

**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).

**FILED**

July 18, 2017  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

2017 IL App (4th) 160864-U  
NO. 4-16-0864

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MATTHEW R. ANDERSON,	)	No. 10CF744
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith, Jr.,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Steigmann and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed and remanded for further proceedings, finding the trial court erred in dismissing defendant’s postconviction petition at the second stage.

¶ 2 In August 2010, a jury found defendant, Matthew R. Anderson, guilty of two counts of burglary. In October 2010, the trial court sentenced him to five years in prison. This court affirmed on direct appeal. In March 2013, defendant filed a *pro se* petition for postconviction relief. In April 2014, after defendant had been appointed counsel and following a hearing, the court dismissed the petition. Thereafter, this court reversed and remanded for further proceedings. In January 2016, the trial court dismissed defendant’s postconviction petition as moot. In May 2016, this court allowed an agreed motion for summary remand. In October 2016, the trial court allowed the State’s motion to dismiss defendant’s petition.

¶ 3 On appeal, defendant argues the trial court erred in dismissing his postconviction

petition. We reverse and remand with directions.

¶ 4

## I. BACKGROUND

¶ 5 In May 2010, the State charged defendant and Edward Allen by information with two counts of burglary (720 ILCS 5/19-1(a) (West 2010)). Count I was based on an accountability theory, in that defendant, without authority, knowingly entered a motor vehicle with the intent to commit therein a theft. Count II alleged that defendant, without authority, knowingly entered a second motor vehicle with the intent to commit therein a theft.

¶ 6 In August 2010, defendant's jury trial commenced. Allen testified he and defendant had an agreement on May 13, 2010, to take loose change from vehicles parked along the street and split the proceeds. Defendant was to take the money from the vehicle, while Allen acted as a lookout. At approximately 12:45 a.m., defendant and Allen were in the Christine Lane neighborhood. Upon arriving at Penny Harman's home, Allen stated both he and defendant each searched a vehicle, both of which were parked in the driveway. Allen admitted taking a Garmin GPS navigation system (GPS) from Harman's vehicle, while defendant entered John Barry's vehicle. Allen did not know if defendant took anything from Barry's vehicle. Allen and defendant then proceeded to walk down the street and were approached by a man who asked them what they were doing. Allen testified he hid from the man, but defendant did not. After speaking to the man, defendant and Allen continued to walk down the street and were stopped by police approximately 10 minutes later. Allen admitted he had initially lied to the police by telling them the GPS found on his person belonged to his girlfriend.

¶ 7 Courtney Friel testified he was home watching television when he heard voices and car doors outside. From his front door, he saw defendant and Allen walking down the driveway across the street. Friel stepped out of his house and saw Allen duck down behind a

Blazer. Friel asked them what they were doing, and defendant said he was drunk and they were out walking around. When Friel questioned defendant about where his “buddy” was, Allen stood up from behind the Blazer. Friel asked both men what business they had at the house across the street, and Allen responded his grandmother lived there. Defendant and Allen told Friel they were going to a friend’s house and continued walking. Friel called the police.

¶ 8           Upon obtaining a description of the men from Friel, the police stopped defendant and Allen, as they matched the descriptions of the suspicious persons Friel reported. Friel later identified both men as the persons he saw earlier. Upon searching the men, the police found defendant had \$4.62 in change and three one-dollar bills in his pocket, while Allen had \$9.81 in coins and a GPS that listed Harman’s address as the “home” address.

¶ 9           One of the officers went to the “home” address listed in the GPS and found Harman’s and Barry’s vehicles parked in the driveway. Both vehicles had been ransacked. The officer then woke Harman and Barry. After looking in their vehicles, Harman reported she was missing approximately one dollar in loose change and a GPS. Barry did not see anything missing from his vehicle but could not recall if he had any loose change in the car.

¶ 10           Based on this evidence, the jury found defendant guilty of two counts of burglary. Defendant was convicted on an accountability theory for Allen’s entry into Harman’s vehicle with the intent to commit a theft and for his own entry into Barry’s vehicle with the intent to commit a theft.

¶ 11           Defense counsel filed a motion for a new trial. In September 2010, defendant filed a *pro se* motion for a new trial, arguing ineffective assistance of counsel. Following a hearing, the trial court denied the motions. In October 2010, the court sentenced defendant to five years in prison. Also in October 2010, the court denied defendant’s motion to reconsider his

sentence.

¶ 12 On direct appeal, defendant argued his sentence was excessive considering the circumstances surrounding the offense and his potential for rehabilitation. This court affirmed defendant's conviction and sentence. *People v. Anderson*, 2012 IL App (4th) 100881-U.

