2015 IL App (1st) 130528-U

SIXTH DIVISION
Order Filed: November 20, 2015

No. 1-13-0528

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 98 CR 30083
	)	
IGOR LYUBYEZNY,	)	Honorable
	)	Garritt Howard,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant failed to demonstrate that his postconviction counsel rendered unreasonable assistance by failing to: (1) amend his *pro se* petition to include claims of actual innocence based upon compelling scientific and legal developments with regard to DNA testing and cell phone tracking; (2) review trial exhibits referenced in the defendant's *pro se* petition; (3) append the petition with necessary affidavits in support of his claim of ineffective assistance of trial counsel; (4) amend the petition to allege the requisite prejudice under *Strickland v. Washington*, or to challenge the representation of counsel on direct appeal; (5) adequately consult with him in the preparation of his petition, and (6) cross-examine his trial counsel during third-stage proceedings on his claim of ineffective assistance of counsel. We reject his contention that the trial court denied him his right to self-representation during the second-stage of proceedings.

¶ 2 The defendant, Igor Lyubyezny, filed a petition seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The circuit court dismissed all but one of his claims at the second stage of proceedings and denied the remaining claim following a third-stage evidentiary hearing. The defendant now appeals, alleging that postconviction counsel's representation fell below the requisite "reasonable assistance" under Supreme Court Rule 651(c) (eff. Dec. 1, 1984), based upon counsel's failure to: (1) amend the defendant's *pro se* petition to properly frame his allegations of "actual innocence" based upon compelling scientific developments in the areas of DNA matching and cell phone "tracking"; (2) review the trial exhibits that were referenced in the *pro se* petition; (3) attach necessary affidavits to the petition that supported the defendant's claim of ineffective assistance of his trial counsel; (4) amend the petition to allege the requisite prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), or to assert a claim of ineffective assistance of counsel on direct appeal; (5) effectively consult with the defendant in the preparation of his petition; (6) cross-examine his trial counsel during the third-stage hearing on his claim of ineffective assistance of counsel. Finally, the defendant argues that the circuit court erred by failing to adequately address his request to waive counsel under Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and proceed *pro se*. For the reasons that follow, we affirm.

¶ 3 Following a jury trial, the defendant was found guilty of murder resulting from the shooting of Tomasz Pohl, and was sentenced to 33 years' imprisonment. His conviction and sentence were affirmed on direct appeal. *People v. Lyubyezny*, No. 1-03-0145 (2005) (unpublished order under Supreme Court Rule 23). We briefly summarize the evidence at trial as set forth in our prior Rule 23 order, supplementing the facts as needed to address the issues in the instant appeal.

¶ 4 The defendant owned and operated an automobile body shop in Skokie, and had been a friend of Pohl's for several years prior to the murder. According to the defendant, in April 1998, he gave Pohl a check for $10,000 to cover repairs made by Pohl to the defendant's shop. Despite the defendant's request that Pohl not immediately deposit the check, Pohl did so, and the check was returned by the bank for insufficient funds. On the afternoon of May 15, 1998, Pohl and the defendant had a telephone conversation, after which Pohl told one of his employees that "a weight [was] off his shoulders," and that he was going to visit the defendant and would return by 6:30 p.m. However, Pohl never came back to work.

¶ 5 On May 18, 1998, Pohl's truck was discovered in a parking lot in Evanston only a few blocks from the defendant's shop. Pohl's cell phone had been turned over to the police, who discovered that the last number dialed was to the defendant's body shop. On May 19, 1998, police officers went to the defendant's shop to question him about Pohl's disappearance. The defendant told the officers that Pohl had been in his shop on May 15, 1998, for about 30 minutes. The officers asked the defendant whether they could "look around," to which he replied, "go ahead." During their search, the officers recovered three .22-caliber shell casings, several photographs depicting a wooded campsite, and, from a garbage can outside the defendant's shop, two bloody paper shop towels lying on top of a newspaper dated May 14, 1998. The police eventually discovered that the wooded campsite, depicted in the photographs, was located in northern Wisconsin, along the Michigan-Wisconsin border. On October 15, 1998, Pohl's body was found buried approximately 1,000 feet from the campsite. His identity was established through DNA evidence as well as dental records. An autopsy revealed that Pohl died from a gunshot wound to the head, and forensic testing showed that he had been shot with a .22- or .25-

caliber firearm. Plastic debris recovered from Pohl's body was found to be similar to plastic recovered from the defendant's shop.

¶ 6 The State also introduced the billing records for a cellular phone that was shown to have been used by the defendant. The billing records revealed that the usage of the cellular phone on May 16, 1998, was consistent with someone driving from the Chicagoland area to northern Wisconsin and back that same day. In particular, the records established that, on May 16, 1998, the phone was used at 9:45 a.m. in Arlington Heights, Illinois, and then throughout the day into northern Wisconsin. At 7:43 p.m., the phone was used in the area of Milwaukee, Wisconsin, and at 8:37 p.m., in Northbrook, Illinois, near the defendant's home in Wheeling, Illinois.

