

No. 1-15-0042

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	83 C 8124
)	
EUGENE HORTON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel was not ineffective.

¶ 2 Defendant, Eugene Horton, appeals from the circuit court’s dismissal of his successive *pro se* petition for postconviction relief at the second stage. Defendant argues that he was denied reasonable assistance where his postconviction counsel stood on his *pro se* successive petition and made no effort to amend the petition to overcome procedural bars or shape his claims into the proper legal format in violation of Illinois Supreme Court Rule 651(c) (eff. Dec.1, 1984). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Petitioner was charged with armed robbery¹ and chose to represent himself at trial with the assistance of his previously-appointed public defenders as standby counsel. The victim identified defendant at trial as the individual who took his car at gunpoint. Defendant was convicted and sentenced to 60 years' imprisonment. We affirmed his conviction and sentence. *People v. Horton*, No. 1-84-791 (Aug. 29, 1985) (unpublished order pursuant to Supreme Court Rule 23). We also affirmed the dismissal of several of petitioner's prior postconviction petitions in *People v. Horton*, Nos. 1-86-2483, 1-96-1565, 1-01-1740 and 1-01-3896 (consolidated), and 1-03-0238, all unpublished orders pursuant to Supreme Court Rule 23.

¶ 5 On August 11, 2006, petitioner filed a petition for habeas corpus relief pursuant to section 10-102 of the Code of Civil Procedure of 1963 (735 ILCS 5/10-102 (West 2004)). The court recharacterized the habeas petition as a successive postconviction petition on September 23, 2007. On April 18, 2008, the court appointed the Cook County Public Defender's office to represent petitioner on his successive petition and additional pleading petitioner had filed. Defendant's claims were as follows: 1) he was denied Miranda warnings and counsel during a pre-trial showup; 2) he was denied *Miranda* warnings and counsel during his pretrial interrogation; 3) standby counsel refused to let him testify and conditioned standby assistance on his not testifying; 4) standby counsel failed to investigate or seek a reduction in sentence based on the fact that the gun used in the robbery was inoperable; 5) the police refused to let him consult with a previous attorney, who would have represented him at the showup and at the motion to suppress; and 6) he could not have raised these claims earlier due to the State's

¹ We note that the State erroneously stated the facts of petitioner's conviction in the murder of Terry Tomalak, *People v. Horton*, 14 Ill. App. 3d 957 (1973), and the subsequent procedural history. In this case, petitioner was convicted of armed robbery.

concealment of the police reports that would have supported these claims.

¶ 6 Over the course of the next several years, Assistant Public Defender (APD) Stewart appeared in court as petitioner's counsel on his successive postconviction petition and requested numerous continuances to "file a supplement," to review transcripts, to contact petitioner. On December 16, 2010, APD Stewart stated that she was "almost through this." APD Stewart requested several more continuances thereafter citing various reasons. On June 21, 2012, APD Stewart informed the court that defendant had "given [her] new information that [she] need[ed] to investigate" and was granted a continuance to September 20, 2012.

¶ 7 On September 12, 2012, APD Stewart informed the court that she needed "seven more weeks to file something" and was granted a continuance. APD Stewart requested and was granted numerous requests for continuances thereafter. On July 16, 2014, petitioner filed a *pro se* motion entitled "motion to inform the state of new evidence, wherein he asserted that on June 9, 2014, he had been diagnosed with "persistent military related post traumatic stress disorder" by the staff at the Menard Correctional Center. Petitioner claimed that this information was new evidence because it "will be used to challenge motion to quash [and] suppress self representation at trial and sentence, conviction or plea negotiations."

¶ 8 On July 24, 2014, APD Stewart filed a certificate in accordance with Illinois Supreme Court Rule 651(c) (eff. Dec.1, 1984), stating that she had communicated with petitioner to ascertain his contentions of deprivation of his constitutional rights, and that she examined the trial record and defendant's "pro se petition filed in this postconviction proceeding." She further stated that the "*pro se* petition, along with the attached affidavit of Joel T. Pelz adequately presented petitioner's contentions" and that "an amended petition will not be filed in this case."

¶ 9 On November 6, 2014, the State filed a response to the successive postconviction

petition. The court also informed the parties that defendant had filed a motion “to inform the State of new evidence.” On December 4, 2014, APD Stewart informed the court that she had already filed her 615(c) certificate. She noted petitioner’s *pro se* motion to inform the state of new evidence, but stood by her decision not to amend this petition. The case was continued to December 11, 2014, for arguments on the State’s motion to dismiss.

¶ 10 On December 11, 2014, the court granted the State’s motion to dismiss, finding that it had recharacterized petitioner’s habeas corpus petition as a successive postconviction petition to err on the side of caution as a result of a “certain discussion.” The court found that petitioner was unable to meet the cause and prejudice test as to the issues raised because the majority of the claims were barred by *res judicata*. It is from this order that petitioner now appeals.

¶ 11 ANALYSIS

¶ 12 Defendant argues that he did not receive reasonable assistance of postconviction counsel where his attorney stood on his *pro se* successive petition and made no effort to amend the petition to overcome procedural bars or shape his claims into the proper legal form in violation of Illinois Supreme Court Rule 651(c) (eff. Dec.1, 1984). Specifically, petitioner claims that postconviction counsel did not amend the petition to include his claim of newly discovered evidence that he was diagnosed in June 2014 with military-related post-traumatic stress disorder (PTSD) and therefore was unfit to stand trial or waive his right to counsel in 1984.

