

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. 4-08-0965

Order filed 3/10/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DONRICO S. HOLTZCLAW,)	No. 03CF2200
Defendant-Appellant.)	
)	Honorable
)	John R. Kennedy,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

Held: Where the evidence presented at the third-stage evidentiary hearing in defendant's postconviction proceedings indicated that trial counsel had not given defendant erroneous advice, defendant failed to prove ineffective assistance of counsel or that his guilty plea was not knowingly and voluntarily entered.

This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this appeal. For the reasons following, we agree and grant the motion to withdraw.

I. BACKGROUND

In June 2004, defendant, Donrico S. Holtzclaw, while represented by Assistant Public Defender Janie Miller-Jones, pleaded guilty to home invasion, a Class X felony (720 ILCS 5/12-11(a)(2) (West 2004)) as part of a partially negotiated plea agreement. In exchange for defendant's plea, the State agreed to recommend a sentencing

cap of 20 years in prison. Defendant retained private counsel, Walter Ding, before sentencing, and in September 2004, the trial court sentenced defendant to 18 years in prison.

In October 2004, defendant filed a *pro se* motion to withdraw his guilty plea, alleging attorney Miller-Jones rendered ineffective assistance of counsel by (1) failing to discuss the case with him, (2) failing to prepare a defense, (3) coercing him into pleading guilty, and (4) failing to advise him that he was subject to the truth-in-sentencing provisions. In January 2005, at the hearing scheduled for defendant's *pro se* motion to withdraw his guilty plea, Ding, on defendant's behalf, moved to withdraw defendant's motion. The trial court obliged and defendant did not file a direct appeal.

In February 2006, defendant filed a *pro se* postconviction petition, alleging he received the ineffective assistance of "trial counsel." Defendant's petition did not specifically name either attorney Miller-Jones or attorney Ding. In May 2006, the circuit court appointed Assistant Public Defender Randall Rosenbaum to represent defendant with regard to his *pro se* petition. Rosenbaum filed an amended postconviction petition, adopting and incorporating the allegations in defendant's *pro se* petition and added allegations related to Ding's ineffectiveness, without mentioning Miller-Jones's representation.

In August 2006, upon the State's filing of a motion to dismiss, the circuit court conducted a hearing and found that defendant's amended petition was directed solely at attorney Ding, not Miller-Jones. The court granted the State's motion to dismiss, finding defendant was not prejudiced by Ding's representation and an evidentiary hearing was not required. Defendant appealed. This court reversed, finding Rosenbaum should have

included allegations regarding Miller-Jones's representation, as it was clear that defendant intended to challenge the voluntariness of his guilty plea. We remanded for further proceedings. *People v. Holtzclaw*, No. 4-06-0678 (February 1, 2008) (unpublished order under Supreme Court Rule 23).

On remand, the circuit court appointed attorney Larry Silkwood to represent defendant. Silkwood filed a second-amended petition, but the State sought, and was granted, an order requiring a bill of particulars. On July 31, 2008, Silkwood filed a third-amended petition. The State filed a motion to dismiss, which the circuit court granted in part and denied in part.

The circuit court found the following ineffective-assistance-of-counsel allegations legally sufficient to survive dismissal. With regard to Miller-Jones's representation, defendant alleged he would not have pleaded guilty but for Miller-Jones's erroneous advice that the day-for-day good-conduct credit would apply to his sentence. He also claimed she had failed to advise him of the possibility that he could receive a sentence requiring him to serve 85% of that sentence. With regard to Ding's representation, defendant alleged he had failed to (1) investigate whether defendant's plea was entered knowingly and voluntarily, (2) file a motion to withdraw defendant's guilty plea, and (3) file a motion to reconsider defendant's sentence.

On November 7, 2008, the circuit court conducted a third-stage evidentiary hearing on the allegations that had survived dismissal. Defendant testified he had agreed to plead guilty because Miller-Jones had told him he would serve a maximum of 10 years if he was sentenced to 20 years due to the application of the day-for-day good-conduct credit. After entering his guilty plea, he hired Ding. He and Ding did not discuss

defendant's understanding of the plea agreement. Defendant asked Ding to file a motion to withdraw his plea after his sentencing hearing when he heard the sentencing judge mention that the victim had suffered great bodily harm and that, as a result, defendant would be subject to serving a mandatory 85% of his sentence. Defendant said he asked Ding what that meant in terms of time actually served and Ding told him he would have to check the statute and get back to him. He never did. Nor, according to defendant, did Ding file any postsentencing motions as requested.

