

NOTICE

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2018 IL App (4th) 150982-U

NO. 4-15-0982

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 24, 2018

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
GERALD WAYNE WHITE,)	No. 11CF414
Defendant-Appellant.)	
)	Honorable
)	J. Casey Costigan,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel was not bound by Rule 651(c) when he was retained at the first stage of postconviction relief, and defendant was afforded reasonable assistance of postconviction counsel.

¶ 2 In February 2014, postconviction counsel filed a postconviction petition on defendant's behalf. Eight days later, defendant, Gerald White, filed a *pro se* postconviction petition. The circuit court advanced the proceedings to the second stage and directed the State to respond to the petition filed by postconviction counsel. Counsel filed a first amended petition as well as a supplemental first amended petition to which the State responded. The circuit court dismissed defendant's amended postconviction petition.

¶ 3 Defendant appeals the dismissal of his postconviction petition, asserting (1) postconviction counsel failed to file a certificate attesting to compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and (2) even if postconviction counsel was not bound by

Rule 651(c), he did not provide reasonable assistance because he did not incorporate three of the claims defendant made in his *pro se* petition into either the first amended or supplemental petition. We affirm.

¶ 4

I. BACKGROUND

¶ 5 In May 2011, a McLean County grand jury returned three bills of indictment charging defendant with (1) unlawful delivery of a controlled substance (count I) (720 ILCS 570/401(d)(i) (West 2010) (less than 1 gram of a substance containing heroin)), (2) unlawful possession of a controlled substance with intent to deliver (count II) (720 ILCS 570/401(d)(i) (West 2010) (less than 1 gram of a substance containing heroin)), and (3) unlawful possession of a controlled substance (count III) (720 ILCS 570/402(c) (West 2010) (less than 15 grams of a substance containing heroin)). The following is a summary of the evidence presented at trial pertinent to this appeal.

¶ 6

A. Trial Evidence

¶ 7

1. *Lora Lindoerfer*

¶ 8 Lora Lindoerfer testified she was employed at a Denny's restaurant in Bloomington, Illinois, in May 2011. She testified she worked as a confidential informant for the State on May 17, 2011, in exchange for the dismissal of theft charges against her. Lindoerfer testified she called defendant, who she named as her drug dealer, and asked to buy \$100 worth of heroin. Defendant told Lindoerfer to call his friend, Michael Chad Boitnott, for a ride to defendant's house. Boitnott agreed to drive Lindoerfer from work to defendant's house. Detective Shumaker and Sergeant Brown led the controlled buy. Lindoerfer wore her Denny's uniform and officers admitted conducting only a limited search before she left to make the controlled buy, although she had been given a thorough search earlier in the day.

¶ 9 Boitnott picked up Lindoerfer in his white pickup truck and drove to defendant's house. Defendant walked to the driver's side window. Lindoerfer testified she leaned over the center console and gave defendant \$100 in marked bills. Defendant gave Lindoerfer two foil packets, which she later gave Detective Shumaker after Boitnott dropped her off at Denny's. Both parties stipulated the packets contained heroin.

¶ 10 2. *Sergeant Brian Brown, Officer Kenneth Bays, and Detective Kevin Raisbeck*

¶ 11 Each of the three men testified they were part of the surveillance team for the alleged transaction. Detective Raisbeck, who was 20 to 30 yards from defendant's house, testified he saw Lindoerfer lean over the center console of Boitnott's truck and exchange something with defendant. Detective Raisbeck recorded the interaction on his cell phone, although the video presented did not show Lindoerfer's actions inside the truck.

¶ 12 After the alleged exchange, defendant drove away from his house, was subject to a traffic stop, and Detective Raisbeck arrested defendant. At the time of arrest, defendant had a cell phone which rang when Detective Riasbeck dialed the number Lindoerfer called earlier in the day. Defendant had \$220 in cash, \$100 of which was the marked cash used in the controlled buy. Additionally, defendant had four foil packets in his pocket at the time of arrest. Both parties stipulated the packets contained heroin.

¶ 13 3. *Defendant's Taped Interview*

¶ 14 Detective Shumaker interviewed defendant at the police station after informing him of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)) and telling him the interview would be audio and video recorded. Throughout the interview, defendant denied selling drugs to anyone, although he admitted using drugs. Defendant admitted knowing Lindoerfer and Boitnott. To explain the source of the cash found in his pocket, defendant

claimed he sold his car to a used car dealer in Bloomington the previous day and received \$300 for it. When Shumaker asked about the heroin found in defendant's coat pocket, defendant claimed the jacket was not his. Defendant denied ever selling heroin. When Shumaker prompted defendant to tell the truth, defendant replied, "Yeah, well, these guys bringing in fifty to a hundred grams of heroin. So, I'm willing to help myself that way."

