

No. 1-10-2059

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. 94 CR 17988
)	
GEORGE ROSS,)	Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Where the presumption of compliance which attached to a Rule 651(c) certificate filed prior to the State's motion to dismiss defendant's postconviction petition on timeliness grounds was rebutted by the record, we vacated the dismissal of the postconviction petition and remanded for further postconviction proceedings.

¶ 2 Defendant, George Ross, appeals from an order of the circuit court which granted the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act at the second stage. 725 ILCS 5/122-1 *et seq.* (West 2010). Defendant claims postconviction counsel failed to provide him a reasonable level of assistance as required by Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), and *People v. Perkins*, 229 Ill. 2d 34 (2007). Defendant asks that the dismissal order be reversed and his cause remanded for further second-stage proceedings. We vacate the dismissal of defendant's postconviction petition and remand for further proceedings.

¶ 3 Following a 1995 jury trial where he represented himself, with an assistant public defender

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acting as standby counsel, defendant was found guilty of home invasion and aggravated criminal sexual assault. Defendant allowed the assistant public defender, who acted as standby counsel, to represent him at sentencing. After a hearing, he was sentenced to consecutive terms of 26 years' on the home invasion conviction, and 29 years' on the aggravated criminal assault conviction. Defendant's convictions and sentences were affirmed on direct appeal (*People v. Ross*, No. 1-95-3333 (1997) (unpublished order under Supreme Court Rule 23)), and his petition for leave to appeal to our supreme court was denied on June 4, 1997. *People v. Ross*, No. 82987 (1997).

¶ 4 In 2002, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 1998)), alleging that his consecutive sentences were void because they violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court denied defendant's section 2-1401 petition, and we affirmed that judgment on appeal. *People v. Ross*, No. 1-03-3400 (2004) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2004, defendant filed another section 2-1401 petition alleging his sentences were void because they violated *Apprendi*.

¶ 6 On February 7, 2006, defendant mailed the subject *pro se* postconviction petition to the clerk of the circuit court. In his petition, defendant challenged his conviction and sentence on the home invasion charge because that charge was a lesser-included offense of the aggravated criminal sexual assault charge. Defendant also alleged ineffectiveness assistance of standby, posttrial, and appellate counsel. Defendant's petition was not ruled upon by the circuit court within 90 days and the petition, thus, advanced to the second stage of postconviction proceedings. 725 ILCS 5/122-2.1(a) (West 2003). Postconviction counsel was appointed to represent defendant. The matter was continued on various court dates; postconviction counsel, at different times, informed the court that he was attempting to obtain records and other evidence not presented at trial to support the claims of ineffectiveness.

¶ 7 On July 31, 2009, postconviction counsel filed a Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb.

6, 2013)) certificate of compliance which stated in pertinent part:

"1. I have consulted with the Petitioner, George Ross, by mail and telephone to ascertain his contentions of deprivations of constitutional rights;

2. I have obtained and examined the report of proceedings of his jury trial and sentencing in this case;

3. I have not prepared a Supplemental Petition for Post-Conviction Relief as the Petitioner's previously-filed *pro se* petition for post-conviction relief adequately sets forth the Petitioner's claims of deprivation of his constitutional rights."

¶ 8 Thereafter, at an October 30, 2009 status, the State filed motions to dismiss defendant's postconviction petition and section 2-1401 petition in this case. The State had previously moved to dismiss defendant's postconviction petition in case number 94 CR 17987. The State argued the postconviction petition in each case was untimely and lacked merit. Postconviction counsel also represented defendant in case number 94 CR 17987.

¶ 9 On October 30, 2009, postconviction counsel stated he was not going to file a written response to the newly filed motions to dismiss. In case number 94 CR 17987, defendant had previously filed a *pro se* partial response and his own unsigned affidavit as to the untimeliness of that petition. Defendant asserted that the delay in filing his petition in case number 94 CR 17987 was due to the facts he had been on lock down for 47 days, and disciplinary segregation for 25 days, and could not use the prison's law library for an additional 8 days.

