2014 IL App (1st) 120618

FIRST DIVISION
November 3, 2014

No. 1-12-0618

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 15923 (02)
	)	
ROBERT GRAFF,	)	Honorable
	)	Luciano Panici,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

Held: Trial counsel was not ineffective for failing to present evidence of witness's drug use on and prior to the night of the crime; postconviction counsel provided reasonable level of assistance; second-stage dismissal affirmed.

¶ 1 Defendant Robert Graff appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant contends that the circuit court erred in dismissing his claim of ineffective assistance of trial counsel. He also contends that the court erred in granting postconviction counsel's motion to withdraw pursuant to *People v. Greer*,

212 Ill. 2d 192 (2004), and further argues that postconviction counsel failed to provide reasonable assistance as guaranteed under the Act. He seeks remand for appointment of new counsel and further second-stage proceedings, or in the alternative, a third-stage evidentiary hearing. For the following reasons, we affirm the judgment of the circuit court dismissing the petition.

¶ 2 **I. BACKGROUND**

¶ 3 This court has already related in detail the facts of this case on direct appeal. Because the issues presented in the instant appeal are limited in scope, we set out only those facts necessary for a basic understanding of the case.

¶ 4 Defendant was tried in 1997 for the armed robbery and first-degree murder of Ronald Monaco. At the time of his death, Monaco was the boyfriend of defendant's mother, Eleanor Graff. Neighbors testified at trial that on the night of May 27, 1996, they heard a series of gunshots near the intersection of 124th and Maple Street in Blue Island. Two men in black clothes and ski masks were seen running from the area where the victim was found dead from multiple gunshot wounds. One of the neighbors, Timothy Driscoll, testified that after the shots were fired he saw one of the assailants kneeling over the victim as he lay on the sidewalk. Driscoll yelled at the assailant and threw a beer bottle at him, striking him in the chest. This caused the assailant to run away.

¶ 5 In the moments immediately after Monaco was shot, Driscoll and another neighbor, Laurene Labriola, both heard Eleanor Graff exclaim that it was her son who had committed the crime. Upon being interviewed at the scene by the responding officer and the detective in the case, Eleanor again repeatedly identified defendant as the shooter, saying, "It was Bobby. He shot him. It was Bobby, my son." Though she was unavailable to testify as a witness, her

statements were admitted into evidence under the spontaneous declaration exception to the hearsay rule.

¶ 6 Codefendant Ronnie Bustos testified that on the night of the murder, Kelly Masco drove him and Defendant to the house of a friend, John Thorsky, to pick up the gun that would be used to rob and shoot the victim. Another witness, Charles Schultz, testified that in fact it was Bustos's brother Chris who picked up the gun from Schultz on the night of the murder. Schultz testified that Chris, like Schultz and Bustos, was a member of the Spanish Gangster Disciples. According to Bustos, after he and Defendant got the gun from Thorsky, they then drove toward Eleanor's apartment to find Monaco. Defendant went to a nearby bar to call Eleanor and lure her away from the scene before the robbery took place. Bustos testified that as both men were walking outside the apartment, he saw Eleanor and Monaco approach in a car and, wearing ski masks, confronted the two outside the apartment building. Defendant wore a red ski mask, drew his gun, and demanded money from Monaco. Defendant shot into the air, and Bustos ran back to the truck as several more shots were fired. Defendant then returned to the truck and told Bustos he had just shot Monaco and had taken $300 from Monaco before he was forced to run away when someone confronted him. Bustos further stated that they changed clothes and dropped the gun off at Thorsky's house after wiping it clean of fingerprints. Police eventually recovered the gun as well as the red ski mask worn by Defendant that he had tossed out the window of the truck. Following a jury trial, Defendant was convicted of armed robbery and first-degree murder and sentenced to 45 years in prison.

¶ 7 Defendant raised several arguments on direct appeal: denial of the right to a speedy trial, improper admission of witnesses' prior statements and hearsay testimony (including the statements of identification made by Eleanor Graff, who was unavailable to testify at trial),

improper remarks by the State during closing argument, deprivation of a fair trial due to the cumulative effect of the errors, and improper consideration of evidence during sentencing. This court, finding "overwhelming evidence of defendant's guilt," affirmed the trial court's conviction and sentence on October 19, 2001. *People v. Graff*, No. 1-99-2849 (2001) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal on April 3, 2002.

