

No. 1-09-2027

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).

FIFTH DIVISION
APRIL 1, 2011

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. 93 CR 12649 |
| |) | |
| CARL ROGERS, |) | The Honorable |
| |) | Brian Flaherty, |
| Defendant-Appellant. |) | Judge Presiding. |

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon
concurred in the judgment.

O R D E R

Held: Second-stage dismissal of successive post-conviction petition affirmed over claim that appointed counsel failed to fulfill the obligations mandated by Rule 651(c).

Defendant Carl Rogers appeals from the dismissal of his third successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He

contends that his court-appointed counsel did not comply with her obligations under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because she failed to amend his petition to adequately present his claims of constitutional violations.

The record shows, in relevant part, that in 1994, a jury found defendant guilty of the first degree murder of Shawn Monroe, and the attempted first degree murder and aggravated battery with a firearm of Terrence Crawford and Raynard Beard. Defendant was sentenced to 55 years' imprisonment for his murder conviction, and concurrent, 25-year terms for his attempted murder convictions, which were ordered to be served consecutively to the murder conviction. This court affirmed that judgment on direct appeal. *People v. Rogers*, No. 1-94-1988 (1995) (unpublished order under Supreme Court Rule 23).

In 1997, defendant filed a *pro se* post-conviction petition in which he alleged that he received ineffective assistance of trial and appellate counsel, and that the trial court abused its discretion in failing to properly instruct the jury on the substantive admissibility of prior inconsistent statements. The post-conviction court summarily dismissed this petition and denied defendant's *pro se* motion to reconsider. This court affirmed that dismissal after granting the public defender's motion for leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Rogers*, No. 1-97-2238

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(1998) (unpublished order under Supreme Court Rule 23).

In 1998, defendant filed a successive *pro se* post-conviction petition in which he alleged that the trial court erred in failing to properly instruct the jury on the admissibility of prior inconsistent statements and in not allowing jury instructions for a lesser offense of murder. He also alleged ineffective assistance of trial and appellate counsel. The post-conviction court dismissed the petition as untimely, and we affirmed that dismissal on appeal after granting the public defender's *Finley* motion for leave to withdraw as counsel. *People v. Rogers*, No. 1-98-3234 (1999) (unpublished order under Supreme Court Rule 23).

On December 11, 2000, defendant filed his third, and instant, *pro se* post-conviction petition, alleging that his consecutive sentences violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On March 8, 2001, the post-conviction court noted the running of the 90-day rule, and the as yet undecided *Apprendi* issue as it related to collateral proceedings, and appointed the public defender to represent defendant. On July 12, 2001, however, defendant filed a *pro se* supplemental post-conviction petition alleging that his petition was timely, that the trial court did not properly instruct the jury on the admissibility of prior inconsistent statements or admonish it that gang activity was not part of the case, and that he received ineffective

assistance of trial and appellate counsel. The State filed a motion to dismiss defendant's petition on August 17, 2001, asserting that it was untimely and, substantively, that he was not entitled to relief under *Apprendi*.

On April 2, 2003, the assistant public defender assigned to defendant's case advised him by letter that she had reviewed his petition and the developments in his case from the time of his conviction to the present. She also informed him that *Apprendi* did not apply to consecutive sentences under Illinois law, that she could not raise any further issues, and that his petition would be dismissed by the post-conviction court. On April 11, 2003, defendant filed a *pro se* motion to reconsider his post-conviction petition based on counsel's statement that his petition would be dismissed.

On September 12, 2003, another assistant public defender appeared in court on defendant's behalf. She indicated that it was unlikely that defendant could succeed on his *Apprendi* claim, but informed the court that she wanted to speak with his former attorney or another attorney because she had not reviewed the case file. On March 19, 2004, she moved for a continuance because, *inter alia*, she had not yet spoken with defendant or finished reading his case file, and thus could not fulfill her obligations under Rule 651(c).

On October 20, 2006, post-conviction counsel filed a

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certificate of compliance with Rule 651(c) and a supplemental petition in which each and every allegation in defendant's *pro se* petitions was adopted. The petition contained a further allegation that defendant received ineffective assistance of trial and appellate counsel and that these claims are not barred by *res judicata* or waiver. On January 12, 2007, the State filed a supplemental motion to dismiss arguing that the petition failed to make a substantial showing of constitutional violations, that it was untimely, and that there was no demonstration of cause and prejudice warranting review of a successive petition.

On October 19, 2007, the circuit court heard arguments on the motion to dismiss. At this hearing, the court asked defendant's post-conviction counsel if the supplemental petition "include[d] things that were in the first items or both?" Counsel replied, "Mine is in its totality."

At the conclusion of argument, defense counsel asked the court to review the petition and consider allowing an evidentiary hearing on the bases stated. The court replied that it would need an opportunity to review its materials, followed by a colloquy between counsel, the court, and the State:

"THE COURT: *** Just so that I am clear, the supplemental petition, the reason that you filed a supplemental petition is that it supplements his petition, which would have

been the third one?

MS. FOSTER [defense counsel]: Right.

THE COURT: You put in the case law and everything?

MS. FOSTER: Right. I didn't want his petition.

THE COURT: Right. And your motion to dismiss basically.

MS. DOSS [the State]: For the supplemental petition that counsel filed, the Aprendi [*sic*].

THE COURT: All I need are these two documents?

MS. FOSTER: You can forget all of the others. Now, do you have the one with the attachments to it, our petition?

THE COURT: I do not have any attachments.

MS. DOSS: I don't have any attachments.

MS. FOSTER: I will make a copy and give them to both of you."

