

No. 1-11-2302

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 03 CR 10572
)	
TIMOTHY SALLIS,)	Honorable
)	Timothy Joyce,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concur in the judgment.

ORDER

- ¶ 1 *Held:* Defendant’s postconviction counsel did not provide inadequate representation when filing an amended postconviction petition because counsel was not obligated to include a new claim for relief that was not contained in the original petition.
- ¶ 2 Defendant Timothy Sallis appeals from the order of the circuit court dismissing his petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) at the second stage without granting an evidentiary hearing. For the

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following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first-degree murder and robbery and sentenced to a total of 50 years of imprisonment. The relevant testimony at trial established that defendant beat Bradley Sterrett to death after an altercation in Sterrett's apartment that involved a dispute over payment for sexual favors. Defendant also stole various electronics from Sterrett's apartment, including Sterrett's cell phone. After the beating, defendant visited his friend, Darriek Jones. Defendant told Jones that Sterrett attacked him and defendant hit him back and "knocked him out."

¶ 5 Jones testified that he took Sterrett's cell phone from defendant and used it to make personal phone calls. The police traced the phone calls, which led back to Jones. Jones told the police several stories of how he acquired Sterrett's cell phone, but after becoming a suspect in Sterrett's murder, Jones eventually told police about defendant's altercation with Sterrett. Police searched Jones' apartment and found an airline boarding pass issued to "Timothy King" and an identification card in the same name, although Jones confirmed that the picture on the card was defendant.

¶ 6 Police issued an investigative alert for defendant and looked for him at several locations where he was known to reside. At one apartment, a detective saw defendant when someone opened the door. The detective entered and arrested defendant, handcuffed him, and read him his rights. The detective noticed that defendant's shoes had "reddish brown stains on them." The stains were later determined to be Sterrett's blood.

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¶ 7 At the police station, almost immediately after detectives finished reading defendant his *Miranda* rights, he said, “you guys must be homicide detectives.” He also told detectives that he knew that this was “about the guy that was beat up at 3200 N. Lake Shore Drive,” the address of Sterrett’s apartment. He then told detectives that he agreed to perform sexual favors for Sterrett for money. After completing the act, Sterrett refused to pay him. The two then “struggled.” Defendant said he hit Sterrett 20 times with his hands and feet until Sterrett was unconscious. He said he stole money from Sterrett’s pocket along with various electronic equipment and the cell phone. He later told detectives that he hit Sterrett because he was angry about not being paid and because Sterrett insulted him.

¶ 8 Defendant agreed to give a videotaped statement to the assistant State’s Attorney about the events leading up to the physical altercation, which was played for the jury at trial. In addition to recounting his version of events, defendant said that he had not been mistreated or threatened in any way.

¶ 9 Defendant also testified at trial. He testified that Sterrett attacked him, hit him four or five times, and tried to choke him. He testified that he hit Sterrett five or six times, but on cross-examination, admitted that he hit him 16 times with all of his force. He stated that he was afraid of Sterrett, who was bigger than him. He also stated that his video confession was inaccurate and that the detective kicked and choked him and made him admit to stealing the electronics.

¶ 10 Defendant was convicted of murder and robbery and was sentenced to a total of 50 years’ imprisonment. On direct appeal, he challenged his sentence on the robbery conviction, but did not appeal his convictions on either offense. *People v. Sallis*, No. 1-06-0301 (November 30,

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2007) (unpublished order under Illinois Supreme Court Rule 23).

¶ 11 Defendant subsequently filed a *pro se* petition for postconviction relief under the Act. In his petition, he asserted 16 claims, including the following: (1) his due process rights were violated “when the police used unlawful force to coerce statements and evidence of [his] guilt” and that his trial counsel was ineffective for not investigating or demanding an evidentiary hearing on those claims; (2) his due process rights were violated because he was interrogated by police without being given a “proper” *Miranda* warning; (3) trial counsel was ineffective because he did not move to suppress defendant’s video statement, even though it was obtained before he had been given a “proper” *Miranda* warning; and (4) trial and appellate counsel were ineffective for failing to preserve for appeal the issue of whether a witness was qualified to testify as a blood spatter expert.

