2018 IL App (2d) 150904-U
No. 2-15-0904
Order filed April 25, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL KING, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 10-CF-302 Honorable Robbin Stuckert, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel provided unreasonable assistance during second- and third-stage postconviction proceedings. We choose to resolve defendant's underlying speedy-trial claim as a matter of law, and, accordingly, we vacate petitioner's armed-violence conviction. We remand the cause as to the armed-robbery conviction for second-stage postconviction proceedings.

¶ 2 Petitioner, Michael King, appeals the third-stage denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). He argues that postconviction counsel provided unreasonable assistance during second- and third-stage proceedings. King notes that counsel did not file a Rule 651(c) certificate (Ill. S. Ct. R. 651(c)

(eff. July 1, 2017)), and he argues that, in fact, counsel failed to fulfill his duties under Rule 651(c). Specifically, King argues that counsel failed to review the record and adequately amend the *pro se* petition to effectively present its claims. King had alleged ineffective assistance of trial and appellate counsel based on trial counsel's failure to: (1) pursue dismissal of the armed-violence charge due to a speedy-trial violation (*People v. Williams*, 204 Ill. 2d 191, 207 (2003)[1]); and (2) inform him of the 15-year sentencing enhancement for armed robbery so that he could knowingly assess the State's September 30, 2010, plea offer. King also argues that counsel failed to adequately present his contentions at the evidentiary hearing. We agree that counsel provided unreasonable assistance at both stages. We vacate the armed-violence conviction, determining that that issue can be decided as a matter of law based on the pleadings. We remand the cause as to the armed-robbery conviction for second-stage proceedings under the Act. Vacated in part; reversed and remanded in part.

¶ 3 I. BACKGROUND

¶ 4 On April 30, 2010, the State charged King by complaint with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). King was brought into custody, demanded trial, and both sides agree that the speedy-trial term began on that day. On September 30, 2010, King rejected a plea offer, the terms of which are now subject to dispute. Soon after, King discharged his public defender, and, on October 20, 2010, private counsel entered an appearance. On December 10, 2010, the State charged King by indictment with two offenses: the initial charge of armed robbery *and* the

[1] King, *pro se*, cited to a different, appellate-level *Williams* case for the same principle (*People v. Williams*, 94 Ill. App. 3d 241, 248 (1981)). For consistency, we adopt appellate postconviction counsel's citation to the supreme court *Williams* case.

subsequent charge of armed violence (720 ILCS 5/33A-2(a) (West 2010)).[2] Both parties agree that, for the purposes of the compulsory-joinder statute (720 ILCS 5/3-3 (West 2010)), the "same act(s)" provide the bases for each of the two offenses.

¶ 5 A. The Crime, Conviction, and Sentence

¶ 6 A description of the underlying facts may be found in our prior order, *People v. King*, 2013 IL App (2d) 111236-U, ¶¶ 5-8. Briefly, on November 9, 2011, King and an accomplice, Eric Bernard, entered Associated Bank wearing hoodies, sunglasses, and wigs. King entered the manager's office, pointed a gun at him, and directed: "Out." Simultaneously, Bernard pointed a gun at the teller, threw a bag at her, and said: "Give me all your money and don't give me any of that dye pack shit." The teller did as instructed, and the offenders ran out through the back door. A citizen found the discarded disguises, which contained DNA evidence. One DNA profile matched Bernard, and the second profile could not exclude King. The second profile was consistent with 1 in 9 people of King's ethnicity. Jasmen Cunningham, a second accomplice who had participated in planning the crime, testified against King in fulfillment of her plea agreement with the State.

¶ 7 Following a bench trial, the court found King guilty of both armed robbery and armed violence and sentenced him to 23 years' imprisonment for each offense, to run concurrently.

[2] The record reflects some discrepancies in the aforementioned dates. The State concedes that the speedy-trial term began on April 30, 2010, but the first demand we see occurred six days later, on May 6, 2010. Also, the indictments are file-stamped December 10, 2010, but the parties stated at hearing that they were filed December 21, 2010. These discrepancies do not affect our analysis, because, as we will discuss, the State overran the speedy-trial term for the armed-violence charge by more than 100 days.

