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FOURTH DIVISION  
May 28, 2015

No. 1-13-0181

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellee,

v.

MICHAEL ASH,

Petitioner-Appellant.

)  
) Appeal from the  
) Circuit Court  
) of Cook County,  
) Illinois.  
)  
) No. 06CR9873  
)  
) The Honorable  
) Mary Margaret Brosnahan,  
) Judge Presiding.  
)

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Cobbs concurred in the judgment.

**ORDER**

¶ 1 Held: Petitioner's trial and appellate counsel did not provide inadequate representation where the underlying issue of a defective charging instrument was nonmeritorious, as the charging instrument was amended prior to trial. Additionally, petitioner's postconviction counsel did not provide inadequate representation when filing an amended postconviction petition because counsel was not obligated to include a claim for relief when the claim was already adequately presented in the initial petition and postconviction counsel incorporated all previous arguments into the supplemental petition. Affirmed.

¶ 2 Petitioner Michael Ash filed a *pro se* postconviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 et seq. (West 2010), relating to his convictions of armed habitual criminal and unlawful use of a weapon by a felon. The trial court appointed postconviction counsel to represent petitioner. Thereafter, defense counsel filed a supplemental postconviction petition on petitioner's behalf. The State filed a motion to dismiss the petition. After a hearing, the trial court granted the State's motion to dismiss, and dismissed petitioner's postconviction petition. Petitioner appeals, contending that the trial court erred in dismissing the petition where petitioner made a substantial showing that he was deprived of the effective assistance of trial and appellate counsel where trial counsel failed to object to a defective charging instrument or file a motion in arrest of judgment, and appellate counsel failed to raise the issue on appeal. On appeal, petitioner also argues that postconviction counsel was ineffective because, although postconviction counsel amended the *pro se* petition which included allegations of the ineffective assistance of appellate counsel, postconviction counsel specifically adopted all *pro se* issues in the supplemental petition, and postconviction counsel alleged the general ineffective assistance of appellate counsel in the supplemental petition, postconviction counsel did not specifically include a claim of the ineffective assistance of appellate counsel for failing to raise the charging instrument issue on direct appeal. For the following reasons, we affirm.

### ¶ 3 I. BACKGROUND

¶ 4 The facts of the case are contained in petitioner's two prior appeals. *People v. Ash*, No. 1-07-1861 (2009) (unpublished order under Supreme Court Rule 23); *People v. Ash*, 2012 IL App (1st) 111557-U. We recite here only the facts necessary to the instant appeal.

¶ 5 After a gun was found in petitioner's house in 2006, petitioner was charged with unlawful use of a weapon and armed habitual criminal. Initially, the armed habitual criminal charge was based on two prior convictions: first degree murder and burglary. Prior to trial, the State informed the court that, while the predicate first degree murder conviction was correct, the other predicate offense should be a conviction for possession of a controlled substance with intent to deliver rather than one for burglary. Without objection, the State orally amended count 1, the armed habitual criminal charge, striking the offense of burglary and correcting it to reflect the qualifying offense of possession of a controlled substance with intent to deliver, stating:

"[ASSISTANT STATE'S ATTORNEY GOLDISH:] Count one needs to be corrected for one of the qualifying offenses. I have the case number on my defendant's criminal history, but the criminal offenses should be possession with intent. And the other charge is a murder.

At that point in the trial, when we are on the record, I will in the presence of jury I will [*sic*] present you certified copies of those convictions or we will stipulate by case number, date of offense, the way normally it would come in."

¶ 6 Also prior to trial, defense counsel filed a motion in limine asking the court to (1) "preclude[e] the use of the name of the charged offense 'Armed Habitual Criminal' when referring to the charge against [defendant]" and (2) allow defendant to stipulate that his prior convictions are elements of the armed habitual criminal charge "without naming those felonies." The court denied the motion as to precluding the use of the named offense, but allowed it as to the stipulation. That is, the court agreed to defendant's request to allow

defendant to stipulate that his predicate felonies were, in fact, elements of the armed habitual criminal charge without actually naming the offense for the jury.

