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2012 IL App (3d) 100410-U

Order filed February 22, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
A.D., 2012

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 14 <sup>th</sup> Judicial Circuit
	)	Rock Island County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0410
v.	)	Circuit No. 93-CF-462
	)	
WILLIAM HORTON,	)	The Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judges, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Justices Wright and Lytton concurred in the judgment.

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**ORDER**

- ¶ 1     *Held:* Postconviction counsel did not comply with Supreme Court Rule 651(c) or provide reasonable assistance to the defendant because the record did not indicate that counsel adequately researched and presented the defendant's contentions of error.
- ¶ 2     The defendant, William Horton, appeals from the trial court's dismissal of his petition for postconviction relief. 725 ILCS 5/122-1, et seq. (West 2006). On appeal, the defendant

contends that: (1) postconviction counsel provided unreasonable assistance because he did not file an amended postconviction petition addressing the untimeliness of the original petition prior to the State's filing of a motion to dismiss; and (2) the cause must be remanded for appointed counsel to comply with Supreme Court Rule 651(c) (eff. Jan. 1, 1967). We conclude that on this record, postconviction counsel did not comply with Rule 651(c) or provide reasonable assistance because the record does not indicate that counsel fully ascertained and presented the defendant's contentions of error. Thus, we reverse the trial court's dismissal of defendant's postconviction petition and remand the cause for counsel to file an amended petition and otherwise comply with Supreme Court Rule 651(c).

¶ 3

#### FACTS

¶ 4 After a trial, a jury found the defendant guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 1992)), attempted murder (720 ILCS 5/8-4(a), 9-1(a) (West 1992)), aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 1992)), and armed robbery (720 ILCS 5/18-2(a) (West 1992)). The court subsequently imposed a 60 year term of imprisonment for the first-degree murder conviction, a concurrent 30-year term of imprisonment for armed robbery, and a consecutive 20-year term of imprisonment for attempted murder. The defendant appealed his convictions to this court, and we affirmed. *People v. Horton*, No. 3-97-0808 (1999) (unpublished order under Supreme Court Rule 23).

¶ 5 On May 16, 2007, the defendant filed a *pro se* petition for postconviction relief. In it, he alleged that appellate counsel provided ineffective assistance because counsel failed to challenge his multiple convictions and sentences for murder, attempted murder, robbery and armed robbery

under the one-act-one-crime rule, and also that the trial court erred when it imposed consecutive sentences for murder, attempted murder, robbery, and armed robbery.

¶ 6 The trial court subsequently found that the defendant's postconviction petition presented "a colorable constitutional claim," so it advanced the petition to second stage proceedings, appointed counsel to represent the defendant, and directed the State to file a response. On February 19, 2009, the State filed a motion to dismiss the defendant's postconviction petition, contending that the petition was untimely filed, and that the defendant did not allege facts showing that the delay was not due to his culpable negligence.

¶ 7 Thereafter, at a status hearing on April 8, 2009, the trial court inquired whether defense counsel had filed a response to the State's motion to dismiss. Defense counsel replied, "[n]o response filed, Your Honor. [Counsel had] contacted [his] client regarding that issue. [He could not] remember if [it was] the statute or the case law, but the deadline can be rebutted by the [defendant] showing that the delay was not the result of culpable negligence." Counsel continued by explaining that the defendant had "given [him] a response as to why [the defendant] may have delayed filing his petition. And [since] the motion that[ was] being advanced by the State [was] dispositive in nature[,] he advis[ed the defendant] that if the court would allow him \*\*\* the opportunity to come and testify as to why he[was] not culpably negligent in the late filing of the petition." The court determined that it would not permit the defendant to present live testimony on the matter, but the defendant could file an affidavit in conjunction with defense counsel's response to the motion to dismiss. The court ordered counsel to file his response within 30 days.

¶ 8 Counsel filed a response to the State's motion to dismiss on May 29, 2009. In these motions, counsel argued that since the defendant's sentence was void, it could be attacked at any

time, and that the defendant's untimely filing of his postconviction petition was not due to his culpable negligence. Counsel attached the defendant's affidavit to his response. The defendant averred that an inmate law clerk incorrectly advised him about his right to seek postconviction relief, and that he was denied access to the prison library and to legal assistance while in prison. Counsel subsequently filed an amended response on November 4, 2009, and added that since the State did not file its motion to dismiss more than 30 days after the court advanced the petition to the second stage, the court should deny the State's motion to dismiss. Counsel did not file a Rule 651(c) to indicate his compliance with that rule.

