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SIXTH DIVISION
September 27, 2013

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. 97 CR 5354
)	
WOJCIECH PARA,)	The Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to rebut the presumption that he received reasonable assistance from post-conviction counsel despite the fact that counsel did not use a Polish interpreter when consulting with defendant. Counsel also was not required to attach an expert witness affidavit to defendant's petition where defendant's claims of ineffective assistance of trial and appellate counsel were meritless.

¶ 2 Following a jury trial, defendant was convicted of first degree murder and home invasion and sentenced to natural life imprisonment. His conviction and sentence were affirmed in 2002. *People v. Para*, No. 1-00-1918 (2002) (unpublished order under Supreme Court Rule 23).

Defendant subsequently filed a post-conviction petition alleging ineffective assistance of trial and appellate counsel and was appointed counsel at the second stage. Post-conviction counsel

filed a Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate along with a supplemental petition on defendant's behalf. Defendant's petition was dismissed and defendant now appeals. On appeal, defendant contends that his post-conviction counsel rendered unreasonable assistance where she failed to consult with defendant in Polish despite defendant informing her of his inability to understand English. Further, defendant contends his post-conviction counsel's representation was unreasonable where counsel failed to amend his petition by placing it in proper legal form by attaching a necessary expert witness affidavit to support his post-conviction contentions.

¶ 3 Defendant utilized a Polish language interpreter throughout the trial proceedings. The State's evidence showed that the stabbing victim, Jozef Hellner, rented a room in a home owned by defendant's mother-in-law, Helena Jedrol (also known as "Helen"). Defendant's wife, Grazyna Jedrol (also known as "Grace") also resided in the home but neither defendant's wife nor mother-in-law were home at the time of the murder. Grace demanded defendant move out of the residence and as of the date of the murder, defendant was no longer a resident of the home.

¶ 4 Another boarder, Andrzej Lsaka, testified that while watching television in his upstairs bedroom, he heard glass breaking in the kitchen and when he went downstairs, he observed defendant in the kitchen with a hammer. Lsaka noticed that the window on the back door had been broken and that defendant had broken into the house. Defendant asked Lsaka about Grace and Helen. Lsaka further testified that defendant started cutting up clothes with a knife he removed from the kitchen. When he observed defendant cutting up Grace and Helen's clothes, Lsaka left the house to warn the women against coming into the house. After standing outside for 10 to 15 minutes, Lsaka observed defendant leave the premises through the front door. Lsaka reentered the house and went upstairs to talk to Hellner. He called out to Hellner, but there was

no response. Lsaka then kneeled down to look underneath Hellner's bedroom door and observed a great deal of blood. Lsaka panicked, left the premises, and went to a friend's house.

¶ 5 Albert Jedrol, another resident of the home, and Helen's son, discovered Hellner's body at about 5:30 p.m on January 23, 1997. He also testified that defendant called the house sometime between 5 and 6 a.m. on the date of the murder, and that defendant wanted to speak to Grace.

¶ 6 Chicago Police forensic investigator Noujokas processed the crime scene. Illinois State Police forensic biologist Daniel Otto conducted DNA analysis on items of evidence recovered from the scene using the restriction fragment length polymorphism (RFLP) testing method. Using this method, Otto determined that blood recovered from the plastic runner on the carpet in the home was consistent with Hellner's blood and could not have originated from defendant.

Otto also determined that blood on defendant's jogging pants and shirt were consistent with defendant's blood and could not have originated from Hellner. Otto was unable to analyze the blood discovered on defendant's shoes, on a towel found in the kitchen, on the knife that was used as the murder weapon, or blood discovered on the carpet. He was unable to analyze the blood using the RFLP method, because there was insufficient DNA to analyze. Otto testified that the polymerase chain reaction (PCR) testing method provided greater sensitivity than the RFLP method and would have been successful in analyzing the DNA samples that were too small to be tested using the RFLP method. Otto was not qualified to conduct PCR testing, but another analyst could have performed the testing had the State or the defense requested.

