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2012 IL App (3d) 100599-U

Order filed October 30, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Henry County, Illinois,
	)	
v.	)	Appeal No. 3-10-0599
	)	Circuit No. 02-CF-216
	)	
JIM L. RICHARDSON,	)	Honorable
	)	Ted J. Hamer,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justice Carter concurred in the judgment.  
Presiding Justice Schmidt dissented.

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**ORDER**

- ¶ 1 *Held:* We reverse the dismissal of defendant's postconviction petition and remand the cause for a new hearing in compliance with Supreme Court Rule 651(c).
- ¶ 2 Defendant, Jim L. Richardson, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2002)) and sentenced to 60 years' imprisonment. Defendant appeals the denial of his second-stage postconviction petition which alleged trial counsel was ineffective for failing to present evidence of his medical conditions. Defendant also asserts remand is necessary for

counsel to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We reverse and remand.

¶ 3

### FACTS

¶ 4 On August 2, 2002, defendant was arrested and charged with the first degree murder of Harold Collins. In a videotaped statement, defendant admitted to the police he killed Collins. However, defendant testified at trial that defendant was present when Geoffrey Mercinni murdered the victim. Defendant testified he falsely confessed to murdering Collins to protect his family from Mercinni, who had threatened to kill them if defendant spoke of the incident. Defendant also testified he was physically unable to commit the murder due to the fact that he was blind in his left eye and recently underwent surgery on his right shoulder. The jury found defendant guilty of first degree murder, and defendant was sentenced to 60 years in prison.

¶ 5 On June 2, 2006, defendant filed a *pro se* postconviction petition alleging he received ineffective assistance from trial counsel. On June 28, 2006, the court appointed counsel for purposes of the postconviction proceeding. Appointed counsel filed an amended postconviction petition on March 4, 2010, which was supported by the affidavits of Sherrie Nichols-Deleski, defendant, and defendant's wife, Ritta Richardson. These affidavits contained statements from each affiant that defendant suffered from blindness in his left eye at the time of the murder. Defendant further averred he had asked trial counsel to call his treating physician as a defense witness and also to introduce defendant's medical records into evidence.

¶ 6 On June 14, 2010, the court conducted a hearing on the State's motion to dismiss defendant's amended petition. Defense counsel stated the amended petition was factually sufficient to establish a violation of defendant's constitutional rights, but, if necessary, defense

counsel offered to replead the case with conclusory allegations. In the alternative, counsel argued if the petition proceeded to an evidentiary hearing, defendant had "multiple witnesses cited in both [defendant's] affidavit and [Ritta's affidavit]" who would testify to the constitutional violations. The court granted the State's motion to dismiss. In its ruling, the court noted that the amended petition substantially adopted the allegations from defendant's *pro se* petition and may have added some allegations. The court found, in part, that the following contentions were unsupported by the amended petition: (1) trial counsel was ineffective for failing to investigate the factual basis for a defense; (2) counsel failed to investigate and properly cross-examine witnesses Susan Collins and Mike Scheckel; and (3) counsel did not present exculpatory evidence to the jury. Postconviction counsel again offered to replead the case with the necessary specificity, but the court had dismissed the case. Defendant appealed.

¶ 7

#### ANALYSIS

¶ 8 On appeal, defendant argues the trial court improperly dismissed his amended postconviction petition because the amended petition stated the gist of a constitutional claim based on the alleged ineffective assistance of trial counsel. Next, defendant argues the cause should be remanded to the trial court because postconviction counsel failed to comply with the mandates of Supreme Court Rule 651(c). We address the second issue first.

¶ 9 Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) requires that once postconviction counsel is appointed, the record must contain a showing, which may be made by a certificate, that appointed counsel has: (1) consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right; (2) examined the record of the proceedings at the trial; and (3) made any amendments to the petition which are necessary for an adequate

presentation of petitioner's contentions. "Rule 651(c) is a rule of procedure and not a suggestion; therefore, it is incumbent that counsel follow the rule and that courts require compliance with it." *People v. Myers*, 386 Ill. App. 3d 860, 865 (2008). Compliance with Rule 651(c) is mandatory and may be established either by an attorney's certificate or by the record showing counsel satisfied the rule's requirements. *People v. Lander*, 215 Ill. 2d 577 (2005). A reviewing court is not entitled to assume that counsel has complied with the rule; rather, there must be an explicit showing in the record that the rule's requirements have been met. *Myers*, 386 Ill. App. 3d 860. Remand is required where postconviction counsel failed to fulfill the above three duties, regardless of whether the claims raised in the petition had merit. *People v. Suarez*, 224 Ill. 2d 37 (2007).

