

**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).

2015 IL App (4th) 130673-U

NO. 4-13-0673

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

June 29, 2015

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
TORI A. STARKS,	)	No. 05CF1654
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.  
Justice Turner concurred in the judgment.  
Justice Holder White dissented.

**ORDER**

¶ 1 *Held:* Where the record failed to indicate that postconviction counsel had fully complied with the certification requirements of Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) on the issue of the timeliness of defendant's postconviction petition, the appellate court vacated the second-stage dismissal of the postconviction petition and remanded for further postconviction proceedings.

¶ 2 In October 2012, defendant, Tori A. Starks, *pro se*, filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2010)), asserting various constitutional violations. Because his petition was filed approximately four years beyond the filing deadline, the circuit court granted the State's motion to dismiss on the timeliness issue. Defendant appeals, claiming postconviction counsel provided unreasonable assistance. We agree. We vacate the dismissal and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In February 2006, defendant pleaded guilty to armed robbery in an open plea agreement. Defendant was eligible for an extended term due to his criminal history and the trial court found the victims had suffered great bodily harm. The court imposed a 40-year prison term and ordered defendant serve 85% of his sentence. Defendant appealed, claiming his sentence was excessive, but this court affirmed. See *People v. Starks*, 4-06-0327 (February 1, 2008) (unpublished order under Illinois Supreme Court Rule 23). Defendant did not pursue any further appellate options.

¶ 5 Four years after the appeal, in October 2012, defendant filed a *pro se* postconviction petition, claiming (1) his due-process rights were violated when the trial court failed to conduct a *Krankel* hearing (see *People v. Krankel*, 102 Ill. 2d 181 (1984)), (2) the court erred by failing to order a fitness examination, (3) his sentence was disproportionate to that of his co-defendant's, and (4) his trial counsel was ineffective for failing to question defendant's "mental deformities" and failing to properly advise him during the guilty-plea proceedings.

¶ 6 In January 2013, the circuit court appointed counsel, who filed an amended postconviction petition, reasserting the allegations from the *pro se* petition, while adding an allegation of ineffective assistance of appellate counsel for not raising the asserted issues on direct appeal. Accompanying the amended petition was counsel's Rule 651(c) certificate, stating she had (1) consulted with defendant by letter and telephone to ascertain his contentions of error, (2) examined the court file and report of proceedings of the guilty-plea hearing, and (3) made amendments to defendant's petition as necessary for the adequate presentation of his claims of error.

¶ 7 The State filed a motion to dismiss, alleging defendant's petition was untimely and that it failed to make a substantial showing of a constitutional violation. Without a hearing,

the circuit court granted the State's motion to dismiss, finding the petition was untimely filed pursuant to section 122-1(c) of the Act. 725 ILCS 5/122-1(c) (West 2010). Citing the statute, the court noted defendant had six months "after the conclusion of the proceedings" to file his postconviction petition. The court found the "conclusion of the proceedings" occurred in November 2008, given the time allowed for filing a petition for leave to appeal to our supreme court, as well as the time allowed for filing a petition for *certiorari* to the United States Supreme Court. Finding defendant had not alleged any grounds excusing the delay, the court dismissed the petition, concluding it was filed 3 years and 11 months late.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Defendant claims his postconviction counsel rendered unreasonable assistance when she failed to comply with Rule 651(c) by failing to amend the petition to address the timeliness issue. Defendant asks this court to reverse the circuit court's dismissal and remand for compliance with Rule 651(c) and for further proceedings.

¶ 11 While a defendant has no constitutional right to postconviction counsel, the Act grants indigent defendants the right to counsel when the petition is not dismissed as frivolous or patently without merit. *People v. Lander*, 215 Ill. 2d 577, 583 (2005) (citing 725 ILCS 5/122-4 (West 2000)). As the right to counsel is wholly statutory, a defendant is only entitled to the level of assistance required by the Act. *Lander*, 215 Ill. 2d at 583. "The Act requires postconviction counsel to provide a 'reasonable level of assistance' to a defendant." *Lander*, 215 Ill. 2d at 583 (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). The reasonable-assistance standard provides less protection than that guaranteed by the federal and state constitutions. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006).

