

No. 1-14-0297

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

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|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County |
| |) | |
| v. |) | No. 03 CR 25021 |
| |) | |
| ELI CUNNINGHAM, |) | Honorable |
| |) | Dennis J. Porter, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Reversed second stage dismissal of the defendant's post-conviction petition and remanded for further proceedings under the Act where post-conviction counsel failed to comply with Rule 651(c).

¶ 2 The defendant, Eli Cunningham, appeals from an order of the circuit court of Cook County dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) at the second stage of proceedings. On appeal, the defendant contends that the circuit court erred in finding that he was culpably negligent in failing to timely file his post-conviction petition. The defendant also contends that the Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate filed by post-conviction counsel is facially deficient and that

the record does not otherwise indicate that counsel complied with the Rule, requiring us to reverse the dismissal of his petition and remand for further post-conviction proceedings. We reverse and remand with directions.

¶ 3 Following a 2005 bench trial, the defendant was convicted of the October 24, 2003, attempted murder of his cousin, Sylvester Daniels, for striking him with his car. The defendant claimed self-defense. He was sentenced to 16 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Cunningham*, 376 Ill. App. 3d 298 (2007).

¶ 4 On August 27, 2008, private counsel filed a post-conviction petition in the defendant's name. The certificate of service indicated that she personally filed the petition with the clerk of the Circuit Court of Cook County. The petition was labeled "*pro se*," and, according to the last page, was respectfully submitted by "S/Eli Cunningham," but was not signed. Private counsel's name appeared nowhere on the petition. The petition alleged that the defendant was deprived effective assistance of trial counsel because counsel failed to notify the State of the defendant's intent to advance a self-defense theory, and investigate the case to secure the testimony of several witnesses, including the defendant's girlfriend, Sheila Collins, who would have corroborated his testimony that his cousin pointed a gun at him. On October 22, 2008, the circuit court summarily dismissed the petition, finding that the allegations were *res judicata*, unsupported, frivolous and patently without merit. The defendant appealed, and his appeal was docketed as No. 1-08-3501.

¶ 5 On February 19, 2010, while appeal No. 1-08-3501 was pending, the defendant filed a *pro se* motion to reconsider, alleging that he did not authorize private counsel to file "anything" on his behalf, and that counsel was not retained by him. He further alleged that counsel filed the

post-conviction petition without his knowledge and that he had merely written counsel to set up a meeting to discuss the possibility of her representing him. The defendant alleged that he received a letter from counsel on February 15, 2008, about obtaining records from the appellate defender's office, and then she was to arrange a meeting with him to discuss potential post-conviction issues. On July 1, 2008, he received a second letter from counsel to arrange a visit or call to discuss her possible representation. The defendant requested that the circuit court withdraw the dismissal and the post-conviction petition, and that he be allowed to refile a post-conviction petition without prejudice.

¶ 6 In support of his motion, the defendant attached his own affidavit averring that he did not retain counsel to represent him "on appeal," and that counsel was not authorized to file the petition. The defendant attached the two letters from counsel. According to the letter dated February 15, 2008, counsel obtained the briefs filed in his case, and requested the transcripts in his case. Counsel stated in this letter that she would arrange a meeting with the defendant to discuss potential post-conviction issues. According to the letter dated July 1, 2008, counsel stated that she received the transcripts, the defendant's post-conviction petition was due at the end of August 2008, and that once she had read the transcripts, she would arrange a call and visit. On March 31, 2010, the circuit court denied the defendant's motion to reconsider, finding it untimely and that it had no jurisdiction to reconsider the dismissal. The defendant appealed, appeal No. 1-10-1036, arguing that the post-conviction petition was invalid because he did not sign it.

