



of probation, claimed that he was innocent of the charges brought against him, that he was falsely arrested, and that his guilty plea counsel was ineffective in failing to investigate the arresting officer, who was being sued and internally investigated for making fraudulent DUI arrests. On appeal, defendant contends that his petition should have advanced to an evidentiary hearing because it made a substantial showing of ineffective assistance of counsel. In the alternative, defendant contends that the order dismissing his petition must be reversed and the cause remanded for compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the events of January 19, 2008. On that date, Chicago police officer Richard Fiorito and another officer pulled defendant over and arrested him. As a result of the arrest, defendant was charged by information with five counts of aggravated DUI and one count of felony driving while driver's license, permit, or privilege to operate a motor vehicle is suspended or revoked.

¶ 5 Four days after defendant's arrest, a preliminary hearing was held. At the hearing, Officer Fiorito testified that about 4 a.m. on January 19, 2008, he was on the 3500 block of North Sawyer when he saw a vehicle disobey two stop signs, swerve, and drive from side to side. He and another police vehicle stopped the driver, identified in court as defendant, who was able to produce identification, but not a driver's license or proof of insurance. Defendant had red bloodshot eyes, smelled strongly of alcohol, had slurred and mumbled speech, and staggered when he left his vehicle. Officer Fiorito testified that he administered field sobriety tests at the police station, in a hallway in the interview room area, due to the extremely cold weather and "the fact that there really wasn't any room or flat level spot to do it" at the scene. Defendant's

performance of the horizontal gaze nystagmus test, the one-leg stance test, and the walk and turn test indicated that he was impaired and intoxicated and under the influence of alcohol. Defendant refused a breathalyzer test. Officer Fiorito checked the status of defendant's driving privileges and learned that his license had been revoked for previous DUIs. Following Officer Fiorito's testimony, the trial court made a finding of probable cause.

¶ 6 A Rule 402 conference commenced on September 18, 2008, but continued. On December 4, 2008, defendant tested positive for marijuana after providing a urine drop for drug testing. At the return court date on December 30, 2008, defendant was taken into custody and mandated to a treatment program with the Cook County Department of Corrections. About one month later, defendant filed a request for another pretrial conference.

¶ 7 On April 15, 2009, a Rule 402 conference was held. Defendant's retained counsel, Michael Young, indicated that defendant wished to plead guilty to one count of aggravated DUI. The trial court admonished defendant that he had the right to a trial, the right to require the State to prove him guilty beyond a reasonable doubt, the right to present witnesses on his behalf, and the right to remain silent. The court also informed defendant that he was facing a possible sentence of three to seven years' imprisonment, followed by two years of mandatory supervised release and a fine of up to \$25,000. The parties stipulated "that a factual basis exists to support this plea." The trial court accepted defendant's plea, entered judgment on one count of aggravated DUI, and sentenced defendant to two years of probation. The trial court thereafter advised defendant that he had a right to appeal, but that in order to do so, he must first file a motion to withdraw his guilty plea.

¶ 8 Defendant did not file a motion to withdraw his plea or take a direct appeal.

¶ 9 On February 8, 2010, defendant filed a postconviction petition drafted by a different retained attorney, Herbert Abrams. In the petition, defendant claimed that he was actually innocent and had been falsely arrested in violation of the Fourth Amendment. Defendant alleged that Officer Fiorito submitted false and perjured testimony at the preliminary hearing. In support of his allegation, defendant asserted that Officer Fiorito had been accused of falsifying DUI arrests in other cases, had been placed on administrative leave, and was no longer being used by the State's Attorney's office as a witness because he no longer had any credibility. Defendant further asserted that Officer Fiorito was being investigated by the Chicago Police Department and had 37 federal lawsuits pending against him for cases involving "similar facts where false and fraudulent arrests, police reports and testimony have \*\*\* alleg[ed] that Officer Fiorito did this in order to earn more overtime pay." Defendant alleged that although he told his guilty plea counsel he was innocent, that no roadside physical performance tests were performed, and that no other "tests" were given to him, counsel advised him to plead guilty based on Officer Fiorito's testimony and police reports. According to defendant, counsel did not interview any witnesses, investigate the case, or file any motions.

¶ 10 The trial court found that the petition stated the gist of a constitutional claim and advanced it to second-stage proceedings.

¶ 11 On June 18, 2010, the State filed a motion to dismiss the petition. In the motion, the State asserted that (1) defendant's claims were waived where he affirmatively accepted a sentence of two years' probation and pleaded guilty in exchange for that sentence; (2) defendant failed to attach supporting documents; (3) defendant failed to make a substantial showing of the

deprivation of a constitutional right based on a claim of actual innocence; and (4) defendant failed to make a substantial showing of ineffective assistance of counsel.

¶ 12 On the same day that the State filed its motion to dismiss, the trial court ordered an instant drug test from defendant. Defendant tested positive for marijuana. As a result, the State filed a petition to revoke probation. At a subsequent Rule 402 conference on November 23, 2010, defendant pleaded guilty to the violation of probation and went into custody at a drug rehabilitation program. The trial court sentenced defendant to 28 days, time considered served, probation terminated unsatisfactorily, and the case was closed.

