

No. 1-12-2915

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. 00 CR 9076
)	
NICKOLAS HASELRIG,)	Honorable
)	Thomas V. Gainer, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices ROCHFORD and REYES concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant cannot establish that he was denied reasonable assistance of postconviction counsel when he has failed to rebut the presumption of compliance with Rule 651(c) triggered by the filing of a Rule 651(c) certificate. Defendant's postconviction petition was properly dismissed at the second stage of proceedings under the Post-Conviction Hearing Act when it failed to make a substantial showing that defendant was denied the effective assistance of trial counsel.
- ¶ 2 Defendant Nickolas Haselrig appeals from the second stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On

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appeal, defendant contends that postconviction counsel provided unreasonable assistance in violation of Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel filed a facially deficient Rule 651(c) certificate and the certificate predated the State's motion to dismiss. Defendant further contends that the circuit court erred in dismissing his petition when an evidentiary hearing was required to examine his claim that he was denied effective assistance of trial counsel by counsel's failure to present the testimony of eyewitness Marcus Reeves, who would have identified Shiman Lowe as the shooter, at trial. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of a March 2000 incident during which Kenyatta Cooper and Ricardo Reynolds were shot. At defendant's bench trial, both Cooper and Reynolds identified defendant as the person who shot them with a rifle. Defendant, on the other hand, denied shooting anyone and identified Shiman Lowe as the shooter.¹ Specifically, defendant testified that he was with Marcus Reeves, "Clarence," "Abican," and Lowe playing dice when a group which included Cooper and Reynolds arrived and joined the game. Lowe got into an argument with one of the men over alleged cheating and left. When Lowe returned, he continued the argument, then pulled out a rifle and began shooting. Ultimately, the trial court found defendant guilty of two counts of attempted murder and sentenced him to two consecutive terms of 15 years in prison. This judgment was affirmed on direct appeal. See *People v. Haselrig*, No. 1-02-1618 (2005) (unpublished order under Supreme Court Rule 23).

¶ 4 In December 2005, defendant filed the instant *pro se* postconviction petition alleging that he was denied the effective assistance of trial counsel by, *inter alia*, counsel's failure to contact eyewitnesses Reeves, Lowe, Clarence, and Abican, and present their testimony at trial. Attached

¹ Lowe was deceased at the time of trial.

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to the petition in support was Reeves's affidavit averring that he was present when Cooper and Reynolds were shot, and that Lowe, rather than defendant, was the shooter. Reeves further averred that he was present when Lowe was killed. He finally averred that on the night of the shooting, Cooper and Reynolds were picking up money from drug sales "the night before," that Lowe was the leader of their "crew," and that the shooting was precipitated by missing money.

¶ 5 The circuit court summarily dismissed the petition, and that judgment was affirmed on appeal. See *People v. Haselrig*, No. 1-06-0437 (2007) (unpublished order under Supreme Court Rule 23). However, our supreme court, pursuant to its supervisory authority, directed this court to vacate our order and reconsider our judgment in light of *People v. Hodges*, 234 Ill. 2d 1 (2009). See *People v. Haselrig*, 234 Ill. 2d 536 (2009). The cause was subsequently remanded to the circuit court for second stage proceedings under the Act. See *People v. Haselrig*, No. 1-06-0437 (2010) (unpublished order under Supreme Court Rule 23).

¶ 6 On remand, the petition was docketed and postconviction counsel filed an appearance in July 2010. Postconviction counsel then requested several continuances so that her investigator could finish certain inquiries. On November 17, 2011, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984). The certificate stated that counsel had consulted with defendant by telephone and mail regarding his contentions of deprivations of constitutional rights, that she obtained and examined the report of proceedings of defendant's guilty plea and sentencing, and that counsel would not be filing an amended petition because the *pro se* petition adequately set forth defendant's claims. Five months later, the State filed a motion to dismiss, which the trial court granted.

¶ 7 On appeal, defendant contends that he was denied the reasonable assistance of

postconviction counsel when counsel filed a facially deficient Rule 651(c) certificate, that is, the certificate referenced a guilty plea when defendant was found guilty following a bench trial.