¶ 9 The court conducted a hearing on November 9, 2009, and found, among other things, that the defendant had not established that he was not culpably negligent in the untimely filing of his postconviction petition. It also determined that it would permit the State to proceed on its motion to dismiss, and subsequently found that the defendant's petition was barred as untimely. At that point, defense counsel stated that the only matter in his response that had yet to be addressed by the court was his contention that the defendant's sentence was void and could be attacked at any time. The court conducted a colloquy with the prosecutor and defense counsel on whether it could consider this matter given that it had found that the defendant's petition was untimely filed. During this conversation, defense counsel stated that he had not "researched the issue because [he] was not aware if [he] was going to be proceeding on that petition or not." The court ultimately found that because the petition was barred due to its untimeliness, it could not rule on the merits of the defendant's contention that his sentence was void. The defendant appeals.

¶ 10

#### ANALYSIS

¶ 11 On appeal, the defendant first contends that postconviction counsel provided an unreasonable level of assistance because counsel addressed the untimeliness of the defendant's postconviction petition in response to the State's motion to dismiss the petition, as opposed to filing an amended postconviction petition. The defendant also contends that the cause must be remanded for counsel to show compliance with Supreme Court Rule 651(c). The State, on the other hand, contends that counsel provided reasonable assistance by filing a response to the State's motion to dismiss, instead of filing an amended petition, and since the petition was properly dismissed as untimely, counsel need not show compliance with Supreme Court Rule 651(c). We conclude that counsel did not comply with Supreme Court Rule 651(c) or provide reasonable assistance to the defendant because the record did not indicate that counsel adequately researched and presented the defendant's contentions of error.

¶ 12 Pursuant to section 122-4 of the Post-Conviction Hearing Act (725 ILCS 5/122-4 (West 2006)), counsel is provided to an indigent defendant who files a *pro se* postconviction petition that advances to a second stage hearing. Since the right to postconviction counsel is wholly statutory, when counsel is appointed, a postconviction petitioner is only entitled to a reasonable level of assistance, rather than the higher standard of assistance that is applicable to trial counsel. *People v. Turner*, 187 Ill. 2d 406 (1999).

¶ 13 Supreme Court Rule 651(c) establishes the level of assistance required by postconviction counsel. This rule requires that the record on appeal disclose that appointed counsel took steps necessary to ensure adequate presentation of the petitioner's postconviction claims in the trial court. *People v. Johnson*, 154 Ill. 2d 227 (1993). Specifically, to assure the reasonable assistance mandated by the Act, Rule 651(c) provides that postconviction counsel must: (1)

consult with the defendant to ascertain his contentions of deprivation of constitutional rights; (2) examine the record of trial proceedings; and (3) make any amendments to the petition that were needed to adequately present the petitioner's contentions. Supreme Court Rule 651(c) (eff. Jan. 1, 1967); see *People v. Perkins*, 229 Ill. 2d 34 (2008).

¶ 14 Compliance with Rule 651(c) is mandatory (*Johnson*, 154 Ill. 2d 227) and may be established either by an attorney's certificate or by the record showing that counsel satisfied the rule's requirements. *People v. Lander*, 215 Ill. 2d 577 (2005). Counsel must comply with Supreme Court Rule 651(c) even if the defendant's petition was not timely filed, as the State may elect whether to assert the affirmative defense of untimeliness. *Lander*, 215 Ill. 2d 577. In doing so, counsel may not engage in a bifurcated second stage hearing by filing a response to the State's motion to dismiss for untimeliness, and then separately responding on the merits of the *pro se* petition. *People v. Peoples*, 346 Ill. App. 258 (2004) (court concluded that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) when counsel filed a response to the State's motion to dismiss that only pertained to the timeliness issue, but omitted further factual and legal support for the contentions raised in the defendant's *pro se* petition).

¶ 15 Concerning counsel's assistance in the context of an untimely *pro se* postconviction petition, our Supreme Court has held that Rule 651(c)'s requirement that counsel amend a *pro se* postconviction petition to adequately present the defendant's claims includes alleging any available facts showing that the defendant was not culpably negligent in the untimely filing of the postconviction petition. *Perkins*, 229 Ill. 2d 34. *Perkins* involved an instance where counsel did not file an amended petition addressing the untimely filing of the original petition, but instead filed a Rule 651(c) certificate and a response to the State's motion to dismiss, and otherwise

argued that the untimely filing of the petition was not due to that defendant's culpable negligence. In finding that counsel did not provide unreasonable assistance under the Act, the *Perkins* court noted that counsel filed a Rule 651(c) certificate, and that the record did not otherwise indicate that counsel did not comply with the dictates of the rule.

