

No. 1-14-0017

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. 09 CR 5917
)	
KENDRICK PEARSON,)	Honorable
)	Lawrence Edward Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) by failing to attach, or sufficiently explain the absence of, evidentiary support for two claims raised in defendant's amended postconviction petition.
- ¶ 2 Defendant Kendrick Pearson, who had been convicted of possession of a controlled substance with intent to deliver and sentenced, based on his criminal background, to a Class X term of eight years in prison, appeals the trial court's dismissal, on motion of the State, of his amended petition for postconviction relief. On appeal, defendant contends that his appointed postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff.

Dec. 1, 1984) by failing to review readily available transcripts and subpoena a video that were necessary to support postconviction claims she had affirmatively asserted had merit.

¶ 3 For the reasons that follow, we reverse the dismissal of defendant's postconviction petition and remand for further proceedings.

¶ 4 Defendant's conviction arose from the events of July 9, 2009. At trial, Chicago police officer Wrigley testified that about 8:30 p.m. on the day in question, he and other officers set up narcotics surveillance in the vicinity of 3553 West 13th Place, where defendant and another man were standing on the sidewalk. As Officer Wrigley watched, a person approached defendant and engaged him in a brief conversation. The person gave defendant money, whereupon defendant took a clear plastic bag from his jacket pocket, retrieved an item from the bag, and gave the item to the person. Based upon Officer Wrigley's training and experience, he believed a narcotics transaction had occurred.

¶ 5 Officer Wrigley testified that after the buyer walked away, defendant and the other man who had been standing on the sidewalk got into a silver car and drove off. Within two minutes, they returned in the same car and parked. Defendant resumed his position on the sidewalk, near a white car with its trunk open. The other man walked to the corner and yelled "rocks," a street term for crack cocaine, three or four times at passing cars. A third man appeared to be working on the white car's front tire.

¶ 6 A short time later, two men approached defendant, who moved into the middle of the street to meet them. Defendant accepted money from both men, took a clear plastic bag from his jacket pocket, retrieved small items from the bag, and gave one to each man before they walked away. At this point, Officer Wrigley radioed enforcement officers with descriptions of defendant

and the man yelling "rocks." As the enforcement officers approached, defendant walked around the back of the white car and stopped near the passenger's side of the trunk. Officer Wrigley's view of defendant was partially obstructed by the open trunk. The enforcement officers placed defendant into custody. Later, at the police station, Officer Wrigley was present when a custodial search of defendant was conducted and \$225 was recovered from his pants pocket.

¶ 7 Chicago police officer Todd Olsen testified that on the night in question, he was working as an enforcement officer. About 8:30 p.m., he received instructions to detain a person matching defendant's description who was standing near a white car with an open trunk at 13th Place and Central Park Avenue. As Officer Olsen and his partner approached, Olsen saw defendant step off the sidewalk to the rear of the white car. Defendant reached into his right jacket pocket, removed a clear plastic bag, and tossed it into the open trunk. Officer Olsen and his partner got out of their car and detained defendant and another man at the front of the white car. When asked about other people on the scene, Officer Olsen stated that there "may have been" a third man repairing the white car. After defendant was detained, Officer Olsen walked back to the open trunk. Inside, he could see a clear plastic bag containing several bags of crack cocaine. Officer Olsen recovered the bag.

¶ 8 The parties stipulated that the five recovered items weighed 0.7 grams total, and that the one item that was tested weighed 0.1 gram and tested positive for the presence of cocaine.

¶ 9 Defendant testified that about 8:30 p.m. on the day in question, he went to the corner of 13th Place and Central Park Avenue to meet two friends and go out to shoot pool. As he waited on the sidewalk for one of the friends to come down, he noticed a man installing speakers in the open trunk of a white car. Defendant joined a group of five or six men who walked over to the

car to watch the man hook up the speaker wires. A few minutes later, police officers "rolled up," got out of their car, and detained all five or six men at the scene.

¶ 10 Defendant denied possessing drugs, selling drugs, or throwing anything in the trunk of the white car. He also denied that anyone was yelling "rocks" at the corner. Defendant testified that he had \$245 on his person to pay his fiancée's light bill, and acknowledged that he had been convicted of robbery and aggravated battery in 2000.

¶ 11 The trial court found defendant guilty of possession of a controlled substance with intent to deliver.

