

No. 1-11-0016

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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. 99 CR 792
)	
TYJUAN KEITH,)	The Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 **HELD:** Defendant was denied reasonable assistance of postconviction counsel when counsel failed to amend his *pro se* petition in order to avoid the procedural bar of forfeiture.

¶ 2 Defendant Tyjuan Keith appeals from the second stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On appeal, defendant does not contest the dismissal of his petition on the merits. Rather, he

contends that postconviction counsel failed to provide him with reasonable assistance because counsel did not amend his *pro se* postconviction petition. He argues, relying on *People v. Turner*, 187 Ill. 2d 406 (1999), that counsel's failure to make a "necessary" amendment to his *pro se* claims, that is, allege ineffective assistance of appellate counsel, violated Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and resulted in the forfeiture of certain claims in the instant proceeding. We vacate the dismissal and remand for further second-stage proceedings.

¶ 3 In November 2002, following a conference held pursuant to Supreme Court Rule 402 (eff. July 1, 1997), defendant entered a plea of guilty to first degree murder arising from the fatal shooting of the victim Robert Scott in 1998. During the plea hearing, the trial court admonished defendant that he was charged with first degree murder and could be sentenced to between 20 and 60 years in prison. When the court inquired whether defendant had been threatened or promised anything in exchange for his plea, defendant answered in the negative. Ultimately, defendant was sentenced to 26 years in prison.

¶ 4 Defendant then filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, alleging that his plea was coerced because his family had been threatened. The trial court appointed counsel, and an amended motion to withdraw the plea was filed. Ultimately, the trial court dismissed the motion as untimely filed. Defendant then appealed, contending that the trial court failed to properly admonish him pursuant to Supreme Court Rule 605(c) (eff. Oct. 1, 2001).

¶ 5 While defendant's appeal was pending, he filed the instant *pro se* petition for postconviction relief. The petition alleged that defendant's guilty plea was unknowing because it was made in reliance on defense counsel's incorrect advice that he would only have to serve 50%

of his sentence and that codefendant Noah Fields would testify against him at trial. The petition also alleged that his plea was coerced because gang member Boyd Batts threatened to hurt defendant's family unless defendant entered a guilty plea. The petition finally alleged that the trial court erred when it denied defendant's motion to suppress evidence.

¶ 6 Attached to the petition in support were the affidavits of defendant, his mother Sharon Keith, and his sisters Frances and Maxine Smith. In his affidavit, defendant averred that defense counsel told him that he would receive day-for-day credit on his sentence and that codefendant Fields would testify against him at trial. In her affidavit, Sharon averred that defense counsel told her and defendant that defendant would receive day-for-day credit and would serve 13 years in prison. Sharon further averred that her daughters told her that Batts approached them and stated that if defendant went to trial, Batts would beat them and their children. Maxine and Frances also averred that Batts said if defendant went to trial he would beat them and their children.

¶ 7 In 2006, this court remanded the cause for proper Rule 605(c) admonishments. See *People v. Keith*, No. 1-04-1296 (2006) (unpublished order under Supreme Court Rule 23).

¶ 8 On remand, proper admonishments were given. Counsel was then appointed and a motion to withdraw the plea was filed. The motion alleged that defendant's plea was not knowing and voluntary because, *inter alia*, a gang member threatened to harm his family if he went to trial, and defense counsel erroneously told him he would only have to serve 50% of his sentence and that a codefendant would testify against him at trial.

¶ 9 Although postconviction counsel had been appointed in the interim, after the cause was

remanded the trial court ordered that the instant proceeding be taken off the court's call pending the resolution of the motion to withdraw the plea.

¶ 10 The court then held a hearing on defendant's motion to withdraw the plea at which defendant, his mother, his sister Frances, defense counsel and Batts testified. Although Maxine Smith did not testify, the parties stipulated that if she were to testify, she would testify similarly to her affidavit.

