

2014 IL App (1st) 121817-U
Rule 23 Order filed December 5, 2014
Modified Upon Denial of Rehearing March 20, 2015

FIFTH DIVISION

No. 1-12-1817 and 1-13-2818 (Cons.)

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).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
)	Cook County
Respondent-Appellee,)	
)	
v.)	No. 04 CR 14421
)	
WILLIE MENZIE,)	
)	Honorable
Petitioner-Appellant.)	Michele M. Simmons,
)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

ORDER

- ¶ 1 *Held:* Affirming the judgment of the circuit court where postconviction counsel performed the duties required under Rule 651(c) and defendant did not make an unequivocal request to proceed *pro se*.
- ¶ 2 Defendant Willie Menzie appeals from the second-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) as well as from the denial of his motion for leave to file a successive postconviction petition. On

appeal, defendant contends that: (1) that his postconviction counsel failed to provide him reasonable assistance generally and as required by Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984); and (2) that the circuit court erred by not investigating his claim that postconviction counsel was in violation of Rule 651(c) and not allowing him to proceed on his postconviction petition *pro se*. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first degree murder for the stabbing death of Willie Slater and sentenced to 23 years in prison. We affirmed his conviction. *People v. Menzie*, No. 1-07-3412 (2009) (unpublished order under Supreme Court Rule 23). The following facts are taken from our order on defendant's direct appeal. We present the facts only to the extent necessary to understand the present appeal.

¶ 5

Trial

¶ 6 Three occurrence witnesses testified at trial: Marlene Mayfield, Aaron Menzie, and defendant. Marlene Mayfield testified she was visiting defendant at his residence in Chicago Heights on May 19, 2004. Around midnight, she was sitting on the front porch with defendant and his nephew, Aaron Menzie. Marlene testified she thought defendant seemed upset and he informed her he was "mad" and that he could "hurt somebody." A short while later, Marlene observed Willie Slater, an individual she knew as "Neal" or "Slay Rock" and had known since the seventh grade, walking down the street toward defendant's house.

¶ 7 As Slater approached the porch area where defendant, Marlene, and Aaron were sitting, defendant walked down the porch steps toward him. When defendant reached Slater, he stabbed him one time. Slater then crossed the street and ran toward the liquor store on the corner. Defendant went inside his house. Marlene went into defendant's house and used the house

telephone to call the police. Marlene then walked with Aaron to the liquor store where she believed Slater was headed. Once officers arrived, Marlene showed them where the family kept their knives in the kitchen. The police found a blood-tipped knife in one of the kitchen drawers.

¶ 8 Aaron Menzie, defendant's nephew, testified that on the day of the stabbing he was living at his grandmother's house with his mother, three siblings, and defendant. Aaron recalled that when he arrived home that evening around 11 p.m., defendant was approaching the house. Aaron checked on everyone inside and joined Marlene and defendant on the porch. Aaron testified that he observed defendant had a knife and he was concerned because the police had been cruising up and down the street. Aaron cautioned defendant to put the knife away. Defendant did not respond.

¶ 9 Aaron then noticed Slater, whom he knew from the neighborhood as "Slay Rock," walking toward them from the direction of the liquor store, which was located about five buildings down. As Slater walked toward the gates of defendant's house, defendant walked down the porch steps and out the gate. Aaron testified defendant met up with Slater and stabbed him. Aaron did not hear Slater say anything to defendant before the stabbing occurred.

¶ 10 After the stabbing, defendant turned and walked back into the house. Aaron followed Slater down the street to the liquor store, while calling 911 on his cellular telephone. When the police arrived at the house, Aaron assisted their search for defendant by pointing to the back of the house. The police found defendant hiding in Aaron's bedroom.

¶ 11 Defendant testified that on May 19, 2004, he had been drinking and smoking crack. He also claimed that he smoked crack with Marlene that day. In Marlene's testimony, she claimed not to have smoked crack that day because she was eight months pregnant. Defendant testified that around 3 p.m., he helped his seven-year-old nephew fix his bicycle. In the course of helping

fix the bicycle, defendant took two knives from the kitchen to cut a patch for the inner tube of his nephew's bicycle tire.

¶ 12 Defendant testified he knew Slater as Neal and had known him for a couple of months at the time of the stabbing. Defendant claimed they were not friends. Defendant testified Slater had been selling drugs in front of his house that day and because defendant's mother did not want him there, defendant asked him to leave. Defendant claimed Slater was upset by his request, but left. Defendant testified he also observed Slater selling drugs in front of the liquor store, known to be a place where members of the Vice Lords gang sold drugs. Slater was a member of the Vice Lords gang.

¶ 13 Defendant testified that later in the afternoon that day he smoked crack with Slater at the side of his house. Defendant next observed Slater as he was leaving the liquor store around sundown. Slater and his companion stopped defendant and asked for change and beer. When defendant said no, Slater and his companion became upset. Defendant claimed Slater threatened him as Slater's companion urged him on. Thereafter, defendant walked away.

