

No. 1-11-1166

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 30148
)	98 CR 30149
)	
MARIA RIVERA,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

¶ 1 *Held:* Where postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) and defendant has not rebutted the presumption of compliance with the Rule, counsel provided a reasonable level of assistance and defendant's postconviction petition was properly dismissed on motion of the State.

¶ 2 Defendant Maria Rivera appeals the second-stage dismissal of her petition for relief under the Post-Conviction Hearing Act ("Act"). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant claims postconviction counsel rendered unreasonable assistance and violated Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) when counsel failed to amend defendant's *pro se* petition to place it in proper legal form, failed to argue that her claims were not barred as

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untimely filed because defendant was not culpably negligent in the untimely filing, and failed to consult with defendant regarding defendant's constitutional claims.

¶ 3 Defendant was charged with unrelated crimes stemming from the deaths of two of her children in 1993 and 1998. In January 2002, defendant pled guilty to first degree murder and aggravated arson for the death of her 23-month-old daughter, Sara, who died of carbon monoxide intoxication due to a fire that defendant started when Sara was locked in her bedroom closet. Defendant also pled guilty to attempted murder and aggravated arson for a fire she started in October 1998 under her four-year-old son Christopher's bed while he was sleeping. Christopher survived the fire; however, he sustained severe burns to 30-40% of his body. Defendant gave an inculpatory statement to police and an assistant State's Attorney. Following her negotiated guilty plea, defendant was sentenced to concurrent terms of 60 years' imprisonment for murder and 30 years each for the remaining charges. She did not file a motion to withdraw guilty plea or to reconsider sentence, and did not file a direct appeal.

¶ 4 As defendant's plea was entered on January 29, 2002, the latest date for filing a timely postconviction petition was January 29, 2005. On October 14, 2004, defendant filed a motion requesting a transcript of her plea hearing and to proceed *in forma pauperis*. On October 20, 2004, she filed a motion for appointment of counsel. On January 3, 2005, defendant filed a "Motion to Amend Post Conviction" requesting that she be allowed to "add [certain] medical records to her post conviction petition filed [on] October 20, 2004 in [the circuit] court." The clerk of the circuit court responded in a letter stating that it had no record of defendant filing a postconviction petition and asking defendant to submit a file-stamped copy of the petition. Defendant did not submit a copy of the petition as requested by the clerk.

¶ 5 On July 5, 2005, defendant filed an untimely *pro se* petition for postconviction relief in which she made several allegations of ineffective assistance of counsel. Her petition was handwritten and contained numerous typographical and grammatical errors. Defendant's petition stated:

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"The attorney didn't bring my children to court I was taking medication couldn't defended myself The medicine was taking prozac. My attorney asked for a psy evaluate and I was not able to perform up to standard Incomplete PSI due to meds medication and its effects my attorney didn't called Adan Arreda, Maria Arreda Blanca Quiroga, Lucio Quiroga Rosie Quiroga, Evelyn Quiroga, Miguel Quiroga, Gabriel Quiroga, Maria Castillo, Zacarias Castillo, Arturo Castillo, Manuel Castillo Lizette Castillo, Diana Arreda, Raul Hernandez, Diana Navaro, Rafael Navaro, Patty Chavez, Octavio Chavez, Cassandra, Cristian Manuel Arreda, Raquel, leo, Noel, Celia Arreda, Esther, Sandra, Mario Attorney didn't come to see me at jail. Attorney lack of visits, also lack of contact My attorney did not called my children as witness Because they can be helpful to my case Theres name are Angie Rivera, Airlia Rivera, Attorney didn't want to go to trial" (Errors in original).

¶ 6 After the Office of the Public Defender was appointed in August 2005, postconviction counsel filed an appearance on defendant's behalf in October 2005. In January 2008, counsel told the court that, in addition to having reviewed the petition, counsel spoke with defendant and was working with defendant to ascertain the name and location of defendant's trial counsel. Counsel also filed a motion for leave to subpoena defendant's medical records and stated on the record that she received and reviewed those records. In December 2009, postconviction counsel informed the court that she had received the trial record from defendant's trial counsel and, in March 2010, counsel stated that she was still reviewing the trial record but that she would be ready to "file something" with the court by the next date.

