

No. 1-12-0579

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 2556
)	
ROBERT LEE,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Liu concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Post-conviction counsel was not required to withdraw and provided a reasonable level of assistance; second-stage dismissal of defendant's petition affirmed.
- ¶ 2 Defendant Robert Lee appeals from an order of the circuit court granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq.* (West 2006)). On appeal, he contends that his post-conviction counsel failed to provide a reasonable level of assistance. We affirm.

¶ 3 The evidence adduced at defendant's jury trial reveals that defendant shot his long-term partner, Constance Evans, in the chest on January 2, 2003 at their home at 1831 South Springfield in Chicago. Evans, who survived the shooting, had lived with defendant for 17 years and they had three children together.

¶ 4 Evans testified that around 7:30 a.m. on January 2, defendant picked her up from work following Evans's shift as an emergency room nurse. On the way home, Evans noticed that defendant had a gun in his jacket pocket. When they arrived home, Evans slept for 10 or 11 hours. Around the time of the incident, the couple was "going through some difficult times" and defendant thought Evans was having an affair with a coworker.

¶ 5 After waking up around 11 p.m., defendant entered the bedroom and Evans sat up in bed. Defendant was wearing the same jacket he had worn when he picked her up from work. Following a heated exchange, defendant smiled at Evans, said "bitch," and pulled out his gun and shot Evans once in the chest. Defendant then sat on the floor and asked if Evans was dead yet, to which Evans responded in the negative and urged defendant to think about their children when he suggested that he "wanted to go with [her]." Evans asked defendant to call 911 and then leave. Defendant left the bedroom crying. Evans was eventually taken to a hospital, where she remained for 10 days.

¶ 6 Defendant testified that the shooting was accidental. Defendant stated that he carried a gun because he felt threatened by one of Evans's co-workers. At approximately 11 p.m. on January 2, he was arguing with Evans in their bedroom. At the time, defendant was wearing his jacket because he planned to spend the night elsewhere to collect his thoughts. However,

defendant ultimately decided to stay home and went to the bedroom to put away his gun.

Defendant removed the gun from his pocket, took a step forward, and tripped on something, whereupon the gun fired. Defendant did not immediately realize that Evans had been shot. Once he noticed that Evans was bleeding, defendant panicked, left the room, and called 911.

Subsequently, defendant left the house and drove around until he went to the police station and turned himself in.

¶ 7 Ultimately, defendant was found guilty of attempted first degree murder and aggravated battery with a firearm and sentenced to concurrent 20-year prison terms.

¶ 8 On direct appeal, defendant contended that: (1) the State failed to prove him guilty of attempted murder beyond a reasonable doubt; (2) his conviction and sentence for aggravated battery with a firearm violated the one-act, one-crime rule; (3) his sentence was excessive; (4) his mittimus should be corrected to accurately reflect his assessed fines, fees, and costs, and (5) the trial court erred when it refused to include a jury instruction on reckless conduct. On May 10, 2006, this court affirmed defendant's conviction and sentence for attempted first degree murder, vacated defendant's conviction and sentence for aggravated battery with a firearm, and amended defendant's fee order. *People v. Lee*, No. 1-04-2207 (2006) (unpublished order under Supreme Court Rule 23).

¶ 9 Defendant filed a *pro se* post-conviction petition on March 16, 2007, alleging that Evans knew the person who was threatening defendant. Defendant further alleged that he was denied effective assistance of counsel when defense counsel interviewed, but failed to call as witnesses, four people who would have testified in defendant's favor. Defendant averred that Percy Carter heard a statement, apparently by Evans, that "my coworker is my friend and if anyone was going to jail it was going to be me [defendant] because I was the one they did not want to be with

anymore." Defendant also averred that Evans told Glen Smith, Odessa Williams, and Tyrone Tate that defendant did not intend to shoot her. Defendant asserted that he had tried to obtain affidavits from these four people, but had been unable to do so because he was incarcerated and "unable to locate most of [the] witnesses['] current addresses without assistance from the court." Defendant's petition was verified and notarized.

