

No. 1-09-2900

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 97 CR 8783
	)	
JOSEPH WILSON,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBride delivered the judgment of the court.  
Presiding Justice Epstein and Justice J. Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* Post-conviction counsel did not violate her duties to review the trial record and make any amendments necessary to raise defendant's constitutional claims when her certificate averred to completing these duties and defendant has not provided sufficient evidence to contradict that averment. Defendant did not show the requisite lack of culpable negligence for filing an untimely post-conviction petition where he mailed a petition three years before the instant petition but it was not received by the circuit court and defendant was not sufficiently diligent in following up on the lack of response from the court.

¶ 2 Following a jury trial, defendant Joseph Wilson was convicted in 1999 of first degree murder and sentenced to natural life imprisonment. We affirmed the judgment on direct appeal.

*People v. Wilson*, No. 1-99-4037 (2001)(unpublished order under Supreme Court Rule 23).

Defendant now appeals from the dismissal, upon the State's motion, of his 2004 *pro se* post-conviction petition as amended by counsel. He contends that counsel failed to comply with the requirements of Supreme Court Rule 651(c) (eff. Dec. 1, 1984) that counsel review the record and make any amendments to the petition necessary to adequately present defendant's claims. Defendant also contends that his petition was improperly dismissed as untimely because he stated the requisite lack of culpable negligence in the late filing.

¶ 3 The evidence at trial showed that, on January 24, 1996, while they were all inmates in the same tier of cells in the county jail, defendant and codefendants Jerome Rucker and Frank Pitts<sup>1</sup> severely beat Cephus Williams. As a result of the beating and the medical treatment thereof, Williams had a breathing tube in his throat from February 1996 onwards. During a cleaning of the tube on July 17, 1996, it became blocked and Williams died from being unable to breathe.

¶ 4 Inmate Tirnell Williams testified that he knew both defendant and victim Williams to be members of the "New Breed" street gang. On the day in question, Tirnell saw an inmate slide a note under the door to the "day room" (the common lounge for that tier of cells), saw defendant pick it up, and saw defendant and codefendants go to Williams' cell. As he passed, defendant told Tirnell to make sure that nobody came into the area. When Tirnell heard screaming and moaning from the cell, he went to the cell door and saw codefendants attacking Williams as defendant watched. Williams tried to leave the cell but was blocked from escaping. Tirnell heard defendant tell Williams that he would be killed if he reported the attack, then saw defendant and codefendants drag Williams from the cell to the nearby stairway where guards found him. Tirnell admitted to being a member of the Blackstones street gang and that he was serving a prison sentence for a weapons offense. While he was placed in protective custody after earlier testimony, he denied receiving any other consideration for his testimony. However, the

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<sup>1</sup>Codefendants pled guilty to attempted first degree murder.

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State had dropped one of the weapons charges against Tirnell and paid him \$700 for relocation to ensure his safety after testifying. Cross-examination and a rebuttal witness showed that Tirnell lied about graduating from high school and receiving a general-equivalence degree (GED).

¶ 5 A jail guard testified that Tirnell told her that defendant and codefendant Pitts beat Williams, but admitted that she did not mention Tirnell's statement in her incident report. Tirnell did not give such an account to the sheriff's investigator who interviewed Tirnell and various other inmates the day after the attack, but the interviews were conducted simultaneously in one room and Tirnell testified that he had been afraid to give a full account to the investigator while other inmates could overhear. Inmates Alonzo Fleming and Timothy Hale corroborated portions of Tirnell's account: Fleming admitted to being the inmate who delivered the note and testified that he saw defendant pick it up, and Hale saw Fleming pass the note to an inmate who then left the day room with other inmates Hale knew to be New Breed members. However, while Hale testified that he told a sheriff's investigator about the passing of the note, the investigator testified that Hale did not.

¶ 6 Inmate Bobby Berry testified at trial that he did not know defendant or Williams but believed them to be New Breed members. On the day in question, Berry saw 15 to 20 inmates congregating near a cell door. When Berry looked into the cell, he saw inmates "wrestling" in the cell. Berry did not identify defendant as one of the inmates in that cell, and Berry testified that he did not see defendant beat Williams or remove him from the cell to the stairs. He also denied seeing anyone slide a note under the day room door. However, an assistant State's Attorney (ASA) testified that Berry implicated defendant and codefendants in the beating of Williams. Berry told the ASA that he saw Williams, defendant, and codefendants enter a cell, saw Williams try to leave the cell, and later saw defendant and codefendants carry Williams

from the cell in a blanket. Before the grand jury, Berry testified to that effect and that he had seen a note being passed to codefendant Rucker in the day room.

