

NOTICE  
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2019 IL App (5th) 150533-U

NO. 5-15-0533

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 10-CF-944
	)	
ISAIAH ROSS,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.  
Justices Chapman and Barberis concurred in the judgment.

**ORDER**

- ¶ 1 *Held*: Any argument that the circuit court erred in denying the defendant's postconviction petition, or that the record failed to show that postconviction counsel provided the defendant with reasonable assistance, would lack merit, and therefore the defendant's appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.
- ¶ 2 The defendant, Isaiah Ross, appeals from the circuit court's judgment denying his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). His court-appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit, and accordingly has filed with this court a motion for leave to withdraw as counsel, pursuant to *Pennsylvania v.*

*Finley*, 481 U.S. 551 (1987). OSAD mailed the defendant a copy of its motion to withdraw, and a copy of the supporting brief that it filed along with its motion. This court gave the defendant ample opportunity to file a *pro se* brief, memorandum, or other document responding to OSAD's motion or explaining why his appeal has merit, but the defendant has not taken advantage of that opportunity. Following a careful examination of OSAD's motion and brief and of the entire record on appeal, this court has concluded that the instant appeal does indeed lack merit. Therefore, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3

### BACKGROUND

¶ 4 In November 2010, the defendant was charged with four counts: (1) armed violence (720 ILCS 5/33A-2(b) (West 2010)), (2) aggravated battery with a firearm (*id.* § 12-3), (3) attempt armed robbery (*id.* §§ 8-4(a), 18-2(a)(2)), and (4) aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)). On January 6, 2012, an assistant State's attorney, the defendant, and the defendant's attorney, Andrew Liefer, appeared before the circuit court and announced that they had reached a plea agreement. The assistant State's attorney recited the agreement's terms: the defendant would plead guilty but mentally ill to counts 2, 3, and 4, *i.e.*, the charges of aggravated battery with a firearm, attempt armed robbery, and aggravated discharge of a firearm, and he would be sentenced to imprisonment for 12 years, 4 years, and 4 years, respectively, with each sentence "followed by" the next, while count 1, which charged him with armed violence, would be dismissed. Apparently seeking clarification, the court asked, "And are all three of those sentences consecutive?", and the assistant State's attorney answered, "That's correct, Your

Honor, with Counts 2 and 4 being served at eighty-five percent, with Count 3 being served at fifty percent Truth-in-Sentencing."

¶ 5 The court admonished the defendant as to his right to plead not guilty and his right to demand a trial, whether by a jury or by the judge alone, as well as his rights at trial, including the right to remain silent and the right to call or to subpoena witnesses, and also admonished him that the State had the burden of proving guilt beyond a reasonable doubt. The defendant indicated his understanding of all these rights and the burden of proof. The defendant stated that he wished to plead guilty, and he indicated that nobody had threatened him or had promised him anything, outside the terms of the agreement, to lead him to plead guilty. The court accepted the defendant's pleas of guilty, adopted the parties' agreement, and imposed the agreed-upon consecutive sentences of imprisonment.

¶ 6 On March 28, 2013, the defendant filed a *pro se* petition for postconviction relief, alleging that plea counsel had provided constitutionally ineffective assistance in various ways. The circuit court determined that the defendant had stated the gist of a constitutional claim, and it appointed counsel to represent him in postconviction proceedings.

¶ 7 On July 14, 2014, the defendant, through appointed counsel, filed an amended postconviction petition. The amended petition alleged that the defendant had been "denied due process and equal protection" under the Illinois Constitution and the United States Constitution, in that (1) plea counsel erroneously advised the defendant that his sentences would be served concurrently, and that he would receive day-for-day good-time credit on those sentences; (2) plea counsel effectively coerced the defendant into

pleading guilty by (i) failing to provide the defendant with adequate explanations of his possible defenses to the charges, "specifically including his mental illnesses and the involuntary nature of his intoxication," (ii) advising the defendant that he definitely would receive a greater sentence if he were found guilty after a trial, and (iii) suggesting that the defendant might receive a lesser sentence if he provided counsel with a useful connection in the illicit drug trade.

¶ 8 Appointed counsel also filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Counsel certified that he had "consulted with [the defendant] to ascertain his contentions of deprivation of constitutional rights," had "examined the entire *Record of the Proceedings of Trial*," and had "made any *Amendments* to the *Petition* filed *pro-se* that were necessary for adequate presentation of [the defendant's] contentions."

¶ 9 On November 10, 2015, the cause proceeded to an evidentiary hearing on the defendant's amended petition. The evidentiary hearing was presided over by the same judge who had presided over the guilty-plea hearing.

