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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 05-CF-1780
)	
LOUIS C. INGRAM,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel failed to comply with Rule 651(c), as he submitted a jury-pool-exclusion claim but did not state it sufficiently or support it with available evidence; thus, we reversed the dismissal of defendant's petition and remanded the cause for compliance with the rule.

¶ 2 Defendant, Louis C. Ingram, appeals the second-stage dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) from his conviction, after a jury trial, of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(3) (West 2004)). Defendant contends that his postconviction counsel failed to provide the

reasonable level of assistance required by Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

We reverse and remand.

¶ 3 Because defendant's appeal involves only one claim in his amended petition, we limit our statement of facts accordingly. In 2008, this court affirmed defendant's conviction and 15-year prison sentence (*People v. Ingram*, No. 2-06-0674 (2008) (unpublished order under Supreme Court Rule 23)). On October 20, 2008, he filed his *pro se* petition. As pertinent here, it alleged that defendant, who is African-American, was denied equal protection in that the jury pool contained no African-Americans. It also alleged generally that trial counsel was ineffective.

¶ 4 An accompanying memorandum alleged that, during jury selection, defendant told his attorney that there were no African-Americans in the entire jury pool; that his attorney responded, " 'its [*sic*] O.K., it may help us' "; and that the trial was held in Rockford, which is nearly one-third African-American. The memorandum elaborated on the claim that trial counsel had been ineffective. As pertinent here, it repeated the account of defendant's exchange with his attorney about the jury pool, and it alleged further that counsel performed unreasonably in failing to move to dismiss the jury panel (see 725 ILCS 5/114-3 (West 2004)). The *pro se* petition and memorandum attached no affidavits.

¶ 5 The trial court appointed counsel for defendant and moved the proceedings to the second stage. Counsel filed an amended postconviction petition. He also filed a certificate under Rule 651(c) stating that he had consulted with defendant by mail about his claims of error; he had read the record of the proceedings at trial; and he had made any amendments to the *pro se* petition that were necessary for an adequate presentation of defendant's contentions.

¶ 6 The amended petition alleged as "Ground Three" that defendant's trial attorney was ineffective for failing to object to the lack of African-Americans in the jury pool. Ground Three

stated further that, during and immediately after jury selection, defendant asked his attorney to raise this issue but the attorney refused, telling defendant, “[T]his may help us.” Ground Three contended that counsel was obligated, at the least, to object to the lack of African-Americans in the jury pool.

¶ 7 The amended petition attached an affidavit from defendant, reading, in pertinent part:

“On January 10, 2006[,] I *** and my Attorney Kulkari [sic] was [sic] in court room [sic] 467 ***. [A]s we wated [sic] for the jury to inter [sic] the court room [sic][,] I notice [sic] that there was not one African[-]Americans [sic] walked in [sic]. I said to my attorney Kulkari [sic] this is not a jury pool of my appears [sic] because there isn’t one black person we can pick. He said that might work in our faver [sic] if we lose at trial, we can ~~we~~ file [a] motion for new trial.”

¶ 8 The State moved to dismiss the amended petition. Addressing Ground Three, the State argued as follows. First, defendant failed to provide evidence of the identities and races of the prospective jurors. Second, he could have raised the issue on direct appeal, so it was forfeited. Third, the amended petition was legally insufficient, as it did not allege facts to show any of the three elements of a jury-pool-exclusion claim: (1) that African-Americans are a distinctive group in the community; (2) that their representation in the venire was not fair and reasonable in comparison to their representation in the community; and (3) that the underrepresentation was the result of systematic exclusion in the jury selection process. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979); *People v. Simms*, 168 Ill. 2d 176, 189-90 (1995).

¶ 9 The trial court dismissed the amended petition. The court agreed with the State that the jury-pool claim was insufficient, as it failed every prong of the *Duren-Simms* test and also failed

to show that trial counsel's decision was not reasonable trial strategy. Further, the court stated, the issue could have been raised on direct appeal, so it was forfeited. Defendant timely appealed.

