2017 IL App (5th) 140231-U

NO. 5-14-0231

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 93-CF-1212
	)	
JULIUS PHILLIPS,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of the defendant's petition for postconviction relief at the second stage of proceedings is affirmed because the defendant received the required reasonable level of assistance from postconviction counsel, and even if this court assumes the petition was timely filed, dismissal is warranted by the fact that the petition is without merit. We correct the mittimus to give the defendant the additional eight days of sentencing credit to which he is entitled.

¶ 2 The defendant, Julius Phillips, appeals the dismissal, by the circuit court of St. Clair County and at the second stage of proceedings, of his petition for postconviction relief. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On July 13, 1994, the defendant was convicted, following a trial by jury, of first-degree murder and aggravated discharge of a firearm. He was sentenced to a term of imprisonment in the Illinois Department of Corrections of 50 years for the first-degree murder conviction and a term of 15 years for the aggravated discharge of a firearm conviction. In his direct appeal from his convictions, the defendant alleged that his trial counsel was ineffective because trial counsel did not object to allegedly inadmissible testimony about statements made by shooting victim Kimberly Stewart, who was seriously wounded in the attack and was the girlfriend of the murder victim, Mitchell Lofton. This court rejected the defendant's challenge to his conviction and sentence, concluding that the testimony complained of was in fact admissible and that accordingly there was no ineffective assistance of trial counsel. We noted that Stewart and Lofton were acquaintances of the defendant, and that Stewart had had "considerable contact" with the defendant prior to the shooting because the defendant's brothers were dating Stewart's sisters. With regard to the reliability, in her statements to multiple people who came to her aid, of her identification of the defendant as one of her attackers, we stated that it was "inconceivable that Stewart, suffering from 12 bullet wounds which bled profusely, would concoct a fabrication during the time between the shootings and the arrival of aid," and we rejected as baseless any claim that Stewart had an ulterior motive for identifying the defendant as one of the perpetrators of the crimes against her and Lofton. See *People v. Phillips*, No. 5-94-0670 (Sept. 27, 1996) (unpublished order under Supreme Court Rule 23). With regard to her

acquaintance with the defendant, Stewart testified at trial that she had known him for between one and three years, and that although she had never had a direct conversation with him, she had heard his voice approximately "70 times" prior to the day of the attack. She testified as to events involving the defendant, lasting approximately 45-60 minutes, immediately leading up to the attack, and in detail as to the attack itself. She was unwavering in her identification of the defendant and his involvement in the events leading up to the attack and in the attack.

¶ 5 On September 3, 1997, the defendant filed a *pro se* petition for postconviction relief on a preprinted form. Next to the space where the form asked the defendant to assert how his constitutional rights had been violated, the defendant, in a handwritten response, referred the court to 6 affidavits executed by the defendant, a 2-page typewritten statement of facts signed by the defendant, 35 pages of exhibits, and a 28-page typewritten memorandum of law, all of which the defendant attached to the petition. On December 31, 1997, the trial court referred the defendant's petition to court administration for the appointment of counsel for the defendant. On January 23, 1998, James P. Stiehl was appointed to represent the defendant for purposes of the defendant's petition for postconviction relief.

¶ 6 On September 1, 1999, the trial court entered an order requiring the defendant to file an amended petition by November 1, 1999, to which the State was required to respond by November 22, 1999. Although it appears from the Case Register of Actions included in the common law record in this case that court appearances may have occurred in December 1999 and April 2000, there is no other verification of that, and the next

document filed in the common law record is an order of the trial court, dated May 23, 2000, requiring the defendant to file an amended petition by July 15, 2000, and the State to respond thereto by August 7, 2000, with a hearing to be held on the petition on August 24, 2000. On August 28, 2000, the trial court entered an order noting that "by agreement of the parties" the cause was to be continued. The amended petition was now to be filed by October 24, 2000, the State's response by November 24, 2000, and a hearing set for December 14, 2000.

¶ 7 On December 12, 2000, the trial court entered an order setting a "[p]re-[t]rial [c]onference" for January 25, 2001, with an amended petition due within 30 days of December 12, 2000, and a response from the State due within 30 days of the filing of the amended petition. On January 23, 2001, the trial court entered an order stating that the January 25, 2001, conference was "cancelled" and resetting the court date for February 22, 2001. On February 23, 2001, the trial court entered an order noting that the judge who presided over the defendant's trial and sentenced the defendant, the Honorable James K. Donovan, had recused himself from the case and that a replacement judge would have to be assigned.

¶ 8 The next order from the trial court was entered on June 5, 2002, and assigned a new judge, the Honorable Richard A. Aguirre, to the case. On June 12, 2002, Judge Aguirre entered an order noting that the case had been pending since September 5, 1997,[1] and ordering Stiehl to file an amended petition and an Illinois Supreme Court Rule 651(c)

[1]In fact, as noted above, the case had been pending since September 3, 1997.

(eff. Dec. 1, 1984) certificate by July 15, 2002. On June 26, 2002, Judge Aguirre entered an order that stated "Extension granted" and ordered the amended petition to be filed by July 30, 2002. There are no additional entries in the Case Register of Actions, and no documents filed in the common law record, until June 13, 2008, when correspondence was received by the court from the defendant in which the defendant requested a status hearing on his case, noting that he had last heard from Stiehl on January 10, 2005, and that Stiehl had not responded to "several" written attempts by the defendant to contact him since that time. On June 25, 2008, the trial court entered an order noting the defendant's correspondence and setting the case "for status" on August 27, 2008.

