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No. 2-13-1078
Order filed January 7, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RONALD E. BURT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. Nos. 92-CF-49 92-CF-50 Honorable William A. Kelly, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel violated Rule 651(c) by failing to support, with sufficient available evidence of prejudicial pretrial publicity, defendant's claim that trial counsel was ineffective for failing to likewise support defendant's motion for a change of venue; thus, although postconviction counsel did not otherwise violate the rule as defendant argued, we reversed the dismissal of defendant's petition and remanded the cause.

¶ 2 Defendant, Ronald E. Burt, appeals the grant of the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He

contends that the judgment must be reversed and the cause remanded because his counsel failed to provide the reasonable representation required by the Act. We reverse and remand.

¶ 3 On January 16, 1992, H. Steven Roy and Kevin Muto were shot to death in separate incidents a short time apart on a farm in Stephenson County. Roy had rented the farm and Muto had worked there. In 1992, defendant was charged with the first-degree murders (Ill. Rev. Stat. 1991, ch. 38, ¶ 9-1(a)) of Roy (case No. 02-CF-49) and Muto (case No. 92-CF-50). Defendant was also charged with armed robbery and other offenses in each case. Two other people who accompanied defendant to the farm, Daniel Booth and David Craig, were convicted separately of the murders. Defendant moved to suppress statements that he had made to the police; after a hearing, the motion was denied. The cause proceeded to a jury trial. On the fourth day of trial, before the defense had presented any evidence, defendant, on his own initiative and without any agreement with the State, changed his pleas to guilty of first-degree murder and armed robbery in each case. The trial court accepted the pleas. After a hearing, the jury found defendant eligible for the death penalty, and the trial court sentenced him to death and denied his motions to withdraw his guilty pleas and to reconsider his sentences.

¶ 4 On direct appeal, the supreme court affirmed, holding that the trial court's preplea admonishments had not been defective; that the sentencing hearing was untainted by either trial-court error or ineffective assistance of counsel; that defendant's death sentence for murder was not unconstitutionally disproportionate to Booth's 40-year prison sentence; and that the death-penalty statute was constitutional. *People v. Burt*, 168 Ill. 2d 49 (1995).

¶ 5 Defendant then petitioned under the Act, contending that (1) the trial court had denied him due process by declining to hold a fitness hearing even though he had been taking psychotropic medicine throughout the proceeding; (2) the court denied him due process by

declining to reopen the fitness inquiry despite having information creating a *bona fide* doubt of his fitness; (3) at sentencing, the State violated due process by failing to disclose that, at Booth's sentencing hearing, Craig had testified that defendant did not shoot Muto; and (4) his trial counsel was ineffective for failing to introduce a statement that defendant gave to the police on January 24, 1992, six days after his first statement, which was admitted into evidence. The trial court dismissed the petition. The supreme court affirmed. *People v. Burt*, 205 Ill. 2d 28 (2001).

¶ 6 In 2003, Governor George Ryan reduced defendant's sentences for murder to life imprisonment. Defendant then filed a federal action for *habeas corpus*. The district court denied the petition, but the Seventh Circuit Court of Appeals ordered the court to grant *habeas corpus* unless the State declared its intention to retry defendant. The federal appellate court explained that the trial court denied defendant due process by accepting his guilty pleas without first ordering a renewed fitness hearing and that his trial counsel had been ineffective for failing to move for a renewed fitness hearing. *Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005).

¶ 7 The process started anew. On November 8, 2005, the trial court appointed Dr. Terrance Lichtenwald to examine defendant for fitness. On March 30, 2006, the parties reported that Lichtenwald had examined defendant and found him fit. They stipulated that defendant was fit, and the trial court so found.

¶ 8 On August 31, 2006, defendant, through attorney Glenn Schorsch, moved for a change of venue. This was in part because key people in the first prosecution now held prominent positions in Stephenson County's justice system: Charles R. Hartman, formerly State's Attorney, was now a circuit judge; Michael P. Bald, formerly assistant State's Attorney, was now an associate judge; and John Vogt, defendant's attorney at the first trial, was now the State's Attorney.

