

No. 1-11-1167

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

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 89 CR 26747 |
| |) | |
| STANLEY HUGHES, |) | The Honorable |
| |) | Luciano Panici, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

- ¶ 1 *Held:* Second-stage dismissal of defendant's post-conviction petition affirmed where the petition was untimely filed, defendant failed to show his lack of culpable negligence for its untimeliness, and also failed to make a substantial showing of any constitutional violations.
- ¶ 2 Defendant Stanley Hughes appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction

Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He seeks reversal of the dismissal order and a remand for an evidentiary hearing, contending that he made a substantial showing that trial counsel did not allow him to testify in his own defense, and that post-conviction counsel failed to comply with Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 3 Following a jury trial in 1992, defendant was found guilty of murder and three counts of aggravated kidnapping, then sentenced to consecutive, respective terms of natural life and 60 years' imprisonment. That judgment was affirmed on direct appeal (*People v. Hughes*, 274 Ill. App. 3d 107 (1995)), and his petition for leave to appeal to the supreme court was denied on December 6, 1995 (*People v. Hughes*, 164 Ill. 2d 573 (1995) (table)).

¶ 4 On August 23, 2001, defendant filed a *pro se* post-conviction petition alleging that he was denied his right to have a jury sentence him and that his extended-term sentences are void under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Defendant asserted therein that he was not culpably negligent for any delay in filing the petition due to his inability to retain private or *pro bono* counsel, and that the constitutional claims were not ripe for adjudication until *Apprendi* was decided in 2000. On April 5, 2002, the circuit court docketed defendant's petition for second-stage proceedings and appointed counsel to represent him.

¶ 5 On April 10, 2002, defendant filed a *pro se* supplemental post-conviction petition alleging, *inter alia*, the denial of his right to the effective assistance of trial counsel who would not allow him to testify. On May 2, 2002, the circuit court joined defendant's supplemental *pro se* petition to his original petition, and after a hearing on February 20, 2004, the circuit court denied defendant's petition.

¶ 6 Defendant appealed and, on the State's confession of error, we remanded the cause for

further post-conviction proceedings. This decision was based on post-conviction counsel's failure to file a certificate of compliance with Rule 651(c), and because the record did not otherwise indicate compliance with the rule. *People v. Hughes*, No. 1-04-1230 (2005) (dispositional order).

¶ 7 In February 2010, defendant filed an amended *pro se* petition alleging various claims including that trial counsel did not allow him to testify, but the circuit court struck the *pro se* amendment because it was filed without leave of court. On July 9, 2010, post-conviction counsel filed a certificate of compliance with Rule 651(c), stating that she had consulted with defendant by mail and phone to ascertain his contentions of deprivations of constitutional rights, reviewed the report of proceedings at trial and sentencing, and that she did not prepare a supplemental petition because defendant's *pro se* petition adequately set forth his claims.

¶ 8 On December 10, 2010, the State filed a motion to dismiss defendant's petition, alleging that his claims were untimely, that *Apprendi* relief is not available to him on collateral review, and that his ineffective assistance of counsel claims are without merit. Following a hearing on April 15, 2011, the circuit court granted the State's motion, finding that the petition was untimely and that the claims therein were without merit. As relevant to this appeal, the circuit court found that, timeliness aside, defendant's claim of ineffective assistance of trial counsel based on the alleged denial of his right to testify is belied by the record showing that defendant waived his right to testify in his own defense. Specifically, the circuit court noted:

"[E]ven in his own petition he allege [*sic*] there was discussion between the defendant and the court where the court asked him whether or not he wanted to testify. He specifically said, no, I don't

want to testify. I will abide by my counsel's decision. So, he was advised whether or not he was allow to testified [*sic*]. Now, he is alleging he wasn't told that he had a constitutional right to testify. That's not required by law."

¶ 9 In this court, defendant first contends that he made a substantial showing that trial counsel did not allow him to testify in his own defense. He asserts that his allegations are supported by the trial record where, in declining to testify, he said, "whatever my attorneys advise for me. I go along with them, your Honor." Defendant acknowledges that it is not incumbent upon the trial court to inform him that he has the absolute right to testify, but he "charges his lawyer with that responsibility."

