2018 IL App (1st) 162946-U

SIXTH DIVISION
September 7, 2018

No. 1-16-2946

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. 95 CR 24766
	)	
ARMANDO CHAIDEZ,	)	Honorable
	)	Earl B. Hoffenberg,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The record demonstrates postconviction counsel provided reasonable assistance as contemplated by Supreme Court Rule 651(c).

¶ 2 Defendant Armando Chaidez appeals the trial court's order granting the State's motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)).[1] He contends that his postconviction counsel did not provide a reasonable level of assistance pursuant to Supreme Court Rule 651(c). We affirm.

[1] Defendant's last name is spelled "Charidez" on the Notice of Appeal and certain places throughout the postconviction record. However, his name is spelled "Chaidez" in other instances

¶ 3 Following a jury trial, defendant was convicted of first degree murder for fatally shooting Joaquin Flores, attempted first degree murder for shooting Xavier Tapia, and aggravated battery with a firearm. The trial court merged the aggravated battery with a firearm charge into the attempted first degree murder charge and sentenced defendant to consecutive sentences of 45 years' imprisonment for first degree murder and 15 years' imprisonment for attempted first degree murder. We set forth the facts of the case in defendant's direct appeal (*People v. Chaidez*, No. 1-97-3421 (1999) (unpublished order pursuant to Supreme Court Rule 23)), and we recite them here to the extent necessary to our disposition.

¶ 4 At trial, Xavier Tapia testified that at around 6 p.m. on August 4, 1995, he was "hanging out" with Flores. At approximately 8:30 p.m., they went to a park at 51st and Wood Streets to play basketball with about 10 other men, including Efren Gutierrez. At around 10 p.m., Tapia and Flores began walking with a "group of guys" to 48th and Wolcott Streets. Tapia was not in a gang, but he knew Flores, Gutierrez, and some of the other men were members of the Satan Disciples street gang. None of the men with Tapia had weapons.

¶ 5 Tapia was walking with Flores and "Julian." Gutierrez and at least six other men were walking across the street. A Satan Disciple said someone was "coming," and Tapia observed Flores run into an alley. Tapia followed Flores with Julian. Upon entering the alley, Tapia saw a man who "tried to shoot a gun, but it didn't go off." The man pointed the gun at them and Tapia hid behind a garbage can for cover before running back through the alley with Flores.

---

throughout the postconviction and original trial records, and on his direct appeal and subsequent petition for leave to appeal to our supreme court. See *People v. Chaidez*, No. 1-97-3421 (1999) (unpublished order pursuant to Supreme Court Rule 23) and *People v. Chaidez*, No. 088647 (February 2, 2000).

¶ 6 As Tapia ran, he heard 9 or 10 shots. As he exited the alley, he heard someone yell, "Man down," and turned to see Flores on the ground. Tapia was shot in the left thigh, and was eventually transported to the hospital.

¶ 7 Efren Gutierrez testified that he was at the scene of the shooting. He was a member of the Satan Disciples, and described various gang territories of the Satan Disciples, City Knights, and Party Players. The Party Players were rivals of the Satan Disciples and City Knights. Gutierrez played basketball with Flores, Tapia, and Jose Ramos on the day in question. At around 9:30 p.m., some of the men playing basketball walked to 48th and Wood Streets and "came across" some City Knights members, including Hector Uriarte. As they walked together, "a guy came running out of a gangway yelling gang slogans" for Party Players. Some of the people Gutierrez was with yelled their gang symbols back. Gutierrez then heard someone say, "He got a gun."

¶ 8 Everyone ran in different directions, and Gutierrez saw Flores, Tapia, and Ramos run into an alley. He hid by a van, and within two minutes, he heard several gunshots. Tapia and Ramos then ran out of the alley, but Flores had been shot. Gutierrez ran to Flores and pulled him around the corner of the alley and heard two or three additional shots. He helped Flores lie on the ground. Gutierrez did not see who fired the shots, but he saw "a heavy set Mexican guy" in the alley holding a shiny object. The man started running and Gutierrez believed two other individuals were with him. Gutierrez heard 10 or 11 shots and believed there were two guns used in the incident.

¶ 9 Several hours after the shooting, Gutierrez viewed a lineup and identified defendant. He acknowledged giving a signed statement to an assistant State's Attorney (ASA) and informing the ASA that he saw the shooter. He testified in front of the Grand Jury less than two weeks later

that the person he identified in the lineup was the shooter. However, at trial he could not identify defendant. Gutierrez acknowledged that he had been serving a four-year sentence for robbery and had a prior conviction for aggravated battery.

