

NOTICE
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2018 IL App (5th) 140594-U

NO. 5-14-0594

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. 07-CF-1161
)	
LEWIS RICE,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Cates concurred in the judgment.

ORDER

¶ 1 *Held:* The second-stage dismissal of the defendant's amended petition for postconviction relief is reversed where his postconviction counsel provided an unreasonable level of assistance for not attaching readily available supporting documentation to the amended petition. Thus, the matter is remanded to the trial court so that postconviction counsel may comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 2 The defendant, Lewis Rice, appeals the second-stage dismissal of his petition for postconviction relief filed pursuant to section 122-1 of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 (West 2014). For the following reasons, we reverse and remand.

¶ 3 We will set forth only those facts pertinent to our disposition of the specific issues on appeal. It was undisputed that, in September 2007, the defendant shot and killed Franklin Jones and shot and injured Grady Appleton while they were in a parked vehicle. At trial, the primary issue was the reasonableness of the defendant's conduct. The defendant maintained that he had been a victim in that he was "minding his own business," had been forced to flee his home earlier that morning because Jones and Appleton had shown up at his house and fired shots at him, and having earlier been shot at by the same men, he had "defended himself" when he shot into their car after they fired at him. The State contended that the defendant had made a conscious decision to get the "motherfuckers" who had previously shot at his truck, that the occupants of the vehicle had merely been sitting in the car when the defendant approached and started shooting into it, and that, at that time, no one had said or done anything to provoke or threaten the defendant. After deliberations, the jury found the defendant guilty of first-degree murder (720 ILCS 5/9-1(a) (West 2006)), armed violence (720 ILCS 5/33A-2(b) (West 2006)), and aggravated battery with a firearm (720 ILCS 5/12-4.2(a) (West 2006)). He was sentenced to serve a mandatory term of natural life imprisonment.

¶ 4 On direct appeal, the defendant argued that his first-degree murder conviction should be reduced to second-degree murder because he acted on an unreasonable belief in the need for self-defense. This court disagreed, finding that the evidence presented for the jury's consideration sufficiently supported the findings that the defendant, with the intent to kill the occupants of the parked vehicle, repeatedly fired into the vehicle in retaliation for their earlier shooting at him, and he did not believe, reasonably or

unreasonably, that the use of deadly force was necessary. *People v. Rice*, 2012 IL App (5th) 100269-U.

¶ 5 On June 20, 2013, the defendant filed a *pro se* petition for postconviction relief, arguing, in pertinent parts, that his trial counsel provided ineffective assistance for failing to investigate and call the defendant's proposed witnesses (Regina Andrews and Alyce Woods) at trial. He argued that the witnesses would have supported his claim of self-defense. He argued that Woods, who was his then-girlfriend, would have testified that he already had a gun on him, which would have contradicted the State's theory that he returned home to get his gun before leaving to find the men, and that the men had first shot at him before he shot back. He noted that he had given Woods' address and phone number to counsel, but she was not called as a witness at trial. Attached to the *pro se* petition were two envelopes sent from Woods from her last known address in Missouri 18 months before trial and a witness list filed by trial counsel, which noted that Woods' current location was unknown but listed her last known address as in Illinois.

¶ 6 Also attached to the *pro se* petition was a self-transcribed transcript of Woods' police interview in which she stated as follows: that the defendant was at her house when a Cadillac with two male occupants parked in the driveway; after the defendant exchanged words with the men, she and the defendant left the house; as they were leaving, one of the men fired shots at the back of their truck; the defendant shot back at them; a little later, she was "dozing off" in the backseat of the defendant's vehicle when she noticed that they were slowing down; she looked up and noticed an approaching vehicle "flink" their lights; and she started to lay back down when she saw the defendant

firing his gun into the red car and the occupants of the red car firing at their car. When asked whether anyone fired at the defendant, she responded, "Being honest I don't know. I don't know. I just know bullets. He shot in there for sure. And I know they [*sic*] bullets."

¶ 7 In addition, the defendant argued that Andrews, who was his then-wife, would have testified that he had a gun in his possession when he left home. Attached to his *pro se* petition was Andrews' affidavit in which she stated that the defendant was "cutting and packaging some rock cocaine" when he received a phone call that there was "something going on" at the house that he had just purchased. She stated that he "put his dope in his pocket," grabbed his gun, and left the house. At approximately 5 a.m., she called to tell him to come home, and he responded that he was waiting for the police because some people in a red Cadillac had been shooting at him. She later saw his truck and observed bullet holes in the glove compartment and in the tailgate.

