

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).

2017 IL App (4th) 150523-U

NO. 4-15-0523

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 16, 2017

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JOSHUA W. SNYDER,)	No. 12CF56
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of defendant's postconviction petition because postconviction counsel provided reasonable assistance of counsel but vacated the fines improperly imposed by the circuit clerk.

¶ 2 In June 2012, defendant, Joshua W. Snyder, entered a plea of guilty to two counts of aggravated battery against a peace officer (720 ILCS 5/12-4(b)(18) (West 2010)). Following the guilty plea, the circuit clerk imposed two fines: a \$50 court-systems assessment and a \$5 State Police operations assistance assessment.

¶ 3 In April 2014, defendant filed a *pro se* petition for postconviction relief. The case proceeded to the second stage of proceedings and, in October 2014, postconviction counsel amended the petition, alleging defendant's trial counsel provided ineffective assistance. In May 2015, the trial court dismissed defendant's amended petition.

¶ 4 Defendant appeals, asserting (1) postconviction counsel provided unreasonable assistance of counsel, and (2) the circuit clerk improperly imposed the two fines. We affirm in part and vacate in part.

¶ 5 I. BACKGROUND

¶ 6 In February 2012, the State charged defendant by information with two counts of aggravated battery against a peace officer (720 ILCS 5/12-4(b)(18) (West 2010)). The charges stemmed from an incident in which correctional officers attempted to extract defendant from his prison cell, at which time defendant allegedly resisted the police and bit a corrections officer.

¶ 7 In June 2012, after waiving his preliminary hearing, defendant entered a plea of guilty to both counts in exchange for concurrent six-year prison sentences. Prior to entering the plea, defendant was admonished that his prior criminal record required him to be sentenced as a Class X offender, with a range of 6 to 30 years' imprisonment. The trial court also admonished defendant he was subject to a three-year period of mandatory supervised release. Defendant indicated he understood, by pleading guilty, he was giving up his rights to (1) plead not guilty, (2) require the State prove the charges beyond a reasonable doubt, (3) a trial, (4) confront and cross-examine witnesses, and (5) present evidence and subpoena witnesses. He also agreed he was not forced or promised anything to plead guilty and that he had a full opportunity to discuss the decision with his attorney.

¶ 8 Following defendant's guilty plea, the circuit clerk imposed two fines: a \$50 court-systems assessment and a \$5 State Police operations assistance assessment. Defendant did not file a motion to withdraw his plea or file a direct appeal.

¶ 9 In April 2014, defendant filed a *pro se* petition for postconviction relief, alleging trial counsel provided ineffective assistance of counsel where he failed to (1) obtain video

evidence of the cell extraction that would aid defendant's case, and (2) advise defendant about a possible claim of self-defense. The following month, the trial court found defendant asserted the gist of a constitutional claim and appointed postconviction counsel to represent defendant's interests.

¶ 10 In October 2014, postconviction counsel filed an amended petition for postconviction relief, alleging trial counsel provided ineffective assistance by failing to obtain video evidence of the cell extraction that would have (1) supported defendant's claim of self-defense; and (2) shown defendant was suffering from a mental breakdown, which could have been considered as mitigating evidence for sentencing purposes. Defendant asserted he felt compelled to enter a guilty plea because trial counsel refused to investigate the cell-extraction video and the possible claim of self-defense.

¶ 11 The following month, the State filed a motion to dismiss the amended petition for postconviction relief, alleging defendant's petition failed to demonstrate (1) defendant acted in self-defense and (2) the cell-extraction video would have changed the outcome of his case.

¶ 12 In March 2015, the case proceeded to a hearing on the State's motion to dismiss. At the hearing, the State asserted defendant failed to make a sufficient showing that trial counsel failed to investigate defendant's mental-health issues or self-defense claim. Moreover, the State argued defendant failed to demonstrate a video of the cell extraction existed or that it would help his case. Conversely, postconviction counsel argued defendant made a substantial showing of a constitutional violation. In making this argument, postconviction counsel noted the allegations in the petition set forth "a possible insanity defense or at least at a minimum a mitigating circumstance here with my client." Postconviction counsel also asserted the video of the cell

extraction "would speak volumes" for defendant's self-defense claim but stated, "[w]e're not in a position to know whether it existed or not at this point."

