

Nos. 1-09-1322 and 1-12-0492
(CONSOLIDATED)

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.)	Nos. 98 CR 29739
)	99 CR 20864
)	99 CR 20865
)	
ANDRELL PARHAM,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where post-conviction counsel complied with Rule 651(c) and provided defendant reasonable assistance, the trial court's judgment was affirmed.
- ¶ 2 Defendant Andrell Parham appeals from orders of the circuit court denying his *pro se* supplemental petition for post-conviction relief (No. 1-09-1332), and his original *pro se* petition for post-conviction relief, which was redocketed and advanced to the second-stage of proceedings (No. 1-12-0492). These cases have been consolidated for review. On appeal from

1-09-1322 and 1-12-0492 (Cons.)

these orders, defendant solely contends that his appointed post-conviction counsel did not comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to amend his original petition to adequately present his claim that the trial court never admonished him of his right to confront witnesses. We affirm.

¶ 3 Following a guilty plea hearing in 2000, defendant was convicted of one count of first degree murder, two counts of attempted murder, one count of aggravated battery, and one count of armed robbery in case number 99 CR 20865; one count of aggravated vehicular hijacking in case number 98 CR 20864; and one count of aggravated vehicular hijacking in case number 98 CR 29739. Codefendants David Johnson and Sherman Ward, who are not parties to this appeal, were also involved in the crimes in case number 99 CR 20865. The plea was negotiated as to all counts except first degree murder, for which the court conducted a special sentencing hearing at the State's request to determine whether the death penalty should be imposed.

¶ 4 During the guilty plea hearing, the following colloquy occurred between the trial court and defendant:

"THE COURT: In 98-29739 the defendant was charged with aggravated vehicular hijacking.

You understand on this count as well as on all of the other counts of the three indictments you're entitled to continue pleading not guilty and to have trials on all these matters. Do you understand that?

DEFENDANT: Yes.

THE COURT: And *** we did have a jury trial here over a year ago, didn't you?

DEFENDANT: Yes.

1-09-1322 and 1-12-0492 (Cons.)

THE COURT: So you know what that is?

DEFENDANT. Yes.

THE COURT: You know if you had a jury trial your lawyer and the [S]tate's attorney would select twelve people to sit as a jury ***. Their job or function would be to listen to the evidence and from the evidence decide whether you had been proved guilty beyond a reasonable doubt.

Do you understand that?

DEFENDANT: Yes.

THE COURT: You also have a right to have a bench trial where I decide whether you're guilty or not guilty. And I too would be bound by the same standard or burden of proof, do you understand that? I could not find you guilty unless I were [*sic*] convinced beyond a reasonable doubt as to your guilt.

Do you understand that?

Do you understand by pleading guilty there is not going to be a trial on any of these counts of these three indictments because you will be admitting you did what is charged here by the guilty pleas? Do you understand that?

DEFENDANT: Yes."

The court then went on to admonish defendant of the possible penalties for the offenses of first degree murder, attempted murder, aggravated vehicular hijacking, aggravated battery with a firearm, and aggravated battery. Finally, the court instructed defendant that he was subject to a three-year term of mandatory supervised release.

1-09-1322 and 1-12-0492 (Cons.)

¶ 5 After accepting the guilty pleas, the trial court sentenced defendant to 40 years for first degree murder, two concurrent terms of 15 years for the attempted murders, and a consecutive 10-year sentence for aggravated battery, for an aggregate 65-year sentence. Defendant was also sentenced to 15 years for armed robbery, to be served concurrently with two concurrent 10-year terms for the aggravated vehicular hijacking counts, all three sentences to run concurrently with the aggregate 65-year sentence.

¶ 6 In May 2000, defendant filed a *pro se* motion to withdraw his guilty plea, which the trial court denied. On appeal, we allowed the State's confession of error and remanded for defendant to file a motion to withdraw his guilty plea, a hearing on that motion, and strict compliance with Supreme Court Rule 604(d) (eff. Aug 1, 1992). *People v. Parham*, No. 1-00-2623 (2002) (dispositional order).

¶ 7 In June 2003, defendant filed a motion to withdraw his guilty plea, alleging that the court erred in sentencing him to 10 years in prison for aggravated battery when the statutory range was 2 to 5 years. The trial court denied the motion. On appeal, we reduced defendant's sentence for aggravated battery from 10 to 5 years, and affirmed the judgment of the trial court with this modification, for an aggregate sentence of 60 years. *People v. Parham*, No. 1-03-2850 (2005) (unpublished order under Supreme Court Rule 23).

¶ 8 In February 2006, defendant filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)), alleging, in pertinent part, that his plea of guilty was not voluntarily or intelligently entered where the trial court's admonishments did not comply with Supreme Court Rule 402 (eff. July 1, 1997), regarding his right "to be confronted" with the witnesses against him. Defendant attached to his petition his own affidavit, which reiterated the claims in his petition. He also attached a portion of the transcript from the plea hearing, which did not contain the admonishments, and a "sentence calculation work sheet."

