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2014 IL App (4th) 120845-U

NO. 4-12-0845

FILED
April 22, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MARK MOTTON,	)	No. 05CF1814
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court (1) found the trial court erred in dismissing defendant's postconviction petition at the second stage and remanded for further proceedings and (2) vacated the fines imposed by the circuit clerk and remanded for the imposition of mandatory fines by the trial court.

¶ 2 In January 2009, a jury found defendant, Mark Motton, guilty of two counts of armed violence (counts IV and V) and single counts of unlawful possession of a weapon by a felon (count VI), calculated criminal drug conspiracy (count II), unlawful possession with intent to deliver a controlled substance (count VII), and unlawful possession of a controlled substance (count VIII). In October 2009, the trial court sentenced defendant to concurrent prison terms of 20 years on count II, 20 years on count IV, 15 years on count V, 10 years on count VI, 15 years on count VII, and 5 years on count VIII. On direct appeal, this court vacated the armed-violence convictions and sentences but affirmed his possession convictions. In December 2011,

defendant filed a *pro se* postconviction petition. In July 2012, the State filed a motion to dismiss, which the trial court granted.

¶ 3 On appeal, defendant argues postconviction counsel provided an unreasonable level of assistance. We reverse in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In September 2005, the State charged defendant in case No. 05-CF-1814 with the offense of unlawful calculated criminal drug conspiracy (count I) (720 ILCS 570/405(a) (West 2004)), alleging he conspired with Paul Dozier, Ricky Exum, and his codefendant brother, William Motton, to deliver heroin and received more than $500 from the conspiracy.

¶ 6 In March 2007, the State charged defendant with seven additional counts, including unlawful calculated criminal drug conspiracy (count II) (720 ILCS 570/405(b) (West 2004)), unlawful criminal drug conspiracy (count III) (720 ILCS 570/405.1(a) (West 2004)), armed violence (counts IV and V) (720 ILCS 5/33A-2 (West 2004)), unlawful possession of a weapon by a felon (count VI) (720 ILCS 5/24-1.1(a) (West 2004)), unlawful possession with intent to deliver a controlled substance (heroin) (count VII) (720 ILCS 570/401(d) (West 2004)), and unlawful possession with intent to deliver a controlled substance (methadone) (count VIII) (720 ILCS 570/401(e) (West 2004)).

¶ 7 In January 2009, defendants' joint jury trial commenced. The State moved to dismiss count I against defendant, which the trial court allowed. Champaign police officer Jack Turner testified he was assigned to the narcotics unit, which uses confidential sources to conduct controlled drug buys. In November 2004, Jerry Thomas, a confidential source, notified the narcotics unit he had been purchasing heroin from Ricky Exum. Officer Turner conducted a controlled drug buy between Thomas and Exum on November 1, 2004. Thomas agreed to

purchase three bags of heroin for $60, and the transaction took place in the parking lot of the American Legion. Thomas later turned over three bags of a brown, powdery substance (exhibit No. 1) that field-tested positive for heroin.

¶ 8 On February 18, 2005, the narcotics unit utilized Thomas to conduct a second buy from Exum. The buy resulted in three bags of a substance that field-tested positive for heroin (exhibit No. 2). A third controlled drug buy was conducted between Thomas and Exum on April 20, 2005, which resulted in the purchase of three individual bags containing a substance that field-tested positive for heroin (exhibit No. 3).

¶ 9 On April 27, 2005, Turner conducted a fourth controlled buy with Jerry Thomas. The man who met with Thomas was later identified as William Motton. Thomas turned over three plastic bags that field-tested positive for heroin (exhibit No. 4).

¶ 10 Officer Turner testified he used a second confidential source, Leslie Bauchamp, to conduct a controlled drug buy on September 12, 2005. Bauchamp indicated she called a particular telephone number to purchase heroin, and Turner recognized the number as the one used by Thomas in the previous four drug buys. Bauchamp met with Exum and purchased three plastic bags, the contents of which field-tested positive for heroin (exhibit No. 6). On September 22, 2005, Bauchamp met with Exum and purchased three plastic bags containing heroin (exhibit No. 8). On September 23, 2005, Bauchamp met with Exum and purchased three plastic bags of suspected heroin (exhibit No. 9).