The 23-year term for armed robbery included a mandatory 15-year enhancement for use of a firearm. 720 ILCS 5/18-2 (West 2010).

¶ 8 B. Direct Appeal

¶ 9 On direct appeal, King challenged the constitutionality of the 15-year enhancement. *King*, 2013 IL App (2d) 111236-U, ¶ 11. Although King lost the appeal, *id*. ¶ 20, the history of the enhancement is relevant to King's postconviction petition.

¶ 10 In 2007, the supreme court issued *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007), which held that the enhancement violated the proportionate penalties clause, because armed robbery contained identical elements as armed violence predicated on a robbery with a category I or category II weapon, but carried different penalties. Armed robbery carried a 21- to 45-year sentence (including the enhancement), but armed violence carried a 15- to 30-year sentence. *Id*. A few months after *Hauschild*, the legislature amended the armed-violence statute to correct the disproportionality by eliminating robbery as a predicate offense. *King*, 2013 IL App (2d) 111236-U, ¶¶ 11, 14 (citing Pub. Act 95-688, § 4 (eff. Oct. 23, 2007)). The legislature did not change the armed-robbery statute. *Id*. ¶ 11. In the years that followed, the districts split on whether the post-*Hauschild* amendment to the armed-violence statute effectively revived the enhancement provisions in the armed-robbery statute. *Id*. ¶ 16. The First and Fifth Districts said yes; the Fourth District said no. *Id*. The Second District did not decide the issue. *Id*.

¶ 11 In 2013, after King submitted his brief on direct appeal, but before the State responded, the supreme court settled the issue in *People v. Blair*, 2013 IL 114122, ¶ 35. *Blair* held that the legislature *did* revive the 15-year enhancement in the armed-robbery statute when it amended the armed-violence statute. *Id*. ¶¶ 25, 32. The court explained that, because a proportionality violation is rooted in the relationship between two statutes, the legislature can remedy the

violation by amending either the challenged statute or the comparison statute. *Id*. And, with respect to the instant amendment, the legislative history demonstrated an intention to correct the proportionality issue by amending the comparison statute. *Id*. ¶ 38. Bound by *Blair*, this court affirmed the 15-year enhancement. *King*, 2013 IL App (2d) 111236-U, ¶ 20.

¶ 12 C. Postconviction Proceedings

¶ 13 On February 10, 2014, King filed a *pro se* postconviction petition. There, he alleged ineffective assistance of trial and appellate counsel based on trial counsel's failure to: (1) pursue dismissal of the armed-violence charge due to a speedy-trial violation (*Williams*, 204 Ill. 2d at 207); and (2) inform him of the 15-year enhancement for armed robbery so that he could knowingly assess the State's September 30, 2010, plea offer.

¶ 14 First, in arguing for the dismissal of the armed-violence charge, King cited to what has become known as the *Williams* rule. *Williams*, 204 Ill. 2d at 207. The *Williams* rule concerns the interplay between the compulsory-joinder and speedy-trial statutes when a defendant is charged at different times with multiple, but factually related, offenses. It provides that, if the initial and subsequent charges are subject to compulsory joinder, then the speedy-trial term for both charges begins when the defendant is brought into custody on the initial charge, *but* delays attributable to the defendant that accrue prior to the filing of the subsequent charge are not attributable to the defendant as to that charge. *Id*. King argued that, here, the initial charge of armed robbery and the subsequent charge of armed violence were subject to compulsory joinder, so the speedy-trial term for both charges began on April 30, 2010. However, delays attributable to King that accrued prior to the filing of the armed-violence charge cannot be attributable to King as to that charge. King cannot have agreed to the continuances accruing between April 30, 2010, and December 10, 2010, as to the armed-violence charge, because he had not yet been

charged with armed violence. Because the State charged King with armed violence after he had already been in custody for more than 120 days, that charge was subject to dismissal.

