

No. 1-10-3139

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 11736
)	
JESSE HARVEY,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices HALL and ROCHFORD concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant failed to show that post-conviction counsel did not comply with Supreme Court Rule requiring counsel to make any amendments to a *pro se* petition necessary to properly raise the defendant's claims. Post-conviction counsel could reasonably conclude that amending the petition to bolster defendant's sentencing claims was not necessary where (1) the instant sentence is concurrent to a longer sentence in another case and (2) the court was familiar with the evidence that counsel allegedly failed to add to the petition. The sole procedural issue raised by defendant, that his verification affidavit was not notarized, was not invoked by the State or the court as a bar to his claim.
- ¶ 2 Following a jury trial, defendant Jesse Harvey was convicted in 2005 of aggravated battery with a firearm and sentenced to 22 years' imprisonment. We affirmed the judgment on

direct appeal. *People v. Harvey*, No. 1-06-0411 (2007)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the dismissal, upon the State's motion, of his *pro se* post-conviction petition. He contends that post-conviction counsel failed to comply with the requirement of Supreme Court Rule 651(c) (eff. Dec. 1, 1984) that counsel make any amendments to the petition necessary to adequately present defendant's claims, and in particular his claims of ineffective assistance of trial counsel for not making a post-sentencing motion and of appellate counsel for not raising trial counsel's ineffectiveness on direct appeal. For the reasons stated below, we affirm.

¶ 3 The evidence at trial was to the effect that, on an evening in April 2000, defendant fired into a car driven by Leroy Ware and occupied by Ware's fiancée as Ware parked at his home. Ware was wounded, and both he and his fiancée identified defendant as the shooter. Defendant also gave a confession while in custody, stating that he wanted to steal the couple's wallets but the driver saw him and tried to drive away, so he fired at the car to keep the couple from driving away. Upon this evidence, the jury convicted defendant of aggravated battery with a firearm, finding him not guilty of attempted first degree murder. Defendant's post-trial motion, as amended, was denied.

¶ 4 Defendant's presentence investigation report (PSI) indicated a 2002 conviction for escape, for which he received probation, and 2004 convictions for aggravated battery with a firearm and two counts of armed robbery, for which he received three consecutive 18-year prison terms. (However, the transcript of the 2004 sentencing hearing indicates that the court actually imposed consecutive prison terms of 40, 18, and 18 years.) The PSI and the sentencing transcripts indicate that the sentencing judge for the 2004 convictions was the judge presiding at the instant trial and sentencing. Defendant's juvenile record included findings of delinquency for robbery, aggravated battery, attempted robbery, burglary, auto theft, and other charges. The PSI also

stated that defendant and his five siblings were abused or neglected by their birth parents to the degree that the birth parents' parental rights were terminated, with defendant and his siblings placed in foster care in separate homes at various times. Defendant attended less than one year of high school and was unemployed at the time of the offense, with his most recent employment being in 1999. Defendant admitted to drug and alcohol abuse and to gang membership.

¶ 5 At sentencing on January 18, 2006, neither the State nor defense suggested any change to the PSI or presented any evidence. The State argued aggravation from defendant's prior offenses and from the fact that, in the instant offense, he shot the victim at close range without giving him an opportunity to surrender his property. The defense argued mitigation from defendant's fractured childhood, noting that the court "also is a little bit familiar with [defendant] already, knowing that he is coming from an abused and neglected environment, knowing that he has been shuffled from foster home to foster home to group home, and in abused and neglected environments." The defense argued that the jury acquitted defendant of attempted murder and thus found insufficient evidence that he intended to cause the victim great bodily harm, and informed the court that he was working towards his GED while in prison. Defendant addressed the court, admitting that he made "real big mistakes in my life," professing that "I am currently trying to rehabilitate myself," expressing remorse for the pain he caused the victims in the instant case and the 2004 cases, and requesting "mercy and leniency." The court then sentenced defendant to 22 years' imprisonment, to be served concurrently to the sentences for the 2004 convictions. The court noted defendant's "tough time as he grew up" and that "certainly he is making efforts to rehabilitate himself." However, the court also noted that defendant shot an "innocent man *** for no reason at all" in the instant case and had a serious juvenile and criminal record, including the 2004 convictions for "a violent crime *** where someone else was shot [and] an armed robbery was committed." The court stated that it could render the instant

sentence consecutive to the 2004 convictions but decided not to "in light of the mitigation that has been presented to the court." The court gave defendant the appeal admonishments required by Supreme Court Rule 605(a) (eff. Oct. 1, 2001).

¶ 6 On direct appeal, we affirmed defendant's sentence against a contention that the court's sentencing-hearing reference to shooting " an innocent man" was evidence that the court improperly considered an element of the offense as an aggravating factor. We noted that the nature of an offense is a proper sentencing consideration and that the court chose not to enhance defendant's sentence by imposing it consecutively to his sentence in the 2004 convictions. Lastly, we held that any error in the court's statement was harmless because the court gave proper consideration to other factors in imposing sentence.

¶ 7 Defendant's 2004 sentence was vacated on direct appeal and the case was remanded for resentencing. *People v. Harvey*, 366 Ill. App. 3d 119 (2006). He was resentedenced to consecutive prison terms of 30 and 18 years.

