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This Order was filed under
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2025 IL App (4th) 240895-U

NO. 4-24-0895

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 3, 2025

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Peoria County
ANTONIO THOMAS,)	No. 11CF14
Defendant-Appellant.)	
)	Honorable
)	Katherine S. Gorman,
)	Judge Presiding.

JUSTICE GRISCHOW delivered the judgment of the court.

Justices Steigmann and Vancil concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part the dismissal of defendant's second-stage postconviction petition, concluding (1) postconviction counsel's Illinois Supreme Court Rule 651(c) (eff. Jul. 1, 2017) certificate was facially valid; (2) defendant was provided reasonable assistance by postconviction counsel where his claims regarding the sentence enhancement and the admission of a rehabilitative prior consistent statement of a witness were meritless; and (3) defendant failed to make a substantial showing of actual innocence to warrant an evidentiary hearing on that claim. The appellate court reversed in part the dismissal of defendant's second-stage postconviction petition, finding defendant was denied reasonable assistance of counsel when postconviction counsel failed to make necessary amendments to defendant's *pro se* petition to shape his ineffective assistance of trial counsel claim into the proper legal form of an ineffective assistance of appellate counsel claim and attach any supporting affidavit.

¶ 2 Defendant, Antonio Thomas, appeals the trial court's dismissal of his postconviction petition at the second stage of the proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). Defendant argues (1) postconviction counsel did not provide him with reasonable assistance where counsel failed to comply with Illinois

Supreme Court Rule 651(c) (eff. July 1, 2017) and (2) he made a substantial showing of actual innocence through new, material, noncumulative evidence. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4

A. Information and Pertinent Pretrial Matters

¶ 5

On January 18, 2011, defendant was charged by indictment with four counts of first degree murder for the death of Curtis Johnson (720 ILCS 5/9-1(a)(1), (2) (West 2010)), one count of aggravated unlawful use of a weapon (*id.* § 24-1.6(a)(1)), and unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)). Prior to trial, three of the first degree murder counts were dismissed, and the remaining first degree murder charge alleged defendant, “without lawful justification, personally discharged a handgun at Curtis Johnson, knowing such act created a strong probability of death or great bodily harm” to Johnson and caused his death. See *id.* § 9-1(a)(2).

¶ 6

The charges arose from an altercation at a Circle K gas station in Peoria, Illinois, on November 9, 2010. Johnson, Tiffany Smith (his girlfriend), and their two children stopped at the gas station when they saw Calvin Brown (the father of a child with Smith’s sister) pull up to the gas pumps. An argument ensued between Brown and Johnson, which escalated into a fistfight. Defendant, the passenger in Brown’s car, exited the vehicle, shot Johnson, and then fled on foot. Brown drove off in his vehicle. Johnson died from his injuries.

¶ 7

Defendant waived his right to a trial by jury, and the case was set for a bench trial on August 22, 2011. On August 15, 2011, defendant filed a motion to continue the trial because John Peyton, a “crucial witness,” was unavailable and “defense would be greatly prejudiced by his absence.” In support, defendant argued Peyton was with Brown shortly after the murder and contradicted Brown’s account of his activities after the murder. Peyton was a fugitive with an

outstanding parole warrant, and his location remained unknown. Defendant's motion was denied.

¶ 8

B. Bench Trial

¶ 9

The bench trial commenced on August 22, 2011. Prior to the presentation of evidence, defense counsel raised the issue of continuing the case, again, due to the unavailability of Peyton. The trial court acknowledged they "went over the whole Peyton issue last week, and nobody had a realistic expectation that he could be found any time between now and 10 years from now." The parties agreed to proceed with trial, with the possibility of requesting a continuance at a later date.

¶ 10

On August 22 and 23, 2011, the State presented its case, including testimony of police officers, forensic experts, including the pathologist who conducted the autopsy on Johnson, DNA analysts, and numerous witnesses to the altercation at the Circle K on November 9, 2010. The State presented video and photographic evidence, as well.