¶ 7 On May 13, 2011, this court consolidated appeal Nos. 1-08-3501 and 1-10-1036, and affirmed the denial of the defendant's motion to reconsider. *People v. Cunningham*, Nos. 1-08-

3501 and 1-10-1036 (consolidated) (unpublished order under Supreme Court Rule 23). The defendant filed a petition for leave to appeal to the supreme court. The supreme court denied the petition for leave to appeal but issued a supervisory order directing this court to vacate its order affirming the denial of the defendant's motion to reconsider the dismissal of his post-conviction petition. It directed this court to remand the matter to the circuit court for an evidentiary hearing on the defendant's motion to reconsider, including whether the petition was filed with the defendant's knowledge and authorization, and if not, whether the petition should be stricken or withdrawn. *People v. Cunningham*, No. 113991, May 30, 2012 (supervisory order). Pursuant to the supervisory order, this court vacated the May 13, 2011, consolidation and decision and remanded to the circuit court, retaining jurisdiction until resolution by the circuit court.

¶ 8 At the evidentiary hearing on remand, the defendant and his counsel testified to their different interactions. The defendant testified that he only authorized counsel to file an extension of time and did not know she did not file one, and never gave counsel permission to file the petition on his behalf. Conversely, counsel testified that she agreed to represent the defendant and file the petition on his behalf, raise the claim unsupported, but then amend the petition with an affidavit as soon as they received one.

¶ 9 At the close of evidence, the circuit court found that counsel and the defendant had entered into an agreement for her to represent him on the post-conviction petition, and there was an attorney-client relationship. The court found that, in August 2008, counsel provided the defendant with the two options she testified to, and she thought that the defendant wanted her to file the deficient petition, but that this was not the defendant's understanding. The court noted that, in the defendant's letter to counsel dated September 26, 2008, he stated "we need to get the

post-conviction petition filed," which showed that he did not know the petition was filed. The court struck the petition filed in August 2008, vacated the dismissal order, and "in short, *** [placed the defendant] back in a position [he was in] *** had the petition never been filed." The court then stated that if the defendant filed anything else, he would be subject to the statute of limitations. On June 26, 2013, given the court's vacatur of the first stage dismissal and initial petition, we dismissed appeal No. 1-10-1036 as moot.

¶ 10 On February 15, 2013, the defendant filed a *pro se* post-conviction petition, alleging that he was denied effective assistance of trial and appellate counsel. The defendant alleged that trial counsel was ineffective for promising him that, if he elected a bench trial, the most he would be found guilty of was leaving the scene of the accident, and electing to stipulate to evidence instead of calling the witness. He also claimed that counsel was ineffective for failing to prepare the defendant to testify, object to the State questioning the defendant regarding the credibility of other witnesses, file a motion to suppress his statement, and introduce his father and Collins as witnesses in support of his self-defense claim. He alleged that the cumulative impact of trial counsel's errors deprived him of effective assistance of counsel and a fair trial, requiring a new trial. In support, the defendant attached his own affidavit, averring that, prior to trial, his counsel promised him that if he waived a jury trial, he would only be convicted of the lesser charge of leaving the scene of an accident.

¶ 11 The defendant was subsequently appointed post-conviction counsel who filed a supplemental petition alleging there was no culpable negligence for the untimely filing of the defendant's petition. Counsel alleged that the defendant had cause for not filing his petition from April 2007, through January 4, 2013, because, during that period, he was either reasonably

relying on assistance of private counsel or litigating before the appellate court and the trial court after remand to have the unauthorized petition stricken. Most of the delay in filing the petition was due to the defendant's relationship with private counsel and his reasonable reliance on her assistance, and once the unauthorized petition was stricken, the defendant acted diligently in preparing his petition. Counsel further alleged that, once the defendant learned that an unauthorized petition had been filed and denied, he diligently sought to have it stricken. Counsel claimed that the defendant did not file his own *pro se* petition during the winter of 2008 and 2009 because he relied on appellate counsel to have the unauthorized petition stricken. Post-conviction counsel then alleged that the defendant's jury trial waiver was not voluntary because trial counsel was ineffective for making a promise that the defendant would only be convicted of a minor crime if he chose a bench trial.

¶ 12 In support of the timeliness issue, counsel attached the defendant's affidavit in which he averred that the delay in filing a timely petition was not due to his own lack of diligence, but was caused by private counsel taking matters into her own hands in putting together a defective petition, which she filed without his knowledge and authorization. He averred that, because counsel was ineffective, she caused the delay with a reckless disregard of the law and his legal rights. The defendant further averred that this delay caused him to burden the courts with his issues because he had to follow certain court procedures, delaying the proceeding even longer, to get the petition stricken in hopes of filing it anew.

