2017 IL App (2d) 140836-U
No. 2-14-0836
Order filed February 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Respondent-Appellee,	)	
v.	)	No. 08-CF-3716
ROMELLE H. GRAHAM,	)	Honorable Christopher R. Stride,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The record does not reflect that postconviction counsel complied with Illinois Supreme Court Rule 651(c). Reversed and remanded with directions.

¶ 2 Defendant, Romelle H. Graham, appeals the trial court's order granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). Defendant argues that the petition should be remanded for an evidentiary hearing. Alternatively, defendant argues that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and that the petition should be remanded for new, second-stage proceedings. For the following reasons, we agree with defendant's

alternative argument, we reverse the dismissal of the petition, and we remand for new, second-stage proceedings.

¶ 3 I. BACKGROUND

¶ 4 In May 2009, a jury convicted defendant of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)). On direct appeal, we affirmed defendant's conviction. *People v. Graham*, No. 2-09-0955 (2011) (unpublished order under Supreme Court Rule 23). A lengthy recitation of the facts and trial evidence leading to defendant's conviction may be found in that decision. In sum, the State's theory of the case was that, in the early morning hours of August 25, 2008, defendant and four accomplices, Ernest Hughes, Paul Alston, Nate Wise, and Mike Reed, broke into a home and shot and killed one of its occupants, Bernard Phillips. The State did not try to establish who fired the gun that killed Phillips; rather, it argued that defendant was the leader of the group and was accountable for the murder. Co-defendants Hughes and Reed testified at trial; as noted in our prior decision, they often testified inconsistently, were repeatedly impeached, and were present at trial only as a result of favorable plea agreements with the State. However, both *consistently* testified, at trial and in their pretrial statements, that defendant planned and acted as leader of the crimes. Indeed, the evidence showed that, prior to their pleas and during their first police interviews, Reed and Hughes identified defendant as the leader. Also at trial, Hughes's girlfriend, Melvinesha Tucker, testified that defendant sent her two letters to forward to Hughes and Wise, essentially suggesting that they not testify against defendant and one another. Those letters were later intercepted, and the State's handwriting expert testified that the handwriting was "probably" defendant's. We also note that, on appeal, defendant's appellate counsel did not directly raise on his behalf any claims that trial counsel was ineffective.[1]

[1] Defendant argued that the trial court erred in failing to appoint conflict counsel to argue

¶ 5 Defendant filed four postconviction petitions: two *pro se* and two with the benefit of appointed counsel.

¶ 6 A. *Pro Se* Petitions

¶ 7 The initial *pro se* petition alleged that the State knowingly used perjured testimony from Tucker and attached a notarized affidavit from Tucker, stating in its entirety that "Micheal [*sic*] Reed send [*sic*] me the letter and the State['s] Attorney forced me to testify on Romelle Graham." Further, it alleged trial and appellate counsel's ineffectiveness. The petition also alleged that the State knowingly used false testimony from Reed and Hughes.

¶ 8 Defendant's first supplemental petition incorporated his initial petition. Further, it alleged actual innocence. The supplemental petition included a notarized affidavit from Hughes, stating that he had lied about defendant's involvement in the murder. Hughes stated that defendant was with Hughes "that night" and "so I just involved him in this situation. I only told the detectives that [defendant] was involved because I was scared [and] they kept telling me to say he was there." Hughes wrote that his statements involving defendant were all lies, and "I'm writing this affidavit to come forth with the truth because I feel bad that I implicated [defendant] in this terrible act. This is the truth [and] know [*sic*] one made me write this it was on my own." The supplemental petition also asserted that, during Hughes's interrogation, detectives were the first to mention defendant's name, citing as support defense counsel's closing arguments at trial and "Hughes['s] video statement at approximately 1:17." Defendant asserted that the State had the videotape and, therefore, saw detectives "feed" Hughes defendant's name.

¶ 9 On June 22, 2012, the trial court determined that the petitions alleged the gist of a constitutional claim and it appointed counsel for second-stage proceedings.

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his *pro se* claims of ineffective assistance of counsel. We rejected that claim.

