

No. 1-10-1544

**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  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 9511
	)	
MICHAEL FIELDS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE QUINN delivered the judgment of the court.  
Presiding Justice Harris and Justice Simon concurred in the judgment.

**ORDER**

¶ 1 *Held:* Second-stage dismissal of defendant's *pro se* post-conviction petition affirmed where the record reflects that (1) the circuit court and post-conviction counsel followed the supreme court's instructions on remand, (2) defendant suffered no prejudice from counsel's alleged failures due to the overwhelming evidence against him; post-conviction counsel provided a reasonable level of assistance and complied with Rule 651(c).

¶ 2 Defendant Michael Fields appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). This order was entered after second-stage proceedings were held on remand pursuant to a supervisory order entered by the supreme court which vacated our initial order affirming the summary dismissal of defendant's post-conviction petition (*People v. Fields*, 225 Ill. 2d 649 (2007)). Defendant now contends that the circuit court and post-conviction counsel ignored the mandate from the Illinois supreme court directing that defendant's claims of ineffective assistance of counsel be addressed under "fundamental fairness" principles.

¶ 3 The record shows that defendant was charged with first degree murder in connection with a shooting incident that took place on January 3, 2000, and resulted in the death of Carl Cook. Defendant elected a trial by jury, at which he was represented by privately retained counsel.

¶ 4 At trial, the State presented four occurrence witnesses, all of whom testified that they saw defendant shoot the victim. During its direct examination of each of these witnesses, the State elicited testimony regarding statements they gave to police two days after the shooting and in their grand jury testimony, to which defense counsel did not object. When the circuit court asked defense counsel during a sidebar whether there was a strategic reason he did not object to this line of questioning, he responded, "no judge."

¶ 5 The jury found defendant guilty of first degree murder and the trial court subsequently sentenced him to 40 years' imprisonment. Defendant filed a direct appeal where he was initially

represented by a public defender who filed an opening brief, raising a single sentencing issue. Defendant's trial counsel was substituted as counsel for defendant on appeal, and then filed a reply brief in which he raised an ineffective assistance of trial counsel claim and a reasonable doubt claim. The ineffective assistance of counsel claim was based on appellate counsel's failure, while acting as trial counsel, to request jury instructions for second degree murder and involuntary manslaughter. In the heading of this claim, reference was made to trial counsel's failure to object to the use of "consistent statements after testimony of State's witnesses," but no mention was made of this failure in the argument itself. This court rejected defendant's claims and affirmed the judgment entered on his conviction of first degree murder. *People v. Fields*, No. 1-01-3535 (2004) (unpublished order under Supreme Court Rule 23).

¶ 6 On December 16, 2004, defendant filed a *pro se* "Petition for Post-Conviction Relief," in which he claimed, in relevant part, that he was denied effective assistance of appellate counsel. Defendant requested additional time to amend his petition in order to demonstrate, *inter alia*, that (1) appellate counsel's performance was affected by alleging his own ineffectiveness at trial, and (2) appellate counsel's errors at trial and on appeal rendered defendant's conviction unreliable. On January 24, 2005, defendant filed a "Supplemental Petition for Post-Conviction Relief," in which he raised the aforementioned claims and asserted that a *per se* conflict of interest arose due to appellate counsel's allegations on appeal of his own ineffectiveness at trial. Defendant also claimed that trial counsel was ineffective for failing to object to the admission of prior consistent statements.

¶ 7 The circuit court summarily dismissed defendant's petition on March 11, 2005. In doing so, the court found that trial counsel's own admission of ineffectiveness was not dispositive of his ineffectiveness claim, and observed that on direct appeal, where counsel argued his own ineffectiveness at trial, this court found that he was not ineffective. In addressing defendant's ineffectiveness claim based on the failure to object to prior consistent statements, the trial court stated that the claim was barred by *res judicata*, again referring to this court's determination on direct appeal that defendant failed to establish prejudice resulting from counsel's actions, nor could he, given the overwhelming evidence of his guilt.

¶ 8 Defendant appealed, challenging the propriety of the summary dismissal of his petition. This court affirmed the circuit court's order on January 25, 2007, finding, in relevant part, that the issue of trial counsel's ineffectiveness was decided on direct appeal, and was thus barred by *res judicata*. *People v. Fields*, No. 1-05-1157, order at 8 (2007) (unpublished order under Supreme Court Rule 23).

