

No. 1-13-3104

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. 02 CR 27150
)	
RODNEY LOVE,)	Honorable
)	Angela M. Petrone,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant cannot establish that he was denied the reasonable assistance of postconviction counsel because he failed to rebut the presumption of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), triggered by the filing of a Rule 651(c) certificate.

¶ 2 Defendant Rodney Love appeals from the second stage dismissal of his petition and supplemental petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant does not contest the dismissal on the merits. Rather, he contends that postconviction counsel provided unreasonable assistance pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to amend his petitions with "available and readily identifiable documents" to properly support defendant's claim. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the August 28, 2002 shooting death of the victim Lyphus Pouncy. The State's theory of the case was that defendant shot the victim, a member of a rival gang, because one of defendant's cousins was shot the previous month. The defense's theory of the case was that the victim was shot by Derrick Nash, another of defendant's cousins. After a jury trial, defendant was found guilty of first degree murder and sentenced to a total of 55 years in prison.

¶ 4 At trial, the State presented the testimony of Christopher Young who observed defendant ride a "girl bike" up to the victim's green car, pull out a gun, and shoot twice. The State also presented the testimony of Ronald Neal, who was at defendant's home with defendant and Nash on the day of the shooting. Neal testified that defendant left riding a "girl's bike" and carrying a gun, and that when defendant returned he stated that he shot a guy in a green car. Finally, the State presented evidence, through the testimony of police officers and a firearms expert, that a handgun recovered from the vicinity where defendant was standing on the day that he was arrested was used in the victim's shooting.

¶ 5 During his testimony, Young stated that he saw the shooting because he was under house arrest. Young also acknowledged that he had a prior conviction for aggravated robbery for which he had been sentenced to boot camp. The following sidebar then took place:

"[PD]: The aggravated robbery, he said he got boot camp for that. We think we should be able to make it clear that is a felony conviction. Because it is sort of ambiguous, if they don't know that class of the offense.

THE COURT: What's your response?

[ASA]: I don't think it is ambiguous. He was convicted of aggravated robbery.

THE COURT: He got boot camp. You want to know whether it was a misdemeanor or a felony?

[PD]: Yes.

THE COURT: Case law says you can put out the conviction and the sentence. I think that's sufficient. ***

[PD]: The problem is, and this is why I asked to come back rather than get into a fight in front of the jury, because of the fact that we believe boot camp is an alternative sentence. And that we're allowed to question regarding dealing possibly any kind of –

* * *

[PD]: Not violation of the terms. Credit for testifying or witnessing ***.

THE COURT: Was he eligible for the boot camp?

[ASA]: No adult background.

* * *

THE COURT: Was he charged with a higher class felony, was it reduced?

[ASA]: Aggravated robbery

* * *

[PD]: We will, in fact, then take the rap sheet and we will understand. It would be our contention that we would still make the argument, though, that boot camp is an alternative sentence and we should be allowed to ask that."

The trial court denied the defense's request, reasoning that the fact that Young was convicted of aggravated robbery was already "out there." Although the defense argued that that the jury could consider "boot camp" to be related to military service and asked to cross-examine Young as to whether he had served in the military, the State objected and the court sustained the objection.

¶ 6 Defendant testified that he was at home with family on the day of the victim's death. With regard to the shooting itself, defendant testified that Neal told him that Nash shot someone, and that Nash admitted to shooting the victim. Nash was killed later that day. Defendant explained he was in the process of purchasing a gun from Neal on the day of his arrest but the transaction was interrupted by the police.

¶ 7 Ultimately, the jury found defendant guilty of first degree murder. The jury further found that during the course of the offense defendant personally discharged a firearm that proximately caused the victim's death. Defendant was subsequently sentenced to 30 years in prison for the murder conviction. He was also sentenced to an additional 25 years in prison because a firearm was used in the commission of the offense. Defendant's conviction and sentence were affirmed on direct appeal. See *People v. Love*, 377 Ill. App. 3d 306 (2007).

