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).

2012 IL App (4th) 100823-U

Filed 6/19/12

NO. 4-10-0823

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
WILLIAM BRADLEY KIRCHNER,	)	No. 97CF67
Defendant-Appellant.	)	
	)	Honorable
	)	Michael G. Carroll
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to establish his postconviction trial counsel did not provide reasonable assistance.

¶ 2 In September 2010, the trial court granted the State's motion to dismiss defendant William Bradley Kirchner's postconviction petition during the second stage of proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)). Defendant appeals, arguing his appointed postconviction counsel "failed to make elementary amendments to his *pro se* petition and failed to secure affidavits from specifically identified witnesses." We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 1998, a jury convicted defendant of the August 1997 murders of Charles Brewer, Doris Jean Brewer, and Bonnie Brewer. Defendant received the death sentence. In December 2000, our supreme court affirmed defendant's conviction. *People v. Kirchner*, 194 Ill.

2d 502, 560, 743 N.E.2d 94, 124 (2000). Because the parties are familiar with the facts in this case, we do not restate them here.

¶ 5 In October 1999, defendant filed a *pro se* postconviction petition. In the petition, defendant alleged he was denied his sixth amendment right to the effective assistance of trial counsel during his trial and sentencing for the following reasons: (1) counsel failed to seek a deoxyribonucleic acid (DNA) test of saliva found on a cigarette butt; (2) counsel failed to seek DNA testing of Randy Merriman to compare to hair and blood found at the crime scene; (3) counsel failed to investigate whether all of the victims' wounds could have been caused by a single knife; (4) counsel failed to present the testimony of Richard Outlaw, regarding how many people he saw in Dyno Warner's backyard; (5) counsel failed to challenge the State's theory defendant wore gloves at the murder scene because no fingerprints were found; (6) counsel failed to seek the suppression of the identification testimony of Donyal Tate and Tiea Davis; (7) counsel failed to investigate Tammy Gharst's bank records to determine whether she wrote a check to defendant when he was in Decatur, Illinois, on the morning of the murders, which would have allegedly established where defendant received the money he had the morning after the murders; and (8) counsel failed to investigate two police officers who said defendant did not commit the murders. Defendant also argued he was denied his sixth amendment right to an impartial jury when police investigators who worked on the case were seen talking to members of the jury during a trial recess. Finally, defendant argued his appellate counsel was ineffective in his direct appeal to the supreme court for failing to argue all the errors alleged in defendant's motion for a new trial and new death-penalty hearing.

¶ 6 In November 1999, the trial court appointed the office of the State Appellate

Defender (OSAD), Capital Litigation Division, to represent defendant with regard to his postconviction petition. In June 2000, attorneys from the law firm of Baker & McKenzie in Chicago, Illinois, entered their appearance for defendant.

¶ 7 In January 2003, then-Governor George Ryan granted defendant a commutation of defendant's sentence to natural life without the possibility of parole.

¶ 8 In January 2010, the circuit clerk's office filed a letter from defendant asking to proceed *pro se* in these postconviction proceedings because of a conflict between Michael Vonnahmen, the attorney assigned to his case by OSAD, and himself. Defendant stated he could not afford to hire an attorney and wanted to proceed *pro se*. In February 2010, the law firm of Baker & McKenzie filed a motion to withdraw as attorneys for defendant.

¶ 9 On February 22, 2010, attorney Vonnahmen filed a Rule 651(c) certificate (see Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), which stated:

> "Counsel has consulted with the petitioner in person to ascertained [*sic*] his contentions of deprievation [*sic*] of constitutional right, has examined the record of the proceedings at the trial, and has not made any amendments to the petition filed *pro se* that are necessary for an adequate presentation of petitioner's contentions since there are no amendments that can be made to the petitioner's petition for post-conviction relief that would not be frivolous or patently without merit."

On February 25, 2010, the trial court allowed Baker & McKenzie's motion to withdraw as counsel. That same day, defendant withdrew his motion to proceed *pro se*.

¶ 10 In April 2010, the State filed a motion to dismiss defendant's postconviction petition. In May 2010, OSAD filed a response to the State's motion to dismiss. In June 2010, the State filed a supplement to its motion to dismiss.

