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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	
OF ILLINOIS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 04—CF—52
)	
CHARLES R. ANTHONY,)	Honorable
)	George J. Bakalis,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: Where defendant's ineffective assistance of trial counsel claim was adequately raised during postconviction proceedings, defendant was not denied reasonable assistance of postconviction counsel.

Defendant, Charles R. Anthony, appeals the judgment of the circuit court denying his postconviction petition after a third-stage evidentiary hearing pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122—1 *et seq.* (West 2008)). Defendant sought relief from his conviction of attempted first-degree murder of police officer Joseph Sangirardi (720 ILCS 5/8—4(a), 720 ILCS 5/9—1(a)(1) (West 2002)). He now argues that his postconviction counsel provided

unreasonable assistance for failing to properly argue his trial counsel's ineffectiveness for failing to adequately develop and present evidence of his heroin withdrawal symptoms as a mitigating factor at sentencing. The State argues that the issue was properly raised and even if it was not properly raised, defendant was not denied reasonable assistance of postconviction counsel. We affirm.

Defendant's journey to this point began on January 2, 2004, in the Du Page County Jail. After completing an initial interview with Sangirardi at the jail, defendant requested to speak with Sangirardi again. Sangirardi returned to the interview room, and defendant attacked Sangirardi. When officers arrived to the interview room, there was blood all over the room, Sangirardi was leaning against a wall, and defendant was wearing an orange shirt and Sangirardi's black trousers with a police badge and empty holster and a belt. Sangirardi sustained multiple nasal bone fractures, multiple left orbital fractures, facial swelling, facial lacerations, and some swelling around the brain. At the time Sangirardi testified, he was unable to drive a car due to permanent loss of peripheral vision, and he was using a cane to walk due to nerve damage in his left leg.

After the attack, Deputy Sergeant Terence Lorigan handcuffed defendant, read him his Miranda rights, and defendant agreed to speak with Lorigan. Defendant told him that Sangirardi had “got[ten] in his face” and grabbed his hand. Defendant told Lorigan that he got up out of his chair and that Sangirardi pushed him back down into his chair. Defendant said that he hit the officer in self defense. After their conversation, defendant, who was on suicide watch, was allowed to shower and was taken back to his padded cell. Lorigan approached him in his cell and asked defendant if he would give a written statement. Defendant provided a written statement and a videotaped statement. In the statements, defendant articulated that when Sangirardi returned to the interview room, defendant was frustrated with the fact that he was being charged with these crimes, facing jail

time, and that his problems were the result of his heroin addiction. The frustration took over and made him attack Sangirardi.

Defendant presented no witnesses on his own behalf, and after closing arguments, the trial court found defendant guilty of attempted first-degree murder. Defendant's sentencing hearing took place on April 12, 2005. The State presented three witnesses. First, Detective Robert Mullany, who testified that he interviewed defendant in December 2003, in connection with two retail thefts and one attempted retail theft in 2003. Defendant told Mullany that he committed the crimes in order to fund his and his girlfriend's heroin addictions. Next, Officer Michael Linkowski testified that he found defendant sleeping in the back of a stolen vehicle in December 2003. Both witnesses testified that defendant was not violent or aggressive and did not resist his arrests. Finally, the State presented Sangirardi, who read a victim impact statement in court. He described how the incident caused his loss of vision, and that his injury precluded him from working as a police officer, resulting in financial hardship for his family.

Defendant presented several witnesses on his behalf. Defendant's father, Raymond Anthony, testified that defendant once rushed into a burning vehicle to help his grandmother, who crashed the vehicle into a tree after blacking out. He described defendant as a well-behaved and nonviolent child. Defendant wrote Raymond a letter from prison, stating his remorse and attributing his trouble to his drug use. Lydia Anthony, defendant's grandmother, testified to the burning car incident and that defendant would often help her with various chores and refuse payment for his work. Ruth Anthony, defendant's mother, testified that defendant was a well-behaved, nonviolent child. She stated that defendant told her that he had a drug problem, and briefly described his struggle to overcome his addiction. She read a letter that defendant wrote her, expressing his regret for his past.

