

No. 1-09-3080

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. 00 CR 9922
)	
HOSEA HAYNES,)	Honorable
)	Lawrence W. Terrell,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Where the record shows that post-conviction counsel provided reasonable assistance, the circuit court's second-stage dismissal of defendant's post-conviction petition is affirmed; where the mittimus does not reflect the proper amount of presentence custody credit, we amend the mittimus.

¶ 2 Defendant Hosea Haynes 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 2008). On appeal, defendant asserts that post-conviction counsel provided unreasonable assistance by failing to raise two additional claims to his *pro se* petition. Defendant also asserts that the

mittimus should be amended to reflect 763 days of presentence custody credit. We affirm as modified.

¶ 3 Following a jury trial, defendant was convicted of first degree murder and sentenced to 60 years' imprisonment. The evidence at trial showed that at about 11:40 p.m. on January 12, 1990, defendant and the victim Michael Kelliher were buying beer at a convenience store in Northlake, Illinois. An employee of the store believed that both men were intoxicated and about to fight, but they left the store. The following day, Kelliher's landlord found Kelliher's body and called the police. An autopsy determined that Kelliher was intoxicated when he died as a result of blunt force injuries to the head along with the contributing factor of multiple stab and incise wounds.

¶ 4 Upon hearing of the homicide, Sergeant Norman Nissen recalled that at 5:30 a.m. on January 13, 1990, he drove up to defendant, who was walking on North Avenue, and asked him where he was going. Defendant responded that he was going to see his mother who worked at a gas station. After defendant told Nissen his mother's name, Nissen realized he knew defendant's mother. Nissen drove defendant, who appeared intoxicated, to the gas station and dropped him off.

¶ 5 On January 14, 1990, Nissen spoke with defendant's parents who allowed police to search their apartment. During the search, a pocketknife and a towel with a substance on it were recovered and submitted to the crime lab for analysis. Blood was found on the knife, but in February 1990, the Illinois State police lab was not doing DNA analysis and the blood was stored.

¶ 6 On February 9, 1990, Sergeant Nissen located defendant at a currency exchange, walked up to him, moved him to the side, and asked defendant if he remembered him. Defendant replied, "I knew I shouldn't have picked up this check," and further stated, "I didn't mean to hurt that guy, but he was going to hurt me." Defendant was arrested, but ultimately was released and

not charged.

¶ 7 On September 11, 1998, a DNA analysis was conducted on the knife and its DNA profile matched that of Kelliher's blood. According to Detective Militello, defendant was arrested in Minnesota on November 5, 1998. After waiving his *Miranda* rights, defendant told police that he went to a bar, drank, met Kelliher, and then went with Kelliher to a convenience store. Defendant remembered that Sergeant Nissen gave him a ride to the gas station, but did not recall getting into a fight or hurting Kelliher, nor did he remember what happened after being dropped off at the gas station.

¶ 8 During closing argument, defense counsel argued that no scientific evidence directly linked defendant to the offense and no one placed him at the scene of the crime. Counsel also noted that defendant was extremely intoxicated when he was picked up by Sergeant Nissen, and that Nissen did not see any blood on defendant's clothes. The jury found defendant guilty of first degree murder.

¶ 9 On direct appeal, defendant contended that the trial court erred in denying his motion to suppress statements he made during his 1998 arrest because knowledge of his invocation of his fifth amendment rights during his February 1990 arrest should be imputed to the Northlake police department for his November 1998 arrest for the same crime. We rejected defendant's argument and affirmed his conviction and sentence. *People v. Haynes*, No. 1-00-4151 (2002) (unpublished order under Supreme Court Rule 23).

¶ 10 In 2003, defendant filed a *pro se* post-conviction petition, alleging that police falsely testified that the knife was obtained from defendant's family member, the State's Attorney presented false testimony about how the knife was obtained, trial counsel was ineffective where he obtained an affidavit from defendant's step-brother, Sebron Floyd, who stated that a brown-handled knife, not a white one, was tendered to police, appellate counsel was ineffective for

failing to introduce Floyd's affidavit on direct appeal, and defendant's mittimus should be corrected to reflect truth-in-sentencing. The circuit court advanced the *pro se* petition to the second stage and appointed counsel.

¶ 11 On July 11, 2008, post-conviction counsel filed a supplemental petition alleging several new claims, including that appellate counsel was ineffective for not raising on direct appeal that the jury was given erroneous instructions, defendant's statements made in the currency exchange should have been suppressed, the State's closing argument was not based on the evidence, the State engaged in misconduct during argument, and the Speedy Trial Act barred his prosecution for murder. Post-conviction counsel also filed an addendum to the supplemental petition, a motion to test the untested physical evidence, a motion for the State to disclose all facts regarding its dealings with Sebron Floyd, a motion to search the Illinois State Police's DNA database, and a motion for discovery of all facts the police knew at the time of defendant's trial regarding the DNA evidence used to convict him. Additionally, post-conviction counsel filed a Rule 651(c) certificate, stating that he consulted with defendant, reviewed the record, and made all necessary amendments to the *pro se* petition.

