

sentenced him to an extended term of six years in prison. Defendant filed a *pro se* motion to reconsider, which the trial court denied. Defendant filed a direct appeal, claiming his sentence was excessive and he was entitled to additional sentencing credit. This court affirmed defendant's sentence, modifying the amount of credit awarded. *People v. Simpson*, No. 4-09-0323, slip order at 11 (Oct. 25, 2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 5 On November 9, 2009, while his direct appeal was pending, defendant filed a *pro se* postconviction petition, claiming his trial counsel rendered ineffective assistance of counsel by filing a Rule 604(d) certificate without performing the actions stated in the certificate. Defendant filed accompanying documents supporting his claim that counsel did not, in fact, (1) meet with him to ascertain defendant's complaints, (2) review the court file or transcripts, or (3) make any necessary amendments.

¶ 6 On November 24, 2009, the State filed a motion to dismiss, claiming (1) the circuit court had no jurisdiction while defendant's direct appeal was pending, and (2) his allegations were "patently without merit." The next day, the court struck defendant's petition for lack of jurisdiction. Defendant appealed. In June 2010, this court remanded the cause for further proceedings on defendant's postconviction petition. *People v. Simpson*, No. 4-10-0054, slip order at 4 (June 7, 2010) (unpublished order under Illinois Supreme Court Rule 23). Upon remand, the circuit court appointed counsel to represent defendant. However, defendant chose to proceed *pro se*.

¶ 7 In February 2011, defendant filed an amended postconviction petition, incorporating the allegations from his original petition and adding, among others, an allegation that his appellate counsel was ineffective for failing to raise on direct appeal the ineffective-assistance-of-trial-counsel argument related to the defective Rule 604(d) certificate and an allegation that his sentence was void

as it exceeded the maximum authorized sentence. The State filed a motion to dismiss.

¶ 8 In June 2011, defendant filed a motion for leave to file a supplemental amendment to his petition regarding the conduct of his original January 2009 preliminary hearing. A few days later, the circuit court, at the hearing on the State's motion to dismiss, granted defendant leave to file his amendment. After considering the parties' arguments, the court granted the State's motion to dismiss. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Defendant claims the circuit court erred in dismissing his postconviction petition at the second stage of the proceedings when he had made a substantial showing of a constitutional violation that both his trial counsel and his appellate counsel rendered ineffective assistance of counsel. In particular, defendant argued in his petition that he was provided ineffective assistance of trial counsel at the postplea stage for his failure to file a sufficient certificate pursuant to Rule 604(d) and ineffective assistance of appellate counsel for failing to raise that issue on direct appeal. This court considers *de novo* the sufficiency of the allegations of a postconviction petition. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

¶ 11 To be entitled to an evidentiary hearing, defendant's petition must make a substantial showing of a violation of a constitutional right supported by the record or accompanying affidavits. *Coleman*, 183 Ill. 2d at 381. Defendant supported his petition with his own affidavit.

¶ 12 Ineffective-assistance-of-counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Reversal under *Strickland* requires defendant to prove that (1) the conduct of trial counsel fell below an objective standard of reasonableness (*Strickland*, 466 U.S. at 687-88) and (2) the deficient performance prejudiced defendant such that

a "reasonable probability" exists that the result would have been different but for the deficient performance (*Strickland*, 466 U.S. at 694). If it is easier to dispose of a claim for lack of sufficient prejudice accruing to defendant, that course should be taken. *Strickland*, 466 U.S. at 697; *Coleman*, 183 Ill. 2d at 397-98.

¶ 13 Claims of ineffective assistance of appellate counsel are judged under the same standards. See *People v. Salazar*, 162 Ill. 2d 513, 521 (1994). To establish ineffective assistance of appellate counsel, defendant must demonstrate that (1) the failure to raise an issue was objectively unreasonable, and (2) but for the failure to raise the issue, the trial court's ruling would have been reversed. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 14 In this case, defendant's trial counsel filed a Rule 604(d) certificate. Under Rule 604(d), the attorney representing the defendant at the postplea motion stage is required to file: "a certificate stating that the attorney has consulted with the defendant either by mail or in person to ascertain defendant's contentions of error in the sentence or the entry of the plea of guilty, has examined the trial court file and report of proceedings of the plea of guilty, and has made any amendments to the motion necessary for adequate presentation of any defects in those proceedings." Ill. S. Ct. R. 604(d) (eff. July 1, 2006). An attorney's failure to strictly comply with the Rule 604(d) certificate requirements is a cognizable claim in postconviction proceedings. *People v. Wilk*, 124 Ill. 2d 93, 107 (1988).

