

NOTICE  
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2019 IL App (5th) 160117-U

NO. 5-16-0117

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 06-CF-779
	)	
JOHN A. ORR,	)	Honorable
	)	Ronald R. Slemer,
Defendant-Appellant.	)	Judge, presiding.

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

**ORDER**

¶ 1 *Held:* Order denying postconviction petition affirmed where defendant, who claimed postconviction counsel was ineffective for omitting certain *pro se* claims from the amended postconviction petition, failed to show that counsel’s representation was unreasonable.

¶ 2 The defendant, John A. Orr, appeals the February 23, 2016, order of the circuit court of Madison County that denied his postconviction petition. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 On April 5, 2006, the defendant was charged with one count of solicitation of murder for hire, with a possible sentence of 20 to 40 years’ imprisonment if convicted

(720 ILCS 5/8-1.2(b) (West 2004)), and one count of solicitation of murder, with a possible sentence of 15 to 30 years' imprisonment if convicted (*id.* § 8-1.1(b)). On March 20 and March 21, 2007, the defendant was represented by private counsel at a jury trial. At the beginning of the trial, the State dismissed the charge of solicitation of murder and submitted the case to the jury on the charge of solicitation of murder for hire. The jury found the defendant guilty of solicitation of murder for hire. On May 17, 2007, the circuit court sentenced the defendant to 20 years in prison. The defendant filed a timely notice of appeal, and appellate counsel was appointed to represent him.

¶ 5 On direct appeal, the defendant's sole argument was that his conviction of solicitation of murder for hire should be reduced to a conviction of solicitation of murder because there was insufficient evidence to sustain his conviction of solicitation of murder for hire. This court affirmed the defendant's conviction of solicitation of murder for hire by order of December 17, 2008. *People v. Orr*, No. 5-07-0322 (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6 On July 24, 2007, and September 11, 2007—while the direct appeal was pending—the defendant filed *pro se* petitions for, *inter alia*, postconviction relief, pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2006)). The petitions alleged that the defendant's constitutional rights were violated due to ineffective assistance of trial counsel “during his entire representation.” In particular, the petitions alleged, *inter alia*, that the defendant's trial counsel was ineffective for failing to file a “Sentence Reconsideration Motion” to address contentions of error at trial and sentencing as the defendant requested, prior to filing a notice of appeal in order to

perfect the appeal. The petitions further alleged that, had trial counsel filed such a motion, the defendant could have presented issues and facts outside the record because “[f]acts did exist that were unknown to the court at the time of trial.” Notably, the *pro se* postconviction petitions failed to specify any such facts or how the facts would have impacted the defendant’s sentence. The petitions further alleged that the circuit court failed to properly admonish the defendant—pursuant to Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001)—that he needed to file a motion to reconsider his sentence before proceeding to appeal.<sup>1</sup>

¶ 7 On July 5, 2011, postconviction counsel entered an appearance on behalf of the defendant. On January 10, 2013, postconviction counsel filed a 651(c) certificate (see Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012)) and a supplemental petition for postconviction relief. The supplemental petition set forth some of the claims the defendant had advanced in his *pro se* postconviction petition but omitted the two aforementioned claims of the *pro se* petition.

¶ 8 On February 23, 2016, following an evidentiary hearing, the circuit court entered an order denying the request for postconviction relief because the defendant failed to show that his trial counsel’s performance fell below an objective standard of reasonableness and failed to show that the defendant suffered prejudice as required by *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant filed a timely notice of appeal, and appellate counsel was appointed.

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<sup>1</sup>Additional claims were set forth in the *pro se* petition but are omitted here, as they are not subject to this appeal.

¶ 9

## ANALYSIS

¶ 10 The issue on appeal is whether the defendant's postconviction counsel failed to provide reasonable representation by omitting the following allegedly meritorious claims that the defendant raised in his *pro se* postconviction petition, thereby failing to adequately amend the *pro se* petition and resulting in counsel's failure to comply with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012): (1) that trial counsel was ineffective for failing to file a motion to reconsider sentence because mitigating evidence existed outside the record and (2) that the circuit court failed to properly admonish the defendant regarding the proper procedure for filing a motion to reconsider sentence, pursuant to Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001) (the subject claims). "Our review of an attorney's compliance with a supreme court rule \*\*\* is *de novo*." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 11 Postconviction petitions are governed by the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The Act "provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial." *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). "Under the Act, a post-conviction proceeding not involving the death penalty contains three stages." *Id.* at 244. "At the first stage, the trial court independently assesses a defendant's petition, and if the court determines that the petition is frivolous or patently without merit, the court can summarily dismiss it." (Internal quotation marks omitted.) *People v. Little*, 2012 IL App (5th) 100547, ¶ 12. "A post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of

a constitutional claim.’ ” *Edwards*, 197 Ill. 2d at 244 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)).

