

No. 1-13-2152

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. 93 CR 297
)	
ANTHONY ROBINSON,)	Honorable
)	Thomas J. Hennelly,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant was not entitled to assistance of counsel under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) where his successive petition was not at the second stage of proceedings.

¶ 2 Defendant Anthony Robinson appeals from the denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that his court-appointed counsel did not comply with his obligations under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because he failed to review the record of defendant's initial postconviction proceedings, failed to amend the

successive petition to overcome procedural bars, and failed to make a legally cognizable argument as to why the petition should proceed. We find that defendant had no underlying right to counsel, and therefore affirm.

¶ 3 This court has previously set forth the evidence presented at defendant's trial in prior appeals. See, *e.g.*, *People v. Robinson*, No. 1-07-1155 (2009) (unpublished order under Supreme Court Rule 23). Therefore, we discuss only those facts necessary to the disposition of this appeal.

¶ 4 The evidence at trial established that a large party was held in the basement of a Chicago townhouse on April 25, 1992. The majority of the partygoers were members of the Vice Lords gang. Several members of the Gangster Disciples, including Ryan Miles and codefendant Charles Wade, walked to the party. On the way, they met Quincy Smith, defendant, and another gang member. According to Miles, defendant asked the group if they were armed and pulled a gun out of his pocket. At trial, Miles testified that he was unable to observe what defendant held, but he admitted previously stating that he had observed a gun. When the group reached the house, defendant and Smith remained outside as the rest of the group entered the basement. Inside, an argument broke out between Wade and several of the Vice Lords. He pulled out a gun and began to fire into the crowd, causing Miles and the other partygoers to flee into the alley behind the house. According to statements Miles later made to an assistant State's Attorney and the grand jury, defendant and Smith shot at the fleeing partygoers. At trial, Miles indicated he never observed the shooters and was impeached with his prior statements. During the shooting, Sean Dawson was struck by a bullet in the leg. Thomas Vanderberk was also struck by a bullet and died of his injuries. After his arrest, defendant admitted to an assistant State's Attorney that he had fired multiple shots at members of the Vice Lords in the alley. He stated that he had been

previously humiliated and threatened by the gang and that he waited behind the house "knowing to gun up the party if the Vice Lords bother[ed] them." He began to shoot because a Vice Lord shoved him and he felt "disrespected." A member of the Gangster Disciples told the grand jury that defendant admitted to shooting a Vice Lord after the party and discussed an alibi with him. At trial, the gang member admitted to giving this previous testimony, but recanted. According to one witness, defendant discussed "shoot[ing] up" the party on the day of the party and the day before.

¶ 5 The jury found defendant guilty of the first-degree murder of Vanderberk and the aggravated battery with a firearm of Dawson. This court affirmed defendant's conviction on direct appeal. *People v. Robinson*, No. 1-95-0532 (1997) (unpublished order under Supreme Court Rule 23).

¶ 6 In September 1997, defendant filed a *pro se* postconviction petition alleging that his confession was coerced and that trial counsel was ineffective for failing to investigate four witnesses. The trial court summarily dismissed the petition, but did so after the statutory 90-day period. Consequently, this court remanded the petition for further proceedings. *People v. Robinson*, No. 1-98-2077 (1999) (unpublished order under Supreme Court Rule 23).

Subsequently, defendant filed two supplemental petitions. Those petitions included multiple affidavits of witnesses supporting an actual innocence claim. The trial court dismissed the petition on the State's motion. In the subsequent appeal, this court remanded for an evidentiary hearing on defendant's ineffective-assistance-of-counsel claim. *People v. Robinson*, No. 1-01-2662 (2003) (unpublished order under Supreme Court Rule 23).

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¶ 7 On remand, defendant filed another supplemental petition alleging new evidence of actual innocence, but the trial court ruled that, pursuant to this court's mandate, the evidentiary hearing was limited to the issue of ineffective assistance of counsel. Following a hearing, the trial court denied defendant's petition. This court affirmed that denial on appeal. *People v. Robinson*, No. 1-07-1155 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 During the pendency of defendant's postconviction proceedings, he also filed a petition for relief from judgment which the trial court denied. On appeal, defendant's appointed counsel moved to withdraw citing *People v. Finley*, 481 U.S. 551 (1987). This court granted counsel's motion and affirmed the judgment of the circuit court. *People v. Robinson*, No. 1-08-1794 (2009) (unpublished order under Supreme Court Rule 23).

