

No. 1-13-1789

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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. 07 CR 15095
)	
RASHON PIKE,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

O R D E R

¶ 1 *Held:* Where postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c), defendant did not rebut the presumption of compliance with that rule, and postconviction counsel provided a reasonable level of assistance, we affirmed the dismissal of defendant's postconviction petition.

¶ 2 Defendant, Rashon Pike, was convicted of burglary and sentenced to seven and one-half years' imprisonment and the judgment was affirmed on direct appeal. *People v. Pike*, No. 1-08-2545 (2010) (unpublished order under Supreme Court Rule 23). Defendant filed a *pro se* postconviction petition which proceeded to the second stage and postconviction counsel was appointed. However, the postconviction petition was dismissed pursuant to the State's motion.

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On appeal from the dismissal, defendant contends that his appointed postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), by failing to amend his *pro se* postconviction petition to allege ineffectiveness of appellate counsel and to procure witness affidavits to support his claims. For the reasons that follow, we affirm the dismissal of defendant's postconviction petition.

¶ 3 The underlying facts of the case have been set forth by this court in *Pike*, (*Pike*, No. 1-08-2545 (2010) (unpublished order under Supreme Court Rule 23)), and are repeated here only briefly.

¶ 4 Defendant's conviction arose from the events of July 9, 2007. On that day, Matthew Fogarty, an officer with the Norfolk Southern Railway police department was on patrol in a railroad yard. He observed defendant and another man climb a 15-foot retaining wall, open and enter a boxcar, and remove five cardboard boxes from the boxcar. Defendant and the other man carried the boxes over a number of railroad tracks and dropped them from the retaining wall down to the alley below. Officer Fogarty called the Chicago police and the railroad police to the scene for assistance. When the other officers arrived, defendant and his co-offender fled over the tracks toward Officer Fogarty, who emerged from hiding and ordered them to stop. The men continued to flee, jumped from the retaining wall down to the alley below, and then ran in opposite directions. Defendant was, ultimately, arrested by the Chicago police while attempting to scale a fence. The co-offender was arrested at approximately the same time. At the police station, defendant confessed that he and his co-offender had entered the railroad property with the intent to remove the items.

¶ 5 On direct appeal, defendant argued that the trial court erred by failing to ask whether each juror understood and accepted the principles of Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)). We affirmed his conviction and sentence after finding the trial court substantially complied with Rule 431(b) under *People v. Zehr*, 103 Ill. 2d 473 (1984).

¶ 6 In June 2011, defendant filed a *pro se* postconviction petition (petition), raising the following ineffectiveness claims: (1) failing to interview "Mr. Brown" of the Chicago Park District to develop testimony "that there have never been bushes upon tracks" and, thus, discredit Officer Fogarty; (2) proceeding to trial without the arresting officer who was stationed in Iraq; (3) dismissing a dispatch officer who was the "only witness" who could have impeached Officer Fogarty; (4) failing to present photographs which "were supposed to be used as evidence"; (5) failing to impeach the co-offender's arresting officer regarding what defendant wore and whether he was on the scene of defendant's arrest; (6) allowing all 12 jurors to serve when they either had a connection to the railroad, or had been victims of robbery or burglary; (7) failing "to discredit and impeach or question allegations of a 3rd party"; (8) failing to impeach his co-offender's arresting officer; (9) agreeing not to use photographs of injuries which defendant sustained during his arrest; (10) failing to mention "other freights" which had been burglarized and the type of lock which was allegedly broken; (11) failing to "follow upon" a line of questioning regarding whether Officer Fogarty was 50 feet, or 50 yards away; (12) allowing the State to present photographs of items contained in that back of a van which "could have already been here," as well the as evidence that a pen knife could have been used to break a lock when the pen knife had not been produced and no report was produced to verify those allegations; and (13) failing to argue that the evidence was tampered with and inconclusive because defendant was not charged

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with burglary to a van. Defendant also alleged that his constitutional rights had been violated by his co-offender's "cop-out" to the lesser charge of criminal trespass, and by defendant's own "steeper sentencing."

