

NOTICE
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2016 IL App (5th) 140028-U

NO. 5-14-0028

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. 96-CF-392
)	
TERRY DIBBLE,)	Honorable
)	Brian Babka,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's dismissal of the defendant's postconviction petition at the second stage of the postconviction proceedings is affirmed where the defendant has failed to make a substantial showing of a constitutional violation and failed to overcome the presumption that his postconviction counsel provided reasonable assistance.

¶ 2 The defendant, Terry Dibble, appeals the second-stage dismissal of his petition for postconviction relief filed pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)). For the following reasons, we affirm.

¶ 3 Initially, we have ordered taken with the case a *pro se* supplemental petition for appellate review filed by the defendant. The Office of the State Appellate Defender has

been appointed to represent the petitioner in this appeal. A defendant has the right to either have counsel represent him or to represent himself; but a defendant does not have the right to both self-representation and the assistance of counsel. *People v. Rucker*, 346 Ill. App. 3d 873, 882 (2003). Thus, a defendant is not entitled to " 'hybrid representation, whereby he would receive the services of counsel and still be permitted to file *pro se* motions.' " *Id.* (quoting *People v. Handy*, 278 Ill. App. 3d 829, 836 (1996)). The defendant has previously been given the option by this court to either have appellate counsel represent him or to allow appellate counsel to withdraw and represent himself. The defendant elected to continue with appellate counsel. Thus, the defendant's August 15, 2016, *pro se* petition is stricken as he is not entitled to hybrid representation.

¶ 4 We now turn to the postconviction petition. We will set forth only those facts pertinent to the issues raised in this postconviction appeal. In April 1996, the defendant was indicted for the offense of first-degree murder in violation of section 9-1(a)(3) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(3) (West 1994)), in that, on or about the ninth day of November 1993, while committing the forcible felony of burglary, he, without lawful justification, shot Billy Barker in the head with a shotgun, causing the death of Billy Barker. Prior to the defendant's trial, Preston Arnsperger and Christopher Mathis, who were also involved in the burglary, pleaded guilty to felony murder. Pursuant to a negotiated plea, Arnsperger and Mathis agreed to testify at the defendant's trial in return for the State agreeing not to seek a sentence in excess of 60 years' imprisonment.

¶ 5 The defendant was tried before a jury on May 19 through 21, 1998, and was found guilty of first-degree murder. The defendant's conviction rested primarily on the

testimony of Arnsperger and Mathis. The murder weapon was never found and no physical evidence linked the defendant to the crime. On August 28, 1998, the defendant was sentenced to 45 years' imprisonment. The defendant appealed his conviction and this court affirmed. *People v. Dibble*, 317 Ill. App. 3d 252 (2000).

¶ 6 On May 7, 2001, the defendant filed a *pro se* petition for postconviction relief, setting forth the following pertinent arguments: (1) that the State had manipulated the out-of-state defense counsel into a stipulation that protected the accomplice witnesses from impeachment with the fact that their plea deals included a promise not to charge them in another murder;¹ (2) that Mathis and Arnsperger conspired to frame him for Barker's murder; (3) that the trial court abused its discretion and committed judicial misconduct by knowingly and intentionally allowing Arnsperger and Mathis to take the witness stand and commit perjury and allowed the perjured testimony to go uncorrected by either the State or the defense; and (4) that he was denied effective assistance of counsel when counsel denied him the right to testify by refusing to call him as a witness.

¶ 7 In support of the allegation that Mathis and Arnsperger conspired to frame him for murder, the defendant provided affidavits from two inmates at the St. Clair County jail, Angel Zamarron and Dewey Johnston. According to Zamarron's affidavit, Zamarron and Mathis met while incarcerated and they talked about Mathis's case. Mathis bragged about the fact that he and Preston "killed a guy and put him in a trunk" and then they

¹The police were also investigating the defendant for the disappearance and death of Nelson Steinhauer, which occurred on the same night as the Barker murder.

"drove him somewhere and cut up his body." Zamarron further stated that Mathis "openly admitted" to killing a man in 1996, but he never mentioned the defendant's name.