¶ 7 At trial, Chicago police officer Kevin Killen testified that at approximately 2:45 PM on April 13, 2006, he executed a search warrant along with 10 or 12 other officers, including Officer John Haggerty, at a house at 5237 South Green Street in Chicago. When the officers arrived, several people were outside of the house. Officer Killen and other officers went to the side door of the house, knocked, announced their office and that they had a search warrant, and entered the house. Officer Killen and other officers went into the basement, which was in disarray. While there, they observed a laundry room to the right and two bedrooms to the left. The first unoccupied room contained medical supplies and medications, and the second bedroom contained men's clothing. In the second room, the walls had holes in them, the wood-paneled siding had been torn. Officer Killen saw Officer Haggerty talking to petitioner in this second bedroom. Petitioner was taken upstairs and Officers Killen and Haggerty searched the bedroom.

¶ 8 When Officer Killen moved the dresser, he noticed a small hole where the drywall was not secured to the wall. He pulled on the drywall and discovered a gun behind the wall. He did not photograph the gun in its place, but removed it from behind the drywall and placed it in an evidence bag which he kept on his person. Before placing the gun in the evidence bag, he unloaded it and noted that the gun was neither dusty nor covered in bits of drywall.

¶ 9 Officer Killen went upstairs to talk with petitioner. Petitioner told him he would show him where the gun was if Officer Killen would stop searching the house, which belonged to petitioner's grandmother. Officer Killen did not show petitioner the recovered gun in case a second gun existed.

¶ 10 When the officers brought petitioner downstairs to the laundry room, petitioner pointed to the opposite side of the wall where the gun was recovered and told the officers, "it's in there." Petitioner told the officers he had received the gun from a man on the block. When the officers showed petitioner the gun, he identified it as the gun to which he had referred.

¶ 11 The officers brought petitioner upstairs. Petitioner made a statement, but no statement was signed, video-taped, or audio-taped in the presence of the State's Attorney. Officer Killen inventoried the gun along with other recovered items upon return to the police station. The gun was not submitted for fingerprints. Officer Killen testified that petitioner identified the gun as his, and Officer Killen documented a summary of petitioner's statement in the police report.

¶ 12 Officer Haggerty testified that, upon approach to the residence in question, he saw several individuals outside. In the basement of the house, Officer Haggerty saw a laundry room, an unoccupied room containing medical equipment and supplies, and another bedroom. Officer Haggerty testified petitioner was lying on the bed in the second bedroom. Petitioner gave Officer Haggerty his name and identified the bedroom as his. Petitioner was then taken upstairs. Officers Haggerty and Killen began a systematic search of the bedroom. The paneling on the wall was broken and there were large holes in the walls. Officer Haggerty noticed men's clothing, shoes, and a weight bench. On a dresser, he recovered petitioner's identification card and a letter bearing the same name and address.

¶ 13 Using his flashlight, Officer Haggerty saw something that looked unusual in the heating vent. He unscrewed the heating vent and recovered a plastic bag containing live ammunition rounds. Officer Haggerty also saw Officer Killen recover a gun from the wall

separating petitioner's bedroom from the laundry room. He noted that the handgun, which had no dust or particles on it, was visible through a hole at the bottom of the drywall.

¶ 14 After these items were recovered, Officer Killen brought petitioner into the basement. Petitioner directed the officers to the laundry-room side of the wall from which the gun had been removed. Petitioner indicated the gun was on the other side of the wall.

¶ 15 The parties stipulated that petitioner had two qualifying offenses under the armed habitual offender criminal statute:

"[ASSISTANT STATE'S ATTORNEY GOLDISH:] It is hereby stipulated by an between the parties that Michael Ash has two felony convictions in his background which are qualifying felony offenses under the Armed Habitual Criminal Statute, under Case Nos. 91 CR 23561 and 04 CR 22622.<sup>1</sup>

So stipulated?

[DEFENSE ATTORNEY WEBBER:] So stipulated."

¶ 16 Petitioner's grandmother, Selma Bergman, testified that petitioner's bedroom was upstairs and her daughter and petitioner's mother, Verlinda, had a room in the basement. She also testified the house was in shambles after the police search. When presented with the recovered gun in court, Bergman denied having ever seen it before, stated she did not know to whom it belonged, and said she did not allow guns in her house.