¶ 10 On March 5, 2010, a hearing was held on the State's motions to dismiss filed in this case and in case number 94 CR 17987. At that hearing, the State argued in part that the instant postconviction petition had been tardily filed and that defendant failed to address his lack of culpable negligence or show due diligence in presenting his postconviction petition. The State also argued that the claims asserted by defendant in his petition were without merit.

¶ 11 Postconviction counsel in response to the State's oral arguments stated that, in both cases,

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he was standing on defendant's *pro se* filings. Postconviction counsel presented an argument in defense of the untimeliness of the postconviction petition in case number 94 CR 17987 based on defendant's *pro se* response and affidavit relating to that motion to dismiss. Then turning to the untimeliness of this postconviction petition, counsel stated:

"[Postconviction Counsel]: As to [this case], yet this was actually a successive [postconviction]. [Defendant's] first [postconviction] was actually filed in a timely manner but this was a successive [postconviction] petition that was before the Court now. Other than that we would stand."

After postconviction counsel made this statement, the following colloquy took place:

"THE COURT: Which one is that? What was the date that he filed that?

[COUNSEL]: The original P.C.?

THE COURT: The successive P.C.

[COUNSEL]: That was February 7th of '06. So it was sometime later. The [petition for leave to appeal] was denied in '97. So, yes, it was quite a bit later."

When questioned by the circuit court regarding the substance of defendant's *pro se* allegations of ineffective assistance of counsel, postconviction counsel described his discussions with defendant as to these claims. Postconviction counsel explained that he had attempted to locate a witness and phone records, evidence which defendant asserted would have shown he was "set up" by the victim.

¶ 12 On July 16, 2010, the circuit court issued a written order granting the State's motions to dismiss defendant's postconviction petitions in both cases. The order did not address defendant's 2-1401 petition in this case. As to the postconviction petition filed in the instant case, the circuit court found defendant's postconviction petition was "untimely and may be dismissed on that ground alone," but also found that the substantive allegations raised in the petition were without merit. The circuit court in its order did not describe the postconviction petition as a successive one and treated it as an initial postconviction petition.

¶ 13 On appeal, defendant's sole claim is that postconviction counsel provided unreasonable assistance. Defendant acknowledges that where, as here, postconviction counsel files a Rule 651(c) certificate, there is a presumption that defendant received adequate representation as set forth in Supreme Court Rule 651(c). Defendant argues, however, that in this case the presumption has been rebutted because postconviction counsel did not adequately represent him as to the State's untimeliness argument.

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)) provides a mechanism for a criminal defendant to challenge his conviction or sentence based upon a substantial constitutional violation. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). In noncapital cases, the Act provides for a three-step process. *Id.* At the first stage, the trial court must evaluate the petition and determine within 90 days of its filing whether it is frivolous or patently without merit. *Id.* A petition which survives the first stage advances to the second stage where the trial court appoints counsel to represent defendant, and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007).

¶ 15 Under the Act, counsel appointed at the second stage must provide a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To provide a reasonable level of assistance, Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), provides that postconviction counsel: (1) consult with defendant—either by mail or in person—to ascertain his claims of deprivation of constitutional rights; (2) examine the trial record; and (3) amend the *pro se* petition where necessary for an adequate presentation of defendant's contentions. *Suarez*, 224 Ill. 2d at 42. Postconviction counsel's compliance with Supreme Court Rule 615(c) is mandatory and generally shown by the filing of a certificate. *Perkins*, 229 Ill. 2d at 50.

