

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.
Plaintiff-Appellee,)	
)	
v.)	No. 97 CR 12134
)	
NATHAN ANTOINE,)	
)	The Honorable
Defendant-Appellant.)	Colleen Ann Hyland,
)	Judge Presiding.
)	

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's *pro se* postconviction petition was properly dismissed where he failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings and there was no support for his contention that postconviction counsel violated Illinois Supreme Court Rule 651(c).

¶ 2 Defendant, Nathan Antoine, appeals from the trial court's order dismissing his *pro se* petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122 *et seq.* (West 2002)) (Act) following second stage review. Following a jury trial, defendant was found guilty of two

counts of aggravated criminal sexual assault and sentenced to consecutive 60-year terms of imprisonment. Defendant contends the trial court erred in dismissing his postconviction petition where postconviction counsel failed to amend his petition with a claim of ineffective assistance of appellate counsel, thereby causing the forfeiture of several claims. Based on the following, we affirm.

¶ 3

BACKGROUND

¶ 4

On direct appeal, our opinion detailed the following relevant facts:

"At trial the jury heard the following evidence.

On March 15, 1997 around midnight, Rose B. stopped at a Jewel on her way home from work. When she returned to her car, she noticed a dark car parked nearby with a man sitting in it. After placing her groceries in her car, she drove away.

While on the road, she realized she had a flat tire. She pulled over to check the tire and opened her trunk. A man she later identified as Antoine pulled alongside her car and offered assistance. A special lug wrench was needed to change her tire, which was not in her trunk. Antoine then offered her a ride back to the Jewel so she could call a friend; she accepted.

Antoine drove to an alley and stopped the car. He unzipped his pants, forced her head down, and said 'suck it or I'll cut you.' She begged Antoine not to force her and told him she was 72 years old. She then noticed she was cut over her right eye and was bleeding. She wiped the blood onto Antoine's pants. After [an] unsuccessful attempt at anal sex, Antoine again pushed Rose B.'s head into his lap and ordered her to perform oral sex on him. She did, and he quickly

ejaculated. Antoine then drove down the alley ordering her to keep her head down. After about 15 minutes, he stopped his car and told her to get out. He threatened to shoot her if she looked at him. He did not allow her to take her purse. After she got out of the car, Antoine drove away.

Rose B. went to a nearby home. The homeowner called the police, and Officer Brian Duffy responded to the call. The paramedics arrived and took her to the hospital.

She was treated with a sex assault kit. The treating nurse collected her pantyhose and took oral and rectal swabs.

While at the hospital, Rose B. told Duffy what happened. Her car was recovered, and the evidence technician David Winston searched for latent prints. He located fingerprints on various parts of the car. He photographed and lifted prints. He also found her flat tire had a puncture-hole on the side.

Officer Stanley McCadlow, an expert in latent print identification and comparisons, made a tentative, but not complete, identification that the latent impression belonged to Antoine. Detective William Villanova obtained an arrest warrant and search warrant for Antoine's home.

On March 19, 1997, police officers arrested Antoine. He was placed in a lineup. Rose B. viewed the lineup and immediately identified Antoine as the perpetrator.

Antoine's car was confiscated and taken to the police station. The front seats were removed and sent, along with the sex assault kit, to the Illinois State Police Crime Lab in Joliet. The pantyhose and oral swab tested positive for

semen. The front passenger seat of Antoine's car tested positive for the presence of blood. Blood samples were taken from Antoine and Rose B.

The semen stains from the oral swab could not be tested because of insufficient material. But the semen stains from Rose B.'s pantyhose were tested. The DNA profile from these stains matched Antoine's DNA profile. The blood stains taken from the seat of Antoine's car were tested and matched Rose B.'s blood.

Forensic Scientist Thomas Skinner compared nine suitable latent prints taken from Rose B.'s car. He determined all of the lifts were prints made by Antoine." *People v. Antoine*, 335 Ill. App. 3d 562, 565-66 (2002).

¶15 On direct appeal, defendant contended: (1) he was entitled to a new trial because the trial court did not transfer his recusal motion and motion for substitution of judge for cause to another judge for the ruling; (2) the trial court erred in refusing to hold a *Franks* hearing on the veracity of the search warrant affidavit; (3) the trial court erred in denying petitioner's motion for a continuance to secure the presence of a newly hired attorney; (4) the trial court did not properly consider his allegations of ineffective assistance of trial counsel prior to sentencing; and (5) sections 5-5-3.2(b)(1) and 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1), 5/5-8-4(a) (West 1996)) violated *Apprendi*. On November 13, 2002, this court affirmed defendant's conviction and sentence. *Antoine*, 335 Ill. App. 3d at 584-85.

