

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).

2024 IL App (4th) 230919-U  
NO. 4-23-0919  
IN THE APPELLATE COURT  
OF ILLINOIS

**FILED**  
August 15, 2024  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ROGER L. KINNERSON,	)	No. 15CF961
Defendant-Appellant.	)	
	)	Honorable
	)	William A. Yoder,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.  
Justices Steigmann and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed, holding the trial court did not err by granting postconviction counsel’s motion to withdraw or by dismissing defendant’s postconviction petition at the second stage of proceedings.

¶ 2 Defendant, Roger L. Kinnerson, appeals the dismissal of his postconviction petition at the second stage of postconviction proceedings. Defendant argues that his petition made a substantial showing of a claim that his trial counsel was ineffective for failing to investigate and present mitigating mental health evidence at sentencing. Defendant also argues that the trial court erred by granting postconviction counsel’s motion to withdraw because counsel failed to address this claim in his motion to withdraw. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2015, defendant was charged with home invasion (720 ILCS 5/19-6(a)(2) (West 2014)), aggravated domestic battery (strangulation) (*id.* § 12-3.3(a-5)), aggravated domestic battery (great bodily harm) (*id.* § 12-3.3(a)), committing a hate crime (*id.* § 12-7.1(a)), and residential burglary (*id.* § 19-3(a)) relating to an incident during which he allegedly attacked his mother in her home. The State proceeded to trial on the two counts of aggravated domestic battery and moved to dismiss the remaining counts. Following the trial, a jury found defendant guilty of aggravated domestic battery causing great bodily harm but not guilty of aggravated domestic battery by way of strangulation. On December 16, 2016, the trial court sentenced defendant to 25 years' imprisonment.

¶ 5 On direct appeal, we affirmed the judgment of the trial court. *People v. Kinnerson*, 2020 IL App (4th) 170650, ¶ 76.

¶ 6 On February 2, 2018, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2018)), in which he alleged that a 911 operator testified falsely at trial. The trial court dismissed the petition, and we affirmed the court's judgment. *People v. Kinnerson*, No. 4-18-0384 (2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 7 On November 15, 2021, defendant, *pro se*, filed a postconviction petition alleging that each of his trial attorneys provided ineffective assistance by failing to raise the issue of his fitness to stand trial, plead, or be sentenced where a *bona fide* doubt existed as to his fitness. The petition alleged: "Counsels['] decision not to explore or expand their investigation into [defendant's] attainable mental health records and request, among other things, for a fitness hearing fell short of effective assistance of counsel." Defendant claimed these mental health

records would “merit good cause for a psychiatric evaluation and subsequent fitness hearing prior to trial.” Defendant further alleged:

“That counsels['] failure to explore [defendant's] established mental condition and request for a fitness hearing is more like inadequate trial preparation than a strategic choice. Thus, an evidentiary hearing is necessary to determine whether psychiatric evidence would have changed the result of the trial and/or sentence hearing proceedings.”

¶ 8 Defendant attached his own affidavit in support of the *pro se* petition, which detailed conversations between defendant and his trial attorneys concerning defendant's fitness and his mental health conditions. Defendant alleged that one of his attorneys “vocalized the monetary costs of a mental fitness psychiatric evaluation and advised [him] that it was not necessary to raise the fitness concern because the State's case against [him] was weak.”

Defendant alleged that, after his trial, one of his attorneys was “apologetic” for failing to request a psychiatric evaluation and fitness hearing prior to trial. The attorney told defendant “that the fitness issue may be suitable for the sentence proceeding without explaining such mitigating circumstances.” Defendant again asked his attorney about the fitness issue approximately two months later, and defendant's attorney stated that the trial court “likely would not consider [defendant's] mental condition as a sentencing mitigation factor and related the monetary costs of the evaluation.”

¶ 9 The trial court found the allegations in the *pro se* petition were not frivolous or patently without merit and advanced the petition to the second stage of postconviction proceedings, appointing the public defender's office to represent defendant.

