

No. 1-08-1702

**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. 98 CR 30630
	)	
KENDRICK PEARSON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CAHILL delivered the judgment of the court.  
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

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**ORDER**

**Held:** Defendant was provided with reasonable representation during postconviction proceedings. The dismissal of defendant's second-stage postconviction petition was affirmed.

Defendant Kendrick Pearson appeals from the second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that his postconviction counsel failed to provide reasonable representation in accordance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We affirm.

Following a 2000 bench trial, defendant was found guilty of robbery and aggravated battery, then sentenced to 25 years' imprisonment. Trial evidence showed that as defendant took

the purse of Beverlene Ruiz, she was knocked to the ground. Defendant was convicted largely based on the identification testimony of Beverlene and her husband, Andres Ruiz. Both separately identified defendant as the offender in a lineup.

Defendant filed a motion to quash his warrantless arrest for lack of probable cause and to suppress the lineup identification and statements as fruits of an illegal arrest. The motion was denied, and the case proceeded to trial, where defendant was convicted.

On direct appeal, defendant challenged the denial of his motion to suppress, the sufficiency of the evidence proving his identity as the offender, his sentence as excessive and his convictions under the one-act, one-crime rule. This court affirmed his convictions. *People v. Pearson*, 331 Ill. App. 3d 312 (2002).

Defendant, *pro se*, filed this postconviction petition. He alleged, *inter alia*, that the lineup was conducted in violation of his fifth amendment due process rights under *United States v. Wade*, 388 U.S. 218 (1967). Defendant set forth the *Wade* factors to be considered when determining whether a witness's in-court identification had an origin independent of an uncounseled lineup. Defendant also alleged that his trial counsel was ineffective for failing to obtain and introduce "known critical evidence." The circuit court summarily dismissed the petition based on waiver and *res judicata*.

Holding that a dismissal based on waiver and *res judicata* could not be applied at the summary dismissal stage, this court reversed the circuit court decision. *People v. Pearson*, No. 1-02-3003 (2004) (unpublished order under Supreme Court Rule 23). Subsequently, in *People v. Blair*, 215 Ill. 2d 427 (2005), the supreme court held that waiver and *res judicata* were proper bases for dismissing first-stage postconviction petitions. Defendant's case already had been remanded for second-stage review, and defendant was appointed counsel.

On remand, postconviction counsel filed an amended postconviction petition, alleging that trial counsel was constitutionally ineffective for failing to challenge the admissibility of

certain identification evidence. Counsel alleged that appellate counsel, in turn, was ineffective for failing to raise trial counsel's ineffectiveness as an issue on direct appeal. Postconviction counsel argued that the identification procedures were "tainted" and unnecessarily suggestive. In support, counsel alleged that before trial, Andres and Beverlene, together, identified defendant as the offender from a lineup photograph. Counsel argued that, as a result, neither was able to independently identify defendant as the offender. Counsel further noted that there was "no evidence in the record that [defendant's] trial attorney made a motion to exclude witnesses not testifying." Counsel asserted, for example, that Andres was in the courtroom at trial when Beverlene identified defendant from the photograph.

Postconviction counsel also alleged that appellate counsel was ineffective for failing to argue trial counsel's incompetence given trial counsel's established professional disciplinary history. Counsel attached the appellate opinions relating to defendant's case, as well as the attorney disciplinary reports and decisions relating to trial counsel.

Postconviction counsel did not file a certificate of compliance under Rule 651(c), as required. Rather, counsel filed a certificate of compliance under Supreme Court Rule 604(d) (eff. Dec. 13, 2005), which relates to challenging a defendant's guilty plea or sentence. Counsel stated in the certificate that he had consulted with defendant to ascertain defendant's contentions of error in relation to his guilty plea and sentence. Counsel stated that he had examined the trial court file and report of proceedings of the "guilty plea," then amended defendant's *pro se* pleadings to adequately present defects in the proceedings.

In argument before the court, however, counsel clarified that he had filed the "amended petition for post-conviction relief" after interviewing defendant and reviewing the "entire trial transcript" and all pleadings filed. Counsel tendered defendant's trial records (6 volumes in total) to the court. The record also contains an affidavit by defendant stating that he read the amended postconviction petition and found its representations correct.

In a written order, the circuit court rejected defendant's claims of ineffective assistance of counsel. The court concluded that the decision to challenge the identification evidence was a matter of trial strategy and, further, the absence of such a motion did not result in prejudice because there was no suggestiveness in the lineup procedure. In reaching that conclusion, the court stated:

"The two witnesses who viewed the line-up, Beverlene and Andres Ruiz, were separated during the line-up and did not view it in each other's company. There was no testimony indicating the police made any suggestions as to who they should identify."

