

2018 IL App (1st) 153352-U

No. 1-15-3352

Order filed May 17, 2018

Fourth 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. 07 CR 11150
)	
DOWAUN ANDREW,)	Honorable
)	Domenica A. Stephenson,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's second-stage dismissal of defendant's postconviction petition is affirmed over his contention that his postconviction counsel was unreasonable for failing to amend his petition to include a verification affidavit.

¶ 2 Defendant, Dowaun Andrew¹, appeals the trial court's second-stage dismissal of his petition filed under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West

¹ Although the cover page of the common law record and the report of proceedings refer to defendant as Andrew Dowaun, in his brief defendant points out that his name is Dowaun Andrew.

2012)). He contends that he received unreasonable assistance from his postconviction counsel because counsel failed to amend his petition to include a verification affidavit as required by the Act. We affirm.

¶ 3 Following a jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1)-(2) (West 2006)), and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)). He was sentenced to consecutive, respective terms of 60 and 10 years' imprisonment. On direct appeal, this court affirmed defendant's convictions over his contention that he was denied a fair trial when the State elicited hearsay testimony concerning his identification as the offender. See *People v. Andrew*, 2012 IL App (1st) 100173-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised on appeal. See *Andrew*, 2012 IL App (1st) 100173-U, ¶¶ 3-10.

¶ 4 The evidence at trial showed that, on July 27, 2006, the victim, Andre Lucas, and his immediate family, rushed to a nearby Walgreens upon hearing that his brother, Deshawn, was being "jumped" by a group of people. When they arrived, a fight broke out between the Lucas family and a group of 10 other people. Finding themselves outnumbered, the family ran home. Shortly thereafter, Andre stood on a corner near his home with his sister Velma's boyfriend, Dupry Steel, while Velma was on the porch. Sharonda Jackson, who was also living at the house, stood in the doorway. As Andre and Steel stood on the street corner, they were approached by a man, later identified as Dajuan Trotter, on a bicycle. Trotter asked the pair if they had seen his brother. Jackson heard Trotter refer to his brother as "Darius," whereas Velma heard him refer to his brother as "D Dub" or "B Dub." Trotter then yelled "bust," and another man, later identified

as defendant, emerged and fired his gun five times at Andre and Steel. A bullet struck Andre in the chest, killing him.

¶ 5 Chicago police officer Parks was assigned to investigate the shooting. When he arrived on the scene, investigators told him about the nickname “D dub.” He was also given a description of the shooter as medium complected, 5’9” tall, and weighing 160 pounds.

¶ 6 In September 2006, Chicago police officer Arteaga was assigned to investigate the homicide of Andre Lucas. When he received the assignment, he was provided the nickname “D dub” as a possible shooter or offender in the case. His investigation led him to an individual named Cedric Hammond, who informed him on September 12, 2006, that defendant went by the nickname “D dub.” Arteaga also interviewed eyewitnesses Steel and Deshawn, and based on those interviews, he put together a photo array with six photographs, one of which was defendant. Arteaga showed the photo array to Velma and Steel, and they each identified defendant as the shooter.

¶ 7 On April 26, 2007, Sharonda went to the police station where she identified defendant from a lineup as the shooter. She testified that she saw the face of the shooter that night and that she had never seen defendant prior to the night in question. When confronted with a prior statement that she had provided to police, she acknowledged that it indicated that she did not get a good look at the shooter’s face.

¶ 8 After argument, the jury found defendant guilty on two counts of first degree murder and one count of aggravated discharge of a firearm. The trial court merged the two counts for first degree murder and sentenced defendant to 60 years’ imprisonment to run consecutively with a 10 year term for the aggravated discharge of a firearm count.

¶ 9 On direct appeal, defendant's appellate counsel challenged his convictions, arguing that the State elicited hearsay testimony concerning his identification as the offender. Defendant also maintained that the error was compounded by the trial court not providing a specific limiting instruction to the jury as to the purpose of the testimony at issue and that his trial counsel was ineffective for not requesting such an instruction. *Andrew*, 2012 IL App (1st) 100173-U, ¶ 20. This court affirmed his convictions.