¶ 9 On August 27, 2008, the status hearing occurred, before the Honorable Annette A. Eckert. Both Stiehl and the defendant were personally present at the hearing. When asked the status of the case, Stiehl stated that he and the defendant had conferred that morning, prior to the hearing, and that there were "a couple of additional issues" that the defendant wished to add to his amended petition. Stiehl then stated, "In addition to my preparing an [a]mended [p]etition dealing with the issue previously raised in his original petition *** he and I have agreed that given the problems with communications, that 60 days would be an appropriate time for us to get that–to get our communications together and get an [a]mended [p]etition on file." Judge Eckert then asked the defendant if that was "satisfactory" with him. The defendant answered, "Yes, ma'am." When asked if it was "satisfactory" for a hearing to be set in December and for the defendant to be transported to the hearing, the defendant again answered, "Yes, ma'am."

¶ 10 Following the hearing, the trial judge entered an order stating that "[b]y agreement of the parties," the defendant was granted until October 27, 2008, to file an amended petition, with a hearing on the petition set for December 10, 2008. On December 8, 2008, the trial court entered an order stating that the case was "[r]e-set for status" on February 25, 2009. On February 25, 2009, the trial court entered an order noting that both the defendant and Stiehl were "present in open court" and that upon the motion of the defendant, the defendant was granted until May 7, 2009, to file an amended petition. On June 24, 2009, the trial court entered an order stating that upon "motion of defense counsel," the defendant was granted until August 24, 2009, to file the amended petition.

¶ 11 On August 25, 2009, Stiehl filed a motion for the production of hospital records, wherein he pointed out that the defendant's original *pro se* petition for postconviction relief raised questions about the truthfulness of Stewart's testimony that she was shot 12 times, and wherein he requested a court order to force the treating hospital to deliver "the appropriate" medical records to Stiehl. On October 19, 2009, the motion was granted and an order was entered. On October 28, 2009, the trial court entered an order noting that the delivery of the medical records was still pending, and granting the defendant until November 28, 2009, to file an amended petition, with a hearing set for January 13, 2010.

¶ 12 On January 13, 2010, the trial court entered an order which stated that "[u]pon motion of defense," the defendant was granted until April 21, 2010, to file his amended petition, with a status hearing set for June 16, 2010. On June 16, 2010, the trial court entered an order which stated that defense counsel had received the medical records in question and had corresponded with the defendant, but had not yet received a response

from the defendant, and which ordered the status hearing continued until July 28, 2010, "[u]pon motion of defendant, no objection by the State," so that defense counsel could again attempt to contact the defendant. On July 28, 2010, the trial court entered an order that "re-set for status to October 12, 2010." On October 12, 2010, the trial court entered an order which stated that, on the defendant's motion and without objection from the State, the matter was reset for status on December 8, 2010. On December 8, 2010, the trial court entered an order which stated "Court unavailable," and that, "[b]y agreement of the parties," the matter was continued until January 19, 2011.

¶ 13 On January 19, 2011, a hearing was held before the Honorable Michael N. Cook. Both Stiehl and the defendant were personally present at the hearing. When asked the status of the case, Stiehl stated that getting the medical records in question "took us a lot of discovery" and noted that he "had to get subpoenas and so forth." He stated that when the records arrived, they were "frankly adverse to our position." Stiehl indicated that he discussed the matter with the defendant, "and there was some discussion that we might abandon his petition as a result of that." Instead, according to Stiehl, the defendant indicated on the morning of the hearing "that there are a couple of additional issues that he wishes to raise." As a result, Stiehl requested "an additional 90 days to investigate his new positions" and file an amended petition. The State did not object. Accordingly, following the hearing, the trial judge entered an order which stated that "[b]y agreement of the parties," the defendant was granted until April 19, 2011, to file his amended petition, with a status hearing set for June 15, 2011.

¶ 14 On June 15, 2011, the trial court entered an order that granted the defendant until September 15, 2011, to file his amended petition, and set a status hearing for November 9, 2011. On November 9, 2011, the trial court entered an order, "[b]y agreement of the parties," that set the next status hearing for February 22, 2012, and stated that "[d]ue to communications with defendant, on defense request, defendant granted leave to file [a]mended [p]etition 30 days after above status date."

¶ 15 On February 22, 2012, a hearing was held before the Honorable Michael N. Cook. Both Stiehl and the defendant were personally present at the hearing. When asked the status of the case, Stiehl reminded the court that the receipt of the medical records in question had taken "a long, long time," and that counsel's review of the records had "disposed of one of the issues" in the defendant's *pro se* petition for postconviction relief. Stiehl then stated that, "frankly, [the defendant] and I have vacillated between whether we were going to pursue the balance of the claims he and I discussed." He indicated to the court that the defendant wished "to pursue them" and that he was therefore "asking for additional time." The State did not object. Judge Cook then asked the defendant, "Is that correct, Mr. Phillips?" The defendant answered, "Yes, sir." Accordingly, following the hearing, Judge Cook entered an order which stated that "[u]pon defense request," the defendant was granted until May 16, 2012, to file his amended petition, with a status hearing set for July 18, 2012.

¶ 16 On June 13, 2012, the trial court entered an order that stated the court would be unavailable on July 18, 2012, and reset the matter for a status hearing on August 15, 2012. On August 15, 2012, the trial court entered an order that reset the matter for

December 5, 2012, and ordered that the amended petition be filed by that date. On December 5, 2012, the trial court entered an order that reset the matter for April 17, 2013, and ordered that the amended petition be filed by that date. On April 17, 2013, the trial court entered an order that reset the matter for June 12, 2013.

