



alleged that he was denied the effective assistance of counsel in that his attorney did not file a posttrial motion and failed to call two physicians in his trial who would have contradicted the State's medical testimony about the injuries inflicted on the child who was in the defendant's care. The defendant amended his petition also alleging that trial counsel was ineffective for not investigating and presenting evidence in mitigation at his sentencing hearing—that the defendant had mental and substance abuse problems that would have likely mitigated his sentence if known by the court.

¶ 6 The trial court appointed counsel for the defendant in this postconviction process on December 28, 2006. On April 26, 2007, the defendant made an oral motion seeking leave to file an amended postconviction petition. Appointed counsel then filed an amended petition on September 27, 2007, which expanded upon the arguments and issues raised by the defendant in his *pro se* and amended petitions as detailed below. On that same date, appointed counsel filed a document entitled, "Certificate in Compliance with Rule 604(D)." In this certificate, the defendant's appointed counsel indicated that he had consulted with the defendant in person to discuss his case and the reasons for his petition for relief. Counsel certified that he had reviewed the court file and the prior proceedings. Appointed counsel also stated that he met with the defendant's trial attorney about the issues raised by the defendant in his *pro se* petition. The attorney concluded this certificate by stating that it was his opinion that the defendant made a valid constitutional argument about errors during his trial and sentencing.

¶ 7 In the amended postconviction petition filed by appointed counsel, the defendant alleged that trial counsel failed to timely file a posttrial motion. The defendant also alleged that his trial counsel failed to investigate his mental status and health as mitigating evidence. In addition to the amended petition and the certificate, the defendant filed an affidavit with the court. In this affidavit, file-stamped October 18, 2007, the defendant alleged as follows:

"I did not meet with my attorney at trial, from the date of the trial completion until seeing him the day of my sentencing, that I did not have any conversations with my counsel after the Pre-Sentence Report was prepared, was not able to provide to him evidence which would have mitigated my situation at the time of the incident, that I was never give [*sic*] an opportunity to bring to light my prior mental health status and prior hospitalizations regarding my mental state when I was as [*sic*] minor, and as an adult. I was not given any opportunity to advise counsel of my state of mind during the Sentencing hearing and was not advised by him of any procedure of what to expect at sentencing."

¶ 8 On March 27, 2008, the trial court dismissed the defendant's postconviction petition without prejudice stating that the petition had not made a substantial showing of a violation of a constitutional right. The defendant then appealed to this court. We concluded that the dismissal did not amount to a final and appealable order because it had been entered "without prejudice." We dismissed the appeal. *People v. York*, No. 5-08-0227 (2008) (unpublished order).

¶ 9 Appointed counsel filed an amended petition on April 29, 2009, which added the allegation that the defendant's constitutional rights to have counsel present at all critical stages of the criminal proceeding had been denied because of a communication with the jury that occurred outside of his presence and without his knowledge.

¶ 10 On July 22, 2010, the trial court dismissed the amended petition stating that it failed to show a substantial constitutional violation.

¶ 11 The defendant appeals this order, but only takes issue with the trial court's denial of one of the three issues alleged in his petition—the failure to present mitigating evidence at sentencing.

¶ 12 On appeal, the defendant alleges that the Supreme Court Rule 604(d) certificate filed

by his attorney did not satisfy or comply with the mandated Rule 651(c) certificate that must be filed by appointed counsel in the postconviction setting. He asks this court to reverse and remand the case in order to allow for a proper certificate to be filed.

¶ 13

#### LAW AND ANALYSIS

¶ 14 Supreme Court Rule 651(c) requires the following:

"The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, 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. Dec. 1, 1984).

