

2015 IL App (2d) 131280-U  
No. 2-13-1280  
Order filed November 23, 2015

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Stephenson County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04-CF-375
	)	
MARTELL A. POGUE,	)	Honorable
	)	James M. Hauser,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* Postconviction counsel violated Rule 651(c) by not including in defendant's petition (or seeking to amend the petition to include) colorable allegations contesting the State's motion to dismiss the petition as untimely; thus, we vacated the trial court's dismissal and remanded the cause, regardless of whether the petition had merit.

¶ 2 Defendant, Martell A. Pogue, appeals from the second-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He asserts that postconviction counsel failed to satisfy the requirement of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) to amend the petition to raise defenses against dismissal for

untimeliness. We agree. We therefore vacate the dismissal and remand the matter for compliance with the rule.

¶ 3

### I. BACKGROUND

¶ 4 A jury found defendant guilty of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(3) (West 2004)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2004)). On June 1, 2005, the court imposed concurrent sentences of 17 years' imprisonment for attempted murder, 17 years' imprisonment for aggravated battery with a firearm, and 15 years' imprisonment for aggravated discharge of a firearm. Defendant appealed, asserting first that the evidence of his intent was insufficient to sustain the attempted-murder conviction and, alternatively, that the one-act, one-crime rule barred entry of convictions on more than one of the three counts. In an order issued February 8, 2007, we affirmed the attempted-murder conviction, but vacated the convictions of aggravated battery with a firearm and aggravated discharge of a firearm. *People v. Pogue*, No. 2-05-0695 (2007) (unpublished order under Supreme Court Rule 23). Defendant did not seek leave to appeal to the supreme court.

¶ 5 Defendant filed a petition for postconviction relief on February 9, 2012. In it, he first asked that the court vacate his supposed surplus conviction of aggravated discharge of a firearm. He further argued that the trial court had not explicitly imposed a term of mandatory supervised release (MSR) on him and that the Department of Corrections' (DOC) addition of a three-year term of MSR violated his due-process rights.

¶ 6 On April 13, 2012, the trial court directed the State to draft an amended mittimus that removed the surplus convictions and added a three-year term of MSR to the term of imprisonment. No such corrected mittimus appears in the record.

¶ 7 The court appointed the public defender to serve as postconviction counsel on the basis that that “would probably be the safest course of action.” As of December 14, 2012, postconviction counsel reported to the court that he had reviewed “the relevant portions of the trial record,” but had not yet met with defendant. As of February 19, 2013, postconviction counsel had had a face-to-face meeting with defendant about his claims, but said that he had to read more of the trial record.

¶ 8 Postconviction counsel filed defendant’s amended petition on April 1, 2013. In that petition, he stated that he was “convicted of the offense [*sic*] of Attempted Murder, Aggravated Battery with a Firearm, and Aggravated Discharged [*sic*] of a Firearm” and that he “filed a direct appeal from the judgments entered upon his conviction and the Appellate court affirmed [his] conviction.” The petition did not mention this court’s having vacated two of his convictions and sentences. The petition further asserted that defendant “filed his original Post-Conviction Petition herein on February 9, 2012, within the three-year time limit specified by 725 ILCS 5/122-1(c) [(West 2012)].” The petition repeated defendant’s argument that his surplus convictions should be vacated. It stated in somewhat more detail the claim that the DOC had imposed the MSR portion of defendant’s sentence and that that was a due-process violation. Finally, it added something with a heading stating that it was a claim of ineffective assistance of appellate counsel. However, the text following that heading simply asserted that claims not raised on direct appeal as a result of ineffective assistance of appellate counsel are not forfeited. The text did not specify what defendant thought that appellate counsel did wrong.

¶ 9 On April 1, 2013, the public defender filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 10 On May 8, 2013, the State moved to dismiss solely based on untimeliness.

¶ 11 Defendant filed a response that tacitly conceded that the petition was filed beyond the three-year limitations period. Defendant instead asserted that the late filing was not due to his culpable negligence. He asserted that, because of his unspecified intellectual and educational limitations, the lack of legal materials in his prison, and the bad advice of appellate counsel, he was not culpably negligent for the petition's untimeliness. He also stated that the "time limitations outlined in 725 ILCS 5/122-1 [(West 2012)] do not apply to a petition advancing a claim of actual innocence." He did not mention what his claim of actual innocence was.

