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NO. 5-12-0205

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

Defendant-Appellant.

) Honorable
) Michael P. Kiley,
) Judge, presiding.

ORDER

¶ 2 The defendant, Scott M. Prince, appeals an order by the circuit court denying his petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). 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 (1994). The defendant was given proper notice and was

granted an extension of time to file briefs, objections, or any other documents to support his appeal. The defendant 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 affirm the judgment of the circuit court of Shelby County.

¶ 3

BACKGROUND

¶ 4 On June 30, 2004, the defendant was charged with two counts of predatory criminal sexual assault. The offenses were alleged to have occurred on or about January 2, 2004. On November 10, 2004, five days before trial, the defendant filed a *pro se* motion requesting a continuance so that he could have time to hire a private attorney. The circuit court denied the motion, and the defendant then entered an open plea of guilty to both counts. The defendant subsequently wrote a letter to the court indicating his desire to withdraw his guilty plea, alleging that he had been denied the effective assistance of counsel. New counsel was appointed and on February 4, 2005, the defendant filed through counsel a "supplemental" motion for leave to withdraw his guilty plea.

¶ 5 In his motion, the defendant argued, *inter alia*, that he was taking medication that "interfered with his capacity to understand the nature of the charges and the proceedings and the consequences of his actions." He also complained that plea counsel was ineffective because counsel did not meet with the defendant enough and did not investigate the defendant's claims.

¶ 6 The court conducted a hearing on the motion prior to sentencing. The defendant

testified as follows. He was diagnosed with depression with "mood and congruency psychotic features" in 1998 while in the military, and was discharged from the military as a result. At the time of his guilty plea, he was taking Zoloft and Wellbutrin for depression. He had been taking Zoloft since November or December 2003, and Wellbutrin since March 2004. The Wellbutrin was prescribed to counter the effects of the Zoloft. Shortly after the plea, the prescriptions for both medications expired and were not renewed. The defendant stated that while on the medications he felt "happy" and "complacent." The defendant claimed that as a result of his being off both the Wellbutrin and the Zoloft, his thoughts became clearer and he described the feeling as "waking up from a dream, a very realistic dream." He began to believe that his case was mishandled. He did not know whether he was in fact guilty of the crimes with which he was charged or if the medications were the cause. He did not think he committed the acts alleged.

¶ 7 The defendant also testified that he had tried to discuss his mental health issues and medication use with counsel, and counsel told him to provide his medical records. The defendant said that he gave counsel the medical records, but counsel told him that the records were irrelevant.

¶ 8 Marci Campbell, a pharmacist, testified as an expert for the State. Campbell stated that she had seen the combination of Zoloft and Wellbutrin prescribed numerous times, and that taking them at the doses prescribed for the defendant, 75 milligrams of Wellbutrin and 50 milligrams of Zoloft per day, would not have affected a person's ability to comprehend. She testified that those doses were relatively low and would not produce the side effects the defendant claimed to have experienced. She further testified that no patients taking Zoloft

and Wellbutrin at the doses prescribed for the defendant had ever complained that it affected their ability to reason and comprehend.

¶ 9 Valerie Rhodes, the administrator of the jail where the defendant was incarcerated prior to sentencing, testified that her duties included keeping logs of the medications that inmates would receive. The defendant's log showed that he was given 75 milligrams of Wellbutrin and 50 milligrams of Zoloft on a daily basis.

¶ 10 Finally, the State presented the testimony of the defendant's plea counsel. Counsel believed that he had met with the defendant about six times prior to the defendant pleading guilty. Counsel reviewed the defendant's medical records from his time in the military, but determined that the records would not benefit his defense. The defendant informed counsel that he was taking Zoloft and another drug, but never complained that the medications were adversely affecting him. Counsel did not notice any indication that the defendant was having difficulty comprehending what was happening. Counsel testified that on the date of the plea, he had advised the defendant that the motion to continue would most likely be denied, and explained the defendant's options. The defendant elected to enter an open plea of guilty.

¶ 11 Following the hearing, the circuit court denied the defendant's motion to withdraw his guilty plea, and set the matter for sentencing.

¶ 12 Following a sentencing hearing on March 18, 2005, the court sentenced the defendant to 12 years' imprisonment on count I and 8 years' imprisonment on count II, with the sentences to run consecutively.

¶ 13 On April 18, 2005, the defendant filed through counsel a timely postplea motion to

withdraw his plea or, in the alternative, to reduce his sentence. The defendant argued, *inter alia*, that his plea was unknowing and involuntary because he was under the influence of Zoloft and Wellbutrin at the time of the plea, and that plea counsel was ineffective for failing to investigate his mental health claims. He also argued that his sentence was excessive in light of his mental health history and family history.