¶ 16, The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. The burden is on the defendant to overcome

this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23. The presumption of compliance may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶ 17 "Postconviction proceedings may not be commenced outside the time limitations period in the Act unless the defendant alleges sufficient facts to show the delay in filing was not due to the defendant's culpable negligence." *People v. Lander*, 215 Ill. 2d 577, 586 (2005). The obligation of compliance with the time limitations in the filing of a postconviction petition remains with the defendant. *Id.* at 588-89. The *pro se* petition, however, need not include allegations as to the issue of timeliness or set forth reasons for the delay as these matters are not relevant at the first stage. *Perkins*, 229 Ill. 2d at 48. The State cannot seek dismissal of the petition as untimely at the first stage. *Id.* at 42.

¶ 18 Under the Act, defendant was required to file his postconviction petition within six months of the denial of his petition for leave to appeal by the supreme court (June 4, 1997), or three years from the date of his conviction (September 22, 1995), whichever is earlier. 725 ILCS 5/122-1(c) (West 2004). Thus, defendant was required to file his postconviction petition by December 4, 1997, six months after the denial of his petition for leave to appeal as the earlier applicable date.

¶ 19 We review postconviction counsel's compliance with Rule 651(c) *de novo*, the same standard by which we review a second-stage dismissal of a postconviction petition. *Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 20 In support of his contention that he received unreasonable assistance of postconviction counsel, defendant relies upon *Perkins*. In *Perkins*, our supreme court interpreted the provisions of Rule 651(c) and held the adequate and proper representation requirements of Rule 651 "necessarily includes [the responsibilities for] attempting to overcome procedural bars, including timeliness ***." *Perkins*, 229 Ill. 2d at 44. The court described this duty of postconviction counsel as follows:

"[W]e hold that Rule 651(c) requires counsel to amend an untimely *pro se* petition to allege

any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence. In discharging this duty, counsel must inquire of the petitioner whether there is any excuse for the delay in filing. As a practical matter, any potential excuse for the late filing will often be discovered by speaking with the petitioner. Counsel must also allege any excuse for the delay in filing apparent from the pleadings and the portions of the record counsel must review to present petitioner's claims. [Citation]. [C]ounsel is required to review those portions of the record necessary to present and support the claims raised by the petitioner in the *pro se* petition[]." *Id.* at 49-50.

Thus, in the face of an untimely petition, postconviction counsel must inquire of defendant whether there is an excuse for the delay, review the record for facts which may support an excuse, and amend the postconviction petition to allege available facts which are necessary to demonstrate defendant was not culpably negligent. *Id.*

¶ 21 Postconviction counsel in *Perkins* filed a Rule 651(c) certificate where he did not address the late filing, and did not amend the *pro se* petition in response to the State's later filed motion to dismiss the petition as untimely. *Id.* at 38-39. Nonetheless, the supreme court concluded that postconviction counsel fulfilled his duties under Rule 651(c) because during the hearing on the State's motion to dismiss, counsel "in effect" presented the defendant's lack of culpable negligence by asserting that the claims raised in the postconviction petition did not exist until the appellate court vacated two of defendant's convictions. *Id.* at 39, 51. The supreme court recognized that postconviction counsel's argument may not have been particularly compelling, but this factor did not demonstrate that another reason could have been raised which would explain the late filing. *Id.* at 51.

¶ 22 Here, postconviction counsel filed a Rule 651(c) certificate, giving rise to the rebuttable presumption that he performed the duties required of him under that rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. However, a review of the record also shows counsel filed the certificate

prior to the State's motion to dismiss the petition as untimely. Postconviction counsel did not amend the certificate or file an additional certificate as to the timeliness issue. Postconviction counsel did not file a responsive pleading or amend defendant's *pro se* petition in response to the State's motion. Indeed, on the date the State filed its motion to dismiss, postconviction counsel declined an opportunity to file a written response. Although *Perkins* did not require postconviction counsel to take such steps, the supreme court found such factors relevant to a determination of whether the requirements of Supreme Court Rule 651(c) had been met in relation to the issue of a tardy postconviction petition. The postconviction counsel's representations during the hearing on the State's motion to dismiss were also considered by the court in *Perkins* in determining whether the presumption of compliance was rebutted. We, therefore, also, look to the arguments made at the hearing in this case.

