

No. 1-10-2218

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 28527
)	
BRYON DEMONS,)	Honorable
)	Colleen McSweeney-Moore,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to make a substantial showing of ineffective assistance of counsel, and where both postconviction attorneys filed a certificate pursuant to Supreme Court Rule 651(c) and defendant has not rebutted the presumption of compliance with the Rule, counsel provided a reasonable level of assistance and defendant's successive postconviction petition was properly dismissed on motion of the State.

¶ 2 Bryon Demons, the defendant, appeals the trial court's dismissal, on motion of the State, of his successive postconviction petition. On appeal, defendant contends that the trial court made improper fact-finding and credibility determinations and incorrectly found that the issues raised in

his petition were barred by *res judicata*. He asserts that his petition made a substantial showing of a constitutional claim of ineffective assistance of counsel. Defendant further contends that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984) where counsel failed to adequately present his claims to the court, amend his petition to properly support those issues, or respond to the State's motion to dismiss.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Following a bench trial, defendant was convicted of criminal sexual assault and, based on his prior convictions, sentenced to an extended 18-year prison term. Defendant's trial took place in July 1999. The underlying facts of the case are set forth at length in our order on direct appeal, but will be repeated here to the extent necessary to consider defendant's postconviction claims.

¶ 5 The evidence adduced at trial established that on July 1, 1998, defendant and the victim were both working at an asbestos removal job site at an elementary school in LaGrange, Illinois. The victim, P.C., who was employed by a company named Northern Environmental, was the project manager and had been on the job for three days. Defendant, who was employed by a company named Loyalty Environmental (Loyalty), was one of the workers removing the asbestos.

¶ 6 P.C. testified that around 11 a.m. on the day in question, defendant asked her to "check" the girls' bathroom for him, since he needed to use a bathroom and he related that the boys' bathroom was not in working order. When P.C. accompanied defendant to the bathroom, he pushed her inside and proceeded to sexually assault her.

¶ 7 P.C. testified that after defendant left the bathroom, she cleaned herself up and went back to her desk. After she gathered some paperwork and prepared to leave, she saw Cozene Williams, a supervisor with Loyalty that she believed to be defendant's cousin. Williams asked her where she was going and what was wrong, but she did not tell him about what had happened in the bathroom. Instead, she agreed to accompany Williams to a hardware store. P.C. stated that while Williams was

in the store and she waited in the car, she saw some police officers across the street. She did not approach the officers because she was scared to tell anyone what had happened.

¶ 8 When P.C. and Williams returned to the school, P.C. gathered defendant's personnel paperwork "[s]o that [she] had information on him." She told Williams that the job was being shut down for the day because she was leaving, and work could not be done without a project manager on site. P.C. then left to go to the hospital. On the way, she called her sister and husband to tell them what had happened. At the hospital, P.C. spoke with police. She gave the police the information from defendant's personnel file. P.C. acknowledged having had conversations with defendant before the assault, but denied having gone anywhere with him or having smoked marijuana with him or Williams.

¶ 9 On cross-examination, defense counsel asked P.C. whether she had "a claim pending with an insurance company regarding this," but the trial court sustained the State's objection to the question.

¶ 10 Cozene Williams testified on defendant's behalf. Williams stated that he had known defendant for over 20 years, and that while they were not related, they considered themselves cousins. According to Williams, after P.C.'s first day at the job site in question, he, defendant, and P.C. drove around together in defendant's car, smoking marijuana. On the morning of the day in question, Williams saw defendant and P.C. in the parking lot talking and laughing with each other. Williams asked defendant if he could take defendant's car to the hardware store, and defendant agreed. P.C. accompanied Williams on the ride to the store, but waited in the car while he went in the store.

¶ 11 Williams testified that when they got back to the school, he went back to work. Shortly thereafter, defendant told him that P.C. was shutting the job down. Williams ran outside to talk with P.C., who was in her truck on her cell phone. Williams knocked on the window and asked what was

wrong and why the job had to be shut down. In response, P.C. told him not to worry about it and drove off. On cross-examination, Williams testified that he first learned about P.C.'s accusations against defendant later that same day, when he spoke with P.C.'s boss on the phone.