¶ 10 On appeal, defendant contends that, although his postconviction attorney filed a certificate of compliance with Rule 651(c), the record as a whole shows that he did not provide the level of assistance that the Act and the rule require. He argues that, although the amended petition included the jury-pool claim, counsel did nothing to support it beyond obtaining defendant's affidavit. Defendant reasons that, had counsel concluded that the claim could not be made in reasonable good faith, he would not have included it—but, having concluded that the claim was reasonable, he was obligated to investigate it and to attempt to support it with evidence. Defendant asserts that counsel could have found such evidence.

¶ 11 We start with general principles. Our review is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). If we conclude that counsel failed to meet his obligations, we must remand regardless of whether the amended petition had merit. *Id.* at 47; *People v. Turner*, 187 Ill. 2d 406, 415-16 (1999).

¶ 12 Postconviction counsel's obligation to provide reasonable assistance to his client includes making any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Perkins*, 229 Ill. 2d 34, 37 (2007). More generally, counsel has an obligation to present his client's contentions to the trial court in an appropriate legal form. *People v. Johnson*, 154 Ill. 2d 227, 245 (1993). At a minimum, counsel must attempt to obtain evidentiary support for the claims that the petition raises. *Id.* Counsel's filing of a proper certificate of compliance with Rule 651(c) raises a presumption that he has met his obligations under the rule, but the presumption may be rebutted by the record. *People v. Lander*, 215 Ill. 2d 577, 584 (2005).

¶ 13 We return to defendant's specific argument—that his attorney did not take reasonable measures to investigate and attempt to support, with evidence, defendant's claim that he was denied a fair trial, owing to the systematic exclusion of African-Americans from the jury pool. As noted, to establish a *prima facie* case of a violation of the fair-cross-section requirement, a defendant must show that (1) the group alleged to have been excluded was a distinctive group in the community; (2) the representation of this group in the venire from which the jury was selected was not fair and reasonable in relation to the number of such persons in the community; and (3) this exclusion was due to systematic exclusion of the group in the jury-selection process. *Duren*, 439 U.S. at 364; *Simms*, 168 Ill. 2d at 189-90.

¶ 14 Defendant observes that, although we may infer that postconviction counsel concluded that he could advance the claim in reasonable good faith (see *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (postconviction attorney who determines that defendant's claims are meritless may not properly file amended petition)), he did not fulfill his obligation to attempt to support each element of the claim with evidence. Defendant observes that, to survive dismissal at the second stage, a petition must make a substantial showing of a constitutional violation. *Johnson*, 154 Ill. 2d at 239. To do so, the petition must support its claims with evidence. *Id.* at 240.

¶ 15 Defendant asserts that such evidence could have been obtained, and easily so on the first two elements of the *Duren-Simms* test. Specifically, defendant notes that counsel could have done the following. First, he could have easily found on-line census data showing that, in 2010, African-Americans composed 20.5% of the total population of Rockford, where defendant resided and where the trial took place. See <http://www.census.gov/quickfacts> (last visited August 3, 2016). Second, in addition to including defendant's affidavit, counsel could have cited the trial record, specifically the uncontroverted statement of one prospective juror that nobody of

defendant's color was in the jury pool. Adding this readily accessible information, defendant argues, would have met the first two prongs of the *Duren-Simms* test: it would have sufficiently alleged that, at all pertinent times, African-Americans were a distinctive group in Rockford and that their representation in the jury pool (0%) was not fair and reasonable in relation to their representation in the community (20.5%).

