

No. 1-12-2175

**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. 98 CR 16874
	)	
JOSH COLE,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice HOFFMAN and Justice ROCHFORD concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Where defendant failed to make a substantial showing of ineffective assistance of appellate counsel, and where postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and defendant has not rebutted the presumption of compliance with the Rule, postconviction counsel provided a reasonable level of assistance and defendant's postconviction petition was properly dismissed on motion of the State.

¶ 2 Defendant Josh Cole appeals from the dismissal, on motion of the State, of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). In the petition, defendant, who had been convicted of first degree murder and sentenced to 40 years

in prison, claimed, among other things, that his sentence was an abuse of discretion. On appeal, defendant contends that his postconviction counsel provided unreasonable assistance by failing to amend his petition to include a claim that appellate counsel was ineffective for not raising a claim that his sentence was excessive. In the alternative, defendant contends that postconviction counsel acted unreasonably in failing to withdraw under *People v. Greer*, 212 Ill. 2d 192 (2004).

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the shooting death of Raymond Smith on December 4, 1996. The underlying facts of the case are set forth in our order on direct appeal and need not be repeated at length here. In short, the State presented evidence at trial that defendant was part of a drug dealing operation run by the New Breeds street gang. Defendant's job was to protect the operation from being robbed. Smith briefly worked for the operation, standing on a street corner and alerting street dealers when the police were coming. However, after two customers complained that Smith had beaten them up and taken their money, the "queen" of the gang decided that "they should take care of their business." Defendant and another member of the operation, Darryl Fleming, were dispatched. Defendant and Fleming hit and kicked Smith and then dragged him through a gangway toward an alley. Fleming asked defendant to hand him a gun and then demanded that Smith give him cocaine. When Smith said he did not have any cocaine and turned to run, Fleming shot him.

¶ 5 A detective and an assistant State's Attorney testified that after defendant was informed of his *Miranda* rights, he admitted that his job was to act as security for the drug operation. Defendant confessed that just before the shooting, he was in an apartment when Fleming came in and asked if he had his pistol. After defendant responded that he did, he and Fleming went

1-12-2175

outside, where they joined two other individuals in beating Smith. Fleming then asked defendant for the pistol, and when defendant produced the weapon, Fleming snatched it out of defendant's hand. Defendant stated that the two individuals who were initially beating Smith dragged Smith into the alley. Fleming demanded that Smith give him cocaine and ordered defendant to go to the end of the gangway and watch for the police. Fleming then shot Smith several times.

¶ 6 Defendant testified at trial that he was working security for the drug house when Fleming came in and asked him for a gun. After defendant gave Fleming the gun, Fleming left. About four minutes later, defendant and several other people went outside to see what was going on. As they walked down the street, defendant heard gun shots and saw Fleming coming out of the gangway. Defendant testified that he was not with Fleming at the time of the shooting. On cross-examination, he denied telling the assistant State's Attorney that Fleming asked him to come outside, that he left the apartment with a gun in his pocket, that he saw two individuals beating Smith, that Fleming asked him for the gun at that point, and that Fleming snatched the gun out of his hand.

¶ 7 The trial court found defendant guilty of first degree murder and subsequently sentenced him to 40 years in prison. On direct appeal, defendant contended that he was denied his due process right to present exculpatory evidence by the trial court's exclusion of testimony about a statement against penal interest made by a person who admitted that he was the shooter. We affirmed defendant's conviction and sentence. *People v. Fleming and Cole*, Nos. 1-00-2628 & 1-01-0146 cons. (2002) (unpublished order under Supreme Court Rule 23).

¶ 8 In 2002, after the direct appeal order was issued, defendant filed a *pro se* petition for postconviction relief, alleging, in relevant part, that the trial court abused its discretion by

sentencing him to 40 years in prison without taking into consideration any factors in mitigation, and that his sentence constituted cruel and unusual punishment.

