

SIXTH DIVISION

March 15, 2013

Nos. 1-10-0863 & 1-10-1676 (Consolidated)

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	81 C 7761
	)	
JAMES SOTO,	)	Honorable
	)	Maura Slattery Boyle,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Justice Gordon and Justice Reyes concurred in the judgment.

**ORDER**

**HELD:** The trial court did not err in dismissing petitioner's postconviction petition at the second stage of the post-conviction proceedings where petitioner failed to make a substantial showing of a violation of his constitutional rights.

¶ 1 Petitioner James Soto appeals the second-stage dismissal of his petition for postconviction

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relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). For the reasons that follow, we affirm.

¶ 2 Petitioner and codefendant David Ayala were charged with murder, attempt murder, aggravated battery, armed violence, and conspiracy in connection with a shooting that resulted in the deaths of two people and injury to a third person. The shooting occurred in Pietrowski Park, in Chicago, Illinois on August 16, 1981.

¶ 3 Petitioner and Ayala were jointly tried by a jury. Petitioner was convicted of two counts of first-degree murder, attempt murder, and conspiracy. Both men were sentenced to mandatory natural life imprisonment on the murder convictions and to concurrent prison terms of 30 years for attempt murder and 7 years for conspiracy. A third co-defendant, Ruben Palomo, was tried separately by a second jury and was convicted of attempt murder and conspiracy and sentenced to concurrent prison terms of 30 years for attempt murder and 7 years for conspiracy.

¶ 4 Petitioner appealed his convictions and sentences. Petitioner argued that the trial court erred by: failing to instruct the jury on the presumption of innocence and the burden of proof; granting a motion for substitution of judges made by the State's primary witness; and imposing a natural life sentence. On direct appeals, which were consolidated for review, this court affirmed petitioner's convictions and sentences. *People v. Ayala*, 142 Ill. App. 3d 93, 100 (1986).

¶ 5 On August 29, 1991, petitioner filed his first *pro se* postconviction petition. In the petition, petitioner alleged ineffective assistance of both trial and appellate counsel. Petitioner alleged that trial counsel failed to investigate and call various alibi witnesses; failed to review certain discovery material; failed to timely object to prejudicial comments and questioning by the prosecution; labored

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under a conflict of interest; and failed to request jury instructions regarding the credibility of accomplice testimony (Illinois Pattern Jury Instructions, Criminal, No. 3.17 (2nd ed. 1981)), and the presumption of innocence and the State's burden of proof (Illinois Pattern Jury Instructions, Criminal No. 2.03 (2nd ed. 1981)). Petitioner also claimed that he had been denied a fair trial on the ground that one of the jurors had a prior acquaintance with one of the victims. Petitioner further argued that appellate counsel was ineffective for failing to raise various issues. The trial court summarily dismissed the petition on September 17, 1991.

¶ 6 On October 11, 1991, petitioner filed a motion for reconsideration and a supplemental *pro se* postconviction petition alleging there was insufficient evidence to prove him guilty beyond a reasonable doubt. Petitioner also alleged that the State knowingly used perjured testimony from Wally Cruz<sup>1</sup> to secure his conviction. In support of the petition, petitioner attached the affidavits of several individuals, including Juan Padilla, an alleged rival gang member and a surviving victim of the shooting, who averred that he told the Assistant State's Attorney that he saw the faces of the shooters and could identify them as Wally Cruz and John Rojas. Padilla averred that the State's Attorney pressured him into claiming that he could not see the shooters' faces.

¶ 7 On November 8, 1991, the trial court summarily dismissed petitioner's motion for reconsideration and his supplemental *pro se* postconviction petition. Petitioner appealed, raising only the issues of knowing use of perjured testimony and ineffective assistance of appellate counsel

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<sup>1</sup> Wally Cruz was indicted with petitioner and made an agreement with the State whereby the State would *nol pros* the murder charge and would recommend a sentence of 5 years imprisonment for conspiracy in exchange for his testimony. See *Ayala*, 142 Ill. App. 3d at 95-96.

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for failing to argue that the verdicts of guilty for conspiracy to commit murder and murder were inconsistent verdicts and therefore petitioner's conviction for conspiracy should have been vacated.

¶ 8 In an unpublished Rule 23 order filed on February 16, 1993, this court determined that appellate counsel was not ineffective for failing to raise the issue regarding the inconsistent verdicts because the failure to raise the issue did result in substantial prejudice to petitioner; however, in the interests of judicial economy, the appellate court vacated the conspiracy conviction. *People v. Soto*, No. 1-91-4024, slip op. at 6 (1993) (unpublished order under Supreme Court Rule 23). More importantly, the appellate court reversed and remanded the matter for further proceedings on the ground that the allegations contained in the affidavit submitted by Padilla met the low threshold of presenting the gist of a meritorious constitutional claim. *Id* at 8. The mandate was received by the trial court on April 26, 1993, and the Public Defender's Office was appointed on May 14, 1993.