¶ 7 The State presented the testimony of Joanna Olson and Cecilia Doyle, both forensic DNA specialists with the Illinois State Police. Olson and Doyle conducted DNA analyses using vials of blood samples Pohl previously provided for paternity testing and from blood drawn from Pohl's spleen during his autopsy. The samples were compared with those taken from the bloody paper towels found in the garbage behind the defendant's body shop, and with blood discovered in the trunk of the defendant's Navigator, which he allegedly drove from his home to Wisconsin to bury Pohl's body. Olson testified that she performed restriction fragments length polymorphism (RFLP) tests and concluded that the blood on one of the towels "was consistent with" the blood standard that came from Pohl. On cross-examination, Olson acknowledged that, as of 2001, the Illinois State Police no longer conducted DNA analyses using the RFLP method. Olson also admitted that she performed her analyses by examining 5 different areas, or "loci," of DNA, even though there were more sensitive technologies available that compared DNA at 13 loci.

¶ 8 Doyle analyzed the DNA recovered from the defendant's Navigator, and testified that it "did match" that recovered from Pohl. Doyle used a process known as polymerase chain reaction (PCR). On several of the samples, she acknowledged that the results indicated that there were multiple possible contributors and that Pohl "could not be excluded" as one of the contributors. Doyle testified to making several comparisons at only 5 or 6 loci, and acknowledged they were only partial matches.

¶ 9 Testifying on his own behalf, the defendant denied shooting Pohl. He stated that, on May 15, 1998, Pohl came to his shop around 3:30 p.m. and stayed for 30 to 40 minutes. After Pohl left, the defendant picked up some photographs and went home. On May 16, he went to work at his body shop. According to the defendant, he left his shop around 9 a.m., ran some errands, and returned home at 7 p.m. The defendant testified that he was not the only person who had access to his cellular phone and he denied having the phone with him on May 16, 1998. The defendant's wife, Alla Lyubyezny, corroborated the defendant's testimony, stating that on May 16, 1998, the defendant returned home around 6 or 7 p.m.

¶ 10 On direct appeal, the defendant argued that (1) the trial court erred in denying his motion to suppress his indictment based upon the State's failure to preserve exculpatory evidence; (2) the court erred in denying his motion to suppress evidence seized from his body shop because, in relevant part, the search of the garbage can exceeded his consent; and (3) his trial counsel was ineffective. We affirmed the defendant's conviction and sentence. *Lyubyezny*, No. 1-03-0145 (2005) (unpublished order under Supreme Court Rule 23).

¶ 11 On October 12, 2006, the defendant filed a *pro se* petition for postconviction relief. The petition alleged: (1) the State knowingly used a significant amount of perjured testimony throughout trial, including during opening statement and closing arguments; (2) ineffective

assistance of trial counsel; and (3) the State failed to prove that the search of his body shop was made with his consent. Attached to the petition was a memorandum detailing the defendant's arguments and the evidence underlying each of the three claims. In support of the perjury claim, the defendant alleged, in relevant part, that the testimony of DNA expert Olson was the product of perjury because it was based upon a blood sample that the State knew was not obtained from Pohl. In his ineffective assistance of counsel claim, the defendant argued that his trial attorney failed to consult with him or adequately prepare for trial, and failed to interview or investigate certain witnesses, including an alleged alibi witness, Svetlana Lukashevsky, who could corroborate his own trial testimony that he was at home on the evening of May 16, 1998, during the time the State claimed he was driving home from Wisconsin after burying Pohl's body. The defendant's petition was also supported by an affidavit from Lukashevsky, in which she attested that, on May 16, 1998, she saw the defendant outside of his residence sometime between 6 and 7 p.m.

¶ 12 The defendant's *pro se* petition was dismissed by the circuit court as frivolous and patently without merit. This court reversed, however, finding that the defendant stated the gist of a constitutional claim with regard to the proffered alibi testimony of Lukashevsky. We held that Lukashevsky was a seemingly disinterested witness who could have provided testimony that the defendant was at his home on the evening of May 16, 1998, instead of driving from Wisconsin. Accordingly, it was "at least arguable" that trial counsel's failure to investigate Lukashevsky's statement or call her as a witness at trial amounted to unreasonable representation that could have affected the outcome of the defendant's trial. Pursuant to *People v. Rivera*, 198 Ill. 2d 364 (2001), we remanded the case for second-stage proceedings with regard to all of the claims

raised in the defendant's *pro se* petition. *Lyubyezny*, No. 1-07-2771 (2009) (unpublished order under Supreme Court Rule 23)

¶ 13 On remand, the circuit court appointed an assistant public defender to represent the defendant. Counsel filed a revised affidavit on behalf of Lukashevsky adding further details about her encounter with the defendant on May 16, 1998. At a subsequent status hearing, counsel asked the court for additional time, stating that she "would like to file a short supplemental" petition. However, no supplemental petition was ever filed. On September 30, 2011, she filed a Rule 651(c) certificate averring that she: (1) consulted with the defendant by mail and telephone to ascertain his contentions; (2) obtained and examined the report of proceedings from his trial and sentencing; and (3) determined that "the petition as written adequately represents the defendant's constitutional claims."

