

NOTICE
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2016 IL App (5th) 140564-U

NO. 5-14-0564

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. 11-CF-54
)	
MYRON BARBER,)	Honorable
)	Jan V. Fiss,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Appointed appellate counsel is granted leave to withdraw, and the judgment denying the defendant's postconviction petition is affirmed.

¶ 2 A few months after pleading guilty to a felony, the defendant, Myron Barber, filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). Through appointed postconviction counsel, the defendant filed an amended postconviction petition, wherein he claimed that his guilty plea was constitutionally invalid on three different grounds. After a hearing, the circuit court denied the petition. The defendant now appeals from that judgment. In this court, the defendant's appointed appellate counsel, the Office of the State Appellate Defender

(OSAD), has filed a motion to withdraw on the ground that this appeal lacks merit. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted the defendant ample opportunity to respond to OSAD's motion and to argue that this appeal has merit, but the defendant did not avail himself of that opportunity. This court has studied OSAD's motion and the entire record on appeal, and has concluded that this appeal does indeed lack merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 In January 2011, the defendant was charged with aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), a Class X felony (720 ILCS 5/12-4.2(b) (West 2010)) punishable by imprisonment for not less than 6 years and not more than 30 years (730 ILCS 5/5-4.5-25(a) (West 2010)). That same month, the defendant was arrested on that charge in the State of Minnesota. He subsequently was extradited to Illinois. In May 2011, the defendant, though represented by the public defender at the time, filed *pro se* a motion to dismiss the charge due to various alleged improprieties in the extradition proceedings. The circuit court never ruled on that motion.

¶ 5 On September 22, 2011, the defendant, his public defender, and a prosecutor appeared before the circuit court. In response to the court's query, the defendant indicated that he was satisfied with the public defender's representation. The prosecutor informed the court that the parties had reached an agreement under which the defendant would plead guilty to the charged offense and would be sentenced to imprisonment for six years, to be followed by mandatory supervised release for three years.

¶ 6 The court proceeded to inform the defendant of the nature of the charge and of the possible penalties, including the minimum and maximum prison sentences. As part of the admonishment on possible penalties, the court told the defendant the following: "Upon being released from the penitentiary, you would be required to serve three years of mandatory supervised release." The defendant indicated that he understood the nature of the charge and the possible penalties. The court admonished the defendant about his right to plead guilty or not guilty, his right to a trial, his rights at trial, including the right to confront the witnesses against him, and also admonished him that a plea of guilty would serve to waive all trial rights. The defendant indicated his understanding.

¶ 7 The prosecutor supplied a factual basis for the plea, and the public defender stipulated to the factual basis. The court then asked the defendant whether anyone had used force, threats, or intimidation to persuade him to plead guilty, and the defendant answered in the negative. The defendant pleaded guilty, and the court accepted the plea.

¶ 8 The defendant waived his right to a presentence investigation report. The court read aloud from a summary of the defendant's prior convictions, and the parties stipulated to its accuracy. In accordance with the terms of the plea agreement, the court pronounced a sentence of six years in the Department of Corrections "plus three years of mandatory supervised release." Finally, the court admonished the defendant on seeking to withdraw the guilty plea and on his right to appeal, and the defendant indicated his understanding.

¶ 9 On the day of the plea hearing, the court entered a written judgment and sentence. It indicated a sentence consisting of imprisonment for six years and mandatory supervised release for three years.

¶ 10 In March 1, 2012, the defendant filed *pro se* a document styled "amended pro se petition for post conviction and 2-1401 relief." (Apparently, the defendant had not previously filed a postconviction petition or a section 2-1401 petition.) In December 2012, the circuit court entered a written order that "denied" the petition. The defendant filed a motion to reconsider. The circuit court granted the motion to reconsider and appointed an attorney to represent the defendant.

