

No. 1-10-0434

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 02 CR 15202
)	
DORALE ELLIS,)	Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

ORDER

- ¶ 1 *Held:* Post-conviction counsel provided a reasonable level of assistance and complied with Rule 651(c); circuit court's second stage dismissal of defendant's petition affirmed.
- ¶ 2 Defendant Dorale Ellis appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, he contends that post-conviction counsel failed to provide him with a reasonable level of assistance with his petition.

¶ 3 The record shows that defendant was convicted of attempted first degree murder on evidence showing that Justin Patton arranged for the victim, Kyle Klimson, to purchase \$1,100 worth of marijuana from defendant. Patton knew defendant through a friend, but the victim was meeting him for the first time. When they met around noon on May 19, 2002, defendant came with another person who took the money from Patton. Defendant and this other man then got in a car. Patton, however, got a bad feeling, and asked for his money back. They gave Patton \$60 back, and Patton told the victim that they had been robbed. The victim drove Patton home, and later went with Sam Kellams, Chris DeBernardis, and Mike Christ, who knew where defendant lived, to defendant's home to ask for his money back. Defendant was not home, and as Kellams and the victim were walking down defendant's driveway, he drove up, and exited his car. Kellams and DeBernardis testified that they heard defendant say that he was "going to light this white boy up," then saw him draw a gun from his back pocket and swing it at the victim's head. The victim and Kellams testified that defendant then chased the victim, knocked him to the ground, put the gun to his neck, and shot him. When Kellams was questioned by police later that day, he told them that defendant was the shooter. The following day, Kellams identified defendant in a photo array. The victim was taken to the hospital where he did not wake up until three days later. He later identified defendant as his offender in a photo array on May 30, 2002.

¶ 4 Defendant, however, testified that when the victim asked for his money back, he and the victim had a fist fight, and afterwards, the victim and his friends started to run away to possibly get weapons. Defendant further testified that an unknown person then shot at him, hitting the victim instead, but he was impeached with a prior conviction. Defendant was subsequently convicted of attempted first degree murder, and sentenced to 25 years' imprisonment. This court previously affirmed that judgment finding, *inter alia*, that the evidence against defendant was not

closely balanced, but, rather, was overwhelming. *People v. Ellis*, No. 1-03-2559, order at 2 (2005) (unpublished summary order under Supreme Court Rule 23).

¶ 5 In March 2006, defendant filed a *pro se* post-conviction petition alleging ineffective assistance of trial and appellate counsel, and actual innocence. He maintained that he was in the process of obtaining a sworn affidavit from one of the State's witnesses, Justin Patton, who would attest that defendant did not shoot the victim, but, rather, someone in the group of people he was with fired the shot that wounded the victim. Defendant claimed that Patton would further attest that the State's witnesses agreed to testify falsely.

¶ 6 In support of his petition, defendant attached his own affidavit in which he averred that he was wrongfully convicted. He further averred that in February 2006, he spoke to a female friend who told him that Patton told her and others that he saw who the shooter was, and felt bad about defendant going to prison for a crime he did not commit. Defendant averred that Patton also told his friend that he would sign an affidavit identifying the person who shot the victim even though he and his friends who were at the scene of the incident agreed to pin the crime on defendant. Defendant also averred that his female friend would obtain Patton's affidavit in a month or so.

¶ 7 Counsel was appointed for defendant, and after many continuances, counsel informed the court on September 19, 2008, that he was hoping to file something by the next court date. The matter was continued to December 19, 2008, and on that date, counsel informed the court that he read the record, and had placed an investigation request so he could speak to a couple of possible witnesses. Counsel stated that he needed one more date to file either a Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate or a supplemental petition. Counsel then stated that the filing was "dependent upon what those witnesses," but at that point he was cut off by the court, and did not finish his sentence.