¶ 12 Defendant testified that after P.C.'s first day at the job site, he, P.C., and Williams drove around together, smoking marijuana. The next day, he and P.C. had conversations about P.C.'s marital problems and other personal topics. At one point, they had a conversation outside the job site in defendant's car. On the morning of the day in question, while he was helping put together face masks at P.C.'s desk, P.C. rubbed his legs and told him they were sexy. Defendant left the area and went to the washroom. He used the girls' washroom because the boys' was under construction. While he was in the washroom, P.C. walked in and said, "Well, come on; let's do it now. Let's do it here." Defendant testified that he "kind of fell for it" and proceeded to have sex with P.C. Afterward, defendant and P.C. left separately and both went to the parking lot. While they were in the parking lot, Williams approached them about going to the hardware store.

¶ 13 On cross-examination, defendant testified that he learned about P.C.'s accusations against him from Williams, who had called "the boss" to find out why P.C. shut the job down. According to defendant, the boss told Williams that P.C. reported she had been raped. Defendant further testified that he called Williams later that evening, and Williams told him P.C. "had called and told the job that she was suing the company and she was suing me." After talking with Williams, defendant called his boss, "Nathan Faus (phonetic spelling)," to attempt to explain what happened that morning.

¶ 14 The trial court found defendant guilty of criminal sexual assault.

¶ 15 On July 15, 1999, at the hearing on the motion for a new trial, Craig Katz, who had represented defendant at trial, asked for leave to file a motion to withdraw on the ground that defendant had alleged ineffective assistance of trial counsel. The trial court granted the motion.

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¶ 16 Defendant's new counsel, Frederick Cohn, then requested a continuance so that he could subpoena people whose testimony would develop facts that were outside the record regarding defendant's ineffective assistance claims. Cohn also filed a motion for a new trial and an amended motion for a new trial. In the initial motion, Cohn asserted that defendant was denied his constitutional right of confrontation when the trial court did not allow cross-examination regarding whether P.C. had made a claim for monetary benefits with defendant's employer's insurance company, which he maintained would have illustrated P.C.'s interest and bias. In the amended motion, Cohn addressed the claim of ineffectiveness, arguing, among other things, that trial counsel failed to call "Nathan Foss" to testify that on the day of the incident, P.C. called the company that managed the project and threatened them, asserting that she was going to sue defendant and the company. The trial court denied the request for a continuance, as well as the motion for a new trial. Thereafter, defendant was sentenced to an extended 18-year prison term.

¶ 17 On direct appeal, defendant was again represented by Cohn. On appeal, defendant contended that trial counsel was prevented from cross-examining P.C. regarding her bias and motive; that the State failed to prove him guilty beyond a reasonable doubt; that the trial court erred in not granting a continuance so that his new counsel could gather information in support of a motion for a new trial; and that he was denied effective assistance of trial counsel. This court affirmed defendant's conviction and sentence. *People v. Demons*, No. 1-99-2562 (2000) (unpublished order under Supreme Court Rule 23). In rejecting the argument that counsel was ineffective for failing to persist in a line of questioning regarding P.C.'s financial motive and bias to testify, we stated that it was "undisputed that [P.C.] had not filed a civil lawsuit prior to defendant's trial and there was not an insurance claim pending at the time of defendant's trial."

¶ 18 In December 2000, defendant filed a postconviction petition, drafted by Cohn. The petition alleged that defendant's rights to due process were violated when the State withheld evidence that

at some time prior to trial, P.C. had either initiated an investigation into or commenced an insurance claim against Loyalty, which would have affected her credibility, interest, and bias. The petition further asserted that trial counsel was ineffective for failing to investigate this potential evidence. Cohn attached to the petition a transcript from the sentencing hearing, during which the prosecutor stated that it was her understanding that at the time of trial, there was no insurance claim pending, but there may have been one "previously filed." Cohn also attached a letter sent to defendant by an insurance administrator for Loyalty on September 2, 1999, denying defendant's request for copies of an investigation undertaken with respect to a claim made by P.C., because the administrator's duty was to Loyalty.

