2015 IL App (4th) 130491-U

NO. 4-13-0491

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 4, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
RICKY TALLEY,	)	No. 09CF1028
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: A certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) raises a presumption that postconviction counsel provided reasonable assistance in compliance with that rule, and defendant has failed to rebut the presumption.

¶ 2 Plaintiff, Ricky Talley, who is serving a sentence of 12 years' imprisonment for unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)), appeals from the second-stage dismissal of his petition for postconviction relief. See *People v. Harris*, 2013 IL App (1st) 111351, ¶¶ 46-47 (describing the three stages of a postconviction proceeding). He contends that his appointed postconviction counsel, W. Keith Davis, failed to give him "a reasonable level of assistance." (Internal quotation marks omitted.) *People v. Greer*, 212 Ill. 2d 192, 204 (2004).

¶ 3 Davis filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). The certificate raises a presumption that he provided reasonable assistance to

defendant. See *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. In our *de novo* review (see *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007)), we conclude that defendant has failed to rebut that presumption (see *Profit*, 2012 IL App (1st) 101307, ¶ 19). Therefore, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. The Jury Trial

¶ 6 In the jury trial, which occurred in May 2010, the State called five witnesses. Two of the witnesses, Rebekah Best and Angla L. Gipson, were participants in a cocaine transaction (which, unbeknownst to Gipson at the time, was a controlled purchase). The remaining witnesses, Jonathan Cleveland, James M. Ferguson, and Stephen Petrillo, were police officers for the city of Normal, Illinois. The witnesses testified substantially as follows.

¶ 7 1. *Rebekah Best*

¶ 8 Since December 8, 2009, Best had been serving a prison term for forgery. She had committed the forgery by writing prescriptions for herself (she had, as she put it, "a long history of substance abuse issues").

¶ 9 In February 2009, when the Normal police arrested Best for the forgery, they suggested she work for them as a confidential source. At first, she declined. But after reflecting on the 10-year extended term of imprisonment she could receive because of her prior convictions, she changed her mind. Hoping to receive "[a] reduction in sentence," she contacted a detective named Cleveland and agreed to be a confidential source.

¶ 10 One thing that was expected of Best, as a confidential source, was to suggest someone from whom she could buy drugs in a controlled purchase. She suggested Angla

Gipson, "a pretty desperate drug addict" from whom she had bought cocaine 8 or 10 times in the past.

¶ 11 The controlled purchase from Gipson happened on April 29, 2009. In preparation for the controlled purchase, a police officer drove by Gipson's residence and visually confirmed that she was home. The police then patted Best down and thoroughly searched her boyfriend's truck, taking everything out of the truck and putting everything back in. Then Cleveland gave her some cash. She drove to Gipson's apartment, with the police following at a discreet distance. When Best arrived at the apartment, Gipson happened to be standing outside.

¶ 12 Best and Gipson entered into an agreement. Best would buy $80 or $100 of crack cocaine (Best could not remember the exact dollar amount), and in return for acting as a go-between, Gipson would receive $20 worth of the cocaine. After Best and Gipson agreed on these terms, Best gave Gipson the cash. Gipson made a phone call and went to meet someone at an Aldi grocery store, leaving Best in the living room by herself.

¶ 13 Five or ten minutes later, Gipson returned and told Best "they were coming [t]here," to Gipson's apartment. She requested Best to retreat into the back bedroom so that Best would not see the visitors and the visitors would not see her. "That's a normal drug activity," Best explained in her testimony. "Nobody wants to know anybody new."

¶ 14 While in the back bedroom, Best made a phone call to Cleveland, "letting him know what was taking so long." Best heard people enter the apartment. She heard voices. Gipson came into the bedroom—Best did not know why—and went back out. A couple of minutes later, after the visitors left, Gipson told Best the coast was clear, and Best returned to the living room. Gipson handed Best three or four Baggies of crack cocaine, out of which Best gave

Gipson a twenty-dollar rock. Gipson invited Best to smoke some cocaine with her, but then Gipson changed her mind and told Best to leave.

¶ 15 Best went out to her boyfriend's truck and called Cleveland, as she had agreed to do. Cleveland told her to meet him two or three blocks up the road. Best drove to where he was, and she gave him the crack cocaine.