¶ 11

Smith was with Johnson and their two children on the evening of the incident. She testified they had just returned some videos they had rented and then stopped at the Circle K to get gas when they saw Brown pull up in his truck. Johnson and Brown began arguing, they exited their vehicles, and the argument escalated. The two men engaged in a physical fight. Smith remained in her car and saw the person in the passenger seat of Brown's car exit the vehicle and approach Johnson and Brown. Smith called out to Johnson and saw the passenger from Brown's car lift his hand and shoot Johnson. The shooter was a Black man wearing a hoodie, but she could not see his face. Smith saw blood on Johnson as he walked back toward the car holding his chest. Johnson fell as he reached the open car door. Smith held Johnson, who was "holding on" but not speaking. Brown stood there for a moment but got back into his car and drove away.

¶ 12

Lauren Thomas was also at the Circle K getting gas on the evening of November

9, 2010, and witnessed the altercation. Her account of the incident was consistent with that of Smith. She also stated she heard Brown yell at the passenger in his car for help. She observed the passenger reach between the seats, grab a gun, and approach Johnson. She turned to get back into her car and heard the gunshot. Lauren did not see the shooter's face, but she noticed he was wearing a black hoodie.

¶ 13 Brown testified he had been using drugs on the night of the incident. He picked up defendant, whom he had known for a few years, stopped at a liquor store to purchase alcohol, and made several other stops. One of the stops was to drop defendant off "for a second" at a family member's home, and Brown returned to pick him up. Defendant rode in his front passenger seat and was wearing black pants and a black hoodie. They eventually drove to the Circle K to purchase cigars, cigarettes, and water. Brown admitted to yelling at Smith and then arguing with Johnson. His account of the argument was consistent with Smith's account. Brown described the fistfight with Johnson, and he admitted Johnson was "winning the fight." At one point, they were separated and squaring up to reengage, when Brown heard a gunshot from behind and saw Johnson grab his stomach and collapse. Brown noticed defendant was no longer in the car. He stated he did not know defendant had a gun. Brown got into his car and drove away. Brown planned to abandon the car, and he drove to an alley, where he saw defendant. Defendant told him to not say anything about the shooting, which led Brown to believe defendant had shot Johnson. At the time of his testimony, Brown was in jail on drug possession charges. He was offered a lesser sentence in a plea agreement on the pending charges in exchange for his testimony.

¶ 14 The State rested.

¶ 15 On August 22, 2011, defendant began his defense with the testimony of Edmond Simmons. Simmons testified he knew both Brown and Peyton, he was not riding in the car with

Brown or at the Circle K on the night of the incident, and he never saw Peyton that evening. Defendant's aunt, Patricia Thomas, testified defendant stopped by her house for about five minutes at around 10 p.m. on the evening of the incident. She believed someone dropped him off. She believed defendant was wearing black pants and a black T-shirt and he had a black jacket.

¶ 16 On August 29, 2011, defendant sought a continuance of the trial due to the unavailability of Peyton. The trial court explained it wanted to give defendant

“as much latitude as he's entitled to, but we're not going to go forever. We're just not. I mean, we're not going to continue this open-ended and we'll see where we're at, you know, next May. I'm being facetious here, but I don't know what a reasonable continuance is under these circumstances.”

The parties agreed to proceed with the trial as scheduled with the witnesses that were available.

¶ 17 On September 2, 2011, defense counsel informed the trial court he had consulted with defendant about subpoenaing various witnesses, and defendant disagreed with him regarding which witnesses should be called to testify. Defendant explained to the court, “I want all of them, Your Honor,” referring to the 69 witnesses listed in the initial discovery documents. Counsel acknowledged he reviewed all of the witnesses with his client and explained his decisions regarding each one to defendant. Counsel believed it was his “call” to decide what witnesses to present. He made his determinations as a matter of trial strategy to present the witnesses he believed would have “bearing on this case.” The court took the matter under advisement. Upon revisiting the matter, the State objected to any further delays due to potential witnesses being tracked down, stating, “[W]e've given the defense now over three weeks to obtain this witness, and we're no farther along than we were in August when we started this trial.”

