FOURTH DIVISION
August 13, 2015

No. 1-13-1358

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division
	)	
DARRYL BUNCH,	)	No. 99 CR 10066 (02)
	)	
Petitioner-Appellant.	)	The Honorable
	)	Neera Lall Walsh,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in dismissing the petitioner's *pro se* postconviction petition at the second stage of postconviction proceedings where postconviction counsel failed to provide a reasonable level of assistance, and instead of advocating on behalf of her client or withdrawing her representation, openly advocated against him in open court.

¶ 2 After a bench trial in the circuit court of Cook county, the petitioner, Darryl Bunch, was convicted of first degree murder and sentenced to 20 years' imprisonment. After the petitioner filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2004)), the petition automatically proceeded to the second stage of

postconviction proceedings and the trial court appointed counsel to represent him. Over eight years later, appointed counsel filed a certificate pursuant to Rule 651(c) (Ill. S. Ct. 651(c) (eff. Feb. 6, 2013)) stating that she would not be amending the petition. The State filed a motion to dismiss the *pro se* petition petition. Appointed counsel filed no response, and at the hearing on the State's motion instead argued to the court that at least two of the petitioner's claims had no merit. The circuit court dismissed the *pro se* postconviction petition. The petitioner now appeals contending that his postconviction counsel failed to provide a reasonable level of assistance and that his petition should have been permitted to proceed to a third stage evidentiary hearing. For the reasons that follow, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following facts and procedural history. On April 29, 1999, together with the codefendant, Rory Cook, the defendant, was charged, with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 1992)) for his participation in the shooting of the victim, Brian Keith Bell on April 3, 1999.

¶ 5 On October 4, 1999, through private counsel, the petitioner filed a motion to suppress his statements to police. In that motion, counsel argued that the petitioner was arrested on April 4, 1999, at 9 a.m. and his alleged confession was obtained on April 6, 1999, at 4 a.m. The motion, *inter alia*, alleged that the petitioner's statements were obtained in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights, because: (1) he was never informed of, nor understood his *Miranda* rights, so that any waiver of such rights was neither knowing or intelligent; (2) the statements were obtained as a result of either physical or mental coercion; (3) at the time of the alleged statements the petitioner was "under the extreme influence of drugs and alcohol such that he was unable to comprehend his constitutional rights and could not coherently represent himself

and his interests;" and (4) "without his glasses, the petitioner could not see well enough to read the statement written for him."

¶ 6 On February 22, 2000, the petitioner's counsel appeared in court and stated that he was withdrawing the motion to suppress. In doing so, counsel explained:

> "At this time, Judge, I am going to ask your indulgence and withdraw that motion at this time. As I indicated to the State's Attorney this morning I may after speaking with my client and his family refile alleging different facts and allegations, but I just did not feel ethically and morally, I want to put on a motion that is at least initially filed without merit.
>
> Without going into the sum and substance of it, your Honor, I did receive late last week [a] transcript of the bond hearing[1] on the case which was, which I had been waiting for which the date and time of which tended to mitigate strongly against our position."

¶ 7 The State responded that it had no objection to counsel withdrawing the motion, but stated

[1] We note that contrary to the petitioner's counsel's statement to the trial court, there is *nothing* in the bond hearing that would mitigate strongly against the initially filed motion to suppress statements. At the bond hearing, the State made a proffer of the incriminating facts it had against the petitioner and the codefendant and the court set bond for both. The State's proffer made no mention of the circumstances surrounding the petitioner's incriminating statements to police. Rather, during the bond hearing the State only proffered that the petitioner had made such a statement to police. The date of the bond hearing also does not mitigate against any argument in the motion to suppress since the hearing was held on April 6, 1999, the same date that the petitioner made his incriminating statements to police.

that it would have objection to counsel being permitted to refile any similar motion in the future. The court agreed with the State, stating that it would not "do this in piece meal fashion," and explaining: "Whatever basis for what you deem to be a possible motion should have been known to you by now. The case is approaching a year old."

¶ 8 In response, the petitioner's counsel stated:

> "Yeah. Let me rephrase it then. And I mean I am always direct and candid. I will be more direct at this point. I don't know of any basis to file a motion to suppress statements that would not be frivolous. Obviously I need to speak to my client and his family. They are all here, all prepared to testify."

