

No. 09-0297

**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).

FIFTH DIVISION  
January 14, 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. 99 CR 28086
	)	
OCTAVIO GARCIA,	)	Honorable
	)	Kerry M. Kennedy,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Epstein concurred in the judgment.

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**O R D E R**

*HELD:* State may supplement the record on appeal with post-conviction counsel's Supreme Court Rule 651(c) certificate; post-conviction counsel complied with Rule 651(c) and provided defendant a reasonable level of assistance; the circuit court's second-stage dismissal of defendant's petition affirmed.

Defendant Octavio Garcia 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 2006)). He contends that this order should be vacated and his cause remanded to the circuit court because his privately-retained post-conviction counsel failed to comply with Supreme Court Rule 651(c), Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

The record shows that defendant was sentenced to 35 years' imprisonment on his 1999 jury conviction for first degree murder, and this court affirmed that judgment on direct appeal. *People v. Garcia*, No. 1-01-3312 (2003) (unpublished order under Supreme Court Rule 23).

In August 2004, defendant filed a *pro se* post-conviction petition alleging several claims of ineffective assistance of trial and appellate counsel. The circuit court appointed counsel to represent defendant, but, in May 2007, defendant retained private counsel who filed an amended post-conviction petition on February 22, 2008. In that amended petition, counsel deleted some of defendant's *pro se* claims, and shaped defendant's other assertions of ineffective assistance of trial and appellate counsel into legal form with additional legal authority.

The State filed a motion to dismiss defendant's post-conviction petition which was argued by the parties on October 3,

2008. The circuit court then took the matter under advisement, and on January 23, 2009, the court granted the State's motion.

Defendant now appeals from that order. He raises no substantive issue regarding the dismissal but maintains that post-conviction counsel failed to file a certificate of compliance with Rule 651(c), and that the record does not affirmatively show that counsel consulted with him to ascertain the basis of his constitutional claims or examined the record of the trial proceedings.

The State filed a brief in response, as well as a motion requesting leave to supplement the record on appeal with counsel's Rule 651(c) certificate. We allowed the State to do so over defendant's objection.

In that certificate, dated July 18, 2010, defendant's post-conviction counsel stated that he consulted with defendant in writing and at the Stateville Correctional Center and ascertained his contentions of deprivation of constitutional rights. Counsel also stated that he examined the record of the trial proceedings, made amendments to the *pro se* post-conviction petition, and did all that was necessary for the adequate presentation of defendant's contentions.

In his reply brief, defendant claims that this court should not have allowed the State to submit a newly created Rule 651(c)

certificate on appeal because it was not filed in the circuit court. Defendant further claims that the supreme court cases and their progeny which allow the State to supplement the record with a Rule 651(c) certificate offer no reasoned justification for such an unusual procedure, especially where the plain language of the rule places the burden of compiling the appellate record on the trial court.

The Act provides for a reasonable level of assistance to post-conviction defendants. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To that end, Rule 651(c) imposes specific duties on both retained and appointed post-conviction counsel (*People v. Richmond*, 188 Ill. 2d 376, 380-81 (1999)), to ensure that *pro se* defendants are provided proper representation when presenting their claims of constitutional deprivation under the Act. *Suarez*, 224 Ill. 2d at 42, 47. The rule requires counsel to consult with defendant to ascertain his contentions of deprivation of constitutional rights, examine the trial record, and make amendments to the *pro se* petition where necessary to adequately present defendant's claims. 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).

Defendant correctly recognizes that our supreme court has held that the State may supplement the record with a Rule 651(c) certificate on appeal. *People v. Stewart*, 121 Ill. 2d 93, 98 (1988); *People v. Harris*, 50 Ill. 2d 31, 34-35 (1971). Although defendant disagrees with these decisions, this court is bound by them, has no authority to overrule them (See, e.g., *People v. Artis*, 232 Ill. 2d 156, 164 (2009)), and, accordingly, allowed the supplementation in this case.

Defendant, nonetheless, claims that the certificate cannot be considered part of the record on appeal since it was not filed in the trial court. In raising this assertion, he relies on *People v. Perkins*, 229 Ill. 2d 34 (2007), modified on denial of rehearing May 27, 2008, which we find factually distinguishable. In *Perkins*, the supreme court noted that defendant did not file his affidavit in the trial court or even while the supreme court was considering his appeal, but waited to submit it with his petition for rehearing, and the supreme court declined to consider it. *Perkins*, 229 Ill. 2d at 52. Here, by contrast, the request to supplement the record was made during the pendency of the appeal, and we allowed it to be filed consistent with the decisions of the supreme court in *Harris* and *Stewart*.

Defendant further claims that the 651(c) certificate was unreliable to affirmatively demonstrate counsel's compliance with

the requirements of the rule or to show that he provided him a reasonable level of assistance. In the certificate, counsel represented that he consulted with defendant to ascertain his contentions of the deprivation of constitutional rights, examined the trial record, and made the necessary amendments to adequately present defendant's contentions. As noted, this creates a presumption of compliance with the rule (*Johnson*, 232 Ill. 2d at 678; *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)); and, although the presumption may be rebutted, defendant has not done so in this case. Consistent with those cases where compliance with the rule has been found when the certificates were filed as supplements to the record on appeal (See, e.g., *Harris*, 50 Ill. 2d at 34-35; *People v. Yarbrough*, 210 Ill. App. 3d 710, 714 (1991); *People v. Ford*, 99 Ill. App. 3d 973, 975 (1981); *People v. Pate*, 30 Ill. App. 3d 9, 11 (1975)), we reach the same conclusion here.

In his reply brief, defendant claims that the record provides no further evidence that counsel ever conducted any additional investigation, did any original research into his claims or made the necessary amendments to his petition. We observe that defendant did not raise this issue in his opening brief, thereby violating Supreme Court Rule 341(h)(7) (eff. July 1, 2008) which prohibits new arguments from being raised in

reply; and, consequently, has waived this new contention for review (*People v. Borello*, 389 Ill. App. 3d 985, 998 (2009)).

Notwithstanding, we find that counsel fulfilled the requirements of the rule in this case. 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)). Here, however, counsel amended defendant's *pro se* petition, shaped his assertions into proper legal form, added further supporting authority for them, and represented defendant at the hearing on the State's motion to dismiss. The record thus shows that post-conviction counsel complied with the requirements of Rule 651(c), and in doing so, provided defendant a reasonable level of assistance with his petition.

In light of the foregoing, we affirm the order of the circuit court of Cook County dismissing defendant's post-conviction petition at the second stage of proceedings.

Affirmed.