¶ 18 When defense counsel resumed presenting his case on September 12, 2011, counsel

noted Peyton had still not been taken into custody on the outstanding warrant or otherwise located. The defense did, however, have one more witness to present. Annie Sanders, the assistant manager of the Circle K, testified she was working when the shooting occurred. Sanders saw the two men fighting, picked up the phone to call 911, and, while making the call, she heard the gunshot. She did not see the shooting or anyone holding a gun.

¶ 19 At the close of arguments on September 12, 2011, defendant was found guilty of first degree murder, aggravated unlawful use of a weapon, and unlawful possession of a weapon by a felon.

¶ 20 On November 4, 2011, defendant filed a motion for a new trial, arguing Peyton, a favorable witness who was previously unavailable, “has been found and may testify to evidence that would have resulted in defendant’s acquittal.” The motion was denied on February 10, 2012.

¶ 21 Defendant was sentenced to 60 years’ imprisonment plus a term of natural life in prison for murder for the weapons enhancement, merged the weapons conviction, and imposed an additional 6 years for aggravated unlawful use of a weapon (eligible for day-for-day credit), to be served consecutively. No sentence was imposed for the conviction of unlawful possession of a weapon by a felon.

¶ 22 Defendant’s motion to reconsider sentence was denied on June 1, 2012.

¶ 23 C. Direct Appeals

¶ 24 Defendant appealed his conviction and sentence, arguing the evidence was insufficient to support his conviction, the sentence imposed was excessive, and he was improperly assessed a DNA analysis fee. The Third District affirmed defendant’s conviction, vacated the imposition of the DNA fee, vacated defendant’s sentence, and remanded the cause for resentencing. See *People v. Thomas*, 2015 IL App (3d) 120461-U.

¶ 25 Following a new sentencing hearing on remand, defendant was again sentenced to 60 years plus natural life in prison for first degree murder. Defendant appealed again, arguing the trial court failed to follow the appellate court’s mandate in resentencing him and his sentence was excessive. The Third District affirmed. See *People v. Thomas*, 2016 IL App (3d) 150571-U.

¶ 26 D. Postconviction Proceedings

¶ 27 On July 20, 2017, defendant filed a *pro se* postconviction petition setting forth, in 40 pages, numerous claims of ineffective assistance of trial and appellate counsel. On October 16, 2017, the trial court advanced the petition to the second stage and advised defendant, who had not requested counsel, to “synthesize and better organize his pleading or argument for fuller review.”

¶ 28 On October 17, 2018, defendant filed an amended *pro se* postconviction petition. The 52-page document stated four separate claims, in addition to a constitutional challenge to section 5/111-3(c-5) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(c-5) (West 2010)) (requiring if any alleged fact is sought to be used as an aggravating factor to increase the sentence, the defendant must be given notice, and the fact must be proven beyond a reasonable doubt).

¶ 29 The first claim in defendant’s postconviction petition alleged he was denied effective assistance of appellate counsel because counsel failed to argue the State did not prove beyond a reasonable doubt that he personally discharged a firearm.

¶ 30 In his second claim, defendant argued he was denied effective assistance of trial counsel when trial counsel “failed to investigate, or interview the potential testimony of several [*sic*] eyewitnesses whom [*sic*] may have provided exonerating testimony that would have directly contradicted the testimony of Tiffany Smith and Lauren Thomas.” Specifically, defendant argued the two people in the car with Thomas on the evening of the incident, her friend, identified as Heidi

Hoggin, and the driver, whom she referred to by the nickname “St. Louis,” “probably witnessed the incident.” At trial, defendant was given the opportunity to express his dissatisfaction that these witnesses, and a long list of others, were not called, and his counsel explained he discussed these matters with defendant and decided, as a matter of trial strategy, to present the witnesses he believed had a bearing on the case. These two witnesses were not included. Defendant contended both witnesses would have exonerated him by stating he was not the shooter.