¶ 12 The court appointed an assistant public defender to assist defendant at the second stage of the postconviction proceedings. Postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) attesting to the following: (1) that he communicated with defendant by letter, read defendant’s *pro se* postconviction petition, and ascertained defendant’s contentions of deprivation of constitutional rights; (2) that he reviewed the trial transcripts; and (3) that he made all amendments to defendant’s *pro se* postconviction petition that were necessary for an adequate presentation of defendant’s contentions.

¶ 13 Postconviction counsel also filed an amended petition, which incorporated defendant’s *pro se* petition and amended defendant’s claim that appellate counsel was ineffective for failing to challenge on direct appeal whether the trial court abused its discretion by allowing a witness to

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testify as a blood spatter expert. The State subsequently filed a motion to dismiss in which it argued that defendant did not make a substantial showing that his rights were violated and that the allegations of the petition were conclusory, unsupported by affidavit, and ultimately meritless.

¶ 14 The court granted the State’s motion to dismiss after extensive argument, which largely focused on the testimony and qualification of the blood spatter expert. As to the remaining claims, the court found that defendant’s allegations were conclusory and without merit. The court found that his claim of receiving an “improper” *Miranda* warning was not well developed because he did not claim he received no *Miranda* warning, but did not explain what an “improper” *Miranda* warning was or how he was deprived of his rights. The claim also was contradicted by his testimony that he thought he was given his *Miranda* rights. Accordingly, his claim that trial counsel was ineffective for not moving to suppress the video statement was without merit. The court also found that his claim that his confession was physically coerced was nonspecific and unsupported by the record. The court also concluded that regardless of whether the blood spatter expert’s testimony was properly admitted, defendant could not show how he was prejudiced by the admission of this testimony and, therefore, his claim failed.

¶ 15

ANALYSIS

¶ 16 Defendant now appeals from the dismissal of his postconviction petition. The sole issue on appeal is whether postconviction counsel provided inadequate representation under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) because he did not amend the *pro se* petition to include a claim of ineffective assistance of appellate counsel for not arguing on direct appeal that

trial counsel was ineffective for failing to file a motion to suppress his confession and quash his arrest based on a lack of probable cause for his arrest.

¶ 17 Before we reach the merits of defendant’s appeal, we first address the State’s argument that defendant “cannot bring the instant free-standing claim that postconviction counsel failed to comply with Rule 651(c) because such a claim is predicated on the deprivation of a statutory right, not a constitutional right.” However, the State’s argument seems to confuse a cognizable claim of a postconviction petition with the appropriate subject matter of an appeal. While it is true that a postconviction petition may only address claims of constitutional deprivations (725 ILCS 5/122-1(a) (West 2010)), there is no question that an appeal from denial of a postconviction petition may address the adequacy of postconviction counsel’s representation. See, e.g., *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (“Petitioner’s only argument on appeal is that he was denied his right to reasonable assistance of counsel during the proceedings on his post-conviction petition”). To hold otherwise would deny a postconviction petitioner any opportunity to challenge the adequacy of his counsel’s representation.

¶ 18 The State’s reliance on *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009), is misplaced. In *Rossi*, the court held that the defendant’s claim of inadequate assistance of postconviction counsel was not a cognizable claim that could be raised in his third successive postconviction petition. *Rossi*, 387 Ill. App. 3d at 1059. Here, defendant’s postconviction petition itself does not address the adequacy of counsel’s representation; rather, he raises the issue on appeal, which is appropriate.

