SIXTH DIVISION
June 10, 2011

No. 1-10-0166

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).

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. 96 CR 8808
	)	
KENNETH CUNNINGHAM,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

O R D E R

Held: Defendant's successive postconviction petition, as amended, was properly dismissed where the record did not contradict postconviction counsel's averments of compliance in his Rule 651(c) certificate.

Defendant Kenneth Cunningham appeals from the dismissal of supplements to his *pro se* successive postconviction petition. Defendant asserts his postconviction counsel did not fulfill his obligation under Supreme Court Rule 651(c) (eff. Dec. 1, 1984) in that counsel failed to supplement defendant's petition by obtaining an affidavit in support of defendant's claim of actual innocence. We affirm.

At defendant's bench trial, the State presented testimony that on January 18, 1996, a confidential informant told police he had purchased cocaine that morning from defendant at his home at 1008 W. 78th Street and had done so during the previous six months. The police obtained a search warrant for both defendant and his residence. On the next day, police officers conducted surveillance of Esther's Place, a tavern frequented by defendant. During a one-hour period, the officers twice saw defendant leave the tavern with another person, walk out of sight and then return. The officers entered the tavern, arrested and handcuffed defendant and took him to his home. Using keys from defendant's key ring, they entered the house and then a locked bedroom where they found men's clothing in the closet and tools on the floor. They also found a plastic bag containing cocaine, three scales, a mixing bowl, a box of ammunition and defendant's prison identification card. In a basement bedroom, the officers found a bag containing 26.67 grams of marijuana. When defendant was searched at the police station, officers found 78 packets of cocaine in his shoes and his driver's license showing the 48th Street address.

The parties stipulated to testimony that the 84.6 grams of cocaine found on defendant's person had a street value of $14,612.50 and the 420.5 grams of cocaine found in the bedroom had a street value of $57,837.50. Testimony also revealed that when defendant was paroled from prison on August 5, 1994, he gave his address as 1008 West 48th Street, Chicago and subsequently did not report a different address. When defendant reported to parole authorities monthly, his calls came from 1008 West 48th Street. Mail to defendant at that address had not been returned.

Defense witnesses included Cathy Butusov, the mother of defendant's two sons, 18-year-old Kenneth Butusov and 15-year-old Brian Butusov. Cathy testified she and defendant had lived together at 1008 West 48th Street for many years, but defendant had moved out of the house in mid-October 1995, taking his clothes with him. He returned to the home occasionally to see his sons. Cathy, her small grandchildren, Brian, and two other youths, 14 and 15 years old,

were present when the police came. Cathy saw the police remove the cocaine, scales and other items from the bedroom but testified those items were not in her bedroom earlier that day.

The court found defendant guilty of one count of possession with intent to deliver cocaine in the amount of 400 to 800 grams, one count of possession with intent to deliver cocaine in the amount of 15 to 100 grams, one count of possession of cannabis with intent to deliver, and one count of unlawful use of a weapon by a felon. The court rejected the defense theory that other occupants of the house, specifically, the teenagers, may have placed the contraband in the bedroom. The court sentenced defendant to natural life in prison as a third-time Class X offender.

We affirmed the judgment of the circuit court on direct appeal. *People v. Cunningham*, 309 Ill. App. 3d 824 (1999). We concluded that the record contained sufficient evidence defendant lived at the 48th Street address and proof beyond a reasonable doubt that defendant had constructive possession of the drugs found in the house. *Cunningham*, 309 Ill. App. 3d at 828.

In 1999, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of trial counsel. One attachment was the affidavit of Brian Butusov, alleging that on a date after defendant's arrest, Brian told a Cook County State's Attorney's investigator that the police had planted the cocaine found in the bedroom. Defendant's petition was dismissed and his motion for reconsideration denied. We affirmed the orders of the circuit court. *People v. Cunningham*, No. 1-00-3538 (2002) (unpublished order under Supreme Court Rule 23).

On August 13, 2002, defendant filed a successive *pro se* postconviction petition, raising the claim of actual innocence based, *inter alia*, on alleged newly discovered evidence in the form of a letter he had received from his son Brian, indicating Brian claimed possession of the contraband found in the home. Brian's letter was attached to the petition. After the petition was initially dismissed, defendant filed a motion to reconsider, which was granted in 2005.

On April 6, 2006, defendant's appointed public defender filed a supplemental postconviction petition that argued Brian's letter constituted newly discovered evidence of actual innocence sufficient to require an evidentiary hearing to hear Brian's testimony. Attached was a copy of Brian's handwritten letter, dated May 12, 2002, stating:

> "When the police raided the house I thought they s[aw] me bring it in the house. *** I wasn't supposed to have it there that long. I was supposed to bag it up and take it back to my boys ***. Even when you were on trial I tried to tell your lawyer I wanted to testify that it was mine but your lawyer told me you would be coming home and that if I said anything that they would have tried me as an adult and I would have got any where from 15 to 60 years in prison so I got scared and *** did[n']t say anything ***. I hope you can forgive me ***."