¶ 12 “If the petition is not summarily dismissed at the first stage, \*\*\* the petition moves to the second stage \*\*\*, where counsel is appointed to represent the defendant and amend [the] postconviction claims.” *People v. Marshall*, 375 Ill. App. 3d 670, 679-80 (2007). The State may also move to dismiss the petition at the second stage. See *Little*, 2012 IL App (5th) 100547, ¶ 12. “At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the defendant’s petition proceeds to the third stage for an evidentiary hearing \*\*\*.” *Id.* “An evidentiary hearing is held only where the allegations of the postconviction petition make a substantial showing that the defendant’s constitutional rights have been violated.” *Marshall*, 375 Ill. App. 3d at 680-81.

¶ 13 “The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal.” *People v. English*, 2013 IL 112890, ¶ 22. “Issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited.” *Id.* “The forfeiture rule applies only where it was possible to raise an issue on direct appeal; thus, a postconviction claim that depends on matters outside the record is not ordinarily forfeited, because matters outside the record may not be presented on direct appeal.” *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009). Moreover, a postconviction claim will not be forfeited where the alleged forfeiture results from

ineffective assistance of appellate counsel. *Id.* at 214-15. However, where a “dismissed postconviction petition does not allege ineffectiveness of appellate counsel on direct appeal, such claims cannot be raised for the first time on postconviction appeal.” *People v. Cole*, 2012 IL App (1st) 102499, ¶ 25.

¶ 14 A defendant has no constitutional right to counsel in postconviction proceedings. See *People v. Cotto*, 2016 IL 119006, ¶ 29. Rather, a defendant’s right to postconviction counsel is “ ‘a matter of legislative grace.’ ” *Id.* (quoting *People v. Hardin*, 217 Ill. 2d 289, 299 (2005)). “Because the right to counsel in post-conviction proceedings is wholly statutory [citation], post-conviction petitioners are entitled only to the level assistance provided by the \*\*\* Act.” *People v. Turner*, 187 Ill. 2d 406, 410 (1999). “It is well settled that the Act requires counsel to provide a ‘reasonable level of assistance’ to [the] petitioner in post-conviction proceedings.” *Id.* (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)).

¶ 15 “To that end, Supreme Court Rule 651(c) outlines the specific duties of appointed counsel in post-conviction proceedings.” *Id.* The record in postconviction proceedings must “demonstrate that appointed counsel ‘has consulted with [the] petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the] petitioner’s contentions.’ ” *Id.* (quoting Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

¶ 16 “The purpose of the rule is to ensure that postconviction counsel shapes the defendant’s claims into a proper legal form and presents them to the court.” *Profit*, 2012

IL App (1st) 101307, ¶ 18. “Substantial compliance with Rule 651(c) is sufficient.” *Id.* “The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance.” *Id.* ¶ 19. “It is [the] defendant’s burden to overcome this presumption by demonstrating his attorney’s failure to substantially comply with the duties mandated by Rule 651(c).” *Id.*

¶ 17 Here, postconviction counsel filed a Rule 651(c) certificate, thereby creating a presumption that the defendant was provided reasonable assistance. See *id.* However, the defendant argues that there is evidence to rebut that presumption. He alleges that his postconviction counsel failed to adequately amend the *pro se* postconviction petition by failing to advance the subject claims.

¶ 18 Conversely, the State contends that the arguments regarding the subject claims raised by the defendant in his *pro se* postconviction petition and omitted by postconviction counsel in the amended postconviction petition are forfeited because they could have—but were not—raised in the direct appeal. We agree with the State.

¶ 19 The subject claims are relative to trial level procedure and could have been raised on direct appeal. However, the sole issue the defendant raised on direct appeal was whether his conviction of solicitation of murder for hire should be reduced to a conviction of solicitation of murder. Because the issues the defendant now attempts to present on postconviction appeal could have been—but were not—presented in the direct appeal, and because no claim of ineffective assistance of appellate counsel was ever raised, these issues are forfeited. See *English*, 2013 IL 112890, ¶ 22. See also *Youngblood*, 389 Ill. App. 3d at 214.

¶ 20 Forfeiture notwithstanding, whether the defendant's *pro se* allegations had merit is crucial in determining whether postconviction counsel failed to provide reasonable representation by not including them in the amended petition. See *Profit*, 2012 IL App (1st) 101307, ¶ 23. In this case, postconviction counsel excluded the subject claims from the amended petition but included others that counsel deemed meritorious. The amended petition was reviewed by the circuit court at an evidentiary hearing and subsequently denied.

¶ 21 Because the subject claims were not raised by appellate counsel in the direct appeal and were therefore forfeited, postconviction counsel could not have in good faith and should not have been expected to include those claims in the amended petition. Moreover, it was not unreasonable for postconviction counsel to exclude from the amended petition any allegations of ineffective assistance of appellate counsel because the defendant did not specify in his *pro se* postconviction petition what the facts outside the record were that could have mitigated his sentence had trial counsel filed a motion to reconsider the sentence. Nor is there any evidence that any such facts were ever brought to the attention of appellate counsel. The defendant concedes in his brief that the *pro se* postconviction petition contains no specific facts to support the correlating claim. However, he alleges that “additional information developed through his post-conviction proceedings” supports the *pro se* claim.

