

NOTICE
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2019 IL App (5th) 160083-U

NO. 5-16-0083

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 97-CF-448
)	
VON JONES,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dismissal of the defendant's postconviction petition at the second stage of the postconviction proceedings without an evidentiary hearing is reversed where postconviction counsel provided unreasonable assistance by, after seeking continuances for nearly 13 years, electing to stand on the defendant's *pro se* petition. Thus, the cause is remanded for further second-stage proceedings with the appointment of new counsel.

¶ 2 The defendant, Von Jones, appeals the dismissal, by the circuit court of St. Clair County, of his petition for postconviction relief at the second stage of the postconviction proceedings. He argues that his postconviction counsel provided unreasonable assistance where, after a nearly 13-year period where counsel sought continuances to file an amended postconviction petition, counsel failed to file an amendment to his *pro se*

petition. He also contends that the trial court improperly dismissed his postconviction petition where he made a substantial showing of a constitutional violation. For the following reasons, we reverse the dismissal of the defendant's postconviction petition and remand for second-stage postconviction proceedings.

¶ 3 The facts necessary to our disposition of this appeal follow. At a jury trial, in May 2000, the defendant was convicted of two counts of first-degree murder for the shooting deaths of two individuals. He was sentenced to mandatory life imprisonment. In his direct appeal from his convictions, he argued that the State had failed to prove him guilty beyond a reasonable doubt. This court disagreed and affirmed his convictions. *People v. Jones*, No. 5-00-0640 (Mar. 21, 2002) (unpublished order under Supreme Court Rule 23). He filed a petition for leave to appeal to the Illinois Supreme Court, which was denied on October 2, 2002.

¶ 4 On April 3, 2003, the defendant filed a *pro se* petition for postconviction relief, claiming the following constitutional violations: (1) that he was denied his statutory and constitutional right to a speedy trial; (2) that he was denied his right to a fair and impartial trial when the trial court failed to inquire during *voir dire* if any panel members would be prejudiced by knowledge of his alleged drug dealer status; (3) that he was denied a fair trial and due process where the State relied on statements of coerced witnesses; (4) that the court and his trial counsel failed to advise him that he had a constitutional right to testify; (5) that the prosecutor committed misconduct by improperly vouching for witness credibility, improperly arguing that the State knew the truth in this case, and improperly asserting that the police would do nothing wrong and

that they did "good work"; and (6) that his trial counsel and appellate counsel were ineffective.

¶ 5 On July 1, 2003, the trial court concluded that the defendant had raised the gist of a constitutional claim on at least one of his claims, appointed James Stiehl as postconviction counsel, and ordered Stiehl to file an amended postconviction petition no later than September 30, 2003. On October 20, 2003, the court, after receiving a request for a continuation from Stiehl, entered an order giving him until December 31, 2003, to file an amended petition. Between February 18, 2004, and November 12, 2004, the case was continued by agreement of the parties to give Stiehl the opportunity to file an amended petition. On November 12, 2004, Stiehl was given until December 15, 2004, to file the amended petition, and the case was set for a status hearing on February 7, 2005. On February 7, 2005, the court ordered Stiehl to file the amended petition on or before April 25, 2005.

¶ 6 On June 12, 2005, the defendant wrote a letter to the trial court seeking information on the status of his postconviction petition. In his letter, he stated that the last he had spoken with Stiehl was June 2004; that Stiehl told him that he would have a hearing in November 2004, at which point Stiehl would know whether the postconviction petition had been dismissed or would proceed to an evidentiary hearing; that he had written to Stiehl several times with no response; and that he was concerned about the status of his petition. On June 27, 2005, the court ordered postconviction counsel to file an amended petition by August 7, 2005, and set a status hearing for September 22, 2005. On September 22, 2005, the court ordered the defendant's jail medical records be

provided to the defense within 30 days and ordered Stiehl to file an amended petition within 30 days of receipts of those records.

¶ 7 At the January 11, 2006, status hearing, the trial court indicated that the defendant's medical records were being copied and would be provided to defense by January 18, 2006. The case was set for a status hearing on February 24, 2006. On February 24, 2006, the court ordered Stiehl to file an amended petition by May 25, 2006. On July 20, 2006, Stiehl was given until September 1, 2006, to file the amended petition, and the case was set for a status hearing on October 19, 2006. On October 19, 2006, the court entered an order, which indicated that additional records needed to be discovered and reviewed by Stiehl and ordered Stiehl to review those documents and notify the State within 15 days if additional forensic material needed to be disclosed. The case was set for a status hearing on December 11, 2006, at which point it was continued to January 2, 2007.

¶ 8 Between January 2, 2007, and June 26, 2008, the case was continued six times. On September 16, 2008, Stiehl was ordered to file the amended petition by January 16, 2009, and the case was set for status hearing on April 1, 2009. On March 2, 2009, Stiehl filed a motion for additional time in order to confer with the defendant about his speedy-trial claims and to complete the "balance of his Amended Post-Conviction Petition." On April 1, 2009, the trial court granted the motion for additional time and set a status hearing for May 5, 2009.