¶ 9 The State then suggested that the matter be passed so that the petitioner's counsel could have an opportunity to speak to his client and the petitioner's family and determine whether he wanted to refile the motion to suppress on another basis. However, instead of taking the State's advice, and passing the matter so that he could have an opportunity to speak with the petitioner's family to determine if they had any information that could be useful in litigating a motion suppress, the petitioner's counsel stated on record: "Judge, at this point, I am withdrawing the motion. I don't anticipate any other motions. I believe that I am ready for trial."

¶ 10 In November 2000, the petitioner proceeded with his bench trial. The petitioner was tried simultaneously with codefendant Cook, who proceeded with a jury trial. At trial, the following evidence was adduced.

¶ 11 Codefendant Cook's girlfriend, Dana Hunt (hereinafter Hunt) testified that in April 1999, she lived with the codefendant in a second floor apartment at 11259 King Drive. The victim, Bell, lived in the apartment below them. According to Hunt, she and codefendant Cook did not pay rent because the building's owner had "just disappeared." Hunt admitted that since then she

and the codefendant lived in the building as "squatters." According to Hunt, about four months prior to the incident, the codefendant permitted Bell to move into the apartment below them, charging him rent.

¶ 12 Hunt testified that at about 3 or 4 p.m., on April 3, 1999, she was drinking in her apartment with the codefendant and a childhood friend, named Garrett Scruthens (hereinafter Scruthens). At about 6 p.m., codefendant left the apartment to get more liquor for Scruthens. Soon thereafter, the codefendant returned, and the petitioner also joined the group in the apartment.

¶ 13 Hunt averred that at about 7 p.m., the codefendant left the apartment again, this time to buy crack cocaine with $20 given to him by the petitioner. The codefendant went to an apartment on the first floor to buy the crack cocaine. Hunt testified that about 10 minutes after the codefendant left, she heard him arguing with Bell outside. She looked out of her front window and saw them fighting across the street in front of the park. She averred that Bell had a hammer in his hand. Hunt ran downstairs and outside to "break up the fight," and had the codefendant return to the apartment. According to Hunt, the codefendant's forehead was bleeding.

¶ 14 Once back in the apartment, Hunt and the codefendant resumed drinking and smoking crack cocaine with Scruthens and the petitioner. According to Hunt, the petitioner told the codefendant that "he should have stomped [Bell.]" A few hours later, the petitioner and codefendant left the apartment again to purchase more liquor.

¶ 15 While they were gone, Hunt went to Bell's apartment downstairs, and gave him $10 that she had borrowed from the petitioner. Hunt explained that she did so, because prior to April 3, 1999, Bell had been repeatedly coming to their apartment, threatening the codefendant that if he did not pay him back the $10 he owed, Bell would "kick his a**." .

¶ 16 After the codefendant and petitioner returned, everyone resumed drinking around the table in

the room. According to Hunt, at some point, the petitioner pulled out a gun, took the bullets out and put them back in and set it on the table. He then said that the codefendant "should have popped [Bell.]" The codefendant responded that "he would if [Bell] kept f*****g with him." The codefendant then picked up the gun and placed it in his back right pocket.

¶ 17 Hunt testified that soon thereafter, Scruthens left and the codefendant went to lock the front door. At that point, Hunt heard the codefendant arguing with Bell again. She went out into the hallway to see what was going on and observed Bell wrestling with the codefendant. She tried to separate them, but they continued to wrestle all the way down to the first floor. At that point, Hunt decided to head upstairs. She testified that through a small window in the door, she then watched as the codefendant pulled out the gun from his back pocket, and the two men continued to wrestle over the weapon, until she heard gunshots. Hunt, however, admitted that when she initially spoke to police after the incident, she never told them about seeing the codefendant wrestling with Bell over the gun. In fact, she never told police that she observed the shooting. Rather at that time, she stated that she merely heard gunshots as she was heading upstairs.