¶ 9 The motion contended that a new venue was required for a second reason: adverse pretrial publicity had made it impossible to select a fair and impartial jury. The motion attached an article published May 7, 2006, in the Freeport *Journal Standard*. The article, approximately three pages long and headlined "Retrial set for 1992 double murder," noted that defendant had been "sent to Illinois' Death Row" for the murders of Roy and Muto and continued, "After inexplicably pleading guilty in the middle of his trial, [defendant] was sentenced to death for his role in the crimes"; that the governor had commuted his sentences to life imprisonment; and that he faced a second trial scheduled for the summer. The article described in some detail how Roy and Muto had been shot. It also noted that Craig had been released from prison and that Booth was in prison but would be eligible for parole in 2011. The article summarized the judicial proceedings that had led up to defendant's impending retrial, including the Seventh Circuit's ruling overturning his first conviction. Finally, the article took note of defendant's statements to the police and how he had changed his story twice.

¶ 10 On September 29, 2006, defendant moved to suppress his statements to the police, alleging that he had not been given *Miranda* warnings; that the police had ignored his request to talk to his attorney; that he had been coerced and threatened; and that, during the questioning, he had been under the influence of powerful drugs.

¶ 11 On October 30, 2006, the trial court held a hearing on both motions. Schorsch argued that newly disclosed evidence justified relitigating the issues in the original motion to suppress. This evidence related to defendant's mental condition, such as the degree to which he had been under the influence of drugs at the time of his statements. It also included Craig's affidavit and his testimony at Booth's sentencing hearing; in both, Craig stated that Booth had shot Muto. The prosecutor responded that, in deciding the original motion, the court had considered defendant's

drug usage at the time of his statements. The court now held that a new motion to suppress was barred by collateral estoppel.

¶ 12 Schorsch then argued his motion to change venue. He stated that he had been unable to find copies of press clippings but had been informed that there were "many." He referred to the May 7, 2006, article in the *Journal Standard* and noted that State's Attorney Hartman was now the chief circuit judge; that Assistant State's Attorney Teresa Ursin was now a circuit judge; that Assistant State's Attorney Bald was now an associate judge; and that defendant's original trial attorney, Vogt, was now the State's Attorney. The prosecutor responded that, when the case had been tried 13 years earlier, defendant had had a fair jury. He also noted that defendant relied primarily on one newspaper article for his claim of adverse pretrial publicity. Finally, he argued that the former prosecutors noted had made played only minor roles in the first prosecution.

¶ 13 The judge denied the venue-change motion as premature, explaining that, absent overwhelming evidence at this stage, the court should go ahead with selecting the jury. If there turned out to be problems in choosing a fair jury, venue could be changed. The court set December 4, 2006, for trial.

¶ 14 On November 20, 2006, at a short hearing, the prosecutor stated that the parties had received copies of Lichtenwald's supplemental-fitness-examination report, which had found defendant fit to stand trial. Schorsch stipulated that Lichtenwald would testify that he had examined defendant on September 24, 2006, and found him fit. The court found that there was no *bona fide* doubt of defendant's fitness.

¶ 15 On December 4, 2006, jury selection began. The judge dismissed the initial jury pool after one prospective juror (Meinders) stated that she did not think she could be fair, as she had read in the newspaper that defendant had originally pleaded guilty.

¶ 16 Jury selection resumed the next day. Of the first group of prospective jurors, the first (Maher) said that he had heard nothing about the case; he was excused for unrelated reasons. The second (Ferguson) said that he had read about the case in the newspaper and heard about it from his landlord but that he could decide the case on the evidence; the judge excused him for unrelated reasons. The third and fourth (Mulder and Bollen) said that they had learned about the case through the media but could be fair; Mulder was excused for unrelated reasons. The fifth (Mathews) said that he knew nothing about the case and could be fair. The sixth (Grunder) said that he had heard about the case and could not be fair; the judge excused him. The seventh (Ditsworth) said that he knew only what he had read in the newspaper that morning; he was excused for unrelated reasons. The eighth (Guentner) said that she had learned about the case through the media but could be fair; on questioning by defendant's counsel, she equivocated, and defendant removed her by a peremptory challenge. The ninth (Mullarkey) said that he had not read or seen anything about the case and could be fair. The last of the group, Cole, said that he knew nothing about the case. The judge swore in Bollon, Mullarkey, Mathews, and Cole.

