

2018 IL App (2d) 160662-U

No. 2-16-0662

Order filed March 2, 2018

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of McHenry County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05-CF-724
	)	
JOSE RODRIGUEZ-TELLEZ,	)	Honorable
	)	Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* Postconviction counsel failed to substantially comply with Rule 651(c) (eff. Feb 6, 2013) by failing to amend defendant's postconviction petition as necessary for an adequate presentation of his claims. Therefore, we reversed the circuit court's dismissal of defendant's amended postconviction petition, and remanded with directions to conduct new second-stage proceedings and allow defendant to replead his postconviction claims with the assistance of new counsel.

¶ 2 This case comes before us for a third time, following defendant's direct appeal (*People v. Rodriguez-Tellez I*, No. 2-07-0048 (2008) (unpublished order under Supreme Court Rule 23)), wherein we affirmed his sentence, and his appeal from the first stage dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2010) (*People v. Rodriguez-Tellez II*, No. 2-09-1230 (2011) (unpublished order under Supreme Court Rule 23)), wherein we reversed and remanded the matter for second-stage proceedings.

¶ 3 In the present appeal, defendant seeks reversal of the circuit court's second-stage dismissal of his amended postconviction petition, contending that he made a substantial showing that he received ineffective assistance of appellate counsel due to counsel's failure to raise a meritorious jury-indoctrination issue on direct appeal. He argues that effective counsel could have raised the issue as either plain error or ineffective assistance of trial counsel, and points to three specific questions posed by the State to potential jurors during *voir dire* that he contends indoctrinated the jury:

“Do you believe that it's possible for a person to be able to recognize another person but not be able to give a description of that person? For example, if someone asked you what your cousin looked like, you might be able to give height, hair color, or eye color, but beyond that you might not be able to describe nose, ears, lips, etc. When you saw your cousin, would you recognize him?” (Mistaken identity question)

“Do you believe that it's possible that a witness might lie in court even though they're under oath? Do you believe it's possible that a witness might lie under oath to protect someone?” (Witness credibility and motivation question)

“If a judge tells you that I have to prove the elements of the crime, and the elements of that crime are A, B, and C, but you have a question about D, but D is not something that I am required to prove to you, would you be able to set aside your question about D if I have proven to you A, B, and C beyond a reasonable doubt and vote guilty?” (ABCD question)

¶ 4 In the alternative, defendant argues that he was denied reasonable assistance of postconviction counsel due to his counsel's failure to amend his *pro se* petition to explicitly include claims that we found in *Rodriguez-Tellez II* were an arguable legal basis for defendant's jury indoctrination and ineffective assistance of appellate counsel claims. Because we find that postconviction counsel violated Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) by failing to amend defendant's *pro se* petition to adequately present these claims, we reverse the circuit court's dismissal of the amended petition, and remand with directions to conduct new second-stage proceedings and allow defendant to replead his claims with the assistance of new counsel.

¶ 5

#### I. BACKGROUND

¶ 6 Defendant was found guilty of first degree murder and sentenced to 60 years' imprisonment, which included a 25-year enhancement for personally discharging a firearm that proximately caused the death of the victim, Jose Medina. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). Defendant filed a direct appeal of his conviction, wherein he argued only that his sentence was excessive. We affirmed, because we found the argument waived due to defendant's failure to raise the issue in a post-trial motion, and the plain error doctrine did not apply. *People v. Rodriguez-Tellez I.*

¶ 7 On August 14, 2009, defendant filed a *pro se* postconviction petition wherein he argued, among other claims not relevant here, that he received ineffective assistance of trial counsel because his "case was tried by the State during *voir dire* jury selection." The circuit court dismissed the petition on October 16, 2009, reasoning that the claims were barred by *res judicata* and forfeiture because they could have been raised on direct appeal but were not. Defendant sought reconsideration, which the circuit court denied, and the Office of the State Appellate Defender was appointed to represent defendant on appeal.

¶ 8 On October 17, 2011, we reversed and remanded the matter for second stage postconviction proceedings.<sup>1</sup> *People v. Rodriguez-Tellez II*. Although we found no error in the circuit court’s ruling that defendant forfeited his claim of ineffective assistance of trial counsel, we determined that the petition impliedly raised a claim of ineffective assistance of appellate counsel—which was neither forfeited, nor frivolous or patently without merit. *Id.* ¶¶ 25-27, 31-34. In that appeal, defendant argued that his appellate counsel was ineffective for failing to raise a claim of jury indoctrination on direct appeal because, according to defendant, the State posed improper questions to the venire during *voir dire* that advanced its theories of the case. *Id.* ¶ 33.