¶ 12 Defendant thereafter filed a *pro se* motion and two *pro se* amended motions for a new trial, alleging that trial counsel was ineffective for failing to present information during trial that there had been a preliminary hearing in which there was no probable cause found. The trial court conducted a *Krankel* inquiry into defendant's allegation and denied the motion, explaining to defendant that the preliminary hearing is separate from trial and that any information brought forth at the hearing is not evidence at the trial. Defense counsel then presented a posttrial motion, arguing that the evidence was insufficient to prove possession or intent to deliver. The trial court denied the motion for a new trial. Then, after hearing arguments in aggravation and mitigation, hearing from defendant himself, and considering the presentence investigation report, the trial court sentenced defendant, based on his criminal history, to a Class X term of eight years in prison.

¶ 13 Defense counsel subsequently filed a motion to reconsider sentence. At the hearing on the motion, defendant asked that the motion be withdrawn. After discussing the matter with

defendant and defense counsel, the trial court allowed the motion to be withdrawn and vacated the appointment of the Cook County Public Defender.

¶ 14 On direct appeal, defendant contended that the evidence was insufficient to convict and challenged the imposition of a three-year term of mandatory supervised release (MSR). We affirmed defendant's conviction and sentence. *People v. Pearson*, No. 1-09-2842 (2011) (unpublished order under Supreme Court Rule 23).

¶ 15 On October 13, 2009, while his direct appeal was pending, defendant filed a *pro se* petition and an amended *pro se* petition for postconviction relief. In these pleadings, defendant contended that his trial counsel was ineffective for failing to challenge his warrantless arrest for lack of probable cause; that the trial court erred in enhancing his sentence based on his criminal background; that intent to deliver was not proved; that his sentence was excessive; and that the trial court erred in not appointing new counsel to represent defendant on his posttrial motions. On April 23, 2010, the trial court docketed defendant's petition and advanced it to second-stage proceedings.¹

¶ 16 The Cook County Public Defender was appointed to represent defendant. On December 6, 2010, defendant filed a motion for new postconviction counsel, and on March 30, 2011, defendant filed another *pro se* petition for postconviction relief. In his petition, defendant asserted that he had not received any contact from postconviction counsel since July 21, 2010; that although the trial court had found no probable cause and dismissed the charges against him, the State's Attorney improperly obtained a grand jury indictment; that appellate counsel was

¹ The trial court later explained that it advanced the matter to second-stage postconviction proceedings because "with all the information that the Court received I inadvertently went over the review period and I had to docket this matter."

ineffective for failing to raise the issue that trial counsel was ineffective for failing to inform defendant that the ARDC had previously suspended him from the practice of law, failing to file pretrial motions to quash arrest and suppress evidence, failing to move to dismiss the indictment, and failing to request a new trial and sentence reduction; that the trial court should have appointed new counsel prior to sentencing; that intent to deliver was not proved at trial; and that his MSR term must be reduced to two years.

¶ 17 On May 11, 2011, the Assistant Public Defender who had been appointed to represent defendant filed a motion to withdraw as postconviction counsel based on a conflict of interest that he represented "cannot be resolved by any means other than to vacate the appointment." The trial court granted the motion. The trial court thereafter appointed an attorney from Chicago Kent College of Law, who subsequently withdrew due to "a conflict," and finally, on August 16, 2011, an attorney from the University of Chicago Law School's Exoneration Project.

¶ 18 On October 5, 2011, postconviction counsel informed the court that she had spoken with defendant, needed to meet with him again, and had "a couple of other things I would like to do." The trial court granted her until October 21, 2011, to file an amended petition. On that date, counsel appeared and asked for a filing date of November 1, 2011, because an issue had come up and she had not had a chance to discuss it with defendant, but had set up a visit with him for the following week.

¶ 19 On November 1, 2011, counsel filed a Rule 651(c) certificate and a "Supplemental Petition for Post-Conviction Relief." The supplemental petition indicated that it was meant to add to defendant's *pro se* claims. After numerous court appearances, counsel filed a "Second Supplemental Petition for Post-Conviction Relief" on November 15, 2012, again representing

that the purpose of the petition was to add to defendant's *pro se* claims. On December 6, 2012, upon motion of the State, the trial court entered an order directing postconviction counsel to file an amended petition presenting only those claims that counsel believed had merit.