¶ 10 The record in the instant case does not contain a Rule 651(c) certificate and counsel did not personally inform the court on the record that counsel contacted defendant in person or by mail before filing the amended postconviction petition. *Cf. People v. Williams*, 5 Ill. App. 3d 56 (1972) (postconviction counsel told the court on the record that he had communicated with defendant by letter and he attempted to see defendant in person). We agree with the trial court's observation that postconviction counsel substantially adopted the arguments made by defendant in his *pro se* petition. In addition, we observe the allegations added by counsel to the amended petition could have been developed from the facts presented in defendant's direct appeal, which was appended to his *pro se* petition, without counsel acting to independently review the trial record.

¶ 11 Moreover, during the hearing on the State's motion to dismiss the amended postconviction petition, counsel made very few references to the trial record and did not

demonstrate a working knowledge of the specific facts. *Cf. People v. Stovall*, 47 Ill. 2d 42 (1970) (record disclosed discussions between the court and counsel about the contents of the record as well as references by counsel to certain portions of the record in an attempt to support petitioner's contentions). In its ruling, the trial court noted counsel's lack of evidentiary allegations, prompting counsel's repeated offers to replead the case with the necessary specificity. Therefore, we conclude that in the absence of the required Rule 651(c) certificate, the record itself does not conclusively indicate that counsel reviewed the record of proceedings before preparing the amended postconviction petition.

¶ 12 Finally, we find the record is unclear whether counsel made the necessary amendments to defendant's *pro se* petition. As the trial court noted, several of the allegations in the amended petition were unsupported. The purpose of Rule 651(c) is to ensure that counsel shapes defendant's claims into the proper legal form and presents those claims to the court. See *People v. Perkins*, 229 Ill. 2d 34 (2007). Thus, on such a record, we cannot conclude appointed counsel took the necessary steps to ensure adequate presentation of the defendant's postconviction claims in the trial court.

¶ 13 Accordingly, the trial court's order dismissing defendant's petition must be reversed and the cause remanded to ensure compliance with Rule 651(c) before considering the merits of the issues contained in the postconviction petition, which may be amended by counsel by adding, deleting, or standing on the issues in the amended postconviction petition following remand.

¶ 14 CONCLUSION

¶ 15 For the foregoing reasons, the judgment of the circuit court of Henry County is reversed, and the cause is remanded for further proceedings.

¶ 16 Reversed and remanded.

¶ 17 PRESIDING JUSTICE SCHMIDT, dissenting.

¶ 18 I would affirm the trial court's second-stage dismissal of petitioner's postconviction petition.

¶ 19 "At the second stage of postconviction proceedings under the Act, the defendant bears the burden of making a substantial showing of a constitutional violation. [Citation.] The State may file a motion to dismiss or an answer to the petition, and the court must then determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. [Citation.] The trial court is foreclosed from engaging in fact-finding at this stage because all well-pleaded facts are to be taken as true unless they are rebutted by the record. [Citation.] Unless a substantial showing of a constitutional violation is established by the allegations in the petition, supported by the trial record and accompanying affidavits, the defendant is not entitled to an evidentiary hearing." *People v. Gamino*, 2012 IL App (1st) 101077, ¶ 12.

¶ 20 A proceeding under the Act is not an appeal of a defendant's underlying conviction, but rather a collateral attack on the judgment. *People v. Evans*, 186 Ill. 2d 83 (1999). As such, *res judicata* bars consideration of issues that were raised and decided on direct appeal, as well as issues that could have been presented on direct appeal but were not. *People v. David Harris*, 206 Ill. 2d 293, 299 (2002); see also *People v. Gale*, 376 Ill. App. 3d 344, 349 (2007) ("*res judicata* bars consideration of issues that were raised and decided on direct appeal, while issues that could have been presented on direct appeal but were not are considered waived").

¶ 21 The amended petition seeks postconviction relief for: (a) trial counsel's ineffectiveness in not procuring and presenting petitioner's medical records at trial to support his testimony that he

was physically incapable of committing this crime; (b) petitioner's actual innocence; (c) the fact that his confession should have been suppressed as it was involuntary; (d) failure to properly instruct the jury; (e) failure to instruct the jury on the lesser-included offense of involuntary manslaughter; and (f) due to his excessive sentence.

¶ 22 All of the issues raised in petitioner's amended petition could have been raised on direct appeal. As such, they are forfeited and affirmation of the trial court's order dismissing the petition is appropriate.

¶ 23 I acknowledge that the postconviction waiver rule is relaxed in three situations: where fundamental fairness requires; where the facts relating to defendant's claim do not appear on the face of the original appellate record; and where the alleged waiver stems from the incompetence of appellate counsel. *People v. James Harris*, 206 Ill. 2d 1, 13 (2002). None of those situations are present in the case at bar. Petitioner makes no claim of ineffective assistance of appellate counsel in his direct appeal. *People v. Richardson*, No. 3-03-0599 (June 17, 2005) (unpublished order under Supreme Court Rule 23 (eff. July 1, 2011)). Not only are all the facts relating to petitioner's claims readily apparent in the record, but fundamental fairness does not require relaxing the postconviction waiver rule in this matter.