¶ 12 The State thereafter filed a motion to dismiss, which the trial court granted on November 6, 2009. The court, however, corrected defendant's mittimus to reflect 729 days of presentencing credit, and ordered that his sentence should be served consistent with the Truth-in-Sentencing Act.

¶ 13 On appeal defendant contends that his post-conviction counsel failed to provide reasonable assistance because he did not amend his *pro se* petition to add a claim alleging ineffective assistance of trial counsel for failing to raise the affirmative defense of voluntary intoxication and failing to request a second degree murder instruction. Defendant further asserts that post-conviction counsel should have also added a claim that appellate counsel was

ineffective for not raising these claims regarding trial counsel's ineffectiveness on direct appeal. We review the circuit court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 The right to post-conviction counsel is a matter of legislative grace, and a post-conviction petitioner is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), imposes specific duties on post-conviction counsel to ensure he provides that level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Under Rule 651(c), post-conviction counsel is required to: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, (2) examine the record of proceedings from the trial, and (3) amend the defendant's *pro se* petition as necessary to adequately present his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 15 Compliance with Rule 651(c) may be shown by the filing of a certificate representing counsel has fulfilled his duties. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). Once the certificate is filed, the presumption exists that defendant received the required representation during second-stage proceedings. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010).

¶ 16 In this case, post-conviction counsel filed a Rule 651(c) certificate thereby creating a presumption that defendant received the representation required by the rule during second-stage proceedings. *Id.* In addition, post-conviction counsel is not required to amend defendant's *pro se* petition. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). Nevertheless, post-conviction counsel in this case filed a supplemental petition, which contained several new claims not raised in defendant's original *pro se* petition, an addendum to the supplemental petition, and several motions on defendant's behalf. Furthermore, defendant does not dispute that counsel consulted with him and examined the record of the proceedings from the trial. Rather, he contends that

counsel failed to shape his claims into adequate legal form.

¶ 17 However, the record shows, and defendant concedes in his reply brief, that the claims he now raises on appeal are not found in his original *pro se* petition. The supreme court has expressly held that post-conviction counsel has no obligation to address issues that were not raised in the defendant's *pro se* petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). Here, because defendant's claims did not appear in his original *pro se* petition, post-conviction counsel could not reshape nonexistent claims, nor was he required to present them for the first time in a supplemental petition. See *People v. Davis*, 156 Ill. 2d 149, 164 (1993) (stating that "[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.)) We, therefore, conclude that defendant has failed to overcome the presumption that he received the reasonable assistance to which he was entitled at the second stage of proceedings.

¶ 18 Defendant also contends that his mittimus should be amended to reflect the proper amount of time he spent in presentence custody. He initially maintained that his mittimus, which shows that he is entitled to 729 days of presentence custody credit, should be amended to reflect 764 days' credit, a total which reflected an arrest date of November 5, 1998, a sentencing date of December 7, 2000, and included the date of sentencing in its calculation. The State responded, and defendant conceded in his reply brief, that pursuant to the supreme court decision in *People v. Williams*, 239 Ill. 2d 503 (2011), the date of sentencing is excluded from presentencing credit calculations.

¶ 19 The State further maintained, however, that the record indicated two different arrest dates, *i.e.*, November 5 and December 5, 1998. Depending on which date was the date of arrest, the State argued that defendant was entitled to either 733 or 763 days of presentence credit. Defendant continued to assert in his reply brief that the record showed November 5 was the date

of arrest, and we agree. We acknowledge that the indictment and the current mittimus list December 5 as the date of arrest. However, Detective Militello of the Northlake, Illinois Police Department testified that he arrested defendant for the offense at bar pursuant to a warrant in Minnesota on November 5, 1998. Therefore, we find that November 5 was the date of the arrest. See *People v. Peoples*, 155 Ill. 2d 422, 496 (1993) (holding that it is well settled that when there is a conflict between the report of the proceedings and the common law record, the report of proceedings prevails); see also *People v. Allen*, 1 Ill. App. 3d 197, 198-99 (1971) (finding the date of arrest was the date confirmed by the testimony of the arresting officers, and not the date appearing in the mittimus). In so finding, we agree with defendant that he was entitled to 763 days of presentence custody credit.

¶ 20 For the foregoing reasons, we amend defendant's mittimus to reflect 763 days of presentence custody credit, an arrest date of November 5, 1998, and affirm the circuit court's judgment in all other respects.

¶ 21 Affirmed.