¶ 7 The trial court, on July 29, 2011, appointed an Assistant Cook County Public Defender (postconviction counsel) to represent him on his *pro se* petition. On November 18, 2011, postconviction counsel notified the court that she had just received the transcripts from the proceedings. At the December 15, 2011, court date, postconviction counsel appeared in court, stated that she had reviewed the transcripts and court file and had spoken with the trial and appellate attorneys. Postconviction counsel further stated that she had an investigator who was attempting to locate witnesses from whom she would need affidavits.

¶ 8 At a subsequent court date on January 24, 2012, postconviction counsel stated that she "had the opportunity to contact witnesses but [was] still in the process with my investigator of having them *** fill out the affidavits that are necessary." One month later, on February 24, 2012, postconviction counsel specified that she had located two witnesses and that appellate briefs had been filed in defendant's direct appeal. After another month, on March 27, 2012, postconviction counsel informed the court that she had been unable to "secure" a witness, an employee of the Chicago Park District, who had moved out of state.

¶ 9 On June 18, 2012, postconviction counsel stated that she had completed her investigation of defendant's allegations and was waiting for him to complete an affidavit so that she could "attach it to his amended motion." One month later, on July 19, 2012, postconviction counsel informed the court that defendant was being sentenced on a separate matter and was "contemplating signing an affidavit [and] withdrawing his petition for postconviction relief." On

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August 27, 2012, postconviction counsel said that defendant had received a substantial sentence on the other case and was "anticipating withdrawing his petition in this matter." However, on September 27, 2012, postconviction counsel informed the court that she had received a voicemail from defendant that he no longer wished to withdraw his petition, but defendant was not in court on that date.

¶ 10 On October 18, 2012, postconviction counsel said to the court that she had met with defendant, who wished to go forward on his petition. Counsel stated that she would not be amending defendant's petition, and filed a Rule 651(c) certificate, which provided as follows:

"1. I have consulted with Petitioner, Rashon Pike, an inmate in the Pinckneyville Correctional Center, in person to ascertain his contentions of deprivations of his constitutional rights.

2. I have obtained and examined the report of proceedings at the trial. I also examined the trial court file concerning the above cited number and the common law record.

3. I have examined the Petitioner's, Rashon Pike, *pro se* Post-Conviction petition.

I have not made any amendments to Petitioner's, Rashon Pike's, post-conviction petition."

The State asked for a continuance to file a motion to dismiss the postconviction petition.

¶ 11 On January 3, 2013, the State was granted leave to file its motion to dismiss the petition. The State, in its motion, argued that defendant's postconviction claims lacked merit; the petition was not verified; the allegations about codefendant had no relevance; and the ineffectiveness claims not only had no merit, but were waived for failure to raise those claims on direct appeal.

¶ 12 At the February 28, 2013, hearing on the motion to dismiss, the State argued that the claims were unsubstantiated and lacked merit, and the ineffectiveness claims were matters of strategy. Postconviction counsel responded to the State's arguments. The trial court, in a written order, granted the State's motion. The trial court found that defendant's claim of a violation of his constitutional rights because of the disparate prosecution of his co-offender, was without merit. The trial court found that defendant's claims of ineffectiveness of trial counsel were legally insufficient, dealt with matters of strategy, and were not prejudicial. As to the claim of ineffectiveness in the selection of jurors, the trial court found it was purely speculative and did not satisfy either the prejudice prong, or the performance prong, of *Strickland v. Washington*, 466 U.S. 668 (1984). The trial court also noted that this particular claim had been forfeited for failure to raise the issue on direct appeal.