¶ 14 A hearing on the defendant's postplea motion was held on November 23, 2005. The defendant testified that the dosages of both Zoloft and Wellbutrin that were reported in previous hearings and motions were inaccurate. He testified that he took 250 milligrams of Wellbutrin twice a day and 75 milligrams of Zoloft once a day. He testified that the medications gave him a false sense that "everything will be okay." He believed that if he had not been on the medications at the time of the plea hearing, he would not have entered a guilty plea. No other testimony or evidence was presented.

¶ 15 When denying the defendant's postplea motion, the circuit court noted that the defendant had not presented any expert medical testimony that would rebut Campbell's testimony at the hearing on the defendant's supplemental motion to withdraw his guilty plea. The court also denied the defendant's request to reconsider his sentence.

¶ 16 The defendant filed a direct appeal wherein he alleged solely that he was entitled to credit for time served. This court modified the defendant's sentence credit. See *People v. Prince*, 371 Ill. App. 3d 878 (2007).

¶ 17 On November 19, 2010, the defendant filed the *pro se* postconviction petition which gives rise to this appeal. In his petition, the defendant argued that he was entitled to a new trial based on "newly discovered evidence" and "actual innocence." The defendant

argued that he was entitled to present the affirmative defense of involuntary intoxication based on his ingestion of the prescription medications Zoloft and Wellbutrin, a defense he alleged was unavailable at the time of his plea. In support of his position, the defendant argued that *People v. Hari*, 218 Ill. 2d 275 (2006), provides that a defendant may pursue the affirmative defense of involuntary intoxication due to ingestion of a prescribed medication where the defendant was not warned of the side effects. The defendant also argued that his plea was involuntary because the medications he was on at the time of his plea affected his ability to think clearly. The defendant further argued that the jail logs of his medications were incorrect, and that the prosecutor misrepresented the actual dose of Zoloft at the hearing on his supplemental motion to withdraw his plea. The defendant attached medical records from the Veteran's Administration, among other documents, to his postconviction petition.

¶ 18 The circuit court appointed counsel to assist the defendant in the postconviction proceedings. Postconviction counsel filed a motion to hire an expert for the purpose of assessing the defendant's claims regarding his use of Zoloft and Wellbutrin at the time of his plea. The circuit court granted the defendant's motion to hire an expert. Postconviction counsel did not amend the defendant's *pro se* postconviction petition.

¶ 19 On May 16, 2011, the State filed an answer to the defendant's postconviction petition. In its answer, the State argued that the defense of involuntary intoxication applies only to the time of the offense, not the time of the plea. The State also argued that the defendant knew or should have known of the side effects of the medications, and that warnings about the medications were generally known.

¶ 20 On June 28, 2011, the State filed a motion to dismiss the defendant's postconviction petition, arguing that the petition was untimely and that the claims raised therein were barred by the doctrine of *res judicata*. At the hearing on the State's motion, the defendant argued that he was claiming actual innocence based upon a previously unavailable defense of involuntary intoxication. The circuit court denied the State's motion to dismiss, finding that the essence of the defendant's actual innocence claim was that he was involuntarily intoxicated due to his ingestion of medications and was thus not criminally responsible. The court explained that a claim of actual innocence survives a timeliness attack in postconviction proceedings.

¶ 21 On November 22, 2011, postconviction counsel filed another motion to hire an expert because the expert the court had previously authorized the defendant to hire had passed away. The circuit court granted the motion. However, counsel was unable to locate another suitable expert who was willing to testify despite having contacted several potential experts.

¶ 22 The defendant also sent a letter to the circuit court reiterating that despite counsel's efforts, no suitable expert could be hired and that there was no way to absolutely prove that he experienced side effects prior to, during, or after the alleged offense.

¶ 23 An evidentiary hearing was held on May 3, 2012. Neither the defendant nor the State presented any testimony. Postconviction counsel asked the court to take judicial notice of the testimony given at the hearings on the defendant's motions to withdraw his guilty plea. The State requested a directed finding because there was no evidence of involuntary intoxication at the time of the offense. The circuit court granted the State's

motion and denied the postconviction petition, finding that the defendant presented no evidence of involuntary intoxication at the time of the offenses. The defendant appeals.

¶ 24

ANALYSIS

¶ 25 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court has 90 days to independently assess the defendant's petition and summarily dismiss it if the court finds it "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage or if the circuit court fails to rule on it within 90 days, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 26 At the second stage, the circuit court must determine whether the defendant is indigent and, if so, whether he wishes to have counsel appointed to represent him. 725 ILCS 5/122-4 (West 2010). After an appointment, Illinois Supreme Court Rule 651(c) requires counsel (1) to consult with the defendant by mail or in person to ascertain his contentions of deprivation of constitutional rights, (2) to examine the record of the proceedings at the trial, and (3) to make any amendments that are necessary to the petition previously filed by the *pro se* defendant. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 27 After appointed counsel has made any necessary amendments to the petition, the State may file a motion to dismiss it. 725 ILCS 5/122-5 (West 2010); *People v.*

Kirkpatrick, 2012 IL App (2d) 100898, ¶ 13. At the second stage, the circuit court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001).

