FIRST DIVISION
February 23, 2015

No. 1-12-3360
2015 IL App (1st) 123360-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
RICKEY ROBINSON,	)	98 CR 3873
	)	
	)	Honorable Carol M. Howard,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Defendant did not demonstrate a reasonable probability that the outcome of his trial would have been different if trial counsel had filed a motion to suppress his statement because three witnesses testified that defendant told them of his role in the offenses. Defendant did not rebut the presumption of postconviction counsel's reasonable assistance when the defendant's complaint of counsel's performance—failure to include facts of alleged police coercion in an amended postconviction petition—was absent from his original petition.

¶ 2 Defendant was charged with first degree murder, armed robbery, aggravated vehicular hijacking, concealment of a homicidal death, and kidnapping related to the death of Nicole Giles.

Two co-defendants, Marques Northcutt (Northcutt) and Peter Andrew Ganaway (Ganaway) were also charged and tried for their involvement in the same. Following a bench trial, defendant was convicted of first degree murder, aggravated vehicular hijacking, armed robbery and concealment of a homicide. Defendant was sentenced to a term of natural life for first degree murder, a consecutive 30-year term for armed robbery, a concurrent 30-year term for aggravated vehicular hijacking, and a consecutive 5-year term for concealment of a homicide. Defendant's conviction and sentences were affirmed on direct appeal and his petition for leave to appeal to the supreme court was denied on February 5, 2003.

¶ 3 **I. BACKGROUND**

¶ 4 At trial, the State called Maisha Muhammad (Muhammad), Leonard Tucker (Tucker), and Michelle McClendon (McClendon).

¶ 5 Muhammad, the best friend of defendant's sister, testified that on the morning of December 29, 1997, around 10:30 a.m., defendant's sister called her and asked her if Muhammad had permission to use her grandmother's car, after which Muhammad drove her grandmother's car to defendant's house and saw defendant, defendant's sister, Ganaway, and Tucker, among others. She further testified that she then left the house with Ganaway and defendant, who was holding a gasoline can, and drove them to a gas station. Muhammad assumed that defendant paid the attendant but she did not see this first-hand. She saw that defendant had the gasoline can when he returned to the car. Muhammad recounted that she then drove around several streets near a viaduct and that defendant directed her to change directions several times and ultimately to stop the car. At that point, defendant and Ganaway got out of the car with the gasoline can and headed toward an alley. Muhammad testified that after five or ten minutes, the two men jogged back to the car and all three returned to defendant's house, where Muhammad and defendant had

a conversation. In that conversation, Muhammad asked defendant "what was going on," to which defendant ultimately asked if Muhammad remembered "Nicky." When Muhammad told defendant she remembered Nicky, defendant replied "[t]hat's whose body we burned."

¶ 6 Tucker testified that he was the boyfriend of defendant's sister and that on December 28, 1997, Tucker was at defendant's house when defendant and his two friends had a conversation about Nicole Giles. While Tucker and defendant were alone, defendant told Tucker that he had killed "her." When Tucker asked "killed who?" defendant responded "Nicole." Tucker testified that he told defendant to "stop playing," to which defendant responded "[t]hat's on stone." Tucker believed that phrase was a way of saying that the speaker was telling the truth. Tucker further testified that defendant told him that he had jumped out of a car and shot Nicole in the head. Defendant revealed to his sister and Tucker that he and his two friends did not use gloves. Tucker and defendant's sister told defendant that the three men's fingerprints would be on her body and Tucker also added "[y]ou all are stupid." Tucker went on to testify that defendant explained "we put her body in a garbage can" and that the gun was dropped off on a street. Tucker did not believe defendant's statements at this time. Tucker explained that early the following morning, on December 29, 1997, he was again at defendant's house when he saw defendant—with a red gasoline can—and Ganaway come through the door and heard defendant say, "It's done. [W]e did it. [W]e burned her body." Tucker testified that he believed what he heard at this time.

¶ 7 McClendon, defendant's girlfriend at the time of the events in question, testified that during the evening of December 29, 1997, she was at defendant's house with Ganaway and defendant when they revealed that they had burned the victim's body. When they were alone, McClendon asked defendant if he had a conscience and if he and his friends knew what they

were doing. She also asked how the weapon was put in the victim's car. McClendon further testified that defendant told her the following information about how the incident happened at the viaduct. One of his friends said he had to use the bathroom, so the victim pulled over to let him out. Defendant and the other friend then pulled the victim out of the car and defendant shot her in the head. McClendon testified that she did not believe defendant at this time, but on December 30, 1997, after defendant left for the police station, McClendon saw the news on television and started to believe what defendant and his friends had been saying. On December 31, two police officers arrived at McClendon's house at 3 a.m. and she went with them to the police station.

¶ 8 Detective Michael McDermott (the Detective) testified about conversations with the defendant at the police station and that defendant was given his Miranda rights. The Detective also testified that he told defendant about their investigation, including that they had recovered the gun, after which defendant made a statement admitting to shooting and robbing the victim.

¶ 9 Additionally, Assistant State's Attorney John Karnezis (ASA) testified that he advised the defendant of his constitutional rights, that defendant answered his questions during interviews at the police station, and that defendant told him he had been treated "okay" by the police. The ASA read into the record, without objection, a 70-page statement defendant gave to him and the Detective. A summary of that statement was included in the order addressing defendant's direct appeal, *People v. Robinson*, No. 1-00-2981 (unpublished order pursuant to Supreme Court Rule 23). A summary of defendant's statement is below. *Id.* at ¶ 3.

