

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) 131093-U
NO. 4-13-1093
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 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
KENDALL O. GUNN,)	No. 08CF1381
Defendant-Appellant.)	
)	Honorable
)	Charles M. Feeney, III,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court reversed and remanded, concluding defendant was denied reasonable assistance of postconviction counsel.
- ¶ 2 Following a January 2010 jury trial, defendant, Kendall O. Gunn, was convicted of one count of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and sentenced to 35 years' imprisonment. In May 2010, defendant filed a direct appeal, and this court affirmed. *People v. Gunn*, 2012 IL App (4th) 100397-U (unpublished order under Supreme Court Rule 23). In February 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant's petition alleged ineffective assistance of both trial and appellate counsel. The trial court appointed postconviction counsel, who stood on defendant's *pro se* pleadings. The State

thereafter filed a motion to dismiss defendant's postconviction petition, which the trial court granted after a November 2013 hearing.

¶ 3 Defendant appeals, arguing he did not receive reasonable assistance of postconviction counsel because his appointed counsel failed to (1) amend his *pro se* ineffective-assistance-of-counsel claim into legally sufficient form, (2) amend his *pro se* petition to provide factual support for his ineffective-assistance-of-counsel claim, and (3) offer any meaningful argument in support of his ineffective-assistance-of-counsel claim at the hearing on the State's motion to dismiss his petition. We reverse and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In December 2008, the State charged defendant by information with one count of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) for the stabbing death of Shane Howard. Later that month, defendant was indicted for two counts of murder (720 ILCS 5/9-1(a)(1) (West 2008)) and one count of first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)).

¶ 6 At defendant's January 2010 jury trial, the State called the victim's first cousin, Zachary Howard, to testify. Zachary testified, on the night of the incident, he and Shane were at a party in the 900 block of West Front Street in Bloomington. He explained Shane had been drinking and had gotten into several confrontations with defendant throughout the evening. At one point, Shane approached Zachary and said, "if you're not trying to get down, go outside," so Zachary went to stand by the front door.

¶ 7 Zachary heard defendant say, "swing on me if you want to do something." Howard then pulled a knife from a strap on his arm and stated, "I will show you how I'm going to swing." Zachary explained Shane did not actually swing the knife, but "just kind of held it there." Zachary could not "really verify whether [defendant] went into [Shane] or [Shane] went

into [defendant]," but his "perception" was that they "kind of went into each other," and after that, several people at the party began fighting.

¶ 8 Zachary testified he was not sure how the fight ended because he went outside. He explained he did not know what had happened until someone came up to him and told him someone had been stabbed. When he learned it was Shane who had been stabbed, he called Shane's mother and then "went to go try and figure out the sense of all this, because [he] didn't see nothing [*sic*]."

¶ 9 At the conclusion of Zachary's direct examination, defense counsel stated she planned to cross-examine him and anticipated it would take "a while." The trial court continued the trial to the next day and ordered Zachary to be in court by 9 a.m. When court resumed the following day, defense counsel indicated she did not intend to cross-examine Zachary.

¶ 10 At the conclusion of defendant's trial, a jury found defendant guilty of one count of first degree murder. 720 ILCS 5/9-1(a)(2) (West 2008). Defendant thereafter filed a motion for a new trial, which the trial court denied. In March 2010, the court sentenced defendant to 35 years' imprisonment. Defendant thereafter filed a motion to reconsider the sentence, which the court denied. In May 2010, defendant filed a direct appeal of both his conviction and sentence, and this court affirmed (*Gunn*, 2012 IL App (4th) 100397-U (unpublished order under Supreme Court Rule 23)).

¶ 11 In February 2013, defendant filed a *pro se* petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-7 (West 2012)). In the petition, defendant alleged his (1) sixth amendment right to confrontation was violated when he was denied the right to cross-examine Zachary, (2) defense counsel was ineffective for failing to do anything to secure Zachary for cross-examination, and (3) appellate counsel was ineffective for failing to raise the

first two issues on direct appeal. Although defendant stated the legal rules governing ineffective-assistance-of-counsel claims in his *pro se* petition, he failed to make an argument alleging he was prejudiced by trial counsel's failures. In addition, no affidavits were attached to defendant's *pro se* postconviction petition.

¶ 12 In April 2013, the trial court made a finding defendant's *pro se* postconviction petition was not frivolous and appointed W. Keith Davis to represent defendant at the second stage of the postconviction proceedings.

¶ 13 In August 2013, Davis filed a declaration to stand on defendant's *pro se* postconviction petition and a certificate in compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), stating he consulted with defendant to ascertain his contentions of deprivation of his constitutional rights and made any amendments to defendant's *pro se* petition necessary for adequate presentation of those claims.

¶ 14 In September 2013, the State filed a motion to dismiss defendant's postconviction petition, alleging (1) defendant did not suffer any prejudice as a result of Zachary not being cross-examined, (2) defendant failed to attach an affidavit to his petition showing what Zachary would have testified to had he been cross-examined, and (3) defense counsel's decision not to cross-examine Zachary was reasonable because his direct-examination testimony was quite favorable to defendant.

¶ 15 In October 2013, Davis filed a motion for leave to supplement defendant's *pro se* petition. Defendant's supplemental claim, which is not at issue in this appeal, contended the jury venire was not properly admonished of the principles outlined in *People v. Zehr*, 103 Ill. 2d 472, 477 (1984). The State thereafter filed a motion to dismiss defendant's supplemental petition, and in November 2013, the trial court held a hearing on the motion.

