

2017 IL App (1st) 161442-U

No. 1-16-1442

December 29, 2017

Second Division

**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 DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 4949
	)	
MONTATE THOMAS,	)	Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge, presiding.

---

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.  
Justices Pucinski and Mason concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's second-stage dismissal of defendant's postconviction petition is affirmed where defendant failed to attach a notarized affidavit in support of his petition, and the record shows that postconviction counsel provided reasonable assistance pursuant to Supreme Court Rule 651(c).

¶ 2 Montate Thomas, the defendant, appeals the trial court's order granting the State's motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the trial court erred in

dismissing his petition because he made a substantial showing that trial counsel was ineffective for failing to call a witness to corroborate defendant's trial testimony. We affirm.

¶ 3 Following a bench trial, defendant was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2006)), and sentenced to nine years' imprisonment. The evidence at trial established that at 3:51 a.m. on November 11, 2007, Lansing police detective Barajas responded to a dispatch regarding a break-in to a Dodge Charger located in an apartment complex parking lot.<sup>1</sup> The dispatch indicated the offenders were leaving the scene in a dark colored Dodge vehicle. Upon driving to the scene, Barajas observed a gray car matching the description of the offenders' vehicle and curbed the vehicle. Defendant was driving the vehicle, and Barajas detained both defendant and his passenger, Joshua Humes. A different officer brought the owner of the Charger and another witness to Barajas's location, and both individuals identified defendant and Humes as the offenders involved in the break-in. Defendant and Humes were both taken into custody. Barajas thereafter conducted an inventory search on defendant's vehicle, and found an assault rifle in the trunk.

¶ 4 Later that day, defendant gave a statement to Barajas and Officer Klausner. Barajas read the statement in open court. In relevant part, the statement read,

“At about 1 a.m. my cousin, Joshua, called me on my phone to pick him up. I was at a party in Chicago. After the party I drove to Joshua's house. He also lives in Chicago.

At Joshua's house he gave me a chrome assault rifle. I took it from him and we agreed that I would pay him for it later. The gun was now mine.

---

<sup>1</sup> Detective Barajas's first name does not appear in the record. He is referred to throughout only as “Detective Barajas.”

I was driving home with my gun in my car to see my wife and kids. It was now about 3 a.m. My cousin Joshua, who I got the gun from, was in my car and he asked me to stop and pull around to an apartment complex parking lot. I didn't want to but I did anyway. I wish I didn't.

My cousin Joshua then got out of my car and broke into a black Charger in the parking lot. I was in the area a few parking spaces away. My cousin called me on the phone again and said come over to the car he was in. I went over and saw my cousin in the black Charger. I then broke up an argument between my cousin and the owner of the vehicle or the owner of the Charger, sorry. My cousin and I left in my car, and that's when we were pulled over.

I am very sorry for what I did. No promises or threats have been used against me.”

¶ 5 Defendant signed the statement. He had prior convictions for attempted first degree murder and residential burglary.

¶ 6 Defendant acknowledged signing the statement, but testified that he made it up in order to protect his cousin, Humes, who was out on parole at the time of the incident. Defendant claimed that the police made up various parts of the statement, and the gun actually belonged to Humes. He stated Humes put the rifle in the trunk of defendant's car. Defendant did not touch or possess it, but instead “took the rap” for Humes as a favor.

¶ 7 The trial court found defendant guilty of violating the AHC statute and sentenced him to nine years' imprisonment. In finding him guilty, the trial court found defendant's testimony was not credible. On direct appeal, defendant argued, *inter alia*, that trial counsel was ineffective for

putting on a defense that conceded his guilt and failing to argue that his prior conviction for attempted first degree murder did not constitute a forcible felony. This court affirmed his conviction in *People v. Thomas*, 407 Ill. App. 3d 136 (2011). This court held that attempted first degree murder is a forcible felony, (*Id.* at 140) and counsel pursued a rational defense that defendant did not own the gun and never intended to exercise control over it. *Id.* at 141. We held that the case came down to a credibility determination, and the trial court did not find defendant credible. *Id.* The Illinois Supreme Court subsequently denied defendant's petition for leave to appeal. *People v. Thomas*, 351 Ill. Dec. 8 (2011).

¶ 8 On August 6, 2010, while defendant's direct appeal was pending, he filed a *pro se* postconviction petition, alleging trial counsel failed to investigate his claim that the rifle recovered from his vehicle belonged to Humes. In support of his *pro se* petition, defendant had attached Humes's statement, entitled "Affidavit" and dated February 12, 2010, which stated that the gun recovered from the vehicle belonged to him, not defendant. Specifically, Humes's statement read, "I truely [*sic*] apologize for letting [defendant] take the fall for a crime he did not commit. The gun in question was not his, but mine. I put the gun in his car and when the police found the gun and asked who [*sic*] gun was it I froze up and let them put it on [defendant], I hope one day [defendant] forgive me for what I've done." The statement was signed by Humes, but was not notarized.

