

2018 IL App (1st) 151949-U

No. 1-15-1949

Order filed May 18, 2018

Fifth 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. 04 CR 11607
)	
WILLIAM JOHNSON,)	Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of the defendant's postconviction petitions was vacated and the cause remanded for compliance with Supreme Court Rule 651(c).

¶ 2 Defendant William Johnson appeals the second-stage dismissal of his petitions for postconviction relief. Defendant contends that the dismissal was erroneous because he was entitled to an evidentiary hearing on his claims of ineffective assistance of appellate counsel in his direct appeal and denial of his constitutional right to testify at trial. Defendant further

contends that his appointed postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 3 Defendant's contention that postconviction counsel's failure to comply with Rule 651(c) is dispositive of this appeal. Therefore, we do not reach the remaining issues raised by defendant.

¶ 4 **BACKGROUND**

¶ 5 Defendant and co-defendant Jose Torres were indicted for multiple offenses including first degree murder, armed robbery, attempted first degree murder, and home invasion. Mr. Torres entered into a plea agreement with the State. In exchange for his testimony against defendant, Mr. Torres pleaded guilty only to home invasion for which he received a sentence of 10 years' imprisonment.

¶ 6 The evidence presented at defendant's trial is detailed in this court's opinion in defendant's direct appeal. See *People v. Johnson*, 408 Ill. App. 3d 157 (2010). Briefly, Mr. Torres was the State's main witness against defendant. While the other witnesses and the physical evidence corroborated Mr. Torres' testimony, none of those witnesses made positive identifications of defendant. Only Mr. Torres' testimony placed defendant at the scene of the offenses. During deliberations, the jurors sent a note to the trial court stating that they could not decide defendant's presence at the scene solely on Mr. Torres' testimony. Ultimately, the jury found defendant guilty of home invasion and armed robbery.

¶ 7 The trial court imposed sentences of 10 years' imprisonment for home invasion, enhanced by a 15-year sentence for committing the offense while armed with a firearm, and a 15-year sentence for armed robbery, the sentences to be served consecutively.

¶ 8 The defendant appealed to this court claiming errors in the *voir dire* conducted by the trial court. This court affirmed finding any error procedurally defaulted. See *Johnson*, 408 Ill. App. 3d at 173.

¶ 9 POSTCONVICTION PROCEEDINGS

¶ 10 Defendant sought relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). In his *pro se* petition, defendant raised multiple claims of trial court error, ineffective assistance of defense counsel and ineffective assistance of appellate counsel. Relevant to this appeal, defendant claimed that (1) trial counsel was ineffective for failing to impeach Mr. Torres with statements he made at the 2006 sentencing hearing of Sengaroun Sayoudone (sentencing transcript) (*People of the State of Illinois v. Sengaroun Sayoudone*, No. 04-10597 (Cook County Cir. Ct.)), and (2) appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to impeach Mr. Torres' testimony.

¶ 11 Defendant's petition advanced to the second-stage of postconviction proceedings, and postconviction counsel was appointed. Counsel filed a supplemental postconviction petition and a Rule 651(c) certificate. The State filed a motion to dismiss the *pro se* petition and the supplemental petition.

¶ 12 After hearing argument, the trial court granted the motion to dismiss. This timely appeal followed.

¶ 13 ANALYSIS

¶ 14 I. Standard of Review

¶ 15 Compliance with Rule 651(c) is reviewed *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17 (compliance with a supreme court rule is reviewed *de novo*).

¶ 16

II. Discussion

¶ 17 At the second stage of postconviction proceedings, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2012). Since the right to counsel in postconviction proceedings is wholly statutory, a defendant is entitled only to the level of assistance required by the Act. *People v. Lander*, 215 Ill. 2d 577, 583-84 (2005). The Act provides for a reasonable level of assistance. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

¶ 18 “To assure the reasonable assistance required by the Act, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. [Citation.] Under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (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 petitioner’s contentions.” *Perkins*, 229 Ill. 2d at 42.

¶ 19 Compliance with Rule 651(c) is mandatory and may be demonstrated by a certificate filed by the defendant’s postconviction counsel. *Perkins*, 229 Ill. 2d at 50. “A ‘certificate’ is generally defined as ‘[a] written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with.’ ” *Perkins*, 229 Ill. 2d at 50 (quoting Black’s Law Dictionary 225 (6th ed. 1990)). When postconviction counsel files a Rule 651(c) certificate, counsel is officially representing to the court that the duties listed in the certificate have been fulfilled. *Perkins*, 229 Ill. 2d at 50. Where postconviction counsel files a Rule 651(c) certificate, a rebuttable presumption exists that the defendant received the representation required by the rule. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 16.