¶ 10 Hector Uriarte testified that, on August 4, 1995, he was a member of the City Knights. The City Knights controlled the area near 48th and Wood, while the Party Players controlled the area surrounding 48th and Wolcott. Uriarte identified defendant as a member of the Party Players gang, and knew him as "Little Loco." At around 10 p.m. on the day of the shooting, Uriarte was with several people near 48th and Wood. A Satan Disciple, Jose Ramos, was with several other people, one of whom had a basketball. Uriarte had known defendant for approximately two years, but did not recall seeing a shooting that night. Uriarte remembered going to a police station in Chicago around 5 a.m. the following morning and speaking with a detective. He did not remember speaking with an ASA, giving a statement, or the content of any statement. He also did not recall telling the ASA that he identified defendant in a lineup as the shooter. When the State showed him his signed statement, he acknowledged that the signature looked like his own, but he did not remember signing it.

¶ 11 On cross-examination, Uriarte testified that he told prosecutors on the morning of trial that he had no memory of this case. He did not remember telling the ASA that, on August 5, 1995, he and the people he was with were going to take control of the area near 48th and Wolcott from the Party Players gang. Uriarte denied being armed that night. He acknowledged that the City Knights colors were black and gray, and he was wearing gray pants and black shoes.

¶ 12 ASA Donald Lyman testified that Uriarte agreed to give a written statement regarding the shooting at 8 a.m. on August 5, 1995. Lyman wrote the statement, read it back to Uriarte, and Uriarte made several changes and then signed it. Lyman published the statement in court.

¶ 13 In his statement, Uriarte related that at about 10:10 p.m. on August 4, 1995, he was walking with Flores, Tapia, and a group of people. Flores, Tapia, and three other Hispanic men walked into an alley, while Uriarte stood on the corner of 48th and Wolcott. He observed Enrique Guerrero, who he knew as "Slick Rick," walking toward him.[2] Guerrero pointed a gun at Uriarte, and he hid behind a car before running away. As he ran, Uriarte observed Guerrero firing a gun into the alley. As Guerrero was firing, defendant, who was holding a gun, walked up to Guerrero. Uriarte had known defendant for two years. Uriarte heard more gunshots as he ran, and saw Flores fall to the ground and Tapia limp while he was running. Uriarte identified both Guerrero and defendant in lineup as the shooters at around 2:45 a.m. on August 5, 1995.

¶ 14 Chicago police officer Patrick Ford testified that he was on duty with his partner in a marked squad car on August 4, 1995. He heard three or four shots the vicinity of 47th and Wolcott, and drove toward the shots. When he arrived at 48th and Wolcott, Ford saw Flores on the ground in front of the alley and several people standing around him. At the scene, he spoke with Uriarte, who told him that "Slick Rick" and "Little Loco" shot the victim. Ford knew who Slick Rick was, and knew that defendant's nickname was Little Loco.

¶ 15 In his squad car, Ford drove to Winchester Avenue and 47th Street. At that intersection, Ford observed defendant standing in front of a bar talking on a cell phone and Guerrero standing in a doorway on a phone next to the same bar. Ford and his partner arrested both defendant and

[2] Enrique Guerrero was arrested with defendant and charged as a codefendant in this case. He was tried in a separate bench trial and acquitted.

Guerrero. They searched the immediate area for weapons, but did not recover anything. "Just a couple of minutes" lapsed between Ford hearing shots and then placing defendant in custody. Defendant was arrested at the opposite end of the alley from where Flores was found on the ground. At least 12 officers searched the alley, but they never recovered a weapon.

¶ 16 Detective Michael Rose investigated the shooting, and conducted a lineup in which Guerrero and defendant participated. Uriarte identified defendant as the person he saw holding a gun in the alley, and Guerrero as the person firing a gun into the alley. Gutierriez also identified defendant as a shooter. Tapia viewed photographs of each lineup participant at the hospital, but he failed to identify anyone.

¶ 17 Police officer James Shader testified that he was an evidence technician for the Chicago Police Department. He processed the crime scene, but did not recover any weapons or firearm cartridges. Shortly thereafter, he went to the police station to take gunshot residue (GSR) swabs of defendant and Guerrero, and sent the swabs to the crime laboratory.

