2020 IL App (1st) 172259-U

No. 1-17-2259

Order filed October 15, 2020

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 15358
	)	
SOTERO SALAZAR,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's summary dismissal of defendant's postconviction petition at stage one, concluding (1) his petition failed to state an arguable claim that his trial counsel labored under a conflict of interest; (2) his postconviction counsel did not provide unreasonable assistance; and (3) the circuit court did not abuse its discretion by failing to rule on the claims in his supplemental petition and his request for leave to amend.

¶ 2 Following a 2014 bench trial, defendant Sotero Salazar, his brother, Ruben Salazar, and three other men were convicted of eight counts of possession with the intent to deliver drugs, in

violation of sections 5(f) and 5(g) of the Illinois Cannabis Control Act (720 ILCS 550/5(f), (g) West 2010)).[1] Defendant and Ruben were sentenced to 15 and 14 years' imprisonment, respectively. In defendant and Ruben's consolidated direct appeal, we affirmed their convictions and sentences. *People v. Salazar*, 2017 IL App (1st) 143471-U.

¶ 3 In May 2017, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). Thereafter, he retained counsel, who filed a supplemental petition on his behalf. The circuit court summarily dismissed defendant's petition, finding it frivolous and patently without merit. Defendant appeals, contending (1) the dismissal of his petition should be reversed and the matter remanded where his retained counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017); (2) the matter should be remanded where the circuit court failed to rule on the supplemental petition or his request for additional time to amend his original petition; and (3) his *pro se* petition stated the gist of a claim of ineffective assistance of counsel based on his trial counsel laboring under an actual conflict of interest. We affirm.

¶ 4 We recounted the trial proceedings at length in our order disposing of defendant's direct appeal. *Salazar*, 2017 IL App (1st) 143471-U, ¶¶ 4-78. We summarize only the evidence which is necessary to our discussion of defendant's contentions.

¶ 5 The State charged defendant, Ruben, and five other men with eight counts of possession with the intent to deliver after Chicago police officers recovered more than 5 million grams of cannabis inside shipping containers and the floor of a warehouse located on the 1000 block of

[1] Because defendant and his brother share the same last name, we will refer to Ruben Salazar by his first name to avoid confusion.

South Kolmar Avenue (the Kolmar property), which was rented by defendant and Ruben, two cargo vans which were parked on the Kolmar property, and a third cargo van which had recently left the Kolmar property.

¶ 6 Prior to trial, defendant and Ruben filed a joint motion to suppress evidence. At the hearing on the motion, defendant and Ruben called Fermin Damian and one of their codefendants, Andres Calderon, to testify. Damian testified that he leased the Kolmar property, on which three warehouses were located, from Bulmaro Rayes. Damian sublet to defendant and Ruben the right to park their construction business equipment on the lot and store materials and tools in one of the warehouses. Damian gave them keys to the warehouse and to the locked fence around the property and allowed them to come and go as they pleased.

¶ 7 Calderon testified that he was arrested on August 22, 2011, and in his possession were the keys that unlocked the storage pods inside the warehouse on the Kolmar property.

¶ 8 The State presented the testimony of Officers Patrick Keating and Thomas Cunningham. Their testimony established, in relevant part, that in August 2011, Keating received information from a confidential informant relating to a large shipment of cannabis that was to arrive in Chicago via a semi-truck and trailer over the weekend of August 20 and 21, 2011. Based on the informant's tip and a subsequent investigation, Chicago police ultimately focused on and surveilled the Kolmar property, which was where they believed the cannabis shipment would be received.

¶ 9 At approximately 9:15 p.m. on August 21, 2011, Keating was surveilling the Kolmar property and observed defendant and Ruben enter the property in a Toyota Tundra pickup truck. Defendant moved a Bobcat and a telescopic forklift about the property. Defendant and Ruben then left the property with Rayes. Six hours later, at approximately 3:15 a.m., defendant returned to the

property without Ruben. Shortly thereafter, several other individuals, not including Ruben, arrived at the property. About 3:50 a.m., defendant appeared to call a meeting and all of the individuals who had arrived at the property gathered around him and stood at attention. During the meeting, defendant spoke in Spanish, motioned with his hands, and pointed, making it appear as if he was giving instructions. After the meeting, defendant again moved the telescopic forklift.

