

No. 1-12-0153

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
)	the Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 01 CR 3167
)	
ROBERT CARTER,)	Honorable
)	Marcus R. Salone
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce and concurred in the judgment.

ORDER

¶ 1 *HELD*: Second-stage dismissal of postconviction petition affirmed where defendant's claim of ineffective assistance of trial counsel was not accompanied by a claim of innocence or the articulation of a plausible defense that could have been raised at trial; postconviction counsel provided reasonable assistance.

¶ 2 Defendant Robert Carter appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends

that: (1) the circuit court erred in dismissing his postconviction petition where he made a substantial showing of ineffective assistance of trial counsel; and (2) postconviction counsel provided unreasonable assistance. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Videotaped Statement

¶ 5 On October 31, 2000, defendant gave a videotaped statement detailing his involvement in the shooting death of a rival gang member named Angelo Sewell. Defendant stated that about 11:30 a.m. on October 29, 2000, he was walking to the store with his girlfriend Nicole when his codefendant, Douglas Jackson, approached them at 69th Street and Clyde Avenue. Defendant and Jackson were fellow Gangster Disciples, and they began speaking as Nicole continued on to the store. Jackson told defendant that he needed money, and defendant responded that he did as well. Jackson then told defendant that he had a "thing," meaning a gun, and they decided "[t]o go hit a lick," *i.e.*, rob someone.

¶ 6 Defendant and Jackson began walking westbound on 70th Street looking for someone to rob. At some point, defendant told Jackson that he wanted to stop by his uncle's home, at 69th Street and Clyde Avenue, to ask for "a couple dollars." As they walked through an alley at that location, they came across "a person on the stairs." The person ran up the stairs upon seeing them, and defendant realized that it was Angelo and told Jackson, "that was one of the 4's," *i.e.*, a member of the rival Four Corner Hustlers gang. Jackson asked defendant if he wanted to "see what he got," meaning go through his pockets, and defendant replied, "yeah."

¶ 7 Defendant and Jackson told Angelo to come downstairs and let him know that they were

not going to shoot him. Angelo complied, then attempted to "slip past" them towards 70th Street. With Jackson on Angelo's left side, defendant tried "to go around behind [Angelo] and then get in front of him and go in his pockets." As he was getting closer to Angelo, however, Jackson pulled his gun and aimed it at Angelo's head. At that point, Angelo began "panicking" and swinging his arms towards the gun. Jackson then shot him, and he and defendant fled and split up. Eventually, defendant caught up with Nicole at 71st Street and Merrill Avenue, and they went to the house of their friend "Glo." There, defendant spoke with Nicole alone and told her that he and Jackson were "trying to hit a lick, get a little money and we had saw one of the 4's so we was gonna [go] through his pockets. But he panicked and started swinging at Doug so Doug shot him." In his statement, defendant described Jackson's gun as a .380 semi-automatic.

¶ 8 B. Motion to Quash and Suppress

¶ 9 Defendant was charged with first degree murder and attempted armed robbery. Prior to trial, his counsel filed a motion to quash arrest and suppress evidence. The motion asserted that defendant was arrested without a valid warrant or probable cause and requested suppression of the statements he made during the detention following his arrest.

¶ 10 At the hearing on defendant's motion, the proceedings began with a motion to exclude witnesses, at which time the following colloquy occurred:

"THE COURT: Any witnesses at trial may be in the gallery?

MR. PALMER [defense counsel]: Not that I anticipate, Judge.

THE COURT: Ladies, step in the hall. Mr. Carter, step in, please. If you might testify at trial, you have to go all the way out. If you might, first of all, what is your name?

MRS. CARTER: Natalie Carter, his mother.

THE COURT: Natalie.

MS. CARTER: Takila Carter.

THE COURT: Takila Carter.

MRS. CARTER: Sister.

THE COURT: If you think you are going to testify at trial, you cannot sit through the proceeding. So you have to go outside.

If you sit through these proceedings, you will not be able to testify at trial.

MRS. CARTER: Okay."

¶ 11 The defense then called Chicago police officer Kevin Stoll. Officer Stoll testified that he was part of a school patrol unit on October 30, 2000. On that morning, he was at South Shore high school and then went to 6838 South Clyde Avenue, where he spoke with defendant. He did not have a search or arrest warrant and did not see defendant violate any state or city laws. He read defendant his *Miranda* rights and transported him to Area 2.