¶ 18 During cross-examination, Hunt admitted that at the time of the shooting, which occurred around 10 p.m., she had been high on crack cocaine and alcohol, and had, in fact, been smoking crack cocaine and drinking gin and beer for over 6 hours. Hunt further acknowledged that the petitioner and the codefendant had been consuming crack cocaine and alcohol even longer than she had that day.

¶ 19 On further cross-examination, Hunt also stated that when she borrowed $10 from the petitioner, he knew that she was going to give the money to Bell so that Bell would stop harassing the codefendant. She acknowledged that the petitioner was the one who offered her money to give to Bell, and that he was attempting to "make the situation calmer."

¶ 20 On cross-examination, Hunt also admitted that she was aware that the petitioner was employed as a licensed security guard, who carried a weapon. She stated, however, that this was the first time she had actually seen the petitioner with a gun. Hunt further testified that the petitioner was in the room when the codefendant returned from his initial fight with Bell bleeding. Hunt admitted that at that point, the petitioner never told the codefendant, "you should have killed him," or "you should have shot him," but merely stated "you should have stomped him." Hunt further admitted that during the course of the evening, the petitioner passed out on the couch at least twice because of the amount of liquor and drugs he had consumed.

¶ 21 On cross-examination, Hunt admitted that the petitioner made no comment to the codefendant when he placed his gun on the table. Rather, as Hunt acknowledged, he made the statement that the codefendant should "pop [Bell's] a**" sometime later that evening. In addition, Hunt admitted that when the codefendant and Bell began their second altercation which ultimately resulted in the shooting, the petitioner remained in the apartment.

¶ 22 Chicago police officer David Showers (hereinafter Officer Showers) next testified, *inter alia*, that at approximately 10:30 p.m. on April 3, 1999, together with his partner, Officer Cordy Fouch (hereinafter Officer Fouch), he responded to a call of shots fired in the vicinity of 113th Street and Indiana Avenue. Once at the crime scene, he observed the codefendant sitting on top of Bell, choking him with his hands. The officers parked the car, and ran over to the men. While Officer Showers pulled the codefendant off Bell, Officer Fouch attempted to provide Bell with assistance. Officer Showers testified that as soon as he pulled the codefendant off Bell, Bell pointed to the codefendant and repeatedly stated, "he is the one that shot me." Officer Showers then handcuffed the codefendant and walked him over to his car, while Officer Fouch waited for the ambulance to arrive to help Bell.

¶ 23 Chicago police officer Fouch next testified consistently with Officer Showers. He further explained that he called an ambulance because Bell told him he had been shot and showed him a small gunshot wound to his abdomen. Officer Fouch also stated that when he asked Bell where the gun was, Bell told him that the codefendant "gave it to his boy who ran into the building." Bell, however did not name the friend to whom the codefendant gave the gun, nor did he describe him. In addition, Officer Fouch admitted when he initially saw the codefendant on top of Bell he did not observe any third party in the vicinity or anyone near or running into the building.

¶ 24 The parties next stipulated that a gunshot residue analysis was performed on the codefendant, the victim, and Hunt. The results of the test revealed that there was gunshot residue on the victim's right hand palm, which was consistent with the discharging of a firearm or the handling of a firearm or being in close proximity to a discharged firearm. The test further revealed that there was gunshot residue on the codefendant's left palm and the back of his left hand, which was consistent with the discharging of a firearm or the handling of a firearm or the being in close proximity to the discharge of a firearm. Finally the test revealed no gunshot residue on Hunt's hand indicating that she was neither in close proximity of, nor had discharged or handled a gun.

¶ 25 The parties further stipulated that an autopsy was performed on the victim on April 5, 1999, the results of which revealed that he died from multiple gunshot wounds, including to his left upper abdomen (through the liver and aorta) and to his right hand. The manner of death was ruled a homicide. In addition, according to the toxicology report the victim was positive for benzolycenine and cocaine.

¶ 26 Chicago police detective Sylvia Van Witzenburg (hereinafter Detective Van Witzenburg)

testified that together with Detective Robert Arteaga (hereinafter Detective Arteaga), she was assigned to investigate the shooting of the victim. After speaking to the codefendant, who was already in custody, at about 6:40 a.m. on April 4, 1999, Detective Van Witzenburg proceeded to 901 East 104th Street to locate the petitioner. At about 8:45 a.m., the detective found the petitioner and took him to the police station. At about 8 p.m. that evening she and Detective Arteaga spoke with the petitioner for about 30 minutes, after which they returned to the codefendant's apartment and found a gun under a couch cushion.