¶ 15 *4. Defendant's Case*

¶ 16 Defendant presented no evidence. The court indicated it would admit three of defendant's prior drug convictions if he chose to testify. Boitnott had a case pending for possession of heroin in connection with the events occurring on May 17, 2011, and asserted his fifth amendment right in refusing to testify.

¶ 17 *B. Jury Verdict, Posttrial Motion, and Sentencing*

¶ 18 The jury found defendant guilty of (1) unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)) and (2) unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). The jury found defendant not guilty of unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(d)(i) (West 2010)).

¶ 19 In December 2011, defendant filed a posttrial motion asking the trial court to set aside the jury's verdict and enter judgment of acquittal notwithstanding the verdict. In a memorandum of law in support of the motion, defendant argued the State failed to present sufficient evidence to sustain his conviction for unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2010)). Defendant asserted Lindoerfer was not a credible witness because she was under the influence of heroin during the controlled buy, and she had a motive to lie.

¶ 20 In January 2012, following a hearing, the trial court denied defendant's posttrial motion and sentenced him to 20 years' imprisonment for unlawful delivery of a controlled substance and 5 years' imprisonment for unlawful possession of a controlled substance.

¶ 21 C. Direct Appeal

¶ 22 On direct appeal, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt, specifically the State failed to prove Lindoerfer did not frame defendant; and (2) the trial court committed reversible error in admitting defendant's taped interview with Detective Shumaker. The appellate court affirmed. In regard to defendant's first argument, this court stated,

“Police officers maintained constant surveillance of the truck in which Lindoerfer traveled from Denny's to defendant's house, and then back to the area near Denny's. The jury saw a video of a very brief interaction between defendant and the occupants of the truck outside of defendant's house. Shortly after that interaction, defendant was arrested and found in possession of the cash Shumaker provided to Lindoerfer approximately an hour earlier for the purpose of purchasing heroin. The foil packets of heroin Lindoerfer gave to Shumaker matched the foil packets found in defendant's jacket pocket when he was arrested. The cellular phone found in defendant's possession was the same cellular phone Lindoerfer communicated with to arrange the purchase of heroin. The jury was entitled to reject the story defendant presented during the interview at the police station and find the version of events provided by Lindoerfer (which was corroborated by the testimonies of five police officers and consistent with the

physical evidence) more credible.” *People v. White*, 2013 IL App (4th) 120108-U, ¶ 40 (Aug. 13, 2013) (unpublished order under Supreme Court Rule 23).

This court concluded a rational trier of fact was presented with sufficient evidence to accept Lindoerfer’s testimony and reject defendant’s alternative theory. *Id.* ¶ 42.

¶ 23 D. Section 2-1401 Petition

¶ 24 In January 2013, with his direct appeal pending, defendant filed a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)) claiming (1) the jury verdicts convicting him for delivery and possession of a controlled substance (720 IILCS 570/401(d)(i), 402(c) (West 2010)) but acquitting him of possession with intent to deliver (720 ILCS 570/401(d)(i) (West 2010)) were inconsistent where the same elements were required for both crimes and (2) the evidence used to convict defendant was insufficient because it could be rebutted by testimony from Boitnott and defendant.

¶ 25 On May 29, 2013, the trial court conducted a hearing on the State’s motion to dismiss defendant’s section 2-1401 petition. Boitnott, having been sentenced for his related charges, agreed to testify. Boitnott said he initially refused to testify because he feared it would negatively impact his then-pending sentence. Boitnott admitted he drove Lindoerfer to defendant’s house but claimed defendant gave Lindoerfer nothing while defendant stood at the side of Boitnott’s truck, talking to Boitnott. However, Boitnott testified he gave defendant \$100 Lindoerfer handed to him. Boitnott testified he saw Lindoerfer pull a foil packet out of her apron before she gave Boitnott the money to hand to defendant.