¶ 9 On December 17, 2008, defendant filed a *pro se* supplemental post-conviction petition, alleging that his trial counsel was ineffective for not objecting to the trial court's failure to admonish him that some of his sentences would run consecutively. On February 27, 2009, the circuit court, without ruling on the issues contained in defendant's original post-conviction petition, entered a written order dismissing his supplemental petition. Defendant filed an appeal from the summary dismissal of his supplemental petition (No. 1-09-1332).

¶ 10 On December 10, 2009, defendant filed a motion to reinstate his original *pro se* post-conviction petition, which the circuit court granted. The circuit court then appointed counsel to represent defendant.

¶ 11 On July 13, 2011, defendant's court-appointed counsel filed a supplemental post-conviction petition requesting a hearing on defendant's original *pro se* petition, which she attached to the supplemental petition. Counsel also attached defendant's *pro se* supplemental petition, the circuit court order dismissing the *pro se* supplemental petition, and his motion to vacate the aforesaid order. At the same time, counsel filed a Rule 651(c) certificate. The certificate stated that counsel "obtained and examined all relevant transcripts, and supplemental documents concerning the above listed case," "consulted with [defendant] to ascertain his contentions of deprivation regarding his post-conviction issues," and "reviewed [defendant's] *pro se* petition and letters to ascertain if any amendments, supporting affidavits or documents will advance his arguments." Counsel did not amend defendant's original petition.

¶ 12 The State filed a motion to dismiss defendant's petition, arguing that defendant's claims were forfeited because he failed to raise them in his motions to withdraw his guilty plea or on direct appeal. The State also maintained that defendant's failure to support the petition with a complete copy of the transcripts of the plea hearing was fatal to his claim that he was not properly admonished about his right to confront witnesses.

¶ 13 On January 18, 2012, the trial court stated it reviewed the petition and then made an oral ruling dismissing defendant's "petition for post-conviction relief as being frivolous and patently without merit." The court also ordered that defendant's mittimus be corrected to reflect a conviction for aggravated battery without a firearm, rather than with a firearm. On January 23, 2012, defendant filed a notice of appeal from the circuit court's January 18 order (No. 1-12-0492).

¶ 14 On appeal, defendant raises no substantive issue regarding the dismissal of his petitions, but claims that his post-conviction counsel failed to comply with Rule 651(c) because she did not make the necessary amendments to his petition to adequately present his *pro se* contentions. In particular, defendant maintains that post-conviction counsel did not attach the relevant portions of his guilty plea transcripts to support his claim that he was not admonished of his right to confront witnesses, and failed to allege ineffective assistance of appellate counsel for failing to argue this claim on direct appeal. Defendant thus asserts that his cause must be remanded for further proceedings.

¶ 15 The Act provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Bocclair*, 202 Ill. 2d 89, 99-100 (2002). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the defendant's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). At the second-stage of proceedings, all factual allegations not positively rebutted by the record are considered true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 389.

1-09-1322 and 1-12-0492 (Cons.)

¶ 16 The right to post-conviction counsel is a matter of legislative grace, and a post-conviction petitioner is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Rule 651(c) provides that reasonable assistance requires performance of three duties: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, (2) examine the record of proceedings from the trial, and (3) amend the defendant's *pro se* petition as necessary to adequately present his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The purpose of Rule 651(c) is to "ensure that postconviction counsel shapes the defendant's claim into a proper legal form and presents them to the court." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Substantial compliance with the rule is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and counsel is not required to advance nonmeritorious claims on defendant's behalf (*People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)).

¶ 17 Our review of an attorney's compliance with a supreme court rule is also reviewed *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19. When post-conviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that post-conviction counsel provided reasonable assistance, and it is then the defendant's burden to overcome this presumption by demonstrating that counsel failed to substantially comply with the duties required by the rule. *Profit*, at ¶ 19.

¶ 18 Here, counsel filed a certificate stating that she obtained and examined all relevant transcripts and supplemental documents, consulted with defendant regarding his post-conviction claims, and reviewed his *pro se* petition to determine whether any amendments, supporting affidavits, or documents would advance his arguments.

¶ 19 Defendant challenges the sufficiency of the certificate, arguing that no presumption of reasonable representation arose because counsel did not expressly state that she made "any

1-09-1322 and 1-12-0492 (Cons.)

amendments" that were necessary for the adequate presentation of defendant's contentions. We reject defendant's reading of the certificate. Where counsel stated that she reviewed the necessary documents to determine whether amendments or supporting documents were necessary - and then did not in fact amend the petition - the clear import is that counsel deemed no amendments were necessary. It is not required that a Rule 651(c) certificate exactly mirror the language of the rule. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008).

¶ 20 Defendant then argues that the record rebuts counsel's certification that no amendments were necessary to adequately present his *pro se* claims to the trial court. He points to his claim that the trial court did not admonish him of his right to confront the witnesses against him. Defendant argues that reasonable representation required counsel to provide the trial court with the transcript showing that the court did not expressly admonish him of this right. Also, because this claim was forfeited by not being raised on direct appeal, defendant argues that counsel was required to amend his petition to add a claim of ineffective assistance of appellate counsel. Defendant argues that he need not demonstrate the merit of the excluded claim because Rule 651(c) violations require reversal regardless of whether the claims raised in the petition have merit. We disagree.

