

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 130517-U

NO. 4-13-0517

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 30, 2016

Carla Bender

4th District Appellate

Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Sangamon County |
| JOE L. MAYS, |) | No. 02CF306 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Patrick W. Kelley, |
| |) | Judge Presiding. |

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The motion to withdraw, filed by counsel appointed to represent a *pro se* petitioner under the Post-Conviction Hearing Act after a judicial determination the *pro se* petition was not frivolous or patently without merit, fails to address each *pro se* claim, requiring reversal of the trial court's judgment.

¶ 2 In May 2003, defendant, Joe L. Mays, pleaded guilty to first degree murder (720 ILCS 5/9-1(a)(1) (West 2002)), armed robbery (720 ILCS 5/18-2 (West 2002)), and aggravated kidnapping (720 ILCS 5/10-2(a)(3) (West 2002)). Defendant, in September 2006, filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)), asserting, in part, his confession was illegally coerced and he was denied the effective assistance of trial counsel. The trial court, in September 2006, appointed counsel to represent defendant in postconviction proceedings.

¶ 3 In February 2013, defendant's counsel filed a motion to withdraw, which was granted by the trial court. The court dismissed defendant's postconviction petition. Defendant appeals, arguing the dismissal was erroneous because (1) under *People v. Greer*, 212 Ill. 2d 192, 817 N.E.2d 511 (2004), counsel's motion to withdraw is insufficient as it failed to address all of defendant's *pro se* claims; and (2) the postconviction petition set forth meritorious claims.

¶ 4 This court, following our earlier decision in *People v. Kuehner*, 2014 IL App (4th) 120901, ¶ 73, 8 N.E.3d 1148, refused to review the sufficiency of the motion to withdraw and affirmed the dismissal upon finding defendant's postconviction claims lacked merit. *People v. Mays*, No. 4-13-0517 (Feb. 24, 2015) (unpublished order under Supreme Court Rule 23 (withdrawn November 9, 2015)). After our judgment was filed, the Supreme Court of Illinois reversed our decision in *Kuehner*. *People v. Kuehner*, 2015 IL 117695, ¶ 24, 32 N.E.3d 655. The supreme court then entered a supervisory order mandating we vacate our earlier order in this case and directing us to reconsider the matter. *People v. Mays* (Sept. 30, 2015), 2015 IL 119098, 45 N.E.3d 673 (nonprecedential supervisory order on denial of petition for leave to appeal directing vacatur and reconsideration). Upon reconsideration, we reverse the dismissal and remand.

¶ 5 I. BACKGROUND

¶ 6 In April 2002, the State charged defendant with multiple counts of first degree murder, aggravated kidnapping, and armed robbery after the March 2002 death of Dan Defraities. In May 2002, defense counsel filed a motion for an examination of defendant to ascertain whether he was fit for trial and to determine defendant's criminal responsibility at the time of the offense. In the motion, defense counsel indicated he learned defendant had a history

of psychiatric treatment and medication. Defense counsel had "serious doubts" as to whether defendant understood the nature and purpose of the proceedings and whether defendant could assist in his defense.

¶ 7 In June 2002, a fitness hearing commenced. At the hearing, the trial court was informed Dr. Terry Killian, a psychiatrist, concluded defendant was unfit for trial. In the same report, Dr. Killian opined treatment in a secure facility should permit defendant to obtain fitness within two months. Dr. Killian further opined the insanity defense would not apply. In September 2002, the Department of Mental Health found defendant fit to stand trial.

¶ 8 In October 2002, defense counsel requested another examination by Dr. Killian. The trial court granted the request. In a December 2002 report, Dr. Killian stated defendant received mental-health treatment at Chester Mental Health Center. Dr. Killian concluded defendant was fit to stand trial, as he had "an adequate understanding of the legal issues." Dr. Killian reiterated his conclusion "a defense of not guilty by reason of insanity would not be supported." Consistent with Dr. Killian's conclusions, the parties stipulated defendant had been found fit to stand trial.

