

No. 1-11-2039

**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. 01 CR 20265
	)	
PARIS ARNOLD,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* Where post-conviction counsel spoke to defendant about his possible claims, reviewed trial record and considered amending defendant's filings, the record did not rebut presumption established by Rule 651(c) certificate that counsel provided reasonable assistance; the dismissal of defendant's petition without an evidentiary hearing was affirmed.

¶ 2 Defendant Paris Arnold appeals the circuit court's order granting the State's motion to dismiss his post-conviction claims. On appeal, defendant contends his post-conviction counsel failed to provide a reasonable level of assistance because counsel did not consult him about his intent to withdraw his original petition or ensure that all of defendant's claims were presented to the court. We affirm.

¶ 3 Following a bench trial in 2003, defendant was convicted of first degree murder. Defendant was sentenced to 45 years in prison, which included a mandatory 20-year sentence enhancement because the court found that defendant personally discharged a firearm during the commission of the offense. On appeal, this court affirmed. *People v. Arnold*, 349 Ill. App. 3d 668, 677 (2004).

¶ 4 On March 15, 2005, defendant filed a *pro se* motion seeking relief from a void judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2004)). In that motion, defendant challenged the admission of hearsay evidence at the hearing on his motion to quash his arrest and suppress evidence. Defendant also raised various claims of ineffectiveness of trial and appellate counsel. Also in the 2005 filing, defendant challenged the constitutionality of the sentence enhancement for the discharge of a firearm.

¶ 5 On April 22, 2005, the circuit court recharacterized defendant's *pro se* filing as a petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2004)), and the court dismissed defendant's claims as frivolous and patently without merit. Defendant appealed that ruling, and this court allowed defendant's motion for a summary remand to the circuit court pursuant to *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005), which requires the trial court to notify a defendant of the treatment of a pleading as a post-conviction petition and allow the defendant the opportunity to withdraw or amend the pleading. *People v. Arnold*, No. 1-05-2227 (August 30, 2006) (dispositional order). The circuit court allowed defendant until December 15, 2006, to withdraw or amend his pleading in accordance with *Shellstrom*. Meanwhile, on September 20, 2006, defendant filed a *pro se* petition for post-conviction relief, which contained the single argument that the trial court erred in allowing the State to amend the grand jury indictment to add a theory of accountability.

¶ 6 On April 5, 2007, the circuit court appointed the office of the Cook County Public Defender as post-conviction counsel for defendant, noting that "the time for summary dismissal has passed." At that point, two filings were pending: defendant's 2005 filing remanded in accordance with *Shellstrom* and the 2006 post-conviction petition containing one claim.

¶ 7 After the court appointed an assistant Cook County public defender as defendant's post-conviction counsel and counsel made her first appearance on July 12, 2007, the resolution of this case took nearly four years. The following is a synopsis of the most relevant court appearances by post-conviction counsel.

¶ 8 In October 2007, at counsel's second appearance, she described "confusion as to what exactly is pending for the court." In January 2008, counsel noted she had received a copy of the 2006 petition. In April 2008, counsel requested time to respond to defendant's filings, stating as to the 2006 petition, "I could respond to that very quickly. I would not be supplementing that one."

¶ 9 After several additional appearances, counsel stated in January 2009 that she was still reviewing defendant's contentions and that defendant had "seven allegations," one of which she had communicated with him about. In July 2009, substitute counsel reported that the assigned public defender had "written to [defendant] about his contentions of error and she needs additional time to confer with him about that."

¶ 10 In 2010, counsel continued to review defendant's claims, stating at a January court date that she had responded to one of defendant's petitions and had read the record. Counsel requested additional time to review defendant's second filing. In October 2010, counsel sought additional time to discuss the issues with defendant.

¶ 11 In December 2010, defendant filed a *pro se* amended post-conviction petition containing additional claims of ineffectiveness of trial and appellate counsel. In his accompanying request

for leave to file that petition, defendant stated he wished to raise two claims that were not included in the 2006 petition. The 2010 petition contained four claims: (1) appellate counsel should have asserted his trial counsel was ineffective for failing to challenge the indictment; (2) the initial charging instrument did not invoke the trial court's jurisdiction; (3) evidence gathered after his arrest should have been suppressed because more than 48 hours passed between his arrest and his initial court appearance; and (4) he did not receive adequate notice of the charges because the indictment did not refer to accountability as an element of the offense.<sup>1</sup>

¶ 12 In January 2011, counsel requested two additional months to prepare. The State indicated it planned to file a motion to dismiss, and the following colloquy occurred:

"THE COURT [to defendant's counsel]: I assume you're going to file a response?

[DEFENSE COUNSEL]: I'm standing on the petition most likely.

THE COURT: When [the State] files [a] motion to dismiss you don't anticipate filing a response?

[DEFENSE COUNSEL]: Correct."

¶ 13 On March 28, 2011, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), which verifies she performed certain duties with regard to the post-conviction proceedings. Counsel told the court she was "standing on [defendant's] petition" and had "packaged" defendant's claims for the State.