¶ 20 On December 12, 2012, counsel filed a new Rule 651(c) certificate and an "Amended Petition for Post-Conviction Relief." This petition presented five claims: (1) trial counsel was ineffective for failing to obtain available evidence from the Police Observation Device (POD) / surveillance camera in the area; investigate the crime scene in order to challenge the arresting and surveillance officers' version of events; investigate and speak with the other individuals detained with defendant in order to call them as witnesses; use transcripts from grand jury testimony to file a motion to quash arrest and to discredit the testifying officers; and ask more specific questions about the location of Officer Wrigley's surveillance, or otherwise preserve this issue for direct appeal; (2) appellate counsel was ineffective for failing to challenge the trial court's dismissal of defendant's posttrial motion without a *Krankel* hearing; raise the ineffectiveness of trial counsel; and challenge the trial court's refusal to allow direct questions concerning Officer Wrigley's surveillance location; (3) the mittimus should be corrected to credit defendant with additional time spent in custody after his initial arrest; (4) the cumulative effect of all errors violated defendant's fundamental right to due process and his right to counsel; (5) any procedurally defaulted claims should be reviewed as claims of ineffective assistance of appellate counsel or based on fundamental fairness. In the petition, counsel stated that defendant did not have access to grand jury transcripts or POD footage, but stated she had "a good faith basis to believe that these would assist [defendant] in proving his post-conviction claims" and requested the transcripts and footage in discovery. She further stated that she believed trial

counsel never attempted to obtain the POD video, but that "a copy of the same video may still be in existence with the Chicago Police Department."

¶ 21 The State filed a motion to dismiss. The State argued, *inter alia*, that trial counsel could not be deemed ineffective for failing to subpoena footage from a POD camera that he did not show existed at the time of the crime, and that defendant could not show he was prejudiced by such failure, as he had not stated what might be contained in the video. The State also argued that defendant's claim that trial counsel was ineffective for failing to use grand jury testimony was "wildly speculative and conclusory," as defendant had not identified the officer who would be impeached with the unspecified testimony. Postconviction counsel filed a response, arguing that defendant's claims were not barred by waiver or *res judicata*, and that defendant had made a substantial showing of ineffective assistance of trial and appellate counsel.²

¶ 22 Following a hearing, the trial court granted the motion to dismiss. In doing so, the trial court found that defendant's claims were speculative, not based on any evidence found in the record or supporting documents, or barred under *res judicata* and/or waiver. With regard to the claims of ineffective assistance of trial and appellate counsel, the court stated that defendant had failed to set forth facts to support the allegations.

¶ 23 On appeal, defendant contends that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

² The State spends several paragraphs of its brief arguing that defendant has failed to provide a complete appellate record by "neglect[ing] to include the response [postconviction counsel] filed to the People's motion to dismiss." While it is true that the response was not initially included in the record on appeal, after the State filed its brief, this court allowed defendant's motion to supplement the record with a number of documents, including the response.

¶ 24 Under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with the rule is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Our review of an attorney's compliance with Rule 651(c) is *de novo*. *Id.* at ¶ 17.

¶ 25 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Id.* at ¶ 19. Here, postconviction counsel filed a certificate. Thus, the presumption exists that defendant received the representation required by the rule, and it is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id.*

¶ 26 Defendant acknowledges that counsel filed a Rule 651(c) certificate, but maintains that compliance with the Rule is rebutted because postconviction counsel failed to examine and attach transcripts of the grand jury proceedings, which formed the basis for one of the two claims she added to the petition and affirmatively asserted had merit, and failed to attach a copy of the POD video, which formed the basis of the other. Defendant argues that postconviction counsel

failed to comply with her obligation to properly shape his claims for second-stage review because she did not attach any evidentiary support, or explain the absence of such support, for the claims involving the grand jury transcripts and the POD video footage. As relief, defendant asks that the case be remanded for further second-stage proceedings so that counsel can comply with Rule 651(c).

¶ 27 Rule 651(c) requires postconviction counsel to examine as much of the record " 'as is necessary to adequately present and support those constitutional claims raised by the petitioner.'" *People v. Pendleton*, 223 Ill. 2d 458, 475-76 (2006) (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Counsel may conduct a broader examination of the record and may raise issues not included in the original *pro se* petition if he or she so chooses, but there is no obligation that counsel do so. *Pendleton*, 223 Ill. 2d at 476. If postconviction counsel chooses to raise additional claims, he or she must do so competently. See generally *People v. Johnson*, 154 Ill. 2d 227 (1993).

