

2013 IL App (1st) 110871-U

SIXTH DIVISION
April 19, 2013

No. 1-11-0871

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. 05 CR 16972
)	
MARVIN PEREZ,)	The Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Lampkin and Justice Reyes 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 Marvin Perez appeals from an order of the circuit court granting the State's motion to dismiss his postconviction petition. On appeal, defendant contends 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 the petition to include facts demonstrating defendant's lack of culpable negligence for filing an untimely petition, and counsel failed to attach affidavits or documentation to the petition. We affirm.

¶ 3 Defendant was charged with shooting two men during a confrontation between rival gang members in Marquette Park. Prior to trial, defendant filed a motion to suppress statements he made to the police and Assistant State's Attorney (ASA) Jazmin De Olazabal. At the hearing on that motion, defendant, Chicago police detective Brian Lutzow and ASA De Olazabal all testified that the police offered defendant food, drink and use of the washroom, but he declined all offers stating that he was not hungry or thirsty, and did not need to use the washroom. Detective Lutzow further testified defendant was not wearing a shirt, and when defendant told police that he was cold while sitting in the air-conditioned interview room, the police gave him a long-sleeved T-shirt to wear. Defendant acknowledged the police gave him a shirt, but claimed it was so he would look presentable for the ASA. The trial court found that there was no evidence of any physical misconduct by the police, expressly noting that defendant had been offered food and use of the washroom, and it denied his motion to suppress.

¶ 4 Following a 2006 bench trial, defendant was convicted of 2 counts of aggravated battery with a firearm and 10 counts of aggravated unlawful use of a weapon. The trial court sentenced defendant to concurrent prison terms of 10 years for each aggravated battery conviction, and 3 years for each aggravated unlawful use of a weapon conviction.

¶ 5 On direct appeal, defendant argued his conviction for aggravated unlawful use of a weapon had to be vacated because it was a lesser included offense of aggravated battery with a

firearm. This court rejected defendant's argument and affirmed his convictions and sentences. *People v. Perez*, No. 1-06-1764 (2008) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal, but issued a supervisory order directing the circuit court to correct defendant's mittimus by merging his multiple counts of aggravated unlawful use of a weapon into one conviction and one sentence for that offense. *People v. Perez*, 228 Ill. 2d 547 (2008).

¶ 6 On June 4, 2009, defendant mailed 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's petition is a preprinted form on which defendant filled in the blanks. One of the preprinted sentences on the form states that the petition was mailed to the clerk of the circuit court within the time frame provided by section 122-1 of the Act. Defendant alleged that his constitutional rights were violated because Detective Minelli investigated him for six hours in a room that was cold and had no water or toilet. Defendant stated that he told the trial judge about these conditions and raised the issue in his motion for a new trial, but the court did nothing and denied his motion. Defendant also stated that he asked his appellate counsel to raise the issue on appeal, but she did not. Defendant's petition ends with a preprinted sentence that reads "Defendant, *pro se*, states, under penalty of perjury, that the facts set out in this petition are true and correct to the best of his/her knowledge and belief." Defendant signed his petition.

¶ 7 The circuit court appointed counsel to represent defendant. The following month, postconviction counsel entered her appearance and requested a copy of the common law record and transcript for defendant's case. On May 20, 2010, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec 1, 1984) stating that she consulted with defendant by letter

and phone to ascertain his contentions of deprivation of his constitutional rights. Counsel further stated that she obtained and examined the report of proceedings for defendant's "guilty plea and sentencing in this case." In addition, counsel stated that she did not file an amended petition because defendant's *pro se* petition adequately set forth his claims of deprivation of his constitutional rights.

¶ 8 On October 21, 2010, the State filed a motion to dismiss defendant's postconviction petition. The State also provided the court with a courtesy copy of the transcript from the hearing on defendant's motion to suppress his statement, expressly noting it received that transcript from postconviction counsel. In its motion to dismiss, the State argued that defendant's petition was untimely filed nearly four months late. The State noted that defendant had not alleged in his petition that he was not culpably negligent for his delayed filing. The State further argued defendant's allegations lacked specificity regarding which constitutional rights were violated and how they were violated; lacked documentary support required by the Act, and were without merit. The State also argued that defendant's allegation that his confession was coerced was *res judicata* because the issue was thoroughly litigated at the hearing on defendant's motion to suppress his statements.