¶ 12 On October 31, 2013, the court dismissed defendant's petition as untimely. At the hearing, the State argued that defendant had effectively conceded the untimeliness but had not given any detail as to why that should be excused. Postconviction counsel responded that, if the reasons he had set out for not dismissing were insufficiently supported, the court should set a date for defendant to do so: he stated that he was "prepared to do that, but \*\*\* [did not] think that's required at this point in the game." He further asserted that "the petition does include an actual innocence claim which is not subject to the time limitations." The court ruled that, because defendant filed his petition almost five years after this court decided his appeal, and because defendant had not set out any circumstances that would show his lack of culpable negligence, his petition was untimely. Defendant filed a timely notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 Initially, we note that defendant's appellate counsel represents that, as of May 19, 2014, DOC records continued to reflect that he had three convictions. Counsel further represents that he contacted DOC staff and that, as a result of those conversations, the error was corrected. The State agrees that the DOC has made that correction.

¶ 15 On appeal, defendant asserts first that the record shows that postconviction counsel failed to comply with the mandates of Rule 651(c). He suggests that the record is inconsistent with postconviction counsel's certification that he had made all "amendments to the petition[] \*\*\* that [were] necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Among other things, he argues that counsel had the duty to amend the petition to attempt to defeat the State's motion.

¶ 16 The State argues that the appeal should be dismissed as moot, or, alternatively, that the dismissal was justified given the remaining issue's complete lack of merit.

¶ 17 At issue here is whether counsel satisfied the requirements of Rule 651(c), and particularly the requirement to "ma[k]e any amendments to the petition[] filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). In particular, the supreme court has interpreted Rule 651(c) to require postconviction counsel to take reasonable steps to defend against dismissal for untimeliness:

"Rule 651(c) requires counsel to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence. In discharging this duty, counsel must inquire of the petitioner whether there is any excuse for the delay in filing. As a practical matter, any potential excuse for the late filing will often be discovered by speaking with the petitioner. Counsel must also allege any excuse for the delay in filing apparent from the pleadings and the portions of the record counsel must review to present petitioner's claims." *People v. Perkins*, 229 Ill. 2d 34, 49-50 (2007).

Thus, the same requirement that counsel adequately present a defendant's claim also requires counsel to make any amendments needed to show that the limitations period is inapplicable.

*Perkins* refers only to amending the petition to allege the defendant's lack of culpable negligence or obtaining the State's waiver or forfeiture of the untimeliness defense. *Perkins*, 229 Ill. 2d at 43. However, the reasoning of *Perkins*, which notes that part of counsel's role is to help the defendant avoid procedural barriers to a hearing on the merits of his or her claims (*Perkins*, 229 Ill. 2d at 44) necessarily implies that counsel must put forward any nonfrivolous matter that would defeat a motion to dismiss for untimeliness.

¶ 18 Counsel's filing of a Rule's certificate creates a *rebuttable* presumption that counsel has met the rule 651(c) requirements. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. The presumption is rebutted when the record shows failure to satisfy the requirements. *Cf. Perkins*, 229 Ill. 2d at 52 (the presumption of compliance created by a Rule 651(c) certificate is un rebutted when nothing in the record contradicts the certificate).

¶ 19 To satisfy the Rule 651(c) requirements, *Perkins* requires that counsel either (1) anticipate the State's moving to dismiss for untimeliness and amend the petition to raise any nonfrivolous defense of which counsel is aware or (2) if counsel has not anticipated the State's motion, seek to make new amendments with any nonfrivolous defense. *Perkins*, 229 Ill. 2d at 48-50.

¶ 20 Here, the record rebuts the presumption of Rule 651(c) compliance created by counsel's filing of a Rule 651(c) certificate. That the State would move to dismiss based on untimeliness was predictable given that the petition was plainly untimely. Despite that, counsel simply asserted in the amended petition that defendant had filed the original petition within the three-year limitations period, an unsupportable claim. Under the circumstances, counsel reasonably could be expected to attempt to rebut anticipatorily a motion to dismiss for untimeliness if possible.