> "The evidence at trial included defendant's court reported statement which indicated that sometime prior to December 28, 1997, he and two codefendants, Marques Northcutt and Peter Ganaway, decided to rob Nicole Giles (the victim) because they believed she would have a large sum of money on her. They then decided that, because she knew them, they

> would also kill her. The three formulated a plan for carrying out the crime and then put it into action. On December 28, 1997, pursuant to the plan, defendant contacted the victim and asked her to come over. The three men entered the victim's vehicle. While the victim was driving, Northcutt indicated that he had to urinate. The victim stopped under a viaduct and Northcutt exited the car. Ganaway pulled the victim out of the car and defendant shot her in the head. A bag was placed over the victim's head and she was pushed back into the car. Defendant and codefendants removed $50 from the victim's pocket and placed her into a garbage can. They then ditched the car. The next day after learning that fingerprints can be left on clothing, defendant and Ganaway returned to the garbage can. Ganaway poured gasoline into the can. Defendant lit a bandana soaked with gasoline and threw it into the can."

The ASA indicated that both he and defendant reviewed and signed the statement. The State also called a Deputy Medical Examiner in Cook County, who testified that an autopsy of the victim revealed that the body was extremely burned and that the cause of death was a gunshot to the victim's neck.

¶ 10 Two other State witnesses testified that they saw a shooting at the viaduct on December 28, 1997, but could not identify the assailants. These witnesses saw an assailant shoot a victim who had been sitting on the ground near the car and then observed a bag being placed over the victim's head and the body being pulled back into the car. They observed two, not three, assailants.

¶ 11 Another State witness also testified that he saw two assailants, one of whom had a gas can, enter an alley near his house. The witness then observed both assailants run back to a parked

car a few minutes later. This witness also heard fire engines, sirens, and police cars and saw smoke a few minutes after his earlier observations.

¶ 12 **II. POSTCONVICTION PROCEEDINGS**

¶ 13 In November 2003, defendant wrote to the Cook County public defender's office and the Clerk of the Illinois Supreme Court inquiring about the status of his petition for leave to appeal. In February 2004, defendant received replies from both offices informing him that his petition had been denied on February 5, 2003.

¶ 14 Defendant filed a *pro se* postconviction petition on January 26, 2005. The trial court advanced the postconviction petition to the second stage and postconviction counsel was appointed on April 22, 2005. On March 11, 2010, defendant's postconviction counsel filed a certificate pursuant to Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). The record reveals that postconviction counsel spoke with defendant on April 14, 2011, and explained that he was "not able to amend or supplement" defendant's *pro se* postconviction petition. On October 7, 2010, the State moved to dismiss the petition. Sometime between May and July of 2011, defendant filed a motion requesting to proceed *pro se.*[1] On July 13, 2011, postconviction counsel made several representations to the trial court. Counsel stated: "Judge, I believe I did adequately investigate the case, interview witnesses, read the transcripts. I think it's more an issue that [defendant] does not agree with my conclusions," and "[w]e talked. I looked at the police reports. Those are the basis of my investigations. Still in all I could not come up with anything to further supplement his claims." The trial court inquired if there were meritorious claims or witnesses not listed in the police reports that should be investigated. Counsel informed the court that he investigated witnesses and talked to the people defendant suggested "as well as what the record

[1] Two copies of this motion are in the record. One is stamped "received" on May 26, 2011, another is stamped "received" on June 27, 2011. The proof of service attached to June copy is file stamped on July 5, 2011. Both motions are identical.

suggested" and that he had nothing to add. On October 12, 2011, postconviction counsel was given leave to withdraw and defendant was given leave to proceed *pro se*.

¶ 15 On November 14, 2011, defendant filed a *pro se* motion "to deny state's motion to dismiss and allow defendant to amend petition." On November 17, 2011, defendant was given leave to file an amended *pro se* postconviction petition. On March 30, 2012, defendant filed an amended *pro se* postconviction petition. The State moved to dismiss the amended petition, relying on its motion to dismiss the original petition.

¶ 16 On October 12, 2012, the trial court granted the State's motion to dismiss, holding that defendant failed to make a substantial showing of a constitutional violation. The trial court first found that while defendant's original *pro se* postconviction petition was untimely, its untimeliness was not due to his culpable negligence. Addressing the merits of his ineffective assistance of counsel claim in the amended postconviction petition, the trial court found that a motion to suppress defendant's confession would have been meritless and that the outcome of the trial would not have been different if trial counsel had filed the motion. Defendant now appeals.

¶ 17 **III. ANALYSIS**

¶ 18 Defendant raises two arguments on appeal. First, defendant argues that his amended *pro se* postconviction petition made a substantial showing of a constitutional violation—that his trial counsel was ineffective for failing to move to suppress his coerced confession—and therefore the trial court erred in granting the State's motion to dismiss.

