

No. 1-12-1868

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. 04 CR 28351
)	
KELLY ROSS,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶1 *Held:* We affirm the circuit court's second-stage dismissal of defendant's post-conviction petition where post-conviction counsel provided reasonable assistance.

¶2 Defendant Kelly Ross 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 2010). On appeal, defendant contends the record failed show that his appointed post-conviction counsel performed the duties required under Supreme Court Rule 651(c) (eff. Feb. 6, 2013), because counsel did not consult with him to ascertain his contentions of deprivation of constitutional rights. We affirm.

¶3 The record reveals that the grand jury returned a two-count indictment against defendant. Count I alleged that on January 8, 2004, defendant "knowingly committed an act of sexual penetration on [G.W.], to wit: contact between [defendant's] penis and [G.W.'s] anus, by the use of force or threat of force." Count II alleged that defendant "knowingly committed an act of sexual penetration on [G.W.], to wit: contact between [defendant's] penis and [G.W.'s] mouth, by the use of force or threat of force."

¶4 After the victim, C.C., testified at trial, the State made an oral motion to amend the indictment to substitute the name C.C. for G.W. as the victim. The State further sought to amend count I to allege penis-to-vagina contact, and count II to allege mouth-to-vagina contact. The court found the State's actions "sloppy," but allowed the amendment over defendant's objections.

¶5 Following defendant's bench trial, the court found him guilty of both counts of criminal sexual assault and sentenced him to a term of natural life imprisonment. This court affirmed that judgment on direct appeal. In doing so, we rejected defendant's argument that the amendments were substantive, untimely alterations to the nature of the offenses charged, and ultimately held that the amendments were formal. *People v. Ross*, 395 Ill. App. 3d 660, 673 (2009).

¶6 On June 24, 2011, defendant filed a *pro se* post-conviction petition alleging solely that the trial court's decision to allow the State to amend the indictment violated his due process rights. The public defender's office was appointed to represent defendant on November 15, 2011. In his first appearance on this case on March 8, 2012, assistant public defender (APD) Timothy Leeming stated he "had a chance to look at [the petition]," requested leave to file a motion to withdraw as counsel for defendant, and asked if defendant could be "writted in so he can be admonished." Defendant was not present at this court date, and the matter was continued.

¶7 According to APD Leeming's motion to withdraw, which was filed on March 8, Leeming considered the merits of defendant's claim that changes to the indictment were not merely formal, but were instead substantive, and thus required re-indictment by a grand jury. Leeming maintained, however, that because this issue raised in the *pro se* petition was previously addressed and settled during defendant's direct appeal, the principles of *res judicata* prohibited re-litigation. Because defendant's claim was frivolous, Leeming determined that he could not in good faith continue to advance the claim that "trial counsel was ineffective for not contacting Sherrie Parker" without violating Illinois Supreme Court case law and rules. Defendant's *pro se* petition made no mention of an individual named "Sherrie Parker."

¶8 APD Leeming appeared in court with defendant present on April 26, 2012. The following colloquy occurred at that hearing:

"APD LEEMING: Judge, the last time the case was up in March, I filed a motion to withdraw as counsel. I had sent a copy to [defendant], and he understands I am going to withdraw as his attorney, and his litigation will continue and all his claims will be preserved and addressed.

THE COURT: Do you understand that, [defendant]?

DEFENDANT: Yes.

THE COURT: So where are we at in the process? Leave granted for the Public Defender's Office to withdraw.

APD LEEMING: Thank you, Judge."

After granting counsel's motion to withdraw, the circuit court again continued the matter. The record does not contain a certificate by post-conviction counsel Leeming that he complied with Rule 651(c).

¶9 On May 1, 2012, the State filed a motion to dismiss defendant's petition, alleging that defendant's contention that the circuit court erred by allowing the State to amend the indictment after trial commenced was barred by the doctrine of *res judicata* where defendant had already raised this issue on direct appeal. On June 13, 2012, a hearing was held on the State's motion to dismiss with defendant representing himself *pro se*. The State reiterated its argument that defendant's claim was barred by the doctrine of *res judicata*, and defendant maintained that the indictment against him had contained the wrong charges and alleged the wrong victim. The court granted the State's motion to dismiss, finding defendant's claim was barred by *res judicata*. This appeal followed.

¶10 On appeal, defendant contends the record does not show that APD Leeming performed the duties required under Rule 651(c), and thus the matter should be remanded for further proceedings. In particular, defendant points out Leeming failed to file a certificate of compliance with Rule 651(c), and maintains the record does not demonstrate counsel consulted with him to ascertain his contentions of deprivation of constitutional rights. The State concedes post-conviction counsel never filed a Rule 651(c) certificate, but nevertheless contends the record demonstrates he consulted with defendant sufficiently to ascertain that defendant alleged only one, precluded claim in his petition. We agree with the State.

