

No. 1-14-1363

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 12442
)	
RUBEN CLAUDIO,)	The Honorable
)	Dennis J. Porter
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by summarily dismissing defendant's postconviction petition after a third stage evidentiary hearing, at which defendant received reasonable assistance from his postconviction counsel. Affirmed.

¶ 2 This appeal arises from the trial court's order summarily dismissing defendant Ruben Claudio's *pro se* petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-

1 *et seq.* (West 2014)). On appeal, defendant contends that the trial court erred by dismissing his postconviction petition because during the evidentiary hearing the trial court failed to properly address whether trial counsel failed to file a motion to withdraw defendant's guilty plea and a notice of appeal. In addition, defendant contends that his postconviction counsel was ineffective. Further, defendant contends that this court should construe Supreme Court Rule 606(a) (effective Dec. 11, 2014) to require appointment of counsel to assist a defendant convicted on a guilty plea in perfecting an appeal from his conviction. We affirm.

¶ 3

I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. Defendant was charged with three counts of first-degree murder and one count of robbery for causing the death of Jennifer Warner. On May 10, 2003, Jennifer, a college counselor at the Illinois Institute of Technology, attended a friend's birthday party. Defendant, who was riding his bicycle in the area of 2100 North Albany, Chicago, observed Jennifer on her way home from the train station carrying her grandmother's monogrammed red purse and decided to rob her. Defendant followed Jennifer into her building's vestibule and put her in a chokehold as she struggled. Defendant then used Jennifer's purse strap as a ligature and choked Jennifer to death. Defendant searched Jennifer's body for money, took the purse and fled. Later, defendant ditched the purse in the basement of 1923 North Humboldt, Chicago, but kept Jennifer's credit cards.

¶ 5 Shortly thereafter, defendant made various third-party admissions to family members and friends. He also used Jennifer's credit cards to buy gasoline at two Chicago gas stations. After defendant's arrest, Assistant Public Defender (APD) Marijane Placek was assigned to represent defendant. APD Placek initially inquired about defendant's mental health and defendant acknowledged that he had a mental illness for which he was prescribed medications. On May 3,

2006, defendant pleaded guilty but mentally ill in a blind plea to first-degree murder. The trial court questioned defendant at length on the consequence of pleading guilty and what rights he "was giving up." Defendant repeatedly acknowledged that he understood the ramifications and agreed to the plea.

¶ 6 On January 3, 2007, the trial court conducted a hearing to make a determination on defendant's mental health. The court found "the record indicat[ed] the defendant suffers from a number of diagnoses, including major depression, which [was] recurrent, generalized anxiety disorder, mental retardation with a global assessment functioning level of . . . 35." In addition, defendant "is virtually illiterate and he functions at a very low level." Thus, the trial court found there was sufficient evidence to find the defendant guilty but mentally ill. The hearing then proceeded to sentencing where the trial court sentenced defendant to 45 years' imprisonment. While the trial court did take into account defendant's mental illness, it also accounted for the severity of the crime and defendant's prior juvenile record consisting of possession of a stolen automobile, retail theft and criminal trespass to a vehicle. Subsequently, defendant did not file a motion to withdraw the plea, reconsider the sentence or notice of appeal.

¶ 7 On January 25, 2010, defendant filed a single-issue *pro se* postconviction petition claiming ineffective assistance of trial counsel for failure to file an appeal. Specifically, defendant contended that he instructed APD Placek to file a notice of appeal at his sentencing and she failed to do so. In support of his claim, defendant filed his own affidavit and a signed statement from Jeramey Brown, the inmate who prepared his petition. The petition then advanced to the second stage where APD Denise Avant was appointed to represent defendant. She read the underlying record, communicated with defendant, interviewed APD Placek and sent an investigator to follow up with defendant. She then filed her 651(c) certificate without

amending defendant's *pro se* petition. The State filed a motion to dismiss defendant's postconviction petition, contending that the petition was untimely, failed to make a substantial showing that defendant's attorney's performance was deficient or that defendant was prejudiced as a result. The court denied the State's motion and the petition advanced to a third stage evidentiary hearing.

¶ 8 At the hearing, defendant testified that when he pleaded guilty to first-degree murder he was diagnosed as mentally ill and was taking the medications Trazodone, Seroquel and Risperdal for "sleeping, hearing voices, [and] depress[ion]." Defendant asked APD Placek to file a notice of appeal in the bullpen, but he did not recall when this occurred, only that it was warm outside. He ascertained that his appeal had never been filed when his cellmate Brown looked into the matter. Brown then helped defendant file a *pro se* postconviction petition.