¶ 9 At a hearing on its motion to dismiss, the State argued that the allegations in defendant's petition were procedurally and substantively deficient, presenting the same arguments raised in its written motion. Postconviction counsel first argued that, regarding timeliness, defendant was housed at the Danville Correctional Center which had "four out of maybe five day look [*sic*] lock downs" during which defendant was not permitted out of his cell. Counsel argued that as soon as the lock-down was lifted, defendant immediately filed his petition. The court asked counsel if it

was sufficient to argue that the prison was locked down most of the time, and whether she knew if it was locked down anytime during the relevant period. Counsel stated that her knowledge was provided to her by defendant, and when she specifically asked defendant about the timeliness of his petition, that was the response he gave her. Regarding the lack of documentation, counsel argued that it would be futile to attempt to obtain an affidavit from the police or ASA about the "deplorable conditions" described in defendant's petition. Counsel then referenced a specific page of Detective Lutzow's testimony in the transcript from the hearing on defendant's motion to suppress his statements. Counsel offered a copy of the transcript to the court, but the court informed her that it already had the transcript. Counsel argued that the transcript showed that defendant was held for hours in a cold room, but noted that the police gave defendant a shirt.

¶ 10 The circuit court found that the issue of timeliness was of "no consequence" as it was more concerned with the substance of defendant's petition, and would not want to see defendant's constitutional rights ignored because his petition was filed a matter of weeks late. The court further found there was no showing that trial or appellate counsel had rendered ineffective assistance. The court recalled that the conditions surrounding defendant's statements were heard during a lengthy motion, and that it found defendant's testimony not credible. Consequently, the court concluded that any constitutional issues regarding defendant's statements had already been litigated, and it granted the State's motion to dismiss defendant's postconviction petition.

¶ 11 On appeal, defendant contends that the dismissal of his postconviction petition should be reversed because postconviction counsel failed to provide reasonable assistance in compliance with Supreme Court Rule 651(c). Defendant argues that counsel's Rule 651(c) certificate states that she reviewed the transcript from defendant's "guilty plea," but he had a bench trial, which

shows that counsel's examination of the trial record was cursory at best. Defendant further argues that counsel failed to amend his petition to include available facts that demonstrated defendant's lack of culpable negligence for filing an untimely petition. Defendant also asserts that counsel failed to attach affidavits and documentation to the petition as required by the Act. Defendant acknowledges that the circuit court dismissed his petition based on *res judicata*, but claims that is irrelevant because counsel's failure to comply with Rule 651(c) can never be considered harmless error.

¶ 12 The State argues that postconviction counsel substantially complied with Rule 651(c), and defendant did not rebut the presumption that counsel fulfilled her duties. The State notes that defendant does not claim that the allegations in his petition have merit. It further notes that none of the errors he alleges on appeal were the basis for the circuit court's dismissal of his petition. The State argues that counsel's decision not to amend defendant's petition was correct because his claim of coercion was contradicted by the transcript from the suppression hearing, and counsel's oral argument regarding his untimeliness was the best she could do with the facts available to her.

¶ 13 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 his 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, including the transcripts from the proceedings below. 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).

¶ 14 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).

¶ 15 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), postconviction 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.

¶ 16 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.

¶ 17 Defendant first contends that counsel violated her duty to examine the trial record. Defendant notes that counsel's 651(c) certificate states that counsel reviewed the transcript from defendant's "guilty plea." Defendant points out that he had a bench trial where 11 witnesses testified, and argues that counsel's error shows that her examination of the trial record was cursory at best.

¶ 18 Where the record shows that postconviction counsel adequately fulfilled the duties required by Rule 651(c), her failure to file a proper certificate is harmless error. *Lander*, 215 Ill. 2d at 584, citing *People v. Williams*, 186 Ill. 2d 55, 59 n.1 (1999). This is because Rule 651(c) does not require strict compliance. *Williams*, 186 Ill. 2d at 59 n.1. Counsel's substantial compliance with Rule 651(c) is sufficient. *Profit*, 2012 IL App (1st) 101307 at ¶ 18.

¶ 19 Here, the record reveals that when postconviction counsel entered her appearance, she immediately requested a copy of the common law record and transcript for defendant's case. In her Rule 651(c) certificate, counsel expressly stated that she "obtained and examined the report of proceedings of his guilty plea and sentencing in this case." At the hearing on the State's motion to dismiss defendant's postconviction petition, counsel pointed the court to a specific page and line from Detective Lutzow's testimony in the transcript from the hearing on defendant's motion to suppress his statements. Counsel argued that the transcript showed that defendant was held for hours in a cold room, and noted that the police gave defendant a shirt. We find that the record thereby demonstrates that counsel thoroughly examined the report of proceedings, adequately fulfilling her duty under Rule 651(c). Accordingly, counsel's erroneous reference to a

"guilty plea" in her certificate was harmless error, and does not constitute unreasonable assistance. See *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 14 (counsel's erroneous citation to Supreme Court Rule 604(d) instead of Rule 651(c) was harmless in light of the substance of counsel's certificate and his representations to the trial court).

¶ 20 Defendant next contends that postconviction counsel provided unreasonable assistance because she failed to amend his petition to include available facts that demonstrated defendant's lack of culpable negligence for filing an untimely petition. Defendant argues that he gave counsel a viable reason why his petition was late, and she was required to amend his petition.

¶ 21 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.

¶ 22 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.

