2018 IL App (1st) 152599-U

No. 1-15-2599

September 17, 2018

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 13163
	)	
MICHAEL WORDLOW,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Justices Mason and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of defendant's postconviction petition is affirmed over his contention that postconviction counsel provided unreasonable assistance of counsel. Postconviction counsel filed an Illinois Supreme Court Rule 651(c) certificate and defendant did not overcome the presumption that postconviction counsel complied with the rule.

¶ 2 Defendant Michael Wordlow appeals from the trial court's order granting the State's motion to dismiss his postconviction petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2014)). Following a December 2005 jury trial, defendant was

convicted of first degree murder for the shooting death of Donald Bedford and sentenced to 85 years in prison. On direct appeal, we affirmed the judgment. *People v. Wordlow*, No. 1-05-1780 (2009) (unpublished order under Illinois Supreme Court Rule 23). Defendant subsequently filed a *pro se* postconviction petition, which the trial court summarily dismissed. On appeal, we remanded to the circuit court because we concluded the court erred when it dismissed defendant's petition as frivolous and patently without merit. *People v. Wordlow*, 2012 IL App (1st) 102188-U, ¶ 16. On remand, the circuit court appointed counsel and later granted the State's motion to dismiss defendant's petition.

¶ 3 Defendant now appeals that order, contending his postconviction counsel provided unreasonable assistance of counsel because he did not amend defendant's petition with detailed allegations to support his claims that trial counsel was ineffective for withdrawing the motion to suppress his videotaped statement and for refusing to allow him to testify. He also contends his postconviction counsel was unreasonable for failing to attach an affidavit from an eyewitness, Satrice Garner, to support his claim that trial counsel was ineffective for failing to call her as a witness, as she would have supported his self-defense claim. We affirm.

¶ 4 BACKGROUND

¶ 5 Prior to trial, defendant filed a motion to suppress statements that were obtained after he "had elected to consult with an attorney." Defense counsel informed the court that, "after consultation" with defendant, defendant was withdrawing his motion to suppress statements. Defendant stated to the court, on the record, that he discussed the motion with defense counsel, and it was his wish to withdraw the motion.

¶ 6 At trial, Satrice Garner (Garner), Bedford's girlfriend, testified that, on April 21, 2002, at about 4 p.m., when she and Bedford were about a block away from their home, Bedford stopped their vehicle next to defendant, William Adams (Adams), and William Hill (Hill), and asked to speak to "Little Melvin."[1] Bedford and Little Melvin had a conversation about Bedford's truck and, while talking, defendant asked Bedford, "What's up? What you coming at him for?" Bedford responded, "I'm not talking to you."

¶ 7 Bedford drove away and parked down the street by Garner's residence. When Garner and Bedford were unloading their groceries, Bedford made a telephone call and walked outside. Garner saw defendant, Adams, and Hill coming towards her house. Little Melvin and a man identified as "Hurry" also came to her house. Bedford finished his telephone conversation and put his cellular phone into his hooded sweatshirt. Bedford and defendant then got into an argument and Garner, who was not too far from Bedford, talked to Hill and Adams. At some point, defendant made a gesture towards Bedford, and Bedford pushed defendant's hand away. Defendant said to Bedford, "I got you" and Bedford responded, "You got who? You got me." Defendant then shot Bedford three times. Defendant was the only person Garner saw with a gun.

¶ 8 On cross-examination, Garner denied telling the detectives that, when Bedford initially stopped the vehicle to talk to Little Melvin, Bedford confronted Little Melvin about the theft of his truck. Garner testified that when the men were walking to her home, they were hollering things across the street and Bedford came out to them. Garner could not recall whether she told the police after the incident that defendant had gestured towards Bedford when the two men were arguing.

[1] Garner and other witnesses refer to William Adams as "Dion" and William Hill as "Wee Wee." We will refer to Adams and Hill by their last names. Little Melvin's full name was not provided.

¶ 9 Adams testified that when he was standing at a porch, Bedford and Garner pulled up in a vehicle and exchanged words, which led to an argument between Bedford and Little Melvin and "Hurry."[2] At some point, defendant, Hill, Little Melvin, and "Hurry" went to the corner by Bedford and Garner's home. Adams heard commotion and a "signal call," which meant to hold your head up or "something is fix'n to happen" such as a fight "or whatever." Adams walked over to Garner's residence and, when he arrived, Garner told him that Bedford and defendant were arguing about a stolen truck.

