

No. 1-09-3489

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. 98 CR 16874
)	
DARRYL FLEMING,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Post-conviction counsel's certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984) was not deficient, and the presumption that counsel fulfilled the duties imposed by the rule is not rebutted by the record.

¶ 2 Defendant Darryl Fleming 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 2002)). He contends that the dismissal must be reversed and his cause remanded because the record does not contain a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984) indicating that post-conviction counsel reviewed all of the *pro se* documents which were

incorporated into his original post-conviction petition, and the record does not otherwise show that post-conviction counsel complied with the requirements of that rule.

¶ 3 Following joint, but severed, proceedings in 2000, defendant and codefendant, Josh Cole, were found guilty of first degree murder and sentenced to respective terms of 45 and 40 years' imprisonment. That judgment was affirmed on direct appeal (*People v. Fleming*, Nos. 1-00-2628 & 1-01-0146 (cons.) (2002) (unpublished order under Supreme Court Rule 23)), and defendant's petition for leave to appeal to the Illinois Supreme Court was denied on October 2, 2002 (*People v. Fleming*, 201 Ill. 2d 585 (2002)).

¶ 4 On June 27, 2003, defendant filed a *pro se* post-conviction petition alleging that his sixth amendment right to counsel was violated because he was questioned by police despite his request for counsel, his fourth amendment right to be free from unreasonable searches and seizures was violated because he was illegally detained at the police station for 27 hours under suspicion of murder, and ineffective assistance of trial and appellate counsel for failing to raise these claims. On July 1, 2003, the circuit court appointed the office of the public defender to represent defendant.

¶ 5 Meanwhile, on July 16, 2003, defendant filed a supplemental *pro se* post-conviction petition raising two claims of ineffective assistance of trial and appellate counsel "in addition to the original pleadings." No further action was taken until February 8, 2005, when an assistant public defender advised the court that she had been assigned to the matter and had read the transcripts, but had a few issues to "flush out with my client."

¶ 6 After various continuances, another assistant public defender appeared on defendant's behalf on May 9, 2007, and he continued to represent defendant through the remainder of the post-conviction proceedings. On May 22, 2008, counsel filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating as follows:

"I have consulted with petitioner, Darryl Fleming, by letter and phone to ascertain his contentions of deprivation of constitutional rights.

I have examined the Report of Proceedings of the trial concerning Indictment Number 98 CR 16874-01 of which trial was heard by the Honorable Marcus Salone.

I have examined petitioner's *Pro Se* Petition for Post-Conviction Relief and as it adequately presents his claim of deprivation of constitutional rights there is nothing that can be added by an amended or supplemental petition."

¶ 7 On June 17, 2008, defendant filed a *pro se* "motion for ineffective assistance of [appellate] counsel for failure to present and preserve issues," which raised 15 additional claims and requested, as relief, that the court allow these claims to be reformulated and supplemented to his pending post-conviction petition. In his supporting affidavit, dated June 7, 2008, defendant stated that on June 3, 2008, he received a letter from post-conviction counsel "that he was going to file a 651(c) certificate upon my next court date, and that there is no need to supplement my *pro se* filings." The following day, he spoke to post-conviction counsel on the telephone about his claim that appellate counsel was ineffective "for not raising my issues on direct appeal," and post-conviction counsel explained that "he was not able to raise the aforesaid issues, because of the application of *Strickland v. Washington*, and direct appeal rules are different from Post-Conviction rules, *** those issues should have been raised on direct appeal."

¶ 8 On July 8, 2008, defendant filed an amended *pro se* motion claiming ineffective assistance of appellate counsel, and that post-conviction counsel "refused to raise requested issues in his petition," repeated 14 of the 15 claims raised in his initial *pro se* motion and added a new claim. As before, defendant asked the court to allow these claims to be supplemented to his

post-conviction petition, and he attached a copy of his affidavit, dated June 7, 2008, from the initial *pro se* motion.