¶ 13 In May 2015, the trial court entered a written order granting the State's motion to dismiss. With respect to defendant's claim regarding his mental condition, the court found the amended petition failed to allege specific facts to demonstrate the existence of his vaguely expressed "mental condition" would have changed the outcome of his case. Moreover, defendant failed to demonstrate the existence of the cell-extraction video or asserting a self-defense claim would have changed the outcome of the proceedings. The court also noted defendant was properly admonished at the time he entered his guilty plea but raised no argument that trial counsel's failure to investigate compelled him to enter a plea of guilty at that time. Accordingly, the court found the amended petition failed to make a substantial showing of a constitutional violation.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant asserts postconviction counsel provided unreasonable assistance by failing to (1) investigate and produce evidence to support his claim of ineffective assistance of counsel, (2) amend his *pro se* postconviction petition to allege a meritorious defense of not guilty by reason of insanity, and (3) understand the applicable sentencing range and available mitigating evidence. Defendant also asserts the circuit clerk improperly imposed two fines that must be vacated. We first address defendant's postconviction claim.

¶ 17 A. Postconviction Claim

¶ 18 At the second stage of a postconviction proceeding, a defendant's petition must demonstrate a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d

458, 473, 861 N.E.2d 999, 1008 (2006). All well-pleaded facts that are not positively rebutted by the record must be taken as true. *Id.* During this stage of the proceedings, a defendant is entitled to reasonable assistance of counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). In order to provide the reasonable assistance required by Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), counsel must meet specific obligations, including (1) consulting with the defendant by phone, mail, or electronic means to ascertain his contentions of a deprivation of a constitutional right; (2) examining the record of proceedings at trial; and (3) making any amendments necessary for the adequate presentation of defendant's contentions. Where postconviction counsel files a facially valid Rule 651(c) certificate, it establishes a rebuttable presumption that counsel provided reasonable assistance. *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 26, 67 N.E.3d 976. To overcome the rebuttable presumption, the defendant must show his postconviction counsel's failure to substantially comply with his duties under Rule 651(c). *Id.* Whether postconviction counsel provided reasonable assistance in compliance with Rule 651(c) is subject to *de novo* review. *Suarez*, 224 Ill. 2d at 41-42, 862 N.E.2d at 979.

¶ 19 Defendant asserts, despite filing a Rule 651(c) certificate, postconviction counsel failed to adequately fulfill his duties as mandated by the rule.

¶ 20 Defendant first argues postconviction counsel failed to investigate and produce records—the video of the cell extraction—to support his claims of ineffective assistance of counsel. Defendant contends that such a failure to investigate and produce records constitutes a failure to make the necessary amendments to his postconviction petition as required by Rule 651(c).

¶ 21 In support, defendant relies on *People v. Johnson*, 154 Ill. 2d 227, 609 N.E.2d 304 (1993). In *Johnson*, postconviction counsel filed an amended postconviction petition alleging

trial counsel was ineffective for failing to call certain witnesses at the defendant's trial. *Id.* at 242, 609 N.E.2d at 311. However, postconviction counsel failed to file affidavits or other supporting documents from those witnesses, and the trial court subsequently dismissed the petition at the second stage of proceedings. *Id.* at 237, 239, 609 N.E.2d at 309-10. The supreme court reversed, stating postconviction counsel "has an obligation under Rule 651(c) to attempt to obtain affidavits from such witnesses for the purpose of shaping the allegations in the postconviction petition into appropriate legal form." *Id.* at 247, 609 N.E.2d at 313. Accordingly, the supreme court remanded the case to allow postconviction counsel an opportunity to contact the witnesses and obtain any necessary supporting documentation. *Id.* at 249, 609 N.E.2d at 314.