¶ 31 The third claim in defendant’s petition asserted a claim of actual innocence based on “newly discovered evidence of the exculpatory eyewitness accounts by Charles Williams” that “shortly before the crime took place,” defendant was not the passenger in Brown’s vehicle. In support, defendant attached an affidavit signed by Williams stating Brown drove up to him shortly before the shooting that evening to purchase illegal drugs, and he saw a person from the neighborhood known as “Sawed Off” in the car with Brown. Williams attested he asked the men where they were going, and they responded that they were going to the Circle K. Williams observed them driving in the direction of the Circle K, minutes later he heard what sounded like a gunshot, and then he heard sirens heading toward the Circle K. Williams went to the Circle K and found out someone had been shot.

¶ 32 Defendant’s fourth claim alleged his appellate counsel was ineffective for not raising on direct appeal the issue that the trial court erred in allowing the State to “bolster” Smith’s credibility by eliciting testimony about her prior consistent statements about the identity of the shooter on redirect examination after she was impeached with a prior inconsistent statement on cross-examination.

¶ 33 The final claim related to defendant’s first claim, which challenged the constitutionality of section 111-3(c-5) of the Code. Specifically, defendant contended the sentence

enhancement provision violated the sixth amendment to the United States Constitution (U.S. Const., amend. VI), which requires the accused be “informed of the nature and cause of the accusation,” as well as the right to a fair trial, due process, and equal protection. Defendant contends he was not given notice in the charging instrument that the State sought the imposition of the “firearm enhancement pursuant to 730 ILCS 5/5-8-1(A)(1)(d)(iii) [(West 2010)].” As such, he argued he did not know the sentencing range he faced upon conviction.

¶ 34 Counsel was subsequently appointed on January 26, 2018.

¶ 35 On January 13, 2020, Maggi Wettstein, of the Peoria County Public Defender’s Office, filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017), stating she had consulted with defendant to learn his contentions of deprivation of his constitutional rights, examined the court file and record of the proceedings, and made any amendments to the petition filed *pro se* that were necessary for “adequate preservation” of defendant’s claims. In March 2020, the case was continued pursuant to COVID-19 administrative orders.

¶ 36 In May 2020, defense counsel filed defendant’s supplemental petition for postconviction relief. This petition incorporated by reference all of the arguments set forth in defendant’s amended postconviction petition filed on October 17, 2018. Defendant alleged further that based upon the decision in *People v. Bass*, 2019 IL App (1st) 160640, his conviction should be reversed because the investigative alert procedure of the Peoria Police Department by which he was taken into custody should be deemed unconstitutional because it allows for an improper warrantless arrest. Defendant also contended his conviction for aggravated unlawful use of a weapon violated his due process rights because the statute had been deemed unconstitutional, citing *People v. Aguilar*, 2013 IL 112116, and *People v. Burns*, 2015 IL 117387.

¶ 37 On November 11, 2020, the State filed a motion to dismiss defendant’s

postconviction petitions. In January 2022, Wettstein withdrew as counsel, and defendant was represented by two other attorneys before Brian McIntyre entered his appearance on defendant's behalf in November 2023. Subsequently, McIntyre confirmed the Rule 651(c) certificate had been filed by Wettstein in January 2020.

¶ 38 The second-stage postconviction hearing was held on May 3, 2024. On June 6, 2024, the trial court granted the State's motion to dismiss defendant's postconviction petitions, finding defendant failed to

“demonstrate sufficient facts that show a substantial denial of constitutional right within his pleadings, for reasons that his arguments either: (1) fail to address constitutional issues (but rather sufficiency of evidence arguments or evidentiary issues); (2) deal with matters previously addressed/resolved in the prior appellate opinion, or are completely rebutted by the record.”

