

No. 1-12-0499

**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).

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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. 99 CR 12045
	)	
TOUSSAINT DANIELS,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Justice Taylor concurred in the judgment.  
Presiding Justice Gordon dissented.

**O R D E R**

- ¶ 1 *Held:* The dismissal of defendant's post-conviction petition at the second stage of proceedings is affirmed over defendant's contentions that his post-conviction counsel failed to comply with Supreme Court Rule 651(c), and failed to provide him with a reasonable level of assistance.
- ¶ 2 Defendant Toussaint Daniels appeals from an order of the circuit court dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) at the second stage of proceedings. On appeal, defendant contends that his post-

conviction attorneys failed to provide him effective assistance of counsel where they did not comply with Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Alternatively, defendant argues that his counsel failed to provide a reasonable level of assistance, independent of the requirements of Rule 651(c). We affirm.

¶ 3 Defendant and codefendants Carl Hemphill and Troy Ballard, who are not parties to this appeal, were arrested and charged by indictment with various offenses, including the first degree murder and aggravated kidnapping of Terry Sales on April 13, 1999. Following a bench trial, defendant was sentenced to 25 years' imprisonment on convictions for first degree murder and aggravated kidnapping. We affirmed that judgment on direct appeal. *People v. Daniels*, No. 1-05-1088 (2006) (unpublished order under Supreme Court Rule 23). Defendant's petition for leave to appeal to the supreme court was denied on May 31, 2007. Defendant's deadline to file a petition for certiorari to the United States Supreme Court was August 29, 2007. See Sup. Ct. R. 13. Because defendant never filed a petition for certiorari to the United States Supreme Court, his deadline for filing a post-conviction petition was February 29, 2008. 725 ILCS 5/122-1(c) (West 2008).

¶ 4 On August 29, 2008, defendant, through his privately retained attorney Fredrick Cohn, filed a petition under the Act, alleging various claims of ineffective assistance of counsel. In addition, defendant argued that the statute of limitations for filing post-conviction petitions was unconstitutional, and that Cohn suffered injuries and health issues that contributed to the delay in filing the petition.

¶ 5 Cohn then drafted a pleading entitled "Motion for Continuance to File Amended Post-Conviction Petition," which did not contain a file stamp or date. Therein, Cohn stated that

because he was unable to complete an amended post-conviction petition, he hired attorney Jennifer Blagg to assist him, and mentioned that "[d]efendant's *pro se* petition was filed on November 30, 2007." Cohn argued that any delay in filing or proceeding with the post-conviction petition was not due to defendant's culpable negligence, and then recounted the facts of his own illness. Attached to this pleading was a *pro se* pleading entitled "Post-Conviction Petition," which was not dated or file stamped. It contained an outgoing legal mail log from prison showing that he mailed a package to the clerk of court on November 30, 2007.

¶ 6 On July 31, 2009, Blagg filed an appearance on behalf of defendant as co-counsel. She informed the court that defendant previously filed a *pro se* petition under the Act in November of 2007, which "slipped through the cracks." On December 18, 2009, Blagg filed a supplemental petition on behalf of defendant, alleging additional ineffective assistance of counsel claims and noting that defendant previously filed a *pro se* post-conviction petition that was never addressed by the circuit court. Defendant attached his own un-notarized affidavit to this petition, which made no mention of a *pro se* petition. Subsequently, defendant filed a second affidavit that was identical to the one attached to Blagg's supplemental petition, except that it included a statement indicating that he placed in the prison mail system a *pro se* post-conviction petition on November 30, 2007, but never heard back from the court about the petition.

¶ 7 On March 26, 2010, the State filed its motion to dismiss, claiming that defendant's petition was untimely and that his ineffective assistance claims were without merit. Blagg responded that defendant's petition was timely because he filed a *pro se* petition on November 30, 2007, and reiterated that defendant was not provided effective assistance of counsel.