¶ 11 Frances Smith testified that she was with Maxine and their children in October of 2002, when Batts approached them and told them to tell defendant that if defendant did not enter a guilty plea, Batts would beat Frances and her sister. Frances was scared so she went home and told her mother what had happened. Frances did not contact the police. With regard to the details of the conversation, she did not remember the time of day, the weather, the street where it occurred, or whether Batts was wearing a coat. Frances admitted that Batts did not know her name, but asserted that he knew her from where she "stay[ed] at."

¶ 12 Sharon Keith testified that her daughters told her about Batts's threat and that she relayed that threat to defendant. She also called 911 and later spoke to officers. Thereafter, because of the threat, she kept her daughters in the house. She did "not really" speak to defense counsel about the case and did not remember if she told him about the threat to her daughters. She later testified that she did not tell defense counsel about the threat. When defense counsel told her that defendant would only serve 50% of his sentence, she told defendant to listen to counsel and plead guilty. Sharon did not know why defendant was seeking to withdraw his plea.

¶ 13 Defendant testified that before pleading guilty, his mother told him that his sisters had

been threatened. The threat was that if defendant did not "make the right decision," that is, not go to trial, his sisters and their children would be hurt. He relayed the threat to defense counsel. This threat was one of the reasons that he entered a guilty plea. Another reason was that counsel told him that codefendant Fields, who had already been acquitted, would testify against him. Defense counsel also told him that there was "no way in hell" defendant would win at trial, that he needed to look out for his family, and that he would only have to serve 50% of his sentence. Defendant asserted that he would not have entered a guilty plea if he had not known about the threat, the day-for-day credit and that codefendant would testify against him.

¶ 14 During cross-examination, defendant asserted that he assumed that defense counsel lied about the acquitted codefendant testifying against him as he did not know that a person could testify after being acquitted of a charge. He admitted that he never told the court that counsel lied to him or that Batts threatened his family. He also admitted that when asked by the court whether he had been threatened with or promised anything in exchange for his plea, he answered in the negative. He thought that if he mentioned the threat, his family would be harmed.

¶ 15 Assistant public defender James Fryman testified that he represented defendant, that the parties held a Rule 402 conference and that an offer of 26 years was made. As the 100% truth-in-sentencing statute went into effect shortly before the offense in the instant case took place, counsel discussed this with defendant and was "pretty upset" that defendant "just missed" being eligible for 50% time. Fryman and defendant discussed the fact that this was a 100% case "many times." He also discussed the fact that codefendant Fields, who had been acquitted, could be called as a "very damaging" witness. Fryman did not know if defendant spoke to his mother

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about the plea. He denied that defendant told him about the threat to defendant's family. If defendant had mentioned the threat, Fryman would have brought it to the court's attention and investigated.

¶ 16 Boyd Batts testified that he moved to Wisconsin in 2000. He was scheduled to testify at defendant's trial. Batts did not know defendant well and did not know any of defendant's relatives or the victim in this case. He denied threatening any of defendant's relatives or being in a gang.

¶ 17 In denying defendant's motion, the court indicated that it had the opportunity to observe the witnesses and their biases as they testified. The court recalled that defendant's plea occurred on the day that the case was set for a jury trial and that there was "substantial" discussion in the Rule 402 conference about 50% cases versus 100% cases and the fact that this case was so close to the threshold period. The court also noted that codefendant Fields had been acquitted and was "out there" subject to subpoena. The court finally noted that it had admonished defendant several times that if defendant had any questions during the plea proceedings, he was to address them to the court and that defendant answered in the negative when asked if he had been threatened or promised anything in exchange for his plea. The court then characterized the testimony of defendant and his sister as difficult to believe, characterized Batts as someone who was not "capable of fighting life anymore" and denied the motion to withdraw the plea.