¶ 8 On July 15, 2002, defendant filed a *pro se* petition for postconviction relief in the circuit court of Cook County. In it he argued that his trial counsel rendered ineffective assistance by failing to: (1) call Kelly Masco to testify that he did not drive the truck during the commission of the crime, as Ronnie Bustos had said, (2) call John Thorsky to contradict Bustos's testimony that Thorsky had given Bustos the gun used in the shooting, (3) obtain DNA analysis of, and present expert testimony on, hair fibers obtained from the ski mask found at the scene, (4) present evidence of the absence of fingerprints on the weapon, (5) call witnesses to testify as to defendant's good relationship with the victim, (6) rebut a witness's prior statement to police about a conversation in which defendant confessed to the crime, (7) call witnesses to testify as to Eleanor's drug use on the night of the incident, and (8) present evidence that others had a motive to rob the victim.

¶ 9 Defendant also alleged in the petition that newly discovered evidence in the form of testimony by Eleanor would establish his actual innocence. He claimed that his mother was willing to testify about her use of crack cocaine on the night of the shooting. He further alleged that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness, claiming that trial counsel did not object to the submission of a witness's prior inconsistent statement to the jury during deliberations. Finally, defendant claimed in his petition that the State failed to

tender evidence of his innocence—namely, DNA and fingerprint analysis of the ski mask and weapon—and that this failure deprived defendant of a fair trial.

¶ 10 The petition was accompanied by several affidavits and exhibits. First is a copy of an investigator's report indicating that detectives interviewed Masco about the murder, and Masco told the detectives that "he had been home all night." Second is an unsigned, unnotarized affidavit from John Thorsky, which states that Thorsky never saw the gun used to commit the crime before Bustos dropped it off late on the night in question. Included with the affidavit is Thorsky's statement to police. It shows that, when police questioned Thorsky as to the whereabouts of the gun, he first stated that he "did not know anything about it," but after being taken to the police station in Blue Island, Thorsky told detectives that Bustos had dropped off the murder weapon at Thorsky's house around one o'clock in the morning on May 28. Exhibits three and four are police reports cataloguing the physical evidence recovered from the scene. They show that police recovered a red ski mask containing hair fibers, that were preserved for analysis. Next is an affidavit from a former acquaintance of Monaco and defendant's former employer, who stated that defendant had a good relationship with Monaco. Exhibit 6 is an affidavit from defendant's father, William Graff, in which he stated that he witnessed Monaco and Eleanor Graff using drugs on several occasions, and that he witnessed Eleanor smoking crack cocaine on the evening of May 27. He describes Eleanor as being "very high" when he stopped by her apartment and says she was still smoking when he left. Also included in the record is an addendum to the affidavit, in which William includes hearsay statements from Thorsky that Thorsky did not see the gun before the shooting and was never contacted about testifying. Exhibits 7 and 8 are unnotarized affidavits from David and Mary Ann Kroll (notarized versions appear elsewhere in the record). They both state that Eleanor had a drug

problem, which was exacerbated by the death of Monaco. David Kroll states that Eleanor "drank alcohol, smoked marijuana, [and] snorted and smoked cocaine." Exhibit 9 is a handwritten statement given by Eleanor Graff to the Cook County State's Attorney's office, in which she stated that she pushed the shooter, who pulled out a silver gun and said, "I told you you're a dead m***-f***." Exhibit 10 is a handwritten, signed statement by Bustos to detectives, in which Bustos stated that Eleanor pushed him on the neck during the crime, and that defendant said, "Give me all your loot." Exhibit 11 is a portion of the trial transcript. It shows that Dr. Nancy Jones, an assistant medical examiner for Cook County and witness for the prosecution, testified on cross-examination that Monaco had "used cocaine close to the time that he died." Elsewhere in the record are Eleanor Graff's "Addendum Affidavit," filed in 2002, and her "Amended Affidavit," signed in 2007. In these documents, Eleanor relates the events surrounding the murder, stating that she was "highly intoxicated," "high on crack cocaine," and "paranoid" that night, and had "absolutely no basis for believing that [her] son was involved."

