

No. 1-12-0504

**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. 03 CR 10832
	)	
COURTNEY WHITE,	)	Honorable
	)	Larry G. Axelrod,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Pierce and Liu concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Second stage dismissal of defendant's post-conviction petition affirmed over defendant's contention that post-conviction counsel failed to provide reasonable assistance under Supreme Court Rule 651(c).

¶ 2 Defendant, Courtney White, appeals from an order of the circuit court of Cook County 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 2010)). He contends that post-conviction counsel

failed to provide him reasonable assistance as mandated by Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)).

¶ 3 The record shows that in August 2004, defendant was tried before the bench and found guilty of possession of a controlled substance with intent to deliver, on evidence showing that he was observed selling crack cocaine at a Chicago Housing Authority (CHA) complex on the near north side of Chicago. Defendant was sentenced to eight years' imprisonment, consecutive to a four-year term imposed in Case No. 03 CR 04533.

¶ 4 This court affirmed the judgment on direct appeal, and modified the order assessing him fines, fees and costs. *People v. White*, No. 1-04-3047 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5 On June 22, 2007, defendant filed the *pro se* post-conviction petition at bar alleging, *inter alia*, that his conviction was based on an illegal arrest, that the State improperly withheld evidence of a police dispatch report, and that he received ineffective assistance from trial and appellate counsel. The memorandum of orders shows that on July 27, 2007, the circuit court appointed the Office of the Public Defender as counsel. Thereafter, the assistant public defender assigned to defendant's case reported difficulty in procuring transcripts, and obtained a court order for their production. During subsequent court appearances, counsel reported that she was reviewing appellate briefs and transcripts.

¶ 6 On June 12, 2009, counsel filed and presented a motion for discovery and requested leave to subpoena the CHA, stating that defendant had informed her that "a security guard from CHA [was] present during the arrest[.]" The circuit court agreed to allow defendant to subpoena the CHA for their records, "to get the name of the security guard" on the date of the offense. Counsel also requested leave to subpoena the Chicago Police Department, stating that she was

having difficulty obtaining the police reports from within the public defender's office. The court suggested, and the Assistant State's Attorney (ASA) agreed, to first attempt to procure the reports through the State's Attorneys' office. At a subsequent court date, counsel informed the court that she had received the police reports from the ASA, and reported that her "client has some information which my investigator is still checking out."

¶ 7 On April 30, 2010, counsel informed the court that she had "requested more appellate materials" to properly investigate defendant's charge of ineffective assistance of counsel. She then stated that she was still investigating and following up on information.

¶ 8 On July 9, 2010, counsel stated that she was "currently investigating [defendant's] witnesses" and was waiting to receive from defendant a list of witnesses that he wanted her "to check into[.]" Once she received that list, counsel would "ask my investigator to interview these people to see if they have anything to add to [defendant's] petition.

¶ 9 During subsequent court appearances, counsel reported that she had received the list of witnesses from defendant, and was attempting to locate those who may have seen defendant's arrest, but that the search had resulted in "largely dead ends." Counsel also stated that she was investigating defendant's allegations of trial counsel's ineffectiveness, and had interviewed trial counsel and secured trial counsel's file and notes for review.

¶ 10 On March 11, 2011, counsel filed a Rule 651(c) certificate in which she stated that she had consulted with defendant to ascertain his contentions of deprivations of his constitutional rights, obtained and examined the trial and sentencing transcripts, and determined that defendant's *pro se* petition for post-conviction relief adequately presented defendant's claims of deprivation of his constitutional rights.

¶ 11 Shortly thereafter, the State filed a motion to dismiss defendant's post-conviction petition, alleging, *inter alia*, that defendant's claims were based on unsupported conclusory allegations insufficient to warrant an evidentiary hearing. Counsel indicated that she would file a response to the motion on May 27, 2011, however, on that date, counsel informed the court that she had recently received a voicemail from a previously unknown witness. Counsel had sent her investigator to speak to the potential witness, and stated that this individual "appears to be a legitimate witness. I want [the investigator] to go out and talk to her again." Counsel informed the court that it may be necessary to supplement defendant's petition with an affidavit from the witness, and the court continued the case for counsel to determine if she would supplement defendant's petition.

¶ 12 On July 15, 2011, counsel filed an amended petition and a new 651(c) certificate. In the amended petition, defendant alleged a "free-standing claim of [actual] innocence" based on the affidavit of Gloria Lowe, in which Lowe averred that, during the evening hours of April 19, 2003, she was on duty as a security guard at the CHA building where defendant was arrested. She did not see police chase defendant from the back of the building, into the lobby and up the stairs, but she did see police walk down the stairs with defendant in custody. Counsel argued that this evidence directly contradicted the testimony of the arresting officer, who testified that police chased defendant through the lobby before his arrest. Counsel claimed this new evidence would likely change the result on retrial, because it tended to establish that the remainder of the officer's testimony, including his observations of defendant participating in drug transactions, was not credible.

¶ 13 Defendant further asserted that this testimony was newly discovered, and that the failure to provide it earlier could not be charged to his lack of due diligence. In support, counsel

submitted documentation showing that trial counsel had submitted a request to locate and interview security staff of the CHA building, which indicated that trial counsel had the names of two other individuals as possible security guards at the time of defendant's arrest, but that trial counsel was not aware of Lowe.

¶ 14 In the accompanying Rule 651(c) certificate, counsel alleged that she had consulted with defendant to ascertain his contentions of deprivations of his constitutional rights, obtained and examined the trial and sentencing transcripts "as well as investigated potential witnesses" and filed an amended petition for post-conviction relief "which adequately presents [defendant's] issues."

