2022 IL App (4th) 200400-U

NO. 4-20-0400

FILED
March 7, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
BRYANT H. HARVEY,	)	No. 14CF1592
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Cavanagh and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) postconviction counsel provided reasonable assistance and (2) the trial court did not err by dismissing the postconviction petition at the second stage of proceedings where the claim was positively rebutted by the record.

¶ 2 In August 2019, defendant, Bryant H. Harvey, filed a *pro se* postconviction petition. In July 2020, the State moved to dismiss defendant's petition. In August 2020, the trial court dismissed defendant's postconviction petition.

¶ 3 Defendant appeals, arguing (1) postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) and provided unreasonable assistance where she failed to amend and support the *pro se* postconviction petition adequately and (2) the trial court erred by dismissing the postconviction petition at the second stage upon finding

counsel was effective without an evidentiary hearing. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 A. Guilty Plea

¶ 6 In November 2014, the State charged defendant with armed robbery and aggravated robbery. On April 21, 2015, defendant entered into a fully negotiated guilty plea to aggravated robbery. During the plea, the trial court explained to defendant the nature of the charge and the minimum and maximum penalties. Defendant indicated he understood the charge and the maximum penalties. Defendant was admonished that, if he pleaded guilty, he would be giving up his absolute right to a bench or jury trial where the State had the burden to prove him guilty beyond a reasonable doubt. The court informed defendant he could still plead not guilty and demand a trial, hear the witnesses testify, ask the witnesses questions, and call witnesses of his own. The court further informed defendant he could testify at trial but no one could make him testify. Defendant indicated he understood. The court asked defendant if his plea was voluntary and of his own free will, and defendant responded, "Sir, yes, sir."

¶ 7 The State read the plea agreement which provided defendant would plead guilty to aggravated robbery and serve 14 years' imprisonment with a 2-year period of mandatory supervised release with credit for 154 days previously served, pay various fines and fees, and pay approximately $12,000 in restitution. In exchange for defendant's plea, the State would dismiss the armed robbery charge and the charges in two other felony cases. Plea counsel, Edwin Piraino, stated, "That is the agreement." The court went over the terms of the plea again and asked defendant if that was the agreement on the aggravated robbery charge. Defendant responded, "Sir, yes, sir." Piraino asked for a moment and then announced, "We have no plea."

After a recess, Piraino informed the court there was an issue with the restitution and the State offered to strike restitution from the agreement. The court again confirmed the terms of the plea, without the restitution, with defendant. When the court asked defendant if he had been promised anything else besides the deletion of the restitution or if anyone had forced or threatened him, defendant stated, "Sir, no, sir."

¶ 8 The State set forth the factual basis for the plea, stating that, on October 23, 2014, a robbery occurred at a RadioShack store. According to the factual basis, "A male subject wearing all black clothing and a mask entered the store brandishing what witnesses perceived to be and described as a handgun." The robber ordered two employees to get on the ground and the robber then took cell phones and cash from the store. One of the employees later admitted to being complicit in the robbery and identified defendant as the robber who had offered her $3000 to help with the robbery. The trial court accepted defendant's guilty plea. The court sentenced defendant to a 14-year term of imprisonment consecutive to a 1-year term of imprisonment in Champaign County case No. 14-CF-1376.

¶ 9 B. First Motion to Withdraw Guilty Plea

¶ 10 The trial court received a letter dated April 23, 2015, from defendant indicating he wished to withdraw his guilty plea. The letter stated defendant was on a high dosage of pain medication for sickle cell disease and he did not fully understand the plea agreement. In May 2015, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. The motion alleged (1) defendant was told the State would file additional charges if he did not plead guilty, (2) there was no factual basis for the plea, (3) he was not mentally competent to enter the plea due to extensive use of narcotics, (4) his attorney told him that he "would do less time due to good time," (5) he did not fully understand all the stipulations to the plea agreement, and

(6) he was innocent of the crime and deserved a trial. The motion further stated defendant suffered from post-traumatic stress disorder (PTSD) and hallucinations, which caused him to hear voices. Finally, defendant alleged his judgment was impaired when he entered his plea because he was on "so many different medications."

