

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).

2011 IL App (4th) 090955-U

Filed 8/8/11

NO. 4-09-0955

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Pike County
JEFFREY L. KINNE,)	No. 06CF5
Defendant-Appellant.)	
)	Honorable
)	Richard D. Greenlief,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* Counsel appointed to represent a *pro se* petitioner under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)) did not violate Illinois Supreme Court Rule 651(c) (eff. Jan. 1, 1989) by not adding the claim defendant was improperly admonished before the trial court accepted his plea, because counsel had no duty to amend the *pro se* petition to add claims that were not necessary to present the *pro se* petitioner's claims.

¶ 2 In April 2009, defendant, Jeffrey L. Kinne, filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In his petition, defendant argued, in part, his sentence was excessive and he was denied the effective assistance of counsel on a number of grounds. Upon appointed counsel's motion, the trial court treated defendant's petition as one under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)). In December 2009, a hearing on the postconviction petition was held, and the trial court, finding no proof of ineffective assistance of

counsel, denied defendant's petition.

¶ 3 Defendant appeals the denial, arguing appointed counsel provided unreasonable assistance and violated Illinois Supreme Court Rule 651(c) (eff. Jan. 1, 1989) by failing to amend his petition to add the claim, apparent from review of the record, he was not properly admonished under Illinois Supreme Court Rule 402 (eff. Jul. 1, 1997). We affirm.

¶ 4 I. BACKGROUND

¶ 5 In January 2006, defendant was charged with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(1), (a)(2) (West 2006)) and one count of battery (720 ILCS 5/12-3(a)(1) (West 2006)). In May 2006, defendant entered a negotiated plea under which he would plead guilty to one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(a)(2) (West 2006)) and would be sentenced to 14 years' imprisonment. Under the same agreement, defendant would admit violating probation on a separate charge and would be sentenced to 30 months' conditional discharge to be served consecutively to his 14-year prison sentence. The court entered an order of conditional concurrence on the plea agreement. The court did not tell defendant he had the right to plead not guilty or persist in that plea if it had already been made, and the court did not inform defendant if he pleaded guilty there would be no trial. The court also did not ask defendant whether any threats or promises, other than the terms of the plea agreement, had been made to obtain the plea.

¶ 6 In June 2006, a sentencing hearing was held. At this hearing, defendant admitted violating his probation. No evidence was admitted in aggravation or mitigation. The trial court sentenced defendant pursuant to the negotiated plea agreement.

¶ 7 Approximately two years later, on June 2, 2008, the trial court received a letter

from defendant seeking a sentence reduction. Defendant stated he did not wish to change his plea, but wanted the opportunity to reduce his time. That same month, the court denied defendant's motion, finding it untimely.

¶ 8 In April 2009, defendant filed his *pro se* petition for relief from judgment under section 2–1401 of the Code of Civil Procedure (735 ILCS 5/2–1401 (West 2008)). In his petition, defendant argued, in part, his sentence was excessive and he was denied the effective assistance of trial counsel because counsel: (1) failed to consult with him regarding strategy; (2) failed to relay his acceptance of the State's plea offer of 9 years' imprisonment; (3) tricked him into accepting a plea of 14 years' imprisonment; (4) performed unprofessionally during pretrial proceedings; (5) failed to secure potential witnesses for trial or for sentencing; (6) failed to introduce defendant's drug and alcohol problems as mitigating evidence at sentencing; and (7) denied him the right of a fair trial by jury. Defendant asked the trial court to vacate the judgment against him or reduce his sentence. In May 2009, the court appointed counsel to represent him.

¶ 9 In August 2009, the State moved to dismiss defendant's petition. In October 2009, defendant, represented by appointed counsel, filed a motion to amend his section 2–1401 petition to recharacterize it as a postconviction petition under the Act.

¶ 10 In December 2009, the trial court held a hearing on defendant's petition. Elizabeth Miller, defendant's appointed counsel during the plea proceedings, testified about her representation of defendant, which began in January 2006. Miller testified while defendant was incarcerated in the Pike County jail she went to see him 11 times. Miller also appeared with defendant five times in court and had an open telephone line on which defendant could have called her.

