2016 IL App (1st) 140142-U

SECOND DIVISION
November 22, 2016

No. 1-14-0142

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 24290
	)	
MICHAEL ALFORD,	)	Honorable
	)	Anna H. Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

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

¶ 2 Defendant Michael Alford appeals from the second stage dismissal of his 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 of his petition on the merits. Rather, defendant

contends that postconviction counsel provided unreasonable assistance pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to comply with the requirements of the rule. We affirm.

¶ 3 Following a jury trial, defendant was found guilty of two counts of aggravated kidnapping and sentenced to two concurrent 20-year prison terms. The evidence at defendant's trial established that defendant and the victim, J.C., were previously involved in a romantic relationship, that defendant put the victim into a headlock outside a club, threw her into a car and beat her while the car was driven to Gary, Indiana. Once there, defendant had sexual intercourse with the victim twice although the victim did not want to engage in sexual intercourse.

¶ 4 The victim testified that in the early morning of April 21, 2002, she encountered defendant as she left a club. She immediately began crying because she thought defendant was going to kill her. Defendant put the victim in a headlock, dragged her to a car, and threw her into the backseat. Although the victim screamed to be let go, defendant got into the backseat and began beating her as defendant's friend drove the car away. Evelyn Bradford, who was with the victim at the club, testified consistently with the victim that defendant put her in a headlock.

¶ 5 The victim further testified that at one point, the driver of the car stopped and got out. Defendant then drove the car to a "little house" in Gary where they previously lived together. Defendant returned to the backseat, removed the victim's clothing and "forced himself" into the victim. Although the victim was crying and screaming, defendant told her to "shut the f*** up," and put on her clothes. Defendant then took the victim inside. Defendant's uncle, Clyde Means, as well as another man and a woman were there. The victim told defendant that she wanted to go home, but slept on the floor with defendant because she did not want him to kill her. The next morning, the victim's phone began ringing. The victim repeatedly told the callers that she was

fine because that was what defendant told her to say. That afternoon, defendant again engaged in sexual intercourse with the victim, although she did not want to have sexual intercourse. When the victim said that she wanted to see their son, defendant started "getting nice," and said that he loved her. Ultimately, the victim was dropped off a few blocks from her mother's home.

¶ 6 S.E., the victim's mother, testified that she received a phone call sometime after 3:30 a.m. from a police officer telling her that the victim had been "kidnapped." When she called the victim's cellular phone, defendant answered and stated that his name was Richard, he was the victim's new boyfriend, and that the victim was fine. S.E. knew it was defendant because she recognized defendant's voice.

¶ 7 The jury found defendant guilty of two counts of aggravated kidnapping. Defendant was sentenced to two concurrent 20-year prison terms. On appeal, this court vacated one of defendant's convictions for aggravated kidnapping pursuant to the one-act, one-crime rule and amended the mittimus to reflect 1,002 days of presentence custody credit. See *People v. Alford*, No. 1-05-1809, Order at 7 (2007) (unpublished order under Supreme Court Rule 23).

¶ 8 In May 2008, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that he was denied the effective assistance of counsel when trial counsel made prejudicial statements designed to inflame the jury against defendant, failed to visit the club or the house in Gary, and failed to investigate and examine certain witnesses. The petition alleged that although defendant gave trial counsel a list of nine witnesses, only three were questioned. Additionally, counsel refused to question Allen Gavin, Lisa Lewis, Glen, and Maria Smith, refused to put Clyde Means on the stand because of an "old" felony conviction, and refused to call defendant's mother and brother at trial. The petition also alleged that defendant was denied the effective assistance of appellate counsel by counsel's failure to raise these issues on direct appeal.

¶ 9 Attached to the petition in support were, in pertinent part, the affidavits of Patricia Coleman Bridges, Tyrone Smith, Maria Smith, and Lisa Lewis (Alford). Also attached were the un-notarized "affidavits" of defendant and Clyde Means.

