

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 130937-U

NO. 4-13-0937

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

Order filed February 1, 2016

Modified upon denial of rehearing March 23, 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
TYSON JONES,)	No. 04CF700
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The record shows postconviction counsel did comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and (2) defendant made a substantial showing of a *per se* conflict of interest due to trial counsel's contemporaneous pretrial representation of defendant and a State's witness.

¶ 2 In May 2008, defendant, Tyson Jones, filed a *pro se* postconviction petition, asserting ineffective assistance of trial counsel and the denial of a fair trial because the prosecutor failed to correct the testimony of Arthur Britt. Defendant's postconviction counsel filed an amended petition and a second amended petition. The State filed a motion to dismiss defendant's second amended petition. In October 2013, the Vermilion County circuit court entered an order, granting the State's motion to dismiss.

¶ 3 Defendant appeals, asserting (1) his postconviction petition must be remanded for counsel's full compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013); (2) his

defense counsel labored under a *per se* conflict of interest; and (3) if a *per se* conflict of interest did not exist, then his defense counsel labored under an actual conflict. We reverse and remand for further postconviction proceedings.

¶ 4

I. BACKGROUND

¶ 5 On November 15, 2004, the State charged defendant with armed robbery (720 ILCS 5/18-2(a)(2) (West 2004)) for the September 14, 2004, robbery at the New Horizon Credit Union located at 1019 East Fairchild Street in Danville, Illinois. That same day, the circuit court appointed the public defender to represent defendant. On November 18, 2004, Assistant Public Defender William Sohn filed defendant's answer to the State's motion for discovery and a motion for discovery. At two pretrial hearings in December 2004, defendant was represented by other attorneys in the public defender's office and not Sohn. At a January 18, 2005, trial call, Sohn represented defendant, and the State sought a continuance.

¶ 6 In January 2005, defendant shared a jail cell with Britt. In August 2003, the State had charged Britt with aggravated criminal sexual assault in Vermilion County case No. 03-CF-42, and the court appointed the public defender's office to represent him. The State later amended the charge to allege aggravated criminal sexual abuse. On February 9, 2004, Sohn appeared on Britt's behalf at Britt's "trial call." However, Britt failed to appear, and the circuit court granted the State's motion to forfeit bond and issued a warrant.

¶ 7 On January 28, 2005, Britt sent an inmate request form to Detective Bruce Stark, indicating Britt wanted "[t]o talk to him about the hit'im up and run at Landmark Credit Union on Fairchild St., over the summer time Last Year." On February 1, 2005, Britt met with Stark and another officer. Britt stated he and defendant were both occupying jail cell J102 about three weeks before the interview. Defendant told Britt the main witness against him was Chris Fields,

and defendant had sent him out of town so he would not be available to testify. Defendant admitted to Britt that he told Fields about the robbery, and what Fields told the police was true.

¶ 8 On February 22, 2005, Sohn filed a motion for appointment of counsel other than the public defender in Britt's case No. 03-CF-42, noting counsel was appointed to represent Britt in that case and defendant in case No. 04-CF-700 and Britt was a potential State witness in case No. 04-CF-700. On March 2, 2005, Judge Thomas Fahey held a hearing on Sohn's motion for appointment of new counsel, at which Britt was present. The court granted the motion and appointed Roy Wilcox to represent Britt. On March 16, 2005, an "amended agreed order to appoint conflict counsel" was entered in Britt's other Vermilion County cases, Nos. 98-DT-229 and 03-TR-8473. The public defender had been appointed in case No. 98-DT-229 on December 17, 2004, and on August 25, 2004, in case No. 03-TR-8473.

¶ 9 On March 7, 2005, a jury was selected in defendant's case, and the cause adjourned until March 9, 2005. Also on March 7, 2005, Detective Keith Garrett conducted a recorded interview of Britt regarding defendant's statements to him. On March 9, 2005, the State asked for a one-week continuance based on Fields's absence, which the circuit court granted. On March 16, 2005, the court swore in the jury, the parties gave their opening statements, and the State presented some of its evidence, including the testimony of Britt. When asked about whom he tried to contact after hearing defendant discuss the credit union robbery, Britt answered, "the lawyer." Sohn's cross-examination of Britt was very brief, consisting of only two pages of the trial transcripts. On March 17, 2005, the rest of the evidence was presented, and the jury found defendant guilty of armed robbery. Judge Fahey presided over defendant's jury trial.

