

No. 1-11-2997

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. 04 CR 21251 |
| |) | |
| LASHAWN TAYLOR, |) | Honorable |
| |) | John A. Wasilewski, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 **Held:** Post-conviction counsel did not provide unreasonable assistance and complied with Rule 651(c); \$5 court services fee vacated; order dismissing second stage post-conviction petition affirmed.

¶ 2 Defendant Lashawn Taylor appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that post-conviction counsel failed to provide him with a reasonable level of assistance and that the assessment of a court services fee was improper.

¶ 3 This court previously affirmed defendant's 2005 jury conviction of unlawful use of a weapon by a felon (Uuw) and Class X sentence of 18 years' imprisonment, after correcting his mittimus to accurately reflect his conviction of a single count of Uuw and the amount of presentence custody credit to which he was entitled. *People v. Taylor*, No. 1-05-3794 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 On September 13, 2006, defendant filed a *pro se* post-conviction petition in which he alleged, in relevant part, that he was denied his right to the effective assistance of trial counsel. He maintained that his trial attorney notified him of the State's offer of six years' imprisonment, and he rejected that offer because he was under the impression that he faced a maximum sentence of seven years' imprisonment if found guilty of the charges. He claimed that he was not admonished of the potential sentences he faced by the court or his trial attorney, that he had no independent knowledge of them, which impaired his decision to "accept the six (6) year plea that was offered by the state," and, if he had known he would be sentenced to 18 years' imprisonment, he would have accepted the six-year offer by the State.

¶ 5 In support of his petition, defendant attached his own affidavit in which he averred that his trial attorney informed him that the State offered him a six-year sentence to plead guilty, and that he did not do so because he was under the impression that the maximum sentence he could receive was seven years' imprisonment. He averred that no one informed him that if he was found guilty, that he could be sentenced to 18 years' imprisonment, and had he known that he could be sentenced to more than seven years' imprisonment, he would have accepted the six-year offer by the State.

¶ 6 Defendant's petition was advanced to the second stage, and defendant was appointed counsel, who subsequently appeared in court on multiple occasions, communicating to the court the status of her review of the petition and the transcripts. On June 4, 2010, post-conviction

counsel filed a Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate in which she stated that she had consulted with defendant by mail to ascertain his contentions of the deprivation of his constitutional rights, obtained and examined the report of proceedings of the trial and sentencing, and determined "that the petition as it is written adequately represents petitioner's constitutional claims and deprivations. Therefore, I will not be supplementing the petition."

¶ 7 On April 15, 2011, the State filed a motion to dismiss, asserting, in relevant part, that defendant's claims were barred by waiver and *res judicata* because many of the matters raised were of record, and he failed to raise them on direct appeal. The State also asserted that defendant was not entitled to relief because he failed to support any of his vague or conclusory allegations to make a substantial showing of a constitutional violation. The State observed that defendant had a privately retained attorney who represented him the first nine months in pre-trial proceedings, and on the date of trial procured a new privately retained counsel who represented him at trial and through sentencing. The State maintained that defendant's allegation that he was ignorant of the possible sentence was self-serving and without support, that defendant did not include affidavits from his first privately retained trial attorney regarding the offer allegedly made, and that there is no evidence in the record that a Rule 402 (eff. July 1, 2012) conference even took place.

¶ 8 At the proceeding on the State's motion to dismiss, counsel informed the court that she had spoken with defendant on the phone and written him several times. She indicated that she was standing on defendant's petition as written, then listed defendant's claims of ineffective assistance of trial counsel, specifically noting that defendant "was not admonished, nor had he acknowledged that he faced a longer sentence if he did not plead guilty."

¶ 9 The circuit court was not persuaded and granted the State's motion to dismiss defendant's post-conviction petition. In doing so, the court observed, in relevant part, that defendant's claim

regarding his attorneys' failure to inform him of the sentencing parameters at the time of trial prevented him from adequately assessing his opportunity to plead guilty was unsupported, self-serving, conclusory, and refuted by the record.

¶ 10 In its written order, the court agreed with the State that defendant's issues were barred by waiver and *res judicata* because the allegations raised by defendant involved complaints regarding the pre-trial, trial and post-trial proceedings, which were matters of record, and could have been raised on direct appeal. The court also explained that defendant failed to establish that he was prejudiced by his trial attorneys' alleged deficient performance, that his conclusions regarding their performance was speculative and conclusory, and that defendant provided no supporting documentation of the alleged offer of six years' imprisonment. The court observed that no affidavits regarding this offer were submitted from his trial attorneys, and the record demonstrates that there was no Rule 402 conference. Accordingly, the court concluded that defendant had failed to make the requisite substantial showing of a violation of any of his constitutional rights.

