

No. 1-13-0216

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 14764
	)	
VICTOR RIVERA,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Justices Neville and Mason concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* Post-conviction counsel provided unreasonable level of assistance; dismissal of defendant's petition is reversed and remanded with directions.
- ¶ 2 Defendant Victor Rivera 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, defendant contends his post-conviction counsel failed to provide a reasonable level of assistance.

¶ 3 The record reveals that defendant was charged with, *inter alia*, first degree murder and aggravated battery with a firearm after an incident in which two people were shot. One of the victims was defendant's cousin, Wilfredo Rivera, who survived and testified at trial. The other victim, Ralph Espinoza, was killed. In addition to testimony from Wilfredo, the State's evidence included testimony from Jacklene Berrios, who was Wilfredo's girlfriend at the time of the shooting and an occurrence witness, Sally Gonzalez, who was Wilfredo's aunt, and Lisa Judycki, who happened to be driving by at the time of the shooting. Defendant did not present witnesses and relied on the State's inability to prove his guilt beyond a reasonable doubt.

¶ 4 At the jury trial, Jacklene Berrios testified that on April 18, 2002 at about 9 p.m., she was drinking on Wilfredo's porch at 33rd and Lituanica in Chicago with defendant, Wilfredo, Wilfredo's brother Alberto Rivera, and a few other people. At one point, Ralph arrived and he and Wilfredo argued. Ralph then left, but returned half an hour later, whereupon he and Wilfredo began fist fighting. During the fight, defendant "came out shooting" from a gangway with a rifle and fired about 10 shots. After Wilfredo fell to the ground, defendant kept shooting and then beat Ralph over the head with the rifle. Eventually, defendant fled and Jacklene told Wilfredo's sister to call an ambulance.

¶ 5 Lisa Judycki testified that while she was driving home from work on April 18, she heard what sounded like firecrackers, and later realized what she heard were gunshots, near 34th and Lituanica. She also observed a man repeatedly hit someone in the head with what appeared to be a pole. Judycki did not know either of the people she had seen.

¶ 6 Blanca "Sally" Gonzalez, who was Wilfredo's aunt, testified that shortly after 9:30 p.m. on April 18, defendant came to her house and told her that he had shot Wilfredo and Ralph. A

few hours later, Alberto arrived, and Sally overheard defendant also tell Alberto that he shot Wilfredo and Ralph.

¶ 7 During his testimony, Wilfredo acknowledged that he had testified before a grand jury that defendant was the shooter and that defendant had called after the incident to apologize for shooting him. Additionally, Wilfredo identified defendant as the shooter in a handwritten statement to an assistant State's Attorney. However, when recounting the incident at trial, Wilfredo denied seeing the shooter. Wilfredo testified that he had told police that defendant was the shooter because the police threatened to "put stuff on [him]" that could interfere with his parole.

¶ 8 At the close of the State's case, defense counsel informed the court that defendant would not present any witnesses. As to defendant testifying, defense counsel stated he had "discussed it at length" with defendant and defendant did not wish to testify. Defendant affirmed that he and defense counsel had discussed his right to testify.

¶ 9 Ultimately, the jury found defendant guilty of first degree murder and aggravated battery with a firearm. Initially, defendant was sentenced to consecutive prison terms of 50 years for first degree murder, which included a 25-year enhancement because defendant personally discharged a firearm that proximately caused death, and 5 years for aggravated battery with a firearm. However, the next day, the trial court corrected defendant's sentence for aggravated battery with a firearm to the minimum of six years.

¶ 10 On direct appeal, defendant contended that: (1) the prosecutors' statements during their closing argument were improper and sufficiently prejudicial to deprive him of a fair trial; (2) the trial court violated the prohibition against increasing the severity of a defendant's sentence; and

(3) the subsection of the statute authorizing the enhanced sentence (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2002)) did not apply to his offense and was unconstitutional. On April 14, 2006, this court affirmed defendant's convictions and sentence. *People v. Rivera*, No. 1-04-2455 (2006) (unpublished order under Supreme Court Rule 23).

