

No. 1-11-0862

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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. 92 CR 6933
	)	
TERRY JOHNSON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE STERBA delivered the judgment of the court.  
Presiding Justice Neville and Justice Hyman concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court did not err in denying defendant's motion for leave to file a fourth postconviction petition because the motion failed to meet the requirements necessary to advance it to second stage proceedings. Since review of defendant's petition did not reach the conclusion of second stage proceedings, appointed postconviction counsel was not required to file a certificate of compliance with Illinois Supreme Court Rule 651(c).
- ¶ 2 Defendant Terry Johnson appeals the trial court's denial of his motion for leave to file a

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fourth postconviction petition. On appeal, defendant claims that appointed postconviction counsel failed to satisfy Illinois Supreme Court Rule 651(c)'s requirements because counsel: (1) did not consult with him; (2) did not review the record; and (3) did not amend the previously filed *pro se* motion for leave to file a fourth postconviction petition. Defendant also claims that counsel was ineffective because he failed to remain abreast of the procedural posture of the postconviction proceedings and, instead, repeatedly requested the trial court to reconsider its prior ruling that was entered in defendant's favor. For the reasons that follow, we affirm.

¶ 3

### BACKGROUND

¶ 4 Following a bench trial, defendant was convicted of first degree murder, aggravated criminal sexual assault, armed robbery, armed violence, criminal sexual assault, aggravated kidnaping, kidnaping, aggravated unlawful restraint, and unlawful restraint. Prior to sentencing, the trial court merged the criminal sexual assault count into the aggravated criminal sexual assault count, and the kidnaping, aggravated unlawful restraint and unlawful restraint counts into the aggravated kidnaping count. The trial court sentenced defendant to a concurrent 25 year prison term. Defendant appealed his convictions claiming that the State failed to prove him guilty beyond a reasonable doubt. This court affirmed his convictions and sentences for attempted first degree murder, armed robbery, aggravated criminal sexual assault and armed violence, but the conviction for aggravated kidnaping was vacated.

¶ 5 Defendant filed a *pro se* postconviction petition on April 14, 1998 raising ineffective assistance of counsel claims, which the trial court dismissed on May 29, 1998, and this court affirmed the trial court's ruling on December 10, 1999. Defendant filed a second *pro se* postconviction petition on June 21, 2000, again raising ineffective assistance of counsel claims,

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which the trial court dismissed on August 11, 2000. Defendant appealed that ruling and this court affirmed the trial court's dismissal of defendant's second postconviction petition.

Defendant filed a third postconviction petition on July 8, 2003, once again raising ineffective assistance of counsel claims, which the trial court denied on July 30, 2003, based on the doctrine of waiver and *res judicata*.

¶ 6 On June 18, 2007, the trial court received defendant's fourth *pro se* motion for leave to file a successive postconviction petition ("petition") along with the petition. Defendant alleged ineffective assistance of counsel based on newly discovered evidence that his trial counsel had a conflict of interest while representing him. Defendant claimed that counsel never revealed that defendant's mother filed a complaint against him with his supervisor alleging that counsel failed to investigate defendant's case. These allegations were set forth in his mother's, Joann Spencer, affidavit that was attached to the petition. In that affidavit, Spencer averred that trial counsel failed to investigate defendant's case by not procuring a store's video tape on the day of the incident, not visiting the crime scene and not interviewing defendant's upstairs neighbor. Spencer also averred that she reported counsel's unprofessional behavior to his supervisor, who reprimanded him. Defendant asserted that the cause for failing to raise these claims previously was that he had no knowledge of the conflict of interest until his mother informed him about the facts underlying his claims in May of 2006. Defendant also claimed that he suffered prejudice because his attorney intentionally neglected his case and purposely withheld his conflict of interest to hurt him as a way to get back at his mother for discussing his performance with his supervisor. Defendant claimed that his case was undermined by the non-disclosure of his attorney's conflict of interest, and that his conviction and sentence denied him due process of law.

