

No. 1-10-0390

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. 02 CR 7698
)	
ERIC STROWDER,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Post-conviction counsel provided a reasonable level of assistance and complied with Supreme Court Rule 651(c); judgment affirmed.
- ¶ 2 Defendant Eric Strowder appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He solely contends that post-conviction counsel failed to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984) in that neither her certificate of compliance nor the record shows that she made the required amendments to his *pro se* petition.

¶ 3 This court previously affirmed defendant's 2002 jury conviction for delivery of a controlled substance and his Class X offender sentence of 13 years' imprisonment (*People v. Strowder*, Nos. 1-02-3356, 1-03-0325 cons. (2004) (unpublished order under Supreme Court Rule 23)) over his direct appeal contention that the trial court erred in allowing the indictment to be amended from possession of a controlled substance to delivery of a controlled substance. This court found that the amendment was formal and thus permissible.

¶ 4 On July 14, 2005, defendant filed a *pro se* post-conviction petition alleging that he was denied his sixth amendment (U.S. Const., amend. VI) right to effective assistance of trial counsel, that his sixth amendment right was further violated when the trial court changed the nature of the charge after the indictment had been returned by the grand jury, that he was denied his eighth amendment right (U.S. Const., amend. VIII) against cruel and unusual punishment, and that he was denied his fourteenth amendment right (U.S. Const., amend. XIV) to due process and equal protection. Defendant also alleged violations of his fifth amendment right (U.S. Const., amend. V) "in the due process that was allowed to happen," and his Illinois Constitutional rights of sections 2, 8, and 8.1 (Ill. Const. 1970, art. I, §§2, 8, 8.1). The circuit court summarily dismissed defendant's petition, and, on appeal, this court remanded the cause for second-stage proceedings after finding that the record was unclear as to whether the trial court ruled on defendant's post-conviction petition. *People v. Strowder*, No. 1-05-2807, order at 4-5 (2007) (unpublished order under Supreme Court Rule 23). On remand, defendant was appointed post-conviction counsel.

¶ 5 On May 20, 2009, after several continuances for post-conviction counsel to obtain the record, counsel informed the court that she had an investigator working on the case. She stated that she was trying to find witnesses that defendant told her were material. On the next court date, post-conviction counsel explained that an investigator was still working on the matter, and trying to move it along. The court gave her a short continuance date. When the matter was recalled on that

date, counsel explained that the investigation was moving slowly, but that there had been some progress. Counsel informed the court that the investigator had confirmed that the witnesses they are looking for have moved, but has located a witness, who he was trying to interview. The matter was continued to September 29, 2009, and on that date, counsel told the court that she was trying to get an affidavit signed.

¶ 6 The matter was continued again, and on November 4, 2009, counsel filed a certificate of compliance with Rule 651(c), stating that she consulted with defendant by mail, by telephone, and in person to ascertain his contentions and allegations of deprivation of constitutional rights, that she obtained and examined the report of proceedings of defendant's trial and sentencing, and that she had "prepared a Supplemental petition for Post-Conviction Relief." In the supplemental petition, counsel noted that the supplemental petition augments, supports, and incorporates by reference the previously filed *pro se* petition. Counsel then set forth the procedural history of defendant's case, and alleged that police violated defendant's state and federal constitutional rights.

¶ 7 She further alleged that on the night of the arrest, defendant was with a man named Red, and that they had just walked out of a grocery and liquor store and were crossing the street when two police officers stopped to ask them questions. One of the officers asked defendant if he had ever been locked up, and he said, yes. The officer then asked defendant if he had a gun, and defendant responded that he did not. The officer told him that if he did not give him a gun, he would arrest him. The officer then arrested him. Defendant thought he was arrested for open alcohol and did not learn that he was charged with a narcotics violation until his first court date.