¶ 8 On July 5, 2013, postconviction counsel was appointed to represent the defendant in the postconviction proceedings. On February 20, 2014, postconviction counsel filed an amended petition for postconviction relief, arguing, among other things, that counsel was ineffective for failing to investigate and call Woods and Andrews as witnesses at trial. The petition argued that Woods would have contradicted the State's claim that the defendant had obtained the gun after the initial altercation. The petition also argued that Andrews would have corroborated the defendant's claim that he already had a gun in his possession and did not return to his house at some point that morning to get the gun. The petition further stated that additional affidavits were not attached "due to the nature of the

points raised." On March 13, 2014, the State filed a motion to dismiss the amended postconviction petition, arguing, *inter alia*, that the defendant forfeited the allegations with regard to the witnesses by failing to raise them on appeal, that he failed to attach affidavits of the witnesses to his amended postconviction petition as required by the Act, and that, even if the evidentiary support had been attached, trial counsel was not ineffective under the *Strickland* standard because Woods' and Andrews' testimony would not have added to his self-defense claim.

¶ 9 On September 12, 2014, the defendant's counsel filed a second amended petition for postconviction relief, which reiterated the argument that trial counsel was ineffective for failing to call Woods and Andrews as witnesses at trial. Counsel did not attach the affidavits from Woods or Andrews, again stating that additional affidavits were not attached "due to the nature of the points raised." On October 8, 2014, the State filed a motion to dismiss the second amended petition for postconviction relief. On November 14, 2014, the defendant's postconviction counsel filed a certificate of compliance, which stated that he examined the entire record, made any necessary amendments for the adequate presentation of the defendant's contentions, consulted with the defendant by correspondence on 25 occasions, reviewed correspondence from the defendant, and consulted with the defendant in person on 7 occasions.

¶ 10 On November 14, 2014, the trial court held a hearing on the State's motion to dismiss. At the hearing, the State argued that the defendant's postconviction petition should be dismissed for counsel's failure to attach affidavits as evidentiary support for the postconviction arguments. The State also argued that, even if the necessary affidavits

had been attached, the decision as to whether to call a particular witness was a matter of trial strategy and the issue of whether the defendant had a weapon in his possession was not determinative of his intent. In reply, postconviction counsel did not explain why there were no affidavits attached to the postconviction petition but argued that the defendant's trial counsel failed to put on a defense, and the defendant should be entitled to an evidentiary hearing on the issues raised in the postconviction petition.

¶ 11 On November 17, 2014, the trial court granted the State's motion to dismiss, finding that the defendant had forfeited the issues raised in his postconviction petition because he failed to raise them at a posttrial hearing or on appeal. The court found that, even had the issue concerning the witnesses not been forfeited, a review of the record did not demonstrate that counsel's performance fell below an objective standard of reasonableness in that the record reflected a consistent trial strategy and there was no showing that the outcome of the trial would have been different. Thus, the court found that no prejudice was shown. The defendant appeals.

¶ 12 Our review of the circuit court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Postconviction proceedings are commenced by the filing of a petition, which clearly sets forth the respects in which defendant's constitutional rights were violated. 725 ILCS 5/122-2 (West 2012).

¶ 13 At the first stage, the trial court independently reviews and assesses a defendant's petition within 90 days of its filing, and if the court determines that the petition is "frivolous" or "patently without merit," the court must summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Edwards*, 197 Ill. 2d at 244. If the petition is not summarily dismissed by the court, it advances to the second stage. *People v. Kelly*, 2012 IL App (1st) 101521, ¶ 22. At the second stage, counsel may be appointed where a defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2012). A defendant's appointed counsel then has an opportunity to amend the *pro se* postconviction petition. *People v. Bocclair*, 202 Ill. 2d 89, 100 (2002). The State may then file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2012). If the State moves to dismiss the amended petition, the circuit court may hold a dismissal hearing, which is still considered part of the second stage. *People v. Hatchett*, 2015 IL App (1st) 130127, ¶ 27. The circuit court must then determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 17. At this stage, all well-pleaded facts that are not positively rebutted by the record are to be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 14 The defendant's petition, which alleged that trial counsel provided ineffective assistance, proceeded to the second stage of the postconviction proceedings. Because the right to counsel in a postconviction proceeding is statutory and not constitutional, defendants are entitled only to the level of assistance guaranteed by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Under the Act, a defendant is entitled to reasonable assistance of counsel. *People v. Greer*, 212 Ill. 2d 192, 204 (2004). To ensure that

defendants receive a reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes specific duties on postconviction counsel. *Turner*, 187 Ill. 2d at 410. Rule 651(c) requires that the record in the postconviction proceedings demonstrate that appointed counsel has (1) consulted with defendant by phone, mail, electronic means or in person to ascertain his contentions of deprivation of constitutional rights; (2) examined the record of the trial proceedings; and (3) made any amendments to the *pro se* petitions that are necessary for the adequate presentation of a defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Further, compliance with Rule 651(c) may be shown by filing an affidavit certifying compliance with these requirements. *Id.* The filing of the certificate of compliance creates a rebuttable presumption that counsel acted reasonably and complied with Rule 651(c). *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 26.

