

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 21756
	)	
JOHN GRAYSON,	)	Honorable
	)	William G. Gamboney,
Petitioner-Appellant.	)	Judge, presiding.

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JUSTICE MITCHELL delivered the judgment of the court.  
Presiding Justice Mikva and Justice Navarro concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The circuit court's dismissal of petitioner's post-conviction petition is affirmed where post-conviction counsel provided reasonable assistance.
- ¶ 2 Petitioner John Grayson appeals the circuit court's dismissal of his post-conviction petition at the second stage of post-conviction proceedings. The issue on appeal is whether Grayson's post-conviction counsel provided unreasonable assistance where counsel (1) failed to attach a verification affidavit to his petition and (2) failed to raise a claim of ineffective assistance of appellate counsel to avoid the procedural bar of waiver. For the following reasons, we affirm.

¶ 3

## I. BACKGROUND

¶ 4 In 2004, petitioner John Grayson was found guilty of first degree murder following a jury trial. Grayson was sentenced to 60 years' incarceration for first degree murder with a consecutive sentence of life imprisonment for personally discharging a firearm during the course of the murder. Grayson's conviction was affirmed on direct appeal. *People v. Grayson*, 363 Ill. App. 3d 1195 (2006) (table) (unpublished order under Illinois Supreme Court Rule 23), *pet. for leave to appeal denied*, 221 Ill. 2d 653 (2006).

¶ 5 In 2006, Grayson filed a *pro se* petition under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2006). Grayson's petition contained three claims challenging the jury instructions given at his trial, as well as claims that his trial counsel and appellate counsel were ineffective for not challenging these jury instructions. Grayson attached an "Affidavit of Indigency and Verification Request for Appointment of Counsel" to his petition but attached no verification affidavit or supporting documentation.

¶ 6 In 2008, the circuit court appointed an assistant public defender to represent Grayson. The assistant public defender died in 2017 without submitting an amended petition on Grayson's behalf. The circuit court then appointed private counsel to represent Grayson. In 2019, counsel filed an "amended/supplemental" post-conviction petition that introduced an additional claim: Grayson's trial counsel was ineffective for not seeking to admit evidence that gunshots were fired from the victim's vehicle under the spontaneous declaration exception to the hearsay rule. Counsel also certified that he had fulfilled his obligations as post-conviction counsel under Illinois Supreme Court Rule 651(c). Ill. S. Ct. R. 651(c) (eff. July 1, 2017).

¶ 7 The State filed a motion to dismiss, arguing that Grayson’s claims failed on the merits. The State also argued that Grayson’s *pro se* and amended petitions should be dismissed on procedural grounds because they lacked notarized verification affidavits indicating that Grayson’s claims were true and brought in good faith, and because they lacked affidavits, records, or other evidence supporting the petitions’ allegations as required under the Act. 725 ILCS 5/122-1(b), 122-2 (West 2020). In response, Grayson’s counsel attached a certification pursuant to section 1-109 of the Code of Civil Procedure attesting that Grayson’s claims were true and brought in good faith. 735 ILCS 5/1-109 (West 2020).

¶ 8 At a hearing on the State’s motion to dismiss, Grayson’s counsel stated that on October 28, 2020, he received a notarized affidavit from Grayson pursuant to the Act which he tendered to the circuit court. The circuit court said that it had not gone looking for the affidavit because “the files are voluminous” but asked counsel to “send it to me again \*\*\* and also to counsel.” Grayson’s counsel agreed to resubmit Grayson’s notarized affidavit.

