

THIRD DIVISION
August 3, 2016

No. 1-13-2879

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. 03 CR 23813
)	
CHOICE ENGE,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Dismissal of defendant's *pro se* postconviction petition on the State's motion affirmed where appointed counsel's facially valid certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) created a presumption of reasonable assistance, which defendant failed to rebut. Counsel was not required to withdraw where she argued defendant was not culpably negligent in the untimely filing of his *pro se* postconviction petition and stood on the petition's substantive claims.

¶ 2 Defendant Choice Enge appeals from the dismissal on the State's motion of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). Enge contends that his court-appointed counsel did not provide reasonable assistance where she neither argued that his petition had merit nor moved to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). Enge further asks that his case be remanded with directions that the trial court make findings as to whether the admitted untimeliness of his petition was due to his culpable negligence. We affirm.

¶ 3 Enge and his codefendants, Jerome Howard and Charles Howard, were charged with, among other offenses, home invasion and felony murder. The three men were tried in a joint trial, but Charles pleaded guilty prior to the trial's conclusion. Enge requested a bench trial while Jerome was tried by a jury.

¶ 4 During the day on December 24, 2002, Jerome and his estranged wife, Sherita Pollard, argued when Pollard refused to spend Christmas eve with Jerome, telling him that she would instead spend the evening with her boyfriend, James Saunders. When Jerome called Pollard's cell phone that evening, Saunders answered, insulted Jerome and hung up.

¶ 5 Late that evening, Enge, Jerome, and Charles arrived at the house leased by Pollard. According to Lavita Govan, Pollard's daughter, sometime after 11:00 p.m., there was a loud banging at the house's front door. Before she could get to the door, Jerome, Enge, and Charles entered the house and went up the stairs. According to Pollard, after the loud banging, she heard the three men rush up the stairs. They tried to enter her bedroom, but she and her sister, Denise Pollard, held the bedroom door closed. Saunders was also present in the bedroom. Enge

threatened to "blow [their] brains out" if they didn't open the door, so Pollard opened it. The three men entered and Pollard saw that Enge and Charles were both armed with handguns.

¶ 6 Jerome ran to Saunders who pulled out his own handgun and held it to Jerome's head. After a brief argument, Jerome knocked Saunders to the bed and they began to wrestle. Enge walked to them, stood over the bed, and shot at Saunders three or four times. Pollard then heard Saunders' handgun begin to fire. At some point, Jerome broke away from Saunders and fled the room. Pollard then ran to a waiting car and rode with her daughter and others to her mother's house about two blocks away.

¶ 7 Jerome arrived at Pollard's mother's house a short time later. He was carrying a gun and indicated he had been shot in the hand. Pollard told him to leave and he did.

¶ 8 According to a medical expert, Saunders' autopsy revealed that his death was caused by four bullet wounds to his chest, shoulder, and leg. The expert opined that the shots entered at a downward angle consistent with shots fired from above. Evidence technicians investigated Pollard's home following the shooting. According to one technician there were bullet holes on the bedroom walls, in a mirror over the bed, and on the stairwell walls. He found eight 9 millimeter bullet cartridges and two .38-caliber fired bullets on the second floor of the house. According to a firearm expert, the recovered cartridges came from a single firearm, and the two fired bullets both came from a single firearm.

¶ 9 At the joint trial, Jerome testified. Although he and Pollard spoke earlier in the day about trying to save their marriage, when he called later, a man, whose voice he recognized as Pollard's boyfriend, answered the phone. Jerome decided then that the couple would not reconcile.

According to Jerome, he went to Pollard's apartment to pick up his belongings, and asked Enge and Charles, his nephews, to come along to help. None of the men was armed. Jerome entered the front door using a key he had been given, and the men went upstairs to let Pollard know they were there. Pollard and her sister tried to close the bedroom door, but Jerome managed to push it open and enter. Jerome began to talk to Saunders, but Saunders pulled out a handgun and held it to Jerome's head. Fearing for his life, Jerome grabbed the gun and the men began to wrestle. The handgun went off several times. Jerome eventually got control of the firearm and fled the room.

¶ 10 Enge offered the stipulated testimony of two police officers and two assistant state's attorneys. According to Detective Padilla, in a prior interview, Pollard did not state that Jerome ran out of the bedroom before she or her sister did. According to Officer Williams, Pollard never stated in a previous interview that Jerome fled the room or that Enge had a weapon. It was also stipulated that two assistant state's attorneys would testify that in her written statement and in her grand jury testimony, Pollard did not mention that Jerome fled the bedroom.