¶ 9 About seven months later, the trial court summarily dismissed defendant's petition. Defendant appealed, this court entered a summary remand, and counsel was appointed. Thereafter, postconviction counsel filed an Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate and the State filed a motion to dismiss the petition. Following argument, the trial court granted the motion to dismiss. Defendant appeals.

¶ 10 Defendant's first contention on appeal is that postconviction counsel provided unreasonable assistance. Under the Act, petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To ensure this level of assistance, Rule 651(c) imposes three duties on appointed post-conviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to the rule, either the record or a certificate filed by the attorney must show that counsel (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. The rule's third obligation does not require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Pendelton*, 223 Ill. 2d 458, 472 (2006); *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 11 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. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with the rule is sufficient. *People v. Richardson*, 382 Ill. App. 3d 248,

257 (2008). Our review of an attorney's compliance with a supreme court rule is *de novo*. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 12 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Jones*, 2011 IL App (1st) 092529, ¶ 23. In the instant case, counsel filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received the representation required by the rule. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 13 Defendant contends that postconviction counsel provided unreasonable assistance by failing to amend his petition to include a claim that appellate counsel was ineffective for not raising a claim that his 40-year sentence was an abuse of discretion. Defendant argues that postconviction counsel failed in his duty to shape defendant's excessive sentence claim into "constitutional form" so as to be cognizable in postconviction proceedings. Defendant asserts that it is not necessary for this court to determine the merits of a claim of ineffective assistance of appellate counsel, but even if it were, an amended petition would substantially state such a claim so as to survive a motion to dismiss. He maintains that had his sentence been challenged as an abuse of discretion on direct appeal, this court likely would have granted him relief due to his limited participation in the crime, young age, insignificant criminal history, troubled upbringing, and work with the "Off the Street Club." As relief, defendant seeks remand for an opportunity to replead the petition with the benefit of reasonable assistance of counsel.

¶ 14 As an initial matter, we address defendant's argument that it is improper for this court to consider the merits of his underlying claim of ineffective assistance of appellate counsel. In

support of this argument, defendant relies on *People v. Turner*, 187 Ill. 2d 406 (1999), and *People v. Jennings*, 345 Ill. App. 3d 265 (2003). However, in both of those cases, postconviction counsel failed to file a Rule 651(c) certificate. See *Turner*, 187 Ill. 2d at 409; *Jennings*, 345 Ill. App. 3d at 270. Therefore, no presumption of compliance with the rule existed.

¶ 15 In the instant case, in contrast, counsel filed a Rule 651(c) certificate, giving rise to a rebuttable presumption that he performed the duties required by that rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. When postconviction counsel files a Rule 651(c) certificate, the question of whether any excluded allegations had merit "is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23. As our supreme court has stated, Rule 651(c) does not require counsel to advance frivolous or spurious claims and, "if amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Greer*, 212 Ill. 2d at 205. Thus, in this case, the determination of whether counsel acted unreasonably rests upon whether his claim of ineffective assistance of appellate counsel had merit. See *Profit*, 2012 IL App (1st) 101307, ¶ 23.

¶ 16 In order to establish that postconviction counsel provided unreasonable assistance, defendant is required to demonstrate that a petition amended in the manner he suggests would have stated a case upon which relief could be granted. *People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005). That is, defendant must show that his claim, as amended, would have had merit. In this case, the question is whether relief would be appropriate on a postconviction claim that appellate counsel was ineffective for failing to contend that his sentence was excessive.

¶ 17 The standard for determining whether a defendant was denied the effective assistance of appellate counsel is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). *People v. Harris*, 206 Ill. 2d 1, 34 (2002). To establish ineffective assistance of counsel under *Strickland*, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

¶ 18 In this case, we cannot find that defendant has made a substantial showing either that appellate counsel acted unreasonably or that he was prejudiced by appellate counsel's failure to contend on appeal that the trial court abused its discretion in sentencing him to 40 years in prison. This is because an argument that defendant's sentence is excessive has no merit.