¶ 10 While defendant and Bedford were arguing, Bedford had his hands in his pocket. Adams never saw Bedford with a gun or saw him take his hands out of his pocket. Adams testified Bedford jumped at defendant aggressively "like he wanted to do something and was talking loud and getting aggressive. Adams denied seeing defendant with a gun or seeing him "pull out a chrome .38" from his front belt and shoot Bedford three times. Adams testified the whole neighborhood kept guns in an abandoned vehicle on the block and defendant had access to the vehicle. Adams denied having seen defendant retrieve a gun from that vehicle before the shooting.

¶ 11 Adams spoke with a police officer and assistant state's attorney (ASA) after the shooting. Adams denied telling the ASA that, after "Hurry" made a noise, defendant and Hill went to a nearby vehicle where defendant kept a gun. Adams remembered telling the ASA he saw defendant "pull a chrome .38" from his front right by his belt but testified he made it up because the officers were trying to put the murder on him. Adams testified about the shooting under oath in a grand jury proceeding and acknowledged he testified defendant and Hill went to a nearby

[2] Adams referred to Satrice Garner as "CeeCee." We will continue to refer to Garner by her last name.

vehicle to get a gun and when defendant and Bedford were arguing, defendant "upped a .38" and shot three times. Adams testified that this testimony was a lie and his grand jury testimony was mostly not truthful. He made up a story that he knew the interrogating officers would believe.

¶ 12 Assistant State's Attorney Bronwyn Sears testified she spoke with Adams, and he gave a handwritten statement. During the interview, Adams told Sears defendant went to a vehicle parked on the block where defendant kept a gun and saw defendant "pull up a .38 chrome *** revolver from his right front belt area."

¶ 13 Hill testified he was on a porch with defendant and Adams when Bedford and Garner pulled up in a vehicle and stopped next to Little Melvin. Defendant and Adams walked to Bedford's car and defendant asked Bedford, "what is the problem and what's going on[?]" and "what did Little Melvin do to your girlfriend[?]" Hill testified defendant was calm and never yelled at Bedford. Bedford then drove down the street and parked in front of Garner's house.

¶ 14 Eventually, "Hurry" and Little Melvin drove to Garner's residence. Adams and defendant walked there. Hill walked half way down the block and, as he got closer, he heard Bedford hollering and defendant was trying to calm him down. Defendant "reached out" and Bedford smacked his hand down. Hill could not really hear their conversation but heard defendant ask Bedford, "what's the problem[?]" When Bedford and defendant were talking, Bedford always kept one hand in his pocket. At some point, Bedford used his other hand to push Garner out of the way, then turned to his left, and, as he was turning back towards his right, defendant shot him. Hill testified that he "saw one shot, he was falling, and [defendant] was shooting." Hill heard about four gunshots. Asked where defendant shot Bedford, Hill testified, "I just saw the gun, I just saw shooting I wasn't looking where it was as I was getting away from there" and he

"just saw [the gun] pointed at him." Hill testified that the gun was silver and looked like a ".38 or something."

¶ 15 After the incident, Hill gave a written statement to ASA Mark Hitt (Hitt). Hill denied telling Hitt he saw defendant take a couple of steps back, stop, and then fire two more shots into Bedford's body in cold blood. Hill acknowledged that when he was under oath in the grand jury proceeding, he testified that after Bedford was shot, defendant fired two more shots while Bedford was on the ground.

¶ 16 On cross-examination, Hill testified that, when Bedford was initially talking to Little Melvin in the car, Bedford was charged up, angry, and raising his voice. Later when Bedford came off of his porch, he was angry, looked down the street to the men, and made a gesture "[l]ike come on down." When defendant and Adams walked over, Bedford was angry, kept wanting to push, "acting real crazy," and "somebody you wouldn't want to be around." Bedford and defendant's conversation escalated into a "physical altercation" because Bedford was very angry and did not want to talk.

¶ 17 Chicago police detective James O'Brien and assistant ASA Hitt both testified that they met with Hill after the incident and Hill gave a handwritten statement. During the interview, Hill stated that, when Bedford was initially talking to defendant in the vehicle, defendant was yelling at Bedford and telling him that Little Melvin "wasn't a ho." Hitt testified that Hill stated he saw Bedford's body on the ground and defendant, who had a gun in his hand, "took two steps back, turned, and fired two more shots" at Bedford.