¶ 15 Second, in support of his argument that trial counsel was ineffective in plea negotiations, King cited to *People v. Curry*, 178 Ill. 2d 509, 518 (1997) (abrogated in part by *People v. Hale*, 2013 IL 113140, as to the prejudice prong), and *People v. Blommaert*, 237 Ill. App. 3d 811, 817 (1992). *Curry* held that, if the State chooses to bargain, the defendant has a constitutional right to effective assistance of counsel during negotiations. *Curry*, 178 Ill. 2d at 518. *Blommaert* held that effective assistance during negotiations includes being informed of the sentencing range for the charged offense. *Blommaert*, 237 Ill. App. 3d at 817. King attached a notarized affidavit. In it, he averred that counsel never informed him that an armed-robbery conviction carried a 15-year enhancement, for a minimum sentence of 21 years. He believed the minimum sentence was six years. This precluded him from knowingly weighing the State's September 30, 2010, alleged offer of probation in exchange for a plea of guilty to a lesser offense. The State made Cunningham a similar offer, which she accepted. Had King known the true sentencing range, he would have accepted the State's offer. King also attached: (1) transcripts from the April 30, 2010, arraignment, where the court failed to admonish him of the enhancement and instead stated that the minimum sentence was six years; (2) transcripts from the September 30, 2010, status hearing, where he rejected a plea offer (not read aloud for the record); (3) transcripts from a December 23, 2010, hearing, where the court again informed him that the minimum sentence was six years; and (4) a signed copy of Cunningham's agreement to plead guilty to the lesser offense of obstruction of justice and testify against King in exchange for a recommended sentence of probation.

¶ 16 On March 24, 2014, the trial court determined that King had presented the gist of a constitutional claim and allowed the petition to proceed to the second stage. It appointed postconviction counsel to amend King's petition.

¶ 17 On April 1, 2015, postconviction counsel filed the amended petition. Procedurally, counsel did not file a Rule 651(c) certificate. He did not attach King's affidavit or any other evidence. Instead, he attached King's signed but unnotarized declaration under penalty of perjury. As to the speedy-trial argument, counsel omitted King's *pro se* allegation of ineffective assistance of appellate counsel. Large portions of argument appear to have been cut and pasted, including King's colloquialisms and citation to first-stage standards for the presentation of claims and for relief. Counsel did add one new sentence: "If [King's] counsel agreed to continuances, he did so without [King's] authority." As to the plea-negotiation argument, counsel at times cited to the armed-violence statute and argued that the 15-year enhancement, and the September 30, 2010, plea offer, pertained to the armed-violence charge. (Again, the armed-violence statute does not contain a 15-year enhancement, and King had not been charged of armed violence as of September 30, 2010.)

¶ 18 On April 28, 2015, the State moved to dismiss the amended petition. It argued that the speedy-trial claim was forfeited for failure to allege ineffective assistance of appellate counsel. It did not respond to the *Williams* argument. It argued that King's plea-negotiation argument was refuted by the record, which contained a September 30, 2010, written offer. That offer was for 18 years at 50% in exchange for a guilty plea to armed robbery, not, as King alleged, probation in exchange for a guilty plea to a lesser offense. The State attached a copy of the September 30, 2010, written offer.

¶ 19 On June 2, 2015, at the second-stage hearing, the State again noted that postconviction counsel had failed to allege ineffective assistance of appellate counsel. The trial court granted counsel leave to file a second amended petition.

¶ 20 On July 17, 2015, counsel filed a second amended petition. It was identical to the first amended petition, except that counsel added the allegation of ineffective assistance of appellate counsel at the tail end. He did not make any other amendments. Again, he failed to file a Rule 651(c) certificate. Again, he did not attach King's affidavit or any other evidence. And still again, he attached King's signed but unnotarized declaration under penalty of perjury. On July 27, 2015, the State moved to dismiss the second amended petition. Again, it did not respond to the *Williams* argument.

