2015 IL App (1st) 130056-U

No. 1-13-0056

FIFTH DIVISION
December 23, 2015

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. 93 CR 18000(04)
	)	
ANDRES RUBIO,	)	The Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

O R D E R

¶ 1 *HELD*: Defendant's postconviction petition was properly dismissed following second-stage review where he failed to make a substantial showing to support his claims of ineffective assistance of trial, posttrial, appellate, and postconviction counsel.

¶ 2 Defendant, Andres Rubio, appeals the second-stage dismissal of his petition for relief from judgment pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On direct appeal, following a trial and sentencing *in abstentia*, we affirmed defendant's first degree murder conviction under a theory of accountability and his 25-year

prison term. *People v. Rubio*, No. 1-08-2596 (May 23, 2011) (unpublished order under Supreme Court Rule 23). Defendant now contends the trial court erred in dismissing his postconviction petition where he made a substantial showing that: (1) his trial counsel was ineffective for failing to file a motion to suppress his involuntary police confession as a product of physical and mental coercion; (2) his posttrial counsel was ineffective for failing to communicate with him to ascertain the reasons for his absence from trial and sentencing in order to effectively litigate a motion for a new sentencing hearing pursuant to section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(e) (West 2008)); and (3) his postconviction counsel was ineffective for failing to amend his *pro se* postconviction petition to allege a claim for ineffective assistance of appellate counsel for failing to raise posttrial counsel's ineffectiveness for not requesting an evidentiary hearing on the section 115-4.1(e) sentencing hearing and for waiving defendant's presence at the hearing on that motion. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 The trial evidence demonstrated that, on July 5, 1993, defendant was involved in a multi-person bar fight that resulted in the death of Armando Gomez. While in police custody, defendant, a native Spanish speaker, provided an inculpatory statement through the assisted interpretation of Police Officer Hector Ortiz. Prior to trial, defense counsel, Assistant Public Defendant (APD) Marc Blesoff, filed a motion to quash defendant's arrest and to suppress evidence, seeking to suppress defendant's custodial statement and lineup identification based on a lack of probable cause. The motion was denied.

¶ 5 Defendant's bench trial began on October 29, 1997. Defendant was tried simultaneously, but separately with two of his codefendants, Ricardo Joya and Jose Flores. Felipe Gomez, the

victim's brother, testified at trial that he was present during the offense. According to his testimony, Gomez observed defendant participate in the altercation during which Pedro Joya, another codefendant, shot and killed the victim.

¶ 6 On October 31, 1997, codefendant Flores failed to appear at trial and the trial court continued the case until November 7, 1997. Then, on November 7, 1997, defendant failed to appear in court. APD Blesoff successfully secured a continuance until November 10, 1997; however, defendant failed to appear again and the trial resumed. In closing argument, APD Blesoff attributed defendant's failure to appear at trial to his fear once codefendant was absent from trial. Defense counsel argued defendant "freaked out" and became "very scared" when his codefendant did not appear. Defendant was found guilty, *in abstentia*, of murder based on accountability. The trial court later sentenced him, also *in absentia*, to 25 years' imprisonment.

¶ 7 In 2008, defendant was taken into custody in Cleveland, Ohio, and extradited to Chicago. Defendant's family hired private counsel, Lewis Gainor, to appeal defendant's conviction and sentence. Mr. Gainor filed a section 115-4.1(e) motion, seeking a new sentencing hearing, which, in relevant part, alleged that defendant's absence from trial "was not willful" "he was afraid he would be unjustly convicted." A hearing was held on the motion on September 4, 2008. Mr. Gainor waived defendant's presence at the hearing. During the hearing, defendant counsel explained:

> "Those are the best facts that I have to show his absence wasn't willful. I consulted with defendant in the Cook County Department of Corrections. I would ask this Court take the allegations in my motion as true. I'm aware of the fact even if taken as true, as a matter of law, [the court is] probably not going to find it enough to give him a new trial or sentencing hearing."

Mr. Gainor additionally stated, if the court denied the motion, he would file a timely notice of appeal that would allow defendant to appeal his 1997 conviction and sentence, thus being a "matter of getting jurisdiction with the Appellate Court." The trial court denied defendant's section 115-4.1(e) motion, finding he willfully absented himself from the court's jurisdiction during trial. Mr. Gainor filed a notice of appeal, but withdrew as counsel thereafter. The Office of the State Appellate Defender was appointed to represent defendant.

