No. 1-09-2660

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
MAY 6, 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. 95 CR 25382
	)	
RONALD EDDMONDS,	)	Honorable
	)	Steven Goebel,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

Held: Where post-conviction counsel complied with Rule 651(c) and provided defendant effective assistance, the trial court's judgment was affirmed; where one of defendant's convictions for murder violated the one-act, one-crime doctrine, the conviction was vacated; and where defendant was entitled to an additional day of presentence custody credit, the mittimus was modified.

Defendant Ronald Eddmonds appeals from the second-stage dismissal of his *pro se* petition for relief under the Post-

Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2008). On appeal, defendant contends that his appointed post-conviction counsel did not comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to amend his petition to adequately present his claim of ineffective assistance of trial counsel. Defendant also asserts that the mittimus should be corrected to reflect one conviction for first degree murder, and an additional two days of sentencing credit for a total of 1,050 days. We affirm as modified.

Following a jury trial, defendant was convicted of first degree murder in connection with the shooting death of Dwayne Green near 918 West Sunnyside Avenue in Chicago on July 28, 1995. Codefendants Jirod Harris and Andre Williams were charged along with defendant, but neither were codefendants at his trial or were a party to this appeal. Defendant was sentenced to 50 years' imprisonment for the murder.

As relevant to this appeal, the evidence showed that during the early morning hours of the date of July 28, 1995, Angelique Pickett heard two gunshots, observed that Green was shot, but did not see the shooter. After responding to the incident, police lifted two fingerprints from a bicycle found at the crime scene, which matched defendant. When Detectives James Gildea and Steven Schorsch arrested defendant on August 11, 1995, at the Skokie courthouse, defendant's attorney told defendant not to make any

statements outside of his presence. After defendant was taken to the police station, Gildea and Schorsch told defendant that he was being held for the investigation of the shooting of Green, and they had his name from witnessess at the scene of the crime and his fingerprints on a bicycle found at the scene. Despite the advice given to defendant by his attorney, defendant told police that when Harris aimed his gun at three people, defendant took out his gun to support Harris. Harris fired his weapon, and, although defendant attempted to fire his weapon, it did not discharge. Defendant dropped the gun and attempted to flee on his bicycle, but the bicycle also failed to operate, and defendant fled on foot.

On August 12, 1995, Sam Barksdale, who was near the scene where the shooting occurred but did not see who shot Green, identified defendant in a police line-up as the person on a bicycle whom he saw reach behind his back as though he was getting a gun, a couple of minutes before the shooting began. Following trial, the jury found defendant guilty of first degree murder, and he was sentenced to 50 years' imprisonment.

On direct appeal, we affirmed the trial court's judgment. *People v. Eddmonds*, No. 1-98-2927 (2001) (unpublished order under Supreme Court Rule 23).

In March 2001, defendant filed an approximately 90-page *pro se* post-conviction petition, alleging, in pertinent part, that

trial counsel was ineffective for failing to file a motion to quash arrest where there was no probable cause for his arrest. On August 9, 2001, the trial court appointed the public defender to represent defendant in the post-conviction proceedings. On January 3, 2002, the State filed a motion to dismiss defendant's petition, alleging that *res judicata* applied to defendant's allegations, and that his ineffective assistance of counsel claims were conclusory without any facts to support them.

On October 1, 2003, appointed counsel filed a response to the State's motion to dismiss, alleging that *res judicata* did not apply and defendant's petition was not merely conclusory where he supported each of his claims. On July 8, 2005, defendant filed a *pro se* document entitled "Motion to Respond to State's Motion to Dismiss," where he withdrew four of the claims initially alleged in his petition. Defendant also alleged that *res judicata* and waiver did not apply to his remaining claims because appellate counsel did not raise these allegations on appeal. In September 2005, defendant filed a *pro se* "Motion to Supplement Post-Conviction Petition," again alleging that police did not have probable cause to arrest him. On December 1, 2005, the State filed a reply to defendant's response to its motion to dismiss.