¶ 19 In response, the State argues that the defendant's original *pro se* postconviction petition is untimely and it has not been shown that its untimeliness was not due to defendant's own culpable negligence. Beyond untimelieness, the State argues that defendant failed to make a substantial showing of ineffective assistance of trial counsel for two reasons. First, trial counsel's

performance was not deficient because the filing of a motion to suppress is a question of trial strategy. Second, defendant was not prejudiced by any deficient performance because he could not demonstrate that a motion to suppress would have been successful, and even if the motion had been successful, he could not demonstrate that the outcome of trial would have been different.

¶ 20 Defendant's second and alternative argument on appeal is that postconviction counsel rendered unreasonable representation for failing to shape defendant's claim that trial counsel was ineffective for failing to move to suppress his coerced confession into appropriate legal form. For this argument, defendant relies on *People v. Turner*, 187 Ill. 2d 406 (1999), in which the court found postconviction counsel provided unreasonable assistance when, among other failures, he failed to include essential elements of defendant's constitutional claims. *Turner*, 187 Ill. 2d at 412-14. See also Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984) (postconviction counsel must make amendments necessary for "an adequate presentation of petitioner's contentions").

¶ 21 In response, the State contends that defendant has forfeited this claim because he elected to proceed *pro se* and filed an amended petition after postconviction counsel informed the court that he would not be amending defendant's original petition. Furthermore, the State contends that postconviction counsel provided reasonable representation, as evidenced by his 651(c) certificate, and nothing in the record supports defendant's claims of a coerced confession.

¶ 22 A. Timeliness of the Petition

¶ 23 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) provides that if "a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c)

(West 2004). Culpable negligence is greater than ordinary negligence and "is akin to recklessness." *People v. Rissley*, 206 Ill. 2d 403, 420 (2003); *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). "[W]hether delay is due to culpable negligence depends not only on when the claim is discovered [by the defendant] but [also] on how promptly the defendant takes action after the discovery." *People v. Davis*, 351 Ill. App. 3d 215, 218 (2004). The sole obligation for filing a timely postconviction petition remains with the defendant. *People v. Lander*, 215 Ill. 2d 577, 588-89 (2005).

¶ 24 We review a trial court's conclusion as to whether established facts demonstrate culpable negligence *de novo*. *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008). We will reverse a trial court's findings of fact on whether a petition's untimeliness was due to defendant's culpable negligence only if those findings are manifestly erroneous. *People v. Ramirez*, 361 Ill. App. 3d 450, 452 (2005). The trial court's order in this case states that "the combination of the late notice from petitioner's appellate counsel and his inquiry to the Illinois Supreme Court about his petition for leave to appeal indicate that petitioner attempted to gather information about his case, although he only did so [] once the deadline had passed." We conclude that these findings of fact are not manifestly erroneous and we agree with the trial court's conclusion that the established facts demonstrate that the delay was not due to defendant's culpable negligence.

¶ 25 In the case at bar, defendant's petition for leave to appeal was denied on February 5, 2003. Defendant then had 90 days, or until May 6, 2003, by which to file a writ of *certiorari*. See Sup. Ct. R. 13(1) (eff. May 1, 2003) ("A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.") The deadline for his postconviction petition was November 6, 2003, or

six months from the deadline for filing a writ of *certiorari*. 725 ILCS 5/122-1(c) (West 2004). Defendant filed his postconviction petition 11 months beyond the deadline, on January 26, 2005.

¶ 26 To establish that the petition's untimeliness was not due to his own culpable negligence, defendant contends that his appellate attorney never informed him of the denial of his petition for leave to appeal. The record reveals that defendant sent a letter to the public defender's office inquiring about the status of his petition for leave to appeal on or about November 21, 2003, and defendant sent a second letter to the Illinois Supreme Court around January 26, 2004 with the same inquiry. The respective responses, dated February 19, 2004, and February 5, 2004, informed defendant that his petition for leave to appeal was denied a year earlier. The public defender office's response also informed defendant that his appellate counsel was no longer in the appeals division of that office and that the office's response had been delayed because of a fire in the building. That letter also said that the trial court may still consider defendant's petition if he had a reason for late filing.

¶ 27 It is undisputed that defendant's petition, filed in January 2005, was not filed within the time limits set forth in the Act. The State argues that the delay was due to defendant's culpable negligence. We do not agree. In *People v. Wilburn*, 338 Ill. App. 3d 1075 (2003), and *People v. Hernandez*, 296 Ill. App. 3d 349 (1998), the court found that delays of 16 and 11 months, respectively, when a change in the law established the defendants' postconviction claims, were delays not due to defendants' culpable negligence. While the instant case does not involve a change in the law, the fact that delays of 11 months or longer may not—without more evidence—amount to culpable negligence is significant. In this case, we have more evidence. First, defendant wrote two letters inquiring about the status of his petition for leave to appeal within weeks of the deadline for filing a timely postconviction petition. The record supports the

conclusion that defendant was only informed of the denial of his petition for leave to appeal in February 2004 after he received responses to his letters. Defendant then prepared his own postconviction petition in 11 months, as did the defendant in *Hernandez*. Furthermore, defendant's inquiry to the supreme court, after not hearing from the public defender's office, demonstrates that defendant's conduct did not involve a "disregard of the consequences likely to result from [his] actions" (See *Boclair*, 202 Ill. 2d at 106 (citing Black's Law Dictionary 1056 (7th ed. 1999)), nor was his conduct akin to recklessness (See *Rissley*, 206 Ill. 2d at 420), but rather his conduct was a good faith effort to gather necessary information. Finally, the public defender's response to defendant's letter indicated a possibility that the court would consider a late petition. This information may have given defendant the impression that what was contained in the letter—his appellate attorney leaving the appeals division and the fire in the public defender's office—was sufficient "reason" for his late filing. See *Rissley*, 206 Ill. 2d at 421-22 (defendant was not culpably negligent when he filed a late postconviction petition after reasonably relying on counsel's erroneous advice).

