2012 IL App (1st) 090885-U

SIXTH DIVISION
Rule 23 Order filed March 9, 2012
Modified upon denial of rehearing May 11, 2012

No. 1-09-0885

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
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 98 CR 23095
	)	
CARLTON WATKINS,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice R.E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 ***Held*:** The second-stage dismissal of defendant's *pro se* petition for postconviction relief is affirmed over defendant's contention that postconviction counsel failed to provide him with reasonable assistance under Supreme Court Rule 651(c).

¶ 2 Defendant Carlton Watkins 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 2006)).

He contends that postconviction counsel failed to provide him with reasonable assistance under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel did not amend defendant's *pro se* petition to allege an error apparent on the face of the record that defendant was convicted under a constitutionally impermissible standard. We affirm.

¶ 3 Defendant was charged by grand jury indictment with two counts of first degree murder arising from the August 4, 1998, stabbing death of his girlfriend Waver Edwards. After a 2002 bench trial, defendant was found guilty of first degree murder and sentenced to 32 years' imprisonment. We affirmed that judgment on direct appeal after granting appellate counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738. *People v. Watkins*, No. 1-02-2886 (September 16, 2003) (unpublished order under Supreme Court Rule 23).

¶ 4 On January 29, 2008, defendant filed a *pro se* petition for relief under the Act, section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)) and the Habeas Corpus Act (735 ILCS 5/10-101 *et seq.* (West 2006)). Defendant alleged that his indictment, conviction and sentence were void under *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and *Gerstein v. Pugh*, 420 U.S. 103 (1975), because there was not a timely judicial determination of probable cause. The circuit court did not rule on defendant's petition within 90 days and advanced the petition to second-stage postconviction proceedings, appointing counsel to represent defendant.

¶ 5 At a hearing on July 15, 2008, defendant's postconviction counsel said he had ordered the trial transcript and the court granted counsel a three-month continuance to review it. On October 15, 2008, counsel filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (Ill.

S. Ct. R. 651(c) (eff. Dec. 1, 1984)). In the certificate, counsel averred that he: (1) communicated with defendant to ascertain his claims of deprivations of his constitutional rights; (2) examined defendant's trial and sentencing transcripts; and (3) examined defendant's *pro se* petition for postconviction relief. After examining these materials, counsel averred that defendant's *pro se* petition adequately presented the issues for postconviction relief and that counsel would not file a supplemental petition on defendant's behalf.

¶ 6 The State filed a motion to dismiss defendant's petition on February 1, 2009. The State argued that defendant's petition was untimely filed, not supported by evidence and failed to make a showing of a constitutional violation. The State also argued that defendant failed to meet the requirements of section 2-1401 of the Code because he failed to allege facts previously unknown to the court and to file those claims within two years of his conviction. The State finally argued that defendant was not entitled to *habeas corpus* relief because he failed to present evidence to support his claim that there was not a timely judicial determination of probable cause.

¶ 7 On February 25, 2009, before the court ruled on the State's motion to dismiss, defendant *pro se* filed a supplemental petition to "Re-Word and Clarify the Pending Petition." Defendant alleged that because he had not been indicted within 48 hours of his arrest, his indictment was void and deprived the trial court of personal or subject matter jurisdiction.

¶ 8 The court granted the State's motion to dismiss on March 25, 2009, finding that defendant had not shown a substantial violation of his constitutional rights to merit relief under the Act. The court also found defendant's petition was untimely filed under section 2-1401 of the Code and that he had not shown a violation of his constitutional rights to merit an order for *habeas*

corpus relief.

¶ 9 Defendant appeals, arguing that his postconviction counsel failed to provide reasonable assistance under Rule 651(c) where counsel averred that he reviewed defendant's trial and sentencing transcripts, yet failed to identify and amend defendant's *pro se* petition to allege a structural error apparent on the face of the record that defendant was convicted under a constitutionally impermissible standard. We set out the facts supporting defendant's conviction as necessary to understand the issue raised on appeal.

¶ 10 Defendant was convicted on evidence showing that he stabbed and killed Edwards on August 4, 1998. At trial, Chicago police officer Anthony Szziarski testified that on that date he was dispatched to 1842 South Drake Avenue in Chicago in response to a 911 call that someone had been killed at that location. There, Officer Szziarski saw defendant, covered in blood, standing on the front porch of the house holding a telephone. Defendant placed his hands above his head and said "[m]y girlfriend was killed. She is upstairs. I want to turn myself in." Defendant then directed Officer Szziarski to an upstairs bedroom of the house where Edwards' body was found. Edwards had been stabbed multiple times and her throat was cut. Defendant was arrested and transported to a hospital where he was treated for lacerations on his hands. He was then transported to Area 4 police headquarters where he gave a handwritten statement to Assistant State's Attorney (ASA) Stan Gonsalves.