¶ 8 Counsel also added a claim of actual innocence. She alleged that police falsely accused defendant, and planted or attributed evidence to him that was not in his possession. She further alleged that one of the police officers admitted that he did not find any narcotics on defendant and that the funds used in the narcotics undercover transaction had not been inventoried. She

maintained that police violated defendant's constitutional rights, and the evidence obtained was "fruit of the poisonous tree." In support of the actual innocence claim, counsel attached defendant's affidavit in which he attested to the same facts alleged in the supplemental petition regarding his arrest.

¶9 The State filed a motion to dismiss defendant's post-conviction petition asserting that defendant's allegations were insufficient procedurally and substantively, completely without merit, contradicted by the record, unsupported, lacking in the required specificity, and barred by *res judicata* and waiver. The State further alleged that defendant's actual innocence claim was not a freestanding claim, but, rather, was "bootstrapped" to his other claims of ineffective assistance of counsel, police misconduct, and insufficiency of the evidence. The State also noted that even if the actual innocence claim was free-standing, it was insufficient to mandate relief under the Act because defendant failed to show that there was newly discovered evidence.

¶10 On January 26, 2010, the circuit court granted the State's motion to dismiss. In its written order, the court observed that defendant's amendment to the indictment issue was subject to *res judicata* because it had already been raised on direct appeal. The court then noted that defendant's claims that he was denied effective assistance of counsel, equal protection and due process, and was subject to cruel and unusual punishment were entirely conclusory and devoid of any facts, and were waived because they could have been raised on direct appeal. The court also noted that defendant asserted one sentence claims without any basis or supporting evidence, and that his claim that police violated his constitutional rights did not include any explanation or specificity. The court further noted that defendant's allegation that his arrest was unlawful was contradicted by the record, that defendant failed to provide an affidavit from Red, and that his own affidavit was self-serving and insufficient to grant relief. In addition, the court found that defendant failed to present an actual innocence claim with newly discovered evidence, and, in essence, challenged the

sufficiency of the evidence, which is not permitted under the Act. The court thus concluded that defendant failed to make a substantial showing that his constitutional rights were violated and granted the State's motion to dismiss.

¶ 11 On appeal, defendant raises no substantive issue regarding that dismissal, but claims that his post-conviction counsel failed to comply with Rule 651(c). He specifically maintains that counsel failed to make the necessary amendments to his petition to adequately present his *pro se* contentions, and that his cause must be remanded for further proceedings. Our review is *de novo*. *People v. Stone*, 364 Ill. App. 3d 930, 933 (2006).

¶ 12 The Act provides for a reasonable level of assistance by post-conviction counsel (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), which can be shown by compliance with Rule 651(c) (*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). That rule specifies the duties of post-conviction counsel; and provides, in relevant part, that counsel make any amendments to the *pro se* petition that are necessary for an adequate presentation of defendant's contentions. A Rule 651(c) certificate creates a presumption of compliance with the rule. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 13 Here, counsel filed a Rule 651(c) certificate stating, in relevant part, that she filed a supplemental petition for post-conviction relief. Defendant maintains that this certification was deficient in that it fails to verify whether she made "all" the amendments to his petition that were necessary for an adequate representation of defendant's contentions. The State, citing *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008), responds that strict compliance with the rule is not required, and that an examination of the certificate firmly establishes that counsel substantially complied with the requirements of Rule 651(c).

¶ 14 In *Richardson*, counsel certified that she supplemented the post-conviction petition which adequately complemented defendant's claims of constitutional deprivation, examined the

report of the trial proceedings, and consulted with defendant. In reaching the conclusion that this certification substantially complied with the requirement of Rule 651(c) that counsel make any amendments necessary for adequate presentation of defendant's contentions, this court noted that there is no requirement that the certificate mirror the language of the rule, or, in other words, that there be strict compliance with the rule. *Richardson*, 382 Ill. App. 3d at 257. *Richardson* further held that Rule 651(c) places no legal duty on post-conviction counsel to add claims which fail to state the gist of constitutional claim or to even add claims not implicated in defendant's *pro se* petition. *Richardson*, 382 Ill. App. 3d at 258. This court also noted that defendant's reliance on *People v. Bashaw*, 361 Ill. App. 3d 963, 969 (2005), was misplaced because in that case counsel did not properly exercise her professional judgment, but, rather, improperly acceded to defendant's wishes to rely on the original post-conviction petition. *Richardson*, 382 Ill. App. 3d at 257.