¶ 8 At a hearing on May 18, 2011, the court noted that the "Motion for a Continuance to File an Amended Post-Conviction Petition" filed by Cohn was not in the court file, and that it had never before seen the document that defendant was alleging to be his November 2007 *pro se* petition under the Act. The trial court specifically stated that it did not "think [the *pro se* petition] [had] ever been filed and \*\*\* [t]here's no date, there's no file-stamp on here, there's \*\*\* nothing." The matter was continued numerous times until the court granted the State's motion to dismiss defendant's post-conviction petition on February 3, 2012, finding that the petition filed by Cohn was untimely. In doing so, the court stated that the petition filed by Cohn was the first petition filed, noting that "[t]here was nothing in [that petition] that would indicate that Mr. Cohn was filing something in addition to what had been previously filed." The court also noted that the un-notarized affidavit filed by defendant did not contain the paragraph indicating that he filed a *pro se* petition, as stated in his subsequent notarized affidavit.

¶ 9 On appeal, defendant now contends that his post-conviction attorneys failed to comply with Supreme Court Rule 651(c) where they failed to marshal readily available evidence to show that he filed a timely *pro se* post-conviction petition. Additionally, defendant points out that counsel failed to file a Rule 651(c) certificate. In so arguing, defendant maintains that the record shows he filed a *pro se* petition before Cohn drafted a petition on his behalf. The State responds that defendant's claim is without merit because the petition filed by Cohn was defendant's first, and Rule 651(c) does not apply to professionally-drafted initial post-conviction petitions.

¶ 10 The Act has three stages. At the first stage, the circuit court must independently review the post-conviction petition within 90 days and dismiss petitions that are frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition is not summarily

dismissed, it is advanced to the second stage, where counsel is appointed and the State may respond. 725 ILCS 5/122-4, 122-5 (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). If the defendant makes a substantial showing of a constitutional violation at the second stage, the petition is advanced to the third stage for an evidentiary hearing. *People v. Gaultney*, 174 Ill. 2d 410, 418-19 (1996).

¶ 11 The sixth amendment right to counsel does not extend to collateral appeals. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Our legislature thus created the Act with *pro se* defendants in mind. See *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968) ("it was anticipated that most of the petitions under the Act would be filed *pro se* by prisoners who had not had the aid of counsel in their preparation"). Most post-conviction petitions are drafted and filed *pro se* (*Hodges*, 234 Ill. 2d at 9), and a defendant is only appointed counsel if his petition is advanced to the second stage (725 ILCS 5/122-4 (West 2012)). Defendants are not barred from hiring post-conviction counsel, however, and Illinois courts have consistently reviewed counseled initial post-conviction petitions. See, e.g., *People v. Mayfield*, 42 Ill. 2d 318, 319 (1969).

¶ 12 The Illinois Supreme court has held that a defendant's post-conviction claims must be "adequately present[ed]." *People v. Ashley*, 34 Ill. 2d 402, 412 (1966). In order to achieve this, Rule 651(c) (eff. Feb 6, 2013), specifies that counsel must consult with the defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to the petition filed *pro se* that are necessary for an adequate presentation of the defendant's contentions. See *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (outlining the specific duties of appointed counsel in post-conviction proceedings). Moreover, under Rule 651(c), "[a]n adequate or proper presentation of [the defendant's] substantive claims

necessarily includes attempting to overcome procedural bars, including timeliness, that will result in dismissal of a petition if not rebutted." *People v. Perkins*, 229 Ill. 2d 34, 44 (2007).

However, our supreme court has held that Rule 651(c) only applies when a defendant proceeds *pro se* at the first stage and is represented by counsel at the second stage, but not when the initial petition was filed by private counsel. *People v. Richmond*, 188 Ill. 2d 376, 382-83 (1999); see *People v. Mitchell*, 189 Ill. 2d 312, 358 (2000) (holding that the third prong of Rule 651(c) does not apply where the initial petition was filed by private counsel); see also *People v. Anguiano*, 2013 IL App (1st) 113458, ¶¶ 24-25 (relying on *Richmond* and *Mitchell* in holding that Rule 651(c) does not apply where the initial petition was filed by retained counsel).

