

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).

2018 IL App (4th) 160780-U

NO. 4-16-0780

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 28, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Woodford County
EUGENE RILEY,)	No. 13CF87
Defendant-Appellant.)	
)	Honorable
)	Charles M. Feeney III,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant received reasonable assistance of postconviction counsel.

¶ 2 In February 2016, defendant, Eugene Riley, filed a *pro se* petition under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The petition advanced to the second stage of the postconviction proceedings, and defendant’s postconviction counsel filed a supplemental petition. The State filed a motion to dismiss defendant’s postconviction petition and supplement. The Woodford County circuit court dismissed all but one of defendant’s postconviction claims. After an October 2016 third-stage hearing, the court denied defendant’s remaining claim.

¶ 3 Defendant appeals, contending he was denied reasonable assistance of postconviction counsel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2013, the State filed true bills of indictment, charging defendant with one count of unlawful possession of cannabis with the intent to deliver (720 ILCS 550/5(g) (West 2012)) and one count of unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(2)(C) (West 2012)). The cannabis count alleged that, on August 1, 2013, defendant knowingly and unlawfully possessed with the intent to deliver more than 5000 grams of a substance containing cannabis. The controlled-substance count alleged that, also on August 1, 2013, defendant knowingly and unlawfully possessed with the intent to deliver 400 grams or more but less than 900 grams of a substance containing cocaine. In November 2013, defendant filed a motion to suppress evidence and quash his arrest. After a December 2013 hearing, the circuit court denied defendant's motion.

¶ 6 On January 21, 2014, the circuit court held a stipulated bench trial on the two counts. The court gave defendant the admonishments contained in Illinois Supreme Court Rule 402 (eff. July 1, 2012). After reviewing the parties' written stipulation, the court found defendant guilty of both charges.

¶ 7 At a March 12, 2014, sentencing hearing, the circuit court sentenced defendant to concurrent prison terms of 12 years on the cannabis count and 18 years on the controlled-substance count. Defendant filed a joint motion for posttrial relief and for reconsideration of his sentence, contending (1) the State failed to prove him guilty beyond a reasonable doubt, (2) the court erred by denying his motion to suppress, (3) his sentences were excessive given his age and prior criminal history, and (4) he was unable to make a statement in allocution at his sentencing hearing because he was under extreme mental and physical duress as a result of being in the jail's segregation unit. After a March 31, 2014, hearing, the court denied defendant's joint posttrial motions.

¶ 8 Defendant appealed his convictions and sentences. In December 2015, defendant filed a motion to dismiss his appeal. On December 16, 2015, this court allowed defendant's motion and dismissed his appeal. *People v. Riley*, No. 4-14-0282 (Dec. 16, 2015) (nonprecedential order dismissing the case).

¶ 9 On February 11, 2016, defendant filed his *pro se* postconviction petition, raising a claim of ineffective assistance of counsel and a claim his due process rights were violated. The circuit court advanced defendant's petition to the second stage of the proceedings and appointed counsel to represent defendant. On August 1, 2016, appointed counsel filed a supplemental petition for postconviction relief, adding the following additional claims: (1) ineffective assistance of trial counsel for failing to include additional statements in the parties' written stipulation, (2) incomplete admonishments regarding the waiver of oral testimony, and (3) ineffective assistance of appellate counsel for counsel's dismissal of defendant's appeal without defendant's agreement. In August 2016, the State filed a motion to dismiss defendant's postconviction petition and supplemental postconviction petition. As to defendant's claim of ineffective assistance of appellate counsel, the State denied the allegation appellate counsel dismissed defendant's appeal without his concurrence but asked that this sole matter be set for an evidentiary hearing. On September 29, 2016, the circuit court entered a written order, dismissing defendant's postconviction petition and supplemental petition except for the issue regarding ineffective assistance of appellate counsel.

¶ 10 On October 14, 2016, the circuit court held the evidentiary hearing, and postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). At the beginning of the hearing, defendant complained about his postconviction counsel's performance but eventually agreed to let postconviction counsel represent him at the

hearing. Defendant testified on his own behalf and presented the testimony of James Williams, defendant's appellate counsel. The evidence at the hearing relevant to the issue on appeal is set forth below.