¶ 10 On November 5, 2012, defendant filed a *pro se* postconviction petition alleging that trial counsel was ineffective for (1) failing to call Shirley Gist or Tonya Gist as alibi witnesses; (2) failing to investigate Cedric Hammond to determine if he provided the nickname "D-Dub" to the police; and (3) failing to file a motion to suppress identification. In support of his petition, defendant attached two pages of his trial transcript, his own notarized evidence affidavit, and a handwritten, unsigned affidavit purportedly from Shirley Gist. Defendant's petition did not include a notarized verification affidavit.

¶ 11 The record indicates that, initially, the trial court did not receive defendant's petition. In August of 2013, defendant appeared before the court and provided proof that, on November 5, 2012, he filed something in the mail. On August 28, 2013, the court allowed defendant to file his petition and docketed it based on an assumed filing date of November 5, 2012. However, because more than 90 days had elapsed, the court appointed counsel to represent defendant during postconviction proceedings.

¶ 12 At a series of three status hearings, between March 2014 and August 2014, appointed counsel informed the trial court that she (1) spoke with defendant, (2) met with two witnesses

and an investigator was working on locating a third, and (3) spoke with defendant's trial counsel and was working on locating one final witness.

¶ 13 On September 25, 2014, appointed counsel filed a supplemental petition for postconviction relief. The supplemental petition incorporated the claims in defendant's *pro se* petition, and presented a new claim that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal. Attached to the supplemental petition was a new, notarized affidavit from Shirley Gist, as well as the previous attachments. The petition also included a certificate from counsel, in accordance with Illinois Supreme Court Rule 651(c), which stated that she consulted with defendant to ascertain his contentions, she examined the record of the proceedings at trial, and she made an amendment to the petition. The supplemental petition did not include a notarized verification affidavit from defendant.

¶ 14 On June 10, 2015, the State filed a motion to dismiss defendant's postconviction petition. The State argued that defendant's petition should be dismissed because it was not accompanied by a verification affidavit from defendant as required by section 122-1(b) of the Act. The State also argued that the petition should be dismissed on the merits because defendant failed to establish that he was provided ineffective assistance by either his trial or appellate counsel.

¶ 15 On October 21, 2015, the trial court granted the State's motion to dismiss after finding that defendant had failed to make a substantial showing that he was denied the effective assistance of trial or appellate counsel. The court found that defendant did not show that counsel was ineffective for failing to call Shirley or Tonya Gist as alibi witnesses because: (1) Shirley Gist's affidavits did not provide defendant with an alibi and, therefore, did not support his claim, (2) petitioner failed to provide either an affidavit for Tonya Gist, or sufficient proof that she was

deceased, and (3) trial counsel's conduct was strategic, and not challengeable under the *Strickland* standard. The court also found that defendant could not show that his trial counsel was ineffective for failing to investigate Cedric Hammond because defendant did not comply with the Act by including an affidavit from Hammond, nor did he provide any information regarding what Hammond's testimony would have been and how it would have helped his case. Finally, the court concluded that defendant's counsel was not ineffective for failing to file a motion to suppress identification because defendant provided no facts to suggest that three eyewitnesses identified him using procedures that were unduly suggestive. The court also dismissed defendant's claim that his appellate counsel was ineffective for failing to raise these issues on direct appeal because (1) defendant failed to show that appellate counsel's decision not to raise the three issues was patently erroneous, and (2) two of the issues were outside of the record and not appropriate issues for direct appeal. Defendant appeals.

¶ 16 Under the Act, a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is a collateral attack on the judgment rather than a direct appeal from the conviction. *Tate*, 2012 IL 112214, ¶ 8. A postconviction "proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122-1(b) (West 2012). Where, as here, a postconviction petition does not implicate the death penalty, a circuit court adjudicates the petition in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

¶ 17 At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether “ ‘the petition is frivolous or patently without merit.’ ” *Hodges*, 234 Ill. 2d at 10 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2006)). If, as here, the petition is not dismissed within the 90-day period, the circuit court must advance the petition to the second stage and order the petition docketed for further consideration. 725 ILCS 5/122-2.1(a), (b) (West 2012); *People v. Suarez*, 224 Ill. 2d 37, 44 (2007). At the second stage, an indigent defendant may be appointed counsel (725 ILCS 5/122-4 (West 2012)), and the State, as respondent, enters the litigation (725 ILCS 5/122-5 (West 2012)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make “a substantial showing of a constitutional violation.” *People v. Edwards*, Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. *Id.*

¶ 18 In this court, defendant does not challenge the dismissal of his petition on the merits. Rather, he argues that his postconviction counsel provided unreasonable assistance because she failed to file a verification affidavit as is required by Section 122-1(b) of the Act. Defendant requests that we remand his case to the trial court for appointment of new counsel to amend his petition.