Pastor Glen Borhert, who knew defendant for approximately 15 years from his family's attendance at his church, testified that he met with defendant and his parents and that defendant sought help for his drug use. Borhert never knew of or heard of defendant acting violently or aggressively. He also read a letter from defendant's high school principal, who wrote that defendant always behaved well at school and was never known to be violent or aggressive. Finally, Sergeant Michael Rhod, Deputy Jack Hauge, and Deputy Johnson, who worked as guards at the jail where defendant was being held, each testified that defendant had never been aggressive or violent during his incarceration.

In closing argument, defense counsel, Neil Levine, stated the following regarding defendant's lack of a violent history and the sudden attack on Sangirardi:

“Well, without knowing anything more we would intuitively think that something must have pushed [defendant] at the last moment, something happened here. Well, what do we have? We have a man who is going through drug withdrawal, as pointed out in the presentence report, is taken into custody two days before, heroin habit of 80 to \$100 a day, as was admitted on December 30, now being stopped cold turkey in the Du Page County Jail. He is on emotional watch, reason to believe, even the suspicion that he tried to commit suicide, even after the fight he was placed on suicide watch. He had just been arrested. He was going through a trauma, a tragedy, whatever you chose to call it, just a horrendous time, not himself, not even close to himself.”

Defense counsel asked the court for the minimum sentence, 20 years' imprisonment, which was still a long sentence for this defendant who lacked any violent criminal history and was “being provoked in this case by drugs, more accurately by being withdrawn from drugs.”

The trial court considered the statutory and nonstatutory factors in aggravation and mitigation. In aggravation, the court considered the permanency of the injuries sustained by Sangirardi and the fact that the crime took place in the jail, requiring a sentence that will be a deterrent. Defendant's nonviolent criminal history acted in both aggravation and mitigation because he did have prior convictions but nothing of a violent nature. The court rejected defense counsel's argument that defendant's drug withdrawal constituted a strong provocation as defined in the sentencing statute. The trial court then made the following comments:

“As I read the report, the presentence report, I heard testimony in this case, the only thing I can keep going back, there has to be something that touched him off. In my mind it has to be tied into his drug use. It has to be tied into the fact that he was in the jail, after being recently arrested. He was coming down off of heroin, there has to be something that ties into that, in my mind, as to why he would have acted as he did in this case. Certainly it is not a defense, perhaps it is some what of an explanation.

He never committed anything that is this close to this nature before. I guess if he gets his drug problem under control maybe he would not commit any more crimes. It is very difficult to predict the future.

Drugs have destroyed [defendant] and apparently his brother, as well, I indicated that he is in the Department of Corrections. That's very sad. It's very sad that has to happen in this society.

I considered all those factors in aggravation and mitigation and what is the appropriate sentence here. The State wants to basically confine [defendant] in the penitentiary for approximately 50 years. He would get out of jail, if he is still alive, at about 74 years of age. Somehow even with the severe seriousness of this offense that doesn't seem to be the proper sentence in this case. You have to look at the potential for rehabilitation. [Defendant] is 24 years of age. Based on the testimony that I have heard, this act that he committed is not what he would normally do in my mind. He is not the type of person he normally is. He has got to pay a penalty certainly, I don't think the court should [lose] track of the potential that he may have for rehabilitation.”

The court sentenced defendant to 30 years' imprisonment. Defendant filed a direct appeal, making several arguments, including that he received ineffective assistance of counsel due to his lawyer's failure to investigate and present expert testimony in support of a diminished capacity defense. Specifically, he argued that his attorney should have introduced evidence regarding the effects of psychotropic medication that he was taking in prison, his suicidal depression, and his heroin withdrawal, because that evidence might have allowed for a diminished capacity defense. This court held that the record was insufficient for an evaluation as to whether there was a reasonable probability that the failure to adduce such evidence impacted the outcome of defendant's trial and that *res judicata* would not bar defendant from asserting the argument in a postconviction petition. *People v. Anthony*, No. 2—05—0424, slip op. at 35-6 (2006) (unpublished order under Supreme Court Rule 23).

