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2016 IL App (3d) 140387-U

Order filed June 7, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0387
PAUL A. SMITH,)	Circuit No. 06-CF-1057
Defendant-Appellant.)	Honorable Amy Bertani-Tomczak, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Despite failing to file an affidavit certifying compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), the record establishes that postconviction counsel provided reasonable assistance.

¶ 2 Defendant, Paul A. Smith, appeals from the dismissal of his amended petition for postconviction relief. Defendant argues that his postconviction counsel provided unreasonable assistance. We affirm.

FACTS

¶ 3

¶ 4

The State charged defendant with aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)) and armed habitual criminal (720 ILCS 5/24-1.7 (West 2006)). Both charges were tried separately. Defendant waived his right to a jury trial on the armed habitual criminal charge and was represented by counsel for the trial. Following a bench trial, defendant was convicted of being an armed habitual criminal. Defendant discharged his attorney and proceeded *pro se* on the trial for the second charge of aggravated battery with a firearm. Defendant was tried twice for the second charge of aggravated battery with a firearm. Following the second trial, a jury found defendant guilty of aggravated battery with a firearm. New counsel was then appointed to represent defendant during the sentencing proceedings.

¶ 5

On April 21, 2008, the trial court sentenced defendant to 40 years' imprisonment for aggravated battery with a firearm and 20 years' imprisonment for armed habitual criminal. Both sentences were ordered to run consecutively. Before the proceedings concluded, sentencing counsel informed the trial court that he would file a motion to reconsider. The trial court continued the matter so sentencing counsel could draft the motion and schedule it for argument.

¶ 6

On May 2, 2008, sentencing counsel appeared before the trial court without defendant. The matter was not on the court's call, but counsel informed the court that he had the motion to reconsider defendant's sentence. The motion to reconsider alleged the trial court failed to adequately consider the mitigating factors in sentencing defendant and the sentence was excessive. Sentencing counsel stated he had provided the State with a copy of the motion. The trial court set the matter for hearing on the motion to reconsider.

¶ 7 On May 5, 2008, the parties appeared in court for a hearing on the motion to reconsider. Defendant was not present because he had not been transported to the courthouse from prison. The trial court continued the matter.

¶ 8 On May 20, 2008, defendant filed a *pro se* motion to reconsider sentence. In the motion, defendant claimed he received ineffective assistance of sentencing counsel because counsel failed to explain to defendant why he was not brought into court on May 5, 2008. The motion described this as "troubling" because defendant was only allowed a certain length of time to file a motion to reconsider to preserve issues for appeal. In addition, the motion claimed counsel's conduct caused "defendant to default by failing to file a timely notice of appeal." According to the motion, sentencing counsel "abandoned a viable federal defense." The motion also argued that the State failed to prove defendant guilty beyond a reasonable doubt, "[t]hus, making these sentences both excessive as well as without merit." And, sentencing "[c]ounsel's failure to raise these issues created a procedural default that limited review of errors."

¶ 9 On May 27, 2008, the parties appeared for the hearing on sentencing counsel's motion to reconsider. At the hearing, counsel noted the motion to reconsider filed in open court on May 5, 2008, was not in the court's file. Counsel then tendered a copy of the motion to reconsider to the trial court. Sentencing counsel acknowledged that defendant had filed a *pro se* motion to reconsider and informed the court that counsel would be standing on sentencing counsel's motion. The trial court denied the motion to reconsider and did not specifically mention defendant's *pro se* pleading.

¶ 10 On direct appeal, defendant's appellate counsel filed a motion for summary remand so the trial court could conduct an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into the allegations of ineffective assistance of sentencing counsel contained in defendant's *pro se*

motion to reconsider. The State filed an objection to summary remand and this court denied the motion.

¶ 11 Subsequent to the denial of summary remand, appellate counsel filed a brief asserting the trial court improperly denied defendant of his right to confrontation when it limited his cross-examination of a State's witness. Appellate counsel did not reraise the *Krankel* issue in his brief. This court affirmed defendant's convictions and sentences. *People v. Smith*, 3-08-0408 (2010) (unpublished order under Supreme Court Rule 23).

