

NOTICE
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2018 IL App (5th) 170074-U

NO. 5-17-0074

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Williamson County.
)	
v.)	No. 88-CF-162
)	
RICHARD NITZ,)	Honorable
)	Phillip G. Palmer,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court. Justices Cates and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Cause remanded for a new limited hearing on postconviction counsel’s compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) where the defendant was improperly required to proceed *pro se* at the previously ordered one.

¶ 2 **FACTS**

¶ 3 The defendant, Richard Nitz, was found guilty of first-degree murder following an initial trial in 1988 and a retrial in 1998. In May 2011, after an evidentiary hearing, the trial court denied a successive petition for postconviction relief that the defendant brought pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)). On appeal from that judgment, we allowed the State to supplement the record with a Rule

651(c) certificate prepared by the defendant's postconviction counsel, Aviva Futorian. See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Futorian's certificate stated that she had consulted with the defendant by telephone, examined the record of the proceedings at trial, and prepared the defendant's petition in a manner that provided an adequate presentation of his contentions of error. On appeal, the defendant filed an affidavit challenging the veracity of Futorian's representations and requested a limited remand so that the dispute could be resolved.

¶ 4 In October 2013, when agreeing that a limited remand was appropriate, we ruled as follows:

“The defendant contends that his postconviction counsel did not consult with him about his contentions of deprivation of his constitutional rights. Ms. Futorian, in her Rule 651(c) certificate, contends that she did consult with the defendant. There is nothing in the record that demonstrates that counsel consulted with the defendant. Thus, a factual issue of whether defendant's appointed postconviction counsel complied with Rule 651(c) exists. Whether postconviction counsel conferred with the defendant concerning his *pro se* allegations of deprivation of constitutional rights is a question of fact for the trial court to resolve. *People v. Finklea*, 186 Ill. App. 3d 297, 301 (1989). ‘Matters which require fact finding based on oral and written evidence *dehors* the record are primarily within the realm of the circuit court.’ *People v. Frey*, 67 Ill. 2d 77, 85 (1977). The trial court must rule on the factual issue of whether postconviction counsel complied with Rule 651(c). Thus, we grant the defendant's motion for

limited remand so that a proper record can be made and an evidentiary hearing can be conducted in which postconviction counsel is allowed to explain her actions as recounted in her Rule 651(c) certificate and the defendant is allowed to cross-examine her about whether she consulted with him concerning his *pro se* allegations of deprivation of constitutional rights.

Accordingly, we must vacate the trial court's order denying the defendant's successive postconviction petition so that the foregoing factual issue can be resolved. If the trial court finds that postconviction counsel adequately complied with Rule 651(c) in consulting with the defendant, reviewing the record, and amending the petition, no additional proceedings will be necessary and an order should again be entered denying the successive postconviction petition. If, however, the court finds that postconviction counsel did not comply with Rule 651(c), the defendant should be allowed to plead anew and a new hearing should be conducted on the successive postconviction hearing." *People v. Nitz*, 2013 IL App (5th) 110271-U, ¶¶ 35-36.

¶ 5 In March 2013, after Futorian advised that she could no longer act as the defendant's postconviction attorney, the trial court appointed Alex Fine of the Williamson County public defender's office to represent the defendant. In August 2014, Fine filed a motion to withdraw, citing a conflict of interest arising from his collaboration with Futorian on an unrelated case. In November 2014, the trial court granted Fine's motion to withdraw and appointed Public Defender Andrew Wilson to be the defendant's new attorney.

¶ 6 In October 2016, the defendant filed a *pro se* motion to remove Wilson as appointed counsel. Alleging that Wilson had been neglecting the case and that Fine had engaged in unethical conduct by collaborating with Futorian, the defendant requested that someone outside the public defender's office be appointed to represent him "and/or" that he be granted a waiver-of-counsel hearing.

¶ 7 In November 2016, the trial court set a date for the limited remand hearing. In December 2016, Wilson filed a motion to continue the hearing on the defendant's behalf.

¶ 8 On January 19, 2017, the court made a docket entry in which it misconstrued the defendant's *pro se* motion to remove Wilson as an unambiguous request to proceed *pro se*. The entry further noted that the defendant's request to remove Wilson was moot because Wilson had "resigned from his position as Public Defender effective January 6, 2017."

