2017 IL App (2d) 150805-U
No. 2-15-0805
Order filed September 28, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHAUNTEL L. TIMS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 11-CF-1764 Honorable John J. Kinsella, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok concurred in the judgment.
Justice Birkett concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) Trial court improperly dismissed defendant's postconviction petition *sua sponte* at the second stage of proceedings; and (2) trial court erred in granting postconviction counsel's motion to withdraw because counsel did not address why all of the claims raised in defendant's *pro se* postconviction petition were frivolous or patently without merit.

¶ 2 Defendant, Chauntel L. Tims, appeals the judgment of the circuit court of Du Page County granting postconviction counsel's motion to withdraw and dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) at the second stage of proceedings. On appeal, defendant raises two issues. First, he argues that

the trial court erred in granting postconviction counsel's motion to withdraw because she did not address why all of the claims raised in his *pro se* postconviction petition were frivolous or patently without merit. Second, defendant argues that the trial court improperly dismissed his postconviction petition *sua sponte* at the second stage of proceedings. We agree with both of defendant's arguments. Accordingly, we reverse the judgment of the circuit court granting postconviction counsel's motion to withdraw and dismissing defendant's postconviction petition *sua sponte* and remand the matter for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with two counts of stalking (720 ILCS 5/12-7.3(a)(1), (a)(2) (West 2010)). The indictments alleged that defendant knowingly and without lawful justification engaged in a course of conduct specifically directed at the victim, Ashley Scheltens, that he knew or should have known would cause a reasonable person to suffer emotional distress (count I) or to fear for her safety (count II). The indictment referenced incidents occurring on May 31, 2011, June 2, 2011, June 7, 2011, and July 31, 2011. The matter proceeded to a bench trial at which the following evidence was presented.

¶ 5 Scheltens testified that at the time of the events in question, she lived alone in a ground-floor condominium unit in Willowbrook. Defendant lived in a nearby building in the same complex. Beginning in May 2011, defendant would occasionally walk by and attempt to chat with Scheltens while she was sitting on her patio. Scheltens estimated that she and defendant had four or five such encounters. According to Scheltens, each time defendant approached she would "evade the situation" by telling defendant to leave her alone and walking inside.

¶ 6 One evening in mid-May 2011, Scheltens was on her patio reading when defendant approached and asked to use her bathroom. Scheltens declined defendant's request, but

defendant opened her sliding patio door and entered Scheltens's condominium. Scheltens followed defendant inside. As Scheltens bent down to pick up a telephone, defendant pushed her onto a couch. Defendant then unzipped his pants, exposed his genitals, and pushed Scheltens's mouth onto his penis. Scheltens testified that she was too scared to resist. After defendant ejaculated, Scheltens got up and locked herself in the bathroom. Scheltens did not tell anyone about this encounter until October 2011, when she was being interviewed by the State in preparation for defendant's trial.

¶ 7 Scheltens testified that on May 31, 2011, defendant knocked on her sliding patio door and asked to use the washroom. Scheltens told defendant that he could not come in, but defendant opened the door and walked inside. As Scheltens was on the phone with the police, defendant left. At that time, Scheltens decided not to press charges against defendant, but the police officers stated that they would talk to defendant about the incident. Defendant returned to Scheltens's condominium on June 2, 2011. Defendant attempted to enter the unit through the sliding patio door, but Scheltens installed a bar so that the door could not be opened. Scheltens called the police, but defendant left before they arrived. The police told Scheltens that there was "really nothing they could do," but they agreed to again talk to defendant.

¶ 8 Scheltens testified that on June 7, 2011, she heard someone knock on her sliding patio door. An hour later, Scheltens went outside and discovered flowers, a candle, and a card on her patio chair. The card read as follows:

> "Dear Friend, as I sit here, I can't help but to notice that it's not what I thought. Only if I could turn back the the [*sic*] hands of time, things could be much better. Fast friend end fast, so I am sending you flowers for growth and a candle for what we have. I am lost

> with words to explain how you make me feel—sluttish, super hard, etc. Go, but don't go."

Scheltens did not call the police immediately, but took the card to her boss to ask for her advice. The day after receiving the letter, Scheltens contacted the police, but did not sign a complaint.

¶ 9 Scheltens testified that on July 31, 2011, she was sitting on her patio when she observed defendant pacing around a nearby cul-de-sac. Defendant went inside, but later reappeared with his feet spread apart and "his hands in the air, kind of shaking them, and just standing there, staring at [her]." No words were exchanged, and defendant stood in position for five minutes before going inside. Defendant then came back outside and stood in the same position for another five minutes. Scheltens estimated that defendant was about 30 feet from her at the time of these incidents. At that time, Scheltens contacted the police and pressed charges against defendant.

¶ 10 Deputy Peter Klockars of the Du Page County Sheriff's Department testified that he was dispatched to a residential complex in unincorporated Willowbrook on the evening of May 31, 2011. Upon Klockars's arrival, Deputy Zeigler was already on the scene, standing next to defendant. Zeigler then left to speak to Scheltens. When Zeigler returned five minutes later, he and defendant discussed Scheltens's report of what had occurred. According to Klockars, defendant seemed "fairly nonchalant about the incident." Defendant stated that he and Scheltens were friends and implied that they were in a relationship. Defendant was advised not to return to Scheltens's residence or to have any contact with her. Defendant indicated he understood. Klockars testified that in speaking with defendant, he detected an odor of alcohol. He also noted that defendant had slurred some words during their conversation.

¶ 11 After speaking with defendant, Klockars and Zeigler went to Scheltens's condominium. According to Klockars, Scheltens appeared "shaken up" and seemed hesitant to speak. The officers told Scheltens that defendant was advised that he was no longer allowed on her property. Scheltens told the officers that she did not wish to pursue charges against defendant. On cross-examination, Klockars stated that he had "very minimal contact" with Scheltens as she mostly spoke with Zeigler.

¶ 12 Deputy Phil Marotta of the Du Page County Sheriff's Department testified that he was dispatched to Scheltens's condominium on the evening of June 2, 2011. When Marotta arrived, Scheltens was visibly upset. Scheltens reported an incident involving defendant. Marotta advised Scheltens that defendant could be charged with disorderly conduct. Scheltens declined to press charges, opting instead to have Marotta instruct defendant to leave her alone. Marotta located defendant nearby and told him to stay away from Scheltens. Marotta testified that during their conversation, defendant had an odor of alcoholic beverage coming from his breath and admitted that he had been drinking.

