

No. 1-14-1898

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 6892
)	
KEVIN BARNES,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

Held: The circuit court's dismissal of defendant's postconviction petition is affirmed over his contention that postconviction counsel failed to comply with Supreme Court Rule 651(c).

¶ 1 Defendant, Kevin Barnes, appeals the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that his petition should be remanded for further proceedings because his postconviction

counsel provided unreasonable assistance by failing to comply with Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. April 26, 2012). He maintains that counsel failed to make amendments to his *pro se* petition that were necessary for the proper presentation of his claims.

¶ 2

I. BACKGROUND

¶ 3

The record shows that following a jury trial, defendant was found guilty of first degree murder in connection with the 1998 shooting death of Antoine Thomas. Following a sentencing hearing, the trial court sentenced defendant to 60 years' imprisonment. Defendant filed a direct appeal from that judgment and this court affirmed his conviction and sentence over his claims that the trial court failed to comply with Supreme Court Rule 431(b), that his trial counsel provided ineffective assistance, that the trial court erred in denying his motion for a new trial without holding an evidentiary hearing, and that the trial court erred in assessing him certain fines and fees. *People v. Barnes*, No. 1-08-2949 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4

On June 13, 2012, defendant filed the *pro se* postconviction petition at bar alleging, *inter alia*, that two of the witnesses at his trial committed perjury. Defendant attached to his petition a letter from Raven Graves, in which Graves stated that one of the witnesses at defendant's trial, Tamarius Jackson, admitted that he lied to police and at trial regarding defendant's involvement in the murder. Defendant also attached an affidavit from Graves, which repeated the statements made in the letter. In support of his second perjury claim, defendant attached an unsigned letter, which was addressed to the Chicago police detective who testified at defendant's trial. The letter discussed information provided by another witness at defendant's trial, Louis Hargrove, and inquired into the value of Louis' information. Defendant contended that the letter was written by Louis' attorney who was representing him on an unrelated federal charge. Defendant also

1-14-1898

attached an affidavit from Louis, in which Louis averred that the detective told him that he would receive a lower sentence on his pending federal charge in exchange for information about defendant's involvement in the murder. At trial, the detective denied that Louis was offered anything in exchange for his cooperation in the murder investigation. In his *pro se* petition, defendant contended that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 5 Defendant also noted, without explanation, that his postconviction petition had to be filed before a deadline of June 5, 2012, but because he was an incarcerated *pro se* litigant, he sent his postconviction petition to a family member to be typed and formatted before filing. On July 20, 2012, the circuit court advanced the petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. On June 12, 2013, counsel indicated that he was filing a certificate and that he had spoken to defendant and reviewed the transcript. Counsel informed the court that he was not going to file a supplemental petition. That same day, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. April 26, 2012)), in which he stated that he communicated with defendant via letter to ascertain his claims under the Act and had examined the transcript of his trial and sentencing. Counsel further stated in the certificate that he would not file a supplemental petition because defendant's *pro se* petition adequately presented his claims.

¶ 6 On January 29, 2014, the State filed a motion to dismiss defendant's petition. In its motion, the State contended that defendant's petition was untimely because it was not filed within six months of the appellate court's ruling on his direct appeal and that he failed to demonstrate that the delay was not due to his culpable negligence. The State further contended that defendant failed to show that the detective and Tamarius committed perjury because his

claims were not supported by the affidavits and other evidence attached to his petition, were contradicted by the record, or were otherwise waived. The court held a hearing on the State's motion on May 7, 2014. In response to the State's contentions, counsel argued that the petition was timely filed because defendant's petition for leave to appeal was denied on November 30, 2011, and he filed his *pro se* petition within six months of that date on May 20, 2012. Counsel further stated that he could have Louis' attorney on the federal charge provide an affidavit stating that he wrote the letter to the detective, but that he was "on extended leave until May 12."