¶ 9 The circuit court granted the State’s motion to dismiss. The circuit court first concluded that Grayson waived his three claims challenging the jury instructions because he failed to raise them on direct appeal. Nevertheless, the circuit court analyzed those three claims along with the three claims of ineffective assistance of counsel and found them to be meritless. The circuit court additionally dismissed each claim due to the lack of a notarized verification affidavit:

“Further, section 122-1(b) of the Act requires that the petition be verified. Here, there is no verification affidavit attached to the petition to indicate that petitioner’s claims are true and brought in good faith. Here, the only attached documentation to petitioner’s original petition was petitioner’s unnotarized ‘Affidavit of Indigency and Verification

Request for Appointment of Counsel,’ but petitioner did not include a verification affidavit or any other supporting documentation. Further, the document itself is unnotarized, and therefore, fatally defective. [Citation.] Petitioner’s failure to comply with the pleading requirement of the Act is enough to dismiss the petition. [Citation.] Although post-conviction counsel has submitted a version of a verification affidavit that says he spoke with petitioner and as far as counsel is aware, petitioner’s claims are true and brought in good faith, it still remains unnotarized, rendering it fatally defective. There are currently no notarized affidavits before this court, and no explanation for why they could not have been provided.”

This timely appeal followed. Ill. S. Ct. R. 606 (eff. Mar. 12, 2021).

¶ 10

## II. ANALYSIS

¶ 11 The Post-Conviction Hearing Act allows a prisoner to collaterally challenge his conviction on state or federal constitutional grounds. 725 ILCS 5/122-1 (West 2020); *People v. Huff*, 2024 IL 128492, ¶ 18. The Act sets forth a three-stage process for adjudicating the petitioner’s claims. *People v. Agee*, 2023 IL 128413, ¶ 36. At the first stage, the circuit court must independently review the petition within 90 days of its filing and determine whether the petition is “frivolous or is patently without merit.” *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 2020). If the petition is not dismissed for being frivolous or patently without merit, it advances to the second stage of proceedings. *People v. Allen*, 2015 IL 113135, ¶ 21. At the second stage, the court may appoint counsel for petitioner, who may supplement or amend the petition. *People v. Bailey*, 2017 IL 121450, ¶ 18; 725 ILCS 5/122-4 (West 2020). The State must either move to dismiss the petition or file an answer to petitioner’s claims. 725 ILCS 5/122-5 (West 2020). In adjudicating the State’s

motion to dismiss, the circuit court must determine if “the petition and accompanying documents make a substantial showing of a constitutional violation.” *Agee*, 2023 IL 128413, ¶ 37. If the circuit court determines that the petitioner has made a substantial showing of a constitutional violation, then the petition advances to the third stage for an evidentiary hearing. *Id.* A circuit court’s dismissal of a post-conviction petition at the second stage is reviewed *de novo*. *Huff*, 2024 IL 128492, ¶ 13.

¶ 12 On appeal, Grayson contends that his post-conviction counsel did not provide him with a reasonable level of assistance. “There is no constitutional right to counsel in proceedings under the Act[.]” *Id.* ¶ 21. The Act entitles petitioners to reasonable assistance of counsel, which is “a standard that is significantly lower than the one mandated at trial by our state and federal constitutions.” *People v. Custer*, 2019 IL 123339, ¶ 30. The Illinois Supreme Court Rules provide three requirements to ensure the reasonable assistance of post-conviction counsel. Ill. S. Ct. R. 651(c). First, counsel must consult “with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights.” *Id.* Second, counsel must examine “the record of the proceedings at the trial.” *Id.* Third, counsel must make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” *Id.* “Counsel’s certification that he or she complied with those duties creates a rebuttable presumption that counsel provided the petitioner with a reasonable level of assistance, absent an affirmative showing otherwise in the record.” *Agee*, 2023 IL 128413, ¶ 43. The petitioner bears the burden of overcoming this presumption by showing that post-conviction counsel did not substantially comply with the duties mandated by Rule 651(c) and may do so by demonstrating that counsel “did not make all necessary amendments to the *pro se* petition,” such

as by failing to make “amendments that are necessary to overcome procedural bars.” *People v. Addison*, 2023 IL 127119, ¶ 21. If post-conviction counsel failed to comply with his or her duties under Rule 651(c), then remand is required “ ‘regardless of whether the claims raised in the petition had merit.’ ” *Id.* ¶ 33 (quoting *People v. Suarez*, 224 Ill. 2d 37, 47 (2007)).

