

No. 1-12-1206

**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. 99 CR 3719
	)	
JAMAL JONES,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LIU delivered the judgment of the court.  
Presiding Justice Simon and Justice Pierce concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Where all claims in *pro se* post-conviction petition were raised and disposed of on direct appeal, post-conviction counsel did not render unreasonable assistance by not adding certifying affidavit to petition; such amendment was not necessary to shape the *pro se* claims into proper legal form where a certifying affidavit could not overcome that all the claims were *res judicata*.

¶ 2 Following a jury trial, defendant Jamal Jones was convicted of first degree murder and sentenced to 40 years' imprisonment. We affirmed on direct appeal. *People v. Jones & Priester*, Nos. 1-03-1512 & -1714 (cons.)(2006)(unpublished order under Supreme Court Rule 23).

Defendant now appeals from the dismissal, upon State motion, of his 2007 post-conviction petition. He contends that post-conviction counsel rendered unreasonable assistance and failed to fulfill her duties under Supreme Court Rule 651(c) (eff. Feb. 6, 2013) by not adding to the *pro se* petition a certifying affidavit by defendant; that is, a notarization of his signature. The State responds that it did not challenge the petition for a lack of notarization and thus forfeited such a challenge, and notes that the court dismissed the petition on its merits rather than due to lack of notarization, so that defendant's contention is moot. Defendant replies that a claim of unreasonable assistance of post-conviction counsel is not subject to a harmless-error analysis.

¶ 3 In severed but simultaneous jury trials, defendant and codefendant Carlos Priester were convicted of the first degree murder of Jerry Kennedy on or about January 4, 1999, and each was sentenced to 40 years' imprisonment. On direct appeal, defendant and codefendant contended that the court erred by (1) not instructing the juries on self-defense and second degree murder and (2) not granting their motions to dismiss the indictment for failure to preserve potentially exculpatory evidence when police returned to its owner a car rented by defendant that contained blood and firearm evidence. They also contended prosecutorial misconduct during closing arguments. Defendant further contended that (1) the court erred by not instructing the jury on involuntary manslaughter, (2) the court erred in excluding a witness on Kennedy's propensity to violence, (3) the evidence was insufficient to convict defendant, and (4) trial counsel was ineffective for not tendering self-defense jury instructions. We analyzed in detail and disposed of each of these claims in a 51-page order affirming the convictions of defendant and codefendant. Our supreme court denied leave to appeal (No. 103090 (Nov. 29, 2006)), and the United States Supreme Court denied *certiorari* (*Jones v. Illinois*, No. 06-10549 (May 29, 2007)).

¶ 4 Defendant filed his *pro se* post-conviction in late 2007, alleging that he was denied (1) a fair trial, equal protection, and due process by the trial court's denial of jury instructions on involuntary manslaughter and self-defense, (2) due process by the denial of his motion to dismiss the indictment and/or sanction the State for releasing the rental car to its owner, (3) due process by prejudicial prosecutorial comments, and (4) effective assistance of trial counsel by not seeking jury instructions on self-defense. The prosecutorial comments identified in the petition were all challenged by defendant on direct appeal. Defendant's typewritten signature on the petition was not notarized.

¶ 5 Counsel was appointed on the petition in August 2008. The case was continued from time to time, with counsel informing the court that she was reviewing the record or investigating a potential witness at defendant's behest. On May 11, 2011, post-conviction counsel informed the court that she was filing her Rule 651(c) certificate; however, there is no copy of it in the record.

¶ 6 The State filed a motion to dismiss the petition in July 2011, arguing that all claims in the petition were raised on direct appeal and thus barred as *res judicata*.

¶ 7 On March 28, 2012, the court held a hearing on the motion to dismiss. Post-conviction counsel reiterated that she had filed her Rule 651(c) certificate and "decided not to supplement this petition" after reviewing the petition and record and communicating with defendant regarding his constitutional claims. Counsel argued the claims in the petition but admitted on the court's inquiry that the same claims had been raised and disposed of on direct appeal. The court dismissed the petition on *res judicata* grounds, and this appeal followed.