¶ 13 Corporal Mary Addison of the Du Page County Sheriff's Department testified that she was dispatched to Scheltens's condominium on June 8, 2011. Scheltens told Addison that a card, some flowers, and a candle were left on her property the previous day. According to Addison, Scheltens seemed upset, anxious, and frustrated. Scheltens turned over a copy of the card to Addison but declined to sign a complaint against defendant. Addison encouraged Scheltens to obtain a no-stalking order. On June 9, Addison spoke with defendant. Defendant stated that he placed the card, flowers, and candle on Scheltens's property as an apology. He also acknowledged that he had been previously told by other officers not to have any contact with Scheltens. Addison then reiterated that if defendant had any contact with Scheltens, he would be

arrested. Defendant indicated he understood and that he would have no further contact with Scheltens.

¶ 14 Addison testified that she was again dispatched to Scheltens's condominium on July 31, 2011. When Addison arrived, Scheltens was crying and shaking. Scheltens related another incident involving defendant. After speaking with Scheltens, Addison proceeded to defendant's home and placed him under arrest. Addison testified that at the time of the arrest, defendant had a strong smell of alcohol coming from his breath and his eyes were glassy and bloodshot.

¶ 15 After the State rested, defendant moved for a directed finding. The trial court denied defendant's motion. Defendant then presented the testimony of Anthony Massie. Massie testified that he and defendant reside in the same building. On July 31, 2011, Massie hosted a party attended by defendant. The party guests, including defendant, gathered inside and outside of Massie's residence. Although Massie saw defendant standing outside, he never observed him in the stance described by Scheltens. Massie acknowledged, however, that he was not watching defendant the entire time that he was at the party.

¶ 16 Defendant testified that he first interacted with Scheltens in May 2011 when she was sitting on her patio and he asked her for a cigarette. Defendant spoke with Scheltens another time when he asked her for a cigarette as he was doing laundry in the condominium complex. Defendant's third encounter with Scheltens occurred on Mother's Day 2011. At that time, there was a party in the unit next to Scheltens. One of the guest's cars had stalled in the parking lot. Defendant went to Scheltens's condominium to ask for jumper cables. After defendant returned the jumper cables, he and Scheltens talked. Scheltens invited defendant into her condominium where they kissed and had consensual oral sex. Defendant testified that he next saw Scheltens in June. Scheltens was on her patio while he was outside smoking a cigarette. Scheltens invited

defendant in and they again kissed and had consensual oral sex. Two days later, defendant again saw Scheltens on her patio. He went over to talk to her so she would not think that he was "ducking her." Defendant asked to use Scheltens's bathroom. After he went inside, Scheltens told him that she was calling the police and she wanted him to leave. Later that day, police officers asked him not to return to Scheltens's residence. Defendant stated that this was the first time he was contacted by the police regarding his interactions with Scheltens.

¶ 17 Defendant testified that following the visit from the police he did not contact Scheltens for a few weeks. However, one night in June he decided to visit Scheltens to make sure everything was okay. Defendant knocked on Scheltens's patio door. Scheltens went to answer the door, but sat back down after she saw it was defendant. Later that night, the police visited defendant and told him not to have any contact with Scheltens. Defendant agreed not to see Scheltens again.

¶ 18 Defendant testified that his mom, with whom he lived, said that he needed to resolve the situation with Scheltens. Defendant's mom suggested that defendant buy Scheltens a gift, so defendant bought Scheltens flowers, a candle, and a card. Defendant presented Scheltens the gift on an evening late in June or early in July. At that time, Scheltens was on her patio talking on the phone. Defendant walked up to Scheltens and set the gifts by her feet. Scheltens thanked defendant. As defendant walked away, Scheltens smiled and gave him a "thumbs up." The next day, the police came to see defendant. They warned defendant not to have any more contact with Scheltens or he would be arrested for stalking.

¶ 19 Defendant testified that he saw Scheltens on July 30, 2011. At that time, he asked her why she called the police on him. According to defendant, Scheltens shrugged as if it was not she who had called. On July 31, 2011, defendant was invited to his neighbor's party. Defendant

testified that he was not able to see Scheltens's condominium while he was at the party, even when he was outside. Defendant also denied standing in the stance described by Scheltens. Later that night, the police came to defendant's residence and arrested him.

¶ 20 Following defendant's testimony, the defense rested. On rebuttal, the State recalled Scheltens. Scheltens denied that her neighbor had a party on Mother's Day 2011. In addition, she denied ever loaning defendant jumper cables or having consensual oral sex with defendant.

¶ 21 Following closing arguments, the trial court found defendant guilty of both counts of stalking. Defendant then filed a motion for a new trial, which the trial court denied. Thereafter, the court merged the two counts and sentenced defendant to an extended term of five years' imprisonment and one year of mandatory supervised release. Defendant's motion to reconsider sentence was denied. On direct appeal, defendant argued that the trial court considered improper evidence at his sentencing hearing. *People v. Tims*, 2013 IL App (2d) 120096-U, ¶ 2. We affirmed defendant's sentence, but vacated the portion of the trial court's order imposing a one-year term of mandatory supervised release and remanded the matter to allow the State to seek modification of that order before the trial court. *People v. Tims*, 2013 IL App (2d) 120096-U, ¶¶ 6, 8. On remand, the trial court modified the sentencing order to reflect a term of four years' mandatory supervised release.

¶ 22 On December 9, 2014, defendant filed a *pro se* petition for postconviction relief. In the petition, defendant asserted various grounds for relief, including that: (1) trial counsel was ineffective for failing to "challenge proof of residency"; (2) trial counsel was ineffective for failing to interview and call as witnesses "two people who could have corroborated [defendant's] alibi"; (3) the "stay away" warning should have been more specific; (4) trial counsel failed to interview Deputy Zeigler, who, in discovery, stated that Scheltens let defendant use her

bathroom on May 31, 2011; (5) trial counsel mistakenly told the court at the posttrial hearing that Zeigler's testimony had been elicited at trial; (6) "Court error" due to a discrepancy between a comment made by the trial court and a comment made "on appeal" by an unidentified source; (7) trial counsel did not challenge the initial arrest; (8) trial counsel did not prepare for the events that occurred prior to defendant's arrest; and (9) trial counsel failed to "inspect" or "request proof" of evidence that Scheltens saw a doctor who prescribed medication for anxiety stemming from defendant's conduct. In an affidavit attached to his petition, defendant also suggested that (1) if called at trial, an individual named Andre Fields would have testified that he saw defendant give Scheltens "the gift of apology, and that it was in fact consensual" and (2) Scheltens wrote a letter of apology to defendant, a copy of which was appended to the affidavit.

