

NOTICE
Decision filed 09/05/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 160036-U

NO. 5-16-0036

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Fayette County.
)	
v.)	No. 11-CF-183
)	
JEREMIAH HOLSHOUSER,)	Honorable
)	M. Don Sheafor Jr.,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Goldenhersh and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s dismissal of the defendant’s postconviction petition is reversed and cause remanded where postconviction counsel failed to provide an explanation why each claim raised by the defendant lacked merit before counsel withdrew representation.

¶ 2 This appeal arises from the circuit court’s dismissal of the defendant’s postconviction petition. The issue before this court is whether the circuit court erred in granting appointed postconviction counsel’s motion to withdraw and dismissing the defendant’s postconviction petition. We reverse and remand for further proceedings.

¶ 3

I. Background

¶ 4 On April 18, 2012, the defendant, Jeremiah Holshouser, pleaded guilty to one count of aggravated battery (720 ILCS 5/12-3.05(b)(1) (West 2008)), a Class X felony, of J.K., a child under 13 years of age, in exchange for a 23-year prison sentence and 3 years' mandatory supervised release.

¶ 5 On July 29, 2013, the defendant filed a *pro se* pleading, titled: "Citation to Discover Assets," requesting materials regarding his plea agreement. The defendant's pleading also requested the circuit court to reverse and remand his case and to allow him to plead anew, alleging that his plea was unknowing and involuntary.

¶ 6 On August 6, 2013, the circuit court found the defendant's *pro se* pleading "unintelligible" and noted that "no further action shall be taken on these pleadings," given that a motion to withdraw the guilty plea or vacate the judgment had not been filed. The court denied the defendant's request for transcripts without costs. The court noted in the docket entry, dated August 6, 2013, that "no post-conviction petition has been filed—no matter is pending before this court ***." Shortly thereafter, on August 23, 2013, the defendant filed a *pro se* motion to reconsider arguing that the court improperly admonished him, pursuant to Illinois Supreme Court Rules 604 (eff. Feb. 10, 2006) and 605 (eff. Oct. 1, 2001), thus, his plea agreement was void and could be attacked at any time.

¶ 7 On September 18, 2013, the defendant filed a notice of appeal alleging that the circuit court had denied his Citation to Discover Assets and motion to reconsider. The

court struck the defendant's notice of appeal as premature because the court had not yet ruled on the August 23, 2013, motion to reconsider.

¶ 8 On September 27, 2013, the defendant filed a *pro se* petition to withdraw guilty plea and vacate sentence. In an affidavit attached to the petition, the defendant argued that trial counsel was ineffective where counsel misled him at trial. The defendant also argued that he had “[n]ewly found [e]vidence from the victim’s mother asking why I took the [b]lame for someone else and she knows I would not hurt her kids.” The record on appeal contains a letter from J.K.’s mother, which stated the foregoing statement.

¶ 9 On November 11, 2013, the circuit court confirmed its denial of the defendant’s July 29, 2013, Citation to Discover Assets. In addressing the defendant’s motion to reconsider, the court determined that the defendant had been properly admonished, pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012), and that his plea was knowingly and voluntarily entered. The court stated that defendant “offered no more by way of factual allegations for consideration to suggest that his plea was otherwise unknowing or involuntary.” Moreover, in considering the pleading as a “Post-Conviction Petition, pursuant to 725 ILCS 5/122-1,” the court could not determine if a preliminary hearing was held or waived by the defendant prior to his entry of a plea of guilty. As such, the court found that a sufficient basis existed to appoint postconviction counsel. The court, thus, advanced the defendant’s cause to the second stage by not dismissing the petition as frivolous or patently without merit and by appointing counsel for the defendant.

¶ 10 On November 11, 2013, the court appointed Thomas Zurliene (Zurliene) as the defendant's postconviction counsel. The court directed Zurliene to review the defendant's pleadings and allegations of procedural and constitutional violations to assist the defendant in filing any amended postconviction pleadings to remedy any alleged deficiencies.

¶ 11 On December 6, 2013, the circuit court issued an order addressing the defendant's September 27, 2013, petition to withdraw his guilty plea and vacate his sentence. The court determined that the petition was untimely, given that 17 months had elapsed from the entry of his plea, and dismissed it without prejudice. On December 9, 2013, the court granted Zurliene's motion to vacate appointment and allow withdrawal as counsel of record.

¶ 12 On May 27, 2014, Matthew Riedle (Riedle) entered his appearance as the defendant's postconviction counsel. That same day, Riedle filed an amended petition for postconviction relief where he alleged that the defendant's right to a preliminary hearing had been violated and his guilty plea should be vacated.

¶ 13 On January 14, 2015, Riedle filed a Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Dec. 11, 2014)) certificate and motion to withdraw as the defendant's counsel before the circuit court. In the Rule 604(d) certificate, Riedle averred that additional research and review of the trial court file had indicated that the claim raised in the defendant's postconviction petition, concerning the absence of a preliminary hearing, was not reversible error. Riedle also informed the court that no legal basis existed to support the defendant's other claims, which included an improper admonishment from the sentencing judge.