¶ 8 According to Johnston's affidavit, Johnston was cellmates with Arnsperger in the St. Clair County jail. Arnsperger told him that the defendant would "take the fall for the murder" that Arnsperger and Mathis committed and that he and Mathis had to get their stories straight. Arnsperger further said that he and Mathis had to "stick together." Arnsperger stated that they would make a deal with the State and "pin" the murder on the defendant since the defendant "had no way to make a deal first, nor had any money for an attorney." Arnsperger also explained the circumstances behind the murder. He claimed that he went to the deceased's house with the defendant and Mathis to purchase drugs. The defendant stayed in the vehicle while he and Mathis went inside the home. Arnsperger explained that Mathis ran up the hallway to the front of the house. Arnsperger heard a gunshot. Mathis then ran up to Arnsperger and said "I shot him." They ran back out of the house and the defendant picked them up in the vehicle.

¶ 9 On August 6, 2001, the circuit court summarily dismissed the defendant's *pro se* postconviction petition as frivolous and patently without merit. The court concluded that all of the issues raised in the defendant's postconviction petition were raised or could have been raised in his direct appeal, and that they were therefore barred by *res judicata* or waiver. The defendant appealed and this court reversed on the basis that the circuit court had improperly engaged in fact finding when it concluded that the issues raised in the petition were barred by *res judicata* or waiver. *People v. Dibble*, No. 5-01-0754 (2003) (unpublished order under Supreme Court Rule 23).

¶ 10 On remand, James Stiehl, Jr., was appointed to represent the defendant on May 12, 2004. On December 13, 2006, the defendant filed a *pro se* motion for leave to amend his petition for postconviction relief. Attached to his motion was a *pro se* amended petition for postconviction relief. The amended petition incorporated issues from his original petition, including the claims that his counsel denied him the right to testify and that Mathis and Arnsperger conspired to frame him for the murder. The defendant complained that nothing had been done in his pending postconviction case since the appointment of counsel.

¶ 11 On February 20, 2007, the circuit court entered an order, setting the due date for the filing of the amended postconviction petition by May 1, 2007. The order indicated that the defendant had delivered to his attorney a handwritten document in excess of 50 pages setting forth his position in relation to the pending postconviction proceedings. The court indicated that the defendant and counsel agreed that at least two months were required for communication and amendment of the petition. On April 27, 2007, the defendant filed *pro se* a lengthy second amended petition for postconviction relief. The petition was approximately 200 pages long. In June 2007, the defendant filed a *pro se* motion for substitution of counsel, claiming that counsel had failed to meaningfully discuss the case and the amendment of the petition with him and failed to file an amended petition.

¶ 12 On July 25, 2007, the circuit court entered an order, granting the defendant additional time to file his amended postconviction petition. In addition, the order noted that the defendant was in agreement with having James Stiehl, Jr., continue as his

counsel. The record indicated that postconviction counsel and the defendant had agreed to "sit down for a protracted period of time" to figure out how to proceed. On September 19, 2007, the court granted counsel additional time to file the amended postconviction petition after counsel indicated that he had discussed with the defendant a number of issues, but they had concluded that an additional issue needed to be raised. The defendant agreed to the additional time.

¶ 13 On February 20, 2008, postconviction counsel informed the court that the defendant had given him an approximately 200 page *pro se* amended postconviction petition and that the defendant was reluctant to relinquish any of the issues raised in the document. Counsel expressed his belief that the petition needed to be truncated and that some of the issues were irrelevant or inappropriate. The defendant and counsel both agreed that they needed additional time to get the amended petition into final form.

¶ 14 On April 9, 2008, a third amended postconviction petition was filed by postconviction counsel. On September 12, 2008, the State filed a motion to dismiss the third amended postconviction petition. A hearing on the motion to dismiss was held in October 2008. The circuit court never ruled on the motion following the hearing, and there is nothing contained in the record to indicate the reasoning as to why no ruling had been made. Approximately three years later, on November 17, 2011, the defendant filed a *pro se* supplemental petition for postconviction relief. Thereafter, the defendant's *pro se* supplemental petition was stricken by the circuit court because the defendant had appointed counsel. The defendant's postconviction counsel requested the court allow him

the opportunity to take the material in the defendant's supplemental petition and incorporate the appropriate issues in a fourth amended postconviction petition.

¶ 15 On January 9, 2012, the defendant's counsel filed a fourth amended postconviction petition, which incorporated the defendant's *pro se* second amended petition and the supplemental petition. Counsel also filed a certificate of compliance pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). On February 15, 2012, the State filed a motion to dismiss, arguing that the defendant's issues were waived, subject to *res judicata*, or failed to satisfy the *Strickland* test for ineffective assistance of counsel. On December 31, 2013, the circuit court granted the State's motion to dismiss.