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¶ 7 While extensive, referencing the following details of the relevant court proceedings is appropriate to provide a full picture of the course of events subsequent to the initial filing of defendant's *pro se* successive postconviction petition. On February 8, 2008, during a hearing on defendant's petition, the trial court stated that "this is a post-conviction matter which 'fell off the call.' I need Mr. Johnson brought in here. I have an address for him in Tams. This will be order of court for three weeks. Let's make it the 28<sup>th</sup>. 2-28-2008. Defendant to be writ in." During the next hearing on February 28, 2008, the trial court indicated that "Mr. Johnson has filed a successive post-conviction - a habeas, I believe, that has been dealt with. I believe that this is the total of the filings in this case." During that same hearing, the trial court continued by stating:

"The Public Defender's Office is appointed. Post-conviction matter is docketed.

You're going to need some time to get an attorney from the Public Defender's Office Post-Conviction Unit to get a hold of you and see if you need to amend your petitions.

I'll set about a two month date to do that since there's extensive work to do on that.

We're going to set it for April 22nd. I'm not going to have you brought back on that particular date, but you will have met your public defender by then."

During the April 22, 2008 hearing, the following colloquy took place:

"MS. AVANT [Public Defender]: Denise Avant, Assistant Public Defender, appearing for Terry Johnson.

Judge, I was informed by the chief of our division that we have been appointed to this case. It's not assigned yet. We would be asking for a 90 day date as well as a copy of

the petition.

THE COURT: Okie doke. I'll give your assistant the file and have her make a copy of it. As long as I know somebody is going to be assigned in the next 90 days, that makes me happy also.

\* \* \*

MS. ROGALA [The State]: Just so that we're all on the same page my understanding from reading the record is there is a successive petition that was filed in 2007 which is the petition that we're dealing with.

THE COURT: That's correct."

¶ 8 During the February 11, 2009 hearing, the following discourse took place between the public defender and the trial court:

"MR. DAVIDSON: Judge, one quick point of clarification. Judge, this was the *pro se* petition, it is a successive petition that was filed with a motion for leave to file a successive petition, and just as a matter of clarification, does your appointing my office mean –

THE COURT: Leave to file successive is granted.

MR. DAVIDSON: The motion to grant - leave to file successive petition is granted.

THE COURT: Yes.

MR. DAVIDSON: Thank you, Judge, I wanted to clarify that. Thank you, Judge."

During the January 10, 2011 hearing, the following colloquy occurred:

"MR. DAVISON [Public Defender]: Judge, Mr. Johnson has filed a *pro se*

postconviction petition which he conceded was successive and he also filed a *pro se* motion for leave to file successive petition. And before my own time in practice, before filing a new petition today I filed a supplemental motion for leave to file a successive petition and attached to that motion is a copy of his *pro se* motion to file a successive petition, and I thought we should resolve this issue before I go ahead and file a new petition on his behalf.

THE COURT: That makes sense. Thank you.

MR. REILLY [The State]: Mr. Davidson provided the State with a copy of that supplemental motion for leave to file successive.

THE COURT: If I were to set that for the same date on February the 9th, is that agreeable?

MR. DAVIDSON: It is for me, but I'm not sure if Mr. Riley will be handling it or not.

MR. REILLY: I was under the impression it was an initial successive petition. It is now in the court's hands whether it is going to decide whether it will grant leave to file, so that's fine.

MR. DAVIDSON: I would be willing to argue the motion that date as well for the successive. For leave to file the successive.

\* \* \*

MR. DAVIDSON: Just so I'm clear. It is my understanding at this point it is not a point that the State has a role?

THE COURT: It is my ruling whether or not it is appropriate to file a successive,

and that's what will happen on the next date.

MR. DAVIDSON: Correct. I just wanted us to resolve it before we took the litigation any further in the case.

THE COURT: Fine."

¶ 9 On the next court date of February 9, 2011, the following colloquy occurred:

"MR. DAVIDSON [Public Defender]: Your Honor, in this case I believe we are here today for your Honor to rule on whether Terry Johnson is granted leave to file a successive postconviction petition. He filed a *pro se* one. And the last time this case was up I filed a supplemental motion for leave to file a successive petition on his behalf. And I believe this morning your Honor indicated you might be ruling on whether the case can go forward or whether you would be denying him leave.

