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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 94—CF—610
)	
JAMES E. BLACK,)	Honorable
)	Timothy Q. Sheldon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: Postconviction counsel complied with Rule 651(c); his certificate, though arguably stale, showed that he had examined the record, and he later advised the court that he had discussed with defendant all of his claims (including one that arose after counsel filed the certificate) and that no amended petition was required; a subsequent *pro se* petition did not require additional Rule 651(c) compliance, as it raised issues that defendant and counsel had already discussed.

Defendant, James E. Black, appeals from the second-stage dismissal of his postconviction petition. He claims that the dismissal of his petition must be vacated and the cause remanded for stage-three proceedings, because his postconviction counsel failed to comply with Illinois Supreme

Court Rule 651(c) (eff. Dec. 1. 1984). We determine that compliance with Rule 651(c) was had, and, thus, we affirm.

On November 9, 1995, defendant entered an open plea of guilty to home invasion (720 ILCS 5/12—11(a)(1) (West 1994)). Although evidence of the victims' ages was not presented to the court during the guilty plea proceedings, the court learned at sentencing that the victims were over 60 years old. Based on that fact, the court found that defendant would be sentenced to an extended term. See 730 ILCS 5/5—5—3.2(b)(4)(ii) (West 1994). After evaluating the aggravating and mitigating factors, the court sentenced defendant to 40 years' imprisonment. Defendant moved to reconsider, and the trial court granted the motion, reducing defendant's sentence to 34 years.

Defendant appealed, arguing that his extended-term sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We agreed, vacated his sentence, and remanded the cause for resentencing. *People v. Black*, 327 Ill. App. 3d 662 (2002) (*Black I*). In doing so, we found meritless the State's suggestion that defendant's sentence could be affirmed because he had been convicted in Florida of burglary of a dwelling/occupied structure (see 730 ILCS 5/5—5—3.2(b)(1) (West 1994)). *Id.* at 666. The State petitioned our supreme court for leave to appeal our decision. The supreme court denied the State's petition, but ordered us to vacate our judgment and reconsider our decision in light of *People v. Jackson*, 199 Ill. 2d 286 (2002). After doing so, we determined that defendant's sentence did not violate *Apprendi*, because, when defendant pleaded guilty, he waived his right to challenge his sentence under *Apprendi*. *People v. Black*, No. 2—00—0189, slip op. at 4 (2004) (unpublished order under Supreme Court Rule 23) (*Black II*).

On September 13, 2004, defendant petitioned for postconviction relief, arguing again that his sentence violated *Apprendi*. That is, defendant claimed that his constitutional rights were violated

when “the [trial] court sentenced [him] to offenses not charged in his indictment, submitted to a jury, or proved beyond a reasonable doubt.” In making his argument, defendant also contended that his sentence could not be affirmed on the basis that he was previously convicted of burglarizing a home in Florida, because that home was unoccupied. Thus, the Florida conviction was of a lesser, not greater, class felony than the home invasion that defendant committed in Illinois.

Because no action was taken on defendant’s petition for almost two years, defendant’s petition advanced to stage two of postconviction proceedings, and counsel was appointed to represent defendant. See 725 ILCS 5/122—2.1(b) (West 2008). On March 13, 2007, defendant’s postconviction counsel filed a Rule 651(c) certificate and sought to withdraw, noting the questionable “viability of the claims advanced by the [defendant].” In that motion, postconviction counsel hinted that defendant raised a claim that his trial counsel was ineffective. However, after investigating defendant’s ineffectiveness claim, “[postconviction] counsel believe[d] that [defendant’s] complaint about [trial counsel] cannot support a claim of ineffectiveness as what [trial counsel] did, at most, was to offer an opinion as to what would be an appropriate sentence in this case.” The trial court granted postconviction counsel’s motion to withdraw and appointed another attorney to represent defendant.