¶ 11 In June 2015, the trial court held a hearing on defendant's motion to withdraw his guilty plea. Defendant was represented at the hearing by George Vargas. Defendant testified he did not fully understand the guilty plea proceedings because he "was under extensive narcotics, OxyContin, and since 2012 [he] suffered severely with PTSD and hallucinations, and [he] did not fully understand all the stipulations." According to defendant, Piraino, his guilty plea counsel, was unaware defendant was on medication. Defendant testified that, although Piraino had visited him in jail, he only went over some of the plea agreement and defendant did not fully understand the agreement.

¶ 12 Defendant testified that, prior to entering his guilty plea, he had been in custody in Champaign County from November 19, 2014, to April 21, 2015. During that time, defendant's medications were administered by the staff at the Champaign County correctional center. At the time of the hearing on the motion to withdraw his guilty plea, defendant was taking "hydroxyurea, penicillin, folic acid, prazosin, Zoloft, Zyprexa, and *** Norco every three to seven hours."

¶ 13 Piraino testified he first appeared on defendant's behalf on January 6, 2015. Piraino communicated with defendant in person, by phone, and by mail approximately half a dozen times by each method. Piraino also communicated with defendant's father. According to Piraino, the State offered a guilty plea deal of 21 years' imprisonment when Piraino first began representing defendant. In April 2015, before defendant pleaded guilty, the State filed charges in

Champaign County case Nos. 15-CF-496 and 15-CF-497. According to Piraino, case Nos. 15-CF-496 and 15-CF-497 exhausted the other potential charges the State had discussed filing.

¶ 14 When asked if defendant appeared mentally competent during their meetings, Piraino testified as follows:

> "He did, and I will say in fairness, I was told by his father that he was on—[defendant] never told me. His father told me that he required many trips to the hospital and [had] some medical issues. I then called the correctional center, talked to the nurse to make sure he was getting proper medication. I did ask if he was on any medications such as narcotics and that, and I was told absolutely not, that the medication was prescribed by a doctor and that they did not dispense narcotics as prescription drugs at the correctional center."

According to Piraino, defendant was intelligent and their conversations were "right on point" and involved discussions about "days for good time" and other programs available in the Department of Corrections (DOC). Piraino testified defendant appeared mentally competent and did not appear to be under the influence of any medication at the plea hearing. According to Piraino, it was defendant who caught the restitution in the plea agreement and stated he did not think that was in the agreement.

¶ 15 Piraino testified he thoroughly explained the plea agreement and the sentence. Piraino went paragraph by paragraph over a document titled "Explanation and Agreements of Rights" with defendant. According to Piraino, the document stated he went over discovery with defendant, explained the range of sentences, and explained that good time credit and program

eligibility would be decided by DOC. The document provided that if defendant had any doubts whatsoever, he should not plead guilty and should proceed to trial. Piraino testified defendant understood the document perfectly, marked the box stating that he wanted to plead guilty, and personally signed the form.

¶ 16 The trial court found defendant had no credibility. The court noted the plea agreement was "incredibly favorable" to defendant. The court denied defendant's motion to withdraw his guilty plea. In June 2015, a notice of appeal was filed. In January 2017, the case was remanded to the trial court for compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017).

¶ 17 C. Second Motion to Withdraw Guilty Plea

¶ 18 In March 2017, Vargas filed a Rule 604(d) certificate. Three days later, defendant filed a *pro se* motion to withdraw his guilty plea. The motion alleged defendant was prescribed narcotics for pain management related to his sickle cell disease. The motion alleged defendant had been diagnosed with PTSD and hallucinations and he heard voices. The motion also alleged defendant was not mentally capable of making rational decisions pertaining to the guilty plea due to his extensive use of psychotropic medication and narcotics. Defendant alleged his judgment was vitiated and invalidated due to the medicinal cocktail of dissimilar medications he was prescribed. Defendant stated he did not fully understand the guilty plea and his attorney, Piraino, told him the State would file additional charges if he did not plead guilty. Additionally, Piraino told defendant he would serve less time if he pleaded guilty due to good time and the work release program. Defendant attached medical records from 2013, 2014, and 2016 to the motion. The records indicated defendant attempted suicide in 2013. A medication administration record from March 2015 showed defendant was taking several medications, including oxycodone.