¶ 17 The court examined the next group of prospective jurors. First, however, Schorsch tendered to the judge a copy of "today's article, the article in the paper today, in where [*sic*] the third paragraph says, 'Burt, who abruptly pleaded guilty in the middle of the first trial, later won commutation of his death sentence in 2003 from Governor George Ryan.' " Schorsch stated for the record that, after five of the seven potential jurors examined to that point said that they had read or heard a media account of the case, he had renewed his motion for a change of venue. The judge denied the motion "at this point" and proceeded to the next panel.

¶ 18 Of the next group, the first (Folgate) was excused for reasons unrelated to pretrial publicity, and the next three (Brubaker, Gahm, Schuler) said that they knew nothing about the

case. Defendant later removed Brubaker. The fifth (Kappes) said that she knew only what was "in the papers and on the news" but admitted that it would be "kinda [*sic*] difficult" to set this information aside and decide solely on the evidence. The judge excused her. The judge also excused Schuler based on the State's strike.

¶ 19 The sixth (Gallagher) said that she knew "a little" from the media and equivocated on whether she could be fair; defendant later had her removed for cause. The next (Davis) said that she remembered reading about the case "when it was in the paper" 12 to 14 years earlier, but not more recently. She said that she could be fair if she did not have to look at photographs; she was later excused. The next prospective juror (Scheider) said that he knew nothing about the case other than what the judge had told the prospective jurors that day. The next prospective juror (Rasner) said that she did not know anything about the case until the previous afternoon, when her husband read to her from the newspaper article about it. The remaining prospective juror (Ethridge) stated that she "did read the article that was in the paper this week" but could decide the case solely on the evidence. The court swore in Gahm, Scheider, Ethridge, and Rasner.

¶ 20 After the second panel was chosen, Schorsch stated, "And just to supplant [*sic*] my previous motion regarding the change of venue, I have copies of the Journal Standard articles from the 3rd of December and the 5th of December."

¶ 21 The final panel was examined. Five (Brierre, Soltysik, Metz, Rees, Schnierla) were excused for reasons other than pretrial publicity. Another (Eilers) said that all she knew was from Sunday's (December 3, 2006) front-page newspaper article and that she could be fair. She was excused on defendant's challenge. One prospective juror (Ruthe) said that she had read about the case in 1992 and had thought defendant was guilty; the judge excused her. The next (Sterns) said that he knew nothing about the case other than what he had read in "[t]he

newspaper report this morning" and that he could be fair. The next (Bendick) said that she knew nothing about the case. The next (Eytcheson) said that he knew "[j]ust what [he] read in the newspaper" recently, which had "jogged [his] memory" about the case, but that he could decide the case fairly. Three prospective jurors (Carlson, Dix, Lingenfelter) admitted that they had been influenced by recent newspaper articles and could not say that they would decide the case solely on the evidence; they were excused. One more (Wolfe) said that she had heard at work that the trial was upcoming; defendant challenged her, and she was excused. The last prospective juror (Kurtz) said that she had no prior knowledge of the case. The court swore in Sterns, Bendick, Eytcheson, and Kurtz.

¶ 22 The court examined two alternate jurors and swore both of them in. One (Simpson) said that she had heard nothing about the case; the other (Felder) said that he was vaguely aware of the case from reading the local paper.

¶ 23 The case proceeded to trial. The testimony and proceedings are well summarized in the several opinions of the supreme court and this court. Here, we note only the following matter pertinent to this appeal. During its case-in-chief, the State played a cassette recording of defendant's January 18, 1992, statement to the police. There is no indication in the record that this recording was edited in any way. The jury found defendant guilty of two counts of first-degree murder and two counts of armed robbery. The trial court sentenced him to life imprisonment for each murder and consecutive 10-year sentences for armed robbery.

¶ 24 On August 31, 2009, this court affirmed the judgment. *People v. Burt*, No. 2-07-0635 (2009) (unpublished order under Supreme Court Rule 23). We rejected defendant's contentions that (1) the trial court had erred in denying, without a hearing, his motion to suppress; and (2) the court had abused its discretion in denying his motion for a change of venue. On the first issue,

we explained that, because the federal appeals court had essentially nullified defendant's guilty pleas in the first proceeding, the ruling on his original motion to suppress stood and, indeed, could have been challenged on the appeal then before us. *Id.* at 12. Thus, collateral estoppel barred a second motion to suppress the same evidence at issue the first time. *Id.* at 12-13. We also noted that the allegedly newly-discovered evidence did not affect this result. *Id.* at 14.