¶ 9 Between May 5, 2009, and November 20, 2009, the case was continued to give Stiehl time to investigate the pretrial continuances. On November 20, 2009, Stiehl was

given until January 22, 2010, to file the amended petition. Between February 26, 2010, and December 7, 2010, the case was continued four times by either defense motion or by agreement of the parties. On February 4, 2011, the trial court, noting that Stiehl was awaiting a signed affidavit from the defendant, gave him until April 15, 2011, to file the amended petition. From June 3, 2011, until November 16, 2012, the deadline to file the amended petition was extended seven times. On November 16, 2012, the case was set for a status hearing on February 22, 2013.

¶ 10 On November 26, 2012, the defendant's affidavit was filed with the trial court. In the affidavit, the defendant stated that he agreed to all pretrial continuances granted by the court from "[and] inclusive of July 1, 1997, to December 30, 1997"; that he did not agree nor was he advised of the continuances beginning on January 27, 1998, and ending April 12, 2000; that he did not authorize attorney Tom Daley to enter any continuances on his behalf; and that he stood ready for trial from January 27, 1998, until the date of his actual trial in May 2000.

¶ 11 From February 11, 2013, until July 12, 2013, the case was continued three times by agreement. On November 1, 2013, the trial court gave the State 30 days to file a responsive pleading or motion to dismiss related to the recently filed affidavit and the most recently filed amended petition. On December 2, 2013, the State filed a motion to produce the amended petition for postconviction relief, noting that an amended petition had not yet been filed in the case. The case was set for hearing on February 7, 2014. Between February 7, 2014, and December 7, 2015, the case was continued nine times to give Stiehl additional time to file the amended petition.

¶ 12 In a December 7, 2015, order, the trial court indicated that Stiehl stated on the record in open court that he wished to stand on the original *pro se* postconviction petition. The State was given until January 15, 2016, to file a responsive pleading. On February 8, 2016, the State filed a motion to dismiss the postconviction petition, contending that the postconviction petition was untimely; that the defendant's claims were forfeited because they were not raised prior to trial, at trial, in his posttrial motion, or in his direct appeal; that his ineffective-assistance-of-counsel claims did not satisfy *Strickland v. Washington*, 466 U.S. 668 (1984); and that his claims were not outcome determinative.

¶ 13 On February 11, 2016, Stiehl filed his Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate of compliance, stating that he had consulted with the defendant to ascertain the contentions of deprivation of constitutional rights, that he had examined the entire record of trial proceedings and all court documents, and that he had determined that the *pro se* petition was necessary for the adequate presentation of the defendant's contentions. That same day, the trial court held a hearing on the State's motion to dismiss.

¶ 14 Following the hearing, the trial court entered an order on February 18, 2016, granting the State's motion to dismiss. In the order, the court determined as follows: that the defendant's speedy-trial claim was without merit; that his claim of error in *voir dire* was speculative; that his claim that the State's witnesses were coerced failed because the record did not indicate that defense counsel failed to provide a competent challenge to the witnesses' credibility; that the defendant's claim that he was denied his right to testify was denied because the record failed to memorialize any facts to support that allegation; and

that any prosecutorial errors in closing argument did not infect the trial. The defendant appeals the denial of his postconviction petition at the second stage of the postconviction proceedings.

¶ 15 On appeal, the defendant first argues that postconviction counsel provided unreasonable assistance by, after seeking continuances for nearly 13 years, failing to make the necessary amendments to his *pro se* postconviction petition.

¶ 16 We will begin our analysis with a brief overview of the well-established law applicable to postconviction proceedings. The Post-Conviction Hearing Act (Act) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. 725 ILCS 5/122-1(a)(1) (West 2014); *People v. Griffin*, 178 Ill. 2d 65, 72-73 (1997). In cases not involving the death penalty, a postconviction proceeding contains three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the trial court independently reviews the postconviction petition and determines whether the petition is frivolous or is patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court finds that the petition is frivolous or patently without merit, then the court must dismiss the petition. *Id.* If the court does not dismiss the petition, then it proceeds to the second stage where, if necessary, the court appoints counsel for defendant. *Pendleton*, 223 Ill. 2d at 472. Postconviction counsel may amend defendant's *pro se* petition to ensure his contentions are adequately presented. *Id.* Also at the second stage, the State may file a motion to dismiss defendant's petition or may file an answer to it. *Id.* If the trial court denies the State's motion to dismiss, then the petition advances to the third stage, where the court holds an evidentiary hearing. *Id.* at 472-73.

In the present case, the State filed a motion to dismiss, which was granted by the trial court.