¶ 16 On appeal, the defendant argues that the circuit court erred by dismissing his postconviction petition without considering the allegation that Arnsperger and Mathis perjured themselves to secure plea agreements for their testimony and that they had conspired to place the blame for the murder on the defendant, which is evidenced by the affidavits attached to the defendant's *pro se* petition. The defendant also argues that his postconviction counsel provided unreasonable assistance when he failed to shape the defendant's postconviction claims into proper form, only pursued issues that were clearly *res judicata*, and failed to properly support the defendant's claims by letting the postconviction case sit idle for over three years.

¶ 17 Our review of the circuit court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). The Post-Conviction Hearing Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Edwards*, 197 Ill. 2d 239, 244

(2001). Postconviction proceedings are commenced by the filing of a petition, which clearly sets forth the respects in which defendant's constitutional rights were violated. 725 ILCS 5/122-2 (West 2012).

¶ 18 At the first stage, the trial court independently reviews and assesses the defendant's petition within 90 days of its filing, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Edwards*, 197 Ill. 2d at 244. If the petition is not summarily dismissed by the court, it advances to the second stage. *People v. Domagala*, 2013 IL 113688, ¶ 33. At the second stage, counsel may be appointed where the defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2012). The defendant's appointed counsel then has an opportunity to amend the *pro se* postconviction petition. *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 27.

¶ 19 The State may then file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2012). If the State moves to dismiss the amended petition, the circuit court may hold a dismissal hearing, which is still considered part of the second stage. *Hatchett*, 2015 IL App (1st) 130127, ¶ 27. The circuit court must then determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *Domagala*, 2013 IL 113688, ¶ 33. However, this inquiry does not allow the circuit court to engage in any fact-finding or credibility determinations because all well-pleaded facts that are not positively rebutted by the record are to be taken as true. *Id.* ¶ 35. An evidentiary hearing is only required when the allegations of the postconviction petition, supported by the trial record and accompanying affidavits,

make a substantial showing of a constitutional right violation. *People v. Flowers*, 2015 IL App (1st) 113259, ¶ 31.

¶ 20 In this case, the defendant's postconviction petition was dismissed at the second stage of review. The defendant first argues that his postconviction petition should advance to the third stage of the postconviction proceedings, *i.e.*, an evidentiary hearing, where the circuit court failed to consider the well-pleaded facts regarding the alleged conspiracy between Mathis and Arnsperger. The defendant argues that the affidavits of Zamarron and Johnston evidence a conspiracy between Mathis and Arnsperger to secure a plea deal and shift the "entire blame for the Barker murder" on the defendant. Thus, the defendant argues that he has made a substantial showing that his constitutional rights have been violated. We disagree.

¶ 21 The murder described in Zamarron's affidavit is not the same murder that occurred in the instant case. In this case, Barker was shot in the eye with a shotgun while his home was being burglarized. His ex-wife found his body the following evening. The murder allegedly committed by Mathis and Arnsperger described in the affidavit involved a man being murdered, put in a trunk, and being driven to an unidentified location where the body was cut up. This murder occurred on the same night as the Barker murder. Moreover, although the affidavit discussed a murder that occurred in 1996, it never mentioned the defendant's name.

¶ 22 Unlike Zamarron's affidavit, Johnston's affidavit appears to pertain to the murder in the instant case. However, we conclude that the defendant has failed to make a substantial showing that his constitutional rights were violated. Some of the statements

contained in the affidavit are positively rebutted by the record. According to the Johnston affidavit, Arnsperger admitted to Johnston that Mathis and Arnsperger committed the Barker murder and conspired for the defendant to take the blame. Arnsperger stated that the defendant did not have an opportunity to make a deal first and had no way of paying for an attorney. However, the record reflects that the defendant spoke to the police in November 1993, a month after the murder, and that Arnsperger did not speak to the police until January 1994. Furthermore, the defendant did retain private counsel for his trial.

¶ 23 However, taking the allegations contained in Johnston's affidavit as true, the defendant has failed to carry his burden of establishing a substantial showing of a constitutional violation. Arnsperger related a different version of events on the night of the murder to Johnston than what he and Mathis testified to at the trial. According to the affidavit, Arnsperger stated that he went to Barker's house with the defendant and Mathis to purchase drugs. The defendant stayed inside the vehicle while Arnsperger and Mathis went inside the house. While inside the house, Arnsperger heard a gunshot and then Mathis ran up to him and said "I shot him." Arnsperger and Mathis then ran back out of the house and the defendant picked them up in the vehicle.