¶ 25 On the second contention of error, we held that the trial court had not abused its discretion. We noted the following. Of the 12 jurors eventually selected, 6 said that they knew nothing about the case other than what the court had told them during jury selection, and the other 6 stated in general terms that they had learned something of the case through the news media but added that they could base their decision solely on the evidence at trial. Further, defendant's attorneys declined to challenge any of these 12 jurors for cause, implying that they believed they could be fair. Finally, we noted that the incident on which the charges were based had taken place 14 years before the jury was selected. *Id.* at 17-18.

¶ 26 Defendant sought relief under the Act. On May 27, 2010, he filed a *pro se* petition. On January 19, 2012, he filed an amended *pro se* petition. (We shall detail its claims as needed in our discussion of the issues on appeal.) The trial court advanced the proceeding to the next stage and appointed Douglas Clymer to represent defendant. See 725 ILCS 5/122-2.1(b) (West 2012). On April 24, 2012, Clymer filed an amended petition including the following claims that are pertinent to this appeal.

¶ 27 First, defendant's trial counsel was ineffective for failing to conduct a reasonable investigation into the prejudicial pretrial publicity surrounding the case, so as to support his motion for a change of venue. The amended petition noted that Schorsch's motion had attached a single newspaper article and that, at the hearing on the motion, the judge had denied the motion

pending jury selection. It argued that Schorsch had been ineffective in that he "failed to conduct any investigation whatsoever into the pretrial publicity *** to support his Motion for Change of Venue. Defense counsel failed to contact any media station or business to present evidence of the extent of the pretrial publicity prior to the hearing and prior to trial." Schorsch "*failed* to contact a single newspaper *or* news station in the area to ascertain how many articles they had printed concerning the case in 1992 *and* after a new trial was ordered for defendant, or how many news casts [*sic*] they had presented to the public both during the original trial and after a new trial was ordered in 2005." (Emphases in original.) Further, most of the potential jurors had known or read something in advance about the charges, and five of those actually selected "knew of or had read something prejudicial concerning this case."

¶ 28 The petition's first claim concluded that the effect of the adverse pretrial publicity on the jurors who tried the case denied defendant a fair trial. Therefore, counsel's failure to investigate and support his claim of adverse pretrial publicity was unreasonable and prejudicial.

¶ 29 The amended petition's second claim was that defendant's appellate counsel had been ineffective for failing to raise patently meritorious issues. These included, as pertinent to this appeal, that (1) Schorsch was ineffective for stipulating that defendant was fit, even though Schorsch was aware that Lichtenwald's meeting with defendant had been cut short by jail personnel and that defendant had previously been diagnosed with brain injuries and mental disorders; (2) Schorsch could not have represented defendant adequately, because of his extremely heavy caseload; (3) the trial court erred in allowing the State to play a portion of defendant's recorded statement, as the portion was taken out of context and prejudiced defendant; and (4) Schorsch was ineffective for failing to investigate adequately the pretrial publicity on which his motion to change venue was based.

¶ 30 The petition's third claim was that defendant's statement of January 18, 1992, should not have been admitted at trial, as he had made it while under the influence of cocaine.

¶ 31 The fourth claim was that Schorsch had been ineffective for (1) failing to hire an independent doctor to evaluate defendant's fitness and failing to dispute Lichtenwald's finding that he was fit; (2) failing to support his motion for a change of venue; (3) failing to use all of the defense's strikes at jury selection, so as to eliminate any juror who had read about the case; (4) failing to get defendant's January 24, 1992, statement admitted at trial; (5) failing to present case law to support "several" defense motions; and (6) calling Craig as a defense witness.

¶ 32 The amended petition's fifth claim, entitled "Cumulative Errors Warrant Reversal," reiterated several earlier assertions and made several conclusional statements about trial counsel's performance. The sixth and final claim was that defendant was "actually innocent" of murdering Muto. It alleged specifically that Booth actually shot and killed Muto. It cited defendant's trial testimony and Craig's statements that Booth shot Muto.

