

No. 1-09-1889

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. 95 CR 32084
)	
LARRY FRAZIER,)	Honorable
)	Brian Flaherty
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to identify sufficient facts in the record to rebut the presumption, created by the filing of a Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate that defendant was afforded the reasonable assistance of postconviction counsel, despite defendant's contention that counsel should have amended defendant's *pro se* petition to support his claim of ineffective assistance of trial counsel for the failure to file a motion to reconsider defendant's sentence.

¶ 2 Defendant Larry Fraizer appeals from the dismissal, on the State's motion, of his petition for postconviction relief. On appeal, defendant does not challenge the trial court's determination that his petition failed to make a substantial showing of a constitutional violation. Rather, defendant contends solely that remand is required because he was denied the reasonable assistance of counsel required by Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We affirm.

¶ 3 The facts of this case are adequately set out in our order affirming defendant's conviction. See *People v. Frazier*, No. 1-99-3820 (2001) (unpublished order under Supreme Court Rule 23). Accordingly, we set forth only those facts necessary for an understanding of this appeal. Following a jury trial, defendant was found guilty of home invasion and residential burglary. The trial court "merged" the counts and sentenced defendant to an extended term of 60 years' incarceration based on the victim being over the age of 60.

¶ 4 Evidence at trial showed that during the course of a burglary, defendant discovered the victim's handgun and used it to threaten her. The victim, fearing for her life, struggled with defendant, the weapon discharged, and defendant was shot. The victim ran outside and encountered two police officers, who arrested defendant still inside the victim's apartment suffering from a gunshot wound to the chest. At sentencing, the trial court noted defendant's extensive criminal background including possession of a stolen motor vehicle, armed robbery, and four additional robberies. The trial court also noted that defendant committed this offense while on parole and only 11 days after being released from prison.

¶ 5 On direct appeal, defendant did not challenge of the sufficiency of the evidence, but contended that his sentence was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) because the age of the victim had not been submitted to the jury as an element of the offense. This court affirmed defendant's sentence, finding that the error was harmless because even if the issue had been submitted to the jury there was no doubt that the victim was over the age of 60. *Frazier*, No. 1-99-3820, order at 13. During the direct appeal, defendant submitted a supplemental *pro se* brief containing 28 separate grounds for relief. This court ultimately struck that pleading, however, finding that defendant had no right to both self-representation and the assistance of counsel.

¶ 6 In 2002, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-

1-09-1889

Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)). The trial court docketed the petition for further proceedings and appointed counsel to assist defendant. Over the next several years defendant filed numerous *pro se* amendments and motions to cite additional authority.

¶ 7 In 2009, appointed counsel filed a certificate in accordance with Rule 651(c). Counsel did not amend the *pro se* pleadings. The State subsequently moved to dismiss the petition, and the trial court granted the State's motion. Defendant timely appealed.

¶ 8 Defendant contends that we must remand this cause for further proceedings because postconviction counsel failed to provide a reasonable level of assistance. Defendant does not dispute that, as the trial court held, his petition failed to make a substantial showing of ineffective assistance of trial counsel. However, defendant argues that his petition could have met that standard if postconviction counsel had amended the claims to properly allege ineffective assistance based on the failure to file a motion to reconsider defendant's sentence. Defendant argues that postconviction counsel should have amended the petition with the grounds that should have been alleged in that petition. On appeal, defendant does not identify those grounds. The State responds that postconviction counsel was not required to amend the petition to expand upon a non-meritorious claim.