¶ 11 In June 2014, the defendant, through appointed counsel, filed an amended petition for postconviction relief. It is this petition that is the subject of this appeal. The defendant claimed that his guilty plea was invalid for three reasons, *viz.*: (1) the circuit court "failed to adequately apprise the Defendant of the sentencing, including the mandatory supervised release, in violation of the principles set forth in *People v. Whitfield*," especially in light of the defendant's "mental state at the time of the plea"; (2) the circuit court failed to determine the defendant's "mental state" at the plea hearing, by failing to ask the defendant whether he had been threatened or coerced, whether he was under any disability, or whether he was using any drugs or medication; and (3) the extradition proceedings and all ensuing court proceedings "were tainted as the result of the appearance of a conflict of interest in that the documents erroneously depict Brendan Kelly as both the Judge executing the warrant and the State's Attorney pursuing it, thereby rendering the documents facially invalid."

¶ 12 The State filed a motion to dismiss the amended postconviction petition on the ground that it was untimely. The circuit court denied the State's motion.

¶ 13 On September 12, 2014, the court held an evidentiary hearing on the amended petition. The defendant testified that on the day he pleaded guilty, he was suffering from "paranoid schizophrenia and mental depression," but was not receiving any kind of treatment for these problems. He "hadn't had [his] meds in a while," the defendant testified. In addition, he was "frustrated and angry" about improprieties in the extradition proceedings and the unwillingness of his attorney, or anybody else, to address those improprieties in any meaningful way. He felt distrustful and isolated. All of these factors combined to reduce the defendant's abilities to reason and to understand the plea proceedings. At the time he pleaded guilty, the defendant thought that he would serve six years in prison and, upon being released, would begin "18 months parole." Upon arriving at prison, though, he "found out that it was two and a half years parole [he] would have to be doing." If he had known that he was "going to be doing a total of almost eight years," he would not have accepted "the six year plea bargain."

¶ 14 Cathy MacElroy, the defendant's public defender at the plea hearing, testified that if she had had a *bona fide* doubt about the defendant's fitness for trial, she would not have hesitated to ask the court to appoint an expert to evaluate the defendant. MacElroy also testified that she was aware of an extradition document generated in Minnesota that listed St. Clair County State's Attorney Brendan Kelly as the judge who handled the matter in Illinois. While representing the defendant, but before the plea, MacElroy concluded that even if the extradition from Minnesota had been improper, the St. Clair County circuit court nevertheless had jurisdiction over the defendant, and dismissal of the criminal case would not have been an available remedy.

¶ 15 On October 29, 2014, the court entered a written order finding that (1) the court, at the plea hearing, properly admonished the defendant, including on the subject of mandatory supervised release; (2) the defendant failed to show that his mental condition rendered him incapable of entering a valid plea at the time; and (3) the "extradition paperwork" contained a scrivener's error but was otherwise proper. On those bases, the court denied the amended postconviction petition. From this judgment, the defendant now appeals.

¶ 16

ANALYSIS

¶ 17 As previously mentioned, OSAD has concluded that this appeal lacks merit and has filed a *Finley* motion to withdraw as counsel. OSAD has identified three potential issues in this appeal: (1) the defendant's guilty plea was invalid because the circuit court failed to properly admonish the defendant about his sentence, including the MSR term; (2) the plea was invalid because the circuit court failed to inquire into the defendant's "mental state" before allowing him to plead guilty; and (3) the plea was invalid because the extradition proceedings "were tainted by the appearance of a conflict of interest."

¶ 18 The Post-Conviction Hearing Act (Act) provides a method by which any person imprisoned in the penitentiary may assert that his conviction resulted from a substantial violation of his federal or state constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2014); *People v. Smith*, 2015 IL 116572, ¶ 9. A proceeding under the Act is a collateral proceeding, not an appeal from the judgment of conviction. *People v. English*, 2013 IL 112890, ¶ 21. A defendant initiates a postconviction proceeding by filing a petition in the

circuit court. 725 ILCS 5/122-1(b) (West 2014). A postconviction proceeding has three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 19 In the case at bar, the defendant's petition advanced all the way to the third stage. At the third stage of a postconviction proceeding, the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2014); *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). An evidentiary hearing involves fact-finding and credibility determinations. *People v. Beaman*, 229 Ill. 2d 56, 72 (2008). Therefore, if the circuit court denies a postconviction petition after an evidentiary hearing, the judgment will not be reversed unless it is manifestly erroneous. *Id.*