¶ 24 If this version of events is true, it still supports the defendant's conviction for first-degree murder. Where one aids another in the planning or commission of an offense, he is legally accountable for the conduct of the person he aids. *People v. Fernandez*, 2014 IL 115527, ¶ 19; *People v. Kessler*, 57 Ill. 2d 493, 497 (1974). "Conduct" encompasses any criminal act done in furtherance of the planned and intended

act. *Kessler*, 57 Ill. 2d at 497. The defendant was charged with accountability for the actions of his codefendants. Nothing in the defendant's postconviction petition refutes the facts that the defendant knew they were going to Barker's house to get illegal drugs, and that when they pulled up to the house, it was dark and apparently empty. The house being dark and apparently empty suggests that they were not going to the house to buy drugs. Barker's murder was committed in furtherance of obtaining the illegal drugs.

¶ 25 Moreover, according to the affidavit, the defendant then drove the getaway car after the murder was committed. See *People v. Gomez*, 127 Ill. App. 3d 551, 556 (1984) (a person who knowingly drives a get-away car is accountable for the crimes committed). Therefore, the defendant, as a participant in the planned crime, would be legally accountable for the murder. Consequently, the defendant has failed to make a substantial showing of a constitutional violation.

¶ 26 The defendant next argues that the case should be remanded for further second-stage proceedings where his postconviction counsel provided unreasonable assistance. The right to counsel in postconviction proceedings is derived from statute rather than the Constitution. *People v. Owens*, 139 Ill. 2d 351, 364 (1990). Thus, postconviction petitioners are guaranteed only the level of assistance which the statute provides. *Id.* That level of assistance has been defined by our supreme court to mean a "reasonable" level of assistance. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). One aspect of "reasonable" assistance is compliance with Supreme Court Rule 651(c). *People v. Carter*, 223 Ill. App. 3d 957, 961 (1992).

¶ 27 Pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), postconviction counsel must certify, or the record must affirmatively show, that counsel has fulfilled these three requirements: (1) consultation with the petitioner, either in person or by mail; (2) examination of the trial record; and (3) amendment of the *pro se* petition, if necessary, to adequately present petitioner's claims of constitutional violation. The third obligation does not require the postconviction counsel to advance frivolous or spurious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). If an amendment to a postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not necessary under the rule. *Id.*

¶ 28 There are two ways in which appointed counsel may comply with Rule 651(c): (1) counsel may file a certificate to show that the requirements of the rule were complied with or (2) the record as a whole may demonstrate that counsel complied with those provisions. *People v. Richmond*, 188 Ill. 2d 376, 380 (1999). A rebuttable presumption that postconviction counsel provided reasonable assistance exists where the Rule 651(c) certificate has been filed. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. The defendant bears the burden to overcome this presumption by demonstrating that his counsel failed to substantially comply with the requirements of Rule 651(c). *Id.*

¶ 29 In the present case, the defendant's postconviction counsel filed the requisite certificate of compliance, which stated that he had fulfilled his obligations under Rule 651. Thus, there is a rebuttable presumption that postconviction counsel provided reasonable assistance and it is the defendant's burden to overcome this presumption. The defendant made the following complaints concerning his postconviction counsel: counsel

demonstrated a lack of familiarity with postconviction procedure; counsel failed to cite any case law in the postconviction petition except for a "passing reference" to *Strickland v. Washington*; counsel failed to shape the defendant's *pro se* arguments into viable arguments and raised many issues that were *res judicata*; counsel failed to explicitly challenge the veracity of Mathis's and Arnsperger's testimony by using the affidavits provided to the defendant by Zamarron and Johnston; counsel failed to attach an affidavit from the defendant indicating that the defendant had wanted to testify at the trial but was prevented from doing so by his trial counsel; and counsel provided dilatory representation where he failed to file an amended postconviction petition until April 9, 2008, and where there was a lengthy delay between the time that counsel was appointed and the order granting the State's motion to dismiss.

¶ 30 We conclude that the defendant has failed to overcome the rebuttable presumption. The record reflects that the defendant had submitted two lengthy *pro se* postconviction petitions for filing and was reluctant to relinquish any of the issues raised in his *pro se* filings. His postconviction counsel consulted with him to identify the issues that were appropriate to address in the amended postconviction petition and to adequately present these claims in the amended petition. Counsel examined the trial court record and filed an amended postconviction petition, which incorporated the arguments raised in the defendant's various *pro se* filings.