¶ 11 On April 4, 2003, defendant filed a motion asking the court to docket his petition and appoint counsel. Because the court had not ruled on the petition within the requisite 90-day period under the Act, the petition was docketed and a public defender was appointed to represent defendant. Following several years of investigation, delay, and continuances, Assistant Public Defender Greg Koster took over the case in 2009 upon the retirement of previously assigned counsel. On July 15, 2009, the court issued an order allowing Koster to inspect the impounded physical evidence in the case, *i.e.*, the red ski mask. On August 19 of that year, an order was entered for the completion of DNA testing on the mask, from which hair samples were taken and compared with defendant's DNA. The results of this test were inconclusive.

¶ 12 In November 2010, Koster filed a motion for leave to withdraw as counsel pursuant to

People v. Greer, 212 Ill. 2d 192 (2004). In his motion, Koster stated that he had consulted with defendant by mail and in person, examined the trial record, and found that none of the claims in the petition had merit. The motion contained a summary of the proceedings at trial, as well as argument as to why the claims had no merit. Koster informed the court of his belief that the issues raised in the petition, including which witnesses counsel should have called to the stand, largely related to matters of trial strategy and thus were not constitutional violations.

¶ 13 On February 18, 2011, defendant filed a *pro se* "Motion to Suppress Greer Motion." In the 31-page document, defendant presented a point-by-point counter to the *Greer* motion, alleging, among other things, ineffective assistance of counsel, prosecutorial misconduct, and errors in both the trial and decision on direct appeal. One day later, the State filed a motion to dismiss the postconviction petition. The State contended that the defendant had failed to meet the standard for a claim of ineffective assistance of counsel under *Strickland* because the challenged actions were matters of trial strategy. It also incorporated by reference the arguments made by Koster in his motion for leave to withdraw. On May 12, defendant filed a 37-page "Motion to Suppress Defense Counsel's Greer Motion, and the States [*sic*] Motion to Dismiss." He largely repeated his previous claims of ineffective assistance, prosecutorial misconduct, and mishandling by police investigators. On August 5, Koster filed a "Response to Petitioner's 'Motion to Suppress,'" in which Koster reiterated his position that defendant's claims were without merit. Regarding trial counsel's failure to present evidence of Eleanor's drug use on the night of the murder, Koster stated that this was a reasonable choice "in light of the police and medical reports." On October 21, defendant filed a 32-page "'Rejoinder' to Defense Counsel's 'Response' to 'Motion to Suppress.'" Defendant made allegations similar to those in his previous filings and expanded upon his claim that Koster failed to provide reasonable assistance.

Defendant asserted that Koster did not adequately consult with him about his contentions, did not approach him about amending the *pro se* petition to "better show his cause," and did not take the necessary procedural steps to withdraw. Enclosed with the filing were copies of affidavits submitted with the petition, as well as two letters from Koster to defendant, dated March 14 and March 31, 2011. Both letters informed defendant that he would be given an opportunity to respond, either personally or through Koster, to the *Greer* motion and the motion to dismiss.

¶ 14 On January 20, 2012, the circuit court held a hearing on all pending motions. Koster initially informed the court that defendant wished to be heard, and the court, having reviewed all of the filings, proceeded without argument on the motions. Finding that defendant's claims "either failed to meet their standards set forth in *Strickland* or [were] matters of trial strategy," the court denied the petition for postconviction relief and granted the State's motion to dismiss. This appeal followed.

¶ 15 **II. ANALYSIS**

¶ 16 The Act sets out a three-stage procedure for defendants to seek collateral relief from a conviction. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). After a defendant files a postconviction petition in the trial court, the court may summarily dismiss the petition at the first stage if it determines that the asserted claims of constitutional error are "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Hommerson*, 2014 IL 115638, ¶ 7. If the court finds that the petition states the "gist of a constitutional claim" (*People v. Boclair*, 202 Ill. 2d 89, 99 (2002)), it advances to the second stage, and counsel may be appointed to represent indigent defendants. 725 ILCS 5/122-4 (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 10. Alternatively, if the court fails to rule on the petition within 90 days of the filing date, the petition automatically advances to the second stage. *People v. Vazquez*, 307