¶ 18 ASA Kathleen Lanahan, the ASA who appeared at Hill and Adam's grand jury proceedings, identified the transcript of Adams' grand jury testimony and the State published it

to the jury. When Adams was under oath at the grand jury proceeding, Adams testified that "Hurvan" made a warning noise to alert everybody that something was about to go down. Defendant and Hill ran to a nearby parked vehicle to get a gun and then went to Garner's residence. When Adams arrived by Garner's house, Garner told Adams defendant and Bedford were arguing about Bedford's stolen van because Bedford thought one of the men had stolen it. As Adams started walking away, defendant "upped the .38" and shot three times. Adams testified defendant pulled the gun from his right waistline and Adams never saw Bedford with a weapon.

¶ 19 Chicago police detective Michael O'Donnell testified that, after defendant was advised of his rights, defendant stated he had a snub nose revolver .38 caliber, removed it from his pocket, and shot Bedford three times. Later, O'Donnell was present for a conversation between assistant State's Attorney Kim Ward and defendant. Ward advised defendant of his rights again and the substance of defendant's statement was similar to the one he made to O'Donnell. Defendant agreed to have his statement videotaped and O'Donnell and Ward had another conversation with defendant that was videotaped.

¶ 20 On cross-examination, O'Donnell testified defendant told him that defendant asked Bedford "what the problem" was and moved in closer to Bedford, who shoved defendant off of him. Defendant told O'Donnell that Bedford had said to Adams that, if Bedford "saw him by himself he would kill him."

¶ 21 ASA Kim Ward testified that, on April 23, 2002, at about 2:30 a.m., after advising defendant of his rights, she and O'Donnell spoke with defendant. When the conversation concluded, Ward asked O'Donnell to step out of the interview room. Ward asked defendant how

he was treated and defendant said "fine." Ward asked him if he was hungry or if he had anything to eat and he told her he had some hamburgers and something to drink. Ward asked him if he needed to use the washroom and he told her he had been allowed to use the bathroom and was "okay." Asked whether he had any complaints, defendant responded "no." Ward provided defendant with options for memorializing his statement and defendant wanted to record a video. Ward read to defendant and asked him to read the "Consent to Videotape Statement," which defendant signed. Ward and O'Donnell then had a conversation with defendant that was videotaped. Ward identified the videotape, testified it was true and accurate, and the State played it for the jury.

¶ 22 In the videotaped recording, defendant acknowledges Ward advised him of his rights before they spoke and Ward read him his rights again on the video. Defendant confirms he understands his rights and that he wishes to talk to Ward and O'Donnell. Defendant states that on April 21, 2002, in the afternoon, he was hanging out with Hill, Adams, and "Melvin."[3] While they were talking, a car pulled up. The men walked to the car and Bedford, who was with his girlfriend, asked Melvin a question about why he was hitting on his girlfriend. Melvin denied trying to hit on his girlfriend and then Bedford drove one block away and parked. Bedford and his girlfriend got out of the car and took groceries inside their house. After being inside for about one minute, they both came out and Bedford, who was wearing a hoodie, stood by the street and tried to get their attention but did not say anything.

¶ 23 Defendant, Hurry, Hill, Adams, and Melvin went down to Garner's house to beat Bedford up. Before defendant walked over, he got a .38 snub nose revolver from an abandoned

[3] Defendant refers to Adams as "Dion" and Hill as "Wee Wee."

car on the street and put it in his coat pocket. After getting the gun, defendant walked with Hill, Adams, and Melvin toward Bedford, who was standing on the sidewalk. Defendant asked Bedford "what the problem" was and, when defendant came closer to Bedford, Bedford pushed defendant off of him. Bedford told Adams, "When I catch you by yourself I am going to kill you." Bedford's hand was in his pocket and defendant did not see him with any kind of a weapon or see him move like he was going to pull out a weapon. After Bedford made the statement to Adams, defendant shot Bedford in the chest. Defendant pulled the trigger three times and, after the third shot, he took off running. As he was running, he met "Rail" and told him to "put [the gun] away" from the police. Defendant never saw Bedford with any kind of a weapon and Bedford never threatened defendant other than making the possible future threat to Adams.

¶ 24 At the conclusion of the interview, defendant acknowledges that the police and Ward treated him "ok" and he had something to eat and drink, cigarettes, and used the bathroom whenever he wanted. Ward asks defendant whether he was giving the statement freely and voluntarily. Defendant pauses and responds "yes." Ward also asks defendant whether any threats or promises were made to get him to make a statement, defendant pauses and responds "no." Defendant acknowledges it was something he wanted to do.

¶ 25 Edmund Donoghue, a medical examiner, testified that Bedford's autopsy showed evidence of four gunshot wounds and it was his opinion within a reasonable degree of medical and scientific certainty that Bedford died of multiple gunshot wounds and the manner of death was homicide.

