

THIRD DIVISION
November 4, 2015

No. 1-13-2661

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. 96 CR 29795
)	
JORGE FLORES,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 **Held:** We affirm the circuit court's second-stage dismissal of defendant's *pro se* post-conviction petition where defendant failed to rebut the presumption that he received reasonable assistance from his post-conviction counsel.

¶ 2 Defendant Jorge Flores 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 2012). On appeal, defendant contends that appointed post-conviction counsel did not provide reasonable assistance

under Supreme Court Rule 651(c) (eff. Feb. 6, 2013), because counsel actively argued against his petition. We affirm.

¶ 3 Following a 1997 jury trial, defendant was convicted *in absentia* of possession of a controlled substance, *i.e.*, 900 grams or more of cocaine, with intent to deliver and sentenced *in absentia* to 30 years' imprisonment. After being arrested in Texas in 2003, defendant was transferred to Illinois custody. He then sought a new trial pursuant to section 115-4.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1 (West 2004)), alleging the trial court failed to properly admonish him as to the possibility of a trial *in absentia*, and that his absence from trial was not willful. The trial court denied defendant's motion, and we affirmed that judgment on appeal. *People v. Flores*, No. 1-04-2773 (2006). The Illinois Supreme Court denied defendant's request for leave to appeal on September 27, 2006 (*People v. Flores*, 221 Ill. 2d 651 (2006)), and defendant did not seek a writ of *certiorari* in the United States Supreme Court.

¶ 4 In 2007, defendant filed a *pro se* post-conviction petition, advancing 16 arguments for relief under the Act. The circuit court summarily dismissed defendant's *pro se* petition on March 9, 2009. On appeal, the cause was remanded for further proceedings under the Act because the summary dismissal occurred beyond the 90-day time period allowed by the Act. *People v. Flores*, No. 1-09-0731 (2010) (dispositional order). On remand, an assistant public defender (APD) was appointed to assist defendant, and filed a Rule 651(c) certificate on June 6, 2011. Defendant, through counsel, subsequently filed a motion to voluntarily dismiss the petition without prejudice, which the circuit court granted on August 15, 2011.

¶ 5 Defendant then filed *pro se* motions to reinstate his post-conviction petition, and an amended *pro se* post-conviction petition, striking 12 of the claims in his original petition. He proceeded on his remaining claims, which alleged ineffective assistance of trial and appellate counsel. The court allowed defendant to reinstate his petition and reappointed counsel. The same APD filed a Rule 651(c) certificate on February 13, 2013, stating that she consulted with defendant by mail and phone on numerous occasions, reviewed the record, and examined his amended *pro se* petition. Post-conviction counsel concluded that defendant's amended petition adequately presented his claims and that there was nothing that could be added by an amended or supplemental petition.

¶ 6 The State filed a motion to dismiss, arguing that defendant's petition was untimely. The State specifically asserted that because defendant was sentenced on July 11, 1997, and did not file a direct appeal, he had to file a petition by July 11, 2000, under the Act. However, defendant did not file his original post-conviction petition until seven years after the deadline. The State also noted that defendant made no excuses for his untimeliness. Finally, the State argued that defendant's claims of ineffective assistance of trial and appellate counsel were without merit.

¶ 7 At a hearing on March 18, 2013, post-conviction counsel informed the court that she was not filing a response, acknowledged that the petition was untimely where defendant was sentenced in 1997 but fled the jurisdiction until 2003, and indicated that she did not have a good faith argument against the motion to dismiss as a matter of law. The court asked defense counsel if she wanted defendant present for the hearing on the petition, and she responded that it was the court's decision. The court decided not to "writ in" defendant.

¶ 8 Defendant replied, *pro se*, to the State's motion to dismiss, noting that defense counsel refused to file a response. Defendant contended that his petition was timely because he was granted an appeal on his motion for a new trial, which he had filed pursuant to section 115-4.1 of the Code.

¶ 9 At a hearing on April 15, 2013, defense counsel acknowledged receiving defendant's response. However, she elected not to adopt his argument because the Act required defendant to establish a lack of culpable negligence for his untimely filing, which defendant could not show because of his willful absence. The State responded that defendant "cannot get around the untimeliness of his petition," and noted that he did not argue a lack of culpable negligence. The court found the petition untimely and granted the State's motion to dismiss. Defendant filed a *pro se* motion to reconsider the dismissal of his petition, reasserting that his petition was timely. The circuit court denied defendant's motion to reconsider in a written order. This appeal follows.

¶ 10 On appeal, defendant does not address the untimeliness or merits of his petition. Instead, he contends that post-conviction counsel deprived him of his right to reasonable assistance where counsel actively argued against his petition. Defendant specifically maintains that instead of advocating on his behalf, or even standing on his petition without amendment or argument, post-conviction counsel affirmatively argued that his petition was untimely during the hearings on March 18 and April 15, 2013. If counsel believed the petition lacked merit, defendant asserts she had an ethical duty to withdraw.