¶ 7 In dismissing defendant's petition, the circuit court found that the petition was untimely filed and that some of the claims raised in the petition were forfeited because they could have been raised on direct appeal. The court further found that defendant's claims that two witnesses committed perjury at his trial were deficient because the affidavits and other evidence defendant attached to his petition were legally insufficient to make the requisite showing under the Act. Accordingly, the court found that defendant's petition did not make a substantial showing of constitutional deprivation and granted the State's motion to dismiss his petition.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant contends that the dismissal of his petition should be reversed because postconviction counsel failed to comply with Supreme Court Rule 651(c). He maintains that counsel failed to make amendments to his *pro se* petition that were necessary for the proper presentation of his claims. The State responds that the circuit court properly dismissed defendant's petition where counsel complied with Rule 651(c) and defendant failed to make a substantial showing that his constitutional rights had been violated.

¶ 10 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1

(West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage of proceedings, counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2010); *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). The Act requires postconviction counsel to provide a reasonable level of assistance (*People v. Owens*, 139 Ill. 2d 351, 364 (1990)), and Rule 651(c) imposes specific obligations on counsel to ensure reasonable assistance under the Act (*People v. Lander*, 215 Ill. 2d 577, 584 (2005)). Specifically, Rule 651(c) requires that the record show that counsel consulted with defendant, either by mail or in person, to ascertain his claims under the Act, examined the record of the trial court proceedings, and made any amendments to the *pro se* petition necessary for the presentation of defendant's contentions. Ill. S. Ct. R. 651(c) (eff. April 26, 2012); *Lander*, 215 Ill. 2d at 584. Counsel may show compliance with the rule by filing a certificate (*Lander*, 215 Ill. 2d at 584), which creates a rebuttable presumption that counsel provided reasonable assistance (*People v. Profit*, 2012 IL App (1st) 101307, ¶ 19).

¶ 11 The Act further provides that after counsel has made any necessary amendment to the petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472. If the State moves to dismiss the petition, the court may hold a dismissal hearing, and all well-pleaded facts are taken as true. *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13. We review an attorney's compliance with a supreme court rule and the dismissal of a postconviction petition at the second stage under a *de novo* standard review. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 12 Defendant first contends that counsel failed to comply with Rule 651(c) because he failed to amend defendant's petition to show that it was timely filed. Under the Act, if a petitioner files a direct appeal, but does not file a petition for *certiorari* with the United States Supreme Court, then his postconviction petition must be filed within six months from the date for filing a petition

for *certiorari*, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence or defendant advances a claim of actual innocence. 725 ILCS 5/122-1(c) (West 2010). In this case, defendant's petition for leave to appeal to the supreme court from his direct appeal was denied on November 30, 2011. *People v. Barnes*, No. 1-08-2949 (2010), *pet. for leave to appeal denied*, No. 111696, (Nov. 30, 2011) (table). The deadline for defendant to file a petition for *certiorari* was 90 days after that date, or February 28, 2012. U.S. Sup Ct. R. 13.1 ("A petition for a writ of *certiorari* seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.").

¶ 13 Accordingly, the deadline for defendant to file a postconviction petition was August 28, 2012. Defendant's petition was stamped filed with the clerk of the circuit court on June 13, 2012, which was within the six-month window. In its brief before this court, the State concedes that the trial court incorrectly found that the petition was untimely. The state contends, however, that this erroneous finding is "irrelevant" because this court's *de novo* review allows us to examine the record and independently determine that defendant's petition was timely filed. The State further contends that the trial court's finding that defendant's petition was untimely is "irrelevant" because, regardless of procedural bars, defendant cannot make a substantial showing that his constitutional rights have been violated as required for relief under the Act.

¶ 14 The State's contention is akin to a harmless error analysis. Defendant contends, however, that the supreme court has found that counsel's failure to comply with Rule 651(c) is not subject to harmless error analysis. *People v. Suarez*, 224 Ill. 2d 37, 47, 51-52 (2007). In *Suarez*, the supreme court found that postconviction counsel did not comply with Rule 651(c) because he did not file a 651(c) certificate and the record did not show that counsel had consulted with

defendant. *Id.* at 40, 44. The court found that remand was required regardless of whether the claims raised in the petition had merit and that noncompliance with Rule 651(c) may not be excused on the basis of harmless error. *Id.* at 47, 52; see also, *Profit*, 2012 IL App (1st) 101307, ¶ 22.