¶ 10 Approximately 10 minutes later, a semi-truck arrived at the property, and defendant spoke with the driver outside the property and then guided the semi-truck into the Kolmar property. Keating then observed defendant operating the telescopic forklift and removing six large storage containers with the assistance of two other individuals. After six storage containers were unloaded from the semi-truck, defendant left the property.

¶ 11 At approximately 7:35 a.m., defendant and Ruben returned to the Kolmar property in the Tundra, after which seven or eight other individuals arrived at the property. At that time, there were a total of six cargo vans parked on the property.

¶ 12 After everyone arrived, one of the cargo vans was backed into the warehouse, everyone went inside, and the door was slid closed. At approximately 8:20 a.m., defendant and Ruben exited the warehouse, and defendant closed the door behind them. Defendant and Ruben remained in the yard, talking and looking around. At about 9:04 a.m., the cargo van was driven out of the warehouse and parked along the fenceline of the Kolmar property. The driver exited the van and returned to the warehouse. Defendant and Ruben went back inside with the driver. This process was repeated twice more with other cargo vans on the property.

¶ 13 During the third such occasion, 15 minutes after the third cargo van was backed inside the warehouse, defendant and Ruben went inside, remained inside for one minute, then exited again.

Ten to twelve minutes later, defendant spoke with the person who had driven the second van. During this conversation, defendant walked to the west side of the warehouse and pointed south. After the conversation was over, defendant walked to the gates, unlocked them, and opened them. While defendant did that, the man with whom defendant spoke entered into one of the vans which had been inside the warehouse, left the Kolmar property, and drove north on Kolmar. Defendant then closed and locked the gate.

¶ 14 Believing that cargo van was loaded with narcotics, the officers decided to conduct an investigatory stop. Cunningham conducted the stop 1½ blocks east of the Kolmar property, on Fillmore Street. After stopping the van, Cunningham stated over the radio that he smelled the odor of marijuana as he approached it. Cunningham called a narcotics canine unit that was on standby. The canine alerted the police officers that there was something unusual in the van and Cunningham observed bales of cannabis wrapped in green cellophane inside the van.

¶ 15 As Cunningham was conducting the stop of the van, other officers in the area mistook which van to stop and attempted to stop another, different white van. In that attempt, the sounds of squealing tires and sirens could be heard. Defendant, who appeared to have heard the commotion, walked from the warehouse to the fenceline and looked out to where Cunningham had made the investigatory stop. After looking out, defendant walked quickly back to the warehouse, saying "policia, policia."

¶ 16 The warehouse door slid open and people started running out. Defendant attempted to close the warehouse door but Keating was able to observe two green cellophane-wrapped bales on the warehouse floor.

¶ 17 Ultimately, the officers entered the Kolmar property and, inside the warehouse, they observed the six storage containers, which were all unlocked and opened. The officers also observed numerous green cellophane-wrapped bales on the floor of the warehouse beside the containers, inside two of the containers, and next to and inside the third cargo van that had been backed into the warehouse. The officers also found green cellophane-wrapped bales inside the first van that was backed into the warehouse that morning.

¶ 18 The circuit court denied the motion to suppress, finding the officers' warrantless entry into the Kolmar property was justified by exigent circumstances. Defendant and Ruben filed a joint motion to reconsider, which the court denied.

¶ 19 The matter proceeded to a bench trial. Keating testified consistently with his testimony at the hearing on the joint motion to suppress. In addition, Keating testified that, while defendant was moving the Bobcat and telescopic forklift about the property on August 21, 2011, Ruben was just "standing in the middle of the yard." At no point during his surveillance of the Kolmar property did Keating observe defendant or Ruben open or look inside any of the storage containers or cargo vans.

¶ 20 Officer Brian Luce testified that, as the cargo vans were being loaded inside the warehouse, defendant and Ruben were outside in the yard, and defendant was paying special attention to the locked gate at the south end of the lot. He confirmed that defendant spoke with the driver of the van that left the Kolmar property, unlocked and opened the gate for the van to drive out, and then closed and locked the gate behind the van. He also testified that he never observed defendant or Ruben look inside, open, remove anything from, or place anything into any of the vans.