¶ 33 The amended petition did not attach any affidavits, records, or other evidence and relied entirely on citations to the record from the previous trials and appeals. Clymer filed a certificate per Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) stating that he had consulted with defendant, examined the trial-court record, and made any amendments to the *pro se* petition that were necessary for an adequate presentation of defendant's contentions.

¶ 34 Later, Bradley Fuller replaced Clymer as defendant's attorney. On November 9, 2012, Fuller adopted Clymer's amended petition and filed a certificate under Rule 651(c).

¶ 35 The State moved to dismiss the amended petition. The State's motion argued that the allegations that trial counsel had been ineffective were unsupported by the record or any affidavits. Therefore, because the Act states, "The petition shall have attached thereto affidavits,

records, or other evidence supporting its allegations or shall state why the same are not attached" (725 ILCS 5/122-2 (West 2012)), the claims of trial counsel's ineffectiveness were insufficient.

¶ 36 The motion asserted next that the amended petition's claims that appellate counsel was ineffective were also legally insufficient, because it made no effort to establish that any of the underlying claims had merit. Indeed, one claim—that the trial court improperly denied defendant's motion to suppress—actually had been raised on appeal. Further, appellate counsel's decision to raise relatively few issues with arguably the most merit was reasonable strategy.

¶ 37 The motion to dismiss argued that the amended petition's third claim, that the trial court had erred in admitting defendant's January 18, 1992, statement to police, was barred by *res judicata*, as defendant had raised it on his direct appeal and this court had rejected it. Finally, the motion to dismiss argued that defendant's actual-innocence claim was legally insufficient, because (1) Craig's statements were not newly-discovered evidence that could not have been obtained earlier; (2) Craig's testimony would merely have been cumulative of defendant's trial testimony; and (3) Craig's testimony would not have established defendant's actual innocence of murdering Muto, as defendant would still have been guilty under an accountability theory.

¶ 38 In argument on the motion to dismiss, the prosecutor contended in part that the amended petition's claims that trial counsel was ineffective were insufficient because they were unsupported by affidavits or other evidence outside the trial-court record. Fuller responded that obtaining affidavits to support such claims is not required where, as here, the only affidavit, other than the defendant's, would have to come from the allegedly ineffective attorney. Further, he argued, other claims in the amended petition were unsupported by affidavits because they were

"related to matters that are clearly in the record." The prosecutor replied that the supreme court has held that, for ineffective-assistance claims under the Act, affidavits are required.

¶ 39 The trial court dismissed the amended petition. Defendant moved to reconsider, arguing primarily that the lack of affidavits to support his claims of trial-counsel ineffectiveness was excused, because the only person whose affidavit could support the claim was the allegedly ineffective attorney. The trial court denied the motion. Defendant timely appealed.

¶ 40 On appeal, defendant contends that the judgment must be reversed and the cause remanded for the appointment of new counsel and appropriate second-stage proceedings under the Act. Defendant asserts that, although his postconviction attorneys filed certificates of compliance with Rule 651(c), the record shows that they did not fulfill their obligations under the rule. Specifically, he argues, neither Clymer nor Fuller attached any affidavits or other supporting documents to the amended petition, even though their failure to do so was necessarily fatal to his chance of obtaining relief.

¶ 41 We review *de novo* the dismissal of a petition under the Act. *People v. Delton*, 227 Ill. 2d 247, 255 (2008). The Act entitles a petitioner to the reasonable assistance of counsel. *People v. Suarez*, 224 Ill. 2d 42 (2007). Rule 651(c) reads, in pertinent part, "The record filed in [the trial] court shall contain a showing, which may be made by the certificate of [the] petitioner's attorney, that the attorney has consulted with [the] petitioner *** to ascertain his [or her] contentions of deprivation of constitutional rights, has examined the record of the proceedings at trial, and *has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of [the] petitioner's contentions*." (Emphasis added.) Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The purpose of Rule 651(c) is to ensure that counsel shapes the defendant's claims into proper legal form and presents those claims to the court. *People v. Perkins*, 229 Ill.