¶ 10 At the evidentiary hearing, the defendant testified on his own behalf. He acknowledged that he had pleaded guilty but mentally ill, but he explained that his mental illness was not a permanent illness, but merely a condition that existed at the time of the offenses, and one that resulted from his unknowing ingestion of a drug. At the time of his sentencing, the defendant understood that he would need to serve 85% of his 12-year sentence and of one of his two 4-year sentences, and would serve 50% of his other 4-year sentence. However, he did not know that the sentences were to be served consecutively;

he thought the sentences were to be concurrent. According to the defendant, he thought that the sentences were to be concurrent because his plea attorney, during a conversation shortly before the plea hearing, specifically told him that the two 4-year sentences would be "ran in together" with the 12-year sentence, and that his time behind bars would be only 10 years. Upon pleading guilty, the defendant heard the judge say the word "consecutive," but at the time he did not know the meaning of that word. Immediately after the plea hearing, the defendant asked plea counsel about the judge's use of the word "consecutive," but plea counsel assured him that "that's just something they just saying" and "it's still all supposed to been ran in concurrent." The defendant did not realize that something was amiss until he arrived at Menard Correctional Center and was given a "calculation sheet" that included the word "consecutive" and a "time range" that was much longer than he had expected. At that point, the defendant filed a motion to withdraw his guilty pleas, but he subsequently learned that the motion was untimely. He then filed his *pro se* postconviction petition.

¶ 11 The defendant further testified that plea counsel had failed to discuss with him the possible defense of involuntary intoxication. Sometime prior to the plea hearing, the defendant informed plea counsel that shortly before he performed the acts that led to the charges, he had smoked marijuana and, unbeknownst to him at the time, the marijuana had been spiked with some other drug, and furthermore he was under the influence of that other drug when he performed the acts. Despite hearing this account of events, plea counsel never discussed with the defendant the difference between voluntary and involuntary intoxication. Shortly before the plea hearing, while discussing the State's

plea offer, plea counsel told the defendant "flat out" that if the case proceeded to trial, he definitely would be found guilty and definitely would be sentenced to extended terms of imprisonment totaling 144 years. The defendant and plea counsel met at the jail on only one occasion, and talked for 30 to 45 minutes. On 8 or 9 occasions, they met at the county courthouse, and most of those meetings lasted 10 to 15 minutes. However, they never discussed trial strategy. They also never discussed the difference between a plea of guilty and a plea of guilty but mentally ill. Nothing was said about the State's plea offer until the day of the plea hearing—January 6, 2012. On three different occasions, counsel asked the defendant whether he had a good "drug connect." The defendant had the impression that counsel was not focused on his criminal case, but was focused on "something else."

¶ 12 The State called the defendant's plea attorney, Andrew Liefer, to testify. Liefer testified that he met with the defendant approximately "two dozen times," always at the jail or the courthouse. These meetings were as short as 2 minutes or as lengthy as 40 minutes. During their conversations, the defendant stated that he had ingested drugs given to him by an "unknown woman," and these drugs resulted in a loss of his mental faculties and precluded him from remembering any of the acts that led to the charges against him. The defendant's account of events led Liefer to consider a defense of involuntary intoxication. He explained to the defendant the difference between voluntary and involuntary intoxication, and he discussed the involuntary-intoxication defense with the defendant on "multiple" occasions. He also arranged for Dr. Cuneo to examine the defendant, in order to explore the drugs' possible significance in the case. The meetings

between counsel and the defendant also included discussions about whether to plead guilty and whether sentences would be concurrent or consecutive.

¶ 13 On the date set for trial, counsel was ready for trial, but the State presented him with a plea offer. Counsel informed the defendant about the offer, and the two of them discussed it for approximately one hour. Counsel offered his thoughts on the likelihood of success at trial, the possible trial outcomes given the number and nature of the charges, and the sentences that their particular trial judge might impose if the trial ended with verdicts of guilty. The defendant's parents joined in this discussion. At first, the defendant seemed inclined to reject the plea offer, but he ultimately decided to accept it. Although the plea offer was made on the date the trial was scheduled to begin, plea negotiations had occurred prior to that date.

¶ 14 According to Liefer, he informed the defendant that any sentences would be consecutive, and that most of the sentences "would have been at eighty-five percent." Liefer did not recall whether he and the defendant engaged in any postplea, postsentencing discussion about consecutive sentencing versus concurrent sentencing. Nevertheless, Liefer expressed confidence that he had been "clear" with the defendant on the consecutive-versus-concurrent issue.