¶ 23 On January 30, 2015, the trial court advanced the petition to the second stage of the postconviction process and appointed a public defender to represent defendant. On June 26, 2015, postconviction counsel filed a motion to withdraw. In her motion, counsel stated that after carefully reviewing the entire record and controlling law at the time of the conviction and sentence and after conducting a thorough review of the claims raised by defendant, she concluded that filing an amended postconviction petition would be frivolous, patently without merit, and unsupportable as a matter of law. Counsel attached to her motion a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb 6, 2013) and a memorandum of law setting forth a statement of facts, a purported list of the claims raised by defendant in his *pro se* petition, and reasons why these claims do not merit relief. Counsel delivered a copy of the motion to defendant and advised him that he would be given an opportunity to respond to the motion and raise any issues he deems reviewable. In her memorandum, counsel identified the following as the issues raised by defendant in his *pro se* petition: (1) trial counsel failed to

interview and call Anthony Massie as an alibi witness; (2) Andre Fields would testify that the encounter on June 7, 2011, was consensual; (3) Scheltens wrote an apology letter to defendant; (4) trial counsel failed to investigate and challenge defendant's residency; (5) the "stay away" warning should have been more explicitly and specifically defined; (6) trial counsel failed to interview and call Deputy Zeigler; and (7) trial counsel failed to investigate and require proof of Scheltens's anxiety medication. Attached to postconviction counsel's memorandum were the affidavits of the attorney who represented defendant at trial and an investigator from the public defender's office.

¶ 24 At a hearing on June 26, 2015, the court asked the State whether it intended to file any "responsive pleadings" to postconviction counsel's motion to withdraw. The assistant state's attorney responded, "I don't believe that it's the People's position to make any argument at this point." The court stated that it would provide defendant an opportunity to review the motion to withdraw, and it set a date to rule on the motion. Prior to concluding, defendant told the court that his arrest "should have been challenged." Postconviction counsel responded that she "never heard that argument before" and that "[t]his is the first time [defendant] had mentioned that he's claiming something ineffective about filing a motion pretrial." The court told counsel, "if you want to discuss it with [defendant] and if that changes any of your positions on the pending motion, then put it on the call and let me know."

¶ 25 On the following court date, August 7, 2015, the attorneys introduced themselves. Immediately thereafter, the court ruled on the motion to withdraw. The court stated that it had read the motion as well as *People v. Kuehner*, 2015 IL 117695, a recent decision from the Illinois Supreme Court. The court questioned whether the State was required to file a motion to dismiss, but concluded that such a motion was unnecessary. The court then stated that it "accept[s] and

grant[s postconviction counsel's] motion, and find[s] that each and every allegation raised by the defendant in his *pro se* petition are [*sic*] in fact frivulous [*sic*] and patently without merit given the information provided in the motion." Therefore, the court granted the motion to withdraw and dismissed defendant's postconviction petition "*sua sponte* as frivolous and patently without merit." Thereafter, defendant initiated the present appeal.

¶ 26 II. ANALYSIS

¶ 27 On appeal, defendant raises two issues. First, he argues that the trial court erred in granting postconviction counsel's motion to withdraw because counsel did not address why all of the claims raised in his *pro se* postconviction petition were frivolous or patently without merit. Second, defendant argues that the trial court erred in *sua sponte* dismissing his postconviction petition at the second stage of proceedings.

¶ 28 The Act provides a mechanism by which a criminal defendant may challenge his or her conviction. 725 ILCS 5/122-1 *et seq*. (West 2014). To be accorded relief under the Act, a defendant must establish "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both" in the proceedings which resulted in his or her conviction. 725 ILCS 5/122-1(a)(1) (West 2014). Because a postconviction proceeding is collateral in nature, it is limited to constitutional issues that could not have been addressed on direct appeal. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008).

¶ 29 In noncapital cases, the Act provides a three-stage process for the adjudication of a postconviction petition. *People v. Johnson*, 2017 IL 120310, ¶ 14. At the first stage, the trial court must independently review the petition and determine whether the allegations therein, if taken as true, demonstrate a constitutional violation or whether they are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 9. If

the trial court affirmatively determines that the petition is neither frivolous nor patently without merit or if it takes no action on the petition within 90 days after the petition is filed and docketed, the petition advances to the second stage, at which point counsel may be appointed to represent an indigent defendant. 725 ILCS 5/122-2.1(a)(2), (b), 122-4 (West 2014); *Tate*, 2012 IL 112214, ¶ 10; *People v. Brooks*, 221 Ill. 2d 381, 389 (2006); *People v. Lentz*, 2014 IL App (2d) 130322, ¶ 7. The State must then answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2014). Thereafter, the trial court determines whether the petition and any accompanying documentation make " 'a substantial showing of a constitutional violation.' " *Tate*, 2012 IL 112214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). If no such showing is made, the petition is dismissed. *Tate*, 2012 IL 112214, ¶ 10. However, if the petition survives the second stage, it advances to the third stage where the trial court conducts an evidentiary hearing. *Tate*, 2012 IL 112214, ¶ 10.

¶ 30 At the outset, we note that the State concedes that the trial court erred in *sua sponte* dismissing defendant's postconviction petition at the second stage of proceedings. See 725 ILCS 5/122-2.1(b), 5 (West 2014); *People v. Starks*, 2012 IL App (2d) 110324, ¶ 23 (holding that the trial court loses its ability to dismiss a postconviction petition *sua sponte* after the petition advances to the second stage of the postconviction process). Upon review of the record, we accept the State's concession. Our inquiry, however, does not end there. As noted above, defendant also claims that the trial court erred in granting postconviction counsel's motion to withdraw because counsel did not address why all of the claims raised in his *pro se* postconviction petition were frivolous or patently without merit. We turn to that issue now.

