

NOTICE
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2013 IL App (4th) 120254-U

NO. 4-12-0254

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 19, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Douglas County
REGINALD ROBINSON,)	No. 07CF64
Defendant-Appellant.)	
)	Honorable
)	Michael G. Carroll,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The record fails to show compliance with Illinois Supreme Court 651(c) (eff. Dec. 1, 1984) in that it is unclear that postconviction counsel examined a transcript relevant to one of the claims in defendant's *pro se* petition.
- ¶ 2 Defendant, Reginald Robinson, appeals from the second-stage dismissal of his petition for postconviction relief. One of his arguments is that his appointed postconviction counsel could not have examined the transcript of the hearing in which he waived a jury trial, considering that the transcript was filed with the circuit clerk several months after counsel filed her certificate pursuant to Rule 651(c). Defendant contends that, in order for counsel to fulfill her investigatory duties under Rule 651(c), she had to examine this transcript, given that one of the claims in his *pro se* petition for postconviction relief was that his jury waiver was unknowing and unintelligent—and, evidently, she did not examine this transcript.

¶ 3 We agree that, in the absence of a showing that postconviction counsel examined the transcript of defendant's jury waiver, Rule 651(c) is unfulfilled, because the transcript is relevant to defendant's claim that his jury waiver was unknowing and unintelligent. Therefore, we reverse the trial court's judgment and remand this case for full compliance with Rule 651(c).

¶ 4 I. BACKGROUND

¶ 5 The State charged defendant with one count of unlawful trafficking in cannabis (720 ILCS 550/5.1 (West 2006)), one count of unlawful possession of cannabis (720 ILCS 550/4(g) (West 2006)), and one count of unlawful possession of cannabis with the intent to deliver it (720 ILCS 550/5(e) (West 2006)). As for this latter count, the State charged defendant with violating section 5(e) of the Cannabis Control Act (720 ILCS 550/5(e) (West 2006)), but the citation of subsection (e) obviously was an error because the State alleged he possessed more than 5,000 grams of cannabis, bringing him within subsection (g) (720 ILCS 550/5(g) West 2006)). All three counts arose from the same incident, in which he brought 188 pounds of cannabis into Illinois in the cab of a tractor-trailer.

¶ 6 In a hearing on July 17, 2007, defendant waived his right to a trial by jury. He did so both orally and in writing. The record before us includes a transcript of the hearing, filed with the circuit clerk on December 20, 2012.

¶ 7 In the transcript, the trial court first admonished a group of defendants, including defendant, regarding their constitutional rights. The court told them:

"THE COURT: Ladies and gentlemen, before I take your Waiver or plea, I'll read you your constitutional rights. We've done this before and I'll do it again, to make sure your understand them.

You each have the right to a speedy and public trial.

You have the right to be tried by a jury at a jury trial or a Judge at a Bench Trial.

You have the right to present evidence on your own behalf at either type of trial.

You have the right to compel the attendance of witnesses on your behalf through the use of the Court's subpoena power.

You have the right to confront and cross-examine witnesses called to testify against you by the prosecution.

You have the right to not testify yourself at your trial, which is your right against self-incrimination.

You have the right to the assistance of a lawyer during all stages of the proceedings, and if your sentence has a possibility of a jail sentence being imposed, and you are financially indigent, you have the right to have a Public Defender appointed to represent you.

You have the right to insist that the State prove beyond a reasonable doubt each and every allegation of the charges against you, since you are presumed innocent of the charges against you."

¶ 8 After the trial court admonished the defendants as a group, the court addressed defendant individually. The court asked him:

"You are Reginald Robinson?"

DEFENDANT ROBINSON: Yes.

THE COURT: Show, Defendant present and accompanied by James D. Lee, his attorney.

Mr. Robinson, it's my understanding you are going to waive your right to jury trial today, is that correct?

DEFENDANT ROBINSON: Yes.

THE COURT: Sir, were you present in open court when I explained constitutional rights to everyone in the courtroom?

DEFENDANT ROBINSON: Yes sir.

THE COURT: Did you understand those constitutional rights?

DEFENDANT ROBINSON: Yes sir.

THE COURT: Did you specifically understand the right to trial by jury?

DEFENDANT ROBINSON: Yes sir.

THE COURT: You believe you understand what a trial by jury is?

DEFENDANT ROBINSON: Yes sir.

THE COURT: You understand that by waiving a trial by jury you will be tried just in front of the Judge or the Court, which is known as a Bench Trial?