¶ 10 B. Petitions filed by Counsel

¶ 11 On November 5, 2012, appointed counsel moved the court for funds to hire an investigator to interview the witnesses mentioned in defendant's prior petitions. In the motion, counsel noted that she had twice visited defendant, for a total of approximately three hours, and that she had spent approximately three hours reviewing discovery and case law. The motion was granted. On February 1, 2013, counsel moved for additional funds for the investigator. The motion noted that the investigator interviewed Hughes and Reed at their respective correctional facilities. It noted that the investigator twice travelled to visit Reed, as Reed refused to sign a statement that he gave the investigator on the first visit.

¶ 12 1. Second Supplemental Petition

¶ 13 On October 31, 2013, counsel filed a second supplemental petition, incorporating defendant's *pro se* petitions and raising three claims. First, a claim of actual innocence based on statements provided by Hughes and Reed to the investigator that defendant had no involvement in the murder and that detectives pressured them to implicate defendant. In his statement, Hughes said that defendant was not involved and that, when he was interrogated, the detectives wanted him to include "everyone" and, because defendant was with him the "night before," he included him at the scene. Hughes thought it would help his own case, and he found out that Reed was doing the same. The investigator asked, "Q: You are stating that the reason [defendant] was implicated was allegedly so you and Reed could get a better deal, which you said was solicited from you off camera, by the detectives and the [assistant State's Attorney]?" Hughes responded, "A: Yes." Hughes's statement to the investigator is not signed or notarized.

¶ 14 In Reed's statement, he said that he saw defendant the night before the murder. When asked why defendant was implicated, Reed responded that "A: Hughes was the one that started

that, 2 officers from Waukegan P.D. showed me Hughes['s] statement, where he stated that [defendant] was involved and they pressed on me to corroborate it." He states that defendant was not involved in the incident. Reed's statement is not signed or notarized.

¶ 15 The petition further claims that 1:27 minutes into Hughes's interrogation, detective Schletz mentions defendant's name to Hughes, stating "do you remember the guy we talked about earlier?",[2] contradicting Schletz's trial testimony that he never mentioned defendant's name to Hughes before Hughes named defendant as a participant. As corroboration for the allegation that the detectives exerted pressure, the petition also attached newspaper articles and cited cases, describing allegations of misconduct against detective Dominic Cappelluti, as well as Cappelluti's involvement in obtaining false confessions.[3] The petition "admits that Cappelluti allegedly played a minor part in this case and did not take a statement from Hughes or Reed," but it asserts that he was "clearly" the officer in charge and his interrogation techniques and tactics have come under scrutiny. Further, the petition again claimed that Tucker was forced to testify falsely that defendant sent her the letters that were later intercepted.

[2] Defendant recites that Schletz then says "Romelle Kuchie." The State claimed in its motion to dismiss that this is incorrect and that Schletz actually referenced "Poochieanna," which was allegedly Lebraun Graham's (defendant's brother's) nickname, as demonstrated later in the interview, and that Scheltz never mentioned defendant's name until after Hughes did.

[3] Counsel also successfully moved the court to obtain and review *in camera* personnel files for detectives Cappelluti, Charles Schletz, and Gianni Giambarducca. Upon review, the court found nothing relevant and ordered that, while the files would not be tendered to either side, they would remain part of the court file, but would be sealed.

¶ 16 The second claim was that trial counsel was ineffective for playing Hughes's interrogation video for the jury and for not properly investigating misconduct by the Lake County police. The petition acknowledged that the ineffective-assistance claim about the video could have been raised on direct appeal, but asserted that the claim could be reviewed (by the trial court) under the plain-error doctrine. It did *not* allege ineffective assistance of appellate counsel for not raising the claim on direct appeal.

¶ 17 The third claim alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing to defendant allegations of misconduct against detectives involved in the case.

¶ 18 No Rule 651(c) certificate accompanied the second supplemental petition.