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¶ 7 After two more status hearings, in November 2010, postconviction counsel filed a Rule 651(c) certificate attesting that she "consulted with" defendant by mail about defendant's constitutional claims, she read the "report of proceedings at trial [*sic*] and sentencing," and did not prepare an amended postconviction petition because defendant's original *pro se* petition adequately set forth defendant's claims. The State filed a motion to dismiss the petition alleging that defendant's petition was untimely and lacked merit and the court held a hearing on the motion. After the State argued its motion, defense counsel stood on the issues in defendant's *pro se* petition and declined to present additional argument. Counsel also stated that she wrote a letter to defendant and arranged to speak to defendant over the telephone but defendant did not call her at the arranged time. Counsel further stated that she "discussed" the issues presented in defendant's petition and explained that defendant was contending that she was taking Prozac at the time of trial and was therefore unable to assist in her defense, that counsel was ineffective for failing to call several witnesses and for failing to visit defendant in jail. Counsel then declined to present argument. Finding the petition untimely filed, the circuit court granted the State's motion to dismiss. The court also dismissed the petition on substantive grounds, finding that, even if it had been timely filed, the petition failed to make a substantial showing of a constitutional violation.

¶ 8 On appeal, defendant claims postconviction counsel rendered unreasonable assistance and violated Rule 651(c) when counsel failed to argue that defendant was not culpably negligent in the late filing of her petition, failed to amend defendant's petition to adequately present her claims by putting the petition in proper legal form and attaching affidavits, and failed to consult with defendant about her claims.

¶ 9 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. Boclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The instant case involves the second stage of the postconviction process. At this stage, dismissal is

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warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 381. At second stage proceedings, all factual allegations not positively rebutted by the record are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 10 The appointment of counsel at the second stage of postconviction petition proceedings is a statutory right, rather than a constitutional right. 725 ILCS 5/122-4 (West 2010); *People v. Turner*, 187 Ill. 2d 406, 411 (1999). The Act provides that petitioners are entitled to a "reasonable" level of assistance of counsel. *Perkins*, 229 Ill. 2d 34, 42 (2007). Rule 651(c) provides that reasonable assistance requires performance of three duties: (1) consulting with the petitioner either by mail or in person to ascertain her constitutional claims; (2) examining the record of the trial court proceedings; and (3) making any amendments to the *pro se* petition necessary to adequately present the petitioner's claims. Ill. S. Ct. R. 651(c); *Perkins*, 229 Ill. 2d at 42. The purpose of Rule 651(c) is to "ensure that postconviction counsel shapes the defendant's claims 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). Counsel is not required to advance nonmeritorious claims on defendant's behalf. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006); *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 11 Our review of an attorney's compliance with a supreme court rule is *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19. When postconviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that postconviction 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*, 2012 IL App (1st) 101307, ¶19.

¶ 12 Defendant contends that counsel was unreasonable because counsel failed to amend the petition to argue that defendant was not culpably negligent in filing an untimely postconviction petition. If a postconviction petition is not filed within the limitations period, the petitioner must allege that the delay was not due to her culpable negligence. 725 ILCS 5/122-1(c) (West 2010); see also *Perkins*, 229 Ill. 2d at 43. Where there are no allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State's motion. 725 ILCS 5/122-1(c) (West 2010). Defendant argues there were facts available for postconviction counsel to argue defendant's lack of culpable negligence on January 3, 2005, because within the limitations period for filing the petition, defendant filed a motion to amend her petition stating that she filed her original petition on October 20, 2004. Defendant claims that the January 2005 motion to amend suggests the "possibility" that defendant's allegedly timely filed petition "may have been lost or misfiled." She argues that postconviction counsel should have presented these facts to the trial court and should have argued that defendant intended to initiate postconviction proceedings before the deadline and was diligently working on her petition. The Act, however, requires that the actual petition be filed prior to the deadline. *Id.* Defendant's argument that a petition may have been filed and then lost or misplaced is speculative, and we cannot fault postconviction counsel for failing to present it. A defendant cannot circumvent the Act's statute of limitations by making a "wholly speculative" claim. *People v. Harris*, 224 Ill. 2d 115, 134 (2007). There is nothing in the record to affirmatively rebut the presumption that counsel acted reasonably in declining to amend the *pro se* petition to argue that defendant was not culpably negligent in untimely filing her petition.

