

No. 1-10-0914

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. 02 CR 5765
)	
CHRISTOPHER DOBBINS,)	Honorable
)	Lawrence Edward Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where the record shows that postconviction counsel filed an amended petition that contradicted the allegations in defendant's *pro se* petition, failed to include an affidavit from defendant, and argued that the petition was at first-stage postconviction proceedings throughout the second-stage proceedings, counsel provided unreasonable assistance and the circuit court's dismissal of defendant's post-conviction petition is reversed and remanded for further proceedings.
- ¶ 2 Defendant Christopher Dobbins appeals the circuit court's grant of the State's motion to dismiss his amended postconviction petition. Defendant contends that his retained postconviction counsel provided unreasonable assistance when he filed an amended petition that

undermined the allegations in defendant's *pro se* petition and counsel did not comply with the requirements of Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We agree and reverse the dismissal of defendant's post-conviction petition. We remand this case to the circuit court to allow defendant an opportunity to amend his petition with the benefit of reasonable assistance of counsel.

¶ 3 Following a 2002 bench trial, defendant was convicted of three counts of criminal sexual assault and one count of aggravated criminal sexual abuse for sexually assaulting his girlfriend's 13-year-old daughter on three separate occasions. The trial court sentenced defendant to consecutive terms of seven and a half years for each of the four offenses, for an aggregate sentence of 30 years' imprisonment.

¶ 4 On direct appeal, defendant argued that he was denied his right to a public trial because the trial court excluded two of his relatives from the courtroom during the victim's testimony. This court rejected that argument and affirmed defendant's convictions and sentences. *People v. Dobbins*, No. 1-03-0083 (2004) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Dobbins*, 215 Ill. 2d 604 (2005).

¶ 5 In March 2005, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2004). Defendant alleged, *inter alia*, that his trial counsel rendered ineffective assistance when he informed defendant that a consent defense was not available in this case. Defendant stated that prior to trial, he discussed defense strategy with trial counsel and informed counsel that he had credible and reliable evidence that any sexual activity between him and the victim had been consensual. Defendant also advised counsel that the victim had a reputation for being dishonest, and that she had engaged in prior consensual sexual activity with others. We quote from the defendant's petition:

"[C]ounsel informed defendant that because of S.M.'s age, 13, she was not old enough or able to give knowing consent. Thus, counsel informed defendant that, under Illinois law, there was no consent defense available, and that because there was no consent defense available, then defendant was prohibited from presenting a consent defense. Counsel further advised defendant that, because there was no consent defense available, under a rape shield law, defendant was also prohibited under Illinois law from presenting evidence concerning S.M.'s reputation as being untruthful and dishonest, concerning prior sexual activities and conduct between S.M. and other people, and concerning inconsistent statements from S.M. as impeachment and substantive evidence; it was, according to counsel's representations to defendant, as aforementioned, it was all inadmissible as evidence under Illinois law."

¶ 6 Defendant further alleged that, based on counsel's advice that a consent defense was not available, he did not intelligently and understandingly waive his right to a jury trial and his right to testify. Defendant also claimed that counsel failed to investigate any of the evidence defendant provided him that would have supported a consent defense. Defendant asserted that while preparing his *pro se* post-conviction petition, he discovered that a consent defense was available to him. Defendant attached to his *pro se* petition his own sworn affidavit in which he restated all of the allegations from his petition regarding his discussion with counsel about a consent defense, as detailed above. Defendant also attached the transcripts from his trial and

sentencing hearing, a copy of his mittimus, and a separate affidavit attesting to the veracity of the statements in his petition.

¶ 7 The circuit court appointed the Cook County public defender to represent defendant and advanced the petition to second-stage proceedings under the Act. After more than a year of continuances, the assistant public defender filed her certificate of compliance pursuant to Supreme Court Rule 651(c). She did not file an amended petition.