¶ 27 Chicago police detective Paul Bernatek (hereinafter Detective Bernatek) next testified that together with Detective Van Witzenburg he spoke to the petitioner at about 9 a.m. on April 4, 1999, shortly after the petitioner's arrest. Detective Bernatek averred that Detective Van Witzenburg advised the petitioner of his *Miranda* rights, and the petitioner verbally acknowledged his rights and agreed to speak with the detectives. In this conversation, the petitioner told the detectives that he and the codefendant were friends and that at the time of the incident he was inside the codefendant's apartment when he heard shots. The petitioner immediately went outside and saw the codefendant, holding a gun and standing over a man on the ground. The petitioner told the detective that he took the gun from the codefendant's hand and hid it before walking home.

¶ 28 On cross-examination, Detective Bernatek admitted that he never had the petitioner sign a written *Miranda* waiver. He also acknowledged that he did not record the interview in any way. According to Detective Bernatek, during the interview, the petitioner did not appear to be under the influence of alcohol or drugs. The detective acknowledged that he was not aware that the petitioner had smoked crack cocaine on the night of the shooting. He also acknowledged that he never gave the petitioner a breathalyzer test. Finally, the detective admitted that he did not know

that the petitioner suffered from multiple sclerosis. The detective denied seeing the petitioner shaking during the interview or speaking slowly in stammers.

¶ 29 Detective Robert McVicker testified that he spoke with the petitioner between 11:45 a.m. and 7 p.m. on April 4, 1999, and that the petitioner did not appear to be under the influence of alcohol.

¶ 30 Chicago police detective Robert Arteaga next testified that he and Detective Bernatek spoke with the petitioner at about 9 a.m. on April 4, 1999, shortly after the petitioner was taken into custody. Detective Arteaga averred that together with Detective Van Witzenburg he next spoke with the petitioner at about 8 p.m. that day. According to Detective Arteaga, on that occasion, the petitioner was advised of his *Miranda* rights from a pre-printed card. The petitioner then told the detectives that he had told the codefendant "I'll pop [Bell] if he comes back." The petitioner explained to the detectives that "pop" meant "shoot." On cross-examination, Detective Arteaga acknowledged that the petitioner had explained to him that when he made this statement to the codefendant, he had been "drinking liquor, talking crazy and bragging." The petitioner also admitted to the detectives that he had brought the gun to the codefendant's apartment prior to the shooting. The petitioner explained, however, that he never gave the gun to the codefendant but merely placed it on the table in the room. According to Detective Arteaga, the petitioner further admitted to him that after the shooting, he took the gun from the codefendant, removed the shells and hid the gun under couch cushions in the codefendant's apartment.

¶ 31 Detective Arteaga further testified that at about 3 a.m. on April 5, 1999, the Assistant State's Attorney (ASA) Scott Anderson (hereinafter ASA Anderson) met with the petitioner, at which time the petitioner reiterated "basically the same information" from his previous interview with the detectives. According to Detective Arteaga, early the next morning ASA Anderson met with

the petitioner again and memorialized his statement in handwriting. Once the statement was written out by ASA Anderson, the petitioner was asked to read the preprinted paragraph about his constitutional rights aloud, as well as the first paragraph of the statement so that the detective could determine his ability to read. Afterward, ASA Anderson read the rest of the statement to the petitioner, and allowed the petitioner to make corrections as he saw fit.

¶ 32 The petitioner's statement was next admitted into evidence. In that statement the petitioner initially indicates that he has read his *Miranda* rights and wishes to give a statement. The petitioner next states, in relevant part, that on the early evening of April 3, 1999, he was drinking and smoking crack cocaine with Hunt and the codefendant. At some point the codefendant left to get more cocaine and got into a fight with a man outside. After the altercation ended, the group resumed drinking and smoking in the codefendant's apartment. Later, the petitioner and the codefendant left to buy more alcohol. After buying beer and gin, they drove to the petitioner's house to get his gun. They then returned to the codefendant's apartment. At some point, while in the apartment, the petitioner put the gun on the table and said, "Man, I'll pop me a ni***r." The petitioner reiterated in his statement that "pop" meant to "shoot" someone. The petitioner then emptied the gun, reloaded it, and put it on the table.