¶ 11 Miller testified the State presented a written plea offer to defendant in February

2006 for nine years' imprisonment. Miller was confident she sent defendant a copy, because it was her practice to do so. She knew she talked to defendant about the offer. Defendant responded by stating he wanted eight years instead of nine. Miller talked with him several times regarding the offer and defendant consistently stated he wanted eight years.

¶ 12 Miller testified she received a revised offer by letter in March 2006. In that letter, the State refused defendant's counteroffer of eight years and made a revised offer, which included probation following the nine years. Defendant wanted eight years and continued to think about it. Defendant ultimately rejected that offer as well. Miller did not recall whether she repeated defendant's counteroffer.

¶ 13 Miller testified, in April 2006, the State sent another letter to Miller regarding defendant. In that letter, the State mentioned it had more carefully reviewed defendant's criminal history and learned defendant was eligible for sentencing as a Class X offender. The State indicated the new offer was a fully negotiated plea of 14 years, and the State would not classify defendant as a Class X offender, or an open plea with a 17-year sentencing cap. Miller discussed these options with defendant.

¶ 14 Miller did not recall defendant identifying any potential witnesses. She testified she usually asked defendants to send her a list with addresses of potential witnesses. Defendant did not indicate he thought he had a viable defense. Defendant's "discussion was that this was an unfortunate incident, and he did not want to have to put the victim through a trial." Defendant did not ask for a trial.

¶ 15 On cross-examination, Miller testified the State met with defendant and her to discuss the options. Defendant did not want the Class X status. At no time until the nine-year

offer was revoked did defendant state he wanted to accept the nine-year offer.

¶ 16 Defendant testified after he received the first nine-year offer, he told Miller he would "kind of like to see about getting eight, but if it's not possible [he] would take the nine." Defendant testified "somehow it was miscommunicated, I guess." Defendant testified "[a]nybody in a criminal situation is going to try to get a little less time than what they offer you the first time." Defendant expected Miller to tell the State if it would not agree to eight years, defendant would accept the nine-year offer. Defendant did not like the probation offer attached to the State's second offer because he did "not have good luck with [the] probation office." Defendant would have accepted the nine years without the probation term. Defendant testified it was not explained to him he could have a sentencing hearing with character witnesses. He may have agreed to the open-plea option.

¶ 17 Defendant testified he did not see Miller 11 times at the jail. Defendant conceded he may have seen her approximately four times. Regarding his drugs-and-alcohol allegations, defendant stated he probably did not "say as much as I should have." Because of their history in Miller representing him on other matters, defendant believed she "automatically" knew this information.

¶ 18 After the hearing, the trial court granted defendant's motion to recharacterize the motion as a postconviction petition and denied the petition. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues, although his counsel filed a certificate that is facially adequate, counsel failed to comply with the dictates of Rule 651(c). Defendant maintains the fact that counsel failed to amend the postconviction petition to add an apparent deprivation-of-due-

process claim based on the trial court's failure to comply with Rule 402 shows he did not comply with Rule 651(c) and provide reasonable assistance. In support, defendant relies on this court's decision in *People v. Jennings*, 345 Ill. App. 3d 265, 802 N.E.2d 867 (2003).

¶ 21 The State does not dispute the trial court did not provide the admonishments required by Rule 402. The State argues, however, counsel's failure to raise the claim does not indicate counsel failed to comply with Rule 651(c) because postconviction counsel is not required to raise allegations of error not made by the defendant.

¶ 22 The right to counsel in postconviction proceedings is statutory. *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 872. For this reason, petitioners under the Act are entitled only to receive the level of assistance mandated by the Act. *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 872. The Act mandates counsel provide a reasonable level of assistance to a postconviction petitioner. *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 872.