¶ 21 Sergeant Thomas Horton testified he conducted surveillance outside the property. He observed a semi-truck arrive at the Kolmar property at 4:10 a.m. and defendant greet the driver and guide him into the Kolmar property. Horton was the first officer to enter the Kolmar property after the individuals began fleeing. He recovered keys to the gate on the ground near defendant, and, because he was the only officer on the property and he did not know whether there was anyone else inside the warehouse, he used the keys to unlock the gate to allow another officer onto the property.

¶ 22 The State also presented numerous stipulations relating to the physical evidence recovered on the Kolmar property and the van that was driven away from it. In relevant part, the stipulations established that numerous bales of compressed plant material wrapped in green cellophane were recovered at the Kolmar property and from the van stopped by Cunningham and sent to the Illinois State Police Crime Lab. The samples received by the lab all tested positive for the presence of cannabis. The total weight of the tested bales was 72,334 grams, and the total weight of the untested bales was 5,171,785 grams.

¶ 23 In closing arguments, defendant's lawyer argued, in relevant part, that defendant's mere presence at the property was not sufficient to establish he possessed the cannabis. Further, defendant had no knowledge of what was inside the storage containers when he unloaded them from the semi-truck or what was being loaded into the vans inside the warehouse on the Kolmar property on the morning of August 22. Defendant's lawyer noted that the officers' testimony established that defendant was never observed looking inside the storage containers or the cargo vans, and he remained outside the warehouse while the vans were being loaded.

¶ 24 The circuit court found defendant guilty of all eight counts and sentenced him to 15 years' imprisonment. We affirmed defendant's convictions and sentence on direct appeal over his contentions that (1) the State failed to present sufficient evidence to sustain his convictions; (2) the circuit court erred by denying his motion to suppress evidence; and (3) his sentence was excessive. *Salazar*, 2017 IL App (1st) 143471-U.

¶ 25 On May 15, 2017, defendant filed a *pro se* petition for relief under the Act, raising several claims. In one of his claims, defendant alleged trial counsel labored under a conflict of interest. Specifically, he alleged he and Ruben "were both represented by attorney's [*sic*], who without [his] knowledge or consent, share[d] an office and work[ed] on cases together, creating a conflict of interest as to which client was more guilty and which client would be defended." He asserted the conflict of interest continued throughout the trial and direct appeal. In a separately numbered claim, defendant asserted "effective counsel should have revealed that he and a co-defendant's attorney share[d] an office and work[ed] on cases together, then worked to resolve this conflict of interests [*sic*] rather than collect a fee from each defendant to represent one while convicting the other."

¶ 26 He attached to his petition a copy of the cover page to the opening brief filed in his and Ruben's consolidated direct appeal. The cover page of the brief indicated that defendant's attorney and Ruben's attorney shared office space in Chicago but worked for separate law firms and had separate phone numbers. Defendant did not offer any other affidavits, records, or documents to support the claims in his petition. In a separate filing entitled "Leave to File Petition for Post-Conviction Relief," defendant alleged "supporting exhibits ha[d] been request[ed] but counsel refuse[d] to produce them."

¶ 27 On May 25, 2017, postconviction counsel appeared in court on defendant's *pro se* petition and entered his appearance for defendant. Counsel stated he was "going to be reviewing [defendant's petition] and perhaps filing an amended version." At a June 9, 2017, status date, counsel informed the circuit court he had received the trial transcripts and was in the process of reviewing them to determine whether the *pro se* petition required amendment. At two subsequent status dates, counsel informed the court he was in the process of drafting an amended postconviction petition. While the petition was pending, the court and counsel repeatedly referenced the 90-day period in which the court was required to rule on the petition.

¶ 28 On August 4, 2017, postconviction counsel filed a "Supplemental Petition for Post-Conviction Relief." The opening paragraph of the supplemental petition requested leave to supplement defendant's original *pro se* petition and stated its allegations were "in addition to what was stated in [defendant's] initial filing." The petition set forth the procedural history of the trial proceedings and the suppression hearing and trial evidence at length. The petition reasserted a claim from defendant's *pro se* petition that his due-process rights were violated when he and his codefendants were unfairly targeted because of their race. In addition, the petition asserted "the fact the officers failed to obtain a search warrant [was] crucial in this matter, and a violation of [defendant's] rights." The petition acknowledged this claim had been raised on direct appeal but nevertheless warranted repeated consideration. The petition also set forth claims that defendant was deprived of his sixth amendment right to the effective assistance of counsel based on various alleged failures by trial counsel. Postconviction counsel did not attach to the petition any records, affidavits, or other documents, nor did counsel attach a certificate under Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). In its prayer for relief, the petition requested, *inter alia*, "sufficient

time and leave to amend th[e] petition to add additional claims and supporting affidavits and factual material as investigation continues."