Ill. App. 3d 670, 672 (1999). At this point in the proceedings, the State has the option to file an answer or a motion to dismiss. 725 ILCS 5/122-5 (West 2012); *People v. Domagala*, 2013 IL 113688, ¶ 33. A petition survives second-stage dismissal if it and any accompanying documentation make a "substantial showing" of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). It then advances to the third stage, where the court holds an evidentiary hearing for factfinding and credibility determinations. 725 ILCS 5/122-6 (West 2012); *People v. English*, 2013 IL 112890, ¶ 23. The standard of review for a dismissal at the second stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 17 **A. Ineffective Assistance of Trial Counsel**

¶ 18 We first address the trial court's second-stage dismissal on the merits. In order to properly engage in a review of the trial court's decision, it is necessary to establish the standard by which the court reached that decision. There is some confusion among the parties on this point. The State argues that the dismissal should be affirmed because defendant has not made a "substantial showing" of a constitutional violation. Defendant disagrees, but asserts that even if we find such a showing has not been made, we must still reverse the decision because at least two of defendant's claims are not frivolous or patently without merit. This standard applies in cases where the court has granted a motion for leave to withdraw. *People v. Johnson*, 401 Ill. App. 3d 685, 697 (2010) (holding that counsel should not have been permitted to withdraw because the claims had arguable merit). However, we do not agree with defendant's contention that the court "implicitly" granted the *Greer* motion. On the contrary, at the beginning and end of the hearing, the court clearly indicated that it was ruling on the State's motion to dismiss. The ruling itself makes no reference whatsoever to the *Greer* motion or the requirements for withdrawal. The State is therefore correct in its assertion that defendant "complains about a

ruling the judge did not make." To the extent that defendant argues Masco's and Thorsky's potential testimony presents the "gist of a meritorious claim" and counsel should not have been allowed to withdraw, those arguments are irrelevant.[1] Accordingly, we apply the standard for a motion to dismiss at the second stage—whether the allegations in the petition, liberally construed, make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 381.

¶ 19 Turning to the merits, defendant raises only one issue in appealing the dismissal of the petition. Specifically, defendant asserts that the testimony of William Graff, David Kroll, and Mary Anne Kroll regarding Eleanor Graff's drug use would have cast doubt on Eleanor's out-of-court identification of her son, defendant, as the shooter. He further argues that, had the jury heard evidence that Eleanor was addicted to crack cocaine and was high on the night of the murder, defendant would have been acquitted.

¶ 20 In order to prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the first prong, a defendant must show that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness." *Id.* at 687–88. The second prong requires a showing that counsel's deficient performance prejudiced the defendant. *Id.* at 688. Put another way, ineffective assistance entails a reasonable probability that, but for the errors of counsel, "the result of the proceeding would have been different." *Id.* at 694. Finally, "it is well established that decisions concerning whether to call certain witnesses for the defense are matters of trial strategy left to the discretion of trial counsel." *People v. Banks*, 237 Ill. 2d 154, 215 (2010). Therefore, such decisions are "generally immune" from ineffective assistance claims. *People v.*

[1] In his reply brief, defendant argued alternatively that the court erred in not ruling on the *Greer* motion. Although, in the words of *Greer*, the procedure in the lower court "leaves something to be desired," we do not agree that this was reversible error. Defendant received a reasonable level of representation, which we discuss later in this order, and the petition would have been dismissed at the second stage in either case.

Enis, 194 Ill. 2d 361,378 (2000).

¶ 21 Defendant argues that trial counsel was ineffective for failing to call William Graff to testify about Eleanor's drug use on the night of the shooting. In his affidavit, William stated that he witnessed Eleanor and Monaco smoking crack on six or eight occasions, saw Eleanor separately smoking cocaine on several occasions, and had since spoken with Eleanor about her mental state on the night of the shooting. Further, William stated that he saw Eleanor and Monaco smoking crack on the night of the shooting: "I stopped by Eleanor's apartment that evening, where I witnessed both Ron and Eleanor smoking crack cocaine. They were both very high when I got there, and were still smoking when I left."

