

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).

2022 IL App (4th) 210080-U

NO. 4-21-0080

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

July 26, 2022

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

v. )

JONATHON PHILLIPS, )

Defendant-Appellant. )

) Appeal from the

) Circuit Court of

) Sangamon County

) No. 10CF87

) Honorable

) John M. Madonia,

) Judge Presiding.

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JUSTICE DeARMOND delivered the judgment of the court.

Presiding Justice Knecht and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err by dismissing defendant’s postconviction petition at the second stage of the postconviction proceedings.

¶ 2 Defendant, Jonathon Phillips, appeals from the second-stage dismissal of his amended petition for postconviction relief. On appeal, defendant contends (1) his postconviction counsel provided unreasonable assistance and (2) he was not provided his procedural due process rights. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 In February 2010, a grand jury indicted defendant with one count of first degree murder (720 ILCS 5/9-1(a)(3) (West 2008)) and one count of armed robbery (720 ILCS 5/18-2(a) (West 2008)), alleging defendant, or someone for whom he was legally accountable, without lawful justification and while committing armed robbery, discharged a firearm and

caused the death of William Suggs. In July 2013, defendant entered into a negotiated plea of guilty wherein he agreed to plead guilty to one count of armed robbery with a finding of bodily harm for a specific sentence of 25 years' imprisonment. Defendant did not file a posttrial motion or appeal.

¶ 5 On October 16, 2014, defendant filed a *pro se* postconviction petition. In the petition, defendant alleged (1) he was not notified in the indictment about the true nature of the offense; (2) when he was interrogated by law enforcement officers on December 21, 2009, he was under the heavy effects of ecstasy and, when he was later charged with first degree murder and armed robbery, the statement was never challenged by his trial attorney; (3) trial counsel told him if he did not plead guilty, he would be on his own; (4) the State used knowingly perjured testimony to obtain a conviction; (5) he was not told by trial counsel about his possible defenses; and (6) the circuit court did not have jurisdiction to sentence him without a presentence investigation report, and his waiver was not valid where the court failed to make a specific finding on the record as to defendant's criminal history pursuant to section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2010)).

¶ 6 On April 22, 2015, because the circuit court had not entered an order on the merits within 90 days of the filing of defendant's *pro se* petition for postconviction relief, the court entered an order advancing the petition to a second-stage hearing pursuant to subsection (b) of section 122-2.1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1(b) (West 2014)). The court appointed Daniel Wright to represent defendant. On February 11, 2016, Wright filed a motion for leave to withdraw as appointed counsel. The court granted Wright's motion for leave to withdraw and appointed Mark Wykoff to represent defendant.

¶ 7 On May 16, 2019, Wykoff filed an amended petition for postconviction relief, incorporating defendant's *pro se* petition and refining defendant's claim the circuit court did not have jurisdiction to sentence him without a presentence investigation report. Defendant argued the court failed to make a specific finding on the record as to defendant's criminal history and thus, defendant's sentence should be vacated and reset for a new sentencing hearing. On May 8, 2020, the State filed a motion to dismiss defendant's amended postconviction petition, arguing defendant failed to allege any violation of his constitutional rights. Rather, "defendant's only claim is that his statutory right pursuant to 730 ILCS 5/5-3-1 was violated."

¶ 8 On September 14, 2020, Wykoff filed a "Supplement to Amended Petition for Post-Conviction Relief" wherein, Wykoff indicated pursuant to the recently issued Illinois Supreme Court opinion, *People v. Sophanavong*, 2020 IL 124337, 181 N.E.3d 154, defendant "may have forfeited and/or waived his 5-3-1 based claim of error." However, Wykoff then asserted the following:

"If, however, undersigned counsel is mistaken in his belief that Defendant's 5-3-1 claim of error is forfeited and/or waived, [defendant] asserts that his trial counsel was ineffective for failing to assert any and all claims of error on his behalf in the trial court, to include his assertion that his sentencing hearing was defective/infirm, thus transforming the statutory defect set forth in his *pro se* Petition to one of a constitutional dimension, enshrined in the sixth amendment to the United States Constitution as more eloquently set forth in the landmark United States Supreme Court decision of *Strickland v. Washington*, 466 U.S. 668 (1984). [Defendant's] *pro se* Petition specifically speaks to the fact that 'of all the rights that an accused person has, the right to be represented by counsel

is by far the most pervasive [as the] core purpose of the counsel guarantee is to assure assistance when the accused is confronted with the intricacies of law, statutes, and sentencing provisions.’ ”