¶ 18 Forensic scientist Scott Rochowicz, an expert in the field of GSR testing and trace element analysis, testified he performed GSR tests on the swabs collected from defendant and Guerrero. When testing for GSR, he looked for three elements: antimony, barium, and lead. The purpose of the test is to determine whether an individual has been within the environment of GSR, and a positive test shows higher levels of GSR than a person would have who is not known to have discharged a firearm. The gunshot residue test was inconclusive as to Guerrero, but positive for defendant. The test showed a high presence of GSR on defendant's right palm and was consistent with discharging a weapon, or handling or being in close proximity of a discharged weapon. Rochowicz could not say definitively that defendant fired a weapon.

¶ 19 Deputy Chief Medical Examiner Eupil Choi testified Flores died of a gunshot wound to the back, which penetrated his rib cage, left lung, and struck his heart and aorta. The wound was "distant" rather than a close-range firing. Flores had abrasions on his face which were consistent with falling face-first into concrete.

¶ 20 During closing arguments, defense counsel argued that the State failed to prove defendant guilty beyond a reasonable doubt. Counsel relied on the absence of a gun or other physical evidence and that Tapia failed to identify a shooter, and characterized the gang witnesses as unreliable liars and predators. The jury found defendant guilty of first degree murder, attempted first degree murder, and aggravated battery with a firearm. The court subsequently merged the aggravated battery count into the attempted first degree murder count and sentenced defendant to consecutive sentences of 45 years' and 15 years' imprisonment.

¶ 21 On direct appeal, defendant argued that the State improperly failed to inform him that Uriarte's trial testimony would refute his prior statement and the trial court abused its discretion by admitting Uriarte's prior statement as an inconsistent statement. This court affirmed defendant's convictions. *People v. Chaidez*, No. 1-97-3421 (1999) (unpublished order pursuant to Supreme Court Rule 23). The Illinois Supreme Court subsequently denied defendant's petition for leave to appeal. *People v. Chaidez*, No. 088647 (February 2, 2000).

¶ 22 On January 11, 2000, defendant filed a *pro se* postconviction petition under the Act. In his petition, he argued, *inter alia*, that (1) he was denied his right to due process where the State "knowingly concealed favorable evidence to the defense" by presenting testimony that the State knew to be false from Uriarte and Gutierrez, and (2) counsel was ineffective for failing to investigate other witnesses and the GSR evidence.

¶ 23 With regard to the first claim, defendant alleged Uriarte and Gutierrez would now testify that they falsely identified defendant as the shooter because he was a member of a rival gang, and they both told the State prior to trial that they did not want to testify because of their false identifications. Defendant also alleged that, "An allegation of newly discovered evidence seek's [*sic*] to establish the defendant's actual innocence of the crimes for which he has been tried and convicted," and later "In the case at bar, [defendant] has exhibited an exceptionally clear case of actual, as well as, factual innocence."

¶ 24 With respect to the second claim, defendant argued that counsel should have investigated and interviewed Gutierrez and Uriarte, who could not remember anything about the crime, as well as various alibi witnesses. Further, defendant claimed counsel should have presented an expert witness to refute the GSR evidence. He added, "counsel could have looked in a common dictionary *** and found that the same elements that are present in gunshot residue are present in many automotive paints and fillers." Defendant asserted that counsel should have contacted defendant's employer and presented evidence that he "worked cleaning up paint over spray and body filler dust the day of the shooting."

¶ 25 In support of his petition, defendant attached, in pertinent part, six affidavits from various relatives, who all averred that on the night in question, they were sitting outside defendant's mother's home with defendant and his girlfriend, Sandra Cabrera, and heard shots nearby. Defendant's relatives then witnessed a man running from where the shots were fired and, afterward, defendant and Cabrera left to go to Cabrera's residence. All six relatives were available to testify at the time of trial.

¶ 26 Defendant also attached an affidavit from Ramiro Ramirez, the landlord of defendant's building. Ramirez averred that, on August 4, 1995, defendant was working on Ramirez's van inside a "three-stall garage that [was] being used as a body shop," and "cleaned up" afterward. He further averred that, "[p]aint, dust and body filler dust accumulate on the property and if not cleaned daily, it becomes very dirty and tracks inside the building."

¶ 27 Additionally, defendant attached "a breakdown of the chemical components in gunshot residue as per the Webster New International Dictionary." The document lists the dictionary definitions of barium, antimony, and lead.

