

**NOTICE:** This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2021 IL App (3d) 180579-U

Order filed August 11, 2021

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2021

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-18-0579
SCOTT C. HARRIGAN,	)	Circuit No. 11-CF-535
Defendant-Appellant.	)	Honorable Paul P. Gilfillan, Judge, Presiding.

---

JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice McDade and Justice Schmidt concurred in the judgment.

---

**ORDER**

¶ 1 *Held:* (1) Postconviction counsel's did not violate Rule 651(c) where the allegations contained in the petition and attached affidavits lacked merit, and (2) defendant's amended postconviction petition failed to substantially show that trial counsel was ineffective.

¶ 2 Defendant, Scott C. Harrigan, appeals the Peoria County circuit court's dismissal of his amended postconviction petition at the second stage. Defendant argues that (1) postconviction counsel violated Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) by failing to address the State's forfeiture claim, and not shaping defendant's ineffective assistance of trial counsel claims;

and (2) his petition made a substantial showing of ineffective assistance of trial counsel. We affirm.

¶ 3

### I. BACKGROUND

¶ 4

On June 3, 2011, the State charged defendant by information with predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and aggravated criminal sexual abuse (*id.* § 12-16(c)(1)(i)). The information was superseded by a two-count indictment charging the same offenses.

¶ 5

On April 29, 2013, the jury trial commenced. Serena T., the victim’s mother, testified that H.T. was seven years old at the time in question, and that defendant was H.T.’s uncle. On May 16, 2011, on the way to defendant’s residence for a visit, H.T. began to cry. When Serena asked what was wrong, H.T. answered, “Uncle Scott licks me down there.” Serena asked where she meant, and H.T. responded, “My pee pee.” H.T. said this had happened “a couple times.” Serena returned home and spoke with her husband, who subsequently called the police.

¶ 6

H.T. testified that defendant “[l]icked [her] pee pee” on more than one occasion. When asked whether defendant licked her vagina “on the inside or the outside,” H.T. answered, “In.”

¶ 7

K.B. testified that her mother was previously married to defendant, and that she lived with defendant for approximately seven years. On May 16, 2011, after learning of H.T.’s statements, K.B. came forward and informed her family that defendant put his fingers in her vagina when she was seven years old.

¶ 8

Defendant testified on his own behalf, denying that he inappropriately touched either H.T. or K.B. No further defense witnesses were called.

¶ 9

The jury found defendant guilty of both counts. The court sentenced defendant to 12 years’ imprisonment for predatory criminal sexual assault of a child and vacated the aggravated criminal

sexual abuse conviction. On direct appeal, we affirmed the court's judgment. *People v. Harrigan*, 2015 IL App (3d) 130900-U, ¶ 40.

¶ 10 On April 4, 2016, defendant filed, as a self-represented litigant, a postconviction petition, alleging trial counsel provided ineffective assistance by not calling witnesses defendant considered essential for his defense, and that his speedy trial right was violated where his trial occurred two years after the charges were filed. Regarding the ineffective assistance claim, the petition alleged that defendant “did not receive adequate defense by [his] counsel, in that [trial counsel] did not have any preparation to counter the prosecution witnesses’ testimony, that there was no physical evidence shown against [defendant], and [trial] counsel was totally unprepared.” Defendant attached six affidavits, which vouched for his good character and expressed dissatisfaction with trial counsel’s representation. Defendant’s mother averred that she “wanted to have people testify as to what they witnessed about H.T. and [K.B.] and [trial counsel] said that the courts wouldn’t allow this testimony.” Defendant averred that trial counsel “said that the laws had recently changed and that any witnesses would just be hearsay on my behalf and that hearsay was not allowed.”

¶ 11 The court advanced the petition to the second stage of proceedings and appointed counsel to represent defendant. Postconviction counsel filed a Rule 651(c) certificate in which he adopted defendant’s initial petition and asserted that it adequately presented defendant’s contentions.

¶ 12 The State filed a motion to dismiss, arguing, *inter alia*, that the petition failed to identify which of defendant’s constitutional rights were violated, defendant’s speedy trial claim was forfeited because it was not raised on direct appeal, defendant failed to show prejudice by providing record citations indicating which delays were attributable to the State, and the decision regarding which witnesses to call is a strategic one reserved for trial counsel.

¶ 13 Postconviction counsel filed a supplemental petition, clarifying that defendant’s petition alleged that his right to effective assistance of trial counsel, due process, and “equal protection of the law” were violated. The supplemental petition did not address the other arguments contained in the State’s motion to dismiss.

¶ 14 On January 26, 2018, the matter was reassigned to new postconviction counsel, who filed a Rule 651(c) certificate.

¶ 15 On August 24, 2018, during the hearing on the State’s motion to dismiss defendant’s postconviction petition, the State argued there had been no speedy trial demand and that the issue was forfeited because it was not raised on direct appeal, and that defendant’s trial counsel was not ineffective for not calling witnesses because such a decision is matter of trial strategy. Postconviction counsel acknowledged that he “reviewed the transcript, reviewed the Common Law Record, [and] did not see a written request for a speedy trial. And also in reviewing the continuances, some were made at the request of the defense and few, if any, were made over the defense [*sic*] objection.” However, postconviction counsel contended that the petition’s reference to the timing of the trial was not a speedy trial violation claim, but instead constituted another ineffective assistance of counsel claim, as the law changed while defendant’s case was pending to permit corroborating witness testimony, such that defendant would have received a different outcome had the case gone to trial promptly. Postconviction counsel asserted that “[t]he law changed while this case was pending to allow corroborating witness testimony. And \*\*\* that corroborating witness did come forward immediately, based on my review of the record. So I think [the trial] could have possibly had a different outcome had it moved earlier.” In response, the State commented it did not “believe any ineffectiveness claim was raised in the context of the speedy trial,” and the court added, “I agree. I think I’m hearing that for the first time today.”

