

2012 IL App (1st) 111154-U

SECOND DIVISION
October 30, 2012

No. 1-11-1154

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. 07 CR 21499
)	
JUAN DIAZ,)	Honorable
)	Sharon M. Sullivan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's claim that post-conviction counsel provided an unreasonable level of assistance rejected where counsel filed a certificate of compliance with Rule 651(c) and the presumption that counsel fulfilled the duties imposed by the rule was not rebutted by the record.

¶ 2 Defendant Juan Diaz appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). He contends that the dismissal must be reversed and his cause remanded because post-conviction

counsel failed to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), which requires a reasonable level of assistance.

¶ 3 The record shows that on January 6, 2009, defendant entered a negotiated plea of guilty to attempted first degree murder in exchange for a 12-year sentence of imprisonment. Before accepting his guilty plea, the trial court admonished defendant of the charge against him and that "there would be 3 years of mandatory supervised release that follows" the 12-year prison sentence. After defendant indicated his understanding of these penalties, and the terms of his plea agreement with the State, the trial court accepted his plea of guilty to attempted first degree murder. On July 13, 2009, defendant filed a *pro se* motion for leave to file a late notice of appeal, which the trial court denied.

¶ 4 Thereafter, on October 7, 2009, defendant was brought before the trial court to explain a letter he sent to the clerk's office inquiring about the status of a motion to withdraw his guilty plea. Defendant stated that he mailed the motion to the clerk on January 26, 2009, and never received a file-stamped copy in return. The trial court stated that it had no record of that filing and continued the matter to November 24, 2009 for defendant to present evidence otherwise. On that date, defendant produced a receipt showing only that he paid for postage on January 26, 2009, which the trial court found insufficient. The trial court then denied defendant's motion to withdraw his guilty plea as untimely, and on January 8, 2010, the trial court denied defendant's motion for rehearing of that decision.

¶ 5 On February 22, 2010, defendant filed the *pro se* post-conviction petition at bar, alleging that the mandatory supervised release (MSR) statute was unconstitutional. On May 13, 2010, the circuit court docketed the petition for further consideration and appointed the public defender to represent defendant as post-conviction counsel.

¶ 6 While the post-conviction matter was pending before the circuit court on July 6, 2010, we granted defendant's *pro se* motion for leave to file a late notice of appeal from the "Order of 1/6/09" and appointed the State Appellate Defender to represent him as appellate counsel. Our records show that no briefs were filed, and on March 22, 2011, appointed appellate counsel filed an agreed motion for summary disposition to correct defendant's mittimus to reflect a credit against his \$30 Children's Advocacy Center fine. This court allowed the motion on April 1, 2011, and issued a written order stating: "This is a final and complete disposition of appeal number 1-10-1763 and the mandate of this Court should issue forthwith." *People v. Diaz*, No. 1-10-1763 (2011) (dispositional order).

¶ 7 Meanwhile, on August 13, 2010, the State advised the circuit court as follows:

"Your Honor, Public Defender Ingrid Gill represents the petitioner. She was here, and she had to leave. She's asking for—there was actually a Notice of Appeal that was actually filed in this case since the last court date on a previous motion that the petitioner had filed. So she was not able to get the records, since this is tied up in the Appellate Court. We're asking just for a status date of September 3rd just for her to try to get the records."

¶ 8 On October 22, 2010, post-conviction counsel tendered to the circuit court, a Rule 651(c) certificate stating as follows:

"I have consulted with petitioner, JUAN DIAZ, in [*sic*] inmate at the Big Muddy Correctional Center by letter on numerous occasions to ascertain his contentions of deprivations of constitutional rights.

I have obtained and examined the Report of Proceedings of January 6, 2009 in which Mr. Diaz plead [*sic*] guilty before the Honorable Judge Sharon Sullivan. I also examined the Report of Proceedings from December 19, 2008 in

which the court found Mr. Diaz fit to stand trial and legally sane at the time of the offense. I examined the trial court file concerning the above cited Indictment Numbers.

I have examined Petitioner's Pro Se Petition For Post Conviction Relief, and as it adequately represents his claims of deprivations of constitutional rights, I have concluded that it is not necessary to make any amendments for an adequate presentation of Petitioner's contentions."

¶ 9 Post-conviction counsel also advised the circuit court, "There is no appellate record. There was not a direct appeal taken from the conviction entered in the negotiated plea," and requested leave to attach a transcript of the January 2009 plea hearing, which the court granted.

¶ 10 On January 21, 2011, the State filed a motion to dismiss defendant's post-conviction petition. Following a hearing on March 11, 2011, the circuit court granted the State's motion, rejecting defendant's assertion that his MSR obligation violates the separation of powers and due process clauses of the Illinois Constitution. On that same date, defendant filed a notice of appeal.

¶ 11 In this court, defendant contends that the second-stage dismissal of his post-conviction petition must be reversed and his cause remanded because post-conviction counsel failed to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Defendant argues that post-conviction counsel's Rule 651(c) certification and her statements to the circuit court reflect that she failed to adequately review the record. He asserts that post-conviction counsel was "completely unaware that [defendant] had a direct appeal pending under appellate court number 1-10-1763, and she failed to review any of the post-plea transcripts reflecting [his] attempt to withdraw his [guilty] plea." After *de novo* review (*People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007)), we find no cause for reversal.