¶ 13 In March 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant raised several claims, including an allegation that trial counsel was ineffective for failing to investigate or call witnesses, in particular Jeff White.

¶ 14 Because defendant's postconviction petition was not ruled upon within 90 days as required under the Act, the trial court appointed counsel and allowed the matter to proceed to the second stage. In February 2014, postconviction counsel Steven G. Jones filed an amended petition, indicating he was adopting and incorporating defendant's *pro se* petition and intending to focus on the grounds of ineffective assistance of trial counsel. Jones did not file a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Thereafter, defendant wrote a letter to the court, stating Jones failed to communicate with him

¶ 15 In March 2014, the State filed a motion to dismiss, arguing the petition should be dismissed since it was time-barred as well as without merit. In April 2014, the trial court conducted a hearing on the motion to dismiss and stated the petition was not time-barred. The court then indicated it would base its decision on the merits of the petition. Jones indicated he was not prepared to argue the merits of the petition, but he then proceeded to do so by briefly summarizing the claims in the petition. The court dismissed the petition, finding, in part, the claim of ineffective assistance of counsel was deficient because no affidavits in support had been attached to the petition.

¶ 16 On appeal, defendant argued the trial court's dismissal of his postconviction petition should be vacated based on counsel's lack of compliance with Rule 651(c). This court reversed and remanded for the appointment of new counsel to represent defendant at the second stage of postconviction proceedings. *People v. Anderson*, No. 4-14-0623 (2015) (unpublished summary order under Supreme Court Rule 23).

¶ 17 On remand in January 2016, defendant's newly appointed counsel, Timothy J. Tighe, Jr., told the trial court he had been unable to contact defendant, who had been released from prison. Based on the representation that defendant was no longer in prison, the court dismissed the postconviction petition as moot.

¶ 18 In May 2016, the office of the State Appellate Defender (appellate defender) filed an agreed motion for summary remand, contending defendant's postconviction petition should have been heard because he was in custody at the time he filed his petition. In allowing the motion, this court remanded the matter for the appointment of counsel and second-stage proceedings.

¶ 19 In July 2016, the case was reassigned to Tighe. At an August 2, 2016, hearing, Tighe stated he had not seen this court's order but would need to communicate with defendant. On August 10, 2016, Tighe filed a Rule 651(c) certificate, stating he had consulted with defendant by mail, examined the record of the trial proceedings, and did not believe any additional amendments to defendant's *pro se* petition or prior counsel's petition were necessary for an adequate presentation of defendant's contentions.

¶ 20 At a September 2016 hearing, Tighe stated he still did not know why this court remanded the case after it had been dismissed as moot. The trial court stated that since the proper certificate was filed, both sides could stand on their original arguments at the next

hearing.

¶ 21 At an October 2016 hearing, the trial court asked Tighe if defendant had completed his sentence in this case, and Tighe responded in the affirmative. The court then asked whether the postconviction petition was moot. Tighe agreed it was moot but stated “the Appellate Court sent it back anyway.” The prosecutor agreed defendant had completed his sentence and stated the Act did not apply to him.

¶ 22 The trial court stated its belief that the case was “moot because the sentence is totally done.” However, the court allowed the attorneys to make additional argument. Tighe stood on the petition. Thereafter, the court allowed the State’s motion to dismiss. The court also noted “defendant’s petition for post-conviction relief is moot as the defendant has completed his prison sentence and parole term at this time.”

¶ 23 At a hearing on November 10, 2016, Tighe asked to file a written notice of appeal. The trial court was unsure if it could do so, as defendant had completed his sentence in this case. The court set the matter for another hearing, telling Tighe it “would really want to know what basis” there was to grant Tighe’s request.

¶ 24 At a hearing on November 21, 2016, Tighe provided a case to the trial court and stated similar cases “don’t automatically become moot,” since defendant filed his petition while he was in custody. The court asked for the status of the case, and Tighe noted he had received defendant’s request to file a notice of appeal. The court directed the circuit clerk to file the notice. This appeal followed.

¶ 25 **II. ANALYSIS**

¶ 26 Defendant argues his postconviction counsel provided unreasonable assistance, thereby denying him the opportunity to have his claims heard on the merits. We agree.

¶ 27 The Act “provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions.” *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant’s conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

“Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. [Citation.] Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived.” *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002).

¶ 28 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2016).