¶ 11 On August 23, 2010, the trial court held a hearing on the State's motion. On September 21, 2010, the court issued a letter ruling, granting the State's motion to dismiss because it agreed with the State

> "that all of the allegations involving the testimony of other people (*e.g.*, Richard Outlaw, Dyno Warner, Donyal Tate, Tiea Davis, Shannon Jones, and Tammy Gharst) failed to include affidavits from any of them that would buttress the Defendant's allegations. Defense counsel conceded the lack of affidavits and the legal effect of the same, but argued some of the allegations (*e.g.*, lack of D.N.A. testing of Randy Merriman) are not amenable to affidavits.
>
> As concerns those allegations that are not amenable to affidavits, the court would agree with the People's argument that the theories and allegations of the Defendant are speculative, conclusory, and *de minimis*. For example, the evidence that there might have been a second knife only indicates either that the Defendant had two knives or that another person was there—not that the Defendant is innocent.
>
> The only theory that tended to exonerate the Defendant was the theory that Dyno Warner and Randy Merriman committed the

murders and conspired to point the finger at the Defendant. There are several problems with this theory. First, it is speculative and not supported by affidavit. Next, there was the evidence from others besides Merriman and Warner that implicate[d] the Defendant.

In conclusion, the court finds that the Defendant failed to make a substantial showing that his constitutional rights were violated. The Defendant failed to show that the acts of his attorneys (trial and appellate) were objectively unreasonable; rather, as the People argue, the decisions made by Defendant's counsel (trial and appellate) appear to fall within the acceptable range of discretionary trial strategy. Even assuming, *in arguendo*, that error was shown, no prejudice was shown. There was no evidence that there was a reasonable likelihood that the outcome would have been different but for the theoretical errors. Accordingly, court grants People's Motion to Dismiss."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues he did not receive reasonable assistance from his postconviction counsel and the case should be remanded for new second-stage proceedings because his attorney failed to make "elementary amendments to his *pro se* petition and failed to secure affidavits from specifically identified witnesses." We review a trial court's dismissal of defendant's

postconviction petition without an evidentiary hearing *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007).

¶ 15 Our supreme court has held the role of postconviction counsel is to "insure that if the petitioner has any constitutional claims of merit they will be properly recognized, developed and articulated in the post-conviction proceedings." *People v. King*, 39 Ill. 2d 295, 297, 235 N.E.2d 585, 586 (1968). A defendant is entitled to "reasonable" assistance from postconviction counsel. See *People v. Turner*, 187 Ill. 2d 406, 414-15, 719 N.E.2d 725, 730 (1999).

¶ 16 Supreme Court Rule 651(c) requires postconviction counsel to provide a certificate verifying the attorney performed certain duties with regard to the postconviction proceedings. Postconviction counsel in this case did file a certificate pursuant to Rule 651(c).

¶ 17 However, defendant argues his postconviction counsel failed to comply with Rule 651(c) because counsel stated any amendments to the petition would be frivolous and patently without merit but did not contend defendant's *pro se* petition adequately presented defendant's arguments. According to defendant, if postconviction counsel believed all the claims were frivolous and patently without merit, he was ethically obligated to file a *Greer* motion to that effect. See generally *People v. Greer*, 212 Ill. 2d 192, 817 N.E.2d 511 (2004). From our review, the record only established postconviction counsel believed any addition to the petition would be frivolous and without merit. The record does not show postconviction counsel thought the petition itself was frivolous and without merit. In fact, during the hearing on the State's motion to dismiss defendant's petition, postconviction counsel told the trial court his failure to address certain points raised in the postconviction petition should not be seen as a withdrawal of those points.

¶ 18 Defendant next argues postconviction counsel's "acceptance of the *pro se* petition including frivolous issues that were clearly rebutted by the record serves [*sic*] as further proof *** post-conviction counsel's failure to amend the *pro se* petition violated Rule 651(c)." Defendant points to the issue raised in his *pro se* petition regarding the identification testimony of Donyal Tate and Tiea Davis as an example of a frivolous issue postconviction counsel should have deleted from the petition. We disagree.

¶ 19 This court has stated:

> "Rule 651(c) does not require counsel to amend the *pro se* petition. [Citation.] Indeed, ethical obligations prohibit counsel from doing so if the claims are frivolous or spurious. [Citation.] The question remains what should counsel do if counsel investigates the claims but finds them without merit. The case law provides options. One is to stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended. See, e.g., *People v. Wolfe*, 27 Ill. App. 3d 551, 552, 327 N.E.2d 416, 418 (1975). Another is to withdraw as counsel. [*People v. Greer*, 212 Ill. 2d 192, 194-95, 817 N.E.2d 511, 514 (2004).] In both of these scenarios, the allegations in the *pro se* petition remained to proceed according to the parameters of the Act." *People v. Pace*, 386 Ill. App. 3d 1056, 1062, 899 N.E.2d 610, 616 (2008).