¶ 19 In April 2017, attorney Alfred Ivy filed a motion to withdraw defendant's guilty plea. Ivy's motion realleged the allegations in defendant's March 2017 *pro se* motion. Ivy's motion also cited authority for the proposition that ingestion of psychotropic medication was grounds for ordering a mental health review to determine a defendant's fitness to stand trial, understand the nature of the proceedings, and aid his attorney in preparing for trial. Ivy included an allegation that Piraino provided ineffective assistance of counsel by failing to present evidence of defendant's physical and mental health and to request a fitness evaluation.

¶ 20 Subsequently, Ivy withdrew as defendant's counsel, and in May 2018, Vargas filed an amended motion to withdraw defendant's guilty plea. The amended motion alleged defendant suffered from sickle cell anemia and had been prescribed strong narcotics. Defendant was diagnosed with PTSD and depression and was prescribed medication due to hallucinations and hearing voices. Piraino did not fully explain the plea deal. As a result of defendant's medical and mental health conditions, he did not understand what the plea was or the consequences of the plea. Piraino did not fully investigate the case and did not disclose that evidence that appeared to be exculpatory existed. Piraino coerced defendant into pleading guilty by telling him the State would file additional charges if he did not plead guilty. Finally, the motion alleged Piraino did not explore the possibility of a fitness evaluation to determine if he fully understood the proceedings against him. The motion alleged that, for the foregoing reasons, defendant's guilty plea was not knowing or voluntary. The motion was supported by medical records from 2013 through 2017. A medication administration record indicated defendant was taking oxycodone in April 2015.

¶ 21 In June 2018, the trial court held a hearing on the amended motion to withdraw defendant's guilty plea. Defendant's father, Bryant Harvey Sr., testified defendant's mental

health problems began after he was involved in a case involving the accidental death of his best friend when he was 15 or 16 years old. Defendant was born with sickle cell anemia and took medications for both the sickle cell anemia and his mental health issues. Defendant's father told Piraino about defendant's struggles and that he had attempted suicide.

¶ 22 Defendant testified he "was diagnosed with PTSD, psycho effective (sic) disorder and hallucinations." For his sickle cell anemia, defendant took "Hydroxyurea, Folic Acid, Penicillin, [and] sometimes opiates for pain." For his PTSD, depression, and hallucinations, defendant took Seroquel and Wellbutrin. Defendant testified he told Piraino about his medical and mental health issues and gave Piraino his mental health records from his hospitalizations. When asked if he understood what he was doing when he pleaded guilty, defendant responded, "No, not completely. I was—I was—I was faced with a lot during the time, and my mind just wasn't really on it. Some of it made sense, a lot of it didn't." According to defendant, Piraino advised him as to how much time he would serve and the good time credit and work release programs, but when defendant arrived at DOC, he learned "it was otherwise." Piraino never discussed having defendant evaluated for fitness.

¶ 23 Defendant testified he filed a Freedom of Information Act request for police records and "found many things that could have *** proven [his] innocence in this case." According to defendant, Piraino did not disclose this evidence. When asked if he was suffering from hallucinations or hearing voices at the time of the guilty plea, defendant responded, "Certainly." The State asked the trial court to take judicial notice of defendant's testimony and cross-examination during the first hearing on the motion to withdraw the guilty plea. Defendant testified he still had some problems but had found a medication that worked. Defendant again stated he was taking Wellbutrin and Seroquel and had recently stopped taking Klonopin. When

asked what he did not understand about the plea, defendant stated, "Well, the fact that—first off, the time, the good time, the sentence, how long I would do in IDOC."

