

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).

2019 IL App (4th) 170310-U

NO. 4-17-0310

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 19, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DEREK EUGENE RIGGS,)	No. 11CF81
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The appellate court affirmed, finding postconviction counsel did not render unreasonable assistance.

¶ 2 In December 2013, defendant, Derek Eugene Riggs, filed a *pro se* petition for postconviction relief, alleging, in relevant part, his trial counsel was ineffective for failing to challenge his identification as the person who robbed a bank. In March 2014, the trial court summarily dismissed defendant’s petition as frivolous and patently without merit. Defendant appealed, and this court reversed and remanded for second-stage proceedings, finding defendant’s postconviction petition stated the gist of a constitutional claim for ineffective assistance of counsel. *People v. Riggs*, 2016 IL App (4th) 140322-U.

¶ 3 On remand, in October 2016, appointed counsel filed an amended postconviction petition, along with a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), but failed

to include the claim that this court found arguably demonstrated ineffective assistance of counsel. In November 2016, the State filed a motion to dismiss defendant's amended postconviction petition, which, following a hearing, the trial court granted by written order in March 2017.

¶ 4 Defendant appeals, arguing he was denied reasonable assistance of postconviction counsel. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Indictments, Jury Trial, and Sentencing

¶ 7 In January 2011, defendant was indicted on six counts of armed robbery. 720 ILCS 5/18-2(a)(2) (West 2010). In September 2011, a jury found defendant guilty of five counts of armed robbery. At the sentencing hearing, the trial court found the guilty verdicts rested on three separate acts: a robbery from a retail store on January 25, 2011, and robberies from two bank tellers on January 14, 2011. Accordingly, the court entered judgment on three counts of armed robbery and sentenced defendant to three consecutive terms of 45 years' imprisonment (30 years' imprisonment plus a 15-year firearm enhancement). 720 ILCS 5/18-2(b) (West 2010). In May 2013, this court affirmed defendant's conviction and the trial court's judgment. *People v. Riggs*, No. 4-12-0301 (2013) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 8 B. Petition for Postconviction Relief

¶ 9 In December 2013, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), alleging, in relevant part, he received ineffective assistance of trial counsel. Specifically, he alleged trial counsel was ineffective for failing to "investigate" evidence regarding defendant's physical

appearance at the time of the bank robberies. Essentially, defendant argued counsel was ineffective for failing to investigate and present evidence to the jury suggesting the bank eyewitnesses misidentified him as the robber. In support, defendant pointed out the bank-robbery eyewitnesses' descriptions made no mention of defendant's six gold front teeth or the tattoo of a star on his face. Further, only one of the six eyewitnesses picked defendant out of a photo lineup. Defendant asserted this was significant given the eyewitnesses identifying him in the unrelated retail-store robbery specifically mentioned both the star tattoo and the gold teeth.

¶ 10 The trial court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. Defendant appealed the first-stage dismissal of his postconviction petition. This court reversed the trial court's judgment and remanded for second-stage postconviction proceedings, concluding defendant's petition stated the gist of a constitutional claim. *People v. Riggs*, 2016 IL App (4th) 140322-U. We noted that the record did not reveal why trial counsel did not question the bank eyewitnesses regarding defendant's "notable characteristics[,]” finding this failure “*arguably* unreasonable and *arguably* could have prejudiced defendant.” (Emphases in original.) *Id.* ¶¶ 14, 19

¶ 11 C. Amended Petition for Postconviction Relief

¶ 12 On remand, at a status hearing on defendant's postconviction petition, postconviction counsel requested 45 days “to file any pleadings[,]” stating:

“I've made it through all the transcripts and the discovery in this case. I've had a couple of opportunities to speak with [defendant]. There's a couple of—I shouldn't say 'couple.' There's six witnesses that I need to speak to, but I believe I can get that done in short order.”

¶ 13 In October 2016, postconviction counsel filed an amended petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 *et seq.* (West 2014)), alleging (1) ineffective assistance of trial counsel for failing “to file a motion to sever” the counts related to the retail store robbery from the counts related to the bank robbery and (2) the trial court denied defendant his right to self-representation. Postconviction counsel filed a Rule 651(c) certificate with the amended petition. Counsel certified that she consulted with defendant to ascertain his assertions of deprivation of constitutional rights, examined the record of proceedings at trial, and “made amendments to the *pro se* petition necessary for adequate presentation of [defendant’s] proceedings.”

¶ 14 In November 2016, the State filed a motion to dismiss defendant’s amended petition for postconviction relief. On December 29, 2016, defendant filed a “Motion to Dismiss Counsel and to Proceed as a *Pro Se* Litigant.” In the motion, defendant stated: “Petitioner told Public Defender that he wanted [the identification] issue presented in the Amended Post-Conviction Petition, and said Public Defender told said Petitioner that that issue would be in Amended Post-Conviction Petition, but Public Defender failed to present the issue.”

¶ 15 On February 17, 2017, the trial court conducted a hearing on the State’s motion. At the outset of the hearing, the trial court had the following exchange with defendant:

THE COURT: Okay. So, [defendant], I just want to talk to you about that request [to dismiss counsel and proceed *pro se*] before we do anything else here today, okay, because you had filed that in the court file back in December asking to dismiss your attorney and to represent yourself further—in further proceedings in this case.

