

No. 1-13-0036

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 91 CR 15025
)	
ALEX PEARSON,)	Honorable
)	Neera Lall Walsh,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

¶ 1 **Held:** We affirm the circuit court's second-stage dismissal of defendant's post-conviction petition where post-conviction counsel provided reasonable assistance.

¶ 2 Defendant Alex Pearson appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2006). On appeal,

defendant contends that his appointed post-conviction counsel did not provide reasonable assistance under Supreme Court Rule 651(c) (eff. Feb. 6, 2013), because appointed counsel did not attach to defendant's petition a notarized affidavit from defendant in support of his claim that trial counsel was ineffective for failing to call a witness known as "G." We affirm.

¶ 3 Defendant was arrested and charged with the first degree murder of Kevin Johns on June 9, 1991. The evidence at trial showed that two witnesses, Wayne Wesley and Stephanie Minor, identified defendant as the shooter. Neither witness saw Johns holding a weapon, placing his hands behind his back, or making any threatening movements. Defendant, who argued that he shot Johns in self-defense, testified that he and Johns engaged in an argument over a gun that was stolen from him in a neighborhood park. They began to fight, and Johns stabbed him twice in the leg with a knife. Defendant ran away and encountered a friend named "G," who gave him a gun and drove him to the 115th block of Calumet Avenue in Chicago where he saw Johns. When defendant approached Johns, Johns got "in [his] face," took two steps back, and reached behind his back. Defendant, believing Johns was reaching for a knife or a gun, shot Johns. Defendant fled the scene and returned the gun to "G." Defendant introduced into evidence his bloody jeans and photos of cuts on his leg.

¶ 4 Following the jury trial, defendant was convicted of first degree murder and sentenced to 45 years' imprisonment. We affirmed that judgment on direct appeal. *People v. Pearson*, No. 1-92-1056 (1994) (unpublished order under Supreme Court Rule 23).

¶ 5 On January 24, 2007, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2006). Defendant

sought to have his section 2-1401 petition recharacterized as a post-conviction petition, but, on August 27, 2007, defendant withdrew the 2-1401 petition and filed a post-conviction petition in its place. The post-conviction petition alleged, in pertinent part, that trial counsel was ineffective for failing to investigate and interview "G," who would have testified that he saw the victim put his hands behind his back as if reaching for a weapon. Defendant attached a document labeled "affidavit" to the petition, stating that he told his trial attorney prior to trial where he could find "G," who would testify that Johns put his hands behind his back as if he was reaching for a weapon. According to defendant, counsel refused to go to "G's" address and subpoena him.

¶ 6 On October 18, 2007, the petition was docketed for second stage proceedings and public defender Dennis Urban was appointed to represent defendant. At the second stage, the petition was dismissed as untimely and defendant's claims were found to be barred by *res judicata*. On appeal, defendant contended that post-conviction counsel labored under a *per se* conflict of interest where the record showed that Urban represented defendant during the post-conviction proceedings and on direct appeal. The State agreed, and pursuant to the State's motion, this court remanded defendant's cause back to the circuit court for new second stage proceedings. *People v. Pearson*, No. 1-09-1569 (2010) (dispositional order).

¶ 7 On remand, new post-conviction counsel was appointed. He filed a Rule 651(c) certificate, stating that he consulted with defendant in prison, by mail, and by telephone to ascertain his contentions of deprivations of constitutional rights. Post-conviction counsel amended defendant's petition by attaching a notarized affidavit from defendant listing the reasons why he was hindered in his pursuit of his post-conviction claims.

¶ 8 The State filed a motion to dismiss defendant's petition on August 20, 2012, arguing that defendant's petition was untimely and his claims were without merit, noting in part that defendant's affidavit stating he told his trial counsel about "G" was flawed as it was not notarized. Defendant responded, through counsel, that his delay in filing his petition was not the result of his culpable negligence where he had little education and his efforts to pursue his claims were hindered by the Illinois Department of Corrections. Defendant further argued that trial counsel's failure to investigate the only witness who was in a position to rebut the State's evidence was sufficient to establish a violation of his right to effective assistance of counsel, and that the State waived the notarization issue by not including it in its first motion to dismiss.