¶ 11 The trial court found Enge guilty of felony murder and home invasion involving the discharge of a firearm. The court sentenced him to 35 years' imprisonment for felony murder and 15 years' imprisonment for home invasion, to run concurrently. On direct appeal, Enge filed a motion for summary remand and vacation of his home invasion conviction because it was the predicate offense for his felony murder conviction. The State did not object and this court vacated the home invasion conviction on July 19, 2006. *People v. Enge*, No. 1-05-0205 (2006) (dispositional order).

¶ 12 Enge filed a *pro se* postconviction petition on July 10, 2009. In the petition, Enge alleged, *inter alia*, that the trial court erroneously failed to sever his trial from his codefendants' trial, the State knowingly presented perjured testimony, the State failed to present sufficient evidence to prove several elements of his offense beyond a reasonable doubt, and that his term of mandatory supervised release was unconstitutional. He also alleged that trial counsel was ineffective for multiple reasons, including failing to (i) investigate the scene of the crime, (ii) fully impeach the State's witnesses, (iii) call Pollard's son as a witness, (iv) file a motion to sever his trial, and (v) file a motion to quash his arrest. Finally, Enge also alleged that appellate counsel was ineffective for failing to raise his claims on direct appeal. Enge attached his own affidavit to the petition, in which he asserted that he had only gone to Pollard's house to help his uncle move and had no knowledge of any planned criminal activity. He also reiterated the factual allegations and claims in his petition.

¶ 13 On October 9, 2009, the trial court appointed counsel for Enge. On December 13, 2012, postconviction counsel filed a certificate under Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), indicating that she had communicated with Enge by phone and mail, reviewed the trial record, and determined that no amendments to his *pro se* petition were necessary to present his claims.

¶ 14 On March 14, 2013, the State filed a motion to dismiss arguing, in relevant part, that Enge's petition was untimely, his claims were barred by waiver and *res judicata*, and his claims were without basis in law or fact. In response, defense counsel obtained a letter from Enge's appellate counsel and an affidavit from Enge. The letter indicated that appellate counsel had not

informed Enge of the result of his appeal until May 18, 2007. Enge's affidavit asserted that he was not culpably negligent in failing to timely file his petition because he did not receive notification of the final disposition of his appeal until five days before the deadline for his petition. See 725 ILCS 5/122.1(c) (West 2008) (requiring that postconviction proceedings based on claims other than actual innocence be commenced within 6 months from the date for filing a certiorari petition in the United States Supreme Court "unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence."). Enge's affidavit did not explain the more than two-year delay between May 18, 2007, and July 19, 2009, when he filed his *pro se* petition. Postconviction counsel also filed an amended Rule 651(c) certificate stating that no amendments were necessary to Enge's *pro se* petition other than the affidavit and letter.

¶ 15 At the hearing on the State's motion to dismiss, postconviction counsel noted that she had filed a Rule 651(c) certificate and stated:

"Before I did that, I spoke with [defendant] numerous times about the issues in this petition. I wrote to him, a seven-page, single-spaced letter indicating that I did not believe his issues were viable or that I could shape them further into constitutional claims.

I also had an investigator go out to investigate certain of his issues."

Counsel also noted that she had addressed the State's untimeliness argument, contending that Enge's delay in filing was not due to his culpable negligence because he had not learned that his home invasion conviction was vacated until May of 2007.

¶ 16 The trial court dismissed Enge's petition, stating that it was "within its rights to dismiss this petition as untimely" because a long period of time passed and Enge "took no action whatsoever." The court then stated that Enge's petition was a "scattergun approach" to many issues that were not cognizable. The court noted that several of Enge's claims were without any evidentiary support and that the mandatory supervised release argument was a "misarticulation." The court noted that the petition failed on "many, many fronts *** without even examining its timeliness." Finally, the court stated, "For purposes of appeal, I am going to rule on its merits today and indicate despite its untimeliness, it lacks an evidentiary basis or sufficiency that would allow me to grant it. For that reason *** the State's motion to dismiss is granted."