Following this court's resolution of defendant's direct appeal, private defense counsel Jack Rimland filed defendant's petition for postconviction relief. The petition argued that defendant was

denied effective assistance of counsel at trial because his “lawyer did not present key evidence that was essential to the court's ability to evaluate [defendant]'s mental state at the time of the beating.” The petition provided that jail records indicated that defendant was given Thorazine and put on a suicide watch in a padded cell immediately before the incident and that defendant was suffering acute heroin withdrawal symptoms. Trial counsel, according to the petition, did not obtain the jail records relating to defendant's condition and medical assessments nor did he seek to establish through expert medical testimony that defendant's violence was not the product of a deliberate intent. The petition contained the medical report of Dr. Sarz Maxwell, a psychiatrist specializing in addictions, which indicated that defendant was on his fourth day of withdrawal and that physical symptoms persist over a period of 7 to 10 days with psychological symptoms lasting much longer. Symptoms include irritability and a propensity to “snap” or become aggressive when the sufferer feels provoked.

The postconviction petition did not argue that trial counsel was ineffective for failing to produce such evidence at defendant's sentencing hearing.

The petition proceeded to a third-stage evidentiary hearing. We summarize the evidence adduced at that hearing. Defendant testified that he was taken into custody on December 30, 2003, for a car theft charge. At the time of his incarceration, he was using about 15 to 20 dime bags per day. A dime bag typically contained a tenth of a gram of heroin. He snorted it for a while but progressed to injections. Approximately two hours prior to his arrest by Bensenville police, defendant used heroin. He was afraid about the charges and being arrested. While in the Bensenville jail, defendant began experiencing heroin withdrawal effects, including hot and cold sweats, vomiting, nausea, and headaches. A couple hours later, he was moved to the Du Page County Jail,

where his withdrawal symptoms worsened, including muscle cramps, inability to sleep, vomiting, diarrhea, and hot and cold sweats. The nurses at the jail told him he would have to tough it out as they did not have a detox facility. On December 31, 2003, defendant attempted suicide by taking the lining of a towel, tying it around his neck, and attempting to suffocate himself. He did this because of the severity of his withdrawal symptoms. A deputy saw him and called for a psychiatrist to evaluate defendant. Defendant spoke with Dr. Bristow, but defendant tried to cover up his attempt because he wanted to try again. However, he was given special linens and clothing and put on emotional watch.

On January 2, 2004, Sangirardi met with defendant. Defendant testified that his withdrawal symptoms were at their worst when he met with Sangirardi. He did not report his symptoms because when he initially informed the nurse, he was told he would have to suffer through it. The night after the attack, defendant was given Thorazine. Later, he was given trazodone and clonidine.

At one point during the hearing, the court clarified an issue when ruling upon an objection:

“[C]orrect me if I'm wrong, the only basis for the petition is the basis that based on his heroin addiction and withdrawal symptoms that he had a diminished capacity and formulate [*sic*] the intent necessary to commit the offense of attempt murder. That is my understanding.”

Defense counsel confirmed that was the intent of the postconviction petition.

On cross-examination, defendant admitted that he gave previous statements indicating that he was provoked and was the aggressor in the attack on Sangirardi. He also admitted that he did not tell others about his symptoms at the time of his custody and afterwards when he spoke to doctors.

Defendant's trial counsel, Neil Levine, testified next. Levine hired Dr. Albert Stipes to evaluate defendant after the attack on Sangirardi. He did not give specific instructions to Dr. Stipes but just asked him to “look for something on guilt/innocence, look for something on mitigation, just see what is there.” Levine did not recall Dr. Stipes reporting anything on the effect of defendant's withdrawal on his crime. He did not recall defendant being placed on suicide watch either. When Levine met with defendant, he did not recall observing any extreme signs of withdrawal, such as irritability, nervousness, or other physical symptoms.