¶ 29 The same day, postconviction counsel informed the circuit court the supplemental petition had been filed. The court stated, "defendant's postconviction petition is frivolous and patently without merit and, accordingly, is dismissed and denied." The court entered a written order in which it addressed each of the claims raised in defendant's *pro se* petition. The written order did not specifically address the claims raised in the supplemental petition. This appeal followed.

¶ 30 On appeal, defendant contends (1) the dismissal of his petition should be reversed and the matter remanded where his retained counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017); (2) the matter should be remanded where the circuit court failed to rule on the supplemental petition or its request for additional time to amend defendant's original petition; and (3) defendant's *pro se* petition stated the gist of a claim of ineffective assistance of counsel based on his trial counsel laboring under an actual conflict of interest. Because our resolution of defendant's third contention is necessary to our resolution of the other two, we will address it first.

¶ 31 The Act sets forth a procedure under which a criminal defendant can assert his or her conviction was the result of a substantial denial of his or her rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act contemplates a three-stage proceeding, which is initiated by the filing of a petition. *Hodges*, 234 Ill. 2d at 9; 725 ILCS 5/122-1(b) (West 2016). At the first stage, the circuit court determines whether, taking all well-pled facts in the petition and supporting materials as true, the petition states the gist of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001).

¶ 32 The circuit court must dismiss the petition if it is frivolous and patently without merit. *Edwards*, 197 Ill. 2d at 244. A petition is frivolous and patently without merit where it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Indisputably meritless legal theories are those which are completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are "those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 17.

¶ 33 The Act requires a defendant to clearly set forth in the petition the respects in which his or her constitutional rights were violated and attach affidavits, records, or other evidence to support his or her allegations or shall state why same is not attached. 725 ILCS 5/122-2 (West 2016). The "gist" standard is a low threshold, and a *pro se* petitioner need only present a limited amount of detail and need not set forth legal argument or cite to authority. *Hodges*, 234 Ill. 2d at 9. However, a limited amount of detail does not mean the defendant is excused from providing any factual detail at all surrounding the alleged constitutional deprivations. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). The purpose of the requirement that petitions include affidavits, records, or other evidence to support the defendant's allegations is to ensure that the claims are capable of objective or independent corroboration. *Delton*, 227 Ill. 2d at 254. The attachments to the petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations. *Delton*, 227 Ill. 2d at 254. "Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *Delton*, 227 Ill. 2d at 254-55. The failure to either attach the necessary affidavits,

records, or other evidence or explain their absence is fatal to a petition and by itself justifies summary dismissal at the first stage. *Delton*, 227 Ill. 2d at 255.

¶ 34 We review *de novo* first-stage dismissals under the Act. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). Accordingly, we review the circuit court's judgment and not its reasoning, and we may affirm the judgment on any basis supported by the record. *People v. Knapp*, 2019 IL App (2d) 160162, ¶ 37.

¶ 35 A defendant's sixth amendment right to the effective assistance of counsel includes the right to conflict-free representation. *People v. Nelson*, 2017 IL 120198, ¶ 29. "For purposes of conflict of interest analysis, the law considers the representation of codefendants by law partners or associates the same as the representation of codefendants by one attorney." *People v. Mahaffey*, 165 Ill. 2d 445, 456 (1995). The mere fact of joint representation of multiple defendants, however, does not create a *per se* violation of the right to the effective assistance of counsel. *Nelson*, 2017 IL 120198, ¶ 29.