¶ 14 Defendant then went home, sat on the porch and consumed beer. He claimed he had consumed seven 40 ounce beers that day. An hour or two later, defendant walked back to the liquor store for more beer. After buying the beer, defendant went to the side of the liquor store to have a beer. It was then that defendant observed Slater walk back to the liquor store and look in the weeds by the dumpster for something. Slater walked up to defendant and asked him where his "pack" was, which defendant understood to mean crack cocaine. Defendant informed Slater he did not know anything about his pack, but claimed Slater did not believe him and hit him on his left side. Defendant testified Slater threatened him that if Slater did not find what he was looking for "something is going to happen to you." Defendant testified he thought Slater was

going to beat him up or kill him. On cross-examination, defendant admitted he did not see Slater with a knife or gun on him.

¶ 15 Defendant testified he returned home and sat on his porch. Marlene and Aaron joined him. He informed them that he was about to be jumped. Five minutes later, Slater came walking down the street very quickly. Defendant testified this made him nervous and that he believed Slater was going to beat him up or kill him.

¶ 16 Defendant also testified he left the porch and approached Slater, asking him why he was "messaging" with him. Defendant testified Slater replied "F*** you" and "started threatening [him] and said something is going to happen to you." Defendant demonstrated for the jury how Slater raised his hands. Defendant admitted that he then reached into his pocket, took out the knife and stabbed Slater. Slater ran across the street toward the liquor store and defendant went inside his house and told his mother what had happened. Defendant admitted he put the bloody knife in a kitchen drawer, threw his bloody shirt in the garbage and hid in Aaron's bedroom from the police because he was scared. Defendant was arrested at his home.

¶ 17 After being advised of his *Miranda* rights, defendant consented to a videotaped interview in which he admitted stabbing Slater. At trial, defendant's videotaped statement was published to the jury and a transcript of the statement was admitted into evidence.

¶ 18 At the close of evidence, the jury was instructed and retired to deliberate. During deliberations, the jury sent out four different notes. An hour into deliberations, the jury sent out a note asking the court why it had not read all of the instructions. After investigating the issue, the court realized it had sent the jury to deliberate with the wrong instructions. The court re-instructed the jury and told the jurors to begin deliberating again. About three hours later, the jury sent out two notes. The first note stated, "is there a way we can clarify mitigating

circumstances." The second note asked for a copy of the defendant's testimony, informing the court, "We are kind of stuck." The court instructed the jury they had all the information they needed. Two hours later, the jury sent out its final note indicating they had "hit an absolute brick wall. We are eleven to one and cannot come to a conclusion." The court instructed the jury to continue deliberating. An hour later, the jury reached a verdict, finding defendant guilty of first degree murder.

¶ 19 Defendant filed a motion for a new trial in which he argued the prosecution improperly failed to disclose that Aaron Menzie had a pending misdemeanor theft charge at the time he testified. At the hearing on the motion, defense counsel claimed he only became aware of Aaron's theft charge after Aaron testified and that had he known about the charge, he would have acted differently during the defendant's trial. On November 1, 2007, four days before defendant's trial commenced, Aaron was arrested in Glenwood on a misdemeanor theft charge. The trial court denied defendant's request for a new trial. Defendant was then sentenced to 23 years in prison. Defendant then filed a notice of appeal.

¶ 20 Direct Appeal

¶ 21 On direct appeal, defendant asserted he was denied a fair trial when the ASA failed to inform the jury that Aaron Menzie had a misdemeanor theft charge pending at the time he testified against defendant. In the alternative, defendant contended he received ineffective assistance of trial counsel for counsel's failure to cross-examine Aaron regarding his pending theft charge. Defendant further contended that he was denied due process when the ASA, during rebuttal closing argument, provided the jury examples of second-degree murder that defendant argued misstated the law with regards to what constitutes an unreasonable belief in self-defense. We affirmed defendant's conviction. See *People v. Menzie*, No. 1-07-3412 (2009) (unpublished

order under Supreme Court Rule 23).

¶ 22 Postconviction Petition

¶ 23 On June 18, 2010, defendant mailed his notarized *pro se* postconviction petition to the clerk of the circuit court of Cook County and the State's Attorney's office. Thereafter, the petition was file stamped with a date of June 28, 2010. In the petition, defendant asserted his constitutional rights were violated because: (1) the trial judge denied the jury clarification on mitigating circumstances of the second degree murder instruction; (2) he received ineffective assistance of counsel as trial counsel failed to object to the judge's decision not to answer the jury's question regarding mitigating circumstances; (3) he received ineffective assistance of appellate counsel when appellate counsel failed to raise issues defendant requested he raise in the direct appeal; (4) the second degree instruction had the potential to confuse the jury regarding the mitigating circumstances; (5) the trial judge denied the jury a copy of defendant's trial testimony; and (6) he was denied effective assistance of counsel when trial counsel failed to call Dr. Ladow and Dr. Wrodell as witnesses on behalf of defendant.