¶ 14 In January 2012, the State moved to dismiss all of the claims in the petition, with the exception of the argument regarding trial counsel's ineffectiveness for failing to interview Lukashevsky, which the State conceded. The parties set a hearing date on the motion for March 23, 2012.

¶ 15 On March 10, 2012, the defendant filed a *pro se* motion for extension of time to file a *pro se* supplemental postconviction petition. In the motion, the defendant alleged that postconviction counsel had promised to file a supplemental petition, but had failed to do so. The motion claimed that counsel had filed a "fraudulent 651 certificate" because, throughout the two years during which she was responsible for his case, she refused to communicate with him or his wife or investigate certain claims that "were not part of his original [postconviction] petition." Accordingly, the defendant requested that the court (1) grant him an extension of time "to inquire as to the nature of the claims" of ineffectiveness on the part of postconviction counsel; (2)

appoint a new public defender or an attorney not from the public defender's office; or, alternatively, (3) grant him an extension of time to prepare a *pro se* supplemental postconviction petition.

¶ 16 On the March 23 hearing date, postconviction counsel informed the court that, although the defendant sought to file a *pro se* supplemental petition, he had expressed no intention to proceed entirely without counsel. In an effort to clarify the defendant's desire with regard to his representation, the court ordered that he be writted into the proceedings at the next hearing, at which time the matter would be addressed with him. The court noted, however, "ordinarily when there's an attorney of record, I do not allow *pro se* motion[s] to be filed." The matter was continued to April 20, 2012.

¶ 17 On April 16, 2012, the defendant filed a *pro se* supplemental postconviction petition. In the petition, the defendant first requested that the circuit court appoint an assistant public defender other than his current attorney who would competently and zealously pursue his postconviction claims. He reiterated the substantive claims from his original postconviction petition, and added new allegations in support of his claim that the State had knowingly used false DNA evidence. The defendant also added an argument alleging inconsistencies in the testimony of Rhonda Kouba, an employee from a cellular phone company who testified as to the location of the phone allegedly used by him throughout the day on May 16, 1998.

¶ 18 On April 20, 2012, postconviction counsel informed the court that she required more time to review the defendant's supplemental *pro se* petition and determine whether to adopt it. At a status call on June 8, 2012, counsel stated that she had reviewed the arguments in the supplemental petition and was not adopting any of the claims. She also stated that she informed the defendant of this fact and he was now requesting new counsel. The defendant interjected that

he wanted a public defender other than his current counsel. The court denied his request, advising the defendant that he could not "pick and choose" which assistant public defender was assigned to him.

¶ 19 On July 20, 2012, the case proceeded to a hearing on the State's motion to dismiss the postconviction petition. At the commencement of the hearing, the State informed the court that it was retracting its concession of the issue regarding trial counsel's ineffectiveness for failing to investigate or call Lukashevny as a witness. The State then argued the merits of its motion, and as it was finishing its case, the defendant addressed the court, stating that he would like to represent himself. The court denied his request and ordered him to remain silent. After his counsel completed her argument, the court permitted the defendant to make any further arguments he chose regarding his initial and supplemental *pro se* petitions. The court then granted the motion to dismiss with regard to all of the defendant's claims except for that of trial counsel's ineffectiveness for failing to investigate or call Lukashevsky. That claim proceeded to a third-stage evidentiary hearing.

¶ 20 At the third-stage proceedings, the defense presented the testimony of Lukashevsky, the defendant's wife, Alla, and the defendant, and the State offered the testimony of the defendant's trial counsel, and an associate from his office who had assisted with the case. Lukashevsky testified that she was the defendant's friend and had known him for over 22 years. On May 16, 1998, she was driving home from work between 6:30 and 7 p.m. when she encountered the defendant outside of his home and briefly stopped and conversed with him. According to Lukashevsky, May 16 was a special day for her family because it was the date her father had passed away, and the family had plans to get together. Lukashevsky testified that, after his arrest, the defendant contacted her asking if he could forward her name to his attorney. She told

him that he could, but was never contacted by the attorney or anyone associated with his case. Lukashevsky stated that, in 2006, the defendant's wife, Alla, requested that she execute an affidavit attesting to six points, which Lukashevsky did. Lukashevsky testified that she was approached by postconviction counsel, and at counsel's request, executed a revised affidavit. Following arguments, the court rejected the testimony of the defense witnesses and denied the petition. The instant appeal followed.

¶ 21 The defendant's allegations of error are directed primarily toward the performance of his postconviction counsel throughout the second and third-stage of the proceedings. We address each claim in turn.