¶ 12 On cross-examination, Officer Stoll stated that on October 30, 2000, he responded to a disturbance at South Shore high school that had started because a student, Angelo Sewell, was shot and killed the previous day. Officer Stoll learned that an ex-student named "Rob" had

knowledge or information regarding the case and eventually determined that "Rob" was the defendant. He spoke with Detective Cummings of Area 2 violent crimes and learned that the detective wanted to speak with defendant about the incident. He then learned that defendant's last known residence was 6838 South Clyde Avenue and went to that location.

¶ 13 Defendant's mother, Natalie Carter, was leaving as Officer Stoll approached the door of defendant's residence. Officer Stoll asked her if defendant was home and said that he needed to speak with him, and she responded that he was home. Defendant then came out of the house, and Officer Stoll had a conversation with him. Officer Stoll told defendant that "the detective" needed to speak with him regarding an incident that occurred the day before and asked him if he was willing to go to Area 2. Defendant responded in the affirmative, and Officer Stoll told defendant's mother that defendant was going to speak with a detective about something that had occurred the day before, gave her the address of the police station, and told her that "she was free to meet him there." Officer Stoll and his partner then transported defendant to Area 2 violent crimes in the "rear of [their] cage car" without handcuffs. Before transporting defendant, Officer Stoll patted defendant down for his own safety and the safety of his partner and defendant. He also advised defendant of his rights because he "did not know where the investigation was going *** [and] just knew detective [sic] needed to speak to him." At Area 2, Officer Stoll introduced defendant to Detective Cummings and that was the conclusion of his involvement in the matter.

¶ 14 On redirect, Officer Stoll testified that students at school had been saying that a former student named "Rob" had been in the area at the time of the shooting and that he learned from Detective Cummings that "Rob" was the defendant. He had no information, however, that

defendant was involved in the crime. Officer Stoll also testified that when he went to defendant's residence, defendant's mother went in the house to get him, and he and defendant first spoke at the door. It was cold outside, and defendant was wearing shorts and flip flops. When defendant agreed to speak with detectives, Officer Stoll told him that he "may want to retrieve some clothing for the weather," and he waited in the doorway while defendant changed into a pair of blue jeans and a sweatshirt.

¶ 15 The defense rested. The State's motion for a "directed verdict" was denied.

¶ 16 The State called Chicago police detective Michael Cummings of Area 2 violent crimes. Detective Cummings testified that he was assigned to investigate the shooting death of Angelo Sewell on October 29, 2000. On the morning of October 30, 2000, he received a call from Officer Stoll at South Shore high school informing him that an individual named "Rob" may have been involved or witnessed the murder. Detective Cummings indicated that he wanted to speak with defendant about the incident; however, defendant was not considered an "offender" at that time.

¶ 17 About noon, Detective Cummings was at Area 2 violent crimes when Officer Stoll introduced him to defendant, who was not in handcuffs. Detective Cummings and defendant had a brief conversation, then Detective Cummings met with defendant's mother at Area 2 shortly thereafter. After speaking with defendant's mother, Detective Cummings went to 6806 Union Avenue and met with defendant's girlfriend, Nicole Scott. Nicole agreed to accompany him to Area 2 violent crimes where they then had a conversation. Detective Cummings testified that Nicole related to him a third party admission regarding the murder of Angelo Sewell. About 5

p.m., after Detective Cummings had finished speaking with Nicole, defendant was placed under arrest for the murder of Angelo Sewell. Detective Cummings testified that defendant was in an interview room at Area 2 when he was interviewing defendant's mother and Nicole Scott.

¶ 18 On cross-examination, Detective Cummings stated that he learned from speaking with witnesses that defendant had "some contact" with Angelo about a week before the shooting. He also stated that defendant was free to leave when he was first brought into an interview room at Area 2. When Detective Cummings left the station after speaking with defendant's mother, defendant remained in the interview room. Defendant was not in handcuffs, but the room was locked and he was not able to leave.