¶ 9 Defendant also attached his own unnotarized "affidavit," dated June 26, 2010. In the statement, defendant stated that he told his attorney that Humes was willing to testify, and his attorney responded, "I don't need his testimony I'll win this case without him," which gave

defendant the “false hope” that defendant “was going to win this case.” The statement further read that trial counsel knew the rifle belonged to Humes.

¶ 10 On August 27, 2010, the trial court dismissed defendant’s petition, reasoning that it lacked jurisdiction while his direct appeal was pending. Defendant appealed the dismissal of his petition and, on May 23, 2011, this court ordered a summary remand, instructing the trial court to advance defendant’s petition for second stage proceedings pursuant to 725 ILCS 5/122-2.1(b) (West 2010) and *People v. Harris*, 224 Ill. 2d 115, 126-32 (2007).

¶ 11 Pursuant to the May 23, 2011, order, the trial court advanced defendant’s petition and appointed the public defender’s office to represent him. On May 1, 2015, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he consulted with defendant by mail, phone, and in person to ascertain his contentions of deprivation of his constitutional rights; he obtained and read the trial transcript; and was prepared to submit a supplemental postconviction petition to amend defendant’s *pro se* petition.

¶ 12 On May 1, 2015, with the assistance of postconviction counsel, defendant filed a supplemental petition for postconviction relief under the Act to amend his original claims, arguing trial counsel was ineffective, among other claims. Relevant to this appeal, defendant alleged that counsel was ineffective for failing to call Joshua Humes as a defense witness to “rebut the presumption that [defendant] knowingly possessed the assault rifle recovered in his car during the incident in question.”

¶ 13 The State moved to dismiss defendant’s petition, arguing, in relevant part, that defendant failed to attach a notarized affidavit in support of his petition, and that his claim of ineffective assistance of counsel for failing to call Humes as a witness lacked merit.

¶ 14 On May 20, 2016, the court granted the State’s motion to dismiss defendant’s petition, finding defendant failed to demonstrate ineffective assistance of counsel.<sup>2</sup> This appeal followed.

¶ 15 On appeal, defendant claims that the trial court erroneously dismissed his petition because he made a substantial showing that defense counsel was ineffective for failing to call Humes as a witness to corroborate defendant’s testimony that the gun belonged to Humes.

¶ 16 The Act provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). At the first stage, the trial court must review the postconviction petition and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed within 90 days at the first stage, counsel is appointed and it advances to the second stage. 725 ILCS 5/122-2.1(a), (b) (West 2010).

¶ 17 The instant case involves the second stage of postconviction proceedings. At the second stage, the dismissal of a petition is warranted only when the allegations in the petition, liberally construed in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At the second stage of postconviction proceedings, the trial court is concerned merely with determining whether the petition’s allegations “sufficiently demonstrate a constitutional infirmity that would necessitate

---

<sup>2</sup> The record contains a purported written order from the trial court, which states, in pertinent part, “[T]he court further finds that (the [*sic*] ineffective assistance of counsel claim raised and presented by petitioner is frivolous and patently without merit. However, the court also finds that petitioner has made a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings. Accordingly, the court grants respondent’s motion to dismiss in part and denies said motion in part.” However, the “order” is not filestamped, nor is it signed and dated by the trial court, and is rife with error.

Neither party addresses the discrepancy between this purported order and the report of proceedings, in which the trial court unambiguously dismissed defendant’s petition. Thus, it is unclear, based on the record, whether the written order was filed or even authored by the trial court. Regardless, because a court’s oral pronouncement controls over a conflicting written order, the court’s oral ruling dismissing defendant’s petition controls. See *People v. Maxey*, 2015 IL App (1st) 140036, ¶ 46.

relief under the Act.” *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). At this stage, “the defendant bears the burden of making a substantial showing of a constitutional violation” and “all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true.” *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review *de novo* the trial court’s dismissal of defendant’s postconviction petition without an evidentiary hearing (*id.*), and we may affirm the judgment below on any basis supported by the record. *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008).

¶ 18 Before we reach the merits of defendant’s ineffective assistance claim regarding trial counsel, we must first consider whether his petition is procedurally sufficient to proceed under the Act. The Act requires both a verification affidavit and supporting evidence to be attached to the petition. 725 ILCS 5/122-1(b) (West 2010) (noting that a proceeding is commenced by the filing of “a petition \* \* \* verified by affidavit”); 725 ILCS 5/122-2 (West 2010) (stating that the “petition shall have attached thereto affidavits, records, or other evidence supporting its allegations”). At issue here is the supporting evidence requirement under section 122-2 of the Act. The State argues that defendant’s petition was properly dismissed at the second stage because defendant failed to attach supporting evidence to his petition as required by section 122-2 of the Act, given that Humes’s statement was not notarized and, additionally, failed to assert that Humes was willing to testify as to the contents of his statement.