¶ 8 On April 27, 2009, the Illinois Supreme Court issued a supervisory order allowing the notice of appeal to serve as an appeal from defendant's 1997 conviction and sentence, as well as the 2008 denial of his section 115-4.1(e) motion. As we previously stated, this court affirmed defendant's conviction and sentence on direct appeal, finding that the evidence was sufficient to support the finding of guilt and that defendant's custodial statement was reliable despite the use of Officer Ortiz as the interpreter. *Rubio*, No. 1-08-2596 (May 23, 2011) (unpublished order under Supreme Court Rule 23).

¶ 9 On June 11, 2009, while his appeal was pending before this court, defendant filed a *pro se* postconviction petition. In his petition, defendant claimed, *inter alia*: (1) his trial counsel was ineffective for failing to file a motion to suppress his custodial statement as the product of physical coercion and false promises that he could return home if he signed the statement; and (2) his posttrial counsel, Mr. Gainor, was ineffective in litigating the section 115-4.1(e) motion because he argued the motion without having first consulted with defendant, he failed to inform the court of defendant's true reason for being absent from trial, namely, because defendant and his family were "under threat of death," and he waived defendant's presence at the hearing. To his petition, defendant attached a self-authenticated affidavit. In his March 23, 2009, affidavit, defendant attested that, while in custody in July 1993, he was mistreated by the police.

Specifically, defendant attested he was physically coerced and tricked into signing a statement in English despite not understanding the language very well. Defendant additionally stated that APD Blesoff never visited him in jail and, when they finally spoke in court, no interpreter was present. Defendant attested that APD Blesoff was aware that no interpreter was used during the preparation of his custodial statement. According to defendant's affidavit, the only time he was spoken to in Spanish was when Officer Ortiz informed him that he would be allowed to go home after signing the statement. Defendant's affidavit additionally stated that, on October 30, 1997, he was threatened at gunpoint by Pedro Joya, one of his codefendants, while standing outside his sister Maria's house. Codefendant threatened to kill defendant's family members in the United States and in El Salvador if defendant did not return to El Salvador immediately. As a result, defendant immediately told his sister that he needed to leave town. Defendant fled to a friend's home in Cleveland and lived under a different name until he was stopped for a traffic violation in May 2008. Defendant further attested that his family hired Mr. Gainor, but Mr. Gainor never met with him to discuss the reasons why defendant failed to appear at trial.

¶ 10 On August 27, 2009, APD Suzanne Isaacson was appointed to represent defendant. On January 6, 2012, APD Isaacson filed an amended postconviction petition, alleging: (1) trial counsel APD Blesoff was ineffective for failing to move to suppress defendant's custodial statement on the basis that it was involuntary and resulted from the police punching and slamming defendant into a wall and falsely promising his release if he signed the statement; (2) posttrial counsel Gainor was ineffective for litigating the section 115-4.1(e) motion and failing to present accurate facts regarding the reasons why defendant fled the jurisdiction; and (3) the cumulative errors warranted postconviction relief. In support of the petition, APD Isaacson

attached three affidavits from defendant, namely, his original affidavit that was attached to the *pro se* petition, along with two others, and portions of the record.

¶ 11 In an affidavit dated September 20, 2011, defendant attested that he told APD Blesoff "about mistreatment by the police at the police station after [his] arrest in July 1993, including that Detective Abreu angrily slammed [him] into a wall and also punched [him], and later, through Officer Ortiz, promised to release [him] if [he] signed a statement. As a result of this, [he] signed a statement." According to defendant's affidavit, he informed APD Blesoff about the mistreatment shortly after his 1993 arrest *vis a vis* another inmate, who acted as an interpreter, because defendant did not speak English and APD Blesoff did not speak Spanish. Defendant attested that APD Blesoff promised he would "do something about this mistreatment, but his only concern was to try to lower [defendant's] bond. The [APD] never asked [defendant] about this again and never brought it up in court."