¶ 31 The right to counsel in postconviction proceedings is statutory. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). The Act requires postconviction counsel to provide a "reasonable level of

assistance" to a defendant. 725 ILCS 5/122-4 (West 2014); *Lander*, 215 Ill. 2d at 583. Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the Act. *Lander*, 215 Ill. 2d at 584. Rule 651(c) requires a showing that postconviction counsel has: (1) consulted with the defendant to ascertain his or her contentions of deprivation of constitutional rights; (2) examined the record of the proceedings at the trial; and (3) made any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *Lander*, 215 Ill. 2d at 584. "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). Thus, when postconviction counsel determines that no meritorious issues are presented by the claims alleged in defendant's *pro se* petition, counsel may move to withdraw. See *Greer*, 212 Ill. 2d at 209 ("[T]he legislature did not intend to require appointed counsel to continue representation of a postconviction defendant after counsel determines that defendant's petition is frivolous and patently without merit.").

¶ 32 In *People v. Kuehner*, 2015 IL 117695, our supreme court provided guidance on handling postconviction counsel's motion to withdraw after a *pro se* postconviction petition advances to the second stage on the basis of an affirmative judicial determination that the petition is neither frivolous or patently without merit. In *Kuehner*, the defendant filed a *pro se* petition for postconviction relief raising claims of ineffective assistance of trial and appellate counsel. *Kuehner*, 2015 IL 117695, ¶ 5. After conducting its first-stage review of the defendant's *pro se* petition, the trial court entered an order finding that the petition was neither frivolous nor patently without merit. *Kuehner*, 2015 IL 117695, ¶ 8. As such, the court docketed the petition

for second-stage proceedings and appointed counsel to represent the defendant. *Kuehner*, 2015 IL 117695, ¶ 8. Subsequently, the State filed a motion to dismiss and appointed counsel filed a motion to withdraw. *Kuehner*, 2015 IL 117695, ¶¶ 8-9. Although appointed counsel concluded that the defendant's claims were without merit or unsupportable as a matter of law, she failed to "address, analyze, or even mention" some of the claims raised in the defendant's *pro se* petition. *Kuehner*, 2015 IL 117695, ¶ 9. Nevertheless, the trial court granted both appointed counsel's motion to withdraw and the State's motion to dismiss. *Kuehner*, 2015 IL 117695, ¶ 9. The appellate court affirmed, prompting the defendant to appeal the matter to the supreme court. *Kuehner*, 2015 IL 117695, ¶¶ 10-12.

¶ 33 In *Kuehner*, the supreme court stated that when a postconviction petition advances to the second stage because the trial court made an affirmative determination that the petition is neither frivolous nor patently without merit, postconviction counsel's burdens and obligations are "decidedly higher" than when the petition advances to the second stage by default. *Kuehner*, 2015 IL 117695, ¶¶ 18-19. The court explained that in the former scenario, the trial court already determined that, on its face, the petition was neither frivolous nor patently without merit. *Kuehner*, 2015 IL 117695, ¶ 20. Thus, "appointed counsel's task is not to second guess the trial court's first-stage finding but rather is to move the process forward by cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication." *Kuehner*, 2015 IL 117695, ¶ 20. Nevertheless, the court recognized that there may be situations where appointed counsel "discovers something that ethically would prohibit [him or her] from actually presenting the defendant's claims to the court." *Kuehner*, 2015 IL 117695, ¶ 21. In such instances, appointed counsel "bears the burden of demonstrating, with respect to each of the defendant's *pro se* claims, why the trial court's initial assessment [that the *pro se* claims are neither frivolous

nor patently without merit] was incorrect." *Kuehner*, 2015 IL 117695, ¶ 21. The court elaborated that "a motion to withdraw filed subsequent to a trial court's affirmative decision to advance the petition to the second stage does not ask the trial court to conduct its first-stage assessment a second time but rather seeks to bring to the trial court's attention information that was not apparent on the face of the *pro se* petition at the time such assessment was made." *Kuehner*, 2015 IL 117695, ¶ 21. Therefore, "where a *pro se* petition advances to the second stage on the basis of an affirmative judicial determination that the petition is neither frivolous nor patently without merit, appointed counsel's motion to withdraw must contain at least some explanation as to why all of the claims set forth in that petition are so lacking in legal and factual support as to compel his or her withdrawal from the case." *Kuehner*, 2015 IL 117695, ¶ 27.

¶ 34 Applying these principles to the facts before it, the *Kuehner* court concluded that appointed counsel's motion to withdraw was deficient. *Kuehner*, 2015 IL 117695, ¶ 23. The court found that while appointed counsel did an "admirable job" of explaining why some of the claims raised in the defendant's *pro se* petition lacked merit, she failed to offer an explanation with respect to *each and every* claim asserted in the *pro se* petition. *Kuehner*, 2015 IL 117695, ¶ 23. The court remanded the cause for further second-stage proceedings with the appointment of new counsel. *People v. Kuehner*, 2015 IL 117695, ¶¶ 24-25.

¶ 35 Turning to the facts in this case, defendant argues that the trial court erred in granting postconviction counsel's motion to withdraw because she did not address all of the issues raised in his *pro se* petition. Defendant further asserts that postconviction counsel's motion to withdraw misstated his claim regarding alibi witnesses and inadequately addressed his claim regarding trial counsel's failure to interview and call Deputy Ziegler. The State responds that postconviction counsel addressed all of the claims raised in defendant's *pro se* petition. The

State also contends that defendant's arguments that postconviction counsel misstated or inadequately addressed some of the other claims raised in his *pro se* petition lack merit.

¶ 36 At this point, we briefly pause to note that the parties dispute the appropriate standard of review. The State advocates for application of the abuse-of-discretion standard since that is the standard applied when reviewing a motion to withdraw filed during pretrial proceedings. *People v. Segoviano*, 189 Ill. 2d 228, 245 (2000); *People v. Howard*, 376 Ill. App. 3d 322, 335-38 (2007). Defendant, in contrast, urges application of the *de novo* standard of review. In support of his position, defendant cites to a passage from *Kuehner* in which the supreme court stated that when postconviction counsel's motion to withdraw does not address each claim in a defendant's *pro se* petition, the motion "must be denied." *Kuehner*, 2015 IL 117695, ¶ 22. The language referenced by defendant from *Kuehner* suggests that a court has no discretion but to deny a motion to withdraw *if* it determines that each and every claim raised in a defendant's *pro se* petition is not addressed in postconviction counsel's motion to withdraw. However, the central issue here concerns *whether* postconviction counsel addressed each and every claim raised in defendant's *pro se* petition. We review this decision for an abuse of discretion as it requires the trial court to evaluate postconviction counsel's motion to withdraw in light of the allegations set forth in the defendant's *pro se* petition. *People v. Richey*, 2017 IL App (3d) 150321, ¶ 20 (reviewing for an abuse of discretion the defendant's claim that the trial court improperly granted postconviction counsel's motion to withdraw because she failed to address each and every claim raised in the defendant's *pro se* petition). An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991); *People v. Nixon*, 2016 IL App (2d) 130514, ¶ 36.

