

NOTICE

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2015 IL App (4th) 130651-U

NO. 4-13-0651

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 30, 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
YARII A. MASSEY,)	No. 07CF561
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held:* Where postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), the appellate court reversed the denial of the postconviction petition and remanded for second-stage proceedings.

¶ 2 Following a June 2008 trial, a jury convicted defendant, Yarii A. Massey (born November 12, 1990), of six counts of aggravated criminal sexual assault and three counts of residential burglary. In August 2008, the trial court sentenced him to 92 years in prison. On direct appeal, this court affirmed the judgment of the trial court. *People v. Massey*, No. 4-08-0915 (May 2010) (unpublished order under Supreme Court Rule 23). In June 2011, defendant filed a *pro se* postconviction petition. In July 2013, the trial court denied defendant's postconviction petition. This appeal followed.

¶ 3 On appeal, defendant argues (1) his postconviction counsel suffered from an actual conflict of interest; (2) postconviction counsel did not comply with Illinois Supreme Court

Rule 651(c) (eff. Dec. 1, 1984); (3) his sentence is unconstitutional; and (4) the automatic transfer provision of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5-130(1)(a) (West 2006)) is unconstitutional. We reverse the denial of defendant's postconviction petition and remand for further postconviction proceedings.

¶ 4

I. BACKGROUND

¶ 5 Following a June 2008 jury trial—the facts of which were discussed in detail in our order affirming defendant's conviction and sentence (see *Massey*, No. 4-08-0915)—defendant was convicted of six counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1), (a)(2) (West 2006)) and three counts of residential burglary (720 ILCS 5-19-3(a) (West 2006)). The charges stemmed from defendant's actions on May 26, 2007. The jury found that on that date, defendant knowingly entered the dwelling place of three separate persons with the intent to commit a felony or theft therein. The evidence demonstrated defendant took items of personal property from two homes and sexually assaulted a third victim in her home. Defendant was later detained by police and had in his possession a duffel bag containing various items of personal property reported missing from the homes. At the August 2008 sentencing hearing, the trial court sentenced defendant to an aggregate prison term of 92 years. Defendant timely filed a motion to reconsider the sentence, which the trial court denied following a hearing.

¶ 6 On direct appeal, defendant argued that (1) the trial court erred in allowing the jury to hear certain evidence and (2) his sentence enhancements for aggravated criminal sexual assault violated the Illinois Constitution. This court disagreed and affirmed defendant's conviction and sentence. *Massey*, No. 4-08-0915.

¶ 7 On June 27, 2011, defendant filed a *pro se* postconviction petition in which he asserted eight grounds for relief. Specifically, defendant argued he was denied his constitutional

rights to due process, a fair trial, and the effective assistance of counsel based on the following:

(1) misconduct by the prosecutor in misstating the testimony of Dr. Douglas Ward, the emergency department physician who treated the victim, expressing her "personal opinions regarding [defendant's] guilt and credibility, making comments likely to inflame the passions of the jury and appealing to the jurors' sense of community," and ineffective assistance of trial counsel for failing to object to the prosecutor's statements and of appellate counsel for failing to raise the issue on appeal; (2) ineffective assistance of trial counsel for failing to challenge false testimony knowingly presented by the State; (3) ineffective assistance of appellate counsel for failing to argue the evidence was insufficient to prove him guilty beyond a reasonable doubt of residential burglary; (4) ineffective assistance of appellate counsel for failing to argue the evidence was insufficient to prove him guilty beyond a reasonable doubt of aggravated criminal sexual assault; (5) ineffective assistance of trial counsel for failing to object to the State's use of impermissible identification testimony and to raise it in his motion for a new trial, and ineffective assistance of appellate counsel for failing to raise the issue on appeal; (6) ineffective assistance of trial counsel for failing to object to the trial court's improper admonishment of prospective jurors during *voir dire* pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 2007), and ineffective assistance of appellate counsel for failing to raise the issue on appeal; (7) ineffective assistance of trial counsel for failing to seek forensic testing of the knife alleged to have been used by defendant; and (8) the cumulative effect of trial counsel's ineffective assistance, which "was tantamount to [defendant receiving] no representation at all."

¶ 8 On September 9, 2011, the trial court ordered "[d]efendant's *pro se* [p]etition for [p]ost[]conviction [r]elief moved to 2nd stage for further consideration. Public Defender appointed."