¶ 13 On appeal, defendant maintains that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), by failing to amend the petition to allege ineffective assistance of appellate counsel; and by failing to procure witness affidavits. Defendant argues that amendment of the petition to include ineffectiveness of appellate counsel was necessary because most of his ineffectiveness of trial counsel claims were based on the trial record and, thus, were barred by forfeiture as they were not raised on direct appeal. Defendant also argues that, without the supporting affidavits of two witnesses, which postconviction counsel had indicated she located during her investigation, his "claims could not succeed." By focusing exclusively on these issues on appeal, defendant has forfeited for review the claims actually raised in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006)

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¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). In noncapital cases, postconviction proceedings have a three-stage process. *Id.* at 244. When the petition proceeds to the second stage as the instant petition did, counsel may amend the petition. *People v. Bocclair*, 202 Ill. 2d 89, 100 (2002). At the second stage, the State must answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2012). The trial court must then determine whether the petition makes a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. We review the dismissal of a postconviction petition at the second stage *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998).

¶ 15 A petitioner, under the Act, does not have an automatic right to the assistance of counsel. *People v. Rials*, 345 Ill. App. 3d 636, 641 (2003). If a *pro se* postconviction petition advances to the second stage, the court will appoint an attorney. *People v. Greer*, 212 Ill. 2d 192, 204 (2004). Under the Act, the level of assistance which must be given to a postconviction petition is not "effective assistance of counsel" rather, the petitioner is entitled only to a reasonable level of assistance of counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Id.* Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel: (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. *Id.*; see also Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

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¶ 16 The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with the rule is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. The third obligation of Rule 651(c) does not require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Pendelton*, 223 Ill. 2d 458, 472 (2006); *Greer*, 212 Ill. 2d at 205; *People v. Milam*, 2012 IL App (1st) 100832, ¶ 33.

¶ 17 "The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance." *Profit*, 2012 IL App (1st) 101307, ¶ 19. Our review of an attorney's compliance with Rule 651(c) is *de novo*. *Id.* ¶ 17.

¶ 18 Here, postconviction counsel filed a Rule 651(c) certificate, thus, the presumption exists that defendant received the reasonable representation required by that rule, and it is the burden of the defendant to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by that rule. *Id.* ¶ 19.

¶ 19 Defendant, however, argues the Rule 651(c) certificate did not give rise to a rebuttable presumption because postconviction counsel did not aver that she had made any amendments to the petition necessary to adequately present defendant's claims, nor did she state that she had determined that no amendments were necessary. In support of this position, defendant, in his reply brief, cites *People v. Bashaw*, 361 Ill. App. 3d 963 (2005). In *Bashaw*, postconviction counsel filed a Rule 651(c) certificate that stated:

" **** I have consulted by mail with [defendant] concerning the allegations in this post-conviction petition.

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*** I have examined the record of proceedings *on appeal* as to the issues being raised by the defendant.

*** the [sic] *petitioner has indicated that he wishes to rely on his original post conviction petition.*' " (Emphasis in original.) *Id.* at 967.

¶ 20 On appeal, this court found that the certificate "fell short in two respects:" it did not certify that counsel had reviewed the record of the trial proceedings and failed to indicate that counsel made necessary amendments to the *pro se* petition. *Id.* at 967-69. The *Bashaw* court determined that counsel's certification that the *defendant* wished to rely on his original petition was not an appropriate substitute for a strategic decision made by counsel regarding whether it was necessary to amend the petition. *Id.* at 969. The *Bashaw* court held that "[a]n attorney who surrenders the decision to the defendant does not fulfill his or her duty to exercise that professional judgment." *Id.*

¶ 21 In this case, unlike in *Bashaw*, there is no indication that postconviction counsel left the strategic decision whether to amend the petition to defendant. Rather, postconviction counsel simply stated that she had not made any amendments to the *pro se* petition. We decline to read into that statement a conclusion that counsel had left a matter of professional judgment in defendant's hands. Second, and more importantly, we do not interpret *Bashaw* to hold, as defendant suggests, that when a Rule 651(c) certificate does not include language specifically stating that counsel determined no amendments are necessary, the presumption of compliance does not arise. As discussed, substantial compliance with Rule 651(c) is sufficient (*e.g.*, *Profit*, 2012 IL App (1st) 101307, ¶ 18). Based on the record which showed postconviction counsel had conducted an investigation into the claims, reviewed the transcripts, and discussed the

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matters with defendant, her statement in the Rule 651(c) certificate that she made no amendments to the petition does not infer she had concluded that amendments were actually necessary.

