

2011 IL App (1st) 090476-U
No. 1-09-0476

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FIFTH DIVISION
JUNE 30, 2011

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. 01 CR 22899
)	
JOSEF DUPREE,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

ORDER

Held: Second-stage dismissal of defendant's post-conviction petition affirmed over claim that appointed counsel failed to fulfill the obligations mandated by Rule 651(c).

¶ 1 Defendant Josef Dupree, AKA Isaac Briggs, appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that post-conviction counsel rendered

unreasonable assistance and violated Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) by failing to adequately review his *pro se* amended post-conviction petition and ascertain whether it contained constitutional claims that needed to be shaped into proper legal form.

¶ 2 The record shows, in relevant part, that in 2002, defendant was found guilty of aggravated kidnapping and aggravated unlawful restraint. At sentencing, the court merged these convictions and sentenced defendant to a single term of 10 years' imprisonment for aggravated kidnapping. This court affirmed that judgment on direct appeal. *People v. Briggs*, No. 1-03-1058 (2004) (unpublished order under Supreme Court Rule 23).

¶ 3 On April 13, 2005, defendant filed a *pro se* petition for post-conviction relief alleging that: (1) the trial court had improperly relied on photographs for which there was no chain of custody; (2) the trial court failed to suppress impermissibly suggestive lineup identifications; (3) defense counsel was ineffective for failing to call alibi witnesses; and (4) the trial court improperly barred certain "expert eyewitness testimony."

¶ 4 On July 18, 2005, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed that dismissal, and on November 30, 2006, this court remanded the cause for second-stage proceedings because the

circuit court had failed to rule on his post-conviction petition within 90 days of its filing. *People v. Briggs*, No. 1-05-2635 (2006) (dispositional order).

¶ 5 On remand, the circuit court appointed the public defender to represent defendant, and on March 27, 2008, counsel filed a Rule 651(c) certificate. At the hearing held that day, counsel noted that the petition filed by defendant adequately presented his contentions, and that he would not be filing a supplemental petition. The State then informed the court that it did not have a copy of defendant's petition and that it was not in the court file. Counsel agreed to forward the State a copy of the petition, and the case was continued to June 18, 2008, to allow the State to file a motion to dismiss.

¶ 6 On May 12, 2008, however, defendant filed a 62-page *pro se* "Motion for Leave to File *Pro Se* Alternative Duplicate Post-Conviction Petition under the Act and Incorporated Rule 137 and 651(c) Certification." The petition was in motion form but consisted of two letters to post-conviction counsel suggesting numerous issues to be raised, discussion and authority for their resolution, and twelve exhibits.

¶ 7 On May 30, 2008, defendant's case appeared on the court's call. The court noted that defendant's case had been continued to June 18, for the State to file its motion to dismiss, and that defendant must have made a *pro se* filing causing it to come up

early. The court then stated that it would continue the case to June 18, 2008, "to see if we can reconcile all this."

¶ 8 On that date, counsel appeared before a different judge and acknowledged that defendant may have made an additional filing, though he did not know the reason for it. He then explained that neither he, nor the State, had a copy of defendant's original petition. He thought that he had mistakenly sent it to defendant, but defendant did not have a copy of it either. He then stated that he had contacted defendant's appellate counsel and the appellate court for a copy of the petition, and explained that the State could not file its motion to dismiss until it had received a copy.

¶ 9 On July 16, 2008, counsel appeared before yet another judge and again explained that the petition had been misplaced. However, counsel informed the court that he had made a copy of defendant's *pro se* motion of May 12, 2008, that it contained the claims defendant wished to raise in his petition, and that he had provided a copy of it to the State. The parties then agreed to continue the case to September 24, 2008, for the filing of the State's motion to dismiss.

¶ 10 Meanwhile, on August 19, 2008, defendant filed a "*Pro Se* Amended Alternative Duplicate Post-Conviction Petition under the Act and Incorporated Rule 137 and 651(c) Certification." This

motion, like his previous filing, was a voluminous document containing numerous claims and exhibits.

¶ 11 On September 24, 2008, the State filed its motion to dismiss, asserting that the claims raised by defendant in his May 12, 2008, motion were barred by *res judicata* and waiver. Defense counsel informed the court that he wanted to send defendant a copy of the motion to dismiss, and the court responded, "Well, there seems to be a bunch of handwritten stuff throughout this file, did you speak to him about the wisdom of that?" Counsel replied, "Exactly, he continues to file things against my counsel but he is going to want to probably file a response against this."