¶ 7 A physician testified to the emergency medical treatment Williams received following his attack, including the insertion of the tracheal breathing tube. Medical examiner Dr. Larry Simms testified to Williams' autopsy results and, after reviewing Williams' medical records and interviewing medical personnel, to the treatment he was receiving just before his death. Both physicians testified that tracheal tubes are susceptible to becoming plugged with mucus. While Williams' tube was only half-blocked by the time of the autopsy, so that Williams would not have been prevented from breathing, Dr. Simms opined that his cause of death was "an upper airway obstruction due to a mucus plugging of the tracheostomy due to blunt head trauma due to assault." Dr. Simms explained, based on his experience with tracheal tubes and on the difficulty medical personnel had in reviving Williams before his death, that the mucus plug had been larger but became partially dislodged by resuscitation efforts.

¶ 8 On this evidence, the jury convicted defendant of first degree murder, and the court sentenced him to natural life imprisonment. On direct appeal, this court affirmed the conviction against contentions of insufficient evidence (on causation of death and for using unreliable jail inmates as witnesses), improper jury instruction on proximate causation, improper admission of gang evidence, improper admission of Fleming's pretrial identification of defendant as resulting from an unduly suggestive procedure, and improper admission of Dr. Simms' cause-of-death testimony as unsupported opinion.

¶ 9 In his February 2004 *pro se* post-conviction petition, defendant reiterated his insufficient evidence and suggestive identification claims, also alleging that he was deprived of due process by false police reports. He claimed that trial counsel was ineffective for not: (1) employing a gang expert to refute the State's improper gang evidence, (2) calling codefendants as trial

witnesses, (3) challenging the "vindictive prosecution" for murder commenced over a year after Williams' death when his family sued the county, and (4) challenging Dr. Simms' opinion testimony. Regarding timeliness, defendant alleged that he originally mailed his petition in April 2001 to the clerk of the circuit court and to the State's Attorney but never received a file-stamped copy. He explained that he filed a federal *habeas* petition in August 2002 on the advice of a prison law clerk and was later told by a paralegal that he should have that case dismissed without prejudice before refiling his post-conviction petition; the *habeas* proceeding was withdrawn without prejudice in September 2003. Defendant supported this claim with an April 2001 notice of service, postage receipt, copy of the order terminating the *habeas* case, and his affidavit, but not a copy of the April 2001 petition.

¶ 10 The case proceeded to the second stage, with counsel appointed for defendant.

¶ 11 In August 2008, counsel filed a supplemental petition raising claims that trial counsel was ineffective for not employing a medical expert to refute the State's medical witnesses and for not seeking a jury instruction on involuntary manslaughter. Regarding the first claim, Williams' medical records from his post-attack treatment in January 1996 may have indicated a pre-existing condition in his upper airway that manifested in July 1996 just before his death, while his records from his final treatment in July 1996 showed "that the resuscitation did not go well," raising the prospect of malpractice. Trial counsel should have had a physician evaluate these possibilities that defendant's attack did not cause Williams' death. The supplemental petition also alleged that the State knowingly elicited false testimony from Tirnell in exchange for lenient treatment and that appellate counsel had been ineffective for not raising the preceding claims on direct appeal. Tirnell's inculpatory testimony was argued to be perjured because it was not credible for various reasons. Regarding timeliness, the supplemental petition adopted the claims

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in the original petition, adding that defendant "has had problems in the past with the processing of mail" in prison "but has no way of determining the responsible parties."

¶ 12 Attachments to the supplemental petition included medical reports, jail reports, and an affidavit from codefendant Pitts. Pitts admitted to being present for the "beating/gang violation" of Williams and averred that defendant merely punched Williams twice, did not intend to seriously harm him, and did not threaten to kill him. Pitts also denied that Tirnell was told to not let anyone near and averred that defendant and codefendants were New Breed members who would not have asked for such assistance from Tirnell, member of the rival Blackstones gang. Lastly, Pitts averred that Tirnell was "a target for a hit" from his own gang and was placed in protective custody after his trial testimony.