¶ 22 This piece of testimony, relating to the night of the shooting and from a witness with personal knowledge, may have been admissible at trial because it bears on Eleanor's ability to observe and correctly identify the shooter. See *People v. Castiglione*, 150 Ill. App. 3d 459, 470 (1986) ("[E]vidence that a witness ingested drugs at or near the time of the crime is admissible to show that her ability to observe, recollect and narrate has been impaired."). However, defendant has failed to overcome the presumption that not introducing this testimony was sound trial strategy given that the testimony would have come from defendant's own father and would potentially have carried little weight with the jury. See *People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011) (counsel could have decided testimony of witness would not be helpful because she was related to defendant); *People v. Barcik*, 365 Ill. App. 3d 183, 192 (2006) (defendant's fiancé likely would not have been considered credible); *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003) (trial counsel not ineffective for failing to call defendant's cousins as alibi witnesses); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (counsel's decision not to call witnesses related to defendant was a matter of trial strategy). On this point, defendant has therefore not made a

substantial showing that counsel's performance did not rise to the level of ineffective assistance of counsel. We also note that Eleanor's identification, though a key part of the prosecution's case, was not the sole piece of evidence on which defendant was convicted.

¶ 23 We now turn to the other witnesses whom defendant claims should have been called at trial to impeach Eleanor's credibility. Defendant also asserts that David and Mary Ann Kroll would have testified at trial as to Eleanor's drug use around the time of the shooting, and that trial counsel was ineffective for failing to call them as witnesses. Accompanying the petition were affidavits from both potential witnesses, in which they stated that Eleanor was a frequent drug user, that drug use affected her relationship with her family, and that it interfered with her employment. Taken as true, these statements do not make a substantial showing that counsel was deficient. The State argues, and we agree, that nothing in either affidavit indicates that Eleanor was under the influence of drugs or otherwise impaired on the night of the shooting, such that a jury would doubt the credibility of her identification. Moreover, it may have been improper for trial counsel to introduce evidence of a witness's use of drugs other than at or near the time of the incident. *People v. Stiff*, 185 Ill. App. 3d 751, 755 (1989). While counsel may use evidence of narcotics addiction to attack the credibility of a witness on cross-examination (*People v. Pitchford*, 314 Ill. App. 3d 72, 80–81 (2000)), the affidavits here indicate that Mary Ann Kroll was present on a few occasions when Eleanor and the victim used drugs, but neither establishes that Eleanor was not capable of correctly identifying the shooter. Moreover, both affiants indicated that Eleanor's drug and alcohol use increased dramatically in the days and weeks *after* Monaco's shooting. Finally, the record shows that trial counsel was aware of potential testimony regarding Eleanor's impairment. Counsel filed a pretrial motion *in limine* to exclude Eleanor's spontaneous declarations based on her alleged cocaine use, and during

argument on the motion counsel informed the court that Mary Ann Kroll was prepared to testify about Eleanor's drug and alcohol consumption. This suggests that counsel was aware of Mary Ann's testimony and made a strategic choice not to call her as a witness. We find that because the affidavits do not specifically relate to Eleanor's condition on the night of the shooting, and because defendant has failed to overcome the strong presumption that not calling Mary Ann Kroll at trial was within the realm of reasonable trial strategy, counsel's performance was not deficient and defendant failed to make a substantial showing that counsel was ineffective for not calling David and Mary Ann to testify.

¶ 24 Having considered the merits of defendant's petition, we next address the level of representation provided by postconviction counsel.

¶ 25 **B. Representation by Postconviction Counsel: Compliance with Rule 651(c)**

¶ 26 Courts have long recognized that defendants have no constitutional right to representation in postconviction proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007); *People v. Partee*, 268 Ill. App. 3d 857, 868 (1994). Because the right to counsel is wholly statutory, defendants are entitled only to a "reasonable" level of assistance. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), postconviction counsel must fulfill three responsibilities: (1) consult with defendant in person or by mail to assess the claims, (2) review the record of proceedings at trial, and (3) amend the *pro se* petition, if necessary, to ensure that defendant's claims are adequately presented to the court. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). By filing a Rule 651(c) certificate, an attorney creates a rebuttable presumption that she has executed her duties under the rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. The failure to file a certificate may be excused if the court finds, through an examination of the record, that counsel provided a reasonable level of assistance. *People v.*

Peoples, 346 Ill. App. 3d 258, 262 (2004). If, however, the record shows that counsel has not met this standard, the judgment must be reversed, regardless of the viability of the underlying claims. *Suarez*, 224 Ill. 2d at 52.