¶ 9 Defendant filed a petition for leave to appeal, which the Illinois Supreme Court denied. However, on September 26, 2007, the supreme court issued a supervisory order directing this court to vacate its prior order of January 25, 2007, and "remanding the case under fundamental fairness principles, to the circuit court for second stage post-conviction proceedings regarding defendant's ineffective assistance of counsel claims." *People v. Fields*, 225 Ill. 2d 649 (2007). On January 17, 2008, the circuit court acknowledged the remand order and appointed post-conviction counsel to represent defendant.

¶ 10 On November 17, 2008, defendant filed a *pro se* "Supplemental Petition for Post-Conviction Relief," in which he raised additional claims of ineffective assistance of trial and appellate counsel. On November 25, 2009, post-conviction counsel filed a Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)) certificate averring that she had consulted with defendant and reviewed the case and, because defendant's *pro se* petition adequately set forth his claims of deprivation of his constitutional rights, she had not filed an amended post-conviction petition.

¶ 11 On February 25, 2010, the State filed a motion to dismiss defendant's post-conviction petition, addressing the petitions defendant filed on December 16, 2004 and January 25, 2005. The State maintained that there was no *per se* or actual conflict of interest based on appellate counsel arguing his own ineffectiveness at trial, and that the dual representation did not prejudice defendant because the evidence against him was overwhelming.

¶ 12 The record reflects that at various status hearings held after the remand, the circuit court and opposing counsel were puzzled about the meaning of the phrase "fundamental fairness" in the supreme court's supervisory order, which none had encountered before. This was illustrated by the following colloquy had at the hearing on the State's motion to dismiss:

THE COURT: Have you ever seen a case sent back under the, quote unquote, fundamental fairness in all these years?

MR. SMITKO (Assistant State's Attorney): No. No, your Honor.

MS. PRICE-HORTON (Post-Conviction Counsel): Your Honor, I would wholeheartedly agree with what you said because that was kind of an interesting

try to interpret that. I think I've never seen fundamental fairness.

THE COURT: I think all the proceedings in the case are fundamentally fair. To send it back and decide it's fundamentally unfair, I don't know what it means but it's before me.

MS. PRICE-HORTON: Yes. I was having trouble with that.

THE COURT: The only thing before me would be the petition filed, would that be back from December of '04?

MR. SMITKO: Yes, Judge. That's what I responded to. I didn't respond to this November 12th of 2008 supplemental petition because I thought that what the Court was directing us to respond to was the '04 petition.

MS. PRICE-HORTON: Your Honor, in comment, if I might make?

THE COURT: Sure. Go ahead.

MS. PRICE-HORTON: With regards to what counsel stated, it seems as if fundamentally fair and in summation it seems as if I was to kind of review and see where everything was but because the bottom line was the petition that counsel is talking about, that was why I filed a 651, Judge.

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THE COURT: The Supreme Court did not follow the appellate court. The appellate court said I was correct in dismissing it. The Supreme Court said well, let it go back for a second stage hearing based on, quote unquote, fundamental

fairness, whatever that means.

¶ 13 The State then argued its motion to dismiss and post-conviction counsel rested on the arguments defendant presented in his petitions. The circuit court granted the State's motion, and, in doing so, found that defense counsel was as effective as he could have been given the overwhelming evidence against defendant. The circuit court noted that four witnesses, some of whom knew defendant prior to the incident, identified him as the shooter. The circuit court also denied defendant leave to file the November 17, 2008 *pro se* supplemental petition for post-conviction-relief, which it treated as a successive petition, after addressing each claim defendant raised in that petition and finding that none of the alleged errors affected the outcome of his case.

¶ 14 On appeal, defendant challenges the propriety of the dismissal order, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Defendant contends that the circuit court and post-conviction counsel ignored the supreme court's mandate to address his claims of ineffective assistance of counsel under "fundamental fairness" principles and requests that his cause be remanded for further second-stage post-conviction proceedings.

¶ 15 At the outset, we observe that, in general, issues in a post-conviction petition that were raised and decided on direct appeal are barred from post-conviction review by *res judicata*, and issues that could have been presented on direct appeal, but were not, are waived. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). However, claims that would otherwise have been barred by these doctrines may nevertheless proceed where fundamental fairness so requires. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005). Given the wording of the supreme court order in this case,

"remand[ing] the cause, under fundamental fairness principles, to the circuit court for second stage postconviction proceedings regarding defendant's ineffective assistance of counsel claims" (*People v. Fields*, 225 Ill. 2d 649 (2007)), we assume that the supreme court found defendant's case to be one where "fundamental fairness" principles required a remand for second-stage post-conviction proceedings on defendant's claims of ineffective assistance of counsel, which otherwise would have been barred by *res judicata* and waiver and summarily dismissed.