¶ 22 The purpose of the Act is to allow inquiry into constitutional infirmities during the proceedings giving rise to the defendant's conviction or sentence that were not, and could not have been, determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). The Act establishes a three-stage process for the adjudication of postconviction petitions in non-capital cases. At the first stage, the circuit court has 90 days to review the *pro se* petition and may summarily dismiss it if it finds the petition to be frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed within the 90-day period, it proceeds to the second stage for further consideration, at which time counsel may be appointed for an indigent defendant. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The burden rests with the defendant to prove a substantial violation of his constitutional rights. *Pendleton*, 223 Ill. 2d at 473. If he succeeds in this burden,

the petition proceeds to the third stage for an evidentiary hearing. *People v. Harris*, 224 Ill. 2d 115, 126 (2007).

¶ 23 A defendant in postconviction proceedings is entitled to only a "reasonable" level of legal assistance, which is less than that afforded by the federal or state constitutions. *Pendleton*, 223 Ill. 2d at 472. In order to ensure the level of assistance contemplated under the Act, Supreme Court Rule Rule 651(c) (eff. Dec. 1, 1984) imposes specific duties upon postconviction counsel. The record must establish that appointed counsel (1) consulted with the defendant to ascertain his contentions of a deprivation of any constitutional rights; (2) examined the record of the proceedings at the trial; and (3) amended the *pro se* petition, if necessary, to ensure that defendant's contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472. The reason for the rule is to ensure that 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 (2007). The filing of a Rule 651(c) certificate by postconviction counsel creates a presumption that the defendant received the representation mandated by the Rule at the second stage of the proceedings. *Id.* at 50. The determination of whether an attorney complied with Rule 651(c) is subject to a *de novo* standard of review. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 24 In this case, the defendant does not dispute that his counsel filed a valid certificate pursuant to Rule 651(c), and that a presumption therefore exists that her representation was reasonable. Accordingly, for each assignment of error, our review is confined to determining whether this presumption has been rebutted by the record. *Perkins*, 229 Ill. 2d at 52.

¶ 25 First, the defendant argues that his counsel's assistance was not reasonable because she failed to amend his *pro se* petition to properly frame his claim of "actual innocence" based upon the "compelling scientific and legal developments" in DNA testing since his trial. Specifically,

he claims that the DNA "match" evidence in this case, based upon comparisons of DNA at 5 or 6 different loci, has been "challenged" by DNA database studies, scholarly commentary, and case law, which hold that the current "gold standard" for DNA comparison is a match at no less than 13 loci. For the reasons that follow, this argument must fail.

¶ 26 Our supreme court has repeatedly held that the obligations of postconviction counsel are limited to claims raised by the defendant. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). Appointed counsel is under no duty to amend a defendant's *pro se* petition to add claims not already implicated in the petition. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). Nor is she required to explore or formulate potential claims (*Davis*, 156 Ill. 2d at 163), or search for sources outside the record which may support general claims raised in the petition. *Pendelton*, 223 Ill. 2d at 475. Rather, counsel's duty is limited to investigating and properly presenting claims raised by the *petitioner*, and obtaining necessary affidavits and documentation in support of those claims. (Emphasis in original.) *Id*.

¶ 27 Here, the claims argued by the defendant on appeal differ significantly from the claims raised in his *pro se* petitions. In his original *pro se* petition, the defendant alleged, in relevant part, that the blood used in one of the DNA comparison tests was not from the vial containing the sample given by Pohl. As support for this contention, the defendant referred to the testimony of Aafriika Hatchett, who had drawn Pohl's blood for a paternity test, in which Hatchett allegedly conceded that the vial she was asked to identify at trial was not one in which she had placed Pohl's original sample. In his supplemental petition, the defendant added the argument that the DNA sample the State claimed was taken from Pohl’s spleen during his autopsy could not have come from his body. Citing a 1998 study, the defendant posited that Pohl's body had been buried too long to produce a valid DNA sample, and that, therefore, both the "prosecutor and the

[f]orensic [s]cientist" knew that the "evidence presented to the jury was false and knowingly perjured." Finally, near the end of the defendant's memorandum in support of his *pro se* petition, he made the following statement: "In this cause, the verdict is weakly supported by the record when in fact a diligent research of the record reflects defendant's innocen[ce]."

¶ 28 According to the defendant, the latter phrase in the foregoing paragraph constitutes a claim of "actual innocence." We reject this notion. A freestanding claim of actual innocence based upon newly discovered evidence is an appropriate basis for postconviction relief. *People v. Shum*, 207 Ill. 2d 47, 64 (2003). However, in order to be entitled to such relief, the defendant must bring forth new, noncumulative evidence, which is material to his claim of actual innocence, and could not have been obtained at the time of trial, despite due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Further, evidence of actual innocence must be "of such conclusive character that it would probably change the result on retrial." *Id.* (citing cases.)