¶ 15 Here, the certificate of trial counsel Don B. Pioletti, Jr., filed April 16, 2009, stated he "consulted with defendant, either by mail or in person, to ascertain the defendant's contentions of error in the sentence or the entry of the plea of guilty. He has examined the trial court file and report of the proceedings of the plea of guilty, and has made any amendments to the motion

necessary for adequate presentation of any defects in those proceedings." Defendant alleges counsel never consulted with him by mail or in person. He attached to his petition documentation tending to prove that fact, including a letter from the warden at the facility where he was housed to support his allegation.

¶ 16 Defendant had filed a *pro se* motion to reconsider his sentence on the date he was sentenced, on March 23, 2009. His counsel filed his Rule 604(d) certificate on April 16, 2009. The hearing on the motion was conducted on April 27, 2009. Defendant claimed his counsel did not consult with him between March 23, 2009, and April 27, 2009. In addition to the other documents supporting his claim, defendant attached to his postconviction petition a response from trial counsel (a response to an Attorney-Registration-and-Disciplinary-Commission complaint) that stated: "It is true that I was never able to contact [defendant]." However, counsel stated they did speak at the sentencing hearing. Defendant denies they spoke. This disputed issue of whether counsel consulted with defendant and thus complied with the requirements of Rule 604(d) should be resolved at an evidentiary hearing. Because strict compliance with Rule 604(d) is mandatory, counsel's noncompliance may be grounds for relief requested by defendant. Without an evidentiary hearing, the circuit court cannot make that determination.

¶ 17 As the supreme court in *Wilk* stated:

"Under the circumstances such as those involved in these cases in a post-conviction petition, the defendant *pro se* needs only to allege a violation of his sixth amendment right to effective assistance of counsel, due to the attorney's failure to preserve appeal rights, and allege whatever grounds he or she would have had to withdraw his or

her plea of guilty had a proper motion to withdraw been filed by defendant's counsel prior to the filing of a notice of appeal. At the hearing on the post-conviction petition, the two-pronged test laid down in *Strickland v. Washington* will apply to determine if in fact the defendant has been deprived of effective assistance of counsel.

The first prong, whether the attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, will require a minimal factual basis. The questions will be: Did the defendant communicate a desire to appeal? Was counsel appointed? Did counsel fail to follow Rule 604(d)? The second prong, whether there is a reasonable probability that, 'but for counsel's unprofessional errors, the result of the proceeding would have been different,' will need to show the merits of defendant's grounds to withdraw the plea." *Wilk*, 124 Ill. 2d at 107-08 (quoting *Strickland*, 466 U.S. at 694).

¶ 18 As a reviewing court, it is not our duty to resolve the factual disputes. Our duty is only to determine whether defendant, with the allegations as set forth in his petition and the supporting affidavits and the record, has made a substantial showing of a constitutional violation to warrant a third-stage evidentiary hearing in this case. *Coleman*, 183 Ill. 2d at 382. Here, defendant's allegations are specific, factual, and supported by documents in the record. See *Coleman*, 183 Ill. 2d at 381-82.

¶ 19 In *People v. Munetsi*, 283 Ill. App. 3d 326, 332-33 (1996), *overruled on other*

grounds in People v. Fitzgibbon, 184 Ill. 2d 320, 326 (1998), this court determined that the issue of the adequacy of a Rule 604(d) certificate could not be waived by defendant because strict compliance with the rule was required. Because of this importance and based on the allegations in defendant's petition, we reverse the circuit court's dismissal and remand for further proceedings on defendant's claim of ineffective assistance of trial counsel as related to counsel's failure to strictly comply with the requirements of Rule 604(d) and any issues necessarily following from the alleged failure.

¶ 20 As for defendant's allegations against appellate counsel, he claims appellate counsel failed to raise the issue of trial counsel's noncompliance with Rule 604(d) on direct appeal. Defendant alleges the transcripts were not available at the time counsel filed his Rule 604(d) certificate. The record reveals the transcripts of the guilty-plea and sentencing hearings were certified on May 13, 2009, while trial counsel's Rule 604(d) certificate was filed on April 16, 2009. The issue of whether counsel actually reviewed the transcripts prior to filing his certificate needs to be litigated in a third-stage evidentiary hearing. The date a court reporter certifies a transcript is not necessarily the date the court reporter prepares a transcript. See *People v. Little*, 2011 IL App (4th) 090787, ¶ 18. Thus, defendant is required to prove his allegation that trial counsel had failed to strictly comply with Rule 604(d), by not reviewing the transcripts, as he represented in his certificate, since they had not yet been prepared. See *People v. Turner*, 403 Ill. App. 3d 753, 756-57 (2010) (because the record suggests counsel had not read the report of proceedings before filing a motion to reconsider, defendant was entitled to remand for new postplea proceedings and counsel's strict compliance with Rule 604(d)). With these allegations, defendant has made a substantial showing that appellate counsel was ineffective for failing to raise on direct appeal trial counsel's failure to strictly comply with Rule 604(d), sufficient to survive second-stage dismissal. We reverse the circuit

court's order dismissing defendant's amended postconviction petition and remand for further proceedings.