On July 20, 2006, private attorney Thomas A. Moore substituted as defendant's postconviction counsel. On a later court date, Moore outlined the progress he had made: "I have read everything. I have interviewed two of the witnesses at the scene and have affidavits. I'm looking for one other witness who was at the scene." On July 21, 2008, Moore filed a second supplemental petition, raising a claim of ineffective assistance of counsel based on trial counsel's lack of knowledge before trial or sentencing that defendant could be sentenced as a habitual criminal. Moore also filed a certificate of compliance under Rule 651(c). The State filed a motion to dismiss, arguing that Brian's letter was not a proper affidavit as it was not notarized. Defendant filed a written response.

On July 20, 2009, a hearing was held on the motion to dismiss. The State argued that the information in Brian's letter was not newly discovered as it could have been discovered with due diligence at the time of trial, and that Brian's letter was contradicted by an earlier affidavit in which he claimed the drugs had been planted. Moore informed the court that he had "reviewed the entire record, trial and appellate," had spoken with defendant in prison by telephone three

times, had "met with [defendant's] son *** on numerous occasions and gone through the contentions that have been raised continuously since 1996." Moore had met with Brian and discussed the letter with him at length. It was not notarized but was a private letter sent by a son to a father in prison, and had been attached to a postconviction petition filed before Moore came into the case. Moore argued: "My belief and my contention today is that that issue is still alive even though it's not notarized ***." Moore represented that Brian was prepared to come into court at a hearing and testify under oath. Noting the letter was not an affidavit, the court granted the State's motion and dismissed the supplemental petition. The court also dismissed Moore's second supplemental petition on the basis of *res judicata*.

On appeal, defendant contends his postconviction counsel, Moore, did not fulfill his obligation under Supreme Court Rule 651(c) in that Moore's failure to supplement defendant's previously filed successive *pro se* petition with an affidavit from Brian in support of defendant's claim of actual innocence constituted less than reasonable assistance of counsel.

Our review from the dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Delton*, 227 Ill. 2d 247, 255 (2008). A court of review requires only a reasonable level of assistance by postconviction counsel. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). 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 postconviction counsel has (1) consulted with the petitioner to ascertain his contentions of constitutional rights deprivation, (2) examined the record of the trial proceedings, and (3) made 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. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010) (citing *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009)). Whether counsel fulfilled his duties under

the rule is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

We reject defendant's contention that Moore failed to satisfy the third requirement of Rule 651(c) because Moore was ignorant of the requirement of section 122-2 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2 (West 2002)) that a postconviction petition contain supporting documentation. Postconviction counsel is presumed to know the law. *People v. Perkins*, 229 Ill. 2d 34, 51-52 (2008). Defendant contends the presumption is rebutted by Moore's statement that the issue of newly discovered evidence showing actual innocence "is still alive even though [Brian's letter is] not notarized." We believe this statement does not evince an ignorance by Moore of the affidavit requirement. The more logical inference is that Moore was referring to the language in section 122-2 that a postconviction petition "shall have attached thereto affidavits, records, *or other evidence* supporting its allegations ***."

The record shows Moore was familiar with the requirements of section 122-2 of the Act. Moore previously had advised the court he had obtained affidavits from two witnesses and was in the process of locating another witness. Moore was aware of, and had responded to, the State's motion to dismiss which had argued Brian's letter was not a proper affidavit because it was not notarized. The State quoted from *People v. Guest*, 166 Ill. 2d 381, 402 (1995): "Without affidavits, [the] court cannot determine whether these witnesses could have provided any information or testimony favorable to defendant." Defendant asserts the State's motion to dismiss placed Moore "arguably on notice" that the lack of an affidavit from Brian could pose a problem for the defense. We agree and conclude that such notice is another indication that Moore was aware of the requirements of section 122-2.

Defendant's attempt to rebut the presumption raised by Moore's Rule 651(c) certificate is speculation. His brief states: "Certainly, if Brian was willing to testify to the contents of the letter, as counsel stated, he would have been willing to sign an affidavit attesting to the same." "[I]t would have required little additional effort on the part of post-conviction counsel to obtain

an affidavit, as he had already taken the trouble to meet with Brian." This is mere conjecture. The absence of an affidavit from Brian does not alone give rise to the presumption that Moore could have obtained an affidavit but failed to do so. On the contrary, "a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241. Although defendant urges us to infer a mistake on the part of counsel, the law requires us to presume competence.

The fact Moore did not produce an affidavit sworn to by Brian is insufficient to overcome the presumption raised by Moore's 651(c) certificate that defendant received the required representation by Moore. 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 Moore's filing of his Rule 651(c) certificate is not rebutted by the record. We must give effect to Moore's representation in his certificate that he complied with Rule 651(c). The circuit court did not err in dismissing the supplements to defendant's successive postconviction petition and we affirm the circuit court's judgment.

Affirmed.