¶ 27 Defendant contends in his reply brief that counsel did not fulfill the duties of Rule 651(c). Ordinarily, a defendant must raise all arguments in the opening brief, or else forfeit consideration of those issues. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief * * *."); Ill. S. Ct. R. 612(i) (eff. Feb. 6, 2013) (applying Rule 341 to criminal appeals). Nonetheless, we examine the record to determine counsel's compliance with the rule, although we also note that neither party has identified any specific failure by postconviction counsel. *People v. Treadway*, 245 Ill. App. 3d 1023, 1027 (1993) (reversing and remanding for new counsel to comply with Rule 651(c), despite neither party having raised the issue).

¶ 28 Initially, we reject defendant's argument that counsel's motion to withdraw was "improper" and "amounted to a 651(c) violation." However, the State is not quite correct in its assertion that "withdrawing as counsel was the only ethical course." While counsel was not strictly required to seek leave to withdraw, there was nothing improper in his doing so. Generally, once counsel has investigated the claims and found them to be without merit, there are two options. The first option is to stand on the *pro se* petition and inform the court of the reasons why it was not amended. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). The second option is to withdraw as counsel. *Id.* The question of whether postconviction counsel should be able to withdraw was considered at length in *Greer*, in which our supreme court held:

> "We are confident that the legislature did not intend to require appointed counsel to continue representation of a postconviction defendant

> after counsel determines that defendant's petition is frivolous and patently without merit. Nothing in the Act requires the attorney to do so, and the attorney is clearly prohibited from doing so by his or her ethical obligations." *Greer*, 212 Ill. 2d at 209.

The logic of defendant's argument seems to be that counsel should not have moved to withdraw because his assessment of the merits was incorrect, and that this equates to a violation of the rule. Defendant, however, confuses the issues. As the court held in *Suarez*,

> "[O]ur analysis * * * does not depend upon whether the *pro se* or supplemental petitions in this case did or did not contain potentially meritorious issues. Our Rule 651(c) analysis has been driven, not by whether a particular defendant's claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized." *Suarez*, 224 Ill. 2d at 51.

Although the *Greer* motion reflects counsel's informed assessment of the claims, it serves only to aid the trial court, which then determines whether the claims have arguable merit. See *Anders v. California*, 386 U.S. 738, 744 (1967) (holding that, procedurally, after counsel makes a finding of frivolousness and requests permission to withdraw, "the court—not counsel—then proceeds * * * to decide whether the case is wholly frivolous"). We recognize that the *Anders* withdrawal procedure governs in cases where representation is *constitutionally* guaranteed. However, on this point, the procedure is the same in postconviction proceedings. See *People v. Johnson*, 401 Ill. App. 3d 685, 694 (2010) ("[I]n determining whether to allow counsel to withdraw, the court must determine whether the record supports counsel's assertion that the

petition is frivolous or patently without merit."). The one additional component of the postconviction court's inquiry is whether the record shows that counsel has satisfied Rule 651(c). *People v. Kuehner*, 2014 IL App (4th) 120901, ¶ 71. Given that filing a *Greer* motion invites the court to evaluate counsel's performance, it would make no sense to say, as defendant does, that filing a *Greer* motion may itself constitute inadequate performance. As discussed further below, the trial court did not rule on the motion. This had the effect of essentially forcing counsel to stand on the *pro se* petition. In either case, the claims proceed under the parameters of the Act. *Pace*, 386 Ill. App. 3d at 1062.

¶ 29 As to the first two prongs of 651(c), the record demonstrates that counsel fulfilled his duties, and defendant does not argue otherwise. An examination of Koster's motion, reply, and correspondence with defendant reveals that he communicated with defendant both in person and by mail to ascertain the nature of the claims. While the initial *Greer* motion incorporates the language of the rule without going into greater detail, Koster's reply contains the following description of his efforts: "Affiant has a) visited Petitioner three times at the Dixon Correctional Center, b) had numerous discussions about the case with Petitioner and his parents in person, my [*sic*] phone, and by mail, [and] c) has repeatedly offered to review Petitioner's *pro se* filings and to offer suggestions prior to filing." Koster also stated in his *Greer* motion that he had "examined the record of the proceedings at the trial (and other material supplied by the petitioner)." The level of specificity in counsel's filings corroborates this assertion and clearly demonstrates that he complied with his duty to investigate and ascertain defendant's claims.