¶ 24 Attached in support of his *pro se* postconviction petition was: (1) a letter from defendant's appellate counsel to defendant; (2) two pages of the trial record regarding the trial court's answers to the jury's second and third notes; (3) one page of the trial record in which the trial court discussed with defense counsel which experts would be testifying; (4) a letter from defendant to his appellate counsel inquiring about the circumstances surrounding the dismissal of Aaron's misdemeanor theft charge and requesting counsel raise as issues on appeal whether the State misstated the law in closing arguments and whether the trial court had a duty to clarify the law on mitigating circumstances for the jury upon receipt of its note.

¶ 25 Also included with his *pro se* postconviction petition were a motion for appointment of

counsel, his own notarized affidavit swearing to the facts he stated in the petition, and a motion to proceed "in forma pauperis."

¶ 26 On August 13, 2010, the public defender was appointed to represent defendant. The assistant public defender (APD) filed her appearance on November 19, 2010.

¶ 27 Thereafter, defendant forwarded a *pro se* "amended postconviction petition" to the circuit court judge.¹ Defendant asserted in the amended petition: (1) he was denied equal protection when the trial judge denied the jury's request for clarification on the mitigating circumstances; (2) the trial court denied his request for a mistrial; (3) the ASA misstated the law on second degree murder in closing arguments; (4) he was not found guilty beyond a reasonable doubt; (5) he did not learn until after the trial concluded that his nephew, Aaron Menzie, had a theft conviction, accordingly he did not get to impeach Aaron Menzie with his prior conviction; (6) that he was denied effective assistance of counsel because trial counsel did not object to the State's witnesses being present in the courtroom during testimony; (7) the trial court abused its discretion in denying his motion for a directed verdict; and (8) the State improperly commented on his credibility in opening statements.²

¶ 28 On February 4, 2011, the circuit court stated that defendant forwarded another postconviction petition to the court. Postconviction counsel acknowledged receipt of the petition and requested the matter be continued for status, as she had not yet received the trial transcript.

¶ 29 At a status hearing on July 8, 2011, both postconviction counsel and the circuit court

¹ The record does not indicate whether defendant mailed this amended petition to the clerk of the circuit court, the ASA, or postconviction counsel. No certificate of service of the amended petition is contained in the record on appeal. The amended petition is included in the supplemental record on appeal, but is not file stamped.

² The copy of the amended *pro se* postconviction petition does not contain a signature page or an affidavit from defendant. It only attaches four pages from the record of proceedings regarding whether the trial court would admit the victim's prior convictions into evidence.

acknowledged that defendant had filed his amended *pro se* postconviction petition on February 4, 2011. The matter was then continued for postconviction counsel to discuss the matter with defendant and file her Rule 651(c) certificate.

¶ 30 On October 28, 2011, postconviction counsel filed an Illinois Supreme Court Rule 651(c) certificate. It stated in relevant part:

"I *** certify in accordance with Illinois Supreme Court Rule 651(c) that:

1. I have consulted with the petitioner, Willie Menzie by mail and phone to ascertain his contentions of deprivations of constitutional rights;
2. I have obtained and read the report of proceedings at trial and sentencing in this case;
3. I have not prepared an Amended Petition for Post-Conviction Relief as the petitioner's previously filed *pro se* and amended *pro se* petitions for post-conviction relief adequately sets [sic] forth the petitioner's claims of deprivation of his constitutional rights."

The matter was continued for the State to file a motion to dismiss.

¶ 31 On March 23, 2012, the circuit court granted the State leave to file a motion to dismiss. The State argued in the motion: (1) defendant's allegations of ineffective assistance of trial counsel are without merit; (2) defendant's ineffective assistance of appellate counsel claim should fail where the underlying issues are without merit; and (3) defendant's claims of errors during trial are waived as they were not raised on direct appeal. The matter was continued to May 4, 2012, for postconviction counsel to file a response to the motion.

¶ 32 On April 27, 2012, defendant filed a *pro se* "motion for appointment of counsel other than a public defender." In the motion defendant asserted that on November 18, 2010, he forwarded postconviction counsel an amended *pro se* postconviction petition and asked that it be

filed. Defendant alleged that postconviction counsel informed him the trial court will not allow his "*pro se* amended petition to be amended." Defendant asserted he forwarded a second *pro se* amended postconviction petition to the circuit court judge, and did not know whether the judge "has accepted petitioner[s] second amended *pro se* petition."³ Defendant asserted postconviction counsel failed to comply with Rule 651(c) because "counsel has not amended petitioner's pro-se amended post-conviction petitions as required by Rule 651(c)." Defendant further asserted that postconviction counsel failed to provide him with a copy of the State's motion to dismiss. Lastly, defendant requested leave to file a third amended *pro se* postconviction petition.

¶ 33 In his third amended *pro se* postconviction petition, file stamped April 30, 2012, defendant argued the ASA misrepresented the law on second degree murder and the trial court abused its discretion in its response to jury's note regarding mitigating circumstances.