¶ 19 Turning to defendant’s substantive argument, we now address whether postconviction

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counsel failed to provide reasonable assistance under Rule 651(c). A defendant has no constitutional right to the assistance of counsel in a postconviction proceeding. *People v. Rials*, 345 Ill. App. 3d 636, 641 (2003). Postconviction proceedings are statutory in nature and the Act prescribes the degree of legal assistance available to a postconviction petitioner. *Rials*, 345 Ill. App. 3d at 641.

¶ 20 Pursuant to the Act, after a defendant has stated the gist of a meritorious claim for a deprivation of his rights in a *pro se* postconviction petition, the petition advances to the second stage of the postconviction proceedings. *Rials*, 345 Ill. App. 3d at 639-40. At that point, the Act provides for the appointment of counsel for indigent defendants. *Rials*, 345 Ill. App. 3d at 640. However, the petitioner is only entitled to a “reasonable” degree of assistance from postconviction counsel, which is a lesser standard than the “effective” assistance of counsel guaranteed by the federal and state constitutions in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006).

¶ 21 Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) enumerates the specific requirements that postconviction counsel must satisfy in providing reasonable assistance to postconviction petitioners. *Pendleton*, 223 Ill. 2d at 472. Under Rule 651(c), the record must demonstrate that postconviction counsel has: (1) consulted with the petitioner to ascertain the petitioner’s contentions regarding the deprivation of his constitutional rights; (2) examined the record of the proceedings at trial; and (3) made any amendments to the *pro se* petition that were necessary to ensure “the adequate presentation of petitioner’s contentions.” Ill. Sup. Ct. R. 651(c) (eff. Dec. 1, 1984); *Pendleton*, 223 Ill. 2d at 472.

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¶ 22 Although defendant argues on appeal that we should review postconviction counsel’s performance under the *Strickland* standard, we decline to do so. He argues that the United States Supreme Court’s recent holding in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), demands that we abandon our well-established rule in Illinois that postconviction counsel need only comply with Rule 651(c). We disagree.

¶ 23 *Martinez* stands for the very limited proposition that when a state requires a defendant to raise ineffective assistance of trial counsel claims in an initial postconviction petition, and postconviction counsel fails to do so, a defendant is not procedurally barred from raising counsel’s deficient performance in a successive collateral proceeding or a federal *habeas* claim. *Martinez*, 132 S. Ct. at 1318. The court held that under those particular circumstances, postconviction counsel’s performance should be evaluated under the *Strickland* standard because the proceedings are similar to a direct appeal. *Martinez*, 132 S. Ct. at 1318. However, the Court explicitly stated that its holding does not apply to “appeals from initial-review collateral proceedings,” as we have in this case. *Martinez*, 132 S. Ct. at 1320. Additionally, it does not apply where, as in Illinois, a defendant has the opportunity to raise claims of ineffective assistance of trial counsel at trial and on direct appeal and are not required to raise them for the first time in a postconviction petition. Accordingly, we see no reason to depart from our analysis of postconviction counsel’s performance under the standards prescribed by Rule 651(c).

¶ 24 Under the rule, postconviction counsel has no obligation to amend a *pro se* petition. *Rials*, 345 Ill. App. 3d at 641. In determining whether to file an amended *pro se* petition, counsel is only required to investigate and properly present the *petitioner’s* claims raised in his original

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postconviction petition. *Pendleton*, 223 Ill. 2d at 475. Postconviction counsel need only “ascertain[] the basis of [petitioner’s] complaints, shape[] those complaints into appropriate legal form and present[] them to the court.” (Internal quotations omitted.) *Rials*, 345 Ill. App. 3d at 641. A postconviction petitioner is not entitled to “the advocacy of counsel for purposes of exploration, investigation, and formulation of potential claims.” *Rials*, 345 Ill. App. 3d at 642 (quoting *People v. Davis*, 156 Ill. 2d 149, 163 (1993)). In fact, under Rule 651(c), postconviction counsel is only required to review “as much of the record as necessary to adequately present and support those constitutional claims raised by the [petitioner].” *Pendleton*, 223 Ill. 2d at 475-76. Accordingly, although postconviction counsel may raise additional issues in an amended petition, there is no requirement that counsel “comb the record” for issues not raised in the original petition. *Pendleton*, 223 Ill. 2d at 476; *Rials*, 345 Ill. App. 3d at 641.