On June 13, 2007, the State filed a motion to dismiss, noting that, pursuant to *Jackson*, defendant waived any claim that his sentence violated *Apprendi*. On August 24, 2007, postconviction counsel advised the trial court that he needed additional time to file a Rule 651(c) certificate. Counsel explained that defendant sent counsel a letter raising an issue that counsel needed to research.

On April 3, 2008, defendant’s counsel filed a Rule 651(c) certificate. In that certificate, counsel asserted that he read all of the report of proceedings and the court file, received two written communications from defendant, reviewed defendant’s correspondence with his first postconviction counsel, and reviewed defendant’s *pro se* postconviction petition. Moreover, counsel stated “[t]hat [defendant] has not requested any amendments to the existing pleadings, but has offered certain case law for counsel to consider, and which counsel has not found to be of assistance in considering the issues presented.” Based on all of that, counsel indicated that he “does not expect to submit an amended post-conviction petition in this matter.”

However, on February 25, 2009, counsel told the court that defendant raised an issue that morning that counsel believed constituted a deprivation of a constitutional right. But for the fact that defendant raised that issue, counsel would have moved to withdraw. Counsel asked for time to investigate the issue, noting that counsel would abandon the other issues that defendant raised in his petition.

On May 4, 2009,¹ defendant filed a *pro se* amended postconviction petition. In this petition, defendant claimed that two attorneys who represented him during the trial proceedings were ineffective. More specifically, defendant asserted that trial counsel failed to (1) recognize that defendant was ineligible for an extended-term sentence; (2) raise an *Apprendi* issue; (3) extend to defendant the State’s offer of a 6½-year sentence and then, in an effort to cover up this mistake, told

¹Although the common-law record indicates that defendant’s amended petition was filed on May 4, 2009, counsel represented in court that the petition had not been filed, and, thus, counsel filed it on behalf of defendant on May 6, 2009. When counsel filed it, counsel had not read through the petition.

defendant not to mention the offer to anyone; (4) confer with defendant before withdrawing defendant's initial appeal; (5) verify that defendant's prior Florida conviction was of a lesser, not greater, class felony than defendant's Illinois home-invasion conviction; (6) investigate the severity of defendant's cancer and what effect that had on his ability to plead guilty; (7) act on a conflict of interest; and (8) appeal this court's decision in *Black II*.

On May 6, 2009, defendant's second postconviction counsel moved to withdraw, noting in his written motion that he questioned the "viability of the claims advanced by [defendant]." In making that statement, counsel averred that "counsel and [defendant] have discussed the claims raised in [defendant's] *pro se* petition for postconviction relief." Moreover, counsel stated that defendant "has failed to advise counsel of additional matters or facts which could be incorporated into an amended petition for postconviction relief." Based on counsel's beliefs, defendant expressed a desire to stand on the claims he raised in his original petition regarding his extended-term sentence and the ineffectiveness of counsel. Concerning defendant's ineffective-assistance claim, counsel asserted that "[he] has reviewed the correspondence provided to prior counsel regarding the conduct of [defendant's] trial attorneys [and that] present counsel agrees with prior counsel's analysis and also believes that the information provided does not advance a claim of ineffectiveness of counsel as proposed by [defendant]." Moreover, counsel specified that defendant's claims about a conflict of interest did not warrant appointment of new counsel, as what trial counsel did, at most, was to offer an opinion as to what would be an appropriate sentence in this case.

In court on May 6, 2009, counsel confirmed that he had investigated the new issue that defendant raised previously. After that investigation, counsel found that that issue did not provide counsel with a basis to proceed with an amended petition. The trial court denied counsel's motion

to withdraw, noting that, if it granted the motion, proceedings on defendant's postconviction claims would never end, as each successive attorney appointed would move to withdraw. The court then gave counsel additional time to read through defendant's amended petition. On September 2, 2009, the court granted the State's motion to dismiss. This timely appeal followed. On appeal, defendant argues that his second postconviction counsel failed to comply with Rule 651(c).