¶ 28 B. Second Stage Proceedings Under the Post-Conviction Hearing Act

¶ 29 At the second stage of postconviction proceedings, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35. A claim is said to make a "substantial showing" of a constitutional violation if its allegations, as supported by the independent corroborative evidence, would entitle the petitioner to relief if proven at an evidentiary hearing. *Id*. The dismissal of defendant's postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 30 1. Ineffective Assistance of Trial Counsel

¶ 31 To determine if defendant was denied effective assistance of counsel, we apply the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant must show both that his counsel was deficient and that this deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687. To establish deficient performance, a defendant must prove that trial counsel's performance, as judged by an objective standard of competence under prevailing professional norms, was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *People v. Evans*, 186 Ill. 2d 83, 93 (1999). In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed. *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008) (citing *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)). If either prong of the *Strickland* test is not met, defendant's claim fails. *People v. Perry*, 224 Ill. 2d 312, 342 (2007). In other words, "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice * * * that course should be followed." *People v. Albanese*, 104 Ill. 2d 504, 527 (1984) (citing *Strickland*, 466 U.S. at 670). We find that a reasonable probability does not exist that the outcome of the trial would have been different when three witnesses testified at trial that defendant told each of them of his culpability in the robbery and murder of Nicole Giles.

¶ 32 All three witnesses, McClendon, Tucker, and Muhammad, testified at trial about what defendant had told them concerning his involvement in Nicole's death. Tucker testified that on December 28, 1997, he was at defendant's house when defendant told him he killed Nicole. Tucker further testified that defendant said he jumped out of a car and shot her in the head.

Tucker went on to testify that the following day, December 29, 1997, defendant had a gasoline can in his hand and said "[i]t's done. [W]e did it. [W]e burned her body." Similarly, Muhammad testified that she drove defendant, who was holding a gasoline can, and Ganaway to an alley where they spent five or ten minutes and then came jogging back to her car. When Muhammad questioned what they were up to, defendant ultimately told her that they burned Nicole's body. Finally, defendant's girlfriend McClendon testified that defendant described the incident as follows: one of his friends said they had to use the bathroom, so the victim pulled over to let him out, and then he and Ganaway pulled her out of the car and defendant shot her in the head. McClendon also found out how they got a weapon into the victim's car and that they had subsequently burned her body. In sum, all three witnesses' testimonies were consistent with one another, none of the three witness equivocated during their testimony, and the autopsy was consistent with the description of the crime as it was described by the three witnesses.

¶ 33 Defendant implies that by not volunteering information to police, the witnesses were "under police pressure," and because Tucker and Muhammad were implicated in the crime, they were motivated to blame defendant. But, defendant fails to acknowledge that one witness was his girlfriend and the two other witnesses were close personal contacts of defendant's sister who had known him for a number of years before the events in question. Moreover, simply because Tucker did not volunteer the information about the crime until the police confronted him with evidence does not discredit all of his testimony as defendant suggests. Nothing in the record reveals that Tucker believed his knowledge of defendant's actions made him vulnerable to police pressure. Neither Tucker nor Muhammad's testimony revealed that they participated in the planning of the crime or had any knowledge of it prior to defendant's revelations. Muhammad

testified that she did not know what the defendant and Ganaway were doing when she drove them to the location of the garbage can.

¶ 34 Coupled with this information is the testimony of the two additional witnesses who saw two people shoot someone under a viaduct on December 28, 1997. On December 29, 1997, another witness observed two people get out of a car, enter an alley and a few minutes later, jog back to the car. One of the individuals was observed with a gasoline can. This witness also saw smoke and heard fire engines come from the alley five or ten minutes after the individuals left in their car. McClendon, Tucker and Muhammad's testimonies, the additional witnesses whose testimony corroborated the consistent testimony of McClendon, Tucker, and Muammad, and both the burning garbage can and autopsy demonstrate that there is not a reasonable probability that the outcome of the trial would have been different even if trial counsel had been successful on a motion to suppress. Therefore, because we find that defendant was not prejudiced, he did not make a substantial showing that his trial counsel was ineffective. We affirm the dismissal of defendant's postconviction petition on this ground.

¶ 35 2. Unreasonable Assistance of Postconviction Counsel

¶ 36 We first address the State's contention that defendant forfeited his right to postconviction counsel and cannot now challenge the reasonableness of that assistance on appeal. The facts relevant to this preliminary contention are as follows. Postconviction counsel was appointed on April 22, 2005. On July 7, 2009, postconviction counsel represented to the court that he had visited and spoken with defendant one week earlier. On March 11, 2010, defendant's postconviction counsel filed a 651(c) certificate. On October 7, 2010 the State moved to dismiss the petition. In a letter to defendant dated April 28, 2011, postconviction counsel referenced a

visit he had with defendant two weeks earlier in which he explained that he was "not able to amend or supplement" defendant's *pro se* postconviction petition.