¶ 22 We find *Johnson* distinguishable. Unlike in *Johnson*, where postconviction counsel failed to attach any supporting affidavits to support the defendant's claim, the present case contains the necessary affidavit to preserve defendant's claim. Here, the case centers on whether postconviction counsel was required to attach a video of the cell extraction where defendant attached an affidavit asserting the cell-extraction video would have aided him in the defense of his case.

¶ 23 In *People v. Jones*, 2016 IL App (3d) 140094, ¶ 29, 50 N.E.3d 1260, the appellate court reviewed a postconviction petition alleging ineffective assistance of trial counsel for failing to challenge redacted portions of the defendant's videotaped statement that would have aided in his defense. The trial court dismissed the petition at the second stage and, on appeal, the defendant asserted his postconviction counsel provided unreasonable assistance. *Id.* ¶ 22. The appellate court determined, ideally, postconviction counsel would have attached a copy of the video for the trial court's review, but that it was sufficient to attach an affidavit explaining how the video would have aided in his defense. *Id.* ¶ 31. Similarly, in the present case,

postconviction counsel attached defendant's affidavit, which described what the video would show and how it would benefit his case. Moreover, as postconviction counsel explained to the trial court during the hearing on the motion to dismiss, he did not have a copy of the video to attach.

¶ 24 Because postconviction counsel included the necessary affidavits to support defendant's claim regarding the cell-extraction video, we conclude counsel substantially complied with Rule 651(c) on this issue.

¶ 25 Next, defendant asserts postconviction counsel provided unreasonable assistance where counsel failed to amend the petition to include an insanity defense. In support, defendant relies on *People v. Schlosser*, 2012 IL App (1st) 092523, 973 N.E.2d 960. In *Schlosser*, after losing his direct appeal, the defendant filed a *pro se* petition for postconviction relief, alleging the evidence at trial was insufficient to support a conviction and his sentencing hearing was unfair. *Id.* ¶ 10. The trial court appointed counsel to represent the defendant, and postconviction counsel adopted the defendant's *pro se* petition without any amendments. *Id.* The State subsequently filed a motion to dismiss, and the case proceeded to a second-stage hearing. *Id.*

¶ 26 At the hearing, postconviction counsel argued the defendant's appellate counsel was ineffective for failing to challenge the sufficiency of the evidence or the sentencing hearing on direct appeal; however, the petition failed to include any ineffective-assistance-of-counsel claims. *Id.* ¶ 19. The appellate court held counsel's failure to amend the defendant's postconviction petition to properly allege an ineffective-assistance-of-counsel claim constituted unreasonable assistance. *Id.* ¶ 26. In so holding, the court stated, "postconviction counsel's admission to the trial court during the hearing on the State's motion to dismiss that he failed to amend the *pro se* petition to include defendant's main claim of ineffective assistance of appellate

counsel clearly demonstrates that counsel did not comply with the duties imposed by Rule 651(c)." *Id.* ¶ 33.

¶ 27 Defendant argues we should apply the reasoning in *Schlosser* to this case and conclude postconviction counsel's failure to amend the petition to include an insanity defense and subsequent argument in favor of an insanity defense constitutes unreasonable assistance. We disagree and find *Schlosser* is distinguishable.

¶ 28 In *Schlosser*, postconviction counsel told the trial court the defendant's postconviction petition hinged upon whether his appellate counsel was ineffective for failing to challenge his conviction and sentence on direct appeal. Thus, an amendment of the petition was necessary to state a constitutional claim, as the mere allegations of unfair sentencing and insufficient evidence fail to state such a claim. That is not the situation here. Rather, in the present case, postconviction counsel amended the *pro se* petition and asserted two ineffective-assistance-of-counsel claims were sufficient to state a constitutional claim. Although postconviction counsel stated at the hearing that the video might set forth "a possible insanity defense," the crux of his argument was that trial counsel was ineffective for failing to obtain a video of the cell extraction. *Schlosser* does not stand for the broad proposition that postconviction counsel provides unreasonable assistance of counsel where he raises a new issue during a postconviction hearing, and we will not create such an interpretation.

