

**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) 170385-U

NO. 4-17-0385

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 7, 2018

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DORIAN D. WILLS,	)	No. 12CF136
Defendant-Appellant.	)	
	)	Honorable
	)	Roger B. Webber,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court. Justices Knecht and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* This court reversed the dismissal of defendant’s postconviction petition where postconviction counsel failed to file a certificate in compliance with Supreme Court Rule 651(c) and there was not a clear and affirmative showing of compliance in the record.

¶ 2 Defendant, Dorian D. Wills, appeals the trial court’s order dismissing his amended petition for postconviction relief. He argues that (1) the trial court erred by dismissing his amended postconviction petition because he made a substantial showing that plea counsel provided ineffective assistance and/or that his plea was involuntary; and (2) postconviction counsel’s representation was ineffective because he failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) where postconviction counsel did not review the record, and neither cited the record nor the proper legal standard in his answer to the State’s motion to

dismiss the amended postconviction petition. We agree with defendant's contention that the record fails to demonstrate postconviction counsel complied with Rule 651(c). We reverse and remand for further proceedings consistent with our decision.

¶ 3

### I. BACKGROUND

¶ 4 In January 2012, the State charged defendant with aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2010)) (count I) and robbery (720 ILCS 5/18-1 (West 2010)) (count II) based on allegations that defendant and his codefendants forced the victim into a vehicle, beat him repeatedly, and stole his clothing and other personal items. On October 22, 2012, defendant entered into a partially negotiated plea agreement in which the State agreed to dismiss the robbery count and recommend a sentencing cap of 20 years' imprisonment.

¶ 5 During the December 10, 2012, sentencing hearing, the trial court acknowledged defendant's rehabilitative potential, his age, and his cooperation with authorities. However, the court noted defendant's lengthy criminal history and the "gratuitous violence that was exhibited in this case \*\*\*." The court sentenced defendant to 20 years in prison. The court then admonished defendant that he had 30 days to file a motion to vacate the judgment and withdraw his guilty plea.

¶ 6 In July 2013, defendant filed a *pro se* postconviction petition. In the petition and accompanying affidavit, defendant alleged his privately retained counsel, James Dedman, was ineffective because he failed to file a motion to reduce his sentence and/or a notice of appeal despite defendant's specific request to do so on the day of the sentencing hearing. Defendant further explained in his petition that plea counsel said "it would be a waste of time and money to [file a] motion for reduction of sentence and appeal." Defendant claimed that he was deprived of

his right to appeal and he was prejudiced by counsel's ineffective representation.

¶ 7 In August 2013, Judge Thomas J. Difanis dismissed defendant's petition as frivolous and patently without merit, stating that defendant was properly admonished and even if defendant's counsel had filed a motion to withdraw his guilty plea, "[s]uch a motion \*\*\* would not have been considered by the [c]ourt."

¶ 8 On appeal, this court reversed and remanded the matter, finding that defendant presented the "gist" of an ineffective-assistance-of-counsel claim as required at the first stage of postconviction proceedings. See *People v. Wills*, 2015 IL App (4th) 130730-U, ¶ 42. Defendant's appointed counsel, Randall Rosenbaum, subsequently amended the postconviction petition.

¶ 9 In July 2015, defendant filed an amended postconviction petition, arguing that plea counsel provided ineffective assistance by disregarding his request to file a postplea motion. Defendant argued he was prejudiced where the trial court failed to provide adequate postplea admonishments pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001) and, in addition, plea counsel conceded during the sentencing hearing that the 20-year sentencing cap was appropriate. The State then filed a motion to dismiss defendant's petition. In September 2015, Judge Difanis granted the State's motion.

¶ 10 In his second appeal, defendant argued that his due process rights were violated where the State filed the motion to dismiss the amended postconviction petition on September 10, 2015, and Judge Difanis granted the State's motion the next day before defendant had notice or an opportunity to be heard on that motion. See *People v. Wills*, 2016 IL App (4th) 150758-U, ¶¶ 17, 21. This court ultimately reversed and remanded the matter because defendant "was not permitted a reasonable opportunity to respond to the motion." *Id.* ¶21. However, this court made

“no findings on the merits of either the motion to dismiss or the postconviction petition.” *Id.* ¶21.

¶ 11 On March 10, 2017, defendant’s newly appointed postconviction counsel, George Vargas, filed an “answer to [the] State’s motion to dismiss [the] amended post-conviction petition.” In his answer, Vargas stated that, “[b]ased on a review of [d]efendant’s *pro se* petition, the court file, the transcripts of proceedings and consultation with the [d]efendant, counsel alleges that [d]efendant’s [f]ederal and Illinois [c]onstitutional rights were violated.” He further asserted that plea counsel provided ineffective representation by disregarding defendant’s specific request to file a postplea motion, the trial court failed to provide adequate postplea admonishments pursuant to Supreme Court Rule 605(c), plea counsel provided ineffective representation by conceding during the sentencing hearing that a 20-year sentencing cap was appropriate, and the plea agreement was involuntary where defendant did not know the consequences of entering into the plea agreement and “believed that he could file a motion to reduce [his] sentence even though there was a sentencing cap \*\*\*.” He requested that the court deny the State’s motion and hold an evidentiary hearing.

¶ 12 On March 14, 2017, four days after Vargas filed his answer, the following was entered on the court docket sheet: “[t]ranscript(s) for [this] case [were] checked out this date.”