¶ 19 On redirect, Detective Cummings testified that defendant gave him an alibi during their conversation. He told defendant that he would like to speak with the people whose names he had provided and asked defendant if he would wait at Area 2. He testified that defendant "agreed to aid in the investigation." On recross, Detective Cummings stated that the interview room door was locked from the outside and that defendant was unable to unlock it from the inside. He did not tell defendant that he was locked in the room, only that he "was leaving now to go interview his mother and Nicole." He had no information at that time that defendant had committed any crimes.

¶ 20 The State rested. Following argument, the trial court denied defendant's motion to quash arrest. The court noted, *inter alia*, that it found "absolutely no constitutional issue in the actions of Officer Stoll." It also noted that there was "nothing in this record to suggest that [defendant] was aware that he could not leave" the interview room in which he was locked. Thus, while it

found that "locking a person in a police facility may be the basis for finding that person in custody," it also found "that that person must offer in some way evidence suggesting that he or she felt unable to move about freely. And there is no suggestion of that."

¶ 21 C. Plea Proceedings

¶ 22 After the denial of his motion to quash and suppress, defendant entered a plea of guilty on October 21, 2002, to first degree murder in exchange for a sentence of 22 years' imprisonment.¹ At the time of his plea, he testified that his confession was a true and accurate statement of what happened on the day of the shooting and that he was freely and voluntarily entering his plea.

¹ The details of defendant's plea proceedings are more fully set forth in this court's order on direct appeal. *People v. Carter*, No. 1-05-2168 (2008) (unpublished order under Supreme Court Rule 23). Only those facts pertinent to this disposition are included here.

¶ 23 On November 19, 2002, defendant filed a *pro se* motion to withdraw his guilty plea, however, and an attorney was appointed to represent him. His attorney filed an amended motion to withdraw guilty plea and vacate judgment, asserting, *inter alia*, that trial counsel was ineffective for failing to investigate matters related to the defense, thereby coercing defendant into pleading guilty. The motion alleged that "[t]rial counsel failed to thoroughly interview Natalie Carter (defendant's mother), [defendant's] girlfriend, Nicole and his sister's ex-boyfriend, Seneca; all witnesses to [defendant's] defense."

¶ 24 At the hearing on defendant's motion to withdraw his guilty plea, defendant and his trial counsel were called to testify. Trial counsel testified, *inter alia*, that during his investigation of defendant's case, he visited defendant at the jail, sent out "numerous" subpoenas, and spoke with defendant's mother and sister, though he did not recall sending out an investigation request. He also testified as follows during redirect:

"Q [the assistant State's Attorney]. And you did investigate this case, correct, even though you did [not] send an investigator request?

A. Correct.

Q. And you talked to witnesses that he gave you, his mother, correct?

A. I talked to his witnesses as well as just, basically, subpoenaing police reports, reviewing the police reports, reviewing them with him, investigating the information that we got during the

motion, doing the motion, preparing the motion to suppress the statements. We hadn't hit the final stretch before trial yet, so I hadn't gone into the final.

Q. Right. But you had investigated by talking to witnesses that you would put on?

A. Right.

Q. Including his mother and his sister that he puts in his affidavit?

A. Right.

Q. And you had information in regard to a Nicole Scont [sic] from the Grand Jury?

A. Right. Nicole Scont [sic] had testified at the Grand Jury, so I had her statement. His other witnesses were all witnesses regarding a potential alibi at the time of the offense. And we just hadn't reached the trial point at that point. So we hadn't gotten into the final stretch of working on it."

The trial court ultimately denied defendant's motion to withdraw his guilty plea. On appeal, defendant did not raise any issue regarding the ineffectiveness of his trial counsel, and this court affirmed the judgment of the trial court. *People v. Carter*, No. 1-05-2168 (2008) (unpublished order under Supreme Court Rule 23).

¶ 26 On September 10, 2008, defendant filed a *pro se* petition for post-conviction relief. He alleged that trial counsel was ineffective for: (1) failing to interview Nicole Scott regarding the circumstances that led to her grand jury statement; and (2) failing to interview and call four individuals who could have corroborated that he was illegally arrested in his apartment: Natalie Carter, Aretha Carter (deceased), Nicole Scott, and Seneca Christiel. With respect to his latter claim, defendant alleged that trial counsel spoke with only one of the four individuals who "witnessed the unlawful search and seizure of the apartment and person of the petitioner" and that he did not discuss the illegal arrest with him or her.