¶ 28 At the third stage of a postconviction petition, the circuit court must determine whether the defendant has met his burden of showing a substantial deprivation of federal or state constitutional rights. *People v. Lane*, 398 Ill. App. 3d 287, 296 (2010). The circuit court's decision at the third stage will not be reversed unless it was manifestly erroneous. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A decision is manifestly erroneous only if the error is " 'clearly evident, plain, and indisputable.' " *People v. Frieberg*, 305 Ill. App. 3d 840, 847 (1999) quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 29 In his postconviction petition, the defendant argued first he was denied his constitutional right to pursue an involuntary intoxication defense because at the time of his plea, the defense of involuntary intoxication based on unexpected and unwarned adverse side effects of prescription medication was unavailable, and that had it been available, he would have presented that defense rather than plead guilty.

¶ 30 Section 6-3 of the Criminal Code of 1961 provides in pertinent part:

"a person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." 720 ILCS 5/6-3

(West 2004).

In *People v Rogers*, 123 Ill. 2d 487 (1988), the supreme court held that the defense of involuntary intoxication was only available if the defendant's intoxication was the result of some external influence such as trick, artifice, or force. *Rogers*, 123 Ill. 2d at 508. In *Hari*, the supreme court overruled *Rogers*, holding that the defense of involuntary intoxication was available where the intoxication resulted from unexpected and unwarned adverse side effects of prescription medication. *Hari*, 218 Ill. 2d at 292-96.

¶ 31 At the evidentiary hearing, the circuit court took judicial notice of the testimony and evidence that was presented at the hearings on the defendant's motions to withdraw his guilty plea. No additional testimony was presented. The transcripts of the hearings on the motions to withdraw the guilty plea reveal that the defendant failed to present any evidence to support his allegation that he was adversely affected by the combination of Zoloft and Wellbutrin at the time he committed the offenses in question. The defendant offered no expert testimony to rebut the testimony of the State's expert. Absent any evidence of the adverse effects of the medication at the time that he committed the crimes, the defendant could not have successfully raised the defense of involuntary intoxication.

¶ 32 The defendant also argued in his postconviction petition that the combination of Zoloft and Wellbutrin rendered his plea involuntary. In denying the State's motion to dismiss, the circuit court noted that this claim had been previously rejected and that *res judicata* principles precluded its relitigation in the proceedings on the postconviction petition. Consequently, the circuit court made no finding with respect to this claim when it denied the petition.

¶ 33 The defendant's claim that his guilty plea was not knowing and voluntary suffers from the same fatal defect as his involuntary-intoxication-defense claim. He presented no evidence, other than his own testimony, to rebut the testimony of the State's expert that the combination of Zoloft and Wellbutrin in the amounts the defendant was taking would not have resulted in the adverse effects the defendant described, or have affected his ability to comprehend. Under these circumstances, no meritorious argument can be made that the defendant's guilty plea was involuntary as a result of the medications he was taking.

¶ 34 Finally, we note that postconviction counsel filed a certificate according to Supreme Court Rule 604(d) (eff. July 1, 2006) rather than Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Failure to file a certificate of compliance with Rule 651(c) is harmless if the record demonstrates that counsel adequately fulfilled his duties under the Rule. *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 14 (citing *People v Williams*, 186 Ill. 2d 55, 59 n.1 (1999)).

¶ 35 The record shows that postconviction counsel met the requirements of Rule 651(c). Counsel certified that he had consulted with the defendant, and the record demonstrates that counsel was well aware that the defendant was claiming both actual innocence based on the previously unavailable affirmative defense of involuntary intoxication and that his guilty plea was involuntary as a result of the medications he was taking at the time of the plea. The record also demonstrates that postconviction counsel had examined the record of the proceedings. Counsel asked the postconviction court to take judicial notice of the testimony from the hearings on the defendant's two motions to withdraw his guilty plea. Counsel was aware that expert testimony was necessary to rebut the testimony of the

State's expert, and attempted more than once to obtain an expert to support the defendant's claims. While postconviction counsel made no amendments to the defendant's postconviction petition, the postconviction petition advanced the defendant's position well without any amendments. Under these circumstances, the filing of a Rule 604(d) certificate instead of a Rule 651(c) certificate was harmless.

¶ 36 The defendant has failed to show any deprivation of his constitutional rights, and the circuit court's decision to deny the postconviction petition was not manifestly erroneous.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, the State Appellate Defender's motion to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Shelby County is affirmed.

¶ 39 Motion granted; judgment affirmed.