¶ 9 In February 2003, defense counsel filed a motion to sever defendant's case from that of his codefendant, Amanda McGuire. Defense counsel asserted McGuire made "hearsay admissions" implicating defendant and defendant made statements implicating McGuire.

¶ 10 In May 2003, defendant pleaded guilty to first degree murder, armed robbery, and aggravated kidnapping. The State agreed to seek a prison sentence of 45 years. At the hearing, the trial court admonished defendant and questioned him to ascertain whether his plea was voluntary and knowing.

¶ 11 The State presented the factual basis for the plea. The police investigated a report the Clark gas station on North Grand Avenue in Springfield was unattended. When the police arrived at the gas station, they found evidence of a robbery. As the police investigated the robbery, they were led to three individuals: defendant, Amanda McGuire, and Cassandra Rossi. Defendant initially denied involvement, but he later confessed. Defendant, who was read his constitutional rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), agreed to waive those rights and provide a written statement. Defendant stated he obtained a metal BB gun and, on March 26, 2002, went to the Clark gas station with McGuire and robbed Defraities, the clerk, while threatening him with the BB gun. After the robbery, defendant and McGuire took Defraities in his truck into the rural Rochester area. Defendant struck Defraities multiple times in the head with the BB gun. Expert testimony would establish Defraities died from severe trauma to the head. The individual who loaned defendant the BB gun would have testified, and the BB gun would have been entered into evidence.

¶ 12 Before accepting defendant's plea, the trial court admonished defendant. Defendant denied anyone threatened him or bullied him to encourage him to plead guilty. Defendant asserted he was happy with his representation. The court found defendant's guilty pleas were voluntary.

¶ 13 In August 2003, defendant was sentenced to concurrent terms of imprisonment of 45 years for first degree murder, 20 years for armed robbery, and 20 years for aggravated kidnapping.

¶ 14 Defendant pursued a direct appeal of his conviction and sentence in January 2005. He later filed a motion to dismiss his appeal, which this court allowed. *People v. Mays*, No.

4-05-0086 (Feb. 25, 2005) (dismissed on defendant's motion).

¶ 15 In September 2006, defendant filed his *pro se* postconviction petition. In his petition, defendant alleged he was denied due process because of police misconduct. Specifically, defendant alleged detectives conducted an unlawful search of his residence, failed to read him his *Miranda* rights, and forced him to sign a statement by threatening bodily harm. Defendant further alleged his trial counsel provided ineffective assistance. Defendant asserted defense counsel (1) failed to request a neuropsychological test battery to aid in the defense; (2) failed to request a change of venue; and (3) coerced him into pleading guilty through misrepresenting facts and law, stating no defense could be raised and abandoning any defense.

¶ 16 That month, the trial court appointed Daniel Fultz to represent defendant. The State filed a motion to dismiss the postconviction petition.

¶ 17 In February 2013, Fultz moved to withdraw as postconviction counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In his six-page motion, counsel maintained he reviewed the applicable law and found defendant's arguments lacked merit. Counsel concluded, because defendant entered a voluntary plea, defendant could not argue his fourth-amendment right against unlawful search and seizure and right of due process were denied. Counsel further concluded defendant could not argue his confession to the police was coerced. Regarding defendant's ineffective-assistance-of-counsel claims, counsel concluded defendant could not show trial counsel's performance was deficient or the existence of a reasonable probability he would not have entered a guilty plea absent trial counsel's error.

¶ 18 Postconviction counsel attached to his motion to withdraw an "Affidavit in Compliance with Supreme Court Rule 651(c)." In the affidavit, counsel averred he consulted

with defendant by mail and in person to ascertain his contentions. Counsel opined defendant appeared "articulate in his position" and "cognizant of the various matters relevant to his contentions." Counsel stated he examined the record of proceedings from the trial and appellate courts and considered amendments to the *pro se* petition.

