

NOTICE
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2018 IL App (5th) 140563-U

NO. 5-14-0563

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 08-CF-365
)	
ART McCRAY,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel substantially complied with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), which required counsel to make any amendments to the petition necessary to adequately present defendant’s claims, despite counsel’s failure to attach affidavits supporting the petition because the court can presume counsel attempted to obtain the necessary documents but was unable to do so.

¶ 2 Defendant, Art McCray, appeals from the circuit court’s order dismissing his petition for postconviction relief. On appeal, defendant argues his postconviction counsel did not provide reasonable assistance, as required by the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), in that counsel failed to support

defendant's claims with adequate evidentiary documents as required by Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We affirm.

¶ 3

BACKGROUND

¶ 4 The State charged defendant with one count of murder for the stabbing death of Ruby L. Coney, a person 60 years of age or older. Following a jury trial, defendant was convicted of first-degree murder. On September 25, 2009, defendant filed a *pro se* posttrial motion raising several issues, including that there should have been a fitness hearing because he was on psychotropic medications during trial, that his trial counsel was ineffective for failing to advise defendant of his right to a fitness hearing, and that his trial counsel was ineffective for failing to seek suppression of defendant's statements to police.

¶ 5 On October 6, 2009, trial counsel filed a posttrial motion asserting the trial court erred in admitting certain testimony, denying defendant's objections to the State's proposed jury instructions, and denying defendant's motion for directed verdict at the close of the State's evidence and the presentation of all evidence because the verdict was against the manifest weight of the evidence.

¶ 6 On October 26, 2009, the court conducted a posttrial motion hearing and a sentencing hearing. At the hearing, the court asked defendant to explain why his *pro se* motion should be granted:

“THE DEFENDANT: Yes, sir. I feel that I wasn't given a fair trial due to ineffective counsel. I feel that I never got a motion to suppress inadmissible statement that I knew would have gotten thrown [*sic*] out if I would have.

THE COURT: Why do you think you would have been successful if that would have been filed?

THE DEFENDANT: I was under the influence of marijuana, and the threats are on the video statement.

THE COURT: Are there any other reasons why you believe that you had ineffective assistance of counsel?

THE DEFENDANT: That's it, sir.

THE COURT: Mr. Cueto [defense attorney], do you wish to respond to those?

MR. CUETO: Only, Your Honor, that I think we did put on the record the issue about a motion to suppress a couple of times before trial, and I think it was—the defense wishes to now proceed with the motion to suppress. So I think that was covered.

THE COURT: In my review of the record, I think those—that issue was certainly addressed. However, Mr. McCray, your motion is on file. Those issues that you have raised will be preserved ***.”

¶ 7 After defense counsel argued the merits of his posttrial motion, the court denied both defense counsel's motion and defendant's *pro se* motion. The court sentenced defendant to 58 years in the Department of Corrections.

¶ 8 Defendant filed a timely appeal. On appeal, appointed counsel argued the trial court erred by failing to conduct an adequate inquiry to determine whether defendant's *pro se* posttrial motion alleging ineffective assistance of counsel required the

appointment of new counsel during the posttrial proceedings. This court affirmed, finding the trial court fulfilled its obligation to evaluate defendant's *pro se* claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181 (1984). *People v. McCray*, 2011 IL App (5th) 090615-U.

¶ 9 On March 28, 2012, defendant filed a *pro se* petition for postconviction relief alleging numerous claims of ineffective assistance of appellate counsel. Defendant claimed his appellate counsel failed to assert, on direct appeal, that trial counsel was ineffective for advising defendant to waive his right to a speedy trial. Defendant also alleged his appellate counsel failed to (1) file the paperwork necessary to perfect an appeal, (2) put on a defense, (3) advise defendant to file a *pro se* motion to reconsider, (4) file a motion to suppress evidence, (5) object to the admission of tampered evidence, and (6) object to the denial of defendant's right to a jury of his peers. Defendant further claimed appellate counsel was ineffective for failing to assert defendant took psychotropic medications during trial, which altered his ability to make sound decisions, and that trial counsel was ineffective for advising defendant to waive his right to an independent medical examination. In support of his claims, defendant attached an affidavit to his petition indicating trial counsel advised him to waive his right to an independent medical expert in open court on August 24, 2009.

¶ 10 On April 26, 2012, the circuit court entered an order finding the *pro se* petition stated the gist of a constitutional claim and appointed counsel to represent defendant. On July 18, 2014, appointed counsel filed an amended petition, asserting defendant was denied the right to a speedy trial, and that trial counsel and Dr. David Cuneo were aware

defendant was taking psychotropic medications at the time of trial and that the medication affected defendant's ability to assist in his defense. Appointed counsel alleged trial counsel was ineffective for failing to (1) adequately address defendant's medication use, (2) file a motion to suppress defendant's statement to police, (3) argue defendant's statement to police was coached, (4) object to the alteration or reduction of the video of his statement, and (5) present testimony from several known alibi witnesses. Appointed counsel also asserted appellate counsel was ineffective for failing to raise each of these issues on direct appeal. Appointed counsel filed a certificate of compliance in accordance with Rule 651(c), stating he had consulted with defendant to ascertain defendant's contentions of deprivations of constitutional rights, he had examined the entire record of proceedings at trial, and he had made any amendments to the petition necessary for the adequate presentation of defendant's contentions. Postconviction counsel did not attach any affidavits or other documentation to the amended petition.