¶ 8 In April 2008, defendant filed the instant petition, alleging in relevant part that (1) trial counsel was ineffective for not filing and presenting a post-sentencing motion when defendant told counsel that he wanted to file one, (2) the court erred when it denied his *pro se* post-sentencing motion without a hearing, and (3) direct appeal counsel was ineffective for not raising these claims. Defendant supported his petition with his signed but unsworn verification affidavit and with a copy of a March 15, 2006, letter from defendant to the clerk of the circuit court stating that he no longer wanted to pursue his direct appeal but instead "to persue [*sic*] my second issue, regarding reconsideration of my sentence." The trial court had deemed this a post-sentencing motion and denied it for lack of jurisdiction.

¶ 9 In 2010, post-conviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) averring that he consulted with defendant by mail and telephone, examined the record of

the trial court proceedings, and concluded from the consultation and examination that "there are no amendments that I can make to his post-conviction pleadings." The certificate in the record is not signed, but counsel told the court on January 29, 2010, that he "filed a 651(c) certificate."

¶ 10 Also in 2010, the State moved to dismiss the petition, arguing that trial and appellate counsel made reasonable strategic decisions not to raise sentencing claims and that defendant was not prejudiced by the absence of such a trial-court motion or appellate claim. The State also argued that the court's denial of the *pro se* post-sentencing motion was proper for lack of jurisdiction because the March 15 letter, accepted *arguendo* as a motion, was filed more than 30 days after sentencing and defendant had in the interim filed his notice of appeal.

¶ 11 On October 8, 2010, the court heard, and then granted, the State's motion to dismiss the post-conviction petition. The court ruled that defendant had not shown that trial or appellate counsel substantially deprived him of any constitutional right where the instant sentence is "concurrent to the other matter, which [was and is] greater than this sentence" so that any error "is not hurting him." This appeal timely followed.

¶ 12 On appeal, defendant contends that counsel failed to comply with the requirement of Rule 651(c) that counsel make any amendments to the *pro se* petition necessary to adequately present defendant's claims.

¶ 13 Rule 651(c) provides that the record in a post-conviction proceeding:

"shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, 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 petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 14 The purpose of Rule 651(c) is to ensure that post-conviction counsel shapes a defendant's claims into proper legal form and presents them to the court. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). "An adequate or proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome procedural bars, including timeliness, that will result in dismissal of a petition if not rebutted." *Id.* Conversely, while post-conviction counsel may conduct a broader examination of the record than may be required by the issues raised in the *pro se* petition, and may raise additional issues if he or she so chooses, counsel is not obligated to do so. *People v. Richardson*, 382 Ill. App. 3d 248, 254 (2008), citing *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). In a similar vein, "[w]hile post-conviction counsel has an obligation to present a petitioner's claims in appropriate legal form, he is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition." *People v. Garcia*, 405 Ill. App. 3d 608, 625 (2010), quoting *People v. Johnson*, 154 Ill. 2d 227, 247 (1993).

¶ 15 The filing of a certificate under Rule 651(c) is counsel's representation to the court that he or she fulfilled the duties listed in the certificate, so that the certificate creates a rebuttable presumption of compliance with the Rule. *Perkins*, 229 Ill. 2d at 50-52. Defendant has the burden of overcoming the presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, at ¶ 23. Our review both of compliance with a Supreme Court Rule and of the second-stage dismissal of a post-conviction petition is *de novo*. *Id.* at ¶ 19.

¶ 16 Defendant contends that post-conviction counsel failed to make a necessary amendment when he did not procure a notarized affidavit from defendant to replace the non-notarized

verification affidavit attached to the *pro se* petition. See *People v. Nitz*, 2011 IL App (2d) 100031. However, neither the State's motion to dismiss nor the court's ruling on that motion referred to the fact that defendant's affidavit was not notarized, so that the incomplete verification affidavit was not invoked as a procedural bar. As we recently stated, "[o]nce the State moved to dismiss on the merits and did not challenge the alleged procedural defects, and once the trial court conducted a hearing, during which neither party raised the alleged procedural defects, and presented its ruling based on the merits, the purported notarization and certification issues became moot." *People v. Kirkpatrick*, 2012 IL App (2d) 100898, at ¶ 27. See also *People v. Henderson*, 2011 IL App (1st) 090923, at ¶¶ 34-35 (a "verification affidavit does not show that the defendant's allegations can be corroborated and is not considered when determining whether a defendant has a factual basis for his claims," although at "the second stage, the State will have the opportunity to object to the lack of notarization ").

¶ 17 As to the substance of the petition, defendant contends that the transcript of his sentencing hearing on the 2004 convictions includes testimony regarding his childhood abuse that caused the trial court to characterize his childhood as "hell on earth," so that post-conviction counsel violated his Rule 651(c) duty by not amending the petition to include that evidence. However, the PSI here addressed defendant's childhood abuse, trial counsel here argued that abuse in mitigation, and the trial court here acknowledged that abuse in imposing sentence. Moreover, the same trial court – that is, the same judge – sentenced defendant in that case and this one so that the trial court was already familiar with the evidence at issue when it sentenced defendant here. Lastly, as the court noted in dismissing the petition, the sentence here is concurrent to the significantly longer sentence in the 2004 conviction (longer both before and after the vacatur in that case) so that defendant's actual term in prison would not be shortened by

1-10-3139

any reduction of the instant sentence. Under these circumstances, counsel could reasonably conclude that it was not necessary to amend the petition to include this evidence.

¶ 18 We conclude that defendant has failed to overcome the presumption from post-conviction counsel's Rule 651(c) certificate that he fulfilled his duties under Rule 651(c). Accordingly, the judgment of the circuit court is affirmed.

¶ 19 Affirmed.