¶ 19 Sentencing decisions are entitled to great deference on appeal because the trial court is in a superior position to fashion an appropriate sentence based on firsthand consideration of relevant sentencing factors, including the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Sentencing decisions will not be disturbed on appeal absent an abuse of discretion. *People v. Stacy*, 193 Ill. 2d 203, 209-10 (2000). Sentences within the permissible statutory range may be deemed the result of an abuse of discretion only where they are "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 20 Here, the record indicates that the trial court was well aware of the underlying facts of the case, including that defendant was not the shooter. The trial court was also aware that defendant

was 16 years old at the time of the offense, that he only had two prior juvenile adjudications of delinquency for unlawful use of a weapon in his criminal history, that he had been raised by a single mother with seven other children, and that he worked as a counselor at the "Off the Street Club" around the time of the shooting. Not only was this mitigation included in the presentence investigation report considered by the trial court, but in addition, at the sentencing hearing, defense counsel noted defendant's age, his gainful employment, and the fact that he had no contact with the police in the 18 months between the time of the shooting and his arrest. Where mitigating evidence has been presented, it is presumed that the trial court considered it. *People v. Sven*, 365 Ill. App. 3d 226, 242 (2006).

¶ 21 The trial court indicated that it had reviewed the presentence investigation report and that defendant did not have much to say to the person who prepared it. The court stated that it was "unable to get an assessment" of defendant from the report, but that rather than draw a negative inference from the scant report, it would instead "focus on the positive aspects of his background." The court then noted that defendant was "of tender years" at the time of the shooting and that he was drawn into the crime by Fleming, who was the actual shooter. The trial court stated in conclusion, "Based upon those matters properly before this court and in consideration of what we hope will be [defendant's] potential for rehabilitation, sir, you're sentenced to 40 years in the Illinois Department of Corrections."

¶ 22 Defendant's sentence of 40 years is a term within the permissible statutory range for first degree murder, 20 to 60 years in prison. 730 ILCS 5/8-1(a)(1) (West 2000). The record indicates, contrary to defendant's assertion, that the trial court properly considered the evidence in mitigation. Given the facts of the case, the interests of society, and the trial court's consideration

of relevant sentencing factors, we cannot find that defendant's sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. Accordingly, there is no abuse of discretion in the length of defendant's sentence. Defendant's argument that his sentence is excessive fails.

¶ 23 Appellate counsel is not obligated to raise issues that are without merit (*People v. Simms*, 192 Ill. 2d 348, 362 (2000)), and postconviction counsel is not required to advance nonmeritorious claims on a defendant's behalf (*Pendelton*, 223 Ill. 2d at 472; *Greer*, 212 Ill. 2d at 205). Here, the ultimate issue of the case, *i.e.*, whether defendant's sentence is excessive, has no merit. Therefore, it cannot be said that appellate counsel was ineffective for failing to raise this issue on direct appeal or that postconviction counsel acted unreasonably in failing to amend the *pro se* petition to include a claim that appellate counsel was ineffective in this respect. Defendant's contention fails.

¶ 24 Anticipating our determination, defendant contends in the alternative that postconviction counsel provided unreasonable assistance by failing to seek to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). In *Greer*, postconviction counsel did not file a Rule 651(c) certificate, and instead moved to withdraw on the basis that the petition lacked merit. *Greer*, 212 Ill. 2d at 194-95. The issue before the supreme court was whether postconviction counsel, once appointed, could withdraw instead of complying with the duties set out in Rule 651(c). *Greer*, 212 Ill. 2d at 195-96. The *Greer* court determined that counsel had the option to withdraw as counsel, but not an obligation to do so. *Greer*, 212 Ill. 2d at 209.

¶ 25 In the instant case, while postconviction counsel had the option of withdrawing, standing on the allegations in the *pro se* petition was also an option. See *People v. Pace*, 386 Ill. App. 3d

1-12-2175

1056, 1062 (2008). Thus, postconviction counsel's act of filing of a Rule 651(c) certificate was not unreasonable. Defendant's contention fails.

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

¶ 27 Affirmed.