¶ 17 The dismissal of a postconviction petition at the second stage of the postconviction proceedings is warranted only where the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, factual allegations that are not positively rebutted by the record are taken as true. *Id.* This court reviews *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing. *Id.*

¶ 18 As previously noted, when a postconviction petition proceeds to the second stage, the trial court may appoint postconviction counsel for defendant. *Pendleton*, 223 Ill. 2d at 472. Because the right to counsel in postconviction proceedings is wholly statutory, a postconviction defendant is only entitled to the level of assistance required by the Act. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Under the Act, a defendant in postconviction proceedings is entitled to only a "reasonable" level of assistance. *Id.*

¶ 19 To assure that a defendant receives the "reasonable assistance" required, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires that postconviction counsel: (1) consult with defendant by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition that are necessary for an adequate presentation of defendant's claims. *Perkins*, 229 Ill. 2d at 42. The filing of a Rule 651(c) certificate of compliance gives rise to a rebuttable presumption that postconviction counsel has provided the reasonable assistance required. *People v. Profit*, 2012 IL App

(1st) 101307, ¶ 19. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the Rule 651(c) requirements. *Id.*

¶ 20 Here, the defendant argues that his postconviction counsel failed to provide the reasonable level of assistance required under the Act. He acknowledges that where, as in this case, postconviction counsel has filed a Rule 651(c) certificate of compliance, there arises a rebuttable presumption that postconviction counsel has provided the reasonable assistance required. However, he contends that in this case the presumption is rebutted. His argument is based on the fact that nearly 13 years elapsed from April 3, 2003, when he filed his *pro se* postconviction petition, until December 7, 2015, when his counsel elected to stand on his *pro se* petition. During that time, postconviction counsel sought numerous continuances to file an amended postconviction petition but filed nothing on his behalf. In support, he relies on *People v. Lyons*, 46 Ill. 2d 172 (1970), and *People v. Kelly*, 2012 IL App (1st) 101521.

¶ 21 In *Lyons*, our Illinois Supreme Court determined that postconviction counsel was unreasonable where, on six occasions, he moved for a continuance of the hearing on the State's motion to dismiss; during the hearing, he declared that he was not ready to proceed; and he made no reply to the State's motion to dismiss, all apparently without filing a Rule 651(c) certificate. *Lyons*, 46 Ill. 2d at 174-75. In making its decision, the court stated that if postconviction counsel was unable to meet his responsibilities under Rule 651(c), then new counsel should have been appointed so that the cause could effectively proceed to disposition. *Id.* at 175.

¶ 22 In *Kelly*, the appellate court held that a nearly 12-year delay between when defendant filed his initial *pro se* postconviction petition and when it was dismissed illustrated the unreasonable representation provided by both appointed and privately retained postconviction counsel, even though defendant's final attorney had filed a Rule 651(c) certificate. *Kelly*, 2012 IL App (1st) 101521, ¶ 40. The court also concluded that private postconviction counsel lacked a basic knowledge of, or fundamentally misunderstood, the Act, pointing to counsel's failure to shape defendant's claims into appropriate legal form for presentation to the court and counsel's erroneous comments at the motion to dismiss hearing concerning the proper standard of review at the second stage of the postconviction proceedings. *Id.*

¶ 23 Here, we conclude that the nearly 13-year delay in bringing the defendant's petition for postconviction relief to disposition combined with counsel's failure to amend the *pro se* petition after requesting numerous continuances to prepare an amendment evidences a lack of reasonable assistance to the defendant by postconviction counsel. Counsel repeatedly indicated to the trial court that he intended to file an amended postconviction petition even though there was no requirement for counsel to do so and then nearly 13 years later changed course and stated that he wished to stand on the original *pro se* petition. At one point, he even indicated to the court that he required additional time to complete the "balance" of the amended petition. Moreover, there was nothing in the record on appeal that indicated the lengthy delay was attributable to the defendant. Although there is some indication that postconviction counsel had to obtain

additional records and an affidavit from the defendant during this time period, this still does not give any persuasive reason for the lengthy delay here.

¶ 24 The State admits that there is "no persuasive reason for the extraordinary amount of time between when the defendant filed his post[]conviction petition, and when the trial court finally ruled on the petition" but contends that there is nothing in the record to indicate that the defendant was in any manner prejudiced by the passage of time. We disagree. During this extraordinarily lengthy passage of time, there was absolutely no movement on the defendant's postconviction petition. A nearly 13-year delay between the appointment of counsel and the dismissal of the defendant's postconviction petition cannot be countenanced as reasonable representation of counsel. If counsel had concluded that there was no reason to amend the defendant's *pro se* postconviction petition, then he should have stood on the petition in a timely manner and not subjected the defendant to a nearly 13-year wait. Further, like in *Lyons*, if counsel was unable to meet his obligations under Rule 651(c), then new counsel should have been appointed so that the cause could effectively proceed to disposition. Thus, we hold that the defendant's postconviction counsel failed to provide a reasonable level of assistance required under the Act and Rule 651(c). We reverse the circuit court's dismissal of his *pro se* postconviction petition without an evidentiary hearing and remand for further second-stage proceedings with the appointment of new counsel.

¶ 25 Reversed and remanded with directions.