¶ 13 On May 12, 2017, in a written order, Judge Roger B. Webber granted the State’s motion to dismiss the amended postconviction petition. The court found that the admonishments at the sentencing hearing substantially complied with Rule 605, defendant’s argument that he was not advised that he needed to file a postplea motion was contradicted by the record because defendant was admonished by the court that he must file a motion to withdraw his guilty plea to preserve his right to appeal, plea counsel was not ineffective and in fact was successful in

negotiating a sentencing cap on defendant's behalf, and defendant's argument that he would have received a lower sentence if counsel had argued more zealously was nothing more than a mere conclusion. Finally, the court found defendant's claim that his guilty plea was involuntary was disingenuous.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues (1) the trial court erred by dismissing his amended postconviction petition because he made a substantial showing that plea counsel provided ineffective assistance and/or that his plea was involuntary; and (2) postconviction counsel's representation was ineffective because he failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) where postconviction counsel did not review the record, and neither cited to the record nor the proper legal standard in his answer to the State's motion to dismiss the amended postconviction petition. We agree with defendant's contention that the record fails to demonstrate postconviction counsel complied with Rule 651(c).

¶ 17 The Post-Conviction Hearing Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E. 2d 1069, 1075 (2010). The Act establishes a three-stage process for adjudicating a postconviction petition. *People v. Harris*, 224 Ill. 2d 115, 125-26, 862 N.E.2d 960, 967 (2007). At the first stage, the trial court reviews the defendant's petition for postconviction relief and dismisses the petition if it determines the claims are frivolous or without merit. *Id.* At that stage, a reviewing court need only consider whether the defendant states the "gist" of a constitutional claim. *People v.*

*Anderson*, 375 Ill. App. 3d 121, 132, 872 N.E.2d 581, 592 (2007).

¶ 18 At the second and third stages of a postconviction proceeding, a defendant's petition must demonstrate a “substantial showing” of a constitutional violation. *People v. Bowens*, 2017 IL App (4th) 150830, ¶ 31, 78 N.E.3d 1058. All well-pleaded facts that are not positively rebutted by the record must be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). At the second stage, the dismissal of a petition without an evidentiary hearing is reviewed *de novo*. *Id.*

¶ 19 During postconviction proceedings, a defendant is entitled to “a reasonable level of assistance.” *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). Counsel is ineffective only if counsel’s performance fell below an objective standard of reasonableness and counsel’s error substantially prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). Further, in postconviction proceedings, “reasonable” assistance is premised on counsel’s compliance with Supreme Court Rule 651(c). *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19, 56 N.E.3d 1141. The record must disclose that postconviction counsel “has fulfilled his mandatory duties” under Rule 651(c). *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18, 973 N.E.2d 960.

¶ 20 Specifically, Rule 651(c) provides, in pertinent part, as follows:

“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.” (Emphasis added.) Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

Postconviction counsel’s filing of a certificate of compliance pursuant to Rule 651(c) creates a rebuttable presumption that he has complied with the rule and that the petitioner has received effective assistance of counsel. *People v. Dalton*, 2017 IL App (4th) 141088, ¶ 24, 71 N.E.3d 820; see also *People v. Perkins*, 229 Ill. 2d 34, 50, 890 N.E.2d 398, 407 (2007) (“[W]hen an attorney files a certificate under Rule 651(c), the attorney is officially representing to the court that the duties listed in the certificate have been fulfilled.”). Here, however, postconviction counsel failed to file a certificate of compliance pursuant to Rule 651(c). In the absence of a filed certificate, “a clear and affirmative showing of compliance on the record must be present.” *People v. Richardson*, 382 Ill. App. 3d 248, 256, 888 N.E.2d 553, 560 (2008). In *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007), our supreme court explained, “[t]his 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.” Here, defendant contends that postconviction counsel failed to substantially comply with Rule 651(c)’s requirement that he examine the record of the proceedings because the only indication that the transcripts in this case were checked out appears in a docket entry made four days *after* counsel filed his answer to the State’s motion.

¶ 21 The State argues, without citation to authority, that there is no requirement that postconviction counsel review the transcripts “*prior* to making amendments to the petition \*\*\*.” (Emphasis in original.) The State appears to argue that counsel may review the transcripts at any

point in time. We do not agree. Our supreme court has stated that, “[t]o ensure that the complaints of a prisoner might be adequately presented, the statute contemplates that the attorney appointed \*\*\* will ascertain the basis of the petitioner's complaints \*\*\* and present the prisoner's constitutional contentions to the court.” *People v. Johnson*, 154 Ill. 2d 227, 237-38, 609 N.E.2d 304, 309 (1993). Clearly, in order to adequately present the prisoner’s constitutional contentions to the court, counsel must *first* review the record. Moreover, our review of the record reflects it was the State that checked out the transcripts on March 14, 2017. Indeed, there is no record of postconviction counsel ever checking out the transcripts from the clerk’s office. Based on our review of the record, we cannot conclude that there was a “clear and affirmative showing of compliance” with Rule 651(c). *Richardson*, 382 Ill. App. 3d at 256. Accordingly, we find a lack of compliance with the requirements of Rule 651(c).

¶ 22 Because we reverse and remand the cause for further proceedings based on counsel’s failure to comply with the requirements of Supreme Court Rule 651(c), we need not reach defendant’s other contentions on appeal. As before, we have not considered the merits of the State’s motion to dismiss or defendant’s amended postconviction petition.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we reverse the trial court’s dismissal of defendant’s amended postconviction petition and remand the cause for further proceedings consistent with our decision.

¶ 25 Reversed and remanded.