THE COURT: Just a second. As concerns the successive postconviction petition, after having reviewed the various documents provided not only by Mr. Johnson but by counsel on the supplemental document, I don't find any issues that are appropriate in the petition. Leave to file successive postconviction petition is granted - leave to file is denied. Leave to file is denied.

\* \* \*

MR. ABRAHAM [The State]: Your Honor, just one matter of clarification. You are entering a finding that there was no cause and prejudice standard - that cause and prejudice standard was not met in this case?

THE COURT: Not met the standard of filing in the successive postconviction, because no violation is alleged that would meet that standard."

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Following the trial court's denial of his motion for leave to file the petition, defendant timely filed the instant appeal.

¶ 10

#### ANALYSIS

¶ 11 The Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) provides a procedural mechanism for criminal defendants to challenge their convictions or sentences based upon on a substantial violation of their federal or state constitutional rights. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). In noncapital cases, the Act provides for a three-stage process. *Id.* At the first stage, the trial court must evaluate the petition and determine, within 90 days of its filing, whether it is frivolous or patently without merit. *Id.* A petition that survives the first stage of the proceedings advances to the second stage where the trial court appoints counsel to represent the defendant and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). The defendant must make a substantial showing of a constitutional violation for the petition to proceed to the third and final stage, where the trial court conducts an evidentiary hearing regarding the defendant's claims. *Id.*, citing 725 ILCS 5/122-6 (West 2002).

¶ 12 Generally, the Act limits a defendant to the filing of one postconviction petition and any claim of a substantial denial of constitutional rights not raised in the original or amended petition is deemed waived. *People v. Guerrero*, 2012 IL 112020, ¶ 14. The requirements providing for review of a successive petition are set forth in section 122-1(f) of the Act, which provides the following:

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and

prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2006).

Based on the above express statutory language, it is evident that both prongs of the cause and prejudice test must be satisfied for the defendant to file an additional postconviction petition. *Guerrero*, 2012 IL 112020, ¶ 14. Again, to file a successive postconviction petition, leave of court must first be obtained. *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009). We review a trial court's ruling denying a motion for leave to file a successive postconviction petition *de novo*. *Id.* at 606.

¶ 13 After the trial court grants a motion for leave to file a petition and appoints counsel to represent the defendant, counsel must abide by the requirements set forth in Illinois Supreme Court Rule 651(c). Rule 651(c) states in relevant part that:

"The record filed in [the trial] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her 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 According to Rule 651(c), counsel appointed at the second stage of a postconviction

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proceeding must consult with the defendant, examine the trial record and make all necessary amendments to the defendant's *pro se* petition to reflect the defendant's postconviction claims of constitutional deprivation. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007). Counsel's compliance with Rule 651(c)'s requirements is generally achieved through the filing of a Rule 651(c) certificate, but the failure to file such a certificate is considered harmless error where the record establishes that appointed counsel satisfied the rule's requirements. *Id.* at 681.

¶ 15 On appeal, defendant claims that because counsel appointed during the second stage of postconviction proceedings failed to satisfy the requirements of Rule 651(c), the trial court's denial of his motion for leave to file the petition should be reversed. Defendant also claims that appointed counsel failed to remain abreast of the procedural posture of his case, and repeatedly requested the trial court to rule upon matters that were previously disposed of in his favor. Specifically, defendant claims that counsel consistently requested the trial court to reconsider its ruling granting defendant's motion for leave to file the petition when the postconviction proceedings had already advanced to the second stage.