¶ 9 Specifically, defendant contended that the State anticipated his mistaken identify defense and asked potential jurors about one’s ability to recognize a person without being able to give a description of them. Defendant also argued that the State anticipated that a particular witness would deny her previous statements implicating him, and asked the venire an improper question concerning witness credibility and motivation when it asked whether it was possible that a witness might lie under oath in order to protect someone. *Id.* ¶ 33.

¶ 10 We found that defendant had an arguable legal basis for his jury indoctrination claim, and specifically pointed to the *voir dire* questions concerning witness credibility and motivation, and the questions asked by the State in anticipation of defendant’s mistaken identity defense. *Rodriguez-Tellez II*, ¶ 34. We stated that these questions “suggest the State used *voir dire* to impanel jurors who were predisposed to the State’s prosecutorial theories.” *Id.* We also found that it was “arguable that appellate counsel’s performance fell below an objective standard of

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<sup>1</sup> Though it was not designated as such, this order reflects a modification of a prior Rule 23 order upon denial of rehearing, wherein we originally affirmed the trial court’s dismissal of defendant’s *pro se* postconviction petition.

reasonableness, given there is a legal and factual basis supporting defendant's claim that he may not have had an impartial jury because of these errors, and that he was prejudiced by counsel's failure to raise these issues on direct appeal." *Id.* We explicitly offered no opinion on the eventual success of defendant's ineffective assistance of appellate counsel claim, and stressed only that defendant's postconviction petition should not have been summarily dismissed at the first stage. *Id.*

¶ 11 Defendant filed an amended postconviction petition through appointed postconviction counsel on March 11, 2016. The amended petition incorporated defendant's *pro se* petition and alleged that defendant received ineffective assistance of appellate counsel because counsel failed to raise on direct appeal "certain defenses regarding the deadlocked jury and the issue of jury indoctrination." The bulk of the petition contended that counsel should have argued on direct appeal that the trial court erred in not declaring a mistrial after the jury submitted a note that it was unable to reach a verdict.<sup>2</sup> The remainder of the petition spanned only a few sentences, and alleged that defendant was denied effective assistance of appellate counsel because he "neglected to raise the issue of jury indoctrination on direct appeal." Citing attached exhibit N, defendant stated that, "[t]he State asked improper questions, which indoctrinated the selected jurors during *voir dire* in anticipation of [defendant's] defense." Exhibit N was composed of excerpts from the report of proceedings, wherein the State asked members of the venire only the ABCD question. The amended petition contained no further allegations or argument to support defendant's jury indoctrination claim. Postconviction counsel also attached a certificate pursuant to Rule 651(c) stating that he consulted with defendant in person to ascertain his contentions of deprivation of

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<sup>2</sup> Defendant does not raise this issue in the present appeal.

constitutional rights, examined the record of the trial proceedings, and made any amendments to defendant's *pro se* petition necessary for an adequate presentation of defendant's contentions.

¶ 12 The State moved to dismiss on March 22, 2016, arguing that the amended petition and its exhibits failed to make a substantial showing of a constitutional violation and that, even if it did, defendant could not establish that his appellate counsel's failure to raise the *voir dire* issue on direct appeal resulted in prejudice because the evidence of defendant's guilt was overwhelming.

¶ 13 The circuit court granted the state's motion and dismissed the amended petition on July 29, 2016. In a written order, the circuit court stated that although the amended petition referenced only the ABCD question in support of defendant's ineffective assistance of appellate counsel claim based on alleged jury indoctrination, it would also address the two *voir dire* questions that this court specifically pointed to in *Rodriguez-Tellez II* formed an arguable legal basis for defendant's claims. The circuit court began by noting that defendant failed to object to the questions at trial, and also failed to include this issue in his post-trial motion. Therefore, according to the circuit court, appellate counsel would have had to raise the jury indoctrination claim as plain error on direct appeal.

¶ 14 The circuit court then reviewed each of the three questions for plain error, and made the following findings: The witness credibility and motivation question was not in error, but even if it was, it was not plain error because defendant presented no evidence that the jury was biased, and the evidence against defendant was overwhelming. Concerning the mistaken identity question, the circuit court noted that this type of question was held improper by our supreme court in *People v. Bowel*, 111 Ill. 2d 58, 64-65 (1986), but found that defendant could not establish plain error because the evidence of his guilt was overwhelming, and he failed to set forth any facts in the petition to show that the jury was biased. With respect to the ABCD

question, the circuit court reiterated that this was the only *voir dire* question included in defendant's amended petition, and found the question to be permissible because it was broad, not tailored to the facts of the case, and did not touch on matters of law or instructions. Defendant timely appealed.