¶ 11 On September 26, 2005, Bauchamp participated in two separate controlled drug buys. On the first buy, she met with Exum and purchased six plastic bags of suspected heroin (exhibit No. 10). Later in the day, Bauchamp met with Exum and again purchased six bags of suspected heroin (exhibit No. 11). On this second buy, Officer Turner recorded the serial

numbers on the money provided to Bauchamp. Those bills were recovered on September 27, 2005, during the execution of two search warrants.

¶ 12 Officer Turner testified he participated in the execution of a search warrant at 111 East Church Street. Turner encountered defendant inside the residence. Defendant told the officers he had a small bag of heroin in his pocket. He also told them they would find a pistol in an upstairs closet. Turner stated the money from Bauchamp's second drug buy on September 26, 2005, was found on the headboard in defendant's bedroom.

¶ 13 Officer Turner explained to defendant that officers were also executing a search warrant at 801 West Hill Street as a result of their investigation regarding Exum's heroin sales. Defendant stated he himself used approximately half a gram of heroin per day. He also stated he traveled to Chicago "about once a week" to purchase heroin for sale in Champaign. Defendant told Officer Turner that he would go to 801 West Hill Street to package the heroin for redistribution with the assistance of William Motton and Exum. The latter two also assisted in the sale of the heroin. During the packaging, defendant indicated they would mix the heroin with a product called Dormin.

¶ 14 On cross-examination, Officer Turner testified William Motton was arrested at 801 West Hill Street as the police were inside searching. William did not appear to have a key to 801 West Hill Street. Turner also stated defendant told him during the search that the gun in the upstairs closet belonged to his wife. Turner identified a firearm owner's identification (FOID) card for Joan Motton, with an address of 111 East Church Street in Champaign. After the close of the State's evidence, the trial court learned the FOID card disclosed to the State during discovery was different than the card shown to Turner and ordered all references to the card be stricken.

¶ 15 Champaign police officer Matt Henson testified he conducted a controlled drug buy with Leslie Bauchamp on September 21, 2005. She met with Exum and returned with three bags of suspected heroin (exhibit No. 7). Henson stated Bauchamp is now deceased.

¶ 16 Champaign police detective Mark Vogelzang testified he assisted in the collection of evidence at 111 East Church Street. He stated a plastic bag of heroin weighing 1.1 grams (exhibit No. 25) was recovered from defendant's shorts. A 9-millimeter handgun (exhibit No. 26) was recovered from the closet of defendant's bedroom. Although the gun was unloaded, it was found in a box with two loaded magazines. Exhibit No. 29 consisted of $315 in United States currency that was recovered from defendant's bed stand. An additional $90 (exhibit No. 13) was identified as funds advanced for narcotics transactions. Vogelzang stated exhibit No. 30 consisted of a plastic bottle containing suspected methadone that was found in the basement stairway of defendant's house.

¶ 17 Champaign police officer Jason Yandell testified he assisted in the controlled drug buy on April 27, 2005. The confidential informant met with a black male, later identified as William Motton. On September 12, 22, and 26, 2005, the informant met with Exum, who was driving a black Chevrolet pickup truck. The truck was registered to defendant. After the buys, Yandell followed Exum and noticed he went to an apartment at 801 West Hill Street and a house at 111 East Church Street.

¶ 18 On September 27, 2005, Officer Yandell participated in the execution of the search warrant at 801 West Hill Street. Yandell interviewed Paul Dozier, who was inside the apartment. Yandell stated Dozier had delivered heroin to a confidential informant the day before. Officers recovered a plastic bag containing suspected heroin (exhibit No. 14). A digital scale was also recovered in the same room as empty bottles of a cutting agent.

¶ 19 During the search, Officer Yandell stated William Motton came to the door. He was taken into custody. A search of his person revealed two cell phones, one of which matched the number used by the confidential informants to arrange drug buys. William also had a set of keys to the black truck used by Exum in several of the drug transactions.

¶ 20 Officer Yandell interviewed William Motton, who stated defendant supplied heroin to him and Exum to sell. William stated his brother would give him 10 bags of heroin per day, William would bring the bags to 801 West Hill Street, and then he or Exum would distribute it. William indicated he received free heroin in exchange for selling it.

¶ 21 Champaign police sergeant Brian Gallagher testified he assisted in the service of the search warrant at 111 East Church Street. In defendant's bedroom, Gallagher located $405 in cash on the headboard of the bed. He also observed a handgun in the closet.