¶ 20 In his postconviction petition, the defendant attacked the validity of his guilty plea. To be constitutionally valid, a guilty plea must be made voluntarily and understandingly. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *People v. Wills*, 61 Ill. 2d 105, 110-11 (1975). Supreme Court Rule 402 was adopted in order to ensure that only valid guilty pleas are accepted and that the record establishes a guilty plea's validity. *Wills*, 61 Ill. 2d at 111. "Substantial" compliance with the provisions of Rule 402 ensures a guilty plea's validity. *People v. McCoy*, 74 Ill. 2d 398, 402 (1979).

¶ 21 At the time of the defendant's guilty plea, Rule 402(a) stated, in pertinent part, that a court "shall not accept a plea of guilty" without first informing the defendant of, and determining that he understands, (1) the nature of the charge, (2) the minimum and maximum sentence, (3) that he has a right to plead not guilty or guilty, and (4) that if he pleads guilty, he waives his right to a trial and the right to be confronted with the witnesses against him, and there will not be a trial of any kind. Ill. S. Ct. R. 402(a) (eff.

July 1, 1997). In pertinent part, Rule 402(b) stated that a court "shall not accept a plea of guilty without first determining that the plea is voluntary." If the defendant pleads guilty pursuant to a plea agreement, the agreement must be stated in open court. The court must question the defendant so as to confirm the plea agreement's terms, and must determine whether any force or threats, or any promises, apart from the plea agreement, were used to obtain the plea. Ill. S. Ct. R. 402(b) (eff. July 1, 1997).

¶ 22 At the defendant's plea hearing, the circuit court scrupulously admonished and questioned the defendant on matters relating to whether the plea was knowing and voluntary. The court specifically admonished and questioned the defendant on each of the points enumerated in subsections (a) and (b) of Rule 402, except for whether there were any promises apart from the plea agreement. (The defendant never has alleged any such promises.) The court did not inquire about the defendant's alleged psychological problems or drugs, but such inquiries were unnecessary. The record establishes that the defendant understood the plea agreement and the direct consequences of pleading guilty, and that his plea was voluntary. Without doubt, the plea was valid.

¶ 23 As for any alleged errors or irregularities in the extradition proceedings, they were waived when the defendant pleaded guilty. "It is well established that a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). Any error or irregularity in the defendant's extradition from Minnesota was not jurisdictional in nature. A long line of United States Supreme Court precedent, known as the *Ker-Frisbie* doctrine, has established that any irregularity in the extradition of a fugitive from justice for an

otherwise constitutional prosecution "affects neither the guilt nor innocence of the accused, *nor the jurisdiction of the court to try him.*" (Emphasis added.) *Ker v. People*, 110 Ill. 627, 637 (1884), *aff'd*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). "The power of a court to try a person for a crime is not impaired even by the fact that he had been brought within the jurisdiction by forcible abduction." *People v. Scott*, 3 Ill. App. 3d 1063, 1064 (1972) (citing *Frisbie*, 342 U.S. at 522). Any error or irregularity in the defendant's extradition had no effect or bearing on the circuit court's jurisdiction, on the proceedings in the circuit court, or on the defendant's guilty plea.

¶ 24

CONCLUSION

¶ 25 At the evidentiary hearing, the defendant failed to establish that his guilty plea was constitutionally invalid. The circuit court did not err, let alone err manifestly, in denying the defendant's postconviction petition. Any argument to the contrary would be meritless. For that reason, OSAD is granted leave to withdraw as the defendant's attorney on appeal, and the judgment of the circuit court is affirmed.

¶ 26 Motion granted; judgment affirmed.