2022 IL App (2d) 210340-U
No. 2-21-0340
Order filed June 10, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-2910
RAUL SAUCEDO-CERVANTEZ,	)	Honorable David P. Kliment
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Having found no issue of potential merit to support an appeal, we grant the appellate defender's motion to withdraw as counsel on appeal and affirm the dismissal of defendant's postconviction petition.

¶ 2 Defendant, Raul Saucedo-Cervantez, appeals the order of the circuit court of Kane County dismissing his postconviction petition. The trial court appointed the Office of the State Appellate Defender to represent defendant. The appellate defender now seeks to withdraw, claiming that the appeal presents no issue of arguable merit. We grant counsel's motion and affirm the dismissal of defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 In November 2008, defendant was charged with various offenses based on his accountability for a shooting death that occurred during an illegal drug deal. For several years thereafter, many continuances were granted, different judges presided over defendant's case, and defendant had a succession of appointed and privately retained attorneys.

¶ 5 On May 19, 2010, defendant appeared in court with his attorney, Assistant Public Defender Thomas McCulloch. Also present was a Spanish interpreter for defendant. McCulloch advised the court that the parties were in plea negotiations, and he asked the court for a continuance so that defendant could speak with his family. The State agreed to a one-day continuance.

¶ 6 On May 20, 2010, McCulloch told the court that defendant had directed him to ask for a continuance because defendant had spoken to his family, who wished to retain private counsel. Defendant permitted McCulloch to continue plea negotiations while defendant attempted to retain private counsel

¶ 7 In January 2013, defendant retained private counsel. On March 14, 2013, defendant pleaded guilty to first-degree murder (720 ILCS 5/9-1(a)(3) (West 2008)) in exchange for 20 years' imprisonment. Before accepting the plea, the court advised defendant of the rights he was giving up by pleading guilty, and defendant said he understood those rights. Defendant also stated that he wished to speak to the court before it imposed sentence. The court said it would allow defendant that opportunity.

¶ 8 After admonishing defendant, the court asked the State for a factual basis for the plea. The State recited that, during the commission of a drug deal, a person for whose actions defendant was accountable used a heavy metal object to kill the victim.

¶ 9 Referencing a signed guilty plea form, the court confirmed that the agreement was read to defendant in Spanish and that he executed the form. The court then questioned defendant to determine if his plea was knowing and voluntary. Defendant assured the court, among other things, that his plea was not induced by threats or promises apart from the plea agreement.

¶ 10 At that point, the court granted defendant's request to address the plea agreement. Defendant advised the court that, in May 2010, McCulloch "offered [him] 20 years at 50; and he told [defendant] to wait, that he could lower it to 15 at 50." Defendant continued:

> "So the judge who was here, whose name was Gallagher, died; so we were waiting and waiting for them to finish the trials of the other defendants in the case; and he promised me, and he said that he could get it down to 15 years at 50, and that's why I waited for so long."

Defendant asked, "And why were they making me wait for three years just to give me those years?" Thus, defendant intimated that McCulloch and the trial judge presiding over the case at that time (who had since died) wanted defendant to wait until the codefendants' cases were resolved.

¶ 11 After hearing defendant, the trial court explained the respective roles of the court, the State, and defense counsel in plea proceedings. The court said it was unable to answer defendant's questions, particularly as to why defendant was asked to wait for three years. The court then asked defendant whether he felt "forced" to plead guilty. Defendant responded, "I don't feel forced, but I don't have any other option. They're telling me if I go to trial, it's a minimum of 50 years." After explaining a defense attorney's role in advising defendant about "the reality of the situation *** as best he can based on the evidence as he sees it," the court reminded defendant that the "ultimate decision [to plead guilty] is [defendant's]." The court asked, "Do you want to proceed with this?" Defendant replied, "Yes." After learning that defendant did not have a criminal

history, the court accepted defendant's guilty plea, finding that it was knowingly and voluntarily entered. The court imposed the agreed sentence of 20 years' imprisonment.

¶ 12 Thereafter, defendant timely moved *pro se* to reconsider his sentence. He argued that his guilty plea was not voluntary. He asserted that he would have accepted the State's May 2010 offer of 20 years served at 50% if McCulloch had not, "of his own volition, acted contrary to defendant's wishes." The trial court appointed counsel for defendant. Counsel filed an amended motion to withdraw the guilty plea and a certificate under Illinois Supreme Court Rule 604(d) (eff. March 8, 2016). Counsel argued that McCulloch was ineffective because he (1) advised defendant to reject the May 2010 offer, believing that a better deal could be obtained, and (2) failed to advise defendant that the May 2010 offer would be revoked if not accepted. The State filed a response, and the trial court scheduled an evidentiary hearing.