¶ 22 Kristen Stiefvater, a forensic scientist with the Illinois State Police (ISP), testified the three plastic bags in exhibit No. 1 contained 0.2 grams of a tan powder containing heroin. John Martin, an ISP forensic scientist, testified the powder in exhibit No. 2 weighed 0.2 grams and contained heroin. Michael Cravens, an ISP forensic scientist, testified exhibit Nos. 3, 4, 6, 7, 8, 9, 10, 11, 14, and 25 all contained heroin. Exhibit No. 14 also contained a blue capsule that contained diphenhydramine, which could have been Dormin or Sleepinal. Exhibit No. 30 was a liquid containing methadone.

¶ 23 Jerry Thomas testified he served as a confidential source in the fall of 2004. He had prior convictions for manufacture and delivery of a controlled substance, felony theft, misdemeanor theft, and burglary. Exum had supplied heroin to Thomas, and Thomas would call him to arrange a buy. On April 27, 2005, Thomas met a man named Willie, who was related to Mo. He identified William Motton as Willie and defendant as Mo. Thomas gave William $60 in

exchange for the heroin.

¶ 24 After the close of the State's case, both defendants exercised their constitutional right not to testify. Counsel for defendant made a motion for a directed finding on the charges of unlawful possession of a weapon by a felon and armed violence. Counsel argued defendant never had direct access to the gun because it was unloaded and on another floor of the residence. Counsel for William made a motion for a directed finding on the charge of unlawful possession with intent to deliver a controlled substance. The trial court denied the motions.

¶ 25 Pursuant to defendant's counsel's request, the jury was instructed on the lesser-included offenses of unlawful possession of heroin and unlawful possession of methadone. Following closing arguments, the jury found defendant guilty of armed violence (methadone), armed violence (heroin), unlawful possession of a weapon by a felon, calculated criminal drug conspiracy, criminal drug conspiracy, possession with intent to deliver a controlled substance (heroin), and possession of a controlled substance (methadone). The jury also found William Motton guilty of unlawful delivery of a controlled substance, unlawful possession with intent to deliver a controlled substance, and criminal drug conspiracy.

¶ 26 In February and April 2009, defendant filed motions for a new trial. In October 2009, the trial court denied the motions. Thereafter, the court sentenced defendant to 20 years in prison for unlawful calculated criminal drug conspiracy, 20 years for armed violence (heroin), 15 years for armed violence (methadone), 15 years for possession with intent to deliver heroin, 10 years for unlawful possession of a weapon by a felon, and 5 years for unlawful possession of a controlled substance (methadone). The court ordered all sentences to be served concurrently.

¶ 27 On direct appeal, defendant argued (1) he was denied his rights to confront and cross-examine and to a fair trial when the jury was allowed to hear the confession of his brother

William, a nontestifying codefendant, without a limiting instruction; (2) his convictions for armed violence must be vacated because the State failed to prove he was "otherwise armed" with a dangerous weapon because he did not have immediate access or timely control over the handgun recovered in the upstairs closet; and (3) his convictions for unlawful possession with intent to deliver heroin and unlawful possession of methadone must be vacated under the one-act, one-crime rule.

¶ 28 As to the first issue, the State argued it was forfeited because no objection had been made at trial and the issue was not raised in a posttrial motion. In addressing forfeiture, this court held the evidence was not closely balanced and the error was not structural. *People v. Motton*, No. 4-09-0851 (Apr. 14, 2011) (unpublished order under Supreme Court Rule 23). This court also disagreed with defendant's claim that counsel was ineffective for failure to object to William's statement, finding defendant could not satisfy the prejudice prong of the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), in light of his detailed statements to police. This court also reversed defendant's convictions for armed violence and remanded for the issuance of an amended sentencing judgment but affirmed his convictions for unlawful possession with intent to deliver heroin and unlawful possession of methadone.

¶ 29 In December 2011, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant argued trial counsel was ineffective for, *inter alia*, failing to file pretrial motions and failing to file a "motion for the production of confession." He also claimed the State failed to disclose his alleged statements to the police officer prior to trial, and his right to confrontation was violated by testimony relating to Exum and Bauchamp, as both were deceased and counsel never had the opportunity to cross-examine them.