¶ 12 On December 9, 2010, defendant filed a *pro se* petition for postconviction relief, which is the subject of the instant appeal. Pertinent to this appeal is defendant's *pro se* allegation that his appellate counsel provided ineffective assistance by failing to reargue the *Krankel* issue and request remand for an inquiry into sentencing counsel's effectiveness. Defendant did not cite any specific deficiencies in sentencing counsel's performance in his *pro se* postconviction petition, but defendant claimed that sentencing counsel was ineffective for the reasons he stated in his previous *pro se* motion to reconsider sentence. Defendant also did not explain how the failure to conduct a *Krankel* hearing prejudiced defendant. After 90 days passed from the filing of the postconviction petition, the trial court docketed the petition for second-stage proceedings and appointed postconviction counsel to represent defendant.

¶ 13 On July 22, 2011, postconviction counsel appeared before the trial court and stated that he had begun reviewing defendant's petition. The trial court allowed a recess so defendant could speak with his counsel. When the matter was recalled, counsel requested a continuance so he could speak with defendant again at the prison and prepare an amended postconviction petition. The trial court granted the continuance.

¶ 14 On October 4, 2011, postconviction counsel reported to the trial court that he was preparing an amended postconviction petition for filing. Counsel stated that he finished reviewing defendant's *pro se* petition and noted defendant had nine issues he wished to advance. The trial court then granted postconviction counsel's request for a continuance to prepare the amended petition.

¶ 15 On November 8, 2011, postconviction counsel informed the trial court that, "[w]e have had an ample opportunity to speak with [defendant] while he has been in Stateville [Correctional Center]." Counsel requested an additional continuance so defendant could forward items to him for the amended petition. The trial court granted the continuance.

¶ 16 On January 12, 2012, postconviction counsel told the trial court, "I have completed my review of his *pro se* petition I have met with him extensively at Stateville [Correctional Center] and I have gotten through most of the transcripts and record on appeal." The trial court continued the matter.

¶ 17 On March 30, 2012, the parties appeared in court and the trial court allowed postconviction counsel's request to speak with defendant and counsel's investigator. After the recess, postconviction counsel sought and was granted a continuance. According to postconviction counsel, he and defendant had an opportunity to narrow down the issues they would be presenting and they wanted to meet again in prison.

¶ 18 On April 5, 2012, the matter was continued again after postconviction counsel informed the court he had spoken with defendant and needed more time to prepare the amended postconviction petition.

¶ 19 On July 16, 2012, postconviction counsel told the trial court he had prepared an amended postconviction petition and delivered it to defendant for review. Counsel was then granted a

continuance. Before the proceedings concluded, the trial court allowed defendant and counsel to use the jury room to speak in private.

¶ 20 On September 10, 2012, postconviction counsel asked the trial court if he and defendant could use the jury room again for a few moments so defendant could speak with counsel's investigator. The trial court allowed the request and continued the matter.

¶ 21 On September 19, 2012, postconviction counsel represented to the trial court that defendant had filed an additional *pro se* supplemental postconviction petition but counsel would not adopt the petition. The trial court responded by telling counsel the matter would be addressed when the parties returned for the previously scheduled hearing in October.

¶ 22 On October 29, 2012, postconviction counsel informed the trial court defendant had not yet decided if he would withdraw the *pro se* supplemental postconviction petition (eventually defendant filed a second supplemental postconviction petition (*infra* ¶ 37)). Counsel then asked for the opportunity to speak with defendant in the jury room. The trial court granted the request and continued the matter.

¶ 23 On January 11, 2013, the parties returned to court. Postconviction counsel reminded the trial court that he had already drafted an amended postconviction petition. At counsel's request, the trial court allowed a recess so defendant could review the petition.

¶ 24 When the matter was recalled, postconviction counsel stated, "[j]udge, I have provided [defendant] with a copy of my amended post-conviction petition. We would like some additional time to review that and perhaps submit some additional issues to me for possible consideration." The trial court granted the continuance.

¶ 25 On January 24, 2013, defendant filed a combined *pro se* motion for "Ineffective Assistance of Counsel/Motion for Geographical Attorney" (referred herein as motion for new

postconviction counsel). Defendant's motion alleged postconviction counsel provided unreasonable assistance. In support, defendant argued that his counsel had not been responsive to defendant's letters. According to the motion, defendant and postconviction counsel met in-person on several occasions to discuss the petition. During those meetings, defendant reviewed the amended petition proposed by counsel. Defendant was dissatisfied with the fact that the amended petition did not contain every claim raised in defendant's *pro se* petition. In addition, defendant was dissatisfied with the amount of time in which the matter had been proceeding. For relief, defendant requested the trial court to appoint an attorney outside of the Will County public defender's office.