¶ 20 Postconviction counsel's Rule 651(c) certificate stated as follows:

“In compliance with Supreme Court Rule 651(c), I have consulted with petitioner either by mail, on the telephone, or in person to ascertain his contentions of deprivation of constitutional rights. I have read and studied the exhibits attached to the pro se petition.

I have examined the appellate decision, (1-09-0879,, [sic] decided Nov. 24, 2010).

I have prepared a pleading which is necessary to adequately present, preserve and supplement Petitioner's pro se claims.”

¶ 21 According to the certificate, counsel reviewed or examined only defendant's *pro se* petition and the exhibits attached, and the appellate decision in defendant's direct appeal, leaving out any reference to having reviewed the record of the trial court proceedings. See *Blanchard*, 2015 IL App (1st) 132281, ¶ 18 (noting that the record is arranged in three sections: the common law record, the report of proceedings, and the trial exhibits). On its face, the certificate of compliance failed to comply with Rule 651(c)'s requirement to examine the record of the trial court proceedings.

¶ 22 The State correctly notes that substantial compliance with Rule 651(c) is sufficient. *Profit*, 2012 IL App (1st) 101307, ¶ 18. The Rule 651(c) certificate does not have to mirror the exact language of the rule to constitute substantial compliance (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and the filing of a poorly drafted certificate can be harmless error, if the record demonstrates that counsel was otherwise competent and fulfilled the required duties (*People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 59). Even the failure to file the certificate is

harmless error if the record demonstrates that counsel adequately fulfilled the required duties. *Lander*, 215 Ill. 2d at 584.

¶ 23 “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.” *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15. “Substantial compliance is such that assumes the beneficial effect of the rule will be achieved.” *People v. Chavez*, 2013 IL App (4th) 120259, ¶ 20.

¶ 24 The State argues that the record demonstrates that postconviction counsel examined the record of the trial court proceedings. The State relies on references in the record of the postconviction proceedings that postconviction counsel had the trial court record in his possession. We are asked to infer from the fact of possession that counsel examined the record. To examine something is to “inspect closely.” New Merriam-Webster Dictionary 261 (1989). None of those references indicate that counsel “examine[d]” the trial court record as required by the rule.

¶ 25 The State then relies on the fact that postconviction counsel’s response to the State’s motion to dismiss contained references to the trial transcripts, and he had attached exhibits from the common law record. The State notes as well that postconviction counsel raised defendant’s claim that trial counsel was ineffective for failing to impeach Mr. Torres with the sentencing hearing transcript. The State points out that counsel even advanced an alternative argument that the discovery of the sentencing transcript constituted new evidence.

¶ 26 For substantial compliance, Rule 651(c) does not require that appointed postconviction counsel examine the entirety of the defendant’s trial proceeding. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). Counsel is required to examine as much of the transcript of proceedings as is

necessary to adequately present and support those constitutional claims raised by the defendant. *Davis*, 156 Ill. 2d at 164.

¶ 27 In his *pro se* petition, defendant raised the issue of appellate counsel's failure to raise trial counsel's ineffectiveness for failing to impeach Mr. Torres with the sentencing transcript. Mr. Torres' testimony was a significant factor in defendant's conviction. Thus, the issue of Mr. Torres' credibility was critical to the success of defendant's petition for postconviction relief. Yet, during the hearing on the State's motion to dismiss the postconviction petitions, postconviction counsel argued that appellate counsel could not have raised trial counsel's ineffectiveness in failing to impeach Mr. Torres with the sentencing transcript because the sentencing transcript was not part of the record on direct appeal. Even after the trial court pointed out that the sentencing transcript was in the record, postconviction counsel continued to argue the point.

¶ 28 The sentencing transcript is contained in volume two of the original common law record at C 484-499. We note, however, that the sentencing transcript exhibit attached to counsel's supplemental petition and marked as "C 148-155" in volume one of the postconviction common law record, does not bear the original common law record cite, indicating that the exhibit did not come from the original trial court proceedings. Likewise, other than the sentencing transcript, the only other exhibit attached to the supplemental petition that was contained in the common law record was trial counsel's supplemental answer to discovery. However, the copy of the answer attached to the supplemental petition is unsigned, whereas the answer in the common law record is signed by trial counsel.