¶ 12 In an affidavit dated November 1, 2011, defendant attested that Mr. Gainor did visit him once in jail, contrary to what he stated in his *pro se* petition. Moreover, Mr. Gainor spoke to defendant in Spanish. According to defendant's affidavit, Mr. Gainor "did not speak Spanish fluently, so the conversation could only take place at a simple level. There were very short and simple questions and answers and there was not a full and complete conversation." Defendant attested that:

> "[he] did not specifically tell Mr. Gainor that [he] did not go to court because [codefendant] threatened [him] at gunpoint *** [i]f [he] would have been interviewed by a fluent Spanish speaker or if a Spanish interpreter had been present, a longer conversation would have taken place and [he] would have specifically described to [Mr. Gainor] the reasons why [he] was afraid to go to

> court, and [he] felt [he] had to leave *** [he] only told [Mr. Gainor] generally that [he] was afraid. [His] English was too weak to communicate any details. [He] did not know at the time that it was important for the attorney to know the details of why [he] did not go to court. Mr. Gainor did not inquire further or come back to see [him]."

¶ 13 Along with the amended postconviction petition, APD Isaacson also filed a certificate indicating her compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 14 The State filed a motion to dismiss the amended postconviction petition, and a hearing on the motion was held on August 27, 2012. The trial court issued a written order on September 17, 2012, granting the State's motion to dismiss. In response, APD Isaacson filed a motion to reconsider the dismissal of defendant's amended postconviction petition. APD Isaacson also requested leave to file a "supplemental exhibit," which was an affidavit by APD Blesoff dated October 17, 2012. In the affidavit, APD Blesoff attested that he reviewed his trial file on October 16, 2012, and, as of March 25, 1994, APD Blesoff knew defendant was arrested on July 8, 1993, and gave a statement on July 9, 1993. The affidavit noted: "no food, Abreu hit him, slammed in chest and on forehead with heel of hand. Defendant signed statement because he was afraid, hungry, and cops said he could go home if he signed." The trial court held a hearing on the request for leave to file APD Blesoff's October 17, 2012, affidavit, after which the trial court took the matter under advisement. Then, on December 3, 2012, the trial court denied defendant's motion to reconsider the dismissal of his amended postconviction petition, noting that it considered APD Blesoff's affidavit in its ruling. This appeal followed.

¶ 15 ANALYSIS

¶ 16 The Act provides a means by which a defendant may challenge his conviction or sentence as a substantial violation of his constitutional rights. *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction petition for relief is a collateral proceeding, not an appeal from the underlying conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21. Because of this, the doctrine of *res judicata* bars consideration of issues that were raised and decided on direct appeal and issues that could have been presented, but were not, are forfeited for purposes of postconviction review. *Id*., ¶ 22. *Res judicata* and forfeiture, however, will be relaxed in three situations: (1) where fundamental fairness so requires; (2) where the alleged waiver is attributable to the incompetence of appellate counsel; and (3) where the facts relating to the claim do not appear on the face of the trial record. *Id.*

¶ 17 The Act provides three stages of review. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A defendant is not entitled to an evidentiary hearing as a matter of right. *People v. Peeples*, 205 Ill. 2d 480, 510 (2002). Rather, a petition will proceed to a third-stage evidentiary hearing only where the allegations, supported by the trial record and accompanying affidavits, make a substantial showing that the defendant's constitutional rights have been violated. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). To determine whether an evidentiary hearing is warranted, a court must take all well-pleaded facts in the postconviction petition and accompanying affidavits not positively rebutted by the trial record as true. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Id.*

¶ 18 Defendant's claims allege ineffective assistance of counsel throughout his trial, posttrial, appellate, and postconviction proceedings. To present a successful claim of ineffective

assistance of counsel at all stages of the proceedings except postconviction, a defendant must show both that: (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the results of trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome, *i.e.*, that the defense counsel's deficient performance rendered the result unreliable or the proceeding fundamentally unfair. *Id*. at 694. A defendant must satisfy both prongs of the *Strickland* test in order to establish ineffective assistance. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). A reviewing court, however, need not consider whether counsel's performance was deficient before assessing whether the defendant demonstrated such prejudice that he is entitled to a new trial as a result of the alleged deficiencies. *People v. Perry*, 224 Ill. 2d 312, 342 (2007).

¶ 19 I. Ineffective Assistance of Trial Counsel

¶ 20 Defendant contends APD Blesoff provided ineffective assistance because he did not pursue a motion to suppress defendant's custodial statement as involuntary where it was provided as a result of physical coercion and false promises. Defendant maintains that, taking the allegations as true, which this court must, his amended postconviction petition substantially showed that his constitutional right to effective assistance was violated. The State responds that defendant's petition was properly dismissed where his unsupported allegations failed to make the requisite substantial showing.