Levine explained his initial defense strategy involved computing his maximum possible sentence, which was 94 years for three offenses that defendant had pending. Because the case was a high profile case and the State's Attorney would not agree to a fair plea agreement, Levine knew he would likely have to try the case. Levine believed that he had sufficient evidence to argue that defendant did not intend to kill Sangirardi, and defendant could possibly get convicted of the reduced aggravated battery offense. Levine worked with Dr. Stipes to determine defendant's psychiatric state. Levine took notes during his conversation with Dr. Stipes, which indicated defendant may have been suffering withdrawal symptoms. However, Levine reviewed the medical records from the jail and no symptoms of withdrawal were noted. Levine wrote in his notes “likely mitigation, heroin withdrawal. Heroin withdrawal, steady discomfort with surges of diarrhea/vomiting, severe withdrawal.” Levine continued with his trial strategy that defendant did not intend to kill. He explained that the heroin withdrawal would “just be mitigation for a sentence but obviously would not negate the question of whether he is guilty or not guilty.” Levine did not ask Dr. Stipes to prepare a written report because there was no defense to present from the results, other than the

“mitigation aspect, something that would be helpful at sentencing, but that [was] not what [Levine] was looking for just then.”

Defense counsel Rimland questioned Levine on his strategy and he factored the withdrawal symptoms into the defense. Levine confirmed that in legal terminology, “mitigation” can mean reducing one's intent, such as reducing first-degree murder to second-degree murder. Levine interpreted his notes regarding “mitigation” to mean related to mitigating his sentence as opposed to mitigating the mental state of the crime. He testified that he was “sure that [Dr. Stipes] used it in terms of the sentence. Had he used it in terms of the mental state, it would have come out in our conversation. He was clarifying several times, and if it were to negate the requisite mental state, I would have gladly accepted it.” Defense counsel Rimland then asked Levine specifically:

“By the way, did you ever use Dr. Stipes for purposes of sentencing mitigation?”

* * *

A: I don't believe I did. I don't remember. I don't believe Dr. Stipes testified even at sentencing. I think there was really no question by the time we came to sentencing. Everybody conceded it that [defendant] had been suffering from heroin withdrawal.”

Dr. Sarz Maxwell testified for defendant next. Dr. Maxwell, a licensed psychiatrist specializing in heroin addiction, testified that she reviewed the medical records and jail records of defendant and in her opinion, defendant was suffering from withdrawal symptoms at the time of his offense, despite there being very few references to defendant's symptoms in his jail records.

Dr. Stipes testified next for defendant. He met with defendant at the Du Page County Jail in April 2004 after Levine requested an evaluation. Dr. Stipes was provided with defendant's medical records and jail records. Defendant described his withdrawal symptoms at the time of the

attack, including nausea, diarrhea, shakes, vomiting, and lack of sleep. When Dr. Stipes asked about the attack, defendant stated that he did not intend to murder Sangirardi but that Sangirardi threatened to charge defendant with crimes he did not commit and insulted him and that he beat him up. Defendant claimed that he took Sangirardi's pants because he had diarrhea and was embarrassed at defecating in his pants. Dr. Stipes concluded, after reviewing the records and interviewing defendant, that defendant's judgment and ability to behave rationally would have been overpowered by his impulses because of the withdrawal and that defendant could not form a rational intent until the impulse subsided. Dr. Stipes believed that the heroin withdrawal did have an effect on defendant's mental status on the day of the attack. Dr. Stipes explained that when evaluating defendant, he was considering defendant's mental fitness, sanity, and mental state. He did not recall whether he told Levine that defendant's heroin withdrawal would likely be "mitigating." He did not prepare a written report for Levine and did not recall their phone conversations in detail.

Joan Colton testified for defendant. Colton was employed by Phase, Incorporated in Rockford, which is an outpatient substance abuse treatment center. In 2003, defendant entered Phase's methadone maintenance program, and Colton was his primary counselor. Defendant received methadone daily and attended group counseling. He was discharged from the program when he was no longer attending because of his incarceration.

The State presented toxicologist Christopher Long, who testified that one does not actually withdraw from heroin but from its metabolite, which is morphine. Long testified that he simply evaluates whether drugs are having an effect at any given time to determine whether the behaviors or symptoms are consistent. He could not testify as to defendant's mental state or provide psychiatric evaluations. Long explained that opiate withdrawal referred to the body taking time to synthesize

heroin's metabolites that they are replacing in the body and that it typically took up to three days. Withdrawal symptoms peak at 24 hours but continue and decline for an additional couple of days. According to Long, after 72 hours, there are no withdrawal symptoms as the body has returned to its normal state. "There may be psychological questions, but that's out of my area," Long stated.