¶ 16 2. *Jonathan Cleveland*

¶ 17 It was on April 13, 2009, that Best signed up to be a confidential source. She named Gipson as a person from whom she could buy drugs. Cleveland testified:

> "Ms. Best told me that [Angla] Gipson was strictly a user. She had a habit and a cocaine addiction, but she did have access to different people in the community that provided her with cocaine. According to Ms. Best, Ms. Gipson purchased cocaine on a regular basis. She had a pretty bad habit, and there were several different people that would provide her with cocaine if she went over there to call."

¶ 18 Cleveland made preparations for a controlled purchase from Gipson, in which Best would be the confidential source. The first step was to make sure "the situation [was] as sterile as possible." A female police officer searched Best, making sure she had no drugs, contraband, or cash on her person. The police also searched Best's vehicle. Next, Cleveland made a photocopy (People's exhibit No. 2) of the five twenty-dollar bills that Best would use to make the purchase. At noon on April 29, 2009, he gave Best this prerecorded cash.

¶ 19 Best then drove from the police station directly to Gipson's house. Police officers followed her, keeping their eyes on her the whole time and making sure she did not stop anywhere or meet anyone along the way. When Best arrived at Gipson's apartment, Cleveland, as well as a detective named Van Holan, watched her exit her vehicle. Van Holan, stationed on the south side of the apartment building, watched Best enter Gipson's apartment. Cleveland drove to the north side of the apartment building, where he established surveillance.

¶ 20 Neither Cleveland nor any of the other police officers could see into Gipson's apartment, and there were no remote listening devices (*i.e.*, no one was wearing a wire).

¶ 21 Fifteen or twenty minutes later, Cleveland heard Van Holan report on the radio that Gipson had come out of the apartment and had got into her vehicle. Other detectives watched Gipson drive to the parking lot of an Aldi grocery store. Cleveland remained where he was, keeping surveillance on Gipson's apartment, because he knew that Best was still inside. After meeting no one at Aldi, Gipson drove back to her apartment and went back inside.

¶ 22 Shortly thereafter, Cleveland saw a green automobile—a Pontiac, he seemed to recall—pull up to Gipson's apartment. A black woman got out of the driver's side of the Pontiac, and a large black man got out of the passenger's side. Cleveland identified defendant, in court, as the man who had gotten out of the passenger's side. The woman and the man entered Gipson's apartment and soon afterward left the apartment and returned to the green car. The green car drove away and the police followed it, keeping it under surveillance.

¶ 23 A short time later, Cleveland saw Best leave Gipson's apartment and return to her vehicle. Using her cell phone, Best called Cleveland. She told him that cocaine had been delivered to Gipson and that Gipson had in turn delivered it to her. Cleveland radioed that information to the take-down units, who then stopped the green car and arrested its occupants.

¶ 24 As Best drove away from Gipson's residence, Cleveland "immediately established a tail car right behind her vehicle so [he] knew she made no further stops and had no contact with anyone else." He followed her directly to the parking lot of Family Video, where she handed over to him the crack cocaine. At that time, the police did another search of Best and her vehicle and found no other contraband.

¶ 25 Cleveland later weighed the crack cocaine. With its packaging included, it was "[0].55 grams of a hard off-white chunky substance that field-tested positive for the presence of crack cocaine." He sealed the cocaine into an envelope and secured the envelope in an evidence locker. (At trial, the parties stipulated to the chain of custody. They also stipulated that a forensic scientist, Michelle Dierker, had tested and weighed the substance and had found that it was 0.1 grams of cocaine.)

¶ 26 One of the members of the take-down unit, Detective Ferguson, handed over to Cleveland the items he had seized from defendant when arresting him. Those items included the prerecorded buy money: the five twenty-dollar bills that Cleveland had photocopied before giving them to Best. The serial numbers matched those in the photocopy.

¶ 27 Cleveland then met with defendant in the interview room of the police station. He informed defendant that their conversation would be audio-recorded and video-recorded, and he read him his rights. Defendant agreed to continue with the interview. People's exhibit No. 4 was a digital video disc (DVD) of the interview, and People's exhibit No. 4A was a transcript of the interview. Copies of the transcript were handed out to the jury members so they could follow along while the DVD was played.