¶ 17 Petitioner's mother, Verlinda, testified that on April 13, 2006, she lived with petitioner and other family members at the house in question. She testified that the basement bedroom was her bedroom rather than petitioner's. On the day of the search, police officers told Verlinda they were arresting petitioner because they found a weapon in his bedroom, but she

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<sup>1</sup> The correct case number of petitioner's predicate conviction for possession of a controlled substance with intent to deliver is 04 CR 22822.

told them it was her gun. She denied having repeatedly told the police officers she knew nothing about a loaded gun. At trial, she explained that, about two or three years earlier, she took a gun, which she identified in court as the gun recovered from the bedroom wall, from a drunken boyfriend and threw it behind the wall. The only way to retrieve the gun was to tear the wall down. She forgot the gun was there, but was surprised to learn that ammunition was recovered from the vent.

¶ 18 Verlinda denied she was a member of the Black P. Stone Nation street gang. She explained that the gang graffiti on the bedroom wall had been there for years and was not put there by her. Approximately one month after police arrested petitioner, Verlinda swore an affidavit in which she attested that the gun had been in her room for almost two years. In March 2007, she told an investigator she had received the gun from a former boyfriend who had since died. When shown a picture of her bedroom, Verlinda identified her belongings, including a leather jacket and a sheet with a picture of a woman on it being used as a window covering. When asked about a pair of shoes in the photograph, she initially said that not everything in the room was hers, then that the shoes were probably hers, and finally that she recognized them as her shoes.

¶ 19 Officer Haggerty testified in rebuttal that he informed Verlinda outside of the house that a handgun had been recovered in petitioner's bedroom. She repeatedly said she knew nothing about that and never said the gun or the bedroom in the basement belonged to her.

¶ 20 Officer James Donahue testified that he heard Verlinda tell Officer Haggerty repeatedly that she had no knowledge of the gun.

¶ 21 The jury found petitioner guilty of unlawful use of a weapon by a felon and being an armed habitual criminal. Petitioner filed a motion for a new trial, which the court denied.

¶ 22 At sentencing, the trial court merged the convictions and sentenced petitioner to eight years' incarceration. Petitioner filed a motion to reconsider the sentence, which the trial court denied.

¶ 23 Petitioner appealed his conviction and sentence, challenging the State's elicitation of specific gang-related evidence; the admission of hearsay testimony; and several of the State's closing arguments. This court affirmed. *People v. Ash*, No. 1-07-1861 (2009) (unpublished order under Supreme Court Rule 23).

¶ 24 In May 2010, petitioner filed a *pro se* postconviction petition alleging: (1) his conviction for armed habitual criminal violated the *ex post facto* clause because his prior convictions occurred before the effective date of the armed habitual criminal statute; (2) the trial court erred in allowing Officer Killen to testify about statements made by petitioner; (3) the State improperly elicited gang evidence from a defense witness; (4) defense counsel was ineffective for not objecting to Officer Killen's testimony; (5) the State made improper remarks during closing argument that attacked defense counsel and appellate counsel were "ineffective for not challenging the charging document;" (7) defense counsel was ineffective for failing to interview and call specific witnesses; and (8) defense counsel was ineffective for stipulating that petitioner had the two predicate felonies necessary to sustain a conviction under the armed habitual criminal statute. In July 2010, the trial court docketed petitioner's *pro se* postconviction petition and appointed counsel to represent petitioner.

¶ 25 During this time, petitioner also filed a petition for writ of *habeas corpus*. The trial court denied the petition, petitioner appealed, and appellate counsel moved to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court allowed counsel to withdraw and affirmed the judgment. *People v. Ash*, 2012 IL App (1st) 111557-U.



¶ 26

Postconviction counsel filed a supplemental postconviction petition in April 2012. He also filed his Rule 651(c) (134 Ill. 2d R. 651(c)) certificate attesting that he complied with the requirements of the Act. By this petition, counsel incorporated petitioner's previously-raised postconviction arguments, stating:

"Counsel waives no issues raised by the Petitioner in his pro se Petition for Post Conviction Relief and incorporates all such arguments raised therein within these pleadings by incorporation."