¶ 29 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure the defendant’s contentions are adequately presented. *People v. Pendleton*,

223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2016). A petition may be dismissed at the second stage “only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.” *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 30 If a constitutional violation is established, “the petition proceeds to the third stage for an evidentiary hearing.” *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted that motion. We review the trial court’s second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 31 In postconviction proceedings, a defendant is not entitled to effective assistance of counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Instead, state law dictates the sufficient level of assistance, and our supreme court has held the Act entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995). To ensure counsel provides that reasonable level of assistance, Rule 651(c) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). The rule requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights; (2) examine the record of the proceedings at trial; and (3) make any amendments to the defendant’s *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Courts have held the “ ‘failure to make a routine amendment to a postconviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c).’ ” *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23, 971 N.E.2d 1204 (quoting



*People v. Broughton*, 344 Ill. App. 3d 232, 241, 799 N.E.2d 952, 960 (2003)).

¶ 32 In the case *sub judice*, counsel filed a certificate pursuant to Rule 651(c). “The filing of a facially valid Rule 651(c) certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule.” *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 25, 67 N.E.3d 976. On appeal, this court reviews an attorney’s compliance with Rule 651(c) *de novo*. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15, 43 N.E.3d 1077.

¶ 33 In his *pro se* postconviction petition, defendant alleged, *inter alia*, trial counsel was ineffective for failing to investigate the case or call witnesses, including Jeff White, who would have contradicted his codefendant’s testimony. In the amended postconviction petition, Jones adopted defendant’s *pro se* petition. He also stated the amended petition would focus on the claims of ineffective assistance of counsel, including trial counsel’s failure to investigate or call witnesses who would have contradicted the codefendant’s testimony. In its motion to dismiss, the State argued, in part, defendant’s claims were barred by the doctrines of *res judicata* or forfeiture because they had been or could have been raised on direct appeal.

¶ 34 On remand, after this court found Jones failed to comply with Rule 651(c), the trial court noted defendant was no longer in prison and dismissed his petition as moot. Thereafter, this court, pursuant to an agreed motion filed by the appellate defender, remanded again for second-stage proceedings. On remand in August 2016, Tighe indicated he had not read this court’s order and would need to communicate with defendant. Later that month, Tighe filed his Rule 651(c) certificate.

¶ 35 In September 2016, Tighe stated he did not know why this court remanded the matter, and the trial court stated the parties could stand on their arguments at the next hearing. At the October 2016 hearing, the court inquired whether the postconviction petition was moot

because defendant was no longer in prison. Tighe agreed the case was moot. The court allowed the parties to make additional argument, and Tighe stood on his petition. The court then allowed the State's motion to dismiss, finding it "well founded." The court also found the petition was moot because defendant had completed his sentence.

¶ 36 We find defendant did not receive the reasonable assistance he is entitled to under the Act. On several occasions, Tighe was under the mistaken impression defendant's postconviction claims were moot because he was no longer in prison, and such a belief offers little support to the requirement that postconviction counsel adequately present defendant's claims to the court.

¶ 37 Counsel also did not amend the petition or the amended petition to overcome the procedural bar of forfeiture. The supreme court has noted "the purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *People v. Perkins*, 229 Ill. 2d 34, 44, 890 N.E.2d 398, 403 (2007). The duty to adequately present a defendant's 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, 890 N.E.2d at 403; see also *People v. Turner*, 187 Ill. 2d 406, 413, 719 N.E.2d 725 (1999) (stating Rule 651(c) requires counsel to amend a petition to allege ineffective assistance of appellate counsel to avoid the procedural bar of forfeiture).

¶ 38 Here, postconviction counsel stated his belief that additional amendments to the postconviction petitions were unnecessary for an adequate presentation of defendant's claims. However, by electing to stand on the postconviction petitions, counsel failed to amend the petitions to allege ineffective assistance of appellate counsel to avoid the bars of *res judicata* or forfeiture. We find the failure to make this routine amendment constitutes unreasonable

assistance in violation of Rule 651(c).

¶ 39 Accordingly, we reverse the trial court's dismissal of defendant's postconviction petitions and remand for further second-stage proceedings, during which defendant is permitted to amend his postconviction petition with a claim of ineffective assistance of appellate counsel. See *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 35, 973 N.E.2d 960. Our decision should not be construed as any indication of whether the allegations set forth in defendant's petitions have merit. Moreover, if newly appointed counsel, after complying with Rule 651(c), determines defendant's claims lack merit, then counsel may move to withdraw as counsel. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 15, 964 N.E.2d 679.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 42 Reversed and remanded with directions.