¶ 34 On May 4, 2012, the circuit court denied defendant's motion for appointment of counsel other than the public defender. The court specifically noted that defendant was seeking to have private counsel appointed. Also that day, postconviction counsel represented that she would not be filing a response to the State's motion to dismiss and requested a hearing date on the State's motion. The matter was then continued for hearing of the State's motion to dismiss to June 15, 2012.

¶ 35 On June 7, 2012, defendant filed a *pro se* response to the State's motion to dismiss. Defendant asserted:

"During petitioner's direct appeal petitioner raised a[n] ineffective assistance of trial counsel claim against the public defender's office. The same office that is

³ No "second amended *pro se* petition" is included in the record on appeal.

representing petitioner on his post-conviction petition which is a conflict of interest.

This office has the impropriety towards me and my case, and it is improper to appoint this office to represent me on my post-conviction petition.

Petitioner filed a motion for appointment of counsel other than a public defender and the motion was denied."

Defendant further stated he was informed by postconviction counsel that she would not be filing a response to the motion to dismiss, therefore he "has taken the initiative to prepare and file his *pro se* response to the motion." In the prayer for relief, defendant requested the court grant him a new trial.

¶ 36 On June 15, 2012, the day of the hearing on the State's motion to dismiss, the circuit court granted the State leave to file a "motion to dismiss *pro-se* pleading filed after representation of counsel." The State asserted in its motion that defendant had no right to file a *pro se* pleading once postconviction counsel has filed an appearance to represent defendant. At the hearing, the State clarified that the motion was directed towards defendant's third amended *pro se* postconviction petition filed April 30, 2012.

¶ 37 The circuit court then inquired as to whether postconviction counsel received defendant's third amended *pro se* postconviction petition. Postconviction counsel acknowledged that she did. The court asked whether postconviction counsel was going to adopt the third amended petition. Postconviction counsel declined to adopt it, as "he is basically saying the same thing that he did in his original post-conviction petition, just rewording it slightly, differently than the original petition, which I have reviewed." The circuit court granted the State's motion to strike defendant's third amended *pro se* postconviction petition. The circuit court also struck

defendant's *pro se* response to the State's motion to dismiss.

¶ 38 After hearing arguments from both counsels, the circuit court granted the motion and dismissed defendant's postconviction petition on the merits. The circuit court found defendant had not met his burden that he had been deprived of any constitutional violation. The circuit court noted, however, that the issue surrounding the jury note could have been raised on appeal, but was not.

Defendant requested leave to file a notice of appeal, which the circuit court granted. The notice of appeal was filed the same day.

¶ 39 Defendant's Motion for Leave to File a Successive Postconviction Petition

¶ 40 On October 16, 2012, defendant filed a *pro se* motion for leave to file a successive petition for postconviction relief. In the motion defendant alleged that had postconviction counsel filed his amended *pro se* petitions, he would have been able to assert the claims he was currently bringing. Defendant indicated that a "successive petition" was attached to the motion; however, no such petition was included in the record on appeal.

¶ 41 On February 8, 2013, the circuit court denied defendant's motion for leave to file a successive postconviction petition because he failed to meet the cause-and-prejudice test. The circuit court noted that defendant amended his original postconviction petition "numerous times" and that his postconviction counsel "represented him with regards to his numerous amended petitions."

¶ 42 Defendant filed a late notice of appeal on March 19, 2013; however, on September 16, 2013, we allowed him to file his late appeal. We consolidated defendant's appeals for review.

¶ 43 ANALYSIS

¶ 44 On appeal, defendant raises two main contentions: (1) postconviction counsel provided

him with an unreasonable level of assistance; and (2) that the circuit court erred by not investigating his claim that postconviction counsel was in violation of Rule 651(c) and not allowing him to proceed on his postconviction petition *pro se*. Defendant did not challenge the dismissal of his postconviction petition on the merits in his opening brief. In its response brief, however, the State discusses the merits of defendant's underlying claims, asserting that the merit of those claims is "crucial" to determining whether postconviction counsel acted reasonably. In reply, defendant addresses the merits of some of his claims, but only within the context of postconviction counsel's reasonableness. Accordingly, by focusing exclusively on the issues of reasonableness of postconviction counsel, we find defendant has forfeited for review the claims actually raised in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). We further note that defendant makes no arguments regarding the denial of his motion for leave to file a successive postconviction petition. Accordingly, he has forfeited the review of that motion as well. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 29. As defendant has forfeited the review of the merits of his claims, we will discuss only whether counsel provided the level of assistance to which defendant was entitled. Prior to addressing this issue, however, we first discuss the purpose and procedures of the Act.

¶ 45 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2010). "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. English*, 2013 IL 112890, ¶ 22. Postconviction proceedings are not a continuation of, or an appeal from, the original case. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Rather, a postconviction

proceeding is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial. *People v. Greer*, 212 Ill. 2d 192, 203 (2004).

