

**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) 180653-U

NO. 4-18-0653

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 7, 2019

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
STEVEN L. FEAGIN,	)	No. 00CF2187
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Turner and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed and remanded with directions, concluding postconviction counsel rendered unreasonable assistance where counsel failed to include an ineffective assistance of appellate counsel claim in defendant's amended postconviction petition.

¶ 2 Defendant, Steven L. Feagin, appeals from the second-stage dismissal of his amended petition for postconviction relief. Defendant argues appointed postconviction counsel rendered unreasonable assistance where counsel failed to include an ineffective assistance of appellate counsel claim in his amended postconviction petition, resulting in the trial court dismissing his amended petition based on forfeiture. In the alternative, defendant requests a *Krankel*-like inquiry into his allegations of unreasonable assistance of postconviction counsel. For the following reasons, we reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4

#### A. Trial Court Proceedings

¶ 5 In December 2000, the State charged "JAMES DOE, A BLACK MALE DNA PROFILE" by information with three counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 1998)), against three separate victims in three separate incidents. In December 2008, a grand jury indicted Feagin, as the "James Doe" defendant, on six counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 1998)).

¶ 6 In November 2011, the trial court granted the State's motion to compel the taking of deoxyribonucleic acid (DNA) from defendant. In January 2012, defendant filed a motion to suppress evidence under *Franks v. Delaware*, 438 U.S. 154 (1978), arguing that the State improperly obtained his DNA from a related Florida sexual assault case. The court denied the motion.

¶ 7 The case proceeded to a June 2012 jury trial on counts four through six, where the trial court previously severed counts one through three for trial purposes. At trial, the State called the victim, M.P., to testify. M.P. testified that on July 13, 1995, she studied at the University of Illinois and lived in an off-campus apartment in Urbana, Illinois. M.P. testified and related her subjection to a sexual assault in her apartment by an African-American male. After the sexual assault, M.P. called the police who responded to her apartment building and took her to the hospital where a nurse performed a "rape kit" on M.P. M.P. worked with a police sketch artist to create a sketch of the perpetrator but failed to identify anyone from photo lineups.

¶ 8 The State's expert, Jennifer Aper, a forensic scientist with the Illinois State Police Springfield Forensic Science Laboratory, testified that the male DNA recovered from M.P. matched defendant's DNA. Defense counsel never cross-examined Aper regarding the accuracy

or reliability of her determination that the male DNA recovered from M.P. matched defendant's DNA.

¶ 9 At the close of evidence, the jury found defendant guilty of all three counts of aggravated criminal sexual assault. The trial court sentenced defendant to three consecutive 30-year prison sentences. After sentencing, the circuit clerk imposed various assessments.

¶ 10 On direct appeal, defendant argued "(1) the trial court erred by denying him a *Franks* hearing, and (2) certain assessments must be vacated, as they constitute fines improperly imposed by the circuit clerk." In May 2014, this court affirmed defendant's conviction and vacated certain fines. *People v. Feagin*, 2014 IL App (4th) 120891-U.

¶ 11 B. Postconviction Proceedings

¶ 12 In March 2015, defendant filed a *pro se* postconviction petition alleging, in relevant part, ineffective assistance of both trial and appellate counsel. Subsequently, the trial court dismissed defendant's *pro se* petition as frivolous and patently without merit. Defendant appealed the trial court's dismissal.

¶ 13 In December 2017, this court remanded the case for a second-stage postconviction proceeding, to include the appointment of counsel. This court held that defendant presented the gist of a constitutional claim of ineffective assistance of counsel in that defense counsel failed to cross-examine the State's DNA expert regarding the number of loci at which defendant's DNA matched the male DNA recovered from M.P.

¶ 14 In June 2018, appointed counsel filed an amended postconviction petition. The amended petition alleged (1) ineffective assistance of trial counsel for failing to challenge the conclusions made by the State's DNA expert during cross-examination, (2) ineffective assistance of trial counsel for failing to assert a violation of defendant's fourth amendment right against

unreasonable searches and seizures when police obtained defendant's DNA in Florida and improperly sent it to Illinois to be used in the present case, and (3) defendant's sentence violated the proportionate penalty and due process clauses of the United States Constitution and Illinois Constitution by constituting cruel and unusual punishment.

¶ 15 In July 2018, the State filed a motion to dismiss defendant's amended postconviction petition. In the motion, the State alleged defendant's claims of ineffective assistance of counsel related to trial counsel's performance, not appellate counsel's performance, and the State moved to dismiss the matter based on forfeiture where defendant could have raised his claims on direct appeal but failed to do so. The State then argued against the merits of the amended petition as if defendant also alleged that appellate counsel was ineffective. In August 2018, defendant filed a response to the State's motion to dismiss, standing on the allegations alleged in his amended petition. Subsequently, the trial court dismissed defendant's amended postconviction petition based on forfeiture.