¶ 10 On April 4, 2005, Britt pleaded guilty in case No. 03-CF-420 to aggravated criminal sexual abuse "for sentence of no more than 4 years [Department of Corrections]—all

other options open." Britt was later sentenced to 31 months' probation in case No. 03-CF-420 and 12 months' probation in case No. 98-DT-229. On April 12, 2005, defense counsel filed a motion for a new trial. In May 2005, defendant filed a *pro se* motion, asserting ineffective assistance of counsel. At a May 2005 joint hearing, the circuit court denied defendant's motion for a new trial and sentenced him to 30 years' imprisonment. Defendant appealed, asserting (1) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt, (2) the court erred by failing to conduct an inquiry into his *pro se* ineffective-assistance-of-counsel claims, and (3) he was prejudiced by improper Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001) admonishments. This court affirmed defendant's conviction and sentence. *People v. Jones*, No. 4-05-0398 (Sept. 11, 2007) (unpublished order under Supreme Court Rule 23).

¶ 11 On May 19, 2008, defendant filed his *pro se* postconviction petition, asserting (1) ineffective assistance of counsel based on trial counsel's failure to object to hearsay statements and (2) denial of a fair trial because the prosecutor failed to correct Britt's testimony. On May 29, 2008, the circuit court denied defendant's petition, noting the relief requested could not be granted under *habeas corpus*. Defendant appealed and filed a motion to remand. This court granted defendant's motion, dismissed the appeal, and remanded the case to the circuit court for further proceedings. *People v. Jones*, No. 4-08-0510 (Aug. 6, 2008) (nonprecedential motion order under Supreme Court Rule 23).

¶ 12 On remand, defendant was appointed postconviction counsel. Postconviction counsel filed numerous motions attempting to obtain documents the State had previously furnished but were now missing from defendant's file. Postconviction counsel also requested leave to take Britt's deposition, noting he had talked to Britt about this case. The circuit court denied the request but told postconviction counsel he could file an affidavit describing his

conversation with Britt.

¶ 13 In September 2012, postconviction counsel filed an amended postconviction petition and a Rule 651(c) certificate, which did not state counsel made all necessary amendments to defendant's postconviction petition. In November 2012, postconviction counsel filed a motion to compel disclosure of an additional witness and for leave to file a second amended petition. The motion noted counsel had just learned about an additional witness to the armed robbery, who had not previously been disclosed. At a January 2013 status hearing, the circuit court granted defendant's motion.

¶ 14 On February 20, 2013, postconviction counsel filed defendant's second amended postconviction petition, asserting numerous constitutional violations. Among the arguments, defendant asserted he was denied due process by the circuit court's failure to protect his right to effective assistance of counsel because Sohn had a *per se* conflict of interest because he represented Britt up until March 16, 2005, which was nine days after a jury was impaneled in defendant's case and one day before testimony began. The petition noted Judge Fahey had appointed Wilcox to replace Sohn in Britt's case on March 2, 2005. Defendant also argued he was denied effective assistance of counsel because Sohn operated under an actual conflict of interest due to his representation of both defendant and Britt. Defendant asserted Sohn could not effectively cross-examine Britt as to any promises of leniency. Additionally, the petition contended defendant was denied effective assistance of counsel because Sohn did not effectively cross-examine Britt. Specifically, defendant argued counsel failed to impeach Britt with the transcript of his recorded statement and his handwritten inmate request form that referred to the incident at the "Landmark Credit Union." Numerous exhibits were attached to defendant's second amended postconviction petition, including postconviction counsel's affidavit about his

conversation with Britt.

¶ 15 On February 25, 2013, postconviction counsel filed a Rule 651(c) certificate that stated the following:

"I, Michael J. O'Brien, Attorney for TYSON JONES, Defendant in the above-entitled cause, do hereby certify that I have consulted with TYSON JONES in writing, by telephone and in person to ascertain his contentions of error in pretrial matters, the trial and sentencing hearing, reviewed the State's answers to discovery, common law record, the transcripts of the trial and sentencing hearing and conducted additional investigation in connection with the preparation of the Second Amended Petition for Postconviction Relief on behalf of said Defendant."