¶ 24 Piraino testified he did not recall any conversations with defendant's father about medications defendant took. Piraino testified defendant's father "could have talked to me and maybe he did in regards to the problems that [defendant] had prior to that date in regards to suicide and so forth." When asked if he heard anything said by defendant or his father in court that day that affected his prior testimony, Piraino stated he recalled getting a letter from defendant asking about three different possibilities of getting the case resolved. According to Piraino, he brought defendant to the court to enter a guilty plea. Piraino testified, "I did not feel comfortable with it, and he signed my explanation of benefits at that time. I told him I wanted to think about it and make sure that this is what he wanted to do. We reset the plea for a week later. I told him to think about it." Piraino testified that, when they returned to court a week later, "He signed another jury waiver on that date stating he completely understood, understood all of the good time, understood that the—the range of sentence, and I went over the discovery with him again, also, in regards to the judgment order and my plea where I guaranteed no good time from [DOC] and said that that was completely up to them and he signed that document that he understood them."

¶ 25 Piraino testified he had no indication whatsoever that defendant was on medications. Piraino did not have access to the jail's records. Piraino received a letter from Carle Hospital that defendant had just completed Lincoln's Challenge. Piraino testified defendant spoke perfect English and he had received letters from defendant in perfect English. Piraino testified, "There was no way that I would have any idea that he was on medications." In

his communications with defendant, nothing indicated to Piraino that defendant was mentally ill or did not understand.

¶ 26 The trial court noted it took guilty pleas very seriously. The court denied the motion to withdraw the guilty plea, stating as follows:

> "Now, could there have been a fitness evaluation, well, there's got to be a *bona fide* doubt as to whether or not the Defendant is fit. According to Mr. Piraino's testimony, he spent many hours with this Defendant. On numerous communications in writing back and forth, the Defendant was suggesting variations on the plea of guilty, variations as to the potential sentence, and when this Defendant pled guilty in this courtroom this Court had no doubt that he knew exactly what was going on. We now have buyer's remorse. That's basically what we have."

¶ 27 D. Postconviction Petition

¶ 28 In August 2019, defendant filed a *pro se* postconviction petition. The petition alleged that plea counsel Piraino was ineffective for failing to request a fitness examination where he had been informed of defendant's hospitalizations for mental health issues and previous suicide attempts. The petition also alleged Piraino was ineffective for failing to fully explain the terms of the plea agreement because "[h]e told defendant that he was plea[d]ing to 15 years at 50%, which is 7.5 years, and that he would have to only do [half] of that; therefore making the defendant believe he only had to do four years at the most." The petition also alleged Piraino failed to disclose exculpatory evidence, including that the RadioShack employee failed to positively identify defendant in a photo lineup. The petition further alleged Piraino was

ineffective for failing to investigate alibi witnesses, including Auteum Ramirez, Jamie Gaines, and Ariel Ramirez. Defendant also alleged Piraino coerced him into pleading guilty. The petition was supported by defendant's signed affidavit and two unsigned affidavits from Ariel Ramirez and Auteum Ramirez.

¶ 29 In July 2020, appointed counsel Ramona Sullivan filed an amended postconviction petition. The amended petition alleged Piraino provided ineffective assistance of counsel in that his "representation fell below the level of a reasonable attorney and that such conduct prejudiced the Defendant due to lack of communication between counsel and Defendant, counsel's failure to investigate his client's defense to the charge, [and] counsel's failure to fully explain the terms of the plea deal." The amended petition alleged the Champaign County Sheriff's Office records showed only the following communication between defendant and Piraino: two in-person visits on April 6, 2015, one telephone call on April 14, 2015, one letter from counsel on March 15, 2016, and two letters from defendant to Piraino on March 8, 2015, and April 15, 2015.

¶ 30 The amended postconviction petition further alleged Piraino failed to investigate witnesses Auteum Ramirez, Ariel Ramirez, and Jamie Gaines who wrote affidavits that were presented to Piraino. The petition also alleged Piraino "threatened that if Defendant did not accept the plea agreement, he would spend over 100 years in prison and that if he did accept the plea agreement, he would be sentenced to 15 years and 'do half of the 7.5 years.' "