¶ 9 In the remaining portions of the Supplement, Wykoff addressed defendant’s “Additional *Pro Se* Assertions of Error.” Regarding defendant’s claim he was not notified of the true nature of the offense, Wykoff explained the charging instruments “comported with constitutional and statutory commands \*\*\* and thus [defendant’s] contention \*\*\* is belied by the record of the proceedings.” Wykoff next addressed defendant’s claim “his conviction was the product of perjured and/or false testimony.” Wykoff asserted “[d]efendant does not specifically state what witness, or which witnesses provided such blasphemous testimony.” In addition, Wykoff pointed out defendant’s conviction was the product of a fully negotiated plea, wherein defendant waived his right to confront his accusers. Wykoff then addressed defendant’s contention that “before pleading guilty to the charges, [defendant] should have been made aware of the possible defenses.” Wykoff indicated defendant initially sought to proceed to a trial under the “mere presence” theory and said theory was raised and litigated during the proceedings. Wykoff opined “no new potential defenses were raised by the amendment of count II to which [defendant] entered a plea of guilty, nor were any previously-available defenses to the originally-filed Count II foreclosed by the amendment of the instrument.” Finally, Wykoff addressed defendant’s claim he was under the “heavy ‘affects’ [*sic*] of ecstasy” at the time he was interrogated by police, and his statement was never challenged by his trial counsel. Wykoff explained the substance of defendant’s “allegation is unsupported by the record, as is his now-expressed dissatisfaction with his counsels’ performance.”

¶ 10 On September 23, 2020, the circuit court conducted a hearing on the State’s motion to dismiss. The State argued the amended petition did not allege any constitutional right was violated, and further, defendant’s claims were forfeited because he failed to file a posttrial motion or appeal raising those issues. In response, Wykoff admitted defendant’s section 5-3-1 claim may have been forfeited under *Sophanavong*, 2020 IL 124337, however, he asserted defendant’s trial counsel was ineffective for failing to ensure defendant was “properly admonished by the Court.” Wykoff filed a certificate in compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). After argument, the court took the matter under advisement.

¶ 11 On January 11, 2021, the circuit court entered a written order granting the State’s motion to dismiss. The court determined the claims advanced in defendant’s amended petition for postconviction relief were controlled by *Sophanavong*, 2020 IL 124337, and therefore, defendant’s failure to raise his claims in a postplea motion within 30 days from the entry of judgment resulted in the forfeiture of defendant’s arguments. In addition, the court stated: “With respect to the remaining allegations set forth by [d]efendant in his initial *pro se* pleading that were thereafter adopted by counsel in supplemental pleadings, a review of the record effectively renders each of those claims as meritless as well.”

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 The Act sets forth a procedure for a criminal defendant to obtain relief from a substantial denial of his constitutional rights during the proceedings leading to his conviction. 725 ILCS 5/122-1(a)(1) (West 2020). The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371.

¶ 15 At the second stage of postconviction proceedings, counsel may be appointed (725 ILCS 5/122-4 (West 2020)), and the State may answer the postconviction petition or move to dismiss it (725 ILCS 5/122-5 (West 2020)). *People v. Edwards*, 197 Ill. 2d 239, 246, 757 N.E.2d 442, 446 (2001). At the second stage of proceedings, the court takes “all well-pleaded facts that are not positively rebutted by the trial record” as true. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). The relevant inquiry at the second stage is “whether the petition and any accompanying documentation make a substantial showing of a constitutional violation.” *People v. Johnson*, 2018 IL 122227, ¶ 15, 123 N.E.3d 1083. The defendant bears the burden of making such a showing. *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. If the defendant satisfies his burden, the petition is advanced to a third-stage evidentiary hearing. *Edwards*, 197 Ill. 2d at 246; 725 ILCS 5/122-6 (West 2020). We review a dismissal of a petition at the second stage *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182, 840 N.E.2d 658, 662 (2005).

¶ 16 A defendant who is represented by counsel in proceedings under the Act is entitled to “a ‘reasonable’ level of attorney assistance.” *Johnson*, 2018 IL 122227, ¶ 16. Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) sets forth the following duties postconviction counsel must undertake: (1) consult with the defendant by phone, mail, electronic means, or in person; (2) examine the record as needed to shape the defendant’s *pro se* claims; and (3) make any amendments necessary for an adequate presentation of the defendant’s *pro se* claims. *People v. Custer*, 2019 IL 123339, ¶ 32, 155 N.E.3d 374.

¶ 17 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel complied with the requirements of the rule and provided reasonable assistance. *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 26, 67 N.E.3d 976. To overcome the

rebuttable presumption, the defendant must show his postconviction counsel's failure to substantially comply with his duties under Rule 651(c). *Wallace*, 2016 IL App (1st) 142758, ¶ 26. In the instant case, postconviction counsel filed a Rule 651(c) certificate, and thus, there is a rebuttable presumption that postconviction counsel rendered reasonable assistance.

#### A. Reasonable Assistance

¶ 18 Defendant argues he did not receive reasonable assistance from postconviction counsel at the second-stage proceedings because Wykoff believed defendant's petition lacked merit. Defendant asserts Wykoff should have withdrawn from the case to provide defendant an opportunity to proceed *pro se* and respond to the State's motion to dismiss. Additionally, defendant argues Wykoff failed to adequately fulfill his duties by failing to investigate and reshape his claims into cognizable legal arguments. The State asserts Wykoff provided a reasonable level of assistance by shaping some of defendant's claims into legally cognizable arguments.