¶ 11 ASA Gonsalves testified that he advised defendant of his *Miranda* rights and that defendant acknowledged understanding those rights before giving his statement. In the statement, defendant said that he had known Edwards for about six months before the murder

and lived with her at 1842 South Drake Avenue. On August 3, 1998, while defendant was at work, Edwards called him and told him to buy cocaine. After leaving his job at a nursing home, defendant bought five "dime bags" of cocaine and a four-pack of beer. Defendant went home and smoked the cocaine with Edwards. The pair then began to argue. Defendant said Edwards criticized him about his job and his income and told him she did not need him. Defendant tried to fall asleep but Edwards continued to "taunt" him. Defendant said this made him angry.

¶ 12 About 1 a.m. on August 4, 1998, as the pair continued to argue, Edwards retrieved a steak knife and approached defendant. Defendant grabbed the blade of the knife and cut his hand. Defendant said this made him "really mad." He then took the knife from Edwards and stabbed her "in the upper body near her neck." Edwards stumbled backwards and defendant moved toward her with the knife in his hand. Defendant pushed Edwards down onto the floor of the living room and climbed on top of her. Edwards started to scream but defendant covered her mouth with his left hand. Edwards bit defendant's hand. Defendant said he became "enraged and was no longer afraid of [Edwards]. He just wanted to hurt her." Defendant then stabbed Edwards repeatedly in the face. He said that he was stabbing Edwards so hard that the handle of the knife broke, causing him to cut his hand. Defendant retrieved another knife from a nearby table. He then "got on top of [Edwards]," turned her over and stabbed her repeatedly in the back. Defendant said that "even though he kept stabbing and cutting [Edwards, she] was still alive." He then placed the knife against Edwards' throat and cut her neck. Defendant said that after he cut Edwards' neck, he "knew that she was dead."

¶ 13 Defendant then called the police and told them that he had killed his girlfriend. After

calling the police, defendant went downstairs with the phone in his hand. When the police arrived at the scene, defendant told two uniformed officers that he had killed his girlfriend and that her body was in the upstairs portion of the house. The officers transported defendant to St. Anthony's Hospital because defendant's hands were bleeding. After being treated in the hospital for lacerations on his hands, defendant was transported to Area 4 police headquarters.

¶ 14 On cross-examination, ASA Gonsalves denied that defendant told him that he was trying to protect himself from Edwards. Gonsalves said defendant told him that he retrieved a knife because he was mad at Edwards.

¶ 15 Defendant presented his theory of the case through stipulations. The parties stipulated that, if called to the stand, Doctor Radhakrishna Benulapalli would testify that he treated defendant on August 4, 1998, at St. Anthony's Hospital. Benulapalli sutured multiple lacerations on defendant's right and left hands and prescribed medication to defendant for the lacerations. Benulapalli also performed a toxicology test on defendant that showed the presence of cocaine and alcohol in defendant's system.

¶ 16 The parties also stipulated that if called to the stand Doctor Mark Gonzalez would testify that the lacerations on defendant's right hand required surgical treatment as a result of tendon and nerve damage. Gonzalez performed surgery on defendant's right hand on August 15, 1998.

¶ 17 During closing argument, defense counsel argued that defendant was justified in killing Edwards because he was acting in self-defense as evident from defendant's statement that Edwards was the initial aggressor and approached him with a knife. In the alternative, counsel argued that if the court did not find defendant justified in killing Edwards, it should find him

guilty of second-degree murder given the circumstances.

¶ 18 The court found the State proved "each and every element of first degree murder *** beyond a reasonable doubt." In announcing its judgment, the court rejected defendant's self-defense claim and noted that he failed to prove "beyond a preponderance of the evidence" the existence of mitigating factors to reduce the offense to second degree murder.

¶ 19 Based on the court's findings, defendant argues that his postconviction counsel was ineffective for failing to amend defendant's *pro se* petition to allege that defendant was convicted under a constitutionally impermissible standard. Defendant claims that the trial court failed to employ the reasonable doubt standard but, rather, required defendant to prove his innocence beyond a preponderance of the evidence. He maintains that this "structural error" calls for automatic reversal of his conviction and that postconviction counsel should have amended his *pro se* petition to allege this error.