¶ 10 On January 19, 2023, counsel filed a “Motion for Finding of No Merit in Post-Conviction and Motion to Withdraw as Counsel.” In the motion, counsel indicated he had reviewed the record, researched all potential issues, and was of the opinion that there were no meritorious issues to be presented for the court’s consideration. Counsel stated that, based on his review of defendant’s medical records from the county jail where he was incarcerated prior to trial, there was no evidence that defendant was unable to understand the proceedings against him or assist in his defense. Counsel asserted: “To the extent [defendant] might argue the court did not take his mental health history into account during sentencing, the Court had [defendant’s] mental health history.” Counsel noted the presentence investigation report (PSI) contained information about defendant’s mental health history, and defendant’s trial counsel addressed defendant’s mental health at the sentencing hearing. Counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) stating, *inter alia*, that he had consulted with defendant to ascertain his contentions of deprivation of constitutional rights.

¶ 11 On February 21, 2023, defendant, *pro se*, filed a response to postconviction counsel’s motion to withdraw, objecting to the motion “on the grounds that a full Mental Health Care history was not cited by Counsel.” Defendant noted that while counsel’s motion indicated he had reviewed defendant’s medical records from the time he spent in jail prior to trial, this did not address defendant’s “readily available” non-jail medical records. Defendant asserted: “[Postconviction counsel] fails to address and attach these Records. Such Records Could help make a Substantial showing of a STATE OR FEDERAL CONSTITUTIONAL VIOLATION and demonstrate Ineffective Assistance of Counsel under The Strickland Standard.”

¶ 12 On April 4, 2023, defendant filed an addendum to his response, attaching mental health medical records from 2006 and 2015. Defendant asserted these records had not been adequately reviewed by counsel.

¶ 13 Also on April 4, 2023, a hearing was held on postconviction counsel's motion to withdraw. Counsel indicated he had reviewed the addendum filed by defendant. Counsel stated the records attached to the addendum were records he had subpoenaed and reviewed, and they did not change his opinion. The trial court granted the motion to withdraw. That same day, the State filed a motion to dismiss the postconviction petition.

¶ 14 On August 16, 2023, the trial court entered an order granting the State's motion to dismiss. This appeal followed.

¶ 15 **II. ANALYSIS**

¶ 16 **A. Substantial Showing**

¶ 17 On appeal, defendant argues that the matter should be advanced to an evidentiary hearing because, liberally construed, the allegations in his postconviction petition along with the medical records attached to the addendum to his response to postconviction counsel's motion to withdraw made a substantial showing of a claim that trial counsel provided ineffective assistance by failing to investigate and present mitigating mental health evidence at the sentencing hearing. Specifically, defendant asserts that his petition alleged counsel failed to investigate his "attainable mental health records" and that an evidentiary hearing was required to determine whether "psychiatric evidence" would have changed the result of the sentencing hearing. Defendant argues that the mental health records he attached to the addendum provided a more extensive review of his mental health history than what was contained in the PSI, his trial counsel's failure to obtain them and present them at sentencing constituted deficient

performance, and there was a reasonable probability that he would have received a lesser sentence if the records had been presented.

¶ 18 The State argues that defendant has forfeited the issue of whether trial counsel was ineffective for failing to present defendant's mental health records as mitigating evidence at sentencing by failing to raise it in his petition. While we find the State's forfeiture argument has merit, we address defendant's argument and find the allegations in the petition failed to make a substantial showing of a claim that trial counsel provided ineffective assistance by failing to present defendant's mental health records as mitigating evidence at sentencing.