¶ 16 Our analysis must begin with a review of the trial court's rulings during the various hearings on defendant's motion for leave to file a petition. A review of the record reveals that the trial court initially commented during a hearing on February 8, 2008, that defendant's postconviction matter "fell off the call," and ordered defendant to be brought to court. At the next hearing on February 28, 2008, the trial court acknowledged that defendant's claims related to a successive postconviction petition, and appointed the public defender's office to represent defendant. The trial court also stated that defendant's postconviction matter was docketed. At the February 11, 2009 hearing, the public defender asked the following question: "Judge, this was

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the *pro se* petition, it is a successive petition that was filed with a motion for leave to file a successive petition, and just as a matter of clarification, does your appointing my office mean -." The trial court responded that "Leave to file successive is granted." The public defender responded by asking "The motion to grant - leave to file successive petition is granted," and the trial court responded, "yes." During the January 10, 2011 hearing, the same public defender indicated that before filing an amended petition on that day, he filed a supplemental motion for leave to file a successive petition attaching defendant's *pro se* motion to file a successive petition. After the public defender handed the State a copy of the supplemental petition, the State indicated that he "was under the impression it was an initial successive petition. It is now in the court's hands whether it is going to decide whether it will grant leave to file, so that's fine." The trial court stated that "It is my ruling whether or not it is appropriate to file a successive, and that's what will happen on the next date." The State also requested confirmation that, at this stage of the proceedings, no filings were expected from the State. The trial court responded that it would be ruling on the motion to file the petition and that the State was not required to file any pleadings.

¶ 17 During the February 9, 2011 hearing, the public defender reminded the court that he filed a supplemental motion during the last hearing and that he believed the trial court would be ruling on whether the case can go forward or whether it would be denying leave. The trial court stated that after reviewing the pleadings filed both by defendant and his counsel, he did not "find any issues that are appropriate in the petition. Leave to file successive post conviction petition is granted - leave to file is denied. Leave to file is denied." The State requested further clarification about whether the trial court was entering a finding that there was no cause and prejudice. The

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trial court responded by stating that defendant had "not met the standard of filing in the successive post conviction, because no violation is alleged that would meet that standard."

¶ 18 Reviewing the record, we, at first glance, agree with defendant that the trial court initially did grant his *pro se* motion for leave to file a petition as indicated by the trial court's express words on February 11, 2009 stating that "leave to file successive is granted" and "the motion to grant - leave to file successive petition is granted." Even prior to that hearing, on February 28, 2008, the trial court appointed the public defender's office to represent defendant and docketed the postconviction matter. These statements support a conclusion that the trial court granted defendant's motion for leave to file his *pro se* successive postconviction petition. Moreover, defendant's *pro se* motion filed in June 2007 included the required cause and prejudice arguments, and after reviewing that petition, the trial court appointed counsel and subsequently stated that defendant's motion for leave to file a successive postconviction petition is granted. Although the trial court did not expressly articulate a finding regarding the cause and prejudice requirements when it granted defendant's *pro se* motion for leave to file a petition and appointed counsel, defendant's motion did include cause and prejudice arguments. Thus, the trial court implicitly ruled that defendant satisfied the cause and prejudice requirements when it granted defendant's *pro se* motion for leave to file a petition. As the proceedings continued and appointed counsel investigated defendant's allegations in his *pro se* motion and petition, appointed counsel filed a supplemental petition attaching defendant's *pro se* petition and motion for leave to file that petition. After reviewing all of those pleadings in their entirety, the trial court denied the motion for leave to file a petition. Indeed, defendant is correct that this latter ruling is in direct contradiction of the trial court's earlier ruling where it granted defendant's

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motion for leave to file a petition. A trial court during a criminal proceeding, however, “has inherent power to reconsider and correct its own rulings.” *People v. Mink*, 141 Ill. 2d 163, 171 (1990); see also *People v. Marker*, 233 Ill. 2d 158, 169, 172 (2009) (recognizing that prior Illinois Supreme Court decisions “expressed the clear judicial policy which favors allowing a trial court to reconsider its rulings”) and *People v. Smith*, 232 Ill. App. 3d 121, 127 (1992) (stating that the time to file a notice of appeal was tolled until the trial court reaffirmed its prior ruling where the trial court *sua sponte* opened reconsideration of an issue). When a case is still pending before a trial court, it has jurisdiction to reconsider any order that it previously entered. *Mink*, 141 Ill. 2d at 171, citing *People ex rel. Daley v. Crilly*, 108 Ill. 2d 301, 305 (1985); *People v. Van Cleve*, 89 Ill. 2d 298 (1982); *People v. Heil*, 71 Ill. 2d 458 (1978). This inherent power to reconsider prior rulings extends to both interlocutory and final judgments. *Mink*, 141 Ill. 2d at 171.