¶ 9 In May 2010 defendant filed a *pro se* successive postconviction petition and motion for leave to file which are at issue in the current appeal. In the petition, defendant alleged that (1) he received ineffective assistance of counsel because trial counsel failed to pursue mental fitness examinations, (2) he was mentally unfit to stand trial, (3) the trial court improperly limited his postconviction evidentiary hearing to the issue of ineffective assistance of counsel, and (4) appellate counsel was ineffective for failing to raise these issues on appeal. Defendant attached the unnotarized statement of Edgar Torres, in which Torres stated that he met an individual in prison who claimed responsibility as the outside shooter and acknowledged defendant's innocence. Defendant also attached an affidavit from his mother, Debbie Triplett, who stated that police officers would not help her track down defendant during his interrogation. She also stated that a week after the interrogation, he showed signs of memory loss, extreme fear, and nightmares. The petition included defendant's affidavit, in which he stated, "I am certain that I

never shot and murdered or wounded any person at any of the times alleged," and that he could not understand any of the trial proceedings due to psychological symptoms resulting from his treatment by the police.

¶ 10 Defendant's successive petition also referred to several previously filed affidavits, though they were not included with the petition. The affidavits from Damien Phelps, Dekolby Harris, Tenika Jones, and Frederick Perry all averred that they witnessed the two shooters in the alley and that neither was defendant.

¶ 11 Defendant's motion for leave to file the petition argued that there was cause to bring his successive petition because he was mentally unfit and "deprived of counsel" in hearings on his initial postconviction petition. He further alleged that his inability to understand the proceedings prejudiced him.

¶ 12 The successive petition was assigned to Judge Thomas J. Hennelly and docketed on May 7, 2010. At a status hearing on October 14, 2011, the clerk of the court indicated that the case had fallen off the call. On November 4, 2011, the trial court noted that the case had previously been continued from December 20, 2010, until December 30, 2011. It stated, "I will assume that was a mistake and it fell off the call." The court appointed counsel for defendant without explanation.

¶ 13 On April 19, 2013, defendant's appointed counsel filed a certificate citing Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). The certificate states that counsel communicated with defendant by mail regarding his case and "examined [defendant]'s transcript of his trial and sentencing in the instant case." The certificate indicates that counsel has read defendant's petition

and indicates that it adequately presents his issues. In court, the State informed the judge that leave had not been granted to file the successive petition and defense counsel agreed.

¶ 14 On May 17, 2013, the State reminded the trial court that it had not yet ruled on defendant's motion for leave to file a successive petition. Defense counsel made an oral motion for leave to file. He argued:

"You know, the courts now sort of want things to be ruled on the merits instead of going back and down, up, up and forth, so I think it would serve judicial economy for us, you know, to hear this case on the merits and have the State file their motion to dismiss."

The trial court took a brief recess and reviewed the petition and motion, before finding defendant's motion failed to establish cause and prejudice as required by *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002), and denying leave to file. Defendant appeals.

¶ 15 Defendant contends that his appointed counsel rendered unreasonable assistance in violation of Rule 651(c). He argues that counsel failed to file a facially sufficient Rule 651(c) certificate, failed to amend defendant's petition to overcome procedural barriers, and failed to put forth a valid argument to overcome those barriers. He asserts that had counsel fully reviewed the entirety of the record, he could have fashioned an actual innocence claim to overcome the general proscription of successive postconviction motions.

¶ 16 The State responds that postconviction counsel filed a facially valid Rule 651(c) certificate, and thus there is a rebuttable presumption that his representation was reasonable which defendant has not overcome. It also argues that counsel was not required to amend defendant's petition to add an entirely new actual innocence claim and was able to stand on defendant's *pro se* petition if he believed it to be without merit. Finally, the State argues that

defendant's claim that postconviction counsel should have developed an actual innocence claim must fail because such a claim would be meritless.