¶ 28 Initially, in the interview, defendant professed ignorance as to why the police had arrested him. He denied selling any cocaine, and he insisted that the cash the police had found on his person was the proceeds of his disability check.

¶ 29 Eventually, though, after Cleveland repeatedly explained to defendant that there had been a controlled purchase and that the cash they had recovered from defendant was police money with prerecorded serial numbers (Cleveland showed him the photocopy), defendant finally admitted to Cleveland, "Yeah, *** I did it man. I did, I, I did it man. I did it. Be up front with you man." Again he told Cleveland, "I made that mistake and I'm going to be up front. Yeah, I did it." And yet again he said, "[Y]ou know I done confessed to it." Defendant urged Cleveland, however, to let his girlfriend go because she had nothing to do with it. Cleveland replied that he could make that happen.

¶ 30 After defendant confessed, the camera was turned off, and he and Cleveland discussed "what type of intelligence information [defendant] may know that could be beneficial to him." Defendant signed up to be a confidential source.

¶ 31 In the beginning, defendant kept in contact with Cleveland fairly often, once a week. And on June 9, 2009, defendant attempted to make a controlled purchase, but no drugs were obtained; either the person had moved, or he no longer wished to deal with defendant. As time passed, though, defendant became increasingly difficult to contact, and consequently, Cleveland obtained a warrant for his arrest.

¶ 32 Cleveland explained at trial:

> "I had no contact with [Mr. Talley] except perhaps one phone call between June and November. The phone number that he gave me no longer was working. I had a phone number for his

> mother where he was supposedly staying. I contacted and left messages for Mr. Talley, but at no point in time did he return a call. Mr. Talley said he was having some trouble because his name was hot from getting arrested by the police officers, and thought perhaps he might be working for them. In a seven-month period or five-month period there was no contact between Mr. Talley or no attempts between—from him to try to contact me or any other members of my office."

¶ 33 As for Best, she pleaded guilty to the charge of forgery, and Cleveland testified in her sentencing hearing, making the trial court aware of all the assistance she had rendered as a confidential source. The court sentenced her to two years' imprisonment. By Cleveland's understanding, "she also had a very extensive criminal background involving the same type of charges."

¶ 34 3. *James M. Ferguson*

¶ 35 Immediately after the controlled purchase, a detective named Ryan pulled over the green Pontiac Bonneville in which defendant was riding (a vehicle to which Ferguson referred as "Mr. Talley's vehicle"). Ferguson pulled up behind Ryan's vehicle. Ryan went to the driver's side of the green car, where the female driver was, and Ferguson went to the passenger's side, where defendant was.

¶ 36 As Ferguson approached the passenger's side of the green car, defendant already had his hands up and was looking back toward Ferguson. Ferguson noticed some loose cash lying on defendant's lap. He ordered defendant out of the car, and as defendant got out, the cash fell off his lap and onto the floorboard.

¶ 37 Ferguson searched defendant's person. He found more cash in defendant's pocket, but he found no contraband. He put the cash from the floorboard, the cash from defendant's pocket, and all the other property he had seized from defendant in a manila envelope and turned the envelope over to Cleveland.

¶ 38 4. *Stephen Petrillo*

¶ 39 When Officer Petrillo heard, over the radio, that a green and tan Jeep Cherokee (Gipson's vehicle) had left the apartment building, he followed the Jeep to Aldi. The Jeep parked at Aldi, and Petrillo observed a woman sitting in the Jeep. The woman did not get out; she just sat there. "She was there for a short while," Petrillo testified, "and then she left." He followed her back to West Olive Street, where Gipson's residence was located.

¶ 40 5. *Angla L. Gipson*

¶ 41 Two or three years before the trial, Gipson began using crack cocaine. She used it two or three times a week until she quit, seven or eight months before the trial. Then she relapsed about three months before the trial.

¶ 42 While living on West Olive Street, Gipson procured cocaine for people. She knew three sources. She testified: "Someone would ask me to get it, and I would call someone, and they would bring it, and I would get a piece of it."

¶ 43 The afternoon of April 29, 2009, Best came over to Gipson's apartment and asked her to obtain $100 of crack cocaine for her. Gipson did not know ahead of time that Best would be coming over. It was not unusual, though, for Best to drop by unexpectedly. Gipson telephoned "Rick" (whom she identified, in court, as defendant). She had known defendant for six months, and he had supplied her with cocaine on five or six previous occasions. She told him on the phone that she "had $100.00 for somebody." He told her to meet him at Aldi.