Defendant also argues that counsel's failure to file an amended certificate following the filing of the State's motion to dismiss is further proof of her noncompliance with Rule 651(c).

¶ 8 This court reviews an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on the State's motion, *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 9 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. The purpose of the rule is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and presents them to the court. *Profit*, 2012 IL App (1st) 101307, at ¶ 18. An attorney's substantial compliance with the rule is sufficient. *Profit*, 2012 IL App (1st) 101307, at ¶ 18.

¶ 10 When a Rule 651(c) certificate is filed, the presumption exists that the defendant received the representation that the rule requires him to receive during second stage proceedings under the Act. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, at ¶ 19.

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¶ 11 In the case at bar, defendant contends that he has rebutted the presumption of substantial compliance because counsel violated her duty to examine the trial record. Defendant argues that counsel's Rule 651(c) certificate states that counsel reviewed the transcript from defendant's guilty plea and sentencing when, in fact, defendant was found guilty following a bench trial. However, we disagree with defendant's contention that the error in postconviction counsel's Rule 651(c) certificate refutes the presumption of substantial compliance created by the filing of the certificate.

¶ 12 In cases where the record shows that postconviction counsel adequately fulfilled the duties required by Rule 651(c), the failure to file a proper certificate is harmless error (*People v. Lander*, 215 Ill. 2d 577, 584 (2005)), because Rule 651(c) does not require strict compliance (*Profit*, 2012 IL App (1st) 101307, at ¶ 18). Here, the record reveals the postconviction counsel requested several continuances to allow her investigator to complete the investigation and counsel time to communicate with defendant. This court notes that defendant does not allege that postconviction counsel did not consult with him by letter and telephone. Consequently, because postconviction counsel consulted with defendant regarding his claims of constitutional deprivation, *i.e.*, he was denied the effective assistance of trial counsel by counsel's failure to present the testimony of certain witnesses at trial, counsel would have learned that defendant was found guilty following a bench trial. Thus, because the record indicates that postconviction counsel substantially complied with the duties required by the rule (*Profit*, 2012 IL App (1st) 101307, at ¶ 18), counsel's erroneous reference to a "guilty plea" in her certificate does not rebut the presumption that defendant received the representation required by the Rule at the second stage of proceedings under the Act. *Rossi*, 387 Ill. App. 3d at 1060; see also *People v.*

Kirkpatrick, 2012 IL App (2d) 100898, ¶ 14 (counsel's erroneous citation to Supreme Court Rule 604(d) instead of Rule 651(c) was harmless in light of the substance of counsel's certificate and his representations to the trial court).

¶ 13 Defendant next contends that postconviction counsel's failure to file an updated Rule 651(c) certificate after the State filed its motion to dismiss is evidence that counsel did not comply with "the rule as to that motion." Specifically, defendant argues that counsel should have filed a response to the motion to dismiss rather than stand upon defendant's *pro se* petition and that her failure to either file a response or an updated Rule 651(c) certificate verifying that she had read the motion to dismiss constituted unreasonable assistance.

¶ 14 However, defendant cites no authority for the proposition that counsel must file an amended 651(c) certificate after the State files a motion to dismiss. Rather, the rule's purpose is to require appointed counsel to consult with a defendant in order to determine that particular defendant's claims of constitutional deprivations. *People v. Marshall*, 375 Ill App. 3d 670, 683 (2007). While Rule 651(c) requires appointed counsel to amend the *pro se* petition as necessary to present the defendant's claims, there is no requirement that counsel respond to the State's motion to dismiss. See Supreme Court Rule 651(c) (eff. Dec. 1, 1984) (counsel must consult with defendant either by mail or in person to ascertain defendant's claims of constitutional deprivation, examine the record of proceedings at trial, and make any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of the defendant's claims); see also *People v. Marshall*, 375 Ill App. 3d 670, 682-83 (2007) (concluding that Rule 651(c)'s requirements must be met only once). We also reject defendant's argument that he was denied the reasonable assistance of postconviction counsel by counsel's decision to stand on defendant's

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pro se postconviction petition rather than respond to the State's motion to dismiss as he fails to identify the amendments that could have been made to his *pro se* petition in order to respond to the State's motion to dismiss. See *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 6 (the purpose of Rule 651(c) is to ensure that counsel shapes the defendant's claims into proper legal form and presents them to the court).