¶ 19 2. Third Supplemental Petition

¶ 20 On November 26, 2013, counsel filed a third supplemental petition, incorporating all prior petitions. In addition, the petition supplemented the actual-innocence claim with an allegation that: "On March 14, 2013[, co-defendant] Paul Alston gave a statement to defendant's investigator[.] In said statement, Mr. Alston stated, amongst other things, 'Hughes was crying on the phone to me about it, because he felt so bad about lying on [defendant], plus they lied on me too.' (Exhibit A – Affidavit of Paul Alston)." No such affidavit or statement was attached to the petition. The petition alleged that the statement made by Hughes to Alston should be admitted as a prior inconsistent statement.

¶ 21 Second, the petition alleged that trial counsel was ineffective for not moving to exclude gang evidence, not requesting that prospective jurors be asked about their opinions of gang membership, and not objecting to the introduction of gang evidence at trial. Again, there was no corresponding allegation that appellate counsel was ineffective for not raising those issues on direct appeal.

¶ 22 No Rule 651(c) certificate accompanied the third supplemental petition.

¶ 23 C. Motion to Dismiss and Court Ruling

¶ 24 The State moved to dismiss defendant's postconviction petition, arguing that none of the four petitions made a substantial showing of a constitutional violation.

¶ 25 On August 14, 2014, after briefing and a hearing, the trial court granted the motion and dismissed the petitions. In sum, the court found that the affidavits from Tucker, Reed, and Hughes would probably not change the result at trial. As for the co-defendants, the court noted that there existed other evidence that corroborated their trial testimonies and, further, that:

> "Reed and Hughes were effectively impeached at trial; they were accurately portrayed [as] opportunists on cross[-]examination; they did not tell the exact version of events from one trial to the next; they were not likeable. In spite of all of that, the jury in [defendant's] case found him guilty. In light of those facts[,] this court cannot say that such evidence constitutes new evidence of such conclusive nature that it would probably change the result on retrial. If a new trial were to take place, these affidavits would only serve as yet another inconsistent statement by which Reed and Hughes could be impeached."

The court further rejected the postconviction ineffective-assistance claims. In its conclusion, the court noted that it was in no way making the ruling by assessing the credibility of witnesses or evidence; rather, its ruling was based upon defendant's claims, liberally construed in light of the trial record. Defendant appeals.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant argues first that the dismissal of his petition must be reversed because his petition made a substantial showing of both actual innocence and the State's

knowing use of perjury. He asks that we remand the petition for a third-stage evidentiary hearing.

¶ 28 Second, and alternatively, defendant asks that the petition be remanded for new, second-stage proceedings on the basis that his postconviction counsel did not comply with Rule 651(c). Specifically, defendant notes that counsel did not: (1) file a Rule 651(c) certificate; (2) amend the petition with notarized affidavits; (3) support certain allegations with necessary affidavits; (4) make arguments necessary to avoid forfeiture; and (5) review trial exhibits critical to claims raised in his petition. Although defendant presents this claim as only an alternative avenue for relief, we have determined that, to ensure the full and fair presentation of defendant's claims, we should reverse and remand on this basis to allow defendant new, second-stage proceedings with the reasonable assistance of counsel as contemplated by the Act and Rule 651(c).

¶ 29 The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, defendants are entitled to a reasonable level of assistance. *Id.* To assure the reasonable level of assistance required by the Act, counsel has certain requried duties under Rule 651(c). See *id.*; see also *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Specifically:

> "[t]he record [on appeal] shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his [or her] contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

Compliance with the duties set forth in Rule 651(c) is mandatory. *People v. Lander*, 215 Ill. 2d 577, 584 (2005). We review *de novo* both whether postconviction counsel has fulfilled his or her duties under Rule 651(c) and the second-stage dismissal of a postconviction petition. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 30 Here, as defendant notes, postconviction counsel never filed a certificate averring that she complied with the aforementioned Rule 651(c) provisions. The failure to file a certificate showing compliance with Rule 651(c) is harmless error *if* the record demonstrates that counsel adequately fulfilled the required duties. *Lander*, 215 Ill. 2d at 584. However, where counsel does not file a Rule 651(c) certificate and the record does not otherwise reflect compliance, the failure to comply with Rule 651(c) is not subject to harmless-error analysis and the case must be remanded for further postconviction proceedings. See *Suarez*, 224 Ill. 2d at 51-52; *Lander*, 215 Ill. 2d at 585. Here, while it is clear that counsel amended the petitions and the record reflects that she met with defendant, it is the final duty under Rule 651(c)—making the amendments necessary for an adequate presentation of petitioner's contentions—that is of concern.