¶ 28 In general, a postconviction petition must be supported by affidavits, records, or other evidence, or must explain why such items are not attached. 735 ILCS 5/122-2 (West 2012). Our supreme court has stated that "[i]n the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *Johnson*, 154 Ill. 2d at 241. However, if the record affirmatively rebuts this presumption, courts have found that the failure to attach supporting evidence, standing alone, constitutes an unreasonable level of assistance. *Id.*

¶ 29 In the instant case, the record rebuts the presumption that counsel made a "concerted effort" to obtain supporting documentation to attach to the amended petition. In the amended petition, counsel made the following statements, which indicate that she had not made any attempts to obtain the grand jury transcripts or the POD video footage, but instead, simply hoped to acquire both in the future:

"Here, counsel for [defendant] does not have access to the grand jury transcripts or the footage from February 10, 2009, taken from the Chicago Police Department camera located at the corner of St. Louis Avenue and 13th Place. However, counsel has a good-faith basis to believe that these would assist [defendant] in proving his post-conviction claims. For this reason, counsel for [defendant] requests each in discovery."

Counsel also made statements in the petition showing that she had not even determined if either of these pieces of evidence existed. With regard to the grand jury transcripts, she stated, "Post-conviction counsel does not possess a copy of the grand jury proceedings in [defendant's] case, but believes that one or more of the arresting officers who testified at [defendant's] trial testified at this proceeding." With regard to the POD video, she stated, "Counsel further believes *** that a copy of the same video may still be in existence with the Chicago Police Department."

¶ 30 Counsel's response to the State's motion to dismiss also contains indications that she had not made a concerted effort to obtain supporting evidence, but rather, simply aspired to gain access to such evidence later in the proceedings. Specifically, in regard to the grand jury transcripts, counsel stated, "[Defendant] does not have a copy of this [grand jury] transcript, and it is obviously not something, as a non-public document, that he is able to obtain on his own at

this stage in the litigation. *** However, [defendant] has a good faith basis to believe that the transcripts contain exculpatory information, and has conveyed that good-faith intuition to counsel." Regarding the POD video footage, counsel remarked, "[I]t is obviously not within [defendant's] ability to obtain historical POD camera data or camera locations; he will need discovery to obtain this video or prove that a camera was there at this time."

¶ 31 The two claims that postconviction counsel added to the amended petition cried out for supporting documentation. Postconviction counsel asserted that trial counsel was ineffective for failing to obtain and utilize grand jury transcripts and POD video footage, yet she failed to attach any evidence of such transcripts or recordings or explain why they were not attached, other than to say that she did not "have access" to them. Postconviction counsel had an obligation to attempt to obtain evidentiary support for claims that were included in the amended petition. *Johnson*, 154 Ill. 2d at 245. Based on the record presented, there appears to be no reason that postconviction counsel could not have at least attempted to obtain the grand jury transcripts or the POD video footage, as she claimed trial counsel should have done.

¶ 32 We are mindful of the State's argument that postconviction counsel's obligation to adequately present defendant's claims are limited to those claims raised in the *pro se* petition, and that counsel cannot be deemed noncompliant for failing to provide evidentiary support for "her own claims on behalf of defendant." The State is correct that postconviction counsel is under no obligation to raise issues not included in the original *pro se* petition. *Pendleton*, 223 Ill. 2d at 476. However, we cannot agree that if postconviction counsel chooses to do so, he or she is not required to attach necessary supporting documentation or explain the reasons for its absence. As noted by defendant in his reply brief, when considering Rule 651(c) compliance, it does not

make sense to distinguish between claims included in a *pro se* petition and claims later added to an amended petition filed by counsel, since attorney-client privilege makes it impossible to know the origin of the amended claims. In the instant case, the claims regarding the grand jury transcripts and the POD video footage may have been, as the State suggests, counsel's "own claims," but may also have been claims that defendant communicated to counsel. Rule 651(c) requires that postconviction counsel consult with the petitioner to ascertain his contentions of constitutional deprivations and make any amendments to the *pro se* petition necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). If postconviction counsel was only obligated to pursue and support claims that were contained in the initial *pro se* petition, there would be no need for counsel to consult with the defendant to ascertain his contentions, and that portion of Rule 651(c) would be rendered superfluous. A Supreme Court Rule must be interpreted so that no part of it is rendered meaningless or superfluous. *People v. Dominguez*, 2012 IL 111336, ¶ 16. Accordingly, we reject the State's position.

¶ 33 We conclude that defendant has overcome the presumption that postconviction counsel complied with Rule 651(c) in connection with the claims concerning grand jury transcripts and POD video footage. We therefore reverse the judgment of the circuit court and remand the cause for second-stage proceedings consistent with Rule 651(c) and for further proceedings as appropriate. On remand, counsel should be given the opportunity to supplement the amended postconviction petition with grand jury transcripts and POD video footage, and the trial court may then reconsider the State's motion to dismiss the petition on the basis of a record that is properly developed. See *Johnson*, 154 Ill. 2d at 249.

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¶ 34 Reversed and remanded.