

NOTICE  
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2019 IL App (5th) 160025-U

NO. 5-16-0025

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,	)	Madison County.
	)	
v.	)	No. 01-CF-528
	)	
AMANUEL WADE,	)	Honorable
	)	Neil T. Schroeder,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the order of the circuit court of Madison County because postconviction counsel did not render unreasonable assistance of counsel by failing to file an amended postconviction petition where there is no indication that an amended petition was necessary.

¶ 2 **BACKGROUND**

¶ 3 On June 15, 2001, defendant Amanuel Wade entered a plea of guilty to one count of first-degree murder in the death of Robert Hempel, who was shot five times during the course of a robbery. Defendant agreed to testify against his codefendants in exchange for a recommended sentence of between 20 and 60 years' imprisonment, dismissal of one count of armed robbery, and dismissal of another count of murder for which he would

have been eligible for the death sentence. On May 28, 2002, upon completion of his testimony against his codefendants, defendant was sentenced to 32 years in prison. His sentence was not enhanced with the statutory firearm enhancement.

¶ 4 Defendant filed a motion to withdraw his guilty plea and two prior postconviction motions briefly summarized as follows. On June 18, 2002, defendant filed a motion to withdraw his guilty plea arguing his trial counsel provided ineffective assistance of counsel by failing to formulate a defense strategy, refusing to file a motion to withdraw his plea, and deceiving defendant into entering his plea by stating defendant would be sentenced to 20 years' imprisonment for testifying against his codefendants. After conducting a hearing, the trial court denied defendant's motion to withdraw his guilty plea and defendant appealed. This court affirmed. *People v. Wade*, 373 Ill. App. 3d 1184 (2007) (table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 5 On August 22, 2008, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2008)), arguing ineffective assistance of counsel for failing to file a motion to dismiss the indictment and failure to investigate statements by codefendants. The circuit court summarily dismissed defendant's postconviction petition and defendant appealed. This court affirmed. *People v. Wade*, 399 Ill. App. 3d 1252 (table) (2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6 Next, on September 27, 2010, defendant filed a *pro se* petition for postconviction relief pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2010)), alleging that the indictment was void because it had been obtained using

perjured testimony. The circuit court dismissed defendant's successive postconviction petition and defendant appealed. This court affirmed. *People v. Wade*, 2012 IL App (5th) 100624-U.

¶ 7 The matter now before the court involves the level of assistance provided defendant concerning his second postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2014)) filed on July 16, 2014.

¶ 8 Defendant filed a *pro se* motion for leave to file a successive postconviction petition alleging his sentence was void due to the sentencing court's noncompliance with section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002)) mandating a gun enhancement and the sentencing court's failure to admonish the defendant of the mandatory gun enhancement. Defendant's petition argued that, at the time of his sentencing, section 5-8-1(a)(1)(d)(iii) required 25 years or up to a term of natural life, be added to a sentence for first-degree murder imposed by the court if, during the commission of the offense, the person personally discharged a firearm that proximately caused death to another person. *Id.* The petition also cited to *People v. White*, 2011 IL 109616, ¶ 21, which held that a defendant's sentence which did not conform to the statutory requirements was void and that where the defendant was not properly admonished concerning the statutory requirements, the entire plea agreement was void as well.

¶ 9 The circuit court found that the defendant's successive postconviction petition stated "the gist of a constitutional claim" and allowed defendant's successive

postconviction petition to proceed. The circuit court further appointed Jack Daugherty to represent the defendant.

¶ 10 On March 24, 2015, Daugherty indicated to the court, in the presence of the defendant, that he would be "standing on the pleadings as filed by defendant." That same day, Daugherty filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), indicating he consulted with defendant in person, examined the trial court file and report of proceedings of the plea of guilty, and made any amendments to the petition filed *pro se* that were necessary.

¶ 11 Also on March 24, 2015, the State filed a motion to dismiss, citing the February 5, 2015, Illinois Supreme Court decision in *People v. Smith*, 2015 IL 116572, ¶ 34, which held that *White* did not apply retroactively, and as such, defendant had no cognizable claim as defendant's conviction was final prior to *White*. At a hearing on the motion to dismiss held on December 21, 2015, Daugherty acknowledged the *Smith* decision but stated that he believed defendant's case was factually distinctive from *Smith* and required "some special attention." Daugherty did not state how defendant's case was distinctive from *Smith* or why defendant's case required "special attention." The circuit court granted the State's motion to dismiss in open court and dismissed defendant's successive postconviction petition.

¶ 12 Defendant appeals from the judgment of the circuit court dismissing his successive postconviction petition, alleging an unreasonable level of assistance based on postconviction counsel's failure to file an amended petition in support of defendant's postconviction claims.