¶ 9 On April 21, 1993, prior to the trial court receiving the mandate, petitioner filed a second supplemental *pro se* petition for post-conviction relief, raising the same issues he previously raised in his original *pro se* postconviction petition. On September 21, 1994, the State filed a motion to dismiss petitioner's postconviction petitions, arguing that the allegations in Padilla's affidavit were conclusory and insufficient to entitle him to an evidentiary hearing. Petitioner did not respond to the State's motion to dismiss.

¶ 10 In January 1996, the Public Defender was allowed to withdraw as petitioner's counsel and Attorney Gwendolyn D. Anderson was appointed to represent petitioner. Approximately two years later, on January 29, 1998, the trial court converted petitioner's status date into a hearing on the State's motion to dismiss and then granted the motion. Attorney Anderson was not present in court

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when the motion was granted.

¶ 11 On February 25, 1998, petitioner filed a motion to reconsider and an amended *pro se* petition for post-conviction relief.

¶ 12 On April 14, 1998, the trial court held a hearing on Attorney Anderson's motion to vacate the order of dismissal. At the hearing, Attorney Anderson informed the trial court that when she took over the case from the assistant public defender there was nothing in the case file indicating that a motion to dismiss had been filed on September 21, 1994. The trial court denied the motion to vacate. On March 13, 1998, petitioner filed another amended *pro se* postconviction petition.

¶ 13 In an unpublished order entered on June 14, 2000, our court vacated the trial court's order of January 29, 1998, dismissing petitioner's petition for post-conviction relief. *People v. Soto*, No. 1-98-1313 (2000). The matter had come before our court on the State's confession of error. The State confessed error on the ground that at the time the trial court granted the State's motion dismissing the petition, the petitioner's attorney was not present in court and had not yet filed a 651(c) certificate. The matter was remanded for further proceedings under the Act. *Id.*

¶ 14 On May 13, 2003, the State moved to dismiss the March 1998 petition, arguing that it was a successive petition. In October of 2004, petitioner sought leave to appeal to the United States and Illinois Supreme Courts. Both courts denied petitioner's request.

¶ 15 On July 16, 2008, petitioner's appointed post-conviction counsel, Attorney Gwyndollette Ward-Brown, filed a certificate indicating compliance with Supreme Court Rule 651 (c), and stating that no amendments to the petition were necessary to adequately present petitioner's claims. On May 13, 2009, the State filed a second motion to dismiss the March 1998 amended petition, arguing that

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the only surviving claim from petitioner's original *pro se* postconviction petition was the claim that prosecutors intimidated Padilla into not naming the shooters. The State maintained that Padilla's affidavit did not support a substantial showing of a constitutional violation because the claims were nonspecific and conclusory.

¶ 16 On February 18, 2010, the trial court granted the State's motion to dismiss the March 1998 petition. The trial court held that the claims contained in the affidavits submitted by Padilla failed to make a substantial showing that petitioner's constitutional rights were violated such that he was entitled to an evidentiary hearing. The trial court determined that the claims in Padilla's affidavit were conclusory and conflicted with his trial testimony and the statements he gave police while he was being treated at the hospital.

¶ 17 Petitioner filed a notice of appeal on March 10, 2010, which was filed stamped on March 18, 2010. That notice of appeal is appellate court number 1-10-0863. On March 16, 2010, petitioner placed into the prison mail system a *pro se* motion for reconsideration/reinstatement of his postconviction petition, which was filed stamped on March 23, 2010. On March 25, 2010, petitioner placed into the prison mail system a *pro se* supplemental motion for reconsideration, which was filed stamped on April 6, 2010.

¶ 18 On May 14, 2010, the trial court denied petitioner's *pro se* motion for reconsideration/reinstatement of his postconviction petition. Petitioner now appeals from the trial court's second-stage dismissal, appellate court number 1-10-1676. Petitioner seeks an evidentiary hearing based on claims contained in his original *pro se* postconviction petition.

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¶ 19

#### ANALYSIS

¶ 20 The Act provides a procedure by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). A postconviction action is not an appeal from the judgment of conviction, but rather 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 *res judicata*, and issues that could have been raised, but were not, are forfeited. *Beaman*, 229 Ill. 2d at 71.

¶ 21 The petition at issue was dismissed at the second stage of the postconviction proceedings. In a noncapital case such as this, a petition will be dismissed at the second stage if the allegations in the petition and any accompanying affidavits, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 381; *People v. Hall*, 217 Ill. 2d 324, 334 (2005). If no such showing is made, a petitioner is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). However, if the allegations in the petition, supported by the record and accompanying affidavits, demonstrate a substantial violation of a constitutional right, then the petition advances to the third stage where the trial court conducts an evidentiary hearing. *People v. Edwards*, 17 Ill. 2d 239, 246 (2001).