The court noted that it was only after the live, in-person lineup that Andres was asked to once again identify defendant from a *photograph* of the lineup. The court further noted that it had presided over trial and "no witnesses were present in court when other witnesses testified."

The court also rejected defendant's claim that appellate counsel was ineffective for failing to challenge trial counsel's competence based on his disciplinary history. The court found that trial counsel competently represented defendant and there was no evidence of neglect. The court dismissed defendant's postconviction petition. Defendant appeals.

Defendant contends that counsel failed to file the proper Rule 651(c) certificate, and there is no evidence demonstrating that counsel satisfied the rule's mandate.

It is well settled that the Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). To assure that reasonable level of assistance, Supreme Court Rule 651(c) requires that postconviction counsel consult with the defendant to ascertain his contentions of constitutional deprivation, examine the trial record and make amendments to the *pro se* petition necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Moore*, 189 Ill. 2d at 541. Postconviction counsel may demonstrate compliance with the rule by filing a Rule 651(c)

certificate attesting to that fact. *People v. Garcia*, 405 Ill. App. 3d 608, 624 (2010). However, the absence of the certificate is harmless if the record shows that counsel complied with the rule. *People v. Davis*, 388 Ill. App. 3d 869, 884 (2009).

The State argues that we should treat the Rule 604(d) certificate as an inadvertently mislabeled Rule 651(c) certificate. However, even if we disregard the certificate completely, we find that the record reflects compliance with Rule 651(c). See *Garcia*, 405 Ill. App. 3d at 625. Counsel represented to the court that he had amended the *pro se* postconviction petition; he did so only after interviewing defendant and reviewing the "entire trial transcript," as well as all pleadings filed. Counsel then tendered defendant's trial records to the court.

The amended petition reveals that counsel competently refashioned defendant's *pro se* arguments in the only conceivable manner to avoid dismissal for waiver and *res judicata*—by challenging appellate counsel's effectiveness. See *People v. Turner*, 187 Ill. 2d 406, 412-14 (1999). Postconviction counsel amended the petition consistent with the record and attached supporting documents, including appellate opinions and records demonstrating trial counsel's disciplinary history, to adequately present the available constitutional claims. Given the evidence, including the amended petition, counsel's representations to the court, together with defendant's affidavit stating that he had read and approved the amended petition, any failure to file a Rule 651(c) certificate was harmless error. See *Davis*, 388 Ill. App. 3d at 884.

Defendant argues that counsel provided unreasonable representation because he failed to review and attach lineup photographs that were "central" to defendant's constitutional claims. Citing *People v. Johnson*, 154 Ill. 2d 227 (1993), defendant suggests that the absence of supporting evidence was in derogation of postconviction counsel's obligations and contributed to the dismissal of his petition.

Defendant's argument is unpersuasive. Defendant faults postconviction counsel for failing to review and attach photographs that defendant himself was also unable to locate. In a

footnote to his brief, appellate counsel notes that after "a diligent effort" that entailed contacting the circuit clerk, public defender's office, State's Attorney's office and postconviction counsel, he was unable to locate the photographs at issue. As stated, defendant is entitled only to a reasonable level of assistance during postconviction proceedings, and the record amply supports defendant received it. See *Moore*, 189 Ill. 2d at 541; *cf. Johnson*, 154 Ill. 2d at 241 (record unequivocally demonstrated that postconviction counsel made "no effort to investigate" claims in defendant's petition or obtain supporting documentation). We do not believe reasonable assistance requires postconviction counsel to conjure out of thin air documents that are apparently no longer part of the record or available.

The lineup photographs themselves were not central to defendant's constitutional claims. Postconviction counsel alleged that both trial and appellate counsel were constitutionally ineffective for failing to challenge the admissibility of certain identification evidence. Postconviction counsel, for example, argued that the identification procedures were "tainted" and unnecessarily suggestive in that Andres twice identified defendant from the lineup photograph in the presence and under the influence of his wife. It is clear that the alleged suggestiveness did not arise from the lineup photographs themselves, but from the actions of the prosecution witnesses. While the photographs would have supplemented counsel's argument, they were not essential given the evidence in the record. See *Garcia*, 405 Ill. App. 3d at 625 (citing *Johnson*, 154 Ill. 2d at 240 (supporting documents required unless allegations are uncontradicted and supported by record)). The absence of this "supporting evidence" was not the basis for the court's dismissal of the petition. *Cf. Turner*, 187 Ill. 2d at 413 (counsel's failure to properly amend postconviction petition "directly contributed to the dismissal of the petition"). Defendant's claim fails.

Based on the foregoing, we affirm the decision of the trial court dismissing defendant's second-stage postconviction petition.

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Affirmed.