¶ 10 In defendant's "affidavit," he stated that a "month prior to the night in question," the victim, who was "really disturbed" about the decline of their relationship, attempted suicide. On April 20, 2002, the victim asked defendant to meet her at a club. When the victim exited the club, she was drunk and defendant asked her "what she was thinking walking out of the club intoxicated" when she knew that defendant was there. Defendant then put his arm around the victim and walked her to Allen Gavin's car. On the way, they passed security guards and a police officer. Once the victim got into the car, her friend asked if the victim was okay and the victim said yes. As Gavin drove to Gary, defendant struck the victim in the face "approximately" three times and argued with her. After Allen got out of the car at his house, defendant drove them to another house. He apologized to the victim for "smacking" her and they talked about their relationship. Defendant requested, and received, the victim's permission to have sexual intercourse. The victim and defendant then went into the house where Clyde Means, Clyde's girlfriend, and Glen were present. The victim and defendant spent the night in a bedroom with Clyde and his girlfriend.

¶ 11 The next morning, the victim took a shower, sent defendant out for snacks and then watched television with defendant. When Glen asked the victim when she wanted to leave, the victim replied "later in the evening." At one point, Lisa called the victim to ask if the victim wanted to go home and the victim declined. After a "few times" of letting the phone go unanswered, defendant asked the victim to answer it because "people were calling *** like something was wrong." When the victim told defendant that she was ready to go home, Glen

drove them. At the victim's request, she was dropped off two blocks away from her mother's home. Never "in a million years" did defendant think that people thought he kidnapped the victim. The night before defendant's arrest, the victim attended defendant's nephew's birthday party, and the victim and defendant had sexual intercourse.

¶ 12 Defendant stated that he told trial counsel that his cousin Lamar would testify that the victim was unstable and attempted suicide. He also told counsel that he was able to contact Clyde Means, Tyrone Smith, Maria Smith and Patricia Coleman Bridges. He was not able to contact Allen Gavin, Clyde's girlfriend, Glen, Lamar, or the security guards or police officers from the club. Defendant set up meetings between trial counsel and Tyrone Smith, Clyde Means, and Patricia Coleman Bridges. However, counsel tried to get defendant to take a deal, and did not put Means on the stand because he had an "old felony."

¶ 13 Patricia Coleman Bridges, defendant's mother, averred that she was not permitted to testify at defendant's trial, even though trial counsel stated that she was going to testify and that she was excluded from the courtroom. Bridges averred that after the "incident in question" the victim obtained an order of protection against defendant but continued to spend time with him.

¶ 14 Tyrone Smith, defendant's brother, averred that defendant asked him to testify at trial, that he was questioned by trial counsel and told he would be a witness, and that he was not permitted inside the courtroom. However, he was never asked to testify. He averred that he would have testified that the victim and defendant attended a birthday party in August 2002, that they talked and laughed, and that after they argued defendant left.

¶ 15 Maria Smith, defendant's sister-in-law, testified that defendant told her that he needed her to testify at trial, but that trial counsel never contacted her. Maria further averred that defendant

and the victim were "in a relationship all the way up to the day" that defendant was arrested, and that she walked in on them having sexual intercourse during a family birthday party.

¶ 16 Clyde Means' "affidavit," which lacked a notary seal, stated that defendant told him that he would play a key role in defendant's defense. Although trial counsel told him that his testimony would be needed, he did not testify. Means stated that he was at the house "the night in question" and he "didn't know what happened outside the house," but that when the victim and defendant entered the house, "everything seemed fine." The next morning, "nothing seemed wrong." He would have noticed if defendant harmed the victim and would have helped her.

¶ 17 Lisa Lewis (Alford) averred that she never had the chance to tell her "recollection of what happened on that weekend in court," that is, she offered to drive the victim home, but the victim declined.

