

No. 1-09-1248

**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).

FIRST DIVISION  
DATE: April 11, 2011

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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. 91 CR 4781
	)	
ROBERT THOMAS,	)	Honorable
	)	John A. Wasilewski,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOFFMAN delivered the judgment of the court.  
Presiding Justice Hall and Justice Lampkin concurred in the  
judgment.

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**O R D E R**

*HELD:* Despite an excessive delay in presenting defendant's second-stage supplemented postconviction petition to the trial court, the record did not contradict postconviction counsel's averments of compliance in his Rule 651(c) certificate and the petition was properly dismissed; judgment affirmed.

Defendant Robert Thomas appeals from the second-stage dismissal of his supplemental postconviction petition. On appeal, defendant contends that his appointed postconviction

counsel was ineffective for failing to amend his *pro se* postconviction petition to claim defendant's trial counsel were ineffective for failing to obtain a pretrial ruling to bar the State's use at trial of alleged prior convictions for impeachment purposes. Defendant also asserts that postconviction counsel's 12-year delay in presenting a supplemented petition to the court was unconscionable and requires reversal and remand for appointment of new postconviction counsel. We affirm.

Defendant was indicted in 1991 on numerous charges arising from a fatal car collision following a police chase. The indictment included first degree murder counts alleging defendant killed Eugene Strepek and Janet Strepek by striking them with an automobile knowing his acts created a strong probability of death or great bodily harm. The indictment also included reckless homicide charges. During pretrial discovery, the State disclosed that it might or might not introduce at trial defendant's prior 1984 conviction for reckless homicide and prior conviction for escape from police. On April 15, 1992, defendant's trial counsel filed a "Motion to Produce," asking the court to require the State to produce any and all documents relating to the alleged 1984 reckless homicide conviction. On July 29, 1992, after the jury had been selected but before evidence was heard, the following exchange occurred:

"MS. LIPINSKI [defendant's attorney]: In the State's answer to discovery there was a brief note that the State intended to use proof of other crimes, prior convictions from Indiana of the defendant[']s. Through pretrial discovery we moved for more specific information. We never received anything. So unless the defendant testifies, we would have a motion in limine to preclude anybody from mentioning the Indiana conviction.

THE COURT: Do you --

MR. CASSIDY [Assistant State's Attorney]: No.

THE COURT: That will be allowed."

The evidence at defendant's 1992 trial revealed that on February 4, 1991, a department store sales clerk and a security guard witnessed two women steal merchandise from the store and flee in a Buick Riviera driven by a third person, later identified as defendant. The security guard notified the police and furnished a partial license plate number, and police in two vehicles pursued the Riviera in a high-speed car chase down a street heavily congested with traffic. As the Riviera sped down 159<sup>th</sup> Street approaching Cicero Avenue, defendant did not slow his speed even though there was a dip in the road ahead, with the hill crest beyond it obstructing a view of the intersection at Cicero Avenue. Defendant drove the Riviera at 60 to 70 miles per

hour into the intersection against a red traffic light, colliding with a car in the cross traffic and killing its two occupants, Eugene and Janet Strepek. The merchandise taken from the department store was found in the Riviera, which had a peeled steering column and had been stolen.

After the State rested, defendant advised the court he did not wish to testify. The defense rested without presenting witnesses. The jury returned guilty verdicts on two counts of first degree murder, aggravated possession of a stolen motor vehicle, and two counts of felony theft.

At the sentencing hearing, the State introduced defendant's 1984 conviction from Indiana for leaving the scene of a fatality, but no prior convictions for reckless homicide or escape were offered. The State also introduced defendant's three convictions in Illinois and Indiana for burglary, two convictions for auto theft, a conviction for possession of burglary tools, and a federal conviction for conspiracy to sell or exchange stolen bonds or securities. The trial court sentenced defendant to natural life in prison without possibility of parole on the two counts of first degree murder, and prison terms of 15 years for aggravated possession of a stolen motor vehicle and 5 years for each of the two theft counts.

On direct appeal, we affirmed the trial court's judgment. *People v. Thomas*, 266 Ill. App. 3d 914 (1994).

In 1995 defendant filed a *pro se* postconviction petition alleging, *inter alia*, ineffective assistance of trial counsel. One such claim related to the State's pretrial disclosure that it might or might not use a prior 1984 conviction for reckless homicide and a prior conviction for escape from police. The petition stated that, upon learning of the State's disclosure, defendant "informed trial counsels that there had been a mistake," that he had "never been charged with either offense." The petition alleged defendant's trial counsel were ineffective for failing to seek exclusion of those alleged convictions or request a jury instruction limiting such convictions to impeachment. On the day of jury selection, defendant asked one of his trial counsel for some documentation showing defendant was ever charged with the two offenses. In response, counsel showed defendant only an unsigned true bill from Lake County, Indiana, charging defendant with reckless homicide. Defendant's petition further asserted that his trial counsel "did not mention" whether the alleged reckless homicide conviction was invalid and, as a result, defendant "was reluctant to take the stand to testify \*\*\* to explain his state of mind prior to the collision" out of concern the State would use those prior convictions to impeach him.