¶ 22 Defendant also argues, generally, that counsel should have amended his claims of ineffective assistance of trial counsel to avoid those claims being barred by forfeiture, and that counsel should have procured witness affidavits because his claims "could not succeed" without such evidentiary support. These arguments do not rebut the presumption of reasonable assistance under Rule 651(c).

¶ 23 First, as to the failure to procure witness affidavits, defendant has not identified what postconviction claim or claims in his postconviction petition counsel should have supported with affidavits. Defendant has not identified the witnesses or what information would have been provided by these witnesses. Defendant's unsubstantiated argument does not meet his burden to defeat the reasonable assistance presumption.

¶ 24 We now address defendant's argument as to postconviction counsel's failure to address the forfeiture of ineffectiveness of trial counsel claims by amending the petition. Under the forfeiture doctrine, a defendant may not raise claims in a postconviction petition which could have been raised on direct appeal, but were not. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). The procedural bar may be overcome by claims that appellate counsel was ineffective in not raising the issue on direct appeal. *Id.* at 450-51. Postconviction counsel who fails to amend a *pro se* petition to raise a claim of ineffectiveness of appellate counsel to avoid the procedural bar of waiver may be found to have provided unreasonable assistance. See *People v. Turner*, 187 Ill. 2d 406, 414 (1999).

¶ 25 The trial court, in dismissing the petition, found that all of defendant's *pro se* postconviction claims of ineffective assistance of trial counsel lacked merit and defendant has not challenged those findings on appeal. Although the trial court found only one claim of ineffectiveness was forfeited—that trial counsel was ineffective for selecting jurors who either had connections to the railroad company, or who had been victims of a robbery or burglary themselves—the trial court first found that this claim was "entirely conclusory and speculative" and failed on the merits. The trial court also found that defendant had not made a sufficient showing that trial counsel was deficient and defendant had been prejudiced by the jury selection. Given that the trial court found all of his postconviction claims failed on their merits, defendant's current argument—that postconviction counsel provided unreasonable assistance in failing to amend his petition to avoid forfeiture—does not rebut the presumption of reasonableness.

¶ 26 Defendant argues that the merit of his ineffectiveness of trial counsel claims is irrelevant, in determining the reasonableness of postconviction counsel's assistance here. Defendant relies primarily on *People v. Suarez*, 224 Ill. 2d 37 (2007). In *Suarez*, our supreme court found that postconviction counsel failed to comply with Rule 651(c) because he did not file a Rule 651(c) certificate, and the record did not show he had consulted with the defendant. *Id.* at 40, 44. Under these circumstances, the *Suarez* court held that remand was required regardless of whether the claims raised in the petition had merit and that noncompliance with Rule 651(c) may not be excused on the basis of harmless error. *Id.* at 47, 52.

¶ 27 Here, in contrast to *Suarez*, postconviction counsel filed a Rule 651(c) certificate, which gave rise to a rebuttable presumption that she performed the duties required by that rule. *Profit*, 2012 IL App (1st) 101307, ¶ 23; *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Additionally,

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the record shows she consulted with defendant, investigated his claims, and reviewed the transcripts. Because the presumption of reasonable assistance is present, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23. Merit is a crucial consideration because fulfillment of the third obligation under Rule 651(c) " 'does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf.' " *Id.* (quoting *Greer*, 212 Ill. 2d at 205 (2004)).

¶ 28 We are mindful of defendant's argument that this court and our supreme court have held that, in some cases, postconviction counsel provides unreasonable assistance by failing to amend a petition to include a claim of ineffective assistance of appellate counsel which is necessary to avoid forfeiture. See *Turner*; *People v. Milam*, 2012 IL App (1st) 100832; *People v. Schlosser*, 2012 IL App (1st) 092523; *People v. Kluppelberg*, 327 Ill. App. 3d 939 (2002). However, in construing *Turner*, we have explained that the decision does "not hold that any failure to amend the petition would be unreasonable." *People v. Rials*, 345 Ill. App. 3d 636, 643 (2003). This holding in *Rials* is consistent with our supreme court's finding in *Greer*, that "amendments to a *pro se* postconviction petition [which] would only further a frivolous or patently nonmeritorious claim *** are not 'necessary' within the meaning of [Rule 651(c)]." *Id.* at 205 (quoting Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)).