Where counsel does not file a written amended petition, but orally amends the petition by articulating the reason for the late filing, counsel sufficiently complies with Rule 651(c). See

Perkins, 229 Ill. 2d at 51; see also *People v. Henderson*, 215 Ill. App. 3d 24, 26 (1991) (counsel's oral amendment of the postconviction petition incorporating an additional allegation was sufficient and no other amendments were necessary to adequately present the defendant's claims).

¶ 23 Here, defendant did not address his lack of culpable negligence for the delay in filing his *pro se* petition. In fact, a preprinted sentence in his petition stated that it was being submitted within the time frame provided by section 122-1 of the Act. The record shows, however, that while preparing defendant's case, postconviction counsel specifically asked defendant about the timeliness of his petition. Defendant told counsel that the prison had "four out of maybe five day" lock-downs during which he was not permitted out of his cell, and as soon as the lock-down was lifted, he filed his petition. Counsel presented this argument to the circuit court at the hearing on the State's motion to dismiss. When the court asked counsel if this explanation was sufficient to excuse the untimely filing, counsel replied that this was the explanation defendant had given her. The record thus reveals that, based on her consultation with defendant, counsel had no reason to amend the *pro se* petition as the explanation defendant provided her 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. 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.

¶ 24 We further note that the circuit court expressly found that, although defendant's petition may have been untimely, the issue of timeliness was of "no consequence" in the court's ruling.

Therefore, counsel's decision that it was not necessary to file an amended petition had no adverse effect on the court's ruling.

¶ 25 Finally, defendant contends that postconviction counsel provided unreasonable assistance because she failed to attach to his petition affidavits and documentation required by the Act.

Defendant claims that counsel should have attached a notarized verification affidavit from defendant as required by section 122-1(b) of the Act, the transcript from the hearing on defendant's motion to suppress his statements, and an affidavit from defendant in support of his argument pursuant to section 122-2 of the Act.

¶ 26 Section 122-1(b) of the Act provides that a post-conviction proceeding is commenced when a prisoner files a petition that is "verified by affidavit." 725 ILCS 5/122-1(b) (West 2008).

The defendant's affidavit verifies that the allegations in his petition are being brought truthfully and in good faith. *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Lack of notarization for a verification affidavit is a procedural defect that may be raised by the State during the second stage of postconviction proceedings. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 35. If the State does not raise the procedural defect, then it is waived. See *Boclair*, 202 Ill. 2d at 101-02 (waiving time limitation for filing). See also *Kirkpatrick*, 2012 IL App (2d) 100898 at ¶ 27 (once the State moves to dismiss without challenging the procedural defect, and the circuit court conducts a hearing, where the defect is not raised, and issues its ruling based on the merits of the petition, the notarization issue becomes moot).

¶ 27 Here, defendant's *pro se* petition ends with a preprinted sentence that reads "Defendant, pro se, states, under penalty of perjury, that the facts set out in this petition are true and correct to the best of his/her knowledge and belief." Defendant signed his petition directly beneath that

statement, but there is no notarization. However, the State did not raise the issue of an insufficient verification affidavit as a procedural bar in its motion to dismiss. Consequently, the State waived this procedural defect during the second-stage proceedings. In addition, the lack of notarization did not affect the sufficiency of the allegations in defendant's petition. See *Henderson*, 2011 IL App (1st) 090923 at ¶¶ 34-35. Under these circumstances, we decline to find that postconviction counsel provided unreasonable assistance by not providing a notarized verification affidavit as doing so would merely elevate form over substance, and we reject that result as inconsistent with our rulings in *Henderson* and *Kirkpatrick*.

¶ 28 Moreover, we find that the record belies defendant's claim that postconviction counsel failed to provide the transcript from the hearing on defendant's motion to suppress as documentation to support the allegations in his petition. Section 122-2 of the Act states that a postconviction "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). Defendant's failure to attach supporting documentation, or otherwise explain its absence, is "fatal" to his petition and alone justifies dismissal of the petition. *People v. Delton*, 227 Ill. 2d 247, 255 (2008).

¶ 29 Here, the record shows that counsel supported the allegations in defendant's *pro se* petition with the transcript from the hearing on defendant's motion to suppress his statements. Although counsel did not "attach" the transcript to the petition defendant had already filed, she provided a copy of that transcript to the State. When the State filed its motion to dismiss, it provided the circuit court with a courtesy copy of that transcript, expressly noting that it had received the transcript from postconviction counsel. At the hearing on the State's motion to

dismiss, counsel offered a copy of the transcript to the court, but the court informed her that it already had the transcript. Counsel then cited to specific testimony in that transcript in support of defendant's allegations.

¶ 30 Because counsel satisfied the documentation requirement of section 122-2 by supporting defendant's allegations with the transcript, she did not need to provide an affidavit from defendant. We note that counsel also explained that she did not attempt to obtain affidavits from the police or the ASA because such efforts would have been futile.

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

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

¶ 33 Affirmed.