¶ 26 On February 28, 2013, postconviction counsel informed the trial court of defendant's pending *pro se* motion for new postconviction counsel. In addition, counsel informed the trial court that the sheriff's office had indicated defendant was present in the courthouse but refused to attend the hearing. Counsel was not provided an explanation as to why defendant refused to attend the hearing. Counsel explained that at the prior hearing he had prepared an amended postconviction petition, but defendant did not approve of the petition.

¶ 27 The trial court struck defendant's *pro se* motion for new postconviction counsel then asked postconviction counsel how to proceed. Postconviction counsel stated he had an amended postconviction petition prepared, but could not file it because defendant needed to sign an affidavit in support of the petition. Because he could not file the petition due to defendant's disapproval, postconviction counsel sought and was given a continuance to prepare a motion to withdraw as counsel.

¶ 28 On April 30, 2013, the parties, including defendant, appeared in court again. Postconviction counsel reminded the trial court of defendant's *pro se* motion for new

postconviction counsel (the same motion the trial court previously struck). When asked to explain his allegations, defendant stated he believed postconviction counsel provided unreasonable assistance and that he wanted an attorney outside of the Will County public defender's office. The following discussion ensued:

"THE COURT: Have you filed an amended petition yet?

[DEFENDANT]: No.

[POSTCONVICTION COUNSEL]: No, Judge. I had one a couple court appearances ago that I was ready to file. It needs an affidavit from [defendant] before it can be filed.

THE COURT: Have you spoken with him about that?

[POSTCONVICTION COUNSEL]: Judge, I have. In my proposed amended petition, I raise two issues. I believe that that is not acceptable to [defendant], I suppose, for the reasons that he sets forth in his motion.

* * *

[DEFENDANT]: When I [previously] come to court, [postconviction counsel] asked could we have side room visit, can we pass my case, and those are the some of the things that we would talk about. One of the other things that we talked about is the fact that I filed nine issues in my original post-conviction petition, but somewhere, 15 months later, we only ended up with two issues.

THE COURT: Well, one of the reasons, and I don't know how they get paired down, is that you're not a lawyer and he is a lawyer and he knows the law, as opposed to you knowing the law, and him with ethical obligations not to

present—not to present frivolous—or I guess frivolous claims, made his decision to go with two as opposed to you said 11?

[DEFENDANT]: Nine.

THE COURT: Nine.

[DEFENDANT]: Actually, I agree with exactly what you just said, but unfortunately, what I don't agree with is, I have had—I have two more—more than two issues in my petition that are not frivolous and that he doesn't want to bring to the attention of the Court. When I asked him why and if he can put it in writing and file a memorandum of law and just some of the things that we talked about, he said he wasn't going to do it, if I don't like it, I can do it on my own. So, you know, without making a big fuss about it, I just decided that I need to sever my relationship with the Will County Public Defender's office.

[DEFENDANT]: *** The fact remains is, Judge, is that I have gone through four public defenders from the Will County Public Defender's office. I know that I am not entitled to the effective assistance that I want, but I do understand that they have an ethical obligation to bring certain things to the forefront and he has not done so.

With the two issues that he has filed, one of the issues I looked over and over again, and it's just—it's just not even—I mean, this is ridiculous. This has gone on for over two years now. I mean, this kind of work, for the kind of case that I have got, this is just gotten out of hand. And two issues, I mean, come on

now. I can bring—I know at least five issues in my petition that are meritorious on its face. I mean, this is just—this is—

THE COURT: So, what your problem with [postconviction counsel] is, that you don't agree with the petition he wants to file, as opposed to the one you want him to file?"

¶ 29 Defendant went on to claim postconviction counsel misled him because "there was no communication" and the only communication the two had "was probably like one or two phone calls and like several side-room visits." Defendant summarized that postconviction counsel provided unreasonable assistance due to a lack of communication and the fact that counsel's proposed amended petition included less claims than defendant's *pro se* petition. The trial court denied defendant's *pro se* motion for new postconviction counsel and suggested defendant speak with postconviction counsel.¹ Defendant then indicated he intended to represent himself in the proceedings. The trial court granted postconviction counsel leave to withdraw and continued the matter so defendant could prepare an amended postconviction petition.

¶ 30 On June 10, 2013, defendant appeared in court and requested that it reappoint a public defender to represent him. The trial court granted the request and continued the matter.