¶ 18 Defendant appealed, contending that his sentence must be vacated and the cause remanded for resentencing because he was sentenced to an agreed term without a presentence investigation report or a specific finding on the record of his criminal history as required by

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section 5-3-1 of the Unified Code of Corrections (see 730 ILCS 5/5-3-1 (West 2004)). On appeal, this court determined that the trial court had failed to strictly comply with section 5-3-1, vacated defendant's sentence and remanded the cause for a new sentencing hearing. See *People v. Keith*, No. 1-07-1479 (2009) (unpublished order under Supreme Court Rule 23). Defendant was subsequently sentenced to 26 years in prison.¹

¶ 19 In 2008, following the denial of the motion to withdraw the plea, the instant postconviction proceeding was restored to the trial court's active call. Postconviction counsel subsequently filed a supplemental postconviction petition, alleging, *inter alia*, a lack of "reasonable assistance" of counsel based upon defense counsel's failure to file a motion to reconsider the denial of defendant's motion to suppress and counsel's failure to raise this issue on remand. Postconviction counsel also filed a certificate and an amended certificate pursuant to Rule 651(c). The State then filed a motion to dismiss, which the trial court granted.

¶ 20 On appeal, defendant contends that postconviction counsel provided unreasonable assistance under Rule 651(c) because counsel failed to adequately present defendant's *pro se* allegations that his plea was unknowing and coerced. More specifically, defendant argues that counsel's failure to make a necessary amendment to his *pro se* postconviction petition to allege that he was denied effective assistance of appellate counsel in his direct appeal resulted in the forfeiture of those claims in the instant proceeding

¶ 21 This court reviews an attorney's compliance with a supreme court rule, as well as the

¹ On appeal from that order, this court affirmed defendant's sentence and corrected his mittimus. See *People v. Keith*, 20011 IL App (1st) 101808-U.

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dismissal of a postconviction petition on motion of the State, *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 22 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail, phone or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. See also *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993) (the attorney appointed will ascertain the basis of the defendant's claims, shape those claims into appropriate legal form and present the defendant's constitutional contentions to the court). The purpose of the rule is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court. *Profit*, 2012 IL App (1st) 101307, ¶ 18.

¶ 23 When a Rule 651(c) certificate is filed, the presumption exists that the defendant received the representation that the rule requires him to receive during second stage proceedings under the Act. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 24 In the case at bar, postconviction counsel filed a Rule 651(c) certificate and an amended certificate, thus creating a presumption that defendant received the representation required by the

rule at the second stage of proceedings. *Rossi*, 387 Ill. App. 3d at 1060. However, defendant contends that he has rebutted the presumption of substantial compliance. Specifically, he contends that postconviction counsel failed to make a "necessary" amendment to his *pro se* petition, *i.e.*, raise a claim of ineffective assistance of appellate counsel, such that his *pro se* claims regarding the nature of his plea were properly presented to the court. Defendant relies on *People v. Turner*, 187 Ill. 2d 406 (1999), and *People v. Kluppelberg*, 327 Ill. App. 3d 939 (2002), to argue that he was denied reasonable assistance of postconviction counsel because amending a petition to include a claim of ineffective assistance of appellate counsel is one of the few specific amendments our supreme court has determined that postconviction counsel must make when "necessary." See *Turner*, 187 Ill. 2d 413-14 (postconviction counsel's failure to make a routine amendment to the defendant's *pro se* petition and allege ineffective assistance of appellate counsel "prevented the circuit court from considering the merits of petitioner's claims and directly contributed to the dismissal of the petition"); *Kluppelberg*, 327 Ill. App. 3d at 947-48 (relying on *Turner* to find that the failure of postconviction counsel to make a routine amendment in order to overcome the procedural bar of waiver was unreasonable and violated Rule 651(c)).

¶ 25 Here, defendant's *pro se* postconviction petition alleged, in pertinent part, that his guilty plea was based upon defense counsel's statements that defendant would receive day-for-day credit on his sentence and that a codefendant would testify against him at trial. The petition also alleged that defendant's plea was coerced because Batts threatened to harm defendant's family if he went to trial. These are the same issues raised in defendant's unsuccessful motion to withdraw his guilty plea. However, these claims were not raised in the appeal from the trial court's denial

of the motion to withdraw the guilty plea. See *People v. Keith*, No. 1-07-1479 (2009) (unpublished order under Supreme Court Rule 23). Therefore, because the claims regarding the nature of defendant's plea could have been raised in that prior proceeding, but were not, they cannot now be raised in the instant postconviction proceeding. See *People v. Harris*, 224 Ill. 2d 115, 124 (2007) (because the scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated, issues that could have been raised on direct appeal but were not are procedurally defaulted).