¶ 21 At the outset, we note that defendant's contention is not forfeited because the allegation that his custodial statement was coerced as a result of police mistreatment was not apparent from the trial record. See *English*, 2013 IL 112890, ¶ 22 (claims that could have been raised, but

were not, are forfeited unless one of the noted exceptions applies). Nevertheless, we find that defendant failed to sufficiently support his allegations in order to demonstrate a substantial showing of ineffective assistance of trial counsel.

¶ 22 Section 122-2 of the Act provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). The purpose for requiring "affidavits, records, or other evidence" is to establish that the allegations in the postconviction petition are capable of objective or independent corroboration. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). "Affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *Id*.

¶ 23 In the present case, defendant submitted three affidavits with his amended postconviction petition. None of defendant's affidavits, however, provided independent corroboration of the facts alleged in his petition. Defendant could have supported his claim that trial counsel was ineffective for failing to challenge the voluntariness of his custodial statement by obtaining affidavits from Officer Abreu and Officer Ortiz, the officers that allegedly engaged in physical coercion and false promises. Defendant argues in his reply brief that the rationale underlying the recognized exception wherein a defendant need not present a supporting affidavit when only an affidavit from the attorney admitting his own ineffectiveness would support the claim because obtaining such an affidavit is difficult, if not possible, should be applied to his case. Defendant, however, fails to cite to any case law extending the corroboration exception beyond the situation involving an attorney charged with ineffective assistance. See *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005); *People v. Williams*, 47 Ill. 2d 1, 4 (1940). Moreover, in this case, defendant

actually could have obtained an affidavit from APD Blesoff to support his allegations, as proven by the fact that APD Blesoff eventually did provide such an affidavit. However, defendant did not obtain APD Blesoff's affidavit in a timely manner; instead, only presenting it to the trial court *after* having filed his motion to reconsider the dismissal of his amended petition. Furthermore, defendant failed to provide an explanation for his inability to comply with section 122-2. Because section 122-2 requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached" and defendant's self-serving affidavits were not capable of objective or independent corroboration, we conclude defendant failed to make a substantial showing that his trial counsel was ineffective.

¶ 24 However, even considering APD Blesoff's affidavit--as the trial court did in denying defendant's motion to reconsider the dismissal of his amended postconviction petition, the affidavit does not lend support for defendant's allegations. APD Blesoff said he knew about defendant's claims prior to trial, yet APD Blesoff never averred it was not his trial strategy to not file a motion to suppress defendant's custodial statement. APD Blesoff did file a pretrial motion to quash defendant's arrest and to suppress evidence based on lack of probable cause to arrest; APD Blesoff chose not to pursue a motion to suppress based on the voluntariness of defendant's statement.

¶ 25 The United States Supreme Court has instructed:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of

> attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689.

¶ 26 We recognize that defendant's September 20, 2011, affidavit did reference the fact that APD Blesoff planned to address the alleged police mistreatment. Notwithstanding, filing a motion to suppress defendant's custodial statement was not the only means by which APD Blesoff could have challenged the voluntariness of that statement. In fact, APD Blesoff did challenge the manner in which the statement was given by cross-examining Officer Ortiz. Additionally, the record suggests APD Blesoff intended to call defendant as a witness had he not fled, thereby providing another means to challenge the credibility and reliability of defendant's statement. As *Strickland* instructs, we must presume that APD Blesoff's decision not to file the motion to suppress was trial strategy. *People v. Bew*, 228 Ill. 2d 122, 128 (2008) (an attorney's decision whether to file a motion to suppress is generally a matter of trial strategy and, thus, entitled to great deference). Defendant's amended postconviction petition, in conjunction with the affidavits, including APD Blesoff's, did not overcome that presumption.

¶ 27 Moreover, defendant's allegations of physical coercion and false promises by the police in order to secure his custodial statement are rebutted by the trial record. In his handwritten statement, defendant stated that he was treated well by the police, that his statement was given

voluntarily, and that he was not threatened or made any promises in return for his statement. In addition, the photographs taken of defendant when he gave his custodial statement do not display any evidence of injury. The law clearly provides that well-pled allegations in a postconviction petition are considered true *if not positively rebutted by the record*. *Childress*, 224 Ill. 2d at 174.

¶ 28 In sum, we find that defendant's amended postconviction petition along with the affidavits failed to substantially show APD Blesoff was ineffective for not challenging the voluntariness of defendant's custodial statement. Because we have determined defendant cannot establish his counsel's performance was deficient, we need not assess whether he suffered resulting prejudice. *Albanese*, 104 Ill. 2d at 525 (a defendant must satisfy both prongs of the *Strickland* test). We, therefore, conclude defendant failed to make a substantial showing that his trial counsel was ineffective.