¶ 44 Gipson drove to Aldi, taking the cash with her, while Best waited inside Gipson's apartment. Defendant changed his mind about transacting the business at Aldi. He telephoned Gipson and told her he did not feel comfortable there because he had seen a white truck that aroused his suspicion. So, he told Gipson he wanted to do the deal in her apartment instead.

¶ 45 Gipson returned to her apartment. At defendant's request, she told Best to go into the back bedroom. Defendant and his girlfriend went into the kitchen, and Gipson followed them there. He laid the crack cocaine on the kitchen table, and Gipson laid the $100, in twenties, on the table. Defendant picked up the cash, and he and his girlfriend left. Gipson gave the cocaine to Best, keeping a twenty-dollar bag for herself.

¶ 46 As of the day of the controlled purchase, Gipson had gone without cocaine for two weeks. She smoked the $20 of crack after Best left. It made her high for three hours.

¶ 47 Afterward, the police arrested Gipson, and she signed up to be a confidential source. She worked for the police in that capacity on a couple of occasions. Her record has remained clean of felony convictions.

¶ 48 That, essentially, was the evidence in the jury trial. The attorneys made their closing arguments; the judge read aloud the jury instructions; the jury retired; and after deliberating for about 40 minutes, the jury returned a verdict of guilty to the charge of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)).

¶ 49 Because of his criminal record, defendant was eligible for Class X sentencing (see 730 ILCS 5/5-5-3(c)(8) (West 2008) (text of section effective until July 1, 2009)), even though the charged offense was a Class 2 felony (720 ILCS 570/401(d) (West 2008)). The trial court sentenced him to 12 years' imprisonment and ordered him to pay a deoxyribonucleic acid (DNA) analysis fee in the amount of $200 (see 730 ILCS 5/5-4-3(j) (West 2008)).

¶ 50 B. The Direct Appeal

¶ 51 In his direct appeal, defendant made two arguments: (1) the evidence was insufficient to support the conviction, and (2) the assessment of a DNA analysis fee was erroneous, considering that his DNA already was on file with the Illinois State Police as a result of a previous conviction. *People v. Talley*, 2012 IL App (4th) 101037-U, ¶¶ 3-4. We disagreed with the first argument but agreed with the second argument. *Id.* Therefore, on April 9, 2012, we affirmed the trial court's judgment, except that we vacated the DNA analysis fee. *Id.* ¶ 5.

¶ 52 C. The Postconviction Proceeding

¶ 53 1. *The Pro Se Petition*

¶ 54 On August 7, 2012, defendant filed a *pro se* petition for postconviction relief. According to the *pro se* petition, the appointed trial counsel, Harvey Welch, rendered ineffective assistance in six ways. First, Welch failed to move for the suppression of defendant's postarrest statement to the police. Second, Welch stated he had no objection when the State moved to amend the indictment. Third, he failed to object to police testimony as to where the cocaine had come from. Fourth, he stipulated to evidence regarding the cocaine and the chain of custody. Fifth, he failed to impeach Best and Gipson with evidence of their criminal activities. Sixth, he presented no viable defense, thereby effectively conceding defendant's guilt.

¶ 55 Also, the *pro se* petition alleged that appellate counsel had rendered ineffective assistance by failing to raise the foregoing claims on direct appeal.

¶ 56 Those were the claims in the *pro se* petition itself. Additionally, in an affidavit attached to the petition, defendant stated:

> "Furthermore, Mr. Welch also refused to call and disclose to the court that a witness name[d] Leslie Folks which I disclose[d] to

> counsel prior to tell [*sic*] was available and willing to come testify that on April 20, 2010[,] that I did not sell crack cocaine to Angela [*sic*] Gipson. Mr. Welch told me that the reason he was not going to subpoena Leslie Folks is that her testimony would not [have] helped my case."

¶ 57 2. *The Amended Petition*

¶ 58 On March 1, 2013, the appointed postconviction counsel, Davis, filed an amended petition for postconviction relief. The amended petition omitted all the claims raised in the *pro se* petition and, in their place, raised a single claim that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*.

