

No. 1-16-0761

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 36130666
	)	36130667
	)	36130668
	)	
RUBEN SANCHEZ,	)	Honorable
	)	Donald R. Havis,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Ellis and Justice Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in dismissing defendant’s postconviction petition at the second stage where postconviction counsel had stated on the record that he had not yet complied with Supreme Court Rule 651(c).

¶ 2 Defendant Ruben Sanchez appeals the trial court’s dismissal of his postconviction petition at the second stage of proceedings. On appeal, defendant argues that the trial court erred in dismissing his petition because (1) his postconviction counsel stated on the record that he had not complied with Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), and (2)

the State improperly orally moved to dismiss defendant's petition on the merits without filing a written motion.

¶ 3 On May 5, 2010, defendant was charged with misdemeanor driving under the influence (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)). Defendant was subsequently charged with a felony DUI in August 2010. The State elected to proceed first on the felony DUI and this case was held in abeyance. The felony DUI proceeded to a jury trial in January 2011. On March 8, 2011, defendant was sentenced to a term of 18 months for the felony DUI.

¶ 4 On the same date, defendant's attorney on the misdemeanor case indicated that a plea deal had been reached. Defendant then pled guilty to misdemeanor DUI in exchange for a sentence of 211 days, time considered served, and court costs.

¶ 5 On June 6, 2011, defendant filed a *pro se* motion to vacate/amend final orders with the stated reason for motion "fail apale public defender did not (*sic*)." Defendant appeared *pro se* in the trial court on June 29, 2011, stating that he was incarcerated until May 6, 2011, and filed an appearance on June 6 to start the appeal process. Defendant indicated an issue with the assessed court costs because he had "no funds." Defendant told the court that he wanted to go "back to trial or I might beat the case." The court told defendant he needed to file a motion to vacate his plea. At that time, defendant's prior attorney spoke as a "friend of the court" and informed the court that more than 30 days had passed since defendant pled guilty. The court then directed defendant to the postconviction unit of the public defender's office.

¶ 6 On July 6, 2011, defendant filed his *pro se* postconviction petition, raising multiple claims, including a claim of ineffective assistance of trial counsel. The petition appeared before the trial court on July 25, 2011, and the court appointed the public defender. The public defender was formally appointed for postconviction relief on November 21, 2011. Multiple public

defenders appeared for defendant with postconviction counsel appearing for the first time on November 5, 2012. Counsel sought several continuances to investigate defendant's allegations.

¶ 7 In September 2014, the State filed a limited motion to dismiss defendant's postconviction petition based on standing, arguing that since defendant was no longer being held in either the Cook County Department of Corrections or within the Illinois Department of Corrections on this case, defendant lacked standing to file under the Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In October 2014, defendant filed a response to the motion to dismiss, arguing that defendant had standing to pursue postconviction relief under *People v. Warr*, 54 Ill. 2d 287 (1973).

¶ 8 At the October 2014 hearing on the motion to dismiss, the prosecutor conceded that under *Warr*, defendant had standing and his petition was timely filed. The prosecutor then asserted that postconviction counsel should not have been appointed. The trial court then asked if defendant's petition alleged grounds for relief. The prosecutor argued that defendant's allegations did not trigger constitutional protection.

¶ 9 Postconviction counsel responded that the "only issue before this Court based on the State's Motion to Dismiss \*\*\* is that there's no standing to proceed because of the incarceration requirement." The trial court stated that the prosecutor "conceded that part," and queried whether based upon "the point of the four corners of this document that your client filed is there any facts that would give him remedy to post conviction at this point." Postconviction counsel proceeded to argue that defendant raised a claim of ineffective assistance of counsel and that he was investigating that claim. Counsel stated that he "should be given the opportunity to supplement the petition with a necessary affidavits [*sic*] necessary documents proving [defendant's] claim

particularly ineffective assistance of counsel claim which by definition relies on materials outside of the record.”

¶ 10 The trial court then observed that defendant’s petition had been pending for three and a half years and no additional documents have been filed beyond defendant’s petition. Counsel then stated:

“[Well] judge, I would be in a position to provide that to the court in very short order. The fact that it’s taken as long as it has I don’t believe I have been on the case that long. But, it does take time to investigate to get affidavits and so forth. It’s not that unusual in [a] post conviction case, Judge, for material to be discovered and put together after the \*\*\* initial filing.”

\*\*\*

Unfortunately, post conviction cases are such that it does take time to work them up and we have to rely on the order in which these cases come in typically. Our office when we get a new post conviction case can not immediately begin working on that because of the other pending cases. That’s how we’ve been working it. Like I said, Judge, often times [we] see post conviction petitions that are sketchy and then are supplemented with much more detailed [*sic*] and present a proper ruling on the facts and the law.

