

2013 IL App (2d) 111076-U  
No. 2-11-1076  
Order filed February 13, 2013

**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  
SECOND DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Carroll County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-48
DEWEY L. GORDON,	)	Honorable Ronald M. Jacobson,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant did not show that postconviction counsel violated Rule 651(c) and thus provided unreasonable assistance: although counsel did not attach required affidavits to defendant's petition, nothing rebutted the presumption that counsel had made a concerted effort to obtain those affidavits but had been unable to do so.

¶ 2 Defendant, Dewey L. Gordon, appeals from an order of the circuit court of Carroll County granting the State's motion to dismiss his *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) for relief from his convictions of a single count each of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2006)) and home invasion (720

ILCS 5/12-11(a)(2) (West 2006)). Defendant contends that he did not receive adequate legal representation during the proceedings on his petition. We disagree and therefore affirm the dismissal of defendant's petition.

¶ 3 Defendant's convictions resulted from a negotiated guilty plea entered on August 29, 2008, pursuant to which he was sentenced to concurrent 17-year prison terms. The convictions were based on separate incidents. As the factual basis for the aggravated criminal sexual assault conviction, it was stipulated that evidence at trial would show that, on September 10, 2006, Beverly T. was awakened in her bedroom by an intruder who was armed with a knife. The intruder placed his penis in her vagina. Several witnesses would testify that, along with defendant, they had been outside the victim's residence. They would testify that defendant went into the victim's residence and that they rejoined the defendant about 15 or 20 minutes later at his own residence. As the factual basis for the home invasion conviction, it was stipulated that the evidence would show that on September 30, 2006, Kristin H. was awakened in her home by an intruder armed with a knife. At some point, she sustained a cut on her hand, and the intruder left her residence. A shoe print found outside her residence was similar to one found outside Beverly T.'s residence. (Although the prosecutor also stated that law enforcement personnel recovered a shoe at defendant's residence, he did not indicate whether there was any evidence linking that shoe to the shoe prints found outside the victims' residences.)

¶ 4 Defendant did not appeal from the convictions. However, on November 22, 2010, he filed a *pro se* postconviction petition claiming, in substance, that his guilty plea was involuntary because he did not receive the effective assistance of counsel. As pertinent here, defendant alleged that his trial attorney refused to prepare an adequate defense and pressured him to plead guilty. Along with

his petition, defendant submitted an unnotarized “affidavit” stating that counsel “never even attempted to interview any of the victims and or witnesses.” The trial court took no action on the petition until March 10, 2011, when it appointed counsel to represent defendant. The State subsequently moved to dismiss the petition, arguing, *inter alia*, that defendant failed to adequately support the petition’s allegations with affidavits or other evidence. Postconviction counsel did not amend the petition, but he filed a written response to the motion to dismiss. At the hearing on the motion, the State, relying on *People v. Payne*, 336 Ill. App. 3d 154 (2002), argued that a postconviction petitioner’s *sworn verification* is not a substitute for affidavits supporting the petition. The State further argued that defendant’s affidavit was self-serving. (The State did not raise any issue concerning defendant’s failure to have the affidavit notarized.) Defendant’s attorney responded that, because defendant had, in fact, attached an affidavit (defendant’s own) to the petition, whereas the defendant in *Payne* had not, *Payne* was inapposite. The trial court granted the motion to dismiss, and this appeal followed.

¶ 5 Under the Act, a person imprisoned for a crime may mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). Proceedings under the Act are divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). During the first stage, the trial court independently examines the petition within 90 days after it is filed and docketed. 725 ILCS 5/122-2.1(a) (West 2010). If the petition is frivolous or patently without merit, it will be summarily dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition may not be summarily dismissed where, as in this case, the trial court fails to do so within the 90-day period. *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011). If the petition is not dismissed at the first stage, it proceeds to the second stage, at which an indigent

defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. (Here, the petition proceeded to the second stage because the trial court failed to take any action upon it within 90 days after it was filed and docketed.) A petition that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held. *Id.*

¶ 6 Section 122-2 of the Act provides that the 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 2010). An evidentiary hearing is required only where the petition’s allegations are properly substantiated in accordance with section 122-2 and make a substantial showing that the defendant’s constitutional rights have been violated. *People v. Johnson*, 154 Ill. 2d 227, 239 (1993). Thus, “[a] post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner’s allegations stand uncontradicted and are clearly supported by the record.” *Id.* at 240. In his *pro se* petition, defendant alleged that his guilty plea was the result of his attorney’s failure to provide him with the assistance required under the Sixth Amendment. Among other things, defendant alleged that his attorney failed to prepare a defense. According to defendant’s affidavit, his trial attorney “never even attempted to interview any of the victims and or witnesses for himself.” However, a claim of ineffective assistance of counsel in connection with the entry of a guilty plea generally “must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial.” *People v. Ramirez*, 402 Ill. App. 3d 638, 643 (2010). Although defendant noted counsel’s failure to interview witnesses, he did not identify any plausible defense that would have come to light as a result of such interviews. Moreover, “a post-conviction petitioner

who attacks the competency of his trial counsel for failing to call *or contact* certain witnesses must attach the affidavits of such witnesses to his post-conviction petition and explain the significance of their testimony.” (Emphasis added.) *Johnson*, 154 Ill. 2d at 240-41.