¶ 37 Sometime between May and July 2011, defendant filed a "motion to proceed on post conviction proceedings pro se and to have the office of the public defender removed from petitioner's case." On October 12, 2011, postconviction counsel was allowed to withdraw and defendant was given leave to proceed *pro se*. On November 8, 2011 defendant filed a "motion to deny the State's motion to dismiss and allow defendant to amend petition." On November 17, 2011, defendant was given leave to file an amended *pro se* postconviction petition.

¶ 38 We find that defendant did not forfeit this argument for consideration on appeal. Postconviction counsel filed a 651(c) certificate in March 2010 and only the following year, did the defendant file a motion requesting leave to proceed *pro se* and to dismiss postconviction counsel. Defendant knew at least since his meeting with postconviction counsel in April 2011 that counsel would not amend his petition. On his own behalf, defendant sought to formalize his intention to amend his petition sometime after postconviction counsel informed him he would not be amending the petition. The fact that counsel was given permission to withdraw after defendant had requested to proceed *pro se* cannot result in forfeiture when defendant had been represented by postconviction counsel for the previous five years.

¶ 39 We now turn to the substance of defendant's second issue. On appeal, defendant argues that postconviction counsel rendered unreasonable representation when he failed to shape defendant's claim—trial counsel was ineffective for failing to file a motion to suppress his coerced statement—into appropriate legal form or attach any evidentiary support for the claim such as the *Report of the Special State's Attorney* or an affidavit from defendant himself. Our

review of an attorney's compliance with a supreme court rule, such as Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), is *de novo*. *People v. Bell*, 2014 IL App (3d) 120367, ¶ 9.

¶ 40 In his original postconviction petition, defendant alleged that "[t]rial counsel rendered ineffective assistance of counsel when he failed to file [a] motion to suppress statement." Defendant complained that he was subjected to "coercion, intimidation, trickeration [*sic*] and deceit by chicago detectives and assistant state's attorneys…" Defendant explained that on December 30, 1997, he arrived at the police station "voluntarily for an interview" and "after answering questions and giving an exculpatory statement [he] was read the Miranda rights and placed under arrest." He stated that he was taken the "area 2 police station" and then to a different police station. Defendant returned to area 2 around 2 a.m. and at that point gave the statement. He further explained that the ASA and Detective interviewed defendant at 4:30 a.m. and again at 6 a.m. and that the ASA testified to another interview that had occurred without the Detective at some time in between the other two. In faulting trial counsel for his failure to file a motion to suppress the statement, defendant stated "it was clear that [his] statement was formed and put together by the assistant state's attorneys and detectives involved in the case. *** The record reflects that [defendant] was interviewed many times by several different assistant state's attorneys and several chicago police detectives, each a veteran in their profession, but none seemed to take any notes of the interview or the conversations." Defendant alleged that "the language and words in the court reported statement is the language police officials use in describing a situation on a report or when testifying" and was "not the way young black urban men express theirselves [*sic*]." The original petition was 20 pages long, not including an "appendix" which contained an affidavit from defendant himself. That affidavit did not contain any facts of the alleged coercion defendant experienced from the Detective and ASA.

¶ 41 In relevant part, defendant's amended *pro se* postconviction petition mirrors the allegation in his original postconviction petition that his statement was "formed" by the police and ASAs. He maintained, as he did in the original petition, that trial counsel failed to file a motion to suppress defendant's statement even though defendant was "subject to coercion, intimidation, trickeration [*sic*] and deceit by Chicago detectives and ASA's"; that the ASA "tricked [defendant] into believing a court reported statement was no different from a written or oral statement"; and that the ASA promised that defendant could call his girlfriend, McClendon. He also reiterated that during multiple interviews no one took notes.

¶ 42 Defendant also attached an affidavit to his amended *pro se* postconviction petition in which he proffered, for the first time, new factual details behind the alleged coercion. In the affidavit, defendant explained that "after hours of stop and go questioning, [the Detective] finally said he didn't have anything to keep me [at the police station] and if I'd go and take a polygraph examination and no deceit is detected I'd be free to leave" and that he was told no deceit was detected. He further explained that on the way back to Area 2 he was interrogated, and upon arriving, was led to an interview room and left there with the door locked. Defendant averred that the Detective came into the interview room, and referencing a past encounter with defendant, said he knew "all about the murder [defendant] was just acquitted of" and that the acquittal was "a slap in the face to the police department." Defendant further stated that the Detective threatened to drive defendant "to a[n] undisclosed alley somewhere, pop a couple slugs in [defendant] and report that when they came to apprehend [the Detective] for questioning," the Detective would say that defendant reached for something and then the Detective shot at him. According to defendant's affidavit, the Detective gave defendant a few minutes to think about this potential scenario. During those few minutes, defendant recalled a situation very similar to

the one described by the Detective in which a man was shot and killed in an alley. Defendant's affidavit stated that the coercion ensued and that the ASA promised to give him a phone call once he and the Detective were satisfied with defendant's statement. In the affidavit, defendant denied any knowledge of or involvement in the murder of the victim and averred that "[a]ny out of court statement signed by me concerning the murder of Nicole Giles as a confession thereto are false and fabricated solely through duress and coercion obtained with threats by Chicago Police detectives who questioned me about the murder of Nicole Giles and promises from the ASA on December of 1997." Finally, the affidavit affirmed that defendant "made each trial, appellate and appointed post conviction attorney's aware of [the Detective] and [ASA's] misconduct in the illegal obtaining of my statement."