¶ 27 Defendant's petition was docketed and counsel was appointed to represent him.² On March 24, 2011, postconviction counsel filed a Rule 651(c) certificate, which stated: (1) that she had "consulted with petitioner, Robert Carter, by mail to ascertain his contentions of deprivations of his constitutional rights"; (2) that she had "obtained and examined the Report of Proceedings of the trial and sentencing concerning Indictment Number 01CR0316701"; and (3) that she had "determined that the petition as it is written adequately represents petitioner's constitutional claims and deprivations." Postconviction counsel elected not to supplement defendant's *pro se* petition.

¶ 28 On May 26, 2011, the State filed a motion to dismiss defendant's postconviction petition. Then, on June 14, 2011, defendant filed a *pro se* answer to the State's motion. In his answer,

² It is unclear when post-conviction counsel was appointed. The record shows that the public defender was appointed on May 29, 2008, before the petition was filed, for a "corrected mitt issue" related to defendant's direct appeal. Then, at a hearing on October 23, 2008, the State "suggest[ed] a January 15th date for counsel to be appointed." When that date arrived, counsel from the public defender's office was present and referred to the case as "a new appointment."

defendant alleged, *inter alia*, that postconviction counsel had "failed to contact [him] to ascertain [sic] anything about his petition." He claimed that counsel's only correspondence with him was information concerning status dates and a letter informing him that the State had filed a motion to dismiss and that counsel was "standing on" his *pro se* petition. He also alleged that postconviction counsel had failed to comply with Rule 651(c) "because additional evidence could have been attained [sic] and presented to th[e] Court." Specifically, he claimed that affidavits from his proposed witnesses were in his "file" and that his previous public defender refused to provide them to him.

¶ 29 At a hearing on August 9, 2011, the court heard argument on the State's motion. At that time, postconviction counsel made the following statements:

"Your Honor, on March 24th, 2011, I filed my 651 C certificate stating that I had consulted with [defendant] by mail to ascertain his contention for deprivations of his constitutional rights, that I had received a report of proceedings of his guilty plea, and I have read it and reviewed it, and I have determined not to supplement his petition.

And I'm standing on his petition wherein his only issue is that he received ineffective assistance of counsel as [the assistant State's Attorney] has already stated for failure to interview four witnesses concerning the search of his place. And based on that, [defendant] is asking for relief."

The court ultimately set a date for its ruling on the State's motion. However, before the court could issue its ruling, defendant attempted to file a *pro se* "2nd AMENDED PETITION FOR POST CONVICTION RELIEF" (amended petition) wherein he reiterated his ineffective assistance of trial counsel claims and also raised a mandatory supervised release issue and ineffective assistance of appellate counsel. He attached to the amended petition his own affidavit as well as the affidavits of Nicole Scott, Seneca Christiel, and Natalie Carter. The affidavit of Nicole Scott did not contain any details regarding the circumstances of defendant's arrest.

¶ 30 Seneca Christiel averred in his affidavit that on the morning of October 30, 2000, he was at 6838 South Clyde Avenue, where he lived with his girlfriend, Dawn Carter (defendant's sister), defendant, and Aretha Carter (their grandmother). At some point, while Natalie Carter was at the apartment visiting her ill mother, Seneca came out of his room and saw Natalie and defendant speaking with police in the living room. He walked towards them, then an officer handcuffed defendant and told Natalie that "they" were taking him to Area 2 for questioning. As they were walking away, "Ms. Carter" asked that defendant be allowed to put on additional clothing—he was wearing basketball shorts, a jersey, and flip-flops—and the officer responded, "No' he is fine with what he has on." Nicole Scott ran out and placed a coat on defendant's back. The officers then put defendant in the squad car and left.

¶ 31 Natalie Carter similarly averred that on October 30, 2000, she was at 6838 South Clyde Avenue checking up on her sick mother. As she was leaving the apartment, she was approached by two Chicago police officers, who asked if defendant was home while "backing" her into the apartment. She stated that he was home, and the officers entered the apartment, saw defendant,

and asked him if he was "Mr. Carter." When defendant responded "yes," they handcuffed him and told Natalie that he would be at Area 2 being questioned about a crime that occurred the day before. Natalie asked if he could put on additional clothing, but the officers stated that "he would be alright with what he had on." Nicole Scott then ran out and asked permission to put defendant's coat on his shoulders. The officers granted her permission and placed defendant in their car.