¶ 37 Having determined the proper standard of review, we now turn to defendant's claim that the trial court improperly granted postconviction counsel's motion to withdraw because the motion did not address all of the issues raised in his *pro se* petition. According to defendant, he raised ten claims in his "*pro se* petition and accompanying evidence," yet postconviction counsel's motion to withdraw discussed only seven of these claims. Specifically, defendant asserts that postconviction counsel failed to address allegations of " 'court error,' trial counsel failing to challenge the arrest, and trial counsel not preparing for the events that occurred prior to the arrest." With respect to the alleged "court error," the State asserts that there was nothing for postconviction counsel to argue because defendant did not reference any specific court error in his *pro se* petition. The State further contends that the remaining two claims that defendant alleges postconviction counsel failed to address in her motion to withdraw are "simply additional variants" on allegations addressed elsewhere in the motion.

¶ 38 One of the claims in defendant's *pro se* petition was captioned "Court error." In this section of his petition, defendant suggested that there was a discrepancy between a comment made by the trial court and a comment made "on appeal" by an unidentified source that impacted his conviction. The State seemingly acknowledges that postconviction counsel did not address this allegation in her motion to withdraw. It suggests, however, that postconviction counsel's omission was excusable because defendant did not reference any specific court error in his *pro se* petition. Even so, postconviction counsel was required to consult with defendant to ascertain his allegations of deprivation of constitutional rights (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) and offer "at least some explanation" as to why this claim lacks merit (*Kuehner*, 2015 IL 117695, ¶ 27). Thus, if postconviction counsel was unable to ascertain the basis of this claim through

consultation with defendant, she should have articulated that conclusion in her motion to withdraw. Instead, postconviction counsel ignored this claim outright.

¶ 39 Likewise, we find that postconviction counsel's motion to withdraw failed to address the two *pro se* claims related to defendant's arrest. The State asserts that these claims are variants on the theme of trial counsel's failure to challenge proof of defendant's residence and the inadequacy of the "stay away" warning. However, the sections of the motion to withdraw which address proof of defendant's residency and the "stay away" warning do not reference defendant's arrest. Furthermore, the record contradicts the State's assertion that the arrest issues were implicitly included in the motion to withdraw. After the motion to withdraw was filed, defendant, in open court, explicitly raised the claim regarding trial counsel's failure to challenge his arrest. In response, postconviction counsel stated, "[t]his is the first time [defendant] had mentioned that he's claiming something ineffective about filing a motion pre-trial. I've never heard this argument before." As noted above, however, defendant did allege in his *pro se* petition that trial counsel failed to challenge his arrest. Moreover, since postconviction counsel stated that she did not know that this issue was included in the *pro se* petition, she could not have addressed it, even implicitly, in the motion to withdraw.

¶ 40 Defendant also claims that postconviction counsel misstated his claim regarding trial counsel's failure to interview and call alibi witnesses. In particular, defendant alleged in his *pro se* petition that trial counsel failed to "interview and call as witnesses two people who could have corroborated [defendant's] alibi." In the motion to withdraw, postconviction counsel stated "[d]efendant alleges that he was denied effective assistance of trial counsel where trial counsel failed to interview and call as an alibi witness at the [d]efendant's [b]ench [t]rial Anthony Massie." Yet, defendant's *pro se* petition did not state that Massie was one of the two alibi

witnesses whom he was referencing. Indeed, as defendant points out, it is unlikely that defendant was referring to Massie since Massie testified at defendant's trial. Further, even if Massie was one of the two alibi witnesses, the motion to withdraw does not identify the other alleged witness. The State responds that postconviction counsel is not required to search for witnesses when a defendant does not provide the identity of the witnesses. See *People v. Johnson*, 154 Ill. 2d 227, 247-48 (1993). While it is true that postconviction counsel is not obligated to "actively search for sources outside the record that might support general claims raised in a post-conviction petition," (*Johnson*, 154 Ill. 2d at 247), this does not excuse postconviction counsel from consulting with a defendant to ascertain his precise claims (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). To the extent that postconviction counsel viewed this claim as vague, she could have consulted with defendant to discover the identity of these two witnesses. If defendant was unable to provide the names of the alleged witnesses, postconviction counsel should have articulated that conclusion in her motion to withdraw. Instead, postconviction counsel recasted the claim as an issue that was not raised in defendant's *pro se* petition.

¶ 41 Finally, defendant challenges postconviction counsel's motion to withdraw with respect to the claim regarding Deputy Zeigler. In his *pro se* petition, defendant alleged that trial counsel failed to interview and call Zeigler, who apparently stated in a discovery document that on May 31, Scheltens let defendant into her apartment to use the bathroom. According to defendant, Zeigler's testimony that Scheltens let defendant into her residence on May 31, 2011, would have impeached Scheltens and affected her credibility. In her motion to withdraw, postconviction counsel stated that this claim was frivolous and patently without merit for various reasons. For instance, postconviction counsel stated that "calling Deputy Zeigler to elicit said statement would have been for impeachment purposes only and not as substantive evidence."

Postconviction counsel further proffered that even if trial counsel should have called Zeigler, the failure to do so "was of such slight significance that it would not have affected the outcome of the trial" and, therefore, "any potential omission of counsel would not have prejudiced the Defendant." Defendant claims that postconviction counsel did not adequately address his claim regarding Deputy Zeigler in her motion to withdraw. However, all *Kuehner* requires is "at least some explanation" as to why all of the claims are frivolous and patently without merit. *Kuehner*, 2015 IL 117695, ¶ 27. Contrary to defendant's contention, postconviction counsel's explanation met that minimum threshold on this issue.