¶ 26 After the State rested, defense counsel informed the court that defendant did not want to testify, stating he had "been informed after discussions with [defendant] that primarily because

of the Court's ruling on allowing the previous conviction in to impeach [defendant] wishes to not testify, Judge, and we have discussed that at length and that is his [wish]." The court then engaged in the following exchange with defendant:

"THE COURT: All right, [defendant], do you understand that it is your decision and your decision only as to whether or not you will testify, do you understand that?

DEFENDANT: Yeah.

THE COURT: Have you made a decision as to whether or not you would testify?

THE DEFENDANT: Yeah.

THE COURT: What is your decision?

THE DEFENDANT: No.

THE COURT: You are not testifying?

THE DEFENDANT: No, I ain't.

THE COURT: Has anyone forced you, threatened, coerced, or promised you anything whatsoever in order to keep you from testifying?

THE DEFENDNT: No.

THE COURT: You have made that decision freely and voluntarily?

THE DEFENDANT: Yes."

¶ 27 Defendant presented a stipulation between the parties that Chicago police detective James O'Brien would testify that he spoke with Garner on April 21, 2002, and Garner stated Bedford confronted the four men about the theft of his truck. He would testify that Garner never told the police that, before the shooting, Bedford had been talking on his cellular telephone and put it into his pocket or that defendant tried to touch, reach, or gesture at Bedford.

¶ 28 During closing argument, defense counsel asserted a self-defense theory, stating that defendant "acted to save himself" and "[w]hether the danger was real or imagined he believed he had to act at that time to save his life." The jury found defendant guilty of first degree murder. The court denied defendant's motion for a new trial and sentenced him to 85 years in prison. On direct appeal, we affirmed the judgment of the circuit court. *People v. Wordlow*, No. 1-05-1780 (2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 29 In April 2010, defendant filed a *pro se* postconviction petition. Defendant alleged claims for ineffective assistance of trial counsel, including, as relevant here, that his trial counsel denied him his right to testify at trial and failed to interview and call Garner as a witness who could have testified in his defense. He also claimed his trial counsel was ineffective for withdrawing the motion to suppress his videotaped confession, alleging he told his counsel "that the alleged statements the police had me to [*sic*] give them were coerced and given under threating [*sic*] circumstances at the police department." Defendant also alleged his trial counsel told him that if he withdrew the motion to suppress, the State agreed not to introduce the videotaped statements into evidence. To the petition, defendant attached a notarized affidavit, asserting he diligently attempted to obtain an affidavit from his trial counsel to support his claims but counsel failed to respond.

¶ 30 ANALYSIS

¶ 31 The trial court dismissed defendant's petition, finding his claims were frivolous and patently without merit. Defendant appealed and, on appeal, with respect to his claim that trial counsel was ineffective for withdrawing his motion to suppress statements, we concluded that "defendant's allegations cannot be characterized as fantastic or delusional when he admits that

he agreed to the withdrawal of the motion to suppress" but asserted "he was motivated by a prior conversation with defense counsel during which counsel told him that the State had agreed not to introduce the videotape if the motion was withdrawn." *Wordlow*, 2012 IL App (1st) 102188-U, ¶ 16. We noted defendant's legal theory that his trial counsel was ineffective when he failed to pursue the motion to suppress was "not indisputably meritless because it is not contradicted by the record." *Wordlow*, 2012 IL App (1st) 102188-U, ¶ 16. Because partial summary dismissals are not permitted under the Post-Conviction Hearing Act, we did not address defendant's claim on appeal that his counsel was ineffective for refusing to allow him to testify at trial. *Wordlow*, 2012 IL App (1st) 102188-U, ¶ 17. We reversed the trial court's summary dismissal and remanded for appointment of counsel and further proceedings.

¶ 32 On remand, the trial court appointed counsel for defendant and counsel filed an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate. The State filed a motion to dismiss the petition and, before the hearing, counsel informed the court that defendant had filed an additional affidavit. The affidavit was notarized and alleged, *inter alia*, Garner was an eyewitness and available to testify on his self-defense theory, Garner informed defendant that the State threatened to charge her if she did not cooperate, and his trial counsel did not contact Garner or investigate his self-defense theory. Defendant also alleged in the affidavit that his trial counsel coerced him not to testify and withdrew his motion to suppress his alleged videotaped confession against his will. Following argument on the State's motion to dismiss, the court granted the State's motion and dismissed defendant's petition.