¶ 36 When, as here, a defendant raises a conflict of interest for the first time after trial, the claim is governed by *Cuyler v. Sullivan*, 446 U.S. 334 (1990), wherein the United States Supreme Court held a defendant " 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance' " to establish a violation of his right to the effective assistance of counsel. *Nelson*, 2017 IL 120198, ¶ 30 (quoting *Sullivan*, 446 U.S. at 348). To make such a showing, the defendant must demonstrate (1) some plausible alternative defense strategy or tactic might have been pursued; and (2) the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. *Nelson*, 2017 IL 120198, ¶ 37. The defendant need not show the alternative defense would have been successful had it been used but rather that it

possessed sufficient substance to be a viable alternative. *Nelson*, 2017 IL 120198, ¶ 37. Moreover, a defendant who claims an actual conflict "must point to some specific defect in his counsel's strategy, tactics, or decision making attributable to [a] conflict," and neither speculative allegations nor conclusory statements are sufficient to establish that an actual conflict of interest affected counsel's performance. (Internal quotation marks omitted.) *People v. Hernandez*, 231 Ill. 2d 134, 144 (2008).

¶ 37 After reviewing the record, we conclude the circuit court properly dismissed defendant's conflict-of-interest claim because defendant failed to sufficiently support his claim with affidavits, records, or other evidence. The sole evidentiary attachment to defendant's petition was the cover page of his and his brother's opening brief in their consolidated direct appeal, which established only that the lawyers had the same business address. However, the cover page alone does not establish that the lawyers were, as defendant asserts on appeal, associates such that their representation of defendant and his brother equated to joint representation of codefendants. Nor did the cover page establish that defendant's lawyer labored under a conflict of interest.

¶ 38 Defendant failed to attach an affidavit to support his allegation that he did not know the lawyers shared office space and worked on cases together nor did he attach an affidavit that supported the existence of a conflict of interest, such as an affidavit indicating defendant's lawyer declined to present evidence that would have painted defendant as a less culpable party than codefendant Ruben as a result of the alleged conflict. Admittedly, the lawyers indicated in court they worked on certain other cases together, but we do not find that established they were associated such that their representation of defendant and codefendant Ruben amounted to joint

representation of codefendants by a single attorney, much less established an actual conflict of interest.

¶ 39 Defendant recognizes his failure to include any affidavits to support his claim as required by the Act but notes he alleged in a separate filing that he requested supporting exhibits from counsel, who refused to produce them. Here, defendant failed to identify with any specificity the nature of the exhibits he requested from his lawyer or which of his claims those exhibits would purportedly support. We find defendant's vague, unspecific allegation fails to meet the Act's requirement that a defendant who fails to attach supporting documents to explain their absence. See *People v. Allen*, 2015 IL 113135, ¶ 32 (attachments to petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations).

¶ 40 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005), wherein the supreme court excused the defendant's failure to attach independent corroborating documentation or explain its absence where the petition contained facts sufficient to infer that the only affidavit the defendant could have furnished other than his own was that of his attorney. In *Hall*, the defendant attached to his petition additional documents which supported his claim, including the relevant portion of the transcript, a copy of the charging instrument, and his own affidavit setting forth in detail the alleged misrepresentations of his attorney that caused him to plead guilty. *Hall*, 217 Ill. 2d at 333-34. Here, on the other hand, the only attachment to defendant's petition was the cover page of his appellate brief, which did not establish his attorney labored under a conflict of interest. Given the lack of evidentiary support for

defendant's claim, we conclude the circuit court properly dismissed defendant's ineffective-assistance claim based on his trial counsel's alleged conflict of interest.

¶ 41 Additionally, even if we were to overlook defendant's failure to attach affidavits, records, or other documents to support his claim, defendant's petition failed to set forth the gist of a claim of ineffective assistance of counsel based on his trial counsel laboring under a conflict of interest. In his petition, defendant alleged the lawyers collected a fee from each defendant and chose which client would be defended and which would be convicted. This conclusory allegation and defendant's failure to point to any specific defect in counsel's representation that was attributable to the alleged conflict was not sufficient to state an arguable claim that counsel was ineffective based on the alleged conflict of interest. See *Hernandez*, 231 Ill. 2d at 144.

¶ 42 Moreover, we find, in light of the trial record, defendant could not have presented a plausible defense of diminished culpability at codefendant Ruben's expense given the overwhelming evidence defendant played a principal role in the offense. See *Nelson*, 2017 IL 120198, ¶ 37. The evidence presented at the hearing on the joint motion to suppress and at trial established that defendant took the principal role in preparing the warehouse property to receive the shipment, actually receiving the shipment, unloading the shipment from the semi-truck, loading the vans for distribution, and directing the distribution itself. As the cargo vans were being loaded inside the warehouse, defendant paid special attention to the gate on the Kolmar property, which he also opened and closed for the cargo van that was stopped by Cunningham. Moreover, he went to the fence to investigate the sound of squealing tires and sirens and directed the individuals involved in the distribution operation to run from the property.