¶ 39 This appeal followed.

¶ 40 II. ANALYSIS

¶ 41 A. Compliance with Rule 651(c)

¶ 42 Defendant argues postconviction counsel provided unreasonable assistance, in violation of Rule 651(c), by (1) filing a Rule 651(c) certification that was facially invalid and (2) failing to amend a number of defendant's ineffective assistance of counsel claims into proper legal form and attach evidentiary support for certain claims.

¶ 43 The Act provides a “statutory procedure by which a defendant can pursue a claim that his conviction or sentence was based on a substantial denial of his constitutional rights.” *People v. Clark*, 2023 IL 127273, ¶ 38. In noncapital cases, proceedings on postconviction petitions involve three stages, the second stage proceedings being at issue in this case. If a petition

is advanced to the second stage, the trial court may appoint counsel to represent an indigent defendant. See 725 ILCS 5/122-4 (West 2016). Defendants are statutorily entitled to reasonable assistance of counsel under the Act, which is “significantly lower than the [standard] mandated at trial by our state and federal constitutions.” *People v. Custer*, 2019 IL 123339, ¶ 30. Appointed counsel must substantially comply with the requirements of Rule 651(c), which requires counsel to certify he has taken the following actions: (1) consulted with defendant “to ascertain his or her contentions of deprivation of constitutional rights,” (2) examined the record of the trial court proceedings, and (3) “made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. July 1, 2017). Filing a Rule 651(c) certificate wherein counsel attests to fulfilling these obligations creates a rebuttable presumption that the petitioner received reasonable postconviction assistance. *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 14. “The defendant bears the burden of overcoming that presumption by showing that postconviction counsel did not substantially comply with the strictures of the rule.” *People v. Addison*, 2023 IL 127119, ¶ 21.

¶ 44 When a postconviction petition is dismissed at the second stage, the decision is reviewed *de novo*. *People v. Huff*, 2024 IL 128492, ¶ 13.

¶ 45 1. *Facial Validity of Counsel’s Rule 651(c) Certificate*

¶ 46 Defendant argues his postconviction counsel’s Rule 651(c) certificate was insufficient on its face because counsel averred amendments were made to the *pro se* petition for the “adequate preservation” of defendant’s claims instead of “adequate presentation” of those claims. We find this to be a distinction without a difference.

¶ 47 Substantial compliance extends to the Rule 651(c) certificate. See *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008). A certificate that fails to exactly mirror the language

of Rule 651(c) may still be found sufficient if it substantially complies with the rule. *People v. Lando*, 2020 IL App (1st) 170851, ¶ 48. Counsel’s statement that amendments were made to defendant’s *pro se* petition to *preserve* defendant’s claims was adequate to infer that counsel was attesting the supplemental petition adequately *presented* defendant’s contentions. In fact, the supplemental petition incorporated by reference all the arguments defendant made in his prior postconviction petitions.

¶ 48 The certificate counsel filed substantially complied with Rule 651(c), creating a rebuttable presumption that counsel provided defendant with the reasonable assistance the law requires. Therefore, we turn to consider whether defendant has overcome that presumption.

¶ 49 *2. Reasonable Assistance of Counsel*

¶ 50 Defendant contends he rebutted any presumption counsel provided reasonable assistance by showing his counsel failed to amend a number of his ineffective assistance of counsel claims to put them into proper legal form and attach evidentiary support for certain of those claims.