¶ 9 It is well established that there is no constitutional right to the assistance of counsel during postconviction proceedings. See *People v. Vasquez*, 356 Ill. App. 3d 420, 422-23 (2005). Rather the right to counsel provided for by the statute "is a matter of legislative grace and favor." *People v. Ward*, 124 Ill. App. 3d 974, 978 (1984); see also *Vasquez*, 356 Ill. App 3d at 423. A defendant is entitled only to the level of assistance provided for in the Act, a reasonable level of assistance. See *People v. Jones*, 2011 IL App (1st) 092529, ¶21, quoting *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 10 Supreme Court Rule 651(c) sets forth the minimum requirements for appointed counsel

under the Act. See *Jones*, 2011 IL App (1st) 092529, ¶20. Counsel must (1) consult with the petitioner to ascertain his contentions of error; (2) examine the record of the proceeding of the original trial; (3) make any amendments to the *pro se* petition that are necessary to adequately present the petitioner's contentions. See *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Rule 651(c) also permits the filing of a certificate from a petitioner's attorney that these requirements have been met. If such a certificate is filed, it gives rise to a presumption that postconviction counsel has provided reasonable assistance during second-stage proceedings under the Act. *Jones*, 2011 IL App (1st) 092529, ¶23.

¶ 11 In the case before us, postconviction counsel filed a certificate pursuant to Rule 651(c). The certificate states that postconviction counsel has complied with the three requirements of Rule 651(c), and defendant does not contend that the certificate is in some way inadequate. Rather, defendant contends that, despite the certificate, the record demonstrates that postconviction counsel failed to make the appropriate amendments to the petition. Accordingly, it is defendant's burden to overcome the presumption by demonstrating counsel's failure to substantially comply with the duties imposed by Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶23.

¶ 12 Defendant relies primarily on *People v. Jennings*, 345 Ill. App. 3d 265 (2003) to support his claim that postconviction counsel failed to comply with Rule 651(c). In *Jennings*, the fourth district of this court found that the defendant had not been accorded the reasonable assistance required by the Act and remanded for further proceedings to allow the defendant to replead with the assistance of counsel. See *Jennings*, 345 Ill. App. 3d at 275. The court found that among counsel's deficiencies was the failure to amend the defendant's claim of ineffective assistance of trial counsel for failure to file a postplea motion to reconsider his sentence. *Id.* at 272. The *Jennings* court noted that "[o]ur supreme court has held that to merit an evidentiary hearing on a

postconviction claim that trial counsel provided ineffective assistance by failing to perfect an appeal, a defendant is required to provide 'some explanation' of the grounds that could have been raised in the postplea motion." *Id.*, quoting *People v. Edwards*, 197 Ill. 2d 239, 258 (2001). The court went on to identify no fewer than seven factors trial counsel could have included in such a postplea motion. *Id.* at 274.

¶ 13 Defendant argues that his case is analogous to *Jennings*. However, defendant's argument overlooks two crucial distinctions. First and foremost, defendant fails to recognize the significance of postconviction counsel's Rule 651(c) certificate. In *Jennings*, postconviction counsel failed to file any certificate, and the burden was therefore on the State to show that the record demonstrated compliance with the rule. See *Jennings*, 345 Ill. App. 3d at 271, citing *People v. Carter*, 223 Ill. App. 3d 957, 962 (1992). Here, however, there is no dispute that a valid Rule 651(c) certificate was filed, and, accordingly, defendant bears the burden of demonstrating counsel's failure to comply. *Jones*, 2011 IL App (1st) 092529, ¶23.

¶ 14 Second, unlike the defendant in *Jennings*, defendant has provided this court with nothing more than speculation and conjecture to support his contention of error. In *Jennings*, the court, presumably with the assistance of the defendant's brief, was able to identify seven factors that the trial court was alleged to have overlooked in sentencing. *Jennings*, 345 Ill. App. 3d at 274. Here, defendant argues that postconviction counsel was ineffective for failing to amend his petition to add arguments that could have been raised in a motion to reconsider his sentence. Defendant, has not, however, identified even a single argument that he would have added to such an amended petition. We are merely left to speculate about the allegedly missing grounds. It is not the role of this court to scour the record looking for reasons to reverse. The presumption created by the Rule 651(c) certificate clearly places the burden on defendant to show noncompliance with the rule.

1-09-1889

¶ 15 Therefore, we conclude that defendant has failed to meet his burden of overcoming the presumption of compliance created by postconviction counsel's Rule 651(c) certificate.

Accordingly, we affirm the order of the trial court dismissing defendant's postconviction petition.

¶ 16 Affirmed.