

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).

2014 IL App (4th) 120939-U

NO. 4-12-0939

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

May 21, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ROBERT AKERS,	)	No. 05CF322
Defendant-Appellant.	)	
	)	Honorable
	)	Michael D. Clary,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Justices Knecht and Steigmann concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Since the replacement counsel in this case was appointed after the hearing on the State's motion to dismiss, procedural due process did not require the replacement counsel to have notice of a hearing on the motion to dismiss, and replacement counsel did not have to comply with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012).
- ¶ 2 The appellate court does not have the discretion to address issues that are not void and were not raised in the postconviction petition.
- ¶ 3 Defendant, Robert Akers, appeals the Vermilion County circuit court's September 2012 dismissal of his *pro se* postconviction petition at the second stage of the proceedings. On appeal, defendant asserts (1) the trial court erred by dismissing his postconviction petition without giving notice to his replacement counsel and allowing replacement postconviction counsel to comply with counsel's duties imposed by Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) and (2) his written sentencing judgment should be amended to reflect one conviction and sen-

tence for first degree murder. We affirm the court's dismissal of defendant's postconviction petition.

¶ 4

#### I. BACKGROUND

¶ 5

In July 2006, defendant stood trial on three counts of first degree murder under section 9-1(a)(1) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(a)(1) (West 2004)), one count of first degree murder under section 9-1(a)(2) of the Criminal Code (720 ILCS 5/9-1(a)(2) (West 2004)), and one count of escape (720 ILCS 5/31-6(c) (West 2004)), all of which were based on defendant's alleged actions on May 22, 2005. The jury found defendant guilty of first degree murder and escape. After an October 2006 sentencing hearing, the trial court entered a written judgment, which states the four first degree murder counts merge together and his sentence on all four counts was 30 years' imprisonment to run concurrent with five years' imprisonment for escape. All four counts of first degree murder were listed on the judgment. Defendant appealed and only asserted he was entitled to a new trial due to the trial court's failure to instruct the jury on the lesser-included offense of aggravated battery. This court affirmed his convictions and sentences. *People v. Akers*, No. 4-06-0926 (Mar. 18, 2008) (unpublished order under Supreme Court Rule 23).

¶ 6

In August 2009, defendant filed a *pro se* postconviction petition. In December 2009, the trial court ordered the State to respond to defendant's petition since the statutory 90-day term for the first stage of the proceedings had passed. In February 2010, the State filed a motion to dismiss defendant's postconviction petition, asserting defendant's claims were barred by the doctrines of *res judicata* and forfeiture. In May 2010, the court appointed Roy Wilcox to represent defendant in the postconviction proceedings. In March 2012, Wilcox filed (1) a motion to appoint a forensic pathologist; (2) an amended postconviction petition, asserting ineffective

assistance of trial counsel and ineffective assistance of appellate counsel; and (3) a "Rule 604(d)" certificate. In May 2012, the State filed an amended motion to dismiss and a response to defendant's request for a forensic pathologist.

¶ 7 On June 6, 2012, the trial court heard arguments on both the amended postconviction petition and the motion to appoint a forensic pathologist. Wilcox represented defendant at the hearing. At the conclusion of the hearing, the court took the matter under advisement to review the trial transcripts.

¶ 8 On August 23, 2012, Wilcox filed a motion to withdraw, noting he was retiring from the practice of law. On August 30, 2012, the trial court granted the motion to withdraw and appointed Leon Parker to represent defendant. On September 20, 2012, the court entered its order, granting the State's motion to dismiss defendant's amended postconviction petition and denying the motion to appoint a forensic pathologist as moot. On October 1, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Apr. 26, 2012) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Apr. 26, 2012).

¶ 9 II. ANALYSIS

¶ 10 A. Replacement Counsel

¶ 11 Defendant contends his procedural due process rights were violated by the trial court's dismissal of his amended postconviction petition without the record showing Parker, who replaced Wilcox after the hearing on the State's motion to dismiss, had notice of the pending dismissal and had complied with the requirements of Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012). We note defendant does not challenge the Rule 651(c) certificate filed by Wil-

cox that was mislabeled as a "Rule 604(d)" certificate.

¶ 12 In support of his procedural-due-process argument, defendant cites *People v. Bounds*, 182 Ill. 2d 1, 5, 694 N.E.2d 560, 562 (1998), and *People v. Smith*, 312 Ill. App. 3d 219, 225, 726 N.E.2d 776, 781 (2000), where procedural due-process violations were found in the dismissal of the defendants' postconviction petitions. In both cases, the trial court had dismissed the petitions at status hearings with no notice to defense counsel. *Bounds*, 182 Ill. 2d at 5, 694 N.E.2d at 562; *Smith*, 312 Ill. App. 3d at 225, 726 N.E.2d at 781. Here, the motion to dismiss defendant's amended postconviction petition was argued by defense counsel at a hearing set for that purpose, and defense counsel had notice of the hearing. Defendant had a full opportunity to argue his claims to the trial court. Thus, those cases cited by defendant are clearly distinguishable from the instant case. Defendant cites no authority that (1) the appointment of replacement counsel while the trial court has taken a motion to dismiss under advisement warrants a new hearing on the motion to dismiss and/or (2) a court must inform replacement counsel of the case's current status. Accordingly, we find no procedural-due-process violation.