¶ 23 During the hearing on the State's motion to dismiss here, postconviction counsel stood on the issues as set forth in defendant's *pro se* petition. Postconviction counsel also described for the court discussions he had with defendant, but the described discussions pertained only to the merits of the petition, and not to the timeliness issue.

¶ 24 Postconviction counsel, in addressing the timeliness issue, stated the postconviction petition before the court was a successive one and that defendant's "first" postconviction petition was filed timely. The postconviction petition at issue was never treated or referred to as a successive one throughout the entire proceedings, except for this instance when postconviction counsel described it as such. The record, however, does not contain an earlier filed postconviction petition under the Act. The only other postconviction filings made by defendant were a petition filed in 2002, and another petition filed in 2004. Both petitions were clearly labeled as having been brought pursuant to section 2-1401 of the Code. On the appeal from the first section 2-1401 petition, we specifically held that the trial court had treated it as a section 2-1401 petition and not as a postconviction petition under the Act. *People v. George Ross*, 1-03-3400 (2004) (unpublished order under Supreme Court

Rule 23). Further, defendant filed both section 2-1401 petitions well beyond the 1997 date for filing a postconviction petition. Thus, all aspects of the statements made by postconviction counsel at the hearing—that the petition at hand was a successive one and there was a prior postconviction petition which was timely filed—are not supported by the record.

¶ 25 The record serves to rebut a presumption that postconviction counsel adequately consulted with defendant as to the tardiness of his petition, and whether his late filing was due to a lack of culpable negligence. Moreover, the record shows postconviction did not adequately review the record as to the timeliness issue as the record is contrary to counsel's argument at the hearing. Unlike the situation in *Perkins*, postconviction counsel's arguments here served to rebut the presumption that an adequate consultation and review of the record had taken place as to the tardily filed postconviction petition.

¶ 26 The Rule 651(c) requirements are meant to guarantee that appointed counsel "ascertains the basis of the complaints, shapes those complaints into appropriate legal form and presents them to the court." *People v. Garrison*, 43 Ill. 2d 121, 123 (1969). In *Perkins*, our supreme court made clear that the issue of timeliness is one that falls squarely within postconviction counsel's responsibilities under Supreme Court Rule 651(c). A defendant's substantive claims of constitutional violations cannot be presented to the court if the postconviction petition is untimely. Postconviction counsel has a duty to adequately search the record and "inquire of [defendant] whether there is any excuse for the delay in filing." *Perkins*, 229 Ill. 2d at 49. The record before us rebuts the presumption that postconviction counsel reasonably and adequately complied with the requirements of Rule 651(c) that counsel consult with defendant and review the record with regard to a possible excuse for defendant's delay in filing the postconviction petition.

¶ 27 We understand that the petition was filed quite late. The State argues defendant has not offered any reasons which would possibly excuse the delay and, therefore, has not rebutted the presumption of compliance. However, as stated, the petition need not set forth allegations as to the

timeliness issue. *Id.* at 48. Further, in considering the adequacy of postconviction representation under Rule 651(c), we are not concerned with any harmless error analysis. *Suarez*, 224 Ill. 2d at 51. By remanding this case for further proceedings as to compliance with Rule 651(c) on the timeliness issue, our decision is not meant to reflect upon or make any ruling on: (1) whether an excuse for the delay in filing exists; (2) whether such an excuse is meritorious and nonfrivolous; (3) the merits of the postconviction petition itself; or (4) the merits of the circuit court's order dismissing the petition.

¶ 28 For the reasons stated, we vacate the dismissal of defendant's postconviction petition and remand for further second-stage proceedings under the Act consistent with our decision. Upon remand, postconviction counsel should document compliance with Rule 651(c) as to the timeliness issue raised by the State's motion to dismiss.

¶ 29 Vacated; remanded.