

No. 1-12-1158

**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. 97 CR 22444
	)	
FRANCIS SMITH,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Delort and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant's postconviction petition was properly dismissed where the record did not contradict postconviction counsel's averments of compliance in her Rule 651(c) certificate despite a 10-year delay in presenting the petition to the trial court; judgment affirmed.

¶ 2 Defendant Francis Smith appeals from the second-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2002)).

On appeal, defendant contends: (1) his court-appointed counsel did not provide a reasonable level of assistance where she failed to amend defendant's *pro se* petition and failed to respond to

the State's motion to dismiss; (2) it was error to permit a law student certified under Supreme Court Rule 711 (eff. Feb. 10, 2006) to represent defendant at the hearing on the State's motion to dismiss without indication in the record that defendant consented to be represented by the student; and (3) the nearly 10-year delay in the postconviction proceedings constituted denial of a reasonable level of assistance of counsel. We affirm.

¶ 3 Defendant was charged with aggravated arson in connection with a fire that occurred on August 2, 1997, in a multi-residence building at 1451 North Maplewood in Chicago. Following a jury trial, defendant was convicted of aggravated arson and sentenced to an extended term of 60 years in prison. On direct appeal, this court affirmed the judgment of the circuit court. *People v. Smith*, No. 1-00-0359 (2001) (unpublished order under Supreme Court Rule 23).

¶ 4 On August 13, 2002, defendant's *pro se* petition for postconviction relief and his *pro se* section 2-1401 petition for relief from judgment<sup>1</sup> were filed in the circuit court. His petition for postconviction relief raised 10 issues. On November 8, 2002, the circuit court appointed the public defender to represent defendant in the second stage of postconviction proceedings. Four court dates later, on November 3, 2003, Assistant Public Defender Marianne Branch (Branch) made her first appearance in court as counsel for defendant. On May 6, 2004, the State filed a motion to dismiss defendant's postconviction petition. On August 5, 2004, Branch formally filed her appearance as defendant's appointed counsel. On May 15, 2005, the State filed another motion to dismiss the postconviction petition. On September 16, 2010, 7 years and 23 court dates after first appearing in court on behalf of defendant, Branch filed in the circuit court her

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<sup>1</sup> Defendant represented himself in proceedings on the section 2-1401 petition, which was denied March 29, 2012, and is not a subject of the instant appeal.

certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 21, 1984). Branch last appeared as defendant's counsel on December 22, 2010. On March 16, 2011, Branch was reported to be "on leave" and on May 18, 2011, Assistant Public Defender Stephanie Foster (Foster) stepped in for Branch as defendant's postconviction counsel. On that same date, the State filed a motion to dismiss both defendant's postconviction petition and his *pro se* section 2-1401 petition for relief from judgment. On March 29, 2012, defendant, acting *pro se*, argued his section 2-1401 motion, which was denied.

¶ 5 On April 2, 2012, the circuit court conducted a hearing on the State's motion to dismiss defendant's *pro se* postconviction petition. Both Foster and 711 student Jim McQuattro<sup>2</sup> presented argument in response to the State's motion. McQuattro argued that at defendant's aggravated arson trial, his counsel was ineffective for failing to adequately cross-examine two police officers on several topics relating to whether defendant knew or should have known the torched building was occupied. McQuattro also argued that it was error not to give the jury a lesser-included offense instruction on arson. Foster argued that defendant's trial counsel was ineffective at a post-trial fitness hearing in cross-examining a forensic psychologist on whether defendant had been fit to stand trial and was fit to be sentenced. Following argument, the circuit court granted the State's motion to dismiss. Defendant now appeals from that order.

¶ 6 On appeal, defendant claims that appointed postconviction counsel failed to comply substantially with Supreme Court Rule 651(c) because counsel did not amend his *pro se* petition. As a preliminary matter, we note that between the appointment in 2002 of the public defender to represent defendant and the dismissal of his *pro se* postconviction petition in 2012, seven

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<sup>2</sup> Also spelled Dequetry in the record.

different assistant public defenders appeared in court on different dates. However, only Branch, who appeared in the vast majority of court dates, filed an appearance and seven years later filed a Rule 651(c) certificate stating that no amendment of the *pro se* petition was necessary. Foster appeared only on the last six court dates, as a substitute for Branch.

¶ 7 We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Delton*, 227 Ill. 2d 247, 255 (2008). Defendant's petition was dismissed at the second stage of the postconviction process, at which stage the circuit court was required to determine whether the petition and any accompanying documentation made a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Section 122-2.4 of the Act provides for the appointment of counsel. 725 ILCS 5/122-2.4 (West 2002). The right to postconviction counsel when a petition advances to the second stage of proceedings under the Act is statutory, not constitutional. *People v. Elken*, 2014 IL App (3d) 120580, ¶ 28, citing *People v. McNeal*, 194 Ill. 2d 135, 142 (2000). Consequently, a court of review requires only a reasonable level of assistance by appointed counsel at such proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 8 We reject defendant's contention that postconviction counsel did not provide reasonable assistance where his *pro se* petition was not amended. Under section 122-5 of the Act, appointed counsel may seek leave to file amendments to the petition. However, there is no requirement that postconviction counsel *must* amend a defendant's *pro se* petition. *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991). The level of postconviction counsel's competence is measured by counsel's compliance with Rule 651(c). *McNeal*, 194 Ill. 2d at 142-43. Rule 651(c) requires that the record demonstrate counsel (1) has consulted with petitioner to ascertain his contentions, (2) has

examined the record of the proceedings at the trial, and (3) "has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Fulfillment of the third obligation under Rule 651(c) does not require counsel to advance frivolous or spurious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). If an amendment to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, it is not "necessary" within the meaning of the rule. *Id.* Consequently, we must give effect to counsel's representation in her certificate that she complied with Rule 651(c). We find it significant that defendant has not suggested in what manner postconviction counsel should have amended the *pro se* petition so as to establish a substantial showing of a constitutional violation.

