

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 130420-U

NO. 4-13-0420

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 11, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
TYRONE J. JOHNSON,)	No. 06CF1532
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The postconviction petitioner was denied reasonable representation by counsel at the second stage of proceedings. Counsel failed to comply with the certificate requirements of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012)), and the record does not establish the certification error was harmless.

¶ 2 In March 2007, defendant, Tyrone J. Johnson, entered into a negotiated plea of guilty to armed robbery (720 ILCS 5/18-2(a) (West 2006)). According to the plea, defendant would serve a 25-year prison sentence, and the State would not pursue the other charges pending against him.

¶ 3 In January 2012, defendant sought leave to file a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). Defendant argued he would not have entered the guilty plea had counsel properly advised him of

the sentence he faced. Defendant alleged counsel told him he could receive an enhanced sentence of 31 years' imprisonment to life if he proceeded to trial, but failed to tell him that enhancement had been held unconstitutional. The trial court granted defendant leave to file the successive petition.

¶ 4 In April 2013, the trial court, on the State's motion, dismissed defendant's petition. The court found defendant had not asserted a claim of actual innocence or a plausible defense and could not withdraw his plea. Defendant appeals, arguing he was denied (1) the effective assistance of counsel when his trial counsel improperly advised him regarding the constitutionality of the sentencing enhancement he faced; and (2) reasonable representation by his postconviction counsel, who failed to file a certificate in compliance with Rule 651(c) (Ill. S. Ct. R. 651(c) (Apr. 26, 2012)). We agree with defendant's second argument and reverse and remand for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 In October 2006, defendant, Tyrone J. Johnson, was charged with two counts of attempt (first degree murder) (720 ILCS 5/8-4(c)(1)(C), (D); 5/9-1(a)(1) (West 2006)), two counts of armed robbery (720 ILCS 5/18-2(a)(4), (a)(3) (West 2006)), one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)), and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2006)) for the alleged shooting and robbery of Buford Lewis.

¶ 7 Before trial was set to begin, the State dropped the attempt charges. On March 6, 2007, jury selection began. Potential jurors were informed defendant was charged with armed robbery and aggravated battery with a firearm.

¶ 8 After a recess, defense counsel informed the court of a negotiated plea agreement. Defendant would enter a plea of guilty to an amended count XI for armed robbery (720 ILCS 5/18-2(a) (West 2006)) and receive a sentence of 25 years' imprisonment. The additional count alleged defendant, while armed with a dangerous weapon, took money from Lewis through use of imminent force. When the trial court asked defendant if that was the agreement, defendant responded, "From the looks of it, I have no choice." The trial court admonished defendant he did "have a choice," and the trial could proceed. Defendant stated, "It's a no-win situation so" Defendant stated, "This is what I want to do."

¶ 9 Defendant conversed with the trial court regarding his options. Defendant said "[t]hey" told him he was not eligible for the maximum, but "then here, I'm getting 25 years." The court offered defendant more time to talk to his attorney. Defendant declined, saying he had spoken to his attorney, but he was concerned about a sentence of 25 years for "a minor mistake." Defendant acknowledged he needed to decide whether to plead guilty. After the court told defendant it would proceed with jury selection, defendant stated the following: "25 years. Okay. Uh—I guess I'll plead guilty to it day-for-day."

¶ 10 The trial court began admonishing defendant about his rights. When the court asked defendant if he wanted to give up his rights and plead guilty, defendant asked, "if I take it to trial and lose, how much time am I looking at? Max?" The court declined answering that question. Defendant then asked his attorney. Counsel responded as follows: "[Y]ou could get convicted of the greatest of the armed robberies with the enhancement that carries a possibility of a minimum of 31 years, maximum of life. Those are the guidelines the judge would have to go by. As I told you before, you would do a minimum of 31 years, maximum on this is life."

¶ 11 Defendant asked if he would serve 85% of the sentence. Counsel said he would. The trial court offered defendant and counsel a five-minute break. After the break, defendant agreed to the deal and pleaded guilty to armed robbery.

¶ 12 The State provided the factual basis for the plea, which included the following:

"[T]he evidence would show that on [October 24, 2006], Buford Lewis was invited by Amanda Jackson to her home here in Decatur, Macon County, Illinois. Mr. Lewis went to that home. Once he arrived, he went inside. He proceeded to the kitchen of the home. When he got to the kitchen, he saw this defendant and Christopher Johnson, this defendant's brother, in the kitchen, both of them with firearms. Mr. Lewis was confronted with the firearms. The money that he had on his person was demanded. He removed the money from his pocket, left it on the floor. While he was in the kitchen, he was shot on two separate occasions. Mr. Lewis recognized this defendant and would identify this defendant as one of the two individuals who confronted him with firearms in the kitchen of Amanda Jackson's home.

In addition, the evidence would show that this defendant was interviewed by Joe Patton of the Decatur Police Department. During the course of the interview with Detective Patton, this defendant informed Detective Patton that he was, in fact, one of the individuals in the kitchen of Amanda Jackson, that he and his

brother did confront Mr.—uh—Lewis with the firearms, and that

Mr. Lewis did leave money for them upon their demand."

