

2014 IL App (1st) 121782-U

SIXTH DIVISION  
FILED: November 7, 2014

No. 1-12-1782

**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. 00 CR 8781
	)	
LEVELLE GASTON,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

---

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Lampkin concurred in the judgment.

**O R D E R**

- ¶ 1 **Held:** Post-conviction counsel did not provide unreasonable assistance and complied with Rule 651(c); order dismissing second stage post-conviction petition affirmed
- ¶ 2 Defendant Levelle Gaston appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing

Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant maintains that he was denied reasonable assistance of post-conviction counsel.

¶ 3 This court previously affirmed the judgment entered on defendant's jury conviction of the first degree murder of his two-month old son on February 29, 2000, based on abusive head trauma (also referred to as shaken baby syndrome), and sentence of 26 years' imprisonment. *People v. Gaston*, No. 1-05-1472 (2007) (unpublished order under Supreme Court Rule 23). In that appeal, defendant contended that the State improperly elicited expert testimony that the infant's fatal injuries were the result of child abuse, and could only have resulted from a knowing, intentional act of child abuse, which precluded the jury from determining whether his acts were accidental, reckless or intentional; and that the State made improper comments during its closing argument which were unsupported by the evidence. *Gaston*, No. 1-05-1472, at 1, 4. This court found, in relevant part, that defendant waived the first issue, but that, waiver aside, there was no error in the introduction of the expert testimony that the fatal injuries were the result of an intentional act of child abuse because whether a victim's injuries, based on the severity, were caused intentionally or accidentally is outside the jury's expertise and therefore the proper subject of expert testimony. *Gaston*, No. 1-05-1472, at 4-5.

¶ 4 In December 2007, defendant filed a *pro se* motion for an extension of time to file his post-conviction petition, alleging that the law library was often closed, and the Hill Correctional Center, where he was incarcerated, was on lockdown. He further alleged that there was no paralegal or clerk to assist him in preparing his petition, and also requested the appointment of counsel. On January 4, 2008, the circuit court denied defendant's request for an extension of time

and appointment of counsel.

¶ 5 On April 29, 2009, defendant filed a *pro se* post-conviction petition alleging that the trial court allowed improperly elicited expert testimony and improper closing arguments in violation of his due process rights. He further alleged that on direct appeal he was prevented from bringing before the court a determination of his mental state which was necessary to prove him guilty beyond a reasonable doubt of murder where the appellate court improperly found this issue waived, and that appellate counsel was ineffective for failing to raise this issue in a petition for rehearing. He further alleged that appellate and trial counsel were ineffective for failing to argue that he was not proved guilty "beyond all, and any reasonable doubt" where he was innocent, and asserted that the infant's mother caused the fatal injuries, as well as prior injuries to the infant. Defendant also alleged that he was not told the basis on which the jury reached its verdict, and that the trial court failed to properly articulate the legal basis for the sentence imposed. Defendant further asserted that the *corpus delicti* of the offense cannot be proved by his statement alone; and that his statement regarding the location of the car seat, *i.e.*, that it fell in the living room with the infant in it, resulted in his conviction.<sup>1</sup>

¶ 6 On July 23, 2009, the case was docketed and counsel was appointed for defendant. On December 12, 2011, counsel filed a supplement to defendant's *pro se* post-conviction petition in which she paraphrased defendant's allegations. She particularly alleged that defendant's right to

---

<sup>1</sup> The trial evidence revealed that photographs taken shortly after the incident showed the car seat in the bedroom.

due process was violated when the trial court allowed improper expert testimony and improper closing arguments, that defendant was denied effective assistance of trial counsel when counsel failed to investigate whether someone else caused the infant's injuries, that he was denied effective assistance of appellate counsel who failed to raise whether the State proved beyond a reasonable doubt that he possessed the requisite mental state to support a finding of guilt, that he was denied the effective assistance of trial and appellate counsel who each failed to argue that he was not proved guilty beyond all and any reasonable doubt, that the trial court failed to specify its reasons for imposing the sentence on the record, and that the State failed to prove the *corpus delicti* of the offense when it failed to offer evidence to corroborate defendant's statement.

¶ 7 Counsel also addressed the timeliness issue, alleging in the supplemental petition that defendant was not culpably negligent for filing his post-conviction petition beyond the statutory deadline. She maintained that defendant was on medication which interfered with his ability to file his petition on time; noted that the facility in which defendant was housed was on lockdown 31 times from January 2007 to May 2009, and attached an exhibit documenting those lockdowns. She further maintained that defendant's actions cannot be characterized as a disregard for the consequences, or as reckless, where defendant, in the prescribed time, contacted the court and described the frequent lockdowns and limited access to the law library preventing him from preparing his motion in a timely manner. Counsel asserted that defendant acted diligently under the constraints of his incarceration, made the court aware of his intention to file a post-conviction petition, and detailed his reasons for the late filing.