¶ 13 Also in August 2008, counsel filed a certificate pursuant to Rule 651(c) averring that she consulted with defendant by mail and telephone several times to ascertain his claims, that she "obtained and examined the Report of Proceedings of the trial" of defendant, and that she prepared a supplemental petition that "adequately complements petitioner's claims."

¶ 14 The State moved to dismiss the petition as supplemented. The State argued that the February 2004 petition was untimely filed. While defendant claimed that he had filed a timely petition in April 2001, he did not support the claim with a copy of that petition, the postage receipt shows only that he mailed something, and he was obliged to diligently follow up when he did not receive a file-stamped copy of his petition or some other indication of its receipt or disposition. Substantively, the State argued that the suggestive identification claim and insufficient evidence claims were barred as *res judicata*. The State argued that the false police report claim was unsupported as the allegedly false reports were submitted to the grand jury but the record did not include the grand jury proceedings, that a gang expert was not necessary in light of the properly-admitted gang evidence, and that the petition did not allege which

codefendant should have been called at trial or what he (or they) would have testified to. The State also argued that the claims regarding a medical expert and Tirnell's alleged suborned perjury were unsupported speculation and amounted to claims of insufficient evidence, and that an involuntary manslaughter instruction would have been contrary to trial counsel's defense theory that defendant was not responsible for Williams' death.

¶ 15 Following the motion to dismiss, counsel sought to further supplement the petition with exhibits to show "that everything that I have mentioned in \*\*\* the supplemental [petition] is factual and \*\*\* not made up." The exhibits were reports from the sheriff's investigators, Dr. Simms' autopsy report, and an academic article from the Korean Society of Cardiology regarding a young man who suffered a heart attack due to a rare congenital condition called "hypoplastic coronary artery disease." The court struck the academic article but admitted the other exhibits.

¶ 16 After hearing arguments on the motion to dismiss, the court dismissed the petition on October 15, 2009. The 2004 petition was untimely, the court found, and defendant did not provide a copy of his 2001 petition in support of his claim that he was not culpably negligent in the late filing. If the court did reach the substance of the petition, the suggestive identification claim and insufficient evidence claims were barred as *res judicata*. The false police report claim was conclusory, as was the claim that the State suborned perjury in Tirnell's testimony, and the vindictive prosecution claim was speculative. Trial counsel was not ineffective for not employing a gang expert to refute the State's improper gang evidence because that evidence was ruled on direct appeal to have been properly admitted. The claim that trial counsel should have called codefendants as witnesses was not supported by affidavit. The claim that trial counsel did not meaningfully test the medical examiner's testimony is contradicted by the fact that counsel cross-examined that witness, and the claim that trial counsel should have employed a medical expert is speculative and conclusory absent evidence that a physician could provide an

exculpatory medical opinion. Lastly, whether to offer an involuntary manslaughter instruction is a matter of trial strategy and was contrary to the defense theory that defendant was not involved in the beating of Williams. This appeal timely followed.

¶ 17 On appeal, defendant first contends that post-conviction counsel failed to comply with the requirements of Rule 651(c) that she adequately examine the trial record and make any amendments to the petition necessary to adequately present defendant's claims. Regarding the duty to examine the record, defendant notes that he personally waived any right to a lesser-include offense instruction on the trial record, so that counsel would not have raised an ineffective-assistance claim against trial counsel regarding the absence of an involuntary manslaughter instruction if she had read the record. Regarding the duty to make necessary amendments, defendant contends that counsel failed to obtain an affidavit from a physician offering an opinion contrary to that of medical examiner Dr. Simms regarding Williams' death.

¶ 18 Rule 651(c) provides that the record in a post-conviction proceeding:

"shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his 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." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 19 "[W]hen an attorney files a certificate under Rule 651(c), the attorney is officially representing to the court that the duties listed in the certificate have been fulfilled." *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). The purpose of Rule 651(c) is to ensure that post-conviction

counsel shapes a defendant's *pro se* claims into proper legal form and presents them to the circuit court. *Perkins*, 229 Ill. 2d at 44. An attorney's Rule 651(c) certificate is not conclusive of compliance with the Rule's requirements and may be rebutted. *Perkins*, 229 Ill. 2d at 52.