DEFENDANT ROBINSON: Yes sir.

THE COURT: Sir, you are going to be waiving that to—all

three Counts, Mr. Nolan [(prosecutor)]?

MR. NOLAN: Yes, Your Honor.

MR. LEE: Yes.

THE COURT: You have a three Count indictment that alleges on May 15, 2007, in Douglas County, you committed the offense of Unlawful Cannabis Trafficking, when you did knowingly bring into Illinois over 5000 grams of a substance containing cannabis with the intent to deliver in this state or another state, in violation of Illinois law.

Second Count alleges Unlawful Possession of Cannabis, same day, time and place.

The Third Count is Unlawful Possession with Intent to Deliver Cannabis, same date.

The most serious of the charges is a Class X Felony on Count One. It indicates it's non-probationable. If you are convicted—with a sentence range of 12 to 60 years to the Department of Corrections, \$400,000 fine—up to a \$400,000 fine and three years of mandatory supervised release.

You understand the maximum possible penalty upon conviction of Count One, the more serious charge?

DEFENDANT ROBINSON: Yes sir.

THE COURT: Sir, knowing the maximum possible penalty,

and being fully aware of your constitutional rights, especially your right to a jury trial, do you still wish to waive your right to a jury trial?

DEFENDANT ROBINSON: Yes sir.

THE COURT: And did anyone use any force, or threat of force today to coerce you to waive your right to a jury trial?

DEFENDANT ROBINSON: No sir.

THE COURT: Did anyone make you any promises as to what the outcome is going to be to induce you to waive your right to a jury trial?

DEFENDANT ROBINSON: No sir.

THE COURT: Are you waiving your right to a jury trial freely and voluntarily?

DEFENDANT ROBINSON: Yes sir.

THE COURT: Show, Defendant admonished as to his right to trial by jury, and the consequences of a Waiver. Written Waiver executed knowingly and voluntarily in open court. Waiver accepted."

¶ 9 On December 11, 2007, on the basis of stipulated evidence in a bench trial, the trial court found defendant guilty of the count of unlawful trafficking in cannabis (720 ILCS 550/5.1 (West 2006)). The other two counts merged into that count.

¶ 10 On February 14, 2008, the trial court sentenced defendant to imprisonment for 20 years, a statutory assessment of \$3,000, and a street-value fine of \$25,000.

¶ 11 Defendant took a direct appeal, and we affirmed the trial court's judgment. *People v. Robinson*, No. 4-08-0353, slip order at 2 (Feb. 11, 2009) (unpublished order under Supreme Court Rule 23).

¶ 12 On July 27, 2010, defendant filed a *pro se* petition for postconviction relief. In his *pro se* petition, one of his claims was as follows: "It cannot be said that defendant made an intelligent and knowing waiver of his constitutional rights to a trial by Jury."

¶ 13 On November 19, 2010, the trial court appointed Lee to represent defendant in the postconviction proceeding. On February 17, 2011, the court granted Lee permission to withdraw, and the court appointed Jeannine Garrett as defense counsel in his stead.

¶ 14 On October 25, 2011, Garrett filed an amended petition on defendant's behalf. Unlike the *pro se* petition, the amended petition did not allege that defendant's waiver of a jury trial was unknowing and unintelligent.

¶ 15 On October 26, 2011, Garrett filed a certificate pursuant to Rule 651(c). In the certificate, she stated as follows:

1. That she is court appointed counsel for Defendant in these Post-Conviction Proceedings.

2. That she has consulted with Defendant by mail and in person to ascertain his contentions of deprivation of constitutional right.

3. That she has examined the record of proceedings at trial, as well as the record of proceedings at sentencing plus the Order of the Appellate Court.

4. Necessary amendments to the Petition filed per [sic] se

have been made."

¶ 16 On October 31, 2011, the State filed a motion to dismiss the amended petition for postconviction relief. In its motion, the State invoked the statute of limitations in section 122-1(c) of the Post-Conviction Hearing Act (725 ILCS 5/122-1(c) (West 2010)). Alternatively, the State argued that defendant had procedurally forfeited his claims because he could have, but did not, raise them on direct appeal. Finally, the State argued that the claims were unmeritorious in that defendant failed to make a substantial showing of a constitutional violation.

¶ 17 On January 17, 2012, the trial court entered an order granting the State's motion for dismissal, for all three reasons the State had raised in its motion.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), the record must show that appointed postconviction counsel "took the steps necessary to assure adequate representation of the petitioner's claims in the trial court." *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Specifically, the record "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 right, 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).

