

No. 1-13-2362

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. 09 CR 2174
)	
GEORGIO DUKES,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition affirmed where defendant did not overcome the presumption of reasonable assistance under Illinois Supreme Court Rule 651(c).

¶ 2 Defendant, Georgio Dukes, appeals from the second-stage dismissal of his postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, defendant does not contest the dismissal of his petition as to its merits. Rather, defendant argues that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)). We affirm.

¶ 3 Defendant was charged with five counts each of attempted murder, aggravated battery with a firearm, aggravated battery based on great bodily harm, aggravated battery based on permanent disfigurement, aggravated battery based on permanent disability, and aggravated battery based on committing a battery on a public way. The charges stemmed from a shooting which occurred on January 9, 2009, in Chicago.

¶ 4 At defendant's bench trial, the testimony of John Sharp, Jerome Sharp, Dominique Sharp, Deric Balark, and Timothy Jackson, established that defendant had fired a gun into a group of people who were standing outside Harlan High School following a basketball game. As a result of defendant's conduct, five people were struck by bullets. The State presented evidence, through the testimony of Detective David Cavazos and Deon Sanderson, that defendant committed the shootings to avenge the December 3, 2008, shooting death of his twin brother Sergio. Trial counsel presented an alibi defense supported by the testimony of defendant, his mother, two siblings, and a neighbor.

¶ 5 The trial court found defendant guilty of five counts of aggravated battery with a firearm based, in part, upon the testimony of the five eyewitnesses, which the trial court found compelling and credible. Defendant was acquitted of all the attempted murder counts and the aggravated battery charges alleging permanent disability. Defendant was sentenced to nine years' imprisonment on December 16, 2009.

¶ 6 On January 15, 2010, posttrial counsel filed on defendant's behalf a motion for reduction of sentence and a motion for a protective order. In the motion for a protective order, posttrial counsel argued that video surveillance footage existed from a digital video recorder (DVR) located in the building where defendant lived and would show defendant did not leave his home

No. 1-13-2362

at the time of the shooting, and that defendant's mother and neighbor had viewed that video surveillance footage on January 20, 2009. Posttrial counsel asserted he had served a subpoena on the building's management company, Woodlawn Community Development Company (Woodlawn) to obtain the video, but that a protective order was necessary because video surveillance footage was "saved" for only one year. Posttrial counsel also claimed that trial counsel had failed to subpoena Woodlawn or, otherwise, sought to obtain the surveillance video footage. The State reminded the trial court that the video surveillance footage had been the subject of pretrial discovery and trial counsel could not obtain it because "it was no longer in existence." The circuit court signed an order directing Woodlawn to preserve any existing surveillance footage evidence.

¶ 7 On February 22, 2010, counsel for Woodlawn appeared in court and stated that Woodlawn was investigating whether the video surveillance footage could be recovered from the building's DVR. The circuit court, over the State's objection, continued the cause to March 22, 2010, and then to March 29, 2010.

¶ 8 On March 29, 2010, posttrial counsel requested another continuance indicating he had spoken to "experts" who believed it was possible to retrieve the video surveillance footage. Although the State again objected, the circuit court continued the cause to April 26, 2010. However, posttrial counsel, thereafter, requested and obtained continuances to May 10, 2010, May 25, 2010, and June 9, 2010. Posttrial counsel informed the court that he was still pursuing recovery of the video surveillance footage from the DVR.

No. 1-13-2362

¶ 9 On June 9, 2010, posttrial counsel reported that he had received "two DVD's" from the State, but he was unable to view them on his computer and requested a continuance to July 21, 2010.

¶ 10 Posttrial counsel also issued subpoenas to the Chicago police department (CPD) for "bluelight video footage at the scene of the crime," and the Chicago Board of Education (Board) "for video footage of the school," with a return date of July 21, 2010. On that date, the CPD and the Board had not complied with the subpoenas and were not present in court. The cause was continued to July 28, 2010.

¶ 11 At the July 28, 2010, court proceeding, posttrial counsel stated that he was unable to view the disk he had received from the CPD and the Board needed additional time to comply with the subpoena. On September 3, 2010, posttrial counsel informed the circuit court that the Board had produced a video which could not be played.

¶ 12 On October 1, 2010, because posttrial counsel had not appeared, the circuit court struck the matter from its call.

¶ 13 On August 17, 2012, defendant filed a *pro se* postconviction petition alleging: he was denied effective assistance of counsel where neither trial counsel nor posttrial counsel filed a notice of appeal following defendant's sentencing hearing despite defendant's requests to do so; trial counsel failed to submit crucial alibi evidence and failed to file a motion to suppress certain witness identifications; he was denied the right to counsel when he was questioned and placed in a line-up; and he was not proven guilty beyond a reasonable doubt. On September 21, 2012, defendant's postconviction petition was continued for second-stage proceedings, and defendant was appointed postconviction counsel.

No. 1-13-2362

¶ 14 On February 5, 2013, postconviction counsel filed a motion for ruling on defendant's previously filed motion for a reduction in sentence, which the State objected to as untimely. The circuit court denied the motion for a reduction in sentence, and granted defendant's request to file a notice of appeal. Defendant then filed a direct appeal.

¶ 15 On March 28, 2013, postconviction counsel filed a motion for postconviction discovery, describing the unsuccessful attempts of both trial and postconviction counsel to obtain the video surveillance footage. According to the motion, trial counsel had attempted to obtain the video surveillance footage from defendant's apartment building, but the footage could not be located. Trial counsel had also believed a computer expert might be successful in retrieving the footage from the computer's hard drive, but found it had been erased. Posttrial counsel had attempted to recover the footage from the computer's hard drive. The trial court granted postconviction counsel's request for leave to issue a subpoena to Woodlawn.

