

No. 1-11-1551

**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. 99 CR 10066
	)	
RORY COOK,	)	Honorable
	)	Rosemary Grant-Higgins
	)	and Neera Lall Walsh,
Defendant-Appellant.	)	Judges Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the circuit court's second-stage dismissal of defendant's post-conviction petition where post-conviction counsel provided reasonable assistance, and vacate the \$90 of costs and fees imposed against him where the circuit court improperly ruled that his petition was frivolous.

¶ 2 Defendant Rory Cook appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2004). On appeal, defendant contends that his appointed post-conviction counsel did not provide reasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because appointed counsel did

not amend defendant's *pro se* petition to add a new claim purportedly presented in attachments to defendant's subsequently filed *pro se* motion seeking new post-conviction counsel, which the circuit court denied before ruling on the post-conviction petition. Defendant also asserts that the circuit court erred in assessing filing fees and court costs against him for filing a frivolous petition where the petition had already advanced beyond the summary dismissal stage. We affirm as modified.

¶ 3 This case arose from the shooting death of the victim, Brian Keith Bell, at 11259 South King Drive in Chicago on April 3, 1999. Prior to trial, defense counsel indicated that self-defense might be raised as an affirmative defense. The State filed a motion *in limine* seeking to bar the testimony of five police officers who would testify to the victim's violent past. The State argued that although evidence of the victim's character can be introduced per *People v. Lynch*, 104 Ill. 2d 194 (1984), those particular accounts of the victim's arrests would be hearsay. The trial court agreed and granted the State's motion. However, the court allowed the victim's sister, Chovan Bell, to testify that in 1994, she called the police and signed a complaint against Brian Keith Bell after she and her fiancé received facial injuries.

¶ 4 At trial, defendant testified that the victim was shot as they struggled over the gun and defendant asserted self-defense. The jury was instructed on the offenses of first degree murder, second degree murder, and involuntary manslaughter. Defendant was convicted of first degree murder and sentenced to 30 years' imprisonment.<sup>1</sup> We affirmed that judgment on direct appeal. *People v. Cook*, 352 Ill. App. 3d 108 (2004). We also dismissed defendant's appeal from an order of the circuit court dismissing his *pro se* motion for arrest of judgment (725 ILCS 5/116-2 (West 2010)), after granting the State Appellate Defender's motion for leave to withdraw as

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<sup>1</sup>Codefendant Darryl Bunch, who is not a party to this appeal, was tried simultaneously in a bench trial, convicted of the first degree murder of Bell on an accountability theory, and sentenced to 20 years' imprisonment.

counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Cook*, 2012 IL App (1st) 113196-U (unpublished summary order under Supreme Court Rule 23).

¶ 5 On May 4, 2005, defendant filed the instant *pro se* post-conviction petition, alleging that he was denied his right to present witnesses at trial who would have testified about the victim's prior acts of violence. Defendant specifically noted that Daniel Fields, Darryl Calvin, Augustine Barr, and Carmen D. Wicks would testify that the victim was violent. According to defendant, the testimony from these witnesses would have been a crucial part of his self-defense argument. Defendant also contended that he was deprived of the opportunity to investigate the circumstances of five pre-existing bullet wounds in the victim's body that would show Bell's violent past. Furthermore, defendant maintained that he was provided ineffective assistance of counsel based on counsel's mistaken belief that testimony from the victim's arresting officers would be admissible at trial, and counsel's failure to raise the fact that he was not presented to a judge for a probable cause hearing within 48 hours of his arrest. Defendant never mentioned sentencing matters in his petition. He attached to his petition trial transcripts and this court's opinion affirming defendant's conviction.

¶ 6 The public defender was appointed to represent defendant, and the petition advanced to the second stage of proceedings within 90 days of the date defendant filed his *pro se* petition. From 2005 to 2009, various assistant public defenders (APDs) represented defendant in this post-conviction matter. A correspondence letter from APD Bruce Landrum shows that he was assigned defendant's case on or about October 1, 2009.

¶ 7 On October 25, 2010, defendant filed a *pro se* motion asking APD Landrum to withdraw and new counsel to be appointed. Defendant alleged in his motion that APD Landrum had not consulted with defendant by phone or visited him to discuss his contentions of constitutional deprivations. In the motion, defendant also maintained that APD Landrum failed to investigate a

variety of claims relating to his petition, including APD Landrum's failure to subpoena Darryl Calvin and Daniel Fields after they were interviewed by his investigator. Accompanying this motion for new counsel were several affidavits that defendant attached from friends and family who stated that they wanted to testify at defendant's sentencing hearing to his good character, but defendant's trial attorney never gave them the opportunity. On November 18, 2010, the circuit court denied defendant's motion without addressing his attached affidavits.