Additionally, petitioner through counsel argued that he was denied the effective assistance of trial counsel because trial counsel "permit[ed] him to be found guilty of the offense of armed habitual criminal when he had not in fact committed a prior criminal offense that was the basis of that charge. Specifically, petitioner alleges his trial counsel was ineffective where he did not challenge the information which reflected an incorrect predicate felony of burglary rather than the correct predicate felony of possession of a controlled substance with intent to deliver. Postconviction counsel argued that the failure to raise this issue on appeal did not constitute forfeiture because the issue was not a matter of record.

¶ 27

The State filed a motion to dismiss petitioner's postconviction petition, arguing in pertinent part that petitioner's claims were forfeited. The State also argued that petitioner's claim of ineffective assistance of counsel was without merit because he failed to show that defense counsel's performance was unreasonable and failed to show he suffered prejudice where he had ample notice of the charge against him and the charging instrument was amended prior to trial to reflect the proper qualifying offenses. The State also argued that, because the jury was only informed of the fact that petitioner had two "qualifying felonies" and petitioner did, in fact, have two qualifying felonies, the error in the stipulated case

number had no bearing on the outcome of the case. Additionally, the State argued that any claim of ineffective assistance of appellate counsel was without merit where the underlying issue of ineffective assistance of trial counsel was without merit.

¶ 28 The court held a hearing on the motion to dismiss, at which the parties stood on their written motions.

¶ 29 In November 2012, the court dismissed the petition in a memorandum order.

¶ 30 Petitioner appeals.

## ¶ 31 II. ANALYSIS

¶ 32 On appeal, petitioner contends the postconviction court erred in dismissing the petition where petitioner made a substantial showing that he was deprived of the effective assistance of both trial and appellate counsel. Specifically, he claims prejudice where trial counsel failed to object to the defective charging instrument or file a motion in arrest of judgment where the information listed a qualifying offense that was not attributable to petitioner, and where appellate counsel did not raise the "fatal variance" between the charged offense and evidence presented at trial on direct appeal. Petitioner also contends his postconviction counsel rendered ineffective assistance where counsel failed to amend petitioner's postconviction petition to include an allegation of ineffective assistance of appellate counsel.

¶ 33 We begin by noting the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (West 2010)) provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Jones*, 213 Ill. 2d 498, 503 (2004); see also *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A postconviction action is a collateral attack on a prior conviction and

sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)).

¶ 34

Proceedings under the Act are commenced by the filing of a petition in the circuit court in which the original proceeding took place. *Jones*, 213 Ill. 2d at 503. The Act creates a three-stage process. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). At the first stage of postconviction proceedings, the circuit court must determine whether the petition is "frivolous and patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Bocclair*, 202 Ill. 2d 89, 99 (2002). At this stage, to proceed further, the allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). This standard presents a "low threshold" (*Jones*, 211 Ill. 2d at 144) requiring only that the petitioner plead sufficient facts to assert an arguably constitutional claim (*People v. Hodges*, 234 Ill. 2d 1, 9 (2009)).

¶ 35

Where, as here, a petition advances to the second stage of the postconviction process, the State may file a motion to dismiss. 725 ILCS 5/122-5 (West 2010). To survive such motion, a petitioner must make a "substantial showing" that his constitutional rights were violated by supporting his allegations with the trial record or appropriate affidavits. *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A third stage evidentiary hearing is only required when the allegations of the petition, supported by the trial record and accompanying affidavits, make a substantial showing of a violation of a constitutional right. *People v. Hopley*, 182 Ill. 2d 404, 427-28 (1998). We review a circuit court's dismissal of a

postconviction petition at the second stage, as here, *de novo*. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 28.