¶ 51 First, defendant contends counsel’s assistance was unreasonable because he failed to adequately shape defendant’s claim of ineffective assistance of appellate counsel regarding the notice requirements of the firearm enhancement. Defendant explains, “[W]here the record rebuts any challenge to the imposition of the firearm enhancement for failure to comply with [section 111-3(c-5) of the Code], counsel failed to adequately present a constitutional claim.” However, defendant also concedes in his brief that “on the face of the record,” section 111-3(c-5) was not violated because (1) the charging instrument stated defendant “personally discharged a handgun” and (2) following the bench trial, the trial court found defendant shot Johnson. See 725 ILCS 5/111-3(c-5) (West 2010); see also *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 62 (holding “the indictment need not include the sentencing enhancement’s language verbatim; it requires only

notice of the alleged fact used as a basis to increase his or her sentence”). “Postconviction counsel is required to investigate and properly present the defendant’s claims.” *People v. Turner*, 2023 IL App (1st) 191503, ¶ 30. However, if any “amendments would only further a frivolous or meritless claim, the amendments are not ‘necessary’ within the meaning of Rule 651(c).” *Id.* (citing *People v. Greer*, 212 Ill. 2d 192, 205 (2004)). Defendant acknowledges his claim regarding the firearm enhancement was meritless; therefore, he cannot claim his counsel provided unreasonable assistance in failing to pursue it by further amendment to the petition. Not every petition can be amended to set forth a substantial constitutional claim. *Turner*, 2023 IL App (1st) 191503, ¶ 30.

¶ 52 Defendant also argues he was denied reasonable assistance of counsel during his second-stage postconviction proceedings when counsel failed to amend his ineffective assistance of appellate counsel claim into a viable constitutional claim. He claims appellate counsel was “patently wrong” for failing to appeal the trial court’s decision to allow the State to improperly bolster Smith’s credibility by allowing her to testify, on redirect, about a prior consistent statement after being impeached with an inconsistent statement on cross-examination.

¶ 53 Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). A petitioner who contends appellate counsel rendered ineffective assistance must show the failure to raise an issue on direct appeal was objectively unreasonable and that decision prejudiced the defendant. *Id.* “Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel’s failure to raise it on direct appeal.” *Id.*

¶ 54 Defendant claims reversible error occurred when Smith was questioned about a prior consistent statement she made to a police officer. On direct examination, Smith stated she knew Brown by the nickname “Fred” or “Dirty Fred.” On the night of the incident, she saw the

passenger in Brown's car (she described him as a Black man wearing a black hoodie) exit the vehicle, walk around to the front of the vehicle, and shoot Johnson. On cross-examination, Smith was asked what she told the police when they first arrived at the scene, and she responded, "That it was Fred." When asked, "You told the officer that it was Dirty Fred that had shot Curtis Johnson," she replied, "No, I just said it was Fred." She later reconfirmed the shooter was the "second male" who got out of Brown's car, though she did not see the shooter's face and could not identify him. On redirect, Smith was asked if she remembered telling a female officer who shot Johnson. Her response was, "I don't know. I think at that time I was just saying it was Fred, and then I don't know who— exactly who I was talking to, but I—that's when I said no, it was—it was somebody with him that shot him, that was with Fred." She explained she was holding Johnson, who had just been shot, when the police arrived and was saying "Fred" because that was the person she knew. She later clarified to the police the shooter was the person with Fred.

¶ 55 "Generally, a prior statement that is consistent with a witness's trial testimony constitutes hearsay and is inadmissible to bolster that witness's credibility or to rehabilitate the witness when he has been impeached by a prior inconsistent statement." *People v. Randolph*, 2014 IL App (1st) 113624, ¶ 14. However, a "prior consistent statement is admissible to rebut an express or implied suggestion on cross-examination that the witness is motivated to testify falsely or his testimony is a recent fabrication." *Id.* ¶ 15. In this case, the implication on cross-examination was Smith had lied or changed her story about who the shooter was in this case. The questions on redirect clearly demonstrated the purpose of allowing Smith to explain the making of the inconsistent statements. She explained, as she was holding Johnson, who had just been shot, she was saying "Fred" because that was the only person she knew who was involved in the incident she had just witnessed and both Fred and the shooter had left the scene. She was otherwise

consistent in her testimony the shooter was the passenger in Brown's car (whom she referred to as Fred). This testimony was properly admitted for the sole purpose of rehabilitating the witness. See Ill. R. Evid. 613(c) (eff. Jan. 1, 2011).