¶ 19 Defendant cites *People v. Shortridge*, 2012 IL App (4th) 100663, 964 N.E.2d 679, in support of his argument. We find *Shortridge* factually distinguishable from the instant case. In *Shortridge*, this court found it impermissible for the defendant's counsel to confess the State's motion to dismiss the postconviction petition. *Shortridge* 2012 IL App (4th) 100663, ¶ 16. We stated the following: "If counsel, in fact, found the allegations 'nonmeritorious,' even with any necessary amendments, then he should have moved to withdraw as counsel, *not confess the State's motion to dismiss.*" (Emphasis added.) *Shortridge*, 2012 IL App (4th) 100663, ¶ 14. The *Shortridge* court explained its decision to reverse and remand for further proceedings "rests solely on the conduct of postconviction counsel." *Shortridge*, 2012 IL App (4th) 100663, ¶ 15. Despite a valid Rule 651(c) certificate, the *Shortridge* court stated that it was "virtually

impossible \*\*\* to determine the merit of defendant's claims where postconviction counsel essentially did nothing to shape the claims into the appropriate legal form." *Shortridge*, 2012 IL App (4th) 100663, ¶ 16.

¶ 20 Thus, in *Shortridge*, postconviction counsel confessed the State's motion to dismiss and the circuit court entered an agreed to order of dismissal. Here, Wykoff never confessed to the entirety of the State's motion to dismiss.

¶ 21 Defendant has not alleged how Wykoff could or should have amended certain claims to present them into cognizable legal arguments. The Act does not require counsel to advance frivolous or spurious claims on defendant's behalf. *Pendleton*, 223 Ill. 2d at 472.

Defendant asserts "[c]ounsel should not continue to represent a petitioner on what he has deemed a meritless petition, as this type of representation is an empty formality which does not fulfill the promise of the Act." However, Wykoff did not determine defendant's *entire* petition to be frivolous or without merit. See *Shortridge*, 2012 IL App (4th) 100663, ¶ 15 ("If newly appointed counsel, after complying with the mandates of Rule 651, determines that defendant's petition lacks *any* meritorious issue, then he should move to withdraw as counsel" (emphasis added)). Rather, Wykoff incorporated defendant's *pro se* claims into the amended postconviction petition and alleged trial counsel was ineffective for "failing to assert any and all claims of error on [defendant's] behalf in the trial court, to include his assertion that his sentencing hearing was defective/infirm." We find Wykoff's representation of defendant was more than simply an empty formality, as defendant suggests. Moreover, the record affirmatively shows defendant was afforded the reasonable level of assistance provided under the Act. Defendant has failed to rebut the presumption his counsel provided reasonable assistance in conformity with the requirements of Rule 651(c).



## B. Procedural Due Process

¶ 22 Defendant next argues his right to procedural due process was violated because he was not afforded the opportunity to respond *pro se* to the State’s motion to dismiss. Specifically, defendant asserts the supplement to the amended petition was “effectively a motion to withdraw because [Wykoff] undermined all of [defendant’s] claims and argued that the post-conviction petition was meritless.” Therefore, the supplement to the amended petition left defendant without “anyone to protect his interests” during the hearing on the State’s motion to dismiss, nor was he given “meaningful time, nor meaningful manner, in which to respond to the State’s motion to dismiss.” The State argues defendant was given the opportunity to respond to the motion to dismiss through Wykoff, the amended petition, and the supplement to the amended petition.

¶ 23 “The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” ’ ” *People v. Al Momani*, 2016 IL App (4th) 150192, ¶ 10, 55 N.E.3d 725 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))). “[T]he protection of a defendant’s right to procedural due process in post-conviction proceedings is of critical importance.” *People v. Kitchen*, 189 Ill. 2d 424, 435, 727 N.E.2d 189, 194 (1999).

¶ 24 In support of his procedural due process argument, defendant cites *People v. Hayes*, 2016 IL App (3d) 130769, 49 N.E.3d 992. We find *Hayes* distinguishable from the instant case. In *Hayes*, postconviction counsel determined the defendant’s *pro se* petition lacked merit and subsequently filed a “Motion to Dismiss and for Leave to Withdraw” requesting that the court dismiss the defendant’s *pro se* petition and allow counsel to withdraw from representation. *Hayes*, 2016 IL App (3d) 130769, ¶ 4. The Third District held postconviction counsel’s performance was reasonable and the defendant was not entitled to new counsel.

However, on remand, the defendant was entitled to file a *pro se* response to the State’s pleading. *Hayes*, 2016 IL App (3d) 130769, ¶¶ 15-19. Here, Wykoff did not move to withdraw, nor did he move to dismiss defendant’s postconviction petition. Rather, Wykoff filed an amended petition and a supplement to the amended petition. He proceeded on a claim of ineffective assistance of trial counsel for failure to assert “any and all claims of error on [defendant’s] behalf in the trial court.” Additionally, Wykoff aggressively argued against the State’s motion to dismiss defendant’s amended postconviction petition. The record shows defendant had a meaningful opportunity to be heard. Accordingly, we find no procedural due process violation.

¶ 25

### III. CONCLUSION

¶ 26

For the reasons stated, we affirm the circuit court’s judgment.

¶ 27

Affirmed.