¶ 26 Ultimately, the circuit court granted the State’s motion to dismiss the section 2-1401 petition. On October 22, 2014, this court affirmed. *People v. White*, 2014 IL App (4th) 130880-U, ¶ 28 (Oct. 22, 2014) (unpublished order under Supreme Court Rule 23). On

defendant's first argument of inconsistent verdicts, this court found no inconsistency because the intent to deliver indictment stemmed from the heroin found in defendant's pocket whereas the delivery indictment referred to the heroin in Lindoerfer's possession. This court stated, "[t]he verdicts were not inconsistent because two different sources of heroin were being referred to in the different counts." *White*, 2014 IL App (4th) 130880-U, ¶ 28. On the sufficiency of the evidence claim, this court found defendant's arguments unpersuasive. This court stated, "[d]efendant could have chosen to testify at trial. Postjudgment relief is limited to matters relating to evidence that did not appear in the record at trial and was discovered after trial was completed." *Id.* ¶ 34. This court also noted defendant's counsel should have elicited this information from Boitnott at trial. Even if Boitnott had testified at trial, this court found his testimony was not conclusive and would not require a retrial.

¶ 27

E. Postconviction Petitions

¶ 28 On February 18, 2014, postconviction counsel filed an initial postconviction petition on defendant's behalf. Counsel argued (1) the jury verdicts convicting defendant for delivery and possession of a controlled substance (720 ILCS 570/401(d)(i), 402(c) (West 2010)) but acquitting him of possession with intent to deliver (720 ILCS 570/401(d)(i) (West 2010)) were inconsistent where the same elements were required for both crimes, (2) actual innocence, (3) prosecutorial impropriety as to the controlled buy, and (4) ineffective assistance of trial counsel.

¶ 29 On February 26, 2014, defendant filed a *pro se* postconviction petition. In addition to the claims of actual innocence and ineffective assistance of counsel argued by postconviction counsel in the original petition, defendant also argued he should have been

allowed to proceed *pro se* or, in the alternative, been granted a continuance where trial counsel was not prepared to try to the case.

¶ 30 On June 24, 2014, the trial court characterized defendant's *pro se* petition as a successive postconviction petition and ruled postconviction counsel's February 18 petition would continue to the second-stage proceedings for purposes of the State's response. The court also denied defendant's request for appointment of counsel typical at the second-stage of postconviction relief, because defendant was already represented by postconviction counsel.

¶ 31 On September 26, 2014, counsel filed a motion for leave to file a first amended petition for postconviction relief. The same day, the trial court held a hearing on the motion, and postconviction counsel informed the court an amended petition would allow him to revise and incorporate defendant's *pro se* claims and counsel's arguments into a cohesive pleading. Postconviction counsel referred to conversations between defendant and himself multiple times during the hearing. The court allowed defendant to file a first amended petition. This petition included the claims from the February 18 petition, defendant's argument regarding a continuance, and an argument defendant's sentence was excessive.

¶ 32 On November 26, 2014, after a hearing on the matter during which postconviction counsel requested the court allow defendant to supplement his petition with additional claims as the result of conversations between counsel and defendant, defendant filed his supplemental first amended petition. Three issues were raised in defendant's *pro se* petition and were never incorporated into counsel's petition. These issues include (1) failure of trial counsel to pursue a potential witness, John Hull, Sr., who was at defendant's house on the date of the alleged delivery and claimed he never saw any exchange; (2) error by the trial court in denying defendant's request to hire new counsel when trial counsel said he was unprepared five days

before trial; and (3) trial counsel's failure to speak with defendant in the days leading up to the trial.

¶ 33 On February 18, 2015, the circuit court granted the State's motion to dismiss defendant's postconviction petition at the second stage. The court noted the record fully supported the verdict below and defendant had not been deprived of his constitutional rights. Additionally, many of defendant's claims were addressed on direct appeal and therefore were barred by the doctrine of *res judicata*.

¶ 34 Defendant filed a motion to reconsider the dismissal of the postconviction petition. On November 4, 2015, the circuit court denied defendant's motion and stated "[a] Supreme Court Rule 651(c) certificate was not required as [defendant] retained counsel and filed a petition before [defendant] filed his *pro se* [sic] petition. *** [S]uch a certificate is not required in this case and therefore the court is proceeding with issuing an order."

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant contends postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) by not (1) filing a certificate of compliance with Rule 651(c) or (2) providing reasonable assistance.