¶ 15

## II. ANALYSIS

¶ 16 The Act provides a method for an individual subject to a criminal sentence to challenge their conviction by alleging that it was the result of a substantial denial of federal and/or state constitutional rights. A postconviction proceeding is not an appeal of the underlying judgment, but rather a collateral proceeding that allows review of constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). Therefore, issues that were raised and decided on direct appeal are barred from consideration by *res judicata*, and issues that could have been raised, but were not, are considered forfeited. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008).

¶ 17 The Act sets forth a three-stage process for adjudicating postconviction petitions. *People v. Hommerson*, 2014 IL 115638, ¶ 7. At the first stage, the circuit court must review the petition and determine whether it is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis either in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). “To survive dismissal at this initial stage, the postconviction petition ‘need only present the gist of a constitutional claim,’ which is ‘a low threshold’ that requires the petition to contain only a limited amount of detail.” *People v. Harris*, 366 Ill. App. 3d 1161, 1166-67 (2006).

¶ 18 If the court determines that the defendant has satisfied this minimum pleading threshold, the petition advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2016). Here, the court

may appoint counsel if the defendant is indigent, and appointed counsel may amend the claims in the petition. *People v. Jones*, 2017 IL App (4th) 140594, ¶ 28. At the second stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). A substantial showing is a measure of the legal sufficiency of the petition's allegations which, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. Defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). In determining whether defendant has made such a showing, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). If the allegations contained in the petition are based upon matters of record, no extrinsic evidence may be required. If the defendant fails to make this showing, the petition may be dismissed. *People v. Cotto*, 2016 IL 119006, ¶ 28. If the requisite showing is made, however, the matter proceeds to the third stage, at which point the circuit court holds an evidentiary hearing on the claims raised in the petition. *Id.* The dismissal of a postconviction petition without an evidentiary hearing, as was the case here, is reviewed *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 19 In the instant appeal, defendant contends that his amended petition made a substantial showing that he was denied effective assistance of appellate counsel and, to that end, argues the underlying merits of the three *voir dire* questions he complained of in *Rodriguez-Tellez II*. According to defendant, had his appellate counsel raised these three examples of jury indoctrination on direct appeal, there is a reasonable probability that the result of his appeal would have been different.



¶ 20 The State responds that defendant has forfeited review of two out of the three *voir dire* questions because he failed to include them in his amended postconviction petition. Specifically, the State argues that defendant’s amended petition merely “raised the bare bones” of the jury indoctrination issue, and notes that defendant failed to raise or argue in the circuit court the issue of whether the prosecution improperly indoctrinated the jury by asking questions related to witnesses credibility and motive, as well as questions pertaining to defendant’s anticipated mistaken identification defense. The State also notes that defendant did not argue in his opening brief that his postconviction counsel was unreasonable for failing to brief, argue, and support these issues in the circuit court, and therefore requests that we find review of these issues forfeited.

¶ 21 In response, defendant asserts that all three questions were adequately raised below because the amended petition incorporated his *pro se* postconviction petition, which made the broad allegation that the State improperly “tried its case” during *voir dire*. Defendant also notes that we addressed all three claims in his prior appeal and found an arguable claim of appellate counsel’s ineffectiveness for failing to raise the identification and credibility claims on direct appeal. In the alternative, defendant asserts in his reply and supplemental briefs that if we are persuaded by the State’s forfeiture argument, then his postconviction counsel necessarily violated Rule 651(c) by failing to amend defendant’s *pro se* petition to include the two claims of jury indoctrination that this court found arguably meritorious in *Rodriguez-Tellez II*. Defendant therefore requests, as alternative relief, that we remand the matter for the appointment of new postconviction counsel and new second-stage proceedings.

¶ 22 We agree with defendant’s alternative argument that postconviction counsel failed to comply with Rule 651(c). Under the Act, postconviction petitioners are entitled to a “reasonable

level of assistance.” *People v. Owens*, 139 Ill. 2d 351, 364. In order to assure such reasonable assistance, Supreme Court Rule 651(c) imposes certain duties on postconviction counsel. Specifically, postconviction counsel must: (1) consult with petitioner to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition that are necessary for an adequate presentation of the petitioner’s contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. See *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Substantial compliance with the rule is sufficient. *Id.* ¶ 18.