¶ 8 Also, on November 18, 2010, APD Landrum filed a Rule 651(c) certificate, certifying that he consulted with defendant by letter to ascertain his contentions of deprivation of constitutional rights, and examined the trial transcripts. Landrum further indicated that after examining defendant's *pro se* petition, he determined that there was no need to file an amended or supplemental petition because defendant's *pro se* petition adequately presented his claims.

¶ 9 On March 24, 2011, the State filed a motion to dismiss defendant's petition, contending, in part, that defendant's claims were barred by *res judicata* and waiver, and his claims of ineffective assistance of counsel could not satisfy the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 10 On May 12, 2011, APD Landrum filed an amended Rule 651(c) certificate, stating that he consulted with defendant by letter to ascertain his contentions of deprivation of constitutional rights, examined the trial transcripts, examined defendant's *pro se* petition, and investigated his claims. Landrum concluded that because defendant's petition adequately presented his claims, nothing could be added by an amended or supplemental petition. Landrum attached to his amended Rule 651(c) certificate an affidavit from Noel Zupancic, who was assigned by the APD to locate and interview witnesses named in defendant's petition. Zupancic attested that as a result of his investigation, Augustine Barr and Carmen Weeks [*sic*] could not be located, Darryl Calvin

stated that the victim in this case was not violent, and Daniel Fields stated that he could not recall the incident.

¶ 11 The circuit court granted the State's motion to dismiss defendant's petition, and assessed \$90 in filing fees and court costs against him for filing a frivolous post-conviction petition.

¶ 12 On appeal, defendant contends that his petition should be remanded for new second stage proceedings because post-conviction counsel did not establish that he examined the additional post-conviction claim found in his October 2010 *pro se* motion, *i.e.*, that trial counsel was ineffective for failing to present mitigating witnesses at his sentencing hearing. Defendant argues that this claim should have been added to his post-conviction petition and appointed counsel's failure to consider it constituted unreasonable assistance under Rule 651(c).

¶ 13 We review the circuit court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 14 The right to post-conviction counsel is a matter of legislative grace, and a post-conviction petitioner is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). We find unpersuasive defendant's contention in his reply brief that the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), created "a much broader and more robust standard of performance for post-conviction counsel" than is set forth in Rule 651(c). The holding in *Martinez*, 132 S. Ct. at 1315, applies only to federal *habeas* proceedings, and we have no authority to disturb the settled law of this state recognizing that defendant is only entitled to reasonable assistance in post-conviction proceedings.

¶ 15 Illinois Supreme Court Rule 651(c) imposes specific duties on post-conviction counsel to ensure he provides reasonable assistance. *Suarez*, 224 Ill. 2d at 42. Under Rule 651(c), post-conviction counsel is required to: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, (2) examine the record of proceedings from the

trial, and (3) amend the defendant's *pro se* petition as necessary to adequately present his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Where a Rule 651(c) certificate is filed, the presumption is raised that the post-conviction petitioner received the required representation by counsel during second-stage proceedings. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009).

¶ 16 Here, post-conviction counsel filed a Rule 651(c) certificate, as well as an amended Rule 651(c) certificate. In the original certificate, counsel indicated that he consulted with defendant by letter to ascertain his contentions of deprivation of constitutional rights, examined the report of proceedings, and examined defendant's *pro se* petition, which counsel found adequately presented his claims making an amendment to his petition unnecessary. In the amended certificate, counsel repeated the above declarations, stated that he investigated defendant's claims, and attached an affidavit from Zupancic. Zupancic attested that he could not locate two witnesses, but was able to interview witnesses Calvin, who stated that the victim was not violent, and Fields, who indicated that he could not recall the incident. The assertions made in counsel's Rule 651(c) certificates are not contradicted by the record (*People v. Perkins*, 229 Ill. 2d 34, 52 (2007)), and counsel was not required to amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)). We, therefore, conclude that defendant has failed to overcome the presumption that he received the reasonable assistance to which he was entitled at the second stage.

¶ 17 In reaching this conclusion, we find that defendant's contention that his October 2010 *pro se* motion to appoint new post-conviction counsel should have been treated as an amendment to his original *pro se* post-conviction petition without merit. Defendant specifically states that because he filed the October 2010 *pro se* motion with the attached affidavits prior to the trial court entering judgment on the post-conviction petition, the affidavits should have been characterized as an additional *pro se* post-conviction claim. In making this argument, defendant

relies on *People v. Watson*, 187 Ill. 2d 448 (1999), to demonstrate that post-conviction petitioners are permitted to supplement or amend their post-conviction petitions. We find *Watson* distinguishable from the case at bar. The defendant in *Watson* sought leave to file an amended post-conviction petition (*Watson*, 187 Ill. 2d at 450), while defendant in this case failed to do so. Instead, defendant simply filed a motion to replace the APD as his post-conviction counsel, and attached to the motion several affidavits from friends and family.