¶ 15 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, thus triggering the presumption that defendant received the representation that the rule requires him to receive during second stage proceedings under the Act (*Rossi*, 387 Ill. App. 3d at 1060), and, as discussed above, although the certificate contained an error, defendant has failed to rebut this presumption (see *Profit*, 2012 IL App (1st) 101307, at ¶ 19). Consequently, defendant has failed to establish that he was denied the reasonable assistance of postconviction counsel (see *Moore*, 189 Ill. 2d at 541).

¶ 16 Defendant next contends that the circuit court dismissed his petition in error when it made a substantial showing that he was denied the effective assistance of trial counsel by counsel's failure to present the testimony of Reeves at trial in order to support defendant's testimony identifying Lowe as the shooter.

¶ 17 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2004). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage where counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2004)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2004)).

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¶ 18 At the second stage, it is the defendant's burden to make a "substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A "substantial showing" of a constitutional violation is a measure of the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle him to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. Therefore, all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *Pendleton*, 223 Ill. 2d at 473. If a defendant makes a substantial showing that his constitutional rights were violated, the matter proceeds to a third stage evidentiary hearing where the circuit court serves as a fact-finder and resolves evidentiary conflicts, weighs credibility, and determines the weight to be given testimony and evidence. *Domagala*, 2013 IL 113688, at ¶¶ 34, 46.

¶ 19 To show an attorney's representation was ineffective, a defendant must establish that counsel's performance was deficient and that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When determining whether an attorney's performance was unreasonable, the reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). A defendant establishes prejudice by showing a reasonable probability, *i.e.*, a probability sufficient to undermine confidence in the outcome of the proceeding, that but for counsel's errors the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. Failure to satisfy either part of the *Strickland* test defeats a claim of ineffective assistance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 20 The decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy, which are generally immune from ineffective assistance of counsel claims. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002); see also *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000) (decisions of trial strategy ultimately rest with trial counsel). In order to establish deficient performance, a defendant must overcome the strong presumption that counsel's actions or inactions were sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42 (2007).

¶ 21 Here, the decision not to present the testimony of Reeves was a matter of trial strategy which is typically not subject to a claim of ineffective assistance of counsel. See *Munson*, 206 Ill. 2d at 139-40. The record reflects that defendant testified that after an argument over alleged cheating in a dice game, Lowe left the area, returned, continued the argument, and ultimately pulled out a rifle. Reeves's affidavit, however, indicates that the shooting was precipitated by missing drug money. Although defendant correctly argues that both men identified Lowe as the shooter, this court rejects his argument that there was only a "minor, irrelevant inconsistency" in their accounts of the shooting. In other words, even if both men were truthful regarding the shooter, one was lying about the circumstances surrounding the shooting, and to accept Reeves's version of events would mean that defendant's version was not truthful.

¶ 22 As *Strickland* instructs, this court evaluates the reasonableness of counsel's challenged conduct "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Here, applying deference to counsel's judgment (*Strickland*, 466 U.S. at 689), we conclude that defendant has failed to establish that trial counsel's performance fell below an objective standard of reasonableness as counsel's decision not to present the testimony of Reeves, which would have

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contradicted defendant's testimony regarding the events leading up to the shooting, was not "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland*, 466 U.S. at 687). Rather, this was simply a strategic decision not to present testimony that would have damaged defendant's credibility, which this court will not second-guess. See *Strickland*, 466 U.S. at 689 (it is "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable"). As defendant has not shown that his counsel's performance was deficient, he has failed to satisfy the first prong of the *Strickland* test, and his claim of ineffective assistance of counsel must fail. *Edwards*, 195 Ill. 2d at 163. Therefore, because defendant has failed to make a "substantial showing of a constitutional violation" (*Domagala*, 2013 IL 113688, at ¶ 35), the circuit court correctly dismissed his postconviction petition.

¶ 23 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 24 Affirmed.