¶ 8 On September 15, 2008, defendant mailed a *pro se* petition for postconviction relief alleging, *inter alia*, that he was not proven guilty beyond a reasonable doubt and was denied the effective assistance of trial and appellate counsel. He also filed a *pro se* motion to dismiss the indictment. The petition was filed on October 3, 2008, and dismissed by the circuit court as frivolous and patently without merit in a written order on December 16, 2008.

¶ 9 On December 15, 2008, defendant mailed a supplemental *pro se* postconviction petition alleging, in pertinent part, that he was denied the right to cross-examine Young as to whether the crime of which Young was convicted was a felony or a misdemeanor and whether Young "received a deal." The supplemental petition also alleged that defendant was denied the effective assistance of trial and appellate counsel because counsel failed to challenge Young's prior convictions and alleged perjury. The supplemental petition was filed on January 6, 2009, and the circuit court denied defendant relief on January 13, 2009.

¶ 10 On appeal, this court determined that that because defendant's claim that counsel was prevented from questioning Young about possible favorable treatment in exchange for his testimony was not completely contradicted by the record, his *pro se* postconviction petitions stated the gist of a meritorious claim of constitutional deprivation. See *People v. Love*, No. 1-09-0478 (2011) (unpublished order under Supreme Court Rule 23). Therefore, we remanded the cause for second stage proceedings under the Act.

¶ 11 Upon remand, the circuit court appointed postconviction counsel. On March 27, 2012, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he had communicated with defendant by letter to ascertain defendant's claims of constitutional deprivation and had examined the transcript of defendant's trial and sentencing. The certificate also stated that postconviction counsel examined, *inter alia*, defendant's *pro se* postconviction and supplemental postconviction petitions, and that "as they adequately present his issues, an [*sic*] supplemental petition will not be filed." The State subsequently filed a motion to dismiss, alleging in pertinent part, that defendant had not "produced any documentation or even suggested that Young's charges had been reduced or that any sentence was recommended for or promised to Young." The circuit court subsequently granted the State's motion.

¶ 12 On appeal, defendant contends postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to support defendant's claim that he was denied the ability to cross-examine Young regarding the 2004 conviction for aggravated robbery, a possible area of bias or motive to testify falsely, with "readily identifiable" court documents. The record on appeal has been supplemented with documents from case 04 CR 00159, including a December 2003 indictment for armed robbery, and a May 2004 mittimus indicating that Young was convicted of aggravated robbery and

sentenced to boot camp. By focusing exclusively on this issue on appeal, defendant has forfeited for review the claims actually raised in his petitions. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 13 This court reviews an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 14 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims 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 the defendant's claims to the court. The rule's purpose is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court. *Profit*, 2012 IL App (1st) 101307, ¶ 18. An attorney's substantial compliance with the rule is sufficient, and the filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Id.* ¶¶ 18-19. A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Id.* ¶ 19.

¶ 15 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, stating that he had communicated with defendant by letter to ascertain defendant's claims of constitutional deprivation and had examined the transcripts of defendant's trial and sentencing and defendant's *pro se* postconviction and supplemental postconviction petitions. Because postconviction counsel

concluded that defendant's *pro se* filings "adequately" presented defendant's claims, counsel did not file a supplemental petition. The filing of this certificate created the presumption that defendant received the representation required by the rule at the second stage of proceedings under the Act. *Id.*

¶ 16 On appeal, defendant contends that he has rebutted this presumption because postconviction counsel failed to make a "necessary" amendment to his *pro se* petitions. Specifically, defendant contends that counsel failed to obtain and attach the documents from Young's 2004 aggravated robbery conviction in order to support his contention that he was denied the right to cross-examine Young about a plea deal. Defendant argues that because Young was indicted for a Class X offense, but was ultimately convicted of a Class 1 offense, these documents "strongly support" defendant's claim that Young given a reduced sentence in exchange for his testimony.