¶ 12 On November 13, 2008, counsel informed the court that about the time the State had filed its motion to dismiss, he had received "voluminous letters" from defendant. The court told counsel that defendant would need to decide whether he was representing himself or having counsel represent him, stating, "I'm not going to have this hybrid filing." Counsel responded, "I'm trying to sway him from doing so." The court, nonetheless, acknowledged that counsel had been "very diligent" and "appear[ed] to be dealing with a difficult client."

¶ 13 On February 11, 2009, defendant and his counsel were present for the hearing on the State's motion to dismiss. Counsel informed the court that he had just learned that defendant had

filed an amended petition in August, which he had not received, and that defendant maintained that the State could have responded to that filing in its motion to dismiss. The court stated that the present hearing was for responding to the motion to dismiss and instructed counsel to confine his arguments to that pleading. ¶ 14 Counsel then asserted the issues raised by defendant which the court found barred by *res judicata*, then granted the State's motion to dismiss. In this appeal from that order, defendant contends that post-conviction counsel provided unreasonable assistance where he confined his argument to those arguments raised in his "original petition," and failed to satisfy the requirements of Rule 651(c) because he never filed an additional Rule 651(c) certificate.

¶ 15 We note, initially, that defendant has obfuscated the issue before this court by the imprecise and seemingly interchangeable references to the writings submitted by defendant which are at the heart of this appeal. For example, defendant refers to counsel's deficiency in confining his argument to the "original" petition when that "original" petition was lost and argument was confined to the amended petition of May 12, 2008. In addition, references are made to an "amended petition" when, in fact, there were two such petitions. For the sake of clarity, we consider the "original petition," which is contained in the record on appeal, as the one filed by defendant in 2005, the "amended

petition" as the one filed on May 12, 2008, and the "57-page amended petition" of August 15, 2008, as a second amended petition.

¶ 16 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 he 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).

¶ 17 Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel has fulfilled his 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).

¶ 18 Here, the record shows that post-conviction counsel filed a Rule 651(c) certificate on March 27, 2008, after reviewing

defendant's original petition which 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. Thereafter, the court deemed the amended petition of May 12, 2008, (725 ILCS 5/122-5 (West 2008)) as the operative petition when the original petition could not be found, and the State responded to it in its motion to dismiss.

¶ 19 At the hearing on that motion, defendant was present and counsel informed the court that he had just learned that defendant had filed another amendment to the petition. The court, however, confined the argument to the amended motion of May 12, 2008, which, counsel asserted, addressed the allegations in the original filing. In doing so, the court tacitly rejected any further amendment, and defendant's attempt at compelling a further response from the State.

¶ 20 Here, defendant faults counsel for failing to seek a continuance to determine whether the second amended petition presented new claims that required further action on his part. The record, however, clearly shows that the hearing was confined to the amended petition of May 12, 2008, that leave was not sought or granted as to the second amended petition (725 ILCS 5/122-5 (West 2008)), and that the court was not allowing hybrid representation (*People v. Rucker*, 346 Ill. App. 3d 873, 882 (2003)). Under these circumstances, counsel's representation may

not be deemed unreasonable for failing to request a further continuance to consider the additional *pro se* filing.

¶ 21 Defendant, nonetheless, contends that counsel did not fulfill his obligations under Rule 651(c) because he failed to review defendant's "57-page amended petition" and file an amended Rule 651(c) certificate with respect to it. We note that defendant has not provided any authority for his position that counsel has such a duty under Rule 651(c) with respect to a *pro se* amended petition filed by defendant without counsel's knowledge and without leave of court.

¶ 22 Defendant attempts to overcome this impediment by citing the circuit court's discretion under the Act to allow amendment to a post-conviction petition (725 ILCS 5/122-5 (West 2008)), and asserting that counsel "should have" treated defendant's amended *pro se* petition as an attempt to amend the original petition, that he "could have" asked for a continuance to review the amended petition, and that he "could have" asked the court for leave to file a supplemental petition addressing defendant's new claims. However, these assertions regarding what counsel "should have" or "could have" done are an improper challenge to the assistance provided by counsel absent a meritorious claim that counsel failed to comply with a specific duty set forth in Rule 651(c). *Mendoza*, 402 Ill. App. 3d at 816-17.

¶ 23 We find it noteworthy that defendant makes no argument with respect to the petition ultimately addressed in the circuit court. In any event, the record shows that counsel conferred with defendant regarding the issues he sought to raise in his petition, that counsel represented that he had done so in arguing the amended petition, and then argued those points at the hearing on the State's motion to dismiss. We thus find no basis in the record for concluding that counsel provided unreasonable representation, and affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 24 Affirmed.