¶ 33 According to the petitioner's statement, sometime later, the petitioner gave the codefendant money to buy more cocaine. The codefendant asked for the gun, and the petitioner told him to take it. A few minutes later, the petitioner heard gunshots. He ran downstairs and saw the codefendant on top of the man he had been fighting with earlier. The codefendant had the gun in his hand, and the petitioner said, "Pop his a**. Pop his a**." The codefendant shot two more times. The petitioner ran up to the codefendant, took the gun from him, and hid it under a couch cushion.

¶ 34 The petitioner's statement further avers that he is "not under the influence of drugs or alcohol" in making the statement and that "[n]o threats or promises were made in exchange" for it. In addition, according to the statement, the petitioner "showed he could read by reading the typewritten rights portion of page one out loud as well as the first handwritten paragraph out loud."

¶ 35 On cross-examination, Detective Arteaga testified that the petitioner was alone in his locked apartment when the officers found him on the morning of April 4, 1999. Detective Arteaga acknowledged that when he interviewed the petitioner nearly 12 hours later at 8 p.m. on April 4, 1999, it was "pretty clear [the petitioner] had been drinking." Detective Arteaga admitted that he could smell the alcohol on the petitioner's breath. Detective Arteaga knew that the petitioner wore glasses, and testified that he was wearing glasses at some point during his interviews. The detective, however, acknowledged that the petitioner did not wear his glasses when he made the handwritten statement to ASA Anderson. The detective, however, could not recall what happened to the glasses, or at which point in the day exactly, the petitioner stopped wearing them. Detective Arteaga did not know that the petitioner could "barely see without his [g]lasses." He also was unaware that the petitioner suffered from multiple sclerosis. The detective further testified that the petitioner did not seem high, but did look tired.

¶ 36 After the State rested its case, the defense called Michael M. Hill (hereinafter Hill) to the stand. Hill testified that he lived in an apartment on East 113th Street and heard gunshots on the night in question. Hill walked about four buildings over to the building at 113th Street and King Drive, where he observed two men fighting. Hill testified it took him less than 2 minutes to walk there. Although Hill heard one of the two men on the ground say he got rid of the weapon, he testified that he never heard him say that he had "his boy" get rid of the gun. Hill saw no one in

the vicinity except for the two men fighting on the floor. Hill averred that he spoke both to the police at the scene of the crime and later to detectives at the police station, and acknowledged that any statement in their police reports that the man on the ground stated that he had given the gun to "his boy" or that he had "his boy" get rid of the gun, was inaccurate.

¶ 37 After hearing all the testimony and closing arguments by the parties, the trial court found the petitioner guilty of first degree murder. Specifically the court stated that it believed that he petitioner provided the gun and encouraged the codefendant before the shooting. In doing so, the court, *inter alia*, relied heavily on the petitioner's statement to police. The court subsequently sentenced the petitioner to 20 years' imprisonment.

¶ 38 On direct appeal, the petitioner argued that the State failed to prove him guilty of first degree murder beyond a reasonable doubt and that the court erred in failing to hold a fitness hearing prior to sentencing, because, *inter alia*, the petitioner had attempted suicide while in custody and had a documented medical history of depression, including continued use of combinations of antidepressants. This court affirmed the petitioner's conviction and sentence on October 3, 2003. See *People v. Bunch*, No. 1-01-2517 (October 3, 2003) (unpublished order pursuant to Illinois Supreme Court Rule 23). The petitioner filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on March 24, 2004.

