

NOTICE
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2014 IL App (5th) 120131-U

NO. 5-12-0131

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. 03-CF-69
)	
NATHANIEL JOHNSON,)	Honorable
)	Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Presiding Justice Welch and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Dismissal of the defendant's amended postconviction petition at second stage of proceedings affirmed where record positively rebuts claim that the defendant's guilty plea was not knowing and voluntary because the defendant did not understand rights he was waiving at time of guilty plea, and where the defendant received the required level of assistance from postconviction counsel, who had no obligation to add new claims to the defendant's *pro se* petition.

¶ 2 The defendant, Nathaniel Johnson, appeals the dismissal, by the circuit court of St. Clair County, of his amended postconviction petition at the second stage of proceedings.

For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal are derived from the record on appeal, and are as follows. In 2003, the defendant was charged with one count of first-degree murder and one count of aggravated arson. The charges stemmed from a fire allegedly set by the defendant in Centreville on January 17, 2003, that resulted in the death of 10-year-old Treyveon Barnes, the son of the defendant's estranged wife. On December 16, 2004, the defendant entered a negotiated plea of guilty to an amended charge of aggravated arson, filed that day, in exchange for, *inter alia*, the State dropping the charge of first-degree murder. At the December 16, 2004, hearing, the State informed the trial judge, the Honorable John Baricevic, that the defendant was "looking at natural life if convicted as charged originally in the [f]irst[-][d]egree [m]urder because of the age of the victim." Judge Baricevic then ascertained from the defendant that the defendant was 36 years old, was a high school graduate who could read, write, and understand the English language, and was not taking any medication or suffering from any illness or condition that would prevent him from understanding the guilty plea proceedings. Judge Baricevic next admonished the defendant extensively about the charges and potential sentences the defendant faced, telling him, *inter alia*, that if convicted of the original charge of first-degree murder, rather than the amended charge "brought forth" that day, the defendant faced "as little as twenty years or a maximum of sixty but [it could] also be natural life without parole, depending on the factors that are presented," and summarizing the potential penalties for the murder charge that was being dismissed by stating, "It is jail, and the only thing you're looking at is the amount of time between twenty and life."

¶ 5 After being assured by the defendant that the defendant understood the potential punishment he faced, Judge Baricevic stated that the State had asked him to "emphasize" that if the State proved "every allegation in their original complaint," the court would be required to sentence the defendant to "natural life." The defendant indicated that he understood this proposition, and then, when queried, stated that he had had adequate time to discuss with his attorney the possible sentences he faced with both the amended charge and with the original charge. Judge Baricevic then admonished the defendant with regard to each right the defendant was giving up by pleading guilty, and the defendant affirmatively stated that he understood each of these rights, which included, *inter alia*, the right to plead not guilty, the right to a trial by judge or by jury, the right to confront witnesses against him at trial, the right to present his own evidence and witnesses, and the rights to remain silent and to require the State to prove him guilty beyond a reasonable doubt. When asked if there was "anything about the charges" the defendant did not understand or wished to ask questions about, or anything about the potential sentences the defendant would like to ask the judge about, the defendant stated: "No. I understand."

¶ 6 The defendant was then asked whether there was anything about his constitutional rights that he wanted to ask the judge about. The defendant responded: "I don't understand all that, but I understand I'm here to plead guilty. I understand that." He further stated, "All that constitutional rights, I'm not—I'm not into that, but I'm just here to plead guilty, yes." He was immediately asked if he felt he was doing so voluntarily, to which he answered, "To bring closure to the family, yes." He then agreed that he'd had every opportunity he needed to speak with his attorney, and his family. When asked, he

stated that other than the joint recommended maximum sentence of 30 years in prison, no one had made him any other promises to induce him to plead guilty, and that no one had forced or threatened him to induce his plea. A factual basis for the charge was given, as well as details about the defendant's admission, to Centreville police, that he started the fire that killed Treyveon Barnes.

¶ 7 Counsel for the defendant then stated that she had gone over the evidence against the defendant with him "thoroughly numerous times," and that they had had "numerous conversations about the case." Nevertheless, she stated that approximately one hour before the guilty plea hearing, the defendant informed her that "he had not given me all of the facts on the case," and that in fact he had been accompanied into the house by one Henry McGee. Counsel stated, however, that the defendant wanted to "protect" the identity of McGee, and wanted to proceed with his guilty plea. Judge Baricevic then asked the defendant if his counsel was correct, and the defendant stated that she was. Judge Baricevic then thoroughly admonished the defendant about his right to have McGee brought to court to testify, pointing out that McGee might testify that the defendant "did it all," or might testify that the defendant was "innocent." The defendant stated that he did not wish to have McGee testify, and that he wished to proceed with his guilty plea. After the defendant formally entered his plea of guilty, Judge Baricevic made a finding that, *inter alia*, the plea was voluntary and that the defendant understood "the constitutional rights available to him and that he understands the consequences of the plea and the waiver of those rights." The defendant received the joint recommended maximum sentence of 30 years in prison.