¶ 28 On February 1, 2000, defendant filed an amended *pro se* petition and attached affidavits from Cabrera, Uriarte, and Gutierrez. Cabrera's affidavit ("the 2000 affidavit"), dated "This 22 day of 2000," corroborated the other alibi witness affidavits and stated that Cabrera was with defendant and his family outside of his house at 10 p.m. on the night of the shooting. They heard gunshots, and she and defendant subsequently left to go to her house. The police arrested defendant after they had walked one block. She was available to testify at defendant's trial, but was never called as a witness.

¶ 29 Guttierez's and Uriarte's affidavits corroborated defendant's claim that they falsely identified defendant as the shooter.

¶ 30 On January 31, 2000, the trial court advanced defendant's petition for second stage proceedings and appointed the Public Defender's office to represent defendant. Defendant's case was assigned to various public defenders, and eventually in June 2007, new counsel from the Public Defender's office was appointed. Over the course of approximately a year, counsel informed the court that she was investigating the case and required additional time to supplement

defendant's petition. On March 14, 2008, counsel told the court she was "hoping to file [her] supplemental today," and she "didn't finish it in time to send a copy to [defendant]."

¶ 31 On April 11, 2008, counsel filed a supplemental affidavit from Cabrera, dated December 8, 1999 ("the 1999 affidavit"), in which Cabrera averred that on August 4, 1995, she was with defendant at a liquor store at 10 p.m. While inside the liquor store, she heard gunshots and defendant wanted to leave the store. Defendant told her to go home "and stay there." This 1999 affidavit contradicted Cabrera's 2000 affidavit attached by defendant to his amended *pro se* petition.

¶ 32 Counsel additionally filed a certificate of compliance pursuant to Supreme Court Rule 651(c). The certificate stated counsel was standing on defendant's *pro se* petition as it adequately presented his claims. Counsel did not otherwise supplement or amend the petition. The State moved to dismiss the petition, arguing in part that Cabrera's conflicting affidavits warranted dismissal. Counsel rested on defendant's petition, and did not explain her reasoning for filing the contradictory 1999 affidavit.

¶ 33 The trial court granted the State's motion to dismiss defendant's petition, citing, in part, Cabrera's conflicting affidavits as a basis for dismissal. The court also found defendant failed to support his claim that the State knowingly used false testimony from Gutierrez and Uriarte, and failed to state a claim for ineffective assistance of counsel. The court did not rule on the actual innocence portions of defendant's petition, but instead found that Gutierrez's and Uriarte's affidavits did not support a failure to investigate claim or a claim that the State used perjured testimony.

¶ 34 On appeal, this court reversed the trial court's order and remanded for compliance with Rule 651(c). *People v. Chaidez*, No. 1-09-0388 (unpublished order pursuant to Supreme Court Rule 23). We found that counsel "provided unreasonable assistance and failed to adequately present defendant's claims as required by Rule 651(c)." *Id.* at *6. Specifically, we noted the following:

> "We are particularly troubled by counsel's submission of an affidavit that was detrimental to defendant's claims and formed the basis of the circuit court's dismissal of those claims. Where counsel submitted the contradicting Cabrera affidavit to the court without any explanation, it is unclear to this court whether postconviction counsel adequately read defendant's petition or was even aware that defendant had filed a supplemental petition with a conflicting affidavit from Cabrera which had otherwise supported his contentions. Instead, at the hearing, counsel merely reiterated the headings in the *pro se* petition and misstated the facts in the petition." *Id.*

¶ 35 We also expressed concern over counsel's failure to amend the *pro se* petition to frame defendant's actual innocence claim in proper legal form. *Id.* at *6-7. We noted the *pro se* petition alleged actual innocence without addressing the legal elements of such a claim, and the trial court ruled on defendant's actual innocence claim as it was framed in the *pro se* petition, rather than if it had been shaped into proper legal form.

¶ 36 On remand, new counsel from the Public Defender's office was appointed. Counsel filed a Rule 651(c) certificate of compliance on June 27, 2013. Therein, counsel certified that she consulted with defendant, examined the trial transcript, and made any necessary amendments to defendant's *pro se* petition. Counsel further certified that she reviewed the records in defendant's

direct appeal and collateral appeal from the dismissal of his postconviction petition, and discussed the claims with four previously appointed attorneys in defendant's postconviction case. She examined the previous attorneys' notes, investigation requests, research, and letters to defendant, and interviewed investigator Noel Zupancic, who investigated the case for those attorneys. Counsel additionally attempted to contact witnesses, including Cabrera. She attached an affidavit from Zupancic, and requested permission to strike the 2000 affidavit, which she described as "undated."[3] Finally, counsel noted that she examined defendant's *pro se* petition and found it adequately presented his claims and that "there is nothing that can be added by [an] amended or supplemental petition."