¶ 8 The matter was subsequently continued to March 6, 2009, and on that date counsel informed the court that his investigator was trying to track down several possible witnesses, he needed one more date, and "whether or not these witnesses pan out, [he] will be filing something on the next date." Counsel explained that there are four witnesses that were initially involved, that he did not know if they "will come through," but defendant is "pretty sure that one or two will change their initial stories," and that he wanted to speak to all four of the witnesses. The court then noted that the matter had been on call since 2006, that something needed to be filed in the next month, and that the farthest it would go out on the matter was May 8, 2009.

¶ 9 On that date, counsel informed the court that he was still trying to track down some witnesses, but they were shorthanded investigators. Counsel explained that the assigned investigator has gone to the witnesses' houses "various times," but no one was home. Counsel requested a short date to speak to these witnesses prior to filing anything. He then stated,

"I can either file a 651(c) alone, or file a supplemental.

Obviously I have to talk with them, because if [I] file a supplemental, it is only a mere allegation, and I don't feel comfortable filing it by itself at this time.

I haven't talked with them."

¶ 10 Counsel further stated that he had not "really ascertained if [defendant] has a viable," but was then cut off by the court, and did not finish his sentence. The matter was then continued to July for defendant to file a supplemental petition.

¶ 11 At the next court date, counsel informed the court that he needed one more date, that he had an investigator looking for four possible witnesses, Michael Chris, Joshua Maurice, Joshua

Pelegrene, and Justin Patton, and that the investigator had been unable to contact them even though she had their addresses. The court denied counsel's request for a continuance, and counsel responded that he would file a Rule 651(c) certificate.

¶ 12 Counsel then filed his certificate. The certificate provided that counsel consulted with defendant by mail and phone to ascertain his contentions of deprivation of constitutional rights, obtained and examined the report of proceedings of defendant's jury trial and sentencing hearing, and had not prepared a supplemental petition because defendant's previously filed *pro se* petition adequately set forth defendant's claims of deprivation of his constitutional rights.

¶ 13 The State subsequently filed a motion to dismiss defendant's post-conviction petition alleging, *inter alia*, that defendant failed to provide the court with an affidavit from Patton and other evidentiary support for his claims. The State further maintained that Patton was not present during the incident where he testified that on the day of the shooting the victim dropped him off at home, and he did not go to the location where the shooting later occurred.

¶ 14 At the proceeding on the State's motion, counsel informed the court that he was never able to contact the four witnesses he was looking for, and therefore was standing on the *pro se* petition. The court then granted the State's motion to dismiss. In doing so, the court noted that defendant did not support his actual innocence allegation, but that counsel tried to locate the witnesses. The court also noted that the evidence against defendant was overwhelming, and there were no exceptional circumstances to award a reversal.

¶ 15 On appeal, defendant raises no substantive issue regarding that dismissal, but claims that his post-conviction counsel failed to provide him reasonable assistance and comply with Rule 651(c) despite his filing of a Rule 651(c) certificate. Defendant maintains that post-conviction counsel failed to comply with his obligation under Rule 651(c) to make amendments to the petition necessary for adequate presentation of defendant's contentions where the record shows

that counsel believed he needed to contact four witnesses to determine if amendments were necessary but did not contact them, and where counsel did not amend the petition to add a claim under *People v. Patrick*, 233 Ill. 2d 62 (2009).

¶ 16 As an initial matter, the State contends that the issue is waived because defendant is raising it for the first time on appeal. We disagree. We may review the issue of whether post-conviction counsel provided a reasonable level of assistance where, as here, defendant is raising it for the first time on appeal from the dismissal of his initial post-conviction petition. *People v. Moore*, 189 Ill. 2d 521 (2000).

¶ 17 The Act provides for a reasonable level of assistance by post-conviction counsel (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), which can be shown by compliance with Rule 651(c) (*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). That rule specifies the duties of post-conviction counsel; and provides, in relevant part, that counsel shall make any amendments to the *pro se* petition that are necessary for an adequate presentation of *defendant's* contentions. When filed, a Rule 651(c) certificate creates a presumption of compliance with the requirements of the rule. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 18 Here, defendant maintains that the record rebuts that presumption where it shows that counsel believed that he had not discharged his Rule 651(c) duty to make necessary amendments, and could not do so until after he spoke with the four witnesses and ascertained whether defendant had any viable claims to amend his petition, relying on *People v. Finklea*, 186 Ill. App. 3d 297 (1989), *People v. Perkins*, 229 Ill. 2d 34 (2007), *People v. Waldrop*, 353 Ill. App. 3d 244 (2004). These cases cited by defendant provide no support for his contention that the record in his case rebuts the presumption that counsel complied with Rule 651(c).