¶ 11 Defendant testified he spoke with Williams two or three times on the telephone. Williams told defendant he had nine potential issues to raise on appeal, but defendant could only recall one of them at the time of the evidentiary hearing. He later testified Williams never discussed the other eight issues with him. During their second telephone conversation, he and Williams talked about a dismissal, but defendant was to get back in touch with Williams about whether to dismiss the appeal. Defendant decided not to dismiss his appeal and asked his sister to contact Williams and let him know. Defendant later acknowledged he could have received a letter dated December 4, 2015, from Williams that indicated his appeal would be dismissed unless defendant contacted Williams. He again testified he asked his sister to contact Williams so his appeal would not be dismissed. Defendant later admitted he ended his second conversation with Williams by telling Williams he might as well go ahead and dismiss the appeal because they did not have any issues to raise. Defendant also testified he and Williams talked about defendant filing a postconviction petition and Williams sent him information on filing a postconviction petition.

¶ 12 Williams testified he represented defendant on his direct appeal and had several conversations with him over the telephone. Williams explained to defendant five of the potential appellate issues related to ineffective assistance of trial counsel and those claims needed to be raised in a postconviction petition because they required a record be developed. As to the trial-related issues, Williams advised defendant he received a very good sentence for the amount of drugs he possessed and a new trial could result in a longer sentence. According to Williams,

defendant was focused on the claims of ineffective assistance of trial counsel. During the second conversation, defendant confirmed he wanted to dismiss the appeal. Williams discussed the effect of dismissing the appeal with defendant, including forfeiture. Defendant indicated he understood. Williams sent defendant a December 4, 2015, letter. Williams testified that, in that letter, he told defendant he was writing to confirm that defendant wanted to dismiss his appeal, and Williams would file the motion to dismiss ten days from the date of the letter, unless defendant wrote him and stated he had changed his mind about the dismissal. Williams did not receive a message from defendant's sister. Williams explained that, if he had received a message from defendant's sister, he would not have filed the motion to dismiss until he had spoken with defendant again. Williams denied filing the motion to dismiss without defendant's consent. In addition to the December 4, 2015, letter, the State presented two written requests to the Department of Corrections by Williams for telephone calls with defendant and three letters from Williams to defendant. The circuit court admitted the State's six documents.

¶ 13 During closing arguments, postconviction counsel noted the standard for proving ineffective assistance of counsel claims and asked the court to determine the facts as it heard them at the evidentiary hearing and rule accordingly. The State argued defendant failed to meet his burden of proving ineffective assistance of appellate counsel. After hearing the parties' arguments, the court denied the postconviction petition as to the remaining issue. The court found Williams's testimony was more credible than defendant's. It found defendant made the decision not to pursue the issues on appeal. The court also noted Williams gave sound advice about pursuing the ineffective assistance of trial counsel claims in a postconviction petition.

¶ 14 On March 10, 2016, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 651(d)

(eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 15

II. ANALYSIS

¶ 16 Defendant asserts he was denied reasonable assistance of postconviction counsel because postconviction counsel did not amend his petition to present a claim of ineffective assistance of appellate counsel based on counsel's erroneous advice that caused defendant to dismiss his appeal. Defendant asserts he had a least three potential claims he could have raised on direct appeal. The State contends defendant's invited error cannot render postconviction counsel's representation deficient under Rule 651(c) and appellate counsel did not give defendant deficient advice.

¶ 17

A. Postconviction Act

¶ 18 The Postconviction Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2016). If the court does not dismiss the petition, it proceeds to the second stage, where the court may appoint counsel for an indigent defendant. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223

Ill. 2d at 472, 861 N.E.2d at 1007. Also at the second stage, the State may file a motion to dismiss the defendant's petition or an answer. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. At both the second and third stages of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 19 B. Right to Postconviction Counsel