¶ 31 First, counsel did not attach to the amended petitions notarized affidavits or, with respect to Alston, any affidavit to support the claims. Defendant's actual-innocence claim hinged on the recantations of Tucker, Hughes, and Reed. With respect to Tucker, defendant's *pro se* petition included a barebones notarized affidavit from Tucker with no detail whatsoever about who, specifically, from the State forced her to lie or how that "force" was exhibited. Counsel never attached a more fulsome affidavit or even an affidavit from the investigator to explain the absence of a more fulsome statement. Similarly, with respect to Hughes, defendant's *pro se* supplemental petition included a short, notarized affidavit, but, when counsel obtained a more fulsome statement from the investigator, it was not signed or notarized. With respect to Reed,

the only statement obtained from him is neither signed nor notarized, and, although counsel commented in a motion for investigative fees that Reed had refused to sign one version, there is no affidavit to that effect in the record. We further note that the unsigned, unsworn statements obtained by the investigator are presented in question-and-answer form, making it unclear whether they are even capable of being sworn to or notarized in future proceedings. See, *e.g.*, *People v. Brown*, 2014 IL App (1st) 122549, ¶ 57. Finally, although the third supplemental petition referenced an affidavit from Alston that would allegedly reflect a conversation he had with Hughes, no such affidavit was attached, nor was there an explanation presented for the affidavit's absence.

¶ 32 The Act requires that allegations in postconviction petitions be supported by affidavits or explanation for why affidavits are not attached. 725 ILCS 5/122-2 (West 2010). "An affidavit that is not sworn is a nullity." *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 497 (2002). The State's position is that, because it did not object to the lack of proper verification, the argument is procedurally defaulted, thereby implying that defendant was not prejudiced by counsel's errors. We find this argument unavailing. The issue is not whether the State can now raise an issue that it did not raise below. Rather, the issue concerns defendant's statutory right to reasonable assistance of counsel, a right that the State cannot forfeit. Indeed, counsel's error could have resulted in dismissal of the petition. See *People v. Allen*, 2015 IL 113135, ¶¶ 35, 38 ("where postconviction counsel is unable to remedy the lack of notarization of an attached statement, dismissal at the second stage is appropriate"). As such, counsel is obligated under Rule 651(c) to attempt to obtain and submit proper affidavits from witnesses identified in the *pro se* postconviction petition, and the failure to do so constitutes unreasonable assistance. See *People v. Nitz*, 2011 IL App (2d) 100031, ¶¶ 18-19; see also *People v. Johnson*, 154 Ill. 2d 227,

247 (1993)). Accordingly, here, we cannot find that appointed postconviction counsel made the amendments necessary to adequately present defendant's claims where the attached support was sparse (Tucker), absent (Alston), and unverified (Hughes and Reed).

¶ 33 Second, defendant notes that postconviction counsel did not make arguments necessary to avoid forfeiture. Specifically, counsel amended the petition to include claims that trial counsel was ineffective for: (1) playing Hughes's entire interrogation video for the jury; (2) not properly investigating misconduct by the Lake County police; (3) not moving to exclude gang evidence; (4) not requesting that prospective jurors be asked about their opinions of gang membership; and (5) not objecting to the introduction of gang evidence at trial. For some of these allegations, counsel acknowledged that the claims could have been raised on direct appeal. As the Act was designed to permit inquiry into constitutional issues that were not, and could not have been, adjudicated previously on direct appeal, issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *People v. English*, 2013 IL 112890, ¶ 22. A forfeited claim may proceed where the forfeiture is due to the ineffective assistance of counsel on direct appeal. *Id.* Here, however, postconviction counsel did not include the corresponding allegation to avoid forfeiture, *i.e.*, that appellate counsel was ineffective for not raising those issues on direct appeal. Instead, she argued that the trial court should consider the issue for plain error, a concept applicable to appellate review. See Ill. Sup. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 34 The State asserts that postconviction counsel was not unreasonable because the issues were matters of trial strategy and appellate counsel could not have been ineffective for failing to raise them. Again, this argument misses the mark.[4] "[T]he purpose of Rule 651(c) is to ensure