I don't want to just ignore that, just because your lawyer is telling me she's ready to go here today. I want to make sure here with you first that you've considered that and maybe you've talked with her and you can tell me whether that is something you want to have heard today, you want to talk to me about your attorney and whether you want to represent yourself or if you've changed your views on that.

DEFENDANT: I will have her today.

THE COURT: Okay. So you've had an opportunity to—I know you've been meeting with [postconviction counsel] for a while here this afternoon, so you've had some time to talk with her about your case and where it's going and so forth.

Is that fair to say?

DEFENDANT: Yes.

THE COURT: Okay. So, at this point, are you telling me that you don't want to proceed on your Motion to Dismiss Counsel?

DEFENDANT: Correct.

THE COURT: Okay. Any questions about that at all, sir?

DEFENDANT: No, no.

THE COURT: All right, thank you, [defendant]. I just wanted to make sure we addressed that before we proceeded further.

¶ 16 In March 2017, in a written order, the trial court granted the State's motion to dismiss defendant's amended petition for postconviction relief. The trial court held that both claims postconviction counsel raised in defendant's amended petition were precluded by the

doctrine of waiver, as both were “premised on the trial record” and “could have been raised on direct appeal” but were not.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues he was denied reasonable assistance of postconviction counsel during the second stage of postconviction proceedings.

¶ 20 At the second stage of postconviction proceedings, a defendant is entitled to reasonable assistance of counsel. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). To provide reasonable assistance, postconviction counsel must complete the duties listed in Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), namely, (1) consulting with the defendant to ascertain his contentions of a deprivation of a constitutional right; (2) examining the record of proceedings at trial; and (3) making any amendments necessary for the adequate presentation of defendant’s contentions. However, “Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on [a] defendant’s behalf.” *People v. Greer*, 212 Ill. 2d 192, 205, 817 N.E.2d 511, 519 (2004).

¶ 21 The filing of a facially valid Rule 651(c) certificate raises a rebuttable presumption that postconviction counsel provided reasonable assistance. See *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 26, 67 N.E.3d 976. To overcome this presumption, a defendant must show that postconviction counsel failed to complete her duties under Rule 651(c). *Id.* We review *de novo* whether postconviction counsel provided reasonable assistance in compliance with Rule 651(c). *Suarez*, 224 Ill. 2d at 41-42.

¶ 22 Defendant acknowledges postconviction counsel filed a Rule 651(c) certificate and is therefore presumed to have provided reasonable assistance. However, defendant argues

that the record rebuts this presumption because it shows postconviction counsel did not include the ineffective assistance claim this court held to be arguably meritorious and therefore did not adequately present his contentions. See *Riggs*, 2016 IL App (4th) 140322-U.

¶ 23 Contrary to the argument of defendant, we find our holding in *Riggs* in no way rebuts the presumption created by postconviction counsel's Rule 651(c) certificate. In *Riggs*, this court merely concluded it was *arguable* defendant's ineffective assistance claim had merit, not that the claim met the showing required during second stage of postconviction proceedings. At the second stage of postconviction proceedings, the trial court determines whether defendant's postconviction petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 25, 85 N.E.3d 568.

¶ 24 Defendant fails to cite to any authority for the proposition that postconviction counsel is required to include a claim held to be arguably meritorious in an amended petition. In fact, such a proposition would be contrary to the case law that states postconviction counsel is not required to advance frivolous claims, as a claim held to be arguably meritorious may turn out to be frivolous upon further investigation on remand. See, *e.g.*, *Greer*, 212 Ill. 2d at 205. Moreover, the record reveals postconviction counsel requested an additional 45 days to file any pleadings because she had to speak to six witnesses, which supports the State's position that counsel investigated the identification issue and found it to be meritless.

¶ 25 Defendant's December 29, 2016, "Motion to Dismiss Counsel and to Proceed as a *Pro Se* Litigant" also fails to rebut the presumption created by postconviction counsel's Rule 651(c) certificate. In the motion, defendant alleged counsel told him that she would include the identification issue in the amended petition but failed to do so. However, at the hearing on the State's motion to dismiss his amended petition, defendant voluntarily withdrew his motion after

meeting with postconviction counsel. The trial court confirmed defendant had met with postconviction counsel “for a while here this afternoon *** [and] had some time to talk with her about [defendant’s] case and where it’s going” and chose not to proceed with his motion. Accordingly, we find defendant failed to rebut the presumption that postconviction counsel provided reasonable assistance.

¶ 26 We note that in defendant’s reply brief, he raises the additional argument that postconviction counsel failed to adequately present defendant’s contentions because she failed to make the proper amendments to overcome waiver. We decline to address this argument because defendant forfeited it by failing to raise it in his initial brief. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (“Points not argued are forfeited and shall not be raised in the reply brief ***.”).

¶ 27 **III. CONCLUSION**

¶ 28 For the reasons stated, we affirm the trial court’s judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 29 Affirmed.