¶ 29 Even excusing the fact that the petition never actually asserts that the defendant did not commit the crime (see *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008)), it fails to allege any newly discovered evidence, which is material to a claim of actual innocence, that would probably change the result in the event of a new trial. Instead, his petition largely consists of an attack on the sufficiency of the State's case, which he alleges was riddled with inconsistent and unreliable testimony, implausibility, and conflicting evidence. The "perjured" statements to which the petition refers relate primarily to the State's opening and closing arguments and to testimony allegedly contradicted by records produced at trial. This does not constitute an assertion of actual innocence so as to give rise to a claim under the Act. See *id*. (actual innocence does not relate to the State's burden of proof, but an actual exoneration of defendant)).

¶ 30 The defendant nonetheless contends that the "crux" of his claim implicated "a growing body of law challenging the admission of DNA 'match' evidence" and the way such evidence is presented. We disagree. Although the petition was thorough and relatively well-written, there is nothing challenging the DNA comparison technique or the number of loci analyzed much less any suggestion that a more reliable DNA analysis might have impacted the outcome of the defendant's case. Although a defendant is not expected to construct legal arguments or cite to legal authority, he must be responsible for providing some basic facts and argument in support of his petition for relief under the Act. *People v. Porter*, 122 Ill. 2d 64, 73 (1988). In summary, despite the defendant's strenuous argument to the contrary, there is nothing in his *pro se* petitions that should have alerted postconviction counsel to any potential claim of actual innocence based upon the DNA evidence in this case. Accordingly, the defendant has failed to demonstrate that counsel provided unreasonable assistance by failing to advance such a claim in an amended petition.

¶ 31 Similarly, we must reject the defendant's contention that counsel provided unreasonable assistance by not properly presenting a claim of actual innocence based upon recent "case law and literature" casting doubt upon the admissibility of the State's cell phone "tracking" evidence. As we held above, the petitions asserted no claim of actual innocence based upon newly discovered, non-cumulative evidence likely to change the result on retrial. *Ortiz,* 235 Ill. 2d at 333. Contrary to the statements in the defendant's brief, his petitions make no argument regarding an alleged flaw in the State's cellular tracking data. As the defendant makes no claim of actual innocence based upon the State's cell phone tracking evidence, postconviction counsel had no reason to amend the petition to assert such a claim. *Pendleton,* 223 Ill. 2d at 475.

¶ 32 Next, the defendant argues that his postconviction counsel failed to comply with Rule 651(c) because she did not review the trial exhibits that were referenced in the defendant's *pro se* postconviction petitions. In fact, he maintains that the exhibits themselves remained stored in a court warehouse following his direct appeal and were neither requested nor removed by counsel.

¶ 33 "Substantial compliance" with Rule 651(c) does not include a requirement that appointed counsel examine the entirety of a defendant's trial proceedings. *Davis*, 156 Ill. 2d at 164. Rather, consistent with the purpose of postconviction proceedings, appointed counsel need only examine "as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Id*.

¶ 34 Counsel's Rule 651(c) certificate stated that she consulted with the defendant and obtained and examined the report of proceedings from trial. During the status conferences, counsel reaffirmed that she received the defendant's transcript and planned to order and review his "trial file." In support of his argument that counsel had a duty to review the trial exhibits themselves, the defendant has provided us with the exhibits, but does not identify how they could have helped advance any specific claim raised in the *pro se* petitions. Nonetheless, we have reviewed the arguments in the *pro se* petitions and conclude that the exhibits would have provided little benefit to postconviction counsel.

¶ 35 Initially, we point out that many of the police reports and photographs to which the petitions refer were attached to the supplemental petition itself. However, the petitions also make reference to phone records which were presented as exhibits at trial. According to the allegations in the petitions, the records refute an argument by the State that, prior to his murder, Pohl had engaged in "heated" telephone conversations with the defendant and had conversed by telephone with other witnesses. Thus, the records were evidence of perjured testimony by State

witnesses. Each of these claims, however, turned upon the defendant's own perceived conflicts between the phone records and the witness' testimony. This type of argument cannot form the basis for relief under the Act, which concerns only matters *dehors* the record. *People v. Enis*, 194 Ill. 2d 361 (2000). Any claims involving conflicts in the evidence presented at trial would have been dismissed by the circuit court under principles of forfeiture or *res judicata*. *Id*. For this reason, it would have served no purpose for counsel to review the telephone and cell phone records, and her failure to do so did not constitute unreasonable assistance.

¶ 36 Next, the defendant argues that the presumption of counsel's compliance with Rule 651(c) is rebutted by the fact that she failed to attach necessary affidavits to the petition in support of one of the defendant's allegations of ineffective assistance of trial counsel.

¶ 37 In his *pro se* petition, the defendant claimed that two of his employees, Mr. Wrobel and Mr. Stephens, could have helped his defense but were not called to testify by his trial counsel. Specifically, Wrobel and Stephens could have contradicted remarks in the State's opening statement that the defendant had "sent them home" early from work on the day of the shooting when they had in fact left of their own accord. In addition, Stephens allegedly could have attested to the fact that he was with the defendant on May 16, 1998, during the time the State claimed the defendant was driving home from Wisconsin after burying Pohl's body. The defendant now argues that, although both Wrobel and Stephens were "available to substantiate" his ineffectiveness claim, postconviction counsel failed to attach their affidavits to the petition or explain why such affidavits were not attached. Instead, she simply elected to stand on the petition as written.

