

No. 1-10-1469

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).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	96 CR 22189
)	
HARRY FLOWERS,)	
)	Honorable
Defendant-Appellant.)	Brian Flaherty,
)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

ORDER

¶ 1 HELD: The trial court did not err in the second-stage dismissal of defendant’s postconviction petition because the issues defendant sought to raise on appeal were not included in his *pro se* petition and his postconviction counsel was not required to file an amended petition and include new issues.

¶ 2 Defendant Harry Flowers appeals the second-stage dismissal of his postconviction petition, arguing that his postconviction counsel failed to provide reasonable assistance because he did not amend defendant's *pro se* petition to include a violation of his constitutional right to counsel of his choice, which was not raised by appellate counsel on direct appeal.

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¶ 3 Following a jury trial, defendant was found guilty of first degree murder in the death of Trevelle Pate in November 1999. Multiple witnesses testified that defendant blamed Pate for the theft of a gun, which Pate had no involvement in. Pate was severely beaten and the 16-year-old victim begged for his life. Defendant then took Pate to a park and shot him multiple times in the head. After waiving the jury for the sentencing hearing, the trial court found defendant eligible for the death penalty, but found sufficient mitigating evidence to preclude the imposition of the death penalty. The court sentenced defendant to an extended-term of 90 years after finding that defendant's conduct was exceptionally brutal and heinous, indicative of wanton cruelty. As this is defendant's second appeal, we will discuss only those facts relevant to defendant's postconviction petition. A more detailed discussion of defendant's trial can be found in his direct appeal. *People v. Flowers*, No. 1-00-2135 (March 29, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 In December 1999, at the hearing scheduled to consider posttrial motions and sentencing, an attorney, Jimmie Jones, appeared stating that he was seeking leave to file a substitution of attorneys for defendant. Defendant's trial counsel was present to file defendant's motion for a new trial. Jones asked to be able to amend the posttrial motions after he received the trial transcript. The trial judge stated that he would proceed with the posttrial motions, but allowed Jones to "file whatever additional appearances" he wanted.

¶ 5 Trial counsel stated that he was ready to argue the motion for a new trial, but requested two weeks to prepare for sentencing. Jones said that he would need a copy of the transcript for sentencing. Trial counsel then informed the judge that defendant's family was refusing to

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cooperate with him in his preparation for sentencing. Jones stated that he was "still not clear as to [his] appearance." The judge told Jones that, "If you want to file an appearance, I don't have any objection to filing any additional appearances if you see fit to, but this case is going to post-trial motions today and I am setting a sentencing date." The judge then passed the case and allowed Jones to speak with defendant's trial counsel. When the case was recalled, Jones was not present. The judge noted Jones's absence and defendant responded that "he had to leave." The judge then proceeded on defendant's motion for a new trial, which was denied.

¶ 6 At the conclusion of the hearing, the parties discussed setting a date for sentencing. Trial counsel again expressed his difficulties with defendant's families. The judge stated that trial counsel would not be "relieved" of the case, but defendant was free to have a new attorney file an appearance in the case to assist at sentencing.

¶ 7 On December 29, 1999, the parties appeared for defendant's death penalty hearing. Jones was not present. Defendant signed a jury waiver for sentencing. At the conclusion of the hearing, the trial court held that defendant was eligible for the death penalty, but the court found sufficient mitigation to preclude its imposition. The court sentenced defendant to an extended term of 90 years' imprisonment.

¶ 8 In January 2000, Jones filed a motion for substitution of attorney and a "motion for extension of time to review the trial record and amend this motion for reconsideration of sentence, or in the alternative motion for reconsideration of sentence." Jones was allowed to substitute in the case. In May 2000, the trial court conducted a hearing on defendant's motion to reconsider his sentence, which the court denied. Jones then asked leave to withdraw as

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defendant's attorney, which the court allowed.

¶ 9 On direct appeal, defendant argued that the evidence was insufficient to sustain his conviction, the trial court erroneously admitted highly prejudicial gang evidence, prosecutors engaged in various acts of misconduct during closing arguments, and his extended term sentence was unconstitutional. Defendant's conviction and sentence were affirmed. See *People v. Flowers*, No. 1-00-2135.

¶ 10 In December 2002, defendant filed his *pro se* postconviction petition. In his petition, defendant argued that: (1) he was denied his constitutional right to a fair trial and due process because the jury panel was not questioned during *voir dire* in regard to any bias toward gangs; (2) he was denied his constitutional right to a fair trial and due process and his right to effective assistance of counsel because his trial counsel failed to submit questions during *voir dire* to prospective jurors to determine whether there was any bias toward gangs; and (3) he was denied due process and his right to effective assistance of appellate counsel because appellate counsel failed to raise the previous two issues on direct appeal and to challenge defendant's sentence on the basis that the aggravating factors for his extended term were not proven by the State beyond a reasonable doubt.

¶ 11 On October 30, 2009, defendant's postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)) attesting that he had consulted with defendant by letter and telephone to ascertain his contentions of deprivation of constitutional rights and that he examined the report of proceedings from defendant's trial and decision in defendant's direct appeal. Counsel stated that he had researched issues concerning the

questioning of a jury *voir dire* regarding the introduction of evidence relating to gang membership and activity. Counsel further attested that he reviewed defendant's *pro se* petition and that, because it adequately set forth his claims, no amended or supplemental petition would be filed. The State then filed a motion to dismiss defendant's postconviction petition, which the trial court granted.