¶ 20 In postconviction proceedings, the right to counsel is wholly statutory, and the Postconviction Act only requires counsel to provide a defendant with a " 'reasonable level of assistance.' " *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005) (quoting *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990)). Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) "imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the [Postconviction] Act." *Lander*, 215 Ill. 2d at 584, 831 N.E.2d at 600. Under that rule, postconviction counsel must (1) consult with the defendant either by mail or in person to ascertain the contentions of deprivation of constitutional rights, (2) examine the record of the circuit court proceedings, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's contentions. *People v. Perkins*, 229 Ill. 2d 34, 42, 890 N.E.2d 398, 403 (2007). The defendant bears the burden of demonstrating his attorney failed to comply with the duties mandated in Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. Our supreme court has consistently held remand is required when postconviction counsel failed to complete any one of the above

duties, “regardless of whether the claims raised in the petition had merit.” *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007). This court reviews *de novo* whether an attorney complied with Rule 651(c). *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15, 43 N.E.3d 1077.

¶ 21 Additionally, postconviction counsel’s filing of a Rule 651(c) certificate raises a presumption that counsel provided reasonable assistance under the Postconviction Act—namely, that counsel adequately investigated, amended, and properly presented the defendant’s claims. *Jones*, 2011 IL App (1st) 092529, ¶ 23. In this case, postconviction counsel submitted a compliant certificate, and thus the presumption arises in this case. On appeal, defendant only contends his postconviction counsel failed to comply with the third requirement of Rule 651(c).

¶ 22 *1. Third Requirement of Rule 651(c)*

¶ 23 The third requirement of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) simply mandates postconviction counsel to make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Our supreme court has further clarified what postconviction counsel is required to do. “Fulfillment of the third obligation does not require counsel to advance frivolous or spurious claims on defendant’s behalf.” *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Moreover, while postconviction counsel “may raise additional issues if he or she chooses, there is no obligation to do so.” *Pendleton*, 223 Ill. 2d at 476, 861 N.E.2d at 1009. Also, defendant “is not entitled to the advocacy of counsel for purposes of exploration, investigation and formulation of potential claims.” *People v. Davis*, 156 Ill. 2d 149, 163, 619 N.E.2d 750, 758 (1993). Accordingly, postconviction counsel only has a duty to adequately present the claims raised by the defendant in his or her *pro se* postconviction petition.

¶ 24

2. *Facts of This Case*

¶ 25 Here, in his *pro se* postconviction petition, defendant argued his claims of ineffective assistance of trial counsel and a violation of his due process rights should have been raised on direct appeal but appellate counsel submitted a motion to dismiss defendant's appeal when defendant did not wish to do so. Postconviction counsel filed a supplemental petition, raising a claim of ineffective assistance of appellate counsel based on appellate counsel's dismissal of defendant's appeal. The supplemental petition asserted defendant adamantly denied asking for or agreeing to a dismissal of his appeal. It further noted an appeal would have addressed the court's denial of defendant's motion to suppress and the lack of full admonishments regarding the waiver of oral testimony. Defendant's ineffective assistance of appellate counsel claim advanced to the third stage of the postconviction proceedings. The circuit court denied defendant's claim because the evidence showed defendant directed the dismissal of his direct appeal.

¶ 26

3. *Defendant's Argument*

¶ 27 Defendant argues that, to fulfill the third requirement of Rule 651(c), postconviction counsel had to amend his supplemental petition at the evidentiary hearing because the evidence did not align with defendant's contention he did not agree to dismiss the appeal. Further, defendant suggests postconviction counsel should have also amended the postconviction petition to include other potential claims of ineffective assistance of appellate counsel that were revealed during the evidentiary hearing. In support of his argument, defendant cites *People v. Jennings*, 345 Ill. App. 3d 265, 267, 802 N.E.2d 867, 869-70 (2003), where this court agreed with defendant he was denied reasonable assistance of postconviction counsel when his postconviction petition was dismissed at the second stage of the proceedings.

