

NOTICE
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2016 IL App (5th) 140150-U

NO. 5-14-0150

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 07-CF-908
)	
VICTOR BURRIES,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed the defendant's petition for postconviction relief where each of the defendant's arguments were waived, barred by *res judicata*, insufficiently pleaded, or harmless error.

¶ 2 The defendant, Victor Burries, appeals the dismissal 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 filed a response. We considered OSAD's motion to withdraw as counsel on appeal and the defendant's response. 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 St. Clair County.

¶ 3

BACKGROUND

¶ 4 On August 24, 2007, a grand jury indicted the defendant on four counts of aggravated criminal sexual assault against a 14-year-old runaway, T.S. A jury trial was held in regards to these charges.

¶ 5 T.S. testified to the following: She was with Taneka Price on the day of the incident. They encountered the defendant and ultimately ended up at the defendant's house. After talking for about an hour in the front room of the house, T.S. and Price attempted to leave. The defendant said that T.S. was not going to leave. Then the defendant pushed T.S. and she fell into a window, breaking it. He then began hitting T.S. in the face. Price told him to stop, but the defendant pushed her out of the house. Once Price was gone, the defendant made T.S. change into lingerie. He then forced her into a back room. During the entire encounter the defendant struck T.S. with his fists, a beer bottle, and a fan. Once in the back room the defendant inserted his penis in T.S.'s vagina, and he placed his mouth on her vagina. The defendant did not ejaculate. The encounter ended when the police arrived and kicked in the door.

¶ 6 On cross-examination, T.S. admitted the following: She was in custody on a domestic battery charge. Additionally she had been on probation for over a year. The

day after the incident she was interviewed at the Child Advocacy Center (CAC). During the interview at the CAC, she admitted that on the day of the incident she was coming down off of heroin, marijuana, and crack cocaine and that she never told the defendant to stop. She did claim that she asked him why he was doing it. She denied having sex with a man at the house other than the defendant or agreeing to a three-way sex act.

¶ 7 Taneka Price testified to the following: She was in custody for a probation violation. She had prior convictions for robbery, possession of a stolen motor vehicle, and unlawful use of a weapon. Price had ongoing problems with cocaine, marijuana, and alcohol. She testified that the State offered her nothing in return for her testimony. Price testified that she was with T.S. on the date of the attack. During the day she smoked marijuana and drank beer. Price and T.S. were invited by the defendant to go for a ride in his car. Ultimately they arrived at the defendant's house. At some point, the defendant went to a store, and he returned with a young man named Matlock. Price indicated that the defendant asked to have sex with T.S. When T.S. and Price attempted to leave the defendant's house, the defendant grabbed T.S. and threw her into a window. After hitting the window, T.S. slid to the ground bleeding from the back of her head, and the defendant began hitting T.S. Initially, Price attempted to stop the attack. At this point, the third man pushed himself and Price out the door. While standing on the patio, she saw the defendant pulling T.S. into the back room, and the defendant told her to take her clothes off while hitting her with a fan. During the encounter, T.S. begged Price not to leave. After the defendant took T.S. into the back room, Price went looking for help. Eventually, she found someone to call the police. The police arrived and started

knocking on the door. The door opened, and T.S. came out of the house and fell in the yard. Price indicated that T.S. was real bloody.

¶ 8 On cross-examination, Price testified as follows: She was wearing a jumpsuit because she was on probation for a parole violation she committed after pleading guilty to unlawful use of a firearm, and it was not her first parole violation. Originally, Price pleaded guilty to the charge in exchange for a sentence of probation after some time in the county jail, even though she could have received a prison sentence of between 3 and 14 years. She also received drug treatment. Price had been in county jail as many as 13 times. The week before the defendant's trial, Price pleaded guilty to four parole violations. In return, she was returned to probation. Price denied telling an investigator that on the day after the attack she and T.S. had been kissing and touching each other sexually. She also denied that T.S. changed clothes with the defendant in the back room while Price was still in the front room. Finally, Price denied having a threesome with T.S. and Matlock.