¶ 17 On May 23, 2013, the State filed a motion to substitute Judge Cook on the basis of matters not relevant to this appeal. On June 12, 2013, the State's motion was granted in an order that also stated that "[b]y agreement" the defendant was granted 30 days to file his amended petition, with a status hearing set for September 18, 2013. On September 18, 2013, the trial court entered an order that reset the matter for November 15, 2013. On November 15, 2013, the trial court entered an order that reset the matter, for a hearing with the defendant present, on February 14, 2014.

¶ 18 On February 14, 2014, a hearing was held before the Honorable John Baricevic. Both Stiehl and the defendant were personally present at the hearing. When asked the status of the case, Stiehl explained that after the setback caused by the review of the requested medical records–which "determined that the number of gunshot wounds was consistent with what had been testified to"–he and the defendant "ended up with some creative differences as to how the–how we should proceed with the amended petition." Stiehl stated that he and the defendant met that morning, prior to the hearing, and that Stiehl believed they had "resolved" their differences. Stiehl stated, "I've indicated exactly what it is I'm going to be putting in the petition. He's indicated that would be acceptable to him. I will have that to him shortly." Stiehl requested "one more scheduling date, a late date in March, for us to get our amended petition on file." The State did not object.

¶ 19 Judge Baricevic then stated, "Mr. Phillips, you heard what your lawyer said. Do you have any questions?" The defendant answered, "No, sir." Judge Baricevic then added, "And, of course, the holdup, Mr. Phillips, usually is when Mr. Stiehl puts it in the mail to you, it requires your signature, to get back to him. So, I mean subject to–to the prison folks getting that to you on time, the quicker you can turn it around, the easier it will be for us to keep to the schedule. But we'll–we'll work on that if it doesn't happen." As the hearing concluded, Stiehl noted that there was "one other thing, Your Honor, that Mr. Phillips and I have discussed because of the length of time it's taken for us to get to this point." Stiehl then advised the judge that the defendant was aware that if he were to succeed on his petition and get a new trial, the defendant might, following that new trial, get "a worse result than the last one where he might end up looking at more time than he's already served." Stiehl stated that the defendant "was aware of those risks and wants to go forward." Judge Baricevic then stated, "Do you agree, Mr. Phillips?" The defendant answered, "Yes, sir." Following the hearing, Judge Baricevic entered an order which granted the defendant until March 28, 2014, to file his amended petition and set the next hearing for May 2, 2014.

¶ 20 On April 1, 2014, Stiehl filed the defendant's amended petition for postconviction relief (the petition). Therein, he alleged ineffective assistance of trial counsel on a number of bases, and ineffective assistance of appellate counsel for failing to include the claims in the defendant's direct appeal. At the end of the petition, next to the defendant's signature, was the handwritten note: "P.S. please read statement of issues for Amendment Petition." Following thereafter in the common law record is a four-page typewritten

document, which is entitled "Statement of Issues for Amendment" and is signed by the defendant and notarized. Unlike the petition, this document does not indicate that it was prepared by Stiehl. Also on April 1, 2014, Stiehl filed his Illinois Supreme Court Rule 651(c) certificate of compliance.

¶ 21 On April 23, 2014, the State filed a motion to dismiss the petition and to strike the "Statement of Issues for Amendment." The State argued that the defendant's original *pro se* petition was untimely filed, barred by *res judicata* and waiver, and without merit. The State argued that the defendant's *pro se* "Statement of Issues for Amendment" could not be considered, because the defendant was represented by counsel and did not have the right to file *pro se* documents such as it.

¶ 22 On May 2, 2014, a hearing was held on the petition and on the State's motion. At the hearing, the State reiterated its timeliness argument, contending the petition was filed approximately seven months late. In response, Stiehl stated, "I can't argue with the–with the dates as they've been presented." When asked if the defendant had "alleged any extraordinary actions which would have delayed the filing," Stiehl responded, "[t]here were never any allegations of excuse." The State also presented argument in support of the other theories put forward in its motion to dismiss. Following the hearing, Judge Baricevic took the matter under advisement in a written order. In a subsequent written order, filed on May 5, 2014, Judge Baricevic dismissed the petition on the grounds that it was untimely filed. This appeal, which was timely filed, followed. Additional facts will be provided as necessary in the analysis section of this order.

¶ 23 ANALYSIS

¶ 24 We begin our analysis with a brief overview of the well-established law applicable to our standard of review in this appeal. The Post-Conviction Hearing Act (the Act) (725 ILCS 5/art. 122 (West 2016)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). In cases not involving the death penalty, the Act sets forth three stages of proceedings. *Id.* at 471-72. At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. *Id*. If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints counsel for the defendant. *Pendleton*, 223 Ill. 2d at 472. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Id.* Also at the second stage, the State may file a motion to dismiss the defendant's petition or may file an answer to it. *Id*. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Id*. at 472-73. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 25 With the second stage of the postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *People*

v. Coleman, 183 Ill. 2d 366, 380 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377 (2008). At a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81. Thus, the dismissal of a postconviction petition at the second stage is warranted 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. *Id*. at 382. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473. However, when conducting that review, "we may affirm the decision of the circuit court on any grounds substantiated by the record, regardless of the circuit court's reasoning." *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010).

