

No. 1-11-0864

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.)	No. 95 CR 25864
)	
JOSEPH WILSON,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The circuit court's second-stage dismissal of defendant's postconviction petition is affirmed where the record shows that postconviction counsel provided reasonable assistance pursuant to Supreme Court Rule 651(c).

¶ 2 Defendant Joseph Wilson appeals from an order of the circuit court granting the State's motion to dismiss his postconviction petition. On appeal, defendant solely contends that the dismissal should be reversed and his petition remanded for further proceedings because his postconviction counsel failed to provide reasonable assistance when she did not amend his

petition to allege facts to counter the State's timeliness defense and show that defendant's delay in filing was not due to his culpable negligence. We affirm.

¶ 3 Following a 1998 jury trial, defendant was convicted of first degree murder and attempted armed robbery for shooting William Burra in the side as Burra tried to drive away from defendant and his four friends. Defendant was found eligible for the death penalty, but sentenced to natural life in prison for the murder with a concurrent term of 15 years' imprisonment for the armed robbery.

¶ 4 On direct appeal, defendant solely argued that his murder sentence was excessive because the court did not adequately consider his rehabilitative potential. This court rejected that argument and affirmed defendant's convictions and sentences. *People v. Wilson*, No. 1-98-1898 (1999) (unpublished order under Supreme Court Rule 23). This court's order was entered on November 5, 1999. Defendant did not file a petition for leave to appeal with our supreme court.

¶ 5 On December 4, 2009, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2008). Defendant alleged that his trial counsel rendered ineffective assistance because she allowed the trial court to consider an improper factor at sentencing, specifically, a pending murder charge in an unrelated case. Defendant also alleged that his appellate counsel rendered ineffective assistance because she failed to raise the issue on direct appeal. In addition, defendant alleged that his life sentence for the murder was severely disproportionate to the sentences received by his two codefendants who were convicted of the same offenses. Defendant stated that codefendant Robert Thompson pleaded guilty and was sentenced to 20 years' imprisonment for the murder, and codefendant Luis Robles was sentenced to 25 years' imprisonment for the murder following a trial. Both men received 15-year sentences for the attempted armed robbery. In an attached affidavit in support of his petition, defendant averred that he could not have raised the allegation regarding the

disparate sentences in an earlier proceeding because he recently discovered those facts while appealing his conviction in the unrelated murder case, number 97 CR 8783.

¶ 6 The circuit court prepared a written order to summarily dismiss defendant's petition, but then discovered that more than 90 days had passed since the petition was filed, and for that reason, appointed counsel to represent defendant and advanced his petition to second-stage postconviction proceedings. Postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that she consulted with defendant by mail and telephone to ascertain his contentions of deprivation of his constitutional rights "and discuss[ed] the timing of the filing of his petition." Counsel further stated that she examined the report of proceedings from defendant's trial and sentencing. In addition, counsel stated that after examining defendant's *pro se* petition, she determined that it adequately presented his contentions, and therefore, was not filing an amended or supplemental petition.

¶ 7 The State filed a motion to dismiss defendant's postconviction petition arguing that the petition was untimely filed well beyond the statutory time limit, and that defendant did not demonstrate that he was not culpably negligent for the late filing. The State argued that defendant did not explain why he waited 10 years after his direct appeal was decided to file his petition. The State further asserted that defendant's allegation regarding an improper sentencing factor was barred by the doctrines of waiver and *res judicata* because the issue could have been raised on direct appeal, and on direct appeal, this court already found that his sentence was not excessive. The State also argued that defendant's claim of ineffective assistance of counsel was without merit because evidence of other crimes may be considered in aggravation at sentencing.

¶ 8 At the hearing on its motion to dismiss, the State argued that defendant's petition was procedurally barred because it was untimely filed more than 10 years late, and defendant did not allege an acceptable reason to excuse the late filing. The State also argued that defendant's

allegations were without merit, presenting the same arguments raised in its written motion. Postconviction counsel stated that she discussed the issues raised in defendant's petition with him at length and also "discussed the timing of the filing of the petition." Counsel and defendant exchanged at least 16 letters between them, in addition to at least two telephone calls during which they discussed the issues. Counsel stated that based upon her communication with defendant and her review of the record and his petition, she did not file an amended petition because his *pro se* petition adequately presented his issues. Counsel expressly argued "Mr. Wilson did claim in his affidavit that he was not aware of the facts surrounding these claims until his appeal[] in another matter was final."

¶ 9 The circuit court noted that the reason defendant's petition advanced to second-stage postconviction proceedings was because the court failed to address it within 90 days as required by the Act. The court then found that defendant's petition was untimely filed, and that the issues raised therein were without merit and would not have passed first-stage review. Consequently, the circuit court granted the State's motion and dismissed defendant's postconviction petition.

¶ 10 On appeal, defendant solely contends that the dismissal should be reversed and his petition remanded for further proceedings because his postconviction counsel failed to provide reasonable assistance when she did not amend his petition to allege facts to counter the State's timeliness defense and show that defendant's delay in filing was not due to his culpable negligence. Defendant notes that he stated in his affidavit attached to his petition that he could not have raised his claim earlier because he recently discovered the facts related to the issue regarding the sentencing disparity. He further notes that counsel only argued what he had already stated in his affidavit. Defendant does not explain what other facts counsel should have alleged.