¶ 56 Because the underlying issue (alleging error in the admission of Smith's rehabilitative prior consistent statement) is not meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal. As such, defendant was not denied reasonable assistance of postconviction counsel when counsel declined to make any amendments that would only serve to further a meritless claim. See *Turner*, 2023 IL App (1st) 191503, ¶ 30.

¶ 57 Next, defendant argues counsel provided unreasonable assistance by failing to shape his claims of ineffective assistance of trial counsel (not raised on direct appeal) into viable constitutional claims of ineffective assistance of appellate counsel. He contends the issues regarding his trial counsel's ineffectiveness for failing to investigate various witnesses, including alleged occurrence witnesses Hoggin and "St. Louis," (which he raised in his *pro se* petition) were evident on the record and could have been brought on direct appeal. Therefore, his postconviction counsel's representation was deficient for failing to shape his claim of ineffective assistance of trial counsel into an ineffective assistance of appellate counsel claim and attach affidavits to support it.

¶ 58 In his *pro se* petition, defendant argued police reports showed Thomas reported she witnessed the incident while seated in the front passenger seat of a van driven by a man she knew as "St. Louis" and her friend Hoggin was seated in the back seat. Defendant contends his trial counsel did not attempt to locate these witnesses. Defendant informed the trial court during the course of the trial he disagreed with his counsel about decisions regarding investigating and presenting the testimony of numerous witnesses, including these two. Referring to the discussion

in court regarding this disagreement, defendant noted his trial counsel acknowledged “there were some things that should have been covered” and had since been “taken care of.” Trial counsel also acknowledged defendant wanted additional witnesses subpoenaed to testify, but he stated, “I will tell you that I have made a call as a matter of trial strategy or tactics to present the witnesses that I feel will have a bearing on this case, *** and that is limited to Annie Sanders now, plus John Peyton and some other witnesses.” We note Peyton was never called to testify because he was not found prior to the end of the trial. In addressing trial counsel’s claim of trial strategy, defendant argued the following in his *pro se* petition:

“The explanation given by counsel cannot be consider[ed] trial strategy first and foremost in order for counsel[’s] decision wether [*sic*] or not to call a particular witness to be consider[ed] trial strategy, counsel must first [have] found out what the potential witnesses testimony would be before he could possibly have made a reasonable judgment that their testimony would not be needed.”

Defendant contends his counsel acknowledged in court he did not have Hoggin’s address. He also admitted he did not seek the assistance of an investigator to find these witnesses and did not interview Thomas, who could have provided their addresses.

¶ 59 We determine the record rebuts the presumption counsel fulfilled the requirements of Rule 651(c) because the record shows counsel failed to make the necessary amendments to defendant’s *pro se* petition to adequately preserve defendant’s ineffective assistance of trial counsel claim. By failing to amend the postconviction petition to allege ineffective assistance of appellate counsel for failing to raise his ineffective assistance of trial counsel claims on direct appeal, these claims of error were waived. See *People v. Turner*, 187 Ill. 2d 406, 413 (1999). As such, postconviction counsel’s failure to do so prevented the trial court from considering the merits

of defendant's claims and directly contributed to the dismissal of the petition without an evidentiary hearing. Defendant's counsel also failed to attach any affidavits to support the claims in the postconviction petition or offer any explanation for their absence. See 725 ILCS 5/122-2 (West 2020) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."). Such an omission is fatal to defendant's claims. It would be improper for this court to determine the merits of defendant's claims where counsel did nothing to shape them into the appropriate legal form. See *Turner*, 187 Ill. 2d at 416. We cannot presume the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c).

¶ 60 Therefore, we reverse the trial court's judgment dismissing defendant's postconviction petition in part, and we remand the case to the trial court with directions to allow defendant, with the assistance of counsel, the opportunity to replead his postconviction claim of ineffective assistance of appellate counsel based on counsel's failure to raise the issue of ineffective assistance of trial counsel.