¶ 15 Here, counsel's certification that she supplemented the petition substantially complied with the requirement of the rule that she make any necessary amendments to the petition to represent defendant's contentions of deprivation of constitutional rights. Although the presumption that arises therefrom may be rebutted, defendant has not done so here where the record shows that counsel supplemented his petition, set forth the procedural history of his case, added a new issue, and included defendant's affidavit in support.

¶ 16 Defendant, however, maintains that counsel failed to comply with her duty to shape the bare allegations in his *pro se* petition into proper legal form. We note, however, that counsel cannot be held to have provided an unreasonable level of assistance where providing further legal and evidentiary support would have only advanced frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). The contested issues set forth in defendant's petition here were either barred by *res judicata* or waived. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). Thus, no amount of legal or factual support would have presented a substantial showing of a constitutional violation.

¶ 17 Defendant, nonetheless, contends that counsel should have raised the waived issues under a claim of ineffective assistance of appellate counsel, relying on *People v. Turner*, 187 Ill. 2d 406 (1999). In *Turner*, the supreme court noted that counsel could have easily overcome waiver by arguing ineffective assistance of appellate counsel; however, it did so in the context of counsel providing no representation at all, thus representing the petitioner in name only. *Turner*, 187 Ill. 2d at 413-15. Here, by contrast, the record shows that counsel employed an investigator to locate witnesses that defendant had claimed were material, and that the investigator's search showed that the witnesses had moved. Nonetheless, counsel disclosed that one witness had been contacted, that the investigation was continuing, and that she was trying to get an affidavit signed. Counsel then filed the supplemental petition to augment defendant's *pro se* claims and add a new one. *Turner* is thus distinguishable from this case, and does not call for the same result. Moreover, an issue is not preserved for purposes of post-conviction relief by merely framing it in the context of a constitutional claim, (*People v. Davis*, 156 Ill. 2d 149, 158 (1993)), and where defendant claims ineffective assistance of appellate counsel, that claim necessarily fails if the underlying issues are meritless (*People v. Childress*, 191 Ill. 2d 168, 174 (2000)).

¶ 18 We also find, contrary to defendant's contention, that his case is not similar to *People v. Johnson*, 154 Ill. 2d 227 (1993), where the supreme court held that the record on appeal did not show that counsel complied with Rule 651(c). In that case, unlike here, counsel made no attempt to obtain affidavits, records, or other evidence to support the post-conviction petition, and copied an allegation in the *pro se* petition. *Johnson*, 154 Ill. 2d at 243, 245.

¶ 19 Here, counsel filed a Rule 651(c) certificate, and the record shows that counsel made a concerted effort to contact witnesses and obtain affidavits over a lengthy period of time to support, and supplemented the *pro se* petition. Thus, contrary to defendant's contention, counsel did not simply copy allegations in the petition, but, rather, attempted to obtain evidentiary support for the

claims raised in the petition. *Johnson*, 154 Ill. 2d at 243, 245. Although counsel was under no obligation to search for sources outside the record that might support the general claims raised in the post-conviction petition (*Johnson*, 154 Ill. 2d at 247; see also *Davis*, 156 Ill. 2d at 162-64), the record here discloses her efforts to provide defendant with reasonable representation.

¶ 20 Moreover, post-conviction-counsel is only required to properly present and support the claims raised by petitioner (*Davis*, 156 Ill. 2d at 164), and has no obligation to raise new claims (*People v. Ramey*, 393 Ill. App. 3d 661, 668-69 (2009)) or amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)). For the reasons stated, we conclude that post-conviction counsel provided defendant a reasonable level of assistance with his post-conviction petition and complied with the requirements of Rule 651(c).

¶ 21 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.