Long testified that defendant showed no physical signs of heroin withdrawal on January 1, 2004, based on the nursing records from the jail. Based on his overall knowledge, defendant could not have been suffering from heroin withdrawal symptoms on the day of the attack because it was 96 hours after defendant's last use of heroin. Ninety-six hours was out of the three-day window for physical withdrawal. On cross-examination, Long admitted that he does not treat or meet with patients and had never witnessed a patient undergoing heroin withdrawal.

Next, the State presented Lisa Zegar, the health care administrator at the Du Page County Jail, to establish the procedures and medical records related to defendant's stay in the jail. Defendant was admitted to the jail while under the influence of heroin, and he was placed on medical watch while detoxifying. She acknowledged that the records showed that on December 31, 2003, defendant's neck was observed to be reddened and welted but that he denied attempting suicide. Later that night, defendant was vomiting. By January 3, 2004, no symptoms were recorded and defendant told a nurse that he felt great. Defendant was removed from "drug watch." However, on cross-examination, the records showed that defendant was placed on suicide watch on January 2. Defendant was not removed from suicide watch until January 4.

Detective Tiffany Wayda of the Du Page County Sheriff's Office testified that she spoke with defendant on January 3, 2004, at 10:53 a.m. and that he advised that he was a heroin addict but that he was not sick or going through withdrawal. Sergeant Dawn Malone of the Du Page County

Sheriff's Office testified that defendant denied any physical complaints and was not belligerent upon intake into the jail.

Dr. James Patrick Corcoran, chief psychiatrist of Du Page County Jail, testified that he met with defendant the day after the attack, on January 3, 2004. He testified that defendant denied feeling depressed or confused and denied having racing thoughts, trouble concentrating or crying spells. Defendant was coherent and his judgment appeared to be intact. He admitted, however, that he placed defendant on suicide watch and prescribed Thorazine to calm defendant down. Dr. Corcoran also explained that long-term effects of heroin withdrawal can last for months after the actual withdrawal from the drug, including effects such as agitation and insomnia.

Officer Max Worcester of the Du Page County Sheriff's Department testified that he placed defendant in a booking chute after his initial interview with Sangirardi ended. Defendant asked Officer Worcester to speak to Sangirardi again, and Officer Worcester stepped back and called for Sangirardi to return. Officer Worcester did not notice anything unusual about defendant's tone of voice. When the two were inside the interview room, Officer Worcester did not hear any raised voices.

At the close of testimony, the court ordered the parties to submit written closing arguments. Defendant filed his "Post-Conviction Memorandum" on December 10, 2008, in which he argued that trial counsel failed to present critical psychiatric evidence that would have established that defendant lacked specific intent to kill Sangirardi. Defense counsel requested the court "vacate the attempted murder count and enter judgment on the lesser included offense of aggravated battery and to re-sentence accordingly." In the memorandum, defendant argued that Levine failed to present the testimony of Dr. Stipes and failed to review the medical records and jail records to argue that

defendant lacked the requisite intent for attempted murder. “Furthermore, as a second, separate incident of error, Mr. Levine did not even present Dr. Stipes's expert evidence as mitigation during the *sentencing* hearing, again leaving this Court without a full understanding of the seriousness of the heroin withdrawal as it affected the defendant's psychological state and helped trigger the violence.” (Emphasis in original).

On January 26, 2009, the trial court issued its written order denying defendant's postconviction petition. The trial court summarized that defendant alleged that trial counsel was ineffective for:

- “a. not obtaining petitioner's jail records to support he was undergoing withdrawal;
- b. not obtaining an expert opinion as to whether petitioner's conduct was caused by heroin withdrawal;
- c. not presenting any evidence pertaining to this issue.”