¶ 61 B. Actual Innocence Claim

¶ 62 Defendant argues his postconviction petition was erroneously dismissed because he made a substantial showing of actual innocence through new, material, noncumulative evidence where he presented an affidavit of a witness claiming to have seen a different person sitting in the passenger's seat of Brown's vehicle just moments before the passenger shot Johnson. He contends this evidence would directly challenge the State's witnesses who purportedly identified defendant as the shooter; thus, it would likely change the outcome of the trial.

¶ 63 As we previously stated, the petitioner bears the burden of making a substantial showing of a violation of constitutional rights to avoid dismissal during second-stage

postconviction proceedings. *People v. Domagala*, 2013 IL 113688, ¶ 35. There are no evidentiary issues or questions of fact to be resolved at this stage. *Id.* Instead, the question raised is “whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act.” *People v. Sanders*, 2016 IL 118123, ¶ 31. The reviewing court considers the matter *de novo* and must make its own independent assessment of the allegations of the petition and supporting documentation to determine whether the defendant has made a substantial showing of a constitutional violation. *Id.*

¶ 64 To survive second-stage postconviction proceedings, a defendant claiming actual innocence must make a substantial showing that the evidence upon which his claim is based was new, material, noncumulative, and so conclusive it would probably change the result on retrial. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 37; *People v. Coleman*, 2013 IL 113307, ¶ 96. Our supreme court has further defined these requirements as follows:

“New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of petitioner’s innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result.” *Coleman*, 2013 IL 113307, ¶ 96.

¶ 65 In his postconviction petition, defendant claims actual innocence, denying he committed the crimes for which he was convicted. Defendant contends Williams is a newly discovered exculpatory witness establishing he was not the passenger in Brown’s car “shortly before the crime took place.” He argues Williams’s affidavit “would likely change the outcome of the trial because it introduces new and compelling evidence that directly challenges the

prosecution's case." In his affidavit, Williams attested he saw Brown shortly before the shooting with a person referred to as "Sawed Off" riding in the passenger seat of his car. He claimed the two told him they were on their way to the Circle K and he watched them drive off in the direction of that location. Williams indicated five minutes later, he heard what sounded like a gunshot, and he then heard sirens heading toward the Circle K. Williams attested he walked to the Circle K and learned that someone had been shot.

¶ 66 Although Williams's affidavit is newly discovered and noncumulative, it falls short of being either material or conclusive. Williams was not an eyewitness to the murder. At best, he was a distance away from the area and heard what he thought was a gunshot coming from the direction of the Circle K. Williams could provide no information about who was present at the Circle K, the circumstances of the altercation that took place, or the identity of the shooter. His information about something that occurred at a different location at an earlier time is immaterial to the question of who committed the murder. Contrary to defendant's assertion, Williams's affidavit does not contradict the testimony of the eyewitnesses to the incident at the Circle K. Brown testified defendant was the passenger in his car on the evening of the incident and when he arrived at the Circle K. Smith and Thomas testified they both saw the passenger in Brown's car exit the vehicle and shoot Johnson. Even assuming as true Williams's assertion "Sawed Off" was with Brown on the evening in question, he attested it was (1) at a different location and (2) prior to the incident at the Circle K. We conclude the new evidence is not conclusive because even when considered along with the trial evidence, it would not lead to a different result. Therefore, we affirm the trial court's dismissal of defendant's actual innocence claim at the second-stage postconviction hearing.

¶ 67

III. CONCLUSION

¶ 68 For the reasons stated, we affirm in part and reverse in part the trial court's judgment dismissing defendant's postconviction petition and remand the case to the trial court with directions that it allow defendant, with the assistance of counsel, the opportunity to replead his postconviction claim of ineffective assistance of appellate counsel based on the failure to raise the issue of ineffective assistance of trial counsel on direct appeal.

¶ 69 Affirmed in part and reversed in part; cause remanded with directions.