¶ 13 At the April 14, 2014, evidentiary hearing, defendant testified that he first heard of the May 2010 offer on May 20, 2010. McCulloch, with the aid of a Spanish interpreter, explained the State's offer to him. McCulloch wrote out the State's offer and defendant's options. The document, which was admitted at the hearing, reads in pertinent part:

> "I have been informed of the State's offer of 20 years on a plea to Armed Violence, at 50% and the dismissal of *all* other charges
>
> Knowing that, I pick:
>
> (1) a trial, which may result in a conviction for murder
>
> (2) the plea offer
>
> (3) a continuance to seek counsel, even if [*sic*] means that the State will withdraw their [*sic*] offer." (Emphasis in original.)

The third option on the document is circled. Below the text are the signatures of defendant and the court reporter and the date of May 20, 2010.

¶ 14 Defendant testified that the document was translated for him by a Spanish interpreter. Defendant confirmed that he chose the third option and signed the document. However, he did not recall McCulloch informing him that the State could withdraw its offer if he asked for time. Defendant testified that he did not accept the offer immediately because he wanted to discuss it with his family. Later, when he told McCulloch that he wished to accept the offer, McCulloch "recommended that [defendant] wait, that [he] could possibly get 15 years at 50 percent." McCulloch told defendant to wait until the codefendants' cases were resolved, as McCulloch believed that he could get defendant a better deal. Eventually, McCulloch retired and another assistant public defender was appointed for defendant. Only after this new appointment did defendant learn that the State's offer had been revoked.

¶ 15 On cross-examination, defendant testified that McCulloch told him he might need to testify against his codefendants. Defendant was willing to testify against one of the codefendants but was told later that his testimony was not needed. Defendant denied ever indicating that he wanted to testify in favor of his codefendants.

¶ 16 McCulloch testified that he (1) advised defendant that the State's May 2010 offer was fair; (2) told defendant he would face a more severe sentence if he went to trial; (3) never told defendant not to take the May 2010 offer; (4) never advised defendant that he could get him a better deal; (5) never heard from defendant after May 20, 2010, that he wanted to accept the State's offer; and (6) would have contacted the State if he had heard from defendant that he wanted to accept the offer. Defendant told McCulloch that he did not want to accept the State's May 2010 offer because he believed it was unfair.

¶ 17 McCulloch also testified that he told defendant that the State would revoke its offer if defendant went to trial or if he persisted in seeking continuances to retain private counsel. McCulloch stated that defendant wanted to testify in favor of one of the codefendants, but McCulloch advised him against that. Defendant never told McCulloch that he wanted to testify against any of his codefendants, but McCulloch did tell defendant that his willingness to provide such testimony could enhance his bargaining power with the State.

¶ 18 The assistant State's Attorney, assigned to the case in May 2010, testified that he believed that the State's May 2010 offer was contingent on defendant testifying against his codefendants and that an agreement was never reached. The codefendants, who agreed to testify for the State, received advantageous offers to plead guilty, but the charges against them remained pending until their testimony was accepted. Although the assistant State's Attorney could not remember if there was a cutoff date for the State's offer to defendant, he believed that the offer would expire when the trial of the most culpable codefendant began.

¶ 19 Also testifying was the Spanish interpreter who was in court on May 20, 2010. She was shown the May 2010 document defendant signed describing the State's offer and defendant's options. She identified her signature on the document. She had translated the document for defendant. She would have read it verbatim for defendant because no paraphrasing was necessary.

¶ 20 The trial court found McCulloch credible and defendant incredible. The court found specifically as follows: (1) defendant could not claim that he did not know that the May 2010 offer could be withdrawn, when the document he signed said exactly that; (2) if defendant had wanted to accept the State's offer or hoped through McCulloch to get a better deal, he would not have asked on May 20, 2010, for a continuance to retain private counsel; (3) despite multiple opportunities after May 2010, defendant did not indicate to McCulloch a desire to accept the May

2010 offer; and (4) when he pleaded guilty in March 2013, defendant persisted in that plea despite his reservations as stated on the record.

¶ 21 Moreover, the court determined that there was no meeting of the minds regarding the State's May 2010 offer; particularly, there was no indication that defendant was willing to testify against his codefendants.

¶ 22 Defendant appealed, arguing that postplea counsel failed to comply with Rule 604(d). We affirmed. See *People v. Saucedo-Cervantes*, 2016 IL App (2d) 140480-U.