¶ 12 Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) outlines appointed counsel's specific duties in postconviction proceedings. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Rule 651(c) requires the record in postconviction proceedings demonstrate appointed counsel "has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012). "The purpose of the rule is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Postconviction counsel's compliance with Illinois Supreme Court Rule 651(c) is mandatory and generally shown by the filing of a certificate. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007).

¶ 13 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act. *Profit*, 2012 IL App (1st) 101307, ¶ 19. The burden is on the defendant to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. The presumption of compliance may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶ 14 "Postconviction proceedings may not be commenced outside the time limitation period in the Act unless the defendant alleges sufficient facts to show the delay in filing was not due to the defendant's culpable negligence." *Lander*, 215 Ill. 2d at 586. The obligation of compliance with the time limitations in the filing of a postconviction petition remains with the defendant. *Lander*, 215 Ill. 2d at 588-89. The *pro se* petition, however, need not include

allegations as to the issue of timeliness or set forth reasons for the delay as these matters are not relevant at the first stage. *Perkins*, 229 Ill. 2d at 48. That is, the State cannot seek dismissal of the petition as untimely at the first stage. *Perkins*, 229 Ill. 2d at 42.

¶ 15 Under the Act, defendant was required to file his postconviction petition by November 2008, given (1) this court's decision on direct appeal was filed in February 2008, (2) defendant did not file a petition for leave to appeal, and (3) did not seek a petition for *certiorari* review within nine months of this court's decision. See 725 ILCS 5/122-1(c) (West 2010) (a postconviction petition must be filed within six months of the conclusion of the proceedings).

¶ 16 We review postconviction counsel's compliance with Rule 651(c) *de novo*, the same standard by which we review a second-stage dismissal of a postconviction petition. *Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 17 In support of his contention that he received unreasonable assistance of postconviction counsel, defendant relies upon *Perkins*. In *Perkins*, our supreme court interpreted the provisions of Rule 651(c) and held the adequate and proper representation requirements of Rule 651(c) "necessarily includes [the responsibilities for] attempting to overcome procedural bars, including timeliness \*\*\*." *Perkins*, 229 Ill. 2d at 44. The court described this duty of postconviction counsel as follows:

"[W]e hold that 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. See *People v. Davis*, 156 Ill. 2d 149, 164 (1993) (under Rule 651(c), counsel is required to review those portions of the record necessary to present and support the claims raised by the petitioner in the *pro se* petition)." *Perkins*, 229 Ill. 2d at 49-50.

Thus, when faced with an untimely petition, postconviction counsel must inquire of defendant whether there is an excuse for the delay, review the record for facts which may support an excuse, and amend the postconviction petition to allege available facts necessary to demonstrate that defendant was not culpably negligent. *Perkins*, 229 Ill. 2d at 49-50.

¶ 18 Postconviction counsel in *Perkins*, like counsel here, filed a Rule 651(c) certificate that did not address the late filing, and counsel did not file an amended petition in response to the State's motion to dismiss the petition as untimely. *Perkins*, 229 Ill. 2d at 38-39. Nonetheless, the supreme court in *Perkins* concluded postconviction counsel had fulfilled his duties under Rule 651(c) because during the hearing on the State's motion to dismiss, counsel "in effect" presented the defendant's lack of culpable negligence by asserting that the claims raised in the postconviction petition did not exist until the appellate court vacated two of defendant's convictions. *Perkins*, 229 Ill. 2d at 51. The supreme court recognized that postconviction counsel's argument may not have been particularly compelling, but this factor did not demonstrate that another reason could have been raised which would explain the late filing. *Perkins*, 229 Ill. 2d at 51.

¶ 19 Here, postconviction counsel filed a Rule 651(c) certificate, giving rise to the rebuttable presumption that she performed the duties required of her under that rule. *Profit*, 2012 IL App (1st) 101307, ¶ 23. However, a review of the record also shows counsel filed the certificate prior to the State's motion to dismiss the petition as untimely. The certificate was filed as part of defendant's amended postconviction petition. Postconviction counsel did not amend the certificate or file an additional certificate as to the timeliness issue. Nor did postconviction counsel file a responsive pleading or a second amended postconviction petition in response to the State's motion.