¶ 13 On January 27, 2012, the trial court allowed Herbert Abrams to withdraw as defendant's attorney and appointed the Public Defender to represent defendant on his postconviction petition. On August 8, 2012, the Public Defender withdrew, and attorney Thomas Needham filed an appearance for defendant. Counsel thereafter filed a response to the State's motion to dismiss the postconviction petition. Defendant argued in the response that the State should have disclosed that it was investigating possible criminal conduct by Officer Fiorito, and that if such disclosure had been made, defendant "would never have decided to plead guilty." Defendant further asserted that had his guilty plea counsel investigated and performed discovery in his case, counsel would have learned "easily-ascertainable facts about Fiorito which would have provided [defendant] with an effective basis to challenge his testimony at trial." Attached to the response were 12 documents, including a memorandum indicating that in January 2009, a police sergeant had requested a confidential investigation into Officer Fiorito's purposeful deletion of "certain steps" required in completing a DUI arrest, as well as Officer Fiorito's repeated statements that he was "making every effort to work overtime to ascertain cash and thusly try's [*sic*] to get a lot

of DUI's for the court appearances"; a *Chicago Tribune* article dated April 3, 2009, reporting that seven federal lawsuits had been filed against Officer Fiorito, alleging that he made false DUI arrests in a scheme to earn extra overtime pay by making court appearances on cases; several other news articles from later in 2009, reporting that Officer Fiorito was under investigation by the Chicago Police Department and was being sued by 42 people for making false DUI arrests; and a 2012 *Chicago Tribune* article reporting that the City had settled two lawsuits by drivers who accused Fiorito of false arrest, and that amid a "flurry of lawsuits," the State's Attorney's office had dropped charges against more than 130 drivers arrested by Officer Fiorito for DUI and Officer Fiorito had been removed from street duty.

¶ 14 The State filed a reply to defendant's response, maintaining that defendant had failed to meet the standard for a claim of ineffective assistance of counsel. Specifically, the State argued that guilty plea counsel could not be deemed to have acted unreasonably for failing to uncover internal investigatory activity that that was not in the public domain and for failing to suspect that any admissible impeachment existed, and that defendant had not demonstrated that had he known of the civil lawsuits and confidential investigations into Officer Fiorito's actions, he would have rejected the offer of probation while he remained in custody and would have prevailed at trial using the information attached to his response. The State further asserted that defendant's guilty plea broke the chain of events that preceded it, and that he could not raise a constitutional right deprivation after entering a knowing and voluntary plea.

¶ 15 A hearing was held on the motion to dismiss the postconviction petition. Following the hearing, the trial court granted the State's motion, finding that defendant had not made a substantial showing of ineffective assistance of counsel. In announcing its decision, the trial

court observed that at the time defendant pleaded guilty, he was facing his third charge of DUI, had tested positive for marijuana while on bond, was in custody, and had been fully advised as to the consequences of his plea. The court noted that the information that had evolved concerning Officer Fiorito could be used for impeachment purposes at trial, but stated, "any attorney can always attack the credibility of any witness that appears at trial" and observed that defendant had waived his right to the cross examination of witnesses. The court concluded that nothing showed that had the information about Officer Fiorito been known to defendant, he would have opted to go to trial rather than plead guilty.

¶ 16 On appeal, defendant contends that the trial court should not have dismissed his petition prior to an evidentiary hearing. He argues that his petition made a substantial showing that guilty plea counsel was ineffective for failing to investigate and discover exculpatory evidence that would have provided him with a plausible defense, and that there is a reasonable probability that absent counsel's deficient performance, he would have pleaded not guilty and proceeded to trial. Defendant argues that even though he had told counsel that he was innocent, and even though the *Chicago Tribune* had published an article 13 days prior to his guilty plea chronicling many allegations against Officer Fiorito, counsel nevertheless failed to subpoena any documents or file any motions for discovery, and encouraged defendant to plead guilty. According to defendant, had counsel done even a cursory investigation into his claims that he was innocent and that no roadside performance tests were performed, counsel would have discovered the readily available plethora of allegations against Officer Fiorito, specifically with respect to the falsifying of DUI arrests, which would have supported defendant's assertions. Defendant maintains that had trial counsel adequately investigated his case, he never would have pleaded guilty, and his defense –

that he was falsely arrested for DUI like so many others falsely arrested by Officer Fiorito – likely would have been successful at trial.

¶ 17 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the second stage of the postconviction process. At this stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The granting of the State's motion to dismiss is warranted if the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). In other words, a defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Id.* at 381. Our review at the second stage is *de novo*. *Id.* at 388, 389.