¶ 46 In noncapital cases, the Act provides for three stages. At the first stage, the circuit court has 90 days to review the petition and may summarily dismiss it if the trial court finds that the petition is frivolous and patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). In the second stage of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. Once amendments, if any, are made to the postconviction petition, the State is then allowed to file a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2010). In the second stage of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. If such a showing is made, then the petition proceeds to the third stage where the circuit court conducts an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2010); *People v. Bocclair*, 202 Ill. 2d 89, 100 (2002).

¶ 47 Here, defendant's petition proceeded to the second stage. Our review of a circuit court's dismissal of a postconviction petition at the second stage without an evidentiary hearing is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 48 Postconviction Counsel's Performance

¶ 49 Defendant first contends postconviction counsel provided him with an unreasonable level of assistance under Rule 651(c). Separately, defendant argues his counsel failed to provide a reasonable level of assistance, independent of the requirements of Rule 651(c).

¶ 50 The Act provides that counsel may be appointed for the defendant at the second stage if the defendant is indigent. 725 ILCS 5/122-4 (West 2010); *People v. Lacy*, 407 Ill. App. 3d 442,

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455 (2011). The appointment of counsel at the second stage of postconviction proceedings is a statutory right. 725 ILCS 5/122-4 (West 2010); *People v. Gray*, 2013 IL App (1st) 101064, ¶ 22. A defendant has no constitutional right to assistance of counsel at a postconviction proceeding. *People v. Williams*, 186 Ill. 2d 55, 60 (1999). Because the source of the right to counsel in postconviction proceedings is statutory, postconviction petitioners are entitled only to the level of assistance provided by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). "The degree of skill and care that a lawyer must exercise in representing a post-conviction petitioner is not 'effective assistance of counsel' and is therefore, not governed by the familiar two-part test first enunciated in *Strickland v. Washington* [citation]." *People v. Rials*, 345 Ill. App. 3d 636, 641 (2003). The Act requires only a reasonable level of assistance by appointed counsel at postconviction proceedings. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 51 To that end, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires the performance of three duties by postconviction counsel: (1) consulting with defendant either by mail or in person to ascertain his constitutional claims; (2) examining the record of the trial court proceedings; and (3) making any amendments to the *pro se* petition necessary to adequately present defendant's claims. *Perkins*, 229 Ill. 2d at 42. "[T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *Id.* at 44. Postconviction counsel is required only to investigate and properly present the defendant's claims (*People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 16) and substantial compliance with the rule is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)). "[W]hen an attorney files a certificate under Rule 651(c), the attorney is officially representing to the court that the duties listed in the certificate have been fulfilled." *Perkins*, 229 Ill. 2d at 50.

¶ 52 Our review of an attorney's compliance with Rule 651(c) is *de novo*. *People v. Jones*,

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2011 IL App (1st) 092529, ¶ 19. When postconviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that counsel provided reasonable assistance and it is defendant's burden to overcome this presumption by demonstrating that counsel failed to substantially comply with the duties required by the rule. *Id.* ¶ 23. We note that in this case postconviction counsel filed a Rule 651(c) certificate thereby creating a presumption that defendant received the representation required by the rule at this stage of the proceedings. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 20.

¶ 53 *Counsel's Performance Pursuant to Rule 651(c)*

¶ 54 We first address defendant's contention that he was denied reasonable assistance of postconviction counsel where postconviction counsel failed to amend his petition as mandated by Rule 651(c). Specifically, defendant argues that postconviction counsel failed to amend in two ways: (1) by leaving four of his claims exposed to the procedural bar of waiver; and (2) by failing to include affidavits in support of his claims. Defendant does not contend that postconviction counsel failed to review the trial transcript or failed to consult with him, but instead only asserts that counsel failed to make necessary amendments to his petition. Accordingly, we will only consider whether postconviction counsel acted unreasonably under the third obligation of Rule 651(c).⁴

⁴ We note that defendant indicated in a footnote in his opening brief that "with respect to the unexamined merits of this issue, that—after the jury was deadlocked eleven to one, and received instruction off the record—one of the twelve jurors who ostensibly convicted Menzie repudiated the verdict during polling." Under Illinois Supreme Court Rule 341(a), the use of footnotes is discouraged. Ill. S. Ct. R. 341(a) (eff. Feb. 6, 2013). Additionally, substantive arguments may not be made in footnotes. *People ex rel. Illinois Dept. of Labor v. General Elec. Co.*, 347 Ill. App. 3d 72, 87 (2004). In further violation of our supreme court rules, defendant then asserted a brief argument in his reply regarding this issue. Ill. S. Ct. R. 341(h)(7) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Moreover, this issue could have been raised on direct appeal, but was not, thus, we find argument on this issue to be waived. *People v. Harris*, 206 Ill. 2d 1, 15 (2002).