¶ 20 In this case, the circuit court did not conduct a hearing and counsel stood silent in response to the State's assertion of untimeliness. Counsel did not indicate whether defendant's delay could be excused, or whether she had even consulted defendant about the issue. The record serves to rebut a presumption that postconviction counsel adequately consulted with defendant as to the timeliness of his petition.

¶ 21 Rule 651(c) is meant to guarantee that appointed counsel ascertains the basis of the complaints, shapes those complaints into appropriate legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Our supreme court made clear the issue of timeliness is one that falls squarely within postconviction counsel's responsibilities under Rule 651(c). *Perkins*, 229 Ill. 2d at 47. A defendant's substantive claims of constitutional violations cannot be presented to the court if the postconviction petition is untimely. Postconviction counsel has a duty to adequately search the record and "inquire of [defendant] whether there is any excuse for the delay in filing." *Perkins*, 229 Ill. 2d at 49. The record before us rebuts the presumption that postconviction counsel reasonably and adequately complied with the requirements of Rule

651(c), demonstrating that counsel consulted with defendant and reviewed the record with regard to a possible excuse for defendant's delay in filing the postconviction petition.

¶ 22 The State argues defendant offered a reason which would possibly excuse the delay in filing the petition. In his *pro se* petition, defendant stated: "he superceeds [*sic*] the time limits post-scribed [*sic*] \*\*\* due to the imposition of a disparate sentence[] upon and his similliarly [*sic*] situated co-defendant." He claimed disparate sentences are void and may be attacked at any time. The State argues that, because counsel indicated she had consulted with defendant about the allegations in his *pro se* petition, she must have consulted with defendant about the timeliness issue since he raised it, as quoted above, in his *pro se* petition. We disagree with the State's assessment and cannot be assured from the record that counsel addressed the issue with defendant.

¶ 23 Further, although the above quote from defendant's *pro se* petition could be interpreted as addressing the timeliness issue, the allegation fails to state any possible excuse for defendant's delay in filing. Thus, we remain convinced postconviction counsel failed to comply with Rule 651(c) by failing to indicate she had addressed the timeliness issue with defendant. By remanding this case for further proceedings for compliance with Rule 651(c) on the timeliness issue, our decision should not be interpreted as one determining whether an excuse for the delay in filing exists or whether defendant's underlying claims have merit.

¶ 24 CONCLUSION

¶ 25 For the reasons stated, we vacate the dismissal of defendant's postconviction petition and remand for further second-stage proceedings under the Act consistent with our decision. Upon remand, postconviction counsel should document compliance with Rule 651(c) as to the timeliness issue raised by the State's motion to dismiss.



¶ 26

Order vacated; remanded with directions.

¶ 27 JUSTICE HOLDER WHITE, dissenting.

¶ 28 As noted in *Perkins*, 229 Ill. 2d at 50, "when an attorney files a certificate under Rule 651(c), the attorney is officially representing to the court that the duties listed in the certificate have been fulfilled." Additionally, it is only when there are *available* facts to allege, that counsel's obligation to amend arises. *Perkins*, 229 Ill. 2d at 49.

¶ 29 In this matter, counsel amended defendant's petition and filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012). In her certificate, counsel represented that as a result of consulting with defendant once by letter and twice via telephone, she made the amendments necessary for adequate presentation of defendant's contentions. Subsequently, the State moved to dismiss the petition as untimely. The majority concludes that because a new certificate was not filed following the filing of the motion to dismiss, the record fails to demonstrate postconviction counsel's compliance with Rule 651(c). I disagree.

¶ 30 The majority fails to identify any evidence in the record to rebut counsel's representation to the trial court, and defendant likewise fails to do so. Given the record does not contradict counsel's statement in her certificate, defendant has failed to rebut counsel's representation of compliance. Under *Perkins*, in circumstances such as those in this case, we must accept counsel's representations contained within her certificate and, thus, assume she would have raised a defense to the timeliness issue, if one existed. Therefore, I would affirm the trial court's dismissal of defendant's petition.