¶ 9 Dennis Aubuchon, who worked with the Illinois State Police in the Forensic Science Laboratory, testified as follows: Aubuchon analyzed a rape kit taken from T.S. His testing found the presence of sperm on the genital swab. He further testified that he believed DNA testing had been ordered on the semen sample. He admitted that his testing could not determine the source or sources of the semen found on the vaginal swab. Generally, if a suspect admits to having sex with a victim, DNA tests would not be performed.

¶ 10 On direct-examination, Detective Draphy Durgins with the Village of Washington Park police department testified as follows: As part of Durgins' investigation, she interviewed the defendant. The interview was recorded. The State showed the recording of the investigation to the jury. During the interview, the defendant stated as follows: he was expecting to have sex with T.S., and he was not interested in her renegeing on the offer. T.S. kept telling the defendant that she would come back, but he did not believe her. The defendant admitted that when T.S. attempted to leave, he threw her into a window, breaking the window. He also admitted to throwing her into a wall. The defendant admitted to using a beer bottle to coerce T.S. in the bedroom where the attack took place. The defendant further stated that the use of the beer bottle was self-explanatory. The defendant testified that he said, "[Y]ou're trying to play me."

¶ 11 Prior to cross-examination of Durgins, the State sought a ruling preventing the defendant from arguing that T.S. had sex with someone else or making any reference to her prior sexual activity. The defendant argued that the State had opened the door to arguments concerning T.S.'s prior sexual encounters by showing portions of the defendant's interview where the defendant stated that prior to the alleged assault, he observed T.S. in a sexual encounter in the house. The court ruled that the State's violation of the rape shield statute (725 ILCS 5/115-7 (West 2006)) did not allow the defendant to violate the rape shield statute. The court, however, left open the issue of what would be allowed in closing arguments.

¶ 12 On further examination, as relevant to this case, Durgins testified as follows concerning what had been played of the interview: the defendant admitted to having sex

with T.S., but the defendant also stated that T.S. never said no. Durgins also testified that the defendant told her that T.S. removed the items of clothing by herself.

¶ 13 Prior to calling the next witness, counsel and the court conferred out of the hearing of the jury. The court reiterated its rulings with respect to the rape shield statute. The defense was free to argue (1) there was no DNA evidence linking the defendant to the crime; and (2) there was evidence of semen. In conformance with the rape shield statute, the defense was not allowed to argue: (1) the semen found belonged to someone else; or (2) because testing found the presence of semen, T.S. had sex with someone else.

¶ 14 Dr. Tim Kutz then testified to the following: Kutz worked for St. Louis University School of Medicine, primarily at Cardinal Glennon Children's Hospital. Part of his duties entail medical examination of children believed to have been abused, both physically and sexually. Following foundational testimony, the court accepted Kutz as an expert in child sexual abuse. Kutz took part in the examination of T.S. He recalled T.S. telling him that she had been: hit in the face with a beer bottle; choked or grabbed around the neck; pushed into a glass window; assaulted by someone licking her genital area; and assaulted by someone putting their penis in her genital area. Kutz found injuries supporting the story told by T.S. As part of the exam, Kutz obtained, among other things, swabs of T.S.'s genital area. Kutz testified that T.S. behaved in a manner consistent with other children who are the victims of sexual abuse. He also testified that it is not uncommon for children who are the victims of sexual abuse to not be able to recall every detail of what happened during the abuse. Kutz further testified that it would not be uncommon

for an abused child to not remember or know whether the perpetrator ejaculated during the attack.

¶ 15 After the State rested, the court again addressed the issues surrounding the State's violation of the rape shield statute. After argument by both parties, the court ruled that the defendant could comment on the semen found in T.S., that it conflicts with her testimony that the defendant did not ejaculate, and that the semen was that of Matlock.

¶ 16 The defense began its case by calling Jeremiah Beison. Beison testified as follows: At some point on the day of the incident, Beison, the defendant, T.S., and Price were riding in Beison's car. They stopped and spent some time at a park. While they were at the park, T.S. and Price were kissing and hugging. Eventually, they arrived at the defendant's house. While at the defendant's house, Beison did not see any hostility between the defendant and T.S. After some time, Beison left the defendant's house. On cross-examination, Beison admitted he never talked to the police about the alleged attack of T.S. The defense then reexamined Beison, and Beison testified that he talked to the police about a robbery.