¶ 9 On April 25, 2012, appointed counsel, Keith Davis, filed a "Motion for Finding of 'No Merit' in Post-Conviction; Motion To Withdraw; Rule 651c Certificate." Davis addressed the eight allegations contained in defendant's *pro se* postconviction petition as follows:

"Complaint 1: Appellate [c]ounsel was ineffective for not briefing the deficiencies of trial counsel. This assumes that trial counsel was deficient, which assertion [*sic*] is without merit[.]

Complaint 2: Both the [p]rosecutor [] by arguing [her] personal belief in [defendant's] guilt [,] and the [d]efense attorney[] by failing to object[] when the State presented false testimony. [Defendant] does not specify which aspect of the testimony is false. If this is a blanket condemnation of the evidence as a whole, it amounts to a 'sufficiency' argument which could have been raised on direct appeal. If it was, it is *res judicata*. [Citation.] The decision to object, or not to object [is] one of fundamental trial strategy and therefore cannot be the basis of a Post-Conviction claim. Indeed, counsel is invested with the right to formulate the decision on what defense will be pursued even if the client disagrees. [Citation.]

Complaint 3: The elements of residential burglary were not proven. Another sufficiency argument which was either raised on direct appeal [,]and thus, *res judicata*[,]or not raised[,], and thus waived. [Citation.]

Complaint 4: A rehash of the allegations of Complaint 1, above.

Complaint 5: [Defendant] asserts that his identification was 'impermissible' without specifying HOW it was impermissible. There is no theory of law which would justify a suppression of identification.

Complaint 6: *Zehr* issues. The Court properly admonished potential jurors about the *Zehr* principles.

Complaint 7: Trial [c]ounsel did not seek forensic testing of the knife. Basic trial strategy. Besides, if the forensics implicated [defendant], he would have been proven guilty beyond any doubt whatsoever, not merely beyond a reasonable doubt. An 'inconclusive' result would not have changed anything. [Defendant] assumes, without any reason whatsoever, that the knife forensics would have overcome the massive display of evidence against him.

Complaint 8: The cumulative effect of trial [c]ounsel's failings was decisive, to [defendant's] detriment. There were no substantial constitutional failings."

In Davis's opinion, defendant's postconviction petition was "utterly without merit and must fail." Davis further certified, pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), he had "consulted with the [d]efendant, either by mail or in person, to ascertain [d]efendant's contentions of deprivation of constitutional right and ha[d] examined the record of proceedings

at trial *** and made any amendments to the *pro se* [p]etition necessary for adequate presentation of [defendant's] contentions."

¶ 10 Also on April 25, 2012, defendant filed a *pro se* motion in which he asked the trial court to allow Davis to withdraw and sought the appointment of other counsel due to Davis "not providing a 'reasonable' level of assistance." Defendant argued Davis's assistance was not reasonable, in part, because Davis did not (1) obtain an affidavit from a witness, Demetrius Moore, to support a claim of ineffective assistance of trial counsel; (2) obtain certain exhibits introduced by the State; or (3) gather information defendant requested regarding Kimberly Campbell, who prosecuted his case.

¶ 11 At a June 22, 2012, hearing on Davis's motions for a finding of no merit and to withdraw as counsel, defendant informed the trial court of his motion to allow Davis to withdraw and for the appointment of other counsel. Defendant explained, in relevant part, that he had sent Davis a letter asking him to obtain an affidavit from Moore, which had not been done. According to defendant, Moore would testify that he saw defendant and A.W. (the victim) together on the night of May 26, 2007, that defendant entered A.W.'s car without force, and Moore did not see defendant with a bag. Defendant stated he had informed trial counsel about Moore during their first visit, but counsel neither obtained an affidavit from Moore nor called him to testify. Davis acknowledged that, in November 2011, he received a letter from defendant in which he alleged ineffective assistance of trial counsel for failing to call Moore to testify. Upon hearing this information, the court declined to rule on Davis's motion for a finding of no merit and his motion to withdraw as counsel and, instead, directed him "to follow up to determine whether or not there's a sufficient factual basis to file an amended petition for post-conviction relief." The court further announced it was denying defendant's motion to replace

Davis, "but grant[ing] it in part in terms of not at this time making a finding of no merit pending further investigation into the matters alleged by [defendant]."