¶ 8 On appeal, defendant contends that post-conviction counsel rendered unreasonable assistance and failed to fulfill her Rule 651(c) duties by not adding to the *pro se* petition a

certifying affidavit by defendant. The State responds that it did not challenge the petition for a lack of notarization and thus forfeited such a challenge, and notes that the court dismissed the petition on its merits rather than due to lack of notarization, so that defendant's contention is moot. Defendant replies that a claim of unreasonable assistance of post-conviction counsel is not subject to a prejudice or harmless-error analysis.

¶ 9 The right to assistance of counsel in post-conviction proceedings is not constitutional but statutory (725 ILCS 5/122-4 (West 2012)) so that counsel's obligation is to provide a reasonable level of assistance to the petitioner. *People v. Bell*, 2014 IL App (3d) 120637, ¶ 10, citing *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Our supreme court adopted Supreme Court Rule 651(c) (eff. Feb. 6, 2013) to ensure that counsel provides a reasonable level of assistance. *Id.* The Rule provides that, in an appeal from the disposition of a post-conviction petition:

"The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her 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."

By its plain language, Rule 651(c) is limited to claims raised by the petitioner, so that post-conviction counsel has no duty to explore, investigate or formulate potential claims. *Bell*, 2014 IL App (3d) 120637, ¶ 12, citing *People v. Davis*, 156 Ill. 2d 149 (1993). Instead, counsel's duty is to shape the petitioner's claims into proper legal form and present them to the court. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). An adequate presentation of a petitioner's claims necessarily

includes attempting to overcome procedural bars, such as timeliness, that result in dismissal of a petition if not rebutted. *Id.*

¶ 10 A post-conviction "proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122-1(b) (West 2012). While an affidavit does not comply with this requirement unless it is notarized, the absence of a verification affidavit is not grounds for summary dismissal but instead a basis for the State to move for dismissal. *People v. Hommerson*, 2014 IL 115638, ¶¶ 11-14; *People v. Hemingway*, 2014 IL App (4th) 121039, ¶¶ 20-21; *People v. Nitz*, 2011 IL App (2d) 100031, ¶¶ 10-11. Thus, adding a notarized certification to a petition is generally one of the amendments necessary to ensure that the petition is proper, so that failure to add it is unreasonable assistance. *Nitz*, 2011 IL App (2d) 100031, ¶¶ 17-19. But see *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 27 ("Once the State moved to dismiss on the merits and did not challenge the alleged procedural defects, and once the trial court conducted a hearing, during which neither party raised the alleged procedural defects, and presented its ruling based on the merits, the purported notarization and certification issues became moot.")

¶ 11 The filing of a Rule 651(c) certificate creates a rebuttable presumption of counsel's compliance with the Rule. *Bell*, 2014 IL App (3d) 120637, ¶ 10; *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. Thus, while our supreme court held in *Suarez* that post-conviction counsel's failure to make a Rule 651(c) showing cannot be harmless error, the merits of a petitioner's *pro se* claims are crucial to evaluating a contention that the presumption from a facial showing of compliance is rebutted in some way. *People v. Profit*, 2012 IL App (1st) 101307, ¶¶ 22-23, citing *Suarez*, 224 Ill. 2d at 42. "Fulfillment of the third obligation under Rule 651(c) does not require

postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If 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.' " *Profit*, 2012 IL App (1st) 101307, ¶ 23, quoting *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Our review of whether post-conviction counsel provided the requisite level of assistance is *de novo*. *Bell*, 2014 IL App (3d) 120637, ¶¶ 9-10.

¶ 12 Here, defendant does not contend that post-conviction counsel did not make a facial showing of Rule 651(c) compliance but that the presumption of compliance is rebutted by counsel's failure to obtain and add a certifying affidavit to the *pro se* petition. However, it is undisputed by defendant in his briefs that every claim he raised in his *pro se* petition was raised and disposed of on direct appeal. In other words, as the State argued and the circuit court found, all claims in the petition were barred as *res judicata*. Under these circumstances, we find that post-conviction counsel did not render unreasonable assistance by not adding defendant's notarized certification to the petition. A certifying affidavit was unnecessary to shape the claims in the petition into proper legal form because notarizing defendant's certification of the petition would not overcome the *res judicata* bar of all the claims therein. In sum, we find not that any error by post-conviction counsel was harmless but that counsel did not commit error – did not act unreasonably – at all under the circumstances.

¶ 13 Accordingly, the judgment of the circuit court is affirmed.

¶ 14 Affirmed.