¶ 21 Thus, unless the record already shows those three propositions, a certificate by postconviction counsel must show them. *Johnson*, 154 Ill. 2d at 238. The showing "may" be made

by certificate, but, in any event, the record "shall" show those propositions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 22 One of the propositions is that postconviction counsel "has examined the record of the proceedings *at the trial*." (Emphasis added.) *Id.* But what if the alleged constitutional deprivation occurred in a *pretrial* hearing? The answer is that counsel must review whatever portions of the trial-court record one would have to review to investigate the defendant's claims of constitutional deprivation. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006); *People v. Turner*, 187 Ill. 2d 406, 411-12 (1999). If the transcript of a pretrial hearing is relevant to a claim the defendant raises in his or her *pro se* petition, counsel must examine that transcript. See *Pendleton*, 223 Ill. 2d at 472. In short, even though the rule, by its terms, requires the examination of "the record of the proceedings at the trial," postconviction counsel actually must examine whatever portions of the record one would have to examine to perform an investigation of the constitutional claims that the defendant raises in his or her *pro se* petition.

¶ 23 In the present case, one of those claims is that defendant's waiver of his right to a jury trial was unknowing and unintelligent. See *People v. Bracey*, 213 Ill. 2d 265, 269 (2004) (to be valid, the defendant's waiver of a jury must be knowing and intelligent). The written jury waiver is not dispositive of the question of whether defendant knowingly and understandingly waived a jury. See *id.* at 269-70 To investigate defendant's claim that his jury waiver was unknowing and unintelligent, his postconviction counsel, Garrett, would have had to examine the transcript of the hearing in which, after admonitions by the trial court, he waived a jury trial. Defendant contends that Garrett could not have examined that transcript, because the transcript was not filed with the circuit clerk until December 20, 2012, some 14 months after she filed her Rule 651(c) certificate on October

26, 2011.

¶ 24 The defendant in *People v. Little*, 2011 IL App (4th) 090787, made a similar argument. In that case, the defendant pleaded guilty to some traffic offenses, for which the trial court sentenced him to terms of imprisonment. *Id.* ¶¶ 5-6. Later, in October 2009, the court held a hearing on the defendant's motion to reconsider the sentences, and at the conclusion of the hearing, the court denied the motion. *Id.* ¶ 7. Immediately before that hearing, defense counsel filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *Id.* ¶ 11. In his certificate, the defense counsel stated, among other things, that he had "examined the *** report of proceedings of [the] defendant's guilty-plea *** hearing[]." *Id.* ¶ 12.

¶ 25 On appeal, the defendant in *Little* argued that defense counsel could not have examined the transcript of the guilty-plea hearing as of October 2009, when he filed his Rule 604(d) certificate, because " 'the court reporter did not certify the guilty plea proceedings until December 15, 2009.' " *Id.* ¶ 13. We responded: "The fundamental problem with [the] defendant's argument is that he equates the *preparation* of the transcripts of the guilty-plea proceedings and sentencing hearing with the court reporter's *certification* of those proceedings." (Emphases in original.) *Id.* ¶ 14.

¶ 26 Obviously, it is true that, before a court reporter can certify and file a transcript of a proceeding (see Ill. S. Ct. R. 608(b) (eff. Dec. 13, 2005)), the court reporter must prepare the transcript. Thus, it is a truism that the preparation of the transcript is not simultaneous with, but precedes, the certification and filing of the transcript. The question, though, in any given case, is by how long the preparation (and availability) of the transcript preceded its certification and filing.

¶ 27 Before the filing of a notice of appeal, which would occasion the certification of the

record (*id.*; *Little*, 2011 IL App (4th) 090787, ¶ 17), the trial court may order the transcription and filing of the guilty-plea proceedings (Ill. S. Ct. R. 402(e) (eff. July 1, 1997)) as well as the provision of the transcripts, free of charge, to the indigent defendant (Ill. S. Ct. R. 604(d) (eff. July 1, 2006)). Presumably, the court so ordered in *Little*, because defense counsel in that case specifically represented to the court, both orally and in his Rule 604(d) certificate, that he had examined the transcript of the guilty-plea hearing. *Little*, 2011 IL App (4th) 090787, ¶¶ 11-12.