¶ 29 II. Ineffective Assistance of Posttrial Counsel

¶ 30 Defendant next contends his posttrial counsel was ineffective for litigating a section 115-4.1(e) hearing without having communicated with him to ascertain his reasons for being absent from trial and sentencing. In fact, defendant argues that Mr. Gainor only visited him once in jail without an interpreter, which hampered defendant's ability to communicate the reason that he fled, namely, because his life and his family members' lives had been threatened by codefendant. Defendant maintains that, had Mr. Gainor known and informed the trial court about the real reason for his absence from trial and sentencing, there is a reasonable probability that defendant would have been granted a new trial.

¶ 31 Section 115-4.1(e) of the Code provides:

> "When a defendant who in his absence has been either convicted or sentenced or both convicted and sentenced appears before the court, he must be

> granted a new trial or new sentencing hearing if the defendant can establish that this failure to appear in court was both without his fault and due to circumstances beyond his control. A hearing with notice to the State's Attorney on the defendant's request for a new trial or new sentencing hearing must be held before any such request may be granted. At any such hearing both the defendant and the State may present evidence." 725 ILCS 5/115-4.1(e) (West 2008).

¶ 32 Much like his contention against trial counsel, defendant's contention against posttrial counsel was not sufficiently supported with "affidavits, records, or other evidence supporting its allegations" as required by section 122-2 of the Act. 725 ILCS 5/122-2 (West 2008). In fact, defendant did not attach any documentation providing objective or independent corroboration for his allegations. See *Delton*, 227 Ill. 2d at 254.

¶ 33 In his March 23, 2009, affidavit, defendant attested that, after he was threatened outside his sister's home by codefendant Pedro Joya, he went inside to inform his sister about the threat to the family. Defendant attested that he immediately packed his belongings and left for Cleveland to stay with a friend. Defendant, however, did not provide an affidavit from either his sister or the friend with whom he stayed in Cleveland, nor did defendant provide an explanation regarding why he was unable to attach the same. In addition, defendant did not provide an affidavit from Mr. Gainor to demonstrate his attorney's limited understanding of the Spanish language. We acknowledge the general exception to the rule requiring corroborating affidavits where the only affidavit the defendant could have furnished other than his own sworn statement was from his attorney, whose effectiveness is being challenged. *Hall*, 217 Ill. 2d at 333. However, defendant did not attempt to rely on this exception in his amended postconviction petition nor did he explain why he was unable to obtain corroboration for his allegation. In fact,

in his October 24, 2011, affidavit, defendant referenced Mr. Gainor's communication with defendant's family members, namely, his nephew, but defendant failed to obtain an affidavit from his nephew or any other family member to corroborate Mr. Gainor's Spanish-language limitations. "Affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *Id*. Simply stated, defendant did not identify any support for the allegations in his petition.

¶ 34 Moreover, we find the allegations made by defendant in his affidavits were positively rebutted by the record. See *People v. Jefferson*, 345 Ill. App. 3d 60, 76 (2003) (only all well-pleaded facts that are not positively rebutted by the record are to be taken as true; "[i]f the claims made in the petition are positively rebutted by the record, they should not be taken as true"). The record contained two contradictory affidavits authored by defendant. The first affidavit dated March 23, 2009**,** which was attached to defendant's *pro se* postconviction as well as his amended postconviction petition, stated that Mr. Gainor never visited him in jail to consult with him prior to the section 115-4.1(e) hearing. In direct contrast, defendant's November 1, 2011, affidavit provided that Mr. Gainor did meet with him in jail prior to the section 115-4.1(e) hearing. Defendant attested that Mr. Gainor spoke to him in Spanish, albeit non-fluent Spanish. Defendant's ability to communicate to Mr. Gainor one version of events as to why he fled from trial (*i.e*, that he was afraid of being unjustly convicted, which is what he admitted to telling Mr. Gainor) instead of the alleged real version he provided in his postconviction petition (*i.e.*, that his life and the lives of his family were threatened by codefendant) is improbable, unconvincing, and contrary to the human experience. See *People v. Brown*, 32 Ill. App. 3d 134, 137 (1975)

(credibility determinations are left to the trier of fact except a court on appeal may reverse when the evidence is so improbable or contrary to the human experience).

