

No. 1-09-2662

**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).

SIXTH DIVISION  
APRIL 15, 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. 97 CR 17707      |
|                                      | ) |                      |
| ANTONIO FOLKES,                      | ) | Honorable            |
|                                      | ) | Diane Gordon Cannon, |
| Defendant-Appellant.                 | ) | Judge Presiding.     |

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JUSTICE McBRIDE delivered the judgment of the court.  
Justices Cahill and R.E. Gordon concurred in the judgment.

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**O R D E R**

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*Held:* Denial of post-conviction petition affirmed over claim that appointed counsel failed to provide reasonable assistance on remand for an evidentiary hearing.

Defendant Antonio Folkes appeals from the denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) following an evidentiary hearing. In a prior appeal, this court reversed the second-stage dismissal of his petition, and remanded the cause for an

evidentiary hearing on whether he was culpably negligent for the untimely filing of his petition. *People v. Folkes*, No. 1-07-1761 (2009) (unpublished order under Supreme Court Rule 23). After conducting that hearing on remand, the circuit court found that the delay in filing was due to defendant's culpable negligence, and denied his petition. In this appeal, defendant contends that he was deprived of the reasonable assistance of post-conviction counsel where the record does not affirmatively show that, on remand, counsel complied with the duties set forth in Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), or filed an additional Rule 651(c) certificate.

The record shows, in relevant part, that defendant was convicted by jury of the first degree murder of James Bowen, then sentenced to 50 years' imprisonment. This court affirmed that judgment on direct appeal (*People v. Folkes*, No. 1-00-3070 (2002) (unpublished order under Supreme Court Rule 23)), and on October 24, 2002, the supreme court denied defendant's petition for leave to appeal.

Under the statute in effect at that time, defendant had until April 24, 2003, to file a petition for post-conviction relief (725 ILCS 5/122-1(c) (West 2002)). Defendant did not meet that time limitation, and in July 2003, he mailed to the clerk of the circuit court, a *pro se* "Motion for Extension of Time," seeking an additional 30 days to file his post-conviction

petition. He claimed that he had been unable to conduct the necessary investigation and research for his petition, and that he had been sending similar motions to the clerk of the court but had not received a response. On August 5, 2003, the circuit court granted defendant's motion.

Meanwhile, on July 25, 2003, defendant filed a *pro se* petition for post-conviction relief, followed by two *pro se* supplemental petitions on September 15, 2003, and November 7, 2003. In support of his petitions, defendant attached to the last entry, affidavits from his mother, Jerlean Folkes, and a fellow inmate, Leander Carter. In her affidavit, Jerlean stated that she had received defendant's trial transcripts in October 2002, and stored them in her cousin's house. Due to her cousin's death in December 2002, she did not have access to the transcripts until July 2003, at which point she mailed them to defendant. Carter averred that in September 2003, defendant asked for his assistance in preparing his post-conviction petition, and that he, in turn, asked two law clerks in the prison law library to assist defendant. However, the law clerks told Carter that they were working on too many other cases and could not help.

On September 22, 2003, the court appointed the public defender to represent defendant, and counsel moved for a discovery order granting her leave to subpoena the telephone

records of defendant's parents from the telephone company for the purpose of determining the dates on which they had contacted different attorneys. The court granted counsel's motion over the State's motion to dismiss her request, and also granted counsel's discovery motion to view the impounded exhibits from defendant's case.

On November 16, 2006, counsel filed a Rule 651(c) certificate and a third supplemental post-conviction petition alleging, *inter alia*, that defendant was denied effective assistance of counsel at trial. Counsel also addressed the untimely filing of the petition asserting that defendant had to rely on his family to retain post-conviction counsel because of his incarceration, and that they were unable to secure representation on his behalf.

In support of this assertion, counsel attached multiple letters and affidavits to the petition. Among them was the affidavit of Vernon Folkes, defendant's step-father, who averred, in relevant part, that after defendant's direct appeal was denied in October 2002, he contacted multiple attorneys to represent defendant on his post-conviction petition. He provided the names of the attorneys he had contacted, and stated that no one would accept the case.

Vernon's affidavit was corroborated by letters from two law firms indicating that they had been contacted regarding

defendant's case and provided a referral, and a letter from another attorney who vaguely recalled being contacted about the case. In addition, three attorneys filed affidavits stating that they were unable to provide defendant with representation. Counsel also provided the affidavits that accompanied defendant's *pro se* supplemental petition of November 7, 2003.

The State filed a motion to dismiss defendant's petition. The State asserted that defendant was culpably negligent for the untimely filing of his petition, and that his claim of ineffective assistance of counsel was without merit. Defendant responded that his ineffective assistance of counsel claim warranted an evidentiary hearing.

Argument was presented on the motion, and, on June 20, 2007, the court granted the State's motion to dismiss, finding that defendant's petition was untimely and that his claims were without merit. This court reversed that judgment on appeal because the circuit court had made no finding as to defendant's culpable negligence, or lack thereof, for the untimely filing of his petition, and remanded the cause for an evidentiary hearing. *People v. Folkes*, No. 1-07-1761 (2009) (unpublished order under Supreme Court Rule 23).