On October 3, 1995, defendant filed a *pro se* amended petition. On December 15, 1995, the trial court appointed the

public defender to represent defendant in the second stage of postconviction proceedings. Defendant filed a *pro se* amended supplemental postconviction petition in 1996. In 1997, the State filed a motion to dismiss. Defendant filed a *pro se* supplemental amendment in 2000. In September 2003, the State filed a supplemental motion to dismiss.

Other than motions filed by defendant requesting appointment of different postconviction counsel, no further action took place until December 14, 2007, when a public defender filed on defendant's behalf a supplemental postconviction petition which raised five additional contentions. The petition did not amend the contentions raised in defendant's original, amended, and supplemental *pro se* postconviction petitions. Counsel also filed a certificate pursuant to Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)). In 2008, the State filed another supplemental motion to dismiss. On May 1, 2009, the trial court granted the State's motion to dismiss, and defendant now appeals from that order.

On appeal, defendant first contends that his appointed postconviction counsel did not fulfill his obligation under Rule 651(c) in that he failed to amend a claim raised in defendant's original *pro se* postconviction petition, namely, that his trial counsel were ineffective for failing to bring a pretrial motion *in limine* pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971)

to bar the State's use of the two alleged "erroneous" prior convictions for impeachment purposes.

Our review from the dismissal of defendant's supplemental postconviction petition without an evidentiary hearing is *de novo*. *People v. Delton*, 227 Ill. 2d 247, 255 (2008). Section 122-2.4 of the Post-Conviction Hearing Act (Act) provides for the appointment of counsel. 725 ILCS 5/122-2.4 (West 2008). The right to postconviction counsel is statutory, not constitutional. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). Consequently, a court of review requires only a reasonable level of assistance by appointed counsel at such proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

The level of postconviction counsel's competence is measured by counsel's compliance with Rule 651(c). *People v. McNeal*, 194 Ill. 2d 135, 142-43 (2000). Rule 651(c) requires the record to show that appointed postconviction counsel has (1) consulted with petitioner to ascertain his contentions of any constitutional rights deprivation, (2) examined the record of the trial proceedings, and (3) made any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Where a Rule 651(c) certificate is filed, the presumption is raised that the postconviction petitioner received the required representation by counsel during second-stage proceedings.

*People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010), citing *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). Whether counsel actually fulfilled his duties under Rule 651(c) is reviewed *de novo*. *Suarez*, 224 Ill. 2d at 41-42.

In the case *sub judice*, appointed postconviction counsel filed a supplemental postconviction petition raising five contentions not previously raised by defendant. Counsel also filed a Rule 651(c) certificate which stated that he consulted with defendant one time in person at the facility where defendant was imprisoned and "on innumerable occasions" by telephone and mail, and had examined "the record of all proceedings." The certificate did not specifically state that counsel had made amendments to the *pro se* petitions necessary to adequately present defendant's constitutional claims, and no amendments appear to have been made. However, the certificate averred that counsel had "reviewed the court record with respect to the claims raised by Mr. Lynch in accordance with my obligation pursuant to" Rule 651(c). The opening paragraph of counsel's supplemental petition noted the issues raised in defendant's original, amended, and supplemental *pro se* postconviction petitions, but offered "no further comment thereon."

We reject defendant's contention that his appointed postconviction counsel failed to satisfy the third requirement of Rule 651(c), that appointed postconviction counsel make "any

amendments to the petition filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." There is no requirement that postconviction counsel *must* amend a petitioner's *pro se* postconviction petition. *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991). "Fulfillment of the third obligation does not require counsel to advance frivolous or spurious claims on defendant's behalf." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). "Indeed, ethical obligations prohibit counsel from doing so if the claims are frivolous or spurious." *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008).