¶ 37 Counsel attached Zupancic's affidavit, which, in turn, was attached to both of Cabrera's affidavits. Zupancic, an investigator with the Public Defender's office, worked on defendant's case in 2006 and was again assigned to investigate the case in January 2012. During both time frames, Zupancic was requested to interview Cabrera. In 2006, Zupancic called Cabrera and left voicemails, but did not speak to her. After the 2012 assignment, Zupancic came into contact over the phone with a woman who identified herself as Cabrera on March 14, 2012. During the phone conversation, Cabrera stated she remembered being at the store with defendant when she heard shots fired, she did not remember signing a second affidavit, and it was "a long time ago." She confirmed that Zupancic could call her again and agreed to meet in person if necessary. Zupancic could not get in contact with Cabrera again, despite calling her number and leaving her business card at addresses in Chicago and Joliet, Illinois, and mailing a letter, which was later returned.

[3] The record contains a second copy of the 2000 affidavit that defendant attached in his amended petition, in which Cabrera averred she was with defendant at his house on the night of the offense. The content of this affidavit is identical to the one defendant attached, but is undated and does not show "This 22nd day of 2000."

¶ 38 On the July 27, 2013 court date, counsel explained that she was requesting to withdraw the 2000 affidavit, attached by defendant to his amended *pro se* petition, because she could not corroborate it based on Zupancic's investigation. Counsel indicated that this court "got the facts incorrect" but was interrupted by the court before elaborating on that statement. The court then requested that counsel put her motion to strike Cabrera's affidavit in writing. Counsel additionally informed the court that she was unable to substantiate defendant's actual innocence claim with newly discovered evidence.

¶ 39 On July 26, 2013, counsel told the court that she was withdrawing her motion to strike the 2000 affidavit after consulting with "people in [her] office." In reference to the contradictory 1999 affidavit filed by prior counsel, she stated that her investigation revealed that Cabrera confirmed she signed the 1999 affidavit and "all [counsel] can assume is that [prior counsel] was trying to be honest with the Court."[4] Counsel then indicated that her investigation had concluded, and she was standing on her June 27, 2013, Rule 651(c) certificate.

¶ 40 On May 16, 2014, counsel filed a motion to withdraw her previously filed Rule 651(c) certificate. In the motion, counsel requested leave to interview Uriarte, Gutierrez, codefendant Guerrero, and other rival gang members who did not testify, and then prepare an amended postconviction petition to frame defendant's actual innocence claim. In the motion, counsel stated that she believed she rendered unreasonable assistance to defendant by failing to investigate Uriarte, Gutierrez and other witnesses listed in police reports after she discovered evidence relating to codefendant Guerrero, who was acquitted at trial after asserting an alibi

[4] Counsel indicated the 1999 affidavit was filed on September 7, 1999. The record shows that the 1999 affidavit was dated December 8, 1999. It is unclear if counsel misspoke or if she is referring to a different affidavit.

defense. She additionally believed she rendered unreasonable assistance by "narrowly interpreting the appellate court remand to mean that it limited her investigation into [defendant's] actual innocence claims" to Cabrera's two affidavits.

¶ 41 At the May 16, 2014, court date, counsel explained that she believed this court's Rule 23 order in case number 1-09-0388 mandated that she file both of Cabrera's affidavits and explain the contradictions. At a later hearing, she explained that Cabrera said she could not remember both affidavits and that she was young and had been drinking on the day in question.

¶ 42 On December 19, 2014, counsel indicated to the court that she had read the transcripts from Guerrero's bench trial and was attempting to locate Guerrero to obtain his affidavit. She stated, "I do believe that the petition needs to be rewritten pursuant to the Post Conviction Act and the law that is involved."