¶ 33 On appeal, defendant contends his postconviction counsel provided unreasonable assistance of counsel because he did not amend defendant's *pro se* petition to include detailed

facts or new affidavits that were necessary to support his claims that trial counsel was ineffective for withdrawing his motion to suppress the videotaped statement, denying him the right to testify, and failing to investigate or call Garner as a witness. Specifically, he argues postconviction counsel failed to amend the petition with specific facts or an updated affidavit from defendant regarding how his statement to the police was coerced and what his testimony would have consisted of had he testified at trial. He asserts his postconviction counsel failed to include an affidavit from Garner, or explain why he did not attach one, which would have supported his claim that trial counsel was ineffective for failing to interview or call Garner as a witness. Defendant argues these additional details and supporting documentation were necessary in order for his ineffective assistance of counsel claims to be cognizable under the Post-Conviction Hearing Act. He requests we remand the case for further proceedings with new postconviction counsel.

¶ 34 Under the Post-Conviction Hearing Act (Act), a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Tate,* 2012 IL 112214, ¶ 8. There are three stages in the postconviction petition process. *Tate,* 2012 IL 112214, ¶ 9. At the first stage, the trial court must determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If the petition advances to the second stage, as here, the court may appoint counsel for defendant (725 ILCS 5/122-4 (West 2014)) and counsel may amend the petition (*People v. Jones,* 2017 IL App (4th) 140594, ¶ 28). The State may file a motion to dismiss or answer the petition. *People v. Harper,* 2013 IL App (1st) 102181, ¶ 33. If the State files a motion to dismiss the petition, the trial court may hold a dismissal hearing and must determine whether

the petition and accompanying documentation make a substantial showing of a constitutional violation. *Harper*, 2013 IL App (1st) 102181, ¶ 33. The court must take all well-pleaded facts that are not positively rebutted by the trial record as true and the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition and accompanying documentation do not make such a showing, the court dismisses the petition at the second stage. *Tate*, 2012 IL 112214, ¶ 10. We review the trial court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 15.

¶ 35 During postconviction proceedings, a defendant does not have a constitutional right to the assistance of counsel. *People v. Cotto*, 2016 IL 119006, ¶ 29. Rather, a defendant is entitled to only a "reasonable" level of assistance, which is less than that afforded by the federal or state constitutions. *Pendleton*, 223 Ill. 2d at 472. To ensure postconviction counsel provides the reasonable level of assistance required by the Act, Illinois Supreme Court Rule 651(c) sets forth specific duties for postconviction counsel at the second stage. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The rule provides, in relevant part:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2103).

It is mandatory that counsel comply with the duties provided in Rule 651(c) (*People v. Lander*, 215 Ill. 2d 577, 584 (2005)), but substantial compliance is sufficient (*People v. Miller*, 2017 IL App (3d) 140977, ¶ 47). Postconviction counsel is not required to amend the defendant's *pro se* postconviction petition. *People v. Malone*, 2017 IL App (3d) 140165, ¶ 10. Further, the rule does not require postconviction counsel to actively search for sources outside the record that might support general claims asserted in a post-conviction petition (*People v. Johnson*, 154 Ill. 2d 227, 247 (1993)) or to advance frivolous or spurious claims (*People v. Csaszar*, 2017 IL App (1st) 100467-B, ¶ 18).

¶ 36 When postconviction counsel files a Rule 651(c) certificate, there is a presumption that counsel provided reasonable assistance at the second stage. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. A defendant has the burden to overcome this presumption by demonstrating his attorney failed to substantially comply with the duties mandated by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Our review of whether an attorney complied with Rule 651(c) is *de novo. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 37 Here, postconviction counsel filed a Rule 651(c) certificate, asserting he "communicated with [defendant], by telephone and by letter to ascertain his contentions of deprivation of constitutional rights," he reviewed the record for his appeals, reviewed his *pro se* petition, and that "[n]o supplemental petition will be filed at this time." Because defendant filed a Rule 651(c) certificate, there is a presumption that he provided the reasonable level of assistance required by the rule. Defendant has not met his burden of overcoming this presumption.

¶ 38 Defendant does not contend that postconviction counsel failed to communicate with him or examine the record of proceedings as required by Rule 651(c). Rather, as previously

discussed, defendant contends postconviction counsel provided unreasonable assistance because he did not amend the petition with detailed facts and updated affidavits to support his claims that trial counsel was ineffective for withdrawing his motion to suppress the videotaped statement to police, denying him the right to testify, and failing to investigate or call Garner as witness.