¶ 10 The State responds that the circuit court properly dismissed defendant's post-conviction petition where it was untimely and he failed to show that the late filing was not due to his culpable negligence. The State also asserts that defendant has failed to show any prejudice resulting from trial counsel's alleged interference with his right to testify where he made no contemporaneous assertion of that right at trial, and voluntarily waived his right to testify after the trial court admonished him of his right to do so.

¶ 11 To withstand a motion to dismiss at the second stage of post-conviction proceedings and merit an evidentiary hearing, defendant must make a substantial showing that his constitutional rights were violated, taking all well-pled facts as true. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010); *People v. Davis*, 119 Ill. 2d 61, 64 (1987). The "substantial showing" of a constitutional violation that must be made at this stage is a measure of the legal sufficiency of the petitioner's well-pled allegations of a constitutional violation, which if proved at an evidentiary

hearing, would entitle defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. The propriety of a second stage dismissal, as occurred here, is a question of law that we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001). Accordingly, we may affirm the decision of the circuit court on any grounds substantiated by the record, regardless of the circuit court's reasoning. *Demitro*, 406 Ill. App. 3d at 956.

¶ 12 Defendant argues that he set forth reasons for the untimeliness of his petition, "*i.e.*, that he had difficulty finding representation and difficulty researching the issues before filing his *pro se* petition." However, defendant's inability to secure counsel is not a justifiable excuse for his tardy filing as the law expects those seeking post-conviction relief to familiarize themselves with the procedural mandates of the Act. *People v. Walker*, 331 Ill. App. 3d 335, 341 (2002) (citing *People v. Diefenbaugh*, 40 Ill. 2d 73, 74 (1968)). Moreover, to initiate proceedings under the Act, it is only necessary that defendant file a petition verified by affidavit, asserting the respects in which his constitutional rights were denied. 725 ILCS 5/122-1, 122-2 (West 2010). Section 122-4 of the Act (725 ILCS 5/122-4 (West 2010)) provides for the appointment of counsel at the second stage of proceedings if defendant's *pro se* petition survives summary dismissal and he so requests. *People v. Gray*, 2013 IL App (1st) 101064, ¶ 21. Thus, whether defendant is able to retain counsel on his behalf to institute post-conviction proceedings has no bearing on his compliance with the applicable filing period. *Walker*, 331 Ill. App. 3d at 341.

¶ 13 Defendant, nonetheless, maintains that the issue of whether he was culpably negligent should not be decided at the second-stage of proceedings, but at a third-stage evidentiary hearing where credibility assessments are properly made. In support of his claim, defendant relies on *People v. Wheeler*, 392 Ill. App. 3d 303, 310 (2009), where the appellate court stated:

"[T]he Illinois Supreme Court has held that when a trial court determines whether or not a defendant was culpably negligent, the trial court must assess the defendant's credibility. *Bocclair*, 202 Ill. 2d at 102, 273 Ill. Dec. 560, 789 N.E.2d 734. Such an assessment is not intended for a second-stage dismissal hearing, where a trial court is foreclosed from fact finding and all well-pleaded facts are taken as true. *Coleman*, 183 Ill. 2d at 380-81, 233 Ill. Dec.789, 701 N.E.2d 1063. Assessments of credibility are better suited to a third-stage evidentiary hearing, which does not occur until after the State's answer, which never occurred in this case."

¶ 14 Although these comments initially appear consistent with defendant's assertions, they were made in the context of addressing whether the circuit court was required to conduct a third-stage evidentiary hearing before granting a defendant post-conviction relief. *Wheeler*, 392 Ill. App. 3d at 310. That issue is not before us in this second-stage dismissal case. Rather, the question before this court is whether defendant made a substantial showing in his post-conviction petition that his constitutional rights were violated, taking all well-pled facts as true. *Demitro*, 406 Ill. App. 3d at 956.

¶ 15 As pertinent to this appeal, the Act requires defendant to include facts showing that the delay in filing the petition was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2010); *People v. Wallace*, 406 Ill. App. 3d 172, 174-75 (2010). Absent allegations substantiating that claim, the Act directs the circuit court to dismiss the petition as untimely at the second stage,

upon the State's motion (725 ILCS 5/122-5 (West 2010)). *People v. Perkins*, 229 Ill. 2d 34, 43 (2007). Here, defendant's assertions were legally insufficient to excuse his tardy request for post-conviction relief, and, consequently, the circuit court properly granted the State's motion to dismiss his petition as untimely at the second stage of proceedings.