¶ 55 Under Rule 651(c) there is no requirement that postconviction counsel must amend a defendant's *pro se* petition (*Rials*, 345 Ill. App. 3d at 641) but, rather, is only required to investigate and present the defendant's claims (*Pendleton*, 223 Ill. 2d at 475). Rule 651(c), however, requires that postconviction counsel make any amendments to the *pro se* petition necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Turner*, 187 Ill. 2d at 412. To that end, postconviction counsel must shape the defendant's *pro se* claims into "appropriate legal form." *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993). Review of the reasonableness of postconviction counsel's effort, however, is foreclosed if the presumption that Rule 651(c) was satisfied exists. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010).

¶ 56 To support his argument that postconviction counsel provided unreasonable assistance, defendant relies heavily on the cases of *Turner* and *People v. Milam*, 2012 IL App (1st) 100832. In each case, the reviewing court determined that postconviction counsel did not fulfill the duties required under Rule 651(c) when the postconviction petition was not amended to overcome the procedural bar of waiver. *Turner*, 187 Ill. 2d at 413; *Milam*, 2012 IL App (1st) 100832, ¶ 36. Both courts, however, expressly noted that the failure of postconviction counsel to amend the claims of ineffective assistance of trial counsel to overcome the procedural bar of waiver prevented the circuit court from considering the defendant's petition on the merits and directly contributed to the dismissal of the petition without an evidentiary hearing thus warranting reversal. *Turner*, 187 Ill. 2d at 413; *Milam*, 2012 IL App (1st) 100832, ¶ 36. Here, defendant's claims were not dismissed based on waiver as the circuit court dismissed defendant's petition on the merits. Accordingly, we find the facts of *Turner* and *Milam* distinguishable from those of the case at bar.

¶ 57 Defendant also relies on the cases of *Schlosser* and *Kirk* to support his argument. In those cases, both reviewing courts held that postconviction counsel failed to comply with the duties of Rule 651(c) where counsel failed to amend the defendant's *pro se* petition to include an allegation of ineffective assistance of appellate counsel. *Schlosser*, 2012 IL App (1st) 092523, ¶ 10; *Kirk*, 2012 IL App (1st) 101606, ¶ 36. Importantly, in each case, the defendant's appointed counsel argued at the hearing on the State's motion to dismiss that appellate counsel was ineffective, but failed to amend the defendant's *pro se* postconviction petition to include this claim. *Schlosser*, 2012 IL App (1st) 092523, ¶ 25; *Kirk*, 2012 IL App (1st) 101606, ¶ 27. As a result, the circuit court dismissed the defendant's petition based on forfeiture (*Schlosser*, 2012 IL App (1st) 092523, ¶ 25) or did not even consider the claim in its written order (*Kirk*, 2012 IL App (1st) 101606, ¶ 14). As pointed out in *Schlosser*, "postconviction counsel's admission to the trial court *** that he failed to amend the *pro se* petition to include defendant's main claim of ineffective assistance of appellate counsel clearly demonstrate[d] that counsel did not comply with the duties imposed by Rule 651(c)." *Schlosser*, 2012 IL App (1st) 092523, ¶ 33. In the present case, defendant does not argue that postconviction counsel made arguments before the circuit court regarding appellate counsel's ineffectiveness that were not contained in his postconviction petitions, nor does defendant point to a place in the record where postconviction counsel made such an argument. Thus, we find defendant's reliance on *Schlosser* and *Kirk* to be misplaced.

¶ 58 Upon reviewing the record, we cannot say that defendant has rebutted the presumption that postconviction counsel performed her duty to amend his postconviction petitions as set forth in Rule 651(c). Defendant has presented us with no evidence that is apparent in the record that counsel failed to amend his petitions. Moreover, defendant has failed to present any authority

that requires a reversal where the circuit court did not dismiss the claim based on a procedural error, but instead dismissed the claim on the merits. Accordingly, we decline to find that postconviction counsel failed to perform her duties as required by Rule 651(c).

¶ 59 Defendant next argues that postconviction counsel failed to abide by Rule 651(c) because she did not obtain the affidavits necessary to support defendant's claims. Specifically, defendant asserts that postconviction counsel did not obtain an affidavit to support his claim that trial counsel was ineffective for failing to call Dr. Ladlow and Dr. Wordell regarding the evidence of trauma found during an examination of defendant. Defendant further asserts that postconviction counsel acted unreasonably in failing to obtain an affidavit that would support his claim that trial counsel requested a mistrial when the jury was deadlocked.

¶ 60 Rule 651(c) does not impose upon postconviction counsel a legal duty to "actively search for sources outside the record that might support general claims raised in a post-conviction petition." *Johnson*, 154 Ill. 2d at 247. "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." *Id.* at 241. Only in cases where the record has rebutted that presumption has the reviewing court found that postconviction counsel failed to provide a reasonable level of assistance. See *id.* at 243; *People v. Waldrop*, 353 Ill. App. 3d 244, 250-51 (2004). In *Johnson*, our supreme court held that postconviction counsel failed to comply with Rule 651(c) as the affidavit he filed established that he made no effort to obtain affidavits from the witness identified in the defendant's *pro se* petition. *Johnson*, 154 Ill. 2d at 241-43. Similarly, in *Waldrop*, the reviewing court held that counsel provided unreasonable assistance and failed to comply with the duties set forth in Rule 651(c) where the

record established that counsel mistakenly believed that he had no duty to obtain an affidavit from a witness identified in the defendant's *pro se* petition. *Waldrop*, 353 Ill. App. 3d at 250.