¶ 13 Defendant maintains that because his attorneys failed to comply with Rule 651(c) under *Perkins*, or file a Rule 651(c) certificate, this court should reverse the circuit court's second-stage dismissal of his petition and remand this cause for further proceedings. Defendant's argument, however, is based on the presumption that he filed a *pro se* petition, and we agree with the State that he did not.

¶ 14 For a motion to be considered filed by the circuit court, the document must pass into the exclusive custody and control of the clerk to be made part of the court records. *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1027 (2009); citing *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 194 Ill. App. 3d 1037, 1041 (1990). "The uniform practice in the trial court has been to require actual receipt by the circuit court, as evidenced by the file stamp, before a paper is considered filed." *Knapp*, 392 Ill. App. 3d at 1027, quoting *Wilkins v. Dellenback*, 149 Ill. App. 3d 549, 553 (1986). A document not properly a part of the trial court proceedings may not be considered by a court of review. *People v. Hermann*, 150 Ill. App. 3d 224, 227 (1986).

¶ 15 Regarding defendant's alleged *pro se* petition, the court stated at the May 18, 2011 hearing that it never saw the petition before, and reiterated that finding when it ultimately dismissed the petition drafted by counsel at the second stage of post-conviction proceedings. Furthermore, the record fails to show that the motion was filed. The memorandum of orders is devoid of any reference to a *pro se* petition, and, while the motion is present in the record as defendant contends, it does not contain a file stamp and is only presented as an exhibit to Cohn's "Motion for Continuance to File Amended Post-Conviction Petition," which likewise did not contain a file stamp. We also note that the petition prepared by Cohn and docketed by the circuit court was not labeled as an amended or supplemental petition, and made no reference to a previously filed *pro se* petition. Finally, the petition prepared and filed by Cohn focused in part on the issue of timeliness, which would not have been an issue had defendant actually filed a timely *pro se* petition.

¶ 16 We reject defendant's argument that his petition was filed because a mail log showed that a "package" was mailed by him to the clerk's office on November 30, 2007. There is no evidence in the record that the mailed package was a post-conviction petition. Moreover, defendant's suggestion that his affidavit claiming that he mailed the petition on November 30, 2007, demonstrates that he did in fact mail the petition is not well-founded. As the circuit court noted when it granted the State's motion to dismiss, defendant filed two affidavits in this case, one notarized and one un-notarized. The un-notarized affidavit, which was filed first, did not include any mention or reference to a previously filed *pro se* petition. As pointed out by the State, it was not until timeliness became an issue that defendant submitted a second notarized affidavit that included an additional paragraph claiming that he filed a *pro se* petition on

November 30, 2007. Because there is a signed document executed by defendant that supports the trial court's determination that the record does not show he ever filed a *pro se* petition, the trial court's determination was not unreasonable or arbitrary. Based on the above, Rule 651(c) was inapplicable to this case, and defendant's attorneys were not required to file Rule 651(c) certificates.

¶ 17 In the alternative, defendant contends that his post-conviction counsel failed to provide him a reasonable level of assistance where counsel did not attempt to overcome the procedural bar of untimeliness. In so arguing, defendant relies heavily on *Anguiano*, which held that even though Rule 651(c) did not apply where the initial petition was filed by retained counsel, all defendants represented by counsel have the right to a reasonable level of assistance at the second stage. *Anguiano*, 2013 IL App (1st) 113458, ¶¶ 26-27; but see *People v. Csaszar*, 2013 IL App (1st) 100467, ¶¶ 19-20 (drawing a distinction between appointed and retained counsel with regard to the right to a reasonable level of assistance). For the reasons discussed below, we conclude that post-conviction counsel provided a reasonable level of assistance.