¶ 32 Defendant averred in his own affidavit that he gave trial counsel the names, addresses, and telephone numbers of Nicole Scott, Natalie Carter, Aretha Carter, and Seneca Christiel, but counsel never investigated them. He also averred that trial counsel "refused to investigate [his] witnesses or facts of the case to establish a defense, so [he] was forced into accepting the 22 year plea as the lesser of two evils, since [he] was sure to get convicted at a trial because [counsel] failed to perform his duties and represent [him] fully." Defendant further averred that post-conviction counsel never contacted him, except for letters indicating the next status hearing.

¶ 33 Over the State's objection, the court allowed defendant to file his amended petition. The court noted that it would give postconviction counsel time to hear back from the affiants in defendant's amended petition and that it would "prefer if [counsel] get another 651(c), because there are a couple additional things in here." The State then filed a supplemental motion to dismiss addressing the claims in defendant's amended petition.

¶ 34 On December 22, 2011, a hearing was held to address defendant's amended petition, at which time the following colloquy occurred:

"MR. McCORMICK [assistant State's Attorney]: Judge,

this is up for arguments on the supplemental PC that was filed by the defendant. The arguments on the initial post conviction petition were already heard, and then we received another filing by the defendant.

THE COURT: I was—I don't think I formally or technically allowed him to file that because he has an attorney and it's a pro se petition.

MS. BROWN [postconviction counsel]: Okay.

THE COURT: But I'm going to allow it because I want to address everything now.

MS. BROWN: Okay. And what you did allow was for me to—he added affidavits to his amended petition. And I did contact Seneca Pruseal [*sic*] at 3800 St. Paul. I did not receive a call back or any other contact from her. She did not respond to my letter.

Also, I contacted Nicole Scott on South Ellis, and [defendant] gave me a second address on Maryland. I also contacted her there. I did not receive a response.

Natalie Carter, [defendant's] mother, I did contact and did receive a response for her, and she did confirm that what was obtained in the affidavit, that she, that what was attached to the amended petition and his petition was still accurate and correct."

Following this colloquy, the parties declined further argument, and the court granted the State's motion to dismiss. In a written order, the court found, *inter alia*, that the affidavits provided by defendant "merely recount Petitioner's lawful arrest on October 30, 2000." Before the conclusion of the hearing on defendant's amended petition, however, the court questioned postconviction counsel about the fact that a new Rule 651(c) certificate was not filed. The court asked "did you have an opportunity to talk to your client about it?" Postconviction counsel responded:

"Actually, I did. And he sent me a letter pertaining to the amended petition. I investigated the allegations and spoke to the witnesses, as I've already tried to contact the witnesses, spoke to one witness as I already stated, and I am not adding to the amended or the original petition."

Defendant now appeals the dismissal of his postconviction petition pursuant to Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 35 II. ANALYSIS

¶ 36 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second stage of proceedings, defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial

record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). All well-pleaded facts that are not positively rebutted by the record are to be taken as true. *Pendleton*, 223 Ill. 2d at 473. We review *de novo* the dismissal of a petition without an evidentiary hearing. *Hall*, 217 Ill. 2d at 334.

¶ 37 Defendant first contends that the circuit court erred in dismissing his petition where he made a substantial showing that trial counsel was ineffective for failing to interview and call known witnesses in support of the motion to quash arrest. Citing the affidavits of Seneca Christiel and Natalie Carter, he argues that "the failure to interview and call known witnesses in support of an uncorroborated theory of an in-home seizure is unquestionably prejudicial" and that such ineffective assistance of counsel renders his guilty plea involuntary.

¶ 38 The State responds that the circuit court properly dismissed defendant's postconviction petition where trial counsel's decision not to call additional witnesses at the motion to quash hearing was a matter of trial strategy. The State further responds that defendant has failed to establish prejudice, "especially where he voluntarily relinquished his right to present a motion to suppress his statement when he chose to accept a sentence of 22 years which was 2 years above the minimum he could have received for first degree murder."