¶ 43 At the second stage of postconviction proceedings, the relevant question is whether the allegations in defendant's petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation that mandates an evidentiary hearing. 725 ILCS 5/122-1 *et seq.* (West 2004); *People v. Chears*, 389 Ill. App. 3d 1016, 1024 (2009). All well-pleaded facts in the petition and affidavits are taken as true, but assertions that amount to conclusions add nothing to the required showing to trigger an evidentiary hearing under the Act. *Chears*, 389 Ill. App. 3d at 1024.

¶ 44 Postconviction counsel is appointed at this stage in order to provide a "reasonable level of assistance" to petitioners (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), but the right to assistance of counsel in postconviction proceedings is not one mandated by the Constitution, but one of "legislative grace." *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003). See also *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (finding that there is no "constitutional right to counsel when mounting collateral attacks upon *** convictions"). To ensure that the "reasonable assistance"

standard is met, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes three mandatory requirements on postconviction counsel. The rule requires:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has [1] consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, [2] has examined the record of the proceedings at the trial, and [3] 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. Dec. 1, 1984). The purpose of this mandatory rule is to ensure that postconviction counsel shapes the defendant's claims into proper legal form and presents them to the court. *People v. Perkins*, 229 Ill. 2d 34, 43-44, 50 (2007).

¶ 45 The obligations of postconviction counsel are limited to claims raised by the petitioner. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). See generally *Bell*, 2014 IL App (3d) 120637, ¶ 13. Appointed counsel is under no duty to "explor[e], investigat[e] and formulat[e] *** potential claims." *Davis*, 156 Ill. 2d at 163. For example, it is the defendant's burden to inform postconviction counsel, with specificity, of the identity of the witnesses who should have been called and generally the information the witnesses would have offered. *People v. Rials*, 345 Ill. App. 3d 636, 642 (2003). Only then does counsel have a duty to attempt to contact those witnesses to obtain affidavits for the purpose of shaping the allegations in the petition into an appropriate legal form. *Id.* See also *People v. Johnson*, 154 Ill. 2d 227, 241 (1993).

¶ 46 The filing of a Rule 651(c) certificate, as postconviction counsel did in this case, creates a presumption of compliance with the rule. *People v. Mendoza*, 402 Ill. App. 3d 808, 810-11 (2010). It is defendant's burden to overcome this presumption by demonstrating his

postconviction counsel's failure to substantially comply with the duties mandated by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19 (citing *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23).

¶ 47 With respect to the consultation and examination of the record requirements of 651(c), defendant has not rebutted the presumption of reasonable assistance. Postconviction counsel stated in his certificate that he had "consulted over the telephone and in writing with [defendant] to discuss the nature of his claims that his constitutional rights have been violated." Based on the record, counsel spoke to defendant either in April 2009 or early July 2009. This was more than four years after postconviction counsel was appointed; however, we are unaware of any case law that requires the consultation to occur within a more condensed timeframe. Defendant has not proffered any support to rebut postconviction counsel's affirmation that he examined the record.[2]

¶ 48 Therefore, the crux of the issue in this case is the third requirement of 651(c): whether postconviction counsel made any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. For the reasons that follow, we find that defendant did not rebut the presumption in favor of postconvinction counsel's reasonable assistance.

¶ 49 The "complaints of a prisoner" frame counsel's duties under Rule 651(c). *People v. Richardson*, 382 Ill. App. 3d 248, 254 (2008). That is, Rule 651(c) places no legal duty on postconviction counsel to add claims not implicated in defendant's *pro se* petition. *Id.* at 258. See also *Rials*, 345 Ill. App. 3d at 642. The fact that counsel is only appointed after a petitioner's *pro se* postconviction petition advances to the second stage of proceedings "demonstrates that it is the substance of the *petitioner's* claims, in his initial post-conviction pleading, which, in the first

[2] The certificate of postconviction counsel, in relevant part, states "I have read the pro-se post-conviction petition; reviewed the trial file and police reports; read the trial transcript; reviewed the appellate briefs and the decision of the Appellate Court affirming Mr. Robinson's conviction and sentence."

instance, determines the fate of the petitioner's claims. The post-conviction court's determination concerning the merit of those claims is based solely upon the *petitioner's* articulation of the same." (Emphasis in original.) *Davis*, 156 Ill. 2d at 163. Defendants in postconviction proceedings, many of whom represent themselves, are responsible for presenting the gist of a constitutional claim in a postconviction petition. *People v. Porter*, 122 Ill. 2d 64, 73 (1988) (citing *People v. Baugh*, 132 Ill. App. 3d 713, 717 (1985)). Only after a petition advances to the second stage is postconviction counsel appointed. *Bell*, 2014 IL App (3d) 120637, at ¶ 13. Had the legislature intended otherwise, it would have provided for the appointment of counsel prior to the filing of the initial postconviction petition. *Id.* (citing *Davis*, 156 Ill. 2d at 164).