¶ 26 In the present appeal, the defendant contends: (1) the trial court erred in dismissing the petition on timeliness grounds; (2) postconviction counsel failed to comply with the requirements of Illinois Supreme Court 651(c) and therefore failed to provide a reasonable level of assistance to the defendant; and (3) the defendant is entitled to an additional eight days of sentencing credit. The State responds to each of these allegations of error. In reply, the defendant asserts, *inter alia*, that the State's responses support the defendant's claim that he did not receive a reasonable level of assistance from postconviction counsel.

¶ 27 As noted above, when a petition proceeds to the second stage, the court may appoint counsel for the defendant. *Pendleton*, 223 Ill. 2d at 472. "[A] defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *Id*. Postconviction counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Id.* However, postconviction counsel is required to investigate and properly present only the claims made by the defendant. *Id*. Although postconviction counsel may go beyond the claims made by the defendant, and may conduct a broader examination of the record and raise additional claims, postconviction counsel has no obligation to do so. *Id*. at 476.

¶ 28 To assure that a defendant receives the "reasonable assistance" required, Supreme Court Rule 651(c) requires that postconviction counsel: (1) consult with the defendant by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's claims. See, *e.g.*, *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Substantial compliance with Rule 651(c) is sufficient, and the filing by postconviction counsel of a Rule 651(c) certificate of compliance gives rise to a rebuttable presumption that postconviction counsel has provided the reasonable assistance required. *People v. Profit*, 2012 IL App (1st) 101307, ¶¶ 18-19. However, with regard to the timeliness of a petition, the plain language of Rule 651(c) that requires any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's claims "includes alleging any facts that may

establish a lack of culpable negligence in the late filling." *Perkins*, 229 Ill. 2d at 43. To prevail on a claim of unreasonable assistance of postconviction counsel, a defendant must demonstrate–as would be the case in a claim for ineffective assistance of trial counsel–that the defendant has been prejudiced by the claimed errors of counsel. See, *e.g.*, *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶¶ 34-37.

¶ 29 With regard to the timeliness issue, we agree with the defendant that this issue was mishandled at the trial court level by postconviction counsel. We also agree that postconviction counsel's mishandling may well have led to the confusion that ensued with both the State and the trial judge about the appropriate law to consider *vis-à-vis* timeliness. Moreover, postconviction counsel failed completely to argue to the trial judge that questions remained about when the defendant mailed his petition, and that the defendant had alleged in documents in support of his original *pro se* petition that a prison lockdown excused any delay in filing that might have occurred, instead affirmatively stating "[t]here were never any allegations of excuse." Accordingly, to ensure no prejudice to the defendant because of this mishandling of the timeliness issue by postconviction counsel, we will assume, *arguendo*, that the petition was timely filed and will consider its merits.

¶ 30 With regard to the defendant's other assertions in support of his claim that postconviction counsel failed to comply with the requirements of Illinois Supreme Court 651(c), and therefore failed to provide a reasonable level of assistance to the defendant, we agree with the State that the assertions are unavailing. We begin by noting that although the defendant acknowledges that where, as in this case, postconviction counsel

has filed a Rule 651(c) certificate of compliance, there arises a rebuttable presumption that postconviction counsel has provided the reasonable assistance required (see, *e.g.*, *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19), the defendant contends that in this case the presumption is rebutted. The defendant buttresses each of his remaining arguments by reminding this court of the lengthy delays that occurred in bringing the petition to fruition in amended form, and suggests that these delays evidence a lack of reasonable assistance to the defendant by postconviction counsel Stiehl. At one point in his opening brief, appellate counsel goes so far as to allege by Stiehl a "near total failure to work on the case for 16 years."

¶ 31 Although we do not fault appellate counsel for concern over the lengthy delays in this case, we believe that a careful, objective review of the record on appeal does not support a reasonable inference that the delays resulted from neglect of the case by Stiehl. The procedural history of the petition is described in detail above. When viewed as a whole, the evidence of record, also described in detail above, paints the picture of a complicated, and at times difficult, relationship between the defendant and Stiehl as they worked to advance the defendant's claims for postconviction relief, which was in no way helped by the fact that the evidence of the defendant's guilt was overwhelming and that any counsel assigned to assist the defendant in his quest for postconviction relief would have faced an uphill battle.

¶ 32 The defendant's *pro se* petition, although nominally on a preprinted form, referred the court to 6 affidavits executed by the defendant, a 2-page typewritten statement of facts signed by the defendant, 35 pages of exhibits, and a 28-page typewritten

memorandum of law, all of which the defendant attached to the petition. When the amended petition was finally filed, on April 1, 2014, it was accompanied by a four-page typewritten document, which is entitled "Statement of Issues for Amendment" and is signed by the defendant and notarized. Unlike the petition, this document does not indicate that it was prepared by Stiehl. It is clear from this, and from the record as a whole, that the defendant, even after being represented by Stiehl, has been heavily involved in trying to control the manner in which his case is presented. We do not fault the defendant for this, as clearly he is more impacted than anyone by the outcome of this case, but we point it out to show one of the reasons why we do not believe it is accurate for appellate counsel to suggest that there was, by Stiehl, a "near total failure to work on the case for 16 years." Stiehl was not faced with an easy task, and it is not clear that his client made things any easier for him.