¶ 16 The court granted the motion to dismiss, noting that the decision to call specific witnesses is generally a matter of trial strategy. The court further determined that defendant’s trial counsel did not provide ineffective assistance because, even if counsel performed deficiently, there was not a reasonable probability that the purported testimony would result in a different outcome. Defendant appeals.

¶ 17 II. ANALYSIS

¶ 18 A.

¶ 19 Defendant argues that postconviction counsel violated Rule 651(c) where counsel: (1) failed to address the State’s forfeiture claim; and (2) did not shape defendant’s meritorious claims of ineffective assistance of trial counsel.

¶ 20 At the second stage of postconviction proceedings, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2016); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Because the right to postconviction counsel is entirely statutory, a defendant is only entitled to reasonable assistance. 725 ILCS 5/122-4 (West 2016); *Perkins*, 229 Ill. 2d at 42. Postconviction counsel must ensure that “if the petitioner has any constitutional claims of merit they will be properly recognized, developed and articulated in the post-conviction proceedings.” *People v. King*, 39 Ill. 2d 295, 297 (1968).

¶ 21 Rule 651(c) ensures that a defendant receives the reasonable assistance guaranteed under the Act. The rule requires that postconviction counsel consult with the defendant to understand his contentions regarding the alleged deprivation of his constitutional rights, examine the record of the trial proceedings, and make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. July 1, 2017); see *Perkins*, 229 Ill. 2d at 42. By filing a valid Rule 651(c) certificate, counsel creates a rebuttable

presumption that he performed the duties required by the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. “A defendant has the burden of overcoming that presumption by demonstrating that counsel failed to substantially comply with the duties set out in Rule 651(c).” *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 36. “The presumption that the defendant received the required representation may be rebutted by the record.” *Id.* Where the presumption of compliance is present, “the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition.” *Profit*, 2012 IL App (1st) 101307, ¶ 23. “If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not ‘necessary’ within the meaning of the rule.” *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 22 The record shows that postconviction counsel filed a timely Rule 651(c) certificate, and the record does not rebut the presumption that counsel complied with his obligations under the rule. Further, the omissions cited by defendant on appeal do not undermine the presumption, as the claims asserted in defendant’s petition were ultimately meritless. See *Id.*

¶ 23 We begin by addressing defendant’s contention that counsel unreasonably failed to respond to the State’s forfeiture argument. The forfeiture doctrine prohibits a defendant from raising claims in a postconviction petition that could have been raised on direct appeal but were not. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). The forfeiture doctrine does not apply “where the alleged forfeiture stems from the incompetence of appellate counsel.” *Id.* at 450-51. To establish that appellate counsel was ineffective, defendant must show both that counsel’s performance was deficient and that, but for counsel’s errors, there is a reasonable probability that the appeal would have been successful. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *People v. Petrenko*,

237 Ill. 2d 490, 497 (2010). “Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.” *People v. English*, 2013 IL 112890, ¶ 34.

¶ 24 Here, defendant cannot show that he received ineffective assistance of appellate counsel because the underlying ineffective assistance of counsel claims lack merit, and therefore, would not warrant a different result on remand. Like the ineffective assistance of appellate counsel claim, to garner relief in the context of ineffective assistance of trial counsel, defendant must establish that he suffered prejudice. That is, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). This is not an outcome-determinative test, and defendant must show that counsel’s allegedly deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.*

¶ 25 Both defendant’s petition and postconviction counsel asserted that trial counsel provided ineffective assistance by failing to call witnesses, not challenging the lack of physical evidence, being generally unprepared, and failing to attempt to expedite the case to avoid an unspecified change in the law that prohibited certain witness testimony. Each of these contentions fail because defendant cannot demonstrate prejudice given the weight of evidence establishing his guilt.

¶ 26 At trial, both H.T. and K.B. testified that defendant penetrated their vaginas with his tongue and fingers when they were younger than 13 years of age. See 720 ILCS 5/11-1.40(a)(1) (West 2014). H.T.’s testimony was corroborated by Serena T., who testified to H.T.’s consistent report of defendant’s sexual penetration. Together, this evidence readily established defendant’s guilt such that calling additional witnesses, challenging the lack of physical evidence, and expediting the case would not have altered the outcome. Because these ineffective assistance of counsel claims are meritless, appellate counsel was not ineffective for failing to raise them on appeal. Similarly, postconviction counsel did not violate Rule 651(c) in failing to raise an ineffective

assistance of appellate counsel claim, because that claim lacked merit. For the same reasons, we find that counsel did not violate Rule 651(c) by failing to shape defendant's ineffective assistance of trial counsel claims, because they were meritless given the lack of prejudice.

¶ 27

B.

¶ 28

Defendant argues he made a substantial showing that trial counsel's performance was deficient for failing to call witnesses and contends we should remand this matter for a third-stage hearing because the circuit court could not properly determine whether trial counsel's decisions were based on sound strategy without hearing evidence. In deciding the prior issue, we determined that defendant's ineffective assistance of trial counsel claims were meritless because defendant could not demonstrate prejudice. *Supra* ¶¶ 25-26. For the same reason, defendant's claim that trial counsel was ineffective for failing to call additional witnesses fails due to a lack of prejudice. See *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 32 (to advance from the second to third stage of postconviction proceedings, a petition must make a substantial showing of a constitutional violation). Therefore, the amended petition failed to make a substantial showing of ineffective assistance of trial counsel.

¶ 29

### III. CONCLUSION

¶ 30

The judgment of the circuit court of Peoria County is affirmed.

¶ 31

Affirmed.