¶ 39 On April 6, 2004, the petitioner filed the instant *pro se* petition pursuant to the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2004). Therein, he alleged, *inter alia*, that trial counsel was ineffective for, among other things: (1) failing to litigate his motion to suppress statements by failing to call witnesses who were available and willing to testify as to the circumstances relevant to the obtaining of those statements; (2) failing to request severed trials; and (3) denying the petitioner his right to testify at trial. The petitioner also alleged that

appellate counsel was ineffective for failing to raise several of these issues in his direct appeal. In support, the petitioner attached notarized affidavits from his mother (Sarah Hagan), two brothers (Robert L. Hagan Jr., and Lee A. Bunch III), an aunt (Margaret McCullough), his girlfriend (Merrid J. Grady), and a family friend (Erica Nicholas). He also attached his own notarized affidavit.

¶ 40 In his affidavit, the petitioner, *inter alia,* averred that he had been drinking and using drugs before he was arrested, and was still intoxicated while in custody. He further averred that he could not read the statement he signed because he did not have his glasses and is legally blind without them. The petitioner also explained that he repeatedly asked for a lawyer while in custody, but was told by police that he could not call a lawyer until he signed a statement. The officers also told the petitioner that he would be released once he signed the statement. The petitioner further averred that his trial attorney never informed him that he would withdraw the motion to suppress before he did so. In addition, although the petitioner told his trial attorney he wanted to testify, his trial attorney told him that he could not, and that he had to take a bench trial.

¶ 41 In their affidavits, executed in 2002 and 2003, the petitioner's two brothers, his girlfriend Grady and their family friend Nicholas averred, *inter alia*, that they went to the police station at approximately 8:30-9 p.m. on April 4, 1999, the day that the petitioner was arrested, and were told that the petitioner was so intoxicated that he could not be interviewed for at least a day or two. The detectives at the police station told them that the petitioner would be allowed to telephone them once he sobered up, so the four went home and waited for a call, but it never came. In their affidavits, the petitioner's mother and aunt averred, *inter alia*, that the petitioner was virtually blind without his glasses, and that he could not have had his glasses at the police

station because they had the glasses at home. The petitioner's aunt averred that she brought the petitioner those glasses to the police station on the third day of his arrest, long after his alleged handwritten statement was made. The petitioner's mother also averred that because the petitioner suffered from multiple sclerosis alcohol affected him "differently than normal persons," and it took "very little alcohol to intoxicate him, and [took] much longer to leave his system." All of the affiants averred that they spoke to trial counsel and were prepared to testify at the motion to suppress hearing, but counsel withdrew the motion without consulting them.

¶ 42 More than 90 days after the petitioner filed his *pro se* postconviction petition, the case automatically proceeded to stage two post-conviction proceedings and on August 5, 2004, the trial court appointed the public defender's office to represent the petitioner. Inexplicably, for over six years, the public defender's office filed no pleadings in the case. Subsequently, the public defender assigned to the case appeared before the trial court on September 23, 2010, stating that she had "just begun" working on the case. Almost a year later, on August 5, 2011, the public defender appeared before the court again, reporting that she had still not finished reading the record. On May 14, 2012, almost eight years after the petitioner had filed his *pro se* postconviction petition, the public defender appeared before the court and stated that her investigator had talked to an unspecified physician who had "tested" the petitioner at Cermak Hospital sometimes after the offense, and the physician "assured us that he was not in fact legally blind." The public defender did not support this statement with any documentation. Rather, in the first pleading filed eight years after the case was assigned to her office, on June 18, 2012, the public defender filed a certificate pursuant to Rule 651(c) (Ill. S. Ct. 651(c) (eff. Feb. 6, 2013)) explaining that she had corresponded with the petitioner, read the trial record, ascertained his claims of constitutional deprivation, and would not be amending his *pro se* petition.

¶ 43 On January 14, 2013, the State filed a motion to dismiss the petition. The public defender did not file a response. At the subsequent hearing on the State's motion to dismiss, the public defender declined to make a single argument in the petitioner's favor. Instead, she contended that two of the petitioner's claims, pertaining to trial severance and waiver of his right to testify at trial were rebutted by the record.

¶ 44 The trial court dismissed the petition in a written order. The petitioner now appeals.

¶ 45 II. ANALYSIS

¶ 46 We begin by setting forth the well-established rules governing postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a means by which a criminal defendant may challenge his conviction on the basis of a "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). 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. Kokoraleis*, 159 Ill. 2d 325, 328 (1994).