¶ 13 The State also provided defendant's criminal history from the pretrial bond report. In July 2006, defendant received 18 months' probation for manufacture and delivery of cannabis. Defendant served six months in a Florida jail for battery in 2003 and four months for resisting/obstructing an officer in December 2002. Defendant's juvenile record showed a conviction in June 1997 for residential burglary. On that offense he served 12 months' probation, which was revoked.

¶ 14 The trial court accepted defendant's guilty plea.

¶ 15 Eight days later, defendant filed a *pro se* motion to withdraw his guilty plea, alleging his counsel "forced" the plea on him. Shortly thereafter, he filed a *pro se* motion to reduce his sentence, repeating his allegation the plea was forced upon him. During this time, defendant remained represented by appointed counsel. In April 2008, the trial court denied defendant's motions.

¶ 16 Between September and December 2009, defendant filed multiple *pro se* pleadings. In the first, entitled "Illinois Supreme Court, Rule 615 Insubstantial and Substantial Error," defendant alleged his plea was involuntary and his trial counsel was ineffective. He requested the withdrawal of his plea and the removal of counsel. The trial court struck the pleading, finding a lack of jurisdiction as defendant's case was on direct appeal.

¶ 17 In October 2009, defendant sent a letter to the trial court stating the appeal was no longer pending. Defendant asked the court to proceed on his September filing.

¶ 18 On November 16, 2009, defendant filed *pro se* a pleading entitled "Defendant's

Supplemental Pleading." Defendant added an allegation the trial court interfered in the negotiation and entry of his guilty plea. Defendant asked the court to set aside his sentence.

¶ 19 The next day, the trial court entered a docket entry, finding the November 16 pleading as one not cognizable under Illinois law. The court recharacterized the petition as one filed pursuant to the Act (725 ILCS 5/122-1 to 122-8 (West 2008)) and gave defendant leave to withdraw the pleading or to amend it within 30 days.

¶ 20 Defendant, on December 2, 2009, filed multiple pleadings, including a "Motion to Amend." In this motion, defendant raised the same concerns regarding ineffective assistance of counsel, conflict of interest, disparate sentencing, and judicial interference. The court dismissed the September 16, November 16, and December 2 pleadings as frivolous and patently without merit. This court affirmed the trial court's findings on appeal. *People v. Johnson*, 4-10-0040 (June 8, 2011).

¶ 21 In January 2012, defendant filed a motion for leave to file a successive postconviction petition. In this petition, defendant alleged his trial counsel was ineffective because counsel incorrectly advised defendant if he was found guilty of armed robbery after a trial, defendant would be subject to a firearm enhancement, extending the sentencing range from 6 to 30 years to 31 years to natural life. Defendant asserted he entered the guilty plea based on this advice, as well as on counsel's advice to enter the plea, and later learned the firearm enhancement had been held unconstitutional before his plea was entered. Defendant attached to his motion and petition a copy of *People v. Harvey*, 366 Ill. App. 3d 119, 134, 851 N.E.2d 182, 196 (2006), in which the First District Appellate Court held unconstitutional the sentencing enhancement for armed robbery while possessing a firearm.

¶ 22 In February 2012, the trial court granted defendant's motion for leave to file a successive petition. Steven Jones was appointed to represent defendant.

¶ 23 In October 2012, postconviction counsel filed an amended postconviction petition on defendant's behalf. The amended petition incorporated defendant's *pro se* claims. The State, in January 2013, moved to dismiss defendant's petition, asserting the petition did not "raise any issue that has not been or could not have been previously litigated."

¶ 24 On January 18, 2013, a hearing was held on the State's motion to dismiss. The State argued defendant had made a number of attempts to withdraw his guilty plea and had alleged counsel was ineffective. The State maintained there were no new issues or new claims raised that could not have been raised earlier. In response, defense counsel simply argued defendant was given leave to file the successive petition, so he was allowed to proceed.

¶ 25 The trial court stated leave was granted because the court "need[ed] input from counsel" on whether, on March 6, 2007, the day defendant was advised of the sentencing range and pleaded guilty, the enhancement was constitutional. The court followed: "He's saying he pleaded guilty because his attorney told him erroneously that he would be subject to a much greater sentence than, in fact, defendant asserts he was because defendant claims the statute was unconstitutional when he pleaded guilty. So my question is, if you happen to know, gentlemen, was the enhancement, the so-called 15, 25 to life statute, was it constitutional on March 6, 2007."

¶ 26 The State emphasized it could have gone to trial on the attempt (murder) charge. The State further articulated the enhancement was not declared unconstitutional on that charge. Defense counsel provided no answer, but asked the court to deny the motion to dismiss. When asked if the State would like a delay so counsel could answer these questions, the State

responded it did not want to subject the court to this when the contention is that defendant is "simply barred" from bringing this claim. The trial court opined: "quite frankly, if my attorney told me if I went to trial, I was looking at life in prison and that was erroneous advice, arguably that would definitely influence my decision whether or not to take the plea agreement." The court continued the hearing on the motion to dismiss.