¶ 16 At the hearing on the motion to dismiss, the State asserted largely the same grounds for dismissal it had raised in its written motion. Thereafter, Davis stated: "Judge, I have photocopied the pertinent portion of the transcript of the hearing held on 13 January, 2010, for the [c]ourt to consider, and this colloquy regarding whether or not [defense counsel] wished to cross-examine the witness, [Zachary], I think it was." He continued, "The [c]ourt can see for itself what the effect of that colloquy is on the case. I submit that [the State] has probably represented the facts correctly. I'm not going to try to say that he's misrepresenting the facts on that hearing, but I just want to provide the [c]ourt with a copy of the transcript so it can satisfy itself properly." In closing, Davis stated, "I'll leave it to the [c]ourt to determine whether or not [defendant] should be allowed to continue on the allegation that he was not allowed to confront and cross-examine Zachary Howard."

¶ 17 Following the hearing, the trial court granted the State's motion to dismiss defendant's postconviction petition, finding (1) there had been no confrontation-clause violation, (2) defense counsel's decision not to cross-examine Zachary was a matter of sound trial strategy, and (3) defendant's *Zehr* contention was meritless.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues he did not receive reasonable assistance of postconviction counsel in violation of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Specifically, he claims counsel failed to (1) amend his *pro se* petition into legally sufficient form, (2) provide factual support for his ineffective-assistance-of-counsel claim, and (3) offer any meaningful argument in support of the claim at a hearing on the State's motion to dismiss the petition.

¶ 21 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. Feb. 6, 2013). We decide *de novo* whether postconviction counsel provided reasonable assistance to the defendant. *Suarez*, 224 Ill. 2d at 42, 862 N.E.2d at 979 (2007).

¶ 22 In this case, Davis filed a Rule 651(c) certificate, which raises a presumption he provided defendant the reasonable level of assistance to which he was entitled under statutory law. See *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. Like all presumptions, however, this presumption is rebuttable. See *id.* Defendant has the burden of overcoming the presumption by proving Davis failed to substantially perform the duties in Rule 651(c). *Id.* Based on the facts before us, we conclude defendant has overcome this presumption.

¶ 23 Davis failed to make any amendments to defendant's *pro se* petition prior to filing his first Rule 651(c) certificate. Although postconviction counsel is not required to amend a petitioner's *pro se* postconviction petition, Rule 651(c) clearly requires postconviction counsel make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." *People v. Turner*, 187 Ill. 2d 406, 412, 719 N.E.2d

725, 729 (1999); Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); see also *Johnson*, 154 Ill. 2d 227, 237-38, 609 N.E.2d 304, 312 (1993) (holding postconviction counsel must shape the petitioner's contentions in a *pro se* petition into "appropriate legal form."). Here, defendant's *pro se* petition failed to include an allegation he was prejudiced by the allegedly ineffective assistance of his trial counsel. Such an allegation is an essential element of defendant's legal claim, and Davis's failure to amend the petition to include it amounted to unreasonable assistance. See *Turner*, 187 Ill. 2d at 413, 719 N.E.2d at 729.

¶ 24 In addition, Davis failed to attach any affidavits in support of defendant's ineffective-assistance-of-counsel claim or offer any explanation for their absence. See 725 ILCS 5/122-2 (West 2012) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.") We agree with defendant he was denied his right to a reasonable level of assistance.

¶ 25 In its brief, the State admits Davis failed to include an explicit allegation of prejudice but claims such failure is immaterial because "the record shows prejudice was implicit in defendant's petition, and the trial court understood that." The State does not cite, nor can we find, any legal authority in support of this contention. While at the first stage of the postconviction process courts are to give liberal construction to *pro se* petitions (see *People v. Hodges*, 234 Ill. 2d 1, 21, 912 N.E.2d 1204, 1214 (2009)), the primary purpose behind appointing counsel at the second stage of the postconviction process is "to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court." *People v. Kuehner*, 2015 IL 117695, ¶ 20, 32 N.E.3d 655.

¶ 26 Moreover, although the State argues (1) defendant could not have established prejudice based on the favorable nature of Zachary's testimony and (2) Davis's failure to

explicitly allege prejudice is irrelevant because the trial court did not dismiss defendant's petition on those grounds, we find these arguments equally unpersuasive. As our supreme court explained in *Turner*:

"[I]t is improper to affirm the dismissal of a post-conviction petition when this court finds that post-conviction counsel's performance was so deficient that it amounts to virtually no representation at all. [Citation.] This court will not speculate whether the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). [Citation.]

* * *

To tolerate such inadequate representation would render the appointment of counsel in post-conviction proceedings nothing but 'an empty formality.' " *Turner*, 187 Ill. 2d at 415-17, 719 N.E.2d at 730-31.

¶ 27 We conclude defendant must be given an opportunity to replead his postconviction petition with the benefit of reasonable assistance of counsel. In so holding, we reiterate our decision should not be construed as an opinion on the merit of defendant's postconviction claims. Our decision rests solely on the conduct of postconviction counsel during these proceedings. See *Suarez*, 224 Ill. 2d at 47, 862 N.E.2d at 982 (Because defendant was denied reasonable representation, remand is required "regardless of whether the claims raised in the petition had merit.").

¶ 28

III. CONCLUSION

¶ 29 We reverse and remand for further proceedings consistent with our decision set forth above.

¶ 30 Reversed and remanded with directions.