¶16 On September 22, 2003, defendant filed his 1132-page *pro se* postconviction petition alleging: (1) the improper issuance and execution of a search warrant; (2) his arrest was illegal; (3) the police lineup and photo array were unnecessarily suggestive; (4) a juror was influenced by prejudicial media attention; (5) the State improperly broadened the indictment prior to trial;

(6) the trial evidence established an insufficient chain of custody regarding fingerprint and DNA evidence; (7) the State failed to disclose exculpatory evidence; (8) the State and the police intentionally destroyed exculpatory evidence; (9) his rights to a speedy trial were violated; (10) the State did not prove his guilt beyond a reasonable doubt; (11) the trial court erred in denying his motion for a directed verdict; (12) the trial court's factual findings were against the manifest weight of the evidence; (13) the trial court abused its discretion; (14) the State misstated evidence in closing argument; (15) ineffective assistance of trial counsel; and (16) ineffective assistance of appellate counsel. On December 24, 2003, defendant filed a 228-page *pro se* supplement to his postconviction petition, additionally alleging: (1) the State misstated the evidence in opening and closing statements; and (2) the trial court abused its discretion by allowing the introduction of evidence in aggravation during his sentencing hearing. Defendant also filed numerous *pro se* posttrial motions, including a motion for additional forensic testing pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2002)), which was litigated separately and ultimately denied. We affirmed the denial for additional forensic testing on appeal. *People v. Antoine*, 2013 IL App (1st) 093141-U.

¶7 The trial court appointed counsel for defendant and the case was continued numerous times through 2008 while appointed counsel sorted through the documents filed by defendant and obtained transcripts. During this time, defendant continued to file posttrial pleadings. From November 21, 2008, through April of 2010, defendant proceeded *pro se*, as requested, while litigating the DNA motion referenced above. In April 2010, defendant requested to have counsel reappointed and the trial court granted the request. The State moved to strike all of defendant's *pro se* pleadings filed after appointment of counsel. In January 2011, postconviction counsel informed the trial court that defendant agreed to withdraw all of the *pro se* filings except

defendant's September 22, 2003, postconviction petition, and the December 24, 2003, supplemental postconviction petition.¹ Counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). On June 17, 2011, the State filed a motion to dismiss. On November 18, 2011, the trial court heard arguments on the motion. The matter was continued several times for the trial court's ruling on the motion to dismiss. On one of the continuance dates, the trial court stated that "for lack of a better word, there is a great deal of material that the Court is going over. There ha[ve] been multiple filings that have predated this last filing. Multiple rulings that have occurred in this matter. I am reviewing all of those, but it is taking a great deal of time. I am—I am going to set this out for [a] longer date."

¶8 Ultimately, in a November 9, 2012, written order, the trial court found defendant was not entitled to an evidentiary hearing for his postconviction petition where the majority of his claims were barred by the doctrines of *res judicata* and forfeiture because they had been or could have been raised on direct appeal as the claims were all a matter of trial record. Moreover, the trial court found in relation to defendant's ineffective assistance claims that "the appellate court has already determined that trial counsel vigorously and ably represented defendant" and that "defendant has failed to provide any support for his allegations of [ineffective assistance of appellate counsel] nor met the Strickland standard." Defendant's postconviction petition was dismissed. This appeal followed.

¶9

ANALYSIS

¶10 Defendant contends he is entitled to further postconviction proceedings where his postconviction counsel failed to amend his petition in violation of Rule 651(c) to include an

¹ Going forward, when referring to defendant's postconviction petition, we consider defendant's postconviction petition as well as his supplemental postconviction petition.

additional claim of ineffective assistance of appellate counsel, thereby causing the trial court to dismiss a number of defendant's claims on the basis of forfeiture.

¶11 The Act provides a convicted defendant with a means to raise a constitutional challenge to the proceedings underlying his conviction and sentence. 725 ILCS 5/122-1(a) (West 2002). A postconviction petition may be summarily dismissed if the trial court determines the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). If the petition is not dismissed, the petition advances to the second stage of proceedings and counsel is appointed. 725 ILCS 5/122-2.1(b) (West 2002); 725 ILCS 5/122-4 (West 2002). The State then must either answer the pleading or move to dismiss. 725 ILCS 5/122-5 (West 2002).

¶12 At the second stage of postconviction proceedings, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). In determining whether to allow the petition to proceed to a third-stage evidentiary hearing, all well-pleaded facts in the petition and accompanying affidavits are taken as true. *People v. Orange*, 195 Ill. 2d 437, 448 (2001). If the petition and accompanying affidavits do not demonstrate a constitutional violation, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246.