¶ 11 We review the circuit court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 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). "Allegations of unreasonableness by postconviction counsel do not present a constitutional basis upon which relief can be granted under the Act." *Id.* When counsel is appointed to represent a post-conviction petitioner, counsel is merely charged with shaping his complaints into the proper legal form and presenting them to the court. *Id.*

¶ 13 Illinois Supreme Court Rule 651(c) imposes specific duties on post-conviction counsel to ensure she provides reasonable assistance. *Suarez*, 224 Ill. 2d at 42. 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). Where a Rule 651(c) certificate is filed, the presumption is raised that the post-conviction petitioner received the required representation by counsel during second-stage proceedings. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 14 Here, post-conviction counsel filed two Rule 651(c) certificates, the first in 2011 regarding defendant's original petition, and the second in 2013 regarding his amended petition. In both certificates, counsel indicated that she consulted with defendant by mail and phone to ascertain his contentions of deprivations of constitutional rights, and examined the report of proceedings, common law record, and all supplements to the record. Counsel further examined the trial court file, and all the appellate briefs and Rule 23 Orders concerning the conviction at issue. Finally, counsel noted that she examined defendant's post-conviction petitions, and that

they adequately presented his claims of deprivations of constitutional rights. There was nothing that could be added by an amended or supplemental petition. The assertions made in counsel's Rule 651(c) certificate are not contradicted by the record (*People v. Perkins*, 229 Ill. 2d 34, 52 (2007)), and counsel was not required to amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)). We, therefore, 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 In reaching this conclusion, we acknowledge that post-conviction counsel repeatedly informed the court that defendant's post-conviction petition was untimely. However, we disagree with defendant that post-conviction counsel failed to provide him a reasonable level of assistance in doing so.

¶ 16 During the March 18, 2013, hearing, post-conviction counsel stated:

"Because here is the situation. The PC says that it's untimely. It is untimely.

He was sentenced in absentia in 1997.

He has been admonished of the possibility of being sentenced, found guilty, and sentenced in absentia.

He wasn't picked up until 2003 on a warrant ***. The motion to reconsider the guilty verdict was litigated and the judge denied that.

So in 2007 when we were appointed his PC again it was voluntarily dismissed. He asked that it be reinstated. He presented four new claims.

But the timeliness issue, Your Honor, as a matter of law is if you are admonished in absentia and you don't come to court and it's litigated is there any relief available in law.

And I don't believe there is.

You'd have to switch to equity.

And here is the problem with equity is that one must have clean hands to come before the court and ask for equitable relief and so if you flee the jurisdiction for six years *** what equitable argument can you present.

And he got picked up in Texas on an ICE violation which means he is deportable.

So I need to explain this to him.

I don't really have a good faith argument against the motion to dismiss as a matter of law, and that's why I'm not filing a response because I can't find what equity."

¶ 17 Similarly, during the April 15, 2013, hearing, post-conviction counsel stated:

"His argument in effect is that because he was granted an appeal on his motion for a new trial under section 725 ILCS 5/115-4.1, and the decision of *** People versus Partee *** that because they had provided procedural grounds for collateral review on a motion for new trial, that under the Post-Conviction Act, he should be allowed to file, and that it should – the statute allowing the 115-4.1 should allow him to file his PC.

I elected not to adopt that argument because the Post-Conviction Act clearly states that for a late filing, you have to establish lack of culpable negligence, but I did have part of my reason for not filing a reply and adopting his argument was that in the appellate

decision under 1-04-2773, the Court said *** 'Therefore, we find that the trial court did not abuse its discretion in denying defendant's motion for a new trial based on defendant's willful absence.'

I don't think as I explained, I don't think you can circumvent the legislative intent under the plain language of the Post-Conviction Act which requires him to either cite actual innocence or lack of culpable negligence, and the statute that my client refers to which allowed him to file a notice of appeal upon the denial of his motion for a new trial many years after the trial in absentia and sentence had been set, it's a procedural safeguard on collateral review."

¶ 18 Defendant contends that the above language showed that counsel believed the petition lacked merit, and, therefore, she had an ethical duty to withdraw pursuant to *People v. Shortridge*, 2012 IL App (4th) 100663, and *People v. Greer*, 212 Ill. 2d 192 (2004). In *Greer*, 212 Ill. 2d at 209, our supreme court held that where counsel determines that a defendant's petition is frivolous, counsel is allowed to withdraw. However, *Greer* does not require counsel to withdraw. The Fourth District of this court recognized two options when post-conviction counsel investigates a defendant's claims and finds them without merit: (1) stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended; (2) withdraw as counsel. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). Here, counsel properly chose the first option, and informed the court of the reason the petition was not amended and why she did not respond to the State's motion to dismiss, *i.e.*, the petition was untimely and no facts existed

that would support a finding that defendant was not culpably negligent where he fled the jurisdiction.

¶ 19 We also find *Shortridge* distinguishable from the case at bar. In that case, the basis of the Fourth District's finding of unreasonable representation was limited to the fact that:

"the circuit court conducted a hearing wherein defendant's counsel appeared, but the State did not. According to counsel, he and the prosecutor agreed that counsel would appear *ex parte* in order to 'reset it.' However, counsel determined that, 'at this point,' he was 'going to confess the motion to dismiss.' The court entered an order dismissing defendant's postconviction petition." *Shortridge*, 2012 IL App (4th) 100663, ¶ 6.

Here, unlike *Shortridge*, the record shows that post-conviction counsel never asked the court to "confess the motion to dismiss" but instead explained her basis for concluding that there were no facts available that could excuse the untimely filing of the petition.

¶ 20 Defendant also claims that post-conviction counsel compounded the alleged error of failing to withdraw by not requesting that defendant be present at the hearing on the State's motion. However, as pointed out by the State, defendant does not allege any facts that show he was prejudiced by his absence. The circuit court, in its discretion, declined to writ defendant in for the court proceedings. Nevertheless, defendant's claims were still reviewed and considered by the circuit court where defense counsel summarized defendant's *pro se* response to the State's motion to dismiss at the April 15, 2013 hearing. Moreover, in dismissing defendant's motion to reconsider the dismissal of his post-conviction petition, the circuit court stated that even if it had received defendant's *pro se* reply brief before ruling on the State's motion to dismiss, "the

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outcome would have been no different." Therefore, defendant has failed to show that it was unreasonable for post-conviction counsel, or an abuse of discretion by the trial court, to not writ him in on the State's motion to dismiss.

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

¶ 22 Affirmed.