On September 16, 2009, the circuit court held the prescribed hearing, during which testimony was presented from defendant and Vernon Folkes. At its conclusion, the court found, on the

evidence presented, that defendant's 13-week delay in filing his petition was due to his culpable negligence, and denied the petition. In this appeal from that judgment, defendant contends that he was deprived of the reasonable assistance of post-conviction counsel because there is no showing in the record that, on remand, counsel performed her duties under Rule 651(c), or filed an additional Rule 651(c) certificate.

The right to post-conviction counsel is a matter of legislative grace, and defendant is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). That said, Rule 651(c) imposes specific duties on post-conviction counsel to ensure that she provides that level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The rule requires that post-conviction counsel consult with defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c).

Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel has fulfilled her duties. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). Once this certificate is filed, the presumption exists that defendant received the required representation during second-stage

proceedings. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010).

In this case, post-conviction counsel filed a Rule 651(c) certificate on November 16, 2006, with the supplemental post-conviction petition that she prepared on defendant's behalf. This filing created a presumption that defendant received the representation required by the rule during second-stage proceedings. *Mendoza*, 402 Ill. App. 3d at 813, and cases cited therein.

In addition to the certificate, the record shows counsel's extensive efforts in preparing defendant's supplemental petition. Not only did she successfully move twice for discovery orders, a typically limited device in post-conviction proceedings (*People v. Olinger*, 176 Ill. 2d 326, 371 (1997)), but she also obtained numerous letters and affidavits detailing defendant's efforts to obtain an attorney to help him with a post-conviction petition. Counsel then prepared a supplemental petition with a revised ineffective assistance of counsel claim, and a section addressing defendant's lack of culpable negligence for the untimely filing of his petition which she supported with the letters and affidavits she had gathered. We have no doubt, and defendant does not contend otherwise, that counsel fulfilled her obligations under Rule 651(c) and provided reasonable representation in the preparation of this supplemental petition.

*Mendoza*, 402 Ill. App. 3d at 813.

Defendant contends, however, that the remand of his petition for an evidentiary hearing on the culpable negligence issue "triggered anew" the duties of post-conviction counsel under Rule 651(c). The State responds that defendant's contention has no basis in fact, or in law.

We initially observe that defendant has cited no case law directly supporting his contention. Instead, he attempts to extrapolate his proposition from *Perkins*, 229 Ill. 2d at 49, where the supreme court held that post-conviction counsel has a duty under Rule 651(c) to amend defendant's *pro se* petition with any available facts showing that he was not culpably negligent for its untimely filing.

Defendant specifically calls our attention to the observation of the court in *Perkins* that where the State moves to dismiss defendant's petition as untimely, Rule 651(c) may require counsel to file a second amended petition which includes facts showing that defendant was not culpably negligent for the delay in filing. *Perkins*, 229 Ill. 2d at 49. Defendant claims that because this could potentially require post-conviction counsel to amend a petition after a Rule 651(c) certificate has been filed, counsel in this case was obligated, on remand, to amend his petition with additional facts showing his lack of culpable negligence despite her prior Rule 651(c) certification.

This argument misinterprets the supreme court ruling in *Perkins*. In that case, the court only found that counsel was obliged to file a second amended petition where she did not "anticipatorily rebut" allegations of untimeliness in the first petition, and the State subsequently raised an issue as to timeliness in its motion to dismiss. *Perkins*, 229 Ill. 2d at 48-49. That clearly was not the case here. Rather, counsel did, in fact, "anticipatorily rebut" the charge of untimeliness by addressing the issue in the supplemental petition and gathering multiple affidavits to support the contention that he was unable to obtain an attorney. Moreover, the State had already raised the issue in its motion to dismiss, and the cause was remanded for an evidentiary hearing because the court had not addressed it.

Thus, unlike *Perkins*, where the court was addressing post-conviction counsel's duties at the pleading stage; this case was remanded for an evidentiary hearing on the culpable negligence issue. The remand order did not address any deficiencies in the pleadings, but rather, provided for the presentation of evidence and an assessment of the credibility of that evidence by the circuit court. *People v. Wheeler*, 392 Ill. App. 3d 303, 310 (2009). This was accomplished in this case, evidence was presented and defendant's excuses for the tardy filing were found wanting. The record thus shows that defendant was afforded able

assistance by post-conviction counsel.

Defendant, nonetheless, presumes that the remand of his case for an evidentiary hearing on culpable negligence somehow created new excuses for his delay in filing which did not exist when counsel first filed her Rule 651(c) certificate. He claims that had counsel inquired further into his hearing testimony that he thought he had three years to file his petition, or into his filing of motions for extension of time, she may have found additional excuses. This claim is purely speculative, and where there is nothing in the record indicating that defendant had additional excuses for his delay in filing which would show his lack of culpable negligence, we cannot assume there was some other excuse that counsel failed to raise. *Perkins*, 229 Ill. 2d at 51.

Accordingly, we affirm the denial of defendant's post-conviction petition by the circuit court of Cook County.

Affirmed.