¶ 19 The history of *Finklea* included defendant appealing the dismissal of his post-conviction petition, and then, prior to the appointment of appellate counsel, filing a *pro se* motion attacking

the representation of his post-conviction counsel. *Finklea*, 186 Ill. App. 3d at 298. Once appellate counsel was appointed, counsel requested the matter to be remanded where there was no Rule 651(c) certificate filed, and the Second District did so for the limited purpose of post-conviction counsel filing a Rule 651(c) certificate, if he could properly do so. *Finklea*, 186 Ill. App. 3d at 298-99. On that remand, counsel filed three versions of a Rule 651(c) certificate before the trial court found that the allegations therein complied with the Rule. *Finklea*, 186 Ill. App. 3d at 302. Under those circumstances, the reviewing court remanded again to the trial court to conduct an evidentiary hearing to determine if counsel complied with the Rule. *Finklea*, 186 Ill. App. 3d at 302. The very narrow factual situation of *Finklea*, is clearly distinguishable from this case where counsel filed a certificate prior to the appeal and filed only one.

¶ 20 We also find that *Perkins* is factually distinguishable from this case as it dealt with the specific issue of whether post-conviction counsel is required to amend an untimely petition at the second stage to overcome the timeliness procedural hurdle. *Perkins*, 229 Ill. 2d at 41. In finding that counsel was required to do so, the supreme court also noted that under Rule 651(c) post-conviction counsel is obligated "to attempt" to obtain and submit affidavits from witnesses identified in the post-conviction petition. *Perkins*, 229 Ill. 2d at 44. Here, counsel attempted to contact the witness named in defendant's petition, Patton, along with three additional witnesses several times over many months, thereby fulfilling his obligation under Rule 651(c).

¶ 21 We also find that *Waldrop* does not support defendant's contention, but, rather supports the conclusion that counsel provided a reasonable level of assistance. In *Waldrop*, 353 Ill. App. 3d at 248-51, counsel filed a Rule 651(c) certificate, but the Second District found that the presumption of compliance was rebutted by the record which showed that counsel mistakenly believed that he did not have a duty to seek an affidavit from the witness identified in defendant's petition. The Second District held that under Rule 651(c), post-conviction counsel had an

obligation to present defendant's post-conviction claims to the court in an appropriate form, which required, at a minimum, an "attempt" to obtain evidentiary support for claims raised in the *pro se* petition, and that based on counsel's failure to do so, counsel's representation fell below a reasonable level of assistance and did not adequately comply with Rule 651(c). *Waldrop*, 353 Ill. App. 3d at 250-51.

¶ 22 In reaching that holding, *Waldrop* relied on our supreme court's decision, *People v. Johnson*, 154 Ill. 2d 227 (1993). In *Johnson*, 154 Ill. 2d at 238, post-conviction counsel did not file a Rule 651(c) certificate, and the supreme court explained that the failure to do so is excused where the record shows that counsel fulfilled his duties as post-conviction counsel. The supreme court then noted that,

"[i]n the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so."

Johnson, 154 Ill. 2d at 241.

¶ 23 The court, however, found that in the case before it the presumption was rebutted by the record. *Johnson*, 154 Ill. 2d at 241. The court explained that post-conviction counsel did not provide a reasonable level of assistance where the record showed that counsel admitted in open court and in an affidavit that defendant named witnesses to him that he wanted contacted but counsel "made no attempt" to do so. *Johnson*, 154 Ill. 2d at 242-43. The supreme court found that where counsel "failed to take any action" to obtain affidavits from the potential witnesses whose identities were known to him, he did not comply with Rule 651(c). *Johnson*, 154 Ill. 2d at 243. The supreme court explained that counsel has an obligation to present a *pro se* post-

conviction petition in appropriate legal form which requires, at a minimum, the obligation "to attempt" to obtain evidentiary support for the claims raised therein. *Johnson*, 154 Ill. 2d at 245.