At this point were [*sic*] appointed to represent [defendant]. Rule 651 C of the Supreme Court requires that we either

supplement or file a petition that says we aren't able to supplement because there is basically there is no issue that we can file. And, I haven't done either of those things as of yet."

¶ 11 The trial court then made a ruling "based upon the four corner of the document that the defendant has filed," and then denied defendant's request for postconviction relief. In November 2014, defendant filed a motion to reconsider arguing that the trial court erred in its *sua sponte* dismissal of defendant's petition because it was not in the procedural posture for litigating a motion to dismiss on the merits. Counsel observed that he had not complied with Rule 651(c) yet. Following a hearing, the trial court denied the motion to reconsider.

¶ 12 This appeal followed.

¶ 13 The Post-Conviction Act provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2012); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Id.* at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 14 The Post-Conviction Act does not apply to misdemeanor convictions, but the Illinois Supreme Court has set forth a procedure for a defendant to seek postconviction relief.

“Such a proceeding shall be governed by the Post-Conviction Hearing Act except in the following respects:

- (1) the defendant need not be imprisoned;
- (2) the proceeding shall be commenced within 4 months after rendition of final judgment if judgment was entered upon a plea of guilty and within six months after the rendition of final judgment following a trial upon a plea of not guilty;
- (3) counsel need not be appointed to represent an indigent defendant if the trial judge, after examination of the petition, enters an order finding that the record in the case, read in conjunction with the defendant's petition and the responsive pleading of the prosecution, if any, conclusively shows that the defendant is entitled to no relief. *People v. Warr*, 54 Ill. 2d 487, 493 (1973).

¶ 15 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2012). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2012)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2012)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See

*Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. “At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard.” *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012).

¶ 16 In this case, the State conceded in the trial court that defendant’s petition was timely filed within four months of his guilty plea. And while the supreme court does not mandate the appointment of counsel in misdemeanor postconviction proceedings, postconviction counsel was appointed to represent defendant. Once counsel is appointed, defendant is entitled to a reasonable level of assistance. See *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 17 Supreme Court Rule 651(c) provides that postconviction counsel file a certificate stating that he or she (1) consulted with the defendant to ascertain his contentions of deprivation of constitutional right, (2) examined record of the proceedings at the trial, and (3) amended the defendant's *pro se* petition, if necessary, to ensure that defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The supreme court has “repeatedly held that the purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court.” *People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007) (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003), quoting *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990)). “Compliance with Rule 651(c) is mandatory.” *Id.* at 50. The supreme court has “consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of

whether the claims raised in the petition had merit.” *Suarez*, 224 Ill. 2d at 47. “Our Rule 651(c) analysis has been driven, not by whether a particular defendant's claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the [Post-Conviction] Act cannot be fully realized.” *Id.* at 51.

¶ 18 Here, postconviction counsel was attempting to complete his duties to provide defendant with defendant’s right to counsel under the Post-Conviction Act and to comply with counsel’s own mandatory compliance with Rule 651(c). Counsel stated on the record that he had not completed his investigation into defendant’s claims, but planned to file something “in short order.” Counsel explicitly stated that he had not complied with Rule 651(c), but the trial court improperly circumvented counsel’s obligations under the rule. We further point out that the trial court’s concern over the length of time the petition had been pending has no support under the Post-Conviction Act where no timeframe beyond filing deadlines exists.

¶ 19 The State asserts that postconviction counsel has substantially complied with Rule 651(c) and we should find the lack of a Rule 651(c) certificate to be harmless error. However, we find no support for the State’s argument. None of the cases cited by the State uphold the finding of harmless error when the postconviction counsel argued that he had not complied with the rule. We reject the State’s assertion that we find substantial compliance where the record shows that counsel intended to supplement defendant’s postconviction petition, but was prevented from doing so. Accordingly, we hold that the trial court erred in dismissing defendant’s postconviction petition when counsel explicitly stated that he had not complied with Rule 651(c). We reverse the dismissal and remand for further second stage proceedings under the Post-Conviction Act.



¶ 20 Since we are reversing and remanding for failure to comply with Rule 651(c), we need not consider defendant's other argument that the State's oral motion to dismiss his postconviction petition was improper.

¶ 21 Based on the foregoing reasons, we reverse the dismissal of defendant's postconviction petition and remand for further proceedings consistent with this order.

¶ 22 Reversed and remanded.