¶ 23 We have reviewed the amendments made by postconviction counsel to defendant’s petition, and find that they fall woefully short of what Rule 651(c) required in this case such that the presumption of reasonable assistance is rebutted. The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the defendant’s claims into proper legal form and presents them to the court. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). In the amended petition, the entirety of defendant’s jury indoctrination argument consists only of a few sentences—the most substantial of which asserts simply that “[t]he State asked improper questions, which indoctrinated the selected jurors during *voir dire* in anticipation of [defendant’s] defense.” In support, postconviction counsel cites various *voir dire* transcripts pertaining only to the ABCD question, and then concludes that defendant received ineffective assistance of appellate counsel because he “neglected to raise the issue of jury indoctrination on direct appeal.” Postconviction counsel failed to offer any argument, citation to authority, or specific facts to support defendant’s claim that appellate counsel was deficient for not raising the issue on direct appeal. Further, he failed to allege that defendant was prejudiced by these alleged deficiencies. See *Strickland v.*

*Washington*, 466 U.S. 668, 687-88 (1984) (To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that counsel’s performance was deficient and that the deficient performance prejudiced defendant).

¶ 24 Postconviction counsel also failed to amend the petition to identify a theory under which appellate counsel could have raised the jury indoctrination claim, given that defendant did not contemporaneously object to the *voir dire* questions he now contends were improper, nor did he raise these issues in a post-trial motion. To preserve an alleged error for review, a defendant must raise a timely objection at trial and raise the error in a written post-trial motion. *People v. Kitch*, 239 Ill. 2d 452, 460 (2011).

¶ 25 Most incredibly, however, postconviction counsel failed to raise or even identify the two *voir dire* questions that this court already found in *Rodriguez-Tellez II* form an arguable legal basis for defendant’s jury indoctrination claim—upon which defendant bases his ineffective assistance of appellate counsel claim. *People v. Rodriguez-Tellez II*, No. 2-09-1230 (2011) (unpublished order under Supreme Court Rule 23). The Act “contemplates the assistance of an attorney, if requested by an indigent petitioner, to insure that if the petitioner has any constitutional claims of merit they will be properly recognized, developed and articulated in post-conviction proceedings. *People v. King*, 39 Ill. 2d 295, 297 (1968). It is axiomatic that the failure to present and preserve for appellate review issues already found by this court to have arguable merit violates Rule 651(c) and constitutes unreasonable performance.

¶ 26 Though the circuit court nevertheless evaluated the propriety of these *voir dire* questions in its written order (explicitly because we found these questions in *Rodriguez-Tellez II* to be an arguable legal basis for defendant’s claims), it did so without the benefit of these arguments actually being raised or shaped in any way by defendant’s appointed counsel. “It is improper to

determine the merit of petitioner’s claims where counsel essentially did nothing to shape the petitioner’s claims into the appropriate legal form.” *People v. Turner*, 187 Ill. 2d 406, 416-17 (1999). We see no reason why the circuit court’s consideration of the merits should excuse postconviction counsel’s failure to amend defendant’s *pro se* petition to adequately present his claims as required by Rule 651(c). See *People v. Russell*, 2016 IL App (3d) 140386, ¶ 12 (Postconviction counsel’s noncompliance with Rule 651(c) may not be excused on the basis of harmless error).

¶ 27 Finally, though the State is correct that defendant did not argue in his opening brief that postconviction counsel violated Rule 651(c), we note that waiver and forfeiture are binding on the parties but do not limit this court’s jurisdiction. See *Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 948 (2010). Defendant also sought leave to file a supplemental brief to address this issue, which we granted. Given that postconviction counsel failed to substantially comply with Rule 651(c), it would be improper to affirm the dismissal of defendant’s postconviction petition. See *Turner*, 187 Ill. 2d at 416. Our supreme court “has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.” *People v. Suarez*, 224 Ill. 2d 37, 48 (2007). Such is the case here.

¶ 28 III. CONCLUSION

¶ 29 The judgment of the McHenry County circuit court dismissing defendant’s amended postconviction petition is reversed. We remand the matter to the circuit court with directions to allow defendant to replead his postconviction claims with the assistance of new counsel.

¶ 30 Reversed and remanded with directions.