2011 IL App (1st) 092108-U

SIXTH DIVISION
September 2, 2011

No. 1–09–2108

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 26947
	)	
DEMOND COLE,	)	Honorable
	)	William G. Lacy,
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

¶ 1 ***Held:*** Decision of circuit court affirmed where defendant raised an improper freestanding claim of unreasonable assistance and Supreme Court Rule 651 did not apply to counsel-prepared petition for leave to appeal.

¶ 2 Following a jury trial, defendant Demond Cole was convicted in 2004 of first degree murder and attempted first degree murder and sentenced to consecutive prison terms of 65 and 6 years. We affirmed the judgment on direct appeal. *People v. Cole*, No. 1–04–3133 (2006) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the dismissal of his postconviction petition both initially prepared and later amended by postconviction counsel. He contends that counsel, by not raising a claim of newly-discovered evidence of actual

innocence, failed to (1) provide reasonable assistance and (2) comply with the requirement of Supreme Court Rule 651(c) (eff. Dec. 1, 1984) that counsel make any amendments to the petition necessary to adequately present defendant's claims. The State responds that (1) counsel was not obligated to comply with Rule 651(c) because counsel prepared the initial petition, and (2) a freestanding claim that postconviction counsel rendered unreasonable assistance is not cognizable on appeal from the dismissal or denial of the petition.

¶ 3 Rule 651(c) provides that the record in a postconviction proceeding:

> "shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 4 Our supreme court has held that Rule 651(c) applies "when a defendant who files a *pro se* post-conviction petition is later represented by retained counsel in the post-conviction proceedings," as well as applying to "appointed counsel representing a defendant who originally files a *pro se* post-conviction petition," but that "[b]y its own terms *** the requirements of Rule 651(c) would not have been applicable" where "the initial petition was prepared and filed by counsel." *People v. Richmond*, 188 Ill. 2d 376, 381, 383 (1999). See also *People v. Bennett*, 394 Ill. App. 3d 350, 354 (2009) ("We see no way to interpret the [*Richmond*] court's words as meaning other than that Rule 651(c) is inapplicable in proceedings where counsel filed the petition"), and *People v. Johnson*, 314 Ill. App. 3d 444, 454 (2000) (also following *Richmond* in finding that Rule 651(c) did not apply to counsel-filed initial petition). Rule 651(c) is inapplicable to counsel here because he prepared and filed the initial petition rather than amending a *pro se* petition.

¶ 5 Under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)), counsel has a statutory duty to provide reasonable assistance to the petitioner-defendant, rather than a constitutional duty of effective assistance. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). A claim that postconviction counsel did not render reasonable assistance is not cognizable as a freestanding claim in proceedings under the Act. *People v. Mendoza*, 402 Ill. App. 3d 808, 816-17 (2010). "When considering an appeal from the dismissal of a petitioner's postconviction petition, the appellate court is limited to considering matters that are of a constitutional dimension. [Citation.] The right to reasonable assistance of postconviction counsel is derived from the Act, rather than the Constitution." *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009). With Rule 651(c) inapplicable here, defendant is raising an improper freestanding claim of unreasonable assistance that we shall not consider.

¶ 6 Accordingly, the judgment of the circuit court is affirmed.

¶ 7 Affirmed.