¶ 19 In January 2001, Cohn filed a motion to proceed with discovery, including the issuance of subpoenas and the taking of depositions, in support of the postconviction petition.

¶ 20 The State filed a motion to dismiss the postconviction petition, which was granted by the trial court. The trial court also denied the request to proceed with discovery.

¶ 21 On appeal from the dismissal, defendant was represented by the State Appellate Defender. Among other things, defendant contended on appeal that the trial court erred in dismissing his petition under principles of *res judicata* and abused its discretion in denying his discovery request.

¶ 22 This court affirmed the dismissal of defendant's petition. *People v. Demons*, No. 1-01-3178 (2003) (unpublished order under Supreme Court Rule 23). In the course of doing so, we found that defendant had not avoided the procedural bar of *res judicata* by attaching the insurance administrator's letter to his petition. Acknowledging that the letter might have "some impeachment value," we determined that it could not be considered substantial evidence which might change the outcome upon retrial. First, we noted that because the letter was written some four months after the trial concluded, it was "mere speculation to conclude that a lawsuit was pending at the time of trial or that the prosecutor was not truthful when she denied knowledge of a claim pending at the time

of trial." Second, we found that the letter did not demonstrate a violation of *Brady*, as it merely indicated that an investigation had been undertaken to protect Loyalty's interests, and did not contradict the prosecutor's statement that P.C. may have previously filed an insurance claim but none was pending at the time of trial. Third, we found that the letter did not support defendant's position that an investigation was pending at the time of trial because it was "vague and ambiguous and [did] not contain 'material' information that, if disclosed to the defense, would have changed the outcome of the trial." Finally, we determined that the letter did not impact the application of *res judicata* to defendant's claim of ineffective assistance of trial counsel, because, in light of the facts presented at trial, the outcome of the trial would not have been different had counsel presented evidence that an investigation had been undertaken to protect Loyalty's interests. As to defendant's argument that the trial court abused its discretion in denying his discovery request, we determined that while the circuit court had inherent discretionary authority to order discovery in postconviction proceedings, defendant had not demonstrated "good cause" for his request because there was no evidence that the outcome of the trial would have been different.

¶ 23 In August 2002, defendant filed a *pro se* petition for a writ of *habeas corpus*, which the trial court dismissed on motion of the State. On appeal, we allowed the public defender of Cook County to withdraw as counsel and affirmed the judgment of the trial court. *People v. Demons*, No. 1-05-2651 (2007) (unpublished order under Supreme Court Rule 23).

¶ 24 In August 2006, defendant filed a *pro se* successive postconviction petition, claiming actual innocence and asserting that he had "finally" been able to obtain the services of an investigator, who discovered and obtained new evidence in the form of affidavits, hospital records, and a complaint P.C. filed against the insurance company. Defendant alleged that his attorneys had provided ineffective assistance of counsel by failing to seek and acquire this "easily obtainable" evidence prior to trial, during trial, or at the time of the initial postconviction proceedings. He alleged that the

documents spoke to P.C.'s credibility and bias, as they demonstrated she had been attempting to obtain "easy money" from the insurance company.

¶ 25 Defendant further alleged in his successive petition that he received ineffective assistance of trial counsel in that his trial attorney, Craig Katz, had been found by the Attorney Registration and Disciplinary Commission (ARDC) to have engaged in a pattern of misconduct between 1997 and 2000. Defendant asserted that because his own trial took place in 1999, Katz's misconduct was "definitely going on at the time of [his] trial."

¶ 26 In support of his petition, defendant attached several documents, including police reports, hospital records, and affidavits. Among the affidavits was one executed by Nathaniel Rowe, who was a project manager for Loyalty at the time in question. Rowe stated in his affidavit that "in the late afternoon of the alleged crime, [P.C.] contacted me via telephone" and that during the conversation, P.C. told him "her side of the alleged crime, referred to [defendant] as a 'nigger,' and was looking to sue Loyalty Environmental and [defendant]." Rowe averred that he found P.C.'s recitation of the events of the day to be inconsistent and contradictory. He also stated that he spoke with all of the workers at the job site, and that the workers told him defendant and P.C. "were very close and appeared to be having a relationship," as they had been seen sitting in each other's cars at lunch and would "disappear for long periods of time." Rowe stated that he had seen defendant and P.C. in a car together, thought it was strange, but assumed they were discussing business. According to Rowe, he gave a copy of all his notes concerning the incident, including his notes of his telephone conversation with P.C., to a representative of Loyalty's insurance company. Finally, Rowe stated that he informed defendant, his family, "and I believe his attorney," that he was willing to testify, but he was never contacted to do so.