We have carefully examined the record to determine whether any facts exist to compel a conclusion that postconviction counsel's failure to amend the claims in defendant's *pro se* petition was the product of inadequate representation, and we have found none. Postconviction counsel certified he had read the record of all the proceedings in this cause. Consequently, he was on notice that the alleged convictions for reckless homicide and escape did not exist, as the sentencing hearing demonstrated. Defendant's original *pro se* petition stated he knew no such convictions existed and that he told his trial counsel they did not exist. Trial counsel filed a pretrial motion to compel the State to provide documentation of the alleged convictions and the record contains no response to that motion by the State. Defendant's *pro se* petition alleged that

immediately before trial, he asked his trial counsel to show him what evidence existed of the alleged convictions and counsel produced only an unsigned true bill charging reckless homicide. The record reveals that before trial evidence was heard, defendant's trial counsel did make an oral motion *in limine* to prevent the State from introducing the challenged convictions "unless the defendant testifies." It is unclear from the assistant State's Attorney's negative response whether the convictions actually existed.

Defendant's *pro se* petition also asserted that, because he did not know whether the State would try to impeach him with the two alleged convictions, he was "reluctant" to testify about his state of mind prior to the fatal collision. His petition made no claim, however, that he ever informed his trial counsel of his alleged reticence to testify for that reason. Postconviction counsel's duty to amend under Rule 651(c) is limited by the constitutional claims petitioner has raised in his *pro se* petition. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). We observe that on appeal, defendant has established no constitutional right to testify that was abridged as a result of omissions of his trial counsel.

Based on the record, postconviction counsel reasonably could have concluded that trial counsel were not ineffective for failing to obtain a specific ruling to exclude the State's use

for impeachment purposes of prior convictions that did not exist and that defendant knew did not exist. Our supreme court has held that "[w]here there is not a showing that sufficient facts or evidence exist, inadequate representation certainly will not be found because of an attorney's failure to amend a petition \*\*\*." *People v. Stovall*, 47 Ill. 2d 42, 46 (1970). Here, the presumption of compliance raised by postconviction counsel's filing of a Rule 651(c) certificate is not rebutted by either the record or defendant's arguments on appeal. Consequently, we must give effect to postconviction counsel's representation in his certificate that he complied with Rule 651(c).

Defendant's second contention on appeal is that he did not receive reasonable assistance of postconviction counsel where it took counsel 12 years to present to the court the supplemental postconviction petition.

The Act requires postconviction proceedings to be commenced within a given time limitation period, a requirement in effect when defendant filed his *pro se* petition in 1995 (725 ILCS 5/122-1 (West 1994)) and when appointed counsel filed the supplemental petition in 2007 (725 ILCS 5/122-1(c) (West 2008)). Section 122-2.1(a) requires that within 90 days of the filing and docketing of a petition, the trial court is required to examine the petition and enter an order thereon. 725 ILCS 5/122-1(c) (West 2008). If a petitioner is under sentence of death, the court

shall order the petition to be docketed for further consideration and hearing within one year of its filing (725 ILCS 5/122-2.1(b) (West 2008)) (there was no such statutory provision in 1995). Within 30 days of a petition being docketed for further consideration, the State shall answer or move to dismiss. 725 ILCS 5/122-5 (West 2008). Section 122-5 of the Act gives the court discretion to extend the time of filing any pleading other than the original pleading. 725 ILCS 5/122-5 (West 2008). Otherwise, there is no statutory time limit in which the trial court is required to rule on a petition or appointed postconviction counsel is obliged to submit an amended petition.

Here, defendant filed his initial *pro se* petition on September 22, 1995 and within 90 days the trial court appointed the public defender to represent him. On December 14, 2007, after at least four assistant public defenders represented defendant over the course of the postconviction proceedings, an assistant public defender filed the supplemental postconviction which is the subject of this appeal.

We agree that the lengthy period of time it took to present counsel's supplemental petition to the trial court was egregious and should not go unremarked. See *People v. Bennett*, 394 Ill. App. 3d 350, 355 (2009). The trial court in this case was conscious of the extreme delay and exhorted counsel on numerous occasions to move the proceedings forward. We also agree with

defendant that significant delay may result in prejudice in certain cases, as where witness testimony becomes unavailable over time. Defendant contends that his appointed postconviction counsel's 12-year delay in filing the supplemental petition prevented defendant from supplementing his *pro se petition* with affidavits or other evidence to adequately present many of his *pro se* claims. However, defendant has not demonstrated that he was prejudiced with respect to the claim of ineffectiveness of trial counsel which is the subject of his claim on appeal. While a lengthy delay such as occurred in this case should not be tolerated, we are mindful that defendant's multiple *pro se* pleadings, including three amended or supplemental petitions filed during the 12-year interval, raised a great number of claims. Moreover, a postconviction counsel's delay in presenting an issue "may simply indicate its relative lack of merit." *People v. McNeal*, 194 Ill. 2d 135, 144 (2000). We conclude that defendant has not established prejudice so as to require reversal of the trial court's order granting the State's motion to dismiss.

For the reasons stated herein, we affirm the judgment of the trial court.

Affirmed.