

**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).

2018 IL App (4th) 160007-U

NO. 4-16-0007

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

November 20, 2018  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CORDELL LAMONTE AVANT,	)	No. 09CF514
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Justices DeArmond and Cavanagh concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant was denied reasonable assistance of postconviction counsel.

¶ 2 In June 2010, defendant, Cordell Lamonte Avant, was convicted of aggravated battery with a firearm and unlawful use of a weapon by a felon. 720 ILCS 5/12-3.05, 24-1.1 (West 2010). In August 2011, defendant appealed his sentence and conviction to this court, arguing that certain fines were improperly entered.

¶ 3 In January 2012, defendant filed *pro se* a “Petition for Relief from Judgment,” arguing that his counsel was ineffective. In February 2012, the trial court construed this as a petition for postconviction relief and advanced it to the second stage.

¶ 4 In October 2012, regarding defendant’s direct appeal, this court entered an agreed order for summary disposition that dealt only with the vacatur of a fine. Later that month, defendant filed *pro se* a motion to withdraw his postconviction petition. At a November 2012 sta-

tus hearing, defendant's attorney stated that he "looked in the court file. There does not appear to be an opinion or a Rule 23 order from the Appellate Court yet. So they have not yet formulated their decision on the case at this juncture." Neither the trial court nor the prosecutor corrected this misstatement. At this hearing, defendant stated that this was a petition for relief from judgment rather than a postconviction petition and requested to withdraw his petition. The court granted defendant's request.

¶ 5 In July 2013, defendant filed a *pro se* postconviction petition. In August 2013, the trial court concluded that the postconviction petition should advance to the second stage and appointed a public defender to represent defendant. Carey Luckman entered his appearance on behalf of defendant in February 2014.

¶ 6 In June 2015, the State filed a motion to dismiss the petition, arguing (1) the petition was untimely and (2) defendant failed to allege facts showing that the delay was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2014) (a postconviction petition shall not be filed "more than 6 months from the date for filing a [*certiorari*] petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. \*\*\* This limitation does not apply to a petition advancing a claim of actual innocence.") Luckman conceded that the petition was untimely but argued that defendant advanced a claim of actual innocence.

¶ 7 In August 2015, the trial court dismissed defendant's petition for postconviction relief. In September 2015, Luckman filed a motion to reconsider in which he argued that defendant had made a claim of actual innocence that was exempt from the six-month deadline. 725 ILCS 5/122-1(c) (West 2014). In December 2015, defendant filed a supplemental affidavit stating that he "believed, when I filed my postconviction petition, that my direct appeal was still go-

ing forward.” Later that month, the trial court denied defendant’s motion to reconsider.

Luckman filed an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate the day after the hearing.

¶ 8 Defendant appeals, arguing that he was denied reasonable assistance of postconviction counsel. We agree and reverse and remand for further proceedings.

¶ 9 I. BACKGROUND

¶ 10 A. The Underlying Conviction and Direct Appeal

¶ 11 In June 2009, the State charged defendant with aggravated battery with a firearm and unlawful use of a weapon by a felon. 720 ILCS 5/12-3.05, 24-1.1 (West 2010). In June 2010, defendant was convicted of both counts.

¶ 12 In July 2010, defendant filed a *pro se* motion for a new trial. In December 2010, defendant’s posttrial attorney filed a motion for a new trial. In February 2011, the trial court denied this motion and sentenced defendant to 22 years in prison. In August 2011, defendant appealed his sentence and conviction to this court, arguing that certain fines were improperly entered.

¶ 13 B. The Petition for Relief from Judgment

¶ 14 In January 2012, defendant filed a “Petition for Relief from Judgment.” In February 2012, the trial court construed this as a petition for postconviction relief and advanced it to the second stage. The court appointed counsel to represent defendant.

¶ 15 C. The Appellate Court’s Order

¶ 16 In October 2012, this court entered the following order regarding defendant’s direct appeal:

“IT IS HEREBY ORDERED

Defendant-Appellant[’s] agreed motion for summary disposition is hereby allowed. This cause is remanded to the circuit court for the filing of a corrected mittimus reflecting the vacatur of his \$100 fine pursuant to a conviction for unlawful use of a weapon by a felon and payable to the Trauma Center Fund.

This order is the mandate of the Court.” *People v. Avant*, No. 4-11-0789 (2012) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 17 D. The Motion to Withdraw

¶ 18 Later in October 2012, defendant filed *pro se* a motion to withdraw his postconviction petition “without prejudice.” Defendant did not mention the outcome of his direct appeal. At a November 2012 status hearing, defendant’s attorney stated that he “looked in the court file. There does not appear to be an opinion or a Rule 23 order from the Appellate Court yet. So they have not yet formulated their decision on the case at this juncture.” Neither the trial court nor the prosecutor corrected defense counsel by informing him that this court had resolved defendant’s appeal.

