

2012 IL App. (1st) 101096-U

FIRST DIVISION

May 14, 2012

No. 1-10-1096

**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 DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 95 CR 28516
	)	
MELVIN HAMMOND,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

**ORDER**

¶ 1 **HELD:** Since the record on appeal did not demonstrate that postconviction counsel complied with Illinois Supreme Court Rule 651(c), the reviewing court vacated the orders granting counsel's motion to withdraw and dismissing the defendant's *pro se* postconviction petition and remanded for further proceedings.

¶ 2 Defendant Melvin Hammond appeals from the second-stage dismissal of his postconviction petition. Defendant Hammond maintains that the circuit court erred when it granted postconviction counsel's motion to withdraw and granted the State's motion to dismiss his *pro se* petition. As explained below, the record does not demonstrate postconviction counsel's compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Therefore, we vacate the orders granting counsel's motion to withdraw and dismissing defendant Hammond's *pro se* postconviction petition and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 At the time of her death, 13-month-old Diamond Shaw resided with her mother, Michelle Tate, and defendant Hammond in defendant Hammond's apartment. Shortly after 9 a.m. on September 20, 1995, paramedics transported Diamond to St. Margaret's hospital, where she was pronounced dead. Defendant Hammond and Ms. Tate were charged with first degree murder in connection with Diamond's death. Defendant's motion to suppress his statement to an assistant State's Attorney was denied. Ms. Tate pleaded guilty to first degree murder and was sentenced to 25 years' imprisonment.

¶ 5 Prior to trial, defendant Hammond's trial counsel filed a motion *in limine* to qualify Dr. Kim Reilly as an expert witness to dispute the opinion of the State's witness, Dr. Kim,<sup>1</sup> that Diamond suffered a skull fracture. Trial counsel withdrew the motion when counsel learned that the State would instead call Dr. Jones, who disagreed with Dr. Kim's finding, to testify.

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<sup>1</sup>St. Margaret's Hospital is located in Hammond, Lake County, Indiana. Dr. Kim, the Lake County coroner, performed the first autopsy on Diamond.

¶ 6 Relevant to our discussion is the trial evidence relating to the time frame in which the injuries resulting in Diamond's death were inflicted. Dr. Nancy Jones, assistant medical examiner, testified that Diamond died as a result of multiple injuries due to blunt force trauma, inflicted between 6 and 12 hours of her death. Although Diamond was pronounced dead at 9:20 a.m., Dr. Jones could not be certain of the actual time of death. On cross-examination, Dr. Jones acknowledged that she had told trial counsel that most of the injuries to Diamond occurred between 1 and 12 hours prior to death. While more likely it was less than 6 hours, the doctor could not rule out that the injuries were inflicted as much as 18 hours prior to Diamond's death. Trial counsel did not call a medical expert to testify on this issue.

¶ 7 According to his pretrial statement, on September 20, 1995, defendant Hammond returned to his apartment at 1:30 a.m. He went to bed but was unable to sleep because Diamond was crying. He acknowledged that he spanked Diamond with his hand twice and that she struck her head twice. Later, Ms. Tate woke him telling him that there was something wrong with Diamond. At trial, defendant Hammond testified that he returned to his apartment a little before 3 a.m. When Diamond would not stay asleep, he spanked Diamond on her butt "a little bit." Defendant Hammond was not sure that Diamond struck her head that morning. He recalled Ms. Tate telling him she was going to spank Diamond.

¶ 8 The jury found defendant Hammond guilty of first degree murder. He was sentenced to natural life imprisonment. On direct appeal, this court vacated defendant Hammond's sentence on constitutional grounds and remanded for a new sentencing hearing. See *People v. Hammond*, No. 1-99-3337 (2001) (unpublished order pursuant to Supreme Court Rule 23). Based on

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Diamond's age and the trial court's finding that his conduct was brutal and heinous, defendant Hammond was sentenced to an extended term of 75 years' imprisonment. In his second direct appeal, this court affirmed defendant Hammond's sentence. See *People v. Hammond*, No. 1-03-0823 (2006) (unpublished order pursuant to Supreme Court Rule 23).

¶ 9 POSTCONVICTION PROCEEDINGS

¶ 10 In July 2007, defendant Hammond filed a *pro se* petition seeking relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006) (the Act)). His petition contained claims of trial court error and ineffective assistance of trial and appellate counsel. Since the petition was not dismissed within 90 days, on February 22, 2008, the *pro se* petition was advanced to the second stage and the circuit court appointed counsel to represent defendant Hammond. See 725 ILCS 5/122-2.1(a) (b) (West 2006).