¶ 43 On January 25, 2016, counsel filed an amended Rule 651(c) certificate. Therein, counsel reiterated that she consulted with defendant and examined the trial record, including the court file and appellate briefs connected with defendant's direct appeal. Further, counsel read the Rule 23 order from this court in case number 1-09-0388 concerning prior counsel's unreasonable assistance with defendant's *pro se* petition, and consulted Zupancic and defendant's prior appointed attorneys in the postconviction case. Counsel additionally reviewed police reports and used them in her investigation, and attempted to contact multiple witnesses, including Cabrera. She again attached Zupancic's affidavit "to attempt to explain [their] attempts to interview Ms. Sandra Cabrera about the contradicting affidavits." Counsel reviewed the record of Guerrero's bench trial but "did not find any exculpatory witness testimony regarding the eyewitness identification of [defendant]." She was unable to interview Guerrero because he suffered a brain

injury and was in hospice care. Finally, counsel concluded that she examined defendant's *pro se* petition and found it adequately presented his claims, such that nothing could be added by a supplemental petition.

¶ 44 On June 17, 2016, the State filed a supplemental motion to dismiss. At the hearing on the State's motion, counsel indicated she was standing on the *pro se* petition and argued that trial counsel was ineffective for failing to present an alibi defense based on the numerous affidavits which revealed that defendant was at home at the time of the shooting. Counsel further argued that trial counsel was ineffective for proceeding to trial on a reasonable doubt and self-defense theory of defense because he did not want to call as witnesses defendant's family members who spoke Spanish.[5] Additionally, she argued that Gutierrez and Uriarte recanted their earlier identifications, and the GSR found on defendant's hands did not link him to the murder weapon.

¶ 45 The court continued the case for a ruling, but stated that counsel followed this court's mandate and "went out of the way to make sure [she] touched every single point that was necessary for the Court to consider the Motion to Dismiss." At a later date, the court granted the State's motion to dismiss. The court found that Cabrera's conflicting affidavits "were totally in opposition to the other witnesses," which consisted of defendant's family members. It noted that it found the affidavits "so inconsistent and so contradictory" that it declined to consider them. The court further found that Ramirez's affidavit did not "in any way" negate the GSR evidence. Moreover, the court noted that the prior trial court judge found the alibi witnesses' statements contradicted the police officer's trial testimony that defendant stated, " 'we weren't shooting at them, they were shooting at us.' " The court found that, after the remand from case number 1-09-

[5] Both the State and the trial court noted that nothing in the record supported this argument.

0388, the case "really has remained unchanged," other than postconviction counsel's efforts to comply with this court's mandate.

¶ 46 In addressing the actual innocence component of defendant's petition, the trial court noted Guiterrez's and Uriarte's pretrial statements were admitted substantively based on their "changed" testimony at trial. The court stated,

> "It's almost ludicrous to think that this could be newly discovered evidence because it isn't newly discovered evidence. They already disinvovled [*sic*] and discredited on their pretrial identification. And, of course, as I said before, the recantation of testimony [is] regarded as inherently unreliable."

¶ 47 On appeal, defendant contends postconviction counsel provided an unreasonable level of assistance by repeating his previous postconviction counsel's errors. Specifically, defendant asserts counsel should have withdrawn both of Cabrera's conflicting affidavits and amended defendant's petition to shape his actual innocence claim.

¶ 48 The Act provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Where, as here, a petition has been advanced to second stage proceedings, an indigent defendant is entitled to representation by appointed counsel under the Act. 725 ILCS 5/122-4 (West 2000); *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Postconviction counsel is required to provide defendant with a "reasonable level of assistance." *Lander*, 215 Ill. 2d at 583 (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). Reasonable assistance is a lower standard than effective assistance under *People v. Strickland*, 466 U.S. 668,

687 (1984). *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 50 (citing *People v. Cotto*, 2016 IL 119006, ¶ 29).

¶ 49 Rule 651(c) codifies the duties of postconviction counsel with regard to *pro se* petitions. Under this rule, postconviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant's contentions. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Compliance with these duties may be shown by a certificate filed by postconviction counsel. Ill. S.Ct. R. 651(c) (eff. Feb. 6, 2013); *Lander*, 215 Ill. 2d at 584. Counsel need only substantially comply with Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. The filing of a Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *Id.* at ¶ 19. We review *de novo* both the trial court's dismissal of defendant's postconviction petition without an evidentiary hearing (*Pendleton*, 223 Ill. 2d at 473), and the interpretation of a supreme court rule, including whether counsel fulfilled her duties under Rule 651(c) (*People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007)).