The trial court summarized that defendant argued that if Levine had done these things there was a strong probability that he would not have been convicted of attempted murder but rather a lesser included offense. The trial court disagreed, finding that much of the jail's medical records did not support defendant's claim that he was suffering severe symptoms of withdrawal, and therefore, even if the evidence presented at the postconviction petition hearing had been presented at trial, there was not a reasonable probability that defendant would have been found not guilty of attempted murder.

The trial court's order made no comment on whether the evidence would have had an effect on defendant's sentence.

On February 24, 2009, defendant filed a motion for reconsideration, in which he argued that the court failed to address or resolve the separate and additional claim that Levine failed to present

Dr. Stipes at sentencing, “where the mitigating aspect of the diminished mental state might at least have resulted in a lesser sentence than 30 years.” On April 2, 2009, the trial court denied defendant's motion for reconsideration. In its ruling, the trial court commented on the evidence presented and the fact that the court did not believe that the psychiatric testimony would have changed the outcome of the trial. Specifically, the court commented that there was no dispute that defendant was a heroin addict but the “only question in my mind was the extent that it could have affected his ability to form the intent in this case.” The court considered defendant's evidence but put more weight on the evidence presented by the State. The court noted that defendant “never blamed his violent conduct on his heroin withdrawal.” The trial court did not specifically comment on whether the evidence not presented would have impacted defendant's sentence.

On appeal, defendant argues that postconviction petition counsel, Jack Rimland, provided unreasonable assistance for failing to raise trial counsel's ineffectiveness for failing to present and develop the evidence of defendant's heroin withdrawal as a mitigating sentencing factor. While defendant's postconviction petition was denied after a third-stage evidentiary hearing, which normally invokes the manifestly erroneous standard of review, the parties here agree that the issue of Rimland's assistance was not at issue during the hearing thereby triggering *de novo* review. As defendant points out, because counsel drafted the original postconviction petition, Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)) is not implicated. See *People v. Bennett*, 394 Ill. App. 3d 350, 354 (2009). The purpose of Rule 651(c) is to ensure that postconviction counsel investigates, amends, and properly presents the defendant's constitutional claims that the defendant has raised in his *pro se* petition for postconviction relief. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). This court has presumed that the supreme court's rationale in finding that Rule 651(c) only applies

where a *pro se* petition was filed and counsel appointed was based on the notion that the “contractual terms of a private representation that produces a postconviction petition would provide an adequate substitute for Rule 651(c)'s explicit imposition of other duties.” *Bennett*, 394 Ill. App. 3d at 354. However, the *Bennett* court did not consider whether counsel's representation was unreasonable independent of Rule 651(c)'s requirements because the defendant did not argue that point. *Id.* at 355.

Defendant in this case does argue that he was entitled to reasonable assistance of postconviction counsel as any indigent defendant would be if counsel were appointed and Rule 651(c) did apply. Defendant, relying upon *People v. Turner*, 187 Ill. 2d 406 (1999), and *People v. Gandy*, 341 Ill. App. 3d 474 (2003), argues that Rimland provided unreasonable assistance by failing to amend the postconviction petition to include an argument pertaining to sentencing; thus, Rimland failed to preserve the issue and avoid forfeiture. Defendant argues that he relied upon Rimland's expertise to ensure that his postconviction petition would cover all of his arguments, including the sentencing argument.

The State counters that *Turner* and *Gandy* are distinguishable because they involved *pro se* petitions that were not amended by appointed counsel and implicated Rule 651(c). Further, the State argues that the standard for evaluating ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), is inappropriate to evaluate postconviction petition counsel because the level of assistance required in postconviction proceedings is lower than the level required at trial. Regardless, the State argues that Rimland's representation was not unreasonable because he did raise the issue complained of on appeal. Even assuming Rimland did fail to raise the sentencing issue, defendant's claim would fail under *Strickland* because he cannot demonstrate that

he was prejudiced by the failure of postconviction counsel to raise the issue of trial counsel's ineffectiveness for failing to present expert testimony regarding defendant's withdrawal symptoms at sentencing. We agree with the State's arguments.