¶ 39 "It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004).

As the Supreme Court noted in *Tollett v. Henderson*:

"[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has

solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

A defendant may, however, challenge the voluntariness of a plea by showing that it was based on ineffective assistance of counsel. *People v. Sharifpour*, 402 Ill. App. 3d 100, 115 (2010).

¶ 40 To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), *i.e.*, a reasonable probability that, but for counsel's deficient performance, defendant would not have pleaded guilty and would have insisted on proceeding to trial (*People v. Manning*, 227 Ill. 2d 403, 418 (2008)). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel; thus, where the ineffectiveness claim can be disposed of on the ground that defendant did not suffer prejudice, the court need not address counsel's performance. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 41 In *People v. Henderson*, 2013 IL 114040, ¶ 15, our supreme court held that "where an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the unargued

suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed." The supreme court has further noted that "[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Hall*, 217 Ill. 2d at 335. Rather, defendant must accompany his claim with a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. "[T]he question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Hall*, 217 Ill. 2d at 336.

¶ 42 Here, we agree with the State that defendant has failed to establish the prejudice prong of *Strickland*. The record shows that nowhere in defendant's *pro se* petitions did he set forth a claim of innocence or articulate a plausible defense that could have been raised at trial, as required. *Hall*, 217 Ill. 2d at 335-36. Defendant disputes this finding, arguing that the testimony of his proposed witnesses would have altered the outcome of the motion to quash arrest and that "certainly suppression of [his] statement and the resultant reasonable doubt is a defense." However, defendant simply assumes, without discussion, that the trial court would have suppressed his statement in the event it found that he was subject to an illegal arrest. This is not necessarily the case. See *People v. Salgado*, 396 Ill. App. 3d 856, 860 (2009) ("A confession given by a defendant following an illegal arrest may be admissible if it is sufficiently attenuated from any illegality."). We do not believe that the mere potential for success on a motion to quash arrest

establishes a plausible defense, *i.e.*, prejudice, in the absence of argument showing that the trial court would also likely suppress the evidence obtained as a result of that arrest. We thus find that defendant failed to establish prejudice and that the trial court properly dismissed his postconviction petition. *Flores*, 153 Ill. 2d at 283-84.

¶ 43 Next, defendant contends that he received unreasonable assistance of postconviction counsel. He claims that postconviction counsel violated Rule 651(c) where she failed to shape his *pro se* petition into adequate form, to ascertain his allegations of constitutional deprivation, or to examine the petitions and record. He further points out that counsel did not respond to the State's motion to dismiss, did not amend his *pro se* answer to the State's motion to dismiss, did not argue in support of his petitions, and "seemed confused as to the issues and witnesses involved."

¶ 44 The State responds that postconviction counsel provided reasonable assistance where she filed a Rule 651(c) certificate and the record establishes that she fulfilled her obligations under the rule. The State also argues that postconviction counsel had no legal obligations with respect to defendant's amended petition because her duties terminated after she filed the original Rule 651(c) certificate.

¶ 45 The right to postconviction counsel is a matter of legislative grace. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008) (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003)). Thus, a petitioner is only entitled to the level of assistance provided for by the Act, *i.e.*, a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). "To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction

counsel." *Suarez*, 224 Ill. 2d at 42. Rule 651 (c) requires that post-conviction counsel consult with defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to defendant's *pro se* petitions that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 46 Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel has fulfilled her duties. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). Once this certificate is filed, the presumption exists that defendant received the required representation during second-stage proceedings. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). "It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c)." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 47 Here, the record shows that postconviction counsel filed a Rule 651(c) certificate on March 24, 2011, creating the presumption that defendant received the required representation. *Mendoza*, 402 Ill. App. 3d at 813. Defendant then filed a *pro se* answer to the State's motion to dismiss disputing counsel's compliance with Rule 651(c). He claimed that postconviction counsel failed to consult with him to ascertain his contentions of deprivation of constitutional rights and failed to obtain affidavits from his proposed witnesses. At the hearing on the State's motion to dismiss, postconviction counsel did not directly address these allegations. However, counsel did reiterate to the court that she had filed a Rule 651(c) certificate in which she stated that she "had consulted with [defendant] by mail to ascertain his contention for deprivations of his

constitutional rights, that [she] had received a report of proceedings of his guilty plea, and [she] *** read it and reviewed it, and [she] *** determined not to supplement his petition."