¶ 17 We first note that Enge does not argue that his petition has merit, and has therefore forfeited any argument on appeal that the petition is meritorious. See *People v. Cotto*, 2016 IL 119006, ¶ 49. He instead contends that he was denied reasonable assistance of postconviction counsel because counsel did not advocate his claims and did not move to withdraw under *Greer*. While Enge acknowledges that postconviction counsel responded to the State's assertion that his petition was untimely, he notes that counsel told the court that she informed Enge his claims were not "viable." He argues that counsel was consequently unable to ethically argue on his behalf and deprived him of reasonable assistance by failing to withdraw.

¶ 18 The Act provides a three-stage mechanism for a defendant who alleges that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 15. At the second stage of the proceeding, as in this case, the State may either file an answer to the defendant's petition or a motion to dismiss. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27.

Before a postconviction petition moves to the third stage, an evidentiary hearing, the trial court must determine if the petition and any attached documents "make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001).

¶ 19 The Act provides for the appointment of counsel at an indigent petitioner's request once a petition reaches the second stage of proceedings. See 725 ILCS 5/122-4 (West 2008). A defendant does not have a constitutional right to the effective assistance of counsel at a postconviction proceeding. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). Instead, the Act provides a statutory right to "a reasonable level of assistance by appointed counsel." *Id.*

¶ 20 In order "[t]o assure the reasonable assistance required by the Act," Rule 651(c) imposes certain duties on counsel in postconviction proceedings. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Counsel must: (1) communicate with the defendant to ascertain the claims of constitutional violations; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's claims. *Id.* Where counsel fails to meet the requirements of Rule 651(c), remand is required "regardless of whether the claims raised in the petition had merit." *People v. Suarez*, 224 Ill. 2d 37, 47 (2007).

¶ 21 Compliance with Rule 651(c) may be shown by the filing of a certificate by counsel. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The filing of a facially valid Rule 651(c) certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. We review counsel's compliance with Rule 651(c) *de novo*. *Id.* at 41-42.

¶ 22 Here, postconviction counsel filed an amended Rule 651(c) certificate which indicated that she had communicated with Enge, examined the record of the trial proceedings and found that the only amendment necessary was the addition of supporting documentation to oppose the State's untimeliness argument. Counsel later provided that documentation. The assertions made in counsel's Rule 651(c) certificate are not contradicted by the record. See *People v. Perkins*, 229 Ill. 2d 34, 52 (2007) (finding Rule 651(c) certificate facially valid where it was not contradicted by the record). And Enge does not contend here that the representations in counsel's affidavit were inaccurate.

¶ 23 In order to render reasonable assistance, counsel was not required to make any amendments to Enge's claim. *People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003). Moreover, as noted above, Enge does not argue on appeal that his postconviction claims had merit or that any amendments were necessary to better present his claims. Although appellate counsel criticizes the performance of postconviction counsel in the trial court, such criticism is unwarranted in the context of this case where appellate counsel does not suggest any amendments that could have been made to Enge's *pro se* petition that would have made a substantial showing of a viable constitutional claim. We therefore conclude counsel's Rule 651(c) certificate was facially valid, and Enge has failed to rebut the presumption that he received reasonable assistance from counsel.

¶ 24 Enge cites *Greer* for the proposition that "[i]f appointed counsel cannot ethically take any action on the client's behalf because there is no non-frivolous argument that can be made, then counsel must seek to withdraw." We believe Enge's reading of *Greer* is mistaken. *Greer* stands

for the proposition that where counsel determines that a postconviction petition is frivolous, counsel is "allowed to withdraw." *Greer*, 212 Ill. 2d at 209. In *Greer*, the petition was advanced to the second stage automatically because the trial court had taken no action on it within 90 days of its filing. 725 ILCS 5/122-2/1, 122-4 (West 2008). Thus, the petition escaped a first stage determination as to whether it was frivolous or patently without merit and counsel was appointed to represent the petitioner. After review and investigation of the claims raised in the petition, appointed counsel sought and was granted leave to withdraw. Specifically, the court found that the procedures for withdrawal of appointed counsel established in *Anders v. California*, 386 U.S. 738 (1967), were applicable to postconviction proceedings so that counsel who determined that no issues of merit were presented after compliance with his or her obligations under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), could file a petition to withdraw detailing the issues considered and indicating why counsel had concluded that those issues lacked merit. *Greer*, 212 Ill. 2d at 209. From *Greer*, Enge draws the conclusion that appointed counsel who, after investigation, finds that a postconviction petition cannot be amended to state viable constitutional claims, *must* withdraw and, further, that failure to do so deprives the petitioner of his statutory right to the reasonable assistance of counsel. We disagree.