¶ 33 Certainly, the prospects for obtaining postconviction relief for the defendant did not improve when the medical records obtained for the defendant by Stiehl did not support the defendant's long shot *pro se* attempt to discredit shooting victim Kimberly Stewart's identification of the defendant as one of the perpetrators of the crimes by alleging that Stewart lied about how many times she was shot by her assailants. The defendant's indecision about what to do next appears to have played a big part in the delays that followed. As described above, on June 16, 2010, the trial court entered an order which stated that defense counsel had received the medical records in question and had corresponded with the defendant, but had not yet received a response from the defendant, and which ordered the status hearing continued until July 28, 2010, "[u]pon

motion of defendant, no objection by the State," so that defense counsel could again attempt to contact the defendant. On July 28, 2010, the trial court entered an order that "re-set for status to October 12, 2010." On October 12, 2010, the trial court entered an order which stated that, on the defendant's motion and without objection from the State, the matter was reset for status on December 8, 2010, all of which support the inference that the defendant did not respond to Stiehl's attempts to contact him.

¶ 34 Inferences notwithstanding, at the January 19, 2011, hearing before Judge Cook, at which both Stiehl and the defendant were personally present, Stiehl told the court that once it was discovered that the medical records were "frankly adverse to our position," Stiehl discussed the matter with the defendant, "and there was some discussion that we might abandon his petition as a result of that." Instead, according to Stiehl, the defendant indicated on the morning of the hearing "that there are a couple of additional issues that he wishes to raise." As a result, Stiehl requested "an additional 90 days to investigate his new positions" and file an amended petition. The State did not object, and Judge Cook subsequently entered an order which stated that "[b]y agreement of the parties," the defendant was granted until April 19, 2011, to file his amended petition, with a status hearing set for June 15, 2011.

¶ 35 Likewise, at the February 22, 2012, hearing before Judge Cook, at which both Stiehl and the defendant were personally present, Stiehl stated that in light of the medical records setback, "frankly, [the defendant] and I have vacillated between whether we were going to pursue the balance of the claims he and I discussed." He indicated to the court that the defendant wished "to pursue them" and that he was therefore "asking for

additional time." The State did not object. Judge Cook then asked the defendant, "Is that correct, Mr. Phillips?" The defendant answered, "Yes, sir." Accordingly, following the hearing, Judge Cook entered an order which stated that "[u]pon defense request," the defendant was granted until May 16, 2012, to file his amended petition, with a status hearing set for July 18, 2012.

¶ 36 In addition, at the February 14, 2014, hearing before Judge Baricevic, at which both Stiehl and the defendant were personally present, Stiehl explained that as a result of the medical records setback, he and the defendant "ended up with some creative differences as to how the–how we should proceed with the amended petition." Stiehl stated that he and the defendant met that morning, prior to the hearing, and that Stiehl believed they had "resolved" their differences. Stiehl stated, "I've indicated exactly what it is I'm going to be putting in the petition. He's indicated that would be acceptable to him. I will have that to him shortly." Judge Baricevic subsequently stated, "Mr. Phillips, you heard what your lawyer said. Do you have any questions?" The defendant answered, "No, sir." Judge Baricevic then added, "And, of course, the holdup, Mr. Phillips, usually is when Mr. Stiehl puts it in the mail to you, it requires your signature, to get back to him. So, I mean subject to–to the prison folks getting that to you on time, the quicker you can turn it around, the easier it will be for us to keep to the schedule. But we'll–we'll work on that if it doesn't happen." As the hearing concluded, Stiehl noted that there was "one other thing, Your Honor, that Mr. Phillips and I have discussed because of the length of time it's taken for us to get to this point." Stiehl then advised the judge that the defendant was aware that if he were to succeed on his petition and get a new trial, the

defendant might, following that new trial, get "a worse result than the last one where he might end up looking at more time than he's already served." Stiehl stated that the defendant "was aware of those risks and wants to go forward." Judge Baricevic then stated, "Do you agree, Mr. Phillips?" The defendant answered, "Yes, sir." Following the hearing, Judge Baricevic entered an order which granted the defendant until March 28, 2014, to file his amended petition and set the next hearing for May 2, 2014.

¶ 37 Contrary to appellate counsel's suggestions of negligence by Stiehl, it appears based upon the record before us that Stiehl exhibited tremendous patience with, and loyalty to, a difficult and indecisive client for an extended period of time. Even the defendant himself seems to realize this. With the exception of the correspondence received by the trial court on June 13, 2008 (in which the defendant requested a status hearing on his case, noting that he had last heard from Stiehl on January 10, 2005, and that Stiehl had not responded to "several" written attempts by the defendant to contact him since that time), the defendant has never complained about the representation he received from Stiehl. In fact, his June 2008 correspondence led to an August 27, 2008, hearing before the Honorable Annette A. Eckert, at which both Stiehl and the defendant were personally present. When asked the status of the case, Stiehl stated that he and the defendant had conferred that morning, prior to the hearing, and that there were "a couple of additional issues" that the defendant wished to add to his amended petition. Stiehl then stated, "In addition to my preparing an [a]mended [p]etition dealing with the issue previously raised in his original petition *** he and I have agreed that given the problems with communications, that 60 days would be an appropriate time for us to get that–to get

our communications together and get an [a]mended [p]etition on file." Judge Eckert then asked the defendant if that was "satisfactory" with him. The defendant answered, "Yes, ma'am." When asked if it was "satisfactory" for a hearing to be set in December and for the defendant to be transported to the hearing, the defendant again answered, "Yes, ma'am."