¶ 50 Here, counsel filed a Rule 651(c) certificate of compliance, detailing her work on defendant's case. This included consulting with defendant by phone and mail, examining the record in defendant's direct appeal and his initial postconviction record in *People v. Chaidez*, No. 1-09-0388 (2011), as well as the transcript of codefendant Guerrero's trial, and consulting with the other public defenders previously assigned to defendant's postconviction case. Counsel's certificate additionally stated that she spoke with the investigator used by defendant's previous attorneys, examined and utilized the police reports associated with the case, attempted to contact multiple witnesses, and acknowledged that previous postconviction counsel was found

to have rendered unreasonable assistance for filing the conflicting 2000 Cabrera affidavit. Moreover, the record indicates she withdrew her initial Rule 651(c) certificate in order to further investigate defendant's actual innocence claim. Thus, there is a rebuttable presumption that counsel rendered reasonable assistance.

¶ 51 Defendant nevertheless maintains that counsel's assistance was unreasonable because she did not withdraw the conflicting Cabrera affidavits or amend his *pro se* petition to shape his actual innocence claim, as he alleges is mandated by our previous Rule 23 order in case number 1-09-0388. We disagree. We find that counsel, who was assigned to this case after it was remanded, took the necessary steps to provide reasonable assistance and comply with our mandate. With respect to the Cabrera affidavits, we expressed concern that previous counsel attached the 1999 affidavit without explanation, which indicated that she had not thoroughly examined the petition and case file. By contrast, defendant's current postconviction counsel, after acknowledging the discrepancy between the affidavits numerous times on the record, had an investigator attempt to locate Cabrera to explain the conflicting affidavits. The investigator eventually came into contact with a woman who identified herself as Cabrera and confirmed that she signed the 1999 affidavit and independently remembered being with defendant in a liquor store at the time of the shooting. Cabrera also informed the investigator that she did not remember signing another affidavit. Neither counsel nor the investigator were able to contact Cabrera again. Thus, the record demonstrates that counsel's efforts in contacting Cabrera were sufficient to show compliance with our previous mandate, which was to explain the conflicting affidavits. That Cabrera did not remember signing the 2000 affidavit attached by defendant does not render counsel's performance unreasonable.

¶ 52 With respect to defendant's actual innocence claim, counsel's motion to withdraw her June 27, 2013, certificate and her amended certificate and the transcript of proceedings show that counsel provided a reasonable level of assistance, despite the fact that she did not amend defendant's petition. Counsel withdrew her initial Rule 651(c) certificate and, in her motion to withdraw, explained that, based on this court's mandate, she needed to investigate the evidence presented at codefendant Guerrero's trial, as well as Uriarte, Gutierrez, and other witnesses listed in police reports in order to adequately state defendant's actual innocence claim. After various status hearings in which counsel informed the court she was still investigating defendant's claims, counsel filed an amended Rule 651(c) certificate. In her amended certificate, counsel stated that she obtained Guerrero's trial transcript, did not find any exculpatory witness testimony, and was unable to interview Guerrero due to a brain injury from which he suffered.

¶ 53 We previously acknowledged that Rule 651(c) does not require counsel to amend a defendant's *pro se* petition or advance frivolous claims. See *Chaidez*, No. 1-09-0388, at *7 (2011) (unpublished order pursuant to Supreme Court Rule 23). Where postconviction counsel concludes that a petition lacks merit, counsel may seek to withdraw or stand on the petition. See *People v. Suarez*, 224 Ill. 2d 37, 43 (2007) (citing *People v. Greer*, 212 Ill. 2d 192 (2004), and noting, "In *Greer*, the issue was whether postconviction counsel may seek to withdraw as counsel due to a petition's lack of merit. This court determined that such a procedure was permissible, noting that under [Supreme Court] Rule 137 counsel could not ethically pursue claims that were frivolous and patently without merit."); see also *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (finding that counsel faced with meritless claims may withdraw under *Greer* or stand on the petition).

¶ 54 Here, the record does not reveal whether counsel determined defendant's claim was frivolous or without merit. However, it shows that counsel consulted with defendant, thoroughly investigated his claims, examined the records in his various cases and codefendant Guerrero's case, and then determined that no amendment was necessary, as required by Rule 651(c). Under these circumstances, we find that the record is sufficient to demonstrate counsel substantially complied with Rule 651(c) and that defendant has failed to overcome the presumption.

¶ 55 We affirm the judgment of the circuit court of Cook County.

¶ 56 Affirmed.