¶ 17 The State argues it is improper to rely on documents that were never presented to the circuit court and that these documents should be stricken from the record on appeal. Defendant responds that the documents are public records, of which this court may take judicial notice. See *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726 (2009) (a reviewing court "may take judicial notice of matters that are readily verifiable from sources of indisputable accuracy"). Defendant further argues that the existence of these documents establishes that he was denied the reasonable assistance of postconviction counsel because counsel could have easily obtained these documents to support defendant's claim.

¶ 18 While we deny the State's motion to strike these documents due to their public nature, we cannot accept defendant's conclusion that these documents establish that postconviction counsel failed to comply with the requirements of Supreme Court Rule 651(c). In order to establish that

postconviction counsel provided unreasonable assistance, defendant is required to demonstrate that a petition amended in the manner he suggests would have stated a case upon which relief could be granted. *People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005).

¶ 19 Defendant responds, relying on *People v. Suarez*, 224 Ill. 2d 37 (2007), that this court must review his claims regarding counsel's compliance with Rule 651(c) without regard to the merits of his postconviction claims. In *Suarez*, postconviction counsel did not file a Rule 651(c) certificate and the record did not show that she had consulted with the defendant; therefore, our supreme court concluded that remand was necessary regardless of whether the claims raised in the petition had merit. *Suarez*, 224 Ill. 2d at 41, 51-52. However, in *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23, this court determined that when counsel files a 651(c) certificate, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." See also *People v. Greer*, 212 Ill. 2d 192, 205 (2004) ("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.")

¶ 20 Here, defendant contends that he was denied the right to cross-examine Young at trial as to whether Young received a plea deal in exchange for his testimony at defendant's trial and that had postconviction counsel amended defendant's *pro se* petitions with the documents from Young's 2004 conviction he would have met his burden to make a substantial showing of a constitutional violation. See *Pendleton*, 223 Ill. 2d at 473 (at the second stage of proceedings under the Act, a defendant bears the burden to make a substantial showing of a constitutional violation). We disagree.

¶ 21 Defendant characterizes the documents relating to Young's 2004 conviction as support for the contention that Young received favorable treatment in exchange for his testimony at

defendant's trial. However, these documents merely reiterate the information presented at trial, that is, Young was convicted of aggravated robbery and sentenced to boot camp. Although Young and a codefendant were indicated for armed robbery, the documents do not indicate the circumstances leading to Young's ultimate conviction for the lesser offense of aggravated robbery. Defendant points to nothing in the record, and presents no evidence on appeal, to support his conclusion that Young's conviction for aggravated robbery was pursuant to a plea agreement related to defendant's case. Rather, he speculates that Young entered a plea of guilty to aggravated robbery and was sentenced to boot camp in exchange for testifying at defendant's trial. However, absent any evidence to support defendant's contention that Young was actually subject to a plea agreement, we cannot accept his unsupported conclusion that one existed. In other words, the documents defendant relies upon do not provide anything material to defendant's claim.

¶ 22 Therefore, we conclude that postconviction counsel did not provide unreasonable assistance by failing to supplement defendant's petitions with the suggested documentation because, even assuming that defendant's allegation if true would state a meritorious claim, these documents do not further that claim. See *Vasquez*, 356 Ill. App. 3d at 425 (in order to establish the denial of reasonable assistance of postconviction counsel, a defendant is required to demonstrate that a petition amended in the manner that he suggests would have stated a case upon which relief could be granted).

¶ 23 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, creating the presumption that defendant received the representation required by the rule at the second stage of proceedings under the Act and defendant has failed to rebut that presumption. See *Profit*, 2012 IL App (1st) 101307, ¶ 19. Therefore, defendant has failed to establish that he was denied the

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reasonable assistance of postconviction counsel (*Moore*, 189 Ill. 2d at 541), and his claim must fail.

¶ 24 For the reasons discussed above, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.