2d 34, 43-44 (2007). The filing of a Rule 651(c) certificate raises a presumption that counsel has met the rule's obligations, but the presumption can be rebutted by a showing that counsel did not substantially comply with the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. If counsel has failed to comply with Rule 651(c), remand is required, regardless of whether the claims in the petition have merit. *Suarez*, 224 Ill. 2d at 47. The defendant is not required to show that his counsel's failure to comply with Rule 651(c) prejudiced him. *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 18.

¶ 42 Here, defendant contends that his postconviction attorneys violated Rule 651(c), because they did not comply with section 122-2 of the Act, which, as pertinent here, states, "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). Defendant notes that the amended petition attached no such affidavits, records, or other evidence and did not explain why there were no such attachments. Moreover, he observes, the supreme court has routinely stated that the failure to attach the supporting documentation or explain its absence is fatal to a postconviction petition even in the first stage and, by itself, justifies dismissal. See, *e.g.*, *Delton*, 227 Ill. 2d at 255.[1] Thus, defendant reasons, his postconviction attorneys failed to comply with section 122-2 of the Act and, thus, defaulted on their obligation under Rule 651(c)

[1] Defendant overlooks (and the State does not argue) that the supreme court has suggested that the failure to comply with section 122-2 is not fatal to a petition at the *second* stage. See *People v. Hall*, 217 Ill. 2d 324, 332 (2005); see also *People v. Barkes*, 399 Ill. App. 3d 980, 987 (2010). Nevertheless, perhaps in derogation of that suggestion, the court has held that Rule 651(c) requires postconviction counsel to comply with section 122-2. See *People v. Johnson*, 154 Ill. 2d 227, 247 (1993).

to make such amendments to the *pro se* petition as were needed to present defendant's claims adequately.

¶ 43 We note that defendant limits his argument on appeal to four of the claims that were raised (or, as we shall explain, he *asserts* were raised) in his *pro se* petition and in the amended petition: (1) that trial counsel was ineffective for failing to support defendant's motion for a change of venue; (2) that trial counsel was ineffective for stipulating to defendant's fitness and failing to argue that Lichtenwald's examination was inadequate because jail personnel cut it short; (3) trial counsel was ineffective because he had too heavy a caseload to represent defendant adequately; and (4) trial and appellate counsel were ineffective for failing to object to the State's presentation to the jury of a selectively edited tape of defendant's statement. Because defendant does not specifically argue that postconviction counsel violated Rule 651(c) or otherwise provided unreasonable assistance in refining and presenting any other claims raised in the *pro se* petition, we limit our review to counsel's performance vis-à-vis these four claims. See Ill. S. Ct. R. 341(h)(7) (points not raised on appeal are forfeited); *People v. Ramirez*, 402 Ill. App. 3d 638, 644 (2010) (applying forfeiture rule).

¶ 44 The State contends in part that, whatever trial counsel's deficiencies in supporting the amended petition, the judgment of dismissal can be supported on independent grounds. See *People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003) (this court reviews soundness of trial court's judgment, not its reasoning). The State also contends that defendant has not shown that his postconviction attorneys failed to comply substantially with Rule 651(c).

¶ 45 We turn to the first of these claims: that postconviction counsel attached neither affidavits or other exhibits to support the claim that trial counsel was ineffective for failing to support sufficiently his motion for a change of venue. Defendant notes that the amended petition alleged

that Schorsch unreasonably failed to support his claim of prejudicial pretrial publicity with any more evidence than the lone article in the *Journal Standard*, published May 7, 2006, seven months before jury selection, and that he failed to investigate the existence of any other pretrial newspaper articles, television or radio broadcasts, or other information that might have helped defendant prove that the trial should have been moved out of Stephenson County. Defendant notes further that even the record we have shows that several prospective jurors, including five who eventually served, had read or heard about the case in the media.

¶ 46 The State responds first that the trial court rejected the first ground not because defendant's attorneys failed to attach the needed documents to the amended petition, but because the claim was forfeited, in that it could have been raised on direct appeal. The State's argument is misguided. The first ground was not based on the record and was dissimilar to the argument that defendant might have raised on his direct appeal. The direct appeal was necessarily limited to the record on appeal; the amended petition's claim was premised on evidence that was not in the record on appeal, precisely because Schorsch had neglected to find that evidence and present it to the trial court. Therefore, the State's forfeiture argument is incorrect.