¶ 9 At the October 22, 2012 hearing on the State's motion to dismiss, post-conviction counsel reiterated that defendant was hindered in his attempts to prepare and file his post-conviction petition, and that his trial counsel was ineffective for not investigating "G." On November 26, the circuit court issued a written order granting the State's motion to dismiss defendant's petition based on untimeliness because it was 13 years late. The court further found that defendant's claim pertaining to ineffective assistance of trial counsel for failing to investigate "G" was not sufficiently supported because defendant failed to submit an affidavit from "G." The court added it would not consider defendant's affidavit regarding "G" because it was not notarized.

¶ 10 On appeal, defendant contends that his petition should be remanded for new second stage proceedings because post-conviction counsel failed to attach a notarized affidavit from him in support of his claim that trial counsel was ineffective for failing to call "G" as a witness.

Defendant argues that the notarized affidavit was a necessary amendment to his *pro se* petition,

and appointed counsel's failure to attach said affidavit constituted unreasonable assistance under Rule 651(c).

¶ 11 The Act provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the defendant's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). At the second stage of proceedings, all factual allegations not positively rebutted by the record are considered true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 12 The right to post-conviction counsel is a matter of legislative grace, and a post-conviction petitioner is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Illinois Supreme Court Rule 651(c) imposes specific duties on post-conviction counsel to ensure he provides reasonable assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Under Rule 651(c), post-conviction counsel is required to: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, (2) examine the record of proceedings from the trial, and (3) amend the defendant's *pro se* petition as necessary to adequately present his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The purpose of Rule 651(c) is to "ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Substantial compliance with the rule is

sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and counsel is not required to advance nonmeritorious claims on defendant's behalf (*People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)).

¶ 13 Our review of an attorney's compliance with a supreme court rule is also reviewed *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19. When post-conviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that post-conviction counsel provided reasonable assistance, and it is then the defendant's burden to overcome this presumption by demonstrating that counsel failed to substantially comply with the duties required by the rule. *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 14 Here, post-conviction counsel filed a Rule 651(c) certificate, stating that he had consulted with defendant in person, by mail, and by telephone to ascertain his contentions of deprivations of constitutional rights, obtained and examined the record of the proceedings at trial, examined defendant's *pro se* petition, and prepared an amendment to the *pro se* petition by attaching defendant's notarized affidavit, which essentially stated the reasons he was unable to file a timely post-conviction petition. The assertions made in counsel's Rule 651(c) certificate are not contradicted by the record (*Perkins*, 229 Ill. 2d at 52), and we thus conclude that defendant has failed to overcome the presumption that he received the reasonable assistance to which he was entitled at the second stage.

¶ 15 Defendant argues, however, that post-conviction counsel's noncompliance with Rule 651(c) is readily apparent where he failed to obtain a properly signed and notarized affidavit from his own client regarding defendant's claim that trial counsel was ineffective for not

investigating "G." In support of this argument, defendant relies on *People v. Suarez*, 224 Ill. 2d 37 (2007), *People v. Turner*, 187 Ill. 2d 406, 414 (1999), and *People v. Schlosser*, 2012 IL App (1st) 092523. In *Suarez*, post-conviction counsel did not file a Rule 651(c) certificate and the record did not show he had consulted with the defendant. *Suarez*, 224 Ill. 2d at 40, 44. In *Turner*, there was no indication that a Rule 651(c) certificate was filed and the supreme court found that post-conviction counsel's failure to make a simple amendment to overcome the procedural bar of waiver represented "a total failure of representation." *Turner*, 187 Ill. 2d at 415-416. In *Schlosser*, post-conviction counsel filed a Rule 651(c) certificate, but "effectively admitted" that he failed to amend the *pro se* petition to include defendant's main claim. *Schlosser*, 2012 IL App (1st) 092523, ¶ 33. Unlike post-conviction counsel here, the post-conviction counsel in *Suarez* and *Turner* were not entitled to a presumption of reasonable assistance, and the representations made by post-conviction counsel in *Schlosser* were not present in this case. We thus find *Suarez*, *Turner*, and *Schlosser* distinguishable from the case at bar. We also note that defendant's reliance on *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 1, in his reply brief is inapposite to the case at bar where, unlike here, the issue centered on the level of assistance required under the Act when a private attorney represented the defendant at the second stage of proceedings.