¶ 19 The trial court asked defendant how he would like to proceed on his motion to withdraw. Defendant stated that he had filed a petition for relief of judgment, not a postconviction petition, and that he wanted to withdraw that petition. The court granted defendant’s request.

¶ 20 E. The Postconviction Petition

¶ 21 In July 2013, defendant filed *pro se* a postconviction petition in which he argued that he was denied effective assistance of counsel because his trial counsel failed to investigate, interview, and present the testimony of various witnesses. In August 2013, the trial court found that the postconviction petition should advance to the second stage and appointed the public de-

fender to represent defendant.

¶ 22 At a hearing on the petition in December 2013, defendant's public defender filed a Rule 651(c) certificate and declaration to stand on the *pro se* petition. However, this attorney informed the court that another attorney, Carey Luckman, was going to represent defendant going forward. The trial court ordered that Luckman would be given additional time to decide whether to stand on the *pro se* petition or file an amended petition.

¶ 23 Luckman entered his appearance in February 2014. In May 2015, Luckman filed a "Second Supplement to Petition for Post-Conviction Relief." Luckman argued that defendant's trial counsel failed to convey a plea offer to defendant.

¶ 24 F. The Motion to Dismiss the Petition

¶ 25 In June 2015, the State filed a motion to dismiss the petition, arguing that defendant's petition should be dismissed because (1) it was untimely and (2) defendant failed to allege facts showing that the delay was not due to his culpable negligence. See 725 ILCS 5/122-1(c) (West 2014) (a postconviction petition shall not be filed "more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. \*\*\* This limitation does not apply to a petition advancing a claim of actual innocence."). Luckman conceded that the petition was untimely but argued that defendant advanced a claim of actual innocence.

¶ 26 G. The Trial Court's Rulings

¶ 27 In August 2015, the trial court dismissed defendant's petition for postconviction relief, concluding that (1) defendant's claims of actual innocence were not supported by new evidence that could not have been discovered before trial and (2) the petition was untimely.

¶ 28 In September 2015, Luckman filed a motion to reconsider in which he argued

that defendant had made a claim of actual innocence that was exempt from the six-month deadline. 725 ILCS 5/122-1(c) (West 2014). In December 2015, defendant filed a supplemental affidavit in support of his postconviction petition. Defendant stated as follows:

“I never received from the appellate court, the circuit court, or the Office of the State Appellate Defender any notification that my direct appeal was dismissed.

In letters between [my appellate counsel] and me, I asked what happened with my appeal, and I was told that it was no longer in her jurisdiction and that the circuit court would contact me. I never received any contact from the circuit court about the appeal status or outcome.

I believed, when I filed my postconviction petition, that my direct appeal was still going forward.”

¶ 29 Later in December 2015, the trial court denied defendant’s motion to reconsider. The court concluded that defendant had not produced “the kind of competent evidence” which would justify reconsideration of the dismissal of his petition. Luckman filed an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate the day after the hearing.

¶ 30 This appeal followed.

¶ 31 II. ANALYSIS

¶ 32 Defendant appeals, arguing that he was denied reasonable assistance of postconviction counsel. We agree.

¶ 33 A. The Applicable Law

¶ 34 The Post-Conviction Hearing Act (Act) provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or

sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2014). A proceeding under the Act is collateral and not an appeal from the defendant’s conviction and sentence. *Crenshaw*, 2015 IL App (4th) 131035 ¶ 23.

¶ 35 The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2014). Within the first 90 days after the petition is filed and docketed, the trial court shall dismiss a petition summarily if the court determines it is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition may be dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. *Allen*, 2015 IL 113135, ¶ 25.

¶ 36 If the court does not dismiss the petition, then it proceeds to the second stage at which the court may appoint counsel for an indigent defendant. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Defense counsel may amend the defendant’s petition to ensure the defendant’s contentions are adequately presented. *Id.*

¶ 37 At the second stage, the State may file a motion to dismiss the defendant’s petition as being untimely. *Id.* As seen below, the Act provides the following time restrictions:

“When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for [*certiorari*] is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a [*certiorari*] petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition

shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

This limitation does not apply to a petition advancing a claim of actual innocence.” 725 ILCS 5/122-1(c) (West 2014).

¶ 38 This six-month deadline also applies when a defendant files an appeal to the Illinois Appellate Court but does not file a subsequent appeal to the Illinois Supreme Court. *People v. Johnson*, 2017 IL 120310, ¶ 24, 77 N.E.3d 615.