¶ 15 Here, unlike *Suarez*, counsel filed a Rule 651(c) certificate, giving rise to a rebuttable presumption that he performed the duties required by the rule. *Jones*, 2011 IL App (1st) 092529, ¶ 23. Accordingly, the question of whether defendant's *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition. *Profit*, 2012 IL App (1st), ¶ 23. Defendant cites *People v. Perkins*, for the proposition that counsel is required to make any amendments to a petition that are necessary to overcome procedural bars, such as timeliness. In that case, however, the circuit court dismissed defendant's petition solely because it was untimely, and did not address the substantive issues raised in the petition. *People v. Perkins*, 229 Ill. 2d 34, 39-40, 44 (2007). In this case, by contrast, the circuit court incorrectly found that defendant's petition was untimely filed, but also addressed each of the substantive claims defendant raised and found them frivolous. If counsel likewise determined that the claims raised in defendant's *pro se* petition were frivolous, he was not required to file an amended petition. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004) ("An attorney *** who determines that defendant's claims are meritless cannot in good faith file an amended petition on behalf of defendant.").

¶ 16 We find no good purpose in remanding the cause so that counsel could amend the petition to show that it was timely filed and the circuit court could dismiss the petition a second time because the claims lack substantive merit. *cf. People v. Alexander*, 2014 IL App (4th) 130132, ¶ 50 (finding that where the circuit court determined that defendant's 2-1401 petition

was frivolous, there was no reason to remand the case so that defendant could comply with the procedural service requirement and the court could repeat its denial of defendant's petition on the merits.)¹ Accordingly, we must determine whether the claims in defendant's petition make a substantial showing of a constitutional violation.

¶ 17 Although defendant raises several arguments in his *pro se* postconviction petition, on appeal he focuses on two contentions that counsel should have amended before filing his 651(c) certificate. Defendant first contends that counsel was ineffective for failing to reclassify his claim that Tamarius Jackson committed perjury at his jury trial as a claim of actual innocence. Defendant also contends that counsel was ineffective for failing to amend and provide supporting affidavits for his claim that Chicago police detective Mike McDermott falsely testified that he did not offer Louis Hargrove a deal in exchange for information about defendant's involvement in the murder. In order to determine the viability of defendant's claims, it is necessary to review the evidence presented at his jury trial.

¶ 18 A full recitation of the facts from defendant's jury trial can be found in this court's order on defendant's direct appeal. *People v. Barnes*, No. 1-08-2949 (2010). As relevant here, Tamarius, defendant's co-defendant and second cousin, testified for the State that on February 7, 1998, he, Antoine Thomas, and Joe Richardson were arrested for an attempted robbery in Bellwood, Illinois. At the police station, Tamarius told the officers about a January 1998 bank robbery in Champaign, Illinois, committed by defendant, Louis Hargrove, and Adonis Hargrove. After leaving the police station, Tamarius told Adonis, Louis, and defendant that Thomas told

¹ For similar reasons, we find that we need not address defendant's contention that counsel was ineffective for failing to amend the petition to include a proper verification affidavit. The circuit court did not dismiss defendant's petition because of the invalid verification affidavit, which was not notarized, and the State did not contend in its motion to dismiss that the verification affidavit was inadequate. Our supreme court has held "that courts of review should not ordinarily consider issues where they are not essential to the disposition of the cause or where the result will not be affected regardless of how the issues are decided." *People v. White*, 2011 IL 109689, ¶ 144. Here, remanding the cause so that counsel could amend the petition to include a proper verification affidavit would not affect the circuit court's determination to grant the State's motion to dismiss because defendant's petition lacked substantive merit.

1-14-1898

the police about the Champaign robbery. Tamarius testified that defendant became angry and said that he was going to "kill" Thomas, but Tamarius stated that he "would do it."

¶ 19 The following day, defendant drove to Tamarius' house and then they picked up defendant's girlfriend, Zainabu Jones. Defendant had a 9 millimeter handgun in his waistband and Tamarius told him that he would help lure Thomas out of his house. After Tamarius lured Thomas out of his house by telling him he needed a jump start for his van, defendant told Thomas that he knew of a house they could rob, which belonged to Zainabu's uncle. Defendant dropped Zainabu off at her grandmother's house, and then drove to Zainabu's uncle's house with Tamarius and Thomas. Defendant told Thomas that he needed help opening a window of the house, and both defendant and Thomas walked around to the back of the house while Tamarius stayed in the vehicle. Tamarius heard three gunshots and then observed defendant running back toward the vehicle with a gun in his hand. Defendant told Tamarius that he had shot Thomas three times.