¶ 20 Here, post-conviction counsel averred in her Rule 651(c) certificate that she had reviewed the trial record and made all necessary amendments to the *pro se* petition. She filed a supplemental petition raising new claims and expanding upon the *pro se* petition, and the supplemental petition includes numerous citations to the trial record.

¶ 21 Against this *prima facie* evidence of compliance with the duty to review the record, defendant contends that counsel could not have raised the involuntary manslaughter instruction claim had she read the record because defendant waived any right to a lesser-included-offense instruction. However, the record also establishes that defendant did so after consulting with trial counsel, so that the possibility that counsel gave erroneous advice was not precluded. Notably, the circuit court denied the claim not based upon defendant's waiver but because such an instruction would have been contrary to trial counsel's theory that defendant was not involved in the beating of Williams. We therefore do not consider this ineffective-assistance claim to be an indication that post-conviction counsel did not read the record.

¶ 22 Against the *prima facie* evidence of compliance with the duty to make all necessary amendments, defendant contends that counsel should have obtained an affidavit from a physician giving a medical opinion regarding Williams' death contrary to Dr. Simms' inculpatory opinion. However, Rule 651(c) does not require post-conviction counsel to obtain additional evidence, so that "[w]hile post-conviction counsel has an obligation to present a petitioner's claims in appropriate legal form, he is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition." *People v. Garcia*, 405 Ill. App. 3d 608, 625 (2010), quoting *People v. Johnson*, 154 Ill. 2d 227, 247 (1993). While

defendant cites cases where post-conviction counsel failed to attach existing documents or obtain affidavits from known witnesses, the crux of his contention is that counsel was obliged by Rule 651(c) to obtain an affidavit from an unknown witness. Based on the above case law, we disagree that counsel was legally obligated to not merely provide the circuit court an existing document or memorialize an existing witness' statement but to seek out a previously non-existent opinion witness and generate an affidavit of a wholly new opinion. We find that defendant has failed to show that post-conviction counsel did not comply with Rule 651(c).

¶ 23 Defendant also contends that his petition was improperly dismissed as untimely because he made the requisite showing that the delay was not due to his culpable negligence.

¶ 24 A post-conviction petition must be filed within six months of either the end of the period for seeking *certiorari* before the United States Supreme Court or the denial of *certiorari*. 725 ILCS 5/122-1(c) (West 2008). The time for seeking *certiorari* is within 90 days of the last judgment, appeal, or review disposition. Sup. Ct. R. 13(1). When a petition is not timely filed and the case proceeds to the second stage, counsel must either allege that the petitioner lacked culpable negligence for the late filing or obtain the State's waiver or forfeiture of the untimeliness defense. 725 ILCS 5/122-1(c) (West 2008); *Perkins*, 229 Ill. 2d at 43. Culpable negligence is closer to recklessness than ordinary negligence and involves disregard for the consequences likely to flow from one's actions. *People v. Gerow*, 388 Ill. App. 3d 524, 529 (2009).

¶ 25 Here, defendant correctly admits that his February 2004 petition was untimely; on direct appeal, our supreme court denied leave to appeal in October 2001 so that he had to file a post-conviction petition by April 2002. 725 ILCS 5/122-1(c) (West 2002). However, he claims that he timely mailed a petition to the clerk of the circuit court in April 2001, an allegation we must accept *arguendo* at this stage. Defendant attempts to explain the passage of nearly three years

between his abortive 2001 petition and the instant petition: he was told by prison law clerks to be patient as his petition could be pending for years, then in August 2002 filed a federal *habeas* petition upon advice of a law clerk, then learned that the 2001 petition was never received, then obtained the dismissal of his *habeas* case in September 2003 before filing the instant petition in February 2004. Notably, defendant does not claim in his petition or affidavit that, when he did not receive a file-stamped copy of his petition, he inquired of the clerk of the court whether his petition was received. Moreover, while a post-conviction petitioner may reasonably rely on the advice of counsel regarding the timeliness of his petition, he should not entrust this responsibility to "jailhouse lawyers," prison law clerks, law librarians, or paralegals where he does not show that they had any specialized knowledge in post-conviction matters. *Perkins*, 229 Ill. 2d at 46, citing *People v. Lander*, 215 Ill. 2d 577, 587-89 (2005). We conclude that defendant has failed to show a lack of culpable negligence for not filing the instant petition until February 2004, nearly two years late.

¶ 26 Accordingly, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.