¶ 13 Post-conviction counsel filed a Rule 651(c) certificate stating:

"In compliance with Supreme Court Rule 651(c), I have consulted with petitioner either by mail, on the telephone, or in person to ascertain his contentions of deprivation of constitutional rights.

I have examined the appellate decision *People v. Cunningham*, Nos. 1-08-3501 & 1-10-1036, issued May 13, 2011.

I have prepared a pleading which is necessary to adequately present, preserve and supplement Petitioner's pro se claims."

¶ 14 The State filed a motion to dismiss, arguing that the petition was untimely. The State further argued that the ineffective assistance of trial counsel claims were without merit and that the ineffective assistance of appellate counsel claim failed because the underlying issues were without merit.

¶ 15 Post-conviction counsel filed a response to the State's motion to dismiss, alleging that the defendant cannot be held culpably negligent for work done on his case while it was in the hands of private counsel or the courts. Counsel further alleged that it was only after January 4, 2013, that the defendant was "directed to advance his *pro se* claims," and he filed his petition within a few weeks of that date. Counsel thus claimed that the defendant's efforts were diligent and reasonable. Counsel further alleged that an evidentiary hearing should be held to examine and assess the defendant's testimony and that of his trial attorney to determine the merits of the defendant's claim that counsel made promises which prompted him to waive his right to a jury trial.

¶ 16 Following a hearing, the circuit court granted the State's motion to dismiss, finding the petition untimely and the individual allegations without merit. As to timeliness, the court noted

that the defendant was trying to have it both ways: asserting that private counsel was not his lawyer or authorized "to do anything," while at the same time arguing that he reasonably relied on her as his lawyer and thus did not file anything. The court stated that the defendant could not have it both ways and that untimeliness was an appropriate basis for dismissal. The court further found that the defendant's jury waiver claim was positively rebutted by the record, that the failure to call a witness was a matter of trial strategy, that the defendant had not shown that the result would have been different had counsel filed a motion to suppress or that motion would have been successful, and that the failure to call Collins was unsupported. The court concluded that there was no merit to the individual allegations and thus no substantial showing of ineffective assistance of appellate counsel for failing to raise those allegations on direct appeal.

¶ 17 The defendant raises two arguments on appeal. He first contends that he was not culpably negligent for failing to file a timely post-conviction petition because he relied on the advice of private counsel during the filing period. He thus claims that the circuit court improperly dismissed his petition as untimely. The defendant's second contention is that post-conviction counsel's Rule 651(c) certificate was facially deficient and the record does not otherwise indicate that counsel complied with that Rule. He thus contends that this court should remand for further proceedings under the Act. For the reasons that follow, we agree with the defendant that the dismissal of his post-conviction petition should be vacated and the cause remanded for further proceedings under the Act for post-conviction counsel's failure to comply with Rule 651(c). Our review of a post-conviction petition dismissed without an evidentiary hearing is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 18 Post-conviction counsel must provide a reasonable level of assistance. *People v. Lander*, 215 Ill. 2d 577, 583-84 (2005). To that end, the Act imposes specific obligations on counsel. *Id.* at 584. Rule 651(c) requires that the record show that counsel: "(1) consulted with the defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights; (2) examined the record of the [circuit] court proceedings; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's contentions." *Id.* Compliance with these duties is mandatory and may be shown by a certificate filed by post-conviction counsel. *Id.* "The filing of a Rule 651(c) certificate gives rise to the rebuttal presumption that post-conviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 19 Here, the defendant contends and the State concedes that post-conviction counsel failed to certify that he examined the circuit court proceedings. Post-conviction counsel's Rule 651(c) certificate affirmatively stated only that he had consulted with the defendant and examined "the appellate decision *People v. Cunningham*, Nos. 1-08-3501 & 1-10-1036, issued May 13, 2011." Therefore, as counsel's certificate demonstrated his failure to comply with Rule 651(c), the defendant overcame the presumption that post-conviction counsel provided reasonable assistance. *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 20 That said, Rule 651(c) requires that either *the record* or the certificate must show that counsel complied with that Rule. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 17. Thus, if the record affirmatively shows that counsel examined the circuit court proceedings, the Rule's requirements have been met. *People v. Myers*, 386 Ill. App. 3d 860, 865 (2008).