¶ 17 The Act provides a three-stage mechanism for a defendant to allege that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 15. At the first stage, the trial court independently reviews the petition and determines whether it is frivolous or patently without merit. *Clark*, 2011 IL App (2d) 100188, ¶ 15. If the petition survives initial review, the process moves to the second stage, where the trial court appoints counsel for the defendant and the State may file a motion to dismiss or an answer. *Clark*, 2011 IL App (2d) 100188, ¶ 15. If the petition makes a substantial showing of a constitutional violation, proceedings advance to the third stage, an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 18 The legislature intended the Act to provide defendants only a single petition except where a due process violation compels a successive petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 16. In order to file a successive postconviction petition, a defendant must first seek leave from the trial court to do so. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Before a trial court grants leave, a successive postconviction petition is not yet considered filed. *Tidwell*, 236 Ill. 2d at 161. Once leave is granted, proceedings move to the first stage. See *People v. Smith*, 2014 IL 115946, ¶ 33 ("[I]t is clear that the legislature intended that the cause-and-prejudice determination be made on the pleadings prior to the first stage of postconviction proceedings.")

¶ 19 Leave will only be granted where a defendant (1) sets forth a claim of actual innocence or (2) complies with the cause-and-prejudice test. *People v. Ortiz*, 235 Ill. 2d 319, 329-31 (2009). A defendant must prove "cause" by showing an "objective factor external to the defense" that

impeded his efforts to raise the claim in an earlier proceeding. *Pitsonbarger*, 205 Ill. 2d at 462.

Prejudice is shown where the claimed constitutional error "so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 20 Although the parties have not addressed the issue in their briefs, we believe the threshold question of whether defendant was entitled to the assistance of counsel in filing a successive postconviction petition must be answered. A defendant does not have a constitutional right to the effective assistance of counsel at a postconviction proceeding. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). Instead, the Act provides a statutory right to "a reasonable level of assistance by appointed counsel at post-conviction proceedings." *Moore*, 189 Ill. 2d at 541. As defendant's right to counsel is a question of statutory interpretation, we review *de novo*. See *People v. Jones*, 214 Ill. 2d 187, 193 (2005).

¶ 21 Section 122-4 of the Act states that if a petitioner requests counsel, "and the petition is not dismissed pursuant to Section 122-2.1, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel." 725 ILCS 5/122-4 (West 2010). The Illinois Supreme Court has consistently interpreted section 122-4 to provide petitioners with a right to appointed counsel only once proceedings have advanced to the second stage. See, e.g., *People v. Blair*, 215 Ill. 2d 427, 449 (2005). Rule 651(c) imposes duties on counsel in postconviction proceedings in order to implement the right to reasonable assistance provided by section 122-4. See *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Consequently, as with section 122-4, the protections of Rule 651(c) are applicable at the second stage of proceedings. See *People v. Marshall*, 375 Ill. App. 3d 670, 683 (2007).

¶ 22 While the trial court appointed counsel after the petition fell off the call, it never granted defendant leave to file his successive petition. Consequently, defendant's petition was never considered filed and had not even progressed to the first stage of proceedings. See *Tidwell*, 236 Ill. 2d at 161; see also *Smith*, 2014 IL 115946, ¶ 33. Since the petition had not advanced to the second stage of proceedings, defendant was not entitled to the assistance of counsel and appointed counsel's actions were not subject to the requirements of Rule 651(c). Therefore, defendant's claim that counsel failed to comply with Rule 651(c) must fail.

¶ 23 Since we find Rule 651(c) did not apply to counsel's representation we need not determine whether that assistance was "reasonable." However, we would note briefly that defendant's claim must fail even if he had been entitled to representation. When counsel files a valid certificate in compliance with Rule 651(c), that certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23; see also Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The certificate must include a showing that counsel (1) consulted with defendant to ascertain his or her contentions, (2) "examined the record of the proceedings at the trial," and (3) made any necessary amendments. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Counsel filed a certificate stating that he had (1) consulted with defendant, (2) "examined [defendant]'s transcript of his trial and sentencing in the instant case," and (3) determined that the petition did not require amendment. Therefore, counsel's certificate created a rebuttable presumption that he substantially complied with Rule 651(c). Defendant has not rebutted this presumption.

¶ 24 For the foregoing reasons, we hold that defendant was not entitled to the assistance of appointed counsel because his successive postconviction petition had not advanced to the second

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stage of proceedings. We therefore conclude that Rule 651(c) was not applicable to counsel's representation. In addition, counsel's certification created a rebuttable presumption that he substantially complied with Rule 651(c) and defendant has not rebutted this presumption.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.