¶ 26 *People v. Schlosser*, 2012 IL App (1st) 092523, is instructive. There counsel was appointed to represent a defendant who had alleged in his *pro se* postconviction petition that he was not proven guilty beyond a reasonable doubt and that his sentencing hearing was unfair, claims not raised on direct appeal. Although counsel filed a Rule 651(c) certificate stating that he was not amending the defendant's petition because it adequately presented the defendant's claims, counsel then raised an oral claim of ineffective assistance of appellate counsel for the first time at a hearing on the State's motion to dismiss. The trial court found that this claim was forfeited as counsel did not raise it in an amended postconviction petition and denied the defendant relief on the grounds of waiver. *Schlosser*, 2012 IL App (1st) 092523, ¶ 19.

¶ 27 On appeal, the defendant contended that he was denied reasonable assistance of postconviction counsel by counsel's failure to amend the *pro se* petition to avoid the application of waiver. *Schlosser*, 2012 IL App (1st) 092523, ¶ 19. The court noted that the "exact same issue" had been addressed in *People v. Turner*, 187 Ill. 2d 406 (1999), and that our supreme court had held that Rule 651(c) requires counsel to amend a *pro se* petition to allege ineffective

assistance of appellate counsel in order to avoid waiver. *Schlosser*, 2012 IL App (1st) 092523, ¶ 22 (citing *Turner*, 187 Ill. 2d at 412-14). Thus, consistent with *Turner*, the court determined that postconviction counsel's failure to amend the defendant's *pro se* petition with a claim of ineffective assistance of appellate counsel was unreasonable. *Schlosser*, 2012 IL App (1st) 092523, ¶¶ 25-26. Accord *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 31 (relying on *Schlosser* to find that postconviction counsel failed to comply with Rule 651(c) when, although counsel raised an oral claim of ineffective assistance of appellate counsel for the first and only time at a hearing on the State's motion to dismiss the defendant's postconviction petition, counsel failed to include that claim in an amended petition).

¶ 28 Similarly, here, because the claims raised in defendant's *pro se* postconviction petition were identical to those raised in his unsuccessful motion to withdraw the guilty plea and could have been raised in the appeal from that denial, but were not, they were waived for the purposes of this postconviction proceeding. See *Harris*, 224 Ill. 2d at 124. Although postconviction counsel filed a supplemental petition to "augment" defendant's claims, counsel did not attempt to overcome that procedural bar by challenging the representation defendant received from appellate counsel. See *People v. Perkins*, 229 Ill. 2d 34, 44 (2007) (the "proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome procedural bars"). Therefore, counsel's failure to amend defendant's *pro se* postconviction petition with a claim of ineffective assistance of appellate counsel in order to overcome the procedural bar of waiver was unreasonable assistance in violation of Rule 651(c). See *Schlosser*, 2012 IL App (1st) 092523, ¶¶ 25-26.

¶ 29 The State, however, contends, relying on *People v. Profit*, 2012 IL App (1st) 101307, that the question of whether defendant's *pro se* allegations had merit is crucial to the determination of whether counsel acted unreasonably. In other words, the State argues that the determination of whether counsel provided unreasonable assistance rests on whether the *pro se* allegations had merit because it is not unreasonable for counsel to choose not to advance meritless claims.

¶ 30 In *Profit*, the trial court docketed the defendant's *pro se* successive postconviction petition and appointed counsel. The defendant then filed two *pro se* pleadings which the trial court struck. Although postconviction counsel filed a Rule 651(c) certificate and asked the court to reconsider the dismissal of one of the defendant's *pro se* pleadings, counsel did not amend the *pro se* petition to include the claims raised in the stricken pleading. The circuit court denied the request to reconsider the dismissal of the pleadings and ultimately dismissed the defendant's petition.