¶ 47 The State also argues that attaching more evidence of allegedly prejudicial articles, broadcasts, and other publicity was not required in order for counsel to render reasonable assistance. The State cites a case in which the appellate court held that extensive pretrial publicity had not tainted the jury. See *People v. Sheley*, 2014 IL App (3d) 120012. The State then concludes that, because the trial-court record disclosed that all of the prospective jurors were questioned about their knowledge of the case and their ability to be fair, "postconviction counsel reasonably concluded that [the claim] was adequately supported by the record so that no additional supporting evidence needed to be attached to the amended postconviction petition."

¶ 48 The State's response is mystifying. It appears to be arguing the merits of the claim and confounding them with the issue of counsel's performance. The State apparently reasons that, although the record showed only weak evidence of juror bias, postconviction counsel acted reasonably in relying solely on the record. We cannot accept such a lax standard for evaluating postconviction counsel's performance. Alternatively, we could view the State as arguing that counsel's errors did not prejudice defendant. That argument, however, presupposes that defendant must show prejudice; but he need not. *Nitz*, 2011 IL App (2d) 100031, ¶ 18.

¶ 49 The essence of defendant's claim was that Schorsch was ineffective for failing to support his pretrial-publicity argument with anything more than a single newspaper article that was seven months old and that, had he investigated properly, he could have found far more evidence of potentially dangerous pretrial publicity, such as more recent newspaper articles, broadcasts on television and radio, or possibly other extraneous information that would have tainted the minds of jurors. This argument cried out for extra-record support: as the amended petition alleged that Schorsch overlooked the existence of prejudicial articles and broadcasts, its failure to attach any evidence of such prejudicial articles and broadcasts left the claim almost entirely unsubstantiated. Postconviction counsel apparently committed the very same sin that Schorsch had. And, in doing so, they forwent the opportunity to provide whatever support they could for the claim, however inadequate that support *might* have turned out to be.

¶ 50 The failure is especially inexplicable given that the record itself, limited as it was, disclosed that such further evidence was readily available. The *voir dire* showed that two newspaper articles on the upcoming trial had appeared on December 3, 2006, and December 5, 2006, the latter one being the very morning on which the eventual jury was chosen. The record told the trial court in this case only that the articles were out there; postconviction counsel could

have easily found the articles and let the trial court know what the articles actually said. Moreover, several prospective jurors referred to news broadcasts that had mentioned the case. Schorsch also referred to "many" public sources of information about the case. There appears to be no reason that postconviction counsel could not have at least investigated these potential sources of prejudicial pretrial publicity, as they claimed Schorsch should have done, which could only have bolstered the claim.

¶ 51 Defendant has overcome the presumption that his postconviction attorneys complied with Rule 651(c) in connection with the claim of trial-counsel ineffectiveness based on pretrial publicity. Moreover, the record of the hearing on the State's motion to dismiss bolsters our conclusion. Fuller argued that no further evidence was necessary to support the claim because (1) no affidavit could be expected from the allegedly ineffective attorney; and (2) (apparently) the claim was related to "matters that [were] clearly in the record." The first of these grounds is irrelevant to whether Clymer or Fuller could have obtained evidence of newspaper articles and other pretrial publicity, and the second falls to the reasoning that we have just set out.

¶ 52 We turn to the next purported postconviction claim as to which defendant contends his attorneys did not render reasonable assistance: the amended petition's claim that Schorsch was ineffective for "stipulating to Dr. Lichtenwald's fitness evaluation finding [defendant] fit to stand trial where Lichtenwald had not adequately interviewed [defendant] in that the interview was cut short by jail personnel." (We note that defendant limits his argument to this aspect of the fitness inquiry and does not preserve any contention that postconviction counsel unreasonably handled the claim that trial counsel was ineffective for failing to obtain an independent doctor to evaluate defendant's fitness.) Defendant contends that postconviction counsel unreasonably failed to

obtain an affidavit from defendant or Lichtenwald to support the claim that the examination was interrupted or cut short.

¶ 53 The State contends that defendant has misread the record. According to the State, the allegation that the examination was improperly cut short appeared in the amended postconviction petition only in connection with the claim that *appellate* counsel was ineffective for failing to raise this issue. In that eventuality, the affidavit requirement would obviously not apply.