¶ 11 On July 10, 2007, defendant filed a *pro se* post-conviction petition, alleging, in part, that he was denied effective assistance of counsel because his attorney failed to call Alberto Rivera as a witness. Defendant stated that Alberto had been "ready and available in the courtroom" to testify, and had he done so, he would have testified that defendant had not confessed to him at Sally's house on the night of the shooting. Defendant asserted that Alberto's testimony would have "obviously contradicted and discredited" Sally's testimony and that his attorney had known the contents of Alberto's proposed testimony.

¶ 12 Additionally, defendant alleged that his attorney coerced him into giving up his right to testify. Defendant averred that he asked his attorney "numerous times" to testify on his own behalf, but his attorney "kept advising him otherwise." Defendant further stated that he gave up his right to testify "only once he was convinced that his attorney was advising him with his best interest at heart." Additionally, although "he did not like it," defendant "gave up his right when asked in court only because of the insistence of his attorney."

¶ 13 Post-conviction counsel was appointed on August 23, 2007. At a proceeding on October 23, 2008, post-conviction counsel reported that he was "still waiting on getting the needed documents." On October 22, 2009, post-conviction counsel asked the court to sign an order "saying that I can obtain a transcript." On April 21, 2011, post-conviction counsel reported that

he had completed his investigation and would be prepared to file an Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate on the next court date.

¶ 14 On September 14, 2011, post-conviction counsel filed the Rule 651(c) certificate, averring that he had consulted with defendant by letter to ascertain his contentions of deprivation of constitutional rights and examined the report of proceedings of defendant's trial. Additionally, post-conviction counsel stated that he had examined defendant's *pro se* petition and because it adequately presented his claim of deprivation of constitutional rights, "there is nothing that can be added by an amended or supplemental petition."

¶ 15 Subsequently, in December 2011, defendant filed a *pro se* "Motion for Leave to File Documents Supporting a Denial of Reasonable Representation by Post Conviction Counsel." In this motion, defendant stated that he received an initial letter from his post-conviction counsel on January 3, 2008, which asked defendant to let counsel know if he had any thoughts about his trial or petition. Defendant stated that subsequently, the only communications he received were notices that his case had been continued. Additionally, defendant received a letter in June 2011 in which counsel indicated that he would not amend defendant's petition and implied that he would not obtain affidavits from the witnesses identified in the petition. After receiving this letter, defendant and his aunt tried to obtain affidavits from "two identified witnesses who are being held in the Federal Detention Center in Chicago," but were told that only an attorney could obtain those affidavits. Defendant's aunt attempted to get post-conviction counsel to obtain those affidavits, but counsel refused. In his motion, defendant failed to identify these two referenced witnesses by name. Defendant further stated that he and his aunt tried to obtain "the location and/or address of three additional witnesses, one of whom will testify" that defendant "was with

him when the shooting occurred and therefore was not the shooter." Again, defendant failed to identify these purported "three additional witnesses" by name. Additionally, defendant asserted that "evidence from Wilfredo Rivera" would establish that his grand jury and trial testimony were the products of coercion and false. Defendant further stated that he believed that Jacklene and Sally were also coerced into testifying, but post-conviction counsel had refused to contact, interview, and depose them.

¶ 16 Attached to defendant's motion were letters he had received from post-conviction counsel. In the first letter, dated January 3, 2008, counsel informed defendant he had been assigned defendant's case and had not yet determined what action would be taken. Counsel also invited defendant to let him know if defendant had any thoughts about the trial or petition and noted counsel's address and phone number. Following this first letter were 11 others that informed defendant that his case had been continued and invited defendant to contact counsel with any questions. On May 17, 2011, post-conviction counsel sent a letter indicating that the case was continued, informing defendant that he would write in about a week with the results of the investigation and counsel's decision, and inviting defendant to contact him with any questions. In a subsequent letter dated June 6, 2011, counsel stated that he planned to file a Rule 651(c) certificate on the next court date and listed the reasons counsel did not plan to supplement defendant's *pro se* petition. Counsel addressed each of defendant's claims, beginning by stating that the claim regarding trial counsel's failure to call Alberto Rivera as a witness was meritless because the petition "contains no affidavit attesting to the fact that your trial counsel knew that the witness would testify accordingly." Further, the evidence was too overwhelming to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). According to counsel,

defendant's guilt was firmly established by Wilfredo's handwritten statement and grand jury testimony, Jacklene's testimony, and the portion of Sally's testimony recalling defendant's confession to her. As to defendant's claim regarding his right to testify, post-conviction counsel stated that defendant was admonished and questioned by the trial court, and further, defendant admitted in his petition that he gave up the right after being convinced by his trial attorney. In closing, counsel invited defendant to call collect with any questions.