¶ 27 In another affidavit, William Foss averred that at the time in question, he was president of Loyalty. Foss stated that on "several occasions during June 1998," defendant sat in P.C.'s car and had lunch with her.

¶ 28 Cozene Williams stated in an affidavit that on the morning of defendant's trial, he questioned attorney Katz about several potential witnesses, including Rowe. According to Williams, Katz's response to his suggestion that he contact the potential witnesses was that "they won't be necessary due to the weakness of the State's case."

¶ 29 Finally, defendant's mother, Barbara Hearon, stated in her affidavit that on a few different occasions before trial, she questioned Katz with regard to at least four potential witnesses, including Rowe, and suggested that he contact them. Hearon stated that Katz told her the witnesses would not be necessary because of the weakness of the State's case.

¶ 30 Within a month of defendant's filing, the trial court appointed the Public Defender of Cook County as postconviction counsel.

¶ 31 In November 2008, postconviction counsel, Elyse Miller of the Public Defender of Cook County, reported to the court that she was attempting to locate the witnesses whose affidavits were attached to defendant's petition. Several court dates later, in August 2009, counsel informed the court that she and her investigator had located and interviewed Foss and Rowe, and neither man had actual personal knowledge of a relationship between defendant and P.C. However, Rowe reported that he had seen them in a car together, thought it was unusual, asked around, and was told by many workers that defendant and P.C. had an ongoing relationship. Rowe also told counsel that P.C. had called him the day of the incident and threatened to sue, and that he had turned over extensive notes to the insurance company. On the next court date, counsel informed the court that her investigator had contacted the insurance company, as well as the Village of LaGrange, and learned that there

were no relevant documents to subpoena. As such, counsel stated that her investigation was complete.

¶ 32 On October 30, 2009, Miller filed a Rule 651(c) certificate in which she stated that she had consulted with defendant by mail to ascertain his contentions of deprivations of constitutional rights; had examined the report of proceedings from trial; and had not prepared a supplemental petition because defendant's *pro se* petition adequately presented his contentions. In addition, counsel stated in her certificate that she and her investigator had spent months trying to find evidence upon which to base a supplemental or amended petition. Counsel indicated that although one of defendant's allegations was that his trial attorney was ineffective because disciplinary action was pending against him at the time of trial, in fact, defendant's trial concluded in July 1999 and disciplinary action was not commenced against his attorney until 2000. With regard to newly discovered witnesses, counsel stated that she and her investigator interviewed William Foss and Nathaniel Rowe, but neither man could provide personal knowledge of a relationship between defendant and P.C. While Rowe indicated he had received a telephone call from P.C. on the day of the incident and gave his notes from that call to Loyalty's insurance company, the insurance company was unable to produce any notes. Finally, counsel stated that she and her investigator had been unable to substantiate defendant's allegation that an insurance claim and civil lawsuit were pending at the time of trial.

¶ 33 Counsel also filed a motion for leave to file a successive postconviction petition, asserting that defendant need not meet the cause and prejudice test because he was claiming actual innocence. The trial court noted that the petition had been filed some three years prior, and granted leave to file.

¶ 34 Thereafter, the State filed a motion to dismiss the petition.

¶ 35 On April 23, 2010, Frederick Weil, of the Public Defender of Cook County, appeared for defendant and indicated he was taking over the case due to Miller's retirement. Weil presented a

motion for leave for the Public Defender to withdraw as counsel, as defendant desired to proceed *pro se*. The trial court denied the motion.