¶ 15 Liefer specifically denied ever telling the defendant that he definitely would be found guilty at a trial, or that he would serve only 10 years behind bars under the plea agreement. He also specifically denied ever asking the defendant to arrange for a "drug connect."

¶ 16 On November 12, 2015, the circuit court entered a written order denying the amended postconviction petition. The court found, based upon its own recollection of the plea hearing and the transcript of the plea hearing, that the defendant was thinking clearly at that hearing, and that his guilty pleas were knowing and voluntary. In regard to the claims of ineffective assistance of plea counsel, the court found plea counsel's postconviction testimony consistent with the record and credible, and found the defendant's testimony inconsistent with the record and incredible. The defendant perfected an appeal from the judgment denying his petition.

¶ 17

#### ANALYSIS

¶ 18 This appeal is from a judgment denying the defendant's amended petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). The circuit court entered the judgment after conducting an evidentiary hearing, listening to witnesses and determining their credibility, and finding facts. In its brief filed in support of its *Finley* motion, OSAD presents two potential issues, namely: (1) whether the circuit court erred in denying the defendant's amended postconviction petition after the evidentiary hearing, and (2) whether this cause must be remanded due to a facially defective Rule 651(c) certificate.

¶ 19 At an evidentiary hearing, the defendant bears the burden of proving, by a preponderance of the evidence, a substantial violation of his constitutional rights. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 22. The circuit court must determine whether the evidence shows that the defendant is entitled to the relief sought in his petition. *People v. Domagala*, 2013 IL 113688, ¶ 34. Any evidentiary conflicts are resolved by

the court, which is the finder of fact and is therefore responsible for determining witness credibility and deciding the weight of evidence. *Id.* Where the circuit court engages in fact-finding and credibility determinations, a reviewing court will not reverse the circuit court's decision unless the decision is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A ruling is manifestly erroneous if an error is clearly evident, plain, and indisputable. *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997).

¶ 20 Here, the defendant challenged the validity of his guilty pleas based upon a claim that the pleas resulted from constitutionally ineffective assistance by his plea counsel. Where a defendant challenges the validity of his guilty pleas based upon a claim that the pleas resulted from the ineffective assistance of plea counsel, the defendant is required to satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005). That is, the defendant is required to establish "that counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's substandard performance." *Id.* at 335. If the defendant fails to establish either the performance prong or the prejudice prong, his ineffective-assistance claim fails. See *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 21 Here, the defendant, in his amended postconviction petition, accused plea counsel of various failures or misdeeds. Both the defendant and plea counsel testified at the evidentiary hearing. As detailed above, the defendant testified in a manner that supported (most of) his postconviction claims, while plea counsel testified in a manner that contradicted the claims. For example, the defendant testified that plea counsel never discussed the defense of involuntary intoxication and told the defendant that any

sentences he might receive would be concurrent, while plea counsel testified that he did discuss the involuntary-intoxication defense and told the defendant that any sentences would be consecutive. The court found that plea counsel's testimony was credible and that the defendant's testimony was incredible, as it was free to do. See *Domagala*, 2013 IL 113688, ¶ 34. Nothing in the record contradicts plea counsel's testimony or raises suspicions about it. This court has no basis for concluding that the circuit court's decision was manifestly erroneous.

¶ 22 As for postconviction counsel's Rule 651(c) certificate, it did not reflect the exact language of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), as OSAD notes. Specifically, the certificate did not specify the mode of postconviction counsel's consultation with defendant—whether it was by telephone, by mail, by electronic means, or in person. This court need not consider whether the certificate substantially complied with Rule 651(c) (see, e.g., *People v. Carrizoza*, 2018 IL App (3d) 160051, ¶¶ 12-13), for the record otherwise makes clear that postconviction counsel provided the defendant with reasonable assistance. He filed an amended petition, shepherded the case to the last stage of postconviction proceedings, and competently handled the evidentiary hearing. Even assuming *arguendo* that counsel's certificate did not substantially comply with Rule 651(c), such a showing in the record is all that is necessary for this court to conclude, with complete confidence, that postconviction counsel substantially complied with Rule 651(c) and provided the defendant with the reasonable assistance to which he was entitled. See generally *Carrizoza*, 2018 IL App (3d) 160051, ¶¶ 12-19.

¶ 23

## CONCLUSION

¶ 24 For the foregoing reasons, the circuit court did not err in denying the defendant's amended petition for postconviction relief, and the record clearly shows that postconviction counsel provided the defendant with reasonable assistance. Any argument to the contrary would lack merit. Therefore, OSAD is granted leave to withdraw as counsel on appeal, and the judgment of the circuit court is affirmed.

¶ 25 Motion granted; judgment affirmed.