The right to counsel in postconviction proceedings is entirely derived from statute. 725 ILCS 5/122—4 (West 2008); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Because the right stems from statute instead of the federal or state constitutions, a defendant is only entitled to the level of assistance required by the Act. *Perkins*, 229 Ill. 2d at 42. The Act provides for a “reasonable” level of assistance of counsel if the petition is not dismissed pursuant to section 122—2.1 of the Act. 725 ILCS 5/122—4; *Perkins*, 229 Ill. 2d at 42; *People v. Kegel*, 392 Ill. App. 3d 538,540 (2009). To ensure a reasonable level of assistance for proceedings under the Act, the supreme court enacted Rule 651(c), which imposes specific duties on appointed postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Under Rule 651(c), appointed 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.” *Perkins*, 229 Ill. 2d at 42. The purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court. *Id.* at 44.

The question of what constitutes “reasonable assistance” of postconviction counsel outside of the context of Rule 651(c) has not been answered by the courts. While a violation of one of the requirements of Rule 651(c) has been deemed unreasonable assistance, there is no case addressing unreasonable assistance when Rule 651(c) is not implicated, such as where retained counsel has filed the initial postconviction petition. As this court discussed in *Bennett*, it is presumably the nature of

the contractual relationship formed when private counsel is retained that produces an adequate substitution for the explicit requirements of Rule 651(c). While appointed counsel must meet the requirements of Rule 651(c), we cannot believe that the legislature intended that private counsel is free to provide a level of assistance below that which is required by the rule and applied to appointed counsel after a *pro se* petition is filed. Therefore, we consider the requirements of Rule 651(c) for guidance when determining whether Rimland provided reasonable assistance.

In *Turner*, the defendant argued on appeal that he was denied his right to reasonable assistance of postconviction counsel because counsel only met with him once in the two-year period of the relationship and otherwise failed to ascertain the constitutional claims in his *pro se* postconviction petition. *Turner*, 187 Ill. 2d at 410. The defendant acknowledged he met with counsel on one occasion, and the court held that there was no reason that counsel could not have ascertained the defendant's constitutional contentions in one meeting. *Id.* at 410. The defendant also alleged that counsel failed to review transcripts from five dates; again, the court held that counsel's failure did not violate Rule 651(c). *Id.* at 411. Rule 651(c) required postconviction counsel only to examine as much of the transcripts as is necessary to adequately present and support those constitutional claims raised by the petitioner. *Id.* at 412. The transcripts pointed to by the defendant did not contain relevant testimony for the claims presented in the petition. *Id.* at 412.

The court further held that counsel was not required to amend a *pro se* postconviction petition but counsel may make any amendments that are necessary for an adequate presentation of the petitioner's contentions. Ill.S.Ct. R. 651(c); *Turner*, 187 Ill. 2d at 412. The defendant's postconviction counsel failed to include an ineffective assistance of appellate counsel claim, which led to the trial court finding the defendant's claim of error at trial, which was not raised in his direct

appeal, was forfeited. *Turner*, 187 Ill. 2d at 413. Counsel also failed to overcome the petition's omissions by raising the additional claims at the hearing on the State's motion to dismiss the petition as he failed to attach any affidavits to support the claims or offer any explanation for their absence. *Turner*, 187 Ill. 2d at 414. The supreme court accordingly held that postconviction counsel provided unreasonable assistance as required by Rule 651(c) by failing to make a routine amendment to the *pro se* petition that would have overcome the forfeiture finding. *Id.* at 414. The court refused to comment on the merits of the defendant's claim, finding that the defendant was simply entitled to reasonable assistance of postconviction counsel to present the claim. The cause was remanded so that the defendant could replead his postconviction petition with the assistance of counsel. *Id.* at 417; *see also Gandy*, 341 Ill. App. 3d at 479 (appointed counsel was held to have rendered unreasonable assistance when counsel failed to file an amended postconviction petition for nearly one year leading to dismissal for untimeliness).