¶ 18 We also find that defendant's October 2010 motion did not raise the issue of ineffective assistance of counsel at sentencing. Instead, defendant's motion listed what he believed to be deficiencies of post-conviction counsel, and attached to that motion affidavits from potential character witnesses. Nothing in defendant's motion stated that he believed these witnesses should have been called in mitigation at sentencing, or that trial counsel was ineffective for not calling them.

¶ 19 Nevertheless, even if defendant's October 2010 *pro se* motion raised an ineffective assistance of trial counsel claim based on counsel's failure to call character witnesses at sentencing, this issue was not raised in his post-conviction petition. "[P]ostconviction counsel is not required to comb the record for issues not raised in the defendant's *pro se* post-conviction petition." *People v. Helton*, 321 Ill. App. 3d 420, 424-25 (2001); see also *People v. Rials*, 345 Ill. App. 3d 636, 641 (2003) (stating that "while counsel **may** add new claims, he is not required to amend a defendant's *pro se* petition to include new issues." (Emphasis in original.)) Therefore, post-conviction counsel in this case could not file a supplemental petition reshaping claims that were nonexistent in defendant's *pro se* petition. See *People v. Davis*, 156 Ill. 2d 149, 164 (1993) (stating that "[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims" (emphasis in original)); compare with *People v. Milam*, 2012 IL App (1st)

100832 ¶ 36 (post-conviction counsel did not provide reasonable assistance where she raised a new claim in an amended petition, but failed to phrase it properly).

¶ 20 Defendant next contends that because the circuit court docketed his petition for second stage proceedings, it erred in assessing filing fees and court costs against him for filing a frivolous petition. We agree.

¶ 21 The Act requires a court reviewing a first stage post-conviction petition to determine whether the petition is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2004)), *i.e.*, the allegations have no arguable basis in either fact or law. *People v. Tate*, 2012 IL 112214, ¶ 9. If a first stage petition is found to be frivolous, the Act authorizes the judge to summarily dismiss it as such. 725 ILCS 5/122-2.1(a)(2) (West 2004).

¶ 22 On the other hand, the Act authorizes the judge to advance a petition to the second stage of proceedings if the judge determines that the petition is not frivolous or patently without merit, or when the petition is not dismissed pursuant to section 122-2.1(a)(2) of the Act, *i.e.*, when the court fails to rule on the petition within 90 days of its filing. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); 725 ILCS 5/122-2.1(b) (West 2004). At that point in the proceedings, the State is authorized to file a motion to dismiss the petition (725 ILCS 5/122-5 (West 2004)), which the court may grant if defendant fails to make a substantial showing of a constitutional violation (*People v. Coleman*, 183 Ill. 2d 366, 381 (1998)).

¶ 23 Section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2010)), authorizes the circuit court to impose filing fees and court costs on prisoners who file frivolous legal documents. The purpose of the statute is to discourage frivolous petitions and reduce their impact on the efficiency of our judicial system. *People v. Marshall*, 381 Ill. App. 3d 724, 737 (2008).

¶ 24 In this case, the court did not find that defendant's *pro se* post-conviction petition was frivolous at the first stage of proceedings. Instead, it advanced the petition to the second stage and appointed counsel to assist defendant. Moreover, the record shows that the court appointed counsel to assist defendant within the 90-day period it had to summarily dismiss his *pro se* petition, indicating that this was not a case where the court inadvertently allowed the 90 days to lapse allowing the petition to automatically advance to the second stage. The subsequent proceedings were conducted in accordance with the requirements of a second stage proceeding (*People v. Lara*, 317 Ill. App. 3d 905, 908 (2000)), and the court ultimately found defendant's claims to be "frivolous."

¶ 25 However, the court's use of the word "frivolous" in dismissing defendant's petition at the second stage was inartful. Contrary to the State's argument that the definition of frivolous in section 22-105 of the Code of Civil Procedure (Code) (735 ILCS 5/22-105 (West 2010)), is broader than its definition used in the standard for dismissal of a post-conviction petition at the summary dismissal stage, the supreme court has held otherwise. In *People v. Alcozer*, 241 Ill. 2d 248, 258-59 (2011), the supreme court held that the determination of whether a lawsuit is frivolous for purposes of section 22-105 of the Code is tantamount to the meaning of frivolous for purposes of evaluating first stage post-conviction petitions. Relying on *Alcozer*, this court recently found that the imposition of costs pursuant to section 22-105 of the Code was improper at a dismissal at the second stage of post-conviction proceedings. See *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 61 (denying the State's request for costs for prosecuting the appeal because the petition was not frivolous where the circuit court advanced it to the second stage before dismissing it). Following *Alcozer* and *McGhee*, we find that the circuit court's imposition of costs and fees pursuant to section 22-105 of the Code was improper because it dismissed defendant's petition at the second stage.

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¶ 26 Accordingly, we vacate the \$90 of costs and fees imposed against defendant pursuant to section 22-105 of the Code, and affirm the second-stage denial of defendant's post-conviction petition in all other respects.

¶ 27 Affirmed as modified.