¶ 16 We particularly find that defendant's reliance on *Turner* is not well founded because it is both factually and legally distinguishable. The supreme court in *Turner* enumerated a multitude of errors committed by post-conviction counsel and then found "that post-conviction counsel's performance was so deficient that it amount[ed] to virtually no representation at all." *Turner*, 187 Ill. 2d at 413-16. The present defendant makes no such argument but rather solely faults post-

conviction counsel for not notarizing defendant's original affidavit in which defendant asserted that "G" would testify on defendant's behalf. Defendant expressly, and incorrectly, submits that *Turner* held that Rule 651(c) is violated where post-conviction counsel fails "to attach an easily-obtainable affidavit from the client himself." Contrary to defendant's representation, neither this holding nor this quotation is included in the *Turner* opinion. In construing *Turner*, this court found that the supreme court "did not hold that any failure to amend the petition would be unreasonable." *People v. Rials*, 345 Ill. App. 3d 636, 643 (2003). Our holding accords with the supreme court's subsequent decision in *People v. Greer*, 212 Ill. 2d 192, 205 (2004), which found that where "amendments to a *pro se* postconviction petition would only further a frivolous and patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule."

¶ 17 In light of *Greer*, this court has previously held that where, as in the present case, the presumption of reasonable assistance is present, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23. That is because "[f]ulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf." *Id.* In so finding, we disagree with defendant's contention in his reply brief that this court in *People v. Kirk*, 2012 IL App (1st) 101606, "rejected the State's overreading of *Profit* because *Profit* was an unusual case." In *Kirk*, this court distinguished *Profit*, in part, because it did not address the precise question at issue in that case, *i.e.*, whether counsel provided unreasonable assistance when he disavowed the defendant's post-conviction petition and orally asserted a new claim of professed merit at the hearing on the State's motion to

dismiss, having failed to include it in the defendant's petition. *Id.*, ¶ 35. In this case, as pointed out by defendant in his reply brief, post-conviction counsel argued the ineffective assistance of trial counsel claim found in defendant's petition at the hearing on the State's motion to dismiss. Post-conviction counsel did not make arguments before the circuit court regarding claims that were not contained in his post-conviction petition, thus distinguishing it from *Kirk*.

¶ 18 Here, amending defendant's petition to include his notarized affidavit stating that he told his trial counsel about "G," would not have made defendant's claim that trial counsel provided ineffective assistance for failing to investigate "G" meritorious. Our supreme court has stated that, "[a] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. (Internal citations omitted.) In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *People v. Enis*, 194 Ill. 2d 361, 380 (2000).

¶ 19 Defendant never submitted an affidavit, notarized or not, from "G," nor did he submit an affidavit explaining the absence of this required supporting documentation. Significantly, defendant did not even allege on appeal that post-conviction counsel provided unreasonable assistance for failing to amend his petition to either include an affidavit from "G," or include an explanation for its absence. Therefore, even if post-conviction counsel had amended defendant's petition to include a notarized affidavit of defendant's version of events, the petition would still have been properly dismissed for lack of supporting documentation where an affidavit from "G" was missing. As such, post-conviction counsel was not unreasonable for declining to amend

defendant's petition with a notarized affidavit from defendant. In reaching this conclusion, we note that defendant's contention that post-conviction counsel asserted a meritless argument in his response to the State's second motion to dismiss, *i.e.*, that the State had waived the notarization issue by failing to include it in its first motion to dismiss, does not change the result in this case.

¶ 20 Based on the facts of this case, defendant has failed to rebut the presumption afforded post-conviction counsel that he acted reasonably under Rule 651(c). Here, post-conviction counsel obtained a notarized affidavit from defendant regarding his claims of lack of culpable negligence to attempt to overcome the untimely filing of the petition, but the circuit court dismissed the petition because it was filed more than 13 years late. The circuit court also considered defendant's allegation that his trial counsel was ineffective for failing to properly investigate "G" as a potential witness. Notably, at trial, defendant testified that his friend "G" gave him the gun used in the murder and drove him to the scene of the murder, and thus, defense counsel knew about "G" at the time of trial. Even though the circuit court added it would not consider defendant's original unnotarized affidavit, the circuit court actually dismissed defendant's ineffective assistance claim because defendant failed to submit an affidavit from "G" and on appeal defendant does not challenge this finding.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.