¶ 19 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)) provides a means for criminal defendants to assert that their convictions were the result of a substantial deprivation of their constitutional rights. *People v. Agee*, 2023 IL 128413, ¶ 36. Postconviction proceedings have three stages. *Id.* At the first stage, the trial court independently reviews the postconviction petition and may summarily dismiss it if it finds it to be frivolous or patently without merit. *Id.*; see 725 ILCS 5/122-2.1(a)(2) (West 2020). If the petition survives first-stage review, it advances to the second stage where counsel may be appointed to assist an indigent defendant. *Agee*, 2023 IL 128413, ¶ 36. The State may file a motion to dismiss or an answer to the petition at this stage. *Id.* At the second stage, the court must determine whether the allegations in the petition, taken as true and liberally construed in favor of the petitioner, and any supporting documentation make a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 33; *People v. Sanders*, 2016 IL 118123, ¶ 31. If the petitioner makes the requisite substantial showing, he or she is entitled to a third-stage evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 20 “[T]he substantial showing of a constitutional violation that must be made at the second stage is a measure of the legal sufficiency of the petition’s well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle petitioner to relief.” (Internal quotation marks omitted.) *People v. Dupree*, 2018 IL 122307, ¶ 29. “Unless the petitioner’s allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or ‘show’ a constitutional violation.” *Domagala*, 2013 IL 113688, ¶ 35. We review *de novo* a court’s dismissal of a postconviction petition at the second stage. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 21 A petition filed under the Act must “clearly set forth the respects in which petitioner’s constitutional rights were violated.” 725 ILCS 5/122-2 (West 2020). “Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.” *Id.* § 122-3. Accordingly, any issue raised on appeal must be presented in the petition that was filed in the trial court. *People v. Jones*, 211 Ill. 2d 140, 148 (2004).

¶ 22 Here, the allegations in defendant’s *pro se* postconviction petition, even liberally construed, are insufficient to make a substantial showing of a claim that his trial counsel was ineffective for failing to obtain his mental health records and present them as mitigating evidence at the sentencing hearing. Defendant’s *pro se* petition did not contain any allegations that his trial attorneys should have presented his mental health records as mitigating evidence at sentencing. While defendant asserted in the petition that his trial attorneys should have “expand[ed] their investigation into [his] attainable mental health records” and that an evidentiary hearing was necessary to determine if “psychiatric evidence” would have changed the result of the “trial and/or sentencing hearing proceedings,” these allegations were tied to his claim that his attorneys should have raised the issue of his fitness to stand trial or be sentenced. Also, while defendant

noted in his affidavit that one of his attorneys told him that the trial court was “unlikely to consider [his] mental condition as a sentencing mitigation factor,” he did not allege in his petition that additional mental health evidence should have been presented as mitigating evidence at sentencing. In the absence of any specific allegation that trial counsel should have presented defendant’s mental health records as mitigating evidence at sentencing, the petition fell far short of making a substantial showing of a claim of ineffective assistance of counsel based on counsel’s failure to present such evidence at sentencing.

¶ 23 We reject defendant’s reliance on *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 48, for the proposition that allegations in a *pro se* petition need only bear “some relationship” to an issue raised on appeal and that such petitions should be viewed with a “lenient eye.” Unlike the instant case, *Thomas* involved the dismissal of a postconviction petition at the first stage of proceedings, where “the threshold for survival is low, and a *pro se* petitioner need allege only enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act.” *Id.* Here, unlike in *Thomas*, a liberal construction of the allegations in the petition had to make a substantial showing of a constitutional violation, not merely state a claim that was arguably constitutional. See *Domagala*, 2013 IL 113688, ¶ 33; *Sanders*, 2016 IL 118123, ¶ 31. As we have discussed, the petition in this case failed to meet this standard.

¶ 24 B. Motion to Withdraw

¶ 25 Defendant alternatively argues that the trial court erred by granting postconviction counsel’s motion to withdraw because the *pro se* postconviction petition made a substantial showing of a claim that defendant’s trial attorneys provided ineffective assistance by failing to obtain his mental health records and present them as mitigating evidence at sentencing, and postconviction counsel failed to address this claim in the motion to withdraw.



