

2014 IL App (1st) 121723-U

FOURTH DIVISION
May 1, 2014

No. 1-12-1723

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. 05 CR 2209
)	
TOMMY NAVEL,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

O R D E R

¶ 1 **Held:** Second stage dismissal of defendant's post-conviction petition affirmed over defendant's contention that post-conviction counsel failed to provide reasonable assistance under Supreme Court Rule 651(c).

¶ 2 Defendant, Tommy Navel, appeals from an order of the circuit court of Cook County 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 2010)). He contends that post-conviction counsel failed to provide him reasonable assistance as mandated by Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

¶ 3 The record shows that defendant was tried before the bench and found guilty of aggravated battery with a firearm, aggravated domestic battery, aggravated battery, and unlawful use of a weapon. He was then sentenced to a single term of 23 years' imprisonment on the aggravated battery with a firearm conviction. This court affirmed that judgment on direct appeal. *People v. Navel*, No. 1-06-3266 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 On March 9, 2009, defendant filed the *pro se* post-conviction petition at bar alleging, *inter alia*, that the evidence did not prove that he intentionally or knowingly shot the victim, and that his sentence was excessive. He also contended that his trial counsel provided ineffective assistance for failing to object to a victim impact statement (VIS) during sentencing, and for failing to present impeachment evidence showing that the victim had visited him while he was in the custody of the Illinois Department of Corrections (IDOC), and had been banned from visiting him because of a drug charge.

¶ 5 The case was advanced to the second stage after more than 90 days passed without an initial review. 725 ILCS 5/122-2.1(b) (West 2010). The circuit court appointed the public defender to represent him, and, on June 22, 2011, counsel indicated that she had received the record and was reviewing it. On January 13, 2012, counsel filed a Rule 651(c) certificate in which she stated that she had consulted with defendant over the telephone and by letter to ascertain his contentions of deprivations of his constitutional rights, that she had reviewed the

available records, including the common law record, the trial and sentencing transcript, and defendant's appeal. Counsel also stated that she had reviewed defendant's *pro se* post-conviction petition to determine if any amendments were necessary for an adequate presentation of defendant's claims.

¶ 6 On April 20, 2012, the State filed a motion to dismiss defendant's post-conviction petition, alleging, *inter alia*, that defendant's claims regarding the sufficiency of the evidence and his sentence were *res judicata*, and that defendant's claims of ineffective assistance of trial counsel were meritless, as he could not show either unreasonable performance or prejudice. On May 17, 2012, the circuit court granted the State's motion to dismiss after the State rested on its motion and counsel rested on defendant's *pro se* petition.

¶ 7 On appeal, defendant abandons the allegations made in his petition, and contends that post-conviction counsel failed to provide him a reasonable level of assistance, requiring a remand and further second-stage proceedings. He asserts that counsel failed to present his arguments in the appropriate legal form by failing to amend his petition to argue ineffective assistance of appellate counsel, and to provide support for his claim of ineffective assistance of trial counsel. We initially observe that by focusing solely on this issue, defendant has waived for review the allegations in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 8 The appointment of counsel at the second stage of post-conviction petition proceedings is a statutory right (725 ILCS 5/122-4 (West 2010); *People v. Turner*, 187 Ill. 2d 406, 411 (1999)) and entitles petitioners to a "reasonable" level of assistance, which is less than that afforded by the federal or state constitutions (*Pendleton*, 223 Ill. 2d at 472). To ensure that defendants receive a reasonable level of assistance under the Act, appointed counsel must comply with the requirements of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). *Turner*, 187 Ill. 2d at 410.

That rule requires that the record show that counsel has consulted with defendant either by mail or in person to ascertain his contentions of the deprivation of his constitutional rights, has examined the record of proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Substantial compliance with the rule is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and our review of an attorney's compliance is *de novo* (*People v. Jones*, 2011 IL App (1st) 092529, ¶ 19).

¶ 9 Where, as here, post-conviction counsel filed a Rule 651(c) certificate of compliance, a rebuttable presumption is created that defendant received the representation required by the rule. *Jones*, 2011 IL App (1st) 092529 at ¶ 23. The burden is then on defendant to establish that counsel failed to substantially comply with those requirements. *Jones*, 2011 IL App (1st) 092529 at ¶ 23.

¶ 10 Defendant contends that post-conviction counsel provided unreasonable assistance when she failed to amend his petition to allege that appellate counsel was ineffective for failing to raise the "on the record" claims in his *pro se* petition. He asserts that in his *pro se* petition, he raised issues that were waived because they could have been raised on direct appeal, and as such, post-conviction counsel should have avoided this waiver by amending his petition to allege that appellate counsel was ineffective for failing to raise them on direct appeal. This assertion finds no support in the record.

¶ 11 Rule 651(c) requires post-conviction counsel to make any amendments necessary to a *pro se* petition. However, in those cases where amendments to a *pro se* post-conviction petition would only further a frivolous or patently nonmeritorious claim, they are not necessary within the meaning of the rule. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Thus, where counsel has

filed a Rule 651(c) certificate, the question of whether the *pro se* allegations have merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23.

¶ 12 In this case, the majority of the claims set forth by defendant in his *pro se* post-conviction petition were raised and ruled on in his direct appeal, and are now barred under the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). In his appeal, defendant contended that the evidence was insufficient to support his conviction based on the failure of the State to prove that he knowingly or intentionally fired a gun at the victim. He also alleged that his sentence was excessive, contending that the court improperly relied on the VIS. On direct appeal, this court found that the evidence was sufficient for a reasonable trier of fact to conclude that defendant acted with the requisite intent, and that there was nothing in the record to show that the court improperly relied on the VIS. *Navel*, order at 10-11. Because these claims were actually raised on direct appeal by appellate counsel, they are *res judicata*, and any claim that appellate counsel was ineffective for failing to raise them would be meritless, and would not support a claim of unreasonable assistance under Rule 651(c). *Greer*, 212 Ill. 2d at 205.