¶ 8 In February 2007, the assistant State's Attorney informed the court that defendant had retained attorney Fred Cohn to represent him in this case. The assistant public defender withdrew from the case. In June 2007, attorney Cohn informed the court that he would be filing an amended postconviction petition. The following month, another attorney informed the court that attorney Cohn had been injured and requested a continuance. Similar requests were made over the following several months. In February 2008, attorney Cohn returned to court and requested time to file an amended petition.

¶ 9 On August 29, 2008, attorney Cohn filed an amended postconviction petition, alleging that defendant was denied effective assistance of trial counsel. The petition alleged that "[c]ounsel never explained to defendant that because of the age of the girl, consent could not be a legal defense." According to the petition, the State had offered defendant a term of 14 years' imprisonment in exchange for his guilty plea, but that trial counsel spent only 15 minutes discussing the offer with defendant. The petition further stated that "[i]f counsel had explained to defendant that his intended defense of consent was not legally available to defendant, he would have accepted the State's offer." The petition also raised a new claim that the trial court's admonishments regarding defendant's right to a jury trial were inadequate. Attached to the amended petition was an affidavit signed by both defendant and attorney Cohn attesting to the veracity of the statements in the amended petition. Also attached was one page from the trial

transcript in which trial counsel informed the court that defendant had declined an offer from the State, and the court advised defendant of his right to a jury trial and accepted his jury waiver.

¶ 10 The State moved to dismiss defendant's amended postconviction petition arguing that his allegation that trial counsel failed to explain that the consent defense was not available to him was contradicted by defendant's *pro se* petition and his affidavit attached to that petition. The State also argued that, although the record indicated that defendant rejected an offer from the State, there was no evidence that he was offered a term of 14 years' imprisonment. In addition, the State asserted that defendant failed to attach any affidavits or other evidence supporting the allegations in his amended petition, and argued that such omission was fatal to his petition in light of his affidavit attached to his *pro se* petition, which directly contradicted the allegations in the amended petition.

¶ 11 At the hearing on its motion to dismiss, the State maintained its argument that defendant's own affidavit refuted the claim in his amended petition that his trial counsel failed to advise him that consent was not a viable defense in light of the victim's age. The State also asserted that there was no evidence that an offer was made to defendant. In response, defense counsel Cohn argued, "First of all, this is a first stage proceeding. And a first stage proceeding is simply a matter of whether there is sufficient allegation of denial of constitutional rights." Counsel then quoted a passage from *People v. Edwards*, 197 Ill. 2d 239, 244 (2001), describing the court's review during first-stage proceedings to determine whether a petition is frivolous or patently without merit. Counsel stated that defendant need only set forth the gist of a constitutional claim with limited detail, and that he need not present his claim in its entirety or include legal arguments. Counsel Cohn argued, "That is the standard your Honor must apply at this stage." Counsel also argued that defendant's jury waiver was invalid because the trial court did not describe the nature of the offense in detail when admonishing defendant. Counsel relied

on a United States Supreme Court case addressing admonishments at a guilty plea hearing. Counsel acknowledged that the case he relied on was not a jury waiver case, but argued that the same principle of law should apply. Counsel insisted that "[w]e need to go past the first stage of a hearing," which was sufficient to deny the State's motion to dismiss. The trial court took the case under advisement.

¶ 12 While the cause remained pending, attorney Cohn submitted a memorandum that in light of the conflicting views of the facts between the State and defendant, a hearing was required to resolve the conflicts. Counsel again argued that "the issue at this first stage is [whether] there is a gist of a constitutional violation asserted," in support of which counsel quoted "the standard for first stage dismissal" from *Edwards*.

¶ 13 Three months later, counsel Cohn submitted his certificate pursuant to Supreme Court Rule 651(c). Counsel stated that he consulted with defendant by mail and telephone to ascertain his contentions of deprivations of his constitutional rights and examined the record of the proceedings, which he described as a "jury trial," and the eventual sentencing hearing in the case. Counsel stated that he amended the *pro se* petition to adequately present defendant's claims by preparing "a Supplemental Petition in support of petitioner's previously-filed *pro se* petitions [*sic*] for post-conviction relief."