¶ 11 On December 11, 2009, the parties appeared before the circuit court, at which time postconviction counsel filed her certificate of compliance with Rule 651(c) and a motion to withdraw as counsel pursuant to the supreme court's decision in *People v. Greer*, 212 Ill. 2d 192 (2004). In her certificate of compliance with Rule 651(c), postconviction counsel stated that she had: (1) conferred with defendant Hammond, by mail, on several occasions, to ascertain his contentions of deprivations of constitutional rights; (2) examined the record of proceedings at the trial; and (3) read his *pro se* postconviction petition and determined that no amendments were necessary for an adequate presentation of his contentions since his *pro se* allegations sufficiently stated his claims.

¶ 12 In the memorandum of law supporting her motion to withdraw, postconviction counsel

set forth defendant Hammond's claims and addressed the merits of each claim, concluding that none of the claims had merit. Counsel stated to the court that she had reviewed the trial transcripts and discussed the claims with defendant Hammond in light of *Greer*. She referred to a letter she sent to defendant Hammond on September 1, 2009. According to counsel, in the letter, she detailed his claims and explained why she could not raise any of those claims in an amended or supplemental postconviction petition. Since all of the claims were frivolous, counsel maintained that *Greer* required her to withdraw as counsel for defendant Hammond. The court granted the motion to withdraw and continued the case for the State to file a response to the *pro se* petition. Thereafter, defendant Hammond filed a supplemental *pro se* petition.

¶ 13 On February 26, 2010, the State and defendant Hammond appeared for a hearing on the State's motion to dismiss. Defendant Hammond asked the circuit court to appoint new counsel for him. When the court offered him a continuance in order to prepare for the hearing, defendant Hammond responded that the State's motion contained untrue statements but that he did not know how to argue. The court denied defendant Hammond's request for new counsel. Following the State's argument, the court granted the motion to dismiss, finding that the allegations of ineffective assistance of counsel had no basis in fact or law and that the sentencing claims had been considered on direct appeal. Thereafter, defendant Hammond filed his notice of appeal.

¶ 14

#### ANALYSIS

¶ 15 Defendant Hammond contends that the circuit court erred in granting postconviction counsel's motion to withdraw because his claims were potentially meritorious and counsel did

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not adequately investigate those claims. He further contends that the circuit court erred when it granted the motion to withdraw without determining whether counsel's conclusion that defendant Hammond's claims were meritless was correct.

¶ 16 On appeal, defendant Hammond identifies five claims raised in his postconviction petition that he maintains have potential merit. We need address only one of those claims: trial counsel's ineffectiveness for not calling a medical expert to testify to the time frame in which the injuries resulting in Diamond's death were inflicted.

¶ 17 I. Standard of Review

¶ 18 Our resolution of this issue requires us to determine whether postconviction counsel fulfilled her duties under Rule 651(c). Where compliance with a supreme court rule is at issue, the court's review is *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (2003).

¶ 19 II. Discussion

¶ 20 Although the Act does not provide for the withdrawal of appointed counsel, our supreme court has held that nothing in the Act barred the withdrawal of appointed counsel where the defendant's claims were frivolous or patently without merit. *Greer*, 212 Ill. 2d at 209. There is no basis for allowing a defendant to have the benefit of counsel throughout postconviction proceedings if the claims are frivolous. *Greer*, 212 Ill. 2d at 208. Where counsel determines that the claims are meritless, counsel is ethically prohibited from continuing the representation. *Greer*, 212 Ill. 2d at 209. A court may grant postconviction counsel's motion to withdraw where: (1) counsel has made some effort to explain why the defendant's claims are frivolous or patently without merit, or (2) in the absence of a sufficient motion, the record supports counsel's

assessment that the defendant's claims are frivolous or patently without merit. *Greer*, 212 Ill. 2d at 211-212.