¶ 22 It was not until the instant appeal that the defendant provided an account of the “facts” that he first alluded to in his *pro se* postconviction petition filed on July 24, 2007. Particularly, in his brief on appeal, the defendant references the evaluation in the record



of court-appointed clinical psychologist Dr. Daniel Cuneo. The defendant states that “[a]lthough Dr. Cuneo’s evaluation found him sane at the time of the offense, it also found that he was suffering from ‘a substantial disorder of thought, mood, and behavior’ which impaired his judgment at the time of the offense.” The defendant alleges that because “[t]his impairment in judgment could be used to mitigate his actions,” he “raised an issue in his *pro se* pleadings that was supported by the record.” We disagree.

¶ 23 Notably, Dr. Cuneo did not file the cited evaluation in the circuit court until September 8, 2015. The defendant was sentenced over eight years earlier on May 17, 2007. The defendant contends that his postconviction counsel failed to provide reasonable representation by not including in the amended postconviction petition his *pro se* claim that trial counsel was ineffective for failing to file a motion to reconsider sentence because mitigating evidence—Dr. Cuneo’s evaluation—existed outside the record. As noted, the evaluation did not become a part of the record until September 8, 2015. Trial counsel could not have presented this evidence in a motion to reconsider sentence, as filing such a motion requires that trial counsel have at his disposal pertinent evidence that could have been raised within 30 days of sentencing. See *People v. Stevenson*, 2011 IL App (1st) 093413, ¶ 13. That could not have been accomplished, as the evidence cited by the defendant did not become available until over eight years after his sentencing.

¶ 24 Notwithstanding the impossibility of a timely presentation of the evidence, it bears mentioning that the defendant did not provide in his brief the complete phrase from the report which set forth Dr. Cuneo’s conclusion. The *entirety* of the phrase cited by the

defendant provides: “It would be my opinion that [the defendant] was suffering from a substantial disorder of thought, mood, and behavior ([PTSD], Chronic and Major Depressive Episode, Recurrent) which afflicted him at the time of the commission of the offense and which impaired [the defendant’s] judgment, *but not to the extent that he was unable to appreciate the wrongfulness of his behavior.*” (Emphasis added.) Dr. Cuneo further concluded that the defendant “could have controlled his behavior if he so desired.” The defendant failed to include these details in his recitation of the facts to support his argument, and the conclusion as a whole actually discredits the defendant’s classification of Dr. Cuneo’s evaluation as mitigating evidence.

¶ 25 Besides the defendant’s claim regarding trial counsel’s failure to file a motion to reconsider his sentence, forfeiture notwithstanding, the claim regarding the alleged incorrect admonishments by the circuit court is also without merit. The admonishments the defendant challenges relate to the requirements of Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001) regarding the procedure for filing a motion to reconsider sentence. We decline to explore the particulars of this claim because even assuming, *arguendo*, that the defendant received incomplete admonishments under Rule 605, “remand is required only where there has been prejudice or a denial of real justice as a result of the inadequate admonishment.” *People v. Henderson*, 217 Ill. 2d 449, 466 (2005). Given our finding that trial counsel’s failure to file a motion to reconsider the sentence resulted in no prejudice to the defendant, the *pro se* claim regarding the allegedly faulty admonishments by the circuit court regarding the procedure of filing said motion is frivolous for the same reasons. Accordingly, we cannot say that the defendant received unreasonable

representation when postconviction counsel opted to omit the claim from the amended petition. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 26 The defendant cites *People v. Jones*, 2016 IL App (3d) 140094, to support his argument that postconviction counsel in this case failed to comply with Illinois Supreme Court Rule 651(c). However, *Jones* is distinguishable from the instant case because there, postconviction counsel's representation was found unreasonable for failure to adequately present in the amended petition a *meritorious* claim of ineffective assistance of trial counsel when facts were present in the record to prompt postconviction counsel to raise the claim. *Id.* ¶ 31. In this case, for the aforementioned reasons, the subject claims are *not* meritorious. Accordingly, *Jones* is not applicable.

¶ 27 Knowing that the subject claims were forfeited or, alternatively, that they were frivolous, it was reasonable for postconviction counsel to exclude them from the amended petition and also to exclude any claims of ineffective assistance of appellate counsel. See *Greer*, 212 Ill. 2d at 205 (postconviction counsel not required to set forth spurious or frivolous claims on behalf of defendant in amended postconviction petition). Because the record demonstrates that postconviction counsel provided reasonable representation to the defendant and substantially complied with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), we affirm the circuit court's order denying the supplemental postconviction petition.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the February 23, 2016, order of the circuit court of Madison County.

¶ 30 Affirmed.