¶ 20 Tamarius further testified that he was arrested on May 18, 1998, for an unrelated unlawful use of a weapon charge. At the police station, Tamarius spoke to Detective McDermott about the murder. Tamarius gave a handwritten statement to an Assistant State's Attorney and was charged with first degree murder. Tamarius agreed to testify against defendant and entered into a negotiated plea agreement to serve concurrent terms of 20 years' imprisonment for the first degree murder charge and two years' imprisonment for the unlawful use of a weapon charge.

¶ 21 Louis Hargrove testified that on February 7, 1998, Tamarius told him, Adonis, and later, defendant that Thomas had informed police about their participation in the Champaign bank robbery. Louis testified that defendant became angry and stated that he would "kill" the victim. Several days later, defendant told Louis that it was "over with," which Louis understood meant

1-14-1898

that Thomas was dead. On March 27, 1998, Louis was arrested by the federal authorities for the Champaign bank robbery. Chicago police officers came to speak with Louis about Thomas' murder, but Louis told them that he did not know anything. Louis pleaded guilty to the bank robbery on June 1, 1998.

¶ 22 On June 5, 1998, Louis signed a handwritten statement regarding the murder. Louis repeated the statements made in his handwritten statement when he testified before a grand jury. Louis testified that after the murder, defendant told him how they had lured Thomas out of his house by telling him that they were going to commit a robbery and then defendant shot him with a 9 millimeter handgun. In both the handwritten statement and his testimony before the grand jury, Louis admitted that he overheard a conversation between defendant and Tamarius several days after the murder during which they agreed what they would say to police if they asked about Thomas. During cross-examination, however, Louis stated that his prior statements to police and the grand jury were not true and that he gave the statements in the hope of receiving a lesser sentence on his federal charge.

¶ 23 Zainabu Jones testified that she was with Tamarius and defendant on February 7, 1998, and heard them speaking in angry tones. She heard defendant say that he was upset with Thomas for telling the police about the Champaign bank robbery and that he was going "mess" him up. The next day, she was in the vehicle with defendant, Thomas, and Tamarius when she pointed out a house and stated that it belonged to her uncle, even though it did not. She observed defendant holding a 9 millimeter handgun, but believed defendant was only going to beat up Thomas. Zainabu testified that a week later, she discovered that Thomas had died, but she did not tell police what she knew until December 1999 when she was arrested on an unrelated charge.

¶ 24 Detective McDermott testified that he was called to the scene of the murder with John Paulson, a forensic investigator for the Chicago Police. They found Thomas dead and crouched up against the wall of a home. On the ground near his body, they found two live 9 millimeter cartridges and one expended cartridge. Detective McDermott further testified that he spoke with Tamarius after his arrest for unlawful use of a weapon and Tamarius told him about the murder and signed a handwritten statement. Tamarius also led Detective McDermott to the house where he and defendant brought Thomas. Detective McDermott denied that Louis was offered anything with regard to his federal case in exchange for information about defendant's involvement in the murder. An autopsy showed that Thomas suffered three gunshot wounds and a bullet found in Thomas' head was tested and found to be a 9 millimeter bullet. The jury found defendant guilty of first degree murder, and the trial court later sentenced defendant to 60 years' imprisonment.

¶ 25 In his *pro se* postconviction petition, defendant contended that on January 18, 2011, he received a letter from Raven Graves recounting a conversation she had with Tamarius. Graves stated that Tamarius told her that, contrary to his testimony at defendant's trial, defendant had no knowledge of the murder, was not present at the scene, and it was actually Tamarius who committed the murder. According to Graves' letter, Tamarius stated that it was "better [defendant] than me" who was in prison. Defendant attached the letter from Graves to his petition along with an affidavit from Graves in which she summarized the information in her letter.