¶ 16 Alternatively, defendant faults post-conviction counsel for failing to amend his *pro se* petition and elaborate on his explanation for its late filing. He asserts that where, as here, timeliness is raised as an issue, post-conviction counsel must allege facts to show a lack of culpable negligence to adequately present his claims under Supreme Court Rule 651(c) (eff. Feb. 6, 2013). However, the facts appearing in the record before this court do not support defendant's allegation that post-conviction counsel provided unreasonable assistance by failing to amend his petition to elaborate on his explanation for why his delay in filing was not due to his culpable negligence.

¶ 17 The right to post-conviction counsel is statutory (725 ILCS 5/122-4 (West 2010)), and defendants are only entitled to a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). 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. However, the third obligation does not require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006).

¶ 18 The filing of a certificate in accordance with Rule 651(c) gives rise to a presumption that post-conviction counsel provided reasonable assistance during second-stage proceedings. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. 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. We observe, however, that the sole obligation of knowing the time limitations for filing a post-conviction petition rests with defendant. *People v. Lander*, 215 Ill. 2d 577, 588-89 (2005).

¶ 19 Although post-conviction counsel is required to amend an untimely *pro se* petition to allege any available facts that are necessary to establish that the delay in filing was not due to defendant's culpable negligence (*Perkins*, 229 Ill. 2d at 49), defendant's inability to secure legal counsel to pursue a post-conviction petition is insufficient to establish a lack of culpable negligence (*Walker*, 331 Ill. App. 3d at 341). There is no indication in the record that defendant provided any additional, identifiable facts that could be alleged, and we thus conclude that post-conviction counsel had no reason to amend defendant's *pro se* petition where the explanation he did provide was without merit and would not support a claim that he was not culpably negligent for the untimeliness of his petition. *Pendleton*, 223 Ill. 2d at 472.

¶ 20 Defendant next contends that he made a substantial showing that trial counsel was ineffective for refusing to allow him to testify in his own defense. He refers this court to the allegation in his initial and amended *pro se* petitions "that he did not voluntarily waive his right to testify, but rather that his trial attorney told him not to testify," and to the trial record where, in declining to testify, he said, "whatever my attorneys advise for me. I go along with them, your Honor."

¶ 21 Where, as here, defendant alleges in a post-conviction petition that his trial counsel interfered with his right to testify at trial, the inquiry into the merit of this claim is under the two-prong test (deficient performance and prejudice) set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hernandez*, 351 Ill. App. 3d 28, 39 (2004); accord *People v. Graham*, 2012 IL App (1st) 102351, ¶ 49. Although defendant's right to choose whether to testify is a fundamental right, the supreme court nevertheless requires that defendant satisfy the prejudice prong of the *Strickland* analysis even where, as here, defendant claims that trial counsel interfered with his right to testify. *Hernandez*, 351 Ill. App. 3d at 39.

¶ 22 The record shows that defendant acquiesced in his attorney's advice that he should not testify and took no steps to invoke his right to testify during his trial. Even taking as true defendant's factual assertion that he did not question counsel's advice, his decision to heed that advice does not raise a colorable claim of ineffective assistance of counsel, particularly where there is no indication that counsel refused to let him testify or would not represent him if he did. *People v. Burks*, 343 Ill. App. 3d 765, 775-76 (2003). Thus, defendant's self-serving post-conviction claim that he truly desired to testify, in the absence of a contemporaneous assertion of his right to testify at trial, was properly rejected by the circuit court. *People v. Enis*, 194 Ill. 2d 361, 399-400 (2000) (citing *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994)).

¶ 23 In addition, defendant has made no attempt to demonstrate or explain how he was prejudiced by counsel's representation in this regard, and we discern none in the record before us. *Burks*, 343 Ill. App. 3d at 776; *People v. Bell*, 234 Ill. App. 3d 631, 639 (1992). Standing alone, defendant's claim is insufficient to satisfy the *Strickland* requirement for prejudice (*People v. Rissley*, 206 Ill. 2d 403, 458 (2003)), and we therefore affirm the second-stage dismissal of his

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post-conviction petition.

¶ 24 Affirmed.