¶ 16 Taking the issues out of order, we first consider whether counsel complied with Rule 651(c). Here, we conclude that since counsel did not file the requisite certificate indicating compliance with Rule 651(c), and since the record does not show that counsel consulted with the defendant to ascertain his contentions of deprivation of constitutional right, or examined the record of trial proceedings, or made the necessary amendments to adequately present the defendant's claims, counsel did not comply with Rule 651(c).

¶ 17 Although the filing of a 651(c) certificate is not necessarily conclusive as to whether counsel complied with that rule, here, counsel did not file one. See *Perkins*, 229 Ill. 2d 34. Thus, we are left to determine whether the record indicates compliance with that rule. Based on our review of the record, we conclude that it does not.

¶ 18 Specifically, counsel acknowledged that he had not researched an issue he raised in his response to the State's motion to dismiss. Given this admission, we do not believe that counsel made the necessary amendments to the defendant's petition to adequately present his claims. Furthermore, the record does not indicate that counsel consulted with the defendant to ascertain his contentions of the deprivation of his constitutional rights apart from the timeliness issue, or that counsel examined the record of the trial proceedings, which are the two other requirements of Rule 651(c). Therefore, defense counsel has not shown compliance with Rule 651(c). In reaching this conclusion, we expressly reject the State's contention that postconviction counsel

need not comply with Rule 651(c) when the defendant files an untimely petition. See *Lander*, 215 Ill. 2d 577 (supreme court held that postconviction counsel must comply with Rule 651(c) notwithstanding the timeliness of the *pro se* postconviction petition).

¶ 19 We now consider whether counsel's failure to comply with Supreme Court Rule 651(c) amounted to unreasonable postconviction assistance. The defendant asserts that counsel provided unreasonable assistance because counsel did not file an amended petition raising his lack of culpable negligence in the untimely filing of the original petition. However, we need not reach this specific matter, because, under these facts, we conclude that counsel's general failure to comply with Supreme Court Rule 651(c) rendered his assistance unreasonable, and three reasons underlie our conclusion.

¶ 20 First, we again note that counsel indicated that he had not researched the matter of whether the defendant's sentence was void because he wanted to first ascertain whether the court would dismiss the postconviction petition as untimely. In doing so, defense counsel sought to engage in a bifurcated procedure regarding the timeliness of the postconviction petition and the merits of the postconviction petition, a procedure that prompted another district of this appellate court to conclude that counsel provided unreasonable assistance. See *Peoples*, 346 Ill. App. 3d 258. We also believe that engaging in such a bifurcated procedure was unreasonable, as it is not contemplated by the Act or by Supreme Court Rule 651(c).

¶ 21 Second, counsel's failure to research an issue is not merely a technical violation of Rule 651(c). Rather, it affirmatively indicates that as the defendant's advocate, counsel did not take the time to fully understand the defendant's contentions of constitutional error, and also that

counsel could not have made the necessary amendments to the defendant's postconviction petition to adequately present his contentions of constitutional error.

¶ 22 Third, we also note that defense counsel initially stated that he had no response to the State's motion to dismiss, but instead wanted to present the defendant's live testimony to the court on the untimeliness matter. It was not until after the court ordered defense counsel to file a response that he did so, and we note that his response was submitted over 20 days after the deadline set by the court. Thus, counsel initially planned to file nothing on behalf of the defendant, but instead sought to have the defendant himself orally explain the untimeliness of his petition. We do not believe that this manner of proceeding indicates that counsel took the requisite actions to introduce the defendant's contentions to the court.

¶ 23 For these reasons, we do not believe that the record discloses that counsel took the necessary steps to adequately present the defendant's claims in the trial court. See *Johnson*, 154 Ill. 2d 227. In light of this conclusion, we need not consider the specific issue of whether counsel was required to raise the defendant's lack of culpable negligence in the untimely filing of his petition in an amended petition, as opposed to in a response to the State's motion to dismiss.

¶ 24 In sum, this record does not indicate that counsel complied with Supreme Court Rule 651(c). Furthermore, counsel did not provide reasonable assistance because counsel did not take the necessary steps to ensure an adequate presentation of the defendant's claims of error in the trial court. Therefore, we must reverse the trial court's dismissal of the defendant's postconviction petition and remand the cause for another second stage hearing. On remand, we direct counsel to fully comply with Rule 651(c), that is, to file an amended petition that includes the defendant's claims of constitutional error and also the defendant's explanation of why he was

not culpably negligent in the untimely filing of his original postconviction petition. See *Perkins*, 229 Ill. 2d at 43 ("the plain language of Rule 651(c), requiring amendments 'necessary for an adequate presentation of [the defendant's] contentions' includes alleging any facts that may establish a lack of culpable negligence in the late filing").

¶ 25

#### CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed, and the cause is remanded for further proceedings.

¶ 27 Reversed and remanded.