

No. 1-15-1951

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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. 09 CR 4354
)	
MIROSLAW ZUKOWSKI,)	Honorable
)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 **Held:** Postconviction counsel was not required to file an Illinois Supreme Court Rule 651(c) certificate at the second stage as he had drafted and filed an original petition on defendant's behalf at the first stage of postconviction proceedings; postconviction counsel provided a reasonable level of assistance by adhering to the requirements of Illinois Supreme Court Rule 651(c).

¶ 2 Defendant-appellant, Miroslaw Zukowski, appeals from the second stage dismissal of his postconviction petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends we should reverse and remand his case for

new second stage proceedings because postconviction counsel did not file a certificate under Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013), or adhere to its requirements. We affirm.

¶ 3 Defendant was charged with two counts of solicitation of murder, one count of solicitation of murder for hire, and two counts of attempt murder as to Louis Bruno, the paramour of defendant's wife. On the first day of trial, the jury heard the following testimony.

¶ 4 Ruslan Shyika testified that defendant told him that he wished "to kill someone" and he asked Mr. Shyika if he knew of a "hit man." After several phone calls from defendant, who asked if he had found anyone, Mr. Shyika contacted the police. Beginning on January 21, 2009, Mr. Shyika participated in a series of recorded telephone conversations with defendant. Cook County Sheriff's police officer Stanley Kogut listened to the conversations where defendant described the victim, provided directions to his home, discussed the fee for "the job," and Mr. Shyika giving defendant Officer Kogut's telephone number.

¶ 5 River Grove police sergeant Jack Glowinski testified that he conducted surveillance of a meeting between Officer Kogut, who was wearing a wire, and defendant. Sergeant Glowinski learned from this conversation that defendant had agreed to pay \$5,000—including a \$500 down payment—to have Mr. Bruno killed. Mr. Bruno, a captain with the Chicago Fire Department, had a "physical relationship" with defendant's wife, Barbara Zukowski, from January 2006 to February 2009.

¶ 6 Officer Kogut met with defendant on February 6, 2009. After Officer Kogut received the \$500 down payment from defendant, the officer placed defendant under arrest. Defendant was given his Miranda rights at the police station where Sergeant Glowinski and an investigator told him that they understood "he was looking to have someone killed," and that the person he solicited to "do the killing" was an undercover police officer. Defendant told Sergeant Glowinski

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that “the fireman that he wanted murdered ruined his life,” and that “he discovered that he was messing around with [defendant’s] wife.” Defendant signed a photograph of Mr. Bruno, “in acknowledgement that [he was] the fireman that he wanted murdered.”

¶ 7 On the second day of trial, defense counsel informed the court that defendant wished to plead guilty “to cut [his] losses.” Defendant pled guilty to one count of solicitation of murder, a Class X felony, in exchange for a sentence of 15 years’ imprisonment. In finding a factual basis for the plea, the court took into consideration the evidence, which had been presented at trial, and the stipulation that, if asked to testify, Officer Kogut would have testified that he had three recorded meetings with defendant in February 2009 where defendant wished to hire Officer Kogut to murder Mr. Bruno. The court sentenced defendant to 15 years’ imprisonment.

¶ 8 Subsequently, after a hearing where trial counsel testified, the court denied defendant’s amended motion to withdraw his guilty plea and vacate sentence. Defendant filed a timely notice of appeal. On July 9, 2012, this court allowed the parties’ agreed motion for summary disposition, which requested that we direct the clerk of the circuit court to correct an incorrectly assessed fine and on July 10, 2012, the mandate was issued. See *People v. Zukowski*, 2012 IL App (1st) 111076 (dispositional order).

¶ 9 On November 12, 2013, defendant mailed from prison a *pro se* postconviction petition which was received by the clerk of the circuit court of Cook County on November 19, 2013. In his *pro se* petition, defendant alleged, *inter alia*, that trial counsel provided ineffective assistance because he: (1) had a conflict of interest; (2) failed to investigate the whereabouts of Mr. Shyika on January 21, 2009; and (3) failed to seek the dismissal of charges based on defendant’s right to a speedy trial. Defendant also alleged that trial counsel was ineffective for failing to: (1) inform the court that appointed counsel who represented defendant on his motion to withdraw his plea

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did not file a Rule 604(d) certificate; and (2) “brief the issue of incomplete admonishments” when the trial court failed to inform him of the impact of an additional three year mandatory supervised release term, or that his conviction could result in deportation.