On October 15, 2008, post-conviction counsel filed a certificate pursuant to Rule 651(c), stating that he communicated with defendant by letter and telephone to ascertain his claims of

a deprivation of constitutional rights, examined defendant's trial and sentencing transcripts, examined his petition under the Act, and found that it adequately presented the issues. Counsel declared that a supplemental petition would not be presented.

On April 30, 2009, the State filed a supplemental motion to dismiss, incorporating its prior motions to dismiss, and concluding that none of the allegations contained in defendant's petition provided the basis for a substantial showing of a constitutional violation. The circuit court heard arguments on the motion to dismiss on May 13, 2009, and post-conviction counsel maintained that trial counsel was ineffective for failing to file a motion to quash arrest where there was no probable cause to arrest defendant. Counsel alleged that the only evidence police had were defendant's fingerprints found on a bicycle near the scene of the shooting. On August 27, 2009, the circuit court granted the State's motion to dismiss and dismissed defendant's petition. In doing so, the court found that there was probable cause to arrest defendant, and trial counsel's decision not to file a motion to quash arrest was trial strategy.

On appeal, defendant contends that his post-conviction counsel provided unreasonable assistance in violation of Rule 651(c). He specifically maintains that counsel failed to amend his post-conviction petition to adequately present his claim that trial counsel was ineffective for failing to file a motion to

quash arrest where there was no probable cause for his arrest. We review the court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

Section 122-4 of the Act provides for the appointment of counsel. 725 ILCS 5/122-4 (West 2008). The right to post-conviction counsel is statutory, not constitutional (People v. Flores, 153 Ill. 2d 264, 276 (1992)), and post-conviction petitioners are only entitled to a reasonable level of assistance (*People v. Perkins*, 229 Ill. 2d 34, 42 (2007)). The reasonableness of post-conviction counsel's assistance 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 post-conviction counsel (1) consulted with defendant to ascertain his contentions of any constitutional 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 post-conviction petitioner received the required representation by counsel during second-stage proceedings. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009).

Here, post-conviction counsel filed a Rule 651(c) certificate. In the certificate, counsel indicated that he communicated with defendant by letter and telephone to ascertain his claims of a deprivation of constitutional rights, and examined defendant's trial and sentencing transcripts. Counsel further examined defendant's petition and declared that it adequately presented the issues, and thus a supplemental petition was unnecessary. The assertions made in counsel's Rule 651(c) certificate are not contradicted by the record (*Perkins*, 229 Ill. 2d at 52), and counsel was not required to amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)).

We reject defendant's contention that his appointed post-conviction counsel failed to satisfy the third requirement of Rule 651(c), *i.e.*, that counsel make any amendments to the petition that are necessary for an adequate presentation of defendant's contentions. Defendant specifically maintains that counsel failed to shape his claim into proper legal form as it was almost 90 pages long and difficult to follow, and failed to provide the necessary evidentiary support for his claim by attaching his arrest report. As noted above, there is no requirement that post-conviction counsel must amend a petitioner's *pro se* post-conviction petition (*People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991)), and fulfillment of the

third obligation does not require counsel to advance frivolous claims (*People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)).

Moreover, we find that there are no facts that exist in the record that compel a conclusion that post-conviction counsel's decision not to amend defendant's petition was the product of unreasonable assistance because he did not shape the petition into proper legal form. On the contrary, a review of defendant's *pro se* petitions demonstrate that defendant adequately framed his claim that trial counsel was ineffective for failing to file a motion to quash arrest on the grounds that there was no probable cause to arrest him. He alleged that he was denied effective assistance under the sixth amendment due to counsel's failure to file a motion to quash arrest, and, in support of his claim, defendant cited to legal authority and the trial record throughout the petitions. Defendant maintained in his petitions that the only evidence known by police at the time of his arrest was the fingerprint contained on the bicycle, and no evidence was presented as to how the bicycle arrived at that location. Furthermore, defendant contended that no witness made a positive identification of him prior to his arrest. Where defendant adequately framed his claims of ineffective assistance, post-conviction counsel was not required to file an amended petition.