¶ 21 On September 2, 2015, the trial court began the second-stage hearing. However, the parties agreed to proceed directly to a third-stage hearing. Postconviction counsel called King, the only witness to testify at the hearing.

¶ 22 First, King testified to the speedy-trial issue. King was aware that trial counsel entered a speedy-trial demand, but he was not aware that the speedy-trial clock tolled each time counsel agreed to a continuance. Trial counsel never instructed King on the mechanics of the speedy-trial term.

¶ 23 Second, King testified regarding the plea negotiations. Counsel asked King whether trial counsel informed him that a 15-year sentencing enhancement would apply if he were convicted of *armed violence*. Counsel did not once question King whether trial counsel had informed him that a 15-year sentencing enhancement would apply if he were convicted of *armed robbery*, the crux of King's claim. Counsel never directly questioned King about the September 30, 2010, plea offer. Rather, he indirectly questioned King about the September 30, 2010, plea offer by

referring to King's original counsel, who had represented King during that time. When he asked King whether original counsel communicated the sentencing range for armed violence, King answered: "No, sir, because at that time [when I was represented by original counsel], I was never charged with the armed violence charge, it was just the armed robbery." Then, counsel repeatedly questioned King about an alleged plea offer occurring one week before trial, in June 2011. This June 2011 plea offer was not mentioned in the written petition.

¶ 24 On cross-examination, the State questioned King about the June 2011 plea offer. King testified that he had been offered probation to testify against his co-defendants. He did not accept the offer, because he did not want to testify against his co-defendants. He explained, however, that he did not know of the enhancement.

¶ 25 After King testified, the State moved for a directed finding. First, it argued that the speedy-trial argument had no merit. It contended that, between April 30, 2010 (the date King was brought into custody for armed robbery), and June 7, 2011 (the date of the bench trial), all but 89 days were attributable to King. Yet again, it did not respond to the *Williams* argument. Second, it argued that the plea-negotiation argument had no merit. It reasoned that, because King was not willing to testify against his co-defendants, it did not matter whether counsel informed him of the 15-year enhancement.

¶ 26 In response to the speedy-trial argument, counsel argued: "It seems to me that any counsel that would take [a continuance] after his client has demanded speedy trial without telling him of the effects of that agreement to continue is not defending his client well or even within the statute, and it would be ineffective assistance of counsel." Counsel did not mention the *Williams* argument. In fact, he did not say the words "compulsory joinder" the entire hearing. In

response to the plea-negotiation argument, counsel argued that the State mischaracterized King's testimony.

¶ 27 The trial court granted the State's motion for a directed finding. The court did not assess King's credibility. It stated that, even accepting King's testimony, there was no basis to "go further" on the petition. It denied King's postconviction petition. This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 King argues that postconviction counsel provided unreasonable assistance during second- and third-stage proceedings under the Act. King notes that counsel did not file a Rule 651(c) certificate and argues that, in fact, counsel failed fulfill his duties under Rule 651(c). Specifically, King argues that counsel failed to review the record and amend the *pro se* petition to adequately present its contentions. King had alleged ineffective assistance of trial and appellate counsel based on trial counsel's failure to: (1) pursue dismissal of the armed-violence charge due a speedy-trial violation (*Williams*, 204 Ill. 2d at 207); and (2) inform him of the 15-year sentencing enhancement for armed robbery so that he could knowingly assess the State's September 30, 2010, plea offer. King also argues that counsel failed to adequately present his contentions at the evidentiary hearing. We agree that postconviction counsel provided unreasonable assistance at both stages.

¶ 30 A. Unreasonable Assistance

¶ 31 The Act provides a means by which a defendant may raise a collateral challenge against his conviction or sentence. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). To be entitled to relief, a defendant must show that he has suffered a substantial deprivation of his constitutional rights. *Id*. The Act provides for proceedings in three stages. *Id*. at 472. At the first stage, the trial court must review a defendant's *pro se* petition to determine whether it presents the "gist" of

a constitutional claim. *Id*. If the petition survives the first stage and the court determines that the defendant is indigent, the court will appoint counsel to ensure that the defendant's contentions are adequately presented. *Id*. Throughout the second-stage pleadings and the third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *Id*. at 473.