¶ 36 On July 16, 2010, Weil filed a Rule 651(c) certificate, stating that he had consulted with defendant by mail and telephone to ascertain his contentions of deprivations of constitutional rights; had obtained and examined the report of proceedings from his trial, posttrial motions, and sentencing; and had not prepared a supplemental petition because defendant's *pro se* petition adequately set forth his claims. Weil also filed an affidavit executed by defendant in support of his petition.

¶ 37 On August 6, 2010, following a hearing, the trial court granted the State's motion to dismiss. In the course of doing so, the trial court stated that defendant was raising issues that he had already raised on direct appeal and in his initial postconviction petition. In particular, the trial court noted defendant's arguments regarding P.C. having filed a civil suit or insurance claim. The court observed that "[b]oth appellate court opinions indicate that there was no suit pending," and determined that the "the trial court's denial of the examination of this issue did not go to the victim's credibility and the appellate court found that it was not an abuse of the judge's discretion." The trial court found that in his successive petition, defendant was attempting to raise issues already decided under the framework of a claim of ineffective assistance of counsel. The court stated, "Claiming that not only was his trial attorney purportedly ineffective for not calling witnesses who came out of the woodwork years later and whose affidavit contradicted the trial testimony of both the victim and the defendant but also that then [defendant's] post-trial motion attorney was ineffective that he was the same counsel on his initial appeal was ineffective. And, also the same attorney on the postconviction. [Defendant] has had several bites at the very same apple."

¶ 38 This appeal followed.

¶ 39 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2008)) provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Bocclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). A postconviction proceeding is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Therefore, issues that were decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been raised, but were not, are forfeited. *Beaman*, 229 Ill. 2d at 71.

¶ 40 The instant case involves the second stage of the postconviction process. At this stage, dismissal is warranted when the petition's allegations, liberally construed in favor of petitioner and in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382. A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381; *Franklin*, 167 Ill. 2d at 9. At second-stage proceedings, all factual allegations not positively rebutted by the record are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 41 On appeal, defendant contends that the trial court erred in dismissing his petition where it made improper fact-finding and credibility determinations and incorrectly found that the issues raised in the petition were barred by *res judicata*. As noted above, our review of a second-stage dismissal of a postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389. Accordingly, we may affirm a second-stage dismissal on any grounds substantiated by the record, regardless of the trial court's reasoning. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010). Given our standard of review, we need not address defendant's arguments that the trial court's reasons for granting the State's motion to dismiss were improper.

¶ 42 Defendant argues that his petition should have advanced to a third-stage evidentiary hearing because he made a substantial showing of two claims of ineffective assistance of counsel. First, he argues that his successive petition made a substantial showing of a claim of ineffective assistance of counsel in that it included allegations that Craig Katz, the attorney who represented him at trial, failed to call Nathaniel Rowe to testify that P.C. threatened to sue the company just hours after the incident; and that Frederick Cohn, who represented defendant posttrial, on direct appeal, and in the initial postconviction proceedings, also failed to investigate Rowe as a witness. Defendant argues that Rowe was not difficult to locate and would have provided crucial evidence to support the defense theory that P.C.'s "plan all along was to concoct this story to set up [defendant] and Loyalty for a financial windfall."

¶ 43 The State maintains that defendant's arguments with regard to his attorneys' failure to investigate and/or present Rowe as a witness are barred by *res judicata* because they were decided on direct appeal. On direct appeal, this court determined that trial counsel was not ineffective for failing to persist in a line of questioning regarding P.C.'s financial motive and bias to testify based upon her filing of a civil lawsuit, and that the trial court did not err in refusing posttrial counsel's request for a continuance so that he could gather information regarding P.C.'s bias and interest based upon the insurance claim she had filed. On appeal from the dismissal of defendant's first postconviction petition, we found that contentions surrounding whether P.C. had filed an insurance claim or civil suit were barred by *res judicata*.