¶ 11 The State filed a motion to dismiss the amended petition asserting the claims were barred by *res judicata* and waiver, and that defendant's claims were without merit, or were not supported by the record or other documentation. The court granted the State's motion to dismiss finding, in part, that defendant failed to support his claim that he was using psychotropic medications during trial, which affected his ability to participate in his defense, as he did not file an affidavit from Dr. Cuneo, or another medical provider. The court also found the allegation was unsupported by the record, in that defendant did not exhibit any abnormal behavior at any time, and responded appropriately when addressed by the court during trial. This appeal follows.

¶ 12

ANALYSIS

¶ 13 On appeal, defendant contends the trial court's decision must be reversed and the cause remanded for further proceedings because his postconviction counsel did not provide reasonable assistance. Defendant argues postconviction counsel failed to make the amendments necessary for an adequate presentation of his claim as required by Rule 651(c), as counsel failed to procure and attach documentation supporting defendant's claim that appellate counsel was ineffective for failing to raise on direct appeal the issue of trial counsel's ineffectiveness for advising defendant to waive his right to present expert evidence that defendant was on psychotropic medications during his trial.

¶ 14 An attorney's compliance with Rule 651(c), as well as the circuit court's dismissal of a postconviction motion without an evidentiary hearing, is reviewed *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 15 The right to assistance of counsel in a postconviction proceeding is purely statutory and petitioners are only entitled to the level of assistance provided for by the Act. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Postconviction counsel is required to provide the petitioner with a reasonable level of assistance. *Suarez*, 224 Ill. 2d at 42. To ensure this level of assistance, Supreme Court Rule 651(c) requires counsel to (1) consult with the defendant to ascertain his claims of errors, (2) examine the record of the proceedings, and (3) amend the *pro se* petition as necessary for an adequate presentation of defendant's claims to the court. Counsel's compliance with the rule is mandatory. *People v. Vasquez*, 356 Ill. App. 3d 420, 423 (2005). Postconviction counsel has the duty

to “shape[] the petitioner’s claims into proper legal form and present[] those claims to the court.” *People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007).

¶ 16 “A post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner’s allegations stand uncontradicted and are clearly supported by the record.” *People v. Johnson*, 154 Ill. 2d 227, 240 (1993). A postconviction claim that trial counsel was ineffective for failing to call certain witnesses must be supported by affidavits of the witnesses and an explanation of the significance of the testimony. *Johnson*, 154 Ill. 2d at 240-41.

¶ 17 Here, postconviction counsel did not attach affidavits or other documents supporting defendant’s contention he was unable to assist in his defense at trial because he was under the influence of psychotropic medications, an omission which could be viewed as evidence of deficient representation. However, counsel filed a certificate averring he had complied with Rule 651(c). Counsel’s filing of the certificate creates a rebuttable presumption he complied with the rule’s requirements. *People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992). Furthermore, when ruling upon a motion to dismiss a postconviction petition unsupported by documentary evidence, the court “may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so.” *Johnson*, 154 Ill. 2d at 241. “Absent a showing of available material for supporting affidavits, a failure to present affidavits obviously cannot be considered a neglect by the attorney.” *People v. Stovall*, 47 Ill. 2d 42, 46 (1970).

¶ 18 Contrary to defendant's assertions otherwise, counsel's omission, by itself, does not rebut the presumption that counsel complied with Rule 651(c). Instead, it is presumed that counsel attempted to obtain the necessary documents, but was unable to do so. Defendant has failed to rebut these presumptions by establishing the existence of any evidence supporting the petition's allegations which could have been procured by counsel.

¶ 19 Further, defendant's claims are unsupported by the record, or the affidavit he filed with his *pro se* petition. The affidavit attached to defendant's *pro se* petition asserted his trial counsel advised him to waive his "right to independent experts, and doctors in open court" on August 24, 2009. The report of proceedings for that date indicates trial counsel advised the court that defendant was ready to proceed with trial the following week, and the defense would not be hiring any independent experts in response to the State's experts who had been disclosed to testify regarding physical evidence that the State intended to admit at trial. Upon questioning by the court, defendant told the court he had discussed the issue with counsel, had no questions, and wished to proceed to trial. Therefore, neither the affidavit filed by the defendant nor the report of proceedings for August 24, 2009, supports defendant's claims that he was using psychotropic medications at the time of trial, that such use impaired his ability to assist with his defense, or that his trial counsel or any other person was aware of such use or impairment.

¶ 20 Defendant's claims are also undermined by the presentence investigation report, in which defendant reported to the probation officer that "his present health [was] good," and defendant denied ever having received treatment for a mental disorder. Defendant

indicated the only medication he was taking was sleeping pills prescribed by a doctor. Furthermore, as noted by the circuit court, which presided over the trial, and the posttrial proceedings, the record indicates defendant always responded appropriately when addressed by the court, and does not indicate defendant demonstrated any abnormal behavior. In this case, nothing in the record on appeal rebuts the presumption postconviction counsel complied with Rule 651(c) as he averred in his certificate of compliance. In light of this court's finding that defendant's claims are not supported by the record or other necessary documentation, we need not address the State's arguments that defendant's claims are barred by *res judicata* and waiver.

¶ 21

CONCLUSION

¶ 22 Based on the foregoing, we conclude postconviction counsel fulfilled his duties under Rule 651(c) and provided defendant with reasonable assistance of counsel. We affirm the circuit court's order dismissing defendant's postconviction petition.

¶ 23 Affirmed.