¶ 17 On November 17, 2011, the State filed a motion to dismiss defendant's petition, contending in part that the decision to call potential witnesses is a matter of trial strategy. The State also asserted that the lack of an affidavit from Alberto was fatal to the petition. Further, the State contended that defendant's allegation that he was denied the right to testify was meritless because he admitted he made that decision on the advice of his attorney, which was not tantamount to coercion.

¶ 18 At the hearing on the State's motion to dismiss, the State asserted largely the same grounds for dismissal as in its written motion. In response, post-conviction counsel stated he would rely on defendant's *pro se* petition and did not have further argument.

¶ 19 In its ruling, the court stated that defendant's claim involving Alberto Rivera was unsupported by "any documentary evidence whatsoever." The court similarly found that defendant's claim about his right to testify was "absolutely completely devoid of any specifics" of defendant's hypothetical testimony. The court also addressed the claim from defendant's *pro se* motion that Wilfredo's testimony was coerced, stating that the claim was "wholly conclusory" because defendant did not include an affidavit or other documentary evidence.

¶ 20 Additionally, the court acknowledged that defendant sought to challenge the performance of his post-conviction counsel, leading to the following colloquy:

"THE COURT: Let me ask you\*\*\*, were you able to or did you take efforts to discuss with [defendant] what the testimony would have been had he wished to testify, did you take any steps to ascertain what it was that Alberto Rivera would have testified to had such been presented to the trial court at the time?

MR. LANDRUM [Assistant Public Defender]: I'm not sure about Albert; but if I recall correspondence with [defendant], I think he would have relied on the defense of self defense or something like that. But I think in the record as far as his wanting to testify, I think that was on the record."

Subsequently, the court granted the State's motion to dismiss.

¶ 21 On appeal, defendant contends his post-conviction counsel failed to render a reasonable level of assistance because, in four years of representing defendant, counsel failed to consult with defendant and amend defendant's *pro se* petition to adequately present his claims.

¶ 22 At the second-stage of proceedings under the Act, a defendant must make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). The right to counsel at this stage is statutory. 725 ILCS 5/122-4 (West 2006). A defendant is entitled to only a "reasonable" level of assistance, which is less than that afforded by the federal or state constitutions. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). To assure the reasonable assistance required by the Act, Rule 651(c) imposes three duties on post-conviction counsel: (1) consult with the defendant by mail or in person to ascertain the contentions of deprivation of

constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's contentions. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The filing of a Rule 651(c) certificate gives rise to a presumption that post-conviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. A defendant overcomes this presumption by demonstrating that counsel failed to substantially comply with the requirements of Rule 651(c). *Id.* 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*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 23 Based on the record which reflects four years of representation, we find that post-conviction counsel failed to provide reasonable assistance to defendant. During the four years post-conviction counsel represented defendant, he breached the duty owed to defendant by only sending letters to defendant indicating the continuances and by failing to consult with defendant by mail, by telephone or in person about substantive matters: the letters did not contain substantive discussions with defendant about Alberto, Wilfredo, or the defendant about his decision not to testify. Instead, by relying on about a dozen letters that reported continuances, there is no indication at all that post-conviction counsel consulted with defendant in order to fully investigate defendant's claims.

¶ 24 Post-conviction counsel breached the duty owed to defendant by failing, during a four-year period, to consult with defendant to determine the witnesses, if any, to interview, who could support defendant's contentions of deprivation of his constitutional rights.

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¶ 25 For the foregoing reasons, we reverse the trial court's dismissal of defendant's post-conviction petition and remand to the trial court with directions that it allow defendant the opportunity to replead his post-conviction petition with the assistance of counsel. See *People v. Turner*, 187 Ill. 2d 406, 417 (1999).

¶ 26 Reversed and remanded with directions.