¶ 21

III. CONCLUSION

¶ 22 For the foregoing reasons, we reverse the circuit court's order dismissing defendant's postconviction claims regarding the ineffective assistance of trial and appellate counsel. We remand for further proceedings consistent with our decision.

¶ 23 Reversed and remanded.

¶ 24 JUSTICE TURNER, dissenting.

¶ 25 I respectfully dissent and would affirm the trial court's dismissal of defendant's *pro se* postconviction petition at the second-stage of the proceedings.

¶ 26 Regarding ineffective assistance of trial counsel, I agree our supreme court has emphasized strict compliance with Rule 604(d). *Supra* ¶ 15. However, this case is now at the second-stage of the postconviction proceedings. In *Wilk*, 124 Ill. 2d 93, 529 N.E.2d 218, our supreme court addressed ineffective assistance of counsel in the context of counsel's failure to comply with Rule 604(d). The supreme court held that, to meet the prejudice prong of the *Strickland* test, the defendant "will need to show the merits of [his or her] grounds to withdraw the plea." *Wilk*, 124 Ill. 2d at 108, 529 N.E.2d at 223-24. Later, in *People v. Edwards*, 197 Ill. 2d 239, 257-58, 757 N.E.2d 442, 452-53 (2001), the supreme court reversed a first-stage dismissal of a postconviction petition, which had alleged trial counsel refused to perfect an appeal, and expressly limited its holding to a first-stage dismissal. In limiting its holding, the supreme court stated, in pertinent part, the following:

"To merit an evidentiary hearing on his claim that he told his trial counsel to file a motion to withdraw his guilty plea and that counsel was constitutionally ineffective for failing to do so, defendant will have to make a substantial showing to that effect. [Citation.] Such a showing will necessarily entail some explanation of the grounds that could have been presented in the motion to withdraw the plea."

Edwards, 197 Ill. 2d at 257-58, 757 N.E.2d at 453.

Thus, even with the complete lack of postplea assistance of counsel in *Edwards*, the supreme court

noted its refusal to presume prejudice at the second-stage of the proceedings. In this case, the allegations against defense counsel are less egregious as counsel provided some assistance. Accordingly, at the second-stage of the proceedings, defendant had to set forth some explanation of the grounds that trial counsel should have included in a postplea motion to make a substantial showing of the prejudice prong of the *Strickland* test.

¶ 27 Here, defendant failed to allege any grounds that his trial counsel should have raised in a postplea motion. I recognize that, like a first-stage defendant, defendant was *pro se* at the second stage of the proceedings in this case. However, defendant dismissed his appointed counsel after the trial court informed defendant of the ramifications of doing so. We generally hold *pro se* defendants to the same standards as an attorney. See *People v. Tatum*, 389 Ill. App. 3d 656, 670, 906 N.E.2d 695, 709 (2009). Thus, I find the trial court properly dismissed the ineffective-assistance-of-trial-counsel issue at the second stage of the proceedings.

¶ 28 As to ineffective assistance of appellate counsel, defendant failed to make a substantial showing of the performance prong. The contentions of error defendant alleges appellate counsel should have raised were based on materials outside the record on appeal, and thus appellate counsel could not have raised the issues during defendant's direct appeal. See *People v. Newbolds*, 364 Ill. App. 3d 672, 676, 847 N.E.2d 614, 618 (2006) (noting that, on direct appeal, a reviewing court can only consider matters that were part of the trial record). The only potential exception is defendant's argument related to counsel's failure to read the transcripts of the proceedings based on the transcripts' certification dates since those dates were in the record on appeal. In *Turner*, 403 Ill. App. 3d at 756, 936 N.E.2d at 703, this court declared the record suggested defense counsel did not read the report of proceedings because the court reporter did not certify the transcript of the

proceedings until a date after the filing of the Rule 604(d) certificate. However, we have since stated the date the court reporter certifies the transcript has nothing to do with the date the transcript was prepared and thus does not undermine trial counsel's Rule 604(d) certificate. *Little*, 2011 IL App (4th) 090787, ¶¶ 16-18, 957 N.E.2d 102. While the *Little* court stated it was distinguishing *Turner*, it clearly disagreed with *Turner* as to its statement a certification date later than the date of the Rule 604(d) certificate suggests counsel failed to read the transcript. Since this court no longer considers the date of certification of the transcripts as evidence of trial counsel's failure to read the transcripts, the appellate counsel in this case had no evidence in the record upon which to argue trial counsel failed to read the record. Thus, appellate counsel also could not have raised counsel's failure to read the transcripts on appeal. Accordingly, the trial court properly dismissed defendant's ineffective-assistance-of-appellate-counsel claim.