

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) 110763-U

NO. 4-11-0763

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 11, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	DeWitt County
KELSEY E. SWICKARD,)	No. 05CF85
Defendant-Appellant.)	
)	Honorable
)	Chris E. Freese,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant failed to show any prejudice from the erroneous statutory citation in his aggravated-battery information, defendant failed to make a substantial showing of ineffective assistance of trial and appellate counsel for their failure to challenge the information.
- ¶ 2 Where postconviction counsel filed an Illinois Supreme Court Rule 651(c) certificate and a supplement to defendant's *pro se* postconviction petition adding the allegations of ineffective assistance of trial and appellate counsel that we have found not meritorious, defendant received reasonable assistance of counsel.
- ¶ 3 Defendant, Kelsey E. Swickard, appeals the DeWitt County circuit court's August 10, 2011, judgment, dismissing (1) his *pro se* postconviction petition at the second stage of the proceedings and (2) his *pro se* motion for rehabilitative sentence reduction. On appeal, defendant challenges only the dismissal of his postconviction petition, asserting (1) he made a substantial showing of ineffective assistance of trial and appellate counsel for their failure to

challenge the validity of defendant's aggravated-battery information, or (2) in the alternative, he was denied reasonable assistance of postconviction counsel due to counsel's failure to properly plead the ineffective-assistance-of-counsel argument. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In October 2005, the State charged defendant by information with attempt (first degree murder) (720 ILCS 5/8-4, 5/9-1(a)(1) (West 2004)) (count I), burglary (720 ILCS 5/19-1(a) (West 2004)) (count II), unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2004)) (count III), aggravated battery (which is listed in the information as 720 ILCS 5/12-4(a)(14) (West 2004)) (count IV), and theft (720 ILCS 5/16-1(a)(1)(A) (West 2004)) (count V). The trial court later severed count III from the other charges on defendant's motion and dismissed count V on the State's motion.

¶ 6

In January 2007, the trial court held defendant's jury trial on the three remaining charges. At his trial, Gregory Boyer identified defendant as the person who stabbed him. Moreover, other witnesses testified about defendant stating he had stabbed Boyer or did something horrible on October 11, 2005. Testimony was also presented about defendant's friends helping him by burning the clothes defendant was wearing during the incident, hiding the knife defendant used, and concealing defendant after the incident. Defendant testified and admitted to breaking into Boyer's car and removing items from it with a folding knife and screwdriver. While he was working on removing some stereo equipment, Boyer saw him, and a fight ensued. Defendant was still holding his knife, and during the fight, defendant stabbed Boyer multiple times. Defendant testified he did so to get Boyer off of him and denied intending to kill Boyer. During closing arguments, the prosecutor recited Illinois Pattern Jury Instructions, Criminal, No.

11.16 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.16), which is for section 12-4(b) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-4(b) (West 1992)). See IPI Criminal 4th No. 11.16, Committee Note, at 469. The prosecutor argued defendant testified he intentionally stabbed Boyer and did not use a firearm when he was stabbing Boyer. At the beginning of his argument, defense counsel admitted defendant was guilty of aggravated battery and burglary. After closing arguments, the court gave the jury IPI Criminal 4th No. 11.16, using the propositions for section 12-4(b)(1) of the Criminal Code (720 ILCS 5/12-4(b)(1) (West 2004)). The jury found defendant not guilty of attempt (first degree murder) and guilty of aggravated battery and burglary.

¶ 7 In March 2007, the trial court sentenced defendant to consecutive, extended-term prison sentences of 14 years for burglary and 10 years for aggravated battery. Defendant filed a postsentencing motion and a supplement, which the court denied. Defendant appealed, contending the trial court erred when it (1) failed to instruct the jury on the lesser-included offense of theft on the burglary charge, (2) imposed consecutive sentences, and (3) imposed extended-term sentences on both charges when it should have done so only on the most serious crime of aggravated battery. This court affirmed defendant's convictions and sentences. *People v. Swickard*, No. 4-07-0503 (June 16, 2009) (unpublished order under Supreme Court Rule 23). Defendant filed a petition for leave to appeal to the Supreme Court of Illinois, which was denied on November 25, 2009. *People v. Swickard*, 234 Ill. 2d 546, 920 N.E.2d 1079 (2009).