¶ 7 According to assistant State's Attorney Ursula Walowski, defendant gave an inculpatory statement on January 26, 1997 at about 11:30 a.m. Defendant told Walowski that on January 23, 2007 in the late afternoon, he went to the house he formerly shared with his wife, Grace, to obtain clothes because Grace "kicked him out" of the house. Defendant was angry that Grace

told him to move out. When he arrived at the house, defendant saw Lsaka in the kitchen and he inquired of Lsaka as to Grace's location. Defendant took a knife from the kitchen, went to his wife's bedroom, and began cutting up Grace's clothes. He also cut up his mother-in-law's clothes. Defendant then went upstairs to another closet and cut up clothes there. The victim, Josef Hellner, surprised defendant by grabbing defendant's back area. Defendant turned around with the knife in his hand and began struggling with Hellner. The struggle continued into Hellner's room where defendant "punched" Hellner with the knife. While in Hellner's bedroom, they both fell and it was at that point that defendant noticed Hellner was bleeding. Defendant left the house and ran away.

¶ 8 The jury found defendant guilty of first degree murder and home invasion. The trial court sentenced him to natural life imprisonment. Defendant appealed, and this court affirmed defendant's convictions and sentence. *Para*, No. 1-00-1918, at 17. In his subsequent *pro se* petition, defendant alleged ineffective assistance of trial counsel for failing to conduct pretrial discovery and interview Albert Jedrol. Defendant claimed that had counsel conducted discovery or the interview, then trial counsel would have known that Albert had an identical pair of boots that could have made the footprint which had been discovered by police in the bloodied carpet. He also argued ineffective assistance of appellate counsel. Defendant's *pro se* petition was prepared by another inmate because, according to the preparer's affidavit, defendant only spoke Polish and only had a rudimentary knowledge of the English language.

¶ 9 Post-conviction counsel filed two Rule 651(c) certificates, one in October 2009, and the second on May 20, 2010. In the latter certificate, counsel averred that she "obtained and examined all relevant transcripts, and supplemental documents regarding" defendant's case, she consulted with petitioner in person to ascertain his contentions of constitutional deprivation, and

finally that she "reviewed petitioner's pro se petition and letters to ascertain if any amendments, supporting affidavits or documents will advance his arguments."

¶ 10 Post-conviction counsel filed a supplemental petition for post-conviction relief on defendant's behalf on May 28, 2010. In it, counsel alleged that defendant's trial counsel was ineffective for failing to order PCR analysis or failing to call an expert witness to testify regarding the deterioration of DNA evidence. The supplemental petition claimed the PCR testing would have provided the identity of the attacker. It also argued that even if trial counsel chose not to order the PCR test, trial counsel should have used an expert witness to "explain the significance of the results of such a test or any explanation to the jury." Post-conviction counsel did not attach an affidavit from an expert witness to support the claims. The State filed a motion to dismiss defendant's petition. The post-conviction court heard argument and granted the State's motion.

¶ 11 On appeal, defendant claims post-conviction counsel rendered unreasonable assistance and violated Rule 651(c) because counsel failed to consult with defendant in the Polish language despite his assertion that he informed counsel that he did not understand English. Defendant further claims that counsel violated the duties outlined in Rule 651(c) when she failed to amend his *pro se* petition by attaching a necessary expert witness affidavit.

¶ 12 The Act provides a three-stage process by which defendants may assert that their convictions were the result of substantial denials of their constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334

(2005). "[A]ll factual allegations that are not positively rebutted by the record are accepted as true." *People v. Childress*, 191 Ill. 2d 168, 174 (2000). Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 13 The appointment of counsel at the second stage of post-conviction proceedings is a statutory right, rather than a constitutional one. 725 ILCS 5/122-4 (West 2010); *People v. Turner*, 187 Ill. 2d 406, 411 (1999). The Act provides that petitioners are entitled to a "reasonable" level of assistance of counsel. *Perkins*, 229 Ill. 2d 34, 42 (2007). Rule 651(c) imposes three duties on post-conviction counsel: (1) consulting with the petitioner either by mail or in person to ascertain his constitutional claims; (2) examining the record of the trial court proceedings; and (3) making any amendments to the *pro se* petition necessary to adequately present the petitioner's claims. Ill. S. Ct. R. 651(c); *Perkins*, 229 Ill. 2d at 42. Either the record or a certificate filed by post-conviction counsel may show compliance with the rule. *Profit*, 2012 IL App (1st) 10130, ¶ 18. The purpose of Rule 651(c) is to "ensure that post-conviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *Id.* Substantial compliance with the rule is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008). Counsel is not required to advance nonmeritorious claims on a defendant's behalf. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006); *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 14 This court reviews *de novo* whether an attorney complied with a supreme court rule. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19. When post-conviction counsel files a Rule 651(c) certificate, a rebuttable presumption is created that counsel provided reasonable assistance, and it is then the defendant's burden to overcome this presumption by demonstrating that counsel failed to substantially comply with the duties required by the rule. *Profit*, 2012 IL