¶ 38 A. Standard of Review

¶ 39 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Act sets forth three stages of proceedings. *Id.* at 471-72. At the first stage, the circuit court independently reviews the defendant's postconviction petition

and determines whether “the petition is frivolous or is patently without merit[.]” 725 ILCS 5/122-2.1(a)(2) (West 2014). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court does not dismiss the petition, it proceeds to the second stage, where the court may appoint counsel for a defendant not already represented by counsel. *Pendleton*, 223 Ill. 2d at 472. Defense counsel may amend the defendant’s petition to ensure his or her contentions are adequately presented. *Id.* Also at the second stage, the State may file a motion to dismiss the defendant’s petition or an answer to it. *Id.* If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Id.* at 472-73. At both the second and third stages of the postconviction proceedings “the defendant bears the burden of making a substantial showing of a constitutional violation.” *Id.* at 473. We review counsel’s compliance with Rule 651(c) *de novo*. *People v. Claudin*, 369 Ill. App. 3d 532, 533, 861 N.E.2d 227, 229 (2006).

¶ 40 B. Failure to File a Rule 651(c) Certificate

¶ 41 Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) “imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the Act.” *People v. Lander*, 215 Ill. 2d 577, 584, 831 N.E.2d 596, 600 (2005). Under that rule, postconviction counsel must (1) consult with the defendant either by mail or in person to ascertain the contentions of deprivation of constitutional rights, (2) examine the record of the trial court proceedings, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the defendant’s contentions. *People v. Perkins*, 229 Ill. 2d 34, 42, 890 N.E.2d 398, 403 (2007). Our supreme court has consistently held remand is required when

postconviction counsel fails to complete any one of the above duties, regardless of whether the claims raised in the petition have merit. *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007). Postconviction counsel's filing of a Rule 651(c) certificate raises a presumption that counsel provided reasonable assistance under the Postconviction Act, namely, that counsel adequately investigated, amended, and properly presented the defendant's claims. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200.

¶ 42 Defendant contends postconviction counsel's failure to file a certificate indicating compliance with Rule 651(c) requires reversal in this case. Defendant argues because he filed a *pro se* petition, the rule applies regardless of the fact postconviction counsel filed a petition before defendant filed *pro se*. Defendant relies on *People v. Richmond*, 188 Ill. 2d 376, 721 N.E.2d 534 (1999), and *People v. Hayes*, 49 Ill. 2d 298, 273 N.E.2d 838 (1971), to support his argument. In both cases, the defendants filed their initial petitions *pro se* and were appointed counsel on remand. *Richmond*, 188 Ill. 2d at 377; *Hayes*, 49 Ill. 2d at 299. In *Richmond*, 188 Ill. 2d at 379, the defendant retained private counsel on remand after the circuit court appointed counsel to represent him. Defendant mistakenly analogizes his situation to the facts in *Richmond* in support of the contention postconviction counsel should have complied with Rule 651(c) and his failure to do so should result in reversal. In doing so, defendant ignores our supreme court's distinction between petitions initially filed by postconviction counsel and those filed *pro se*. The court states "[i]n neither case, however, was the initial post-conviction petition filed *pro se*; rather, in both cases the initial petition was prepared and filed by counsel. By its own terms, then, the requirements of Rule 651(c) would not have been applicable in those settings." *Id.* at 383.

¶ 43 Defendant argues this court should treat the situation as if counsel had been retained at the second stage of postconviction proceedings because their filings were “nearly simultaneous.” Defendant does not cite authority to support his contention. In fact, defendant’s authority is directly on point to refute his claim postconviction counsel was required to file a certificate in compliance with Rule 651(c). We also reject the idea the petitions were “nearly simultaneous.” The fact is postconviction counsel filed his petition first and the circuit court ruled the State should respond to counsel’s petition.

¶ 44 C. Reasonable Assistance

¶ 45 In postconviction proceedings, the Act only requires counsel to provide a defendant with a “ ‘reasonable level of assistance.’ ” *Lander*, 215 Ill. 2d at 583-84 (quoting *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990)). “Reasonable assistance” is a lesser requirement than “effective assistance” described in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 50, 84 N.E.3d 527. “Strictly speaking, a defendant is entitled to less from postconviction counsel than from direct appeal or trial counsel. The flip side of this principle is that it should be even more difficult for a defendant to prove that he or she received unreasonable assistance than to prove he or she received ineffective assistance under *Strickland*.” *Id.* Both appointed and retained postconviction counsel are required to provide “reasonable assistance[.]” *People v. Cotto*, 2016 IL 119006, ¶ 41, 51 N.E.3d 802. Per *Zareski*, 2017 IL App (1st) 150836, ¶ 61, we must examine whether counsel should have presented or amended the claims and whether this failure prejudiced defendant. If the claim has no merit, defendant cannot receive postconviction relief. *Id.* To fulfill this obligation “does not require counsel to advance frivolous or spurious claims on defendant’s behalf.” *Pendleton*, 223 Ill. 2d at 472.