Defendant further testified that he filed his own postsentencing motion, a motion to withdraw his guilty plea. When his motion was called for a hearing, defendant said he told Ding that he would withdraw his motion since he would be serving only 50% of his sentence. He had relied on a sentence-calculation sheet provided to him in prison. Had he known that he was required to serve 85% of his sentence, he would not have withdrawn his motion challenging his guilty plea.

For the State, Miller-Jones testified and denied ever advising defendant that he would serve only 50% of his sentence. In fact, she did not believe she and defendant spoke of sentencing credit. She would have never promised that he would receive day-for-day good-conduct credit, knowing that a bodily harm finding was possible. For her testimony, Miller-Jones relied substantially on the notes she had taken during her conversations with defendant.

Next, Ding testified that he had encouraged defendant to withdraw his motion to withdraw his guilty plea so as to not jeopardize the 20-year sentencing cap. According to Ding, he and defendant never discussed sentencing credit and defendant never mentioned discussing it with Miller-Jones.

During defendant's rebuttal case, defendant's mother, Jessica Jasper, and Nikki Lee Baldwin all testified that they had received letters in May or June 2004 from defendant. In those letters, defendant indicated that he had discussed his sentencing possibilities with his public defender, who had advised him that he would only serve 10 years of a 20-year sentence, "since it's a Class X." The circuit court indicated that it would consider the letters as evidence of defendant's state of mind at the time he pleaded guilty in June 2004, but not as impeachment evidence of Miller-Jones. The evidence was closed and the court noted that it would continue the hearing until a later date for the parties' closing arguments.

After considering the arguments of the parties, the circuit court denied defendant's postconviction petition. The court found Miller-Jones's testimony was credible and corroborated by her notes taken during or immediately after conversations with defendant. The court found it incredible that Miller-Jones, given her experience, would have advised defendant that he would serve only 50% of his sentence. The court held defendant failed to prove that Miller-Jones was ineffective. Likewise, the court held defendant failed to prove that Ding was ineffective. The court did not believe that Ding advised defendant that he would have to research the statute on the applicable sentencing credit. The court concluded that defendant failed to prove that the outcome of his case would have been different had the attorneys not engaged in the alleged ineffective assistance of counsel. The court found the evidence indicated that defendant would have pleaded guilty regardless. This appeal followed.

Appointed counsel, OSAD, has filed a motion to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), asserting no issues of arguable merit warrant

appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points and authorities by March 10, 2010, which he has done. The State filed an appellee brief supporting OSAD's position.

After examining the record in accordance with our duties under *Finley*, we affirm the circuit court's judgment and grant OSAD's motion to withdraw as counsel on appeal for the following reasons.

II. ANALYSIS

We review a third-stage denial of a postconviction petition under a manifest-weight-of-the-evidence standard. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). In this case, the issue of whether defendant's constitutional rights were violated by the ineffectiveness of his trial counsel centered on a credibility contest between defendant and the respective counsel. The circuit court, being in a superior position to make a credibility determination, found the attorneys more credible than defendant. As a reviewing court, we will generally defer to the circuit court's determination. See *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477 (2007). Without any indication in the record that the court's decision was manifestly erroneous, we would have no reason to disturb the court's finding on appeal.

Therefore, we agree with OSAD's assessment of this case. By making a credibility determination in favor of Miller-Jones and Ding, the circuit court concluded that neither counsel had affirmatively misrepresented the amount of sentencing credit that defendant would receive. Without an affirmative misrepresentation, it cannot be said that defendant's guilty plea was involuntary due to counsel's ineffective assistance. *Cf. People v. Correa*, 108 Ill. 2d 541, 553 (1985) (the defendant relied on erroneous and misleading advice in entering his guilty plea and therefore, his plea was not intelligently or knowingly

made). The trial court found that neither counsel offered erroneous advice and, therefore, neither counsel's performance could be deemed substandard. Without any reasonable hope of prevailing on an ineffective-assistance-of-counsel claim with regard to the application of the truth-in-sentencing provision of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)((iii) (West 2008)) to defendant's sentence, any appeal pursued by defendant would be frivolous.

III. CONCLUSION

For the foregoing reasons, we grant OSAD's motion for withdrawal, and we affirm the circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal.

Affirmed.