¶ 17 The State objected to any further questions along those lines. Counsel then conferred with the court concerning the objection. The defendant wanted to have Beison testify to being a witness of a robbery committed by Price to show that Price had a reason to testify favorably for the State in return for leniency on her pending charges. The State argued that it was irrelevant and prejudicial. Noting that no charges had been filed, the court sustained the objection, and no further questioning of Beison occurred. The defense then rested.

¶ 18 In its closing arguments, the State made note of the young age of T.S. The defense, in its closing, pointed out that there was evidence that Price, T.S., and the defendant talked about having a threesome while they were driving around. Additionally, the defense pointed out that there was evidence of Price and T.S. trying on lingerie while they were at the defendant's home. Finally, the defense pointed out that the State did not present any DNA evidence of the semen and reminded the jury that T.S. testified that the defendant did not ejaculate. The State noted that the defendant made the following statements in the video of the defendant's interview: The defendant said he penetrated T.S. and performed oral sex with her. He said, "I'm guilty of pushing her into that window. I pushed her two times." He said he threatened her with a beer bottle. He stated that she said, "Please don't hurt me. Please don't hurt me." He said T.S. was bleeding. The defendant said: "No, we're going to get down before you go. You aint going to renege on me now, hell no." The defendant also stated that earlier she told him she wanted to leave the house. She was crying before she took her clothes off. She was crying as they went in to the bedroom. "I didn't have to say anything about the beer bottle. It was self-explanatory." He said, "bitch are you trying to play me?" The defendant did not object to any of those statements.

¶ 19 Ultimately, the jury convicted the defendant on four counts of aggravated criminal sexual assault, which merged into two convictions. The circuit court sentenced the defendant to terms of 28 and 6 years to be served consecutively

¶ 20 On direct appeal, the defendant raised the following issues:

1. The defendant's trial counsel was ineffective for failing to offer jury instructions on the lesser included offenses of aggravated criminal sexual abuse, patronizing a juvenile prostitute, battery, consent to the interaction, and reasonable belief of the age of T.S.
2. The defendant was denied a fair trial because he was denied the opportunity to present DNA evidence that the semen found in T.S.'s vagina was not his.
3. The defendant was denied a fair trial because he was not allowed to confront Price about an alleged robbery charge, and the potential charge gave her motivation to lie.
4. The defendant was denied a fair trial because the trial court gave the criminal pattern jury instruction regarding bodily harm (Illinois Pattern Jury Instructions, Criminal, No. 11.65A (4th ed. 2000)) that includes causing pregnancy and the transmission of a sexually transmitted disease as forms of bodily harm.

This court affirmed the circuit court's judgment. *People v. Burries*, No. 5-08-0236 (Sept. 16, 2010) (unpublished order under Supreme Court Rule 23).

¶ 21 Following his direct appeal, the defendant filed a petition for postconviction relief. The defendant amended the petition for postconviction relief twice. The circuit court advanced the amended petition to second-stage proceedings. The defendant's second amended petition alleged that his constitutional rights were violated in the following ways:

1. The defendant was denied due process because the State committed prosecutorial misconduct by telling the jury that Taneka Price was not offered anything in

exchange for her testimony. The defendant argued that the following facts revealed that Price received promises from the State in exchange for her testimony: (1) Price was not charged with a robbery despite evidence that she committed a robbery; (2) although a conviction for aggravated use of a weapon requires a minimum sentence of three years' incarceration, she received mandatory supervised release; and (3) at the time she testified against the defendant, she was charged with unlawful trespass to a vehicle, and she was subsequently released for time served. Additionally, the defendant alleged that his trial and appellate counsel provided ineffective assistance by not raising this issue at trial and on appeal.

2. The defendant received ineffective assistance of counsel because counsel failed to investigate Price's background or impeach her with the pending theft charge. Additionally, he alleged that his appellate counsel provided ineffective assistance by not raising this issue on appeal.
3. The defendant received ineffective assistance of counsel because counsel failed to tell the jury about Price's motive to falsify her testimony. Additionally, he alleged that his appellate counsel provided ineffective assistance by not raising this issue on appeal.
4. The defendant received ineffective assistance of counsel because counsel failed to impress upon the jury that the defendant was being prosecuted for a sex crime or that the age of consent was a defense, despite the State's repeated argument to the jury that the victim was only 14 at the time of the crime.