¶ 15 The defendant acknowledges that postconviction counsel filed a certificate of compliance. Counsel certified that he examined the entire record of proceedings, made necessary amendments for the adequate presentation of the defendant's contentions, consulted with the defendant by letter to ascertain his arguments, reviewed correspondence from the defendant to further clarify his arguments, and personally consulted with the defendant. Thus, there is a rebuttable presumption that counsel acted reasonably, and, in order to rebut this presumption, the defendant must demonstrate that his counsel's failure to attach evidentiary support to the second amended postconviction petition constituted a failure to substantially comply with the duties mandated by Rule 651(c).

¶ 16 An evidentiary hearing in a postconviction proceeding will only be held where the allegations of the postconviction petition make a substantial showing of a constitutional violation, and the petition is supported by affidavits, records, or other evidence. *People v. Johnson*, 154 Ill. 2d 227, 239 (1993). The affidavits must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the defendant's allegations. *Id.* at 240. "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." *Id.*

¶ 17 Here, the defendant argues that postconviction counsel failed to make the necessary amendments to the postconviction petition to support his arguments in that counsel failed to attach the transcript of Woods' police interview and Andrews' affidavit to the amended petition. He notes that the affidavits were attached to his *pro se* petition but were not attached to the second amended postconviction petition filed by appointed counsel and that the amendment filings did not adopt the *pro se* petition but instead replaced that petition. Thus, he argues that counsel did not comply with Rule 651(c) and that this court should remand without requiring any showing of prejudice.

¶ 18 In support, the defendant cites *People v. Suarez*, 224 Ill. 2d 37 (2007), and *People v. Waldrop*, 353 Ill. App. 3d 244 (2004). In *Suarez*, our supreme court concluded that postconviction counsel's failure to file a Rule 651(c) certificate warranted remand for compliance regardless of whether the claims in defendant's postconviction petition were viable. *Suarez*, 224 Ill. 2d at 51. The court stated "[o]ur 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." *Id.* The court noted that it had consistently declined the State's invitation to excuse noncompliance with Rule 651(c) on the basis of harmless error. *Id.* In making this decision, the supreme court discussed *People v. Johnson*, 154 Ill. 2d 227, 243 (1993), in which it held that the postconviction petition failed to comply with the requirements of Rule 651(c), and thus counsel provided unreasonable assistance, where the record indicated that counsel did not take any action to obtain affidavits of potential witnesses whose identities were known to him.

¶ 19 Similarly, in *Waldrop*, the appellate court held that postconviction counsel failed to provide reasonable assistance where he mistakenly believed that he did not have a duty to seek an affidavit from a witness specifically identified in defendant's *pro se* petition. 353 Ill. App. 3d at 250. The court noted that, under Rule 651(c), postconviction counsel had an obligation to present defendant's postconviction claims to the court in appropriate legal form, and, at a minimum, had an obligation to attempt to obtain evidentiary support for claims raised in the *pro se* petition. *Id.* at 251. The court concluded that, "contrary to postconviction counsel's belief, the requirement that an affidavit or other supporting document be attached to a postconviction petition does not depend on the issue that the claim of constitutional deprivation raises; on the contrary, all claims may be dismissed without an evidentiary hearing unless they are sufficiently supported." *Id.* at 249-50. Thus, the court concluded that, without affidavits or other supporting evidence, the trial

court had no choice but to dismiss the postconviction petition without an evidentiary hearing because counsel had not adequately complied with Rule 651(c). *Id.* at 251.

¶ 20 Here, counsel mistakenly believed that affidavits were not necessary due to the nature of the claims raised. The State acknowledges that counsel failed to attach the evidentiary support but argues that the assistance rendered by counsel satisfies Rule 651(c) and the absence of affidavits did not prejudice the defendant. However, this is contrary to *Suarez*, which instructs that, where counsel fails to adequately comply with Rule 651(c), the proper remedy is remand without any additional showing of prejudice. Because postconviction counsel has not adequately complied with Rule 651(c) by making the necessary amendments to the defendant's *pro se* petition, we must conclude that postconviction counsel provided an unreasonable level of assistance. Thus, we conclude that this cause should be remanded to the trial court so that postconviction counsel may comply with Rule 651(c).

¶ 21 For the above reasons, the judgment of the circuit court of St. Clair County is reversed, and the cause is remanded for further proceedings.

¶ 22 Reversed and remanded.