¶ 9 On cross-examination, defendant further testified that the decision to plead guilty "was really [APD Placek's] because [he] made her do everything," but he never told her he did not want to plead guilty. APD Placek did explain everything that would happen after defendant's plea regarding his sentence. She further told defendant that she was going to file a motion to appeal his case and would take care of his guilty plea before he got his sentence. Defendant never told the trial court that he did not understand what was happening and knew he had 30 days to file a motion to withdraw his plea. After sentencing, defendant never asked APD Placek to file a motion to withdraw his guilty plea and had no more contact with her.

¶ 10 APD Placek testified that she had been working with the Public Defender for over 40 years and had been assigned to the homicide task force for 20 years. She recalled noticing something was odd about defendant's behavior after her first visit to jail and inquired about his mental health. She then confirmed that defendant was receiving his prescription medications

while incarcerated. APD Placek was concerned that defendant might not understand the seriousness of the State's charges against him, so she enlisted the help of Julie Norman, a licensed clinical social worker and mental health professional. APD Placek also requested that Dr. Alexander Abolsky, a forensic psychologist, evaluate defendant to see if there was an affirmative defense available. APD Placek did not recall how many times she visited defendant in jail, but believed it would have been about 4 times.

¶ 11 As part of her usual practice as an experienced public defender on the task force, APD Placek would have gone through police reports and defendant's statement. She also would have made sure defendant was aware of the evidence against him and discussed possible outcomes, including the State's purview to seek the death penalty since a robbery was involved. In addition, APD Placek would have given defendant the maximum and minimum sentencing range with possible extensions and asked defendant's permission to negotiate a plea agreement. Defendant allowed APD Placek to negotiate with the State, but a favorable plea was never reached. Therefore, APD Placek discussed the option of a blind plea of guilty but mentally ill, including the ramifications and strategy behind it. APD Placek also asked Norman to explain the ramifications of this type of plea to defendant who indicated he understood.

¶ 12 At the hearing, APD Placek and the State agreed upon a series of stipulations, including Dr. Abolsky's finding that defendant was "guilty but mentally ill." After sentencing, APD Placek would have had a conversation with defendant telling him if he had any concerns or needed help dealing with his mental illness to contact her office. Defendant never indicated that he "did not understand what had happened at sentencing, wanted to withdraw his guilty plea, was upset about the 45 years, or wanted [APD Placek] to file an appeal." Further, she never would have filed a notice of appeal without the client's consent.

¶ 13 Subsequently, the trial court denied defendant's petition for postconviction relief, noting that defendant understood the terms of his plea and there was no evidence to suggest that defendant contacted APD Placek to withdraw his guilty plea and file a notice of appeal. In addition, the trial court observed that "the evidence show[ed] that the defendant - not [that] the defendant was unhappy at the time that the defendant [was] unhappy now and that's why he has filed this . . . postconviction petition." Consequently, defendant filed this timely notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant contends that the trial court erred by summarily dismissing his *pro se* postconviction petition because during the evidentiary hearing the trial court failed to properly address whether trial counsel failed to file a motion to withdraw defendant's guilty plea and a subsequent notice of appeal. The Act allows review of a defendant's claim where there was a "substantial denial of his * * * rights" under either, or both, the Illinois Constitution or United States Constitution in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2014). Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues that have previously been decided by a reviewing court are barred by *res judicata*. *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007). At the first stage, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2014); *People v. Sawczenko*, 328 Ill. App. 3d 888, 892 (2002). If the petition is not dismissed at the first stage, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2014). At the second stage, the State has an opportunity to either answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2014). The trial court

then determines whether the petition makes a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition is not dismissed at the second stage, it proceeds to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2014). This case presents an appeal from the dismissal of a petition at the third stage of the postconviction process. When a petition is advanced to a third stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a trial court's decision unless it is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "Manifest error is error which is clearly evident, plain, and indisputable." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

¶ 16 We find the trial court's decision was not manifestly erroneous. At the evidentiary hearing, defendant testified that he understood what was happening at sentencing and voluntarily agreed to plead guilty but mentally ill. And although he contends that APD Placek told him she was going to file an appeal "in the bullpen," he cannot recall when this incident took place and suggests it was prior to pleading guilty. Further, defendant admitted that he did not ask APD Placek to file a motion to withdraw his guilty plea and has had no contact with her since sentencing. On the other hand, APD Placek, an accomplished, veteran public defender, testified that she never discussed important matters with clients in the bullpen as defendant suggests because other inmates could eavesdrop. In addition, although APD Placek instructed defendant to contact her if he had any concerns, defendant never raised any issues, never indicated that he did not understand what had happened at sentencing, that he wanted to withdraw his guilty plea, that he was upset about the 45 years, or that he wanted [APD Placek] to file an appeal."