¶ 21 In support of his argument that merit is irrelevant, defendant relies on *People v. Suarez*, 224 Ill. 2d 37, 40, 44 (2007), where our supreme court found that post-conviction counsel failed to comply with Rule 651(c) because he did not file a Rule 651(c) certificate and the record did not show he consulted with the defendant. In this context, the *Suarez* court held that remand is required regardless of whether the claims raised in the petition were meritorious. *Suarez*, 224 Ill. 2d at 52. Here, unlike *Suarez*, counsel filed a Rule 651(c) certificate, giving rise to a rebuttable presumption that he performed the duties required by the rule. Therefore, in this case, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel

1-09-1322 and 1-12-0492 (Cons.)

acted unreasonably by not filing an amended petition." *Profit*, at ¶ 23 (distinguishing *Suarez* on similar grounds).

¶ 22 Here, defendant's underlying claim was that his guilty plea was unknowingly made because the trial court failed to admonish him of his right to confront the witnesses against him, as required by Supreme Court Rule 402. Because defendant's position on appeal is that counsel must amend his petition to adequately support his claim regardless of its merit, he presents no argument on whether the court's admonishments were sufficient to satisfy due process despite the missing admonishment. However, under *Profit*, and our above analysis, the determination of whether an allegation has merit is crucial to determining the reasonableness of counsel's decision not to amend or support it. The purpose of appointing counsel in a post-conviction proceeding is to ensure that meritorious issues are properly advanced, not to have nonmeritorious claims presented in the best possible way. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (Rule 651(c) does not require post-conviction counsel to advance frivolous or spurious claims on a defendant's behalf).

¶ 23 The purpose of Rule 402 admonishments is to ensure that a defendant understands his plea, the rights he has waived by pleading guilty, and the consequences of his action. *People v. Dougherty*, 394 Ill. App. 3d 134, 138 (2009). However, the failure to properly admonish a defendant, standing alone, does not automatically establish grounds for reversing the judgment or vacating the plea. *People v. Fuller*, 205 Ill. 2d 308, 323 (2002). Substantial, not literal, compliance is all that is required. *Dougherty*, 394 Ill. App. 3d at 138. Whether reversal is required depends on whether real justice has been denied or whether defendant has been prejudiced by the inadequate admonishment. *Fuller*, 205 Ill. 2d at 323. We may consider the entire record in order to determine substantial compliance with Rule 402(a). See *People v. Sutherland*, 128 Ill. App. 3d 415, 419 (1984).

¶ 24 Rule 402(a)(4), the subsection involved here, requires the court to admonish the defendant "that if he *** pleads guilty there will not be a trial of any kind, so that by pleading guilty he *** waives the right to a trial by jury and the right to be confronted with the witnesses against him ***; or that by stipulating the evidence is sufficient to convict, he *** waives the right to a trial by jury and the right to be confronted with any witnesses against him *** who have not testified." The guilty plea transcript shows that the court told defendant that he was entitled to continue to plead not guilty and to have trials on all the charges and noted that defendant had a "jury trial here over a year ago." Defendant affirmed that he understood the nature of both a jury and a bench trial, and knew that a trial involves having the judge or jurors listen to the evidence and then decide whether he was proved guilty beyond a reasonable doubt. The court also told defendant that by pleading guilty he would not have a trial because he would be admitting he did what was charged. Although the court did not expressly tell defendant he would have the "right to confront witnesses," post-conviction counsel could have reasonably concluded that the transcript left no doubt that defendant understood that right, especially where he had been involved in an earlier jury trial. See, e.g., *People v. Mendoza*, 48 Ill. 2d 371, 373-74 (1971) (finding substantial compliance with Rule 402(a) in a post-conviction claim where the defendant was informed of the right to a jury trial, but was not informed he was waiving the right to self-incrimination and to confront witnesses). Under these circumstances, we cannot conclude that counsel acted unreasonably in failing to attach the guilty plea transcript to defendant's *pro se* petition. Therefore, the presumption of reasonable representation raised by the Rule 651(c) certificate has not been rebutted.

¶ 25 The cases cited by defendant do not compel a different result. In *People v. Turner*, 187 Ill. 2d 406, 413-17 (1999), unlike the case at bar, there was no indication that a Rule 651(c) certificate was filed, and the supreme court detailed several "omissions and failures" that led it to

1-09-1322 and 1-12-0492 (Cons.)

conclude that counsel's conduct amounted to "a total failure of representation." In *People v. Milam*, 2012 IL App (1st) 100832, ¶ 37, post-conviction counsel's failure to allege in her amended petition a claim of ineffective assistance of appellate counsel to overcome the procedural bar of waiver prejudiced the defendant where there was some evidence in the record that supported his underlying claim of an involuntary confession. Here, however, counsel could have reasonably concluded that the guilty plea transcript showed substantial compliance with Rule 402.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 27 Affirmed.