Assuming *arguendo*, postconviction counsel believed some of the issues defendant raised in his *pro se* postconviction petition were in fact frivolous and spurious (which as we stated earlier is

not clear from the record), postconviction counsel's actions followed the first option this court listed in *Pace*. This did not amount to unreasonable assistance. Had postconviction counsel deleted any issues defendant raised in his *pro se* postconviction petition, defendant likely would be complaining counsel interfered with his ability to present the issues he raised in his *pro se* petition.

¶ 20 As further support for his contention his postconviction counsel failed to provide reasonable assistance, defendant also points to the fact postconviction counsel did not attach an affidavit from defendant or from any other individuals defendant identified in his *pro se* petition. Our supreme court has stated, "In the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *People v. Johnson*, 154 Ill. 2d 227, 241, 609 N.E.2d 304, 311 (1993). However, this presumption may be rebutted if plainly contradicted by the record. *Johnson*, 154 Ill. 2d at 241, 609 N.E.2d at 311.

¶ 21 Defendant argues his postconviction counsel's Rule 651(c) certificate shows postconviction counsel did not think it was necessary to obtain defendant's affidavit. We disagree. Postconviction counsel's Rule 651(c) certificate does not mention affidavits. Further, postconviction counsel's statement "there are no amendments that can be made to the petitioner's petition for post-conviction relief that would not be frivolous or patently without merit," does not establish a misunderstanding of the law but an assessment of the facts at issue in this case. This case is distinguishable from *People v. Waldrop*, 353 Ill. App. 3d 244, 249, 818 N.E.2d 888, 893 (2004), upon which defendant relies, where postconviction counsel stated in open court he did

not believe affidavits were necessary to support the defendant's argument in that case. Postconviction counsel in the case *sub judice* made no similar statements.

¶ 22 Defendant also argues the fact his postconviction counsel did not file an affidavit from defendant shows counsel did not attempt to obtain an affidavit from defendant. According to defendant:

> "It cannot seriously be questioned that [defendant] would [not] have written and signed an affidavit in support of his petition if given the opportunity. Apart from the notion that it was obviously in his personal interest to provide support for his own petition, the fact that he wrote and filed his own notarized *pro se* post-conviction petition suggests that he would have been both willing and able to produce a simple affidavit had he known it was necessary. Nonetheless, no such affidavit was secured. In short, although counsel could have successfully procured an affidavit from [defendant] had he tried, he did not amend the *pro se* petition to include an affidavit from [defendant]."

Appellate counsel continued:

> "According to his notarized petition, Kirchner was aware of two officers that had information supporting his innocence that his trial attorney failed to contact. Only Kirchner or his trial counsel could write an affidavit stating that trial counsel had been informed about these officers and counsel failed to investigate. [Citation.]

> Furthermore, Kirchner could have attested to seeing police officers speaking with members of the jury. Additionally, despite post-conviction counsel's statement to the contrary at the hearing on the motion to dismiss, the affidavit of either Kirchner or Tammy Gharst was necessary to show that one of Gharst's checks was cashed on August 8, and that her bank records would have been relevant to the trial. [Citation.] Accordingly, amending Kirchner's petition to include these affidavits would not have been frivolous, but instead essential to reasonably represent him on his petition."

¶ 23 We first note we have no way of knowing anything about the interactions between defendant and his postconviction counsel other than postconviction counsel's assertion in his Rule 651(c) certificate he consulted with defendant in person. Defendant does not dispute the truth of this point. As a result, although defendant argues "[i]t cannot seriously be questioned that [defendant] would [not] have written and signed an affidavit in support of his petition if given the opportunity," the record does not establish this to be the case.

¶ 24 Even if, assuming *arguendo*, this court agreed defendant would have written and signed an affidavit, the record still would not establish postconviction counsel's failure to file an affidavit from defendant meant his representation was unreasonable. Defendant ignores the legitimate reasons why postconviction counsel might have decided not to file an affidavit from defendant. For example, defendant may have wanted to state things in his affidavit postconviction counsel knew were untrue based on their communications. On the other hand, postconviction counsel may not have doubted defendant's honesty regarding the content of

defendant's affidavit but determined the affidavit was of no help in establishing a constitutional violation.

¶ 25 Based on the record in this case, we can only speculate why postconviction counsel did not file any affidavits from defendant or any other witness in support of defendant's postconviction petition. We are not going to find postconviction counsel's representation unreasonable based on speculation. The record in this case does not rebut the presumption postconviction counsel offered reasonable assistance.

¶ 26 III. CONCLUSION

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

¶ 28 Affirmed.