

NOTICE

Decision filed 04/15/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110298-U
NO. 5-11-0298
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Washington County.
)	
v.)	No. 00-CF-67
)	
LEONARD B. PARKER,)	Honorable
)	Dennis G. Hatch,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant's postconviction counsel was reasonably effective despite presenting an argument unsupported by the law where other available arguments were adequately presented in the postconviction petition.
- ¶ 2 The defendant, Leonard Parker, appeals from the dismissal, by the circuit court of Washington County, of his petition filed pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). The petition was dismissed on the State's motion as having been untimely filed. On appeal, the defendant argues that his postconviction counsel failed to render reasonable assistance when he failed to fully advance an available argument tending to excuse the late filing, and instead presented an argument unsupported by the law. For reasons which follow, we affirm the dismissal.
- ¶ 3 On September 12, 2000, the defendant was charged by amended information with four counts of first-degree murder stemming from the stabbing, by a codefendant, of the victim during the course of a robbery and/or residential burglary. The defendant was not the

stabber, but was charged under a theory of accountability.

¶ 4 On October 26, 2000, the defendant pleaded guilty to count II of the amended information, which charged him with first-degree murder during the course of a robbery. In return the State agreed to ask for a sentence of imprisonment of not more than 50 years and to dismiss the other counts of the amended information.

¶ 5 On December 13, 2000, judgment was entered and the defendant was sentenced to serve 35 years in the Department of Corrections and to pay a \$10,000 fine and court costs. The defendant's motion to reconsider sentence was denied, and he brought a direct appeal from the judgment. On November 4, 2001, the defendant's appeal was dismissed because he had not properly filed a motion to withdraw his guilty plea.

¶ 6 Almost nine years later, on October 28, 2010, the defendant filed a *pro se* petition pursuant to the Act, raising four claims of error in the proceedings leading to his conviction. The petition addressed the delay in filing, seeking to justify it as not based on the defendant's own culpable negligence. On December 13, 2010, the court found that at least some of the defendant's claims were not frivolous or patently without merit and advanced the petition to the second stage of postconviction proceedings. See 725 ILCS 5/122-2.1(b) (West 2010).

¶ 7 Counsel was appointed to represent the defendant. Counsel declined to amend the defendant's *pro se* petition. On July 12, 2011, counsel filed a certificate pursuant to Supreme Court Rule 651(c), which requires that counsel certify that he has consulted with the petitioner to ascertain his contentions of deprivation of constitutional rights, has examined the record of any proceedings at the trial, and has made any amendments to the *pro se* petition that are necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 8 On March 31, 2011, the State filed a motion to dismiss the postconviction petition for the reason that it was filed beyond the time allowed by section 122-1(c) of the Act, which

sets time limits by which petitions must be filed, "unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2010). There is no question that the defendant's petition was filed well beyond the time limit set by section 122-1(c). One of the defendant's claims of error raised in the petition is that his trial counsel had been ineffective in failing to act on information that the police had disregarded the request of the minor defendant's parents that the police not interrogate the minor defendant until one of them had arrived. The defendant had been only 16 years of age at the time of his arrest and had confessed his involvement in the crime in response to police interrogation. He argued that effective trial counsel would have learned these facts and moved to suppress the defendant's confession. Had the defendant's confession been suppressed, he might not have pleaded guilty.

¶ 9 In his petition, the defendant set forth facts which he believed excused his failure to raise this claim within the time limits set forth in the Act. He alleged that he had not learned until August 2009 that the police had disregarded his parents' request that he not be questioned. Upon learning of this, the defendant sought to, and did, obtain affidavits from his parents, which were attached to the petition.

¶ 10 At the hearing on the State's motion to dismiss the petition as untimely, instead of advancing the argument that the defendant had learned of his potential postconviction claim only recently, counsel argued that the rights implicated in the defendant's petition were too important to be barred by the statute of limitations. The only argument the defendant's counsel made to excuse the late filing was that the issues raised by the petition involved a significant constitutional right. Counsel argued that the petition raised issues concerning the effectiveness of trial counsel and that manifest injustice would occur if his petition was not heard. Counsel argued that due to the serious nature of the claims raised, the court should overlook any culpable negligence on the petitioner's part.

¶ 11 The defendant argues on appeal that his postconviction counsel provided unreasonable assistance when he failed to fully advance an available and meritorious argument, set forth in the defendant's petition, tending to excuse the late filing of the petition and instead presented an argument unsupported by the law. The defendant argues that the argument made by his counsel had no legal merit and that, despite having filed a certificate as required by Supreme Court Rule 651(c), his counsel did not adequately present the defendant's contentions. The certificate was therefore inadequate and his counsel's performance was unreasonable.

¶ 12 This court reviews *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Williams*, 186 Ill. 2d 55, 59-60 (1999).

¶ 13 The right to counsel in postconviction proceedings is wholly statutory. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). A petitioner is entitled only to the level of assistance required by the Act. *Perkins*, 229 Ill. 2d at 42. The Act provides for a "reasonable" level of assistance. *Perkins*, 229 Ill. 2d at 42. To assure the "reasonable" assistance required by the Act, Illinois Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Rule 651(c) requires only that counsel (1) consult with the petitioner to ascertain his contentions of deprivation of constitutional rights, (2) examine the record of proceedings at trial, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 14 The requirement of making any amendments necessary for an adequate presentation of the petitioner's contentions includes alleging any facts that may establish a lack of culpable negligence in the late filing. *Perkins*, 229 Ill. 2d at 43. In the instant case, no such amendment was necessary as the defendant's *pro se* petition included the facts and argument which the defendant now claims were the only ones tending to excuse the late filing. We

note that Rule 651(c) does not require that counsel orally argue to the trial court each and every argument presented in the petition.

¶ 15 This case is not like *People v. Turner*, 187 Ill. 2d 406, 413 (1999), and *People v. Broughton*, 344 Ill. App. 3d 232, 242 (2003), relied upon by the defendant, where postconviction counsel were required to make oral arguments to the circuit court in order to cure their failure to amend in writing the postconviction petition. In the case at bar, no such amendment was required because the facts and argument tending to excuse the late filing were included in the postconviction petition.

¶ 16 We believe the defendant's counsel acted reasonably in presenting an additional, alternative argument in support of excusing the late filing of the petition. If nothing else, the argument might have induced the State to waive its objection to the late filing. We emphasize that the defendant's argument that he was not culpably negligent in filing his petition and the facts supporting it are fully presented in the defendant's postconviction petition. The petition is supported by the affidavits of the defendant's mother and father that they did not give the police permission to interrogate the defendant without them present. It is also supported by the defendant's affidavit that he did not learn that his parents had not given permission for the interrogation, and that his confession could have been challenged, until August 2009. Furthermore, the circuit court acknowledged on the record that it had reviewed the postconviction petition. Accordingly, the circuit court was fully aware of the defendant's argument regarding his lack of culpable negligence. Counsel's oral presentation of the argument at the hearing would not have added anything. Postconviction counsel's assistance was reasonable and met the requirements of the Act and Supreme Court Rule 651(c).

¶ 17 For the foregoing reasons, we affirm the dismissal of the defendant's postconviction petition.

¶ 18 Affirmed.