¶ 13 Grayson’s post-conviction counsel filed a Rule 651(c) certificate; therefore, we must presume that counsel provided reasonable assistance. However, Grayson argues that the facts in the record overcome this presumption. First, Grayson argues that his post-conviction counsel provided unreasonable assistance because he failed to attach a notarized verification affidavit to Grayson’s post-conviction petition. Proceedings under the Act “shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit.” 725 ILCS 5/122-1(b). The purpose of this verification affidavit is to confirm “that the allegations are brought truthfully and in good faith.” *People v. Collins*, 202 Ill. 2d 59, 67 (2002). A lack of an affidavit as required under the Act is a proper basis for second-stage dismissal. *People v. Hommerson*, 2014 IL 115638, ¶ 14; *People v. Madison*, 2023 IL App (1st) 221360, ¶ 42 (listing cases).

¶ 14 The parties agree that the record does not contain an affidavit as required under the Act. Further, counsel’s unnotarized certification pursuant to section 1-109 of the Code of Civil Procedure does not satisfy this requirement. *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 16 (“[A] section 1–109 certification may not verify a postconviction petition. Instead, a section 122–1(b) affidavit is required and \*\*\* affidavits filed pursuant to the Act must be notarized to be valid.” (Internal quotation marks omitted.)); *People v. Wideman*, 2013 IL App (1st) 102273, ¶ 15, *as*

*modified*, (Aug. 5, 2013); *People v. Turner*, 2012 IL App (2d) 100819, ¶ 25, *as modified on denial of reh'g*, (July 11, 2012); see *People v. Tlatenchi*, 391 Ill. App. 3d 705, 715-16 (2009).

¶ 15 While the circuit court could have granted the State's motion to dismiss solely due to the lack of a notarized verification affidavit, it did not. Instead, it wrote a 36-page order that thoroughly analyzed and dismissed each of Grayson's post-conviction claims on the merits. While the circuit court also dismissed Grayson's claims due to the lack of a notarized affidavit, this procedural defect was an additional, alternative basis for dismissal. In dismissing each claim, the circuit court held that "[t]he instant claim's failure \*\*\* to comply with the pleading requirements of the Act is *further fatal* to petitioner's claim." (Emphasis added.) The circuit court spent the substantial majority of its order addressing the merits of Grayson's claims.

¶ 16 Based on this record, Grayson fails to rebut the presumption that his post-conviction counsel provided him with reasonable assistance. Grayson cannot show that his counsel failed to substantially comply with his duty under Rule 651(c) to make any amendments "necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c). The circuit court addressed the merits of Grayson's claims despite his petition's procedural deficiencies, and therefore the lack of a verification affidavit is of no moment.

¶ 17 In *People v. Buchanan*, our court recently rejected a defendant's claim of unreasonable assistance of his postconviction counsel on nearly identical facts. There, postconviction counsel filed a Rule 651(c) certificate but did not attach an affidavit to Buchanan's *pro se* petition. *People v. Buchanan*, 2024 IL App (1st) 221579-U, ¶¶ 8-9. The circuit court dismissed Buchanan's petition at the second stage. *Id.* ¶ 14. The circuit court acknowledged the lack of an affidavit and stated that "[b]ased on that technicality, the [petition] would be denied." *Id.* However, the circuit court

declined to dismiss on that basis and instead dismissed the petition on the merits. *Id.* ¶¶ 14, 50. This court held that “[s]ince the court had an independent and sufficient basis to dismiss the petition’s claims, postconviction counsel’s failure to remedy the lack of a notarized verification affidavit was inconsequential. Given the dismissal on the merits, we find that defendant has not rebutted the presumption that counsel provided reasonable assistance.” *Id.* ¶ 52. Similarly, Grayson fails to demonstrate that his postconviction counsel provided him with unreasonable assistance because, despite the lack of an affidavit, the circuit court still analyzed and dismissed his petition on its merits.