¶ 8 On May 10, 2010, defendant filed a *pro se* postconviction petition, asserting (1) his extended-term sentence for aggravated battery was void, (2) his consecutive sentencing was void, and (3) he was denied effective assistance of trial counsel because counsel failed to

impeach the victim's testimony with his written statement at the time of the incident. On July 6, 2010, defendant filed a *pro se* motion for rehabilitation of sentence, asking the court to reduce his sentence due to his accomplishments in prison. In July 2010, attorney Dodie Junkert appeared on defendant's behalf on both the postconviction petition and the sentencing motion. In August 2010, Junkert filed an amended motion for rehabilitation of sentence. That same month, defendant filed a *pro se* amendment to his postconviction petition, arguing his constitutional rights were violated because his aggravated-battery information lists the wrong statutory provision.

¶ 9 In September 2010, the State filed motions to dismiss defendant's postconviction petition and his amended motion for rehabilitation of sentence. In November 2010, Junkert withdrew as defendant's counsel, and the trial court appointed Phillip Lamkin to represent defendant. In July 2011, Lamkin filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and a supplement to defendant's postconviction petition. The supplement first argued defendant was denied effective assistance of trial counsel due to (1) counsel's failure to bring to the trial court's attention the error in the aggravated-battery information, (2) counsel's stipulation defendant was guilty of aggravated battery and burglary as charged, and (3) counsel not being properly prepared to argue the issues of extended-term and consecutive sentencing. It also alleged defendant was denied effective assistance of appellate counsel because of counsel's failure to (1) raise the aforementioned matters of ineffective assistance of trial counsel and (2) address the applicable statute regarding consecutive sentences.

¶ 10 After an August 10, 2011, hearing, the trial court denied defendant's postconviction petition and motion for rehabilitation of sentence. On August 25, 2011, defen-

dant filed a timely notice of appeal for both the postconviction petition and sentencing motion in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Thus, this court has jurisdiction of both the petition and motion pursuant to Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 11

II. ANALYSIS

¶ 12

A. Standard of Review

¶ 13 On appeal, defendant only challenges the dismissal of his postconviction petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 14

At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at

472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 15 With the second stage of the postconviction proceedings, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 16 B. Ineffective Assistance of Trial and Appellate Counsel

¶ 17 Defendant claims he was denied effective assistance of trial and appellate counsel

because neither counsel challenged the charging instrument for his aggravated-battery conviction. The State argues defendant did not suffer prejudice from any error. This court analyzes such claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006) (appellate counsel); *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999) (trial counsel). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

¶ 18 To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Strickland*, 466 U.S. at 687. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Stated differently, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. The *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice, rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 19 Both the United States and Illinois Constitutions (U.S. Const., amend. VI; Ill.

Const. 1970, art. I, sec. 8.) entitle a criminal defendant to notice of the "nature and cause of the accusation" against him. The allegations in a criminal charge "should identify the offense and the offender, set out the nature and elements of the crime, and provide the date and county of the occurrence." *People v. Ryan*, 117 Ill. 2d 28, 37, 509 N.E.2d 1001, 1004 (1987). A charge's "citation to an incorrect statutory provision is not necessarily fatal." *Ryan*, 117 Ill. 2d at 37, 509 N.E.2d at 1004-05. To warrant reversal, the defendant must suffer prejudice from the citation error. See *Ryan*, 117 Ill. 2d at 37, 509 N.E.2d at 1005.

¶ 20 Here, the statutory citation was clearly erroneous because section 12-4(a)(14) of the Criminal Code did not exist. However, defendant has not shown he was prejudiced by the error. The information at issue alleged defendant committed aggravated battery on October 11, 2005, by his following actions:

"defendant, in committing a Battery, in violation of Section 12-3 of Act 5 of Chapter 720 of the Illinois Compiled Statutes, intentionally caused great bodily harm to Gregory Boyer, in that he stabbed Gregory Boyer in the abdomen, chest and back with a stabbing instrument, in violation of Chapter 720, Act 5, Section 12-4(a)(14) of the 2004 Illinois Compiled Statutes."