¶ 25 Enge's reading of *Greer* conflates the consequences of appointed counsel's determination that (a) a *pro se* postconviction petition cannot be amended to further articulate a constitutional claim and (b) the petition is factually unfounded or false. Because a postconviction petition is a collateral attack on the petitioner's conviction and because such petitions are designed to address only constitutional claims that were not and could not have been raised in the prior proceedings

(*Greer*, 212 Ill. 2d 192, 203), postconviction counsel will be unable, in a high percentage of cases, to fashion the allegations of a *pro se* petition to make the required substantial showing of viable constitutional claims. But a conclusion that no viable constitutional claims can be advanced on a petitioner's behalf is not the same as a determination that the petition, as it stands, is frivolous or factually unfounded. Indeed, a *pro se* petitioner's claims of trial error may well have some merit, but for various reasons—e.g., *res judicata*, forfeiture or errors that do not implicate constitutional rights—those errors will not support postconviction relief.

Postconviction counsel's responsibilities in such circumstances are fulfilled by taking the steps required under Rule 651(c) and standing on the petition's allegations. *People v. Turner*, 187 Ill. 2d 406, 412 (1999); *Jennings*, 345 Ill. App. 3d at 272.

¶ 26 Here, among the myriad issues included in Enge's postconviction petition was his claim that his trial counsel failed to call Pollard's son as a witness and investigate the scene of the crime. We do not know what postconviction counsel's investigation revealed, but given counsel's representation that she had an investigator look into certain of the issues, we must assume that she concluded if these errors occurred, they would not have changed the outcome of the trial and, therefore, amendment of the postconviction petition to make a substantial showing of a constitutional claim was not possible. Counsel's conduct in filing her Rule 651(c) certificate and resting on the *pro se* petition was perfectly proper. We decline Enge's invitation to second-guess his appointed counsel's determination that she was not ethically obligated to withdraw from representing him.

¶ 27 Further, appointed counsel's representation to the court that she had advised Enge that his claims were not "viable" and could not be shaped further into constitutional claims was not the functional equivalent, as Enge argues, of advocating against her client. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 6 (court found postconviction petitioner did not receive reasonable assistance of appointed counsel given that counsel, at a status hearing, informed the court that he was "going to confess to the [State's] motion to dismiss" and the court, in the absence of both the State and the petitioner, dismissed the petition). Had counsel simply informed the court that she would stand on the petition without amendment, the fact that counsel had concluded that she could not further shape any constitutional claims on Enge's behalf would have been just as obvious to the trial court. We suggest that, in the future, postconviction counsel who has determined that no amendments to a *pro se* petition are necessary need only advise the court that she has communicated with her client without revealing the substance of those communications. But we find no basis for reversal in the statement made by postconviction counsel here where the record indicates that she fulfilled her obligations to Enge as required under Rule 651(c). Moreover, postconviction counsel did actively advocate on Enge's behalf with regard to the timeliness of his petition.

¶ 28 Finally, Enge's suggestion that he was prejudiced by his counsel's failure to withdraw is a *non-sequitur*. If, as Enge contends, his lawyer was required to file a motion to withdraw, under *Greer*, that motion would have been accompanied by a brief detailing the issues counsel considered advancing and why those issues lacked merit. Further, had the motion been granted, the reasonable assistance of counsel to which Enge was entitled under the Act would have been

at an end. Nothing in the Act entitles a petitioner to substitute counsel if appointed counsel withdraws. *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 7 ("[W]hile the precise issue before the court in *Greer* was whether an attorney appointed under the Act may withdraw when his or her client's position is incurably meritless, the import of the *Greer* court's reasoning is that, once an attorney appointed to represent a defendant in a postconviction proceeding has withdrawn in conformity with the requirements of *Greer*, there will be no further statutory right to counsel, at least in the absence of unusual circumstances."). Having been afforded the assistance of counsel who consulted with him, examined the record of proceedings at trial and determined that no further amendments to the petition were necessary, it cannot be said that Enge was deprived of his statutory right because his attorney determined she was not obligated to withdraw.

¶ 29 As Enge has failed to rebut the presumption of reasonable assistance raised by counsel's Rule 651(c) certificate, we find that counsel's assistance was reasonable and remand is unnecessary. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 30 Affirmed.