On January 25, 2008, the post-conviction court granted the State's motion to dismiss finding that defendant's petition was untimely and successive. Defendant filed several motions after

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his petition was dismissed, including: a *pro se* late motion to reconsider (March 28, 2008); a *pro se* supplemental motion to reconsider (May 29, 2008); a *pro se* motion for a status hearing on the motion to reconsider (November 12, 2008); and a *pro se* motion for leave to request court to stay post-conviction dismissal order until final disposition of pending motions (May 20, 2009). On July 10, 2009, the post-conviction court denied the latter motion, and on July 30, 2009, defendant filed notice of appeal. The supreme court entered a supervisory order on August 10, 2010, directing this court to allow defendant's notice to stand as a valid notice of appeal for the order dismissing his third post-conviction petition.

Defendant here contends that the dismissal of his petition should be reversed and remanded because his post-conviction counsel did not comply with her obligations under Rule 651(c). He particularly cites counsel's failure to amend his petition to adequately present his claims of constitutional violations and add facts to show that the untimeliness of the petition was not due to his culpable negligence. The dismissal of a petition without an evidentiary hearing is subject to plenary review. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

Initially, the State responds that defendant's petition was improperly docketed from the start. The record shows that the trial court docketed defendant's successive petition because it

was uncertain whether *Apprendi* applied to collateral proceedings and the 90-day period for initial consideration of the petition was running. Once the petition was docketed, defendant filed a *pro se* supplemental petition raising additional claims.

At the time proceedings commenced in this case, the procedure for considering successive post-conviction petitions was less than clear. The supreme court recognized this fact in *People v. Pitsonbarger*, 205 Ill. 2d 444, 457 (2002), and has since attempted to clarify the process through its subsequent decisions.

In *Pitsonbarger*, 205 Ill. 2d at 459, the supreme court held that the cause and prejudice test set forth in *People v. Flores*, 153 Ill. 2d 264, 278-79 (1992) should be applied when determining whether fundamental fairness required that the ordinary rule of waiver be relaxed so that a claim raised in a successive petition could be considered on its merits. Following *Pitsonbarger*, the Act was amended to incorporate this cause and prejudice test, and, additionally, to require that a defendant obtain leave of court before filing a successive post-conviction petition. 725 ILCS 5/122-1(f) (eff. Jan. 1, 2004). As a result, a successive petition is not considered "filed" under the Act unless leave is expressly granted by the circuit court, even though the circuit court clerk has received and accepted it. *People v. Tidwell*, 236 Ill. 2d 150, 159, 161 (2010). It therefore follows that the

passage of the 90-day docketing period for examination of an initial petition does not automatically advance a successive petition to the second stage of proceedings where leave has not been obtained (725 ILCS 5/122-2.1(a) (eff. Jan. 1, 1993)). *People v. LaPointe*, 227 Ill. 2d 39, 43-44 (2007).

It is thus evident that the process employed in this successive post-conviction case did not comport with the procedures set forth in the cited cases. Instead, the petition was advanced to the second stage without any apparent regard for the cause and prejudice test, and counsel was appointed.

In post-conviction proceedings, defendant is entitled to a reasonable level of assistance from counsel (*People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008)), and Rule 651(c) imposes specific duties to ensure that counsel provides that level of assistance (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)). Compliance with the rule is mandatory, and may be shown by the filing of a certificate representing that counsel's duties have been fulfilled. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007).

Rule 651(c) requires that post-conviction counsel consult with defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c). The filing of a Rule 651(c)

certificate creates a presumption that defendant received the representation that the rule requires during the second stage of proceedings. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010).

In this case, appointed counsel filed a certificate of compliance with the requirements of the rule, thereby creating the presumption that she provided defendant with the reasonable representation to which he was entitled in this post-conviction proceeding. In this appeal, defendant disputes that conclusion and contends that post-conviction counsel failed to fulfill her obligations because she did not amend his *pro se* petition to allege that his untimely filing was not due to his culpable negligence, and removed from the court's consideration his *pro se* petition which contained such allegations. We disagree.

The record shows that counsel filed a supplemental post-conviction petition which was clearly labeled as such, and, thus, represented that it supplemented the previous filings. The record further shows that counsel expressly incorporated all the allegations made by defendant in his *pro se* petitions in the "supplemental" petition which she filed on his behalf. The trial court was thereby notified of the content of, and had access to, the allegations set forth in defendant's *pro se* petitions.

We further observe that defendant has not posited, and we have found nothing in the record indicating, additional excuses

for defendant's delay in filing which would show his lack of culpable negligence. We cannot assume there was some other excuse that counsel failed to raise (*People v. Perkins*, 229 Ill. 2d 34, 51 (2007)), and his bare assertion of counsel's inadequacy in this regard does not overcome the presumption of compliance with Rule 651(c) (*Mendoza*, 402 Ill. App. 3d at 813).

Defendant takes issue with this conclusion and calls our attention to the statements made by counsel during argument on the State's motion to dismiss. He specifically points to counsel's representation to the court that she "didn't want his [defendant's] petition," and that the court could "forget" all the other documents. However, the totality of the colloquy from which these statements were culled suggests that counsel incorporated the content of the previous petitions in the supplemental petition, including defendant's allegations regarding his lack of culpable negligence. Then, in her response to the State's argument, counsel asserted that his petition should not be automatically denied because the alleged waiver was attributable to the ineffective assistance of trial and appellate counsel.

Accordingly, we find that counsel's statements to the court were, at most, ambiguous, and insufficient to overcome the presumption that she fulfilled her duties under Rule 651(c). *Mendoza*, 402 Ill. App. 3d at 813. In this respect, this case is

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clearly distinguishable from *Suarez*, 224 Ill. 2d at 42, cited by defendant, where counsel did not file a Rule 651(c) certificate and the record did not otherwise demonstrate that counsel fulfilled the duties mandated by the rule.

We thus affirm the dismissal of defendant's post-conviction petition.

Affirmed.