¶ 30 In February 2012, the trial court found the petition stated the gist of a constitutional claim and appointed counsel. In March 2012, defendant filed a *pro se* supplemental memorandum in support of his postconviction petition. Defendant argued trial counsel was ineffective for failing to (1) investigate prior to trial, (2) file certain pretrial motions, (3) present evidence at trial, and (4) object to improper evidence at trial. Therein, defendant claimed trial counsel was ineffective for failing to investigate whether the FOID card was valid at the time of the search and the method of how police funds that "were said (but never proven)" to have been used in the controlled buys and recovered during the search were prerecorded.

¶ 31 In June 2012, appointed counsel filed a supplement to the postconviction petition, raising claims of ineffective assistance of trial counsel. Appointed counsel also filed his certification pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 32 In July 2012, the State filed a motion to dismiss pursuant to section 122-5 of the Act (725 ILCS 5/122-5 (West 2010)). The State argued (1) defendant's claims were barred by *res judicata*, as trial counsel's ineffectiveness was raised on direct appeal; (2) none of his issues constituted "new" evidence that could not have been raised on direct appeal; and (3) his claims were barred by forfeiture because the petition did not raise a claim of ineffective assistance of appellate counsel for failing to raise trial counsel's ineffectiveness.

¶ 33 In September 2012, the trial court held a hearing and addressed the merits of several of defendant's claims. The court also found some of the issues had been addressed on direct appeal, did not involve new evidence, or were waived without a claim of ineffective assistance of appellate counsel. The court granted the State's motion to dismiss. This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 Defendant argues that, where his postconviction claims of ineffective assistance of trial counsel were based entirely on the trial record, appointed postconviction counsel provided an unreasonable level of assistance in violation of Rule 651(c) when he failed to amend defendant's *pro se* postconviction petitions to allege ineffective assistance of appellate counsel, which was necessary to overcome forfeiture. We agree.

¶ 36 A. The Act and Reasonable Assistance of Counsel

¶ 37 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 38 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 39 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2010). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in

light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted that motion. We review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 40 In postconviction proceedings, a defendant is not entitled to effective assistance of counsel. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Instead, state law dictates the sufficient level of assistance, and our supreme court has held the Act entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995). To ensure counsel provides that reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). The rule requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, (2) examine the record of the proceedings at trial, and (3) make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Compliance with Rule 651(c) is mandatory and may be shown by the filing of a certificate representing that counsel has fulfilled the duties. *People v. Perkins*, 229 Ill. 2d 34, 50, 890 N.E.2d 398, 407 (2007).

¶ 41 When a Rule 651(c) certificate is filed, the presumption exists that the defendant received the representation that the rule requires him to receive during second-stage proceedings under the Act. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. The defendant has the burden to overcome this presumption by demonstrating postconviction counsel

failed to substantially comply with the duties required by Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. Whether counsel substantially complied with Rule 651(c) is also reviewed *de novo*. *Jones*, 2011 IL App (1st) 092529, ¶ 19, 955 N.E.2d 1200 (citing *Suarez*, 224 Ill. 2d at 41-42, 862 N.E.2d at 979).

¶ 42 In the case *sub judice*, postconviction counsel filed a Rule 651(c) certificate, thereby creating a presumption that defendant received the representation required by Rule 651(c) at the second stage of the proceedings. However, defendant argues he has rebutted the presumption of substantial compliance. Defendant contends postconviction counsel "failed to make a simple and obvious amendment to allege ineffective assistance of appellate counsel," where his claims were forfeited because they could have been raised on direct appeal.

¶ 43 In his *pro se* petitions, defendant made various claims of ineffective assistance of trial counsel—claims that could have been raised on direct appeal as the issues were based on the trial record. Although postconviction counsel filed a Rule 651(c) certificate and a supplement to defendant's *pro se* petitions, counsel did not amend the petitions to include a claim of ineffective assistance of appellate counsel. Courts have held the forfeiture doctrine bars a defendant from raising claims in a postconviction petition that could have been raised on direct appeal but were not. *People v. Blair*, 215 Ill. 2d 427, 443-44, 831 N.E.2d 604, 615 (2005); *People v. Miller*, 203 Ill. 2d 433, 437, 786 N.E.2d 989, 992 (2002). The State argued at the hearing on the motion to dismiss that defendant's claims were forfeited and pointed out that no claim of ineffective assistance of appellate counsel had been made. The trial court agreed with the State and dismissed defendant's petition in part based on defendant's forfeiture.