¶ 39 To determine whether postconviction counsel was unreasonable for not amending a petition, "the question of whether the *pro se* allegations had merit is crucial" because the third requirement under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims. *Profit*, 2012 IL App (1st) 101307, ¶ 23 (quoting *People v. Greer*, 212 Ill. 2d 192, 205 (2004)). Further, when a postconviction claim lacks a sufficient factual basis, postconviction counsel's decision not to amend a *pro se* petition does not constitute a deprivation of adequate representation. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 21.

¶ 40 Defendant first contends postconviction counsel was unreasonable because he did not amend the petition with detailed facts and supporting documentation about how his confession was coerced in order to support his claim that trial counsel was ineffective for withdrawing the motion to suppress his videotaped confession. Without specific facts to support his claim, defendant argues that his confession was coerced, his petition did not clearly set forth how his constitutional rights were violated. Defendant also asserts the record does not show that postconviction counsel attempted to contact trial counsel or ask defendant about the details of the alleged coerced statement he gave to the police.

¶ 41 We conclude postconviction counsel was not unreasonable for failing to amend the petition to add detailed facts about defendant's alleged coerced statements to the police where there is no available material in the record showing how counsel could have amended the

petition. See *Malone*, 2017 IL App (3d) 140165, ¶ 10 (quoting, *People v. Stovall*, 47 Ill. 2d 42, 46 (1970)).

¶ 42 Detective O'Donnell and ASA Ward testified that before their conversations with defendant, they advised defendant of his rights. Ward further testified that before defendant agreed to take a videotaped statement, he told her he had been treated fine, had something to eat and drink, had been allowed to use the bathroom, and did not have any complaints. In the videotaped recording, Ward advised defendant of his rights and defendant confirmed he understood them. Defendant acknowledged that the police and Ward had treated him "ok," he had something to eat and drink, cigarettes, and was allowed to use the bathroom whenever he wanted. Defendant confirmed he was giving the statement freely and voluntarily and no threats or promises were made to him to get him to make the statement. Further, the written allegations in defendant's motion to suppress with the trial court were based on the allegation that, in response to police questioning, he made statements to the police after he had requested an attorney. The motion was not based on the allegations that the police coerced or threatened him into making a statement, as defendant alleged in his petition.

¶ 43 Accordingly, there is no available material in the record to show that counsel could have amended the petition, or included supporting documentation, to add details regarding how defendant's statement was coerced. See *Malone*, 2017 IL App (3d) 140165, ¶¶ 9-11 (where postconviction counsel filed a Rule 651(c) certificate and did not amend the petition or attach affidavits or documentation, the court concluded that postconviction counsel provided reasonable assistance, finding: " '[T]here is no showing of the existence of any facts or evidence on which such affidavits could have been founded. Absent a showing of available material for supporting

affidavits, a failure to present affidavits obviously cannot be considered a neglect by the attorney' ") (quoting *People v. Stovall*, 47 Ill. 2d 42, 46 (1970))). Further, counsel need not go on a fishing expedition to find facts and evidence outside the record that might support defendant's claims. *Malone*, 2017 IL App (3d) 140165, ¶ 10 (quoting, *People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005)); see *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 40. Postconviction counsel was therefore not unreasonable for failing to amend the petition to add details regarding how defendant's confession was coerced.

¶ 44 Moreover, postconviction counsel did not provide unreasonable assistance when he did not amend the petition to add detailed facts about defendant's alleged coerced confession to support defendant's claim that trial counsel was ineffective for failing to argue the motion to suppress because the claim has no merit. Ineffective assistance of trial counsel claims are reviewed under the standard provided in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under this standard, to establish a claim for ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish prejudice when a claim is based on counsel's failure to file a motion to suppress, a defendant must demonstrate that the unargued suppression motion is meritorious and a reasonable probability exists that the outcome of the trial would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 45 Here, defendant cannot establish prejudice for his claim that his trial counsel was ineffective for failing to argue the motion to suppress. The record shows that, had defendant's trial counsel argued the motion to suppress and had his statements been suppressed, no

reasonable probability exists that the trial outcome would have been different. The evidence at trial overwhelmingly established that defendant shot Bedford without justification. Garner testified that, while defendant and Bedford were arguing, defendant made a gesture towards Bedford and Bedford pushed his hand away, after which the men exchanged words. Defendant said "I got you" and Bedford responded, "You got who? You got me?" Defendant then shot Bedford three times. Defendant was the only person Garner saw with a gun and there was nothing in her testimony to support a finding that defendant acted or used force to defend himself from Bedford.