¶ 31 On August 12, 2013, the parties returned to court and the same postconviction counsel was reappointed to represent defendant. Postconviction counsel told the trial court he had spoken with defendant and told defendant that he intended to file the amended petition he previously drafted. Postconviction counsel was granted a continuance so that he could obtain

¹For clarity, we note that this is the same motion the trial court struck at the February 28, 2013, hearing.

defendant's approval of the amended petition and defendant's signature for an affidavit to attach to the petition.

¶ 32 On September 10, 2013, postconviction counsel informed the trial court he had met with defendant and provided him with the amended petition for review and an affidavit to sign. According to postconviction counsel, defendant refused to look at the petition and told him he had no interest in it. Because of this, counsel informed the court he was not in a position to file the amended petition and, instead, counsel prepared a written motion for leave to withdraw. In response, defendant informed the court he planned on hiring a private attorney. The trial court did not specifically discharge postconviction counsel but continued the matter so defendant could obtain private counsel.

¶ 33 On October 31, 2013, the parties returned to court and defendant had not retained private counsel. The following discussion occurred:

"[POSTCONVICTION COUNSEL]: Judge, at this point as long as I still represent [defendant], first of all, let me say that as I represented to the Court on the last several appearances, I have had an amended petition ready to go and ready to be filed that [defendant] refuses to provide an affidavit in support of.

So because of his refusal to provide that affidavit, I am not able to file that petition with the Court.

* * *

THE DEFENDANT: Excuse me judge, If I may, [Y]our Honor? You know what? If the Court will give me a moment to talk to counsel, if I could review this amended motion that he filed?

THE COURT: Great, go ahead."

¶ 34 Following a recess, the matter was continued after postconviction counsel stated, "[j]udge, I have provided [defendant] with a copy of my proposed amended petition as well as the affidavit. I think he would like an opportunity to take a look at it. *** I think he would just like some time to review that, and I believe he may be inclined to have me file that once he's had the appropriate opportunity to review it."

¶ 35 On December 10, 2013, the parties returned to court and postconviction counsel asked for leave to file the amended postconviction petition. The trial court allowed the request then granted the State 30 days to file a motion to dismiss the amended petition.

¶ 36 The amended postconviction petition included a recitation of the procedural history of defendant's case. The amended petition noted the petition was untimely, but alleged the untimely petition was not due to defendant's culpable negligence. Substantively, the amended petition alleged two instances in which appellate counsel provided ineffective assistance of counsel. Unlike defendant's original *pro se* postconviction petition, the amended petition filed by counsel did not include a claim that appellate counsel provided ineffective assistance of counsel in failing to argue that the trial court inadequately inquired into defendant's posttrial claims of ineffective assistance of sentencing counsel pursuant to *Krankel*.

¶ 37 On February 4, 2014, the parties returned to court again but, in the interim, defendant filed a second *pro se* supplemental postconviction petition. At the status hearing, postconviction counsel told the court he was not adopting the supplemental petition and the trial court noted it would not consider the *pro se* filing. The following discussion occurred:

"THE DEFENDANT: I will object to any further continuances as well as him not adopting it. If he wants to withdraw from my case he can, but the

supplemental petition stays. If he wants to withdraw from my case, he can withdraw, but my supplemental petition stays. Counsel has already told me—

THE COURT: Hold on. So you want to go by yourself? You're on your own? Is that what you want?

THE DEFENDANT: [Postconviction] counsel has already told me that he was not going to adopt the argument and why he was not going to adopt it.

THE COURT: Right.

THE DEFENDANT: This was at the time that he told me four months ago that this Court was going to dismiss my petition without a hearing but he never stated why. This is the same attorney, [Y]our Honor, that would not answer any of my letters, would not respond or set up any phone calls. I have addressed this with the Court several times before. You have found that [appointed counsel] has not been ineffective. When a lawyer does not talk to his client or anything of that nature, there becomes a problem, and this is what I have been trying to explain to the Court all along."

¶ 38 Over defendant's objection, the trial court set the matter for hearing on the State's motion to dismiss and noted that it would not consider defendant's *pro se* supplemental postconviction petitions.

¶ 39 On May 13, 2014, the parties appeared in court for a hearing on the State's motion to dismiss. Following the parties' arguments, the trial court granted the State's motion and dismissed defendant's amended postconviction petition. Postconviction counsel did not file a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Defendant appeals.