¶ 28 In *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 873, postconviction counsel failed to file a Rule 651(c) certificate, and the record did not explicitly show postconviction counsel complied with the second and third requirements of Rule 651(c). As to the third requirement, this court found postconviction counsel failed to amend defendant's *pro se* petition to include (1) grounds that could have been raised in a motion to reconsider the defendant's sentence because the grounds were necessary for an adequate presentation of the defendant's ineffective assistance claim and (2) a disparate-sentencing claim because the substance of his ineffective assistance claim showed defendant wanted to challenge his sentence. *Jennings*, 345 Ill. App. 3d at 272, 274, 802 N.E.2d at 873-75. Specifically, we found postconviction counsel needed to allege grounds that could have been raised in a motion to reconsider the defendant's sentence in support of defendant's ineffective assistance of counsel claim based on counsel's failure to perfect an appeal. *Jennings*, 345 Ill. App. 3d at 272, 802 N.E.2d at 874-75. In support of our conclusion, we noted that, in *People v. Edwards*, 197 Ill. 2d 239, 258, 757 N.E.2d 442, 453 (2001), our supreme court held a defendant must provide " 'some explanation' " of the grounds that could have been raised in the postplea motion to obtain an evidentiary hearing on a postconviction claim that trial counsel provided ineffective assistance by failing to perfect an appeal. *Jennings*, 345 Ill. App. 3d at 272, 802 N.E.2d at 874. As to the disparate-sentencing claim, we noted postconviction counsel did not have to comb the record to discern the claim because counsel had supplemented the defendant's petition with a September 1999 letter from trial counsel to the defendant's mother, in which trial counsel suggested a disparate-sentencing claim. *Jennings*, 345 Ill. App. 3d at 274, 802 N.E.2d at 875.

¶ 29 In this case, postconviction counsel did amend defendant's *pro se* petition by filing a supplement to defendant's *pro se* petition. That supplement included grounds appellate

counsel should have raised on appeal. That claim was not dismissed at the second stage, and an evidentiary hearing was held on the claim. Defendant alleges postconviction counsel became aware of the proper ineffective assistance of appellate counsel claim during the evidentiary hearing, and not during the second stage of the proceedings as in *Jennings*. Accordingly, we find *Jennings* is distinguishable.

¶ 30 Here, the alleged deficiency in postconviction counsel's supplemental petition resulted from defendant's own misrepresentation or his incorrect memory of the facts surrounding the dismissal of his direct appeal. Defendant changed his testimony at the hearing. He first denied ever telling counsel it was okay to dismiss his appeal and then later testified he told counsel to go ahead and dismiss the appeal. Defendant cites no case law suggesting Rule 651(c) requires postconviction counsel to amend a postconviction petition in the middle of a third-stage evidentiary hearing because defendant's allegations were not supported by the evidence at the hearing. To hold as defendant urges would require this court to expand Rule 651(c)'s requirements and mandate postconviction counsel add claims other than those necessary for an adequate presentation of a petitioner's claims as they develop during the evidentiary hearing. Given the supreme court's rulings to the contrary (see *Pendleton*, 223 Ill. 2d at 475-76, 861 N.E.2d at 1009) and the burden that would place on postconviction counsel, we refuse to do so. Accordingly, we find defendant has failed to overcome the presumption postconviction counsel fulfilled the third requirement of Rule 651(c) and provided defendant with reasonable assistance of counsel.

¶ 31 4. *New Claims of Ineffective Assistance of Appellate Counsel*

¶ 32 Additionally, defendant spends a large portion of his briefs setting forth new claims of ineffective assistance of appellate counsel and pointing out the claims appellate

counsel should have raised on direct appeal. The State addresses defendant's contentions on the merits. However, we decline to address those issues. See *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008) (noting this court's duty to determine whether any issues have been forfeited).

¶ 33 As we have already explained, postconviction counsel did not have a duty to raise additional claims of ineffective assistance of appellate counsel. See *Pendleton*, 223 Ill. 2d at 476, 861 N.E.2d at 1009. Thus, whether the new issues defendant raises have merit is irrelevant to the issue of reasonable assistance of postconviction counsel under Rule 651(c). Also, our supreme court has emphasized a claim not raised in the postconviction petition cannot be argued for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004). Further, the appellate court lacks the supervisory authority to excuse a defendant's appellate forfeiture caused by the defendant's failure to include issues in his postconviction petition. *Jones*, 213 Ill. 2d at 508, 821 N.E.2d at 1099.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the Woodford County circuit court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 36 Affirmed.