¶ 18 We agree with defendant that post-conviction attorneys have a duty to attempt to overcome procedural bars, such as forfeiture, *res judicata*, and untimeliness. See, e.g., *Perkins*, 229 Ill. 2d at 44 (post-conviction counsel has a duty to attempt to overcome the procedural bar of timeliness). We initially note that post-conviction counsel Cohn argued in defendant's August 29, 2008, petition that the lateness of the petition was attributable to Cohn's own injuries and illness. In addition, Cohn maintained that the Act's statute of limitations is unconstitutional. More importantly, as previously argued, there was no record in this case of defendant ever filing a *pro se* petition. As the State points out, to argue that a petition was filed when there was no

record of it would have been disingenuous. The argument would not have been well-pleaded and would have been nothing more than unsupported conclusory statements because, as defendant admits, the alleged *pro se* petition was neither dated nor file stamped. "Nonfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the [Act]." *People v. Brown*, 236 Ill. 2d 175, 205 (2010). Furthermore, counsel is not required to raise futile or disingenuous arguments. *People v. Haynie*, 347 Ill. App. 3d 650, 654 (2004). Therefore, post-conviction counsel cannot be deemed to have provided unreasonable assistance where he attempted to overcome the procedural bar of untimeliness, despite the significant evidence to the contrary.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.

¶ 21 PRESIDING JUSTICE GORDON, dissenting:

¶ 22 Defendant's postconviction petition was dismissed at the second stage solely on timeliness grounds. Defendant appeals on the ground that his postconviction attorneys failed to comply with Supreme Court Rule 651(c) and failed to provide effective assistance. Where postconviction counsel failed to file the certificate required by Supreme Court Rule 65, where the prison log supports defendant's claim that he mailed his *pro se* petition in a timely fashion, where defendant moved promptly to retain counsel when he did not hear back from the court after his timely mailing, where his postconviction counsel admitted that he was not competent to handle defendant's case due to his own illness and health issues, and where counsel stated that the delay was caused not by any culpable negligence on the part of the defendant but by his own

illness, I would reverse and remand for a second-stage consideration of the substantive issues in defendant's petition.

¶ 23 In the case at bar, the deadline for filing a postconviction petition was February 29, 2008. *Supra* ¶ 3. Defendant produced an outgoing legal-mail log from his prison showing that he mailed a petition to the clerk of the court in a timely manner on November 30, 2007. *Supra* ¶ 5. In addition, defendant swore in a notarized affidavit that he placed his *pro se* postconviction petition in the prison mail system on November 30, 2007, but he never heard back from the court. *Supra* ¶¶ 6, 8.

¶ 24 When he failed to hear back from the court, defendant then privately retained an attorney, Fredrick Cohn, who did not file a petition until August 29, 2008. *Supra* ¶ 4. In the petition, Cohn explained that the delay in filing the August 2008 petition was due to Cohn's various injuries and health issues. *Supra* ¶ 4.

¶ 25 Cohn then drafted a pleading without a file stamp or date, entitled "Motion for Continuance to File Amended Post-Conviction Petition," in which he stated that he was unable to amend the *pro se* petition filed on November 30, 2007, and had hired another attorney, Jennifer Blagg. *Supra* ¶ 5. Cohn reiterated that any delay was not due to defendant's culpable negligence but to Cohn's own illness, and Cohn recited the facts of that illness. *Supra* ¶ 5.

¶ 26 Blagg filed an appearance and informed the court that defendant's *pro se* petition, filed in November 2007, had "slipped through the cracks." *Supra* ¶ 6.

¶ 27 On February 3, 2012, a full four years after Cohn filed a petition, the trial court dismissed as untimely the petition that Cohn filed on August 29, 2008. *Supra* ¶ 8.

1-12-0499

¶ 28 Since defendant's attorneys failed to comply with Supreme Court Rule 651(c) by failing to file a certificate and since the record is replete with evidence that postconviction counsel acted negligently by failing to move promptly, I would reverse and remand for a second-stage consideration of substantive issues, which defendant has been waiting years for.