¶ 12 At a September 4, 2012, status hearing, the trial court noted Davis had filed a "memorandum to the court regarding 'Demetrious Moore' and 'Andre Woods.'" In his memorandum, Davis opined that an affidavit from Woods, which defendant had given him, may support defendant's claims he was not in possession of the goods taken during the burglaries and that A.W. did not appear to be upset or harmed. Davis also indicated he was unable to locate Moore, and therefore, defendant's allegations regarding what Moore would testify to were "at best[,] hearsay and unproveable." However, Moore was present at the hearing—apparently having been notified by defendant—and provided the court with a handwritten statement that he saw defendant "sit in the car with a Caucasian lady." Also at the hearing, defendant expressed his desire to file a supplement to his *pro se* postconviction petition; however, as defendant was represented by counsel, the court directed him to furnish the proposed filing to Davis for review.

¶ 13 At a November 26, 2012, status hearing, Davis asked the trial court to set his motion for a finding of no merit for a hearing, asserting, "[i]n the event that my motion is denied, we can proceed to hearing on the [postconviction petition] itself."

¶ 14 At a January 30, 2013, hearing, on Davis's motion for a finding of no merit, Davis acknowledged his motion did not take into account any information obtained subsequent to its filing, specifically information pertaining to Moore and Woods. The trial court expressed its concern that "[a] finding of no merit with respect to a petition for post[]conviction relief that doesn't incorporate the evidences [*sic*] which [defendant] says were erroneously ignored during the course of his trial doesn't really dispose of the issues raised by his concerns, no matter how late-arriving they are." Although Davis opined that the testimony of Moore and Woods would

not "add significantly to the validity of [defendant's] petition," he noted both witnesses were present in court and prepared to testify. With no objection by the State, the court agreed to hear evidence and Davis agreed to thereafter file an amended pleading to conform to the proofs. In addition, the court noted as follows:

"[I]t's my view that the defendant's post[]conviction claim has to be amended to incorporate *** these additional claims of error. I think they go to the ineffective[-]assistance[-]of[-]counsel claim that has been advanced by the defendant in his petition, and with those inclusions, I'm assuming Mr. Davis will have [decided] whether or not he wishes to proceed with his motion, which at that point would be an amended motion, or wishes to simply proceed on the *** amended petition for post[]conviction relief."

¶ 15 The trial court then proceeded to an evidentiary hearing. Moore testified that he was a close friend of defendant and, on May 26, 2007, he observed defendant "get in a car with a Caucasian lady." When asked whether the lady seemed upset, nervous, afraid, excited, or angry, Moore responded, "[n]o, sir." Moore further testified he did not notice anything unusual about defendant at that time and did not see him with any personal items. Similarly, Woods testified he saw defendant "get in the car with some girl" following a party on May 26, 2007. Woods stated that "the girl" who got in the car with defendant was "cool" and there "was[] nothing wrong with her." Defendant then testified that A.W. was the white female Moore and Woods saw him with on the night in question. Following this testimony, the trial court granted Davis leave to file an amended postconviction petition.

¶ 16 On March 15, 2013, Davis filed an amended petition for postconviction relief in which he abandoned all of defendant's *pro se* claims, and asserted instead, that defendant "was substantially deprived of his constitutional rights to a fair trial in that he was unable to present to the jury newly-discovered evidence from Demetrious Moore and Andre Woods *** and had he been able to so present that evidence, the result would have been very different: he would have been acquitted."

¶ 17 At a May 1, 2013, status hearing, the State announced it would not be filing a motion to dismiss the amended postconviction petition. Davis stated he would not be presenting any further evidence on behalf of defendant and the State requested to reserve its right to present evidence at a hearing on defendant's amended postconviction petition.

¶ 18 At a July 3, 2013, hearing on defendant's amended postconviction petition, the State declined to present any evidence. After hearing arguments, the trial court found the testimony of Moore and Woods "wholly unbelievable" and, on that basis, denied defendant's amended postconviction petition.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues (1) postconviction counsel suffered from an actual conflict of interest; (2) postconviction counsel did not comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984); (3) his sentence is unconstitutional; and (4) the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2006)) is unconstitutional.

¶ 22 The Post-Conviction Hearing Act provides a mechanism by which a criminal defendant may challenge his conviction based on a substantial deprivation of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). A postconviction proceeding is collateral in nature

and is limited to constitutional issues that could not have been addressed on direct appeal.

People v. Pitsonbarger, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002).