¶ 32 There is no constitutional right to effective assistance of counsel in postconviction proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The right to counsel in postconviction proceedings is statutory, and the Act provides for a reasonable level of assistance. *Id*.; 725 ILCS 5/122-4 (West 2010). Rule 651(c) is meant to ensure that petitioners receive a reasonable level of assistance. *Id*. The rule requires:

> "The record filed in th[e] court shall contain a showing, *which may be made by the certificate of petitioner's attorney*, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." (Emphasis added.) Ill. S. Ct. Rule 651(c).

¶ 33 Substantial compliance with the duties set forth in Rule 651(c) is mandatory. *People v. Lander*, 215 Ill. 2d 577, 584 (2005). Postconviction counsel may show compliance by filing a Rule 651(c) certificate. *Id*. Filing a Rule 651(c) certificate gives rise to a rebuttable presumption that counsel complied with the rule and provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Failure to file a Rule 651(c) certificate is harmless error, if the record demonstrates that counsel adequately fulfilled the required duties. *Lander*, 215 Ill. 2d at 584. In

the absence of a Rule 651(c) certificate, it is not enough that the record "indicate" that counsel fulfilled his duties; the record must "demonstrate" that counsel fulfilled his duties. *Id*. at 585.

¶ 34 While failure to certify compliance by filing a certificate can be harmless error, failure to actually comply with the rule cannot. *Id*. Once a petitioner survives the first stage, he is entitled to the reasonable assistance of counsel to help him adequately present his claims. *Suarez*, 224 Ill. 2d at 46. The statute cannot fulfill its purpose without requiring counsel to perform this basic level of assistance. *Id*. Thus, where counsel fails to provide reasonable assistance, remand is required, regardless of whether the claims raised in the *pro se* and amended petitions are viable. *Id*. at 47.

¶ 35 Here, as the State concedes, counsel did not file a Rule 651(c) certificate. Therefore, we must look to see whether the record demonstrates that counsel fulfilled his duties. The State presents *no* argument that counsel fulfilled his duties, other than a single conclusory sentence to that effect. Instead, the State argues that the failure to comply with Rule 651(c) "is without consequence," because King's underlying claims were without merit. This argument is misplaced, because the failure to comply with Rule 651(c) is not subject to a harmless-error analysis. *Suarez*, 224 Ill. 2d at 47.

¶ 36 King, in contrast, points to numerous instances in the record demonstrating counsel's unreasonable assistance. We address counsel's performance during second- and third-stage proceedings mindful that, in this case, the parties agreed to forego argument and a ruling on the motion to dismiss the second amended petition and conducted an evidentiary hearing with just one witness, King, before the court entered a directed finding.

¶ 37 Rule 651(c) requires counsel to examine the record. Here, the record does not demonstrate that counsel did so. If he had, he surely would have made basic observations in

support of the argument that trial counsel never informed King that, if convicted of armed robbery, he could be subject to a mandatory 15-year enhancement, for a minimum of 21 years. For example, as the State concedes, at arraignment, the trial court incorrectly advised that the sentencing range for armed robbery was 6 to 30 years. On September 30, 2010, the State submitted a written offer of 18 years at 50%, in exchange for a plea of guilty to armed robbery. This offer is problematic, as it is outside the statutory minimum sentence for armed robbery. Therefore, the offer supports King's claim that he was never informed of the true sentencing range (even if it contradicts his assertion that he was offered probation). Finally, as noted in this court's earlier order, as of September 30, 2010, the districts were split as to whether the armed-robbery enhancement was revived by the amendment to the armed-violence statute. This district had not yet weighed in. Any of these observations would have provided support and context to King's argument.