¶ 44 The forfeiture doctrine has been found not to apply "where the alleged forfeiture stems from the incompetence of appellate counsel." *Blair*, 215 Ill. 2d at 450-51, 831 N.E.2d at

619. Moreover, the " 'failure to make a routine amendment to a postconviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c).' " *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23, 971 N.E.2d 1204 (quoting *People v. Broughton*, 344 Ill. App. 3d 232, 241, 799 N.E.2d 952, 960 (2003)).

¶ 45 Defendant argues postconviction counsel had an obligation under Rule 651(c) to amend his *pro se* petitions to argue appellate counsel was ineffective for failing to raise his claims on direct appeal. See *People v. Turner*, 187 Ill. 2d 406, 413, 719 N.E.2d 725, 729 (1999) (finding postconviction counsel's failure to make a routine amendment to the defendant's *pro se* petition and allege ineffective assistance of appellate counsel "prevented the circuit court from considering the merits of petitioner's claims and directly contributed to the dismissal of the petition without an evidentiary hearing").

¶ 46 In support of his argument, defendant relies on *People v. Milam*, 2012 IL App (1st) 100832, 974 N.E.2d 241. In that case, the defendant argued postconviction counsel failed to fulfill her duties under Rule 651(c) by not alleging ineffective assistance of appellate counsel in the amended postconviction petition to overcome the procedural bar of forfeiture. *Milam*, 2012 IL App (1st) 100832, ¶ 1, 974 N.E.2d 241. The trial court granted the State's motion to dismiss, finding the defendant's claim was barred by *res judicata* and/or because it could have been raised on direct appeal. *Milam*, 2012 IL App (1st) 100832, ¶ 18, 974 N.E.2d 241.

¶ 47 On appeal, the First District noted "Rule 651(c) requires that postconviction counsel make any amendments to the *pro se* petition necessary to adequately present the defendant's contentions" and "postconviction counsel must shape the defendant's *pro se* claims into 'appropriate legal form.' [Citation.]" *Milam*, 2012 IL App (1st) 100832, ¶ 33, 974 N.E.2d 241. Under the facts before it, the appellate court found counsel failed to amend the petition to

allege ineffective assistance of appellate counsel, which prevented the trial court from considering the merits of the claim and directly contributed to the dismissal of the petition at the second stage. *Milam*, 2012 IL App (1st) 100832, ¶ 36, 974 N.E.2d 241. The court stated counsel's failure to allege ineffective assistance of appellate counsel amounted to a failure to present the defendant's claim "in 'appropriate legal form' and placed defendant in the same position he would have found himself in had counsel not raised the claim at all." *Milam*, 2012 IL App (1st) 100832, ¶ 36, 974 N.E.2d 241. Thus, the court concluded it was "improper to affirm the dismissal of defendant's petition because of counsel's failure to make a 'routine amendment' that would have presented his claim in appropriate legal form." *Milam*, 2012 IL App (1st) 100832, ¶ 36, 974 N.E.2d 241.

¶ 48 In this case, postconviction counsel's amended petition made specific allegations of constitutional error but failed to include the necessary allegation of ineffective assistance of appellate counsel that would have overcome the procedural default. Counsel did not amend the petition even after the issue of forfeiture was raised in the State's motion to dismiss and argued at the hearing. Also, the trial court granted the State's motion to dismiss partly on the grounds of forfeiture.

¶ 49 We find, as in *Milam*, that postconviction counsel failed to present defendant's claims in appropriate legal form by not alleging ineffective assistance of appellate counsel. This routine amendment would have enabled defendant to overcome the procedural bar of forfeiture, and the failure to do so constitutes unreasonable assistance in violation of Rule 651(c). *Turner*, 187 Ill. 2d at 414, 719 N.E.2d at 730; *People v. Kluppelberg*, 327 Ill. App. 3d 939, 947, 764 N.E.2d 1182, 1189 (2002).

¶ 50 The State, however, relying on *People v. Profit*, 2012 IL App (1st) 101307, 974

N.E.2d 813, argues the matter of whether defendant's *pro se* claims had merit is essential in determining whether counsel acted reasonably by not amending the petition. In *Profit*, 2012 IL App (1st) 101307, ¶ 9, 974 N.E.2d 813, the trial court docketed the defendant's *pro se* petition and appointed counsel. The defendant then filed two *pro se* pleadings, which the court struck. *Profit*, 2012 IL App (1st) 101307, ¶ 11, 974 N.E.2d 813. Although postconviction counsel filed a Rule 651(c) certificate and asked the court to reconsider the dismissal of one of the defendant's *pro se* pleadings, counsel did not amend the *pro se* petition to include the claims raised in the stricken pleadings. *Profit*, 2012 IL App (1st) 101307, ¶ 13, 974 N.E.2d 813. The court denied the request to reconsider the dismissal of the pleadings and dismissed the petition.