¶ 40

ANALYSIS

¶ 41

Defendant contends the dismissal of his postconviction petition must be reversed and the matter remanded for Rule 651(c) compliance because postconviction counsel failed to file a Rule 651(c) affidavit certifying his compliance with the rule. While we acknowledge counsel failed to file a Rule 651(c) certificate, we conclude defendant is not entitled to automatic reversal as the record shows substantial compliance with Rule 651(c).

¶ 42

A defendant is only entitled to a reasonable level of assistance from appointed postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) requires postconviction counsel to: (1) consult with the petitioner to ascertain his contentions of constitutional deprivation; (2) examine the record of the proceeding of the original trial; and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Postconviction counsel's failure to file an affidavit certifying compliance with Rule 651(c) does not warrant automatic reversal. *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Instead, the failure to file a Rule 651(c) certificate "will be excused where the record demonstrates that counsel adequately fulfilled his duties as post-conviction counsel." *Id.* "Substantial compliance with Rule 651(c) is sufficient." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. We discuss postconviction counsel's compliance with each duty in turn.

¶ 43

First, we consider whether the record demonstrates that counsel consulted with defendant to ascertain his contentions of constitutional deprivation. There are several instances in the record that show postconviction counsel satisfied the consultation requirement. On July 22, 2011, postconviction counsel spoke with defendant to review his *pro se* allegations. On

November 8, 2011, postconviction counsel informed the trial court he had "ample opportunity" to speak with defendant and on January 12, 2012, postconviction counsel represented that he spoke "extensively" with defendant. On March 30, 2012, and January 11, 2013, postconviction counsel met defendant in court to discuss narrowing down defendant's *pro se* allegations and possibly adding new claims to the amended petition. Also, on April 5, July 16, September 10, and October 29, 2012, postconviction counsel and defendant spoke in court. On August 12, 2013, postconviction counsel represented that he had spoken with defendant regarding counsel's intent to file the amended postconviction petition. Moreover, defendant's statements in court and the allegations in his *pro se* filings confirm the two spoke at length regarding defendant's contentions of error. In light of this, we find the record establishes that counsel met the consultation requirement of Rule 651(c).

¶ 44 Next, we consider whether the record establishes that postconviction counsel reviewed the record of the proceedings at trial. In considering counsel's compliance with this duty, we are mindful that "Rule 651(c) does not require, for substantial compliance, that appointed postconviction counsel examine the entirety of a petitioner's trial proceedings." *People v. Davis*, 156 Ill. 2d 149, 164 (1993). To satisfy this duty, "appointed counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Id.* We find that postconviction counsel satisfied this requirement.

¶ 45 In particular, we note postconviction counsel's statements at the following hearings: (1) July 22, 2011, that he had the opportunity to review defendant's *pro se* petition; (2) October 4, 2011, that he had finished reviewing the issues in defendant's *pro se* petition; and (3) January 12, 2012, that he had met with defendant "extensively" and that counsel had "gotten through most of

the transcripts and record on appeal." Further, our review of the amended postconviction petition, postconviction counsel's response to the State's motion to dismiss, and postconviction counsel's argument on the State's motion to dismiss demonstrate counsel's thorough review of the proceedings and his knowledge of the facts surrounding defendant's trial, posttrial, and appellate proceedings.

¶ 46 Finally, we consider whether the record shows that postconviction counsel made any amendments to the petition as necessary for an adequate presentation of defendant's *pro se* claims. Although defendant claims the record fails to establish that postconviction counsel satisfied this requirement, "[d]efendant has not offered any recommendation as to how counsel could have otherwise improved the petition." *People v. Henderson*, 215 Ill. App. 3d 24, 26 (1991). Our review of the amended petition shows that it contains substantive facts and argument, along with appropriate citation to authority and the record. The petition also includes a detailed procedural history of the case and sets forth factual allegations concerning the timeliness of the petition. We also note that the petition does not recite *verbatim* defendant's *pro se* claims, contains significant factual support drawn from the record, includes references to authority, and provides an attached affidavit executed by defendant. See, *cf.*, *Johnson*, 154 Ill. 2d at 248-49 (finding postconviction counsel provided unreasonable assistance where, *inter alia*, counsel filed an amended postconviction petition which copied defendant's *pro se* allegations *verbatim* and counsel failed to attach evidentiary support to the amended petition).