¶ 42 In short, the trial court accepted and granted postconviction counsel's motion to withdraw on the basis that each and every allegation raised by defendant in his *pro se* petition for postconviction relief was frivolous and patently without merit. This finding constituted an abuse of discretion because, as noted herein, postconviction counsel did not address each and every claim raised in defendant's *pro se* petition. Postconviction counsel failed to address defendant's *pro se* claims regarding "court error" and trial counsel's failure to challenge his arrest. Further, postconviction counsel improperly recast defendant's *pro se* claim regarding trial counsel's failure to interview and call two alibi witnesses as an issue that was not raised in defendant's *pro se* petition. As such, postconviction counsel did not comply with *Kuehner*'s mandate that a motion to withdraw contain "at least some explanation" why all of the claims set forth in a postconviction petition lack merit. Accordingly, we reverse the circuit court's grant of postconviction counsel's motion to withdraw and the State's motion to dismiss and remand this matter for further second-stage proceedings, including the appointment of new postconviction counsel. See *Kuehner*, 2015 IL 117695, ¶¶ 25 (recognizing the challenges that defendant and counsel would face on remand if the court were to order counsel's continued participation);

People v. Jackson, 2015 IL App (3d) 130575, ¶ 17 ("[I]f a trial court grants a motion to withdraw after the postconviction petition has advanced to the second stage of postconviction proceedings and counsel fails to explain why all of the claims are frivolous or patently without merit, the proper remedy is to reverse and appoint new postconviction counsel on remand"). If, upon remand, appointed counsel wishes to file another motion to withdraw, he or she is free to do so. However, the motion must include "at least some explanation" why each and every claim set forth in defendant's *pro se* petition is either frivolous or patently without merit. *Kuehner*, 2015 IL 117695, ¶ 27. Finally, we note that our decision should not be construed as an indication that the allegations set forth in defendant's *pro se* petition have merit.

¶ 43 The dissent's approach intimates that a *pro se* defendant must include a certain level of specificity in his or her postconviction petition. However, Rule 651(c) obligates appointed counsel to consult with the defendant to ascertain his or her allegations of error. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Indeed, as the supreme court stated in *Kuehner*, the primary purpose of Rule 651(c) is to "move the process forward by cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication." *Kuehner*, 2017 IL 117695, ¶ 20. Requiring appointed counsel to consult with a *pro se* defendant about points that are unclear in his or her postconviction petition would not place an onerous burden on appointed counsel. To hold otherwise would undermine postconviction counsel's obligation under Rule 651(c) to consult with the defendant.

¶ 44 III. CONCLUSION

¶ 45 For the reasons set forth above, the judgment of the circuit court of Du Page County is reversed and the case is remanded for further proceedings in accordance with this decision.

¶ 46 Reversed and remanded with directions.

¶ 47 JUSTICE BIRKETT, concurring in part and dissenting in part:

¶ 48 I agree with my colleagues that the trial court's order dismissing defendant's postconviction petition must be reversed and remanded for further proceedings under the Act. The Act does not allow *sua sponte* dismissal by a trial court once a petition has been docketed for consideration. See 725 ILCS 5/122-2.1(b) (West 2014). However, I respectfully dissent from the majority's holding that the trial court abused its discretion in granting postconviction counsel's motion to withdraw.

¶ 49 The following additional background is necessary to understand why I believe there was no abuse of discretion on the part of the trial court in granting the motion to withdraw. On December 20, 2013, defendant appeared before the trial court. Pursuant to our Rule 23 order, the State requested imposition of a four year period of mandatory supervised release (MSR). Defendant objected, stating that he "was given a year already." Over defendant's objection, the trial court imposed a four year term of MSR. The trial court then asked defendant if he had some other matter that he wished to be addressed. Defendant stated, "[y]es, I have a problem with my post-petition [*sic*] filing." The trial court asked defendant if he had filed a postconviction petition and defendant said, "[n]o, I haven't filed one. I need some help to address it." Defendant explained that he wanted to challenge the following on due process grounds:

> "that the State did not prove fair notice, nor give warning not to live 30 feet from plaintiff, not that I am not to be seen doing anything at my residence, without due process. Under Illinois law, any or all no-contact orders must go on a court petition. Wherefore, to inform or give fair notice to refrain, he or she, from any foreseeable damage, so please Your Honor ***."

¶ 50 The trial court then explained the processes involved in a post-conviction proceeding and that upon filing of a petition defendant could request appointment of counsel. Defendant again asked, "[t]here is no way I can challenge some type of like, the State said they gave me notice, there is no way I can challenge that?" The trial court again explained that defendant could raise any "constitutional issues or arguments that he wanted to at that time." Defendant was remanded to the Department of Corrections.

¶ 51 As the majority explains, defendant's postconviction petition makes a number of claims. Defendant's first claim is that he is actually innocent based on newly discovered evidence. In the next paragraph of defendant's petition he alleges that trial counsel was ineffective for failing to "challenge proof of residency and interview and call as witnesses two people who could have corroborated petitioner's alibi." Defendant alleges that he "informed [his] trial attorney that at the time of the offense, [he] was at [his] residence enjoying a party with [his] neighbor, Anthony Massie. And for that reason, [he] had nothing to do with causing fear and emotional distress for doing so." In this paragraph defendant also alleges that a "stay away" should be made to be "more specific as regards how and where 'stay away' is to be carried out and the degree of restriction of the defendant's personal freedom."

¶ 52 In the next paragraph of the petition defendant alleges that a "stay away" in this case "places more stringent restrictions on defendant's personal freedom." Defendant maintains in this paragraph that his "right of personal freedom cannot be protected without a time limit." He alleges that his "last encounter to [*sic*] the plaintiff was on June 7, 2011" and that his arrest was not until "one month and twenty two days after the 'stay away' warning."

¶ 53 In the next paragraph, defendant explains why he pled not guilty. He states that "[t]here were [*sic*] no forcible entry if I were [*sic*] in fact standing some 30 feet [from] where I live. A

reasonable person is not going to plead guilty for coming and going from there [*sic*] resident [*sic*] without fair warning, refraining what not to do, courts order only." Defendant acknowledges that Deputy Peter Klockars testified that he told defendant that he was no longer allowed on the property. Defendant alleges that, "[c]learly, Deputy Peter and trial counsel, don't understand the right to do so. The right to enjoy the some [*sic*] resident [*sic*], without externally imposed restraints, and immunity from an obligation or duty."