¶ 13 We also note that defendant's attempt to avoid waiver of his VIS claim by rephrasing it as a failure of counsel does not alter our conclusion. A petitioner cannot obtain relief under the Act simply by rephrasing previously addressed issues in constitutional terms in his petition, as such claims will be properly defeated by operation of waiver and *res judicata*. *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992). Here, we find that post-conviction counsel did not provide unreasonable assistance to defendant by failing to amend his petition to assert a claim of ineffective assistance of appellate counsel regarding the VIS where the proposed underlying claim was denied on direct appeal.

¶ 14 We similarly find that that post-conviction counsel was not unreasonable for failing to amend defendant's petition to assert his claim that trial counsel failed to present evidence to adequately impeach a witness "under the umbrella" of ineffective assistance of appellate counsel. Defendant's claims were based on trial counsel's failure to enter evidence showing that the victim had visited defendant while he was in the custody of IDOC, and had been banned from visitation because of a drug charge, after the victim denied visiting defendant during her testimony. In support of his claim, defendant attached a letter from IDOC to the victim, dated February 3, 2006, informing her that her name was being placed on the visitor's "permanent restriction list" due to a violation of the rules prohibiting "drugs/suspended license[.]" In his petition, however, defendant did not indicate how or when he became aware of the letter, or why trial counsel should have known this when the victim testified.

¶ 15 In any event, the proposed evidence relates only to a matter of impeachment, which is generally considered to be trial strategy, and therefore not supportive of a claim of ineffective assistance of counsel. *People v. Lacy*, 407 Ill. App. 3d 442, 463 (2011). Additionally, the value of the impeachment evidence is limited. Whether the victim visited defendant while in IDOC custody, or whether she had been banned from that visitation because of a drug issue, does not go to a critical issue or element of the offense, particularly where, as here, the victim had already admitted at trial that she used drugs on the night of the incident, and where her relationship with defendant was well-documented, including the fact that they had a 12-year old daughter. Under these circumstances, we find that it is not reasonably probable that defendant was prejudiced by the failure to impeach on this issue, and conclude that post-conviction counsel was not unreasonable for failing to amend his petition to assert ineffective assistance of appellate counsel for not raising this claim on direct appeal.

¶ 16 In reaching this conclusion, we find *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 33, relied on by defendant, to be factually distinguishable. In *Schlosser*, this court held that post-conviction counsel was required to allege a claim of incompetence of appellate counsel in order to avoid waiver. In that case, however, post-conviction counsel raised such a claim for the first and only time at the hearing on the State's motion to dismiss the petition, and "effectively admitted" to the court that defendant's main claim included ineffective assistance of appellate counsel, despite failing to include that claim in the petition. *Schlosser*, 2012 IL App (1st) 092523, ¶ 28. No such representations were made in this case, and unlike in *Schlosser*, 2012 IL App (1st) 092523, ¶ 25, defendant's underlying claims were raised and decided on direct appeal. Thus we find it readily distinguishable from the case at bar.

¶ 17 Defendant next contends that post-conviction counsel provided unreasonable assistance in failing to adequately investigate or amend his petition to include additional evidence supporting the proposed impeachment of the victim. He alleges that counsel "could have obtained an affidavit from [defendant] explaining what he and his trial attorney knew—and when—about [the victim] being banned from visitation" or, that she could have "obtained an affidavit from defense counsel in support of the claim, explaining the basis for her question of the witness at that time." These arguments are merely speculative, asserting what counsel could or should have done, and as found above, they do not relate to the question of defendant's guilt or innocence of the charged offenses. Moreover, there is nothing in Rule 651(c) that suggests the certificate is intended to be a comprehensive recounting of all of post-conviction counsel's efforts (*Jones*, 2011 IL App (1st) 092529 at ¶ 24), and in the absence of evidence to the contrary, where counsel filed a certificate, we presume that she provided the assistance required under the Rule (*People v. Perkins*, 229 Ill. 2d 34, 52 (2007)).

¶ 18 We are also unpersuaded by defendant's claim, that under *Greer*, 212 Ill. 2d 192, counsel was required to withdraw as counsel rather than file a Rule 651(c) certificate if she determined that his claims were nonmeritorious. In *Greer*, post-conviction counsel, who was appointed solely because the court failed to dismiss the petition within the required time for summary dismissals, did not file a Rule 651(c) certificate, and instead moved to withdraw on the basis that the petition lacked merit. *Greer*, 212 Ill. 2d at 194-95.

¶ 19 The issue before the supreme court was whether post-conviction counsel, once appointed, could withdraw instead of complying with the duties set out in Rule 651(c). *Greer*, 212 Ill. 2d at 195-96. Although *Greer* permits withdrawal where defendant's petition cannot be amended to state a meritorious claim, it does not set out a *per se* rule that counsel must withdraw instead of complying with Rule 651(c) and standing on the *pro se* petition. Rather, when counsel finds defendant's claims to be without merit, "[t]he case law provides options. One is to stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended. Another is to withdraw as counsel." *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (citations omitted). As applied to the case at bar, we find that counsel was not required to withdraw, and that her decision to stand on defendant's *pro se* petition was not unreasonable.

¶ 20 For the reasons stated, we affirm the second stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 21 Affirmed.