¶ 38 Additionally, counsel made no discernible effort to improve the text and attachments of the *pro se* petition. Counsel initially failed to include the allegation of ineffective assistance of appellate counsel, even though the *pro se* petition had included that allegation. He also failed, in both the first and second amended petitions, to attach any affidavits or evidence supporting the allegations, as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)), even though the *pro se* petition had included a sworn and notarized affidavit as well as supporting evidence. (Instead, counsel attached King's signed but unnotarized "declaration under penalty of perjury.") Courts have held this error alone sufficient to establish unreasonable assistance. See *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 19. Additionally, as to the speedy-trial claim, counsel did little more than cut, paste, and change the paragraph order of the *pro se* petition. He retained colloquialisms and inappropriate references to first-stage standards for the presentation

of claims and for relief. For example, he argued that King presented the "gist," rather than a "substantial showing," of a constitutional claim, that King requested leave to proceed in *forma pauperis*, and, ironically, that King requested the appointment of counsel. It is especially troubling that these errors remained in the second amended petition, after counsel was given the opportunity to add the claim of ineffective assistance of appellate counsel and generally rethink the procedural posture of postconviction proceedings.

¶ 39 Counsel also failed to adequately present the substance of the underlying claims. As to the speedy-trial claim, the single exception to counsel's cut-and-paste approach was the addition of the one-line argument: "If petitioner's counsel agreed to continuances, he did so without petitioner's authority." However, there is no merit to this argument. Decisions pertaining to the speedy-trial term are strategic matters left to trial counsel. *People v. Ramey*, 151 Ill. 2d 498, 523-24 (1992). At hearing, counsel pursued this argument to exclusion of the *Williams* argument. There, counsel did not once cite to *Williams* or say the words "compulsory joinder." We acknowledge the condensed procedure below, but, still, it is unclear to us why counsel would abandon a speedy-trial argument that survived the second stage in favor of a speedy-trial argument that has been repeatedly rejected by the courts. See, *e.g.*, *People v. McDonald*, 2018 IL App (3d) 150507, ¶ 32 (while third-stage counsel does not have a *per se* duty to advance a successful second-stage argument, it is certainly the prudent and expected course). Here, it is especially puzzling that counsel did not raise the *Williams* argument at the third stage (or argue it as a matter of law at the second stage), because the relevant and supportive facts are not disputed. Thus, if the argument passed constitutional muster in the second stage, there is no reason why it could not do so again at the third stage, where the standard again is a substantial showing of a constitutional violation.

¶ 40 Counsel also provided unreasonable assistance in presenting King's argument that trial counsel provided ineffective assistance during the plea negotiations. According to King, trial counsel failed to inform him of the 15-year enhancement applied to an armed-robbery conviction so that he could knowingly assess the State's September 30, 2010, plea offer. However, postconviction counsel misunderstood and confused the argument. In amending King's *pro se* petition, counsel at times incorrectly stated that the 15-year enhancement applied to an armed-violence conviction. Counsel cited to the armed-violence statute, showing that the word "violence," rather than "robbery," was not just an unfortunate typographical error. Counsel conflated the statute to which the enhancement applied (armed robbery) with the statute whose amendment revived the enhancement (armed violence). This error is not excusable, given that King had not even been charged with armed violence as of September 30, 2010. He was not charged with armed violence until December 10, 2010, well after he rejected the September 30, 2010, plea offer. At hearing, counsel persisted in his error, asking King if trial counsel informed him that an armed-violence conviction was subject to an enhancement. Defendant had to correct counsel: "No, sir, because at that time, I was never charged with the armed violence charge, it was just the armed robbery." Further exacerbating the error, counsel then moved away from the September 30, 2010, plea offer and questioned King about an alleged plea offer that occurred one week before trial, in June 2011. The June 2011 offer was not mentioned anywhere in the written petition. The State then questioned King only about the June 2011 offer, not the September 30, 2010, offer. Thus, at hearing, postconviction counsel failed to present, not just adequately but entirely, King's argument that trial counsel did not provide him with the correct information to assess the September 30, 2010, plea offer.