¶ 7 Defendant does not dispute that the absence of affidavits from the witnesses he claims that trial counsel should have contacted was grounds for dismissal. He argues, however, that the absence of such affidavits establishes that he did not receive adequate legal representation in the postconviction proceedings. The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, “defendants are entitled to a reasonable level of assistance, but are not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial.” *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009). The duty to provide reasonable assistance requires compliance with the specific obligations described in Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). See *Davis*, 382 Ill. App. 3d at 711. That rule provides, in pertinent part, that “[t]he record [on appeal] shall contain a showing, which may be made by the certificate of petitioner’s attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 8 Here, postconviction counsel filed the required certificate. A Rule 651(c) certificate gives rise to a presumption that postconviction counsel fulfilled his or her duties, but the presumption may be rebutted by the record. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 19. As noted, defendant points to postconviction counsel’s failure to obtain affidavits in support of the *pro se* petition as

showing that, notwithstanding the Rule 651(c) certificate, counsel failed to fulfill his duties. Although postconviction counsel must amend a *pro se* petition so as to shape the defendant's claims into proper legal form (*People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007)), counsel's failure to supply necessary affidavits or other evidence will not, in itself, rebut the presumption that arises from the Rule 651(c) certificate. To the contrary, "[i]n the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241; see also *Kirk*, 2012 IL App (1st) 101606, ¶ 25 (quoting *Johnson*).

¶ 9 Defendant insists, however, that if postconviction counsel concluded that the claims in defendant's *pro se* petition were "frivolous," he could have moved pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), to withdraw as counsel. Defendant further reasons as follows:

"[I]f counsel does not move to withdraw, then he is obligated to amend the petition and support it as best he can. Counsel must do one or the other; he is not free to do nothing. If, as here, counsel neither moves to withdraw, nor amends a deficient *pro se* petition, then the reviewing court must remand for compliance with Supreme Court Rule 651(c) without considering the merits of the *pro se* claims."

¶ 10 There is no basis for the rule defendant proposes. *Greer* held that the trial court did not err in granting postconviction counsel's motion to withdraw, which indicated, in essence, that counsel had interviewed all potential witnesses and had found no meritorious claim. While noting that Rule 651(c) requires postconviction counsel to make "necessary amendments" to a *pro se* petition, the *Greer* court reasoned 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. The court added that it would be unethical for counsel to sign such an amended petition, and “[a]n attorney \*\*\* who determines that defendant’s claims are meritless cannot in good faith file an amended petition on behalf of defendant.” *Id.* The rule in *Greer* essentially reconciles postconviction counsel’s Rule 651(c) duties to the defendant with counsel’s ethical responsibility to the court. However, *Greer* has nothing to say about the presumption that arises when counsel certifies compliance with Rule 651(c). Counsel’s failure to withdraw from representing a defendant whose *pro se* petition is meritless might represent an ethical lapse, but it does not justify a conclusion that counsel could have done something to salvage the petition. Moreover, it is not clear that counsel’s inability to supply affidavits would necessarily justify withdrawal under *Greer*. *Id.* at 211-12 (“we hasten to emphasize that the inability of postconviction counsel to ‘properly substantiate’ a defendant’s claims is *not* the standard by which counsel should judge the viability of a defendant’s postconviction claims” (emphasis in original)). Thus, we cannot necessarily infer that, if counsel were unable to substantiate the petition, he would have moved to withdraw.

¶ 11 We note defendant’s contention that, were we to remand for further proceedings, postconviction counsel would not, in fact, be obliged to withdraw. Defendant argues that the *pro se* petition could be amended to state a meritorious claim based on the trial court’s failure to correctly admonish him about the length of the term of mandatory supervised release he must serve after completing his prison term. See generally *People v. Whitfield*, 217 Ill. 2d 177 (2005). Defendant does not dispute, however, that postconviction counsel’s obligation to provide reasonable assistance did not entail pursuing this claim. See *Johnson*, 154 Ill. 2d at 237-38. Nor does he argue that the existence of this claim is, in itself, grounds for reversing the trial court’s order.

¶ 12 For the foregoing reasons, the judgment of the circuit court of Carroll County is affirmed.

¶ 13 Affirmed.