¶ 22 Review of a trial court's dismissal of a postconviction petition at the second stage is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In the instant case, we do not believe the trial court erred in dismissing petitioner's petition without conducting an evidentiary hearing.

¶ 23 Petitioner contends the trial court erred by dismissing his postconviction petition where the

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court improperly engaged in credibility determinations with respect to the claims set forth in Padilla's affidavit. Credibility determinations are not to be made at the second stage of the postconviction proceedings. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). We find petitioner's contention to be without merit.

¶ 24 We find that the claims contained in Padilla's affidavit are insufficient to warrant an evidentiary hearing concerning whether the ASA acted improperly and limited his trial testimony. On February 18, 2010, at a hearing on the State's motion to dismiss petitioner's postconviction petition, the trial court noted that when police interviewed Padilla at the scene shortly after the shooting, he told them he never saw the shooters. At the hospital, he repeated a similar statement. The trial court observed that Padilla made these statements long before the ASA ever became involved in the case or had an opportunity to influence his trial testimony.

¶ 25 Moreover, we find that the claims in Padilla's affidavit are little more than a recantation of his trial testimony. Our supreme court has determined that recantation of testimony is inherently unreliable. *People v. Steidl*, 177 Ill. 2d 239, 260 (1997). In sum, we find the trial court did not engage in any credibility determinations in dismissing petitioner's postconviction petition.

¶ 26 Petitioner further contends there were other allegations of improper conduct by the State that surfaced at trial and maintains that the affidavit of Robert Jacquez served to bolster the allegations made by Padilla. In his affidavit, Jacquez averred he had knowledge that Wally Cruz had lied about a gang meeting. Jacquez claimed he was prepared to testify that he never attended a gang meeting on the day of the shootings, but was intimidated by the ASA into making false statements to the grand jury. Jacquez averred he took the Fifth after he was told he would be indicted if there was a

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conflict between his grand jury and trial testimony. Petitioner contends that Jacquez's and Padilla's affidavits together, establish a substantial showing that the State engaged in misconduct. We must disagree.

¶ 27 In petitioner's appeal from the summary dismissal of his supplemental *pro se* petition for post-conviction relief, this court addressed the allegations related to the claims contained in Jacquez's affidavit and determined that they were conclusory and required no further action under the Act. *People v. Soto*, No. 1-91-4024, slip op. at 7-8 (1993) (unpublished order under Supreme Court Rule 23). As a result, petitioner's present arguments concerning Jacquez's affidavit are barred by *res judicata* because they have been previously addressed.

¶ 28 Petitioner next contends that his trial counsel was ineffective for failing to request accomplice jury instruction IPI 3.17 (Illinois Pattern Jury Instructions, Criminal, No. 3.17 (2nd ed. 1981)), concerning Wally Cruz's testimony. Cruz was an admitted accomplice to this crime and testified that he participated in planning the shooting and he drove the getaway van to and from the scene. Cruz was indicted with petitioner and made an agreement with the State whereby the State would *nol pros* the murder charge and would recommend a sentence of 5 years imprisonment for conspiracy in exchange for his testimony. *Ayala*, 142 Ill. App. 3d at 95-96.

¶ 29 Once a witness has been shown to be an accomplice, the jury may be instructed that the witness's testimony is subject to suspicion and should be considered with caution. *People v. Newell*, 103 Ill. 2d 465, 470 (1984). We find that petitioner's claims regarding IPI 3.17 are forfeited because they could have been raised on direct appeal, but were not, and are also subject to *res judicata* because they were raised in his initial *pro se* postconviction petition, but were subsequently

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abandoned.

¶ 30 Petitioner has forfeited review of this issue because he did not raise it on direct appeal. On direct appeal, petitioner argued, among other things, that the trial court erred by failing to instruct the jury on the presumption of innocence and the burden of proof. See *Ayala*, 142 Ill. App. 3d at 96. However, petitioner failed to raise the issue regarding IPI 3.17, and therefore the issue is forfeited.

¶ 31 Our review of this issue is also barred by *res judicata*. Petitioner raised this issue in his initial *pro se* postconviction petition filed on August 29, 1991. The petition was summarily dismissed. Petitioner then filed a motion for reconsideration and a supplemental *pro se* postconviction petition, neither of which set forth the issue regarding IPI 3.17.

¶ 32 The trial court summarily dismissed petitioner's motion for reconsideration and his supplemental *pro se* postconviction petition. Petitioner appealed, raising only the issues of knowing use of perjured testimony and ineffective assistance of appellate counsel for failing to argue that the verdicts of guilty for conspiracy to commit murder and murder were inconsistent verdicts. Petitioner did not raise the issue of ineffective assistance of trial counsel for failing to tender IPI 3.17.