¶ 19 In May 2013, the trial court held a hearing on the motion to withdraw. When arguing in support of his motion, counsel asserted, "[a]fter a review of everything," he could not "find that there is anything that [defendant] has alleged in his *pro se* petition that would violate the standards enunciated by the Supreme Court in *Strickland v. Washington*, there was nothing that counsel did in entering into the plea negotiations, anything done in the pretrial performance that would violate [defendant's] Sixth Amendment right to counsel." The trial court asked defendant if he had anything to add. Defendant replied, "No, sir." The trial court granted the motion and dismissed defendant's postconviction petition.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant first argues postconviction counsel's motion to withdraw is inadequate, as counsel failed to address each claim in his *pro se* petition. The State does not dispute defendant's conclusion appointed counsel failed to address each claim. The State, which filed its appellate brief before the supreme court ruled on *Kuehner*, argues we need not address the sufficiency of the motion.

¶ 23 The Act provides a process by which an inmate may obtain postconviction review of claims his conviction led to a substantial denial of his constitutional rights. After a petition is filed under the Act, the trial court must, within 90 days of filing, examine the petition and

determine if the claims within it are frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2006)). At this stage, if the court finds the claims are not frivolous or patently without merit, the court appoints counsel to represent the indigent petitioner during further postconviction proceedings (725 ILCS 5/122-4 (West 2006)). A petition may also advance to the next stage of proceedings if the court does not take any action on the petition within 90 days of its filing. See *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996).

¶ 24 Once counsel is appointed, the petitioner is entitled to reasonable representation by counsel. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995); *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23, 971 N.E.2d 1204. To ensure petitioners are provided reasonable representation, Rule 651(c) imposes certain duties on appointed counsel. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). Appointed counsel must (1) consult with the petitioner to ascertain the petitioner's contentions of deprivation of constitutional rights, (2) examine the record of the trial proceedings, and (3) make any amendments to the *pro se* petition "necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Counsel may also file a certificate to show compliance with Rule 651(c). See *People v. Lander*, 215 Ill. 2d 577, 584, 831 N.E.2d 596, 600 (2005).

¶ 25 Appointed counsel is not required by Rule 651(c) "to advance frivolous or spurious claims on defendant's behalf"; counsel may withdraw rather than advance such claims. *Greer*, 212 Ill. 2d at 205, 211, 817 N.E.2d at 519, 523. If counsel believes the *pro se* claims are frivolous or without merit, counsel has an ethical obligation to seek withdrawal as counsel. *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 13, 964 N.E.2d 679.

¶ 26 When counsel is appointed and a petition advances to the second stage of proceedings due to affirmative judicial action, the motion to withdraw as counsel must include an explanation as to why each *pro se* claim lacks merit. *Kuehner*, 2015 IL 117695, ¶ 21, 32 N.E.3d 655. "[C]ounsel may not simply move to withdraw on the grounds that the *pro se* claims are frivolous or patently without merit, as the trial court already has ruled expressly to the contrary." *Id.* Counsel thus "bears the burden of demonstrating, with respect to each of the defendant's *pro se* claims, why the trial court's initial assessment was incorrect." *Id.*

¶ 27 In this case, appointed counsel's motion to withdraw fails to address the merits of defendant's ineffective-assistance-of-counsel claims. In his *pro se* petition, defendant asserted multiple claims of ineffective assistance, such as the following: defense counsel (1) failed to request a neuropsychological test battery to aid in the defense; (2) failed to request a change of venue; and (3) coerced him into pleading guilty through misrepresenting facts and law, including misrepresenting facts regarding a codefendant's case. Appointed counsel's only assertion regarding the futility of these arguments is "[p]etitioner cannot show that there is a reasonable probability that, but for trial counsel's alleged errors, he would not have entered a guilty plea." This assertion is not an explanation but an unsupported conclusion. While the conclusion may be true, *Kuehner* requires more.

¶ 28 We therefore reverse the trial court's judgment and remand for further second-stage proceedings. On remand, appointed counsel may file another motion to withdraw, but such motion must contain "at least some explanation as to why all of the claims set forth in defendant's *pro se* petition are either frivolous or patently without merit." *Id.* ¶ 24.

¶ 29 III. CONCLUSION

¶ 30 We reverse the trial court's judgment and remand for further proceedings.

¶ 31 Reversed and remanded with directions.