¶13 Once counsel is appointed to an indigent defendant, the defendant is entitled only to the level of assistance guaranteed by the Act, which this court has determined to be only a "reasonable" level of assistance. *People v. McNeal*, 194 Ill. 2d 135, 142 (2000). Our supreme court repeatedly has held that counsel must perform specific duties in his or her postconviction representation as provided by Rule 651(c). *People v. Greer*, 212 Ill. 2d 192, 204-05 (2004) (citing *McNeal*, 194 Ill. 2d at 142). More specifically, Rule 651(c) requires that the record in the

postconviction proceedings demonstrate that appointed counsel "has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

Ill. S. Ct. R. 651(c). The filing of a 651(c) certificate creates a presumption of compliance with the rule. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). We review *de novo* whether an attorney complied with a supreme court rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶14 Defendant argues that his appointed postconviction counsel violated Rule 651(c) by not amending his petition to include an allegation that appellate counsel was ineffective for failing to raise specified contentions on appeal. According to defendant, appointed counsel's failure to amend the postconviction petition to add the ineffective assistance of appellate counsel claim caused the forfeiture of the following claims: (1) ineffective assistance of trial counsel; (2) improper chain of custody; (3) lack of probable cause and the scope of the warrant; and (4) the violation of due process stemming from a juror's exposure to a prejudicial newspaper article.

Relying on *People v. Turner*, 187 Ill. 2d 406 (1999), defendant contends that Rule 651(c) "requires appointed post-conviction counsel to add a claim of appellate counsel's ineffectiveness to any claim subject to forfeiture because it was not raised on direct appeal." The State responds that defendant's interpretation of Rule 651(c) is incorrect, as it would require every postconviction counsel to amend every *pro se* petition to include an ineffective assistance of appellate counsel claim.

¶15 Contrary to defendant's argument, the law is clear that "[t]here is no requirement that post-conviction counsel must amend a petitioner's *pro se* post-conviction petition." *Turner*, 187 Ill. 2d at 412. Rather, the supreme court has advised that "[f]ulfillment of the third obligation

under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Greer*, 212 Ill. 2d at 205. Pursuant to the rule, appointed counsel must shape the defendant's *pro se* claims into "appropriate legal form." *People v. Johnson*, 154 Ill. 2d 227, 238 (1993).

¶16 In this case, we conclude that postconviction counsel did not violate Rule 651(c) by not amending defendant's *pro se* petition to include an additional claim for ineffective assistance of appellate counsel. The supreme court has been definitive in stating that appointed postconviction counsel need only amend the *pro se* petition to sufficiently present the *defendant's* claims (*People v. Richardson*, 382 Ill. App. 3d 248, 254 (2008) (citing *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006)) and need only amend those claims that are meritorious (*Greer*, 212 Ill. 2d at 205). The record reveals that defendant presented 17 bases of ineffective assistance of appellate counsel and had knowledge of the doctrine of forfeiture wherein one of his claims alleged his appellate counsel was incompetent for failing to "raise the above issues on Direct Appeal, which caused the petitioner Prejudice for further review of these issues which was objectively unreasonable and the sentence or conviction would have been reversed had the issues been raised." Despite this knowledge and the expansive grounds presented for ineffective assistance of appellate counsel, defendant argues that postconviction counsel should have preserved claims for ineffective assistance of trial counsel, improper chain of custody, lack of probable cause and impropriety with the scope of the warrant, and the inclusion of a biased juror by alleging ineffective assistance of appellate counsel for failing to raise these claims.

¶17 Defendant has failed to overcome the presumption provided by postconviction counsel's certificate of compliance with Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23 (citing *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009)). The postconviction record demonstrates that counsel spent *years* reviewing defendant's *pro se* petition, as well his numerous *pro se* posttrial motions and the record. After such extensive review of defendant's *pro se* claims, postconviction counsel chose not to amend the petition. See *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (when postconviction counsel determines, after investigating the defendant's claims, the claims are without merit he may choose to stand on the petition). There is nothing in the record to support defendant's contention that postconviction counsel's choice violated Rule 651(c), especially where defendant has not presented any arguments demonstrating that his claims were meritorious. We recognize that this court has stated that harmless error analysis is not appropriate where there has been a violation of Rule 651(c). See *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). However, in this case, harmless error analysis has no application because the record does not support a finding that postconviction counsel failed to satisfy Rule 651(c). *Cf. id.*; *Turner*, 187 Ill. 2d at 415-16.