¶ 14 On October 20, 2009, the circuit court entered an order granting the State's motion to dismiss defendant's post-conviction petition. The court found, *inter alia*, that defendant's *pro se* post-conviction petition contradicted his claim that his trial counsel rendered ineffective assistance. The court quoted a paragraph from defendant's petition and found that defendant admitted that trial counsel informed him that a consent defense was not available to him due to the victim's age. The court also found that, by defendant's own admission, he clearly understood the nature of the charge against him. In addition, the court found that the record showed that

defendant was sufficiently admonished before waiving his right to a jury trial. Based on these findings, the court concluded that defendant failed to make a substantial showing that his constitutional rights were violated.

¶ 15 Defense counsel Cohn filed a motion for reconsideration of the dismissal of defendant's post-conviction petition. Therein, counsel stated that "in the first phase of a post-conviction hearing, the court is to act with no input from either side." Counsel then quoted a case which stated that a defendant can file a motion to reconsider the "summary dismissal" of a postconviction petition. Attorney Cohn asserted, "In an Amended Motion for Post-Conviction Relief and Reply to Respondent's Motion to Dismiss, it was raised that the plea was unconstitutional." Counsel quoted several paragraphs from the amended postconviction petition. The circuit court found that defendant's reliance on the guilty plea case from the United States Supreme Court was misplaced, and it denied his motion for reconsideration.

¶ 16 On appeal, defendant solely contends that attorney Cohn, his retained postconviction counsel, failed to provide reasonable assistance and demonstrated a clear misunderstanding of the posture of his case. Defendant notes that postconviction counsel alleged in the amended petition that trial counsel never explained that a consent defense was not available in this case due to the victim's age. Defendant argues that this allegation directly contradicted the allegation in his *pro se* petition in which defendant stated that trial counsel explained the lack of a consent defense to him. Defendant asserts that rather than "adequately presenting" his claims, counsel undermined them and negated the veracity of his claims in both petitions. Defendant also argues that postconviction counsel failed to attach an affidavit from defendant that would support the allegations in the amended petition as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)). In addition, defendant notes that counsel repeatedly asserted that the petition was at the first stage of postconviction proceedings when the petition

had proceeded to the second-stage. Defendant argues that counsel's repeated misunderstandings on the record demonstrates that he failed to provide reasonable assistance. Defendant also contends that counsel's mistakes rebutted the statement in his 651(c) certificate that he amended the *pro se* petition to adequately present defendant's claims. Accordingly, defendant argues that postconviction counsel did not satisfy the requirements of Supreme Court Rule 651(c).

¶ 17 Initially, the State asserts that counsel filed a valid 651(c) certificate, and therefore, defendant is precluded from raising the claim that he was denied reasonable assistance from postconviction counsel because it is not a free-standing constitutional claim that is cognizable under the Act as there is no constitutional right to counsel in postconviction proceedings. The State relies on this court's holding in *People v. Mendoza*, 402 Ill. App. 3d 808 (2010). In *Mendoza*, the defendant did not claim that his postconviction counsel failed to comply with any of her duties under Rule 651(c). Instead, defendant made a general claim that counsel failed to provide reasonable assistance when she filed an amended petition that "watered down" his key argument and failed to attach any affidavits to the petition. *Id.* at 811. This court held that absent an allegation that postconviction counsel violated a specific duty under Rule 651(c), the defendant's general claim that counsel provided unreasonable assistance did not overcome the valid 651(c) certificate filed by counsel. *Id.* at 821.

¶ 18 We find that the *Mendoza* holding does not apply in this case. Under Supreme Court Rule 651(c), postconviction counsel is required to consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, examine the record of proceedings from the trial, and amend the defendant's *pro se* petition as necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Here, defendant specifically argues that postconviction counsel failed to amend his *pro se* petition to adequately

present his claims. It follows that defendant has expressly claimed that counsel violated one of his specific duties under Rule 651(c), which permits review by this court.