¶ 19 There is no constitutional right to counsel in postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). Because the right to counsel in such proceedings is wholly statutory (see 725 ILCS 5/122-4 (West 2012)), petitioners are entitled only to the level of assistance provided by the Act, which has been determined to be a “ ‘reasonable level of assistance.’ ” *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). To that end, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires

that the record in postconviction proceedings demonstrate that counsel “has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Counsel’s duty is to shape defendant’s claims into proper legal form and present them to the court. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). An adequate presentation of defendant’s claims necessarily includes attempting to overcome procedural bars that result in dismissal of a petition if not rebutted. *Id.*

¶ 20 The Act requires that a petition be verified by affidavit. 720 ILCS 5/122-1(b) (West 2012)). “The verification affidavit, ‘like all pleading verifications, confirms that the allegations are brought truthfully and in good faith.’ ” *People v. Hommerson*, 2014 IL 115638, ¶ 9 (quoting *People v. Collins*, 202 Ill. 2d 59, 67 (2002)). Lack of a verification affidavit is a procedural defect that may properly be raised by the State at the second stage of postconviction proceedings. *Hommerson*, 2014 IL 115638, ¶ 13.

¶ 21 Here, counsel filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received the representation required by the rule. See *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23 (“The filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act.”). It is defendant’s burden to overcome this presumption by demonstrating his postconviction counsel’s failure to substantially comply with the duties mandated by Rule 651(c). See *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 22 Defendant does not dispute that the record shows that his postconviction counsel complied with Rule 651(c) by communicating with him to ascertain his claims, reviewing the record of the proceedings at trial, making certain amendments to his *pro se* petition, and attaching notarized evidence affidavits from defendant and Shirley Gist. Rather, defendant contends that postconviction counsel's failure to obtain and add a certifying affidavit to his petition rebuts the presumption that she made the amendments to his "*pro se* [petition] that [were] necessary for an adequate presentation of [his] contentions" as required by Rule 651(c).

¶ 23 The State acknowledges that defendant's supplemental petition does not include a notarized verification affidavit, but argues that, under the circumstances of this case, the absence of the verification affidavit is of "no consequence" because it was not the basis for the trial court's dismissal of defendant's petition. Defendant replies that remand is required because a claim of unreasonable assistance of postconviction counsel is not subject to a prejudice or harmless-error analysis.

¶ 24 After carefully reviewing the record at bar, we find that defendant has failed to overcome the presumption that counsel provided reasonable assistance during second-stage proceeding. While we acknowledge that the Act required a certified verification affidavit from defendant, which was not included in the amended petition, it is undisputed that counsel substantially complied with Rule 651(c) in all other regards. The record shows that counsel: communicated with defendant to ascertain his claims; reviewed the record of the proceedings at trial; made certain amendments to his *pro se* petition; and attached notarized evidence affidavits from defendant and Shirley Gist. Moreover, counsel's failure to include a verification affidavit did not result in dismissal of the petition. See *Perkins*, 229 Ill. 2d at 44 (An adequate presentation of

defendant's claims necessarily includes attempting to overcome procedural bars that *result* in dismissal of a petition if not rebutted) (emphasis added). Rather, after a hearing, the trial court dismissed the petition on the merits without reference to defendant's lack of a verification affidavit. In so doing, the court essentially accepted the allegations therein as having been brought truthfully and in good faith, notwithstanding counsel's failure to include a verification affidavit. See *Hommerson*, 2014 IL 115638, ¶ 9 (the verification affidavit confirms that the allegations are brought truthfully and in good faith).

