence. At the sentencing hearing, the court sentenced the defendant to five years' incarceration followed by two years of MSR.

¶ 7 The defendant did not file a motion to withdraw his plea or to reconsider his sentence, nor did he file a timely notice of appeal. A number of months after sentencing he filed a late notice of appeal. This court appointed OSAD to represent the defendant and entered an order for the defendant to show cause why his notice of appeal should not be dismissed. After briefing, this court dismissed the defendant's appeal. In our order, we stated that the defendant's avenue for relief was to file a postconviction petition.

¶ 8 The defendant filed a *pro se* postconviction petition. The trial court appointed counsel who filed an amended postconviction petition raising these claims: plea counsel failed to ensure the defendant's guilty plea was knowing and voluntary, and plea counsel failed to file a timely motion to withdraw the guilty plea or notice of appeal. The State filed an answer to the petition, and the matter proceeded to a third-stage hearing.

¶ 9 The defendant was the only witness at the hearing. He testified that he had not wanted to plead guilty, but that plea counsel told him that his girlfriend was going to testify for the State and that he would only receive probation. The witness list filed by

the State did not include the defendant's girlfriend. The defendant admitted that he had discussed other possible alternatives to the sentence of probation with plea counsel. The defendant testified that he had a strong basis for having the search suppressed, which he could have asserted if he had not pleaded guilty. The defendant also testified that he was heavily medicated on the day of his guilty plea, causing him to not understand what happened.

"THE COURT: I've known the defendant for many years. \*\*\*

THE COURT: [His] credibility is such that his testimony alone with nothing in writing is insufficient to support the petition."

¶ 10 These statements were the crux of the trial court's ruling. In addition to finding that the defendant lacked credibility in general, the trial court expressed its recollection of the plea hearing. The court believed that the defendant was informed that there was no guarantee of a particular sentence. The court found that the defendant understood that provision on the day of the hearing. The court also pointed out that by pleading guilty to regular burglary the defendant faced a maximum sentence of 7 years instead of 15. The court also recalled that the defendant was able to understand the proceedings despite the effects of any medication he may have been taking.

¶ 11 ANALYSIS

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim

must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage the court determines if the petition presents a gist of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition for failing to state the gist of a constitutional violation, the petition moves to second-stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage of the proceeding, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381. At the third stage, "[f]act-finding and credibility determinations are to be made." *People v. Marshall*, 375 Ill. App. 3d 670, 674 (2007). At the third stage, the defendant must make "a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A circuit court's ruling on a postconviction petition following a third-stage evidentiary hearing will not be disturbed on review unless it is manifestly erroneous. *Id.*

¶ 13 The defendant asserted that he received ineffective assistance of plea counsel. An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, defendant

must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Albanese*, 104 Ill. 2d at 525. Second, defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670. Where allegations of ineffective assistance of counsel survive to a third-stage hearing, we review the trial court's decision as a mixed question of fact and law. *Id.* at 698; *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66. We accept the trial court's findings of fact so long as they are not against the manifest weight of the evidence. But we review *de novo* whether the facts found by the trial court prove ineffective assistance of counsel. *Id.*

¶ 14 Here, the trial court found that the defendant was unbelievable in his testimony. The trial court had seen the defendant's plea and sentencing hearing. The trial court had known the defendant for a number of years, during which he had dealt with the defendant in the criminal justice system, sentencing him on at least one other occasion. Assuming, *arguendo*, that the allegations raised by the defendant constituted ineffective assistance of counsel, the question remains: Was the trial court's finding that the defendant lacked credibility to support his postconviction petition against the manifest weight of the evidence?

¶ 15 A finding is against the manifest weight of the evidence only if it contains error that is clearly evident, plain, and indisputable. *People v. Hughes*, 329 Ill. App. 3d 322, 325 (2002). The only evidence in this case is the defendant's testimony. And we can only review that testimony through a cold record, which leaves us in a position far inferior to that of the trial judge who not only heard the testimony at the postconviction hearing but dealt with the defendant at the plea and sentencing hearings. See *People v. English*, 406 Ill. App. 3d 943, 954-55 (2010). Moreover, the trial court had known the defendant for years, including in other court appearances.

¶ 16 The trial court's finding that the defendant lacked the credibility to prevail on his postconviction petition was not against the manifest weight of the evidence. Having found that the trial court did not err in disbelieving the defendant's testimony, there was no evidence to support the allegations in the defendant's petition.

¶ 17 It does not stretch reason to believe that the defendant did not choose to withdraw his guilty plea or file an appeal. While he did not receive the sentence of probation we are sure he hoped for, he did receive a sentence of 5 years, while had he been found guilty on the original charge, he would have received a sentence between 4 and 15 years. So this is not a case where we can presume ineffective assistance of counsel because it is so improbable that the defendant would accept the sentence of five years.

¶ 18 **CONCLUSION**

¶ 19 The circuit court properly denied the defendant's postconviction claims of ineffective assistance of counsel. Therefore, we grant OSAD's motion to withdraw and affirm the decision of the circuit court of Randolph County.

¶ 20 Motion granted; judgment affirmed.