¶ 39 A petition that is untimely will not be dismissed if the petitioner alleges facts showing that the delay was not due to his culpable negligence. *Id.* ¶ 25; 725 ILCS 5/122-1(c) (West 2016). The term “culpably negligent” means “something greater than ordinary negligence and is akin to recklessness.” *People v. Bocclair*, 202 Ill. 2d 89, 108, 789 N.E.2d 734, 745 (2002). The defendant’s ignorance of the law will not excuse his delay in bringing a postconviction petition. *Id.* at 104-05. A defendant is culpably negligent if he entrusts his postconviction petition to lay persons (jailhouse lawyers or prison librarians). *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 599 (2005). However, a defendant is not culpably negligent if he reasonably relies upon the incorrect advice of his attorney. *People v. Marino*, 397 Ill. App. 3d 1030, 1034, 927 N.E.2d 75, 79 (2010).

¶ 40 In postconviction proceedings, the right to counsel is entirely statutory. *Lander*, 215 Ill. 2d at 583. The Act requires counsel only to provide a defendant with a reasonable level of assistance. *Id.* Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) “imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the Act.” *Id.* at 584. Under this rule, postconviction counsel must (1) consult with the defendant



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 defendant's contentions. *People v. Perkins*, 229 Ill. 2d 34, 42, 890 N.E.2d 398, 403 (2007). However, the duty to amend a *pro se* petition "does not require counsel to advance frivolous or spurious claims on defendant's behalf." *Pendleton*, 223 Ill. 2d at 472.

¶ 41 In *Perkins*, the supreme court reasoned as follows:

"In sum, consistent with the plain language of Rule 651(c), its purpose, and our prior decisions, we hold that Rule 651(c) requires counsel to amend an untimely *pro se* petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence. In discharging this duty, counsel must inquire of the petitioner whether there is any excuse for the delay in filing. As a practical matter, any potential excuse for the late filing will often be discovered by speaking with the petitioner. Counsel must also allege any excuse for the delay in filing apparent from the pleadings and the portions of the record counsel must review to present petitioner's claims." *Perkins*, 229 Ill. 2d at 49-50.

¶ 42 The defendant bears the burden of demonstrating that his attorney failed to comply with Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. The filing of a Rule 651(c) certificate raises a presumption that postconviction counsel adequately investigated, amended, and properly presented the defendant's claims. *Id.* Regardless of whether the claims raised in the petition have merit, remand is required when postconviction counsel fails to comply with Rule 651(c). *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982

(2007). The appellate court reviews *de novo* whether an attorney complied with Rule 651(c). *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15, 43 N.E.3d 1077.

¶ 43

B. This Case

¶ 44 In October 2012, this court had already entered its order regarding defendant's direct appeal. In November 2012, during a hearing on defendant's petition for relief from judgment, defendant's attorney stated that he "looked in the court file. There does not appear to be an opinion or a Rule 23 order from the Appellate Court yet. So they have not yet formulated their decision on the case at this juncture." Neither the trial court nor the prosecutor corrected this misstatement.

¶ 45 The defendant's withdrawal of his petition for relief from judgment, which the trial court construed as a postconviction petition, and subsequent filing of an untimely postconviction petition may have been induced by his attorney's misstatement of fact. Defendant's possible ignorance is buttressed by his December 2015 affidavit in which he stated that he "never received from the appellate court, the circuit court, or the Office of the State Appellate Defender any notification that my direct appeal was dismissed." He further stated that he "believed, when I filed my postconviction petition, that my direct appeal was still going forward."

¶ 46 Even though the State filed a motion to dismiss because the petition was untimely, Luckman never amended defendant's postconviction petition to allege facts showing that the delay was not due to defendant's culpable negligence. As such, notwithstanding Luckman's filing of a Rule 651(c) certificate, defendant has shown that his attorney failed to comply with the duties mandated in Rule 651(c). *Perkins*, 229 Ill. 2d at 49-50.

¶ 47 Accordingly, we remand this case back to the trial court for the purpose of demonstrating compliance with Rule 651(c). On remand, the trial court should appoint a new

attorney for defendant. In passing, we note that (1) our finding of a Rule 651(c) violation is not necessarily an endorsement of the veracity of defendant's claims and (2) the trial court remains free to determine whether the delay in filing was due to defendant's culpable negligence. *Sua-rez*, 224 Ill. 2d at 47.

¶ 48

### III. CONCLUSION

¶ 49

For the reasons stated, we reverse and remand for further proceedings.

¶ 50

Reversed and remanded.