¶ 23 In July 2017, defendant filed three *pro se* petitions and one *pro se* supplemental petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). In these petitions, he argued that (1) McCulloch was ineffective because he (a) did not advise defendant that the State would revoke the May 2010 offer if defendant rejected it and (b) induced defendant to reject the May 2010 offer by telling defendant that if he hired private counsel, he might get a better deal. Defendant also argued that (2) his March 2013 plea was involuntary because he was forced to plead guilty when he ran out of money to pay private counsel; (3) the trial court abused its discretion when it accepted the March 2013 plea; and (4) appellate counsel was ineffective for failing to raise issues (1) through (3). Last, defendant claimed that (5) his private counsel was ineffective for not preventing defendant from pleading guilty in March 2013 to first-degree murder where the State provided an insufficient factual basis; and (6) he received an unconstitutionally disparate sentence compared to his codefendants' sentences. Attached to the filings were defendant's affidavits and the affidavit of his wife. The latter averred that McCulloch told defendant to talk to his family before accepting the State's offer; defendant spoke to her; and the offer was revoked after she and defendant talked.

¶ 24 The trial court advanced defendant's petition to the second stage of proceedings under the Act. The court appointed counsel, who filed an amended petition and a certificate under Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). In the certificate, counsel asserted, among other things, that he reviewed the trial records and transcripts in defendant's case; consulted with defendant by phone, mail, and in-person; and filed an amended petition on defendant's behalf. The amended petition adopted defendant's *pro se* claim that appellate counsel was ineffective for failing to argue McCulloch's ineffectiveness for neglecting to tell defendant that the State's May 2010 offer would be revoked after May 20, 2010.

¶ 25 The State filed a motion to dismiss, which the trial court granted after a hearing. Defendant timely appealed, and the trial court appointed the appellate defender for defendant.

¶ 26 II. ANALYSIS

¶ 27 Per *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), the appellate defender moves to withdraw as counsel. In her motion, counsel states that she read the record and found no issue of arguable merit. Counsel further states that she advised defendant of her opinion. Counsel supports her motion with a memorandum of law providing a statement of facts, a list of potential issues, and arguments why those issues lack arguable merit. We advised defendant that he had 30 days to respond to the motion. Defendant has responded.

¶ 28 Counsel suggests two potential issues but concludes that neither has arguable merit. The first potential issue is whether defendant made a substantial showing that appellate counsel was ineffective for failing to raise McCulloch's ineffectiveness for (1) failing to tell defendant that the State's May 2010 offer would be revoked after May 20, 2010, and (2) neglecting defendant's case thereafter. The second potential issue is whether postconviction counsel provided reasonable assistance.

¶ 29 In reviewing these claims, we observe that the Act provides a three-stage mechanism for a defendant to advance a claim that he suffered a substantial deprivation of his constitutional rights. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). Defendant's petition was dismissed at stage two. "At the second stage of postconviction proceedings, the trial court shall appoint counsel for an indigent defendant." *People v. McGee*, 2021 IL App (2d) 190040, ¶ 29. "The State may file a motion to dismiss or an answer." *Id.* " 'If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage.' " *Id.* (quoting *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009)). "To survive dismissal, the petition must make a substantial showing of a constitutional violation." *Id.* "The trial court is precluded from engaging in any fact-finding or credibility determinations at this stage because '[a]ll well-pleaded factual allegations not positively rebutted by the trial record must be taken as true for purposes of the State's motion to dismiss.' " *Id.* (quoting *People v. Sanders*, 2016 IL 118123, ¶ 42). A substantial showing of a constitutional violation at the second stage is " 'a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle [the defendant] to relief.' " *Id.* (quoting *People v. Domagala*, 2013 IL 113688, ¶ 35). Dismissal is warranted when the defendant's allegations, liberally construed in a light most favorable to the defendant, are positively rebutted. *People v. Coleman*, 183 Ill. 2d 366, 382, 385 (1998). We review *de novo* a dismissal of a petition at the second stage. *McGee*, 2021 IL App (2d) 190040, ¶ 29.

¶ 30 In his amended petition, defendant argued that appellate counsel was ineffective for failing to raise McCulloch's ineffectiveness. To prevail on a claim of ineffective assistance of trial or appellate counsel, a defendant must satisfy the two-pronged test from *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Avitia*, 178 Ill. App. 3d 968, 970 (1989). Specifically, " 'a

defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.' " *McGee*, 2021 IL App (2d) 190040, ¶ 30 (quoting *People v. Graham*, 206 Ill. 2d 465, 476 (2003)). "To review the second-stage dismissal of a petition alleging a *Strickland* violation, we determine whether defendant made a substantial showing under the two-pronged ineffectiveness test." *Id.*