¶ 12 The right to post-conviction counsel is statutory (725 ILCS 5/122-4 (West 2000)), and defendants are only entitled to a reasonable level of assistance. *Suarez*, 224 Ill. 2d at 42. To ensure that level of assistance is provided, Rule 651(c) imposes three duties on post-conviction counsel. *Suarez*, 224 Ill. 2d at 42. Under that rule, the record of the filed certificate must show that post-conviction counsel consulted with defendant either by mail or in person to ascertain his claims of deprivation of constitutional rights, examined the trial record, and made amendments to the *pro se* petition which were necessary for an adequate presentation of defendant's contentions. *Suarez*, 224 Ill. 2d at 42.

¶ 13 Here, post-conviction counsel filed a Rule 651(c) certificate stating that she consulted with defendant by letter to ascertain his contentions regarding the deprivation of his constitutional rights, examined the transcripts of the January 2009 plea hearing and the December 2008 proceeding in which defendant was found fit to stand trial, and determined that defendant's constitutional claims were adequately presented in the *pro se* post-conviction petition.

¶ 14 Where, as here, counsel files a certificate in accordance with Rule 651(c), "the presumption exists that petitioner received the representation Rule 651(c) requires a postconviction petitioner receive during second-stage proceedings." *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). To overcome this presumption, defendant must demonstrate that post-conviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 15 In his reply brief, defendant acknowledges the State's position that post-conviction counsel is not required to examine the entirety of the "trial" proceedings (*People v. Davis*, 156 Ill. 2d 149 (1993)), but he maintains that post-conviction counsel failed to provide him a reasonable level of assistance because she completely misunderstood the procedural history of his case,

which would have been apparent from the "halfsheet" notations in the court file that she claimed to have reviewed. Defendant claims that it was unreasonable for post-conviction counsel to fail to review the proceedings that followed his guilty plea "[g]iven that [he] was attempting to challenge his sentence in his post-conviction petition." We disagree.

¶ 16 Defendant does not explain, nor do we discern, how the proceedings that followed his guilty plea were necessary for post-conviction counsel to adequately evaluate the constitutional challenge to the MSR statute raised in his *pro se* post-conviction petition. As the State points out, defendant alleged in his *pro se* petition that the MSR statute was unconstitutional because it violated due process and the separation of powers doctrine, and such a challenge did not require a review of the post-plea proceedings in which defendant attempted to withdraw his guilty plea because defendant was challenging the validity of the MSR statute on its face.

¶ 17 A constitutional challenge to a statute presents a question of law (*People v. Masterson*, 2011 IL 110072, ¶ 23), and the facts in a case become relevant only if defendant brings an as-applied challenge, as opposed to a facial challenge where the facts do not affect our review (*People v. Montyce H.*, 2011 IL App (1st) 101788, ¶ 16). That post-conviction counsel advised the circuit court that there was no appellate record also does not overcome the presumption that she adequately reviewed the record as relevant to evaluating defendant's *pro se* MSR claim. *Davis*, 156 Ill. 2d at 164-65. Post-conviction counsel was not required to review more than that portion of the proceedings necessary to adequately present defendant's MSR claim (*Davis*, 156 Ill. 2d at 165), and we therefore reject defendant's contention that he was denied the reasonable assistance of post-conviction counsel (*Jones*, 2011 IL App (1st) 092529, ¶¶ 25-26).

¶ 18 Moreover, we are unpersuaded that *People v. Bashaw*, 361 Ill. App. 3d 963 (2005), relied on by defendant, requires a different result. In *Bashaw*, 361 Ill. App. 3d at 967-69, the reviewing court found that post-conviction counsel's Rule 651(c) certificate was deficient because counsel

certified that she reviewed the record of proceedings "on appeal," rather than the record of proceedings "at trial" as required by the rule, and counsel's deference to defendant's decision to stand on his *pro se* petition was not an appropriate substitute for counsel's obligation to make any necessary amendments for an adequate presentation of the claims in defendant's *pro se* petition. Although "[w]e may differ with the *Bashaw* court as to its reading of the certificate there as falling short of a showing 'that counsel had in fact reviewed the trial proceedings' because of postconviction counsel's 'remarks during the proceedings below' " (*People v. Richardson*, 382 Ill. App. 3d 248, 255 (2008)), we find here that post-conviction counsel's remarks, coupled with her Rule 651(c) certificate and the record of the post-conviction proceedings, do not "cast serious doubt" on the notion that counsel reviewed the necessary trial proceedings (*Richardson*, 382 Ill. App. 3d at 255). Rather, we conclude that, unlike in *Bashaw*, post-conviction counsel exercised her professional judgment in her representation of defendant, that she substantially complied with the requirements of Rule 651(c), and did not provide unreasonable assistance. *Richardson*, 382 Ill. App. 3d at 257-59.

¶ 19 For the reasons stated, we affirm the second-stage dismissal of defendant's post-conviction petition.

¶ 20 Affirmed.