¶ 43 On the other hand, the evidence showed codefendant Ruben, while a party to the sublease on the warehouse property and certainly involved in the offense, took on a lesser role than did defendant. The evidence showed codefendant Ruben did not prepare the warehouse property by moving machinery about the yard and, critically, was not present when the shipment was received and unloaded from the semi truck in the middle of the night. Further, while codefendant Ruben entered the warehouse with defendant as the cargo vans were being loaded, the evidence showed he merely stood around the yard. In light of this record, we fail to see how a defense of diminished culpability at codefendant Ruben's expense, if presented by defendant, would have been plausible.

¶ 44 Defendant next contends his postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Specifically, defendant contends postconviction counsel failed to file a Rule 651(c) certificate and the record does not otherwise show counsel complied with the dictates of the rule. Therefore, defendant maintains that, pursuant to *People v. Suarez*, 224 Ill. 2d 37, 47 (2007), we must reverse and remand the matter for second-stage proceedings.

¶ 45 The State argues defendant cannot establish postconviction counsel provided unreasonable assistance. The State maintains the protections of Rule 651(c) were not triggered in this case because it involved a first-stage dismissal and the rule is designed to promote the aim of second-stage proceedings, *i.e.*, the further development of claims that have already passed first-stage scrutiny. Instead, the State argues, defendant was required to show he was prejudiced by counsel's failure to offer amendments to the conflict-of-interest claim in the supplemental petition. According to the State, defendant cannot establish he was prejudiced where the conflict of interest claim lacked merit.

¶ 46 In *People v. Johnson*, 2018 IL 122227, ¶ 23, our supreme court held that a defendant who retains counsel at the first stage of proceedings under the Act is entitled to the reasonable assistance of counsel. There, the defendant's initial petition, filed with the assistance of counsel, was summarily dismissed at the first stage. *Johnson*, 2018 IL 122227, ¶ 5. The defendant thereafter filed a supplemental motion to reconsider, alleging postconviction counsel failed to raise purportedly meritorious claims. *Johnson*, 2018 IL 122227, ¶¶ 6, 8. The circuit court found the defendant had forfeited the claims in the supplemental motion to reconsider because they were not raised in the initial petition. *Johnson*, 2018 IL 122227, ¶ 8.

¶ 47 On appeal, the defendant argued the circuit court erred by failing to consider whether counsel's representation in failing to include the claims in the supplemental motion was unreasonable and, if so, then he should be permitted to supplement his petition with the additional claims. *Johnson*, 2018 IL 122227, ¶ 9. The appellate court found the defendant was not entitled to reasonable assistance at the first stage of proceedings under the Act and, therefore, affirmed the circuit court's judgment. *Johnson*, 2018 IL 122227, ¶ 10.

¶ 48 The supreme court reversed, concluding a defendant is entitled to reasonable assistance from postconviction counsel at the first stage of proceedings under the Act. *Johnson*, 2018 IL 122227, ¶ 23. In doing so, the court's primary concern was to place *pro se* and represented petitioners on an equal footing, so that meritorious claims would not be lost. *Johnson*, 2018 IL 122227, ¶ 21. The court noted that a *pro se* petitioner can include any and all claims in his petition but a defendant who retains counsel is bound by counsel's decisions as to which claims to include. *Johnson*, 2018 IL 122227, ¶ 21. Noting that most reasonable-assistance claims at the first stage will be based on postconviction counsel's alleged failure to include a meritorious claim, the court

observed that imposing some standard of representation at the first stage fulfilled the purpose of the Act, which is "to ensure that criminal defendants are not deprived of their liberty in violation of their constitutional rights." *Johnson*, 2018 IL 122227, ¶¶ 17, 21. Ultimately, the supreme court remanded the matter to the circuit court to determine whether the claims raised in the defendant's supplemental motion to reconsider withstood first-stage scrutiny and whether postconviction counsel was aware of such claims and refused to include them. *Johnson*, 2018 IL 122227, ¶ 24. If the claims set forth in the supplemental motion were frivolous and patently without merit, then defendant was not denied reasonable assistance. *Johnson*, 2018 IL 122227, ¶ 24. If, on the other hand, the claims withstood first-stage scrutiny and counsel was aware of such claims, then defendant should be permitted to amend his petition with the claims and proceed to second-stage proceedings. *Johnson*, 2018 IL 122227, ¶ 24.