¶ 41 B. Remedy

¶ 42 Having established that postconviction counsel provided unreasonable assistance, we turn to remedy. Ordinarily, the remedy is to remand the entire cause to the second stage for the appointment of new counsel and compliance with the Act. See, *e.g.*, *Nitz*, 2011 IL (2d) 100031, ¶ 19. However, in the interest of judicial economy, we choose to resolve King's underlying speedy-trial claim as a matter of law, and, accordingly, we vacate the armed-violence conviction. In denying the petition, the court specifically noted that it did not assess credibility. As to the speedy-trial claim, it need not have. The facts are not in dispute. Therefore, our review of the speedy-trial claim is *de novo*. See *Pendleton*, 223 Ill. 2d at 473. The cause is remanded only as to the armed-robbery conviction, where newly appointed counsel may amend the petition as necessary and comply with Rule 651(c)'s certificate requirement.

¶ 43 Turning to King's speedy-trial claim, King alleged that trial and appellate counsel were ineffective for failing to pursue dismissal of the armed-violence charge. Specifically, King argued that the armed-violence charge was subject to dismissal pursuant to the *Williams* rule, which concerns the interplay between the compulsory-joinder and speedy-trial statutes. The failure to pursue dismissal of a charge based on a violation of the *Williams* rule constitutes ineffective assistance, if there was a reasonable probability of success and no justification for failing to bring the claim. See *People v. Usery*, 364 Ill. App. 3d 680, 689 (2006).

¶ 44 The speedy-trial provisions of the Criminal Code of 1963 provide that "[e]very person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant[.]" 725 ILCS 5/103-5(a) (West 2010). The 120-day guarantee can become complicated when a defendant is charged at different times with multiple, but factually related, offenses. *Williams*, 204 Ill. 2d at 198.

¶ 45 The compulsory-joinder provisions of the Criminal Code of 1961 provide:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, *they must be prosecuted in a single prosecution*, except as provided in Subsection (c), *if they are based on the same act*.
>
> (c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately." (Emphases added.) 720 ILCS 5/3-3 (West 2010).

Here, both sides agree that the compulsory-joinder provisions apply to the armed-robbery and armed-violence charges. The offenses were known to the prosecuting officer at the commencement of the prosecution, and they are based on the same act(s). The charges are required to be brought in the same prosecution.

¶ 46 The interplay between the speedy-trial and compulsory-joinder requirements results in the *Williams* rule: "If the initial and subsequent charges are subject to compulsory joinder, delays attributable to the defendant on the initial charges are not attributable to the defendant on the subsequent charges." *Williams*, 204 Ill. 2d at 207. This rule prevents the State from lulling a defendant into agreeing to delays on pending charges while it, but not defendant, prepares for trial on the not-yet-pending charges. *Id*. In that scenario, when the State files the new charges, the defendant would "face a Hobson's choice between a trial without adequate preparation and further pretrial detention to prepare for trial." *Id*. The court should not presume that the defendant would have agreed to a continuance if he knew he faced both charges. *Id*.

¶ 47 The *Williams* rule has been applied in cases with facts analogous to the instant case. In *People v. Hunter*, 2012 IL App (1st) 092681, for example, the police recovered cannabis and a loaded handgun from a vestibule near defendant. Following a determination of probable cause, the State charged the defendant by information with possession of cannabis only, and defendant made a demand for trial. The court granted various continuances by agreement. After the defendant had been in custody on the initial charge for 176 days, the State indicted the defendant with the initial charge of possession of cannabis and the subsequent charges of unlawful use of a weapon by a felon and armed habitual criminal. The defendant moved to dismiss the new charges, and the trial court granted the motion. On appeal, the parties agreed that, *if* the charges were subject to compulsory joinder, then, per *Williams*, the subsequent charges were subject to dismissal. It did not matter that, as here, the initial charge was by information or complaint and the subsequent charges were by indictment. The narrow issue before the appellate court was whether the charges were, in fact, subject to compulsory joinder as being "based on the same act." The court determined that the defendant engaged in a *single act* of simultaneous constructive possession of the cannabis and the guns. *Id.* ¶ 28. To hold that the offenses were based on *separate acts* would be a hypertechnical result, artificially creating multiple acts of constructive possession at discrete moments in time. *Id.* ¶ 27. Accordingly, the court affirmed the dismissal of the subsequent charges. *Id.*