¶ 16 On April 22, 2013, the State filed a motion to dismiss defendant's second amended postconviction petition. At a May 2013 hearing, the circuit court heard arguments on the State's motion and took the matter under advisement. On October 9, 2013, the court entered an order granting the State's motion to dismiss. In a letter to the parties, the court explained its ruling. The court noted it found the supreme court's decisions in *People v. Free*, 112 Ill. 2d 154, 492 N.E.2d 1269 (1986), and *People v. Fields*, 2012 IL 112438, 980 N.E.2d 35, controlling and not this court's decision in *People v. Murphy*, 2013 IL App (4th) 111128, 990 N.E.2d 815. The court further found that, while there may have been a conflict of interest from February 1, 2005, to March 2, 2005, the public defender's office took immediate steps to remove and eliminate the conflict.

¶ 17 On October 24, 2013, defendant filed a notice of appeal that had an incorrect

judgment date of October 7, 2013, and labeled the court's dismissal as a denial. On November 1, 2013, defendant filed an amended notice of appeal with the proper date of October 9, 2013, and stated the appealed judgment was a dismissal of a postconviction petition. Illinois Supreme Court Rule 606(c) (eff. Feb. 6, 2013) allows for an amended notice of appeal as provided in Illinois Supreme Court Rule 303(b)(5) (eff. May 30, 2008). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Rule 303(b)(5) allows a notice of appeal to be amended without leave of court within the 30-day period to file a notice of appeal. Accordingly, we find defendant's amended notice of appeal was timely and properly filed and, thus this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 18

II. ANALYSIS

¶ 19

A. Standard of Review

¶ 20

On appeal, defendant challenges the second-stage dismissal of his second-amended postconviction petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2008)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471 72, 861 N.E.2d at 1007.

¶ 21

At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court

appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 22 With the second stage of the postconviction proceedings, the trial court is concerned only with determining whether the petition's allegations sufficiently show a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a dismissal hearing, the court is prohibited from engaging in any fact-finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. We review *de novo* the trial court's dismissal of a postconviction

petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 23 B. Rule 651(c) Certificate

¶ 24 In postconviction proceedings, defendants are not entitled to effective assistance of counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Instead, state law dictates the sufficient level of assistance, and our supreme court has held the Postconviction Act entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995). To ensure counsel provides that reasonable level of assistance, Rule 651(c) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). The rule requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, (2) examine the record of the proceedings at trial, and (3) make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Compliance with Rule 651(c) is mandatory and *may be* shown by the filing of a certificate representing that counsel has fulfilled the aforementioned duties. *People v. Perkins*, 229 Ill. 2d 34, 50, 890 N.E.2d 398, 407 (2007). The certificate provision is not a rule of strict compliance, and thus the failure to file a proper affidavit certifying compliance with Rule 651(c) is harmless if the record demonstrates postconviction counsel adequately fulfilled his or her duties. *People v. Williams*, 186 Ill. 2d 55, 59 n.1, 708 N.E.2d 1152, 1154 n.1 (1999).

¶ 25 In this case, postconviction counsel filed a Rule 651(c) certificate and a supplemental certificate. However, both certificates failed to state the third requirement that counsel made amendments to defendant's *pro se* petition that were necessary for an adequate presentation of defendant's contentions. The record shows postconviction counsel made discovery requests and filed two amended postconviction petitions. In his appellant brief,

defendant fails to point out any amendments postconviction counsel did not make. However, the State in its brief argues defendant has forfeited both of his actual-conflict arguments because they were not properly raised in defendant's second amended postconviction petition. Defendant disagrees with the State's assertion but asserts that, if the State is correct, then the forfeiture is an example of postconviction counsel's failure to make all amendments necessary for an adequate presentation of his claims. We disagree with the State that defendant failed to assert in his petition the circuit court was aware of the conflict of interest because defendant clearly argued the judge that appointed a new attorney in Britt's case was the same judge that presided over his case. As to whether the actual conflict affected defense counsel's performance, the State argues defendant forfeited that issue because he raised none of his supporting examples in his second amended postconviction petition. However, defendant raised one of the matters in a claim of ineffective assistance of counsel and raised a general argument trial counsel failed to effectively cross-examine Britt. Postconviction counsel presented the court with a copy of the alleged impeachment materials and a copy of Britt's testimony, which consisted of only two pages of cross-examination. Postconviction counsel also pointed out inconsistencies in Britt's testimony and his statement to the police. Under the facts of this case, we find postconviction counsel did satisfy the third prong of Rule 651(c) and remand is not warranted on this issue.