¶ 38 Although given the opportunity to do so, the defendant did not indicate any dissatisfaction with how Stiehl was handling the case, and certainly did not request different counsel. Notably he did not complain, in his correspondence or at the hearing, about the delay between the last entry of record–the June 26, 2002, order of Judge Aguirre that stated "Extension granted," and ordered the amended petition to be filed by July 30, 2002–and the date at which correspondence with Stiehl allegedly ended, January 10, 2005, which certainly leads to the reasonable inference that he was either responsible for, or at the very least acquiesced in, that 2½-year delay. Nor did he explain, in his correspondence or at the hearing, why he waited until June of 2008 to contact the court, which again supports the reasonable inference that he accepted responsibility for some of the delays in this case. Indeed, at the August 27, 2008, hearing, the defendant unequivocally acquiesced in the requested continuance. It is not clear if the "problems with communications" referenced by Stiehl referred in part to delays attributable to the prison in which the defendant was then housed, but Stiehl's use of the phrase "get our communications together and get an [a]mended [p]etition on file," in light of the record as a whole, reasonably can be construed to support the inference that the defendant was in part, if not in whole, responsible for many of the delays in this case.

¶ 39 In addition, on the other two occasions that the defendant appeared in open court and was asked about Stiehl's requests for continuances–the appearances on February 22, 2012, and February 14, 2014–the defendant again unequivocally acquiesced in the requested continuances. Also, at the February 25, 2009, appearance at which both the defendant and Stiehl were "present in open court," the defendant did not object when his counsel moved for another extension of time.

¶ 40 In short, there is no basis in the record to conclude that Stiehl was not, at all times, working as diligently as possible under the circumstances to attempt to secure postconviction relief for the defendant. We note as well that two of the delays in this case were caused by the unavailability of the court, which led to the rescheduling of hearing dates, and that for reasons that are not clear from the record, there was a 15-month span of time between Judge Donovan's recusal from the case and the assignment of Judge Aguirre to the case. We also note that it took nearly two months for the trial court to grant the defendant's motion for the production of hospital records, and that procuring those records took much longer than Stiehl anticipated–neither of which appears from the record to be in any way the fault of Stiehl.

¶ 41 There is no doubt that Stiehl sought many, many continuances prior to filing the petition. However, there is nothing in the record to suggest that these continuances were requested as the result of negligence of the case by Stiehl; to the contrary, the foregoing suggests that many of the continuances resulted from the actions and inactions of the defendant himself, including the defendant's indecision about whether to continue to seek postconviction relief or to abandon the petition. It is true, as the defendant contends in

his reply brief, that Rule 651(c) not only does not *require* postconviction counsel to amend a *pro se* petition, but also that postconviction counsel may *not* amend a *pro se* petition if postconviction counsel determines that the claims therein are frivolous or without merit, but instead must either withdraw as counsel or stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended. See, *e.g.*, *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). However, in this case postconviction counsel did not find the petition to be frivolous or without merit, and in fact did amend the claims in an attempt to secure relief for the defendant. With regard to the length of time it took him to do so, in addition to the reasoning set forth above, we note that it can be difficult for even the most diligent and experienced postconviction counsel to know whether to continue pursuing difficult claims on behalf of a defendant or to give up on that defendant altogether, especially when the Act contemplates only one postconviction petition, the abandonment of which by counsel may effectively end the hopes of that defendant for relief from a serious conviction and a lengthy sentence. Accordingly, while this court will not tolerate negligence or malingering by postconviction counsel if we become aware of such conduct, we are wary of intruding on the professional discretion that must be exercised by postconviction counsel when attempting to determine how to navigate a difficult postconviction case, and will not presume negligence or malingering where, as here, other explanations for delay are present in the record on appeal.

¶ 42 Therefore, we decline to construe the delays in this case as evidence that Stiehl neglected this case, and therefore we do not conclude that the presumption of compliance

with Rule 651(c) has been rebutted by the mere fact that it took an inordinate amount of time for an amended petition to be filed. Nor will we conclude, without more, that the presumption is rebutted by the mishandling of the timeliness issue. We turn, then, to the defendant's other specific claims. The defendant also contends postconviction counsel failed to comply with Rule 651(c), and therefore did not render reasonable assistance to the defendant, because "there is nothing in the record to indicate that he made any attempt at all to contact the two surviving potential witnesses for the defense described in his amended petition." However, as the State correctly responds, there is no requirement that postconviction counsel provide that level of detail with regard to his actions. On April 1, 2014, Stiehl filed his Illinois Supreme Court Rule 651(c) certificate of compliance, along with the petition. We have already rejected the defendant's contention that the presumption of compliance with Rule 651(c) has been rebutted in this case. Accordingly, we will not infer, as appellate counsel asks, that Stiehl "made little or no effort to contact the two surviving witnesses." As we have noted in a similar context, we will not "presume the existence of error which is not affirmatively shown of record." *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 43 Appellate counsel also takes issue with the fact that Stiehl included in the petition a claim that trial counsel was ineffective for failing to investigate Stewart's medical records, even after Stiehl knew the defendant's *pro se* allegation that Stewart lied about how many times she was shot was unsupported by the medical records he had requested and received. We agree that the inclusion of the claim in the petition does not aid the defendant. However, it does not prejudice the defendant either, as this court is capable of