¶ 48 Here, the facts fit neatly into the *Williams* rule. The parties agree that the armed-robbery and armed-violence charges are subject to compulsory joinder. On April 30, 2010, the State charged King by complaint with armed robbery only, King was brought into custody, and demanded a speedy trial. Both parties agree that the speedy-trial term began on that day. Between September 30, 2010, and December 10, 2010, King agreed to a series of continuances,

accounting for 221 out of the 225 days that had passed. On December 10, 2010, the State charged King by indictment with armed robbery and, for the first time, armed violence. Per *Williams*, the 221 days of continuances cannot be attributed to King as to the subsequent charge, armed violence. Because the 120-day speedy-trial term ran on the armed-violence charge, it was subject to dismissal.

¶ 49 We reject the State's argument that the *Williams* rule does not apply. For the first time on appeal, the State introduces the concept of implicit charges. It urges that, on April 30, 2010, it *explicitly* charged King with armed robbery, but it *implicitly* charged King with armed violence. Thus, in the State's view, there were no "initial" and "subsequent" charges so as to implicate the *Williams* rule, and, beginning on April 30, 2010, King's agreement to continuances applied to both charges.

¶ 50 In support of its argument that it implicitly charged King with armed violence on April 30, 2010, the State cites to section 111-2 of the Code of Criminal Procedure:

> "(f) Where the prosecution of a felony is by *information or complaint* after preliminary hearing, or after a waiver of preliminary hearing in accordance with paragraph (a) of this Section, *such prosecution may be for all offenses, arising from the same transaction or conduct* of a defendant even though the complaint or complaints filed at the preliminary hearing charged only one or some of the offenses arising from that transaction or conduct." (Emphases added.) 725 ILCS 5/111-2(a) (West 2010).

¶ 51 Contrary to the State's position, section 111-2 does not apply to this case. Section 111-2 merely addressees when the filing of new charges will require a new probable cause hearing. *People v. Redmond*, 67 Ill. 2d 242, 245-49 (1977). The State cites no authority for its position that section 111-2 addresses implicit charges. It cites no authority for its position that section

111-2 provides that, so long as the State explicitly charges a defendant for *an* offense, it may, at any time prior to trial, bring a charge for *any* different offense based on the same conduct without implicating the defendant's right to a speedy-trial. This would be an absurd result, because a defendant must know the elements of the charged offense, and not just a charged underlying act, in order to prepare a defense.

¶ 52 Moreover, if this court were to interpret section 111-2 as urged by the State, then the *Williams* rule would never apply to cases involving an initial charge by information or complaint. Any additional charge subject to compulsory joinder by virtue of being based on the same act necessarily would be "implicitly" charged in the initial charging instrument. As demonstrated by *Hunter*, 2012 IL App (1st) 092681, ¶ 28—where the initial charge was by information—this cannot be the case.

¶ 53 We also reject the State's alternative argument, that, even if it did not charge King with armed violence on April 30, 2010, it was still permitted to charge King with armed violence on December 10, 2010, because the speedy-trial term had not run. The State acknowledges that 225 days passed between April 30, 2010, and December 10, 2010, but it argues that all but four days were by agreement. The State misses the point of the *Williams* rule: a defendant cannot agree to a continuance on a charge that has not yet been brought. None of the 225 days can be attributed to defendant as to the armed-violence charge.

¶ 54 There is no justifiable reason for trial and appellate counsel's failure to raise the *Williams* issue. Therefore, they provided ineffective assistance. See *Usery*, 364 Ill. App. 3d at 689. Accordingly, we vacate the armed-violence conviction. We remand the cause for second-stage proceedings under the Act as to the armed-robbery conviction.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we vacate the armed-violence conviction and remand the cause to second-stage proceedings under the Act as to the armed-robbery conviction.

¶ 57 Vacated in part; reversed and remanded in part.