¶ 8 Subsequently, the defendant made an ultimately unsuccessful attempt to reduce his sentence. Then, in April 2006, he filed a *pro se* postconviction petition. The amended postconviction petition that is the subject of this appeal was filed by counsel on June 1, 2010. The State filed a motion to dismiss the amended petition, then filed an amended motion to dismiss the amended petition, and a hearing upon the latter motion was held on February 22, 2012. Following the hearing, Judge Michael N. Cook granted the State's amended motion to dismiss the amended postconviction petition, and this timely appeal followed.

¶ 9

ANALYSIS

¶ 10 We generally review *de novo* a trial court's second-stage dismissal of a postconviction petition. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "[A]ll well-pleaded facts that are not positively rebutted by the trial record are to be taken as true," and "the defendant bears the burden of making a substantial showing of a constitutional violation." *Id.* On appeal, the defendant first contends his plea of guilty was not knowing and voluntary because he "did not understand his rights and thus could not properly waive them at the time of his plea." The crux of the defendant's argument is that his statements, when asked if there was anything about his constitutional rights that he wanted to ask the judge about, that "I don't understand all that, but I understand I'm here to plead guilty. I understand that," and "All that constitutional rights, I'm not—I'm not into that, but I'm just here to plead guilty, yes," evidence the fact that he did not understand the rights he was waiving. The State counters that the defendant's statements are not proof that he did not understand his rights, but instead, when viewed in the context of the

overall proceedings, evidence only that he was not interested in talking further about the subject of his constitutional rights and did not understand why the judge continued to question him about them, when all the defendant desired was to proceed to his guilty plea.

¶ 11 We agree with the State. First, as the State points out, the allegation in the defendant's petition that the above statements rendered his plea unknowing and involuntary is a bald allegation, unsupported by any explanation in the petition of what constitutional right the defendant did not understand, and unsupported by any affidavit from the defendant. Second, when the defendant's statements are read in the context of the entire proceeding, in which Judge Baricevic painstakingly went through all the constitutional rights the defendant was waiving and made certain that the defendant stated unequivocally for the record that he understood those rights, we find that the record positively rebuts any allegation from the defendant that his plea was not knowing and voluntary because he did not understand the nature of his rights. To the contrary, we agree that the record demonstrates that the defendant stated clearly and unequivocally that he understood the nature of each constitutional right he was waiving, and that his waiver was knowing and voluntary. Indeed, as detailed above, immediately after the defendant made the statements in question, he was asked by Judge Baricevic whether he felt he was entering his plea voluntarily, to which he answered, "To bring closure to the family, yes." Moreover, also as detailed above, after hearing the defendant's statements in the context of the entire proceeding, Judge Baricevic, when accepting the defendant's plea, made the specific factual finding that, *inter alia*, the plea was voluntary and that the

defendant understood "the constitutional rights available to him and that he understands the consequences of the plea and the waiver of those rights." The defendant's disdain for further discussion of his constitutional rights, and his haste to enter his plea of guilty, cannot now be twisted into the conclusion that the defendant did not understand what he was doing.

¶ 12 The defendant next contends he received less than the required level of assistance from postconviction counsel because counsel failed to include a claim in the petition that the defendant's guilty plea was not knowing and voluntary because the defendant was misinformed about the penalty he faced if he was convicted of murder. It is axiomatic "that a defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), the duties of postconviction counsel "include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the proceedings at the trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented." *Pendleton*, 223 Ill. 2d at 472. Counsel is not required "to advance frivolous or spurious claims," and " 'is only required to investigate and properly present the *petitioner's* claims.' (Emphasis in original.)" *Id.* (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Although counsel may choose to raise issues not found in the *pro se* petition, counsel has "no obligation to do so." *Id.* at 476.

¶ 13 In the case at bar, the defendant concedes that he did not include in his *pro se* petition "the specific claim that made a substantial showing that [his] plea was unknowing and involuntary—namely, the prosecutor, the circuit court and defense counsel misinformed [him] *** that because the decedent was under the age of 12, [the defendant] faced a mandatory life prison sentence" if convicted of murder. However, he contends that because postconviction counsel "came close, but failed to raise the precise issue that has been raised here," and because the defendant's *pro se* petition "identified [the defendant's] concern at the guilty plea proceedings about an enhanced sentence related to the death of the 12-year-old [*sic*] decedent," we should find that counsel's representation fell below the required standard. However, we agree with the State that *People v. Pendleton*, 223 Ill. 2d 458 (2006), and its progeny make it clear that postconviction counsel " 'is only required to investigate and properly present the *petitioner's* claims.' (Emphasis in original.)" (*Pendleton*, 223 Ill. 2d at 472 (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993))), and that although postconviction counsel may choose to raise issues not found in the *pro se* petition, counsel has "no obligation to do so." *Id.* at 476. In this case, not only did the defendant not include the claim he raises on appeal in his *pro se* petition, but he also did not include any facts in his *pro se* petition that would support that claim, such as, for example, facts demonstrating a nexus between his decision to plead guilty and his newly alleged fear, raised for the first time by appellate counsel in this appeal, that the State would actually be able to prove every allegation in the original first-degree murder complaint and he would face a mandatory

life sentence; accordingly, postconviction counsel was under no obligation to include the claim in the amended petition, and the defendant's second claim of error fails.

¶ 14

CONCLUSION

¶ 15 For the foregoing reasons, we affirm the circuit court's dismissal of the defendant's amended postconviction petition.

¶ 16 Affirmed.