disposing of an unwarranted claim by a defendant without that claim coloring our analysis of the other claims raised by the defendant. In this case, the claim that trial counsel was ineffective for failing to investigate Stewart's medical records is positively rebutted by the assertions of Stiehl, before the trial court, that the medical records demonstrated that there was no merit to the defendant's *pro se* allegation that Stewart lied about how many times she was shot. We reiterate that while the inclusion of the claim in the petition may have been inartful, it did not prejudice the defendant in any way. As explained above, to prevail on a claim of unreasonable assistance of postconviction counsel, a defendant must demonstrate–as would be the case in a claim for ineffective assistance of trial counsel–that the defendant has been prejudiced by the claimed errors of counsel. See, *e.g.*, *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶¶ 34-37. There is simply no way this claim, positively rebutted by the record, could be amended in such a way as to procure for the defendant postconviction relief, and accordingly there can be no prejudice to the defendant in this situation. Moreover, as noted above, postconviction counsel is required to investigate and properly present only the claims made by the defendant; although postconviction counsel may go beyond the claims made by the defendant, and may conduct a broader examination of the record and raise additional claims, postconviction counsel has no obligation to do so. See, *e.g.*, *People v. Pendleton*, 223 Ill. 2d 458, 472, 476 (2006).

¶ 44 Appellate counsel also notes that none of the allegations in the petition were supported by affidavits, as required. He acknowledges that ordinarily, a trial court ruling upon a motion to dismiss a postconviction petition which is not supported by affidavits or

other documents may reasonably presume that postconviction counsel made a concerted effort to obtain affidavits in support of the claims, but was unable to do so. See, *e.g.*, *People v. Johnson*, 154 Ill. 2d 227, 241 (1993). However, he again asks this court to consider the mishandling of the timeliness issue, and the lengthy delays, to infer that Stiehl did not comply with Rule 651(c). We again decline to conclude that the presumption of compliance with Rule 651(c) has been rebutted in this case, and reiterate that we will not "presume the existence of error which is not affirmatively shown of record." *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 45 We turn next to the merits of the petition, mindful of the fact that at the second stage of postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. See, *e.g.*, *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). As explained above, at this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377 (2008). The dismissal of a postconviction petition at the second stage is warranted 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. *Coleman*, 183 Ill. 2d at 382. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473. However, when conducting

that review, "we may affirm the decision of the circuit court on any grounds substantiated by the record, regardless of the circuit court's reasoning." *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010).

¶ 46 We have already determined that the claim that trial counsel was ineffective for failing to investigate Stewart's medical records is positively rebutted by the assertions of Stiehl, before the trial court and on the record, that the medical records demonstrated that there was no merit to the defendant's *pro se* allegation that Stewart lied about how many times she was shot. In the petition, the defendant also contended that trial counsel was ineffective because trial counsel failed to interview four potential "defense and alibi witnesses," two of whom have subsequently passed away. For a postconviction claim of ineffective assistance of trial counsel to survive dismissal at the second stage of proceedings, a defendant must make a substantial showing that, *inter alia*, there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *People v. Lee*, 2016 IL App (1st) 152425, ¶ 55. " 'A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome'−or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *Id*. (quoting *People v. Colon*, 225 Ill. 2d 125, 135 (2007)). In this case, we agree with the State that the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation, because there is no reasonable probability that but for trial counsel's alleged failure to investigate the four potential alibi witnesses, the result of the defendant's trial would have been different. As the State

notes, trial counsel presented the testimony of two alibi witnesses who attempted to persuade the jury that the defendant was elsewhere when Stewart and Lofton were attacked, as well as the testimony of another defense witness, Andre Phillips, who attempted to impeach Stewart's testimony that the defendant was one of her attackers. The jury was not persuaded. Moreover, as explained in detail above, the evidence of the defendant's guilt was overwhelming. Trial counsel's alleged failure does not undermine our confidence in the outcome of the defendant's trial, nor did it render the result of the trial unreliable or fundamentally unfair.

¶ 47 In the petition, the defendant also contended that trial counsel was ineffective because trial counsel "was totally unprepared for trial, having interviewed none of the potential witnesses and in fact only having interviewed the [d]efendant on one occasion at the St. Clair County Jail for a period of 15 to 30 minutes." We agree with the State that this allegation too is positively rebutted by the record, which shows that trial counsel was very well prepared and advocated vigorously and competently on the defendant's behalf, including engaging in extensive cross-examination of the State's witnesses and presenting the defense witnesses described above. Accordingly, we agree that the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation, because there is no reasonable probability that but for trial counsel's alleged failure, the result of the defendant's trial would have been different.

¶ 48 The defendant also contended in the petition that trial counsel was ineffective because "[a]s a result of [trial counsel's] lack of preparation, the [d]efendant did not learn

that he was going to trial until the day of trial" and that "[a]s a consequence, he was unable to [adequately] assist [trial counsel] in the defense of his case and was forced to sit at counsel table during the *voir dire* in an orange St. Clair County inmate jumpsuit." We agree with the State that the premise underlying this allegation is positively rebutted by the record, which, as noted above, shows that trial counsel was very well prepared for trial and advocated vigorously and competently on the defendant's behalf. Accordingly, there is no merit to any contention that harm flowed to the defendant "as a result" of, or "as a consequence" of, the faulty premise that there was a lack of preparation by trial counsel.