¶ 23 In noncapital cases, postconviction proceedings take place in three stages. "At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether 'the petition is frivolous or is patently without merit.' " *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100 (quoting *People v. Hodges*, 234 Ill. 2d 1, 10, 912 N.E.2d 1204, 1208-09 (2009), quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). If the circuit court does not dismiss the postconviction petition within 90 days as "frivolous or patently without merit," it automatically advances to the second stage. *Id.* ¶ 10. Alternatively, the circuit court may affirmatively advance the petition to the second stage within 90 days. 725 ILCS 5/122-2.1(b) (West 2012). At the second stage, counsel may be appointed to represent the defendant and the State is allowed to file an answer or a motion to dismiss. *Tate*, 2012 IL 112214, ¶ 10, 980 N.E.2d 1100. "At this second stage, the circuit court must determine whether the petition and any accompanying documentation make 'a substantial showing of a constitutional violation.' " *Id.* (quoting *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001)). "If no such showing is made, the petition is dismissed." *Id.* However, if the defendant makes a substantial showing of a constitutional violation, the petition advances to the third stage, where an evidentiary hearing is conducted. *Id.*

¶ 24 A. Postconviction Counsel

¶ 25 On appeal, defendant raises two issues as to postconviction counsel, both of which he contends require remand for further postconviction proceedings. First, he asserts Davis labored under an actual conflict of interest as a result of his contractual-work relationship with the public defender, Kim Campbell, who was the prosecuting attorney during defendant's trial.

Second, he argues counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec 1, 1984). We address defendant's Rule 651(c) argument first.

¶ 26 While a defendant has no constitutional right to postconviction counsel, an indigent defendant is entitled to appointed counsel under the Post-Conviction Hearing Act where, as is the case here, his postconviction petition advances beyond the first stage. *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005) (citing 725 ILCS 5/122-4 (West 2000)). "A defendant is entitled only to the level of assistance required by the Act, however, because the right to counsel is wholly statutory and is not mandated by the Constitution." *Id.* "The Act requires postconviction counsel to provide a 'reasonable level of assistance' to a defendant." *Id.* (quoting *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1188 (1990)).

¶ 27 Here, defendant argues Davis failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Essentially, defendant's complaint is that Davis unilaterally determined defendant's *pro se* claims lacked merit and then abandoned them, contrary to his duties under Rule 651(c).

¶ 28 Before proceeding to the merits of the Rule 651(c) issue, we take this opportunity to note the unique procedural posture of this case. In particular, at the second stage of the postconviction proceedings below, Davis filed a motion for a finding of no merit and to withdraw as counsel based on his opinion that none of defendant's *pro se* claims were meritorious. At the first hearing on Davis's motion, defendant brought to the trial court's attention an allegation that trial counsel was ineffective for failing to present Moore's testimony. This allegation was not included in defendant's *pro se* petition, but defendant brought it to Davis's attention in a November 2011 letter. In an effort to ensure all of defendant's postconviction complaints were considered, the court declined to rule on Davis's motions, and

instead, directed Davis to investigate defendant's new allegation and determine whether an amended postconviction petition should be filed. When Davis's motion was again called for hearing in January 2013, Davis had not amended his motion for a finding of no merit to include any information obtained subsequent to its filing, including information pertaining to Moore and Woods. Nonetheless, the court agreed to proceed to an evidentiary hearing, during which evidence pertaining to the new allegation of ineffective assistance of trial counsel was elicited. Following this hearing, Davis filed an amended petition for postconviction relief to conform to the evidence presented at the evidentiary hearing. In the amended postconviction petition, Davis advanced only the new claim and explicitly abandoned all of defendant's *pro se* claims. Subsequently, the court denied defendant's amended postconviction petition on the grounds that the testimony of Moore and Woods was not credible. Thus, the allegations in defendant's *pro se* postconviction petition, specifically the claims which underlie his Rule 651(c) argument on appeal, were not considered by the court.

¶ 29 Rule 651(c) imposes three duties on appointed postconviction counsel. Specifically, the rule requires postconviction counsel to (1) consult with the defendant to ascertain his allegations of deprivation of constitutional rights; (2) examine the record of the trial proceedings; and (3) make any amendments to defendant's *pro se* petition necessary for an adequate presentation of defendant's claims. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). "The duties imposed on postconviction counsel serve to ensure that the complaints of a prisoner are adequately presented." *People v. Suarez*, 224 Ill. 2d 37, 46, 862 N.E.2d 977, 982 (2007).

¶ 30 "The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19, 974 N.E.2d 813. A defendant may overcome this presumption by demonstrating

postconviction counsel failed to substantially comply with the duties mandated by the rule. *Id.* We review *de novo* the issue of whether an attorney complied with the requirements of Rule 651(c). *Id.* ¶ 17.