¶ 50 Defendant's original postconviction petition generally recounted three successive interviews with detectives and assistant State's Attorneys. Specifically, he complained that neither the Detective nor the ASA took notes, that the statement itself was not his own, and that "trial counsel should have objected to this statement being entered into evidence." He went on to say that "it was clear that [defendant's] statement was formed and put together by the assistant state's attorneys and detectives involved in the case." Commenting on part of his purported statement, defendant said "the alleged answer that petitioner gave to the question is not the way young black urban men express theirselves [*sic*], the language and words in the court reported statement is the language police officials use in describing a situation on a report or when testifying." Defendant stated that trial counsel failed to "question petitioner's statement or even to object to petitioner's statement being entered into evidence." To this original postconviction petition, defendant attached his own affidavit in which he complained about his trial attorney's performance and that his appellate counsel only raised a sentencing issue but "refused to raise any of the other valid issues in my case."

¶ 51 In his affidavit to the amended postconviction petition and on appeal, defendant contends that the Detective at the police station coerced him into confessing by threatening to kill him. That affidavit explained that the Detective threatened to take defendant "to a[n] undisclosed alley somewhere, pop a couple slugs in [defendant] and report that when they came to apprehend [the Detective] for questioning" the Detective would say that defendant reached for something and [the Detective] shot at him." According to defendant, the Detective also reminded defendant that it was an insult for defendant to have been recently acquitted of murder.

¶ 52 Without a doubt, defendant is not expected to construct legal arguments or cite to legal authority, but he must be responsible for including basic facts. *Porter*, 122 Ill. 2d at 73. Only with sufficient facts would postconviction counsel be able to shape defendant's constitutional claims into legal form. Here, in his original *pro se* petition, defendant did not include anything more than general allegations that his own words were not used for the statement. There was nothing about coercion. Moreover, the facts that defendant alleges to support his coerced confession claim in his amended *pro se* petition are so specific, detailed, shocking, and unsettling that any reasonable layperson would have thought to include such facts in a postconviction petition, whether or not that layperson knew that those facts would amount to a constitutional claim.

¶ 53 Other Illinois decisions have refused to find that postconviction counsel rendered unreasonable assistance based on a defendant's contention that counsel failed to raise an issue when that issue had not been asserted initially by the defendant. In *People v. Pendleton*, 356 Ill. App. 3d 863, 871 (2005), the appellate court held that defendant's assertion that he told trial counsel he wished to withdraw his guilty plea "should have alerted postconviction counsel that trial counsel might have been ineffective" and that because postconviction counsel did not

include an admonishment issue in an amended postconviction petition, the appellate court found that postconviction counsel provided unreasonable assistance. *Id.* at 870-71. Reversing, the supreme court held that the assertion that defendant wanted to withdraw his guilty plea bore "no rational relationship" to the admonishment issue and that defendant had forfeited the admonishment issue by failing to include it in his original or amended petition. *Pendleton*, 223 Ill. 2d 458, 475 (2006).

¶ 54 Similarly, in *People v. Richardson*, 382 Ill. App. 3d 248 (2008), trial testimony revealed and the *pro se* postconviction petition alleged that defendant was brutalized or physically coerced by police officers. *Id*. at 250-51. The petition was summarily dismissed. *Id.* Several years later, defendant filed a successive postconviction petition in which he argued that his sentence violated *Aprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* The trial court appointed counsel to represent the defendant. *Id.* Counsel amended the successive petition, but did not include a claim that defendant's due process rights were violated when he was brutalized by police. *Id.* at 251-52. In ruling on counsel's compliance with the obligations of 651(c) based on defendant's allegations that counsel failed to include the brutalization claim, we held that 651(c) did not require counsel to amend the successive postconviction petition to include allegations of police brutality, even when that claim was included in his initial *pro se* postconviction petition and trial testimony revealed the same allegations. *Id.* at 257-58. The court succinctly stated that the "pronouncements of the supreme court have made clear, however, [that] only the 'complaints of a prisoner' * * * frame counsel's duties under Rule 651(c)." *Id.* at 254.

¶ 55 As the reasoning in these cases suggests, postconviction counsel had no obligation to shape defendant's claim—that trial counsel was ineffective for failing to file a motion to suppress a coerced confession—when neither the original *pro se* postconviction petition nor the record

included facts that would have alerted postconviction counsel to a coerced confession claim. Counsel is under no obligation to search for sources outside the record that might support the general claims raised in defendant's postconviction petition. *People v. Johnson*, 154 Ill. 2d 227, 247 (1993). See also *Davis*, 156 Ill. 2d at 162-64. Rule 651(c) only requires postconviction counsel to examine as much of the record "as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Davis*, 156 Ill. 2d at 164. Postconviction counsel *may* conduct a broader examination of the record, but there is no obligation to do so. *Id.* Unlike *Richardson*, where the record included allegations of police brutality (382 Ill App. 3d at 251-52), nothing in the record here would have alerted postconviction counsel to a potential claim of a coerced confession. In defendant's own words, he simply said that the statement was not "formed" by him. We think it reasonable to conclude that postconvinction counsel is also not obligated to search for *facts* outside the record that might support defendant's general claim of "coercion, intimidation, trickeration and deceit" in his original postconviction petition. Allegations that a threat to one's life led to a coerced confession are a far cry from the allegation that the words of a confession are representative of the language used by police officers and ASAs.