App (1st) 101307, ¶ 19. In this case, counsel filed two Rule 651(c) certificates, thus, the presumption exists that defendant received reasonable assistance and defendant must demonstrate that counsel failed to substantially comply with the duties mandated by Rule 651(c). *Id.*

¶ 15 Defendant first contends that post-conviction counsel's statements on the record rebut the presumption that counsel fulfilled her duty to consult with defendant to ascertain his claimed deprivations of constitutional rights where counsel reported that defendant informed her that he did not understand English. Counsel's second Rule 651(c) certificate provides that she "consulted with [defendant] in person to ascertain his contentions of deprivations regarding his post-conviction issues." Based upon this certification, defendant must rebut the presumption that she fulfilled her duty to consult with him, and he has failed to so because his contentions are positively rebutted by the record.

¶ 16 The record includes the transcripts of various court proceedings relating to the petition. On October 23, 2008, counsel informed the court that, "[t]he only problem I'm having is he indicates that he cannot understand me. So by the next court date I think I should have figured out how to get a Polish interpreter to speak with him." On March 19, 2009, counsel told the court that she "finally had an opportunity to speak with [defendant]. The issue concerning that [*sic*] I would not be able to understand him because of his language barrier. But I finally had an opportunity to find out what his issues are." On June 25, 2009, counsel stated that "despite the language barrier," she was able to "have some conversation with [defendant]," and they were "just about finished with his amended petition." On September 24, 2009, counsel informed the court that she prepared her Rule 651(c) certificate, but that she encountered a problem with defendant in that she speaks with him on the phone, but then defendant sends her a letter stating

that he does not understand English. A month later, counsel filed her Rule 651(c) certificate and she informed the court that she arranged a three-way interview with the Polish interpreter. Then, on February 11, 2010, counsel stated that she "had an opportunity to speak with [defendant] yesterday[,] " and that defendant was on "lockdown." Counsel explained that she was "looking into whether to add two additional issues to the petition."

¶ 17 On July 13, 2011, the court conducted a hearing on the State's motion to dismiss and questioned counsel regarding defendant's ability to understand counsel when she spoke to defendant in English. Post-conviction counsel explained that a Polish interpreter was used at trial, but that when counsel called defendant at the prison and asked whether defendant understood her, defendant indicated that he did. Counsel was not able to arrange for a Polish interpreter at the prison. She further explained to the court that she spoke with defendant's counselor who informed her that whenever the counselor communicates with defendant in English, defendant understands the counselor. Post-conviction counsel explained that she never spoke with defendant in Polish over the telephone, but that defendant never indicated that he did not understand her or that he needed a Polish interpreter. His responses to counsel were such that counsel believed that defendant understood what she was saying in English. The court then noted that the murder occurred in 1997 and that it had no doubt that defendant would have improved his English by 2011. The court then stated that it was satisfied with the Rule 651(c) certificate.

¶ 18 Although defendant stated in a letter to counsel that he did not understand English, counsel stated on the record numerous times that she spoke to defendant over the telephone and he understood counsel when she spoke English. Counsel informed the court that defendant's responses to her were such that she believed defendant understood what she was saying in

English. The post-conviction court was also satisfied that defendant communicated effectively with counsel in English. Further, counsel's Rule 651(c) certificate also provides that through verbal communication with defendant, she was able to ascertain defendant's contentions of deprivation of his constitutional rights. While defendant argues that counsel failed to consult with him in Polish, defendant does not argue that counsel failed to set forth his constitutional claims. Ultimately, post-conviction counsel reported to the court that she had consulted with defendant and that these consultations were adequate for her to ascertain his contentions of error. We will not ignore both the presumption created by the Rule 651(c) certificates and the clear statements of post-conviction counsel that any language barrier had been surmounted. Accordingly, we find that counsel substantially complied with the duty to consult with defendant to ascertain his claims of constitutional deprivations.

¶ 19 Defendant further contends that post-conviction counsel provided unreasonable assistance by failing to amend the petition. Specifically, defendant argues that post-conviction counsel should have attached an expert witness affidavit to support his claim that his trial counsel was ineffective for failing to introduce the testimony of an expert witness who would have testified that the PCR method of DNA testing would have yielded results and what the results would have shown, or why the testing was not done.