[4] Indeed, whether strategic or not, postconviction counsel believed trial counsel's errors

that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court" and "[a]n adequate or proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome procedural bars *** that will result in dismissal of a petition if not rebutted." *Perkins*, 229 Ill. 2d at 44. In *People v. Turner*, 187 Ill. 2d 406 (1999), the court held that Rule 651(c) requires counsel to amend a *pro se* petition to allege ineffective assistance of appellate counsel to avoid the procedural bar of waiver or forfeiture. *Id*. at 413-14. As the State essentially does here, the State in *Turner* argued that postconviction counsel's errors were not prejudicial. *Id.* at 415. The *Turner* court disagreed, noting that "in the case of post-conviction counsel's failure to overcome the procedural bar of waiver, the prejudice to petitioner is palpable." *Id.*

¶ 35 Third, defendant asserts that the record does not reflect that postconviction counsel actually reviewed the portions of the record necessary to present his claims. Specifically, defendant notes that the petition claims that Hughes's interrogation video: (1) shows, at the 1:27 mark, that Schletz suggests to Hughes defendant's involvement; and (2) was improperly played in its entirety for the jury and trial counsel was ineffective for presenting it. However, Hughes's interrogation video was apparently split into five DVD's labeled numbers one through five; however, although the record contains five DVD's, the DVD labeled number one is actually a duplicate of the DVD labeled number two, with both DVDs starting at the same time (1:33), a time later than that which allegedly reflects Schletz suggesting defendant's name. Accordingly, defendant concludes, the portion of the record that he references for his claim is not actually in the record, and counsel apparently did not notice it. Defendant further notes that, in the

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were sufficiently egregious to raise the claims in the first instance and, as such, she should have raised the arguments necessary to overcome forfeiture.

supplemental petitions counsel filed, she does not actually cite the videos themselves but, rather, trial counsel's comments about the video in closing argument. As such, defendant contends, where there exists no Rule 651(c) certificate, the record must clearly and affirmatively show that counsel complied with the rule and, on this record, it is not clear that counsel reviewed the critical portion of Hughes's interrogation video that supports his argument.

¶ 36 Defendant is correct that, under Rule 651(c), counsel is required to review those portions of the record necessary to present and support the claims raised by the petitioner in the *pro se* petition. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). In his brief, appellate counsel notes that he was attempting to locate the missing DVD. We have still not received it. Citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984), the State spins the absence of the DVD as resulting in a forfeiture because defendant has not presented a full record for review. In our view, however, we agree with defendant that the absence of the DVD merely supports defendant's claim that the record does not clearly and affirmatively reflect that counsel reviewed it, despite it being the subject of two claims in the petition. Thus, we again conclude that the record does not reflect that counsel fulfilled the duties necessary to adequately present defendant's claims.

¶ 37 The failure to comply with the duties delineated in Rule 651(c) is not subject to harmless-error analysis because it is improper to speculate whether the court would have dismissed the petition if counsel had adequately performed all of his or her duties. See *Turner*, 187 Ill. 2d 406, 416-17. As in *Turner*, we note that we express no opinion on the merits of the claims in defendant's postconviction petition, nor whether an evidentiary hearing is appropriate. Rather, on remand, the trial court will have the opportunity to evaluate the claims once appointed counsel has made any amendments to the petition that are necessary to adequately present defendant's claims. See *id.* at 417.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we reverse the judgment of the circuit court of Lake County. The cause is remanded to the circuit court with directions that it allow defendant the opportunity to re-plead his postconviction petition with the reasonable assistance of counsel.

¶ 40 Reversed and remanded with directions.