¶ 31 Here, the record rebuts defendant's claim that McCulloch did not inform him that the May 2010 offer could be revoked. Specifically, the document executed by defendant on May 20, 2010, explicitly acknowledges that defendant was presented with the State's offer for defendant to plead guilty to armed violence in exchange for a 20-year sentence served at 50% and that, instead of accepting this offer, defendant opted for "a continuance to seek counsel, even if [*sic*] means that the State will withdraw their [*sic*] offer." In court on May 20, 2010, McCulloch, in defendant's presence and with the aid of a Spanish interpreter, advised the court that defendant wanted a continuance to retain private counsel. At the evidentiary hearing on defendant's motion to withdraw his March 2013 guilty plea, defendant confirmed that it was his choice to take time to discuss the offer with his family. Moreover, the record rebuts defendant's claim that McCulloch neglected defendant's case. While defendant attempted to retain private counsel, McCulloch continued negotiations with the State. Because McCulloch was not ineffective, appellate counsel was not ineffective for failing to allege McCulloch's ineffectiveness. See *People v. Borizov*, 2019 IL App (2d) 170004, ¶ 14.

¶ 32 The record also rebuts defendant's claim that postconviction counsel provided unreasonable assistance. In considering that issue, we note that the appointment of counsel at the second stage is a statutory right, not a constitutional one. 725 ILCS 5/122-4 (West 2018); *People*

v. Suarez, 224 Ill. 2d 37, 42 (2007). That statutory right entitles the defendant to a reasonable level of assistance from postconviction counsel. *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19. To ensure this level of assistance is provided, Rule 651(c) imposes three duties on appointed counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Specifically, counsel must (1) consult with the defendant to ascertain his or her contentions of constitutional deprivations; (2) examine the record of the trial proceedings; and (3) make any amendments to the filed *pro se* petition that are necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017); *Perkins*, 229 Ill. 2d at 42.

¶ 33 "The filing of a Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel provided reasonable assistance." *People v. Miller*, 2017 IL App (3d) 140977, ¶ 47. The defendant may overcome that presumption "by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c)." *Id.* Like the second-stage dismissal of a postconviction petition, we review *de novo* whether counsel provided the reasonable level of assistance required by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 34 Here, postconviction counsel filed a Rule 651(c) certificate indicating that he complied with the three duties delineated in Rule 651(c). The record does not rebut counsel's assertions. Particularly, we cannot conclude that it was unreasonable for counsel not to include in the amended petition all the claims defendant raised in the *pro se* petitions, as, again, the record rebuts these *pro se* claims. First, while defendant claimed that McCulloch said that *private counsel* might get defendant a better deal, defendant stated at both the March 2013 plea hearing and the April 2014 evidentiary hearing that McCulloch said that *he* could get defendant a better deal. In any event, the May 2020 document states simply that defendant asked for a continuance because he wanted to obtain private counsel and that he did so knowing that the State's offer could be revoked.

¶ 35 Second, the record rebuts any contention that defendant's March 2013 plea was involuntary because he ran out of money to pay private counsel. Defendant was thoroughly admonished. He confirmed that no one forced or threatened him to plead guilty. He voiced reservations based on the lapsed May 2020 offer but said nothing about diminished funds. The trial court accepted defendant's guilty plea only after it ensured that defendant still wished to plead guilty.

¶ 36 Third, the court did not abuse its discretion when it accepted the March 2013 guilty plea. Only after the court thoroughly admonished defendant did it accept the plea, finding it knowingly and voluntarily entered.

¶ 37 Fourth, because the foregoing issues lack merit, appellate counsel was not ineffective for failing to raise them. See *People v. Williams,* 2016 IL App (1st) 133459, ¶ 33 (" 'Appellate counsel is not required to brief every conceivable issue on appeal, and counsel is not incompetent for choosing not to raise meritless issues.' ") (quoting *People v. Maclin,* 2014 IL App (1st) 110342, ¶ 32).

¶ 38 Fifth, the State's factual basis for the March 2013 guilty plea was sufficient. Sixth, and last, because defendant and his codefendants were not similarly situated—as, among other things, the codefendants pleaded guilty in exchange for helping the State—any claim that defendant's sentence is unconstitutionally disparate is baseless. See *People v. Spriggle,* 358 Ill. App. 3d 447, 456 (2005).

¶ 39 In his response to appellate counsel's motion to withdraw, defendant asks for appointment of another attorney on appeal. We deny that request. It is well settled that a defendant may not ask for the appointment of an attorney when another attorney has already been appointed. See *People v. Abernathy,* 399 Ill. App. 3d 420, 426 (2010) ("[A] criminal defendant has no right to

choose his or her court-appointed counsel or insist on representation by a particular public defender.").

¶ 40 III. CONCLUSION

¶ 41 After examining the record, the motion to withdraw, the memorandum of law, and defendant's response, we agree with counsel that this appeal presents no issue of arguable merit. Thus, we grant the motion to withdraw and affirm the judgment of the circuit court of Kane County.

¶ 42 Affirmed.