

NOTICE
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2018 IL App (5th) 140549-U

NO. 5-14-0549

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. 02-CF-374
)	
LEE PRICE, SR.,)	Honorable
)	Zina R. Cruse,
Defendant-Appellant.)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Barberis and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's appointed appellate counsel is granted leave to withdraw, and the circuit court's order denying the defendant's petition for postconviction relief is affirmed.

¶ 2 The defendant, Lee Price, Sr., appeals from the circuit court's order denying his petition for postconviction relief after an evidentiary hearing. The defendant's appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has filed a motion to withdraw as counsel, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), along with a memorandum in support of the motion. The defendant has filed a written response to OSAD's motion. For the

reasons that follow, this court grants OSAD's motion to withdraw and affirms the order denying postconviction relief.

¶ 3

BACKGROUND

¶ 4 In April 2002, the defendant was charged with a single count of first-degree murder. Two attorneys were appointed to represent him. In November 2005, the defendant pleaded guilty to the charge, pursuant to a fully negotiated plea agreement with the State. During the plea hearing, the court thoroughly admonished the defendant in regard to the charge, possible penalties, his right to plead not guilty, his rights at trial, and the effects of a guilty plea. The court also questioned the defendant on the voluntariness of his guilty plea, and the defendant indicated that he was pleading guilty voluntarily, without any threats or promises outside the plea agreement. The defendant indicated that he accepted legal responsibility for the charge even though he and a codefendant disagreed on who actually delivered the fatal blows to the decedent. Adopting the terms of the plea agreement, the circuit court sentenced the defendant to imprisonment for 40 years. The defendant did not file a motion to withdraw the guilty plea and did not attempt to appeal from the judgment of conviction.

¶ 5 In January 2007, the defendant filed a *pro se* petition for postconviction relief. He claimed that (1) plea counsel had provided constitutionally ineffective assistance by allowing the defendant to plead guilty even though counsel knew that the guilty plea was motivated by the defendant's desire to avoid further jailhouse beatings and threats by a sheriff's deputy, and (2) he had been coerced into pleading guilty due to jailhouse beatings and threats by a correctional officer, as well as his counsel's refusal to seek to

have him transferred to another jail. In March 2007, the circuit court found that the defendant had stated the gist of a constitutional claim, and the court appointed postconviction counsel for the defendant.

¶ 6 Between November 2007 and April 2010, appointed postconviction counsel filed, on behalf of the defendant, a few amended petitions. The last of these amended petitions, and the subject of the instant appeal, was a verified fourth amended petition for postconviction relief, filed in the circuit court on April 29, 2010. In that petition, the defendant alleged that during the months prior to his guilty plea, he was repeatedly beaten and threatened by a sheriff's deputy in the county jail, where he was being held. He alleged that his attorneys had neglected his case, for example, by meeting with him on only two occasions prior to the guilty plea, and had coerced him into pleading guilty. According to the defendant, his guilty plea was the product of duress and his own inability to think clearly due to the administration of psychotropic drugs. The defendant also incorporated by reference his original *pro se* postconviction petition.

¶ 7 The State filed a motion to dismiss the verified fourth amended petition. After the circuit court denied that motion, the State filed an answer to the petition.

¶ 8 On September 29, 2014, postconviction counsel filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Counsel swore that he had "examined the entire record of the plea and sentencing," that he had amended the *pro se* postconviction petition as necessary for an adequate presentation of the defendant's contentions, that he and the defendant had corresponded with one another on various specified dates in order to allow counsel to ascertain the defendant's contentions of

constitutional deprivation, and that he had consulted with the defendant in person on five specified dates in order to ascertain those contentions.

¶ 9 Also on September 29, 2014, the court held an evidentiary hearing on the defendant's fourth amended postconviction petition. The defendant testified on his own behalf and he called two other witnesses, Gina Toth and Jon Cearlock.

¶ 10 The defendant testified that he was in the St. Clair County jail for three years and nine months before he finally pleaded guilty, and during all that time he met with attorney Richard Roustio only five times and with attorney Eugene Menges only twice. At least two years passed between the defendant's first meeting with the attorneys and his second meeting. However, the defendant met regularly, each month, with John Price, a death penalty mitigation specialist who worked with the two attorneys, and John Price updated him on the progress of the case. On numerous occasions, the defendant asked to examine all of the discovery received from the State, but nobody ever allowed him to do so.