¶ 33 In petitioner's appeal from the summary dismissal of his supplemental *pro se* petition for post-conviction relief, this court recognized that petitioner had narrowed his claims for relief in "apparent recognition of the application of the principles of waiver and *res judicata*." *People v. Soto*, No. 1-91-4024, slip op. at 4 (1993) (unpublished order under Supreme Court Rule 23). It was not until petitioner filed an amended *pro se* petition for post-conviction relief in 1998, that he resurrected his claim of ineffective assistance of trial counsel for failing to tender IPI 3.17. However, at this time, it was too late for petitioner to bring up this claim for review as he was barred by the doctrine

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of *res judicata*.

¶ 34 Moreover, even if we were to find that trial counsel's failure to request IPI 3.17 was sufficient to show that counsel's performance was deficient under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), petitioner would still be unable to show that counsel's deficient performance prejudiced his defense, as required under the second prong of *Strickland*.

¶ 35 The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is composed of two prongs: deficiency and prejudice.

¶ 36 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 37 A defendant must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need

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not decide whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992). Applying these principles to the instant case, we find that defendant has failed to show that trial counsel's failure to request IPI 3.17 prejudiced his defense, where the jury was given Illinois Pattern Jury Instructions, Criminal, No. 1.02 (2nd ed. 1981), a general instruction concerning the credibility of witnesses. This instruction informs the jury that it is the sole judge of the believability of the witnesses and the weight to be given their testimony, and that in considering their testimony, it may take into account any interest, bias, or prejudice the witnesses may have.

¶ 38 The jury was also given Illinois Pattern Jury Instructions, Criminal, No. 3.12 (2nd ed. 1981), which read, "Evidence that a witness has been convicted of an offense may be considered by you only as it may affect the believability of the witness." We believe that the substance of IPI 3.17, was sufficiently covered by IPI 1.02 and IPI 3.12.

¶ 39 In addition, during closing arguments, defense counsel argued that Cruz had received a "sweet" deal in exchange for his testimony. Defense counsel argued that Cruz was a liar, he lacked credibility, and he had a motive to give false testimony. Based on defense counsel's closing arguments, the jury was well aware that it should consider Cruz's testimony carefully in light of the other evidence in the case. In sum, petitioner has failed to show that the particular language contained in IPI 3.17<sup>2</sup> would have made a difference in this case.

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<sup>2</sup> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois

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¶ 40 Petitioner finally argues he was denied a reasonable level of assistance from post-conviction counsel. Again, we must disagree.

¶ 41 In post-conviction proceedings, there is no constitutional right to the assistance of counsel. *People v. Marshall*, 375 Ill. App. 3d 670, 679 (2007). Rather, the right to the assistance of counsel in post-conviction proceedings is a statutory right provided by the Act. 725 ILCS 5/122-4 (West 2008); *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 13. Under the Act, petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 42 In an effort to ensure this level of assistance, Supreme Court Rule 651 (c) imposes three duties on appointed post-conviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by counsel must show that counsel: (1) consulted with the petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right; (2) examined the record of the trial court proceedings; and (3) made any amendments to the *pro se* petition that are necessary for an adequate presentation of petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Demons*, 2012 IL App (1st) 102218-U, ¶ 51, 2012 WL 6950639. Our review of an attorney's compliance with a supreme court rule is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 43 The purpose of Rule 651 (c) is to ensure that post-conviction counsel shapes a petitioner's claims into proper legal form and presents them to the court. *Demons*, 2012 IL App (1st) 102218-U,

¶ 52. The filing of a Rule 651 (c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance. *Id* ¶ 53.

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Pattern Jury Instructions, Criminal, No. 3.17 (2nd ed. 1981).

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¶ 44 On July 16, 2008, post-conviction counsel filed a certificate in accordance with Rule 651 (c). Counsel stated that no amendments to the petition were necessary to adequately present petitioner's claims. Petitioner now argues that despite the certificate, the record demonstrates that post-conviction counsel failed to make appropriate amendments to the petition. Petitioner maintains that post-conviction counsel failed to amend the petition to: include his claims regarding IPI 3.17; incorporate the affidavit of Robert Jacquez; incorporate various affidavits to support his contention that the State engaged in misconduct; and include a claim that trial counsel was ineffective for not investigating and calling certain individuals as witnesses to dispute Wally Cruz's trial testimony.

¶ 45 We have already concluded that these underlying issues are without merit. Post-conviction counsel is not required by Rule 651 (c) to advance nonmeritorious claims. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). "If amendments to a *pro se* post-conviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Therefore, we find that petitioner has failed to rebut the presumption that post-conviction counsel provided reasonable assistance.

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 47 Affirmed.