¶ 25 In defendant’s *pro se* petition, he asserted that his trial counsel was ineffective because he did not investigate defendant’s claims that he was physically coerced when making statements to the police and did not move to suppress defendant’s videotaped statement which was given before he received a “proper” Miranda warning. Additionally, he asserted that trial and appellate counsel were ineffective for failing to preserve for appeal the issue of whether the blood spatter expert was properly qualified. After review, postconviction counsel amended the petition to more fully develop petitioner’s claim regarding the blood spatter expert.

¶ 26 On appeal, defendant argues that postconviction counsel should have amended his petition to assert that the motion to suppress should have been based on lack of probable cause due to the fact that his arrest was based on an inherently unreliable statement from Jones and that

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his trial counsel should have filed a motion to quash arrest. Defendant argues that because counsel did not so amend the petition, he was denied the reasonable assistance of postconviction counsel under Rule 651(c).

¶ 27 We disagree. The claim defendant argues for on appeal is a new and different claim from those raised in his original petition, and counsel had no obligation to include it in the amended petition. A motion to suppress based on the voluntariness of a statement involves an alleged violation of one's rights under the fifth amendment of the United States Constitution. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009). Under those circumstances, the State bears the burden of showing that the statement was knowingly, intelligently, and voluntarily made without physical coercion and with full knowledge of his rights against self-incrimination. *People v. Cleesen*, 177 Ill. App. 3d 103, 115 (1988); see also *Richardson*, 234 Ill. 2d at 253-54. On the other hand, a motion to suppress evidence based on lack of probable cause to arrest involves an alleged violation of one's fourth amendment right to be free from unreasonable searches and seizures. *People v. Johnson*, 237 Ill. 2d 81, 89 (2010). In determining whether to suppress such statements as "fruits of the poisonous tree," a court undertakes a lengthy analysis of whether the statements were "tainted" by the allegedly illegal arrest or whether they were sufficiently attenuated from the arrest so as to remove any possible taint. *Johnson*, 237 Ill. 2d at 93; *Cleesen*, 177 Ill. App. 3d at 115 (noting also that the defendant has the burden of going forward on such a motion).

¶ 28 Postconviction counsel's only obligation was to review the record to ensure that defendant's claims contained in his *pro se* petition, based on the voluntariness of his statement,

were adequately developed and presented to the circuit court in a legally appropriate manner. A claim that the statement should have been suppressed based on a lack of probable cause is a new and distinct claim that alleges a different constitutional violation and requires a different legal analysis. *Cleesen*, 177 Ill. App. 3d at 115 (distinguishing a motion to suppress based on involuntariness from one based on lack of probable cause). While postconviction counsel could have amended the petition to add the probable cause claim, he was under no obligation to do so. See *Rials*, 345 Ill. App. 3d at 643 (holding that counsel “need not scour the record to ascertain any other potential errors and constitutional issues not implicated in the defendant’s *pro se* petition”). Accordingly, we cannot say that counsel provided inadequate representation for failing to include that new argument in the amended petition. See *People v. Richardson*, 382 Ill. App. 3d 248, 258 (2008).

¶ 29 Defendant’s alternative argument that postconviction counsel did not comply with Rule 651(c) is also unavailing. He contends that had counsel adequately reviewed the record, as he attested to in his Rule 651(c) certificate, he necessarily would have discovered that defendant had a meritorious argument to suppress his statement based on a lack of probable cause for his arrest. We have addressed this very argument in the past and rejected it, and we do so again here. *Richardson*, 382 Ill. App. 3d at 253, 256-57.

¶ 30 For all of the foregoing reasons, we affirm the circuit court’s dismissal of defendant’s postconviction petition.

¶ 31 Affirmed.