¶ 8 Counsel also filed a Rule 651(c) (eff. Feb. 6, 2013) certificate in which she stated that she

had consulted with defendant by mail and telephone to ascertain his contentions of the deprivation of his constitutional rights and discussed the timing of the filing of his petition. She also stated that she examined the report of proceedings from his trial and sentencing, examined his *pro se* post-conviction petition, and although she determined that it was an adequate representation of his contentions, she filed a supplemental post-conviction petition to address the timeliness of the petition.

¶ 9 On May 8, 2012, the State filed a motion to dismiss alleging that defendant's petition was untimely, and that he failed to demonstrate a lack of culpable negligence for the untimely filing. The State noted that the lockdowns were mostly specific residential units in the correctional facility, that defendant failed to show that he resided in any of those locations, and that where defendant has some access to the law library, he may still be found culpably negligent. The State further alleged that defendant's substantive claims are barred by the doctrines of *res judicata* and forfeiture, that defendant failed to comply with the pleading requirements of the Act by providing factual support for his allegations, and also failed to show that the performance of his trial or appellate counsel was objectively unreasonable or that he was prejudiced by their representation.

¶ 10 On the same date, defendant filed his own affidavit averring that he was delayed in filing his post-conviction petition because the correctional center he was in was on lockdown, that he had limited access to the law library, and no paralegals or law clerks to help him in preparing his petition. Defendant also averred that the claims contained in his post-conviction petition and the supplemental petition are true and correct to the best of his knowledge and belief.

¶ 11 On June 5, 2012, a hearing was held on the State's motion to dismiss. The State informed the court that defendant's post-conviction petition was filed more than 14 months after the filing deadline, and that the court may only consider his claims if it finds that defendant lacked culpable negligence. The State asserted that defendant failed to provide sufficient facts showing that the lock-downs at the prison prevented him from having a meaningful opportunity to prepare his petition. The State further noted that the pleading requirements at the first stage are low, that defendant was not required to cite legal authority or to make legal arguments, and that defendant's claims were without merit, or barred by *res judicata* or waiver. The State asserted that defendant failed to show that his conviction would have been reversed if either appellate or trial counsel argued that he was not proved guilty beyond a reasonable doubt, and if appellate counsel argued on direct appeal that the State failed to prove that he acted with the requisite intent.

¶ 12 Defense counsel responded that defendant did not know that he did not need to cite legal authority, and, therefore, did not need the assistance of a paralegal or law clerk, and to impart that knowledge to him at his present location is "too far-reaching." Counsel noted that defendant filed an affidavit averring that the issues raised in his petition along with the explanation for the late filing were true and correct to the best of his knowledge and belief. Counsel also noted that defendant had alleged ineffective assistance of trial and appellate counsel which allowed the court to address the substantive issues raised, despite waiver or *res judicata*.

¶ 13 After considering the issues raised in defendant's petition, the circuit court granted the State's motion to dismiss, "on the grounds asserted by the State." Defendant now appeals from

that ruling.

¶ 14 On appeal, defendant maintains that post-conviction counsel provided unreasonable assistance in that she failed to amend his petition to present compelling scientific developments to the court challenging the scientific testimony at trial which formed the basis of his conviction, and otherwise failed to shape his claims into proper legal form. The State responds that defendant's petition was untimely filed, and that his claim regarding the scientific developments is without merit and would not overcome the overwhelming evidence of his guilt. We initially observe that defendant has raised no issue regarding the timeliness or merits of his petition or asserted that counsel failed to abide by the other requirements of Rule 651(c). Accordingly, we find that he has waived those issues for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 15 We further observe that the Act provides for a reasonable level of assistance by post-conviction counsel (*People v. Suarez*, 224 Ill. 2d 37, 42 (2007)), which can be shown by compliance with Rule 651(c) (*People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). That rule specifies the duties of post-conviction counsel and provides, *inter alia*, that counsel make any amendments to the *pro se* petition that are necessary for an adequate presentation of defendant's contentions. The filing of a Rule 651(c) certificate creates a presumption of compliance with the rule (*People v. Johnson*, 232 Ill. App. 3d 674, 678 (1992)) which defendant may overcome by demonstrating that counsel failed to substantially comply with the duties mandated by the rule (*People v. Jones*, 2011 IL App (1st) 092529, ¶23).

¶ 16 Here, counsel filed a Rule 651(c) certificate stating that she had consulted with defendant by mail and telephone to ascertain his contentions of the deprivation of his constitutional rights

and discussed the timing of the filing of his petition, that she examined the report of proceedings from his trial and sentencing, examined his *pro se* post-conviction petition, and that, although she determined that defendant's petition contained an adequate representation of his contentions, she filed a supplemental post-conviction petition to address the timeliness of the petition. This certificate creates a presumption of compliance with the rule (*Johnson*, 232 Ill. 2d at 678; *Marshall*, 375 Ill. App. 3d at 680); and we find, for the reasons that follow, that defendant has failed to rebut that presumption in this case.