¶ 10 Defendant's petition was docketed and post-conviction counsel was subsequently appointed. Counsel appeared in court on several dates to report on his progress. On November 13, 2008, counsel informed the court that his investigation was ongoing and that defendant had given him names of potential witnesses. On February 19, 2009, counsel reported that he had finished reviewing the transcripts and was trying to locate three witnesses. On July 30, 2009, counsel stated his investigation was still ongoing.

¶ 11 On February 18, 2010, counsel filed an Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate, in which he stated that he had communicated with defendant by letter to ascertain his claims of deprivation of his constitutional rights and he had examined the transcript of defendant's trial and sentencing. Additionally, counsel averred that he had examined defendant's *pro se* post-conviction petition and because it adequately stated defendant's claims, counsel had not prepared an amended petition.

¶ 12 On May 20, 2010, the State filed a motion to dismiss, contending that defendant had failed to supply or explain the absence of supporting documentation and had failed to verify the petition. The State further asserted that defendant's petition concerned a matter of trial strategy, which is generally immune from claims of ineffective assistance of counsel.

¶ 13 At the hearing on the motion to dismiss, the State asserted largely the same grounds for dismissal that it had raised in its written motion. Additionally, the State acknowledged that

defendant had actually verified his petition, but stated this was nonetheless insufficient because defendant had not supplied accompanying documentation or explained its absence.

¶ 14 In response, counsel began by stating that he filed a Rule 651(c) certificate without amending defendant's petition. Counsel further stated that he had conducted an investigation "as [defendant] did note that there were numerous people that he wanted to have testify who did not testify." However, counsel had been unable to locate those witnesses and any witnesses he was able to locate he "was not able to obtain an affidavit from." Counsel did not offer further argument.

¶ 15 In its ruling, the court stated that defendant's petition lacked documentation to support its allegations. Additionally, the court found that defendant's claim concerned a matter of trial strategy, rather than deficiency in trial counsel's performance. The court determined that the petition was flawed "on its face" and granted the State's motion to dismiss.

¶ 16 On appeal, defendant contends his post-conviction counsel failed to provide a reasonable level of assistance when he did not withdraw and instead argued against defendant's petition and failed to respond to the State's motion to dismiss. Defendant argues that at the hearing on the State's motion to dismiss, counsel essentially asserted that the petition's allegations were frivolous, which required counsel to withdraw. Defendant further asserts that his petition explained the absence of supporting documentation and counsel should not have conceded the State's argument by stating that the petition lacked affidavits. Additionally, defendant contends that at the second stage of proceedings, a petition alleging ineffective assistance of counsel cannot be dismissed on the basis of trial strategy.

¶ 17 At the second stage of post-conviction proceedings, a defendant must make a substantial showing of a violation of constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

Appointment of counsel at this stage is a statutory right (725 ILCS 5/122-4 (West 2006); *People v. McNeal*, 194 Ill. 2d 135, 142 (2000)), and a defendant is only entitled to a reasonable level of assistance (*Id.*). Under Rule 651(c), reasonable assistance requires counsel to perform three duties: (1) consult with the defendant to ascertain his contentions of deprivation of constitutional rights; (2) examine the record of proceedings at the trial; and (3) make any amendments to the petition filed *pro se* that are necessary for an adequate presentation of the defendant's contentions. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Substantial compliance with Rule 651(c) is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Further, the filing of a Rule 651(c) certificate gives rise to a presumption that post-conviction counsel provided reasonable assistance during second stage proceedings under the Act. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Our review of an attorney's compliance with a supreme court rule, as well as the dismissal of a post-conviction petition on the State's motion, is *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 18 Defendant asserts that counsel's admission that he could not secure affidavits amounted to a statement that the petition's allegations were frivolous. Citing *People v. Greer*, 212 Ill. 2d 192 (2004), defendant contends that counsel was accordingly required to withdraw. We are not persuaded by defendant's reliance on *Greer*. In that case, our supreme court held that where counsel determines that a defendant's petition is frivolous and patently without merit, counsel should be allowed to withdraw. *Greer*, 212 Ill. 2d at 209. However, the court also "[hastened] to emphasize" that counsel's inability to properly substantiate a defendant's claims "is *not* the standard by which counsel should judge the viability of a defendant's postconviction claims." (Emphasis in original.) *Id.* at 211-12. Moreover, *Greer* does not require counsel to withdraw. When counsel determines a defendant's claims to be without merit, our case law provides two