¶ 14 At the March 3, 2015 hearing, Riedle informed the court that he had withdrawn the amended postconviction petition that he had filed on May 27, 2014. The court approved Riedle's motion to withdraw as counsel of record at that time. Subsequently, the court appointed Walter Lookofsky (Lookofsky) to represent the defendant.

¶ 15 At a hearing on August 21, 2015, Lookofsky stated that “[u]nless I'm able to learn something from consulting with [the defendant], I anticipate filing a certificate and motion to withdraw as counsel [if] I don't believe there is anything I can do for him.”

¶ 16 On September 23, 2015, Lookofsky informed the circuit court that, after he spoke with the defendant and reviewed the entire trial court file, there were no legal issues that he could raise to support the defendant's claims. Lookofsky also stated that “I don't know that we need any further settings unless [the defendant] wishes to proceed *pro se*.” One day later, Lookofsky filed a Rule 604(d) certificate of compliance, which stated:

“Now comes Walter B. Lookofsky, Attorney of Law, court appointed attorney for the defendant, Jeremiah Holshouser, and hereby certifies that I have consulted with the Defendant personally to ascertain his contentions of error in the plea, have examined the trial court file and report of proceedings of the plea of guilty, and have been unable to find a meritorious claim.”

Following Lookofsky's filing of the Rule 604(d) petition, the court dismissed the defendant's petition for postconviction relief. The defendant filed a timely notice of appeal on October 19, 2015.

¶ 17

II. Analysis

¶ 18 On appeal, the defendant argues that the circuit court erred in granting Lookofsky's, court-appointed postconviction counsel's, motion to withdraw as counsel where counsel failed to explain why the defendant's claim lacked merit. The defendant also argues that counsel provided unreasonable assistance where counsel failed to amend the defendant's claims in his *pro se* petition.

¶ 19 Postconviction proceedings involve three stages, the second of which is at issue in this appeal. The right to counsel attaches only once the petition has advanced to the second stage and the level of assistance guaranteed is a reasonable level of assistance. *People v. Greer*, 212 Ill. 2d 192, 203-04 (2004) (citing 725 ILCS 5/122-2.1, 122-4 (West 2000)). Providing reasonable assistance requires postconviction counsel to perform certain duties, as outlined in Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Pursuant to that rule, postconviction counsel is required to consult with the defendant to determine the issues the defendant wants raised, to examine the record of the trial or plea proceedings, and to make any amendments to the petition “ ‘that are necessary for an adequate presentation of [defendant's] contentions.’ ” *Greer*, 212 Ill. 2d at 205 (quoting Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). An attorney, however, may not ethically advance arguments he knows to be meritless; thus, he is not required to amend the petition to present frivolous claims. *Id.* at 205-06. This presents a dilemma “if a petition is advanced to the second stage because it appears meritorious on its face, but turns out to be frivolous.” *People v. Johnson*, 2018 IL App (5th) 140486, ¶ 25. Our supreme court

addressed postconviction counsel's obligations under these circumstances in *People v. Kuehner*, 2015 IL 117695.

¶ 20 In *Kuehner*, the circuit court considered defendant's claims and found that the *pro se* postconviction petition was not frivolous or patently without merit; thus, the court advanced the petition to the second-stage proceedings and appointed counsel. *Id.* ¶ 8. The circuit court later dismissed the petition after appointed counsel, in moving to withdraw, explained why some of the claims contained in defendant's petition were without merit but failed to provide an explanation as to all claims. *Id.* ¶ 9. The supreme court reversed, holding that where a *pro se* postconviction petition advances to the second stage "on the basis of an affirmative judicial determination that the petition is neither frivolous nor patently without merit, appointed counsel's motion to withdraw must contain at least some explanation as to why *all* of the claims set forth in that petition are so lacking in legal and factual support as to compel his or her withdrawal from the case." (Emphasis added.) *Id.* ¶ 27. In so holding, the court explained that "appointed counsel's task is not to second guess the trial court's first-stage finding but rather is to move the process forward by cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication." *Id.* ¶ 20. As such, the court clarified that where appointed counsel is unable or unwilling to include explanations with respect to each of the *pro se* claims contained in the petition, appointed counsel's motion to withdraw must be denied. *Id.* ¶ 22.

¶ 21 We find the case at issue similar to *Kuehner*. Here, the record clearly indicates that Lookofsky fell short of the standard set forth above. In particular, Lookofsky failed to provide an explanation why each claim raised by the defendant lacked merit. Rather,

without identifying any specific issues or providing details why each claim lacked merit, Lookofsky simply stated that the defendant's claims could not be supported.

¶ 22 Accordingly, we reverse the circuit court's order allowing Lookofsky to withdraw as counsel and dismissing the defendant's *pro se* postconviction petition, and we remand for further second-stage proceedings. See *Kuehner*, 2015 IL 117695, ¶ 24. On remand, the court should appoint a new attorney to represent the defendant. See *id.* ¶ 25. Furthermore, the issue regarding Lookofsky's failure to amend the defendant's claims is moot because, on remand, appointed postconviction counsel will have the opportunity to amend the defendant's petition to include additional claims.

¶ 23 III. Conclusion

¶ 24 Accordingly, the judgment of the circuit court of Fayette County is hereby reversed and the cause remanded.

¶ 25 Reversed; cause remanded.