¶ 15 The purpose of Supreme Court Rule 651(c) is to ensure that indigent defendants are provided with proper representation when presenting their claims of constitutional violations. *People v. Treadway*, 245 Ill. App. 3d 1023, 1026, 615 N.E.2d 887, 890 (1993); *People v. Alexander*, 197 Ill. App. 3d 571, 573, 554 N.E.2d 1078, 1079 (1990). The defendant correctly argues that the inquiry does not end just because counsel has filed a Rule 651(c) certificate. *People v. Robinson*, 324 Ill. App. 3d 553, 556-57, 755 N.E.2d 1034, 1037-38 (2001). The issue is whether the appointed attorney rendered a reasonable level of assistance with respect to the required elements. *Id.* Furthermore, on appeal, the court should not presume that appointed counsel fulfilled the requirements of Rule 651(c). *People v. Carter*, 223 Ill. App. 3d 957, 962, 586 N.E.2d 835, 838 (1992).

¶ 16 In this case, what is certain is that appointed counsel filed a certificate pursuant to a supreme court rule—but from the express title of the certificate, the certificate was not prepared and filed pursuant to Rule 651(c). Because Supreme Court Rule 604(d) is a rule that would not apply to the defendant's situation, the rule bears no relationship to the

certificate prepared and filed by the defendant's attorney.<sup>1</sup> Admittedly, the rule contains identical requirements that must be included in a certificate filed by the defendant's attorney. We believe that the attorney's designation of the wrong supreme court rule in this case was undoubtedly an error. Supreme Court Rules 604(d) and 651(c) contain the same requirements for the content of the certificates. Therefore, we would expect the certificate in this case, although labeled a Rule 604(d) certificate, to contain the Rule 651(c) requirements. Upon close examination of the certificate filed in this case, the contents of the certificate mirror the requirements of Rule 651(c). The first Rule 651(c) requirement is that the attorney has consulted with the defendant by mail or in person to ascertain the contentions of constitutional right deprivation. The defendant's appointed counsel represented to the court, "That I have consulted with Mr. York in person to discuss the case and the reasons for Mr. York's Petition for Relief." The second Rule 651(c) requirement is that the appointed attorney must examine the record of the proceedings at trial. The defendant's attorney represented to the court, "That I have also reviewed the court file of record in this matter and the prior proceedings in this cause relative to the Petition For Relief." The third Rule 651(c) requirement is that the appointed attorney must make any amendment to the *pro se* petition necessary to adequately present the petitioner's contentions. The defendant's appointed counsel did not include a paragraph in his certificate dedicated to the filing of an amended petition. However, contemporaneous with the filing of the certificate, appointed counsel filed an amended petition for postconviction relief.

¶ 17 We first address whether or not the use of the wrong supreme court rule in the title

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<sup>1</sup>Supreme Court Rule 604(d) provides guidance in cases where a criminal defendant has pled guilty to a charge and wishes to appeal. The rule provides the procedure for filing a motion directed to the plea or the sentence, or both. Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

of the certificate is reversible error and/or whether the failure to specifically state that an amended petition has been filed is reversible error. The State correctly argues that fulfillment of this third obligation under Supreme Court Rule 651(c) does not require the filing of a petition that would be considered frivolous. *People v. Greer*, 212 Ill. 2d 192, 205, 817 N.E.2d 511, 519-20 (2004). An amended petition does not need to be filed in order to comply with the third requirement. *Id.* Consequently, we do not find that the failure to reference the defendant's contemporaneous filing of an amended petition within the body of the certificate is a fatal flaw. Furthermore, we do not find that the mislabeled supreme court rule in the title of the certificate is fatal to compliance with supreme court requirements.

¶ 18 At issue, then, is the content of the amended petition filed by appointed counsel. The defendant acknowledges that his attorney filed an amended petition. The defendant argues that his appointed attorney did not include all issues he wanted brought to the trial court's attention in this postconviction setting. Specifically, the defendant wanted the court to know about his mental health status. He argues that his trial attorney was ineffective for not bringing this issue to the court's attention at sentencing, as he believes his mental status would have been a mitigating factor against his lengthy 25-year prison sentence. The defendant claims that his appointed attorney failed to provide a reasonable level of assistance to him at the postconviction phase by failing to adequately raise his mental status in the amended petition and by failing to attach psychiatric records that would have supported his claim.