¶ 18 The petition was docketed and postconviction counsel was appointed. On September 24, 2010, postconviction counsel told the court that defendant alleged that he was denied the effective assistance of trial counsel because counsel "did not call any witnesses" at trial. Postconviction counsel stated that defendant had given her a list of witnesses and that she had spoken "to about half of them." However, she needed additional time to speak to the "other half" and to "adduce their testimony to writing." On March 11, 2011, postconviction counsel told the court that she had three more witnesses to speak with and asked for a "three month date" to wrap up the investigation. On September 2, 2011, postconviction counsel told the court that she had located three witnesses and was "in the process of obtaining affidavits."

¶ 19 On April 19, 2012, postconviction counsel filed a certificate pursuant to Rule 651(c) (eff. Dec. 1, 1984), stating that she had obtained and examined all relevant transcripts, letters and exhibits; had consulted with defendant by telephone and letter to ascertain his contentions of

constitutional and due process violations; had reviewed defendant's letters and filed documents regarding the petition and arguments that defendant wished to present to the court; and was filing the certificate "without amendment." The State then filed a motion to dismiss and postconviction counsel filed a response.

¶ 20 On May 10, 2013, the trial court noted that there were affidavits in defendant's possession that were not part of the court file. The court then stated that legal arguments were raised in defendant's reply to the motion to dismiss that were not "addressed in the State's motion." The court requested that "these affidavits *** be made part of the court file, *** because based on the 6501 [*sic*] certificate, it appears that [defendant] wants these affidavits to be included." The court then asked that postconviction counsel "file either an amended PC or incorporate it in some fashion" so that the State was given "appropriate notice" and could address the issues in a motion to dismiss. The State was granted leave to withdraw the previously filed motion to dismiss.

¶ 21 On June 28, 2013, postconviction counsel filed a supplemental postconviction petition alleging, *inter alia*, that trial counsel's failure to present witnesses that were available and "could shed light on the credibility of the State's witnesses" was incompetence rather than trial strategy. Counsel also raised a challenge to defendant's conviction for aggravated kidnapping because the aggravating factor, sexual assault, took place in Indiana.

¶ 22 Attached to the supplemental petition in support were the affidavits of Patricia Coleman Bridges,[1] Mary Alford, Thomas Alford, Jimmie Hollies, Darthy Steward and Lisa Lewis. Also attached in support was the "affidavit" of Cassandra Sneed, which was signed by a "notary" and stated in handwriting "Lake County, IN" and "My com exp 5-31-2017." The affidavits of Mary

[1] Although Coleman Bridges' "new" affidavit was stamped by a notary in 2009 and stated that it was "Page 2," it was not attached to the *pro se* postconviction petition.

Alford, Thomas Alford, Jimmie Hollies, Darthy Steward, Lisa Lewis, as well as the Sneed document, were dated 2011 and were not attached to the *pro se* petition.

¶ 23 Cassandra Sneed stated that the victim spent the night of the "incident" at the house in Gary and that at no time did Sneed witness or hear defendant harm the victim "on that particular day or any other." Patricia Coleman Bridges averred that the victim attended a family birthday party, and "was very cozy" with defendant.

¶ 24 Mary Alford, defendant's grandmother, averred that she attended all court dates and drove witnesses to court, but that no one was called to testify for defendant. Mary further averred that she drove Means to court "on two separate occasions to testify and he was not allowed to [testify] due to court being postponed or cancelled." Mary averred that Means became ill with cancer, was not well enough to have his statement notarized, and died.

¶ 25 Michael Alford, defendant's uncle, averred that defendant used to work with him, and that he hoped that defendant could rejoin the family business. Jimmie Hollies, defendant's cousin, averred that when defendant was released from prison, defendant would have a job with the family business. Darthy Steward averred that she had known defendant since he was a child, that she was "appalled" that no one was permitted to testify as to defendant's character at trial, and that in her opinion the victim committed "fraud" at trial due to "extreme jealousy and rejection of marriage."

¶ 26 Lisa Lewis' 2011 affidavit was largely consistent with the affidavit attached to defendant's *pro se* postconviction petition in that she averred that she "just knew" she would be called to testify at trial because she had spoken to the victim that weekend. She further averred that she went to court on "numerous occasions," but was never acknowledged.