¶ 24 As the trial court correctly noted, a jury convicted petitioner based "on overwhelming evidence." Petitioner gave a three-hour confession. He led the police to the murder weapon, and bloody clothes worn during the murder were found at petitioner's job site, as was jewelry taken from the victim's residence. Petitioner admitted gaining access to the victim's house via one of the victim's sister's keys. The victim's sisters testified that petitioner not only had access to the keys but that he failed to meet them the night of the murder as he previously informed them he intended to do. The State adduced significant testimony at trial regarding petitioner's motive for

murdering the victim as well. At trial, petitioner testified at trial to both his medical malady, as well as treatment received on his shoulder and back. He also testified to the threats allegedly made by Mercinni.

¶ 25 While petitioner asserts that trial "counsel was ineffective for failing to investigate and present evidence of defendant's physical limitations," he fails to address the State's argument that this claim could have been made on direct appeal and is, therefore, waived. Nowhere does petitioner argue, nor could he, that the facts relating to this claim do not appear on the face of the original appellate record. Waiver aside, the substance of this claim fails as petitioner cannot in anyway show prejudice.

¶ 26 When reviewing a second-stage dismissal of a petition that alleges ineffective assistance of counsel, we employ the familiar test of *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether petitioner has shown that counsel's representation fell below an objective standard of reasonableness "and second, that he was prejudiced such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *People v. Graham*, 2012 IL App (1st) 102351, ¶ 49. "Petitioner's failure to make the requisite showing of either deficient performance or sufficient prejudice defeats his ineffectiveness claim." *Id.*

¶ 27 There is a strong presumption of outcome reliability, so to prevail on an ineffective assistance claim, a petitioner must show that counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The burden is on the petitioner to affirmatively show prejudice. *Id.* at 693. To do so, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different." *Id.* at 694.

¶ 28 No reasonable probability exists that the outcome of this trial would have been any different had defense counsel acted exactly as petitioner now claims he should have acted. As such, petitioner failed to make a substantial showing of ineffective assistance of counsel and dismissal of his postconviction petition was proper. It is hard to imagine a case in which evidence of a defendant's guilt is stronger than the instant matter.

¶ 29 Finally, I find the record establishes that postconviction counsel complied with Rule 651(c) and, as such, would affirm dismissal of the amended postconviction petition. As the majority correctly notes, the failure to file a certificate showing compliance with Rule 651(c) is harmless error if the record demonstrates that counsel adequately fulfilled the required duties. *Supra* ¶ 9; *People v. Lander*, 215 Ill. 2d 577, 585 (2005). A review of the amended postconviction petition and accompanying affidavits prepared and filed by counsel adequately demonstrate counsel's compliance with the rule's requirements. It is interesting to note that petitioner does not argue to this court that postconviction counsel failed to consult with him prior to amending the petition, as required by Rule 651(c), to ascertain his claims. Petitioner does not dispute the State's claim that postconviction counsel made arguments both in the amended petition and at the hearing on the State's motion to dismiss, which could only have been made following consultation with petitioner.

¶ 30 Petitioner's main complaints regarding failure to comply with Rule 651(c) stem from: (1) the lack of a certificate of compliance; and (2) allegations that postconviction counsel failed to "explain why other witnesses were not named" and failure to "attach affidavits from anyone stating what these witnesses would have said had they been interviewed." As noted above, failure to file a certificate is not *per se* fatal to the trial court's dismissal of the petition.

¶ 31 Moreover, our supreme court has rejected similar claims that postconviction representation is somehow inadequate for failing to search the earth "in an attempt to discover witnesses who might have offered mitigating evidence." *People v. Johnson*, 154 Ill. 2d 227, 247 (1993). The *Johnson* court noted:

"While post-conviction counsel has an obligation to present a *petitioner's claims* in appropriate legal form, he is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition. The petitioner has the obligation to inform counsel with specificity of the identity of witnesses who should have been called in his defense. The petitioner also has an obligation to inform counsel generally of the information which such witnesses might have offered at trial or the sentencing hearing. Upon receipt of such information, counsel has an obligation to attempt to contact those witnesses who might provide information needed to support a potentially meritorious claim raised in the post-conviction petition. Counsel has no obligation, however, to engage in a generalized fishing expedition in search of support for claims raised in a petition." (Emphasis in original.) *Id.* at 247-48.

¶ 32 Petitioner does not argue that his counsel failed to comply with Rule 651(c) by ignoring requests to contact witnesses petitioner identified. Petitioner's claims amount to nothing more than an argument that his counsel ran afoul of Rule 651(c) by failing to search for sources of potentially exculpatory evidence. Counsel had no obligation to do so. Counsel had a duty to

formulate petitioner's allegations into coherent legal arguments. He did. As such, I hold the record supports a finding that petitioner's counsel complied with Rule 651(c) and would affirm the trial court's dismissal of the petition.