¶ 47 While defendant does not dispute the facts discussed above (*supra* ¶ 46) defendant argues postconviction counsel was unreasonable in failing to include the *Krankel* issue in the amended postconviction petition. Specifically, defendant argues the amended petition filed by

postconviction counsel should have included defendant's *pro se* claim that appellate counsel was ineffective for not reraising the argument that remand was necessary for a *Krankel* inquiry.²

¶ 48 Before addressing the substance of defendant's argument, we note that defendant does not specifically contend that postconviction counsel's decision to omit the above claim from the amended petition violated any of the three duties set forth in Rule 651(c). We therefore hold defendant's general claim that "[p]ost-conviction counsel had a duty to properly shape [defendant's] complaints into an appropriate legal form and to present those properly framed issues to the court[,] is insufficient to establish unreasonable assistance. "In the absence of a specific claim that postconviction counsel violated any of the three duties mandated by Rule 651(c), we question whether the defendant's *** contention is subject to review." *People v. Mendoza*, 402 Ill. App. 3d 808, 814 (2010).

¶ 49 Even if we were to construe defendant's contention as a claim that postconviction counsel violated the third duty mandated by Rule 651(c) (make any necessary amendments), the substance of defendant's *Krankel* argument lacks merit. "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf." *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 50 Our supreme court has determined that, while there is a constitutional right to the assistance of counsel, there is no constitutional right to a *Krankel* inquiry. *People v. Patrick*, 2011 IL 111666, ¶ 41. Instead, "*Krankel* serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective

²While defendant raised several other issues in his *pro se* postconviction petition and supplemental petitions that counsel omitted from the amended postconviction petition, this is the sole issue raised on appeal.

assistance claims." *Id.* ¶ 39. Accordingly, defendant is not entitled to postconviction relief unless he establishes his appellate counsel was ineffective for failing to reraise the *Krankel* issue.

¶ 51 To establish a claim of ineffective assistant of counsel, defendant must show: (1) counsel's performance was objectively unreasonable; and (2) defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both prongs of *Strickland* are needed to state a claim of ineffective assistance, a defendant's ineffective assistance argument may be disposed if defendant fails to establish prejudice. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 52 In examining the second prong, prejudice means "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Prejudice in the instant context means that "but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). More specifically, absent counsel's error, defendant's " 'sentence or conviction would have been reversed.' " *People v. Mack*, 167 Ill. 2d 525, 532 (1995) (quoting *People v. Caballero*, 126 Ill. 2d 248, 270 (1989)). Stated another way, defendant must show that a *Krankel* inquiry would have revealed a meritorious claim of ineffective assistance of sentencing counsel. Here, even if defendant's appellate counsel had raised the issue on direct appeal, and even if we had found there was a *Krankel* violation, defendant's convictions and sentences would not have been reversed.

¶ 53 Initially, we note that defendant has not, in the underlying proceedings, his *pro se* postconviction petition, his additional *pro se* filings during the postconviction proceedings, or on appeal, identified how he was prejudiced by sentencing counsel's alleged deficient performance. Moreover, our review of the record establishes that defendant's *pro se* allegations did not warrant

the appointment of independent counsel for further *Krankel* inquiry. Defendant's *pro se* allegations are entirely contradicted by the record. In particular, defendant's claim that sentencing counsel provided ineffective assistance of counsel is based on defendant's erroneous belief that counsel failed to timely file a motion to reconsider defendant's sentence and a notice of appeal. Further, defendant's claim that counsel failed to ensure defendant's presence at a status hearing in no way amounts to a claim of ineffective assistance. In fact, the hearing in question was continued due to the fact that the sheriff was unable to transport defendant to the courtroom. Thus, defendant's allegations would have been rejected on the merits had they been raised at a preliminary *Krankel* hearing. See *People v. Towns*, 174 Ill. 2d 453, 466 (1996). In light of this, we conclude postconviction counsel's decision to omit this claim from the amended postconviction petition did not violate the third duty required by Rule 651(c).

¶ 54 In sum, the record demonstrates that postconviction counsel substantially complied with the three duties mandated in Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 18. We therefore conclude postconviction counsel fulfilled his obligations under the rule—notwithstanding his failure to file an affidavit certifying his compliance.

¶ 55 CONCLUSION

¶ 56 The judgment of the circuit court of Will County is affirmed.

¶ 57 Affirmed.