¶ 27 The State filed a motion to dismiss, which the circuit court granted. Defendant now appeals.

¶ 28 On appeal, defendant does not contest the dismissal of his petition on the merits; rather, he contends that this cause must be remanded for further second stage proceedings under the Act because postconviction counsel's "purported" 651(c) certificate failed to comply with the requirements of the rule and was "stale." Defendant also contends that the record reveals that postconviction counsel failed to make a "necessary" amendment to his *pro se* petition, *i.e.*, obtain notarized affidavits from defendant and Cassandra Sneed.

¶ 29 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 purpose of the rule is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. An attorney's substantial compliance with the rule is sufficient. *Id*. This court reviews an attorney's compliance with a supreme court rule *de novo*. *Id.* ¶ 17.

¶ 30 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Id*. ¶ 19. Here, postconviction counsel filed a Rule 651(c) 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.*

¶ 31 In the case at bar, defendant contends that he has overcome the presumption because (1) counsel did not certify "that she made the necessary amendment to the *pro se* petition," or that she had concluded that no amendments were necessary to adequately present defendant's *pro se* claims; (2) the certificate filed by counsel became "stale" upon the filing of the supplemental postconviction petition; and (3) counsel failed to shape defendant's arguments into proper legal form by obtaining notarized affidavits from Allen Gavin, defendant and Cassandra Sneed.

¶ 32 Rule 651(c) requires that counsel: (1) consult with the defendant to ascertain his contentions of constitutional deprivations; (2) examine the record of the trial proceedings; and (3) make any amendments to the filed *pro se* petition "necessary" to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Here, counsel specifically stated in her certificate that she had examined the transcripts, letters and exhibits; consulted with defendant by phone and letter to determine his claims; reviewed the documents filed by defendant and the arguments that he wished to present to the court; and that she was filing the Rule 651(c) certificate "without amendment." Inherent in counsel's statement that she was filing the certificate "without amendment" was her conclusion that no amendment to the *pro se* petition filed by defendant was necessary.

¶ 33 To the extent that defendant argues that postconviction counsel should have filed a second rule 651(c) certificate upon the filing of the supplemental postconviction petition and that her failure to do so establishes noncompliance with the rule, we disagree.

¶ 34 Initially, we note that defendant cites no authority in support of his proposition that a Rule 651(c) certificate somehow becomes "stale" with the passage of time. The record reveals

that at a May 2013 hearing, the circuit court noted that there were affidavits in defendant's possession that were not part of the court file and that "it appears that [defendant] wants these affidavits to be included" in the record. The court then asked postconviction counsel to file an amended postconviction petition so that these affidavits would be included in the record. Counsel complied, filing a supplemental petition which included affidavits obtained in 2011 which were not attached to defendant's *pro se* postconviction petition. We are unpersuaded by defendant's argument that counsel was required to file a second Rule 651(c) certificate under the circumstances of this case because the record reveals that she filed the supplemental postconviction petition at the request of the circuit court in order that all the affidavits and documents from potential witnesses were included in the record. The circumstances under which the supplemental postconviction petition was filed in this case, *i.e.*, pursuant to the trial court's request, do not necessarily undermine postconviction counsel's conclusion in the Rule 651(c) certificate that no amendment to defendant's *pro se* postconviction petition was "necessary."

¶ 35 Defendant finally contends that postconviction counsel failed to comply with the requirements of Rule 651(c) because she failed to shape his claims into proper legal form in that she failed to ensure that the "affidavits" of defendant and Cassandra Sneed were notarized and to obtain an affidavit from Allen Gavin.