¶ 16 In September 2018, defendant filed a *pro se* motion to reconsider. Defendant argued that postconviction counsel provided an unreasonable level of assistance in violation of Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Defendant asserted the State moved to dismiss his amended petition primarily because his claim of ineffective assistance related only to trial counsel, not appellate counsel. He alleged that the claims he presented to his postconviction counsel included allegations of ineffective assistance of both his trial and appellate counsel. Furthermore, defendant asserted if his postconviction counsel had alleged ineffective assistance of appellate counsel, the State would have been precluded from moving to dismiss his amended petition. The trial court denied defendant's *pro se* motion.

¶ 17 This appeal followed.

¶ 18

## II. ANALYSIS

¶ 19 Defendant appeals the second-stage dismissal of his postconviction petition, arguing appointed counsel rendered unreasonable assistance where counsel failed to include a claim of ineffective assistance of appellate counsel—for failing to assert ineffective assistance of trial counsel on direct appeal—in his amended postconviction petition, resulting in the trial court dismissing his amended petition based on forfeiture. In the alternative, defendant requests a *Krankel*-like inquiry into his allegations of unreasonable assistance of postconviction counsel. We reverse and remand with directions.

¶ 20

### A. Standard of Review

¶ 21 "The [Illinois] Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 [to 122-7 (West 2016)]) 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, 1074-75 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 22

The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2016).

¶ 23 At the second stage, the trial court may appoint counsel who may amend the petition to ensure the defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also, at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2016). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 24 If a substantial showing of a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted the motion. We review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 25 B. Reasonable Assistance

¶ 26 The right to counsel at the second stage of postconviction proceedings is wholly statutory, and petitioners are only entitled to the level of assistance provided for by the Act. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007) (citing *People v. Turner*, 187 Ill. 2d 406, 410, 719 N.E.2d 725, 727-28 (1999)). "The Act provides for a reasonable level of assistance." *Id.* (citing *People v. Flores*, 153 Ill. 2d 264, 276, 606 N.E.2d 1078, 1084 (1992)).

¶ 27 In order to assure a reasonable level of assistance, Illinois Supreme Court Rule 651(c) requires that postconviction counsel (1) consults with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, (2) examine the record of the proceedings at the trial, and (3) make any amendments necessary to the *pro se* petition to adequately present petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. July 1,

2017). "[T]he Illinois 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. Schlosser*, 2012 IL App (1st) 092523, ¶ 30, 973 N.E.2d 960 (quoting *Suarez*, 224 Ill. 2d at 47).

¶ 28 Here, appointed counsel filed a certificate pursuant to Rule 651(c) (eff. July 1, 2017). "The filing of a facially valid Rule 651(c) certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule." *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 25, 67 N.E.3d 976. On appeal, we review an attorney's compliance with Rule 651(c) *de novo*. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15, 43 N.E.3d 1077.

¶ 29 In defendant's *pro se* postconviction petition, he made numerous allegations of ineffective assistance of both trial and appellate counsel. Following remand however, appointed counsel failed to allege ineffective assistance of appellate counsel in defendant's amended postconviction petition. The State moved to dismiss defendant's amended postconviction petition based on forfeiture where defendant failed to raise ineffective assistance of appellate counsel but did raise ineffective assistance of trial counsel claims not raised on direct appeal. Thus, based on the State's argument the trial court granted the motion to dismiss.

¶ 30 Here, postconviction counsel's failure to include an ineffective assistance of appellate counsel claim in the amended petition left the petition vulnerable to procedural bar. Petitions for postconviction relief are collateral proceedings, not direct appeals. *People v. Smith*, 326 Ill. App. 3d 831, 839, 761 N.E.2d 306, 314 (2001). Therefore, issues actually decided on direct appeal are barred in postconviction proceedings by the doctrine of *res judicata*. *Id.* Issues

that could have been raised on direct appeal but were not raised are forfeited. *Turner*, 187 Ill. 2d at 412-13; *People v. Viramontes*, 2017 IL App (1st) 160984, ¶ 59, 87 N.E.3d 364.