¶ 13 Defendant further alleges that postconviction counsel provided unreasonable assistance by failing to amend the petition. Specifically, defendant argues that her petition should have been amended because it is difficult to ascertain the actual nature of her claims and, as a result, the petition should have been amended to be shaped into proper legal form, including alleging that defendant was prejudiced by her trial counsel's ineffective assistance. While this court

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agrees that defendant's *pro se* petition was inartfully written and did not include an allegation of prejudice, postconviction counsel stated at the hearing that defendant's petition alleged that her trial counsel failed to call a number of witnesses and visit defendant in jail, and that defendant was taking Prozac at the time of her plea.

¶ 14 Our supreme court has held that postconviction counsel is not required to amend a petition to advance nonmeritorious claims. *Pendleton*, 223 Ill. 2d at 472. Here, defendant's claim of ineffective assistance of counsel is without merit because defendant entered into a negotiated plea agreement, thereby rendering the claim that trial counsel failed to call witnesses a non-issue. The parties stipulated to the statement of facts that formed the basis for defendant's guilty plea. Additionally, defendant responded to each question posed by the trial court when entering into the negotiated plea and in waiving her right to trial by jury. The parties stood on the Rule 402 conference when the trial court asked whether there was evidence to be presented in aggravation and mitigation. Therefore, because there was no trial, no argument in aggravation or mitigation, and because the record indicates that defendant understood the nature of the charges against her, and knowingly and intelligently entered into the guilty plea and jury waiver, we find that defendant's postconviction claim of ineffective assistance of counsel is meritless and postconviction counsel was not required to amend the petition.

¶ 15 Defendant also contends that postconviction counsel's representation was unreasonable because counsel failed to amend the petition to include affidavits supporting defendant's claims. In making this argument, defendant does not suggest how affidavits from the alleged witnesses could have supported the petition. Instead, she argues only that "of the 29 witnesses listed in [defendant's] petition – several of whom were identified by first name only – counsel did not describe what a single one of them would have contributed to a plea hearing or trial." This argument is based on nothing more than speculation that the witnesses would have had anything relevant to contribute. Claims of ineffective assistance of counsel cannot be based on mere speculation. *People v. Bew*, 228 Ill. 2d 122, 135 (2008). Indeed, where a postconviction petition

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is not supported by affidavits it may reasonably be presumed that postconviction counsel made a concerted effort to obtain the affidavits but was unsuccessful. See *People v. Johnson*, 154, Ill. 2d 227, 241 (1993).

¶ 16 Defendant's claim that postconviction counsel failed to consult with her to ascertain the nature of her constitutional claims is affirmatively rebutted by the record. Although defendant's claim of failure to consult focuses on postconviction counsel's statement during the hearing that counsel arranged a telephone call with defendant but defendant did not call at the arranged time, the record shows that on January 25, 2008, counsel told the court that she spoke with defendant and was working with defendant to ascertain the name and location of defendant's trial counsel. Later, postconviction counsel informed the court that she corresponded with defendant's trial counsel by mail and telephone and received trial counsel's record of the trial court proceedings. On November 19, 2010, postconviction counsel informed the court that she had consulted with defendant by mail and asked defendant to call her. Because the record is clear that postconviction counsel consulted with defendant and defendant's trial counsel, counsel complied with the consultation requirement in Rule 651(c).