¶ 16 Throughout his briefs in this appeal, however, defendant appears to be applying a broader interpretation of the supreme court's order, in particular the phrase "fundamental fairness," as to each claim. We do not find this a proper interpretation of the supervisory order, where "fundamental fairness," as employed by the court, clearly refers to ordering the remand for second-stage proceedings, and not to the standard to be applied to each of defendant's ineffective assistance of counsel claims.

¶ 17 At the second-stage of post-conviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true; however, nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 18 To establish a claim of ineffective assistance of trial counsel warranting further proceedings under the Act, defendant must show that counsel's performance was deficient and that he suffered prejudice as a result, *i.e.*, a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied, and, if such a claim can be disposed of on the ground that defendant did not suffer prejudice, the court need not consider whether counsel's performance was deficient. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992). Claims of ineffective assistance of appellate counsel are resolved under the same standard. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 19 Defendant maintains that, in using the phrase "whatever that means," in relation to the phrase "fundamental fairness" in the supervisory order, the circuit court did not understand the supreme court's mandate, failed to consider his claims, and "rubber stamped" a dismissal. The record, however, reflects otherwise, where the court found that defendant had not made a substantial showing of a constitutional violation of his right to the effective assistance of counsel. The circuit court heard argument on the State's motion to dismiss and then granted the motion based on its finding that, given the overwhelming evidence against him, defendant failed to show that he was prejudiced by counsel's actions. In announcing its decision and explanation therefor, the circuit court did not refer to the doctrines of *res judicata* or waiver as the basis of its decision. Accordingly, the record reflects that the circuit court complied with the mandate by considering

defendant's claims of ineffective assistance of counsel, even though they had been previously deemed barred by those doctrines.

¶ 20 Defendant, however, argues without authority that the circuit court was required to address his ineffective assistance of counsel claims individually in making its determination on the State's motion to dismiss his petition. We disagree. Due to the overwhelming evidence against him, defendant failed to make a substantial showing to establish the prejudice prong of the *Strickland* test, and the circuit court was thus not required to decide whether counsel's performance was deficient. See *People v. Graham*, 206 Ill. 2d 465, 476-77 (2003); *Flores*, 153 Ill. 2d at 283-84.

¶ 21 In his reply brief, defendant appears to concede that he failed to establish any prejudice due to counsel's alleged errors, as he argues that the circuit court erred in failing to address his claims of ineffective assistance of trial and appellate counsel under the standard set forth in *United States v. Cronin*, 466 U.S. 648 (1984). This is presumably because, unlike *Strickland*, prejudice need not be established under *Cronin*.

¶ 22 In *Cronin*, the supreme court identified three circumstances implicating the right to counsel where prejudice may be assumed, including, in relevant part, where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. 466 U.S. at 658-59. In *Bell v. Cone*, 535 U.S. 685, 696-97 (2002), the supreme court emphasized that an attorney's failure to test the prosecution's case must be complete in order to warrant the presumption of prejudice. Because the defendant in *Bell* argued that counsel failed to oppose the prosecution at specific

points, and not throughout the proceeding as a whole, the court held that *Strickland* governed the analysis of counsel's conduct. 535 U.S. at 697-98. In doing so, the court noted that the aspects of counsel's performance about which defendant complained were similar to other errors it had held subject to the *Strickland* standard. *Bell*, 535 U.S. at 697-98.

¶ 23 Here, defendant cited *Cronic* in his petition for the general proposition that the right to counsel is the right to effective assistance of counsel. He did not, however, argue that *Strickland* was inapplicable to his claims, that prejudice should be presumed under *Cronic*, or identify which of the three circumstances delineated in *Cronic* applied to his case. Nevertheless, defendant now maintains that *Cronic* applies because he alleged in his petition that counsel's errors rendered his conviction unreliable "due to a lack of fundamental fairness in the adversarial process," which mirrors the language in *Cronic*.

