

**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).

2019 IL App (4th) 160936-U

NO. 4-16-0936

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

May 7, 2019

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.	)	Sangamon County
DEREK D. NOLDEN,	)	No. 08CF979
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Justices DeArmond and Cavanagh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed the trial court’s order which granted postconviction counsel’s motion to withdraw because it did not comply with the requirements set forth in *People v. Kuehner*, 2015 IL 117695, 32 N.E.3d 655.

¶ 2 In April 2011, a jury convicted defendant, Derek D. Nolden, of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2008)), possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2008)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The trial court sentenced defendant to 22 years in prison on the armed-habitual-criminal conviction, two terms of 7 years each on the other convictions, and ordered those sentences to run concurrently. On direct appeal, this court reversed defendant’s conviction for possession of a stolen firearm because it violated the one-act, one-crime doctrine, but affirmed his other convictions and sentences. *People v. Nolden*, 2013 IL App (4th) 110608-U, ¶ 62.

¶ 3 In March 2014, defendant *pro se* filed a petition for postconviction relief pursuant

to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant alleged—among other things—ineffective assistance of trial and appellate counsel. In May 2014, the trial court appointed counsel to represent defendant on his postconviction petition. In August 2014, the State filed a motion to dismiss.

¶ 4 In November 2014, postconviction counsel filed a motion to withdraw. In July 2015, the trial court granted counsel’s motion to withdraw over defendant’s objection. The court denied defendant’s request to appoint new counsel. In October 2016, the court granted the State’s motion to dismiss defendant’s postconviction petition.

¶ 5 Defendant appeals, arguing the trial court erred by granting postconviction counsel’s motion to withdraw because it did not comply with the requirements set forth in *People v. Kuehner*, 2015 IL 117695, 32 N.E.3d 655. We agree, reverse the trial court’s dismissal, and remand for further second-stage proceedings.

¶ 6 I. BACKGROUND

¶ 7 A. Procedural History

¶ 8 In April 2011, a jury convicted defendant, Derek D. Nolden, of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2008)), possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2008)), and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The trial court sentenced defendant to 22 years in prison on the armed-habitual-criminal conviction, two terms of 7 years each on the other convictions, and ordered those sentences to run concurrently. On direct appeal, this court reversed defendant’s conviction for possession of a stolen firearm because it violated the one-act, one-crime doctrine, but affirmed his other convictions and sentences. *Nolden*, 2013 IL App (4th) 110608-U, ¶ 62.

¶ 9 B. The Postconviction Petition

¶ 10 On March 10, 2014, defendant *pro se* filed a postconviction petition in which he alleged several deprivations of his constitutional rights including ineffective assistance of counsel. Defendant claimed his trial counsel was ineffective for failing to investigate all potential defense witnesses and present their testimony at pretrial hearings and at trial. Defendant also claimed his counsel was ineffective for failing to (1) make certain legal arguments, (2) suppress evidence, (3) object to the composition of the jury, and (4) object to various evidence and arguments presented by the State. Defendant filed amendments and additional affidavits in support of his petition on March 21, March 25, and May 2, 2014. In his March 25, 2014, filing, defendant claimed trial counsel was ineffective because he failed to investigate three witnesses, (1) Michael Lightfoot, (2) Ashanti Beyah, and (3) Kesheena Nolden, who would have supported defendant's claim at trial that he did not own the guns that were the basis for the charges.

¶ 11 On May 2, 2014, at a hearing, the trial court asked the State how the case should proceed. The State responded, "As there is a constitutional allegation in this[,] I believe it should be going on to the second stage, Your Honor, and have counsel appointed for him." The court agreed and appointed postconviction counsel.

¶ 12 In August 2014, the State filed a motion to dismiss, arguing that defendant's claims were barred by *res judicata*, insufficiently pleaded, and unsupported by the record.

¶ 13 C. The Motion to Withdraw

¶ 14 In November 2014, postconviction counsel filed a motion to withdraw, in which counsel indicated defendant had filed a postconviction petition on March 12, 2014, an amended petition on March 21, 2014, and an affidavit in support of the petition on May 2, 2014.

Postconviction counsel delineated the numerous claims of constitutional deprivations that defendant had made in his petition and set forth the procedural and factual history of the case.