¶ 36 Under Rule 651(c) there is no requirement that postconviction counsel must amend a defendant's *pro se* petition (*People v. Rials*, 345 Ill. App. 3d 636, 641 (2003)); rather, counsel is only required to investigate and present the defendant's claims (*People v. Pendleton*, 223 Ill. 2d 458, 475 (2006)). Rule 651(c), however, requires that postconviction counsel make any amendments to the *pro se* petition necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec.1, 1984). To that end, postconviction counsel must shape the

defendant's *pro se* claims into "appropriate legal form." *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993).

¶ 37 Here, defendant's *pro se* petition alleged that he was not able to contact Allen Garvin or Clyde's girlfriend but that he told trial counsel that they were potential witnesses. The record reveals that postconviction counsel told the court that defendant gave her a list of witnesses and contains her statements to the court that she spoke to those witnesses. Although defendant contends the omission of Allen Garvin's affidavit supports his claim that counsel provided unreasonable assistance, we presume, based on counsel's compliance with the 651(c) certificate requirement, that counsel made an effort to obtain Garvin's affidavit in support of defendant's postconviction claims, but was unable to do so. See *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25, citing *Johnson*, 154 Ill. 2d at 241.

¶ 38 With regard to Cassandra Sneed, Sneed was not one of the witnesses named in the *pro se* postconviction petition. Her "affidavit," obtained in 2011 during the course of postconviction counsel's investigation, indicates that she lived in the Gary house in April 2002, and leads to the conclusion that she was Clyde Means' girlfriend. This court is not convinced, however, that the notarization of Sneed's and defendant's "affidavits" would have resulted in this cause proceeding to a third-stage evidentiary hearing because the facts contained in those documents, even if notarized, would not support a substantial claim of a constitutional violation. See *Pendleton*, 223 Ill. 2d at 473 (at the second stage of proceedings under the Act, it is the defendant's burden to make a "substantial showing of a constitutional violation").

¶ 39 We cannot agree with defendant's contention that trial counsel was unreasonable because she failed to determine the identity of Means' girlfriend and then present her testimony at trial when Sneed's assertion that defendant did not harm the victim inside the house in Gary would

not necessarily have contradicted the victim's testimony as the victim testified at trial that she complied with defendant's instructions so that defendant would not kill her. See *People v. Wheeler*, 401 Ill. App. 3d 304, 312-13 (2010) (to establish ineffective assistance of counsel, a defendant must prove counsel's performance fell below an objective standard of reasonableness and that this substandard performance prejudiced the defendant by creating a reasonable probability that, but for counsel's errors, result of trial would have been different).

¶ 40 With regard to defendant's statement, the details contained in defendant's "affidavit," that he struck the victim in the face approximately three times as Gavin drove them to Indiana, that he and the victim engaged in sexual intercourse in the car, and that they spent the night in Gary, are largely consistent with the victim's testimony. Even if defendant's affidavit was notarized, his belief that the sexual contact with the victim was consensual and that he did not kidnap her are self-serving, and given the victim's testimony at trial, contradicted by the record. To the extent that defendant believed that he was denied the effective assistance of counsel by trial counsel's failure to investigate and present the testimony of certain witnesses at trial, the pleading of that claim rests upon the affidavits of the potential witnesses rather than that of defendant. See *People v. Johnson*, 183 Ill. 2d 176, 192 (1998) (in order to support a claim of ineffective assistance of counsel for failure to investigate and call a witness, a defendant must tender an affidavit from the individual who would have testified). Thus, because defendant's affidavit, even if notarized, did not establish a substantial claim of a constitutional violation under the facts of this case, we find that counsel's failure to ensure defendant's affidavit was notified was not a violation of Rule 651(c). Accordingly, we must give effect to postconviction counsel's official representation that she complied with the requirements of Rule 651(c). See *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009).

¶ 41 Ultimately, because defendant has failed to rebut the presumption created by the filing of a Rule 651(c) certificate by establishing that counsel did not substantially comply with the duties required by Rule 651(c) (see *Profit*, 2012 IL App (1st) 101307, ¶ 19), the trial court's dismissal of defendant's petition was proper.

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

¶ 43 Affirmed.