¶ 24 Here, counsel's filing of a Rule 651(c) certificate stating that it was not necessary to file a supplemental petition because defendant's *pro se* petition set forth defendant's claims adequately created a presumption of compliance with the rule (*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007); *Johnson*, 232 Ill. App. 3d at 678); and, although the presumption may be rebutted, defendant has not done so in this case where the presumption is supported by the record. The record in this case shows that post-conviction counsel, unlike the post-conviction counsels in *Waldrop* and *Johnson*, attempted to contact the witness identified in defendant's petition along with three additional witnesses. Counsel made more than a concerted effort to contact these witnesses where he had his investigator *attempt* to contact them numerous times over many months. Contrary to defendant's contention, counsel's belief that he should contact them before filing anything and his numerous attempts to do so do not equate to noncompliance with the Rule's requirement to make necessary amendments to adequately present defendant's contentions, but, rather, show that he satisfied his obligation "to attempt" to obtain evidentiary support for the claims raised in the petition (*Johnson*, 154 Ill. 2d at 245), and, thus, provided a reasonable level of assistance, and complied with the Rule 651(c) (Compare *Waldrop*, 353 Ill. App. 3d at 250-51).

¶ 25 In addition, counsel cannot be held to have provided an unreasonable level of assistance where including affidavits or other evidence from the four witnesses would have only advanced a frivolous or spurious claim. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Defendant's contention that someone else shot the victim was clearly frivolous in light of the overwhelming evidence against him which showed that two eyewitnesses along with the victim heard him say that he was "going to light this white boy up," and saw him take out a gun and swing it at the

victim's head, an eyewitness identified him as the shooter shortly after the incident, and the victim identified him as the offender less than two weeks after the incident. Given the overwhelming evidence of defendant's guilt, the petition would not have stated a cause of action upon which relief could be granted even if counsel amended the petition with affidavits or other evidence from the four witnesses. *People v. Vasquez*, 356 Ill. App. 3d 420, 429 (2005). Thus, defendant has not rebutted the presumption of compliance with Rule 651(c).

¶ 26 Defendant, nonetheless, claims that post-conviction counsel was required to amend the petition with a claim under *Patrick*, 233 Ill. 2d 62, namely, that the trial court abused its discretion in delaying its ruling on his motion *in limine* to exclude a prior conviction and infringed upon his right to testify on his own behalf. He maintains that this was not a new or onerous burden, especially where *Patrick* was decided while his post-conviction matter was pending. This court has previously held that *Patrick* does not apply retroactively to cases pending on collateral review when *Patrick* was decided. *People v. Cathey*, 406 Ill. App. 3d 503, 507-10 (2010), appeal allowed by, No. 111746 (Ill. Mar. 30, 2011). Thus counsel cannot be held to have provided an unreasonable level of assistance for failing to amend defendant's petition with this claim. Furthermore, any error in delaying ruling on defendant's motion *in limine* was harmless in light of defendant's need to testify to present a defense, and the overwhelming evidence against him. *People v. Mullins*, 242 Ill. 2d 1, 23-25 (2011).

¶ 27 Moreover, post-conviction counsel is only required to properly present and support the claims raised by petitioner (*People v. Davis*, 156 Ill. 2d 149, 164 (1993)), and has no obligation to raise new claims (*People v. Ramey*, 393 Ill. App. 3d 661, 668-69 (2009)) and amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)). We, therefore, conclude that post-conviction counsel provided defendant a reasonable level of assistance with his post-conviction petition and complied with the requirements of Rule 651(c).

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¶ 28 In light of the foregoing, we affirm the order of the circuit court of Cook County granting the State's motion to dismiss defendant's post-conviction petition at the second stage of proceedings.

¶ 29 Affirmed.