¶ 19 Alternatively, the State argues that postconviction counsel's certificate shows that he fulfilled his duties under Rule 651(c), and defendant failed to overcome the presumption that, on that basis, counsel provided reasonable assistance. The State asserts that, regardless of counsel's mistakes about the advice given by trial counsel and the correct stage of the proceedings, he adequately presented defendant's *pro se* claim that trial counsel gave him incorrect advice.

¶ 20 We review the circuit court's dismissal of a postconviction petition *de novo* when no evidentiary hearing has been held. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The interpretation of a supreme court rule, including whether counsel fulfilled his duties under Rule 651(c), is also reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 21 Pursuant to the Act, during second-stage postconviction proceedings, an indigent defendant is entitled to representation by appointed counsel. 725 ILCS 5/122-4 (West 2004); *Suarez*, 224 Ill. 2d at 44. Postconviction counsel is required to provide defendant with a "reasonable level of assistance." *Id.* at 42. Supreme Court Rule 651(c) requires postconviction counsel to perform specific duties to ensure that defendants receive such reasonable assistance and that their complaints are adequately presented. *Id.* at 42, 46. The requirements of Rule 651(c) also apply to retained counsel who represent defendants in postconviction proceedings. *People v. Richmond*, 188 Ill. 2d 376, 381 (1999). In accordance with Rule 651(c), postconviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant's contentions. *People v. Lander*, 215 Ill. 2d 577, 584 (2005).

Compliance with these duties is mandatory and may be shown by a certificate filed by post-conviction counsel. Rule 651(c); *Lander*, 215 Ill. 2d at 584.

¶ 22 However, counsel's Rule 651(c) certificate is not conclusive evidence of compliance with those duties and may be rebutted by the record. *People v. Perkins*, 229 Ill. 2d 34, 52 (2007). Our supreme court has long held that where the record shows that postconviction counsel has provided inadequate representation, it is error to dismiss defendant's petition. *Suarez*, 224 Ill. 2d at 47, citing *People v. Jones*, 43 Ill. 2d 160, 162 (1969). In such cases, defendant's limited right to counsel conferred by the Act has not been fully realized. *Suarez*, 224 Ill. 2d at 51. Where postconviction counsel fails to fulfill his duties under Rule 651(c), defendant's petition must be remanded to the circuit court for further proceedings, regardless of whether the allegations therein have merit. *Suarez*, 224 Ill. 2d at 47.

¶ 23 Here, we find that postconviction counsel failed to provide defendant with the reasonable level of assistance required by the Act. Our review of the record reveals that the amended postconviction petition prepared by counsel directly contradicted defendant's contentions. In his *pro se* petition, defendant expressly stated that trial counsel informed him that a consent defense was not available in this case due to the victim's age. Defendant recounted his discussions with trial counsel in great detail, describing how counsel told him that the victim "was not old enough or able to give knowing consent." Defendant further stated that counsel explained to him that under Illinois' "rape shield law," he could not present any evidence of the victim's reputation for being dishonest, or of her prior sexual activities with others. Defendant restated this information in his sworn affidavit submitted in support of his *pro se* petition. Despite these explicit claims, in the amended petition, postconviction counsel asserted that trial "[c]ounsel never explained to defendant that because of the age of the girl, consent could not be a legal defense." Postconviction counsel provided no explanation for this clear contradiction

between the two petitions, which served as a basis for the State's motion to dismiss the amended petition. Similarly, the trial court's dismissal of the petition was substantially based on the contradiction between the *pro se* and amended petitions. The court quoted defendant's *pro se* petition and expressly found that defendant admitted that trial counsel had informed him that a consent defense was not available to him due to the victim's age. It is irrefutable on the record before us that postconviction counsel undermined defendant's contention rather than reshape the allegation to adequately present defendant's claim.

