

No. 1-12-2174

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. 98 CR 12767
)	
DAMION MORGAN,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *HELD:* Second stage dismissal of defendant's *pro se* post-conviction petition affirmed where defendant failed to rebut the presumption that he received reasonable assistance from post-conviction counsel; mittimus corrected to reflect proper calculation of credit for time served.

¶ 2 Defendant Damion Morgan appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He does not challenge the dismissal of his petition on the merits, but claims that post-conviction counsel failed to provide him a

reasonable level of assistance as required by *People v. Perkins*, 229 Ill. 2d 34 (2007), and Supreme Court Rule 651(c) (eff. Feb. 6, 2013). As a result, he requests that the dismissal order be reversed and his cause remanded for further second-stage proceedings with the appointment of new post-conviction counsel. He also requests that his mittimus be amended to reflect 592 days of presentence credit instead of 426 days.

¶ 3 Following a 1999 jury trial, defendant was found guilty of first degree murder and sentenced to 45 years' imprisonment. On direct appeal, this court affirmed that judgment over defendant's *pro se* contention that trial counsel was ineffective for failing to request either a second degree murder or self-defense jury instruction, and after granting appellate counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). *People v. Morgan*, No. 1-99-4442 (2001) (unpublished order under Supreme Court Rule 23).

¶ 4 On October 3, 2008, defendant filed a *pro se* post-conviction petition alleging that a juror "deliberately failed" to timely inform the trial court of her relationship to a witness for the State, that the trial court erred in reading the jury instruction related to eyewitness testimony by substituting the word "or" in the factors, and that trial counsel was ineffective for failing to object to that jury instruction. On October 16, 2008, the circuit court denied defendant leave to file the petition, stating that he had previously filed a post-conviction petition on January 31, 2003, which was dismissed, and that defendant failed to state a basis for filing a successive post-conviction petition. On appeal, we reversed that judgment and remanded for second-stage proceedings under the Act, finding that the circuit court mistakenly treated defendant's initial petition as a successive petition. *People v. Morgan*, No. 1-09-0493 (2010) (unpublished order under Supreme Court Rule 23). On remand, the circuit court docketed defendant's petition for second-stage proceedings and appointed counsel to represent him.

¶ 5 On August 31, 2011, post-conviction counsel filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Feb. 6, 2013), stating as follows:

"1. I have communicated with petitioner Damion Morgan by letter to ascertain his claims of a deprivation of his constitutional rights.

2. I have examined Petitioner's transcript of his jury trial and sentencing in the instance case.

3. I have examined Petitioner's *pro se* Petition for Post-Conviction Relief and as it adequately presents his issues, as [*sic*] supplemental petition will not be presented."

¶ 6 Thereafter, on January 31, 2012, the State filed a motion to dismiss defendant's post-conviction petition alleging that it was untimely filed, which alone was cause for dismissal. The State further alleged that defendant's claims were procedurally barred by waiver because they were based upon matters of record and could have been raised on direct appeal, and, notwithstanding, that his claims were wholly without merit because they were rebutted by the record. At the hearing on this motion, the State argued the matters raised therein, and post-conviction counsel stood on the claims as set forth in defendant's *pro se* petition. Counsel also suggested that the court rule on the merits of these claims rather than only on the procedural problems of the case.

¶ 7 In a written order, entered June 14, 2012, the circuit court granted the State's motion finding that defendant's petition was untimely, that the claims therein were waived and otherwise without merit, and, ultimately, that defendant failed to make a substantial showing of a constitutional violation. Waiver aside, the court specifically rejected defendant's claim of juror bias, pointing out that the targeted juror immediately informed the trial court of the "possible

relationship" he had with a witness for the State, when the juror was five years of age, 16 years prior to the trial. The court noted that this juror was candid in answering the trial court's questions and clearly stated that she could be fair and unbiased. The court also rejected defendant's jury instruction claim, noting that defendant was not prejudiced by the jury instruction related to eyewitness testimony because the evidence against him was overwhelming. Lastly, the court rejected defendant's attendant claim that trial counsel was ineffective for failing to object to that jury instruction.