¶ 24 Even assuming that the phrase defendant quotes was sufficient to raise the argument he now advances on appeal, his argument fails. As in *Bell*, defendant complains not of a complete failure on the part of counsel to test the prosecution's case, but of specific points in which defense counsel's representation was allegedly ineffective, such as his failure to object to prior consistent statements, which are the type of alleged errors that have been held subject to the *Strickland* standard. See *e.g.* *Bell*, 535 U.S. at 697-98; see also *People v. Todd*, 154 Ill. 2d 57, 68-69 (1992). Accordingly, because *Strickland*, and not *Cronic*, was the applicable standard for evaluating counsel's performance, prejudice is not presumed.

¶ 25 Defendant further contends that post-conviction counsel failed to provide him reasonable assistance of counsel on remand. The Act provides for a reasonable level of assistance by post-conviction counsel (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), which can be demonstrated by compliance with Rule 651(c) (*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). That rule specifies the duties of post-conviction counsel; and provides, in relevant part, that counsel shall make any amendments to the *pro se* petition that are necessary for an adequate presentation of defendant's contentions. When filed, a Rule 651(c) certificate creates a presumption of compliance with the requirements of the rule. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 26 Here, defendant maintains that the record rebuts that presumption where it shows that counsel had a difficult time interpreting the phrase "fundamental fairness" in the supreme court's supervisory order, that her description as to why she filed a 651(c) certificate was "incomprehensible," and that she admitted that "she was unsure of her role on remand."

¶ 27 Although post-conviction counsel stated that she was having "trouble" with the phrase "fundamental fairness," that does not mean that she did not understand, or fulfill, her duties under Rule 651(c). Contrary to defendant's assertion, we do not find any statement in the record to show that counsel was unsure of her role on remand. Rather, the record reflects that in response to the circuit court's query as to whether she or the State had ever seen a case sent back under fundamental fairness, counsel stated, "I think I've never seen fundamental fairness," meaning that she had not. Prior to describing why she had filed a 651(c) certificate, the State clarified that the

motion to dismiss was directed at defendant's 2004 petition, and not to the petition that he filed in 2008. Post-conviction counsel then stated:

"With regards to what counsel stated, it seems as if fundamentally fair and in summation it seems as if I was to kind of review and see where everything was but because the bottom line was the petition that counsel is talking about, that was why I filed a 651, Judge."

Although this statement may be somewhat difficult to follow, when read in context, it is evident that counsel was conveying that, when she was appointed as post-conviction counsel she assessed the case and then filed a 651(c) certificate in relation to the petitions defendant had filed prior to the remand.

¶ 28 In his reply brief, defendant takes issue with the State's argument that the circuit court properly refused to address his claim that trial counsel was ineffective for failing to object to the form of IPI 3.15 given to the jury. This claim was raised for the first time in the *pro se* petition that he filed in November 2008, which, as discussed above, the circuit court construed as a successive petition and denied him leave to file after considering the claims stated therein. Defendant, nevertheless, contends that post-conviction counsel should be found in violation of Rule 651(c) where counsel "permitt[ed]" the court to determine that his claim regarding erroneous jury instructions was waived.

¶ 29 The record shows otherwise. In denying defendant leave to file the *pro se* November 2008 petition, the circuit court specifically addressed this claim and stated that, even assuming

the instruction was erroneous, it "would not change the results of the trial, in any event."

Accordingly, the circuit court's finding did not rest on waiver, but on the lack of prejudice, and defeats his Rule 651(c) argument regarding post-conviction counsel.

¶ 30 Moreover, the 651(c) certificate filed by counsel reflects that she had (1) communicated with defendant by letter and telephone to ascertain his contentions of deprivation of constitutional rights, (2) examined the report of proceedings in his trial as well as reviewed and investigated issues and sentencing in his case, and (3) had not filed an amended petition because defendant's *pro se* petition adequately set forth his claims. Counsel was not required to raise new claims (*People v. Ramey*, 393 Ill. App. 3d 661, 668 (2003)) or to amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)), and the assertions in her Rule 651(c) certificate are not contradicted by the record (*People v. Perkins*, 229 Ill. 2d 34, 52(2007)).

¶ 31 We therefore reject defendant's contention that post-conviction counsel failed to comply with Rule 651(c) in failing to inform the circuit court that he had relied on *Cronic* in addition to *Strickland* for his ineffective assistance of counsel claims, and in failing to support his claims under *Cronic*. As previously discussed, *Strickland*, and not *Cronic*, is the applicable standard, and post-conviction counsel may not be faulted for failing to advance a frivolous claim. *Pendleton*, 223 Ill. 2d at 472.

¶ 32 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 33 Affirmed.

1-10-1544