¶ 29 Therefore, the fact that postconviction counsel cited to portions of the report of proceedings in the supplemental petition does not indicate, let alone establish, that he examined the common law record. As defendant points out, the sentencing transcript or parts thereof could be found in the common law record at two different places, and therefore, it would have been hard to overlook.

¶ 30 The Rule 651(c) certificate did not state that postconviction counsel examined the record of the trial proceedings or any portion of it. The record does not reflect substantial compliance in light of counsel's insistence, erroneously, that a significant piece of evidence supporting defendant's claim of ineffectiveness of appellate counsel was not in the record. Instead, postconviction counsel raised a claim of innocence based on alleged newly discovered evidence, namely, the sentencing transcript. That argument is completely rebutted by the record. See *Davis*, 156 Ill. 2d at 164 (Rule 651(c) requires counsel to review those portions of the record necessary to present and support the claims raised by defendant in the *pro se* petition). The defendant raised the ineffective assistance of appellate counsel in his *pro se* petition. By maintaining that the sentencing transcript was not in the trial record and on that basis raising a claim of newly discovered evidence, clearly rebutted by the record, we cannot conclude that postconviction counsel substantially complied with his duty to present and support defendant's claims.

¶ 31 Neither the certificate of compliance nor the record established that postconviction counsel substantially complied with the mandatory duty under Rule 651(c) to "examine the record of the trial court proceedings." *Perkins*, 229 Ill. 2d at 42. Counsel's failure to comply with that duty led to his failing to "make any amendments to the *pro se* petition necessary for an

adequate presentation of the petitioner's contentions." *Perkins*, 229 Ill. 2d at 42. Therefore, postconviction counsel failed to provide reasonable assistance to defendant as required by the Act.

¶ 32 We now must determine whether remand is necessary. See *People v. Schlosser*, 2017 IL App (1st) 150355, ¶¶ 39, 41-42.

¶ 33 In *Schlosser*, this court relied on the supreme court's opinion in *People v. Suarez* 224 Ill. 2d 37 (2007), wherein the court held that "[e]ven if the allegations in a petition were insufficient to raise a constitutional issue, it is error to dismiss a postconviction petition on the pleadings where there has been inadequate representation by counsel." *Schlosser*, 2017 IL App (1st) 150355, ¶ 42 (citing *Suarez* 224 Ill. 2d at 47). " '[R]emand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record and amendment of the *pro se* petition regardless of whether the claims raised in the petition had merit.' " *Schlosser*, 2017 IL App (1st) 150355, ¶ 42 (quoting *Suarez*, 224 Ill. 2d at 47). The reviewing court " 'cannot simply presume, however, that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c).' " *Schlosser*, 2017 IL App (1st) 150355, ¶ 43 (quoting *People v. Johnson*, 154 Ill. 2d 227, 246 (1993)).

¶ 34 In finding remand necessary, the court in *Schlosser* explained that "[u]nder Rule 651(c), the issue is not whether the defendant's claims have merit or whether he can later establish substantial prejudice." *Schlosser*, 2017 IL App (1st) 150355, ¶ 44 (citing the court's prior opinion in *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 32). "The problem is that, when postconviction counsel does not complete the few duties imposed by the rule, the limited right to

counsel conferred by the Act becomes illusory.” *Schlosser*, 2017 IL App (1st) 150355, ¶ 44; see *Blanchard*, 2015 IL App (1st) 132281 (remand for filing a new certificate and hearing necessary where postconviction counsel certified that she examined the trial record but did not raise a claim in the supplemental petition because she erroneously believed the exhibit supporting the claim was not in the record).

¶ 35

CONCLUSION

¶ 36 The dismissal of defendant’s postconviction petitions is vacated. The cause is remanded to the trial court to allow postconviction counsel to comply with the certification requirements of Rule 651(c), by filing a supplemental certificate of compliance. The supplemental certificate must reflect counsel’s examination of the record of the trial court proceedings relative to defendant’s claim of ineffective assistance of counsel for failing to impeach Mr. Torres’ testimony and the failure to raise the claim on direct appeal. Upon compliance with Rule 651(c), the trial court shall reconsider defendant’s *pro se* petition and supplemental petition. See *Blanchard*, 2015 IL App (1st) 132281, ¶ 19.

¶ 37 Vacated and remanded with directions.