¶ 36 i. The Ineffectiveness of Trial Counsel

¶ 37 Initially, the State argues that petitioner's claim of the ineffective assistance of trial counsel is procedurally barred by the doctrine of forfeiture because petitioner did not raise this issue on direct appeal even though, as petitioner admits, the issue "was apparent from the trial record alone." "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. [Citation.] Issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. [Citation.] However, the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. [Citation.]" *People v. English*, 2013 IL 112890, ¶ 22. Because petitioner argues the ineffective assistance of appellate counsel for failing to raise this claim on direct appeal, we will address the merits of this argument under the second reason for relaxing the forfeiture doctrine.

¶ 38 Claims of ineffective assistance of counsel are evaluated under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 690 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504 (1984). Under that test, a defendant must demonstrate that (1) counsel's performance was objectively unreasonable compared to prevailing professional standards; and (2) a reasonable probability exists that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 39 To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004); *People v. Burks*, 343 Ill. App. 3d 765, 775 (2003).

¶ 40 Establishing the prejudice prong of *Strickland* requires a "showing of actual prejudice and not simply speculation that the defendant may have been prejudiced." *Patterson*, 2014 IL 115102, ¶ 81. A petitioner must show a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Patterson*, 2014 IL 115102, ¶ 81. A "reasonable probability" is defined as a demonstration sufficient to undermine confidence in the outcome of the trial, rendering the result unreliable or fundamentally unfair. *Martinez*, 348 Ill. App. 3d at 537 (citing *People v. Evans*, 209 Ill. 2d 194, 220 (2004)).

¶ 41 Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690; *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). "Based on the second-stage procedural posture of the instant case, the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a

substantial constitutional deprivation which requires an evidentiary hearing." *Makiel*, 358 Ill. App. 3d at 106, citing *People v. Coleman*, 168 Ill. 2d 367, 381 (1995).

¶ 42 The Illinois Criminal Code of 1961 (the Code) defines the crime of armed habitual criminal thus:

"(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

(1) a forcible felony as defined in Section 2-8 of this Code;

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm \* \* \*;

or

(3) any violation of the Illinois Controlled Substances Act \* \* \* that is punishable as a Class 3 felony or higher." 720 ILCS 5/24-1.7(a) (West 2011).

¶ 43 The statute "demonstrates an unmistakable purpose to criminalize recidivist offenders who subsequently receive, possess, sell, or transfer firearms. [Citation.] Moreover, the statute evinces a clear intent that the crime apply to those offenders whose prior offenses were of a particular serious class or nature." *People v. Adams*, 404 Ill. App. 3d 405, 411 (2010). Both the prior convictions and the present conduct must be proved beyond a reasonable doubt. *Adams*, 404 Ill. App. 3d at 412.

¶ 44 In the case at bar, petitioner specifically contends that trial counsel was ineffective for failing to object to the defective information or file a motion in arrest of judgment based on the defective information. According to him, trial counsel should have challenged the charging instrument because it incorrectly listed a burglary conviction as one of the

qualifying offenses. However, it was unnecessary for trial counsel to object or file a motion in arrest of judgment based on the defective information because, as noted above, the State had already amended the information.

¶ 45

Although the charging instrument itself does not reflect amendments on its face, our review of the record on appeal convinces us that all parties understood the amendment to have been made where the State made the oral amendment to the charging instrument in the presence of the court and defense counsel. Where there is a discrepancy between the common law record and the record of proceedings, as it is argued there is in the case at bar, it is proper for this court to consider the record as a whole. *People v. Durr*, 215 Ill. 2d 283, 306 (2005). ("Although the common law record imports verity and is presumed correct, where the common law record is contradicted by matters in the report of proceedings, a reviewing court must look at the record as a whole to resolve the inconsistencies."). Initially, we note that the amendment was proper because it was made to correct a formal defect or miswriting in the charging instrument. See 725 ILCS 5/111-5(a) (West 2011); *People v. Milton*, 309 Ill. App. 3d 863, 866-67 (1999) (Under section 111-5 of the Code, "any miswriting, misspelling or grammatical error" qualifies as a formal defect which is correctable through amendment). Next, we find the record as a whole demonstrates that the amendment was made. Specifically, the armed habitual criminal charge was initially based on two prior convictions of first degree murder and burglary. Prior to trial, the State informed the court that, while the predicate first degree murder conviction was correct, the other predicate offense should be a conviction for possession of a controlled substance with intent to deliver rather than a conviction for burglary. Without objection, the State amended count 1, the armed habitual

criminal charge, striking the offense of burglary and correcting it to reflect the qualifying offense of possession of a controlled substance with intent to deliver, stating:

"[ASSISTANT STATE'S ATTORNEY GOLDISH:] Count one needs to be corrected for one of the qualifying offenses. I have the case number on my defendant's criminal history, but he criminal offenses should be possession with intent. And the other charge is a murder.