¶ 19 We agree with the State that defendant failed to include with his petition the requisite supporting evidence as required by section 122-2 of the Act. The purpose of an evidentiary affidavit is to (1) contain a factual basis to demonstrate the petition’s allegations are capable of objective corroboration, and (2) “identify with reasonable certainty the sources, character, and

availability of the alleged evidence supporting the petition’s allegations.” *People v. Allen*, 2015 IL 113135, ¶ 32 (quoting *People v. Delton*, 227 Ill. 2d 247, 254 (2008)). Although defendant attached a signed statement from Humes, which stated that the recovered weapon belonged to Humes, it was not notarized. Therefore, the statement is not an affidavit. See *Allen*, 2015 IL 113135, ¶ 31 (“An affidavit consists of a ‘statement sworn to before a person who has authority under the law to administer oaths.’ ”) (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002)). While lack of notarization is insufficient for a first-stage summary dismissal, the State “may challenge this nonjurisdictional procedural defect at the second stage of proceedings,” and the court may dismiss defendant’s petition upon the State’s motion on this basis. *Allen*, 2015 IL 113135, ¶¶ 34-35. Without the requisite notarization, we find that the court properly dismissed defendant’s petition at the second stage. See e.g., *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992) (when the defendant attacks competency of trial counsel in postconviction petition for failure to call or contact certain witnesses, defendant must attach affidavits from those witnesses).

¶ 20 Defendant alternatively argues that his postconviction counsel rendered unreasonable assistance for failing to amend his petition to include a notarized statement from Humes. Defendant contends that Illinois Supreme Court Rule 651(c) requires counsel to make any necessary amendments to defendant’s *pro se* petition for an adequate presentation of his contentions and, here, postconviction counsel’s failure to obtain Humes’s notarized affidavit resulted in a failure to cure a defect in defendant’s petition in violation of Rule 651(c).

¶ 21 We review the interpretation of a supreme court rule, including whether counsel fulfilled his duties under Rule 651(c), *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). At second-



stage postconviction proceedings, an indigent defendant is entitled to representation by appointed counsel under the Act. 725 ILCS 5/122-4 (West 2010); *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Postconviction counsel is required to provide defendant with a “reasonable level of assistance.” *Lander*, 215 Ill. 2d at 583 (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). Pursuant to Rule 651(c), postconviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant’s contentions. *Pendleton*, 223 Ill. 2d at 472. Compliance with these duties may be shown by a certificate filed by postconviction counsel. Ill. S.Ct. R. 651(c) (eff. Feb. 6, 2013); *Lander*, 215 Ill. 2d at 584. Counsel’s substantial compliance with Rule 651(c) is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. A Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *Id.* at ¶ 19.

¶ 22 Here, counsel filed a Rule 651(c) certificate; therefore, we presume that counsel provided defendant with the reasonable level of assistance required by the rule. The burden is on defendant to rebut this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19. Defendant has failed to meet that burden. While defendant claims postconviction counsel rendered unreasonable assistance by failing to include Humes’s notarized affidavit, we cannot say counsel was unreasonable based on the record before us.

¶ 23 The record reveals that, on numerous court dates, counsel informed the trial court that he met with defendant and received and read the record. It further reveals that counsel repeatedly informed the court that his investigation was pending, and he was attempting to locate and

interview various witnesses associated with the case. Postconviction counsel later filed a supplemental petition to amend defendant's *pro se* claims. It is not clear from the record which witnesses, if any, postconviction counsel was able to contact. However, at one hearing, counsel stated, "Judge, I've got the record but there is a witness who we are trying to locate in this matter that is part of the petition," indicating that counsel was attempting to locate Humes, who is the only witness named throughout the petition.

¶ 24 Thus, as a whole, the record demonstrates that counsel met with defendant, conducted an investigation, attempted to contact at least one witness, and ultimately amended defendant's *pro se* petition with a supplemental petition. Based on this information, we cannot say that counsel acted unreasonably in failing to attach Humes's notarized affidavit. The record does not clearly and unequivocally rebut the presumption that counsel made a concerted effort to obtain the necessary affidavit. Rather, "the record here is not so clear, and therefore the presumption that defendant's postconviction counsel made a concerted effort to obtain affidavits in support of the claims is not rebutted." *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 22. Accordingly, we reject defendant's argument that he was denied reasonable assistance of postconviction counsel under Rule 651(c).

¶ 25 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.