¶ 54 In the next paragraph of his petition defendant carries on the theme that he should not have been charged. He states that "[t]rail [*sic*] counsel know [*sic*] or should have known a reasonable person remaining present outside there [*sic*] resident [*sic*], is not a violation nor have anything to do with [*sic*]. Pursuant to 720 ILCS 5/12(a) (1),(2) fear and emotional distress. The charges thereof, should have been cleared up."

¶ 55 In the next paragraph, defendant alleges that trial counsel failed to interview deputy Ziegler, who would have testified that on "May 31, 2011, in that incident, the defendant knocked on her door and asked to us the bathroom, the victim let the defendant in."

¶ 56 Defendant alleges in the next paragraph that trial counsel confused the court or committed plain error during closing arguments by stating, "and I believe the first officer testified that he—she did let him in to go use the bathroom."

¶ 57 Defendant next alleges "court error." Defendant quotes the trial court's finding that "[o]n the 31st of July—but there is no doubt in my mind the defendant stood a distance from her apartment, looked over at her several times in that afternoon, and attempted to communicate with her." Defendant cites the definition section of the stalking statute that provides, "[p]lacing a person under surveillance means: (1) remaining present outside the person's school, place of employment, vehicle, other place occupied by the person, or residence other than the residence

of the defendant; or (2) placing an electronic tracking device on the person or the person's property." See 720 ILCS 5/12-7.3(c)(7) (West 2014). Defendant states that "[o]n appeal, they believe that: if it weren't from him being in the parking lot, this would have been a misdemeanor." (Defendant provides no citation or documentation for this comment). Defendant then states "[w]hereupon arguing [*sic*] for reduce [*sic*] sentencing. Their understanding was not clear. It would not be logical to say this would have been a misdemeanor without an arrest; there's no warrant for an arrest. This case would not have gone to trail [*sic*], wherefore, counselor lack [*sic*] the challenged [*sic*] of the initial arrest." Defendant complains that "[m]y resident [*sic*] should have not been used to mean 'stalking'."

¶ 58 In his next paragraph, captioned "No Motion Filed," defendant again states, "[c]learly, remaining present outside my resident [*sic*] is not a violation." Defendant quotes a passage from the record of proceedings where trial counsel stated that he considered filing a motion "to keep out all the past incidences as being more prejudicial than probative ***." Defendant alleged that the "'course of conduct' should, in [his] opinion, need to be cleared up. Trial counsel failed to demonstrate the feasibility were [*sic*] petitioner have a right to be in his own person, and enjoy his resident [*sic*] as to plaintiff, with no time restricted."

¶ 59 Defendant's next paragraph is captioned "Insufficient Evidence." In it, he claims that trial counsel never "inspect [*sic*] newly discovered claim brought up at trial that the victim was prescribed medication for anxiety, stemming from [his] present [*sic*] in front of [his] resident [*sic*]." Defendant states that counsel should have requested "proof of doctor statement or prescription. Again, providing only if there's a crime for being at my resident [*sic*]."

¶ 60 Defendant's affidavit attached to his petition begins with another reference to the definition of surveillance in the stalking statute. See 720 ILCS 5/12-7.3 (c)(7) (West 2014). He

avers in paragraph two that "plaintiff have [*sic*] a right to view the parking lot from her back entrance" and "petitioner have [*sic*] the right to look her way and remain present outside" and "[he had] the right to have been even closer to her resident [*sic*] unlike the 30 feet as she describe [*sic*]." Defendant attached various photographs to the affidavit: (1) a picture of his front entrance: (2) one of defendant outside of his residence, which he said "demonstrate [*sic*] what should have been challenged, and right to do so pass [*sic*] and present"; (3) the back of the victim's residence, with a notation to the stalking statute's definition in section 12-7.3 (7), (8) in the Criminal Code of 2012 (Code) (720 ILCS 5/12-7.3 (7),(8) (West 2014)), which defendant said "demonstrates how the plaintiff can view the parking lot" and "demonstrate [*sic*] how close the petitioner can be to the plaintiff resident [*sic*]." Defendant also attached documents showing his address to be 14B Kingery Quarter, Apartment 105, a fact that was never in dispute.

¶ 61 To support his claim of actual innocence defendant attached a type-written letter that purports, by its contents and heading, to be from the victim. The letter begins with an apology, stating "I never intended [for] you to go to prison." The letter's contents are inconsistent with the victim's trial testimony in that she describes a sexual relationship with defendant and she explains why she became so upset with defendant. The letter is not signed or authenticated in any way and defendant does not explain how or when he came into possession of the letter.[1]

¶ 62 On December 23, 2014, the trial court took defendant's *pro se* petition under advisement and informed defendant that if it determined that the petition had merit, it would appoint counsel.

[1] Postconviction counsel's memorandum in support of her motion to withdraw states that the letter was found in defendant's hallway and defendant did not claim any personal knowledge that the victim wrote the letter.

The matter was continued to January 30, 2015, for status. On that date the trial court announced its finding following its first stage review. Specifically, the trial court held:

> "Let me choose my words carefully. I'm going to go ahead and appoint counsel, and I'm going to not dismiss this case at the first stage. There was a document submitted with the petition which purports—although it is not signed, purports to be a statement from the victim in this case. I'm very skeptical about that but, nevertheless, he filed that with his petition and we're going to have a hearing on this petition. And I expect that both sides will vigorously investigate that claim. It certainly would be inconsistent with the statements and the testimony of the victim as I reviewed my file. If, of course, it is a fraudulent document and determined to be such, the petitioner will suffer the consequences. But I'm not going to dismiss the petition. I'm going to appoint counsel. Public defender will be appointed."

¶ 63 The trial court stated that there "may be other issues in terms of the petition; other grounds for the State to object," but said that "what I see here is too serious to even consider dismissing it at this time." The matter was continued for filing of an amended postconviction petition. On May 20, 2015, appointed counsel reported to the court that defendant had been in a car accident and was unavailable. Counsel requested that the case be continued because defendant wanted to be in court since counsel did not anticipate filing anything. On May 22, 2015, appointed counsel told the court that the State informed her of a new Illinois Supreme Court case, *People v. Kuehner*, 2015 IL 117695. Counsel said the case would affect how she proceeded because she planned to file a motion to withdraw. Counsel requested that the case be continued to June 26, 2015. Her request was granted.