¶ 38 In general, a postconviction petition must be supported by affidavits, records, or other evidence, or must explain why such items are not attached. 735 ILCS 5/122-2 (2010); *Johnson*,

154 Ill. 2d at 240-41. However, the supreme court has stated that "[i]n the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d 227, 241 (1993); see also *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 18–24; *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25. Unless the record affirmatively rebuts this presumption, courts have declined to find that the failure to attach an affidavit, standing alone, constitutes an unreasonable level of assistance. See *Johnson*, 154 Ill. 2d at 241; *Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 18–24; *cf.*, *People v. Waldrop*, 353 Ill. App. 3d 244, 250–51 (2004).

¶ 39 The defendant provides no support for his conclusory assertion that Wrobel and Stephens were available to provide affidavits or testify on his behalf. In fact, the *pro se* petition itself suggests that trial counsel had attempted to contact these witnesses to obtain their testimony but they had ultimately proved unavailable. Regardless, we find nothing in the record to suggest that postconviction counsel failed make a concerted effort to investigate or contact witnesses she believed could have furthered the defendant's claims.

¶ 40 In support of his contention that counsel's assistance was unreasonable for her failure to attach the affidavits, the defendant relies upon *Johnson*, 154 Ill. 2d 227, which actually militates against him. In *Johnson*, appointed counsel not only failed to submit a Rule 651(c) certificate, but filed an affidavit "unequivocally" establishing that he "made no effort to investigate the claims raised in the defendant's post-conviction petition or to obtain affidavits from any of the witnesses specifically identified" in the petition. *Id.* at 241. In this case, by contrast, counsel filed the Rule 651(c) certificate, and obtained a revised affidavit from Lukashesky, a significant

alibi witness for the defendant. The record demonstrates that she consulted with the defendant by phone and mail regarding his postconviction claims, and obtained and examined the materials necessary to present those claims. Accordingly, there is no basis to conclude that she failed to make a diligent effort to obtain affidavits from all witnesses who could have furthered the defendant's claims under the Act.

¶ 41 The defendant next maintains that counsel's assistance was unreasonable because she failed to amend the *pro se* petition to properly assert his claim of ineffective assistance of trial counsel. According to the defendant, the petition failed to sufficiently allege the requisite prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984), and was dismissed by the trial court on this basis. This claim is without merit.

¶ 42 The petition alleged that his trial counsel was ineffective under *Strickland*, because he "fail[ed] to conduct an investigation and interview witnesses," including Stephens, Wrobel and Lukashevny, "whose testimony would corroborate defendant's whereabouts" during the time the State claimed he was in Wisconsin. The petition also expressly stated that, under *People v. Albanese*, 104 Ill. 2d 504 (1984), there was a reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different. At the hearing on the state's motion to dismiss the petition, the trial court reached the merits of each of the ineffective assistance claims raised by the defendant. The court concluded either that they were barred under principles of *res judicata* or that they did not "rise to the level of" a *Strickland* violation. The court did not dismiss the ineffective assistance claim for failing to allege prejudice, and the defendant's argument here fails.

¶ 43 We next address the defendant's contention that postconviction counsel rendered unreasonable assistance by failing to amend the petition to assert a claim of ineffective assistance of his appellate counsel.

¶ 44 In his *pro se* petition, the defendant argued that his consent to the search of his shop was not knowing and voluntary. In particular, he alleged that when he agreed to let the officers "look around," he was not given a written consent form or an explanation of his rights. The defendant claimed that, due to his "lack of familiarity with the police procedures *** and limited ability to speak and understand the English language," his consent was not voluntary. The trial court dismissed this claim on the basis of *res judicata*, finding that it had been addressed on direct appeal. The defendant now claims that the specific question of the "language barrier" was not raised on direct appeal, and his postconviction counsel should have amended the *pro se* petition to challenge the forfeiture of this issue by appellate counsel.

¶ 45 We agree that the issue of the defendant's lack of consent based upon his limited understanding of English was not raised on direct appeal. We do not agree, however, that his counsel was unreasonable for failing to amend the petition to challenge the forfeiture of the issue. Postconviction counsel is not required to amend a petition to advance every claim raised by a defendant, particularly claims that are nonmeritorious or spurious. *Pendleton*, 223 Ill. 2d at 472. In order to prevail on a claim of ineffective assistance of appellate counsel, the defendant would have been required to prove that counsel's failure to brief the consent issue amounted to incompetent representation and that this decision prejudiced him. *People v. Jones*, 219 Ill. 2d 1, 23 (2006).