¶ 13

## ANALYSIS

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). A postconviction proceeding is not an appeal from an underlying judgment, but rather a collateral attack on the judgment. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). As a collateral proceeding, a postconviction proceeding allows inquiry only into constitutional issues that were not and could not have been adjudicated in an appeal of the underlying judgment. *Id.*

¶ 15 Counsel may be appointed where a defendant cannot afford counsel (725 ILCS 5/122-4 (West 2016)), and the right to counsel in postconviction proceedings is derived from statute rather than the Constitution. *People v. Owens*, 139 Ill. 2d 351, 364 (1990). Thus, postconviction petitioners are guaranteed only the level of assistance which the statute provides. *Id.* That level of assistance has been defined by the Illinois Supreme Court to mean a "reasonable" level of assistance. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). One aspect of "reasonable" assistance is compliance with Illinois Supreme Court Rule 651(c). *People v. Carter*, 223 Ill. App. 3d 957, 961 (1992). An attorney's compliance with Rule 651(c) is reviewed *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 16 There are two ways in which appointed counsel may comply with Rule 651(c): (1) counsel may file a certificate to show that the requirements of the rule were complied with or (2) the record as a whole may demonstrate that counsel complied with those

provisions. *People v. Richmond*, 188 Ill. 2d 376, 380 (1999). A rebuttable presumption that postconviction counsel provided reasonable assistance exists where the Rule 651(c) certificate has been filed. *Profit*, 2012 IL App (1st) 101307, ¶ 19. The defendant bears the burden to overcome this presumption by demonstrating that his counsel failed to substantially comply with the requirements of Rule 651(c). *Id.*

¶ 17 In the present case, the defendant's postconviction counsel filed the requisite certificate of compliance which stated that he had fulfilled his obligations under Rule 651(c). Thus, there is a rebuttable presumption that he provided reasonable assistance and it is the defendant's burden to overcome this presumption.

¶ 18 Defendant states that postconviction counsel argued at the dismissal hearing that defendant's case was "factually distinctive and requires some special attention." It is defendant's position that if postconviction counsel believed defendant's case required some special attention, "he should have filed an amended petition to adequately represent the facts warranting 'special attention.' "

¶ 19 Defendant cites to *People v. Suarez*, 224 Ill. 2d 37, 47 (2007), which held that remand is required where postconviction counsel fails to comply with the requirements of Rule 651(c) regardless of whether the claims raised in the petition had merit. In *Suarez*, counsel did file an amended petition but failed to file the requisite Rule 651(c) certificate of compliance. This matter is distinguishable from *Suarez* as postconviction counsel did file the requisite certificate of compliance establishing the presumption that he provided reasonable assistance. Further, the holding in *Suarez* did not state that postconviction counsel must file an amended petition but stated that "[s]uch [Rule 651(c)] compliance

must be shown regardless of whether the claims made in the *pro se* or amended petition are viable." *Id.* at 52.

¶ 20 The requirements of Rule 651(c) imposed on postconviction counsel serve to ensure that the claims of a petitioner are adequately presented. To that end, the statute requires a showing that counsel has consulted with the petitioner to ascertain contentions of deprivation of constitutional rights, has examined the record of proceedings, and has amended the *pro se* petition, *if necessary*. The third obligation does not require the postconviction counsel to advance frivolous or spurious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Nor does the third obligation require that an amended petition be filed unless such amendment is necessary for an adequate presentation of petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 21 Defendant does not provide any additional facts, evidence, or law that postconviction counsel could have raised in an amended petition that was not raised in defendant's *pro se* petition. Defendant's *pro se* petition, which was filed prior to the *Smith* decision, correctly cited to the *White* case. Even if postconviction counsel had addressed the *Smith* decision in an amended petition, the Illinois Supreme Court issued its decision in *People v. Castleberry*, 2015 IL 116916, ¶ 1, on November 19, 2015, which abolished the void sentence rule. Therefore, at the time of the hearing on the State's motion to dismiss, defendant would not have had a successful argument to void his pretrial agreement and sentence. As such, defendant has failed to demonstrate that an amended petition was necessary or that postconviction counsel's representation was not reasonable by failing to file an amended petition.

¶ 22 Defendant also argues that postconviction counsel had a duty to file a motion requesting the trial court to reconsider its prior ruling allowing defendant's petition to proceed. In support of this argument, defendant cites to *People v. Kuehner*, 2015 IL 117695, ¶ 27, which held that a postconviction counsel's motion to withdraw after a *pro se* postconviction petition has advanced to the second stage must set forth some explanation as to why all of the *pro se* claims are lacking in legal and factual support and warrant counsel's withdrawal. The *Kuehner* court did not hold, as defendant suggests, that postconviction counsel had a duty under Rule 651(c) to file a motion to withdraw when he became aware of a change in the law that was not available at the time the circuit court made its determination to allow defendant's *pro se* petition to proceed. The *Kuehner* court only set forth the requirement that a motion to withdraw address all *pro se* claims that were allowed to proceed.

¶ 23 We conclude that the defendant has failed to overcome the rebuttable presumption of reasonable assistance from his postconviction counsel. There is no requirement that postconviction counsel file an amended petition. Rule 651(c) only requires an amended petition be filed where necessary, and in this matter, defendant's appeal is bereft of any factual details to demonstrate that an amended petition was necessary.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the circuit court's order dismissing defendant's postconviction petition.

¶ 26 Affirmed.