¶ 9 On January 27, 2017, the cause proceeded to the limited remand hearing. At the outset, when the defendant asked about his pending *pro se* motion, the trial court stated that the motion was moot and that the defendant would be proceeding *pro se* as he had "asked to do." When the defendant explained that he did not want to proceed *pro se* and that he had requested an attorney outside the public defender's office, the court stated that it was not going to appoint another attorney and directed the defendant to proceed *pro se*. Thereafter, Futorian took the stand, and the trial court examined her regarding the representations set forth in her 651(c) certificate. The defendant and the State then cross-examined her. The trial court gave the defendant the opportunity to testify, but he declined to do so.

¶ 10 The trial court subsequently entered a written order finding that Futorian had adequately complied with Rule 651(c). The court specifically found that she had examined the pertinent portions of the record, had amended the defendant's *pro se* petition as necessary, and had consulted with the defendant regarding his contentions of error no less than five times by telephone. Noting, *inter alia*, that the defendant had not testified at the hearing and had not denied that Futorian had consulted with him on at least five occasions, the trial court reentered its previous order denying the defendant's successive postconviction petition. In February 2017, the defendant filed a timely notice of appeal.

¶ 11

DISCUSSION

¶ 12 The defendant argues that the trial court committed reversible error by requiring him to proceed *pro se* at the limited remand hearing. The State confesses error and concedes that because the defendant was denied the right to counsel, the cause must be remanded for the appointment of counsel and a new hearing. See generally *People v. Ames*, 2012 IL App (4th) 110513; *People v. Partee*, 85 Ill. App. 3d 679 (1980). We accept the State's confession and accordingly vacate the trial court's judgment reentering its previous order and remand the cause for further proceedings. Given that the cause must be remanded, we need not address the defendant's alternative argument that the trial court erroneously concluded that Futorian complied with Rule 651(c). See *People v. Latona*, 184 Ill. 2d 260, 280-81 (1998). We further note that although the State suggests that the record supports the trial court's findings, the State seemingly concedes that the

court's judgment is presumptively unreliable given that the defendant was made to proceed *pro se*. See *United States v. Cronin*, 466 U.S. 648, 659 (1984).

¶ 13 While the parties agree that the cause must be remanded for the appointment of new counsel and a new limited remand hearing, they disagree as to whether new counsel should be someone outside the Williamson County public defender's office. The parties agree that an indigent defendant is not entitled to counsel of his choice and that the trial court has the discretion to appoint counsel other than the public defender "only after a showing of good cause." *People v. Powell*, 139 Ill. App. 3d 701, 706 (1985); see also 725 ILCS 5/113-3(b) (West 2016).

¶ 14 The defendant argues that the record supports a finding that there is good cause for the appointment of outside counsel. Referencing his complaints regarding attorneys Wilson and Fine, the defendant maintains that the Williamson County public defender's office has demonstrated that it is incapable or unwilling to represent him. We disagree. The defendant's argument impermissibly attributes his allegations against Wilson and Fine to the public defender's office as a whole. See *People v. Munson*, 265 Ill. App. 3d 765, 768-71 (1994); *Powell*, 139 Ill. App. 3d at 706. Furthermore, given that Wilson apparently resigned from his position as the Williamson County public defender as of January 6, 2017, any complaints that the defendant might have had with respect to Wilson's representation or his management of the office are, as the trial court indicated, moot. We also note that the defendant acknowledges on appeal that had he previously been given the choice between having the public defender's office reappointed or representing himself at the limited remand hearing, he may have decided on the

reappointment of the public defender's office. In any event, the defendant is unable to establish good cause why his request for outside counsel should presently be granted. We thus deny his request that we direct the trial court to appoint counsel other than the Williamson County public defender's office. The trial court can consider the defendant's request for outside counsel anew should it arise again on remand.

¶ 15

CONCLUSION

¶ 16 For the foregoing reasons, we hereby vacate the trial court's judgment reentering its previous order and remand for the appointment of new counsel and a new limited remand hearing. As previously directed,

“If the trial court finds that postconviction counsel adequately complied with Rule 651(c) in consulting with the defendant, reviewing the record, and amending the petition, no additional proceedings will be necessary and an order should again be entered denying the successive postconviction petition. If, however, the court finds that postconviction counsel did not comply with Rule 651(c), the defendant should be allowed to plead anew and a new hearing should be conducted on the successive postconviction hearing.” *Nitz*, 2013 IL App (5th) 110271-U, ¶ 36.

¶ 17 Judgment vacated; cause remanded for further proceedings.