¶ 19 We turn to the allegations of the amended postconviction petition filed by the defendant's appointed attorney. In count I of his amended petition, appointed counsel alleged that his appellate counsel was ineffective for failing "to raise several highly viable issues during the sentencing phase of the trial." In support of this claim, the defendant

states:

"That in this instant case, trial counsel failed to include, adopt or even question the defendant on his medical and mental status and health during the representation of the defendant and failed to adequately represent the defendant's mitigating factors at the sentencing hearing. In fact, after the trial of the defendant, the attorney for the defendant did not even talk or speak to his client, this defendant[, ] from the trial conclusion until the sentencing hearing was underway. The counsel had received the Probation Officer's Pre-Sentencing Report and did not ask the defendant about its contents, did not ask about the mental health issues and did not make any attempt to introduce same to the Court as a mitigating factor for sentencing. \*\*\* The Pre-Sentencing Report indicated that the defendant has been treated for mental health issues and for depression as a minor in 1994 at Chester Hospital in Terre Haute, Indiana, and that he had used alcohol, marijuana and Meth in the past and that the defendant has [sic] last been intoxicated on drugs on the day of the offense. Counsel for the defendant never investigated or questioned the defendant about these issues and did not include them in his argument or questioning of the investigator or in evidence of Mitigation for the crime convicted."

¶ 20 The defendant's postconviction attorney clearly raised the mental health and substance abuse issues. The defendant's affidavit filed along with the amended petition verifies this issue. In his affidavit, the defendant states that if the court had been made aware of his mental health issues, of his past treatment and history of psychiatric medications, and of his alcohol and drug consumption on the day of the incident, the court would have considered these issues as mitigating factors.

¶ 21 The defendant faults his appointed counsel for failing to attach the 1994 hospital records showing that he had been hospitalized for depression, as well as any other records

that supported his claim of substance abuse. The defendant contends that the failure to attach these supporting documents mandates a finding that his attorney did not adequately represent him in this postconviction stage as contemplated by the third prong of Supreme Court Rule 651(c).

¶ 22 A defendant who files a postconviction petition is not entitled to an evidentiary hearing as a matter of right. *People v. Harris*, 206 Ill. 2d 293, 299-300, 794 N.E.2d 181, 187 (2002). The trial court will only order an evidentiary hearing if the allegations of the postconviction petition made a substantial showing that the defendant's constitutional rights have been violated and the petition supports that claim. *People v. Waldrop*, 353 Ill. App. 3d 244, 249-50, 818 N.E.2d 888, 893 (2004).

¶ 23 Appointed counsel only has a duty to make a reasonable investigation. *People v. Orange*, 168 Ill. 2d 138, 149, 659 N.E.2d 935, 940 (1995). Counsel's judgment, upon review and consideration of the defendant's claims, is allowed a heavy measure of deference. *Id.*

¶ 24 Constitutionally competent assistance is measured by a test of whether the defendant received "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on an ineffective-assistance-of-counsel claim, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

¶ 25 We have thoroughly reviewed the record and the allegations in the amended petition. We also note that the defendant's claim of "mental issues" was not supported by the presentence investigation report, which listed his mental health as "good"—a fact known by appointed counsel and by the circuit court. The mental health claim the defendant wanted the court to consider in ruling upon his postconviction petition was already before the court. Attaching hospital records from an admission eight years prior to the felony committed by

the defendant was not critical. The defendant received the effective assistance of counsel in his second stage of postconviction review despite the claimed failure to include a copy of the 1994 hospital records. We conclude that the defendant has failed to establish that the outcome would have been different had his attorney attached those medical records to this second-stage postconviction amended petition.

¶ 26

#### CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Richland County is hereby affirmed.

¶ 28 Affirmed.