¶ 11 The defendant further testified that on August 26, 2005, at the St. Clair County jail, a correctional officer named Scruggs was distributing rolls of bathroom tissue by throwing the rolls to the inmates. When Scruggs did not throw a roll to the defendant, the defendant clapped his hands and called out to Scruggs, without using any ugly or insulting language. Scruggs accused the defendant of calling to him in the same manner that a person would call a dog. Then, Scruggs "raced" toward the defendant, hit him in the chest and ribs, grabbed him by his throat and one arm, and threw him into his cell. The defendant landed on the floor of his cell, with his left arm hitting a bed. Scruggs was

much bigger and stronger than the defendant. The attack caused considerable pain for the defendant, and it left bruises on the defendant's chest, ribs, arms, and throat.

¶ 12 A few hours after the attack, the defendant finally was allowed to go to the infirmary. He spoke with a nurse and described his injuries, including an injury to his throat. Immediately afterward, photographs of the injuries were taken. The next day, the defendant saw a doctor, who prescribed a pain reliever. X-rays were taken, but they did not show anything significant. The defendant's injuries healed in approximately two weeks. At some point after the attack, the defendant phoned attorney Roustio and informed him of it.

¶ 13 The defendant did not see Scruggs again until the third week of October 2005, when Scruggs told him that if he were to be sent to "seg," he would be "hanging from the bars." This remark caused the defendant to fear for his life. Not long afterward, he told attorneys Roustio and Menges that he needed to plead guilty for the purpose of leaving the county jail and getting away from Scruggs. His attorneys took advantage of his fear and "talked [him] into" pleading guilty.

¶ 14 The defendant further testified that he entered his guilty plea in November 2005 solely due to his fear of being killed by Scruggs at the jail. When addressing the judge at the plea hearing, the defendant did not mention his fear of being killed at the jail, because attorney Roustio had told him to "agree with whatever the judge said." In addition, the defendant "couldn't focus" at the plea hearing, due to his being under the influence of two psychotropic drugs, Trazodone and Prozac. A psychiatrist had prescribed those two drugs, and the defendant had started taking them, less than six months prior to the plea

hearing. The two drugs caused the defendant to feel "high" or "drunk," and consequently he did not understand what was happening at the plea hearing, and he did not understand issues important to his case, such as the theory of accountability. At the time of the plea hearing, the defendant thought he understood what was happening, but when he saw the transcript of the plea hearing, he realized that he had not understood. When the judge at the plea hearing asked him whether he was under the influence of any drugs, the defendant thought the judge was referring to illicit drugs, and therefore he did not mention the prescribed psychotropic drugs. The defendant was still taking Trazodone and Prozac at the time of the postconviction hearing in September 2014, but by that time the two drugs were aiding, rather than impairing, his concentration and comprehension.

¶ 15 Gina Toth testified that on August 26, 2005, at 8:15 p.m., while she was on duty as a nurse at the St. Clair County jail, she examined the defendant, who was a jail inmate. The defendant complained of pain in his chest, ribs, and upper arm, all on his right side. Toth observed "a reddened area," measuring four centimeters by four centimeters, on the right side of the defendant's chest and a smaller area of "discoloration" on his right arm. Toth did not observe any discoloration on the defendant's throat. The defendant told Toth that at 3:10 p.m. that day, correctional officer Scruggs had pushed him into his cell and hit him. Toth suggested that the defendant apply ice packs. She did not see any need for the defendant to remain in the infirmary.

¶ 16 Jon Cearlock, a Department of Corrections inmate at the time of the postconviction hearing, testified that on August 26, 2005, he was incarcerated in the St. Clair County jail and shared a cell with the defendant. A correctional officer named

Scruggs was distributing rolls of bathroom tissue. When Scruggs did not give a roll to the defendant, the defendant "clapped his hands, hey, hey, right here. You missed me." The defendant did not use any abusive language, but Scruggs accused him of being disrespectful. Scruggs ran up to the defendant, pushed him, "swung and hit him in the side," and shoved him into his cell. The defendant did not hit Scruggs. Sometime afterward, the defendant went for medical help.