¶ 25 Under these circumstances, defendant's argument amounts to asking us to remand the matter so that counsel could amend his petition to include a verification affidavit and the trial court could then again dismiss the petition because the claims therein lack merit. We decline defendant's invitation to do so. See *People v. White*, 2011 IL 109689, ¶ 144 (cautioning that "courts of review should not ordinarily consider issues where they are not essential to the disposition of the cause or where the result will not be affected regardless of how the issues are decided"); *cf. People v. Alexander*, 2014 IL App (4th) 130132, ¶ 50 (finding that where the circuit court determined that defendant's 2-1401 petition was frivolous, there was no reason to remand the case so that defendant could comply with the procedural service requirement and the court could repeat its denial of defendant's petition on the merits.). Accordingly, where counsel complied with Rule 651(c) in all other regards except for filing a verification affidavit and the trial court dismissed defendant's petition on the merits, defendant has failed to overcome the presumption that counsel provided a reasonable level of assistance during second-stage proceedings as contemplated by the Act.

¶ 26 In reaching this conclusion, we have considered the cases cited by defendant in support of his argument that counsel provided an unreasonable level of assistance based on her failure to file the verification affidavit and find them distinguishable. Defendant primarily relies on *People v. Nitz*, 2011 IL App (2d) 100031, for the proposition that counsel’s failure to attach a notarized verification affidavit shows that she did not comply with Rule 651(c)’s requirement to adequately present his petition. But see *People v. Kirkpatrick*, 2012 IL App (2d) 100898 (declining to follow *Nitz* because “[o]nce the State moved to dismiss on the merits and did not challenge the alleged procedural defects, and once the trial court conducted a hearing, during which neither party raised the alleged procedural defects, and presented its ruling based on the merits, the purported notarization and certification issues became moot”).

¶ 27 Here, unlike in *Nitz*, postconviction counsel made amendments to defendant’s petition to ensure that his claims were supported. As mentioned, counsel attached defendant’s own notarized evidence affidavit and a notarized evidence affidavit from Shirley Gist. See *Nitz*, 2011 IL App (2d) 100031, ¶ 6 (postconviction counsel’s two amended petitions failed to provide any affidavits aside from an unnotarized affidavit defendant provided with his earlier *pro se* petition, even though the allegations contained in his affidavit were required to support his postconviction claims).

¶ 28 We are likewise not persuaded by *Suarez* and *Turner*, cited by defendant in support of his argument that counsel’s failure requires a remand regardless of the merits of his petition, because our supreme court has held that counsel’s failure to comply with Rule 651(c) is not subject to harmless error analysis. See *People v. Suarez*, 224 Ill. 2d 37, 51 (2007) (“Our Rule 651(c) analysis has been driven, not by whether a particular defendant’s claim is potentially meritorious,

but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized. “); see also *People v. Turner*, 187 Ill. 2d 406, 416-17 (1999) (“[I]n this case it is improper to determine the merit of petitioner’s claims where counsel essentially did nothing to shape the petitioner’s claims into the appropriate legal form.”).

¶ 29 However, in *Suarez* and *Turner*, our supreme court found that postconviction counsel completely failed to comply with Rule 651(c). In *Suarez*, our supreme court found that the record contained no evidence that postconviction counsel consulted with the defendant to ascertain his contentions of constitutional deprivation. *Suarez*, 224 Ill. 2d at 43. The court stated that compliance with Rule 651(c) “must be shown regardless of whether the claims made in the pro se or amended petition are viable.” *Id.* at 52. Likewise, in *Turner*, the defendant’s postconviction counsel failed to make any of the necessary amendments to his petition, including failing to include a claim of ineffective assistance of appellate counsel to avoid waiver, failing to amend defendant’s allegations to plead the necessary elements, and failing to attach any affidavits to support defendant’s claims. *Turner*, 187 Ill. 2d at 412-14. The court concluded that “[c]ounsel’s conduct represents a total failure of representation” and “demonstrate[d] that he represented petitioner in name only. *Id.* at 415.

¶ 30 Here, unlike in *Suarez* and *Turner*, postconviction counsel substantially complied with Rule 651(c). The record shows that counsel spoke with defendant, interviewed at least two witnesses, attempted to find a third, and spoke with defendant’s trial counsel. Counsel obtained a notarized affidavit from Shirley Gist in support of defendant’s ineffective assistance of trial counsel claim. She also amended defendant’s petition to include a claim of ineffective assistance

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of appellate counsel in order to avoid waiver. In short, unlike in *Turner*, the record is clear that postconviction counsel's representation of defendant was not "in name only."

¶ 31 For these reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 32 Affirmed.