¶ 17 Rule 651(c) places no legal duty on post-conviction counsel to add claims not implicated in defendant's *pro se* petition. *People v. Richardson*, 382 Ill. App. 3d 248, 258 (2008). Here, defendant maintains that counsel should have amended his petition to allege that he was not proved guilty beyond a reasonable doubt and that the mother caused the infant's fatal injuries, present a challenge to the reliability of the expert witnesses or an actual innocence claim based on certain treatises which he claims show, *inter alia*, that an adult shaking a baby cannot cause the fatal injuries suffered by his child, that the injuries could have been caused by a short fall to the ground, and that the effects of shaken baby syndrome or falling to the ground don't necessarily occur immediately. He maintains that these treatises support his contentions that the infant's fatal injuries were the result of either falling to the concrete ground, which he did on the day of the incident, and two days prior, or as a result of the mother's actions where the evidence showed that the infant suffered prior injuries, including broken ribs.

¶ 18 Defendant, however, is not entitled to advocacy of post-conviction counsel for purposes of exploration, investigation, and formulation of potential claims. *People v. Jennings*, 345 Ill.



App. 3d 265, 274 (2003). Post-conviction counsel is only required to properly present and support the claims raised by defendant (*People v. Davis*, 156 Ill. 2d 149, 164 (1993)), and has no obligation to raise new claims (*People v. Ramey*, 393 Ill. App. 3d 661, 668-69 (2009)) or amend the petition (*Jennings*, 345 Ill. App. 3d at 272. Thus, counsel was under no obligation to search for sources outside the record that might support the general claims raised in defendant's post-conviction petition (*People v. Johnson*, 154 Ill. 2d 227, 247 (1993); see also *Davis*, 156 Ill. 2d at 162-64), or to cite to the treatises defendant now presents in his brief regarding studies on shaken baby syndrome to provide a reasonable level of assistance, and comply with Rule 651(c).

¶ 19 Notwithstanding, defendant further maintains that counsel failed to comply with her duty to shape the remainder of the allegations in his *pro se* petition into proper legal form. Defendant has not alleged how counsel could or should have amended the claims to present them in proper legal form, and we cannot agree that post-conviction counsel failed to provide reasonable assistance where she supplemented the petition, paraphrased the issues in defendant's *pro se* petition in order to make them more understandable, had defendant file an affidavit in support of his claim that he was not culpably negligent for the untimely filing of his petition, and argued the petition before the circuit court. *People v. Turner*, 29 Ill. 2d 379, 384 (1963); *People v. Henderson*, 215 Ill. App. 3d 24, 26 (1991). Since many of the contested issues raised in the petition were either barred by *res judicata* or waived (*People v. Rissley*, 206 Ill. 2d 403, 412 (2003)), merely rephrasing them into ineffective assistance of counsel issues would not have overcome those procedural barriers (*People v. Williams*, 186 Ill. 2d 55, 62 (1999); *People v. Flores*, 153 Ill. 2d 264, 277 (1992)). No amendments were necessary given the posture of this

case, as the Act does not require counsel to advance frivolous or spurious claims on defendant's behalf. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006).

¶ 20 Defendant maintains, however, that this court can analyze the merits of the underlying issues in deciding whether counsel provided reasonable assistance. We observe that where the Rule 651(c) certificate is insufficient on its face, this court will not look to the merits of the petition. *People v. Profit*, 2012 IL App (1st) 101307, ¶22, citing *People v. Suarez*, 224 Ill. 2d 37 (2007). However, where, as here, the certificate is in compliance with the rule, and defendant challenges whether counsel should have amended the petition, we may consider whether the amendments would advance frivolous or spurious claims because if they do, then they are not necessary under the Act. *Profit*, 2012 IL App (1st) 101307, ¶23.

¶ 21 Defendant contends, nonetheless, that counsel had an ethical duty to either zealously advocate on his behalf or move to withdraw as counsel if the issues were without merit, and her failure to do so demonstrates the glaringly unreasonable level of assistance provided to him. We observe, however, that where counsel is presented with a frivolous petition, counsel may move to withdraw (*People v. Kelley*, 2013 IL App (4th) 110874, ¶24, citing *Greer*, 212 Ill. 2d 211) or may stand on the petition (*People v. Wolfe*, 27 Ill. App. 3d 551, 552-53 (1975)). Here, counsel elected to stand on the allegations raised by defendant, and supplemented the petition on the timeliness issue given defendant's prior request for an extension of time to file his post-conviction petition, which was denied. Under these circumstances, we conclude that post-conviction counsel provided defendant a reasonable level of assistance with his petition, complied with the requirements of Rule 651(c), and his contrary contention is without merit.

1-12-1782

¶ 22 In light of the foregoing, we affirm the order of the circuit court of Cook County dismissing defendant's post-conviction petition.

¶ 23 Affirmed.