Furthermore, we disagree with defendant's contention that he was denied a reasonable level of assistance by post-conviction

counsel because counsel did not provide evidentiary support for his claim by attaching his arrest report to the petition. Defendant states that at the very least the arrest report would have shown who Gildea and Schorsch talked to before his arrest, and even if it did not, the report would bolster his argument that trial counsel should have filed a motion to quash arrest since there was no probable cause to arrest him. We initially note that there is a presumption that counsel attempted to obtain documentation but was unable to do so. *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004). More importantly, this presumption is not rebutted here because defendant's claim is based on speculation as to what information the report might contain. Even without the police report, the record shows that police had probable cause to arrest defendant.

Defendant next maintains, and the State concedes, that this court should vacate one of his convictions for murder because it violates the one-act, one-crime rule.

The one-act, one-crime doctrine prohibits multiple convictions when the convictions are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). When multiple murder convictions are entered for the same act, only the conviction for the most serious offense should be reflected

in the mittimus, and convictions on the less serious charges must be vacated. *People v. Cardona*, 158 Ill. 2d 403, 411 (1994).

Here, the mittimus shows that the trial court found defendant guilty of two counts of murder, *i.e.*, intentional murder (count 1) and knowing murder (count 2), based on the shooting death of Green. Because there was only one murder victim in this case, the less serious offense of knowing murder should have merged with the intentional murder, reflecting one conviction of first degree murder. See *People v. Braboy*, 393 Ill. App. 3d 100, 107 (2009) (when a defendant is convicted of murder based on charges alleging intentional, knowing, and felony murder, the defendant is presumed to be convicted of the most serious offense of intentional murder). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), to reverse, affirm, or modify the judgment from which the appeal is taken, we vacate defendant's conviction for knowing murder (count 2).

Defendant finally maintains that the mittimus must be amended to reflect two more days of presentence custody credit. The record establishes that defendant was arrested on August 11, 1995, and sentenced on June 25, 1998. Defendant claims the mittimus incorrectly awards defendant only 1,048 days of presentence custody credit. Defendant specifically maintains that the mittimus must be amended to reflect a total of 1,050

days of credit against his sentence, including the day of sentencing. The State asserts that defendant is entitled to 1,049 days, excluding the day of sentencing. We agree with the State.

A reviewing court may correct the mittimus at any time. *People v. Quintana*, 332 Ill. App. 3d 96, 110 (2002). The right to receive *per diem* credit is mandatory, and normal waiver rules do not apply. *People v. Williams*, 328 Ill. App. 3d 879, 887 (2002). A defendant is statutorily entitled to credit for all "time spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2010); *People v. Latona*, 184 Ill. 2d 260, 270 (1998). A defendant held in custody for any part of a day should be given credit against his sentence for that day. *People v. Smith*, 258 Ill. App. 3d 261, 267 (1994). Therefore, we award defendant presentence custody credit from August 11, 1995, through June 24, 1998. However, we deny credit for the date of sentencing on June 25, 1998, because the supreme court, during the pendency of this appeal, held that the day of sentencing, as evidenced by the issuance of the mittimus, is not to be counted as a day of presentence custody. *People v. Williams*, 239 Ill. 2d 503, 510 (2011).

Accordingly, we vacate the judgment entered on defendant's conviction of knowing murder (count 2); order the clerk of the

court to correct the mittimus to reflect a single conviction for murder in violation of section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 1994)); amend the mittimus to award 1,049 days of presentence custody credit; and affirm the judgment of the trial court in all other respects.

Affirmed in part; vacated in part; mittimus corrected.