

NOTICE

Decision filed 07/13/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110089-U

NO. 5-11-0089

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,

Plaintiff-Appellee,

v.

CAREY C. PETTIGREW,

Defendant-Appellant.

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Appeal from the  
Circuit Court of  
Randolph County.

No. 09-MR-1

Honorable  
Richard A. Brown,  
Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.  
Justices Welch and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's denial of the defendant's petition for postconviction relief claiming the ineffective assistance of guilty plea counsel was not manifestly erroneous where the outcome of the proceeding turned on the credibility of the witnesses and where the circuit court found the testimony of guilty plea counsel to be more credible than that of the defendant.

¶ 2 Defendant, Carey C. Pettigrew, appeals the denial of his petition for postjudgment relief. The Office of the State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644, 627 N.E.2d 715 (1994). Pettigrew was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has not filed a response. We have considered the State Appellate Defender's motion to withdraw as counsel on appeal. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we

now grant the State Appellate Defender's motion to withdraw as counsel on appeal, and we affirm the judgment of the circuit court of Randolph County.

¶ 3 On August 20, 2007, Pettigrew pled guilty to possession of a weapon while confined to a penal institution (720 ILCS 5/24-1.1(b) (West 2006)), and he was subsequently sentenced to four years' imprisonment. Pettigrew did not file a postjudgment motion or a direct appeal.

¶ 4 On January 2, 2009, Pettigrew filed *pro se* a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 to 122-8 (West 2006)) alleging that guilty plea counsel falsely promised him that he would be sentenced to probation if he would "say yes to everything the judge said to him" during the plea hearing, and that he had pled guilty in reliance on his attorney's false promises. The circuit court docketed the petition for further proceedings and appointed counsel to represent Pettigrew. Appointed counsel filed an amended postconviction petition alleging that Pettigrew had been denied the effective assistance of counsel in that guilty plea counsel had "manipulated" Pettigrew into pleading guilty and had "promised" Pettigrew that he would receive a sentence of probation if he answered affirmatively to all of the court's questions at the sentencing hearing. The amended postconviction petition also alleged that "mental illness" prevented Pettigrew from understanding the consequences of pleading guilty. No affidavits or other supporting evidence accompanied the amended postconviction petition.

¶ 5 The State filed a motion to dismiss Pettigrew's amended postconviction petition, which the circuit court granted following a hearing. This court reversed the judgment of the circuit court and remanded the cause for further proceedings, holding that postconviction counsel's failure to attach supporting documentation to the amended postconviction petition constituted unreasonable assistance of counsel. *Pettigrew v. People*, No. 5-09-0163 (Aug. 3, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On remand, appointed counsel filed a second amended postconviction petition alleging (1) that guilty plea counsel had "manipulated" Pettigrew into pleading guilty and that Pettigrew did not understand the implications of a guilty plea because he suffered from mental illness, (2) that plea counsel did not explain to Pettigrew that he had already discussed Pettigrew's case with the State's Attorney prior to the plea, and (3) that plea counsel promised Pettigrew that he would receive a sentence of probation if he answered "yes" to all of the questions that the court asked him. Pettigrew's affidavit accompanied the second amended postconviction petition.

¶ 7 At the evidentiary hearing on his postconviction petition, Pettigrew testified that he had long suffered from bipolar disorder, depression, ADD, and polysubstance abuse, and that he did not understand the implications of pleading guilty because of his mental illness. Pettigrew stated that guilty plea counsel told him that the State would not agree to a sentence of probation as part of a negotiated plea, but that he would receive a sentence of probation if he entered an open plea of guilty and answered "yes" to all of the court's questions.

¶ 8 Attorney Jeremy Walker testified that he had been appointed to represent Pettigrew and had represented him at the plea and sentencing hearings. Walker sought a mental fitness examination based on Pettigrew's assertion that he was taking psychotropic medication. Dr. Cuneo performed the evaluation. Walker reviewed the contents of Dr. Cuneo's report with Pettigrew. With Pettigrew's agreement, Walker stipulated to the contents of the report. With respect to the plea, Walker testified that the State had offered a sentence of four years' imprisonment in exchange for a guilty plea but that Pettigrew wanted a sentence of probation. Walker explained that the only way to get a sentence of probation was to enter an open plea of guilty. Walker advised Pettigrew that an open plea was not a good idea because of his criminal history and the possibility of an extended-term sentence. However, Walker told Pettigrew that "if he wanted to argue for probation and he was willing to roll

the dice as far as the ultimate sentence goes," Walker would proceed accordingly. Walker denied telling Pettigrew that he could arrange for probation if Pettigrew entered an open plea of guilty. Walker testified that Pettigrew was lucid and cooperative during the guilty plea discussions, and he seemed to understand what was happening at the guilty plea and sentencing hearings.

¶ 9 The circuit court denied Pettigrew's postconviction petition, finding that Pettigrew's guilty plea was knowing and voluntary and that Walker did not promise him a sentence of probation. Pettigrew appeals.

¶ 10 The Act provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183, 840 N.E.2d 658, 663 (2005). To obtain postconviction relief, the petitioner must show that he suffered a substantial deprivation of his constitutional rights in the proceeding that produced the conviction or sentence being challenged. *People v. Caballero*, 228 Ill. 2d 79, 885 N.E.2d 1044 (2008). The petitioner bears the burden of demonstrating that a substantial deprivation of his constitutional rights occurred (*People v. Pendleton*, 223 Ill. 2d 458, 861 N.E.2d 999 (2006)), and a circuit court's adverse decision on a petitioner's claims of constitutional deprivation following an evidentiary hearing will not be disturbed on review unless it is manifestly erroneous. *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). "Manifestly erroneous" refers to error that is " 'clearly evident, plain, and indisputable.' " *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286 (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997)).

¶ 11 The only evidence introduced at the evidentiary hearing was the testimony of Pettigrew and Walker. "The credibility of the testimony in a post[ ]conviction case, as in

other cases tried by the court without a jury, is a matter for the trial judge to determine." *People v. Alden*, 15 Ill. 2d 498, 503, 155 N.E.2d 617, 620 (1959). As the fact finder at the evidentiary hearing, the court was free to disbelieve Pettigrew's testimony that he did not understand the proceedings at the guilty plea hearing, and it was free to believe that Walker never promised Pettigrew that he would receive a sentence of probation. There is nothing in the record suggesting that the circuit court's credibility determinations are clearly, plainly, or indisputably wrong. Consequently, the circuit court determination that Pettigrew was not denied his constitutional right to the effective assistance of guilty plea counsel is not manifestly erroneous.

¶ 12 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Randolph County is affirmed.

¶ 13 Motion granted; judgment affirmed.