¶ 49 Rule 651(c) sets forth specific duties that must be undertaken by postconviction counsel, including that counsel consult with the petitioner to ascertain his or her constitutional claims, examine the trial record, and make any amendments necessary to petitions that are filed *pro se* that are necessary for an adequate presentation of the petitioner's claims. Ill. S. Ct. R. 651(c) (eff. July 1, 2017). When the record shows, either through counsel's certificate or otherwise, that counsel fulfilled the duties set forth in Rule 651(c), a defendant cannot succeed on a claim of unreasonable assistance unless he demonstrates counsel failed to substantially comply with the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 50 We are not aware of any reported decision which holds that an attorney retained at the first stage of proceedings is required to comply with Rule 651(c). In *Richmond* and *Cotto*, our supreme court suggested Rule 651(c) applies when a defendant *pro se* files his initial petition and later

retains counsel to amend the petition. See *People v. Richmond*, 188 Ill. 2d 376, 381 (1999) ("Rule 651(c) is applicable in these circumstances, when a defendant who files a *pro se* post-conviction petition is later represented by retained counsel in the post-conviction proceedings"); *People v. Cotto*, 2016 IL 119006, ¶ 41 ("Rule 651(c) applies only to a postconviction petition initially filed by a *pro se* defendant"). However, both *Richmond* and *Cotto*, unlike the present case, involved appeals from second-stage dismissals.

¶ 51 We note our supreme court's decision in *Johnson* suggests Rule 651(c) is not applicable until a petition is advanced to the second stage of proceedings. *Johnson*, 2018 IL 122227, ¶ 18 (citing *Cotto*, 2016 IL 119006, ¶ 41) (Rule 651(c) "applies only to those defendants who file their initial petition *pro se* and are appointed counsel at the second stage"). In any event, *Johnson* did not address the issue of whether postconviction counsel retained at the first stage of proceedings must comply with Rule 651(c). Rather, as noted above, the court remanded the case to the circuit court to determine whether the claims were meritorious and whether counsel was aware of the claims.

¶ 52 In *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 55, this court observed that, "[i]f a prisoner retains counsel at the first stage, he or she is entitled to reasonable assistance, but not to the additional protections of Rule 651 and *Suarez*'s holding" that the failure to comply with Rule 651(c) mandates reversal regardless of prejudice. Noting that the supreme court had not explicitly stated a standard on which to evaluate reasonable-assistance claims, this court held "a *Strickland*-like analysis is the appropriate standard to use for reasonable[-]assistance claims." *Zareski*, 2017 IL App (1st) 150836, ¶ 59. We observed that such a standard would "prevent pointless remands to

trial courts for repeated evaluations of claims that have no chance of success." *Zareski*, 2017 IL App (1st) 150836, ¶ 59.

¶ 53 In this case, defendant claims on appeal that counsel failed to include and make necessary amendments to adequately present his conflict-of-interest claim. This is analogous to the type of reasonable-assistance claim the *Johnson* court recognized would be the typical claim on appeal from first-stage proceedings. See *Johnson*, 2018 IL 122227, ¶ 21 ("[A]ny assertion of deficient attorney performance at this stage will almost certainly be of the same type as the one asserted in this case, that is, an assertion that counsel failed to include one or more claims in the petition the defendant wanted to have raised."). *Johnson* implicitly recognized that to succeed on such a claim on appeal from a first-stage dismissal, counsel would have had to be aware of the omitted claim and failed or refused to include it and the omitted claim would have to withstand first-stage scrutiny. This comports with our analysis in *Zareski*, which adopted a *Strickland*-like analysis for claims of unreasonable assistance raised on appeal from a first-stage dismissal.

¶ 54 As discussed above, defendant's *pro se* conflict-of-interest claim lacked merit. Not only did defendant fail to attach any evidentiary support for his claim, he failed to identify what evidentiary support he could have attached. Moreover, our review of the trial record shows defendant could not have presented a plausible defense of diminished culpability at codefendant Ruben's expense. See *Nelson*, 2017 IL 120198, ¶ 37. Simply put, we are not aware of, and defendant has not shown, any amendments postconviction counsel could have made to the petition to withstand first-stage scrutiny under the Act. Accordingly, we cannot say from the matter before us that postconviction counsel's representation was unreasonable.

