

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).

FILED

October 25, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 140842-U

NO. 4-14-0842

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DONDRE M. ADAMS,)	No. 12CF64
Defendant-Appellant.)	
)	Honorable
)	Scott Daniel Drazewski,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed and remanded because postconviction counsel failed to file a certificate demonstrating compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and the record did not establish the certification error was harmless.

¶ 2 In September 2013, defendant, Dondre M. Adams, filed a *pro se* postconviction petition. Following an August 2014 evidentiary hearing, the trial court denied defendant's petition. Defendant appeals, arguing he was denied reasonable assistance by his postconviction counsel. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 Following a May 2012 trial, a jury found defendant guilty of residential burglary (720 ILCS 5/19-3(a) (West 2010)). In July 2012, the trial court sentenced defendant to six years'

imprisonment.

¶ 5

A. Direct Review

¶ 6

Defendant appealed from his conviction and sentence, and the office of the State Appellate Defender (OSAD) was appointed to represent defendant on appeal. In August 2013, OSAD filed a motion for leave to withdraw as appellate counsel. OSAD asserted it had reviewed the record and concluded any request for review would be without merit. OSAD provided defendant with a copy of the motion. On our own motion, we granted defendant leave to file additional points and authorities. Defendant filed three *pro se* motions for an extension of time to file additional points and authorities, all of which we granted. In February 2014, defendant filed a *pro se* motion to dismiss his appeal, which we granted. *People v. Adams*, No. 4-12-0823 (Feb. 20, 2014) (dismissed on defendant's own motion).

B. Collateral Review

¶ 7

In September 2013, defendant filed a *pro se* postconviction petition. Defendant alleged his trial counsel provided ineffective assistance by failing to (1) file a pretrial motion to challenge the statements of a police officer, (2) file a pretrial motion to challenge the charging instrument, (3) be an effective advocate during *voir dire*, (4) give him access to discovery material, and (5) investigate and call witnesses who would have testified he was innocent of the charged offense. Defendant further alleged his appellate counsel provided ineffective assistance by failing to brief these meritorious claims. Defendant's petition did not include any affidavits or additional evidence in support of his claims.

¶ 8

In March 2014, the trial court held a status hearing on defendant's *pro se* postconviction petition. The court noted defendant had previously been determined indigent, and

the public defender's office was appointed to represent him. Defendant's postconviction counsel indicated he had reviewed defendant's *pro se* postconviction petition but needed additional time to review transcripts and consult with defendant. The court continued the matter.

¶ 9 In May 2014, the trial court held another status hearing. At the hearing, defendant's postconviction counsel indicated: "After reviewing the record and discussing it with *** defendant, we are going to stand on this written filing." The court continued the matter to allow the State to file a motion to dismiss or an answer.

¶ 10 In July 2014, the State filed an answer to defendant's postconviction petition. At a hearing that same month, the trial court noted, "[s]ince the State has elected to file an answer as opposed to a motion to dismiss, *** we are moving to a stage three analysis[,] that being of the defendant's postconviction petition." Postconviction counsel indicated, "in going over the petition with *** defendant, although I've adopted the petition in whole, there are certain allegations that are not supported by the record that we're not going to be contesting." Postconviction counsel did not amend the petition or attach any affidavits or additional evidence in support of defendant's claims. The court set the matter for an evidentiary hearing.

¶ 11 In August 2014, the trial court held an evidentiary hearing on defendant's postconviction petition. Postconviction counsel initially indicated he was only pursuing defendant's claim trial counsel provided ineffective assistance by failing to investigate and call certain witnesses as that was the only claim he found to have merit. During the hearing, defendant and defendant's trial counsel testified. After the witnesses' testimony, the court questioned postconviction counsel regarding his conclusion defendant's additional claims in his postconviction petition were meritless, which counsel responded by providing the bases for his

conclusion. Following closing arguments, the court denied defendant's postconviction petition, noting, in part, the petition contained only bald conclusory allegations with no affidavits or testimony from witnesses who would have testified.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues we must remand as his postconviction counsel failed to provide reasonable assistance. Specifically, defendant maintains at least some of his claims are not frivolous, and counsel's failure to support the one claim he did advance also constitutes unreasonable assistance. The State concedes the matter must be remanded on the basis postconviction counsel failed to file a Rule 651(c) certificate and the record does not otherwise affirmatively show compliance with Rule 651(c).

¶ 15 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) provides criminal defendants a manner by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. While there is no constitutional right to the assistance of counsel in postconviction proceedings (*People v. Johnson*, 154 Ill. 2d 227, 237, 609 N.E.2d 304, 309 (1993)), the Act gives petitioners the right to reasonable representation (*People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995); *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 23, 971 N.E.2d 1204).

¶ 16 Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) ensures postconviction counsel provides reasonable representation by imposing specific duties. *People v. Suarez*, 224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). Rule 651(c) requires counsel to (1) consult with the

petitioner to ascertain the petitioner's contentions of deprivation of constitutional rights, (2) examine the record of the trial proceedings, and (3) make any amendments to the *pro se* petition “necessary for an adequate presentation of petitioner's contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). “Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf.” *People v. Greer*, 212 Ill. 2d 192, 205, 817 N.E.2d 511, 519 (2004). In fact, the filing of an amended petition by counsel under such circumstances would violate Illinois Supreme Court Rule 137 (eff. July 1, 2013). *Greer*, 212 Ill. 2d at 205, 817 N.E.2d at 519-20.

¶ 17 Postconviction counsel is required to file a certificate indicating he or she complied with Rule 651(c). *People v. Cotto*, 2016 IL 119006, ¶ 27, 51 N.E.3d 802. “The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance.” *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19, 974 N.E.2d 813. When counsel fails to file a Rule 651(c) certificate, a court may deem the error harmless if the record includes a clear and affirmative showing that counsel satisfied the rule's requirements. *People v. Lander*, 215 Ill. 2d 577, 584, 831 N.E.2d 596, 600 (2005); *People v. Smith*, 2016 IL App (4th) 140085, ¶ 33, 50 N.E.3d 353.

¶ 18 Postconviction counsel failed to file a Rule 651(c) certificate. The record further fails to affirmatively disclose counsel complied with the requirements of Rule 651(c). Postconviction counsel stood on defendant's *pro se* postconviction petition, made no amendments to the petition, and did not attach any affidavits or additional evidence in support of defendant's claims. At the evidentiary hearing, postconviction counsel indicated he would not pursue certain claims in defendant's postconviction petition as he deemed them to be without

merit. Postconviction counsel's conclusion he could not ethically argue all of the claims in defendant's postconviction petition required him to file an amended petition presenting only those claims he deemed were arguable and omitting those claims he deemed meritless. Under the circumstances presented, we accept the State's concession of error as the record fails to affirmatively disclose postconviction counsel complied with the requirements of Rule 651(c). We reverse the trial court's judgment and remand the matter for compliance with Rule 651(c). See *Smith*, 2016 IL App (4th) 140085, ¶ 36, 50 N.E.3d 353.

¶ 19

III. CONCLUSION

¶ 20 We reverse the trial court's judgment and remand for second-stage proceedings under the Act with new postconviction counsel who shall file a Rule 651(c) certificate.

¶ 21 Reversed and remanded.