¶ 47 In a noncapital case, the Act creates a three-stage procedure of postconviction relief. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005); see also *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Proceedings under the Act are commenced by the filing of a petition in the trial court that contains the allegations pertaining to the substantial denial of the petitioner's constitutional rights. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage, the trial court must, within 90 days after the petition is filed and docketed, review the petition and determine whether the allegations, if taken as true, demonstrate a constitutional violation or whether they are "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a) (2) (West 2004); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 48 If the trial court does not dismiss the petition as frivolous or patently without merit within the 90-day time period, the petition advances to the second stage, where it is docketed for additional consideration. 725 ILCS 122-2.1(b) (West 2004). At the second stage, the trial court will appoint an attorney for the petitioner if he cannot afford one and the State is entitled to file responsive pleadings. *People v. Steward*, 406 Ill. App. 3d 82, 88 (2010).

¶ 49 At the second stage of postconviction proceedings, the circuit court must determine whether the petition and any accompanying documentation have made a substantial showing of a violation of constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); see also *People v. Towns*, 182 Ill. 2d 491, 501 (1998) ("In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true."). In addition, the trial court may not "engage in fact-finding or credibility determinations." See *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Rather any factual disputes raised by the pleadings must be advanced to and resolved at an evidentiary hearing. See *People v. Domagala*, 2013 IL 113668, ¶ 35; see also *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("The Illinois Supreme Court *** [has] recognized that factual disputes raised by the pleadings cannot be resolved by a motion to dismiss at either the first stage *** or at the second stage *** [of postconviction proceedings], rather, [they] can only be resolved by an evidentiary hearing"); see also *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998) ("[A]t the dismissal stage of a post-conviction proceeding, whether under section 122-2.1 or under section 122-5, the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act. Moreover, our past holdings have foreclosed the

circuit court from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding.").

¶ 50 In the present case, on appeal, the petitioner argues that his petition should have been permitted to proceed to a third stage evidentiary hearing on his ineffective assistance of trial counsel claim based upon trial counsel's failure to litigate his motion to suppress statements to police and call witnesses available and willing to testify on the petitioner's behalf. In the alternative, the petitioner argues that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (Ill. S. Ct. 651(c) (eff. Feb. 6, 2013)), so as to provide him a "reasonable level" of assistance when she refused to respond to the State's motion to dismiss and instead affirmatively advocated against him.

¶ 51 Because, as shall be articulated below, we agree with the petitioner that he was provided with an unreasonable level of assistance by postconviction counsel we need not address the merits of the allegations set forth in the petitioner's postconviction petition. See *People v. Shortridge*, 2012 IL App (4^{th}) 100663, ¶ 13; see also *People v. Turner*, 187 Ill. 2d 406, 415-16 (1999) (holding that it is improper for a reviewing court to affirm the dismissal of a postconviction petition when it finds that postconviction counsel's performance was so deficient that it amounted to virtually no representation at all; noting that the reviewing court "will not speculate whether the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c).").

¶ 52 Our supreme court has repeatedly held that when counsel is appointed to represent an indigent petitioner at the second stage of postconviction proceedings, the petitioner is entitled to "reasonable" level of assistance. *People v. Greer*, 212 Ill. 2d 192, 204 (2004). Our supreme court has explained that to provide this level of assistance postconviction counsel must perform

specific duties as articulated by Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). See *Greer*, 2012 Ill. 2d at 204-05; *People v. Shortridge*, 2012 IL App (4th) 10063, ¶ 13; see also *People v. Elken*, 2014 IL App (3d) 120580, ¶ 30. This rule requires that counsel consult with the petitioner (either by mail or in person) to ascertain his contentions of deprivation of constitutional rights, examine the record of the trial proceedings, and make any amendments to the *pro se* petition that are necessary for an adequate representation of the petitioner's contentions. See *Greer*, 212 Ill. 2d at 205 (citing Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)); see also *Shortridge*, 2012 IL App (4th) 100663, ¶ 13; see also *Elken*, 2014 IL App (3d) 120580, ¶ 30.