¶ 48 Thereafter, defendant sought to file a *pro se* amended petition in which he reiterated his original ineffective assistance of trial counsel claims, raised additional issues, and attached affidavits from his proposed witnesses. The court allowed defendant to file his amended petition and, in doing so, told counsel that she would "prefer" that she file another Rule 651(c) certificate. Counsel did not do so, however. At the hearing on defendant's amended petition, postconviction counsel nonetheless informed the court that she had contacted the affiants supplied by defendant. She stated that only Natalie Carter responded to confirm her affidavit, then declined to present any additional argument. The court ultimately granted the State's motion to dismiss. Prior to the conclusion of proceedings, the court inquired about the absence of an updated Rule 651(c) certificate. The court asked postconviction counsel, "did you have an opportunity to talk to your client about it?" Counsel responded:

"Actually, I did. And he sent me a letter pertaining to the amended petition. I investigated the allegations and spoke to the witnesses, as I've already tried to contact the witnesses, spoke to one witness as I already stated, and I am not adding to the amended or the original petition."

¶ 49 We first address defendant's claim that there was no valid Rule 651(c) certificate on file in this case. Here, it is undisputed that postconviction counsel filed a Rule 651(c) certificate on March 24, 2011, in which counsel certified that she had consulted with defendant, examined the

report of proceedings, and determined that defendant's *pro se* petition adequately presented his claims. Defendant nonetheless argues that this certificate became "outdated," and thus invalid, when he subsequently filed a *pro se* amended petition. Specifically, he argues that a new Rule 651(c) certificate was required because "[w]hen the circuit court allowed [defendant] to amend his petition despite being represented by counsel, the docket contained a new *pro se* petition," and "Rule 651(c) requires post-conviction counsel to shape whatever *pro se* petition is on the docket into appropriate legal form."

¶ 50 We find defendant's argument unpersuasive. Essentially, defendant is arguing that postconviction counsel has an ongoing duty under Rule 651(c) to "shape" *pro se* amendments to a petition, made after a Rule 651(c) certificate has been filed, into appropriate legal form. Nothing in the language of Rule 651(c) suggests such a duty, however. The rule clearly requires postconviction counsel to make necessary amendments to the "petitions filed *pro se*." It does not, though, impose a separate duty on counsel to amend subsequent *pro se* amendments to the petition. Ill. S. Ct. R. 651(c). Defendant appears to be cognizant of this limitation, as he has attempted to characterize his *pro se* amended petition as "a new *pro se* petition," rather than an amendment to his initial petition. We find this characterization inapt, however, because a new *pro se* petition would be heard for the first time only at the first stage of postconviction review, not at a second-stage proceeding as occurred here. *People v. Johnson*, 2011 IL App (1st) 092817, ¶ 65 (noting that there are three stages of postconviction review). Ultimately, we find no support for defendant's argument that counsel has a duty under Rule 651(c) to amend *pro se* amendments to a postconviction petition after her Rule 651(c) certificate has been filed. We

therefore reject defendant's claim that counsel was required to file an updated Rule 651(c) certificate in this case.

¶ 51 Having found that a valid Rule 651(c) certificate was filed, we turn to whether defendant has overcome the presumption that postconviction counsel fulfilled her obligations under Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19. With respect to the first two duties of counsel under Rule 651(c), defendant argues that counsel failed to properly consult with him or examine the record, but predicates these arguments entirely upon the absence of a valid Rule 651(c) certificate. We will not address these arguments further given our conclusion that a valid Rule 651(c) certificate was filed in this case.

¶ 52 With respect to the third duty under Rule 651(c), defendant argues that postconviction counsel failed to make necessary amendments to his *pro se* petition. He first claims that counsel failed to obtain available affidavits in support of his ineffective assistance of trial counsel claim, citing *People v. Johnson*, 154 Ill. 2d 227 (1993).