¶ 14 On June 9, 2011, counsel filed an amended Rule 651(c) certificate stating she had consulted with defendant about his three filings. The certificate stated counsel consulted with defendant about his 2005 and 2006 filings and the contentions in his December 2010 petition,

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<sup>1</sup> In defendant's 2010 filing, his four claims are labeled as paragraphs 2 through 5; the initial paragraph of the document contains the procedural history of this case.

which counsel had not received until May 2, 2011. Counsel attested she reviewed the file of defendant's trial counsel and read the record of defendant's trial and sentencing, as well as the appellate court briefs and orders in both appeals. The certificate stated that counsel had not amended defendant's *pro se* petitions and that the petitions "adequately set forth his contentions."

¶ 15 Also on June 9, 2011, counsel filed a motion to withdraw defendant's 2005 filing, stating she had conferred with defendant and defendant had written several times asking her to withdraw the 2005 petition. The State filed a motion to dismiss defendant's post-conviction claims, challenging the merits of the claims in the 2005 and 2006 filings.

¶ 16 Defendant was not present in court on June 9, 2011. After the State indicated it sought dismissal, counsel stated that defendant had asked her to "submit another filing." The court continued the case so defendant could be present. Counsel told the court she filed an amended Rule 651(c) certificate because she reviewed the claims in the petition and "did not feel they warranted an amended petition."

¶ 17 On June 30, 2011, the following colloquy occurred:

"THE COURT: I know both counsels filed motions, and counsel is going to file a 651(c). There were some things that you wanted to do withdraw [*sic*] from your 651(c). I wanted Mr. Arnold here to make sure that he was in agreement with that in regards to any of those assertions in your petition for post-conviction relief. Specifically I believe you indicated to the court you were seeking to withdraw Arguments 3, 4 and 5, am I correct on that? You were originally intending that and I just wanted to make the record clear.

[DEFENSE COUNSEL]: I was just going to withdraw his entire [section 2-1401] petition and convert it to a post-conviction petition.

THE COURT: Correct.

[ASSISTANT STATE'S ATTORNEY]: Which included Claims 2 through 5.

THE COURT: Are you withdrawing that at this time?

DEFENDANT: No.

THE COURT: Then we will proceed. Are you ready to argue, Ms. Florek?

[DEFENSE COUNSEL]: Let me just bring up another point. Mr. Arnold asked me to file some additional issues for him, and I told him if he is represented by the Public Defender –

THE COURT: There is but one lawyer on this case.

[DEFENSE COUNSEL]: So you are not allowing it?

THE COURT: If you are not filing it then I won't allow it.

[DEFENSE COUNSEL]: It is not something I prepared. It is something he prepared.

THE COURT: At this point, no, I will not allow it. We have everything filed here as far as I understand. I have a 651(c), is that correct?

[DEFENSE COUNSEL]: That is correct.

THE COURT: Let's proceed to argument."

¶ 18 The assistant State's Attorney described the facts surrounding defendant's conviction and the procedural history of defendant's post-conviction claims filed in 2005 and 2006, noting that the State's motion to dismiss addressed those claims.

¶ 19 Counsel for defendant stated she had received the motion to dismiss, adding: "I have had it in my possession for a month. I did not respond. I will stand on that." The colloquy continued:

"THE COURT: Do you wish to argue anything else or add anything else at this time? I want to make the record really clear.

[DEFENSE COUNSEL]: No. I explained to my client my views on the issues. The State offered theirs. Your Honor I am sure has reviewed the motion. I felt that there was nothing I could do to expound on his position, and I stand on the motion and offer no response."

¶ 20 After reviewing the claims contained in the 2005 and 2006 filings, the circuit court granted the State's motion to dismiss those claims.

¶ 21 On appeal, defendant contends he did not receive reasonable assistance from his post-conviction counsel as required by Supreme Court Rule 651(c) and that his case should be remanded for further proceedings under the Act.

¶ 22 Defendant's petition was dismissed at the second stage of post-conviction proceedings, where counsel had been appointed to assist defendant in shaping his claims. See 725 ILCS 5/122-4 (West 2004). At this stage, after post-conviction counsel has made any necessary amendments to the petition, the State may answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2004). If the circuit court determines that the petition and any attached documents make a substantial showing of a constitutional violation, the petition will proceed to the third stage of post-conviction review, where the court conducts an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2004). Our review of the trial court's dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 23 At the second stage of post-conviction proceedings, the right to counsel is entirely statutory (see 725 ILCS 5/122-4 (West 2004)), and a petitioner is entitled only to a "reasonable" level of assistance. *Suarez*, 224 Ill. 2d at 42. The duty to provide this reasonable assistance

requires compliance with the obligations set out in Supreme Court Rule 651(c), which states that appointed counsel must: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments to the defendant's previous filing or filings that are necessary to present his or her claims to the court. Ill. S. Ct. R. 651 (eff. Dec. 1, 1984). The rule ensures that post-conviction counsel investigates and shapes a defendant's allegations into a proper legal form and presents them to the court. *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 24 The rule requires post-conviction counsel to file an affidavit certifying that he or she has complied with these requirements. Ill. S. Ct. R. 651 (eff. Dec. 1, 1984). The filing of a Rule 651(c) certificate creates a rebuttable presumption that post-conviction counsel provided reasonable assistance. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). A defendant has the burden of overcoming this presumption by demonstrating that post-conviction counsel failed to substantially comply with the duties required by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. The presumption of compliance can be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶ 25 Defendant argues he has rebutted the presumption of post-conviction counsel's compliance with the rule because the record establishes counsel failed to consult with him about withdrawing the 2005 petition and did not present the claims from his 2010 filing.