options: (1) stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended or (2) withdraw as counsel. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008). Here, counsel took the former course. When he was unable to secure the affidavits, he informed the court accordingly and stood on the allegations in the petition. Such an approach was acceptable and counsel was not required to withdraw.

¶ 19 In reaching this conclusion, we reject defendant's reliance on *People v. Kirk*, 2012 IL App (1st) 101606, and *People v. Shortridge*, 2012 IL App (4th) 100663, two cases where post-conviction counsel was found to have rendered unreasonable assistance. In *Kirk*, post-conviction counsel disavowed the defendant's post-conviction petition and orally asserted an entirely new claim, which rebutted the representation in counsel's Rule 651(c) certificate that the petition adequately presented defendant's issues. *Kirk*, 2012 IL App (1st) 101606, ¶ 35. In *Shortridge*, post-conviction counsel explicitly confessed to the State's motion to dismiss. *Shortridge*, 2012 IL App (4th) 100663, ¶ 6. In contrast to the attorneys' conduct in *Kirk* and *Shortridge*, here counsel informed the court of the results of his months of investigation, which explained why the petition was not amended, and then stood on the allegations in the petition.

¶ 20 Further, counsel acted reasonably when he did not respond to the arguments in the State's motion to dismiss. To the extent defendant faults counsel for not obtaining the necessary affidavits, we note that post-conviction counsel is required to *attempt* to obtain evidentiary support for the claims raised in a defendant's petition. (Emphasis added.) *People v. Johnson*, 154 Ill. 2d 227, 245 (1993). Counsel's reports over a period of months and his statement at the hearing on the motion to dismiss demonstrate that counsel fulfilled this obligation. Further, counsel is not required to advance frivolous or spurious claims to fulfill the requirements of Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 23. Here, defendant's proposed arguments would

have been meritless in light of the absence of supporting affidavits. A petition must have affidavits, records, or other evidence supporting its allegations or explain why the documents are not attached. 725 ILCS 5/122-2 (West 2006). This requirement has particular significance for defendant's petition. To support a claim of failure to investigate and call witnesses, a defendant must introduce affidavits from those individuals who would have testified. *People v. Guest*, 166 Ill. 2d 381, 402 (1995). The explanation given for the absence of affidavits in defendant's petition—that he needed assistance from the court—had expired, as counsel had been appointed and spent many months attempting to locate witnesses and secure affidavits. The absence of supporting documentation was fatal to defendant's petition and was alone grounds for dismissal. See *Johnson*, 154 Ill. 2d at 245 (where allegations in petition were not supported by affidavits, records, or other evidence, trial court "had no choice but to dismiss" petition without evidentiary hearing).

¶ 21 Additionally, contrary to defendant's contention, arguments about trial strategy are appropriate for second stage proceedings that involve claims of ineffective assistance of counsel. See *People v. Tate*, 2012 IL 112214, ¶ 22 (noting that the State's strategy argument was "more appropriate" for the second stage of post-conviction proceedings, where both parties are represented by counsel and a defendant must make substantial showing of a constitutional violation). Moreover, at the hearing on the motion to dismiss, any argument counsel could have made about strategy would have been fruitless where the petition lacked supporting affidavits. Under these circumstances, defendant received reasonable assistance of post-conviction counsel.

¶ 22 For the foregoing reasons, we affirm the circuit court's dismissal of defendant's post-conviction petition at the second stage of proceedings.

¶ 23 Affirmed.