¶ 9 Defendant also contends that postconviction counsel did not respond to the State's motion to dismiss. The State filed its last motion to dismiss on May 18, 2011, the date of Foster's first appearance substituting for Branch in the postconviction proceedings. Defendant notes that although Foster advised the court that she would respond to the State's motion to dismiss, the record reflects that no written response was filed. Defendant argues that neither Foster nor the 711 student communicated with defendant, they "merely regurgitated a handful of the arguments" defendant raised in his *pro se* petition, and they did not demonstrate they had actually read the trial and appellate records. We disagree. On a date prior to the hearing, Foster advised the court that she had spoken with defendant by telephone the previous day. At the hearing on the State's motion, both Foster and the 711 student presented lengthy and vigorous oral argument in response to the State's motion. Their oral responses to the State's motion to dismiss presented arguments and factual matters in greater detail than what was presented in the

*pro se* petition and demonstrated that they were very familiar with the record of the proceedings at defendant's trial. Consequently, we must reject defendant's claim that their combined representation of defendant at the hearing on the State's motion to dismiss "amounted to an acquiescence to" the State's motion.

¶ 10 Defendant argues, however, that the efforts of Foster and the 711 student at the hearing on the motion to dismiss did not benefit him. He asserts that they did nothing to challenge the State's arguments of *res judicata* and forfeiture. Defendant notes that the 711 student mistakenly argued that there were "exceptions to *res judicata* that would not apply" to defendant's claims. What the student meant to say, and what he clarified moments later, was that the issue of failure to give a lesser-included jury instruction on arson was an exception to *res judicata* that *would* apply where the issue was preserved for review but counsel on direct appeal was ineffective for not raising it. In addition, assistant Public Defender Foster argued that the issue of defendant's failure to testify was also not *res judicata*. Defendant makes no suggestion as to what successful argument, if any, could have convinced the court to deny the State's motion.

¶ 11 Defendant also contends there is no indication in the record that he consented to representation by the 711 student at the hearing. Defendant misapprehends the record. A written and signed consent, filed on March 29, 2012, four days before the hearing on the State's motion to dismiss, appears in the common law record. In proceedings on March 29, the court noted that the consent had been filed. The clerk's memorandum of orders (half-sheet) also records the filing of the written consent.

¶ 12 Finally, defendant contends that he did not receive reasonable assistance of postconviction counsel where it took almost a decade to present his postconviction petition to the

circuit court. The record before us reveals that the public defender was appointed to represent defendant in the postconviction proceedings on November 8, 2002. Between that date and nearly 9½ years later, on April 2, 2012, when the petition was dismissed pursuant to a motion by the State, the case was before the court on 37 different dates. Branch was the attorney of record for most of those dates. Some months after she filed her Rule 651(c) certificate, Branch was on leave, and Foster filled in for her during the last year of the postconviction proceedings.

¶ 13 There are certain time restrictions in proceedings under the Act. Petitioners are required to commence postconviction proceedings within a given time limitation period. 725 ILCS 5/122-1(c) (West 2002). Within 90 days of the filing and docketing of a petition, the trial court is required to examine the petition and enter an order thereon. 725 ILCS 5/122-2.1(a) (West 2002). Within 30 days of a petition being docketed for further consideration, or within such further time set by the court, the State is required to answer or move to dismiss. Upon a motion to dismiss being filed and denied, the State is required to file an answer within 20 days of such denial. 725 ILCS 5/122-5 (West 2002). Section 122-5 gives the court discretion to extend the time for filing any pleading other than the original pleading. Otherwise, there is no statutory time limit in which the trial court was required to rule on a petition or in which counsel was obliged to submit an amended petition. However, this is not to say that we condone the lengthy period of time which the petition languished before being brought to a hearing.

¶ 14 We agree with defendant that the lengthy period of time it took to obtain a ruling on the petition was egregious and should not have happened. See *People v. Bennett*, 394 Ill. App. 3d 350, 355 (2009). In fact, it is fair to say that such an inexcusably lengthy delay shows a lack of regard for procedural rules and defendant's rights. However, while a lengthy delay such as

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occurred in this case should not be tolerated, the record, as well as applicable law does not show any prejudice to defendant. Thus, while condemning this outrageous delay in the strongest terms, we conclude that defendant has not established prejudice so as to require reversal of the circuit court's order granting the State's motion to dismiss.

¶ 15 Accordingly, for the reasons set forth we affirm the judgment of the circuit court of Cook County.

¶ 16 Affirmed.