

2012 IL App (2d) 110568-U  
No. 2-11-0568  
Order filed November 30, 2012

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 94-CF-1301
	)	
JULIO RODRIGUEZ,	)	Honorable
	)	Gary V. Pumilia,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant did not show that postconviction counsel violated Rule 651(c) and thus provided unreasonable assistance: although counsel did not attach required affidavits to defendant's petition, nothing rebutted the presumption that counsel had made a concerted effort to obtain those affidavits but had been unable to do so.

¶ 2 Defendant, Julio Rodriguez, appeals from an order of the circuit court of Winnebago County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (720 ILCS 5/122-1 *et seq.* (West 2010)), seeking relief from his conviction of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 1994)). On appeal, defendant argues that postconviction counsel did

not comply with the requirements of Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and thus provided unreasonable assistance, because the postconviction petition alleged that trial counsel was ineffective for failing to call witnesses, but postconviction counsel did not support the allegation with affidavits from the witnesses as to the content of the potential testimony. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 On February 24, 1995, a jury found defendant guilty of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 1994)), and the trial court sentenced him to 60 years' imprisonment. Defendant appealed, and we affirmed. *People v. Rodriguez*, No. 2-95-0701 (1997) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 29, 2007, defendant filed a *pro se* petition for postconviction relief, alleging, *inter alia*, that trial counsel was ineffective in that he "refused to subpoena any of [defendant's] Co-Defendants to testify on [defendant's] behalf." Postconviction counsel was appointed to represent defendant on his petition.

¶ 6 On October 15, 2008, postconviction counsel filed a certificate in accordance with Rule 651(c), stating that he consulted with defendant, by mail, to ascertain his contentions of the deprivation of constitutional rights, examined the record of the proceedings at trial, and made any amendments to the *pro se* petition necessary for an adequate presentation of defendant's contentions. Also filed on October 15, 2008, was defendant's affidavit, wherein defendant averred that his trial counsel failed to subpoena any of his codefendants to testify on defendant's behalf and that their testimony was crucial to defendant's case. According to defendant, "[i]t would have exposed inconsistencies in the State's witnesses['] testimony and would [have] provided the jury with reasonable doubt."

¶ 7 The State filed a motion to dismiss the petition. Following a hearing, the trial court granted the State's motion. With respect to defendant's claim that counsel was ineffective for failing to subpoena any of defendant's codefendants to testify on defendant's behalf, the court ruled that "trial counsel's not calling the co-defendants is a matter of trial strategy. There is no showing that they would have testified or that it would have been favorable to the Defendant."

¶ 8 Defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 Defendant argues that postconviction counsel did not comply with the requirements of Rule 651(c) and thus provided unreasonable assistance, because the postconviction petition alleged that trial counsel was ineffective for failing to call witnesses but postconviction counsel did not support the allegation with affidavits from the witnesses as to the content of the potential testimony. See *People v. Barcik*, 365 Ill. App. 3d 183, 190-91 (2006).

¶ 11 There is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory (see 725 ILCS 5/122-4 (West 2010)), and petitioners are entitled to only the level of assistance provided for by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). The Act provides for a reasonable level of assistance. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel. The rule provides as follows:

"Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on

appeal, both without cost to the petitioner. The record filed in that court 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 right, 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).

¶ 12 Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel has fulfilled his duties. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). "[W]hen an attorney files a certificate under Rule 651(c), the attorney is officially representing to the court that the duties listed in the certificate have been fulfilled." *Perkins*, 229 Ill. 2d at 50. "The filing of the certificate gives rise to the presumption that the defendant received the required representation during second-stage proceedings [citation]; however, this presumption may be rebutted by the record [citation]." *People v. Kirk*, 2012 IL App (1st) 101606, ¶19.

¶ 13 In the present case, postconviction counsel filed his Rule 651(c) certificate, thereby creating the presumption that defendant received the requisite representation. Defendant does not dispute that counsel consulted with him or examined the record; rather, he argues that, because counsel failed to attach the requisite affidavits, counsel did not make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions" and thus did not comply with Rule 651(c). Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 14 Defendant's argument is unavailing. "In the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in

support of the post-conviction claims, but was unable to do so.” *People v. Johnson*, 154 Ill. 2d 227, 241 (1993); see also *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 18-24. Only in cases where the record has rebutted that presumption has the reviewing court found that postconviction counsel failed to provide a reasonable level of assistance. See *Johnson*, 154 Ill. 2d at 241; *People v. Waldrop*, 353 Ill. App. 3d 244, 250-51 (2004). For instance, in *Johnson*, the supreme court held that counsel failed to comply with Rule 651(c) where an affidavit he filed unequivocally established that he made no effort to obtain affidavits from the witness identified in the defendant’s *pro se* petition. *Johnson*, 154 Ill. 2d at 241-43. Similarly, in *Waldrop*, this court held that counsel provided unreasonable assistance and failed to comply with Rule 651(c) where the record established that counsel mistakenly believed that he had no duty to obtain an affidavit from a witness identified in the defendant’s *pro se* petition. *Waldrop*, 353 Ill. App. 3d at 250. Here, defendant points to nothing in the record to suggest that postconviction counsel failed to make a concerted effort to contact defendant’s codefendants and obtain their affidavits. Thus, the presumption that counsel did so is not rebutted. See *Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 18-24 (rejecting the defendant’s contention that he was denied the reasonable assistance of postconviction counsel, based on counsel’s failure to attach supporting affidavits, where the record was “devoid of a ‘flat contradiction’ ” to overcome the presumption that counsel made a concerted effort to obtain the supporting documents). Accordingly, we reject defendant’s contention that he was denied the reasonable assistance of postconviction counsel.

¶ 15

### III. CONCLUSION

¶ 16 For the reasons stated, we affirm the order of the circuit court of Winnebago County granting the State’s motion to dismiss defendant’s postconviction petition.

¶ 17 Affirmed.