¶18 We further note that *Turner* is factually distinguishable from the case at bar. In *Turner*, the defendant raised a number of detailed arguments in his *pro se* petition, including that trial counsel was ineffective for failing to discover and impeach a witness with evidence that was withheld by the State and statements that he made to undisclosed family members and prisoners at jail. *Turner*, 187 Ill. 2d at 409. Postconviction counsel did not amend the defendant's *pro se* petition and the trial court granted the State's motion to dismiss, finding the claims were barred by *res judicata* or were waived because the defendant could have brought them on direct appeal. *Id.* The supreme court, however, stated that the defendant's claims would have been preserved

had postconviction counsel amended the petition to allege ineffective assistance of appellate counsel for failing to raise the claims on direct appeal. *Id.* at 413. The supreme court also faulted postconviction counsel for failing to make additional amendments which were necessary to adequately present the claims in the defendant's petition, such as that the defendant was prejudiced by trial counsel's assistance and that the evidence allegedly withheld by the State was material. *Id.* In addition, the supreme court noted that the defendant's postconviction counsel failed to attach any supportive affidavits for the claims in the postconviction petition that counsel acknowledged were based on evidence outside the record. *Id.* at 413-414.

¶19 In sum, the supreme court found in *Turner* that postconviction counsel not only failed to make a routine amendment to the postconviction petition to overcome the procedural bar of forfeiture, but also chose to stand on the *pro se* petition that omitted essential elements of the defendant's constitutional claims and contained virtually no evidentiary support. *Id.* at 414. Based on the totality of the circumstances, the supreme court concluded that postconviction counsel's representation fell below the level of assistance required by Rule 651(c) where "counsel's conduct represent[ed] a total failure of representation." *Id.* at 414-15; see also *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 32 (finding postconviction counsel violated Rule 651(c) where he chose to stand on the defendant's *pro se* petition, but later admitted to the trial court during a hearing on the State's motion to dismiss the petition that counsel failed to amend the petition to include the defendant's main claim of ineffective assistance of appellate counsel).

¶20 Similarly, in *Johnson*, postconviction counsel amended the defendant's *pro se* postconviction petition, but "realleged, *verbatim*, every allegation in the *pro se* petition and added two additional claims," without offering any supporting affidavits or documents. *Johnson*, 154 Ill. 2d at 239. While recognizing that postconviction counsel had "no obligation to actively

search for sources outside the record that might support general claims raised in [the] postconviction petition," the supreme court ultimately concluded the postconviction counsel's failure to attempt to obtain affidavits from witnesses identified by the defendant in his *pro se* petition demonstrated postconviction counsel's failure to amend the defendant's petition "in a manner necessary to adequately present the defendant's claims, as required by Rule 651(c)." *Id.* at 247-48.

¶21 In contrast, in our case, there is nothing in the record contradicting postconviction counsel's certification that no amendments were necessary for the adequate presentation of the claims in defendant's petition. In fact, defendant failed to provide any support in the record that the specified claims were dismissed based on forfeiture. The trial court's November 9, 2012, written order granting the State's motion to dismiss defendant's postconviction petition does not expressly identify which of defendant's claims were dismissed based on *res judicata* and which were dismissed based on forfeiture. Our review of the record, however, demonstrates that either the trial court, the appellate court, or both considered whether defendant received effective assistance of trial counsel, whether there was probable cause to arrest defendant, whether the scope of the warrant was proper, whether there was a proper chain of custody, and whether there was juror bias caused by exposure to a prejudicial newspaper. Accordingly, the claims that defendant presumes were forfeited as a result of postconviction counsel's failure to include a claim of ineffective assistance of appellate counsel for neglecting to raise the contentions on direct appeal appear to have been barred by *res judicata*.

¶22 Moreover, in the cases where a violation of Rule 651(c) has been found, the court has concluded that postconviction counsel was "inept" (*Turner*), so deficient that there was virtually no representation at all (*People v. Tyner*, 40 Ill. 2d 1, 2-4 (1968)) , and appeared as a mere

"tokenism" (*People v. Wilson*, 40 Ill. 2d 378, 381 (1968)). No such claim can be made in this case where postconviction counsel spent years combing through defendant's voluminous *pro se* pleadings and the record prior to deciding to stand on defendant's nearly 1400 page *pro se* petition.

¶23 Based on the foregoing, we conclude that defendant failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings.

¶24 CONCLUSION

¶25 We affirm the second-stage dismissal of defendant's *pro se* postconviction petition.

¶26 Affirmed.