¶ 29 A defendant claiming ineffectiveness of appellate counsel for failure to argue an issue "must show that the failure to raise that issue was objectively unreasonable, and that the decision prejudiced the defendant." *People v. Easley*, 192 Ill. 2d 307, 328-29 (2000) (citing U.S.C.A. Const. Amend. 6; S.H.A. Const. Art. 1, § 8.). However, an appellate counsel is not incompetent

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for failing to raise arguments which are without merit. *Id.* at 329. "Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *Id.* The trial court, in dismissing the petition, found that the ineffectiveness of trial counsel claims were not meritorious, and defendant has not appealed those findings. Therefore, ineffectiveness of appellate counsel claims based on a failure to raise those claims would also be meritless. Postconviction counsel was not obligated to amend the petition to raise nonmeritorious ineffectiveness of appellate counsel claims and, therefore, did not provide unreasonable assistance.

¶ 30 Furthermore, each of these cases cited in support of defendant's argument, that postconviction counsel acted unreasonably in not amending the petition to include ineffectiveness of appellate counsel claims, are readily distinguishable from the case at bar.

¶ 31 First, in *Turner*, there was no indication that a Rule 651(c) certificate was filed. *Turner*, 187 Ill. 2d at 413-17. Here, by contrast, counsel filed a Rule 651(c) certificate and is, thus, entitled to a presumption of reasonable assistance.

¶ 32 Second, both the *Turner* and *Milam* courts expressly noted that the failure of postconviction counsel to amend claims of ineffective assistance of trial counsel to overcome the procedural bar of waiver prevented the circuit court from considering the defendants' petitions on the merits and directly contributed to the dismissal of the petitions without evidentiary hearings. *Id.* at 412-13; *Milam*, 2012 IL App (1st) 100832, ¶ 36. In the instant case, defendant's claims were not dismissed on forfeiture grounds, but on the merits and, therefore, *Turner* and *Milam* are distinguishable.

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¶ 33 Third, in *Schlosser*, postconviction counsel filed a Rule 651(c) certificate asserting that he did not amend the defendant's petition because it adequately presented his claims. *Schlosser*, 2012 IL App (1st) 092523, ¶ 10. However, at the hearing on the State's motion to dismiss, counsel admitted to the circuit court that he failed to amend the *pro se* petition to include the defendant's main claim of ineffective assistance of appellate counsel. *Id.* ¶¶ 28, 33. Accordingly, this court found that counsel's representation in the Rule 651(c) certificate that he had made any necessary amendments to the petition was rebutted by the record. *Id.* ¶ 33. Here, by contrast, counsel made no arguments or statements that rebut her Rule 651(c) certificate.

¶ 34 Finally, in *Kluppelberg*, there was no indication that postconviction counsel filed a Rule 651(c) certificate. The circuit court there found that because postconviction counsel did not allege appellate counsel's ineffectiveness for not raising a particular issue of trial counsel's ineffectiveness, the issue of trial counsel's ineffectiveness was waived. *Kluppelberg*, 327 Ill. App. 3d at 947. *Kluppelberg* is distinguishable from the instant case, where postconviction counsel filed a Rule 651(c) certificate, thus, triggering a presumption of compliance, and the trial court dismissed defendant's *pro se* allegations on the merits, not on the basis of forfeiture.

¶ 35 In conclusion, postconviction counsel filed a Rule 651(c) certificate in the instant case, thus, triggering the presumption of compliance with the rule. Because we cannot find that postconviction counsel provided an unreasonable level of assistance, and defendant has failed to rebut the presumption, we affirm the dismissal of the petition.

¶ 36 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 37 Affirmed.