Additionally, he alleged that his appellate counsel provided ineffective assistance by not raising this issue on appeal.

5. The defendant received ineffective assistance of counsel because his trial counsel failed to submit jury instructions for the lesser included offenses of patronizing a female prostitute or aggravated criminal sexual abuse. Additionally, he alleged that he his appellate counsel provided ineffective assistance by not raising this issue on appeal.
6. The State violated the defendant's constitutional rights by violating the rape shield statute. The pleading is far from clear but it appears he is claiming a violation of his rights to due process and effective assistance of counsel.
7. The State violated the defendant's due process rights by failing to correct testimony given at trial that it knew was false: T.S.'s testimony that she did not have sex at the house.
8. The State violated the defendant's due process rights by allowing T.S.'s fraudulent testimony to go uncorrected. T.S. testified that the defendant "pushed me into the window, he hit me, he hit me with a beer bottle." He argues that the State had a duty to correct that testimony because the CAC report contains an alleged statement by T.S. stating that the defendant pushed her, and she tripped over a couch.

¶ 22 The State filed a motion to dismiss. Following a hearing the circuit court dismissed the defendant's second amended postconviction petition. The defendant then filed a timely notice of appeal, leading to this appeal.

¶ 24 The Post-Conviction Hearing Act (the 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. When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. All facts not rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Finally, *res judicata* and waiver apply to claims in a postconviction petition, and they are a valid basis for a trial

court to dismiss a claim in a postconviction petition *sua sponte*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 25 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.) *Id.* 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.* In *People v. Tate*, 2012 IL 112214, the Illinois Supreme Court stated that at the second stage of postconviction proceedings the petitioner must " 'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. 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.

¶ 26 State's Failure to Disclose Deal With Price for Favorable Testimony

¶ 27 The defendant's first allegation was that the State denied him due process by failing to disclose that it had a deal with Price encouraging her to testify favorably for the State. Additionally he alleges he received ineffective assistance of counsel by his trial and appellate counsel for not raising the issue.

¶ 28 Price testified on direct examination that the State did not promise her anything in exchange for her testimony. "The use of perjured testimony to obtain a criminal conviction violates due process of law." *People v. Ellis*, 315 Ill. App. 3d 1108, 1112 (2000) (citing *People v. Olinger*, 176 Ill. 2d 326, 345 (1997)). This is so even if the State does not solicit the false testimony but merely allows it to go uncorrected. *Id.* Even when there have been no actual promises by the State to a witness charged of other crimes, and the witness testifies as such, it can still be a due process violation if the jury is misled and the witness receives some benefit from her testimony. See *id.* at 1115-16 (discussing *Olinger*).

¶ 29 Ultimately, we need not determine if a due process violation occurred with regard to Price's testimony that she received nothing in return for her testimony because we are not required to address the merits if any potential error is harmless. *People v. Hart*, 214 Ill. 2d 490, 517 (2005). We review the error to determine whether it was harmless beyond a reasonable doubt. *People v. Mullins*, 242 Ill. 2d 1, 23 (2011). "In other words, the inquiry is 'whether the defendant would have been convicted regardless of the error.' " *Id.* (quoting *People v. Dean*, 175 Ill. 2d 244, 259 (1997)). Even had the jury been made aware of any additional benefits Price would allegedly receive in exchange for her

testimony, the most that would have happened would be the jury giving Price's testimony no credence. The other evidence presented at trial, especially the testimony of T.S. and the video of the defendant's interview, is sufficient evidence that there is no reasonable likelihood that the defendant would not have been convicted. As any error was harmless, the defendant cannot meet the *Strickland* requirement that he show the outcome of his appeal would have been different if his appellate counsel had raised the issue on direct appeal.