¶ 21 Here, the record does not affirmatively show that counsel was familiar with the circuit court proceedings. The defendant was represented by a different attorney at trial. Post-conviction counsel, who filed the 651(c) certificate, first appeared on the matter on October 2, 2012. At that time, he told the circuit court that he did not "know a lot about the case." He requested discovery pertaining to the defendant's relationship with private counsel who had filed the original post-conviction petition. At the hearing on the State's motion to dismiss, post-conviction counsel indicated that he was resting on the pleadings filed, which consisted of the *pro se* petition filed in February 2013, the supplement petition filed in August 2013, and the response to the State's motion to dismiss filed in December 2013. He argued the timeliness issue, maintaining that any delay was not due to the defendant's lack of diligence. He also discussed the defendant's claim that trial counsel made the defendant promises which prompted him to elect a bench trial, and resulted in an involuntary waiver of a jury trial. The record thus shows that counsel was familiar with the pre-trial proceedings and post-conviction matters, but it does not show that as to the trial proceedings.

¶ 22 Post-conviction counsel failed to comply with Rule 651(c) where the record shows that he failed to review the trial proceedings. The defendant had alleged in his *pro se* petition that trial counsel was ineffective for failing to prepare him to testify, object to the State's questioning of him regarding the credibility of other witnesses, file a motion to suppress his statement, and introduce his father and Collins as witnesses in support of his self-defense claim. He alleged that the cumulative impact of trial counsel's errors deprived him of effective assistance of counsel and a fair trial, requiring a new trial. However, as indicated by post-conviction counsel's 651(c) certificate, counsel did not review the trial proceedings and the record does not show otherwise.

As counsel was unfamiliar with the trial proceedings, he could not provide the defendant reasonable assistance with his post-conviction petition, which included multiple claims based on the trial proceedings. Accordingly, without a showing that post-conviction counsel fulfilled the Rule's requirements, we cannot conclude that the defendant was provided with adequate representation. *Myers*, 386 Ill. App. 3d at 865-66.

¶ 23 The defendant contends that this conclusion requires reversal of the dismissal order of the post-conviction petition and remand for further post-conviction proceedings, citing *People v. Brown*, 52 Ill. 2d 227, 230-31 (1972) (dismissal of post-conviction petition reversed and case remanded because there was nothing in the record to show that counsel examined the record of the petitioner's trial proceedings in compliance with Rule 651(c)). The State, on the other hand, argues that post-conviction counsel may have simply listed the wrong proceedings and that this court should solely remand to the circuit court for the limited purpose of ascertaining whether post-conviction counsel reviewed the trial record. In support, the State cites *People v. Robinson*, 2015 IL App (4th) 130815, ¶ 10, in which the Fourth District noted, in the "BACKGROUND" of its facts section, that it had previously remanded the case for the limited purpose of demonstrating compliance with Rule 651(c) in *People v. Robinson*, 2013 IL App (4th) 120254-U, ¶ 34. The background of a case is clearly not law. Furthermore, an unpublished case has no precedential value. *People v. Petty*, 311 Ill. App. 3d 301, 303 (2000); see also Ill. S. Ct. Rule 23(e) (eff. July 1, 2011).

¶ 24 Further, our supreme court in *Lander*, 215 Ill. 2d at 585, 590, reversed the dismissal of the defendant's post-conviction petition and remanded for further proceedings under the Act for counsel's noncompliance with Rule 651(c). We are bound by the decision of the supreme court.

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People v. Artis, 232 Ill. 2d 156, 164 (2009). Accordingly, we reverse the dismissal of the defendant's post-conviction petition and remand to the circuit court. *Lander*, 215 Ill. 2d at 585, 590. Because we reverse and remand based on counsel's failure to comply with Rule 651(c), we need not address the defendant's culpable negligence argument.

¶ 25 In light of the foregoing, we reverse the dismissal of the defendant's post-conviction petition and remand for further proceedings under the Act.

¶ 26 Reversed; remanded with directions.