¶ 26 Defendant also contended that Detective McDermott falsely testified that he never discussed an exchange with Louis, or the attorney representing Louis on the federal bank robbery charge, where Louis would receive a lesser sentence on the federal charge in exchange for information about defendant's involvement in the murder. Defendant attached to his petition an

1-14-1898

unsigned letter that he asserts was written by Louis' attorney to Detective McDermott. In the letter, the author writes that "Mr. Hargrove's information was largely responsible for making the case against Kevin Barnes" and that "I would very much appreciate some sort of written statement from you on Mr. Hargrove's behalf as to the value of the information which he has provided to your organization and to the Grand Jury." Defendant also attached to his petition an affidavit from Louis, in which Louis averred that he initially told Detective McDermott and the Assistant State's Attorney that he did not have any information about Thomas' murder, but Detective McDermott told Louis that he thought he was lying and that he was facing a long prison sentence for the bank robbery. Louis further averred that Detective McDermott then told Louis that if he gave them some false information about Thomas' murder, then Detective McDermott would speak to the U.S. District Attorney in Champaign to secure a deal for him to receive a lesser sentence on the bank robbery charge. Louis averred that he, therefore, lied and told Detective McDermott that defendant told him that he killed Thomas. Louis stated that he told the same lie to the Assistant State's Attorney and the grand jury. Finally, Louis averred that defendant never told him about the murder and that he never heard a conversation between defendant and Tamarius about Thomas' murder.

¶ 27 We first address defendant's claim that counsel was ineffective for failing to reframe his claim that Tamarius Jackson provided false testimony as one cognizable under the Act, a claim of actual innocence. The Illinois Supreme Court has held that "[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims.' (Emphasis in original.)" *Pendleton*, 223 Ill. 2d 458, 472 (2006) (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993); see also *People v. Richardson*, 382 Ill. App. 3d 248, 254 (2008) ("it is the complaints of prisoner that frame counsel's duties under Rule 651(c).") (internal quotation marks omitted). Thus, counsel is

required only to examine the record to the extent necessary to adequately support the constitutional claims raised in defendant's petition. *Pendleton*, 223 Ill. 2d at 475. "While postconviction counsel *may* conduct a broader examination of the record (*Davis*, 156 Ill. 2d at 164 [citation]), and may raise additional issues if he or she chooses, there is no obligation to do so" (emphasis in original.) *Pendleton*, 223 Ill. 2d at 476.

¶ 28 Here, defendant contended in his petition that the State used Tamarius' false testimony to obtain his conviction, but defendant acknowledged that the State might not have known that Tamarius committed perjury. However, such a claim does not raise a constitutional issue without an allegation that the State knew of the perjury. *People v. Brown*, 169 Ill. 2d 94, 106 (1995). Defendant did not make such a claim in his petition, meaning that it was not cognizable under the Act. Further, defendant did not frame this contention as one of actual innocence, and counsel was under no obligation to modify the claim as one of actual innocence. *Pendleton*, 223 Ill. 2d at 476.

¶ 29 Moreover, in order to succeed on a claim of actual innocence, defendant must present new, material, noncumulative evidence that is so conclusive that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Conclusive means the new evidence, considered along with the trial evidence, "would probably lead" to a different verdict. *Id.*, citing *Ortiz*, 235 Ill. 2d at 336-37. In this case, defendant merely presented a letter and affidavit from a third party who stated that Tamarius told her that he presented false testimony at defendant's trial. Based on the overwhelming evidence presented at defendant's trial, we cannot say that this evidence would "probably" have changed the result on retrial. Crucially, defendant failed to attach to his petition an affidavit from Tamarius that he actually provided false testimony, but merely provided a letter from a third party. Although defendant contends the omission of this

affidavit supports his claim that counsel provided unreasonable assistance, we presume, based on counsel's compliance with the 651(c) certificate requirement, that counsel made an effort to obtain affidavits in support of the postconviction claims, but was unable to do so. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25, citing *People v. Johnson*, 154 Ill. 2d 227, 241 (1993).

¶ 30 Defendant nonetheless contends that even assuming counsel was unable to procure an affidavit from Tamarius, he still failed to provide reasonable assistance because he did not amend the petition to show an explanation for the absence of such affidavit. As discussed above, although postconviction counsel must amend a *pro se* petition in order to shape the defendant's claims into proper legal form (*Perkins*, 229 Ill. 2d at 43-44), counsel's failure to supply certain affidavits or other evidence in support of the petition will not, in itself, rebut the presumption that arises from the Rule 651(c) certificate. Here, the court did not dismiss defendant's petition on the basis that he failed to explain the absence of an affidavit from Tamarius, but rather found that the affidavits and other evidence provided were insufficient. Based on counsel's filing of a 651(c) certificate, the court could reasonably presume that counsel undertook "a concerted effort" to obtain affidavits in support of the defendant's postconviction claims, but was unable to do so. *Johnson*, 154 Ill. 2d at 241; see also *Kirk*, 2012 IL App (1st) 101606, ¶ 25. Accordingly, counsel was not required to amend defendant's petition to reflect that he had made such efforts.