¶ 30 Failure to Investigate Price's Background or Impeach Her

¶ 31 The defendant alleges that he received ineffective assistance of trial counsel because counsel failed to investigate Price's background and impeach her. He also alleges that his appellate counsel was ineffective for failing to raise the issue on direct appeal. The record refutes the defendant's claim. The defendant's trial counsel did impeach Price with her criminal background.

¶ 32 Price's Motive to Falsify Her Testimony

¶ 33 The defendant alleges ineffective assistance of trial and appellate counsel in regards to the jury not having been made aware of Price's alleged reason to testify falsely. As we discussed above, given the evidence presented at trial, any potential error was harmless beyond a reasonable doubt.

¶ 34 Trial Counsel's Failure to Address T.S.'s Age

¶ 35 The defendant alleged that trial counsel provided ineffective assistance because he failed to impress upon the jury that the defendant was on trial for a sex crime and that the age of consent was a valid defense. He also alleged that his appellate counsel was

ineffective for failing to address this issue. The defendant's claim that trial counsel was ineffective for failing to argue that the age of consent is a defense to his conviction is barred by *res judicata* because it was raised and rejected on direct appeal, and his claim that appellate counsel was ineffective fails.

¶ 36 Lesser Included Offenses

¶ 37 The defendant next argued that his trial counsel was ineffective for failing to offer jury instructions on lesser included offenses and that appellate counsel was ineffective for failing to raise this issue. As with the previous issue, this was addressed on direct appeal; the ineffective assistance of trial counsel claim is barred by *res judicata*, and his claim of ineffective assistance of appellate counsel necessarily fails.

¶ 38 Rape Shield Law

¶ 39 The defendant's next argument was that his due process rights were denied because the State violated the rape shield statute (725 ILCS 5/115-7 (West 2006)), which prevents the introduction of evidence of prior sexual activity of the victim, when it presented the tape of the defendant's interview wherein the defendant described a prior sexual act of the victim. The defendant makes no argument on how allowing his own statement that the victim engaged in sexual acts with other people on the day of the attack damaged his case. It would appear to bolster the claims made in his case. In any event, the defendant did not raise this claim on direct appeal and, unlike his other claims, he did not allege that appellate counsel was ineffective. Consequently, this claim is forefieted.

¶ 40

State's Failure to Correct Incorrect Statements by T.S.

¶ 41 The defendant also argued that the State had a duty to correct testimony by T.S. that it knew to be false. As discussed above, the State cannot allow perjured testimony to take place at trial. The defendant attempted to show that T.S. presented perjured testimony by highlighting the difference between T.S.'s testimony at trial and her statement as presented in a report prepared by the CAC. At trial, T.S. testified that the defendant pushed her into a window. The CAC report indicates that T.S. stated, "[the defendant] pushed me, and I tripped over a couch." We note the defendant cited to a portion of the transcript that involved the State's closing arguments, not T.S.'s testimony. Nevertheless, our review of the record shows that T.S. did in fact testify as indicated. The two statements taken together do not show that the State knew that T.S.'s testimony at trial was false. Being pushed and tripping over a couch is not inconsistent with testimony that the defendant pushed T.S. causing her to hit the window as she testified. And the defendant himself stated that he pushed her into the window. Even if we assume that T.S. lied and the State knew it was a lie and did nothing to intervene, given the evidence presented at trial, the error was harmless beyond a reasonable doubt.

¶ 42 The second alleged lie told by T.S. that the State failed to correct is that T.S. testified that she did not have sex with another man at the defendant's house. The defendant made no factual allegations showing this statement to be false. He disagrees with it, but that does not make it a lie. And he provides nothing to indicate that the State knew this was a lie. Regardless, this argument is waived because it was not raised on direct appeal, and even if the statement was a lie and the State knew it, given the

evidence produced at trial, including video of the defendant's own statements, the error would have been harmless beyond a reasonable doubt.

¶ 43

CONCLUSION

¶ 44 The defendant's arguments that his constitutional rights were violated fail because the arguments were either waived, barred by *res judicata*, improperly pleaded, or harmless beyond a reasonable doubt. OSAD's motion to withdraw is granted, and the judgment of the circuit court of St. Clair County is affirmed.

¶ 45 Motion granted; judgment affirmed.