¶ 49 Moreover, as the State points out, the record demonstrates that it was during a pretrial conference on the morning of the first day of trial, not during *voir dire*, that the defendant appeared "in orange" rather than "dressed out," as Judge Donovan characterized it. The conference took place because the defendant's mother and brother had told trial counsel that morning that they had been in contact with an attorney in St. Louis, and accordingly, the defendant's mother and brother, as well as the defendant himself, wanted "a continuance so that they may obtain–retain his services to represent him in this matter." Although the defendant represented to Judge Donovan that his family had retained the attorney and paid him money, and that the attorney had agreed to represent the defendant, when Judge Donovan and the parties recessed to call the attorney, they discovered that the defendant's representation to Judge Donovan was not true, that the attorney was not even licensed in Illinois, and that there was "nothing to

indicate" that the defendant would "have counsel from St. Louis." Accordingly, Judge Donovan denied the defendant's request for a continuance.

¶ 50 Thus, the record positively rebuts the notion that trial counsel was in any way responsible for the alleged fact that the defendant "did not learn that he was going to trial until the day of trial," and by extension, the record positively rebuts the notion that "[a]s a consequence," the defendant was unable to adequately assist trial counsel in the defense of his case. The defendant does not allege that he was clad in an orange St. Clair County inmate jumpsuit during trial–only that he was during *voir dire*. Even if we were to assume, *arguendo*, that he did not change clothes between the pretrial conference and *voir dire*, the defendant would not prevail on this claim. This court has previously held that a defendant's right not to appear before a jury in jail clothing is subject to harmless error analysis, and that such error is harmless beyond a reasonable doubt if there is overwhelming evidence of the defendant's guilt. *People v. Steinmetz*, 287 Ill. App. 3d 1, 6-7 (1997). In this case, as we have explained above, the evidence of the defendant's guilt was overwhelming. Accordingly, we agree that the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation, because there is no reasonable probability that but for trial counsel's alleged failure, the result of the defendant's trial would have been different.

¶ 51 The defendant also makes a claim, in the petition, that "[t]rial counsel made no effort to impeach any of the witnesses brought forward by the prosecution." We agree with the State that this allegation too is positively rebutted by the record, which, as explained above, shows that trial counsel extensively cross-examined the State's

witnesses, and in fact used defense witnesses to attempt to impeach them, all in an effort to undermine the State's case against the defendant and to convince the jury that the defendant was not responsible for the crimes against Stewart and Lofton. The jury was not persuaded. Accordingly, we agree that the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation, because there is no reasonable probability that but for trial counsel's alleged failure, the result of the defendant's trial would have been different.

¶ 52 The final contention of ineffective assistance of trial counsel in the petition asserts that the defendant "was advised by Judge Donovan that, as a consequence of questions asked by one or more of the jurors, a mistrial was offered" to trial counsel, but that trial counsel "declined the mistrial without consultation with [the defendant] in violation of" the defendant's rights. This assertion is positively rebutted by the record. It is true that during their deliberations, the jurors sent questions to Judge Donovan. However, Judge Donovan and the parties agreed that the questions amounted to six factual questions about what the evidence in the case showed, as well as a request for "the book" used by Judge Donovan when instructing the jury, and moreover agreed that the proper response to the questions was to instruct the jury to continue its deliberations on the basis of the testimony and exhibits presented to the jury during the trial, as well as the instructions the jury had received. There was never any discussion of a mistrial, nor any basis therefor. There was no request for a mistrial, and no *sua sponte* offer from Judge Donovan of a mistrial. Accordingly, this allegation in the petition, liberally construed in light of the trial record, fails to make a substantial showing of a constitutional violation, because

there is no reasonable probability that but for trial counsel's alleged failure, the result of the defendant's trial would have been different.

¶ 53 After considering the defendant's petition fully on its merits, we cannot find a reasonable probability that, but for trial counsel's alleged unprofessional errors, the result of the proceeding would have been different; accordingly, we affirm the trial court's dismissal of the petition. See, *e.g.*, *People v. Lee*, 2016 IL App (1st) 152425, ¶ 68. Moreover, as the State aptly notes, although the petition also alleges ineffective assistance of appellate counsel for failure to raise on direct appeal the foregoing allegations of ineffective assistance of trial counsel, because the underlying allegations are without merit, so too is any claim of ineffective assistance of appellate counsel, as appellate counsel has no obligation to raise meritless claims on direct appeal. See, *e.g.*, *People v. House*, 2015 IL App (1st) 110580, ¶ 79.

¶ 54 Finally, with regard to the defendant's claim that he is entitled to an additional eight days of sentencing credit, the State does not disagree as a matter of either the facts of this case or of the generally applicable sentencing credit law, but nevertheless contends that relief from the claim "is not available on this appeal." However, as the defendant correctly notes, this court has held that even where, as a general proposition, "[a] sentencing credit issue of this type is not appropriately considered in an appeal from the dismissal of a post-conviction petition which did not raise the issue" because the issue should have been raised "by filing a motion to amend mittimus in the trial court," this court may nevertheless, " 'in the interests of an orderly administration of justice,' " decide to treat the defendant's request on appeal as a motion to amend mittimus, and we may

consider and grant that motion "because an amended mittimus may be issued at any time." *People v. Wren*, 223 Ill. App. 3d 722, 731 (1992). Accordingly, we exercise our authority under Illinois Supreme Court Rule 615(b) and hereby correct the mittimus to give the defendant the additional eight days of sentencing credit to which he is entitled. See, *e.g.*, *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 52.

¶ 55 CONCLUSION

¶ 56 For the foregoing reasons, we affirm the dismissal of the defendant's postconviction petition at the second stage of proceedings, and correct the mittimus to give the defendant the additional eight days of sentencing credit to which he is entitled.

¶ 57 Affirmed; mittimus corrected.