¶ 19 After reviewing again the information relating to defendant's motion for leave to file a petition and the information included in the supplemental motion filed by defendant's appointed counsel perfecting the *pro se* motion, the trial court appears to have reconsidered its prior ruling, which it is at liberty to do, and denied the motion for leave to file a petition. See *Smith*, 232 Ill. App. 3d 121 at 127 (recognizing that a trial court may *sua sponte* reconsider a prior ruling). Even though the trial court previously ruled that defendant's *pro se* motion for leave to file a petition was granted, the case remained pending before it, which provided it with jurisdiction to reconsider its prior order. *Mink*, 141 Ill. 2d at 171. This time, after the trial court reconsidered its ruling, it articulated that defendant did not raise any appropriate issues in the petition and that defendant did not meet the standard required for filing a successive postconviction petition,

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which are considerations associated with first stage proceedings. Thus, the trial court denied defendant's motion for leave to file a successive postconviction petition at the first stage of postconviction proceedings.

¶ 20 We agree with the State that because defendant did not raise any claims on appeal regarding the merits of his arguments set forth in the petition, any such claims are forfeited for review. Rather than arguing the merits of the claims raised in his petition, defendant instead contends that appointed counsel was ineffective because he did not comply with Rule 651(c)'s requirements. Defendant also claims that appointed counsel repeatedly asked for clarification from the trial court regarding its ruling on defendant's *pro se* motion for leave to file a petition and whether it, in fact, did rule on that motion prompting the trial court to reconsider its ruling. Because the trial court first granted defendant's *pro se* motion for leave to file a petition and appointed counsel, but it did not subsequently reconsider that ruling until the February 9, 2011 hearing, defendant's *pro se* petition during the interim period following the initial granting of the motion and the later denial was considered to be at second stage proceedings. At this stage of postconviction proceedings, appointed counsel must abide by Rule 651(c)'s requirements. The parties do not dispute that postconviction counsel did not file a Rule 651(c) certificate of compliance. Defendant argues that not only did counsel not file a certificate, but the record does not support a finding that counsel nonetheless complied with the rule's requirements. Specifically, defendant claims that counsel did not contact him to discuss the proceedings, nothing in the record indicates that counsel actually read the trial record and transcripts even though counsel requested them, and counsel did not file an amended motion despite his requests for additional time to file that pleading.

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¶ 21 The procedural history of this case presents a unique set of facts. Defendant's matter initially proceeded past the first stage of postconviction proceedings by virtue of the trial court granting defendant's *pro se* motion for leave to file a petition and appointing counsel. However, before the trial court made second stage findings and entered a ruling relating to that stage, it reconsidered and reversed its earlier ruling subsequently ruling that defendant's petition failed to satisfy the requirements necessary to advance a petition to second stage proceedings. At the conclusion of the second stage, not only must the State either answer or move to dismiss the petition, but the trial court must enter a ruling deciding "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Here, the matter did not advance to the conclusion of second stage proceedings as the relevant ruling was not entered or considered by the trial court and the State did not respond to or move to dismiss the petition. Moreover, the State, during the January 10, 2011 hearing indicated that its impression was that the matter was at the first stage of proceedings and the trial court told the State that it was not currently required to file any pleadings. Because defendant's matter was ongoing and it never reached the conclusion of second stage proceedings, the appointed counsel was not yet required to file a Rule 651(c) certificate. Accordingly, reversal of the trial court's denial of defendant's motion to file a fourth postconviction petition is not warranted based on appointed counsel's failure to file a Rule 651(c) certificate.

¶ 22

#### CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the trial court.

¶ 24 Affirmed.

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