¶ 20 The State argued for dismissal of this claim at the second stage because defendant's petition attached no supporting affidavits. Defendant's post-conviction counsel argued during the hearing that it was "incorrect" and "unreasonable" to require defendant to obtain an expert witness affidavit during the first stage of defendant's *pro se* petition. Counsel further argued that if the court decided to allow defendant's petition to advance to an evidentiary hearing, that it would be more "economical" and would make more "sense" for defendant to present the expert

witness affidavit at that time. After hearing argument on the State's motion, the trial court concluded that defendant was not denied the effective assistance of counsel because the PCR testing would not have benefitted defendant or had any effect on the outcome of the trial.

¶ 21 Post-conviction counsel argued to the post-conviction court that defendant's petition should advance to an evidentiary hearing without a supporting affidavit because of the impracticality of obtaining such an affidavit. The Post-Conviction Hearing Act makes clear that a petition must be supported by "affidavits, records, or other evidence" or must explain "why the same are not attached." 720 ILCS 5/122-2. "A post-conviction petition which is not supported by affidavits or other supporting documents is generally dismissed without an evidentiary hearing unless the petitioner's allegations stand uncontradicted and are clearly supported by the record." *People v. Johnson*, 154 Ill. 2d 227, 240 (1993).

¶ 22 However, we need not decide whether counsel's argument reflected a misunderstanding of the law or an attempt to convince the trial court to interpret the law more liberally. Post-conviction counsel substantially complied with the requirement that she amend defendant's *pro se* petition, where necessary, to put it in proper legal form. Our supreme court has held that post-conviction counsel is not required to amend a petition to advance nonmeritorious claims. *Pendleton*, 223 Ill. 2d at 472. As our supreme court explained in *People v. Greer*, 212 Ill. 2d 192, 205 (2004), "[f]ulfillment of the third obligation under Rule 651(c) does not require post-conviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* post-conviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule."

¶ 23 We agree with the post-conviction court that expert testimony regarding PCR analysis of DNA samples found during the police investigation would not have advanced defendant's case at

trial. This court held on direct appeal (*Para*, No. 1-00-1918, at 16), there was substantial evidence of defendant's guilt. Therefore, defendant cannot show that he was prejudiced by trial counsel's failure to present expert testimony regarding PCR testing. The evidence showed that defendant broke into the house and armed himself with a knife. Lsaka observed defendant cutting up clothing. Hellner was found dead shortly after defendant had been alone with him in the house and defendant was seen leaving the house. Significantly, at trial defendant also admitted to stabbing Hellner during a struggle. The evidence against defendant was strong. In granting the State's motion to dismiss the petition, the post-conviction court analyzed the evidence and concluded that additional DNA evidence would not have improved defendant's case. In this court, defendant does not argue how he was prejudiced by the lack of this evidence. Accordingly, we agree with the circuit court that expert witness testimony regarding the PCR method of DNA testing would not have benefitted defendant or had any effect on the outcome of the trial. Thus, it was not necessary for post-conviction counsel to attach an expert witness affidavit to defendant's supplemental petition.

¶ 24 Defendant cites *People v. Johnson*, 154 Ill. 2d 227 (1993), as support for his position that counsel failed to fulfill her duty to amend. However, *Johnson* does not compel a different result. In *Johnson*, 154 Ill. 2d at 242-45, post-conviction counsel was found to have provided unreasonable assistance because counsel admitted on the record that he failed to investigate the petitioner's claims and made no attempt to contact or obtain an affidavit from the petitioner's named expert witness during the two year pendency of the petition. Thus, the presumption of Rule 651(c) compliance was positively rebutted by the record. Here, however, defendant has failed to rebut the presumption. This failure, as explained above, is evidenced by counsel's statement on the record that she spoke with defendant and ascertained his contentions of

constitutional deprivations. It is also evidenced by the trial court's finding (which defendant does not address here) that defendant's proposed expert witness affidavit would not have advanced defendant's arguments or changed the outcome of the trial, and therefore, were not necessary within the meaning of Rule 651(c).

¶ 25 Post-conviction counsel filed Rule 651(c) certificates, thereby triggering the presumption of compliance with the rule. Defendant has failed to rebut the presumption. Accordingly, we find that counsel provided reasonable assistance and dismissal of defendant's petition was proper.

¶ 26 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.