¶ 59 Davis attached to the amended petition a letter he had written to defendant on January 28, 2013. In the letter, Davis advised defendant that all the claims in his *pro se* petition were "utterly without merit" and were bound to "fail," and he recommended that defendant abandon those claims and, in the amended petition, raise only a claim of noncompliance with Rule 431(b), a claim Davis characterized as a "dead bang winner." Davis wrote he would "proceed in that fashion unless [defendant] offer[ed] compelling reasons not to do so."

¶ 60 3. *A Status Hearing*

¶ 61 In a status hearing on March 22, 2013, Davis told the trial court that defendant objected to the amended petition and that defendant wanted to proceed on the claims in his *pro se* petition. Although the court noted defendant's objection to abandoning the claims raised in the *pro se* petition, the court told him, "Your disagreement with counsel is not something we're going to be going into here."

¶ 62 Because the amended petition set forth only one claim of noncompliance with

Rule 431(b), the trial court found that an evidentiary hearing would be unnecessary.

¶ 63 4. *The Hearing on the State's Motion To Dismiss the Amended Petition*

¶ 64 On April 22, 2013, the State moved to dismiss the amended petition.

¶ 65 On May 22, 2013, in a hearing on the motion for dismissal, the trial court concluded it had substantially complied with Rule 431(b), and therefore the court denied the amended petition for postconviction relief.

¶ 66 This appeal followed.

¶ 67 II. ANALYSIS

¶ 68 A. How *Elken* Is Distinguishable

¶ 69 Defendant compares Davis to the postconviction counsel in *People v. Elken*, 2014 IL App (3d) 120580. As we will explain, however, *Elken* is distinguishable because the postconviction counsel in *Elken* filed no amended postconviction petition.

¶ 70 In *Elken*, the postconviction counsel, "S. Clemens," told the trial court that the defendant's *pro se* petition lacked merit—and that was the extent of his contribution. *Id.* ¶ ¶ 17, 19. At no time did Clemens move to withdraw. *Id.* ¶ 20. "He simply stood up at the hearing and stated that [the] defendant's contentions had no merit." *Id.* ¶ 32.

¶ 71 The Third District explained that this "confession" by Clemens was "not necessarily wrong." *Id.* ¶ 36. "Clemens could not have filed an amended petition to advance [the] defendant's contentions if his research found them to be frivolous without contravening [Illinois Supreme Court] Rule 137 [(eff. Feb. 1, 1994)]." *Id.* ¶ 35. If Clemens had filed a motion to withdraw, the motion would have had to state his reasons for wanting to withdraw. *Id.* ¶ 36. He thereby would have "confessed" that the defendant had no viable claims, and he would have impliedly conceded that the petition should be dismissed. *Id.* The whole problem, though, was

that Clemens had filed no motion to withdraw, as he should have done before the hearing, and consequently the defendant was blindsided: he had received no "opportunity to prepare for such an attack on his petition and to make any arguments in rebuttal." *Id.*

¶ 72 In the present case, by contrast, Davis had no occasion to file a motion to withdraw. He had a claim to argue. It was a new claim he was raising on defendant's behalf: a claim of noncompliance with Rule 431(b). It is not unreasonable to substitute an arguable claim for frivolous claims. Simply by filing an amended petition that raised a new claim but omitted all the claims in the *pro se* petition, Davis would have signified that, in his opinion, the claims in the *pro se* petition lacked merit and should be jettisoned. See *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn."); *People v. Phelps*, 51 Ill. 2d 35, 38 (1972) (an amended postconviction petition supersedes the *pro se* petition). Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) contemplates "amendments to the petitions filed *pro se*," and the amended petition, by omitting and thereby effectively abandoning *pro se* claims, would have implied what Davis's letter made explicit.

¶ 73 Significantly, defendant does not argue that Davis was incorrect about the merits of the claims in the *pro se* petition. He does not argue that Davis was unreasonable in this assessment. He merely insists that Davis could have "added the Rule 431(b) claim without attacking and abandoning the *pro se* claims." But there is no such thing as hybrid representation (as if to say, "I am presenting this supplemental claim on behalf of my client, but my client is presenting these other claims on his own."). See *People v. Thompson*, 331 Ill. App. 3d 948, 951 (2002) ("[A] defendant has no right to both self-representation and the assistance of counsel.").