¶ 46 Adams and Hill corroborated Garner's testimony. Adams stated in his grand jury testimony that when defendant and Bedford were arguing, defendant pulled a gun out and shot Bedford three times and he never saw Bedford with a gun. Likewise, Hill testified that Bedford and defendant's conversation escalated into a physical altercation and then defendant shot Bedford. Hill stated in his grand jury testimony that defendant fired two shots at Bedford when Bedford was on the ground. The evidence does not show that it was necessary for defendant to use force to defend himself. We find therefore that this evidence, even without defendant's statements to the police, overwhelmingly supported the jury's verdict that defendant shot Bedford and was not acting in self-defense when he did so.

¶ 47 Accordingly, we cannot find that the outcome of the trial would have been different had trial counsel argued the motion to suppress statements and had defendant's statements been suppressed. Defendant's ineffective assistance of counsel claim based on counsel's failure to argue the motion to suppress statements would therefore fail because he cannot establish

prejudice. Because defendant's claim has no merit, postconviction counsel was not unreasonable for failing to amend the petition to add facts or attach affidavits to support the claim.

¶ 48 As pointed out by defendant, in our prior order remanding the case for second stage proceedings, we found "defendant's allegations cannot be characterized as fantastic or delusional when he admits he agreed" to withdraw his motion to suppress but asserted "that he was motivated by a prior conversation with defense counsel." *Wordlow*, 2012 IL App (1st) 102188-U, ¶ 16. We also found defendant's theory that his trial counsel was ineffective for failing to pursue the motion to suppress was not "indisputably meritless because it is not contradicted by the record." *Id.* However, when we issued our prior order, we were reviewing the trial court's summary dismissal under the first stage standard, where the question is whether the petition was "frivolous or patently without merit," *i.e.*, whether it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009). In contrast, we are now reviewing defendant's claim that his postconviction counsel, who filed a Rule 651(c) certificate, provided an unreasonable level of assistance for failing to amend the petition to support his claim that trial counsel was ineffective for withdrawing the motion to suppress the videotaped statements and, thus, must determine whether the allegations had merit. See *Profit*, 2012 IL App (1st) 101307, ¶ 23. This instant appeal requires defendant to show substantial deprivation of his constitutional rights in the trial that resulted in his conviction. *Pendleton*, 223 Ill. 2d at 471. Therefore, our prior findings are not inconsistent with this ruling.

¶ 49 Defendant next contends that postconviction counsel was unreasonable for failing to amend the petition and defendant's affidavit to support his claim that his trial counsel was ineffective for coercing him not to testify. Defendant argues counsel was unreasonable for not

including details about what his trial testimony would have consisted of had he testified at trial. Defendant asserts that without any details regarding how he would have testified to support his self-defense claim, he cannot show that he was prejudiced when his trial counsel denied him the right to testify.

¶ 50 Although a defendant should make the decision about whether to testify in his own behalf with the advice of counsel, the decision belongs to a defendant. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). Advice not to testify is considered a matter of trial strategy and does not constitute ineffective assistance unless evidence suggests that counsel refused to allow the defendant to testify. *Youngblood*, 389 Ill. App. 3d at 217. "When a defendant's postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a 'contemporaneous assertion *** of his right to testify.' " *Id.* (quoting *People v. Brown*, 54 Ill.2d 21, 24 (1973)). To prove ineffective assistance of counsel based on counsel's alleged failure to deny a defendant the right to testify, a defendant must show prejudice. *People v. Barkes*, 399 Ill. App. 3d 980, 989 (2010).

¶ 51 Here, defendant claims he told his trial counsel "several times" during the trial that he wanted to testify because "certain" State witnesses were not telling the truth and his counsel denied him the right to testify. However, defendant's claim is contradicted by the record where there is nothing to show counsel refused to let defendant testify or that defendant reaffirmed his intention to testify when it was time to present or rest his case. See *People v. Thompkins*, 161 Ill. 2d 148, 177 (1994) (concluding that the defendant's postconviction claim that his trial counsel denied him the right to testify was properly rejected where the petition showed that the defendant

told counsel that "some time before trial that he wished to take the witness stand" but "[n]othing in the present record demonstrates that the defendant later reaffirmed that intention, and the defendant was silent when counsel rested the case without having called the defendant to the stand"). Rather, the record shows that defendant made the decision not to testify because the court ruled that the State could introduce his previous conviction for impeachment if he testified. Further, during the colloquy with the court regarding defendant's right to testify, defendant expressly stated on the record that he did not want to testify, it was his decision, no one forced, threatened, coerced, or promised him anything to keep him from testifying, and he was making the decision freely and voluntarily.