¶ 20 The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 21 The right to postconviction counsel is statutory, not constitutional. 725 ILCS 5/122-4 (West 2006); *Suarez*, 224 Ill. 2d at 42. The Act requires that postconviction counsel provide a reasonable level of assistance to a defendant. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Whether such assistance was reasonable is determined by postconviction counsel's performance of the three duties set forth in Rule 651(c). Rule 651(c) requires that counsel: (1) consult with the defendant to ascertain his contentions of any constitutional deprivations; (2) examine the record of the trial proceedings; and (3) make any amendments to the *pro se* petition

necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Suarez*, 224 Ill. 2d at 42. Postconviction counsel is not required to amend the defendant's *pro se* petition if counsel finds amendments are unnecessary. *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991).

¶ 22 Postconviction counsel may demonstrate compliance with Rule 651(c) by filing a certificate averring that he has fulfilled his duties under the rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. When, as here, counsel files a certificate under the rule, a presumption is created that counsel has complied with the rule. *Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 23 We first address the State's argument that defendant's claim is not a viable free-standing claim that can be raised on appeal because defendant does not attack the sufficiency of the Rule 651(c) certificate. See *People v. Mendoza*, 402 Ill. App. 3d 808, 816-17 (2010) (the defendant's claim was improper on appeal where he made a general claim of unreasonable assistance of counsel but did not allege counsel's failure to comply with Rule 651(c)). We disagree with the State and observe that, here, defendant specifically invoked Rule 651(c) in making his claim of unreasonable assistance of counsel, claiming that his counsel did not adequately amend his petition in compliance with the rule.

¶ 24 Turning to the merits of the appeal, defendant argues that counsel should have amended the *pro se* petition to allege that defendant was convicted under a constitutionally impermissible standard. Counsel's failure to raise this claim does not violate Rule 651(c). Rule 651(c) requires postconviction counsel only to examine " 'as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner.' "

People v. Turner, 187 Ill. 2d 406, 412-13 (1999) (quoting, *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Counsel is not required to either examine the record in search of claims or amend the petition to include claims that are unrelated or unnecessary to properly present the claims raised by the defendant in the *pro se* petition. *Davis*, 156 Ill. 2d at 164-65. Accordingly, postconviction counsel provided reasonable assistance under rule 651(c).

¶ 25 Lastly, we are unpersuaded by defendant's argument that he was convicted under a constitutionally impermissible standard because the trial court shifted the burden of proof and required him to prove beyond a preponderance of the evidence that he acted in self-defense. Here, defendant was charged with two counts of first degree murder under section 9-1 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1 (West 1996)). First degree murder occurs when a person kills another person without lawful justification. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995); 720 ILCS 5/9-1(a) (1996). One of the recognized legal justifications to first degree murder is the affirmative defense of self-defense. *Jeffries*, 164 Ill. 2d at 127. Section 7-1 of the Criminal Code provides that:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1 (West 1996).

¶ 26 At trial, defendant argued that he was justified in killing Edwards because he was acting in self defense. In *Jeffries*, our supreme court instructed:

> "Once an affirmative defense is raised, the State has the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense. [Citation.] Thus, when a murder defendant asserts self-defense, the State must prove *more* than the three elements of first degree murder. The State must also prove that the murder was not carried out in self-defense, and that the defendant's use of force was not legally justified. [Citation.]
>
> After the State establishes the elements of first degree murder in accordance with section 9-1, the trier of fact next addresses the issue of lawful justification. In order to instruct the jury on self-defense, the defendant must establish some evidence of each of the following elements: (1) force was threatened against a person; (2) the person threatened is not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) he actually and subjectively believed a danger existed which required the use of the force applied; and (6) his beliefs were objectively reasonable. [Citations.] If the State negates *any one* of the self-defense elements, the defendant's claim of self-defense must fail. The trier of fact must then find the defendant guilty of either first or second degree murder. Therefore, the defendant's *unreasonable* belief is not necessarily an element the State must disprove in defeating a claim of self-

> defense. Rather, it is only one of the six enumerated factors which the State may choose to attack to rebut a claim of self-defense. Indeed, the State could also defeat a self-defense claim by proving the absence of any threat of force against the defendant, that the defendant was the aggressor, the absence of a danger of imminent harm, or a lack of unlawful force." (Emphasis in original.) *Jeffries*, 164 Ill. 2d at 127-28.

¶ 27 If the State has successfully negated the defendant's claim of self-defense and has proven each of the other elements of first degree murder, then, and only then, may the trier of fact proceed to a determination of second degree murder. *Jeffries*, 164 Ill. 2d at 128-29. To be found guilty of second degree murder, the defendant must prove by a preponderance of the evidence that: (1) at the time of the killing he was acting under a sudden and intense passion resulting from serious provocation by the victim; or (2) at the time of the killing he believed the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in section 7 of the Criminal Code, but his belief was unreasonable. 720 ILCS 5/9-2(a) (West 1996).