¶ 24 Furthermore, the record reveals that postconviction counsel failed to attach any affidavits or other evidence to support the allegations in the amended petition or offer any explanation for their absence. Section 122-2 of the Act requires defendant to support the allegations in his postconviction petition by either attaching factual documentation to the petition, or otherwise explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). The purpose of this requirement is to show that the allegations in the petition are capable of independent or objective corroboration. *Id.* at 254. Defendant's failure to attach the affidavits or documentation required by the Act, or otherwise explain their absence, is "fatal" to his postconviction petition and alone justifies dismissal of that petition. *Id.* at 255, citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002).

¶ 25 The only document counsel attached to the amended petition was one page from the trial transcript in which trial counsel informed the court that defendant had declined an offer from the State, and the court advised defendant of his right to a jury trial and accepted his jury waiver. Presumably, this page was intended to support the new claim in the amended petition that the trial court's admonishments regarding defendant's right to a jury trial were inadequate. Postconviction counsel failed to include an affidavit from defendant explaining the contradictory claim that trial counsel never explained that consent was not a viable defense in this case. See

People v. Turner, 187 Ill. 2d 406, 414 (1999) (postconviction counsel's failure to include "even an affidavit from petitioner describing this evidence" constituted unreasonable assistance). Nor did postconviction counsel provide any evidence that the State offered defendant a term of 14 years' imprisonment in exchange for his guilty plea. In its motion to dismiss, the State argued that the omission of this evidentiary support was fatal to the amended petition in light of defendant's affidavit attached to his *pro se* petition which clearly contradicted the allegations in the amended petition. We agree and find that postconviction counsel's failure to attach the supporting documentation required by the Act constituted unreasonable assistance.

¶ 26 Finally, defendant argues that postconviction counsel's repeated assertion that the petition was at the first stage of postconviction proceedings when it was actually in second-stage proceedings shows that counsel did not demonstrate a reasonable understanding of defendant's case and the legal standard applicable to second-stage proceedings. The record shows that at the hearing on the State's motion to dismiss the petition, counsel repeatedly argued that the petition was at "a first stage proceeding" and urged the court to apply the "gist" standard when reviewing the petition. In his subsequent memorandum, counsel again argued that the petition was at the "first stage" of proceedings. Also, in his motion for reconsideration of the petition's dismissal, counsel maintained that the petition was in the "first phase" of postconviction proceedings and that a defendant can file a motion to reconsider the "summary dismissal" of a post-conviction petition. We find that the record reveals that postconviction counsel misunderstood the procedural posture of the case and consequently the required showing to advance the petition.

¶ 27 We are also troubled by the assertion in the Rule 651(c) certificate that postconviction counsel reviewed the record of the proceedings of the "jury trial" in this case. Defendant was convicted following a bench trial. In addition, in his motion for reconsideration, counsel stated, "In an Amended Motion for Post-Conviction Relief and Reply to Respondent's

Motion to Dismiss, it was raised that the plea was unconstitutional." Defendant did not enter a guilty plea, and there is no "Reply to Respondent's Motion to Dismiss" in the record. We find that such errors precluded a finding that defendant was provided the statutory assistance to which he is entitled.

¶ 28 Based on the record before this court, we find that postconviction counsel failed to provide defendant with the reasonable level of assistance required by the Act. Accordingly, defendant must be given an opportunity to replead his postconviction petition with the benefit of reasonable assistance of counsel. See *Turner*, 187 Ill. 2d at 417.

¶ 29 We express no opinion on the merit of the claims in defendant's postconviction petition, or whether an evidentiary hearing on his claims would be appropriate in this case. See *id.*

¶ 30 For these reasons, we reverse the dismissal of defendant's amended postconviction petition and remand the cause to the circuit court to allow defendant an opportunity to amend his postconviction petition with the benefit of reasonable assistance of counsel. See *Lander*, 215 Ill. 2d at 590.

¶ 31 Reversed; remanded with directions.