¶ 16 Defendant acknowledges that it would not have been so simple to support the third prong of the *Duren-Simms* test, systematic exclusion, sufficiently to avoid dismissal. But he contends that a reasonable postconviction attorney could have done much more than did his counsel here, and that the task was far from unrealistic. Defendant notes that, in *Duren*, the Court held that the defendant's petition made a *prima facie* showing that women had been systematically excluded from the jury venire. The petition relied on statistical proof of the relatively low percentages of women summoned for jury service during a five-month period in 1975 and a three-month period in 1976 (the defendant's trial was held in 1976) (*Duren*, 439 U.S. at 362-63), and the Court concluded that the evidence of steady underrepresentation over time made a *prima facie* case of the third element (bolstered by evidence of how jury-selection procedures were tilted toward underrepresenting women) (*Duren*, 439 U.S. at 367).

¶ 17 The State says little in response, beyond relying on the general principles that we must presume that postconviction counsel complied with Rule 651(c) and that if no affidavits or other documents are attached to an amended petition, we must presume that postconviction counsel attempted to obtain affidavits but was unable to do so (see *Johnson*, 154 Ill. 2d at 241). As noted, however, these presumptions can be rebutted by the record. The State also notes evidence that counsel and defendant corresponded frequently; this is beside the point, as defendant is

alleging not that counsel failed to satisfy Rule 651(c)'s consultation requirement but that he failed to satisfy its necessary-amendment requirement.

¶ 18 We agree with defendant that his postconviction counsel did not fulfill all of his obligations under Rule 651(c) and that the judgment must be reversed and the cause remanded. Defendant has demonstrated first that counsel submitted a patently insufficient claim of a constitutional violation: the amended petition's allegation that defendant was denied a jury pool that represented a fair cross-section of the community did not even set out the elements of that claim and, more important, it provided minimal or no factual allegations on each element. Defendant has demonstrated second that counsel neglected to take easily available measures to support two of the elements of the claim. It would not have been difficult to attach census data or other evidence to prove that African-Americans represented a distinctive group within the pertinent community. Also, while defendant's affidavit provided some evidence that there were no African-Americans in the venire, the more definitive statement of the prospective juror, which was not disputed, was easily available from the trial-court record.

¶ 19 Finally, while we agree with defendant that evidence of systematic discrimination would have been more difficult to obtain, the amended postconviction petition does not even show that counsel was aware of this element or, assuming that he was aware of it, that he made any effort to obtain such evidence. The amended petition's claim was thus deficient not merely for the absence of evidence (or the lack of any explanation for that absence) but also for legal insufficiency.

¶ 20 When the record demonstrates such deficient performance by postconviction counsel, the court of review must reverse the dismissal of the amended petition and remand for compliance with Rule 651(c). See *Turner*, 187 Ill. 2d at 413-14 (postconviction counsel performed

unreasonably, in part for failure to allege prejudice, an essential element of ineffective-assistance claim, and for failing to allege materiality, an essential element of claim that State wrongfully withheld evidence); *People v. Jennings*, 345 Ill. App. 3d 265, 272-75 (2003) (*pro se* petition alleged that trial counsel had been ineffective for failing to move to reconsider sentence imposed on open guilty plea and for failing to file appeal; postconviction counsel performed unreasonably for neglecting to allege grounds that could have been raised in motion to reconsider sentence, an essential element of claim, and also for failing to raise sentencing challenge that was implicit in *pro se* petition). Although counsel's failings in this case might have been less egregious than those of counsel in either *Turner* or *Jennings*, they were serious enough to require new proceedings in which postconviction counsel fulfills the requirements of Rule 651(c).

¶ 21 We do disagree with the trial court (and the State at the trial-court level) that the claim was forfeited. Because defendant's claim was that his trial attorney was ineffective, and this claim required (and to a very limited degree counsel supplied) evidence outside the trial-court record, it was not forfeited. See *People v. Evans*, 186 Ill. 2d 83, 94 (1999) (forfeiture rule does not apply when facts relating to claim of counsel's ineffectiveness do not appear on face of record).

¶ 22 The judgment of the circuit court of Winnebago County is reversed, and the cause is remanded.

¶ 23 Reversed and remanded.