¶ 35 We acknowledge that, during second stage review of a postconviction petition, a court must not make credibility determinations and must take all well-pled allegations not positively rebutted by the trial record as true. *People v. Domagala*, 2013 IL 113688, ¶ 35. However, the key is that the allegations are well-pled and are not positively rebutted by the record. *Jefferson*, 345 Ill. App. 3d at 76. In this case, defendant's allegations were not well-pled and were positively rebutted by the record. We, therefore, conclude that defendant failed to sufficiently support his claim against posttrial counsel pursuant to section 122-2 of the Act. As a result, defendant did not make a substantial showing of ineffective assistance of posttrial counsel.

¶ 36 III. Ineffective Assistance of Postconviction Counsel

¶ 37 Defendant finally contends his postconviction counsel was ineffective for failing to include in her amended postconviction petition a claim of ineffective assistance of appellate counsel related to posttrial counsel's ineffectiveness. Essentially, defendant attempts to avoid forfeiture of his claim that posttrial counsel was ineffective for failing to request an evidentiary hearing on his section 115-4.1(e) motion and for waiving defendant's presence at the hearing that was held. Because the substance of defendant's contention was a matter of trial record, the doctrine of forfeiture generally would prohibit review on appeal. *English*, 2013 IL 112890, ¶ 22. The doctrine of forfeiture, however, is relaxed where appellate counsel was ineffective for failing to preserve the argument. *Id.* Accordingly, in order to reach the merits of his underlying contention of posttrial counsel's ineffectiveness, defendant contends postconviction counsel should have amended his *pro se* postconviction petition to include a claim of appellate counsel's ineffectiveness for failing to preserve the underlying contention against posttrial counsel.

¶ 38 We first note that there is no constitutional right to the assistance of postconviction counsel; the right to counsel is entirely based on the Act (725 ILCS 5/122-4 (West 2008)) and a defendant is entitled only to the level of assistance provided for by the Act. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 13. A defendant in postconviction proceedings is entitled only to a "reasonable" level of assistance, which is less than that afforded by the federal and state constitutions. *People v. Munson*, 206 Ill. 2d 104, 137 (2002). Rule 651(c) provides that appointed counsel's duties include consultation with the defendant to ascertain his contentions of constitutional deprivation, examination of the record of the trial proceedings, and amendment of the petition, if necessary, to ensure the defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c). Fullfillment of the third obligation does not require counsel to advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). 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).

¶ 39 We find that defendant failed to overcome the presumption that APD Isaacson provided effective assistance of counsel throughout the postconviction proceedings. APD Isaacson was only required to amend defendant's postconviction petition to present meritorious claims. Resolution of defendant's contention, therefore, requires this court to assess posttrial counsel's performance in proceeding with the section 115-4.1(e) hearing without requesting an evidentiary hearing and without defendant's presence.

¶ 40 Defendant relies on *People v. Brown*, 121 Ill. App. 3d 776 (1984), *abrogated on other grounds, People v. Partee*, 125 Ill. 2d 24 (1988), and *People v. Cobian*, 2012 IL App (1st) 980535, as support that section 115-4.1(e) required an evidentiary hearing and his presence at that hearing. Unlike in *Brown* and *Cobian*, in this case, the trial court did conduct a hearing on

defendant's section 115-4.1(e) motion. However, because posttrial counsel waived defendant's presence at the hearing, defendant claims he was not available to testify regarding his true reason for his absence from trial and sentencing. Ultimately, we need not resolve whether defendant's absence from the hearing that took place requires a new section 115-4.1(e) hearing because defendant's contention fails as a matter of law on a different basis.

¶ 41 Although it was a matter of record that posttrial counsel did not request an evidentiary hearing and waived defendant's presence at the hearing that was conducted, defendant's reasoning for the desired evidentiary hearing and opportunity to testify was unknown to appellate counsel. In fact, defendant did not reveal his true reason for his absence from trial and sentencing until he filed his *pro se* postconviction petition. The information, therefore, was outside the trial record. As a result, defendant cannot support a claim challenging appellate counsel's performance based on information unknown to counsel when filing defendant's appeal.

¶ 42 In sum, we conclude that defendant failed to make a substantial showing of postconviction counsel's ineffective assistance.

¶ 43 CONCLUSION

¶ 44 We affirm the second-stage dismissal of defendant's amended postconviction petition where he failed to make a substantial showing to support his claims.

¶ 45 Affirmed.