¶ 31 The amended petition further alleged ineffective assistance of postplea counsels Ivy and Vargas for failing to present available evidence from the Champaign County Sheriff's Office regarding the lack of communication between Piraino and defendant. The amended petition also alleged Ivy and Vargas failed to present testimony from medical or mental health

providers. The amended petition's final claim alleged defendant's incarceration during the COVID-19 pandemic was cruel and unusual punishment given defendant's sickle cell anemia. The amended postconviction petition was supported by the following: an affidavit from defendant; Champaign County jail logs showing the visits, calls, and letters between Piraino and defendant; and defendant's medical records from 2019 and 2020. Postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 32 In August 2020, postconviction counsel filed a motion to supplement the amended postconviction petition with additional allegations and supporting documents. The motion to supplement stated, in part, that "Defendant alleges that his guilty plea was not knowingly or voluntarily made and that he would not have entered into the plea agreement if he had been able to review the evidence against him and if he had understood the terms and consequences of the plea agreement." The motion included a second affidavit from defendant and a handwritten letter from Jamie Gaines.

¶ 33 The State filed a motion to dismiss defendant's postconviction petition and another motion in opposition to defendant's motion to supplement the postconviction petition. The State argued that any claims that Piraino was ineffective for failing to communicate with defendant, investigate witnesses, or fully explain the plea were either *res judicata,* waived or forfeited, positively rebutted by the record, or could have been raised on direct appeal. The State argued any claims that Ivy provided ineffective assistance were irrelevant because Ivy ultimately withdrew and never represented defendant at a hearing. The State argued Vargas did attach defendant's medical records to the motion to withdraw the guilty plea and his decision not to call medical or mental health care providers as witnesses was a matter of trial strategy. Finally, the State argued that defendant's cruel and unusual punishment argument was not eligible for relief

under the Postconviction Hearing Act because it was not a constitutional defect in the original proceeding.

¶ 34 In August 2020, the trial court entered a written order dismissing defendant's postconviction petition. The court denied the State's request that it not consider the supplement to the postconviction petition. The court ruled as follows:

> "[T]he State's Motion to Dismiss is well-taken. As indicated by the State, the record, which consists of the plea of guilty and the hearings on the Motion to Withdraw the Plea of Guilty, positively rebut[s] the Defendant's assertions. Although the Defendant used the magic words 'ineffective assistance of counsel[,]' the record indicates otherwise. Mr. Piraino and Mr. Vargas provided the Defendant with competent and appropriate representation. The Defendant was completely aware of his rights at the plea of guilty. Mr. Vargas did the best he could to represent the Defendant on all subsequent hearings."

Accordingly, the court dismissed defendant's postconviction petition.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 On appeal, defendant argues (1) postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) and provided unreasonable assistance where she failed to amend and support the *pro se* postconviction petition adequately and (2) the trial court erred by dismissing the postconviction petition at the second stage upon finding counsel was effective without an evidentiary hearing.

¶ 38 As an initial matter, we address the State's motion to strike portions of defendant's brief. Specifically, the State complains defendant's citations to various websites are not authorities this court can take judicial notice of. Moreover, the State argues these sources were never presented to the trial court and, thus, are not part of the record. Defendant asserts his citation of these websites were presented only as an aid to this court in defining the medications defendant was administered and analogizes the websites to dictionaries. We conclude the sources defendant cites were not presented to the trial court and therefore are not part of the record before us on appeal. Accordingly, while we deny the motion to strike, we decline to consider defendant's citations to these sources. We turn now to the merits of defendant's arguments on appeal.

¶ 39 A. Reasonable Assistance

¶ 40 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2018)) provides a collateral means for a defendant to challenge a conviction or sentence for a violation of a federal or state constitutional right. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). At the first stage of postconviction proceedings, the trial court must determine, taking the allegations as true, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2018). At the second stage of postconviction proceedings, "the State may move to dismiss a petition or an amended petition pending before the court." *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1008 (2006). The defendant bears the burden of making a substantial showing of a constitutional violation. *Id.* at 473. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court

dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *Id.*

¶ 41 "[A] defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *Id.* at 472. Pursuant to Rule 651(c), counsel's duties "include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the proceedings at the trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented." *Id.* "Our review of an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, is *de novo*." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17, 974 N.E.2d 813.