¶ 13 Defendant also asserts the trial court erred by dismissing his postconviction petition without allowing replacement counsel to comply with Rule 651(c). In postconviction proceedings, once counsel is appointed for an indigent defendant, the defendant is entitled only to the level of assistance guaranteed by the Post-Conviction Hearing Act (725 ILCS 5/art. 122 (West 2008)). See *People v. Greer*, 212 Ill. 2d 192, 204, 817 N.E.2d 511, 519 (2004). Our supreme court has determined that level of assistance to be "only a reasonable level." (Internal quotation marks omitted.) *Greer*, 212 Ill. 2d at 204, 817 N.E.2d at 519 (quoting *People v. McNeal*, 194 Ill. 2d 135, 142, 742 N.E.2d 269, 273 (2000)). The supreme court designed Rule 651(c) to ensure a defendant receives the required reasonable level of assistance from

postconviction counsel (*People v. Marshall*, 375 Ill. App. 3d 670, 680, 873 N.E.2d 978, 986 (2007)) and has repeatedly held postconviction counsel must perform the specific duties set forth in Rule 651(c) in the trial court (*Greer*, 212 Ill. 2d at 204-05, 817 N.E.2d at 519).

¶ 14 Rule 651(c) states, in pertinent part, the following:

"The record filed in [the trial] 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." Ill. S. Ct. R. 651(c) (eff. Apr. 24, 2012).

"A filed Rule 651(c) certificate creates a presumption of compliance that can be rebutted by the record." *Marshall*, 375 Ill. App. 3d at 680, 873 N.E.2d at 987.

¶ 15 In support of his Rule 651(c) argument, defendant cites *People v. Richmond*, 188 Ill. 2d 376, 381, 721 N.E.2d 534, 537 (1999), where our supreme court held retained counsel representing a defendant who had filed a *pro se* postconviction petition also had to comply with the requirements of Rule 651(c). In that case, the reviewing court reversed the first-stage dismissal of the defendant's *pro se* postconviction petition and remanded the case for further proceedings. *Richmond*, 188 Ill. 2d at 378-79, 721 N.E.2d at 536. On remand, the trial court appointed counsel to represent defendant, and the defendant later retained private counsel before the hearing on the defendant's postconviction petition. *Richmond*, 188 Ill. 2d at 379, 721 N.E.2d at 536. The defendant's retained counsel did not file a Rule 651(c) certificate and did not make any amend-

ments to defendant's *pro se* petition before the hearing. *Richmond*, 188 Ill. 2d at 379, 721 N.E.2d at 536. While the defense attorney at issue in *Richmond* was the second attorney on the postconviction petition, he was retained before any amendment to the *pro se* petition and the hearing on petition. Accordingly, the analysis was properly focused on the second attorney's need to comply with Rule 651(c).

¶ 16 In this case, the second attorney was appointed after (1) the *pro se* petition was amended, (2) the original attorney had filed a Rule 651(c) certificate, and (3) the trial court held a hearing on the State's motion to dismiss. Defendant cites no authority that Rule 651(c) must be complied with a second time. In a situation similar to this one, the Third District held Rule 651(c) did not apply to successor counsel appointed to represent the defendant on a *pro se* petition for rehearing after the trial court had granted the State's motion to dismiss. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060, 902 N.E.2d 158, 164 (2009). The Third District noted the law was clear the prior attorney had the obligation to comply with Rule 651(c) and that attorney did file a Rule 651(c) certificate. *Rossi*, 387 Ill. App. 3d at 1058, 902 N.E.2d at 162. Since Parker was appointed after the hearing on the State's motion to dismiss, we discern no real difference between the situation in this case and where new counsel is appointed for a petition for rehearing.

¶ 17 Moreover, in *Marshall*, 375 Ill. App. 3d at 683, 873 N.E.2d at 989, the First District held Rule 651(c) did not apply to counsel at the third-stage of the postconviction proceedings. In reaching that conclusion, the court discussed the case of *People v. Rankins*, 277 Ill. App. 3d 561, 660 N.E.2d 1317 (1996). The *Marshall* court noted *Rankins* supports the conclusion Rule 651(c)'s requirements must be met *only once* and not by attorneys representing a defendant at each stage of the postconviction proceedings. *Marshall*, 375 Ill. App. 3d at 682, 873 N.E.2d at 988.

¶ 18 Accordingly, we find Parker did not have to comply with Rule 651(c), and thus the trial court did not err by dismissing defendant's amended postconviction petition without requiring Parker to comply with Rule 651(c).

¶ 19 B. Written Sentencing Judgment

¶ 20 For the first time on appeal, defendant asserts the written sentencing judgment should be amended to show only one conviction and sentence for first degree murder. The State asserts we cannot address this argument because it was not included in defendant's postconviction petition. Defendant responds we should overlook his forfeiture of the argument and address the merits of the issue for the sake of judicial economy. We agree with the State.

¶ 21 Our supreme court has held multiple convictions imposed in violation of the "one-act, one-crime rule" are voidable, not void. *People v. Davis*, 156 Ill. 2d 149, 157-58, 619 N.E.2d 750, 755 (1993). Thus, the rule that allows courts to address a void order at any time does not apply to defendant's request. See *People v. Bailey*, 2014 IL 115459, ¶12, 4 N.E.3d 474. Moreover, our supreme court has found a defendant cannot raise an issue for the first time on appeal from the dismissal of a postconviction petition. *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004). It further stressed "our appellate court is not free, as this court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *People v. Jones*, 213 Ill. 2d 498, 508, 821 N.E.2d 1093, 1099 (2004). Accordingly, we lack the discretion to excuse defendant's forfeiture of his written sentencing judgment argument.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the Vermilion County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed.