

No. 1-10-1025

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. 96 CR 24320
)	
ANTHONY RAND,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

1. *Held:* Where postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) and defendant has not rebutted the presumption of compliance with the Rule, counsel provided a reasonable level of assistance and defendant's petition was properly dismissed following an evidentiary hearing.
2. Anthony Rand, the defendant, appeals the trial court's dismissal, following an evidentiary hearing, of his petition for postconviction relief. On appeal, defendant contends that his appointed postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984). He argues that counsel filed a supplemental petition that merely restated one of

several issues raised in the *pro se* petition and omitted essential issues and affidavits that had been included in his *pro se* petitions, and failed to obtain updated affidavits from two witnesses who provided support for his claim of actual innocence.

3. For the reasons that follow, we affirm.

4. Following a simultaneous but severed jury trial with his codefendant, Jason Miller, defendant was convicted of the first degree murder of Jesus Luevano and the attempted first degree murder of Cuauhtemac Silva. He was sentenced to concurrent terms of 52 and 10 years in prison, respectively. The underlying facts of the case are set forth in our decision on direct appeal and will be repeated here only where necessary to address the issues in this appeal.

5. Defendant was convicted primarily based on the testimony of three eyewitnesses and a confession. At trial, Cuauhtemac Silva testified that around 10 p.m. on September 2, 1996, he, Jesus Luevano, Jose Villenuva, and Felix Padilla were standing on a street corner in Chicago when two African-American men approached on bicycles and started shooting at them. In court, Silva identified those men as defendant and codefendant. As Silva watched, defendant shot Luevano six or seven times and then rode away from the scene. Similarly, Jose Villenuva also testified that two African-American men approached his group on bicycles. According to Villenuva, Luevano fell down, after which defendant shot him from a distance of two to three feet.

6. Edgar Flores testified that he was walking home from work when he noticed two African-American men on bicycles approach four Hispanic men who were standing on a street corner. Flores, who did not know any of the men, saw the African-American men shoot at the Hispanic men, who ran. Seconds later, he saw one of the African-American men, identified in court as defendant, shoot one of the Hispanic men several times. Both African-American men fled. Flores spoke with police officers at the scene and later went to the police station, where he identified defendant in a lineup.

7. In his confession, defendant admitted that he and codefendant rode bicycles up to a group of four Hispanic men and started shooting. According to defendant's confession, codefendant chased one victim down on foot, while defendant rode home on his bicycle.

8. Three witnesses testified on defendant's behalf: Linda O'Neal, Warnell Murphy, and Gregory Golston. These witnesses testified that at the time of the shooting, defendant was with them, sitting on O'Neal's porch.

9. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Rand*, No. 1-98-1824 (2002) (unpublished order under Supreme Court Rule 23).

10. On September 25, 2002, defendant filed a *pro se* petition for postconviction relief, raising claims that counsel was ineffective for failing to interview and present alibi witnesses and that his constitutional rights were violated where counsel did not call him to testify, as he had promised to do. Defendant attached an affidavit from Ricky Murphy, who attested that he, Linda O'Neal, Warnell Murphy, and Fredrick Pollard were with defendant at the time of the shooting. Defendant also attached an affidavit from his mother, Christine Evans, who averred that one week before trial, counsel told her defendant would testify on his own behalf. Evans further attested that she repeatedly told counsel to contact Murphy and Pollard.

11. On November 15, 2002, counsel was appointed to represent defendant.

12. In 2003, defendant filed a *pro se* pleading titled "Amended Petition for Post-Conviction Relief."¹ In the petition, defendant alleged, among other things, that the trial court erred when giving Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 3.15), by including the word "or" between the factors for analyzing eyewitness identification.

¹Although the petition included in the record is undated, according to the supplemental petition filed by postconviction counsel, the petition was filed on September 4, 2003.

13. On December 9, 2003, the State filed an "amended" motion to dismiss, although no original motion to dismiss appears in the record. In the amended motion, the State asserted that the petition was barred by the statute of limitations, that defendant had not established counsel was ineffective, and that defendant had waived his claim regarding the right to testify.

14. On August 29, 2005, defendant filed a *pro se* pleading titled "Petitioner's Petition for Post-Conviction Relief," asserting that he had new evidence demonstrating his innocence in the form of affidavits executed by Jo Jean Young and Lorease Williams. Defendant attached to his petition two affidavits, identical except for the affiant's name. In each, the affiant stated that she was driving at the time and location of the offense when she witnessed two men, neither of which was defendant, shooting at a group of Latinos. The affiants both stated that they did not come forward sooner because they were unaware defendant was incarcerated, but upon obtaining this information, they were put in touch with an unnamed member of defendant's family through an unnamed friend.

15. In court on August 15, 2007, postconviction counsel indicated that she had read the trial transcript and her office had talked with both newly discovered witnesses. According to counsel, one of the witnesses had been out of state, and her investigator was attempting to set up an interview with the witness in order to obtain an affidavit.

16. On May 7, 2008, counsel reported that although her investigator had talked with one of the witnesses over a year prior, she had not been able to get in touch with either of them. Counsel asked for a three-month continuance, stating that if she was still unable to contact the witnesses, she would file the notarized affidavits provided by defendant. In addition, counsel indicated she would file a Rule 651(c) certificate at that time.

17. On August 6, 2008, counsel informed the court that she had talked to one witness and had been "playing phone tag" with the other. Nevertheless, she stated that she was ready to file a

supplemental petition because she did not know "whether we're actually going to be able to get it and I do have a notarized affidavit." The case was continued.

18. On October 23, 2008, counsel filed her Rule 651(c) certificate and a supplemental petition for postconviction relief, to which she attached the affidavits defendant had included with his 2005 petition. In her certificate, counsel stated that she had consulted with defendant by mail, telephone, and in person in order to ascertain his contentions of deprivations of constitutional rights; that she had examined the record of the proceedings at the trial; and that she had read defendant's *pro se* petition and had filed a supplemental petition necessary for an adequate presentation of defendant's contentions. The supplemental petition indicated that it adopted and incorporated "each and every allegation" asserted in defendant's previous *pro se* petitions. In the petition, counsel alleged that defendant was entitled to relief on the grounds of newly discovered evidence of two witnesses, Jo Jean Young and Lorease Williams, who did not come forward until 2005 but could testify that defendant was not the shooter.

19. The State thereafter filed a motion to dismiss, which was argued on August 12, 2009. Prior to argument, postconviction counsel advised the court that she was proceeding only on the arguments raised in defendant's 2005 petition and her supplemental petition. However, after arguing those claims, counsel added that she was preserving defendant's claim of ineffective assistance of trial and appellate counsel for failing to raise a *voir dire* issue identified in defendant's 2003 postconviction petition. After taking the matter under advisement, the trial court denied the State's motion to dismiss and advanced the case to an evidentiary hearing.

20. On April 2, 2010, prior to the commencement of the evidentiary hearing, postconviction counsel and the State indicated to the trial court that the only issue to be decided was the claim of actual innocence based on newly discovered evidence. Postconviction counsel also informed the

court that because she had been unable to contact Lorease Williams, she would not be calling her as a witness.

21. Jo Jean Young testified that in 1996, she lived in Chicago and knew defendant from the neighborhood. She identified her signature on the affidavit that defendant had attached to his *pro se* petition, but stated that she did not remember how she came to sign it and did not recall who drafted it or gave it to her. Young testified that on September 2, 1996, she was riding in a car being driven by Lorease Williams when she saw "fire coming from some guns." After Williams stopped the car, Young saw two black men and two Latino men shooting at each other. The lighting was clear and she could see the faces of the black men, neither of whom was defendant. Young did not see defendant anywhere near the scene of the shooting, but did see him earlier that evening at a barbecue in their neighborhood. Young testified that a few weeks after the shooting she became aware that defendant had been arrested for murder when a friend told her, and that she thereafter spoke with defendant's mother.

22. Young acknowledged that the affidavit did not state that Williams was in the car with her when she witnessed the shooting. She also admitted that although the affidavit stated she was driving the car, that was not the truth. Although Young remembered speaking with an assistant State's Attorney and an investigator about the case, she explained that she was taking "a lot" of medication at the time and did not remember the details of their conversation.

23. The parties stipulated that if called to testify, Craig Cegielski would state that he was an investigator employed by the Cook County State's Attorney's office, and that he and an assistant State's Attorney interviewed Jo Jean Young at her home on March 13, 2009. At that time, Young reported that she was not in a vehicle at the time or scene of the shooting. Young denied seeing two black men shooting at Latino men, denied knowing defendant or any of his relatives, and denied ever being told about the shooting by a friend. When shown a photograph of Lorease Williams, Young

told the investigator that she did not know her. Finally, Young told the investigator that she was not sure the signature on the affidavit was hers and added that she had no independent recollection of signing the affidavit.

24. The defense moved the affidavits signed by Young and Williams into evidence. Young's affidavit was admitted, but the trial court denied counsel's request to consider Williams' affidavit because she was not present for cross-examination.

25. Following argument, the trial court denied defendant's petition for postconviction relief. In doing so, the court found that defendant had presented newly discovered evidence, but that Young was not a credible witness, and that "nothing that she has said in the slightest [] would have affected the outcome of the previous trial."

26. On appeal, defendant contends that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

27. Under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), petitioners are entitled to a "reasonable" level of assistance from counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To assure a "reasonable" level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. The rule's third obligation does not require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Pendelton*, 223 Ill. 2d 458, 472 (2006) (citing *People v. Greer*, 212 Ill. 2d 192, 205 (2004)).

28. The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with the rule is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)(citing *People v. Wright*, 149 Ill. 2d 36, 73 (1992)). Our review of an attorney's compliance with a supreme court rule is *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19.

29. The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Jones*, 2011 IL App (1st) 092529, ¶ 23. In the instant case, counsel filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received the representation required by the rule. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id.*

30. Defendant maintains that he has rebutted the presumption of substantial compliance in this case. He argues that counsel's supplemental petition was inadequate in that it merely restated one of the many issues he raised in his *pro se* petitions and omitted essential issues and affidavits that he had included in prior filings. In particular, defendant faults counsel for failing to (1) add a prejudice component and affidavits to his claim regarding alibi witnesses; (2) include his mother's affidavit and necessary allegations relating to the violation of his right to testify; (3) add documentation in support of his claim that the jury received an improper version of IPI Criminal 4th No. 3.15, along with a claim of appellate counsel's ineffectiveness to avoid procedural default; and (4) properly amend his claim of actual innocence by obtaining updated affidavits from Jo Jean Young and Lorease Williams. We address defendant's arguments in turn.

31. First, defendant argues that postconviction counsel was inadequate because she failed to amend his *pro se* claim that trial counsel was ineffective for failing to call Ricky Murphy and Fredrick Pollard as alibi witnesses. According to defendant's argument, counsel should have shaped

his claim to include specific allegations of prejudice or materiality, should have attached affidavits from the two witnesses to her supplemental petition, and should have attached his mother's affidavit, which stated that she told trial counsel to get in touch with Murphy and Pollard.

32. Defendant's argument lacks merit. As noted above, postconviction counsel is not required by Rule 651(c) to advance nonmeritorious claims. *Greer*, 212 Ill. 2d at 205. In his affidavit, Murphy offered the same alibi for defendant that had been presented at trial through the testimony of Linda O'Neal, Warnell Murphy, and Gregory Golston. The jury considered this alibi and rejected it. Accordingly, even if postconviction counsel had taken the action defendant suggested, the alibi testimony provided by Murphy and Pollard would have been cumulative and would not have changed the outcome of his trial. Therefore, defendant has failed to overcome the presumption of reasonable assistance.

33. Second, defendant asserts that postconviction counsel should have amended his claim that trial counsel refused to allow him to exercise his right to testify at trial. Specifically, defendant argues that counsel should have amended the claim to include an allegation that he made a contemporaneous assertion of his right to testify and that he was prejudiced by the denial of this right.

34. Again, we cannot agree with defendant that postconviction counsel was unreasonable in failing to amend this claim in the manner he suggests. Even if counsel had attempted to amend the claim, she would have been unable to establish prejudice, as evidence of defendant's guilt was overwhelming. At trial, three eyewitnesses identified defendant as a shooter, and one of those witnesses was a disinterested passerby. In addition, defendant confessed that he and codefendant shot at the victims. On direct appeal, this court found that the State's evidence "overwhelmingly supported the verdict." Given the overwhelming evidence of defendant's guilt, we decline to find that postconviction counsel acted unreasonably in failing to amend defendant's meritless claim

regarding his right to testify. See *People v. Madej*, 177 Ill. 2d 116, 147 (1997) (affirming the dismissal of the defendant's post-conviction petition where he could not show that the violation of his right to testify created a reasonable probability that the trial outcome would have differed because evidence of his guilt was overwhelming); *People v. Hernandez*, 351 Ill. App. 3d 28, 40 (2004) (affirming the dismissal of defendant's post-conviction petition where he could not show he was prejudiced by trial counsel's alleged violation of his right to choose whether or not to testify).

35. Third, defendant argues that counsel should have amended his *pro se* claim that the jury received a version of IPI Criminal 4th No. 3.15 that erroneously listed the factors for evaluating eyewitness identifications in the disjunctive. He asserts that counsel should have included this argument in her supplemental petition, along with an allegation that appellate counsel had been ineffective for failing to raise the issue on direct appeal.

36. Once again, the claim that defendant asserts counsel should have amended is without merit. While the giving of IPI Criminal 4th No. 3.15 with "or" between the factors is plain error (*People v. Herron*, 215 Ill. 2d 167, 191 (2005)), that error is deemed harmless where the evidence of the defendant's guilt is clear and convincing (*People v. Battle*, 393 Ill. App. 3d 302, 307 (2009)). As explained above, on direct appeal this court found the evidence against defendant in the instant case was overwhelming. Therefore, the alleged error in giving the instruction was harmless. We cannot find that postconviction counsel was unreasonable in failing to amend and reshape a meritless argument.

37. Finally, defendant argues that postconviction counsel failed to shape his claim of actual innocence based on newly discovered evidence into appropriate legal form where she neglected to obtain and attach new affidavits from Young and Williams so as to overcome the problem that their affidavits were substantively identical, and therefore, could not be accurate. Defendant argues that

he was prejudiced by this failing, because in the absence of a new affidavit from Young, the State easily undermined her credibility at the evidentiary hearing.

38. As an initial matter, we cannot agree with defendant that counsel was unreasonable in failing to obtain a new affidavit from Young, as Young actually testified at the evidentiary hearing. To require a new affidavit from a testifying witness would be illogical. As to Williams, defendant has not explained how he was prejudiced by the absence of a new affidavit. At the evidentiary hearing, the trial court refused to enter Williams' affidavit into evidence because she was not present for cross-examination. We cannot see how the trial court's decision would have been different had the affidavit from Williams been a new one. Defendant's argument lacks merit. Accordingly, postconviction counsel was not unreasonable in her presentation of defendant's claim of actual innocence based on newly discovered evidence.

39. In the instant case, postconviction counsel filed a Rule 651(c) certificate, thus triggering the presumption of compliance with the Rule. Defendant has failed to rebut the presumption. Accordingly, we cannot find that counsel provided an unreasonable level of assistance.

40. For the reasons explained above, we affirm the judgment of the circuit court.

41. Affirmed.