¶ 46 Defendant argues postconviction counsel failed to incorporate three of the claims from his *pro se* petition into any of the amended petitions filed by counsel. Those claims include (1) failure of trial counsel to investigate a potential witness, John Hull, Sr., who was at defendant's house on the date of the alleged delivery and claimed he never saw any exchange; (2) error by the trial court in denying defendant's request to hire new counsel when trial counsel said he was unprepared five days before trial; and (3) trial counsel's failure to speak with defendant in the days leading up to the trial. The record indicates postconviction counsel incorporated several of defendant's *pro se* claims into the amended petitions and gave them a coherent legal form. We address each of defendant's contentions in turn.

¶ 47 1. *Possible Exculpatory Testimony*

¶ 48 Defendant argues had postconviction counsel argued Hull would have provided exculpatory testimony and attached Hull's affidavit to the petition, defendant could have received a retrial. This argument fails for the reasons this court rejected the same argument from defendant regarding Boitnott. The possible testimony would be inconclusive and would not have changed the result on retrial. In fact, Hull's affidavit was even less detailed than Boitnott's potential testimony.

¶ 49 Issues raised on direct appeal are barred by the doctrine of *res judicata*. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 452 (2004). Issues that could have been raised on direct appeal, but were not, are forfeited. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). This issue should have been raised on direct appeal. On defendant's direct appeal, this court stated "[p]ostjudgment relief is limited to matters relating to evidence that did not appear in the record at trial and was discovered after trial was completed." *White*, 2014 IL App (4th) 130880-U, ¶ 34.

¶ 50 This issue was addressed at defendant's posttrial and sentencing hearing regarding trial counsel's alleged ineffectiveness. The trial court stated "[w]hat the people who were standing outside somewhere could have seen that's not in the video or the officer didn't see is conjecture."

¶ 51 *2. Request for New Counsel*

¶ 52 Defendant argues postconviction counsel erred in not including defendant's claim the trial court should have granted defendant a continuance to obtain new counsel. On June 10, 2011, defendant requested to proceed *pro se* for the first time. "A trial court must grant a motion for continuance when the ends of justice so clearly require." *Feder v. Hiera*, 85 Ill. App. 3d 1001, 1002, 407 N.E.2d 799, 801 (1980). "However, it has broad discretion in granting or denying such a motion and, in the absence of a manifest abuse of that discretion, its judgment will not be disturbed on appeal." *Id.*

¶ 53 The trial court dealt with defendant continually requesting new representation or to proceed *pro se*. In the final pretrial hearing, the trial court noted the numerous delays due to changes in representations and continuances requested by defendant. On October 6, 2011, the trial court stated "it appears to the Court that there is not a legitimate reason to be seeking a delay in the trial here, rather seeking delay for the sake of delay." No evidence shows the trial court abused its discretion in denying defendant another continuance. This issue could and should have been dealt with on direct appeal. The failure to do so results in forfeiture. See *Ligon*, 239 Ill. 2d at 103.

¶ 54 *3. Trial Counsel's Lack of Communication*

¶ 55 Defendant alleges trial counsel was ineffective for failing to communicate with defendant in the days leading up to trial. This claim is rebutted by the record. Defendant's claim,

as far as the record indicates, is limited to the weekend before defendant's trial when defendant's wife tried to call trial counsel but could not get in touch with him. Defendant testified at his posttrial hearing he had no problem speaking with trial counsel at any point except for the weekend immediately preceding trial.

¶ 56 Lack of communication is a hard burden for defendant to demonstrate. In *People v. Penrod*, 316 Ill. App. 3d 713, 723, 737 N.E.2d 341, 351 (2000), trial counsel admitted to never calling or seeing defendant in jail, but because defendant could not demonstrate how contact would have changed the outcome of his trial, counsel's assistance was held to be effective. Our review of the record indicates trial counsel communicated effectively with defendant and did what he could with the facts, as they were stacked against defendant.

¶ 57 III. CONCLUSION

¶ 58 We affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 59 Affirmed.