¶ 56 Defendant complains that postconviction counsel failed to obtain affidavits to attach to an amended petition, but the absence of necessary affidavits does not, by itself, rebut the presumption in favor of reasonable assistance of postconviction counsel. *Johnson*, 154 Ill. 2d at 241. Instead, courts "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." *Id.* See also *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25. Notably, defendant attached his own affidavit to the original *pro se* postconviction petition, but did not mention any of the facts that

he later included in his amended petition's affidavit. The failure to have raised the facts and details of a coerced confession cannot now be couched in a claim of postconviction counsel's unreasonable assistance.

¶ 57 Although defendant has failed to rebut the presumption of reasonable assistance of postconviction counsel, counsel's performance in this case was underwhelming. Most disappointingly, it took counsel over four years to consult with defendant and he asked for approximately 20 continuances during postconviction proceedings. While the consultation requirement of 651(c) can be accomplished in a single meeting (*Turner*, 187 Ill. 2d 406, 411 (1999)), it seems a disservice to defendant if that consultation takes place four years after postconviction counsel's appointment. In that way, we tend to agree with the special concurrence of Justice Maag in *People v. Woidtke*, 313 Ill. App. 3d 399, 413 (2000), who wrote "solely to state [his] strong personal belief that the actions of the trial court and counsel in allowing the defendant's postconviction petition to languish for [six] *years* without even a hearing are unconscionable." (Emphasis in original.) *Id.* Yet, a defendant in postconviction proceedings is only entitled to a "reasonable" level of assistance, which is less than that afforded by the federal or state constitutions (*Pendleton*, 223 Ill. 2d at 472 (citing *People v. Munson*, 206 Ill. 2d 104, 137 (2002)), and we are unaware of any case law that would suggest this counsel's continuances or delay in consulting with defendant falls short of his 651(c) obligations.

¶ 58 Finally, defendant contends that the *Report of the Special State's Attorney* which was "an independent evaluation by the Special State's Attorney of 148 complaints of torture perpetrated by police officers under the command of Jon Burge at Area 2 and Area 3 from 1973 to 2006" should have been included in an amended postconviction petition because the report names the same Detective who interviewed defendant as one of the detectives who abused suspects and that

fact would have strongly corroborated defendant's claim that the Detective threatened him in 1997. However, as described above, the defendant's original postconviction petition did not include facts of threats or coercion but only a general allegation that the "language and words in the court reported statement is the language police officials use in describing a situation on a report or when testifying" and was "not the way young black urban men express theirselves [*sic*]." Postconviction counsel's obligations under 651(c) are not triggered when the original postconviction petition does not alert him to the facts supporting a constitutional claim. *Pendleton*, 223 Ill. 2d 458, 475 (2006). If defendant chooses to file a successive postconviction petition based on this or other information, it would be subject to the "cause and prejudice" showing in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002).

¶ 59 We find that defendant did not rebut presumption of reasonable assistance to shape the allegations of a coerced confession into proper legal form when his original petition merely alleged a general allegation of "coercion, intimidation, trickeration and deceit." We affirm the trial court's dismissal of defendant's amended *pro se* postconviction petition.

¶ 60 Affirmed.

¶ 61 JUSTICE CUNNINGHAM specially concurs:

¶ 62 I write separately to express my concerns regarding the anomalous procedural history of this case. Even in a system in which delays are often lengthy, this case stands out as one of the worst that I have ever seen. While I agree with the ultimate holding of the majority, I am compelled to comment on the lengthy delay and its effect on the perception of justice in this case and beyond.

¶ 63 To say postconviction counsel's performance was underwhelming is an understatement. While counsel's weak performance does not rise to the level which would require reversal of the

trial court's dismissal of defendant's postconviction petition, the obvious breakdown in the procedural posture of the case shocks the conscience. The case languished for *five years* while counsel sought and received numerous continuances, only to eventually proceed on the unamended, *pro se* petition initially filed by defendant without benefit of counsel. It is not inaccurate to say that defendant did not receive *attentive* representation, notwithstanding that I do not believe that the outcome would ultimately have been different if he had. However, in order to maintain the public trust, confidence and belief in our criminal justice system, a court of review cannot appear to condone or be soft on questionable behavior such as that exhibited by postconviction defense counsel in this case.

¶ 64 Although counsel's performance did not meet the unreasonable representation threshold, which would warrant reversal under established case law, it was inattentive and disappointing to say the least. Accordingly, it is important to acknowledge and express disappointment and disapproval of the lengthy, inexplicable delay which suggests marginally acceptable representation by postconviction defense counsel and a seemingly oblivious trial court which granted the many continuances. It is obvious that defendant's case was ignored for a long period of time. There is simply no rational explanation nor justification for what amounted to a five-year delay in disposing of the untimely, unamended petition drafted by defendant without the benefit of counsel. In such a circumstance, even when the correct outcome is reached, as in this case, there remains an aura of injustice which undermines public confidence in our justice system. As officers of the court, lawyers should represent their clients in such a way as to promote a sense of advocacy and justice. An inexplicable five-year delay on a straightforward postconviction petition marked by numerous continuances does nothing to build client or public trust in the system.