¶ 12 This appeal followed.

¶ 13 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2004)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2004); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. “A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment.” *People v. Evans*, 186 Ill. 2d 83, 89 (1999). “The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.” *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 14 At the first stage, the circuit court must independently review the postconviction petition

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within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2002). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage. Counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2002)) and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2002)).

¶ 15 At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. "At the second stage, the petition may be dismissed '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. Gacho*, 2012 IL App (1st) 091675, at ¶16 (quoting *People v. Hall*, 217 Ill. 2d 324, 334 (2005)). "[I]n the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2002).

¶ 16 Defendant argues that his postconviction counsel failed to provide reasonable assistance because his attorney did not amend his postconviction petition to include a claim that defendant was deprived his constitutional right to counsel when the trial court refused to allow substitution of counsel at sentencing and appellate counsel was ineffective for failing to raise this issue on appeal.

¶ 17 The right to counsel in postconviction proceedings is statutory as provided in the Post-Conviction Act, not a constitutional right. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Further, "a defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *Pendleton*, 223 Ill. 2d at 472. Rule 651(c) provides that postconviction counsel file a certificate stating that he or she (1) consulted with the defendant to ascertain his contentions of deprivation of constitutional right, (2) examined record of the proceedings at the trial, and (3) amended the defendant's *pro se* petition, if necessary, to ensure that defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The supreme court has "repeatedly held that 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, 43-44 (2007) (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003), quoting *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990)).

¶ 18 The Illinois Supreme Court has also stated that the "'question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act.'" *People v. Jones*, 213 Ill. 2d 498, 505 (2004), quoting *Coleman*, 183 Ill. 2d at 388. See also *Pendleton*, 223 Ill. 2d at 475; *People v. Davis*, 156 Ill. 2d 149, 158-60 (1993). Additionally, the supreme court in *Pendleton* observed that "'post-conviction counsel is only required to investigate and properly present the petitioner's claims.'" (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 472 (quoting *Davis*, 156 Ill. 2d at 164). "Rule 651(c) only requires postconviction counsel to examine as much of the record 'as is necessary to adequately present and support those constitutional claims

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raised by the petitioner.' " *Pendleton*, 223 Ill. 2d at 475 (quoting *Davis*, 156 Ill. 2d at 164).

"While postconviction counsel may conduct a broader examination of the record, and may raise additional issues if he or she so chooses, there is no obligation to do so." *Pendleton*, 223 Ill. 2d at 476 (citing *Davis*, 156 Ill. 2d at 164).

¶ 19 Further, the supreme court in *Pendleton* held that any claim not raised in a defendant's *pro se* or amended postconviction is forfeited under general principles of procedural default. *Pendleton*, 223 Ill. 2d at 475 (citing *Jones*, 213 Ill. 2d at 505 and *Davis*, 156 Ill. 2d at 158-60 ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived")). "[A]n issue is not preserved, for purposes of post-conviction relief, merely by framing it in the context of a constitutional claim." *Davis*, 156 Ill. 2d at 159.

¶ 20 With these principles in mind, the issue on appeal is whether defendant's *pro se* postconviction petition raised a constitutional violation of his right to the counsel of his choice which appellate counsel should have raised on direct appeal such that his postconviction counsel, under Rule 651(c), should have amended the petition to fully present this constitutional claim to the court. However, even if we liberally construe defendant's *pro se* postconviction petition, the petition does not suggest a constitutional violation of his right to counsel of his choice or that his appellate counsel was ineffective for failing to raise this issue. The three claims outlined in defendant's petition did not discuss or even mention Jones's appearance at the hearing on posttrial motions, let alone argue that he was deprived of his choice of counsel at sentencing. The only claim related to sentencing raised in defendant's *pro se* petition was whether his appellate counsel was ineffective for failing to assert on direct appeal that the aggravating factors for an extended

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term were not proven beyond a reasonable doubt. This argument does not suggest any constitutional issue relating to his counsel at sentencing. Defendant's other claims of ineffective assistance of his appellate counsel were for failing to raise two issues relating to the potential jurors being questioned about gang bias. No claim of ineffective assistance of appellate counsel related to his right to counsel was suggested in his petition. Since defendant's petition did not present a constitutional violation of his right to counsel in a claim that his appellate counsel was ineffective, we find that this issue has been forfeited on appeal. See *Pendleton*, 223 Ill. 2d at 475; *Davis*, 156 Ill. 2d at 158-59.

¶ 21 Even if defendant had not forfeited this issue, defendant is only entitled to a reasonable level of assistance in preparation of his constitutional claims at postconviction and his postconviction counsel was not required to amend defendant's petition to assert these claims. Defendant was not denied reasonable assistance of postconviction counsel by this failure to do so. See *Pendleton*, 223 Ill. 2d at 474-75; see also *Davis*, 156 Ill. 2d at 163 (stating that a postconviction petitioner is "not entitled to the advocacy of counsel for purposes of exploration, investigation and formulation of potential claims"). Because defendant has not made a substantial showing of a constitutional violation, the trial court properly dismissed his postconviction petition.

¶ 22 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 23 Affirmed.