¶ 8 In this appeal from that judgment, defendant contends that his post-conviction counsel provided unreasonable assistance by failing to amend the petition "to allege ineffective assistance of appellate counsel that was necessary to overcome forfeiture" and to offer an argument against the State's motion to dismiss. We initially observe that by focusing exclusively on this issue, defendant has waived for review the claims actually raised in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 9 The right to post-conviction counsel is statutory (725 ILCS 5/122-4 (West 2010)), and defendants are only entitled to a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To ensure that level of assistance is provided, Rule 651(c) imposes three duties on post-conviction counsel. *Suarez*, 224 Ill. 2d at 42. Under that rule, the record of the filed certificate must show that post-conviction counsel consulted with defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights, examined the trial record, and made amendments to the *pro se* petition which were necessary for an adequate presentation of defendant's contentions. *Suarez*, 224 Ill. 2d at 42. Substantial compliance with Rule 651(c) is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and we review *de novo*, post-conviction counsel's compliance with Rule 651(c) and the dismissal of his post-conviction petition on the State's motion (*People v. Jones*, 2011 IL App (1st) 092529, ¶ 19).

¶ 10 Where, as here, post-conviction counsel files a Rule 651(c) certificate, a rebuttable presumption arises that counsel provided reasonable assistance during second-stage proceedings, and it is defendant's burden to overcome that presumption by demonstrating that counsel failed to substantially comply with the duties imposed by the rule. *Jones*, 2011 IL App (1st) 092529, ¶ 23. Defendant contends that he has done so based on counsel's failure to amend his petition to include a claim of ineffective assistance of appellate counsel, which, he claims, would have allowed him to avoid the application of the forfeiture doctrine.

¶ 11 We initially note, and agree with defendant, that all the claims raised in his petition were based entirely on the trial record and, thus, could have been raised on direct appeal. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). We also recognize that the doctrine of forfeiture does not apply where fundamental fairness so requires, where the alleged forfeiture stems from the incompetence of appellate counsel, or where the facts relating to the claim do not appear on the face of the original appellate record. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005).

¶ 12 Citing *People v. Turner*, 187 Ill. 2d 406 (1999), defendant argues that the failure of post-conviction counsel to make a routine amendment to the post-conviction petition, which would overcome the procedural bar of forfeiture, amounts to unreasonable assistance. *Turner*, however, is factually distinguishable from the present case. In *Turner*, defendant raised various detailed arguments in his *pro se* petition, including that trial counsel was ineffective for failing to discover and impeach a witness with evidence that was withheld by the State and statements that he made to undisclosed family members and prisoners at the jail. *Turner*, 187 Ill. 2d at 409. Post-conviction counsel did not amend the petition, and the circuit court granted the State's motion to dismiss, finding the claims in the petition barred by *res judicata* or waived because defendant could have raised them on direct appeal but failed to do so. *Turner*, 187 Ill. 2d at 409. The supreme court observed that had post-conviction counsel amended the petition to allege

ineffective assistance of appellate counsel for failing to raise defendant's claims on direct appeal, they would not have been barred by waiver. *Turner*, 187 Ill. 2d at 413. Given the totality of the circumstances in that case, the supreme court concluded that counsel's performance was unreasonable and fell below the level of assistance required by Rule 651(c). *Turner*, 187 Ill. 2d at 414.

¶ 13 In reaching that decision, the supreme court recognized its long-standing rule that "[t]here is no requirement that post-conviction counsel must amend a petitioner's *pro se* post-conviction petition," and expressed no opinion on the merits of defendant's post-conviction claims or whether an evidentiary hearing would be appropriate. *Turner*, 187 Ill. 2d at 412, 416-17 (citing *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991)). In construing the decision in *Turner*, this court determined that the supreme court did not hold that *any* failure to amend the petition would be unreasonable or that post-conviction counsel *had to* add new claims not mentioned in defendant's *pro se* petition; but rather, that it merely found that counsel's failure to make a routine amendment to a post-conviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c). (Emphasis added.) *People v. Rials*, 345 Ill. App. 3d 636, 643 (2003).

¶ 14 Here, post-conviction counsel filed a Rule 651(c) certificate, which gave rise to the rebuttable presumption that he performed the duties required of him under that rule (*Jones*, 2011 IL App (1st) 092529, ¶ 23). As noted, all the claims raised in defendant's untimely petition were based entirely on the trial record, but not raised on direct appeal, and the State did not waive the procedural bars of timeliness (see *People v. Bocclair*, 202 Ill. 2d 89, 101 (2002) (timeliness is not a jurisdictional prerequisite but an affirmative defense that the State may forfeit or may choose to waive by failing to file a motion to dismiss on that ground)) or forfeiture (see *Blair*, 215 Ill. 2d at 456 (noting that the State had not indicated that it wished to forgo the affirmative defense of *res*

judicata and forfeiture on appeal)). Unlike *Turner*, nothing in the record on appeal contradicts post-conviction counsel's certification that there were no amendments necessary for adequate presentation of the claims in defendant's petition, and thus we give effect to post-conviction counsel's official representation that he complied with Rule 651(c). *Perkins*, 229 Ill. 2d at 52. In doing so, we recognize that the duties imposed by Rule 651(c) frame post-conviction counsel's obligations "to investigate and properly present the *petitioner's* claims." (Emphasis in original.) (Internal quotation marks omitted.) *People v. Ramey*, 393 Ill. App. 3d 661, 667 (2009).