¶ 9 On September 25, 2008, the State requested an extension of time to file its motion to dismiss defendant's post-conviction petition, and allow post-conviction counsel to review defendant's *pro se* motion claiming ineffective assistance of appellate counsel, "which we have just brought to counsel's attention since filing the 651-C," and "determine whether [counsel] wants to supplement it or resolve it." The circuit court granted the State's request and continued the matter to November 13, 2008.

¶ 10 On the continued date, the State expressed its concern about post-conviction counsel's Rule 651(c) certificate because it only referenced defendant's original *pro se* post-conviction petition, and defendant had filed a supplemental *pro se* post-conviction petition in July 2003 and a *pro se* motion claiming ineffective assistance of appellate counsel in June 2008. When the State advised the court that it was uncertain as to whether leave to file these two subsequent matters was granted, the court stated that it was granting leave to file them and a revised Rule 651(c) certificate from post-conviction counsel.

¶ 11 On February 1, 2009, post-conviction counsel tendered to the court, a revised Rule 651(c) certificate, "which encompass[e]d the substitute pleadings filed by the petitioner." The State acknowledged its receipt of the revised Rule 651(c) certificate, which covered "everything of substance." In his revised certificate, post-conviction counsel stated as follows:

"I have consulted with petitioner, Darryl Fleming, by letter and phone to ascertain his contentions of deprivation of constitutional rights.

I have examined the Report of Proceedings of the trial concerning Indictment Number 98 CR 16874-01 of which trial was heard by the Honorable Marcus Salone.

I have examined petitioner's *Pro Se* Petition for Post-Conviction Relief, along with his Supplemental Petition; and as it adequately presents his claim of deprivation of constitutional rights there is nothing that can be added by an amended or supplemental petition."

¶ 12 On August 27, 2009, the State filed a motion to dismiss defendant's post-conviction petition. Following a hearing, the circuit court granted the State's motion, finding that defendant's claims were either not cognizable under the Act, or otherwise barred by waiver and *res judicata*.

¶ 13 In this appeal, defendant contends that the second-stage dismissal of his post-conviction petition must be reversed and his cause remanded because the record fails to affirmatively show that postconviction counsel complied with the requirements of Rule 651(c). Defendant argues that the certificate is deficient because post-conviction counsel never certified that he made the necessary amendments to the two *pro se* motions claiming ineffective assistance of counsel, "which the circuit court incorporated into [defendant's] post-conviction petition," or that the motions adequately presented [his] contentions as they were originally drafted. He also claims that the record does not indicate that post-conviction counsel followed the dictates of Rule 651(c) with regard to these *pro se* motions for ineffective assistance of counsel. After *de novo* review (*People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007)), we find no cause for reversal.

¶ 14 The right to post-conviction counsel is statutory (725 ILCS 5/122-4 (West 2000)), and defendants are only entitled to a reasonable level of assistance. *Suarez*, 224 Ill. 2d at 42. To ensure that level of assistance is provided, Rule 651(c) imposes three duties on post-conviction counsel. *Suarez*, 224 Ill. 2d at 42. Under that rule, the record or the filed certificate must show that post-conviction counsel consulted with defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights, examined the trial record, and made amendments

to the *pro se* petition which were necessary for an adequate presentation of defendant's contentions. *Suarez*, 224 Ill. 2d at 42.

¶ 15 Here, post-conviction counsel initially filed a Rule 651(c) certificate stating that he consulted with defendant by letter and phone to ascertain defendant's contentions of deprivation of constitutional rights, examined the trial transcript, and determined that defendant's constitutional claims were adequately presented in the *pro se* post-conviction petition. Post-conviction counsel also filed a revised Rule 651(c) certificate, which, he represented to the court, "encompass[ed] the substitute pleadings filed by the petitioner." In his revised certificate, post-conviction counsel stated that he had consulted with defendant by letter and phone to ascertain his contentions, examined the trial transcript, and determined that defendant's constitutional claims were adequately presented in the original and supplemental *pro se* petitions.