¶ 31 The defendant argues that counsel did not provide reasonable assistance because he failed to present and argue viable issues that were identified in the defendant's *pro se* filings. In particular, the defendant notes that many of the issues raised in the amended

postconviction petition were issues that had also been raised on direct appeal and, therefore, could be considered *res judicata*. First, we note that the defendant has not identified any additional claims that counsel should have raised that would not be considered *res judicata*. Appointed counsel need only make those amendments that are necessary for the adequate presentation of the defendant's constitutional-violation claims. *People v. Peoples*, 346 Ill. App. 3d 258, 262 (2004).

¶ 32 In addition, as for counsel including issues that were considered *res judicata* in the amended petition, we emphasize that postconviction counsel has a duty to attempt to overcome procedural bars, such as forfeiture, *res judicata*, and untimeliness. See *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 44. Counsel demonstrated that he understood this procedural hurdle and attempted to overcome it by raising claims of ineffective assistance of appellate counsel. See *People v. Turner*, 187 Ill. 2d 406, 415 (1999) (our supreme court concluded that counsel's failure to amend the postconviction petition to allege ineffective assistance of appellate counsel prevented the circuit court from considering the merits of defendant's claims).

¶ 33 Counsel also attempted to overcome the procedural hurdle of *res judicata* by arguing that the circuit court should examine trial counsel's errors, some of which were acknowledged by this court on direct appeal, cumulatively to determine whether the defendant received effective assistance of counsel. This argument may not have been particularly compelling, but it appears to have been the best option available based on the facts. See *People v. Perkins*, 229 Ill. 2d 34, 51 (2007) (counsel fulfilled his duties,

where, although his argument was not particularly compelling, it was the best option available).

¶ 34 The defendant also asserts that postconviction counsel failed to specifically discuss the perjury issue, which is evidenced by the Zamarron and Johnston affidavits, in the amended postconviction petition. However, counsel incorporated the defendant's *pro se* filings, which included this issue, in the amended petition. Furthermore, we have concluded that the affidavits do not raise a substantial showing of a constitutional violation.

¶ 35 The defendant further complains that his postconviction counsel should have attached an affidavit from him explaining how he was prevented by trial counsel from testifying at trial. According to the defendant, had postconviction counsel attached the defendant's affidavit to the amended petition, the "bare-bones allegation" would have developed into a well-pleaded allegation of a constitutional violation, which would have been accepted as true at the second stage of the postconviction proceedings. Although we agree with the defendant that all well-pleaded facts that are not positively rebutted by the record are to be taken as true at this stage in the proceedings, we conclude that since the defendant's claim that he was not allowed to testify at the trial is positively refuted by the record, amending the postconviction petition with an affidavit from the defendant would not have made a substantial showing of a constitutional violation. The record indicates that the circuit court specifically addressed the defendant about his right to testify and that defense counsel had discussed this right with him. Defense counsel noted

that he had discussed the pitfalls of testifying with the defendant, but made it clear that the defendant had this right. The defendant agreed to this summary of their discussion.

¶ 36 Last, the defendant complains that postconviction counsel provided dilatory representation. In particular, the defendant notes that he was appointed counsel on May 12, 2004, and appointed counsel failed to file an amended petition until April 9, 2008. Then, following a hearing on the State's motion to dismiss the amended petition, the petition sat idle for over three years with no ruling from the trial court.

¶ 37 From a review of the record, it appears that the first delay was the result of repeated continuances from the defendant's counsel, continuances which the defendant agreed to, that resulted from the defendant's counsel being presented with lengthy *pro se* filings from the defendant. The record indicates that both counsel and the defendant agreed that they would need months for communication and amendment of the postconviction petition.

¶ 38 As for the second delay, there is nothing in the record to explain why the circuit court did not rule on the amended postconviction petition and the case therefore sat stagnant for three years. The defendant asserts that postconviction counsel did not provide reasonable assistance where he allowed the delay to continue. The defendant notes that timeliness is particularly important in postconviction proceedings where evidence becomes more difficult to obtain, a sentiment to which we agree. However, we note that the defendant has not presented any evidence that he was harmed by the delay.

¶ 39 Moreover, we note that the delay in the court's ruling was not caused by postconviction counsel. We want to emphasize that we do not condone the delay that

occurred in the postconviction proceedings in this case. Reasonable efforts should be made by counsel and the courts to resolve postconviction petitions within a judicious time frame. Because the defendant has not established that the delay affected postconviction counsel's Rule 651(c) obligations, we conclude that the defendant has not overcome the presumption that his postconviction counsel substantially complied with the duties mandated by Rule 651(c).

¶ 40 For the reasons stated, the circuit court's dismissal of the defendant's postconviction petition is affirmed.

¶ 41 Affirmed.