¶ 26 A postconviction petitioner does not have a constitutional right to counsel at the second stage of postconviction proceedings. *People v. Frey*, 2024 IL 128644, ¶ 23. Rather a petitioner’s right to counsel during postconviction proceedings is wholly statutory. *Id.* The Act affords postconviction petitioners the right to a reasonable level of assistance of counsel, which is less than that afforded by the federal and state constitutions to criminal defendants at trial. *Id.* At the second stage of proceedings, postconviction counsel’s duties are prescribed by Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), which provides:

“The record \*\*\* shall contain a showing, which may be made by the certificate of petitioner’s attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.”

See *People v. Addison*, 2023 IL 127119, ¶ 37.

¶ 27 Postconviction counsel is required to investigate and properly present only the claims raised by the petitioner. *Frey*, 2024 IL 128644, ¶ 24. Counsel may, but is not required to, raise additional claims as well. *Id.* The filing of a Rule 651(c) certificate by counsel creates a rebuttable presumption that the petitioner received reasonable assistance of counsel. *Id.*

¶ 28 If appointed counsel determines none of the issues raised in the petition are meritorious, he may seek to withdraw as counsel. *People v. Turner*, 2023 IL App (1st) 191503, ¶ 60; *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). In such circumstances, a motion to withdraw must set forth why each of the petitioner’s *pro se* claims lack merit. *Frey*, 2024 IL 128644, ¶ 27; *People v. Kuehner*, 2015 IL 117695, ¶ 21.

¶ 29 In *Frey*, our supreme court addressed the question of whether appointed counsel provided an unreasonable level of assistance by failing to address in a motion to withdraw an issue that was arguably, though not clearly, set forth in a *pro se* petition. The *Frey* defendant filed a *pro se* postconviction petition raising several claims of ineffective assistance of counsel and a proportionate penalties sentencing claim. *Frey*, 2024 IL 128644, ¶ 5. The portions of the petition concerning both the ineffective assistance claims and the proportionate penalties claim contained allegations that the jury could not initially agree on a verdict with two jurors voting not guilty, but the trial judge would not let them leave for the night “unless they all agreed on something.” *Id.* ¶¶ 5-6. The petition alleged that “ ‘being outnumbered and pressured [the jurors] took the defendants [*sic*] freedom!’ ” *Id.* ¶ 5.

¶ 30 The defendant appended his sister’s affidavit to the petition, which stated the jurors sent a note to the trial court at approximately 9 p.m. on the evening the trial concluded, requesting that they be permitted to continue deliberating the next day because they had not yet reached a unanimous verdict. *Id.* ¶ 9. The affidavit stated the court denied the jurors’ request because it did not want to postpone a trial scheduled the next day, and the jury returned a guilty verdict approximately 45 minutes later. *Id.* The defendant’s sister averred that she believed this violated the defendant’s right to due process. *Id.* This affidavit was preceded by a page titled “Newly Discovered Evidence,” which stated:

“[The defendant’s sister] made a Sworn Affidavit on behalf of the defendant which is claiming a violation of the defendants [*sic*] right to due process by forcing the jury to come to a unanimous verdict or they were not allowed to leave that night despite a 10-2 verdict! Failure of trial counsel to fully depose all

witnesses also adds this to the claim for ineffective assistance of trial counsel.” *Id.*

¶ 8.

¶ 31 Appointed postconviction counsel filed a motion to withdraw, which addressed the claims of ineffective assistance of counsel and the proportionate penalties claim raised in the *pro se* petition. *Id.* ¶ 11. Counsel also filed a certificate pursuant to Rule 651(c). *Id.* The trial court granted the motion to withdraw and later dismissed the petition. *Id.* ¶¶ 12-13. The defendant appealed, arguing postconviction counsel provided an unreasonable level of assistance by failing to address in the motion to withdraw the due process claim concerning the jury note. *Id.* The appellate court reversed and remanded for further proceedings, finding the petition, liberally construed, contained a due process claim concerning the jury note, which postconviction counsel failed to address. *Id.* ¶¶ 14-18.