¶ 31 Here, Davis certified his compliance with Rule 651(c), which raises a rebuttable presumption that he provided defendant with the reasonable level of assistance to which he was entitled under the Post-Conviction Hearing Act. However, defendant maintains Davis improperly characterized his *pro se* claims as being without merit and abandoned them, and therefore, did not fulfill his duties under Rule 651(c). Based on our review of the record, we agree with defendant and conclude he has overcome the presumption of Rule 651(c) compliance.

¶ 32 Rule 651(c) required Davis to both consult with defendant in order to ascertain his contentions of constitutional error and make any amendments necessary for an adequate presentation of defendant's claims. The summaries of defendant's *pro se* claims provided by Davis in his motion for a finding of no merit—which he incorporated into the amended postconviction petition by noting he "abandon[ed] the allegations of [defendant's] *pro se* [p]etition for [p]ost[c]onviction [r]elief, for the reasons stated in his [motion for a finding of no merit]"—reveal that he did not fulfill his Rule 651(c) obligation to ascertain and adequately present defendant's claims.

¶ 33 Defendant's first *pro se* claim alleged prejudicial prosecutorial misconduct. In particular, defendant asserted errors in the prosecutor's closing-rebuttal argument, remarks made by the prosecutor which defendant alleged inflamed the passions of the jury, and improper personal opinions expressed by the prosecutor. In addition, defendant alleged trial counsel was ineffective for failing to object or otherwise preserve the prosecutorial-misconduct issue for appeal and appellate counsel was ineffective for failing to raise the issue on appeal under the

plain-error doctrine. In his motion for a finding of no merit, however, Davis summarized the issue as one of ineffective assistance of appellate counsel "for not briefing the deficiencies of trial counsel" and then concluded "[t]his assumes that trial counsel was deficient, which assertion [*sic*] is without merit." It is apparent Davis failed to address defendant's underlying prosecutorial-misconduct claim prior to concluding defendant's first *pro se* claim lacked merit.

¶ 34 Defendant's second *pro se* claim alleged the State knowingly presented false testimony. In particular, defendant pointed to alleged inconsistencies between the victim's prior statements and her testimony at trial, as well as alleged inconsistencies between one police officer's incident report and his trial testimony and another police officer's grand jury testimony and his trial testimony. In his motion for a finding of no merit, Davis noted defendant failed to specify what testimony was false. However, contrary to Davis's assertion, defendant's *pro se* petition contains specific details of the alleged false testimony.

¶ 35 Defendant's third *pro se* claim alleged ineffective assistance of appellate counsel for failing to raise on appeal a sufficiency-of-the-evidence argument regarding his residential-burglary conviction. In his motion for a finding of no merit, however, Davis characterized defendant's contention of error only as a sufficiency-of-the-evidence argument, and he failed to address defendant's ineffective-assistance-of-counsel claim.

¶ 36 Defendant's fourth *pro se* claim alleged ineffective assistance of appellate counsel for failing to raise a sufficiency-of-the-evidence argument regarding his aggravated-criminal-sexual-abuse conviction. In his motion for a finding of no merit, Davis concluded defendant's contention of error was "[a] rehash of the allegations of [his first claim]." As noted, however, defendant's first claim concerned prosecutorial misconduct and his fourth claim concerned appellate counsel's ineffectiveness in failing to address the sufficiency of the evidence.

Defendant's first and fourth *pro se* claims concerned two entirely different legal theories.

Accordingly, defendant's fourth claim of error was not a rehash of his first claim.

¶ 37 Last, defendant's fifth *pro se* claim concerned what he characterized as impermissible identification testimony. Specifically, defendant asserted ineffective assistance of trial counsel for failing to object to the identification testimony and ineffective assistance of appellate counsel for failing to raise the issue on appeal. In his motion for a finding of no merit, Davis concluded that defendant did not specify how his identification was impermissible and asserted "[t]here is no theory of law which would justify a suppression of identification." However, in his *pro se* petition, defendant clearly claimed the "show up identification wi[t]ness[s] testimony was tainted since his knowledge of the case came from a police scanner" and the witness only identified him after "he was handcuffed and surrounded by armed police officers with no other individuals present in [a] similar position." Moreover, contrary to Davis's assertion, there are occasions when a witness's identification of a defendant is so tainted that due process prohibits the identification testimony. See *People v. Ramos*, 339 Ill. App. 3d 891, 898, 791 N.E.2d 592, 597 (2003) (citing *Neil v. Biggers*, 406 U.S. 188, 196-97 (1972)) ("where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or 'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by operation of law under the due process clause of the fourteenth amendment").