¶ 17 The court admitted into evidence several photographs depicting the defendant's head, neck, and torso as they appeared a few hours after the alleged beating at the jail.

¶ 18 The State called three witnesses to testify at the evidentiary hearing—Johnny Scruggs, Richard Roustio, and Eugene Menges.

¶ 19 Scruggs testified that at the time of the postconviction hearing, he was a captain with the Alorton police department, but in August 2005, he was a correctional officer at the St. Clair County jail. On August 26, 2005, in the middle of the day, Scruggs was distributing rolls of bathroom tissue to jail inmates. The defendant continuously clapped his hands and repeatedly tried to block Scruggs's path. Scruggs moved the defendant out of the way and walked around him. When Scruggs told the defendant to go to his cell, the defendant replied, "Fuck you, nigger." Scruggs pushed the defendant into his cell. Scruggs did not strike the defendant or touch the defendant's neck or throat. The defendant did not fall, hit his head, or bleed; he remained standing as Scruggs pushed him into his cell. The remainder of that day was uneventful.

¶ 20 The next day, when Scruggs arrived at the jail to begin his shift, he was surprised when his supervisor told him that the defendant had complained of injuries. Scruggs

started working as a correctional officer at the jail three weeks prior to his run-in with the defendant. He continued to work at the jail for "more than a month" after the incident, at which point he was fired, while still a probationary employee, due to his being injured on the job.

¶ 21 Richard Roustio, an attorney since 1994, testified that he and Eugene Menges represented the defendant in his first-degree murder case. Roustio served as lead counsel. The State was seeking the death penalty, and both Roustio and Menges were certified to handle death-penalty cases. Roustio, Menges, and personnel from the Office of the State Appellate Defender met and discussed the case regularly. Roustio met with the defendant "dozens" of times at the county courthouse and "at least ten times" at the county jail, where the defendant was being held. On "many" of those occasions, he and the defendant reviewed the discovery and discussed the evidence in the case. A death penalty mitigation specialist named John Price also met with the defendant regularly.

¶ 22 As part of his representation of the defendant, Roustio deposed employees of the crime lab that had analyzed evidence in the case, and he thereby learned that the lab had inadvertently deleted DNA evidence in the defendant's case. Shortly after that revelation, the State withdrew its request for the death penalty. The State proposed that the defendant plead guilty in exchange for a sentence of life imprisonment. Roustio discussed this offer with the defendant, who told Roustio that he preferred a term of years. Eventually, the parties reached a plea agreement that included a term of years.

¶ 23 Roustio could not specifically recall any conversation in which he discussed with the defendant the theory of accountability for a crime. Roustio also could not remember

whether the defendant was taking psychotropic medication at the time of the guilty plea, whether the defendant ever expressed a fear of remaining in the county jail, or whether the defendant ever stated that he had been hit or threatened by a correctional officer. Roustio testified that if he had heard that the defendant had been beaten by a correctional officer, he would have remembered hearing it. Roustio never had an impression that the defendant did not understand what was happening in his case. In preparing for the plea hearing, Roustio told the defendant to answer the judge's questions truthfully; he never told the defendant to answer the judge's questions in whatever ways would ensure the judge's acceptance of the guilty plea. Roustio never had an impression that the defendant was pleading guilty involuntarily. During the time he represented the defendant, Roustio thought that their attorney-client relationship was good.

¶ 24 Eugene Menges, an attorney since 1977, testified that he served as "second chair" to Richard Roustio during their representation of the defendant in his murder case. During their representation of the defendant, Menges and Roustio together met with the defendant on several occasions, and the three discussed factual and legal issues in the case. On more than one occasion, the attorneys discussed the theory of accountability with the defendant. The defendant never did or said anything that caused Menges to think that the defendant did not understand those discussions. The defendant did not want a plea agreement that included a life sentence, and he eventually agreed to plead guilty and to be sentenced to a term of years. Menges considered the defendant fit to plead guilty. He never doubted that the defendant understood all that was happening at the time of the guilty plea. He never heard the defendant, or anyone else, state that the

defendant had been beaten or threatened at the jail, and he never doubted that the guilty plea was voluntary. Menges could not recall whether he and the defendant ever discussed psychotropic drugs.