¶ 26 The State responds that Rule 651(c) only requires post-conviction counsel to adequately present the claims in defendant's initial filing in 2005 and not any contentions included in his subsequent petitions. We disagree with that assertion by the State. It is true that post-conviction counsel is only required to investigate and present the petitioner's claims and has no duty to raise new contentions; counsel is not required to "advance frivolous or spurious claims on a defendant's behalf." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). However, post-conviction

counsel "may raise additional issues if he or she so chooses" in the course of amending a *pro se* petition. *Pendleton*, 223 Ill. 2d at 476. The State offers no legal authority for its contention that post-conviction counsel was only required to shape the claims that were set out in defendant's initial post-conviction filing. This court has held that "[a]lthough counsel has no duty to generate new claims for the petitioner [citation], counsel's assistance is not limited to claims whose gist the petitioner has already succeeded in stating." *People v. Komes*, 2011 IL App (2d) 100014, ¶ 32, citing *People v. Davis*, 156 Ill. 2d 149, 163 (1993).

¶ 27 The State also argues that defendant fails to set out on appeal the potential merits of the claims in his 2010 petition. Such explanation of the possible merits of defendant's post-conviction claims is unnecessary because if we conclude post-conviction counsel failed to fulfill the duties of consultation, examining the record and amending a *pro se* petition as set out in Rule 651(c), remand of the case is required "regardless of whether the claims raised in the petition had merit." See *Suarez*, 224 Ill. 2d at 47.

¶ 28 Having clarified that post-conviction counsel could amend defendant's initial post-conviction filing with new claims, we consider whether counsel's representation fell below the level of reasonable assistance. Based on our review of the entire record, we conclude that defendant has not rebutted the presumption that counsel's representation met the level of reasonable assistance required by Rule 651(c).

¶ 29 In July 2009, counsel told the court she had written to defendant about his contentions. In January 2010, counsel indicated she had read the record and had responded to one of defendant's filings. On June 9, 2011, counsel said defendant had asked her to "submit another filing," and counsel moved to withdraw the 2005 filing, indicating she had conferred with defendant. At the final proceeding on June 30, 2011, post-conviction counsel voiced an intent to further refine defendant's claims, stating she wanted to convert the 2005 petition, which had originally been

filed as a motion under section 2-1401 "into a post-conviction petition" and noting defendant had asked her "to file some additional issues for him." Defendant was asked by the court if he withdrew his initial filing, and defendant responded "no." The court stated it "would proceed" and the court went on to consider the claims in the 2005 and 2006 filings. The court also indicated counsel would not be allowed to present defendant's 2010 *pro se* filing, noting the rule against hybrid representation. Although the record reflects that counsel and defendant disagreed about the presentation of defendant's initial claims and also that counsel did not prepare a new petition including the 2010 claims, the record does not rebut counsel's attestation that she consulted with defendant as to all of his filings and decided it was not necessary to amend his claims.

¶ 30 Defendant compares these proceedings to those in *People v. Turner*, 187 Ill. 2d 406 (1999), and *People v. Schlosser*, 2012 IL App (1st) 092523. In both of those cases, post-conviction counsel failed to amend the defendant's petition to include and preserve a claim of ineffective assistance of appellate counsel, resulting in the waiver of that claim. *Turner*, 187 Ill. 2d at 412-14; *Schlosser*, 2012 IL App (1st) 092523, ¶ 22. Here, in contrast, defendant does not contend his post-conviction counsel failed to make a routine amendment of his petition but, rather, that counsel did not adequately present all of his claims.

¶ 31 Defendant further contends on appeal that when counsel did not present an argument in response to the State's motion to dismiss, counsel provided unreasonable representation by acquiescing to the dismissal of his claims. Defendant compares these proceedings to those in *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 14, in which post-conviction counsel referred to his client's allegations as "nonmeritorious." The appellate court in *Shortridge* concluded the defendant's counsel should have moved to withdraw from representing the defendant instead of conceding the viability of the defendant's claims. *Shortridge*, 2012 IL App (4th) 100663, ¶ 14.

Here, in contrast, defendant's post-conviction counsel did not make such a concession. Counsel stated she would stand on the claims raised in the defendant's petitions, saying she had "explained to [defendant] my views on the issues." Counsel's representation in this case did not constitute unreasonable representation as in *Shortridge*.

¶ 32 In summary, defendant has not met the burden of overcoming the presumption created by Rule 651(c) that he received the reasonable assistance of post-conviction counsel.

¶ 33 Accordingly, the circuit court's dismissal of defendant's post-conviction claims without an evidentiary hearing is affirmed.

¶ 34 Affirmed.