¶ 53 In *Johnson*, defendant filed a *pro se* postconviction petition. *Johnson*, 154 Ill. 2d at 239. The petition was not supported by affidavits or other supporting documentation, but "specifically identified witnesses and documents which would support the allegations raised in the petition." *Johnson*, 154 Ill. 2d at 239. Postconviction counsel then filed an amended postconviction petition, which "realleged, *verbatim*, every allegation in the *pro se* petition and added two additional claims." *Johnson*, 154 Ill. 2d at 239. Postconviction counsel did not, however, attach any affidavits or supporting documents, or certify his compliance with Rule 651(c). *Johnson*, 154 Ill. 2d at 238-39. Moreover, he filed an affidavit, "which unequivocally establishe[d] that

[he] made no effort to investigate the claims raised in the defendant's post-conviction petition or to obtain affidavits from any of the witnesses specifically identified in the defendant's *pro se* petition." *Johnson*, 154 Ill. 2d at 241. On appeal, the supreme court noted that "[i]n the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241. In the case before it, however, the supreme court found:

"[C]ounsel simply copied an allegation raised in the *pro se* petition. He concedes that he made no effort to contact the witnesses specifically identified in the *pro se* petition, or to amend the petition with affidavits of such witnesses. In such circumstances, we must conclude that counsel failed to adequately comply with Supreme Court Rule 651(c)." *Johnson*, 154 Ill. 2d at 243.

¶ 54 Defendant maintains that the record in this case "clearly contradicts the presumption that counsel made a 'concerted effort' to obtain the affidavits but was 'unable to do so.'" In support of his claim, he cites the fact that counsel averred in her Rule 651(c) certificate that the petition was adequate "as it is written," not that she could not obtain affidavits. He also cites the fact that he was personally able to obtain "at least two affidavits" despite being incarcerated.

¶ 55 Here, postconviction counsel did not need to obtain affidavits as defendant had already

done that. Postconviction counsel informed the court that defendant's mother reaffirmed her affidavit, and she could not locate the other affiants. This information supplemented her information in the Rule 651(c) certificate—nothing more is required. To hold to the contrary would essentially require in all second-stage proceedings, even where a Rule 651(c) certificate is on file, an affirmative showing that counsel attempted to obtain evidence supporting affidavits filed in support of a postconviction petition. This would entirely defeat the purpose of a Rule 651(c) certificate. "The purpose of requiring a certificate is to ensure that the requirements of Rule 651(c), ensuring that post-conviction petitioners receive adequate representation such that their claims of constitutional deprivation are set forth, have been met." *People v. Wright*, 149 Ill. 2d 36, 66 (1992). Only where no Rule 651(c) certificate is on file must the record affirmatively demonstrate compliance with the rule. *People v. Lander*, 215 Ill. 2d 577, 584 (2005) ("The failure to file a certificate showing compliance with Rule 651(c) is harmless error if the record demonstrates that counsel adequately fulfilled the required duties."). Because counsel in the instant case certified her compliance with Rule 651(c) by filing a certificate and by informing the judge in open court as to the steps she took to confirm or flesh out the affidavits attached to the amended postconviction petition, we reject defendant's claim that postconviction counsel did not fulfill her obligation under Rule 651(c). *People v. Williams*, 186 Ill. 2d 55, 59 n.1 (1999).

¶ 56 We also reject defendant's claim that postconviction counsel failed to make necessary amendments to his *pro se* petition where she did not amend it to include a claim of prejudice. Notably, appellate counsel in the instant case has not advanced any viable claim of prejudice, which postconviction counsel could have amended defendant's *pro se* petition to include. The

fact that neither postconviction counsel, nor appellate counsel here, have been able to formulate a viable claim of prejudice strongly suggests that no such claim exists. Our supreme court has noted that "[f]ulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf." *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Under the circumstances, we decline to remand this cause merely so that postconviction counsel can advance what appears to be a frivolous claim. *People v. Turner*, 187 Ill. 2d 406 (1999), cited by defendant, is distinguishable from the case at bar because here, unlike *Turner*, counsel filed a Rule 651(c) certificate stating that defendant's *pro se* petition "adequately represent[ed] [his] constitutional claims and deprivations."

¶ 57 In sum, we conclude that defendant has failed to rebut the presumption that he received the representation to which he was entitled during second-stage proceedings. *Mendoza*, 402 Ill. App. 3d at 813. We therefore affirm the second-stage dismissal of his postconviction petition.

¶ 58 Affirmed.