¶ 42 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. "Rule 651(c) requires only that postconviction counsel certify having undertaken the limited actions prescribed. Those requirements do not include bolstering every claim presented in a petitioner's *pro se* postconviction petition, regardless of its legal merit, or presenting each and every witness or shred of evidence the petitioner believes could potentially support his position." *People v. Custer*, 2019 IL 123339, ¶ 38, 155 N.E.3d 374. With respect to counsel's duty to submit affidavits, the supreme court has stated, "In the ordinary case, a trial court ruling upon a motion to dismiss a [postconviction] petition which is not supported by affidavits or other documents may reasonably presume that [postconviction] counsel made a concerted effort to obtain affidavits in support of the [postconviction] claims, but was unable to do so." *People v. Johnson*, 154 Ill. 2d 227, 241, 609 N.E.2d 304, 311 (1993). The defendant bears the burden of overcoming the presumption of reasonable assistance by demonstrating his

attorney's failure to substantially comply with Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 43 Defendant's postconviction petition raises claims of ineffective assistance of counsel. A claim of ineffective assistance of counsel is governed by the familiar framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. The deficient-performance prong requires a defendant to show that counsel's performance was objectively unreasonable under prevailing professional norms. *People v. Veach*, 2017 IL 120649, ¶ 30, 89 N.E.3d 366. The prejudice prong requires a showing that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Id.* A defendant must satisfy both prongs to prevail on a claim of ineffective assistance of counsel. *Id.*

¶ 44 Here, postconviction counsel filed a certificate pursuant to Rule 651(c), thus giving rise to a rebuttable presumption that she provided reasonable assistance. Defendant asserts the record rebuts this presumption where postconviction counsel failed to adequately allege prejudice due to Piraino's allegedly ineffective assistance by not alleging defendant would not have pleaded guilty and would have insisted on going to trial if Piraino had investigated witnesses. The State asserts that the supplement to the petition filed by postconviction counsel adequately alleged prejudice. Defendant argues that the supplement to the petition did not amend the petition and therefore did not include an allegation of prejudice.

¶ 45 Postconviction counsel filed a motion to supplement the postconviction petition with an allegation that "[d]efendant alleges that his guilty plea was not knowingly or voluntarily

made and that he would not have entered into the plea agreement if he had been able to review the evidence against him and if he had understood the terms and consequences of the plea agreement." Defendant argues that, even if this was sufficient to make the allegation of ineffective assistance complete, it only "related to the communication issue, not the other ineffective assistance issues such as the failure to investigate." We disagree. The allegation of prejudice in the supplement to the postconviction petition is not limited to a "communication issue." It addresses the evidence against defendant and plea counsel's alleged failure to adequately explain the plea to defendant. This allegation of prejudice was sufficient to place defendant's contentions of ineffective assistance of counsel before the trial court. Moreover, the trial court did not dismiss defendant's postconviction petition because it failed to allege prejudice. Rather, the court dismissed defendant's petition because it was positively rebutted by the record. The court found attorneys Piraino and Vargas provided competent and appropriate representation and defendant "was completely aware of his rights at the plea of guilty."

¶ 46 Defendant further contends postconviction counsel provided unreasonable assistance because she failed to amend the petition to include a claim of plea counsel's ineffective assistance for failure to request a fitness evaluation. The State argues postconviction counsel provided reasonable assistance where she determined this issue was without merit and therefore did not advance the claim in the amended postconviction petition. "[T]o establish that his trial counsel's alleged incompetency prejudiced him within the meaning of *Strickland*, defendant must show that facts existed at the time of his trial that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense." *People v. Easley*, 192 Ill. 2d 307, 319, 736 N.E.2d 975, 985 (2000).

¶ 47 As the State correctly points out, Piraino's failure to request a fitness evaluation was fully litigated at the two hearings on defendant's motion to withdraw the guilty plea. Defendant's claim of ineffective assistance of counsel for failure to request a fitness evaluation has merit "only if he shows that the trial court would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered." *Id.* At the second hearing on defendant's motion to withdraw the guilty plea, Vargas argued Piraino's ineffective assistance based on his failure to request a fitness evaluation. The trial court denied the motion to withdraw the guilty plea, stating as follows:

> "Now, could there have been a fitness evaluation, well, there's got to be a *bona fide* doubt as to whether or not the Defendant is fit. According to Mr. Piraino's testimony, he spent many hours with this Defendant. On numerous communications in writing back and forth, the Defendant was suggesting variations on the plea of guilty, variations as to the potential sentence, and when this Defendant pled guilty in this courtroom this Court had no doubt that he knew exactly what was going on. We now have buyer's remorse. That's basically what we have."