Postconviction counsel must provide a "reasonable" level of assistance by complying with Rule 651(c). *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Under Rule 651(c), the record of postconviction proceedings must demonstrate that counsel has "consulted with [the defendant] either by mail or in person to ascertain his contentions of deprivation of constitutional right, 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 [the defendant's] contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984. Postconviction counsel may file a certificate to show compliance with Rule 651(c), but a certificate is not necessary if the record shows such compliance. See *id.*; *People v. Johnson*, 154 Ill. 2d 227, 238 (1993) (counsel's failure to file an affidavit certifying compliance with Rule 651(c) is harmless error if "the record demonstrates that counsel adequately fulfilled his duties as post-conviction counsel"). Because whether counsel complied with Rule 651(c) does not require us to defer to the trial court's reasoning, our review is *de novo*. See *People v. McCreary*, 393 Ill. App. 3d 402, 406 (2009); see also *People v. Robinson*, 324 Ill. App. 3d 553, 556 (2001) (dismissal of a petition without an evidentiary hearing is reviewed *de novo*).

Defendant claims that compliance with Rule 651(c) was not had, because counsel's Rule 651(c) certificate was filed over one year before the hearing on defendant's petition. In the interim, counsel represented to the court that defendant raised an issue that could warrant relief. Thus,

defendant asserts that counsel should have either filed another Rule 651(c) certificate or amended defendant's petition. We disagree.

Here, although we might agree with defendant that the Rule 651(c) certificate was stale, the record nevertheless reveals that counsel adequately fulfilled his responsibilities under Rule 651(c). Specifically, in counsel's original Rule 651(c) certificate, he indicated that he examined the report of proceedings and court file. At the February 25, 2009, court proceedings, which arose after counsel filed his Rule 651(c) certificate, counsel advised the trial court that defendant had alerted counsel to an issue that could warrant relief. Thus, counsel was given time to investigate that issue. After investigating that issue, counsel moved to withdraw. In counsel's motion to withdraw and during the proceedings had when counsel filed that motion, counsel stated that he had investigated all of defendant's postconviction claims and that none of them were viable. As part of this investigation, counsel spoke with defendant about the issues that defendant raised in his original petition. During those discussions, defendant failed to advise counsel about any issue that required an amended petition. Thus, counsel did not file an amended petition. Because counsel was unable to advance a potentially viable issue, he was under no obligation to file an amended petition. See *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991) (“[T]here is no requirement that post-conviction counsel *must* amend a defendant's *pro se* petition.” (Emphasis in original.)).

The fact that counsel did not file a new Rule 651(c) certificate after the trial court denied counsel's motion to withdraw does not alter our view. Nothing in the record indicates that defendant's claims of ineffective assistance delineated in his amended petition were different from those that defendant raised to counsel previously. Rather, an examination of counsel's motion to

withdraw, in addition to defendant's original and amended petitions, reveals that defendant's amended petition raised issues that defendant and counsel had discussed.

Defendant relies on *People v. Johnson*, 338 Ill. App. 3d 1004 (2003). In *Johnson*, postconviction counsel told the trial court that he had spoken to the defendant once on the telephone and did not have any plans to speak to him in person. The record did not contain a reference to any other communication that counsel had with the defendant. As a result, this court held that postconviction counsel failed to satisfy Rule 651(c)'s consultation requirement. We reasoned that, because the record did not reveal what was discussed during the phone conversation, there was no indication that postconviction counsel had consulted with the defendant about his constitutional claims. *Id.* at 1008.

Johnson is distinguishable. Whereas postconviction counsel in *Johnson* did not mention what topic he and the defendant discussed on the telephone, here counsel indicated that he spoke with defendant about the issues that defendant raised in his petitions. Thus, counsel met Rule 651(c)'s consultation requirement, because a discussion of the petitions would necessarily involve a discussion of the allegations of constitutional deprivation set forth in the petitions.

For these reasons, we affirm the judgment of the circuit court of Kane County.

Affirmed.