Counsel then addressed each of the claims previously listed and explained why he concluded that they were frivolous or patently without merit. In general, counsel concluded that defendant's claims were either (1) legally immaterial because established case law precluded them or (2) affirmatively refuted by the record. Relevant to this appeal, when discussing trial counsel's alleged failure to investigate all potential witnesses, postconviction counsel stated as follows:

“Petitioner’s allegation that trial counsel failed to investigate the case adequately and interview all witnesses is without merit. In addition to the lack of pled facts that make this a bald allegation without any factual support, there is ample evidence throughout the record of trial counsel’s investigation of witnesses and facts surrounding the case. For instance, counsel called multiple witnesses at trial and attempted to call others that did not appear at the hearings. \*\*\* Further, throughout the trial, counsel had a clear understanding of the facts, and sufficiently cross-examined the prosecution’s witnesses to reveal facts that supported the Petitioner. Petitioner does not allege that any particular witness, other than Michael Lightfoot as discussed below, should have been called or investigated. As such, there is no basis to support the claims made by Petitioner that trial counsel failed to adequately interview and investigate witnesses.”

¶ 15

#### D. The Trial Court’s Rulings

¶ 16

In July 2015, the trial court conducted a hearing on postconviction counsel’s motion to withdraw. Counsel explained that the case had been continued several times so that defendant could gather evidence to support his claims. Counsel stated that he had spoken with Lightfoot, who was now incarcerated, and attempted to get an affidavit from him but had been unsuccessful. The trial court granted the motion over defendant’s objection. The court did not

explain its reasoning.

¶ 17 In October 2016, after several more continuances for defendant to gather evidence, the trial court conducted a hearing on the State's motion to dismiss. The State adopted the arguments set forth in postconviction counsel's motion to withdraw and argued that defendant's claims were either unsupported or affirmatively rebutted by case law and the record. The trial court agreed and granted the motion to dismiss.

¶ 18 In November 2016, defendant filed a motion to reconsider, in which he claimed his postconviction counsel was ineffective. The trial court denied the motion.

¶ 19 This appeal followed.

## ¶ 20 II. ANALYSIS

¶ 21 Defendant appeals, arguing the trial court erred by granting postconviction counsel's motion to withdraw because it did not address each and every one of the claims raised in his *pro se* petition as required by *Kuehner*. We agree and reverse.

### ¶ 22 A. The Standard of Review and Applicable Law

¶ 23 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2016). Within the first 90 days after the petition is filed and docketed, the trial court shall dismiss a petition summarily if the court determines it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Allen*, 2015 IL 113135, ¶ 25. Because most postconviction petitions are drafted by *pro se*

defendants, “the threshold for a petition to survive the first stage of review is low.” *Id.* ¶ 24. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is inappropriate. *Id.* If the petition is not dismissed as being frivolous or patently without merit, then the trial court orders the petition to be docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2016).

¶ 24 At the second stage, the trial court appoints counsel who must then investigate defendant’s claims and make any amendments necessary for an adequate presentation of defendant’s contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The State may file a motion to dismiss the petition, and the petition advances to a third-stage evidentiary hearing only if defendant makes a “substantial showing of a constitutional violation.” (Internal quotation marks omitted.) *People v. Johnson*, 2018 IL App (5th) 140486, ¶ 22, 99 N.E.3d 1.

¶ 25 The right to counsel in postconviction proceedings is statutory rather than constitutional, and therefore a defendant is only entitled to the level of assistance guaranteed by the Act. *People v. Greer*, 212 Ill. 2d 192, 203, 817 N.E.2d 511, 518-19 (2004). The Illinois Supreme Court has determined that the Act and Rule 651 require appointed counsel to provide only reasonable assistance, a lower standard than the constitution requires. *Kuehner*, 2015 IL 117695, ¶ 15. Rule 651(c) outlines certain duties that postconviction counsel must perform in order to provide reasonable assistance. *Id.* Counsel must (1) consult with the defendant to determine the issues defendant wants to raise, (2) examine the record of the proceedings in the trial court, and (3) make any amendment to the petition necessary to adequately preserve defendant’s contentions. *Id.* However, postconviction counsel is not required to present frivolous or meritless claims and must withdraw if counsel cannot advance any arguably meritorious claims. *Id.*

¶ 26 The requirements postconviction counsel must meet to withdraw vary depending

on how the petition advanced to the second stage. See *id.* ¶ 19. If the petition advanced by default—that is, the trial court did not take any action on the petition within 90 days of filing—counsel “should make some effort to explain why defendant’s claims are frivolous or patently without merit.” (Emphasis omitted.) *Greer*, 212 Ill. 2d at 212. However, a trial court may grant a motion to withdraw in such a case when the record has demonstrated “in fact” that defendant’s claims are patently without merit and counsel has complied with Rule 651(c). *Kuehner*, 2015 IL 117695, ¶ 16.