¶ 54 In the amended petition's second category of constitutional violations, all relating to *appellate* counsel's representation, Clymer did allege that counsel should have argued that Schorsch was ineffective for stipulating that defendant was fit "where counsel was aware that *** Lichtenwald's meeting and evaluation to determine the defendant's fitness to stand trial was cut short by the staff of the Stephenson County Jail ***." Although this argument referenced the jail personnel's alleged interference with the fitness examination, it did so only in the context of the ineffectiveness of appellate counsel, an allegation for which nonrecord support would not only not be required but would be improper, since counsel on defendant's direct appeal was constrained to raise only those issues for which the record offered a factual basis.

¶ 55 Thus, we agree with the State that defendant cannot successfully argue on appeal that defendant's postconviction counsel violated Rule 651(c) in connection with the termination of Lichtenwald's examination.

¶ 56 Moreover, defendant's opening brief's entire argument on this matter consists of the assertion, "Counsel also failed to attach to his amended petition an affidavit from either Dr. Lichtenwald or [defendant] about the fitness evaluation interview being cut short." Thus, defendant has failed to develop and support any argument based on the allegedly premature termination of the fitness examination. Arguments insufficiently developed may be deemed

forfeited. *Holmstrom v. Kunis*, 221 Ill. App. 3d 321, 325 (1991). We consider defendant's second argument no further.

¶ 57 Defendant's third instance of postconviction counsel's alleged neglect relates to the allegation, in his *pro se* petition and the amended petition, that Schorsch was ineffective in that "[his] caseload was too large to adequately address the issues in this case," including the motion for a change of venue and defendant's mental health. Defendant argues that postconviction counsel unreasonably failed to obtain affidavits or other evidence to support this claim.

¶ 58 We disagree, as this ostensible claim of ineffective assistance was actually no such thing, and no refinement or reworking of the claim could have made it viable. To establish ineffective assistance of trial counsel, a defendant must prove that (1) counsel's representation was objectively unreasonable; and (2) as a result of counsel's unprofessional errors, the defendant was prejudiced. *Strickland v Washington*, 466 U.S. 668, 687-88 (1984); *People v. Ross*, 229 Ill. 2d 255, 260 (2008). By alleging merely that Schorsch was overworked, defendant did not allege that he actually erred. This is evident from the phrasing of the claim itself: by stating that Schorsch's heavy caseload caused him to err in two specific respects, both raised elsewhere in the *pro se* and amended petitions, the petitions folded the "ineffective because overworked" claim into two others that did genuinely allege ineffective assistance. Therefore, the "claim" is not cognizable under the Act, and postconviction counsel could have omitted it entirely without performing unreasonably.

¶ 59 We turn to the fourth and final claim that, according to defendant, postconviction counsel did not handle reasonably. He asserts, "[Defendant] also claimed in his *pro se* petition that trial and *appellate* counsel were ineffective for not [arguing] that he had been denied a fair trial when

the prosecution was allowed to play an edited copy of his recorded statement which took his statement out of context." (Emphasis added.)

¶ 60 Defendant simply misreads the record. His *pro se* petition did assert that *appellate* counsel was ineffective for failing to argue that the trial court erred in admitting an edited version of his statement. Nowhere in the *pro se* petition, however, did he assert that trial counsel was ineffective for failing to contest the introduction of the recording. The two citations to the record that defendant's appellate brief provides in support of his factual assertion are to portions of his *pro se* petition alleging *appellate* counsel's effectiveness. Therefore, defendant's postconviction counsel was under no obligation to advance any claim in the amended petition that trial counsel was ineffective for failing to contest the introduction of the recording. See *Johnson,* 154 Ill. 2d at 247. Further, as previously stated, nonrecord support for defendant's claim against appellate counsel would have been improper.

¶ 61 In sum, we hold that, of the four grounds on which defendant alleges that postconviction counsel performed unreasonably, there is merit only in the first ground, that arising out of the amended petition's claim that trial counsel was ineffective in connection with the motion for a change of venue. Nonetheless, this is sufficient to disturb the judgment dismissing the amended petition. We therefore reverse the judgment of the circuit court of Stephenson County, and we remand the cause for second-stage proceedings consistent with Rule 651(c) and for further proceedings as appropriate.

¶ 62 Reversed and remanded.