¶ 15 On October 11, 2007, the State filed a motion to dismiss the amended petition, arguing that Lowe's affidavit was not newly discovered, and that it was not of such a conclusive character that it would likely change the result on retrial. The State also noted that in defendant's initial *pro se* post-conviction petition, defendant described his version of the facts surrounding his arrest, stating that the officer "rushed upon" defendant in the lobby of the CHA building. The State contended that this version was at odds with the allegations contained in Lowe's affidavit.

¶ 16 In defendant's response to the motion to dismiss, counsel claimed, *inter alia*, that defendant's *pro se* petition should not be considered by the court because the amended petition effectively abandoned and withdrew it. She further contended that his drafting of the *pro se* pleading was "defective" because defendant was not legally trained and had previously suffered a head injury.

¶ 17 After a hearing on January 13, 2012, the circuit court granted the State's motion to dismiss, finding Lowe's affidavit insufficient "to conclude that this is anything that would have had an effect on the trier-of-fact's decision."

¶ 18 On appeal, defendant abandons the allegations made in his petition, and contends that post-conviction counsel failed to provide him a reasonable level of assistance, requiring a remand and further second-stage proceedings. We initially observe that by focusing solely on this issue, defendant has waived for review the allegations in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 19 The appointment of counsel at the second stage of post-conviction petition proceedings is a statutory right (725 ILCS 5/122-4 (West 2010); *People v. Turner*, 187 Ill. 2d 406, 411 (1999)) and entitles petitioners to a "reasonable" level of assistance, which is less than that afforded by the federal or state constitutions (*Pendleton*, 223 Ill. 2d at 472). To ensure that defendants receive a reasonable level of assistance under the Act, appointed counsel must comply with the requirements of Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). *People v. Turner*, 187 Ill. 2d at 410. That rule requires that the record show that counsel has consulted with defendant either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Substantial compliance with the rule is sufficient (*People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008)), and our review of an attorney's compliance is *de novo* (*People v. Jones*, 2011 IL App (1st) 092529, ¶ 19).

¶ 20 Where, as here, post-conviction counsel filed a Rule 651(c) certificate of compliance, a rebuttable presumption is created that defendant received the representation required by the rule. *Jones*, 2011 IL App (1st) 092529 at ¶ 23. The burden is then on defendant to establish that counsel failed to substantially comply with those requirements. *Jones*, 2011 IL App (1st) 092529 at ¶ 23. Here, we find that defendant has failed to do so.

¶ 21 The record, as outlined above, shows a concerted effort on the part of post-conviction counsel to review defendant's claims of constitutional deprivation, examine the record, and amend the petition to adequately present defendant's claims. Among other efforts, the record explicitly shows that counsel moved for additional discovery from the CHA and police department, reviewed and investigated a list of potential witnesses provided by defendant, interviewed trial counsel and reviewed his file and notes, and sent an investigator to speak to Lowe on multiple occasions.

¶ 22 Defendant contends, however, that post-conviction counsel made "wholly unsubstantiated" claims that Lowe's affidavit was not discovered despite trial counsel's "due diligence." He asserts that post-conviction counsel failed to present any evidence showing such diligence, and, in the absence of such evidence, counsel should have pled alternative claims of both actual innocence and ineffective assistance of counsel.

¶ 23 In so arguing, defendant claims that "there is no evidence in the record that [post-conviction] counsel conferred with trial counsel, and no explanation of what attempts she may have made to do so." The record, however, shows otherwise. On October 22, 2010, and February 4, 2011, post-conviction counsel indicated to the court that she had interviewed trial counsel, and had followed up with that investigation by securing trial counsel's file and notes for review. There is nothing in Rule 651(c) that suggests the certificate is intended to be a comprehensive recounting of all of post-conviction counsel's efforts (*Jones*, 2011 IL App (1st) 092529 at ¶ 24), and as noted by the State, counsel attached to the amended petition evidence of trial counsel's request for information regarding the security officers at the building. This request indicated that trial counsel was attempting to locate the security guards, and had the names of two individuals who may have been on duty at the relevant time, but did not have Lowe's name.

Although defendant responds that this was no more than a form request and does not show that counsel thoroughly investigated trial counsel's diligence, given counsel's certification, as well as her explicit statements on the record regarding her interview of trial counsel and review of his trial file, we will not assume counsel's failure to do so. *Jones*, 2011 IL App (1st) 092529 at ¶ 26.

¶ 24 Moreover, in order to adequately present defendant's claim of actual innocence, counsel indicated that she had abandoned the claims of defendant's previous *pro se* petition, which were at odds with the claim raised in the amended petition. Our review of the record shows that doing so was not unreasonable. As the supreme court has noted, the fact that counsel's strategy proves unsuccessful does not indicate that she did not provide reasonable assistance; rather, the presumption created by the 651(c) certification is that "[c]ounsel's argument was apparently the best option available based on the facts." *People v. Perkins*, 229 Ill. 2d 34, 51 (2007).

¶ 25 Defendant next claims that counsel failed to "conform" Lowe's affidavit to sufficient standards of specificity and concreteness. In so arguing, defendant acknowledges that Lowe's affidavit was insufficient to show that she "was in the lobby at the relevant time[.]" Although defendant characterizes this as a failure on counsel's part, there is no evidence in the record to indicate that Lowe was able or willing to produce an affidavit with greater specificity than the one she tendered to counsel, or that her affidavit would conform with the scenario proposed by present counsel. As such, we conclude that defendant has failed to rebut the presumption of reasonable assistance arising from the filing of the certificate (*Jones*, 2011 IL App (1st) 092529 at ¶ 23), and affirm the second stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 26 Affirmed.