¶ 46 In this case, the defendant's appellate attorney challenged the defendant's consent to the search on several different grounds, and could reasonably have concluded that a further claim

based upon his alleged lack of understanding of the English language would have been fruitless. The defendant does not claim he was unable to fully understand the police officers' request to "look around." There is no evidence that, before, during or after trial, he ever required the assistance of an interpreter, particularly during his own testimony. His *pro se* petition and attached memorandum, as well as his written correspondence with counsel, are readily understandable. In light of these facts, postconviction counsel could similarly have concluded that appellate counsel's decision to forego an appeal based upon the defendant's language barrier did not constitute ineffective assistance.

¶ 47 Next, the defendant argues that, despite counsel's representations to the contrary in her Rule 651(c) certificate, the record establishes that she failed to effectively consult with him as required under the rule. Specifically, she promised to file a supplemental postconviction petition and then failed to do so, and refused the efforts of both he and Alla to speak with her regarding new claims he wanted to assert in his supplemental petition.

¶ 48 The defendant has failed to rebut the presumption of reasonable assistance with regard to the consultation issue. Apart from filing her Rule 651(c) certificate, counsel represented to the court that she had examined both of the defendant's petitions and had spoken with him regarding his allegations and her decision of whether to adopt them. The record also refutes the defendant's claim that counsel refused to speak with him or Alla. Further, during the third-stage proceedings, counsel presented testimony from the defendant and Alla, which would not have been possible had counsel not communicated with both of them. Accordingly, the defendant's contention regarding a lack of sufficient consultation is unavailing.

¶ 49 Next, the defendant argues that the circuit court "failed to adequately address" his request to waive counsel and proceed *pro se* under section 122-4 of the Act (735 ILCS 5/122-5 (West

2010)). In response, the State contends that the record establishes that the defendant never clearly and unequivocally waived his right to proceed *pro se.*

¶ 50 In order to facilitate our determination of this issue, we set forth the facts giving rise to the defendant's contention. In his *pro se* motion for an extension of time to file a supplemental postconviction petition, the defendant alleged that postconviction counsel had failed to draft a supplemental petition as promised and refused to communicate with him regarding claims he wished to add to his original petition. As a result, the defendant requested that the court "grant an extension of time to inquire as to the nature" of his claims of counsel's ineffectiveness; appoint a new attorney; or grant the defendant additional time "while he also attempts to obtain a *pro bono* attorney" to represent him for the second and third stage of the proceedings.

¶ 51 At a subsequent status hearing, postconviction counsel noted that the defendant was seeking to file a *pro se* supplemental petition but that he had not expressly asked to proceed *pro se* throughout the second-stage process. The court decided that the defendant would be writted into the proceedings at the next hearing, at which time they would determine the defendant's intentions regarding representation.

¶ 52 At the next hearing date, postconviction counsel informed the court that the defendant had filed his supplemental postconviction petition, and that she had reviewed it and notified him that she would not be adopting any portion of it. Counsel also informed the court that the defendant was requesting new counsel. The following colloquy ensued between the defendant and the court:

> "THE COURT: You want a different Public Defender?
>
> THE DEFENDANT: I want to preserve my right and my issue with another attorney.

THE COURT: Well, you don't get to pick and choose which Public Defender gets assigned to you, sir. If you hire your own lawyer, you can hire any lawyer you want; but if you get a Public Defender, you have the Public Defender that's assigned to you.

THE DEFENDANT: I can't afford my own attorney.

THE COURT: I understand that *** but if we allowed people to pick and choose which public defenders represented them, that would lead to chaos.

***

THE COURT: Well, your request to have a different public defender is denied. So this is your lawyer.

THE DEFENDANT: Okay.

THE COURT: Unless you hire your own one [*sic*]."

¶ 53 During the hearing on the motion to dismiss, the defendant interjected on two occasions stating that he wished to represent himself and that he would be representing himself "from this point forward." The court denied his request to change representation in the middle of the hearing. However, over objection by the State, the court permitted the defendant to "supplement" the statements of his counsel, telling him, "argue whatever you want." The defendant did so, arguing the contentions in his supplemental *pro se* petition. When the parties subsequently appeared for the third-stage proceedings, the court again inquired whether the defendant wished to continue without counsel. After initially wavering and then stating that he'd like to represent himself on the issue of perjured testimony, the defendant affirmatively retracted his request to proceed *pro se*. He was represented by his postconviction counsel throughout the third-stage hearing.