¶ 53 While Rule 651(c) does "not obligate counsel to advance frivolous or spurious claims" (*Greer*, 212 Ill. 2d at 105; *Shortridge*, 2012 IL App (4th) 100663, ¶ 13; *Elken*, 2014 IL App (3d) 120580, ¶ 30), if appointed counsel believes that a petitioner's postconviction petition is frivolous or patently without merit, counsel has an "ethical obligation" to file a motion to withdraw as counsel. *Greer*, 212 Ill. 2d at 209; *Shortridge*, 2012 IL App (4th) 100663, ¶ 15. In that vein, our courts have previously held that where postconviction counsel acquiesces to a State's motion to dismiss instead of filling a motion to withdraw as counsel, counsel's conduct represents a "total failure of representation," denying the petitioner the right to reasonable assistance of counsel under the Act. See *e.g.*, *Shortridge*, 2012 IL App (4th) 100663, ¶ 13; *Elken*, 2014 IL App (3d) 120580, ¶ 30.

¶ 54 In the present case, the record reveals that after the circuit court advanced the petition to second stage proceeding and appointed the public defender's office to represent him, unaccountably the public defender did not being working on the petitioner's case for six years and then never filed a single document on the petitioner's behalf. What is more, the record

reflects that eleven months after informing the court that she had "just begun" working on the petitioner's case, the public defender told the court that she had still not finished reading the record. Again inexplicably it took the public defender another year to file her first document in the petitioner's cause—a Rule 651(c) certificate informing the court that she had reviewed the petitioner's file and would not be amending his *pro se* petition. See *e.g.*, *People v. Bennetett*, 394 Ill. App. 3d 350, 352 (2009) (criticizing postconviction proceedings that "stalled" at the second stage for seven years, and noting that "[s]uch lapses reflect poorly on the court and bar and cannot go unmarked"); *People v. Woidtke*, 313 Ill. App. 3d 339, 413 (200) (Maag, J. concurring) ("the actions of the trial court and counsel in allowing the defendant's postconviction petition to languish for [six] *years* without even a hearing are unconscionable)") (emphasis in original).

¶ 55 Even more egregiously, the record reveals that after the public defender declined to amend the *pro se* petition and the State filed a motion to dismiss, the public defender neither filed a response to the motion, nor orally advocated on behalf of her client. Rather, at the hearing on the State's motion to dismiss, the public defender informed the court that she was "choosing not to respond to" the State's motion. Henceforth, during the hearing, the public defender did not make a single argument on the petitioner's behalf. Rather, inexplicably she twice interrupted the State to provide further support to their motion to dismiss: first to note that the petitioner's claim that his trial counsel should have moved for severance was meritless because the trial court actually granted counsel' motion for severance, and second to state that his claim that he was denied his right to testify at trial was rebutted by the record because he waived that right in open court.

¶ 56 Under this record, we are compelled to agree with the petitioner that he was denied his right

to a reasonable level of assistance by postconviction counsel. See *Shortridge* , 2012 IL App (4th) 100663, ¶ 16; *Elken*, 2014 IL App (3d) 120580, ¶ 30**.** We likewise find that "it is virtually impossible in this case to determine the merit of the petitioner's claims where postconviction counsel essentially did nothing to shape the claims into the appropriate legal form." *Shortridge* , 2012 IL App (4th) 100663, ¶ 16 (citing *Turner*, 187 Ill. 2d at 415). We therefore conclude that the circuit court's order dismissing the *pro se* petition should be reversed and new counsel appointed to represent the petitioner with the utmost expedience. See *Turner*, 187 Ill. 2d at 415-16 ("[I]t is improper to affirm the dismissal of a postconviction petition when this court finds that postconviction counsel's performance was so deficient that it amounts to virtually no representation at all"); see also *Shortridge* , 2012 IL App (4th) 100663, ¶ 16.

¶ 57 In doing so, we urge the newly appointed counsel to look carefully at the trial record before it, since that record reveals that if the petitioners incriminating statements to police, leading to the discovery of the gun, had been suppressed, the only concrete testimony against him would have been provided by Hunt, who was admittedly high and intoxicated at the time, and possibly never observed the shooting.

¶ 58 III. CONCLUSION

¶ 59 For all of the aforementioned reasons we reverse and remand with instructions.