¶ 17 The cases cited by defendant do not compel a different result. In *Turner*, 187 Ill. 2d at 414, the supreme court held that postconviction counsel's representation was unreasonable where counsel failed to amend the petition to include a routine legal theory (ineffective assistance of appellate counsel) that would have saved defendant's petition from forfeiture. Here, defendant's argument that counsel could have amended the petition to state a viable claim is wholly speculative.

¶ 18 In *People v. Suarez*, 308 Ill. 2d 37, 40-41 (2007), postconviction counsel did not file a Rule 651(c) certificate and the record did not otherwise establish compliance with that rule. Under those circumstances, there was no presumption of compliance, and the court held that remand for compliance was necessary without regard to whether defendant's allegations had merit. *Id.* at 51. The case at bar is more like *Perkins*, 229 Ill. 2d at 38, where postconviction

counsel filed a Rule 651(c) certificate, giving rise to a presumption of compliance. The defendant argued on appeal that counsel failed to render reasonable assistance where the record showed he was unfamiliar with the timeliness requirements of the Act and did not establish facts showing that the untimely filing was not due to the defendant's culpable negligence. *Id.* at 40. The court rejected that argument, stating, "There is nothing in the record to indicate that petitioner had any other excuse showing the delay in filing was not due to his culpable negligence. We cannot assume there was some other excuse counsel failed to raise for the delay in filing." *Id.* at 51. As in *Perkins*, postconviction counsel's filing of a Rule 651(c) certificate gives rise to a presumption of compliance. That presumption cannot be rebutted by mere speculation.

¶ 19 In *Schlosser*, 2012 IL App (1st) 092523, ¶ 2, postconviction counsel filed a Rule 651(c) certificate asserting that he made any necessary amendments to the petition. However, in arguing against the State's motion to dismiss, counsel raised theories that would have avoided forfeiture but failed to amend the defendant's postconviction petition to include allegations or facts supporting those theories. *Id.* at ¶¶ 27-28. The circuit court found the claims forfeited and this court reversed and remanded. *Id.* at ¶¶ 10, 36. In doing so, we held that counsel's assertions at the hearing were insufficient to constitute an amendment to the petition. *Id.* at 28. Under those circumstances, counsel's representation in the Rule 651 (c) certificate that he had made any necessary amendments to the petition was rebutted by the record. *Id.* at ¶¶ 10, 28. That did not happen in the case at bar.

¶ 20 Finally, without raising it as a separate point on appeal, defendant asserts that where counsel finds the *pro se* petition so lacking in merit that it cannot be amended or supported by documentation, counsel must move to withdraw rather than file a Rule 651(c) certificate. The only authority defendant cites is *Greer*, 212 Ill. 2d 192. In *Greer*, postconviction counsel was appointed solely because the court failed to dismiss the petition within the required time for summary dismissals. *Id.* at 194-95. Instead of filing a Rule 651(c) certificate, counsel moved to

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withdraw on the basis that the petition lacked merit. *Id.* at 195. The issue before the supreme court was whether postconviction counsel, once appointed, could withdraw instead of complying with the duties set out in Rule 651(c). *Id.* at 195-96. The supreme court held that withdrawal was permitted, stating that "[i]f amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not "necessary" within the meaning of the Rule." *Id.* at 205. Although *Greer* permits withdrawal where the defendant's petition cannot be amended to state a meritorious claim, it does not state a *per se* rule that counsel must withdraw instead of complying with Rule 651(c) and standing on the *pro se* petition.

¶ 21 In conclusion, postconviction counsel filed a Rule 651(c) certificate, thereby creating the presumption of compliance with the Rule. Defendant has failed to rebut the presumption. Accordingly, we cannot find that counsel provided an unreasonable level of assistance. Dismissal of defendant's petition was proper.

¶ 22 Affirmed.