¶ 13 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Where defendant is not sentenced to death, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d

410, 418 (1996).

¶ 14 The Act contemplates the filing of only one postconviction petition. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2010). Consequently, all issues actually decided on direct appeal or in an original postconviction petition are barred by the doctrine of *res judicata* and all issues that could have been raised on direct appeal or in an original postconviction petition, but were not, are waived. *People v. Blair*, 215 Ill. 2d 427, 443 (2005); 725 ILCS 5/122-3 (West 2010).

¶ 15 Successive postconviction petitions are only allowed when fundamental fairness so requires or when a defendant can establish cause and prejudice for failing to raise the issue in an earlier proceeding. *People v. Lee*, 207 Ill. 2d 1, 4-5 (2003). The cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 (725 ILCS 5/122-3 (West 2010)), so that a claim raised in a successive petition may be considered on its merits. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002); 725 ILCS 5/122-1(f) (West 2010). A defendant must meet a “more exacting” or “substantial” showing of cause and prejudice to be granted leave to file a successive postconviction petition. *People v. Edwards*, 2012 IL 111711 ¶¶ 22, 32. A “gist” of a claim of cause and prejudice is insufficient. *Id.* ¶¶ 25, 29.

¶ 16 Pursuant to the cause-and-prejudice test, the petitioner must show good cause for failing to raise the claimed errors in a prior proceeding and actual prejudice resulting from the claimed errors. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2010). “Cause” is defined as “any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim at the initial post-conviction proceeding.” *Pitsonbarger*, 205 Ill. 2d at 462; 725 ILCS 5/122-1(f) (West 2010). “Prejudice” is defined as an error so infectious to the proceedings

that the resulting conviction violates due process. *Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f) (West 2010). A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under *res judicata* and waiver principles. *Pitsonbarger*, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2010). We review the trial court's denial of a motion to file a successive postconviction petition *de novo*. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006).

¶ 17 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure that every petitioner receives this reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are “necessary” to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. Illinois Supreme Court Rule 615(c) ensures that postconviction counsel shapes a defendant's allegations into a proper legal form and then presents them to the court. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. An attorney's substantial compliance with the rule is sufficient. *Id.* ¶ 18. This court reviews an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State *de novo*. *Id.*

¶ 18 When postconviction counsel files a Rule 651(c) certificate, there is a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 19 Here, postconviction counsel filed a Rule 651(c) certificate, thus creating a presumption that petitioner received the representation required by the rule at the second stage of proceedings. *Jones*, 2011 IL App (1st) 092529, ¶ 23. However, defendant contends that he has rebutted the presumption of substantial compliance when counsel failed to make certain necessary amendments to his *pro se* postconviction petition to include his claim of new evidence, which was his diagnosis of PTSD 30 years following his conviction.

¶ 20 As the State points out, petitioner's claim of unfitness based on his June 2014 PTSD diagnosis was not included in his 2006 habeas petition which was converted into a successive postconviction petition and therefore was not properly before the postconviction court. Petitioner's characterization that postconviction counsel "stood" on his motion and failed to inform the state of new evidence is incorrect. Counsel did not adopt the pleading and expressly told the court she would not be filing an amended petition to include petitioner's new claim. Postconviction counsel cannot be found to be unreasonable for not shaping, adopting or including a claim that petitioner did not include in his 2006 petition. See *People v. Pendelton*, 223 Ill. 2d 458, 475-76 (2006) (postconviction counsel not obligated to raise issues which defendant did not raise in his petition).

¶ 21 Even if this claim were properly before the postconviction court, petitioner's claim has no merit. Whether petitioner's *pro se* allegations have merit is crucial in determining whether counsel acted unreasonably by not filing an amended petition. *Id.* ¶ 23. "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *People v. Greer*, 212 Ill. 2d 192, 2015 (2004).

¶ 22 Defendant was diagnosed with PTSD in June 2014, almost 30 years after his trial.

Although the PSI from the defendant's underlying 1984 conviction shows defendant was in the military from 1967-1971, there is no evidence in the record before us to suggest that petitioner was suffering from PTSD at the time of trial, nor is there any basis to conclude that, even if defendant suffered from military-related PTSD, that influenced his fitness to stand trial or to represent himself. We therefore cannot find that postconviction counsel was ineffective for failing to amend petitioner's successive postconviction petition to include this claim.

¶ 23 We likewise reject petitioner's argument that it was unreasonable for postconviction counsel to stand on petitioner's supplemental petition if she believed it lacked merit and was unable to shape the claims into proper legal format. When postconviction counsel investigates a *pro se* petitioner's postconviction claims and finds they have no merit, counsel has two options: 1) withdraw as counsel; and 2) to stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). Here, postconviction counsel chose to stand on the petition and explained that she considered defendant's motion to inform the state of new evidence, but declined to file an amended petition. Postconviction counsel made no comments against the merits of petitioner's claims and argued against the State's motion to dismiss.

¶ 24 We similarly reject petitioner's claim that counsel's failure to amend his successive postconviction petition to overcome the procedural bars of forfeiture, *res judicata* and untimeliness constituted unreasonable assistance. Petitioner has failed to state on what grounds counsel could have possibly argued to overcome forfeiture, *res judicata* and untimeliness given that defendant was convicted in 1984 and had previously filed several postconviction petitions. See *People v. Perkins*, 229 Ill. 2d 34, 40 (2007).

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¶ 25

CONCLUSION

¶ 26 For the reasons stated, the judgment of the postconviction court is affirmed.

¶ 27 Affirmed.