¶ 27 In April 2013, the hearing recommenced. The trial court stated it suggested at the earlier hearing it needed information on the constitutionality of the enhancement. The court asked the State if it had additional argument. The State responded only that defendant should be barred from raising issues that were ruled on or could have been ruled upon previously. Defense counsel stated only the following: "The defendant asked for leave to file a successive petition. It was granted by the court. I think that's within the court's discretion, and I believe the court has the authority to do so."

¶ 28 The trial court reiterated it continued the hearing to get an answer on whether the enhancement was constitutional at the time of the plea hearing. The court found the record showed the issue had not been raised by defendant in earlier proceedings. It did not believe the issue could be deemed waived. The court found trial counsel did inform defendant the sentencing range for armed robbery extended to life imprisonment. The court observed, "it's disappointing that none—none of the work is done and the court's not given a response" on the question the court asked. We find it disappointing as well.

¶ 29 The trial court noted it was inclined to deny the State's request because of the State's performance on the issue. However, the court, citing *People v. Hall*, 217 Ill. 2d 324, 841 N.E.2d 913 (2005), found defendant had not articulated a claim of actual innocence or a

plausible defense that could have been raised at trial in order to withdraw his guilty plea.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 We begin with defendant's argument his postconviction counsel failed to provide reasonable assistance and comply with the mandates of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012)).

¶ 33 There is no constitutional right to the assistance of counsel in postconviction proceedings. *People v. Johnson*, 154 Ill. 2d 227, 237, 609 N.E.2d 304, 309 (1993). The Act, however, gives petitioners the right to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995); *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23, 971 N.E.2d 1204. Rule 651(c) ensures counsel provides reasonable representation by imposing specific duties. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). According to Rule 651(c), postconviction counsel must (1) consult with the petitioner to ascertain the petitioner's contentions of deprivation of constitutional rights, (2) examine the record of the trial proceedings, and (3) make any amendments to the *pro se* petition "necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012). When counsel fails to file a certificate in compliance with Rule 651(c), a court may deem the error harmless if the record shows counsel satisfied the rule's requirements. *People v. Lander*, 215 Ill. 2d 577, 584, 831 N.E.2d 596, 600 (2005). Our review of this issue is *de novo*. *Suarez*, 224 Ill. 2d at 42, 862 N.E.2d at 979 (stating the standard of review after the dismissal of a postconviction petition without an evidentiary hearing is *de novo*).

¶ 34 Defendant argues the certificate filed by counsel does not comply with Rule

651(c) as counsel failed to certify he "made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012). Defendant asserts counsel merely certified he "filed an amended Petition for Post-Conviction Relief, incorporating the *pro-se* petition." Counsel did not argue in support of defendant's claims and counsel did not comply with the trial judge's request for information on the constitutionality of the sentencing enhancement.

¶ 35 The State concedes the certificate is flawed, but it argues the error is harmless. The State argues counsel's error was strategic and the trial court erred in granting defendant leave of court to file the successive postconviction petition. Neither of those arguments even needs to be addressed.

¶ 36 Postconviction counsel failed to comply with Rule 651(c). Nothing in the record shows postconviction counsel even understood defendant's arguments of constitutional deprivations. Postconviction counsel simply incorporated defendant's *pro se* petition, adding only a summary of the procedural history. Postconviction counsel did not file a response to the State's motion to dismiss, which could have demonstrated an understanding of defendant's claim. At the hearing, when confronted with the State's arguments regarding *res judicata* and waiver, counsel could not articulate and support defendant's assertions. Counsel merely responded by emphasizing the trial court had granted leave for the successive petition. When asked by the trial court whether defendant's key assertion the sentencing enhancement was unconstitutional was true, counsel did not know—nor did the State. This failure persisted even after the trial court continued the hearing for over two months for the specific purpose of learning whether the enhancement was constitutional when defendant entered his guilty plea and after the court made

clear it would address the merits.

¶ 37 Postconviction counsel failed to provide reasonable representation, and we need not address defendant's claim raised in his petition. Because defendant was denied reasonable representation, remand is required "regardless of whether the claims raised in the petition had merit." *Suarez*, 224 Ill. 2d at 47, 862 N.E.2d at 982. It is the responsibility of the trial court to review the record to ascertain whether a defendant may make a substantial showing of a constitutional violation. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 31, 973 N.E.2d 960. We are fully aware of the decisions in *Harvey*, *People v. Hauschild*, 364 Ill. App. 3d 202, 217, 845 N.E.2d 74, 86-87 (2006), and *People v. Hauschild*, 226 Ill. 2d 63, 86-87, 871 N.E.2d 1, 14 (2007). We suggest an examination of those cases and a more enthusiastic approach by defense counsel and the prosecution will better inform the trial court.

¶ 38 III. CONCLUSION

¶ 39 We reverse the trial court's judgment, remand for appointment of new counsel, and direct the trial court to conduct a second-stage proceeding under the Act.

¶ 40 Reversed; cause remanded with directions.