¶ 31 On appeal, the defendant contended postconviction counsel's presumed compliance with Rule 651(c), created by the filing of a Rule 651(c) certificate, was rebutted by counsel's failure to allege any of the claims contained in his stricken *pro se* pleadings, regardless of the merits of those claims. *Profit*, 2012 IL App (1st) 101307, ¶¶ 19-21. However, the court determined that whether counsel provided unreasonable assistance by not filing an amended petition rested on whether the forfeited claims had merit. *Profit*, 2012 IL App (1st) 101307, ¶¶ 23. Therefore the court's ultimate conclusion that the defendant failed to rebut the presumption that counsel complied with Rule 651(c) was based on an assessment of the merits of the stricken *pro se* claims. *Profit*, 2012 IL App (1st) 101307, ¶¶ 24-31.

¶ 32 We find that the State's reliance on *Profit* to be misplaced as that case is distinguishable for several reasons. First, *Profit* dealt with a situation where appointed postconviction counsel abandoned claims that were raised in the petitioner's several *pro se* petitions but had been stricken by the court. As we pointed out, fulfillment of counsel's obligations under Rule 651(c) does not require the advancement of frivolous or spurious claims on the petitioner's behalf. As a result, the abandonment of claims by appointed postconviction counsel that were raised in a *pro se* petition does not constitute unreasonable representation if the claims have no merit. In the case at bar however, postconviction counsel did not abandon the claims at issue here. In fact, these claims were before the trial court, appointed counsel having filed a Rule 651(c) certificate indicating that they were adequately alleged in the *pro se* petition. Counsel also filed a "supplemental" petition to "augment" the *pro se* petition with an additional claim. The trial court, however, found that the claims at issue here were procedurally barred. The key difference between these cases is that in *Profit* the claims had been stricken and were not realleged whereas here, the claims at issue were before the trial court but considered barred. A simple amendment alleging ineffective assistance of appellate counsel would have avoided the procedural bar and was therefore "necessary" under Rule 651(c). Additionally, in *Profit* the court considered that the record did not indicate any basis upon which the procedural bar there could have been avoided whereas here it could have easily been accomplished with a simple routine amendment. We find that the circumstances in this case are more akin to those presented in *Turner* and *Schlosser*.

¶ 33 In *Schlosser*, we also rejected the State's argument raised here that we should examine the

underlying merits of the defendant's claims.

"Our supreme court has held that, even if the allegations in a petition were insufficient to raise a constitutional issue, it is error to dismiss a postconviction petition on the pleadings where there has been inadequate representation by counsel. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007) (citing *People v. Jones*, 43 Ill. 2d 160, 162 (1969)). Despite the State's claims that there is no merit to defendant's claim of ineffective assistance of appellate counsel, the Illinois Supreme Court 'has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.' *Suarez*, 224 Ill. 2d at 47.

Rather than the appellate or supreme court, it is the trial court that reviews the record to determine whether a defendant is able to make a substantial showing of a constitutional violation: 'We cannot simply presume, however, that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). It is the duty of the trial court *** to determine on the basis of a complete record whether the postconviction claims require an evidentiary hearing.' *Johnson*, 154 Ill. 2d at 246." *Schlosser*, 2012 IL App (1st) 092523, ¶¶ 30-31.

As in *Schlosser*, we decline the State's invitation to examine the claims that underlie the assertion that appellate counsel was ineffective and leave that to the trial court upon a fully developed

record.

¶ 34 Accordingly, because postconviction counsel rendered unreasonable assistance by failing to amend defendant's *pro se* postconviction petition to include the claim of ineffective assistance of appellate counsel, the dismissal of defendant's petition must be reversed and the cause remanded for additional second-stage proceedings, during which defendant is permitted to amend his postconviction petition with a claim of ineffective assistance of appellate counsel. See *Schlosser*, 2012 IL App (1st) 092523, ¶ 35 (citing *Turner*, 187 Ill. 2d at 417). We note our decision should not be construed as any indication as to whether defendant's claim of ineffective assistance of appellate counsel has merit. Moreover, if newly appointed counsel, after complying with the duties of Rule 651(c), determines that defendant's petition lacks any meritorious issues, then counsel may move to withdraw as counsel. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 15.

¶ 35 For the reasons discussed above, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings under the Act.

¶ 36 Reversed and remanded.