¶11 The Act provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Bocclair*,

202 Ill. 2d 89, 99-100 (2002). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the defendant's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). At the second stage of proceedings, all factual allegations not positively rebutted by the record are considered true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶12 The right to post-conviction counsel is a matter of legislative grace, and a post-conviction petitioner is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). Illinois Supreme Court Rule 651(c) imposes specific duties on post-conviction counsel to ensure he provides reasonable assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Under Rule 651(c), post-conviction counsel is required to: (1) consult with the defendant by phone, mail, electronic means or in person to ascertain his allegations of how he was deprived of his constitutional rights, (2) examine the record of proceedings from the trial, and (3) amend the defendant's *pro se* petition as necessary to adequately present his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The purpose of Rule 651(c) is to "ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *People v. Profit*, 2012 IL App (1st) 101307, ¶18. Substantial compliance with the rule is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and counsel is not required to advance nonmeritorious claims on defendant's behalf (*People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)).

¶13 When post-conviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that post-conviction counsel provided reasonable assistance. *Profit*, 2012 IL App (1st)

101307, ¶19. However, as in the present case where no such certificate is in the record, there is no presumption that counsel fulfilled his obligations. *Suarez*, 224 Ill. 2d at 42-44. Nevertheless, the "absence of a Rule 651(c) certificate is harmless if the record shows that counsel abided by the rule's requirements." *People v. Peoples*, 346 Ill. App. 3d 258, 262 (2004). Our review of an attorney's compliance with a supreme court rule is also reviewed *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶19.

¶14 Here, APD Leeming substantially complied with Rule 651(c) where the evidence demonstrated that he consulted with defendant. Counsel made two appearances in this case, and, although defendant was absent during counsel's first appearance, he was present at the second. During APD Leeming's second appearance, he stated that he "sent" defendant a copy of the motion to withdraw, and noted that defendant understood the consequences of that motion. Counsel thus complied with Rule 651(c) where he clearly communicated with defendant through the mail by sending him the aforementioned motion to withdraw. In addition, APD Leeming's statement to the court that defendant indicated he understood the consequences of the motion to withdraw was further evidence that APD Leeming consulted with him. Defendant even echoed counsel's sentiment at the hearing when he told the court that he understood APD Leeming was withdrawing as his attorney. The fact that both counsel and defendant were in court at the same time suggests that they also communicated in person.

¶15 In concluding that APD Leeming substantially complied with Rule 651(c), we find unpersuasive defendant's contention that counsel never stated that he had communicated with defendant about the substance of his claims, instead opting to inform him that his petition would still be decided and his claims preserved despite his decision to withdraw from the matter.

Defendant only included one claim in his *pro se* post-conviction petition *i.e.*, the trial court's decision to allow the State to amend the indictment violated his due process rights, which was barred by *res judicata* as it was decided on direct appeal. We thus agree with the State that, besides informing defendant that persisting in such a claim would require him to withdraw, there was simply nothing else for APD Leeming to discuss as defendant's meritless claim could not have been clarified or amended into a proper claim. Moreover, APD Leeming was not obligated to advance a new claim that was not raised in defendant's *pro se* petition. See *People v. Davis*, 156 Ill. 2d 149, 163 (1993) (explaining that a post-conviction petitioner is not entitled to the advocacy of counsel for purposes of exploration, investigation, and formulation of potential claims). It is also significant to note that any correspondence between APD Leeming and defendant regarding the substance of defendant's claim would have taken place off the record, and this court would not be privy to its content. See *People v. Radojcic*, 2013 IL 114197, ¶39 (stating that the purpose of the attorney-client privilege is to encourage frank communication between the client and his attorney without the fear that confidential information will be disseminated to others).

¶16 Defendant acknowledges that counsel's motion to withdraw addressed the merits of defendant's one claim, but argues that addressing the claim fails to demonstrate that APD Leeming consulted with defendant. Defendant observes that Leeming apparently partially pasted over a pre-existing motion from another case as revealed by the reference to a person named Sherrie Parker and no one by that name was involved in defendant's case. Such carelessness on the part of counsel is never justified. However, the motion correctly conveyed, in an appended memorandum of law, the crime, the procedural background, the history of the case, the direct

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appeal decision by this court, and the applicability of *res judicata* to the issue raised in the post-conviction petition. In light of counsel's representation that he mailed the motion to defendant, which is a permissible means of communication under Rule 651(c), and the mutual understanding evident between counsel and defendant at the hearing that counsel would withdraw and the claim would be preserved, we find that the consultation duty was fulfilled.

¶17 For the foregoing reasons, we affirm the judgment of the circuit court.

¶18 Affirmed.