That follows the language of section 12-4(a) of the Criminal Code (720 ILCS 5/12-4(a) (West 2004)), which provides a person commits aggravated battery when, "in committing a battery, [he] intentionally or knowingly causes great bodily harm, or permanent disability or disfigurement." The indictment also mentions the victim was stabbed "in the abdomen, back, and chest with a stabbing instrument." Such allegations are consistent with section 12-4(b)(1) of the Criminal

Code (720 ILCS 5/12-4(b)(1) (West 2004)), under which a person commits aggravated battery when, in committing a battery, he "[u]ses a deadly weapon other than by the discharge of a firearm." Accordingly, the aggravated-battery information satisfied the constitutional requirements for a charging instrument. Moreover, the prosecutor's closing argument about aggravated battery and the aggravated-battery jury instruction, both of which were based on section 12-4(b)(1), should not have been a surprise to defendant and defense counsel.

¶ 21 Defendant further alleges his defense theory may have been different had defense counsel known the aggravated-battery charge was based on section 12-4(b)(1). However, even absent defendant's admission to stabbing Boyer with a knife, the State's evidence was overwhelming defendant was the person who stabbed Boyer with a knife, and Boyer's injuries were severe, which satisfies the elements of both sections 12-4(a) and 12-4(b)(1). Defendant does not suggest a different defense theory that he could have used, and we are aware of none that would have led to defendant's acquittal on the aggravated-battery charge.

¶ 22 Since defendant cannot establish any prejudice from the erroneous statutory citation, defendant cannot make a substantial showing of the prejudice prong of the *Strickland* test as to both trial and appellate counsel. Accordingly, the trial court properly dismissed this allegation in defendant's postconviction petition.

¶ 23 C. Reasonable Assistance of Postconviction Counsel

¶ 24 Defendant argues that, if his ineffective-assistance-of-counsel claims are insufficient to warrant an evidentiary hearing, then he was denied reasonable assistance of postconviction counsel. The State disagrees.

¶ 25 In postconviction proceedings, defendants are not entitled to effective assistance

of counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Instead, state law dictates the sufficient level of assistance, and our supreme court has held the Postconviction Act entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995). To ensure counsel provides that reasonable level of assistance, Rule 651(c) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). The rule requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, (2) examine the record of the proceedings at trial, and (3) make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Compliance with Rule 651(c) is mandatory and may be shown by the filing of a certificate representing that counsel has fulfilled the duties. *People v. Perkins*, 229 Ill. 2d 34, 50, 890 N.E.2d 398, 407 (2007). When, as in this case, postconviction counsel files a Rule 651(c) certificate, a presumption arises that the defendant received the required representation during the second-stage proceedings. *People v. Mendoza*, 402 Ill. App. 3d 808, 813, 931 N.E.2d 703, 707-08 (2010). However, that presumption may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680, 873 N.E.2d 978, 987 (2007).

¶ 26 Here, defendant asserts his postconviction counsel did not comply with the second and third requirements of Rule 651(c) because a review of the record would have shown a basis for challenging trial and appellate counsel's effectiveness for failing to properly raise the charging issue at either level. However, postconviction counsel did raise such a claim in his July 2011 supplement to defendant's postconviction petition. If defendant is suggesting postconviction counsel could have done more to present his ineffective-assistance-of-counsel claim based on the

charging instrument, he does not provide any specifics on what more could have been done beyond citing to his argument on appeal on that issue. This court has already rejected that argument. In *People v. Greer*, 212 Ill. 2d 192, 205, 817 N.E.2d 511, 519 (2004), our supreme court stated the following:

"Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule."

Since we have already found defendant's ineffective-assistance-of-counsel claim is not meritorious, any amendments based on defendant's appellant brief would have been frivolous, and thus were not necessary. Accordingly, we find defendant was not denied reasonable assistance of postconviction counsel.

¶ 27

III. CONCLUSION

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

¶ 29 Affirmed.