¶ 55 Defendant finally contends that the circuit court abused its discretion in failing to rule on the claims set forth in counsel's supplemental petition and counsel's request therein to amend the petition. We disagree.

¶ 56 The circuit court has discretion to allow a defendant to amend a petition as is appropriate, just, and reasonable and as is generally provided in civil cases. 725 ILCS 5/122-5 (West 2016). "Generally, when a party asks to amend a complaint, leave to do so is freely given." *People v. Brown*, 336 Ill. App. 3d 711, 716 (2002). Leave to amend a postconviction petition may be granted at the first stage of proceedings, and a defendant need not file a formal motion for leave to amend. *People v. Harris*, 224 Ill. 2d 115, 131, 140 (2007).

¶ 57 We review the denial of leave to file an amended postconviction petition for an abuse of discretion. *Brown*, 336 Ill. App. 3d at 716. A court abuses its discretion when it refuses to allow a plaintiff to amend his complaint when a cause of action can be stated if the complaint is amended. *Brown*, 336 Ill. App. 3d at 716 (citing *People v. Scullark*, 325 Ill. App. 3d 876, 880 (2001)). However, a court does not err when it fails to specifically rule on a boilerplate request in a prayer for relief to amend or supplement a petition. *Harris*, 224 Ill. 2d at 139-40. Where a defendant fails to provide details as to what amendment may be offered and why more time is needed to do so, he "will be hard-pressed to show that the court abused its discretion in denying the request[ ]." *Harris*, 224 Ill. 2d at 140.

¶ 58 Defendant, relying on *Brown*, argues the circuit court's failure to rule on the claims in the supplemental petition or his request for additional time to amend the petition requires reversal and remand for second-stage proceedings. We do not find this argument persuasive.

¶ 59 In *Brown*, this court found that, although the defendant failed to seek leave to amend his petition or to obtain a ruling from the circuit court on his amended petition, his petition was properly supported and sufficiently presented the gist of a constitutional claim uncontradicted by the record. *Brown*, 336 Ill. App. 3d at 720. We noted we were unable to determine whether the circuit court implicitly denied the amended petition or simply refused to address it. We held, under "the rather unique circumstances" of the case (*Brown*, 336 Ill. App. 3d at 720), the circuit court erred in either instance—by denying the defendant's request to amend or refusing to address the request—"particularly in light of the fact that the amended petition raised the gist of a constitutional claim" (*Brown*, 336 Ill. App. 3d at 721).

¶ 60 *Brown* is inapposite. The court in *Brown* explicitly limited its holding to the "rather unique circumstances" of the case (*Brown*, 336 Ill. App. 3d at 720), which are not present here. More importantly, the amended petition in *Brown* set forth an arguable claim of ineffective assistance of counsel based on the failure to call alibi witnesses that was supported by four affidavits whereas, in this case, as defendant concedes, the supplemental petition did not contain an arguably meritorious claim. Accordingly, we conclude the circuit court did not abuse its discretion by failing to specifically address the claims presented in the supplemental petition. See *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 27 (postconviction court is not required to specifically address each claim raised by a defendant).

¶ 61 Defendant also argues the circuit court abused its discretion by denying his request, contained in the prayer for relief of the supplemental petition, that he be granted "sufficient time and leave to amend this petition to add additional claims and supporting affidavits and factual materials as investigation continues." Based on *Brown*, defendant argues the record does not

affirmatively show the court exercised its discretion at all in relation to the supplemental petition's request for additional time.

¶ 62 We fail to see how the circuit court could abuse its discretion by failing to allow additional time to amend the petition and develop evidence. First, we note the initial 90 days in which the court was to evaluate the initial petition had almost expired when postconviction counsel filed the supplemental petition. In any event, the boilerplate request contained in the petition did not identify with any specificity what amendment would be offered, what additional evidence was being sought, or how amendment would cure the defects in the initial and supplemental petitions. See *Harris*, 224 Ill. 2d at 139-40. Accordingly, we find the court did not abuse its discretion by denying defendant's request for leave to amend his petition.

¶ 63 For the reasons stated, we affirm the circuit court's judgment.

¶ 64 Affirmed.