We find *Turner* and *Gandy* distinguishable from the facts of this case because unlike in *Turner* where postconviction counsel failed to entirely include a claim leading to forfeiture of the issue, and unlike in *Gandy* where counsel did not timely file an amended petition, we agree with the State that Rimland *did* adequately present the argument that the heroin withdrawal evidence should have been entered into mitigation at sentencing. While the sentencing issue was clearly not the *focus* of the evidentiary hearing, Rimland addressed the issue in his closing brief and again in his motion for reconsideration. The court never stated that it would not consider the issue because it was not included in the original petition. The evidence which was to be considered by the court was not different from the evidence presented on the issue of specific intent. Based on the record before us, it is clear that Rimland presented the issue to the court such that the issue was not forfeited as in

Turner and Gandy. There is also no indication in the record or raised by defendant on appeal that Rimland failed to review the trial court proceedings or failed to meet with defendant to ascertain his contentions. The trial court had heard and reviewed the potentially mitigating evidence when it denied defendant's petition and when it considered the motion for reconsideration of the petition. Since we find that the issue was sufficiently addressed during postconviction proceedings and that Rimland's level of assistance did not fall short of the requirements of Rule 651(c), we cannot find that Rimland provided unreasonable assistance of counsel.

Defendant seems to argue that because the trial court did not make a specific reference to the evidence's impact on sentencing, the issue was not adequately raised or developed and is now forfeited. However, defendant seemingly seeks review of Levine's performance at trial as he argues that this court should review Levine's performance at sentencing using a *de novo* standard of review since the trial court made no conclusions concerning the issue. We disagree on both points. First, we determined that the issue was sufficiently before the trial court when it denied defendant's petition and his motion for reconsideration of the petition. Second, we review a denial of a postconviction petition after a third-stage evidentiary hearing using a manifestly erroneous standard of review. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). A decision is manifestly erroneous only if it contains error that is clearly evident, plain, and indisputable. *People v. Calhoun*, 351 Ill. App. 3d 1072, 1078 (2004).

Upon the motion for reconsideration of the petition, the trial court stated that there was no doubt that defendant was going through withdrawal but the question in the court's mind was the extent to which it could have affected defendant's ability to form intent. The court, in reviewing the evidence at trial and in postconviction proceedings, noted that defendant never blamed his violent

conduct on his heroin withdrawal and that the records from the jail did not support defendant's claim of symptoms. It determined that the State's evidence was more credible and that much of the evidence in the record did not support defendant's claim of overpowering withdrawal symptoms.

Further support that the trial court had previously considered defendant's heroin withdrawal in mitigation, though not specifically Dr. Stipes' testimony, is found in the sentencing hearing transcripts. When reviewing the sentencing factors, the trial court commented that defendant's drug withdrawal had to tie into his burst of violence. While the court did not consider it a valid defense, it thought it may be an "explanation." The court extensively commented on how drugs had negatively impacted defendant's life but that defendant had rehabilitative potential when it determined 30 years' imprisonment was an appropriate sentence rather than the 50 years the State recommended. Later, at the motion to reconsider the sentence, Levine argued that defendant's drug withdrawal caused him to "snap" and should have been regarded as more mitigating than the court attributed to the factor. Levine asked the court to reweigh the factors. The court explained it had factored in that defendant was withdrawing from heroin but did not find it a "major strong factor" because defendant had just had an interview with Sangirardi without any problems shortly before the interview that ended in the attack. Defendant argues now that had the trial court had the medical expert testimony at the time, it would have sentenced defendant to the minimum. We disagree since the trial court stated on the record that it found the evidence submitted by the State in the evidentiary hearing to be more credible.

The same trial court judge presided over all of defendant's proceedings, resulting in his familiarity with the facts and evidence that were presented throughout the case. While the trial court did not explicitly state that the medical expert evidence did not warrant a lower sentence, such a

ruling was implied when the court denied defendant's petition and his motion for reconsideration of the petition. Defendant cannot now claim that because the court did not rule in his favor or specifically address each argument made to the court that the issue simply was not presented and ruled upon. Moreover, to the extent defendant argues that we should review the trial court's denial of his petition on the sentencing issue, we find that its denial was not manifestly erroneous based on the transcripts of the trial, sentencing, and postconviction proceedings contained in the record.

Based on the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

Affirmed.