Rule 137 would not have allowed Davis to argue claims he knew to be frivolous (see *Greer*, 212 Ill. 2d at 205), and an amended petition, by omitting the *pro se* claims, effectively would have abandoned them (see *Phelps*, 51 Ill. 2d at 38). Unless Davis moved to withdraw, his only choices were to (1) refrain from filing an amended petition, in which case he had to argue all the *pro se* claims (and, ethically, he could have done so only if they were arguable); or (2) file an amended petition which either (a) presented some of the *pro se* claims while omitting the meritless ones or (b) omitted all the *pro se* claims while asserting a new claim. He chose (2)(b)—and by so doing, he went beyond the call of duty: postconviction counsel is required to reshape the potentially meritorious claims in the *pro se* petition so as to put them in correct legal form; but postconviction counsel is not required to formulate new claims (*People v. Ramey*, 393 Ill. App. 3d 661, 668 (2009)).

¶ 74 B. Leslie Folks

¶ 75 Defendant contends that Davis provided less than reasonable assistance in that, judging by his letter to defendant, he "shrugged off" the claim, in defendant's affidavit, that Leslie Folks would have testified he "[had] not [sold] crack cocaine to *** Gipson."

¶ 76 As Welch and Davis apparently perceived, this claim was futile on its face. It would have made no difference in the trial if Folks had testified that defendant was not the one who actually sold the cocaine to Gipson. Even if, instead of defendant, his unnamed female companion made the sale, he nevertheless would have been legally accountable for the sale because the jury would have inferred that he had solicited, aided, or abetted the sale. See 720 ILCS 5/5-2(c) (West 2008). That inference would have been unavoidable from the facts. Defendant's car pulled up to Gipson's apartment. He got out of the front passenger seat and accompanied the driver into the apartment. Immediately after defendant and his female

companion rode away in his car and Best telephoned Ferguson that she had received the cocaine, the police pulled defendant's car over and found the prerecorded currency in defendant's lap. Best, whose person and vehicle the police searched ahead of time, handed over to the police her share of the cocaine from the controlled purchase. Finally, defendant confessed to the police: "Yeah, *** I did it man. I did, I, I did it man. I did it. Be up front with you man." At a minimum, he aided or abetted the sale. No rational trier of fact would have concluded he was an innocent bystander.

¶ 77 C. The Omission of a Claim That Appellate Counsel Rendered Ineffective Assistance on Direct Appeal by Failing To Argue Noncompliance With Rule 431(b)

¶ 78 "[T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). Defendant argues that Davis failed to shape into proper legal form the claim of noncompliance with Rule 431(b) in that, although Davis alleged that the trial counsel, Welch, had rendered ineffective assistance by failing to raise the noncompliance with Rule 431(b), Davis neglected to allege that appellate counsel likewise had rendered ineffective assistance by failing to raise, on direct appeal, the noncompliance with Rule 431(b).

¶ 79 But this claim of ineffective assistance of appellate counsel, premised on the failure to argue noncompliance with Rule 431(b), would have been a new claim, a claim that defendant had not raised in his *pro se* petition. Postconviction counsel has no obligation to raise new claims. *Ramey*, 393 Ill. App. 3d at 668. "Post-conviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993). "While appointed counsel for a *pro se* petitioner for postconviction relief may conduct an examination of the record that is broader than what is

required to adequately present and support the constitutional claims raised by the petitioner in the *pro se* petition and may raise additional issues in an amended petition if he or she so chooses, there is no obligation to do so." 14B Ill. Law and Prac., *Criminal Law* § 924

¶ 80 D. The Right to Self-Representation in Postconviction Proceedings

¶ 81 Citing *People v. Heard*, 2014 IL App (4th) 120833, ¶ 10, defendant observes that a "defendant has [a] right to proceed *pro se* in postconviction proceedings." That is true, but to invoke that right, the defendant must clearly and unequivocally waive his right to postconviction counsel. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 23. Defendant has not cited the page of the record in which he did so. His insistence to the trial court that he wanted his *pro se* claims heard was not a clear and unequivocal waiver of his right to counsel.

¶ 82 III. CONCLUSION

¶ 83 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs against defendant.

¶ 84 Affirmed.