At that point in the trial, when we are on the record, I will in the presence of jury I will present you certified copies of those convictions or we will stipulate by case number, date of offense, the way normally it would come in."

Additionally, defendant's presentence investigation report, contained in the record on appeal, reflects that defendant's predicate felonies were murder and possession of a controlled substance with intent to deliver. The record supports the State's position that the information was amended.

¶ 46

Moreover, defense counsel requested that the court allow petitioner to stipulate that his prior convictions are elements of the armed habitual criminal charge without naming those prior felonies. Accordingly, at trial, the prior felonies were never presented to the jury in a manner in which the jury had any idea what the prior convictions were for. Instead, the parties merely stipulated that petitioner had two qualifying offenses under the armed habitual criminal statute, stating:

"[ASSISTANT STATE'S ATTORNEY GOLDISH:] It is hereby stipulated by an between the parties that Michael Ash has two felony convictions in his



background which are qualifying felony offenses under the Armed Habitual Criminal Statute, under Case Nos. 91 CR 23561 and 04 CR 22622.<sup>2</sup>

So stipulated?

[DEFENSE ATTORNEY WEBBER:] So stipulated."

¶ 47 Petitioner does not challenge the fact of these convictions, as his criminal history clearly reflects petitioner's prior convictions for first degree murder and possession of a controlled substance with intent to deliver. Nor does defendant challenge the fact that the convictions are qualifying convictions under the armed habitual criminal statute. Based on the oral amendment to the charging instrument, the State, defense counsel, and petitioner all understood that they were stipulating to the qualifying offenses of murder and possession of a controlled substance with intent to deliver. Where the oral amendment was of record and made in the presence of all parties, any defects were cured. Therefore, there was no basis for defense counsel to object to the charging instrument, nor basis to file a motion to challenge the charging instrument. See, *e.g.*, *In re Ottinger*, 333 Ill. App. 3d 114, 118 (2002) ("failure of defendant's counsel to make a futile objection does not constitute fundamentally deficient performance"); *People v. Givens*, 237 Ill. 2d 168, 175 (2000) (As a general rule, trial counsel's failure to file a motion that would have been futile does not establish incompetent representation.).

¶ 48 Nonetheless, even if counsel's representation were unreasonable, we would still find that petitioner is unable demonstrate prejudice. See *Palmer*, 162 Ill. 2d at 475-76 (Failure to

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<sup>2</sup> While we recognize that the actual case number of the predicate conviction for possession of a controlled substance with intent to deliver is 04 CR 22822, we find this discrepancy a non-issue, as it appears to us the assistant state's attorney merely transposed the 6 for the 8. Again, the parties all understood the predicate convictions were for murder and possession with intent, and the jury was merely informed by stipulation of the fact of the predicate felonies, rather than the details underlying the predicate felonies.

make the requisite showing of either deficient performance or sufficient prejudice defeats the claim.).

¶ 49 Establishing the prejudice prong of *Strickland* requires a "showing of actual prejudice and not simply speculation that the defendant may have been prejudiced." *Patterson*, 2014 IL 115102, ¶ 81. A petitioner must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Patterson*, 2014 IL 115102, ¶ 81. A "reasonable probability" is defined as a demonstration sufficient to undermine confidence in the outcome of the trial, rendering the result unreliable or fundamentally unfair. *Martinez*, 348 Ill. App. 3d at 537 (citing *Evans*, 209 Ill. 2d at 220).