¶ 15 The additional cases cited by defendant do not compel a different result. In *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 28, post-conviction counsel raised a claim of ineffective assistance of appellate counsel for the first time at the hearing on the State's motion to dismiss the petition, yet he filed a Rule 651(c) certificate asserting that he made any necessary amendments to the *pro se* petition. In *People v. Milam*, 2012 IL App (1st) 100832, ¶ 36, post-conviction counsel raised a new due process claim in an amended petition, but as in *Turner*, counsel failed to raise it in the context of an ineffective assistance of appellate counsel claim, which prevented the circuit court from considering the merits of that claim and directly contributed to the dismissal of the petition without an evidentiary hearing. In *People v. Kluppelberg*, 327 Ill. App. 3d 939, 947 (2002), defendant alleged in his *pro se* post-conviction petition that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness based on counsel's failure to introduce into evidence a police report that classified the fire that killed a mother and her five children as accidental, but post-conviction counsel only alleged in the amended petition that trial counsel was ineffective for not raising this issue. Here, the circuit court dismissed defendant's petition as untimely and, notwithstanding, found that his claims therein were waived and otherwise had no merit. Based on the facts of this case, we give effect to post-conviction counsel's official representation that he complied with Rule 651(c) and

conclude that post-conviction counsel fulfilled his duties under the rule. *Perkins*, 229 Ill. 2d at 52.

¶ 16 Defendant nonetheless maintains that if post-conviction counsel believed that all of his claims were ultimately without merit, even after making amendments to address his procedural default, then counsel should have withdrawn pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). In *Greer*, post-conviction counsel was appointed entirely because the circuit court failed to dismiss the petition within the required time for summary dismissals. *Greer*, 212 Ill. 2d at 194-95. Rather than filing a Rule 651(c) certificate, post-conviction counsel moved to withdraw on the basis that the petition lacked merit. *Greer*, 212 Ill. 2d at 195. 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. The supreme court stated, "If amendments to a *pro se* postconviction petition would only further a frivolous and patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Greer*, 212 Ill. 2d at 205. Under these circumstances, *Greer* recognizes the *option*, not obligation, to withdraw as counsel in accordance with *Anders* procedures. (Emphasis added.) *Greer*, 212 Ill. 2d at 209. Thus, although post-conviction counsel had the option of withdrawing in this case, standing on the allegations in the *pro se* petition and informing the court of the reason the petition was not amended is also a recognized option. *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008).

¶ 17 Lastly, defendant asserts that he is entitled to 592 days of presentence credit, but only received 426 days of credit. He notes that trial testimony and the common law record show that he was arrested on April 9, 1998, and sentenced on November 22, 1999. The State responds that defendant failed to establish that he was in custody for the additional days because the circuit court denied one of defendant's motions requesting the same and defendant's failure to include a

transcript of proceedings from that denial creates an ambiguity that should be construed against him.

¶ 18 Our *de novo* review of the record (*People v. Harris*, 2012 IL App (1st) 092251, ¶ 34), namely the presentence investigation report filed October 22, 1999, and the mittimus entered on November 22, 1999, confirms that defendant was arrested on April 9, 1998, then sentenced on November 22, 1999, and is entitled to presentence credit for 592 days. "[O]nce a defendant is arrested for an offense he or she is clearly 'in custody' for that offense even before he or she is formally charged." *People v. Roberson*, 212 Ill. 2d 430, 439 (2004), *quoted in Harris*, 2012 IL App (1st) 092251, ¶ 35. Pursuant to Supreme Court Rule 615(b)(1), we order that the mittimus be corrected to reflect 592 days of presentence incarceration credit. *People v. Coleman*, 409 Ill. App. 3d 869, 881 (2011).

¶ 19 For the reasons stated, we affirm the second stage dismissal of defendant's post-conviction petition and order the mittimus corrected as indicated.

¶ 20 Affirmed as modified.