¶ 30 The only possible issue regarding Rule 651(c) is counsel's compliance with the third prong, amending the *pro se* petition if necessary to ensure claims are adequately presented. Counsel in this case did not file an amended petition. Defendant claims, without explanation,

that counsel failed to adequately present his claims by moving to withdraw. However, the third prong requires only that counsel make any necessary amendments to the petition. The failure to amend is not a 651(c) violation where the defendant does not "establish that such failure resulted in the omission of a significant allegation or suggest in what manner the petition should have been amended." *People v. Rankins*, 277 Ill. App. 3d 561, 564 (1996).

¶ 31 As noted above, defendant does not specify exactly what actions counsel should have taken in order to adequately present his claims. He cites *People v. Johnson*, 154 Ill. 2d 227 (1993), in which the court was faced with a situation where counsel had openly admitted he had not even made an attempt to obtain support for otherwise unsupported claims. This left the circuit court with no choice but to dismiss the petition. *Johnson*, 154 Ill. 2d at 245. On appeal, the court instructed that, "at a minimum, counsel had an obligation to attempt to obtain evidentiary support for claims raised in the post-conviction petition." *Id*. The court also held that, in the ordinary case, a court faced with a motion to dismiss an unsupported petition "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," unless this presumption is "flatly contradicted" by the record. *Id.* at 241.

¶ 32 The record shows that counsel fulfilled his duties to the extent possible. Defendant mentions the issue of a missing affidavit from Kelly Masco, a man alleged to have been with defendant and Bustos on the night of the murder, but who told police he had been home all night. However, defendant does not argue that counsel should have attempted to procure it. He states in his reply brief, "had Graff's post-conviction attorney recognized that this claim at least stated the gist of a meritorious claim of ineffective assistance—rather than dismissing Masco's potential testimony as 'collateral'—counsel *would have been* under an obligation to at least

attempt to secure an affidavit from Masco" (emphasis added). Defendant argues we may not presume counsel made such an attempt.

¶ 33 Regardless of the applicability of *Johnson*, we find that the record makes an affirmative showing of reasonable assistance. On the issue of potential testimony from Masco and Thorsky—neither of whom have signed a sworn affidavit—Koster informed the court in his *Greer* motion that "neither Masco nor Thorsky has answered the door to repeated attempts by a Cook County Public Defender investigator." And while claims of ineffective assistance for failing to call a witness must be accompanied by an affidavit from the witness (*People v. Enis*, 194 Ill. 2d 361, 380 (2000)), all that counsel could have been required to do was to make an attempt. To be clear, there is no requirement that counsel *must* amend the petition. *People v. Greer*, 212 Ill. 2d at 205 ("Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf."); *Kuehner*, 2014 IL App (4th) 120901, ¶ 75 ("Defendant concedes that * * * the Rule 651(c) requirement that counsel make any amendments to the *pro se* petition necessary for an adequate presentation of defendant's contentions does not apply when, as here, counsel deems defendant's claims to be frivolous and patently without merit."). Our ruling is further supported by the fact that the State's motion to dismiss and the circuit court's ruling indicate the dismissal of the petition was based on a failure to meet the standard for ineffective assistance claims, not on the absence of evidentiary support.

¶ 34 Finally, it is important to note that not only was counsel not required to make any amendments, he could not have done so in good faith, given his evaluation of the merits. *Greer*, 212 Ill. 2d at 205. In *Greer*, the court instructed that the extent of postconviction counsel's 651(c) obligations is limited by the ethical standards of Supreme Court Rule 137 (eff. July 1,

2013). *Id.* Rule 137 provides:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137.

Thus, under the language of *Greer*, once counsel in this case determined that the petition lacked merit, he was ethically *prohibited* from amending or supplementing the petition. See, *e.g.*, *People v. Elken*, 2014 IL App (3d) 120580, ¶ 30.

¶ 35 We emphasize that our review of counsel's performance is distinct from our discussion of the underlying merits. See *Suarez*, 224 Ill. 2d at 51; *Cf. People v. Profit*, 2012 IL App (1st) 101307, ¶ 23 (distinguishing *Suarez* on the ground that where counsel files a 651(c) certificate, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition"). Because the record shows defendant received the level of assistance to which he was statutorily entitled, we decline to reverse and remand the case for appointment of new counsel.

¶ 36 **III. CONCLUSION**

¶ 37 For all of the foregoing reasons, we affirm the judgment of the circuit court granting the State's motion to dismiss the petition.