¶ 25 At the close of the evidentiary hearing, the court took the matter under advisement. On October 8, 2014, the court entered a written order denying the fourth amended petition. The court specifically found that the defendant's guilty plea was voluntary and that plea counsel had not provided constitutionally ineffective assistance. The defendant filed a notice of appeal from that order, thus perfecting the instant appeal.

¶ 26 ANALYSIS

¶ 27 As previously mentioned, OSAD has filed a *Finley* motion to withdraw as the defendant's appellate counsel, along with a memorandum in support of the motion. The defendant has filed a written response, but much of his response concerns matters outside the record and is therefore unhelpful to this court. OSAD has presented two potential issues for review: (1) whether the circuit court's denial of the defendant's postconviction petition was manifestly erroneous, and (2) whether postconviction counsel complied with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 28 Where a postconviction petition advances to the third stage of proceedings, and the circuit court conducts an evidentiary hearing, the defendant has the burden of proving, by a preponderance of the evidence, a substantial violation of a constitutional right. *People v. Coleman*, 2013 IL 113307, ¶ 92. The circuit court acts as the finder of fact at the evidentiary hearing; it determines the credibility of witnesses and the weight of their testimonies, and it resolves any conflict in the evidence. *People v. Domagala*, 2013

IL 113688, ¶ 34. This court will not reverse the circuit court's ruling on a postconviction petition after conducting an evidentiary hearing unless the ruling is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A ruling is manifestly erroneous if it is arbitrary, unreasonable, and not based on the evidence. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. Convincing a reviewing court that a circuit court's ruling was manifestly erroneous is a difficult task. *Id.*

¶ 29 At the evidentiary hearing in this case, the defendant testified that he pleaded guilty because a correctional officer had beaten him at the jail and he feared that the officer would kill him if he remained at the jail. Witness Jon Cearlock corroborated the defendant's testimony about the beating. However, neither the photographs of the defendant's alleged injuries nor the testimony of the jail's nurse lend credence to the defendant's testimony about a beating, and the correctional officer himself described only a reasonable use of force against the defendant. The defendant accused his plea attorneys of neglecting him and his case, *e.g.*, meeting with him only a few times before his guilty plea and failing to explain the theory of accountability. The attorneys gave a very different account. They described a thorough handling of the case, which included many substantive discussions with the defendant, as well as the taking of depositions that resulted in the State's dropping its pursuit of the death penalty. The defendant also testified that at the time he pleaded guilty, he was under duress, was not thinking clearly, and was ill-informed about the law applicable to his case. This assertion was rebutted by the plea attorneys and by the transcript of the plea hearing. The transcript evidences a voluntary and knowing plea.

¶ 30 The circuit court, as the finder of fact, was free to find that the correctional officer, the plea attorneys, and the jail's nurse were more credible than the defendant and his corroborating witness. Given the totality of the evidence adduced at the evidentiary hearing, the circuit court's denial of postconviction relief certainly was not manifestly erroneous. Indeed, a ruling in the defendant's favor would have been highly surprising.

¶ 31 As for whether postconviction counsel complied with Illinois Supreme Court Rule 651(c), the record establishes that counsel did so comply.

¶ 32 In postconviction proceedings, a criminal defendant has a right to reasonable assistance from his attorney. *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19. Reasonable assistance is assistance that substantially complies with Rule 651(c). *Id.* The rule provides, in pertinent part, as follows:

"The record filed in [the appellate] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

A Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. This court reviews *de novo* the question of whether a postconviction attorney complied with Rule 651(c). *People v. Mason*, 2016 IL App (4th) 140517, ¶ 12.

¶ 33 Here, postconviction counsel's certificate was more than sufficient to establish a rebuttable presumption of compliance with Rule 651(c), and nothing in the record rebuts that presumption. Counsel even specified the dates of his face-to-face meetings with the defendant and of his written correspondence with the defendant. Counsel was clearly diligent, and his assistance was more than reasonable.

¶ 34

CONCLUSION

¶ 35 The circuit court's ruling on the defendant's postconviction petition was not manifestly erroneous, and postconviction counsel did not fail to provide a reasonable level of assistance. Any argument to the contrary would lack merit. Therefore, OSAD is granted leave to withdraw as appellate counsel, and the order of the circuit court is affirmed.

¶ 36 Motion granted; judgment affirmed.