¶ 50 Here, petitioner suffered no prejudice where, as noted previously, he was given notice of the amendment and the jury only heard the case number rather than the actual conviction. Additionally, petitioner cannot escape the fact that he actually had the predicate felonies for the armed habitual criminal conviction in his criminal background. To be clear, petitioner does not argue on appeal that he was prejudiced because he was convicted of armed habitual criminal but was never convicted of the underlying requisite felonies. Rather, petitioner admits to having the requisite felonies—and they are clearly reflected in petitioner's criminal background—but contends that he was somehow prejudiced by the fact that, prior to trial, his charging information erroneously listed "burglary" rather than the appropriate "possession of a controlled substance with intent to deliver." The State amended the information as reflected in the colloquy prior to jury selection, petitioner and his attorney were given notice of the amendment, and the jury—at petitioner's request—never heard the names of the underlying convictions, but only that they were "qualifying" for purposes of the armed habitual criminal statute. Based on the totality of the record, petitioner did not suffer

prejudice under *Strickland*, and the trial court properly dismissed his postconviction petition. See *Patterson*, 2014 IL 115102, ¶ 81 (A petitioner must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different.).

¶ 51 ii. The Ineffectiveness of Appellate Counsel

¶ 52 Next, petitioner contends appellate counsel was ineffective for failing to argue on appeal that his trial counsel was ineffective for failing to challenge the charging instrument as defective. "A petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner." *People v. Childress*, 191 Ill. 2d 168, 175 (2000). Appellate counsel is not ineffective for failing to raise frivolous or otherwise nonmeritorious issues on appeal because the defendant suffers no prejudice. *Childress*, 191 Ill. 2d at 175. Because we have determined that petitioner's underlying claim is without merit, it cannot be said that any ineffectiveness on appellate counsel's behalf constituted incompetence.

¶ 53 iii. The Ineffectiveness of Postconviction Counsel

¶ 54 Finally, petitioner contends postconviction counsel was ineffective because, although postconviction counsel amended the *pro se* petition which included allegations of the ineffective assistance of appellate counsel, postconviction counsel specifically adopted all *pro se* issues in the supplemental petition, and postconviction counsel alleged the general ineffective assistance of appellate counsel in the supplemental petition, postconviction counsel did not specifically include a claim of the ineffective assistance of appellate counsel for failing to raise the charging instrument issue on direct appeal. Petitioner acknowledges

that postconviction counsel filed a Rule 651(c) certificate, but contends that the record demonstrates counsel failed to comply with the duties articulated in Rule 651(c). Specifically, petitioner argues that, because the defective charging instrument was "an obvious one," postconviction counsel should have seen that appellate counsel failed to raise it on appeal, and should have amended the petition to include the allegation of ineffective assistance of appellate counsel.

¶ 55 Where, as here, postconviction counsel filed a Rule 651(c) certificate, counsel is presumed to have fulfilled his legal duties and, thus, rendered reasonable assistance. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). Notwithstanding the filing of the certificate, defendant asserts that the record establishes non-compliance with the duties of postconviction counsel where, although counsel adopted petitioner's *pro se* appellate ineffectiveness argument on the issue, counsel should have amended the supplemental petition to include a more artful version of the argument. See, e.g., *People v. Perkins*, 367 Ill. App. 3d 895, 899 (2006) ("When the record demonstrates that counsel has failed to provide the representation required by Rule 651(c), counsel's certificate that he has done so is ineffective to demonstrate compliance."). This issue presents a question of law for which our standard of review is *de novo*. *Rossi*, 387 Ill. App. 3d at 1057.

¶ 56 The right to representation in the postconviction context is statutory. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). In postconviction proceedings, an indigent defendant is entitled to appointed counsel (725 ILCS 5/122-4 (West 2010)), who should provide a reasonable level of assistance. *Pendleton*, 223 Ill. 2d at 472. "Our supreme court has repeatedly held that the purpose of Rule 651(c) is to ensure that postconviction counsel: (1) ascertains the bases of the postconviction petitioner's complaints, (2) shapes those complaints

into proper legal form, and (3) presents those complaints to the court." *Rossi*, 387 Ill. App. 3d at 1058 (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 558 (2003)).