¶ 44 In the instant appeal, defendant is arguing that his attorneys were ineffective for failing to investigate and present evidence that on the day of the incident, P.C. was interested in seeking financial compensation. We agree with defendant that this issue is sufficiently distinct from the issues decided on direct appeal so as to avoid the operation of *res judicata*. In a similar vein, we agree with defendant that his current claims of ineffectiveness are not barred by waiver, as his claims

concern ineffectiveness which he alleges occurred on direct appeal and in the initial postconviction proceedings and therefore, could not have been raised in those prior proceedings. *People v. Flores*, 153 Ill. 2d 264, 282 (1992).

¶ 45 Claims of ineffective assistance of counsel are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. If a case may be disposed of on one *Strickland* prong, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 46 As noted above, defendant argues that both Katz and Cohn were ineffective for failing to investigate and/or present Rowe as a witness. He maintains that Rowe's testimony would have provided crucial supporting evidence for his theory of defense that P.C. was not a victim of a sexual assault, but rather concocted a story in order to obtain a financial windfall.

¶ 47 We find that defendant has failed to establish the prejudice prong of the *Strickland* test. Even if Katz, who represented defendant at trial, had presented Rowe as a witness, or Cohn, who represented defendant posttrial, on appeal, and in the initial postconviction proceedings, had investigated Rowe, we cannot say that the outcome of the proceedings would have been different. At trial, defendant testified that he learned from his co-worker, Williams, that P.C. had called their boss on the day of the incident, reported she had been raped, "and told the job that she was suing the

company and she was suing me." In his affidavit, Rowe averred that in the late afternoon of the day in question, P.C. called him and indicated she was looking to sue Loyalty and defendant. Had Rowe testified at trial consistent with his affidavit, his testimony would have been cumulative to defendant's. The allegation that P.C. had formed an almost immediate intention to sue for her injuries was introduced at trial. While Rowe may have been able to add more detail on the topic, we cannot find that but for Katz's failure to investigate and present such testimony from Rowe, there was a reasonable probability that the result of the trial would have been different. It follows that in turn, defendant suffered no prejudice from Cohn's posttrial failure to investigate Rowe as a witness. Defendant's claim of ineffectiveness fails.

¶ 48 Second, defendant argues that his petition made a substantial showing of a claim of ineffective assistance in that he alleged his trial attorney, Craig Katz, had been suspended from the practice of law by the ARDC for conduct that included neglecting clients during the same time frame as defendant's trial. Defendant argues that although conduct from his own trial was not part of the ARDC complaint, the fact that Katz acted improperly in representing other clients during the same time period lends "strong support" for his claim that Katz was ineffective for failing to investigate. Defendant maintains that he could not have raised this issue in earlier proceedings, as Katz was not suspended until some two years after defendant filed his first postconviction petition.

¶ 49 As an initial matter, we note that contrary to defendant's assertion in his briefs in this court, his successive petition did not allege that Katz had been suspended from the practice of law for neglecting clients. Rather, defendant alleged only that the ARDC had investigated Katz and found that he had engaged in "a pattern of intentional willful misconduct" between 1997 and 2000. More important, the record does not reflect that defendant attached any documents to his petition to support his allegation, or that he offered an explanation as to why no such documents were attached. Section 122-2 of the Act mandates that a petition for postconviction relief "shall have attached

thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). A defendant's failure to comply with this requirement justifies dismissal without an evidentiary hearing. *People v. Niezgoda*, 337 Ill. App. 3d 593, 596 (2003). Absent any supporting evidence, defendant has failed to make a substantial showing of a claim of ineffective assistance. We find no error in the trial court's dismissal of the petition.

¶ 50 Defendant's second contention on appeal is that both attorneys who represented him on his successive postconviction provided unreasonable assistance where they failed to adequately present his claims to the court, failed to amend the successive petition to properly support those issues, and failed to respond to the State's motion to dismiss.

¶ 51 Under the Act, petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. The rule's third obligation does not require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Pendelton*, 223 Ill. 2d 458, 472 (2006); *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 52 The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with the rule is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008). Our

review of an attorney's compliance with a supreme court rule is *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19 (citing *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007)).