¶ 31 In his amended petition defendant alleged (1) ineffective assistance of trial counsel for failing to challenge the conclusions made by the State's DNA expert during cross-examination, (2) ineffective assistance of trial counsel for failing to assert a violation of defendant's fourth amendment right against unreasonable searches and seizures when police obtained defendant's DNA in Florida and improperly sent it to Illinois to be used in the present case, and (3) defendant's sentence violated the proportionate penalty and due process clauses of the United States Constitution and Illinois Constitution by constituting cruel and unusual punishment. All of defendant's claims could have been raised on direct appeal. See *People v. Veach*, 2017 IL 120649, ¶ 46, 89 N.E.3d 366 ("[I]n Illinois, defendants are required to raise ineffective assistance of counsel claims on direct review if apparent on the record."). However, appellate counsel failed to raise defendant's claims on direct appeal. Therefore, defendant forfeited all of his claims in his amended petition. See *Turner*, 187 Ill. 2d at 412-13.

¶ 32 A well-established exception to the doctrine of forfeiture exists in postconviction proceedings where appointed counsel amends the postconviction petition to allege ineffective assistance of appellate counsel for failing to raise petitioner's claims on direct appeal. *Id.* at 413.

¶ 33 While appointed counsel filed a 651(c) certificate and amended the postconviction petition, counsel failed to include in the amended petition a claim of ineffective assistance of appellate counsel for failing to raise defendant's claims on direct appeal. Postconviction counsel's failure to add a claim of ineffective assistance of appellate counsel left the petition vulnerable to dismissal on procedural grounds and precluded the trial court from considering the merits of the claims in the amended petition. See *id.*



¶ 34 The Supreme Court noted, "the purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *People v. Perkins*, 229 Ill. 2d 34, 44, 890 N.E.2d 398, 403 (2007). The duty to adequately present a defendant's claims "necessarily includes attempting to overcome procedural bars \*\*\* that will result in dismissal of a petition if not rebutted." *Id.*; see also *Turner*, 187 Ill. 2d at 413. By failing to amend defendant's petition to include an ineffective assistance of appellate counsel claim, postconviction counsel rendered unreasonable assistance of counsel. See *id.* at 414. (The court found the omission of a "routine amendment" to a postconviction petition constituted unreasonable assistance of counsel.)

¶ 35 In its brief, the State cites to the ineffective assistance standard in *Strickland v. Washington*, 466 U.S. 668 (1984) and immediately addresses the merits of defendant's claims, arguing that defendant's ineffective assistance of counsel claims lack any merit. However, postconviction counsel precluded this court from even considering the merits of defendant's claims because counsel rendered unreasonable assistance by failing to allege ineffective assistance of appellate counsel in defendant's amended petition. See *Turner*, 187 Ill. 2d at 415 ("Counsel's failure to amend the post[-]conviction petition precluded consideration of petitioner's claims on the merits."); *People v. Schlosser*, 2012 IL App (1st) 092523, ¶¶ 32-33 (The court determined it is impossible to determine whether the petitioner's claims had merit if counsel failed to complete the duties mandated by Rule 651(c), and "[c]ounsel cannot fulfill his Rule 651(c) duties simply by filing a certificate if he [failed to provide] adequate assistance.").

¶ 36 Our case is analogous to *Turner*, 187 Ill. 2d at 414, where the Supreme Court found postconviction counsel's assistance unreasonable because counsel failed to amend the postconviction petition to allege ineffective assistance of appellate counsel, an amendment that

would have overcome the procedural bar of waiver and avoided dismissal. The court determined counsel's failure to amend the petition precluded consideration of petitioner's claims on the merits. *Id.* at 415. Here, counsel amended defendant's postconviction petition but counsel failed to make the necessary amendment—alleging ineffective assistance of appellate counsel—to avoid forfeiture. Therefore, we find counsel failed to provide the reasonable assistance defendant is entitled to under the Act.

¶ 37 Accordingly, we reverse the trial court's dismissal of defendant's postconviction petition and remand for appointment of new counsel and further second-stage proceedings, during which defendant may amend his postconviction petition to include a claim of ineffective assistance of appellate counsel. See *Schlosser*, 2012 IL App (1st) 092523, ¶ 35. Our decision should not be construed as any indication of whether the allegations set forth in defendant's petition have merit. Moreover, if newly appointed counsel, after complying with Rule 651(c), determines defendant's claims lack merit, then counsel may move to withdraw as counsel. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 15, 964 N.E.2d 679.

¶ 38 Finally, because we are remanding due to postconviction counsel's failure to comply with Rule 651(c) and ordering the appointment of new counsel, we decline to address defendant's alternative argument requesting a *Krankel*-like inquiry into his allegations of unreasonable assistance of postconviction counsel.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 41 Reversed and remanded with directions.