¶ 18 In urging a contrary result, Grayson relies on authority that is distinguishable. In *Madison*, the circuit court dismissed the petition *because* it was unsupported by an affidavit, and as such, the circuit court never ruled on the merits of the petition. 2023 IL App (1st) 221360, ¶ 44. In *Nitz*, the circuit court dismissed the defendant’s petition on the merits, but the appellate court reversed due to the lack of an affidavit. *Nitz*, 2011 IL App (2d) 100031, ¶ 24. The appellate court held that “Nitz’s counsel should have sought to remedy the lack of a notarized affidavit,” and because he failed to do so, he provided unreasonable assistance. *Id.* ¶ 19. However, defense counsel in *Nitz* had not filed a Rule 651(c) certificate, and the *Nitz* holding was based at least in part on the state’s concession at oral argument that counsel’s failure to provide an affidavit amounted to unreasonable assistance. *Id.* ¶ 19 n.1. In other cases where counsel has failed to file a verified affidavit, our court has not followed *Nitz*. See, e.g., *People v. Velasquez*, 2024 IL App (1st) 231046-U, ¶¶ 41-43 (holding that “neither *Nitz* nor *Madison* compels a finding of unreasonable representation” despite post-conviction counsel’s failure to provide verification affidavit because the State failed to raise the issue before the circuit court); *People v. Andrew*, 2018 IL App (1st) 153352-U, ¶¶ 24-25



(distinguishing *Nitz* and holding that defendant failed to overcome the presumption that post-conviction counsel provided reasonable assistance where “counsel complied with Rule 651(c) in all other regards except for filing a verification affidavit and the trial court dismissed defendant’s petition on the merits”). In any event, where the circuit court actually rules on the merits of the petition despite the absence of an affidavit, the reasoning in *Buchanan* is more persuasive. The circuit court dismissed Grayson’s petition on the merits and thus he cannot show that his counsel failed to make amendments necessary for an adequate presentation of Grayson’s contentions. *Buchanan*, 2024 IL App (1st) 221579-U, ¶ 52.

¶ 19 Finally, Grayson argues that his post-conviction counsel provided unreasonable assistance because he failed to raise a claim of ineffective assistance of appellate counsel in his amended post-conviction petition to avoid the procedural bar of waiver. In the amended petition, counsel raised a new claim: that Grayson’s trial counsel was ineffective for not seeking to admit evidence of gunshots being fired from the victim’s vehicle under the spontaneous declaration exception to the hearsay rule. Grayson argues that this claim was subject to waiver because it could have been raised on direct appeal but was not. Grayson contends that waiver could have been avoided if counsel had simultaneously raised a claim of ineffective assistance of appellate counsel regarding the spontaneous declaration issue. However, in its order the circuit court explicitly held that this claim was not waived. “An ineffective assistance claim based on what the record discloses counsel did, in fact, do is subject to the usual procedural default rule,” but “a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense.” *People v. Tate*, 2012 IL 112214, ¶ 14. Even though Grayson’s ineffective assistance of trial counsel claim regarding the spontaneous declaration exception was not brought on direct

appeal, it was not subject to waiver because it concerned what trial counsel allegedly ought to have done in presenting a defense. *Id.* Therefore, an ineffective assistance of appellate counsel claim was not necessary to avoid waiver, and counsel's failure to raise it in the amended petition cannot constitute unreasonable assistance. See *Addison*, 2023 IL 127119, ¶ 27 (“[T]he failure to allege ineffective assistance of appellate counsel *when necessary to overcome a forfeiture* [is] a violation of Rule 651(c).” (Emphasis added.)).

¶ 20

### III. CONCLUSION

¶ 21 The judgment of the circuit court of Cook County is affirmed.

¶ 22 Affirmed.