¶ 61 Here, defendant provides us with unsupported speculation that the doctors or trial counsel would have been able to supply affidavits helpful to defendant. Moreover, defendant fails to identify any place in the record that suggests postconviction counsel failed to make a concerted effort to obtain such affidavits. Nothing in the record on appeal contradicts the Rule 651(c) certificate filed by counsel in which she asserted that there were no amendments necessary for adequate presentation of the defendant's claims. Accordingly, we must give effect to postconviction counsel's official representation that she complied with Rule 651(c). See *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009).

¶ 62 In sum, we conclude defendant has failed to rebut the presumption that postconviction counsel fulfilled the duties required by Rule 651(c).

¶ 63 *Counsel's Performance Independent of Rule 651(c)*

¶ 64 Defendant also contends that postconviction counsel provided unreasonable assistance independent of Rule 651(c). Specifically, defendant asserts that counsel was unreasonable for failing to file and argue his first amended *pro se* postconviction petition. Defendant also contends that postconviction counsel was unreasonable because one year and eight months passed before she filed her Rule 651(c) certificate. Defendant maintains that if postconviction counsel's failure to act was rooted in her belief that all of defendant's claims were meritless, then she should have moved to withdraw pursuant to *Greer*.

¶ 65 In the absence of a specific claim that postconviction counsel violated any of the three duties mandated by Rule 651(c), it is questionable whether the defendant's contentions are subject to review. *Mendoza*, 402 Ill. App. 3d at 814-816 (finding the defendant's general

challenge to the reasonableness of postconviction counsel's efforts outside of Rule 651(c) was "not cognizable as a freestanding-claim in post-conviction proceedings"). As previously discussed, the right to appointment of counsel at the second stage of postconviction proceedings is a statutory right, not a constitutional right. 725 ILCS 5/122-4 (West 2010); *Williams*, 186 Ill. 2d at 60. Instead, a defendant is only entitled to a reasonable level of assistance from appointed counsel. *Perkins*, 229 Ill. 2d at 42. To assure a reasonable level of assistance has been provided, Rule 651(c) requires counsel to perform three duties. *Id.* Those duties do not include a duty to file and argue a subsequent *pro se* postconviction petition submitted to the court while the defendant was represented by counsel. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Nor do those duties refer to a time limit on filing the Rule 651(c) certificate. *Id.* In absence of a specific claim that postconviction counsel violated any of the three duties mandated by Rule 651(c), defendant's contentions are not subject to review. See *Mendoza*, 402 Ill. App. 3d at 814-816.

¶ 66 Even if defendant's contentions could be construed as falling within the bounds of Rule 651(c), defendant fails to persuade us that a remand for compliance with Rule 651(c) is warranted. Here, the circuit court acknowledged that defendant filed the amended *pro se* postconviction petition on February 4, 2011. Moreover, postconviction counsel indicated in her Rule 651(c) certificate that defendant's amended *pro se* petition was filed. The record accordingly refutes defendant's arguments.

¶ 67 Defendant also asserts that postconviction counsel provided him with unreasonable assistance because she failed to address the arguments contained in his amended *pro se* postconviction petition during the hearing on the State's motion to dismiss. We note that defendant has failed to cite any authority to support this proposition. Illinois Supreme Court Rule 341(h)(7) requires that an appellant's brief "contain the contentions of the appellant and the

reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). "[I]t is well settled that *** bare contentions that fail to cite any authority do not merit consideration on appeal." (Internal quotation marks omitted.) *People v. Fredericks*, 2014 IL App (1st) 122122, ¶ 64. Defendant has failed to raise this issue adequately and, therefore, we decline to address it in this appeal.

¶ 68 Defendant's contention that postconviction counsel should have withdrawn under *Greer* is also unsupported by the record. In *Greer*, our supreme court held that postconviction counsel is allowed to withdraw where counsel believes the defendant's petition is frivolous and patently without merit. *Greer*, 212 Ill. 2d at 209. Despite making the argument that postconviction counsel should have withdrawn, defendant admits in his brief that "[s]ince it was the circuit court that advanced Menzie's petition to the second-stage of post-conviction proceedings, and since counsel did not move to withdraw, but rather adopted Menzie's claims, it stands to reason that counsel did not find them meritless." Accordingly, we find defendant has conceded this argument.

¶ 69 Based on the aforementioned reasons, we conclude that postconviction counsel did not provide defendant with unreasonable assistance. Defendant has failed to rebut the presumption that postconviction counsel abided by the duties required under Rule 651(c).