¶ 11 The State argues that postconviction counsel provided reasonable assistance and complied with Rule 651(c). The State notes that defendant does not claim that there are

additional facts that would excuse his tardiness. The State asserts that this court affirmed defendant's conviction in the unrelated murder case on June 12, 2001, which was eight and a half years before he filed his postconviction petition in December 2009. The State has included a copy of this court's order in the unrelated case in the appendix of its brief. The State argues that defendant's excuse for his late filing was without merit, and thus, counsel was not required to pursue it any further.

¶ 12 We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The interpretation of a supreme court rule, including whether counsel fulfilled her duties under Rule 651(c), is also reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). When considering the allegations raised in a postconviction petition, the court may review the trial record and any action taken by the appellate court in such proceedings. 725 ILCS 5/122-2.1(c) (West 2008). The reviewing court may affirm the circuit court's dismissal of a postconviction petition on any basis shown in the record. *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008).

¶ 13 A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 128 (2007). Defendant must demonstrate that he suffered a substantial deprivation of a constitutional right in the proceeding that produced his conviction or sentence in order to be entitled to postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006).

¶ 14 At second-stage postconviction proceedings, an indigent defendant is entitled to representation by appointed counsel. 725 ILCS 5/122-4 (West 2008); *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Postconviction counsel is required to provide defendant with a "reasonable level of assistance." *Lander*, 215 Ill. 2d at 583. Pursuant to Supreme Court Rule 651(c), post-

conviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant's contentions. *Pendleton*, 223 Ill. 2d at 472.

Compliance with these duties may be shown by a certificate filed by postconviction counsel. Rule 651(c); *Lander*, 215 Ill. 2d at 584. Counsel's substantial compliance with Rule 651(c) is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. A Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *Profit*, 2012 IL App (1st) 101307 at ¶ 19.

¶ 15 Here, counsel filed a Rule 651(c) certificate; therefore, the presumption exists that counsel provided defendant with the reasonable level of assistance required by the rule. The burden is on defendant to rebut this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307 at ¶ 19.

¶ 16 Postconviction proceedings must be initiated within the time limitations specified in section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2008)), unless defendant alleges facts showing that the delay in filing his petition was not due to his culpable negligence. *Lander*, 215 Ill. 2d at 586. Our supreme court defined "culpable negligence" as conduct greater than ordinary negligence and akin to recklessness. *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). It is solely defendant's obligation to know the time limitations for filing his postconviction petition, and his ignorance of the law or his legal rights will not excuse a delay in filing. *Lander*, 215 Ill. 2d at 588-89.

¶ 17 Postconviction counsel is required to amend an untimely *pro se* petition to allege any available facts that are necessary to establish that the delay in filing was not due to defendant's

culpable negligence. *People v. Perkins*, 229 Ill. 2d 34, 49 (2007). To fulfill this duty, counsel must ask defendant if there is any excuse for his delay in filing. *Perkins*, 229 Ill. 2d at 49.

¶ 18 Here, we find that postconviction counsel did not provide unreasonable assistance when she did not amend defendant's *pro se* petition to counter the State's timeliness defense. Counsel expressly stated in her Rule 651(c) certificate, and at the hearing on the State's motion to dismiss, that she "discussed the timing of the filing of the petition" with defendant. At the hearing, counsel argued "Mr. Wilson did claim in his affidavit that he was not aware of the facts surrounding these claims until his appeal in another matter was final." Defendant claimed that he discovered the facts regarding the sentencing disparity after his appeal was decided in his unrelated murder case under criminal court number 97 CR 8783. However, as the State correctly demonstrates, this court rendered its decision in that appeal on June 12, 2001. *People v. Wilson*, No. 1-99-4037 (2001) (unpublished order under Supreme Court Rule 23). Defendant filed his *pro se* postconviction petition eight and half years later, on December 4, 2009. Therefore, the claim in defendant's affidavit that he "recently" discovered the facts is not true. We find that counsel had no reason to amend the *pro se* petition as the explanation defendant provided her was without merit and would not support a claim that he was not culpably negligent for the untimeliness of his petition. Counsel was not required to advance a frivolous or spurious claim on defendant's behalf. *Pendleton*, 223 Ill. 2d at 472. Defendant has not identified any additional facts that counsel should have alleged on his behalf. Pursuant to *Perkins*, by asking defendant about his late filing, then orally articulating that reason to the court, counsel sufficiently complied with her duty under Rule 651(c). *Perkins*, 229 Ill. 2d at 51. Accordingly, we find that counsel's decision that it was not necessary to file an amended petition was reasonable.

¶ 19 Based on our review of the record, we conclude that postconviction counsel substantially complied with the duties required in Rule 651(c) and provided defendant with the reasonable

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assistance contemplated by the Act. Accordingly, the circuit court's dismissal of defendant's postconviction petition during the second stage of proceedings was proper.

¶ 20 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.