¶ 17 Here, defendant's contention that APD Placek definitively agreed to withdraw his guilty plea and file a notice of appeal before defendant actually pled guilty or was sentenced is highly

improbable. Even if defendant's rights were discussed prior to his plea and sentencing, he still had the burden of either filing *pro se* or requesting that APD Placek file a motion to withdraw his plea or reconsider sentencing. And although defendant claims that the trial court did not thoroughly review this issue at the hearing, the record suggests otherwise. The trial court specifically indicated that "defendant never did contact [APD] Placek nor . . . ask to withdraw his plea of guilt or file a notice of appeal and had he done so [APD Placek] surely would have done as he wished." It is up to the trial court to make credibility determinations and we will not substitute our judgment for that of the trier of fact in these matters. See *People v. Childress*, 191 Ill. 2d 168, 174 (2000) (fact-finding and credibility determinations are made by the trial court in a third stage proceeding and we accord great deference to the trial court's factual determinations). Moreover, when a postconviction petition is advanced to a third stage evidentiary hearing, the defendant bears the burden of showing a substantial deprivation of his constitutional rights and he has not done so here. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). Therefore, we find no error in the trial court's determination.

¶ 18 Defendant next contends that he was denied reasonable assistance from his postconviction counsel when she failed to successfully argue and ascertain that defendant and APD Placek discussed filing a notice of appeal during plea discussions. The right to counsel in postconviction proceedings is wholly statutory and a petitioner is entitled only to the "reasonable" level of assistance required by the Act. *People v. Lander*, 215 Ill. 2d 577, 583. (2005). Under Supreme Court Rule 651(c) (eff. Feb. 6, 2013), postconviction counsel must (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's

contentions. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). This court has consistently held that remand is required where postconviction counsel fails to complete any one of the above duties, regardless of whether the claims raised in the petition had merit. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). The filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during second stage proceedings under the Act, namely adequately investigated, amended and properly presented claims. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Defendant bears the burden of demonstrating that his attorney failed to comply with the duties mandated in Rule 651(c).

¶ 19 In the case *sub judice*, the record suggests that postconviction counsel met all of the requirements under Rule 651(c) and defendant received reasonable assistance. For instance, postconviction counsel executed the 651(c) certificate, reviewed the proceedings below, interviewed APD Placek and had an investigator review matters with defendant. Counsel also successfully defeated the State's motion to dismiss and provided sworn affidavits of defendant and Brown. And although defendant contends that at the evidentiary hearing postconviction counsel misunderstood when APD Placek and defendant discussed filing a notice of appeal, this contention is belied by the record. It was defendant who could not recall when the alleged conversation took place and APD Placek testified that defendant never asked her to file a motion to withdraw the plea. Thus, defendant did receive more than adequate representation statutorily available to him.

¶ 20 Further, defendant contends that we should construe Supreme Court Rule 606(a) (eff. Dec. 11, 2014) to automatically require appointment of counsel to assist a defendant convicted on a guilty plea in perfecting an appeal from his conviction. We observe that defendant not only failed to raise this issue in his *pro se* postconviction petition, but postconviction counsel filed a

651(c) certificate creating the presumption that this issue was not one which defendant requested to raise. See *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009) (upon the filing of a certificate in accordance with Rule 651(c), the presumption exists that postconviction counsel adequately consulted with petitioner and presented petitioner's desired claims); *People v. Jones*, 213 Ill. 2d 498, 507-09 (2004) (under Illinois law, a defendant cannot present new claims for the first time on appeal for postconviction relief). Moreover, in *People v. Merriweather*, 2013 IL App (1st) 113789, ¶ 28, based on the plain language of Supreme Court Rules 604(d) (eff. March 8, 2016) and 606(a), this court rejected defendant's argument that "the 30-day period following a guilty plea is a 'critical stage' of the criminal process during which a defendant has an absolute right to counsel" and we see no basis to deviate from that ruling here. The record demonstrates that the trial court explained defendant his rights at sentencing and he acknowledged that he understood. Thus, it was defendant's burden to file a *pro se* motion to withdraw his guilty plea or request counsel. Accordingly, the trial court properly dismissed defendant's postconviction petition.

¶ 21

CONCLUSION

¶ 22 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.