¶ 53 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Jones*, 2011 IL App (1st) 092529, ¶ 23. In the instant case, both attorneys who represented defendant on his successive postconviction petition filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received the representation required by the rule. It is defendant's burden to overcome this presumption by demonstrating his attorneys' failure to substantially comply with the duties mandated by Rule 651(c). *Id.*

¶ 54 Defendant maintains that he has rebutted the presumption of substantial compliance in this case, and has identified two claims that he asserts his attorneys failed to properly present to the trial court: (1) ineffective assistance of counsel at trial, direct appeal, and in the initial postconviction proceedings for failing to "bring to the forefront" the circumstance that on the day of the incident, P.C. called Rowe and threatened to sue the company; and (2) during the same time period as defendant's trial, trial counsel was engaging in unethical behavior that eventually led to his suspension from the practice of law. Defendant argues that his attorneys on his successive petition missed the key points of both of these issues, and instead wrongly focused on the fact that there was no lawsuit pending at the time of trial and that there was no ARDC action taken against trial counsel until after trial.

¶ 55 We have already addressed the underlying substance of the first claim at length, and determined that defendant did not suffer ineffective assistance by his trial, appellate, and initial postconviction counsels' failure to investigate and/or present Rowe's testimony that P.C. called him on the day of the incident and threatened to sue. As noted above, postconviction counsel is not required by Rule 651(c) to advance nonmeritorious claims. *Pendleton*, 223 Ill. 2d at 472; *Greer*, 212

Ill. 2d at 205. We cannot agree with defendant that the attorneys who represented him on his successive postconviction petition were unreasonable in failing to make the claim defendant now suggests. Even if the attorneys had attempted to present the claim of ineffectiveness, they would not have been able to establish prejudice. Defendant's argument fails.

¶ 56 With regard to the ARDC investigation of defendant's trial counsel, defendant asserts that his attorneys "neglected to properly present the issue regarding the fact that [Katz] was suspended from the practice of law for conduct that took place during the time of [defendant's] trial," and that this argument "could have been better explained to the judge." Indeed, in our view, the attorneys who represented defendant on the successive postconviction petition could have attached ARDC documents to the successive petition to show that such proceedings had actually taken place. Nevertheless, even if the attorneys had attached such documents from the ARDC, the claim would not have succeeded.

¶ 57 As defendant acknowledges, there is no *per se* rule that a defendant must be granted a new trial whenever his counsel is involved in contemporaneous proceedings with the ARDC. *People v. Szabo*, 144 Ill. 2d 525, 529-31 (1991). Instead, courts apply a *Strickland* analysis when a defendant claims ineffectiveness based on attorney disciplinary proceedings. *Szabo*, 144 Ill. 2d at 530-31. Defendant argues that "the fact that Katz acted improperly in representing at least eight other clients during the time period of 1997 to 2000 is strong support for his claim of the denial of due process due to ineffective assistance of counsel for failure to investigate, where it showed that Katz neglected clients during the time of the trial." Defendant's claim is purely speculative. Even if Katz neglected other clients during the time he was representing defendant, it does not necessarily follow that he failed to investigate in defendant's case. See *Long-Gang Lin v. Holder*, 630 F. 3d 536, 546 (7th Cir. 2010) (although trial counsel had been suspended from practice by the ARDC, defendant was

required to show that the attorney committed an error or omission that caused prejudice in his own case).

¶ 58 Moreover, the underlying claim of ineffectiveness relates back to Katz's failure to investigate Rowe as a witness. We have already determined that defendant would have been unable to establish prejudice resulting from Rowe's absence on the witness stand. Again, counsel is not required by Rule 651(c) to advance nonmeritorious claims. *Pendleton*, 223 Ill. 2d at 472; *Greer*, 212 Ill. 2d at 205. We cannot find that either attorney who represented defendant on his successive postconviction petition was unreasonable in failing to amend and reshape what is ultimately a meritless argument. Defendant has not overcome the presumption of reasonable assistance.

¶ 59 In the instant case, both attorneys who represented defendant in his successive postconviction proceedings filed a Rule 651(c) certificate, thus triggering the presumption of compliance with the Rule. Defendant has failed to rebut the presumption. Accordingly, we cannot find that either attorney provided an unreasonable level of assistance. Dismissal of defendant's petition was proper.

¶ 60 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 61 Affirmed.