¶ 16 Where, as here, a certificate in accordance with Rule 651(c) is filed, "the presumption exists that petitioner received the representation Rule 651(c) requires a postconviction petitioner receive during second-stage proceedings." *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). To overcome this presumption, defendant must demonstrate that post-conviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 17 In *Jones*, 2011 IL App (1st) 092529, ¶ 24, where a claim similar to that raised by defendant was made, this court found:

"We find no authority for the defendant's assertion in his brief that because the certificate filed pursuant to Rule 651(c) did not mention all of the *pro se* petitions filed by the defendant, it follows that postconviction 'counsel failed to review all of [defendant's] *pro se* post-conviction claims.' [Citation.] There is

nothing in Rule 651(c) that suggests the certificate is intended to be a comprehensive recounting of all of postconviction counsel's efforts. Nor does the defendant point to one of the duties imposed by Rule 651(c) that postconviction counsel failed to fulfill in order to undermine the presumption of compliance. [Citation.]"

¶ 18 As in *Jones*, defendant here does not argue before this court that a substantial question of a violation of his constitutional rights was raised in any of the *pro se* documents not mentioned in the revised Rule 651(c) certificate, and this fact alone is fatal to defendant's claim that post-conviction counsel rendered unreasonable assistance. *Jones*, 2011 IL App (1st) 092529, ¶ 25; accord *Mendoza*, 402 Ill. App. 3d at 813 (if the presumption that Rule 651(c) was satisfied exists, a review of the reasonableness of counsel's efforts is foreclosed).

¶ 19 The State asserts in its brief that defendant's June 7, 2008 affidavit, attached to both his *pro se* motions claiming ineffective assistance of counsel, "unequivocally establishes that defendant spoke with counsel about the claims raised in his motions and that counsel explained to defendant why each and every one of them failed to present a viable constitutional claim suitable for post-conviction relief." Logically, however, defendant's averment, in his June 7, 2008 affidavit, that he spoke to post-conviction counsel on the telephone about his claim that appellate counsel was ineffective "for not raising my issues on direct appeal," cannot establish unequivocally that post-conviction counsel spoke to defendant about claims in motions yet to be filed. Conversely, the fact that defendant does not indicate in his affidavit that post-conviction counsel communicated with him about the contents of the two *pro se* motions for ineffective assistance of counsel, is insufficient to overcome the presumption arising from post-conviction counsel's revised Rule 651(c) certificate, which "encompasse[d] the substitute pleadings filed by the petitioner."

¶ 20 Moreover, we are unpersuaded that *People v. Bashaw*, 361 Ill. App. 3d 963 (2005), relied on by defendant, requires a different result. In *Bashaw*, 361 Ill. App. 3d at 967-69, the reviewing court found that post-conviction counsel's Rule 651(c) certificate was deficient because counsel certified that she reviewed the record of proceedings "on appeal," rather than the record of proceedings "at trial" as required by the rule, and counsel's deference to defendant's decision to stand on his *pro se* petition was not an appropriate substitute for counsel's obligation to make any necessary amendments for an adequate presentation of the claims in defendant's *pro se* petition. Here, unlike *Bashaw*, post-conviction counsel stated in his revised Rule 651(c) certificate that he had reviewed the *trial* record, consulted with defendant about his constitutional claims and determined that they were adequately presented in defendant's *pro se* petitions. Although the circuit court gave defendant leave to file his two *pro se* motions for ineffective assistance of counsel, we will not presume that post-conviction counsel failed to read, consider, or discuss the contents of defendant's repetitive *pro se* pleadings "simply because counsel failed to mention them explicitly in the Rule 651(c) certificate." *Jones*, 2011 IL App (1st) 092529, ¶ 26. Ultimately, we discern no deficiency in the revised Rule 651(c) certificate filed by post-conviction counsel, and find that defendant has not overcome the presumption that post-conviction counsel fulfilled the duties imposed upon him by the rule.

¶ 21 For the reasons stated, we affirm the second-stage dismissal of defendant's post-conviction petition.

¶ 22 Affirmed.