¶ 54 The language of section 122-4 of the Act (735 ILCS 5/122-4 (West 2010)) makes clear that, if the defendant chooses to proceed *pro se*, he is entitled to do so. *People v. Gray*, 2013 IL App (1st) 101064. However, the right to self-representation is not absolute, and waiver of counsel must be clear, unambiguous, and unequivocal. *Id.* (citing *People v. Baez*, 241 Ill. 2d 44, 115-16 (2011)). The reason for requiring a clear waiver of counsel is to prevent a defendant from (1) appealing either the denial of his right to counsel or the right to self-representation; and (2) manipulating or abusing the criminal justice system by vacillating between desiring counsel and requesting to proceed *pro se*. *Baez*, 241 Ill. 2d at 116. In determining whether the waiver of counsel was clear and unequivocal, we examine the overall context of the proceedings, including the defendant's conduct following his request to represent himself. *People v. Phillips*, 392 Ill. App. 3d 243, 260 (2009). The circuit court's determination of whether the defendant has validly waived his right to counsel is subject to reversal only for an abuse of discretion. *Id.*

¶ 55 We reject the defendant's claim that the court failed to properly address his request to proceed *pro se*. In addition, we hold that the court did not improperly interfere with his right to do so. In his *pro se* motion for an extension of time, and after he was writted into the proceedings, the defendant continued to equivocate between wanting to represent himself and requesting alternative counsel. He criticized his counsel's alleged lack of responsiveness and appeared more motivated by his disapproval of her strategy than with an intention to proceed *pro se*. His first clear request to represent himself came in the midst of the hearing on the State's motion to dismiss. However, the court denied the defendant's request, allowing the parties to complete their arguments. He then permitted the defendant to make his own arguments. This was properly within the court's discretion. See *People v. Ward*, 208 Ill. App. 3d 1073, 1083 (1991) (trial court has discretion to keep order in courtroom and prevent disruptions in the

proceedings). Accordingly, as the defendant was at first equivocal in his desire to represent himself, and then, after being allowed to do so, ultimately elected to proceed with his counsel, we find no interference with his rights under Secton 122-4 of the Act.

¶ 56 The defendant's final challenge pertains to postconviction counsel's performance at the third-stage evidentiary hearing on the issue of trial counsel's ineffectiveness for failing to investigate Lukashevsky. He contends that counsel effectively offered him "no advocacy," because she elected to forego cross-examination of the State's primary witness, the defendant's trial attorney. We disagree.

¶ 57 At the hearing, postconviction counsel argued Lukashevsy would prove that, contrary to the State's theory of the case, the defendant was at home on the evening of May 16, 1998, and not driving from Wisconsin. In her testimony, Lukashevsky stated that she had seen the defendant that evening and had a conversation with him outside of his home. She testified that, after the defendant's arrest, he had asked her if he could forward her name to his defense counsel. Lukashevsky testified that she consented to the defendant's request, but was never contacted by any attorney. In addition, Alla came to her office in 2006, asking her to write an affidavit on the defendant's behalf for postconviction proceedings. Lukashevsky testified that she provided the affidavit, averring that she was "not allowed" to present testimony at trial about her encounter with the defendant on May 16, 1998. The defendant and Alla also testified and corroborated this account. They added that they had provided the names of additional witnesses to trial counsel, many of whom were never contacted to testify at trial.

¶ 58 In response, the State introduced the testimony of the defendant's trial counsel and an associate attorney who assisted at trial. Both testified to having had multiple meetings with the defendant in preparation for trial and receiving the names of potential exculpatory witnesses.

However, they denied ever being told about Lukashevsky. According to trial counsel, he had, either personally or through an assistant, interviewed every single witness given to him by the defendant.

¶ 59 We initially note that the defendant has failed to any cite case law in support of his argument on this issue. Accordingly, he is deemed to have forfeited it for review under Supreme Court Rule 341(h)(7) (eff. July 1, 2008); *People v. Lomax*, 2012 IL App (1st) 103016, ¶ 54.

¶ 60 Forfeiture aside, the argument fails. It is presumed that defense counsel will pursue sound trial strategies. *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997) (citing *Strickland*, 466 U.S. at 689). The decision of whether to cross-examine a witness is a matter of trial strategy, which is subject to substantial deference on review, and does not generally support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997).

¶ 61 Postconviction counsel made a diligent effort to present the defendant's claim of trial counsel's ineffectiveness to the court: specifically, that trial counsel inexplicably neglected to investigate potentially exculpating evidence on behalf of the defendant. Postconviction counsel and her co-counsel conducted a comprehensive examination of Lukashevsky, the defendant, and Alla, and made efforts to rehabilitate their testimony after cross-examination. Although she did not seek to impeach the testimony of the defendant's trial attorney, her co-counsel did cross examine the trial attorney's associate on the failure to follow up with Lukashevsky and other witnesses. Finally, at the conclusion of the evidence, postconviction counsel gave a closing argument with a thorough summary of the evidence presented. Based upon the totality of her representation at the third-stage hearing, her failure to cross-examine trial counsel appears to be an exercise of trial strategy rather than objectively unreasonable representation. As such, we

afford counsel's decision the appropriate deference, and conclude that the defendant's claim here is without merit. See *Pecoraro,* 175 Ill. 2d at 357.

¶ 62 For the foregoing reasons, we affirm the judgment of the circuit court which dismissed the claims in the petition at the second-stage, and denied the claim of ineffective assistance of counsel at the third stage.

¶ 63 Affirmed.