¶ 27 When a trial court advances a petition to the second stage within 90 days, it is presumed that the court has made a finding that the petition was not frivolous or patently without merit on its face. *Johnson*, 2018 IL App (5th) 140486, ¶ 42; *Kuehner*, 2015 IL 117695, ¶ 20. In this instance, when postconviction counsel determines a motion to withdraw is necessary, counsel is essentially filing a motion to reconsider the trial court’s initial ruling. *Kuehner*, 2015 IL 117695, ¶ 21. As a result, “appointed counsel owes the trial court at least some explanation as to why, despite its superficial virtue, the *pro se* petition is *in fact* frivolous or patently without merit, and counsel owes this explanation with respect to each of the defendant’s *pro se* claims.” (Emphasis in original.) *Id.* Similar to a motion to reconsider, a motion to withdraw “does not ask the trial court to conduct its first-stage assessment a second time but rather seeks to bring to the trial court’s attention information that was not apparent on the face of the *pro se* petition at the time such assessment was made.” *Id.*

¶ 28 B. *Kuehner* Applies to This Case

¶ 29 To determine whether postconviction counsel met all of the requirements to withdraw, we must first decide which standard applies: the lower standard of *Greer* or the “decidedly higher” standard of *Kuehner*. *Id.* ¶ 18. The State argues that the record is not clear that the trial

court made a decision on the merits as to whether defendant's petition should be advanced to the second stage. In the absence of an explicit finding, the State claims *Greer* should apply. We disagree for two reasons.

¶ 30 First, the record demonstrates that the trial court affirmatively advanced defendant's petition to the second stage. At the May 2, 2014, hearing, the trial court permitted defendant to file an affidavit in support of his *pro se* petition. Additionally, defendant's petition was made up of multiple filings which had been pending before the court since March 2014. The trial court also indicated at the hearing that defendant's trial counsel, who was present and had been assisting defendant by transcribing his handwritten motions and filing them, could no longer represent defendant because of his ineffective assistance of counsel claims. Accordingly, the record indicates that the trial court was aware of the allegations in the postconviction petition and affirmatively advanced it to the second stage.

¶ 31 Second, the trial court asked the State for its opinion on how to proceed. The State replied, "As there is a constitutional allegation in this[,] I believe it should be going on to the second stage, Your Honor, and have counsel appointed for him." It is well settled that "a party cannot complain of error that it brought about or participated in." *People v. Hughes*, 2015 IL 117242, ¶ 33, 69 N.E.3d 791; *In re Detention of Swope*, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004) ("Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented."). Before the trial court, the State believed defendant's claims should be advanced to the second stage. It cannot now claim that the trial court's doing so was somehow error or not an affirmative decision.

¶ 32 C. The Motion to Withdraw

¶ 33 The supreme court in *Kuehner* made clear that postconviction counsel must ex-



plain why a defendant’s “petition is *in fact* frivolous or patently without merit,” and counsel must “make that case with respect to each and every *pro se* claim asserted.” (Emphasis in original.) *Kuehner*, 2015 IL 117695, ¶¶ 21, 22. In this case, postconviction counsel failed to address defendant’s argument that counsel failed to investigate two witnesses. Specifically, postconviction counsel claimed “[defendant] does not allege any particular witness, other than Michael Lightfoot \*\*\*, should have been investigated.” But defendant *did* allege that two witnesses—Ashanti Beyah and Kesheena Nolden—could have corroborated his claim that Lightfoot owned the firearms. Further, we find it worth mentioning that postconviction counsel did not reference defendant’s March 25, 2014, filing, in which these allegations were presented, despite mentioning every other *pro se* filing. It appears that postconviction counsel did not review the pleading, but whether he did or did not, his failure to address at least one of the claims therein means he did not comply with *Kuehner*.

¶ 34 We do not criticize postconviction counsel for failing to comply with *Kuehner*, given that *Kuehner* was decided after counsel filed his motion to withdraw. Additionally, *Kuehner*’s requirement that “each and every *pro se* claim” must be addressed is an extraordinarily difficult standard to meet. Postconviction counsel’s motion to withdraw was 29 pages long, contained a thorough discussion of the procedural and factual history, and methodically addressed over a dozen other claims. Despite counsel’s laudable efforts, we conclude counsel failed to comply with *Kuehner* and we remand the case for further second-stage proceedings. We express no view on the ultimate merits of defendant’s claims or what action new postconviction counsel should take on remand.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we reverse the trial court’s judgment and remand the case

for further second-stage proceedings. In closing, we thank defense counsel for her detailed and well-reasoned brief.

¶ 37           Reversed.