¶ 31 In addition, contrary to defendant's contention, the State did not "implicitly acknowledge" in its motion to dismiss that Graves' affidavit alone would have been sufficient to support defendant's claim if it had been demonstrated that Tamarius' affidavit was unavailable. The State merely noted that defendant failed to show that Tamarius was unavailable or that his affidavit could not be obtained and that the other attachments to his petition were insufficient. In fact, the

State explicitly stated that the letter was not even signed to show that it was actually from Graves and that Graves' affidavit did not contain any admissible statements from Tamarius. This is far from the "implicit acknowledge[ment]" that defendant suggests.

¶ 32 We next address defendant's claim that counsel was ineffective for failing for failing to provide supporting affidavits for defendant's claim that Detective McDermott falsely testified that Louis was not offered any deal regarding his federal sentence in exchange for information about the murder. Defendant asserts that the manner in which this claim was presented in his *pro se* petition was inadequate under the Act because he alleged that appellate counsel was ineffective for failing to raise this issue on direct appeal. Defendant asserts, however, that because this claim relies on matters outside of the record, it could not have been raised on direct appeal. Accordingly, he contends that counsel should have amended the petition to assert the trial counsel was ineffective for not presenting the evidence of Detective McDermott's perjury.

¶ 33 As discussed above, " '[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims.' " (Emphasis in original.) *Pendleton*, 223 Ill. 2d 458, 472 (2006) (quoting *Davis*, 156 Ill. 2d at 164; see also *Richardson*, 382 Ill. App. 3d 248, 254 (2008) ("it is the complaints of prisoner that frame counsel's duties under Rule 651(c).") (internal quotation marks omitted)). Thus, counsel is required only to examine the record to the extent necessary to adequately support the constitutional claims raised in defendant's petition. *Pendleton*, 223 Ill. 2d at 475. "While postconviction counsel *may* conduct a broader examination of the record (*Davis*, 156 Ill. 2d at 164), and may raise additional issues if he or she chooses, there is no obligation to do so." (emphasis in original.) *Pendleton*, 223 Ill. 2d at 476. Thus, because defendant framed this issue as one of ineffective assistance of appellate counsel,

1-14-1898

postconviction counsel was not required reframe the issue as one of ineffective assistance of trial counsel.

¶ 34 Defendant further contends that it was "inexplicable" for counsel to fail to obtain an affidavit from Louis' attorney on the federal charge substantiating defendant's claim that Detective McDermott knew that Louis would receive a lower sentence on his federal case based on his cooperation in the murder investigation. Defendant asserts that the record affirmatively shows that counsel did not speak with Louis' attorney before filing the Rule 651(c) certificate. Contrary to defendant's contentions, at the hearing on the State's motion to dismiss counsel stated that "I've been trying to—[Louis' attorney] will be coming back from extended leave on May 12." Counsel then informed the court that he could have Louis' attorney submit an affidavit that he wrote the letter addressed to Detective McDermott that defendant attached to his petition "if that's an issue with your Honor."

¶ 35 These statements do not affirmatively show that counsel did not speak with Louis' attorney before filing the Rule 651(c) certificate. Rather, the court could presume, based on counsel's filing of the 651(c) certificate, that counsel made an effort to obtain affidavits in support of defendant's claim, but was unable to do so. *Kirk*, 2012 IL App (1st) 101606, ¶ 25, citing *Johnson*, 154 Ill. 2d at 241. Despite counsel's representation that he could provide an affidavit from Louis' attorney that he wrote the letter to Detective McDermott, the circuit court found that defendant's claim was "legally insufficient." Under these circumstances, we find that defendant has not rebutted the presumption that counsel provided reasonable assistance under Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶¶ 19, 31.

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.