¶ 16 At the April 30, 2013, and May 30, 2013, court dates, postconviction counsel reported that Woodlawn had not retained the video surveillance footage, and posttrial counsel had never been given a copy, but that she may have a "lead as to a witness." Postconviction counsel requested additional time to determine if a DVR located in the basement of defendant's building, housed the video surveillance footage in question. Although the trial court had expressed doubts that the video surveillance footage could still be available, the matter was again continued.

¶ 17 At a June 27, 2013, hearing, postconviction counsel stated that after further investigation, she was unable to locate the video surveillance footage. On that same date, postconviction counsel filed a certificate under Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2014, as amended)), which stated: (1) she consulted with defendant by mail and telephone to

No. 1-13-2362

ascertain his contentions of constitutional deprivation; (2) she obtained and examined the trial transcripts; and (3) after investigating defendant's claims, she would not be filing an amended postconviction petition. The Rule 651(c) certificate also stated that it did "not cover potential claims of ineffective assistance of appellate counsel or other claims that are not yet ripe."

¶ 18 In court, postconviction counsel informed the trial court that she was standing on defendant's *pro se* postconviction petition, and the following discussion ensued:

"THE COURT: What do you want to say about the *pro se* petition?

[POSTCONVICTION COUNSEL]: Well the Court has already allowed an appeal to go forward. [Defendant] does raise that a reasonable doubt exists as to his conviction. He raises it in terms of the appeal. I did put in the certificate that since the appeal hasn't been briefed or decided that at a future time he can raise appellate issues and that I have investigated as far as I can go and we have nothing to add one way or the other.

THE COURT: I recall this case. There were multiple witness[es] that identified [defendant] as the shooter at the incident at Dunbar High School. I don't believe there is an issue with my finding *** him guilty of being that shooter beyond a reasonable doubt. Your 651(c) is filed."

The trial court dismissed defendant's postconviction petition. Defendant now appeals.

¶ 19 As to defendant's direct appeal, this court affirmed defendant's convictions on March 13, 2015. See *People v. Dukes*, 2015 IL App (1st) 130881-U (2015).

¶ 20 Defendant does not contest the dismissal of his postconviction petition as to its merits, but argues postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2014, as amended)). Defendant specifically asserts that

No. 1-13-2362

postconviction counsel filed a "facially deficient" Rule 651(c) certificate of compliance and maintains that the record does not demonstrate that postconviction counsel complied with Rule 651(c).

¶ 21 The Act requires only a reasonable level of assistance of postconviction counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Rule 651(c) requires appointed counsel to: (1) consult with the defendant by phone, mail, electronic means or in person to ascertain his allegations of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are necessary to the petition previously filed by the *pro se* defendant to present his claims to the court. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The purpose of a Rule 651(c) certificate is to ensure that postconviction counsel shapes a defendant's allegations into proper legal form and presents them to the court. *People v. Profit*, 2012 IL App (1st) 101307,

¶ 18. An attorney's substantial compliance with the rule is sufficient. *Id.* Compliance with Rule 651(c) may be shown by the filing of a certificate representing counsel has fulfilled her duties. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Our review of an attorney's compliance with Rule 651(c) is *de novo*. *Id.* ¶ 19.

¶ 22 Here, postconviction counsel filed a Rule 651(c) certificate, thus, the presumption exists that defendant received representation as required by that rule. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). It is the defendant's burden to overcome this presumption by demonstrating

No. 1-13-2362

his attorney's failure to substantially comply with the duties which are mandated by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 23 Defendant argues that because the certificate contained the "caveat" that it did not cover potential claims of ineffective assistance of appellate counsel, or other claims that were "not yet ripe," postconviction counsel had not considered all of his claims of constitutional deprivation. At the time postconviction counsel filed the Rule 651(c) certificate, the direct appeal process had not yet been concluded. Any fair reading of the Rule 651(c) certificate reveals that postconviction counsel merely indicated the certificate did not cover any claims which may arise as a result of the direct appeal. This is a completely reasonable attempt at clarification of the scope of postconviction counsel's actions and the postconviction petition. Postconviction counsel did not and could not know whether direct appeal counsel would be ineffective, or that the appeal process would give rise to additional claims. Postconviction counsel's statement as to issues relating to the direct appeal, does not render the Rule 651(c) certificate facially deficient.

¶ 24 Defendant argues that postconviction counsel's statement reveals a misunderstanding of the law because the availability or pendency of a direct appeal does not affect the ripeness of a claim for postconviction relief. Defendant misconstrues postconviction counsel's statement. Postconviction counsel was asserting that the certificate did not cover *future* claims arising out of the direct appeal. She was not stating that the direct appeal prohibited the assertion of *existing* claims.

¶ 25 Finally, defendant maintains that the record does not support compliance with Rule 651(c) in that postconviction counsel did not amend the *pro se* petition and, in court, only discussed the claim as to the video surveillance footage. We disagree. First, postconviction

No. 1-13-2362

counsel is not required to amend a defendant's *pro se* postconviction petition. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). Second, upon filing the Rule 651(c) certificate, postconviction counsel, as an initial matter, informed the trial court that the video surveillance footage could not be located. Thus, postconviction counsel was updating the circuit court on her attempts to obtain the video surveillance footage, an issue which was the subject of many previous court proceedings, and the asserted reason for seeking numerous continuances of the posttrial matters and the postconviction petition. Postconviction counsel was not stating that this was the only claim she had addressed or considered.

¶ 26 Accordingly, we conclude that the Rule 651(c) certificate was adequate to create the presumption of compliance, and defendant has identified nothing in the record which would rebut that presumption. *Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.