¶ 26

C. *Per Se* Conflict

¶ 27 Defendant also argues his trial counsel labored under a *per se* conflict of interest because counsel also represented Britt, one of the State's witnesses. The State disagrees.

¶ 28 Our supreme court has found a *per se* conflict of interest exists in the following three situations: "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel

contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved with the prosecution of defendant." *Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35. If a *per se* conflict exists, then the defendant does not need to show the conflict affected the attorney's actual performance. *Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35. Unless the defendant waives his right to conflict-free representation, a *per se* conflict constitutes automatic grounds for reversal. *Fields*, 2012 IL 112438, ¶ 18, 980 N.E.2d 35.

¶ 29 At issue in this case is the second situation constituting a *per se* conflict. Our supreme court has noted it has "clearly and consistently held that, in cases where defense counsel has represented a State's witness, a *per se* conflict of interest will not be held to exist unless the professional relationship between the attorney and the witness is contemporaneous with defense counsel's representation of the defendant." *Fields*, 2012 IL 112438, ¶ 20, 980 N.E.2d 35. In *Murphy*, 2013 IL App (4th) 111128, ¶ 51, 990 N.E.2d 815, this court rejected the State's argument that, for a *per se* conflict to exist, the contemporaneous representation must still exist on the date of the defendant's trial. Our conclusion in *Murphy* is consistent with the supreme court's decision in *Free*, 112 Ill. 2d at 168-69, 492 N.E.2d at 1275, where the supreme court did a contemporaneous representation *per se* conflict analysis for the defendant's *postconviction* counsel. In *Murphy*, we reversed the defendant's conviction and remanded the cause for a new trial because the defendant's counsel had *clearly* represented a State's witness during the pretrial phase of the defendant's case. *Murphy*, 2013 IL App (4th) 111128, ¶ 79, 990 N.E.2d 815. The defense counsel's representation of the State's witness was clear because, after the witness was a known State's witness in the defendant's case, defense counsel appeared on the witness's behalf shortly after the witness was charged and represented the witness at the witness's guilty plea

hearing, at which the witness was also sentenced. *Murphy*, 2013 IL App (4th) 111128, ¶¶ 15-20, 990 N.E.2d 815.

¶ 30 The State asserts *Murphy* is distinguishable because defendant failed to make a substantial showing Sohn's involvement in Britt's case amounted to representation of Britt. While we agree with the State the issue is whether Sohn represented Britt at the same time he represented defendant, we disagree defendant failed to make a substantial showing Sohn was also representing Britt. The docket sheets in Britt's case No. 03-CF-42 indicate Sohn was the last attorney who appeared in court on Britt's behalf before Sohn's motion to withdraw as counsel. The appearance was at a February 9, 2004, "trial call," and Britt failed to appear. Moreover, in Sohn's February 22, 2005, motion to withdraw as counsel, Sohn indicated he had been appointed to represent both defendant and Britt. Defendant's postconviction counsel's affidavit states Britt informed said counsel that, before he contacted the police, Britt attempted to contact Sohn by telephone and letter regarding his conversation with defendant but Sohn never responded. The aforementioned facts indicate Sohn was the attorney in the public defender's office representing Britt for almost an entire year when he became a State's witness in defendant's case.

¶ 31 Since defendant has made a substantial showing of a *per se* conflict of interest, a third-stage evidentiary hearing on defendant's second amended postconviction petition is warranted. Additionally, based on our finding regarding defendant's *per se* conflict argument, we do not address his alternative argument that he made a substantial showing of an actual conflict of interest.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we reverse the judgment of the Vermilion County circuit court dismissing defendant's second amended postconviction petition and remand the cause for

further postconviction proceedings.

¶ 34 Reversed and remanded.