¶ 21 In order to comply with *Greer*, postconviction counsel's motion to withdraw must address all of the defendant's claims. *People v. Komes*, 2011 IL App. (2d) 100014 ¶29. In *Komes*, the reviewing court explained the necessity for addressing all of the defendant's claims:

"For counsel moving to withdraw, the critical point \*\*\* is the [Greer] court's description of a proper motion to withdraw. Counsel must make an effort to explain why the petitioner's 'claims' are frivolous - we draw attention to the use of the plural noun. Given the ethical concerns underlying the court's reasoning [citation], 'claims' logically must mean *all* of the petitioner's claims. This is because *any* claim that will potentially allow counsel to produce a nonfrivolous amended petition is sufficient to give counsel an ethical basis to continue representation." (Emphasis in original.) *Komes*, 2011 IL App. (2d) at ¶29 (citing *Greer*, 212 Ill. 2d at 205-07).

¶ 22 In his *pro se* petition, defendant Hammond asserted trial counsel's ineffectiveness in failing "to call and use their own Medical expert witness to challenge the States expert witness opinion as to cause of Death and when (time frame) injuries that caused death and other injuries inflicted." In the memorandum accompanying her motion to withdraw, counsel addressed the above claim as follows:

"Trial counsel was not ineffective for failing to call its own medical expert witness to challenge the State's expert as to the cause of death. Trial counsel did plan to hire its own expert witness because it disagreed with the State's expert, Dr. Kim, who was going to

testify that Diamond had a skull fracture. However, when the State's other expert, Dr. Jones, opined that Dr. Kim was wrong, the State only had Dr. Jones testified. Therefore, trial counsel withdrew their expert because she was no longer necessary."

Counsel did not address defendant Hammond's claim that trial counsel was ineffective for not calling a medical expert to testify as to the time frame in which Diamond's fatal injuries were inflicted.

¶ 23 Since postconviction counsel's motion to withdraw did not address all of defendant Hammond's claims, there was no proper basis upon which to grant the motion to withdraw. Nonetheless, "[I]f the record shows that counsel did everything required of him or her under Rule 651(c) *and* that all the claims in the original petition were patently without merit, then it serves no purpose to reverse a grant of leave to withdraw simply because of insufficiencies in the motion." (Emphasis in original.) *Komes*, 2011 IL App. (2d) at ¶30.

¶ 24 Pursuant to Rule 651(c), postconviction counsel's duties include consulting with the defendant to ascertain his contentions of deprivation of constitutional right, examining the proceedings at trial and amending the petition. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006); Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). To assure that a defendant's claims have been adequately presented, the Act contemplates that appointed counsel will ascertain the bases of the claims, shape those claims into appropriate legal form and present them to the court. *People v. Davis*, 156 Ill. 2d 149, 162 (1993).

¶ 25 Despite postconviction counsel's representations, the record does not support her compliance with Rule 651(c). Counsel can know if a claim needs further development only if he



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or she has discussed that specific claim with the defendant. *Komes*, 2011 IL App. (2d) ¶34.

While counsel stated in her Rule 651(c) certificate that she had consulted with defendant Hammond, the record reflects that she failed to ascertain his claim of ineffectiveness based on trial counsel's failure to call a medical expert to testify as to the time frame in which Diamond's fatal injuries occurred.

¶ 26 It appears from the record that the defense's only medical expert was Dr. Reilly, who was retained only to dispute Dr. Kim's expected testimony on the issue of whether Diamond suffered a skull fracture. Dr. Reilly was not called to testify, and trial counsel did not present any expert medical testimony on the time-frame issue. Counsel's duty to amend the petition under Rule 651(c) does not require postconviction counsel to advance a defendant's frivolous or spurious claims. *Pendleton*, 223 Ill. 2d at 458. However, unless the record shows that counsel has, in fact, ascertained a defendant's claims, the court cannot presume that the claims are in their final form, and a decision as to their frivolity is likely to be premature. *Komes*, 2012 IL App. (2d) at ¶32. Moreover, the issue before us is whether post conviction counsel complied with Rule 651(c), not whether defendant Hammond's claim is meritorious. See *People v. Suarez*, 224 Ill. 2d 37, 52 (2007) (lack of a meritorious claim does not excuse failure to comply with Rule 651(c)).

¶ 27

#### CONCLUSION

¶ 28 The record before us does not demonstrate postconviction counsel's compliance with Rule 651(c). Therefore, the orders granting the motion to withdraw as counsel and the dismissal of the defendant's *pro se* petition must be vacated, and the cause remanded. See *Komes*, 2011 IL

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App. (2d) ¶36. Upon remand, any motion to withdraw must demonstrate compliance with Rule 651(c) and must demonstrate that every claim raised by defendant Hammond is frivolous or patently without merit.

¶ 29 Vacated and remanded with directions.

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