¶ 51 On appeal, the defendant argued postconviction counsel's presumed compliance with Rule 651(c) was rebutted by counsel's failure to allege any of the claims in his stricken *pro se* pleadings, regardless of the merits of those claims. *Profit*, 2012 IL App (1st) 101307, ¶¶ 19-21, 974 N.E.2d 813. The First District, however, found "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23, 974 N.E.2d 813. The court concluded the defendant failed to rebut the presumption that counsel complied with Rule 651(c) based on an assessment of the merits of the stricken *pro se* claims. *Profit*, 2012 IL App (1st) 101307, ¶¶ 24-31, 974 N.E.2d 813.

¶ 52 We find *Profit* distinguishable. *Profit* dealt with a situation where appointed counsel abandoned claims that had been raised in the defendant's *pro se* petitions but were stricken by the trial court. Here, the claims were before the trial court but, in part, considered barred because of the doctrine of forfeiture. A simple amendment alleging ineffective assistance of appellate counsel would have avoided the procedural bar and was therefore necessary under

Rule 651(c). We note the First District has also stated, as follows:

> "Our supreme court has held that, even if the allegations in a petition were insufficient to raise a constitutional issue, it is error to dismiss a postconviction petition on the pleadings where there has been inadequate representation by counsel. [Citations.] Despite the State's claims that there is no merit to defendant's claim of ineffective assistance of appellate counsel, the Illinois Supreme Court 'has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.' [Citation.]
>
> Rather than the appellate or supreme court, it is the trial court that reviews the record to determine whether a defendant is able to make a substantial showing of a constitutional violation: 'We cannot simply presume, however, that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). It is the duty of the trial court *** to determine on the basis of a complete record whether the postconviction claims require an evidentiary hearing.' [Citation.]" *People v. Schlosser*, 2012 IL App (1st) 092523, ¶¶ 30-31, 973 N.E.2d 960.

As in *Schlosser*, we decline to examine the claims that underlie the assertion that appellate

counsel was ineffective and leave that to the trial court upon a fully developed record.

¶ 53 Accordingly, we find postconviction counsel failed to comply with the third requirement of Rule 651(c), resulting in defendant not receiving reasonable assistance of postconviction counsel. Thus, the trial court's order dismissing defendant's petition must be reversed and the cause remanded for additional second-stage proceedings, during which defendant is permitted to amend his petition with a claim of ineffective assistance of appellate counsel. *Schlosser*, 2012 IL App (1st) ¶ 35, 973 N.E.2d 960 (citing *Turner*, 187 Ill. 2d at 417, 719 N.E.2d at 731). We note our decision should not be construed as any indication of whether the allegations set forth in defendant's *pro se* petitions have merit.

¶ 54 B. Fines

¶ 55 In its brief, the State suggests this court should vacate certain fines imposed by the circuit clerk and remand for the imposition of mandatory fines. In its oral and written sentencing order on October 21, 2009, the trial court ordered defendant to pay a $200 deoxyribonucleic acid analysis fee, a $100 crime laboratory fee, a $360 mandatory street-value fine, a $1,000 mandatory drug assessment, and a Violent Crimes Victims Assistance Act fee of a nonspecified amount. A review of the circuit clerk's online records reveals additional assessments against defendant, some of which are fines.

¶ 56 This court has held "[t]he imposition of a fine is a judicial act" and the circuit clerk, a nonjudicial member of the court, has no power to levy fines. *People v. Swank*, 344 Ill. App. 3d 738, 747-48, 800 N.E.2d 864, 871 (2003); see also *People v. Williams*, 2013 IL App (4th) 120313, ¶¶ 15-25, 991 N.E.2d 914. Accordingly, we vacate the fines imposed by the circuit clerk and remand with directions for the trial court to impose the applicable mandatory fines for the pertinent offenses.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings consistent with this order. We also vacate the fines imposed by the circuit clerk and remand with directions for the trial court to impose mandatory fines.

¶ 59 Reversed in part and vacated in part; cause remanded with directions.