¶ 18 A challenge to a guilty plea based on allegations of ineffective assistance of counsel is subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hall*, 217 Ill. 2d at 334-35. Under *Strickland*, the defendant must establish that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by that substandard performance. *Id.* at 335. Counsel performs inadequately where he fails to ensure the defendant's guilty plea was entered voluntarily and intelligently. *Id.* Prejudice exists if there is a reasonable probability that absent counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Id.* A bare allegation that the defendant would have pleaded not guilty and insisted on trial is not enough to establish prejudice. *Id.* Rather, such a claim must be

accompanied by either a claim of innocence, or the articulation of a plausible defense which could have been raised at trial. *Id.* at 336-37. Whether counsel's deficient representation caused the defendant to plead guilty is a question that largely depends on predicting whether the defendant likely would have been successful at trial. *Id.* at 336. To obtain relief, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *People v. Hughes*, 2012 IL 112817, ¶ 65 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

¶ 19 In the instant case, we need not determine whether counsel's performance fell below an objective standard of reasonableness. This is because defendant has not made a substantial showing of prejudice. See *People v. Salas*, 2011 IL App (1st) 091880, ¶ 91 (if a claim of ineffectiveness may be disposed of due to lack of prejudice, this court is not required to address whether counsel's performance was objectively reasonable). Even assuming that counsel had investigated and discovered the civil lawsuits and internal investigations surrounding Officer Fiorito, defendant has not convinced us that a decision to reject the plea bargain being offered him would have been a rational decision. At the time defendant pleaded guilty, his circumstances were far from promising. He had two prior DUIs in his criminal history. While on bond for the instant offense, he tested positive for marijuana and was taken into custody and mandated to a treatment program. He was still in the custody of that treatment facility when he participated in the Rule 402 conference that resulted in his plea. He was facing a possible sentence of three to seven years in prison, followed by two years of mandatory supervised release, and a fine of up to \$25,000. He had refused a breathalyzer test, a factor that could have been introduced at trial as circumstantial evidence of consciousness of his own guilt. *People v. Johnson*, 218 Ill. 2d 125,

140 (2005); *People v. Weathersby*, 383 Ill. App. 3d 226, 230 (2008). Given the particular facts of this case, we agree with the State that in these circumstances, defendant had "every incentive" to enter a guilty plea in exchange for a sentence of two years' probation. Defendant has not met his burden of making a substantial showing that there is a reasonable probability that absent counsel's alleged errors, he would have pleaded not guilty and insisted on going to trial. See *Hall*, 217 Ill. 2d at 335.

¶ 20 We cannot find that defendant has made a substantial showing of ineffective assistance of counsel. Accordingly, we conclude that the trial court did not err in granting the State's motion to dismiss.

¶ 21 Anticipating our decision, defendant contends in the alternative that the dismissal of his petition must be reversed and the cause must be remanded for compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984) because postconviction counsel failed to file a 651(c) certificate and failed to make the necessary amendments to the petition to adequately present his contentions. Defendant argues, "Here, if this Court finds that [defendant's] claims were not adequately developed in Argument I above, it should find that such inadequacy was due to postconviction counsel's failure to 'shape' [defendant's] complaints into 'appropriate legal form.' " Defendant further argues that if this court finds that the pleadings failed to set forth the necessary facts and arguments to support his claim of ineffective assistance of counsel, then this court should find that such shortcoming was due to postconviction counsel's unreasonable assistance in failing to adequately shape defendant's claims. Specifically, defendant faults postconviction counsel for failing to amend the petition to include factual allegations of discrimination and false

arrest based on sexual orientation, both in defendant's case and in other cases involving DUI arrests made by Officer Fiorito.

¶ 22 Rule 651(c) provides that in a postconviction proceeding, the record shall:

"contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has 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.Dec.1, 1984).

¶ 23 In *People v. Richmond*, 188 Ill. 2d 376, 381 (1999), our supreme court held that Rule 651(c) applies "when a defendant who files a *pro se* post-conviction petition is later represented by retained counsel in the post-conviction proceedings," as well as in situations where "appointed counsel represent[s] defendant who originally files a *pro se* post-conviction petition." However, the *Richmond* court also held that "[b]y its own terms \*\*\* the requirements of Rule 651(c) would not have been applicable" where "the initial petition was prepared and filed by counsel." *Id.* at 383; see also *People v. Bennett*, 394 Ill. App. 3d 350, 354 (2009) ("We see no way to interpret the [*Richmond*] court's words as meaning other than that Rule 651(c) is inapplicable in proceedings where counsel filed the petition"). Accordingly, in the instant case, Rule 651(c) is inapplicable because the petition was prepared by an attorney, rather than defendant.

¶ 24 Postconviction counsel has a statutory duty to provide reasonable assistance to a defendant, rather than a constitutional duty of effective assistance. *People v. Perkins*, 229 Ill. 2d

34, 42 (2007). A claim that postconviction counsel failed to render reasonable assistance is not cognizable as a freestanding claim in proceedings under the Act. *People v. Mendoza*, 402 Ill. App. 3d 808, 816-17 (2010). "When considering an appeal from the dismissal of a petitioner's postconviction petition, the appellate court is limited to considering matters that are of a constitutional dimension. [Citation.] The right to reasonable assistance of postconviction counsel is derived from the Act, rather than the Constitution." *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009). Here, where Rule 651(c) is inapplicable, defendant's argument that counsel provided unreasonable assistance in failing to adequately shape his claims is a freestanding claim of unreasonable assistance. As such, it is not cognizable, and we will not consider it.

¶ 25 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.