¶ 11 On appeal, defendant abandons the allegations made in his petition, and contends that his post-conviction counsel failed to provide him a reasonable level of assistance based on counsel's failure to amend his petition to include support for his claim that trial counsel was ineffective for failing to inform him that if he rejected the six-year offer by the State, he would be sentenced as a Class X offender. He claims that post-conviction counsel's failure to either properly support his claim or withdraw if it was frivolous shows that she did not comply with Rule 651(c). We initially observe that by focusing on this single issue, defendant has waived the issues in his petition for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 12 The Act provides for a reasonable level of assistance by post-conviction counsel (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), which can be shown by compliance with Rule 651(c)

(*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). That rule specifies the duties of post-conviction counsel and provides, *inter alia*, that counsel make any amendments to the *pro se* petition that are necessary for an adequate presentation of defendant's contentions. The filing of a Rule 651(c) certificate creates a presumption of compliance with the rule. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992).

¶ 13 Here, counsel filed a Rule 651(c) certificate stating, in relevant part, "that the petition as it is written adequately represents petitioner's constitutional claims and deprivations. Therefore, I will not be supplementing the petition." As noted, this creates a presumption of compliance with the rule (*Johnson*, 232 Ill. 2d at 678; *Marshall*, 375 Ill. App. 3d at 680); and, although the presumption may be rebutted, we find, for the reasons that follow, that defendant has not done so in this case.

¶ 14 Defendant maintains that counsel should have supported his petition with affidavits from his trial counsel and the prosecutors, or, at a minimum, contacted them, or explained the absence of supporting evidence. The supreme court has determined that under Rule 651(c), post-conviction counsel is obligated to attempt to obtain and submit affidavits from witnesses identified in the post-conviction petition. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). Thus, in *People v. Johnson*, 154 Ill. 2d 227, 242-43 (1993), where counsel admitted in open court and in an affidavit that defendant named witnesses to him that he wanted contacted, but counsel "made no attempt" to do so, the supreme court found that counsel did not comply with Rule 651(c).

¶ 15 On the other hand, the same court noted that where, as here, the State files a motion to dismiss an unsupported post-conviction petition, the circuit court may reasonably presume that counsel made a concerted effort to obtain affidavits but was unable to do so. *Johnson*, 154 Ill. 2d at 241. Counsel's representations to the court regarding her review of the petition, and the transcripts, her consultations with defendant, and determination that the petition as it is written

adequately represents petitioner's constitutional claims, support that presumption, and there is nothing in the record to rebut it.

¶ 16 The record is devoid of any indication that a 402 conference had even been held or that an offer was made, and defendant presented no basis for his claim otherwise. In fact, the record shows that defendant had been sentenced at least twice before to a Class X sentencing range, rendering his claim regarding his knowledge of the sentencing range he faced on conviction spurious and triggering no obligation of counsel to advance such a claim. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Under these circumstances, we find that defendant has not rebutted the presumption of compliance with the rule, which attached to counsel's filing of the certificate; and, as noted in *People v. Jones*, 2011 IL App (1st) 092529, ¶¶24-26, we will not presume that counsel failed to provide reasonable assistance simply because she did not explicitly mention each of her efforts in the certificate filed.

¶ 17 Notwithstanding, defendant maintains that counsel's Rule 651(c) certificate was an "empty formality," and if she found his claims frivolous, she should not have presented them to the court, and withdrawn. He maintains that her failure to withdraw or properly present his ineffective assistance of counsel claims shows that she did not comply with Rule 651(c). We disagree.

¶ 18 As noted, counsel is under no obligation to advance a frivolous or spurious claim (*Greer*, 212 Ill. 2d at 205), nor is counsel required to withdraw when counsel finds the claims made by defendant are without merit. Rather, where counsel is presented with a frivolous petition, counsel may move to withdraw (*People v. Kelley*, 2013 IL App (4th) 110874, ¶24, citing *Greer*, 212 Ill. 2d 211) or stand on the petition (*People v. Wolfe*, 27 Ill. App. 3d 551, 552-53 (1975)). In either instance, the allegations in the *pro se* petition proceed according to the parameters of the Act. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (and cases cited therein). In this case,

post-conviction counsel elected to stand on the petition as written, and in doing so, did not refute her compliance with Rule 651(c) or provide defendant unreasonable assistance.

¶ 19 Defendant next contends, the State concedes, and we agree that the trial court improperly assessed a \$5 court system fee against defendant because that fee only applies to vehicle offenses. 55 ILCS 5/5-1101(a) (West 2010); 625 ILCS 5/1-100 (West 2010). Defendant was not convicted of such a crime, and pursuant to our authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we vacate the \$5 fee, and direct that the fines and fees order be modified to that effect.

¶ 20 In light of the foregoing, we vacate the \$5 fee and direct that the fines and fees order be modified accordingly, and affirm the order of the circuit court of Cook County granting the State's motion to dismiss defendant's post-conviction petition at the second stage of proceedings.

¶ 21 Affirmed, as modified.