¶ 32 Our supreme court reversed the judgment of the appellate court and affirmed the judgment of the trial court. *Id.* ¶ 37. The *Frey* court found that the *pro se* petition was, “at best, ambiguous” as to whether the defendant was raising a due process claim concerning the jury note. *Id.* ¶ 31. The court found that the “most natural way” to read the petition was that it raised substantive claims of ineffective assistance of counsel and a proportionate penalties sentencing claim. *Id.* ¶ 32. The court noted that although the jury note was mentioned in the substantive portion of the petition and in the defendant’s sister’s affidavit, it was tied to the other claims asserted in the petition. *Id.*

¶ 33 The *Frey* court stated that because it is “not always possible to discern what claims a *pro se* postconviction petitioner is raising,” Rule 651(c) requires counsel to consult with the petitioner to ascertain his or her claims. *Id.* ¶ 30. The court found that nothing in the record rebutted the presumption created by the filing of the Rule 651(c) certificate that counsel

consulted with the defendant to ascertain his claims. *Id.* ¶ 31. The court stated that if defendant had advised postconviction counsel during their consultation that he intended to raise ineffective assistance of counsel claims and a proportionate penalties claim, “the record would look precisely as it does now.” *Id.* The court found that “[c]ounsel’s failure to mention a due process claim based on the \*\*\* jury note strongly suggest[ed] that, after consulting with petitioner, counsel reasonably ascertained that petitioner was not asserting a standalone due process claim \*\*\*.” *Id.* ¶ 33. The court also noted that though the defendant objected to the motion to withdraw, he never indicated that counsel had overlooked a due process claim. *Id.* ¶ 31.

¶ 34 Here, as in *Frey*, defendant’s *pro se* petition was “at best, ambiguous” (*id.*) as to whether it was raising a claim that trial counsel was ineffective for failing to present defendant’s prior mental health records as mitigating evidence at sentencing. As we have discussed, defendant’s *pro se* petition and supporting documentation contained no express allegation that his trial attorneys should have presented his mental health records as mitigating evidence at sentencing. *Supra* ¶ 22. Rather, the allegations concerning his trial attorneys’ failure to obtain his mental health records were tied to his claim that his trial attorneys should have requested a fitness hearing. *Id.* While postconviction counsel’s motion to withdraw briefly addressed the question of whether the trial court failed to take defendant’s mental health history into account at sentencing, this does not show, as defendant now claims, that the petition unambiguously raised the separate claim of whether trial counsel was ineffective for failing to present additional mental health evidence at sentencing.

¶ 35 As in *Frey*, postconviction counsel in the instant case filed a Rule 651(c) certificate asserting that he had consulted with defendant to ascertain his claims, and nothing in the record rebuts the presumption created by the certificate that counsel did so. Accordingly, as

in *Frey*, counsel’s failure to include a claim in the motion to withdraw that trial counsel was ineffective for failing to present his mental health records at sentencing “strongly suggest[ed]” that counsel reasonably ascertained pursuant to his consultation with defendant that defendant did not intend to assert such a claim in his *pro se* petition. See *Frey*, 2024 IL 128644, ¶ 33.

¶ 36 We reject defendant’s argument that *Frey* is distinguishable because, here, defendant objected in his response and in the addendum to postconviction counsel’s failure to fully address the claim that trial counsel was ineffective for failing to present his mental health records at sentencing. Defendant’s response stated that postconviction counsel failed to cite a “full mental healthcare history” in his motion to withdraw and failed to “address the readily available medical records” other than the jail records. Defendant then proceeded to attach the records he believed counsel had overlooked to his addendum to the response. However, defendant did not state, in either his response or the addendum, that postconviction counsel overlooked a claim that trial counsel was ineffective for failing to present these records as mitigating evidence at sentencing.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court’s judgment.

¶ 39 Affirmed.