¶ 38 In finding Davis did not comply with Rule 651(c) here, we find instructive the recent supreme court decision in *People v. Kuehner*, 2015 IL 117695, 32 N.E.3d 655. In *Kuehner*, our supreme court held that when a *pro se* postconviction petition is advanced to the second stage by the trial court's finding that the petition is not frivolous or patently without merit,

"appointed counsel's task is not to second guess the trial court's first-stage finding but rather is to move the process forward by cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication." *Id.* ¶ 20. While the court recognized "there may be occasions when, in the course of fulfilling his or her Rule 651(c) responsibilities, appointed counsel discovers something that ethically would prohibit counsel from actually presenting the defendant's claims to the court," the court noted "counsel may not simply move to withdraw on the grounds that the *pro se* claims are frivolous or patently without merit, as the trial court already has ruled expressly to the contrary." *Id.* ¶ 21. "Rather, in such cases, appointed counsel bears the burden of demonstrating, with respect to each of the defendant's *pro se* claims, why the trial court's initial assessment was incorrect." *Id.* This is so because "a motion to withdraw subsequent to a judicial determination that the *pro se* petition is not frivolous or patently without merit is tantamount to a motion to reconsider," which "seeks to bring to the trial court's attention information that was not apparent on the face of the *pro se* petition at the time such assessment was made." *Id.*

Accordingly, when filing a motion to withdraw in this situation, "appointed counsel owes the trial court at least some explanation as to why, despite its superficial virtue, the *pro se* petition is *in fact* frivolous or patently without merit, and counsel owes this explanation with respect to each of the defendant's *pro se* claims." (Emphasis in original.) *Id.*

¶ 39 The *Kuehner* court determined a remand for further second-stage proceedings in that case was necessary for two reasons:

"First, we wish to underscore that we are serious about appointed counsel's burden when seeking to withdraw from representation following a judicial determination that the *pro se* petition is neither frivolous nor patently without merit. Second, we decline to do a

job that properly belongs to appointed counsel. Again, in filing her motion to withdraw in this case, appointed counsel was representing to the court that, despite its first-stage finding that defendant's *pro se* petition is neither frivolous or patently without merit, the *pro se* petition in fact is so utterly lacking in legal and factual support as to ethically compel her withdrawal from the case. Nevertheless, appointed counsel provided no explanation as to why this was the case with respect to a sizable portion of the *pro se* petition, leaving it to the trial and reviewing courts to figure it out for themselves. We decline to do this." *Id.* ¶ 24.

¶ 40 Given the circumstances presented here, and in light of *Kuehner*, we conclude Davis failed to comply with Rule 651(c). In particular, Davis failed to ascertain and adequately present at least five of defendant's *pro se* contentions of error to the trial court. Rather than "cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication," as was his task according to *Kuehner*, or explaining why he was ethically precluded from doing so, Davis simply abandoned defendant's *pro se* claims, having determined on his own they were without merit. However, in advancing the postconviction petition to the second stage, the trial court had previously determined otherwise, and Davis failed to establish that the trial court's assessment was incorrect.

¶ 41 For these reasons, we reverse the denial of defendant's postconviction petition and remand for second-stage proceedings under the Post-Conviction Hearing Act consistent with our decision. As noted by the *Kuehner* court, "[i]f upon remand appointed counsel wishes to file another motion to withdraw, he or she is certainly free to do so. To be viable, however, that

motion must include at least some explanation as to why all of the claims set forth in defendant's *pro se* petition are either frivolous or patently without merit." *Id.*

¶ 42 Finally, given the unique circumstances of this case, we direct the trial court to appoint new postconviction counsel on remand. See *id.* ¶ 25 (recognizing the challenges that the defendant and counsel would face on remand if the court were to order counsel's continued participation).

¶ 43 B. Remaining Issues

¶ 44 Because we reverse the denial of defendant's postconviction petition and remand for postconviction proceedings with new postconviction counsel, we do not reach defendant's conflict-of-interest or constitutional claims.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we reverse the denial of defendant's postconviction petition and remand for second-stage proceedings under the Post-Conviction Hearing Act consistent with our decision.

¶ 47 Reversed; cause remanded with directions.