¶ 52 Accordingly, defendant's claim that his trial counsel was ineffective for denying him the right to testify is contradicted by the record and there is no available material in the record showing how postconviction counsel could have amended the petition to support his claim. See *Malone*, 2017 IL App (3d) 140165, ¶ 10. Postconviction counsel therefore did not act unreasonably when he failed to amend the petition to include details about what defendant's trial testimony would have consisted of had he testified at trial.

¶ 53 Defendant next contends that postconviction counsel was unreasonable for failing to include an affidavit from Garner, or explain its absence, to support his claim that trial counsel was ineffective for failing to interview or call her as a witness. Defendant asserts that Garner would have helped his self-defense claim.

¶ 54 Generally, a trial court's ruling on a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that postconviction counsel made a concerted effort to obtain affidavits to support the postconviction claims, but was

unable to do so. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993). However, if the record "flatly" contradicts this presumption, postconviction counsel's representation may fall below a reasonable level of assistance. *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004).

¶ 55 Here, the record does not flatly contradict the presumption that postconviction counsel made a concerted to obtain affidavits from Garner and other witnesses but was unable to do so. The record reveals that after postconviction counsel was appointed, he met with defendant, reviewed the record, and investigated the case, as he informed the court that "right now we're in the middle of an investigation." Counsel also informed the court that defendant wanted him to investigate William Hill as a witness and counsel was "trying to get the information. It's going slowly, but I should probably know by the next court date." Further, before the hearing on the State's motion to dismiss the petition, counsel expressly informed the court that he attempted to contact Garner, stating "[w]e tried to contact [Garner]. It was very difficult to do so, as well as we also tried to contact William Hill, who also testified they were unavailable at the time." Accordingly, the record shows that counsel met with defendant, conducted an investigation, and attempted to contact witnesses, including Garner. The record therefore does not rebut the presumption that counsel made a concerted effort to contact Garner. Thus, counsel was not unreasonable for not attaching an affidavit from Garner.

¶ 56 Furthermore, Garner did testify at trial and there is nothing to show that counsel could have amended the petition with an affidavit from Garner that would have supported his self-defense claim or claim that trial counsel was ineffective for failing to call her as a witness. See *Malone*, 2017 IL App (3d) 140165, ¶ 10 (" 'Absent a showing of available material for supporting affidavits, a failure to present affidavits obviously cannot be considered a neglect by

the attorney.' ") (quoting *Stovall*, 47 Ill. 2d at 46)). Accordingly, we cannot find that counsel provided unreasonable assistance of counsel when he did not attach an affidavit from Garner.

¶ 57 Finally, we note that defendant asserts postconviction counsel was unreasonable because he did not file a motion to withdraw under *People v. Greer*, 212 Ill. 2d 192, 211 (2004). He claims that because counsel did not file a motion to withdraw and rested on the petition, counsel must have determined that defendant's claims had merit and therefore provided unreasonable assistance when he failed to amend his petition. We disagree.

¶ 58 We first note that, as previously discussed, postconviction counsel was not required to amend defendant's *pro se* petition (*Malone*, 2017 IL App (3d) 140165, ¶ 10) or advance frivolous or spurious claims (*Greer*, 212 Ill. 2d at 205). Further, under the Act, when a defendant's appointed postconviction counsel withdraws, the defendant does not have a further statutory right to counsel. *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 7 ("the import of the *Greer* court's reasoning is that, once an attorney appointed to represent a defendant in a postconviction proceeding has withdrawn in conformity with the requirements of *Greer*, there will be no further statutory right to counsel, at least in the absence of unusual circumstances"). Thus, after postconviction counsel fulfilled his obligations under Rule 651(c), which did not require him to amend the petition, defendant received reasonable assistance of counsel and defendant did not have a further statutory right to counsel. See *People v. Norton*, 203 Ill. App. 3d 571, 574 (1990). Therefore, had postconviction counsel withdrawn instead of electing to stand on the unamended *pro se* petition, as he did here, the court would not have been required to appoint new counsel for defendant and the result would have been the same, *i.e.*, the unamended *pro se* petition would have been dismissed for being without merit. We therefore reject defendant's

argument that he did not receive reasonable assistance of postconviction counsel under Rule 651(c) because counsel did not withdraw but rather stood on the unamended *pro se* petition.

¶ 59 CONCLUSION

¶ 60 Accordingly, based on the foregoing, defendant has failed to overcome the presumption that counsel complied with the requirements of Rule 651(c). We therefore conclude that postconviction counsel did not provide unreasonable assistance of counsel and the court's dismissal of defendant's petition at the second stage is affirmed.

¶ 61 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 62 Affirmed.