¶ 29 Moreover, nothing in defendant's *pro se* postconviction petition alludes to an insanity defense. Rather, the only mention of his mental status is found in his attached affidavit, where he claims he had a mental breakdown and "blacked out" *prior to* the extraction team entering his cell and then states the extraction team's actions caused him to act in self-defense. At no time did defendant's *pro se* petition suggest he lacked culpability due to his "mental

breakdown" or "blacking out." Instead, defendant used his mental status to explain why the extraction team entered his cell. The affidavit clearly demonstrates he was not "blacked out" during the extraction itself, as his affidavit provides details as to what happened during the extraction. When postconviction counsel amended the *pro se* petition, he noted defendant was having a mental breakdown that did not constitute a legal defense but should have been considered a mitigating factor at sentencing.

¶ 30 In filing an amended petition, postconviction counsel is not required to raise new issues the defendant failed to raise in the *pro se* petition. "Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164, 619 N.E.2d 750, 758 (1993). Thus, postconviction counsel cannot be said to have provided unreasonable assistance of counsel for failing to raise a new issue that defendant neglected to raise in his *pro se* petition. We therefore find substantial compliance with Rule 651(c) with respect to this issue.

¶ 31 Finally, defendant contends postconviction counsel failed to comply with Rule 651(c)'s requirement to examine the record of proceedings, as shown by counsel's argument that defendant's mental condition should have been used as a mitigating factor in sentencing despite defendant receiving a minimum sentence. However, defendant's postconviction petition centered on the evidence and defenses he could have presented at trial, not his sentencing. "Rule 651(c) only requires postconviction counsel to examine as much of the record 'as is necessary to adequately present and support those constitutional claims raised by the petitioner.'" *Pendleton*, 223 Ill. 2d at 475, 861 N.E.2d at 1009 (quoting *Davis*, 156 Ill. 2d at 164, 619 N.E.2d at 758). Nothing in the *pro se* petition alleged any errors with respect to the sentence defendant received, and postconviction counsel was therefore under no obligation to examine the record with respect

to defendant's sentence, which would have clarified defendant was subject to Class X sentencing. Postconviction counsel's addition of this issue appears to be aimed at explaining the importance of the cell-extraction video and the ways that the video could have aided defendant's defense. We therefore conclude the record demonstrates postconviction counsel substantially complied with Rule 651(c) with respect to this issue.

¶ 32 Because we have concluded postconviction counsel substantially complied with Rule 651(c), we find defendant has failed to demonstrate postconviction counsel provided unreasonable assistance of counsel.

¶ 33 B. Clerk-Imposed Fines

¶ 34 Defendant next asserts two clerk-imposed fines must be vacated. The State concedes this issue, and we accept the State's concession.

¶ 35 Because the circuit clerk lacks the authority to impose fines, any fines imposed by the circuit clerk are void from their inception. *People v. Daily*, 2016 IL App (4th) 150588, ¶ 28, 74 N.E.3d 15. We review *de novo* whether the circuit clerk improperly imposed fines. *Id.* ¶ 27. In this case, the clerk imposed a \$50 court-systems assessment and a \$5 State Police operations assistance assessment, both of which constitute fines and may not be imposed by the circuit clerk. See *People v. Hible*, 2016 IL App (4th) 131096, ¶ 16, 53 N.E.3d 319; *Daily* 2016 IL App (4th) 150588, ¶ 30, 74 N.E.3d 15. Accordingly, we vacate these fines.

¶ 36 III. CONCLUSION

¶ 37 For the foregoing reasons, we affirm the trial court's judgment in part and vacate the improperly imposed fines.

¶ 38 Affirmed in part and vacated in part.