¶ 57

Postconviction counsel's Supreme Court Rule 651(c) certification is included in the record on appeal. In it, counsel for the public defender attests:

"1. That undersigned counsel is the attorney of record for Michael Ash, Reg. No. B-52018, currently incarcerated, Western Illinois Correctional Center, 2500 Ill. Route 99 South, Mount Sterling, IL 62353, in his *pro se* Petition for Post Conviction Relief, Case 06 CR 09873-01.

2. That the Petitioner Michael Ash was sentenced after a jury trial to eight years concurrent on one count each of armed habitual criminal and unlawful use of a weapon by a felon. Original sentencing date by Judge James D. Egan was June 18, 2007.

3. That I have consulted with the petitioner by mail. I have also made a personal visit to consult with him at Western Illinois Correctional Center on October 17, 2011. I have examined the record of all proceedings relevant to issues raised by the petitioner in his pleadings filed *pro se*; that within said the [sic] pleadings of the petitioner filed *pro se* on or about May 17, 2010.

4. That I have reviewed the court record with respect to the claim raised by Mr. Ash within said the pleadings [sic] of the petitioner filed *pro se* on or about May 17, 2010, asserting deprivation of constitutional right(s) and have made necessary amendments to his *pro se* Petition for Post Conviction Relief for an adequate presentation of petitioner's contentions in accordance with my obligation pursuant to this rule. Pursuant to client instruction, while no issues raised by him

have been or are now waived, I have limited my amendments to those issues involving the charge of armed habitual criminal based upon the criminal background of another individual."

¶ 58 Initially, the State argues that "petitioner cannot bring a free-standing claim of unreasonable assistance of post-conviction counsel on appeal because such a claim is predicated on deprivation of a statutory right, not a constitutional right." Under the State's interpretation of *Rossi*, a petitioner essentially is foreclosed from bringing a claim of the ineffective assistance of postconviction counsel because effective postconviction counsel is statutory rather than constitutional. We think the State's argument confuses a cognizable claim of a postconviction petition with the appropriate subject matter of an appeal. While the State is correct in asserting that the postconviction process is reserved for claims of constitutional deprivations, case law is replete with examples in which courts address the adequacy of postconviction counsel's adequacy on appeal from the denial of a postconviction petition. See, e.g., *People v. Turner*, 187 Ill. 2d 406, 410 (1999) ("Petitioner's only argument on appeal is that he was denied his right to reasonable assistance of counsel during the proceedings on his post-conviction petition"); *People v. Mendoza*, 402 Ill. App. 3d 808; *People v. Schlosser*, 2012 IL App (1st) 092523; *Perkins*, 367 Ill. App. 3d at 899. To hold as the State would have us hold would deny all postconviction petitioners the opportunity to challenge the adequacy of a postconviction counsel's representation. We decline to do so. Accordingly, we turn to the merits of petitioner's claim.

¶ 59 As demonstrated from postconviction counsel's Rule 651(c) certificate, postconviction counsel did what he was required to do and what was requested by petitioner. That is, he adequately amended, presented, and supported the claims raised by petitioner. While

postconviction counsel did not include a claim of ineffective assistance of appellate counsel as to the defective instrument claim, he did incorporate petitioner's previously-raised postconviction arguments, stating:

"Counsel waives no issues raised by the Petitioner in his pro se Petition for Post Conviction Relief and incorporates all such arguments raised therein within these pleadings by incorporation."

¶ 60 These previously-raised arguments, incorporated by counsel into the supplemental petition, include a claim of the ineffective assistance of appellate counsel regarding the defective charging instrument issue. By explicitly incorporating that claim and stating that none of the claims petitioner raised in his petition were being waived, postconviction counsel ensured that petitioner's claims were properly preserved for litigation. That claim, in fact, was not decided by this court based on forfeiture, but was decided on the merits, that is, this court found no merit in the claim of the ineffective assistance of appellate counsel where the underlying claim itself was without merit. Accordingly, we cannot say that postconviction counsel provided inadequate representation for failing to include an additional claim for the ineffective assistance of appellate counsel in petitioner's supplemental petition.

### ¶ 61 III. CONCLUSION

¶ 62 For all of the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 63 Affirmed.