¶ 21 In any event, an aspect of counsel's duty arose *after* counsel filed his Rule 651(c) certificate. The State moved to dismiss on the basis of untimeliness after the certificate's filing. At that point, under *Perkins*, counsel's duty was to seek leave to file an amended petition setting out any allegations or matters that would tend to defeat the motion. Counsel filed a response in which he asserted that he could present facts that would tend to show defendant's lack of culpable negligence. He made the same claim in a later representation to the court. However, counsel did not attempt to amend the petition to set out those facts or otherwise seek to put those facts before the court. The record appears to preclude any explanation for that failure other than the one implied by counsel's argument—that those facts would properly be raised at the third stage. That argument is completely without support in the law. Thus, assuming that counsel had an ethically proper basis for raising defendant's lack of culpable negligence to controvert the State's motion to dismiss (see Ill. R. Prof. Conduct, R. 3.1 (eff. Jan. 1, 2010)), only ignorance of the law prevented counsel from following the mandate of *Perkins* and seeking to amend the petition to seek to avoid dismissal. Because counsel failed to seek to make a required amendment, his actions violated Rule 651(c).

¶ 22 The State argues that the petition is now moot, or alternatively, given the MSR issue's complete lack of merit, that dismissal was proper. We do not agree. We do agree that defendant's surplus-conviction claim is now moot; the parties agree that all relevant records show defendant as convicted of attempted murder only. However, because defendant still has the sentence of imprisonment that the court imposed and the term of MSR, defendant's claim that his MSR was improperly imposed cannot be moot. Further, that the remaining claim lacks merit is not relevant given that counsel did not satisfy the requirements of Rule 651(c). The supreme court "has consistently held that remand is required where postconviction counsel failed

to fulfill the [Rule 651(c)] duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit.” *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). The State argues that *Suarez* is distinguishable on the basis that counsel in *Suarez* did not file a Rule 651(c) certificate. That is not a relevant distinction. As we have discussed, the filing of a certificate does not change the requirement for Rule 651(c) compliance, but simply establishes a rebuttable presumption of compliance. Once the record establishes a violation, no logical reason exists for different treatment of cases with certificates and those without.

¶ 23 The State argues that remand in this case will be completely fruitless and therefore should be avoided. It notes that appellate postconviction counsel succeeded in correcting the DOC’s record to remove defendant’s surplus convictions. It notes the clear nonviability of defendant’s remaining claim, something that defendant does not contest. While we grant the pragmatic appeal of the State’s argument, it is not consistent with the law as set out in *Suarez*. The *Suarez* court, as we quoted it above, explicitly rejected a harmless-error analysis when a Rule 651(c) violation has occurred: “remand is required \*\*\* [where a Rule 651(c) violation is established] *regardless of whether the claims raised in the petition had merit.*” (Emphasis added.) *Suarez*, 224 Ill. 2d at 47..

¶ 24 Given that appellate postconviction counsel has fully addressed the more plausibly meritorious of the issues defendant raised, we will specifically note that if, on remand, counsel discovers that he can continue his representation only by advancing frivolous or spurious claims, counsel has the duty to withdraw. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

“Fulfillment of the [obligation to amend] under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant’s behalf. 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. Moreover, the mere filing of an amended petition by counsel under such circumstances would appear to violate the proscriptions of [Illinois] Supreme Court Rule 137 [(eff. Feb 1, 1994)]. \*\*\* Rule 137 provides in pertinent part:

‘The signature of an attorney \*\*\* constitutes a certificate by him that \*\*\* that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law \*\*\*.’  
[Citation.]

An attorney \*\*\* who determines that [a] defendant’s claims are meritless cannot in good faith file an amended petition \*\*\*.” *Greer*, 212 Ill. 2d at 205.

On remand, *Greer* will be available if necessary.

¶ 25

### III. CONCLUSION

¶ 26 For the reasons stated, we vacate the dismissal of defendant’s postconviction petition and remand the cause for compliance with Rule 651(c) and for further proceedings.

¶ 27 Vacated and remanded with directions.