¶ 23 Rule 651(c) is designed to assure the statutory reasonable level of assistance is provided. See *Jennings*, 345 Ill. App. 3d at 271, 802 N.E.2d at 872-73. Rule 651(c) requires, in relevant part, "appointed post-conviction counsel make 'any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.'" *People v. Turner*, 187 Ill. 2d 406, 412, 719 N.E.2d 725, 729 (1999) (quoting Ill. S. Ct. R. 651(c) (eff. Jan. 1, 1989)). Rule 651(c) does not mandate postconviction counsel otherwise amend a defendant's *pro se* postconviction petition. See *People v. Pendleton*, 223 Ill. 2d 458, 475-76, 861 N.E.2d 999, 1009 (2006) (holding while postconviction counsel "may raise additional issues if he or she chooses, there is no obligation to do so"). We further note it is well established "a defendant is not entitled to the advocacy of postconviction counsel for purposes of 'exploration, investiga-

tion[,] and formulation of potential claims." *Jennings*, 345 Ill. App. 3d at 274, 802 N.E.2d at 875 (quoting *People v. Davis*, 156 Ill. 2d 149, 163, 619 N.E.2d 750, 758 (1993)).

¶ 24 Turning to defendant's case law, in *Jennings*, the defendant filed a *pro se* postconviction petition alleging his trial counsel was ineffective for failing, in part, to move for reconsideration of his 60-year sentence for first degree murder. *Jennings*, 345 Ill. App. 3d at 266-67, 802 N.E.2d at 869. Defendant's postconviction counsel did not file a Rule 651(c) certificate and did not amend the *pro se* petition. *Jennings*, 345 Ill. App. 3d at 267, 270, 802 N.E.2d at 869, 872. After the State moved to dismiss defendant's postconviction petition, postconviction counsel supplemented the *pro se* petition with a September 1999 letter from defendant's trial counsel to defendant's mother that suggested a disparate-sentence claim. *Jennings*, 345 Ill. App. 3d at 267, 274, 802 N.E.2d at 869, 875. The court granted the State's motion to dismiss. *Jennings*, 345 Ill. App. 3d at 267, 802 N.E.2d at 869.

¶ 25 On appeal, the *Jennings* defendant argued, in part, his postconviction counsel failed to provide a reasonable level of assistance as counsel did not comply with Rule 651(c). *Jennings*, 345 Ill. App. 3d at 267, 802 N.E.2d at 869. We agreed. *Jennings*, 345 Ill. App. 3d at 270, 802 N.E.2d at 872. First, we found the record did not show trial counsel examined the record of the proceedings as required by Rule 651(c). *Jennings*, 345 Ill. App. 3d at 271-72, 802 N.E.2d at 873. Second, we concluded trial counsel improperly failed to amend defendant's ineffective-assistance claim to include grounds that could have been raised by trial counsel in a motion to reconsider sentence. *Jennings*, 345 Ill. App. 3d at 272, 802 N.E.2d at 873-74. We concluded, "under the particular circumstances of this case," postconviction counsel should have amended the *pro se* petition to add a claim "an arbitrary and unreasonable disparity existed

between [defendant's] 60-year sentence" and the 56-year sentence imposed on the woman who hired defendant to murder her husband. *Jennings*, 345 Ill. App. 3d at 267, 274, 802 N.E.2d at 870, 875. In so holding, we reasoned postconviction counsel had acknowledged defendant's *pro se* petition raised a challenge to defendant's sentence and the September 1999 letter, which postconviction counsel used to supplement the *pro se* petition, actually suggested the disparate-sentence claim. *Jennings*, 345 Ill. App. 3d at 274, 802 N.E.2d at 875.

¶ 26 This case is factually distinguishable from *Jennings*. Defendant, in his *pro se* petition, did not specifically raise the claim he was improperly admonished by the trial court. Defendant did not even challenge his conviction by the trial court in general. In fact, the record even contains a postplea statement by defendant he did not wish to challenge his plea, only the sentence. The unique circumstances of *Jennings* simply do not exist here.

¶ 27 To hold as defendant urges requires this court to expand Rule 651(c)'s requirements and mandate postconviction counsel add claims other than those necessary for an adequate presentation of a petitioner's claims. Given Rule 651(c)'s language and supreme court rulings to the contrary of defendant's petition (see, e.g., *Pendleton*, 223 Ill. 2d at 475-76, 861 N.E.2d at 1009), we will not so hold.

¶ 28 III. CONCLUSION

¶ 29 For the stated reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 30 Affirmed.