¶ 70 Proceed *Pro Se*

¶ 71 Defendant next asserts that the circuit court erred in denying his request to represent himself. Defendant specifically argues, "[b]ecause Menzie had a right to represent himself in post-conviction proceedings, the trial court had an obligation, at the very least, to investigate Menzie's claims that post-conviction counsel was neglecting her duty, and admonish Menzie that he could proceed *pro se* if he did not want to accept the help of the public defender."

¶ 72 Defendant initially maintains that whether a postconviction petitioner has a right to represent himself is a matter of first impression in Illinois. In response, the State disagrees that this is a matter of first impression because in *Gray* this court determined that the Act itself establishes a right for a postconviction petitioner to represent himself. We agree that *Gray* held that a defendant has a right to proceed *pro se* under the Act (*Gray*, 2013 IL App (1st) 101064, ¶ 22) and defendant concedes this point in his reply brief.

¶ 73 The right to self-representation, however, is not absolute. In order to proceed *pro se* after requesting counsel be appointed under the Act, a defendant must knowingly and intelligently relinquish his right to counsel. *Id.* ¶ 23 (citing *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011)). "Waiver of counsel must be clear and unequivocal, not ambiguous, so that a defendant waives his right to self-representation unless he articulately and unmistakably demands to proceed *pro se*." *Id.* The court must determine whether the defendant truly desires to represent himself and has definitively invoked his right of self-representation in order for the statement to be clear and unequivocal. *Id.* The court must also indulge every reasonable presumption against waiver of the right to counsel. *Id.* The determination of whether there has been an intelligent waiver of the right to counsel depends upon the particular facts and circumstances of the case, including the background, experience, and conduct of the defendant. *Id.* We review the trial court's determination for abuse of discretion. *Id.*

¶ 74 Here, defendant asserts he expressed a clear intention to represent himself because he continued to file documents on his own behalf after postconviction counsel filed her Rule 651(c) certification. Defendant, however, cites no authority in support of this position in contravention of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). The State responds that defendant did not express an unequivocal desire to represent himself, as he did not file a motion to proceed

pro se nor did he indicate in any of his *pro se* filings that he wished to represent himself.

¶ 75 A review of the record demonstrates defendant did not make an unequivocal request to represent himself. Defendant's initial postconviction petition requested appointment of counsel. The circuit court granted defendant's request and appointed postconviction counsel. One month after the State filed its motion to dismiss defendant filed his *pro se* "motion for appointment of counsel other than a public defender." The complete motion is not included in the record on appeal. We note that the responsibility for preserving a sufficiently complete record of the proceedings before the trial court rests with the defendant, as the appellant. *People v. Fernandez*, 344 Ill. App. 3d 152, 160 (2003). Where the record on appeal is incomplete, any doubts arising from that incompleteness will be construed against the defendant. *Id.* The portion of the motion that is included in the record does not indicate defendant desired to represent himself. In fact, the title of the motion clearly indicated that defendant wished to remain represented by counsel. When ruling on defendant's *pro se* "motion for appointment of counsel other than the public defender," the circuit court noted that defendant sought the appointment of private counsel. The circuit court made no statement on the record that defendant indicated a desired to represent himself. No other documents included in the record establish that defendant had any desire to proceed *pro se*. Moreover, defendant's *pro se* filings do not, as defendant suggests, set forth a desire to proceed *pro se*, but instead represent an intent to bring to the attention of the court additional arguments in support of his postconviction petition. Accordingly, we find defendant did not make a clear and unequivocal statement that he desired to represent himself and, therefore, did not definitively invoke his right of self-representation. See *Baez*, 241 Ill. 2d at 116; *c.f. Gray*, 2013 IL App (1st) 101064, ¶ 15, 17, 24 (finding defendant unequivocally requested to proceed *pro se* where postconviction counsel informed the court of

defendant's desire and defendant also made a written request).

¶ 76 Defendant further asserts that the circuit court had a duty to investigate his claims that postconviction counsel had violated her statutory duties in his case. In support of this contention defendant relies upon *People v. Krankel*, 102 Ill. 2d 181 (1984) and *People v. Moore*, 207 Ill. 2d 68 (2003). Neither case, however, is applicable to the case at bar. In each case, the defendant raised a claim of ineffective assistance of trial counsel before the trial court, which was effectively denied. *Krankel*, 102 Ill. 2d at 187; *Moore*, 207 Ill. 2d at 74. Neither case considered a claim of unreasonable assistance of postconviction counsel. Because defendant cites no relevant authority to support this contention, we find this argument to be forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). We note, however, it is well established that there is no constitutional right to effective assistance of counsel in postconviction proceedings and "Rule 651(c) does not require that defendants receive the same level of assistance of counsel that the Constitution guarantees to defendants at trial ***." *Williams*, 186 Ill. 2d at 60. Accordingly, we conclude defendant has failed to establish that he made an unequivocal request to represent himself and, therefore, the circuit court did not err.

¶ 77 CONCLUSION

¶ 78 For the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 79 Affirmed.