¶ 64 On June 26, 2015, appointed counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) along with her motion to withdraw as postconviction counsel and a memorandum of law in support of the motion to withdraw. Counsel informed the trial court that she had provided copies to defendant and requested a continuance for defendant to review her motion. Counsel assured the court that her motion dealt with the merits of defendant's petition and there were no "attorney-client issues." Defendant said that he had a question and the court told him to ask his attorney. Defendant said he was sure that he had already asked her, but that he never got it resolved. Defendant explained that in his petition he was trying to challenge his arrest "for surveilling." He said, "[s]o, I was asking her to challenge that I was in my residence and according to the statute, I'm not doing anything wrong. And that's—that makes me—like, why should I bring in witnesses when if I were to go to trial, they can't ask me what I am doing wrong."

¶ 65 The trial court said it did not totally follow defendant, and questioned whether he was making a claim of ineffective assistance of trial counsel for not challenging defendant's arrest. Postconviction counsel said, "this is the first time [defendant] has mentioned that he's claiming something ineffective about filing a motion pretrial. I've never heard that argument before. Defendant responded, "[t]hat's the first line of my defense." The trial court said that postconviction counsel could speak to defendant to determine whether "that changes any of your positions on the pending motions." The matter was continued to August 7, 2015.

¶ 66 On August 7, 2015, the trial court said that it had read *Kuehner* and believed that, based upon the supreme court's statement that a motion to withdraw is analogous to a motion to reconsider, it had the authority to dismiss the petition "if the court determines that each and every one of the issues raised in the *pro se* petition have been addressed." As the majority notes,

the trial court agreed with post-conviction counsel that "given the information provided in the motion" each and every allegation raised by defendant in his *pro se* petition was frivolous and patently without merit.

¶ 67 My colleagues conclude that our supreme court's holding in *People v. Kuehner*, 2015 IL 117695, requires reversal of the trial court's order granting postconviction counsel's motion to withdraw because her motion failed to address three of defendant's *pro se* claims: (1) court error; (2) trial counsel's failure to challenge defendant's arrest; and (3) trial counsel's failure to interview and call two alibi witnesses. I disagree. First, in *Kuehner*, postconviction counsel failed to file a Rule 651(c) certificate. *Kuehner*, 2015 IL 117695, ¶ 11. In the instant case, postconviction counsel filed a 651(c) certificate, which gives rise to a presumption that postconviction counsel provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19; *People v. Perkins*, 229 Ill. 2d 34, 52 (2007). ("[w]e do not intend to suggest that an attorney's Rule 651(c) certificate is conclusive of compliance and can never be rebutted.") Our 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." *Perkins*, 229 Ill. 2d at 44. While postconviction counsel in the instant case did not file an amended petition, she explained in her memorandum of law why the substance of each of defendant's claims was without merit. The overarching claim in defendant's *pro se* petition is that he never should have been arrested because he was at or about his own residence when the alleged surveillance activities took place. This was the theme of defendant's "court error" claim that the majority believes postconviction counsel failed to address. Defendant maintained that his residence "should have not been used as to mean 'stalking.'" Postconviction counsel explained in her memorandum of law that trial testimony established the proximity of

defendant's residence to the victim's residence. Counsel stated, "[s]ubsequent conference between the defendant and appointed post-conviction counsel have not led to additional merit to this claim." Indeed, it appears from defendant's *pro se* petition that he misunderstands the definition of surveillance in Illinois' stalking statute. See 720 ILCS 5/12-7.3(c)(7)(1) (West 2014). Contrary to the majority's view, postconviction counsel addressed defendant's claims regarding his "residence" and explained that she had conferred with defendant regarding the claim.

¶ 68 Defendant's *pro se* petition does state, as the majority notes, that this case would not have gone to trial had trial counsel "challenged the initial arrest." This phrase is continued in the "court error" paragraph and is repeated in the paragraph entitled "No Motion Filed." Both of these paragraphs are based on defendant's claim that because of the proximity of his residence to the victim's, "remaining outside my resident [*sic*] is not a violation." While postconviction counsel could have elaborated on her explanation, her motion does "at least" provide "some explanation" as to why this claim is frivolous and patently without merit.

¶ 69 Finally, the majority concludes that postconviction counsel "recasted" defendant's claim regarding trial counsel's failure to interview and call alibi witnesses "as an issue that was not raised in defendant's *pro se* petition." *Supra*, ¶ 40. Defendant's *pro se* petition alleges that trial counsel "failed to challenge proof of residency and interview and call as witnesses two people who could have corroborated petitioner's alibi. Prior to trial, I informed my trial attorney at the time of the offense I was at my resident [*sic*] enjoying a party with my neighbor, Anthony Massie." There are no supporting documents for defendant's claim that trial counsel failed to interview "alibi witnesses." In fact, there was no disclosure of an alibi defense. In his testimony at trial, defendant admitted having contact with the victim on multiple occasions but offered an

innocent explanation for those contacts. The only witness defendant names is Massie, who, as postconviction counsel explained, "actually testified" for defendant. Even a *pro se* petitioner "must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 255 (2008). There is a presumption that counsel reviewed this claim with defendant, as she avers in her 651(c) certificate. While counsel could have been more specific, I do not believe the trial court abused its discretion in accepting counsel's explanation, especially in light of the fact that there was no alibi defense offered at trial.

¶ 70 Our supreme court explained in *Kuehner* that the *pro se* claims that postconviction counsel failed to address were "specific, substantial and *sufficiently present* in the petition to warrant appointed counsel's attention." (Emphasis added.) *Kuehner*, 2015 IL 117695, ¶ 23. Unlike in *Kuehner*, defendant's reference to "two people who could have corroborated petitioner's alibi" is not sufficiently present in the petition to warrant any more attention than counsel gave it. Counsel did provide "at least some explanation" as to why this "alibi" claim was frivolous and patently without merit.

¶ 71 In conclusion, I agree with the majority that the trial court's order dismissing defendant's *pro se* petition must be reversed. The Act does not allow *sua sponte* dismissal once a petition has been docketed. However, I believe that trial counsel's 651(c)'s certificate, together with her motion to withdraw and supporting memorandum of law, satisfy *Kuehner's* requirement that postconviction counsel provide "at least some explanation" as to why all of defendant's claims are frivolous and patently without merit.