¶ 28 It is well-settled that, unless the record demonstrates otherwise, we must presume that a trial judge knows and follows the law. *People v. Primbas*, 404 Ill. App. 3d 297, 302 (2010). This presumption is rebutted only when "the record contains strong affirmative evidence to the contrary." *People v. Howery*, 178 Ill. 2d 1, 32 (1997). The specific question before us is whether the record in this case contains strong affirmative evidence that the trial court incorrectly allocated the burden of proof to defendant. See *Howery*, 178 Ill. 2d at 32-33. After examining

the record as a whole, we cannot say that it does.

¶ 29 The court found as follows:

"THE COURT: Thank you. I have listened to the evidence as presented by both the defense and prosecution and also observed the demeanor of the witnesses while testifying and took in consideration the stipulations that have [been] entered into, and I also have listened to the arguments of the attorneys.

It's my finding after reviewing all the evidence that the State has proved each and every element of first degree murder as alleged in Counts One and Two beyond a reasonable doubt. Now, the defense has alleged an affirmative defense of self-defense.

I find that [there] has been some evidence of self-defense, but also I find that the State – the Defense has not proved beyond a preponderance of the evidence that [defendant's] actions were such that if self-defense did exist as under the statute that his belief would be reasonable or even unreasonable.

Therefore, I find that the Defense has not reached the burden of proving the mitigation factor beyond a preponderance of the evidence, beyond – excuse me – beyond a preponderance of the evidence, so now I must look to the other.

There has been some evidence of sudden intense passion resulting from a serious provocation. Certainly there were certain words that had been said that could be considered provocation, serious provocation; but, again they have not been proven beyond a preponderance by the defense. Therefore, there will be a

finding of first degree murder on Counts One and Two; Counts One and Two will merge."

¶ 30 The trial court's findings can easily be interpreted to have first disposed of defendant's self-defense claim and then turned to the analysis of second degree murder and the preponderance of evidence standard concerning mitigating factors. The record shows the court first found that the State had "proved each and every element of first degree murder" beyond a reasonable doubt. In this case, this finding inherently included a finding that the State had also proved beyond a reasonable doubt that the killing was without lawful justification; *i.e.*, was not in self-defense. The trial court then properly turned its attention to the question of second degree murder and found that defendant had failed to prove either of the two mitigating factors enumerated in the statute "beyond a preponderance of the evidence."

¶ 31 This interpretation of the trial court's comments is bolstered by the court's use of the transitional phrase "therefore," evincing that the court's earlier remarks concerned and led to the conclusion that the offense should not be mitigated to second degree murder. The mere placement of the word "reasonable" in the preceding phrase may simply have been the court's recognition of its previous finding that the State had proven beyond a reasonable doubt that defendant's use of force was not justified. This finding is certainly supported by the evidence. In defendant's own post-arrest statement, he admitted that he had disarmed Edwards and only then did he begin to stab her repeatedly, knock her down, get on top of her, rearm himself when the knife broke, then continue to stab her and ultimately slit her throat. Given this evidence, the court found that there "has been some evidence of self-defense" but properly recognized that it

was Edwards who was initially armed and that once she was disarmed, defendant was no longer in danger of imminent harm nor could he have actually and subjectively believed that he was in danger, requiring the use of force he used. Therefore, the court properly found that other elements of self-defense had been negated, rendering the question of reasonableness irrelevant. As mentioned, absent strong affirmative evidence to the contrary, we presume that the trial judge knows and follows the law. *Primbas*, 404 Ill. App. 3d at 302; *Howery*, 178 Ill. 2d at 32. Here, there was no such evidence to rebut this presumption.

¶ 32 Contrary to defendant's argument, we find this case readily distinguishable from *People v. Kluxdal*, 225 Ill. App. 3d 217 (1991). In *Kluxdal*, we reversed the defendant's murder convictions and remanded the case for a new trial because the trial court applied an improper standard of proof to the evidence of the defendant's insanity. See *Kluxdal*, 225 Ill. App. 3d at 223 (in announcing its judgment the trial court said it " 'was not entirely convinced by clear and convincing evidence that [the defendant] was insane,' " (emphasis omitted) despite that the defendant was only required to prove by a preponderance of the evidence that he was not guilty by reason of insanity). Here, unlike *Kluxdal*, the trial court did not apply a stricter standard of proof to defendant's mitigating evidence of serious provocation and unreasonable belief. Having found that defendant was not convicted under a constitutionally impermissible standard we necessarily reject defendant's related argument that his conviction is void.

¶ 33 For the reasons stated we affirm the order of the circuit court granting the State's motion to dismiss defendant's *pro se* postconviction petition.

¶ 34 Affirmed.