¶ 28 The present case is distinguishable in that postconviction counsel did not specifically state, in her Rule 651(c) certificate, that she had examined the transcript of the hearing in which defendant waived his right to a jury trial. It is true that defendant took a direct appeal and that, under Illinois Supreme Court Rule 608(a)(7) (eff. Dec. 13, 2005), "[t]he record on appeal must contain *** a transcript of proceedings regarding *** waiver of jury trial." Nevertheless, if the transcript of the guilty-plea hearing had been included in the record on direct appeal, one would expect it to bear a file-stamp date falling within the 63-day period after the filing of the direct appeal on May 9, 2008. See Ill. S. Ct. R. 608(c) (eff. Dec. 13, 2005) ("The record shall be filed in the reviewing court within 63 days from the date the notice of appeal is filed in the trial court ***.") Instead, the transcript bears a file-stamp date of December 20, 2012. More to the point, the circuit clerk's certification of the record on direct appeal, dated July 11, 2008, says the record at that time consisted of only two items: "one volume of the Common Law record" and "one volume of the Report of Proceedings," *i.e.*, the hearing of December 11, 2007, in which the court heard evidence on the motion for suppression and in which, after denying the motion, the court found defendant guilty on the basis of the stipulated evidence. So, it is evident that the separate transcript of the hearing of July 16, 2007, in which defendant waived his right to a jury trial, was not part of the record on direct appeal (and,

moreover, the sufficiency of that waiver was not an issue on direct appeal). See Ill. S. Ct. R. 608(b) (eff. Dec. 13, 2005) ("The report of proceedings contains *** all other proceedings before the trial judge, unless the parties designate or stipulate for less.").

¶ 29 That leaves the question of whether the transcript of the hearing of July 16, 2007, was prepared and available for appointed defense counsel after our decision on direct appeal (February 11, 2009) and before the filing of the Rule 651(c) certificate (October 26, 2011). The answer apparently is no because, during that period, the trial court ordered only the preparation of the trial transcript for defendant. According to the docket entry of November 3, 2010, defendant moved for the "*Trial Transcripts and Common Law Records*," and in the docket entry of November 19, 2010, the court ordered: "Transcript to be prepared *pursuant to request of Defendant*." (Emphases added.) Thereafter, up until the filing of the Rule 651(c) certificate, we do not see any further orders for the preparation of transcripts. Until the court so ordered, the court reporter would not have any particular reason to prepare the transcript of the hearing of July 16, 2007. See *Little*, 2011 IL App (4th) 090787, ¶ 17 ("[N]o need exists to prepare a record on appeal until a notice of appeal has been filed."). Because defendant was indigent and was represented by an assistant public defender, the court reporter's compensation for providing the transcript would seem to have been contingent on the court's ordering the transcript, making it unlikely that the court reporter would have done this work spontaneously. See 705 ILCS 75/3, 4 (West 2010); Ill. S. Ct. R. 607(b) (eff. Dec. 13, 2005). In sum, the record is at best ambiguous as to whether postconviction counsel examined the transcript of the hearing of July 16, 2007. This ambiguity needs to be cleared up.

¶ 30 It might be argued, though, that insisting on Garrett's personal examination of this transcript would be pointless, considering that the transcript is before us on appeal and it appears to

lend no support to defendant's claim that his jury waiver was unknowing and unintelligent but, rather, appears to positively refute that claim. In other words, Garrett's error could be characterized as harmless.

¶ 31 Harmless or not, the error is reversible. The supreme court has "consistently declined the State's invitation to excuse noncompliance with [Rule 651(c)] on the basis of harmless error." *People v. Suarez*, 224 Ill. 2d 37, 51 (2007). Even if the underlying constitutional issue appears to lack merit—because of untimeliness, lack of evidence, or some other reason—the supreme court insists on compliance with Rule 651(c) as a threshold matter. *Id.* "Such compliance must be shown regardless of whether the claims made in the *pro se* or amended petition are viable." *Id.* at 52. See also *People v. Lander*, 215 Ill. 2d 577, 584 (2005) ("We hold that defendant's attorneys were required to comply with Rule 651(c) despite the untimeliness of defendant's *pro se* petition.").

¶ 32 In sum, the record does not show compliance with Rule 651(c) because the record does not show that Garrett examined the transcript of the hearing of July 17, 2007: a portion of the record relevant to defendant's *pro se* claim that his waiver of a jury trial was unknowing and unintelligent. We will consider no other issue until the record shows that postconviction counsel has examined all portions of the record relevant to the constitutional claims defendant raises in his *pro se* petition.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the trial court's judgment and remand this case for the purpose of demonstrating compliance with Rule 651(c).

¶ 35 Reversed and remanded with directions.