Under these circumstances, defendant cannot show the trial court would have found a *bona fide* doubt as to his fitness and neither appellate counsel nor postconviction counsel provided ineffective assistance by declining to raise this issue.

¶ 48 Finally, defendant asserts postconviction counsel provided unreasonable assistance by failing to adequately support the claim that plea counsel failed to investigate witnesses and postplea counsels were ineffective for failing to present testimony from medical or

mental health providers. As discussed above, we "may reasonably presume that [postconviction] counsel made a concerted effort to obtain affidavits in support of the [postconviction] claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241. Defendant cites *Johnson*, 154 Ill. 2d 227, and *People v. Turner*, 187 Ill. 2d 406, 719 N.E.2d 725 (1999), in support of his argument that postconviction counsel provided unreasonable assistance for failing to attach witness affidavits. We find both cases distinguishable. In *Johnson*, postconviction counsel did not file a certificate in compliance with Rule 651(c) and filed an affidavit "unequivocally establish[ing] that counsel made no effort to *** obtain affidavits from any of the witnesses specifically identified in the defendant's *pro se* petition." *Johnson*, 154 Ill. 2d at 241. In *Turner*, postconviction "[c]ounsel failed to include even an affidavit from petitioner describing this evidence or identifying witnesses who possess or have knowledge of this evidence." *Turner*, 187 Ill. 2d at 414.

¶ 49 Here, postconviction counsel filed a certificate in compliance with Rule 651(c), giving rise to the rebuttable presumption of reasonable assistance. Postconviction counsel also supported the petition with two affidavits from defendant, jail records, medical records, and a letter from one of the witnesses identified by defendant. Defendant points to no affirmative evidence in the record to establish that postconviction counsel failed to seek out and examine evidence relevant to these claims. Defendant has failed to demonstrate the record affirmatively rebuts the presumption of reasonable assistance. Accordingly, we conclude postconviction counsel provided reasonable assistance and complied with Rule 651(c). Therefore, we affirm the judgment of the trial court.

¶ 50 B. Dismissal of Postconviction Petition

¶ 51 As discussed above, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. "At the second stage of

proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *Id.*

¶ 52 Defendant argues the trial court erred by dismissing his claim of ineffective assistance of plea counsel for failure to adequately communicate with him at the second stage of proceedings. The State asserts this claim is positively rebutted by the record as Piraino detailed his communications with defendant. Defendant argues the jail records showing Piraino visited defendant in person twice, had one phone call with defendant, and sent defendant one letter contradict Piraino's testimony and sufficiently allege a substantial showing of a deprivation of a constitutional right such that the trial court should have held a third-stage evidentiary hearing.

¶ 53 We agree with the State that the record positively rebuts defendant's claim that he was denied the effective assistance of counsel based on counsel's failure to communicate with him. At the first hearing on defendant's motion to withdraw his guilty plea, Piraino testified he communicated with defendant in person, by phone, and by mail approximately half a dozen times by each method and he also communicated with defendant's father. Piraino testified he thoroughly explained the plea agreement and the sentence. Piraino went paragraph by paragraph over a document titled "Explanation and Agreements of Rights" with defendant. Defendant acknowledged that Piraino visited him in jail.

¶ 54 Defendant argues the jail records postconviction counsel attached to the petition contradict Piraino's testimony as to the number of times he communicated with defendant. Even if the jail records are inconsistent with Piraino's testimony, they do not establish that Piraino provided ineffective assistance by failing to communicate with defendant. *People v. Valladares*, 2013 IL App (1st) 112010, ¶¶ 61-64, 994 N.E.2d 938 (finding sufficient communication with the

defendant where counsel testified he spoke with the defendant several times although he never traveled to the jail to meet the defendant). The record shows Piraino adequately communicated with defendant and explained the terms of the plea deal. Accordingly, we conclude the trial court did not err in dismissing this claim in defendant's postconviction petition at the second stage of proceedings.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.