¶ 10 However, on November 15, 2013, private counsel, on behalf of defendant, filed a separate postconviction petition. Private counsel’s petition did not reference defendant’s *pro se* petition, but alleged other claims, including that defendant was denied effective assistance based on trial counsel’s failure to provide proper representation and failed to prepare him for trial. The petition alleged, *inter alia*, that: (1) trial counsel did not properly visit defendant before trial; (2) trial counsel’s “on[c]e-a-month” “court lock-up conversations” with defendant were insufficient to adequately prepare him for trial; and (3) defendant was never given the opportunity to listen to “court ordered recordings” of conversations that defendant allegedly participated in.

¶ 11 On February 27, 2014, the circuit court docketed the “petition” for second stage proceedings. The State, on September 17, 2014, moved to dismiss the petitions. Counsel filed a response to the motion and the court held a hearing on the motion where defense counsel made arguments.

¶ 12 On May 20, 2015, the circuit court granted the State’s motion to dismiss, finding that defendant failed to make a substantial showing of a constitutional violation. In its written order, the court noted that defendant filed a “*pro se* initial post-conviction petition” on November 15, 2013, “which was supplemented, shortly thereafter, by retained counsel.” The court summarized the claims asserted in both counsel’s petition and defendant’s *pro se* petition. The court concluded that defendant’s claims of ineffective assistance of trial counsel were alleged errors that occurred before he entered his guilty plea and, thus, those claims were waived. The court, nevertheless, addressed all of defendant’s claims and explained why each lacked merit.

¶ 13 On appeal, defendant contends that postconviction counsel did not file a Rule 651(c) certificate and that the record does not affirmatively show that postconviction counsel met the rule's requirements. Defendant argues that we must reverse the dismissal of his postconviction petition and remand this case for a new second stage postconviction proceeding.

¶ 14 The State, citing *People v. Richmond*, 188 Ill. 2d 376 (1999), and *People v. Anguiano*, 2013 IL App (1st) 113458, responds that the requirements of Rule 651(c) do not apply where, as here, an initial petition was filed by retained counsel during the first stage. The State further argues that, should Rule 651(c) apply, the postconviction petition here substantially complied with its provisions. In response, defendant asserts that, under the mailbox rule, his *pro se* petition was filed prior to retained counsel's petition and, therefore, Rule 651(c) does apply.

¶ 15 Under the Post-Conviction Hearing Act (Act), a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 16 The postconviction process, generally, involves three stages. *Id.* ¶ 9. At the first stage, after an independent review of the petition and taking all allegations as true, the trial court may summarily dismiss the petition if it is "frivolous or patently without merit." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Where, as here, if the court does not dismiss the petition, it must "order the petition to be docketed for further consideration." The petition then advances to the second stage of postconviction proceedings. 725 ILCS 5/122-2.1(b) (West 2012); *People v. Cotto*, 2016 IL 119006, ¶ 26. At the second stage, if the defendant is indigent and requests counsel, the court may appoint counsel, and appointed counsel may amend the claims in the petition. *People v. Jones*, 2017 IL App (4th) 140594, ¶ 28.

¶ 17 It is well-settled that there is no constitutional right to assistance of counsel during postconviction proceedings. *Cotto*, 2016 IL 119006, ¶ 29 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) and *Johnson v. Avery*, 393 U.S. 483, 487-88 (1969)). Rather, when a postconviction petition advances to the second stage, the Act generally requires a reasonable level of assistance and applies to all petitions (*id.* ¶ 41), which “is less than that afforded by the federal or state constitutions.” *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). To advance to the third stage, a defendant’s second stage postconviction petition must make “a substantial showing of a constitutional violation.” *Anguiano*, 2013 IL App (1st) 113458, ¶ 14.

¶ 18 To ensure that postconviction counsel provides the reasonable level of assistance required under the Act at the second stage, Rule 651(c) sets forth “specific duties” for postconviction counsel (*People v. Perkins*, 229 Ill. 2d 34, 42 (2007)), and provides, in relevant part:

“The record filed in [the trial court] shall contain a showing, which may be made by the certificate of petitioner’s attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2103).

¶ 19 It is mandatory that counsel adhere to the requirements set forth in Rule 651(c) (*People v. Lander*, 215 Ill. 2d 577, 584 (2005)), but “[s]ubstantial compliance” is sufficient. *People v. Miller*, 2017 IL App (3d) 140977, ¶ 47. If postconviction counsel files a Rule 651(c) certificate, there is a presumption that counsel provided reasonable assistance at the second stage proceedings. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. When counsel does not file a Rule

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651(c) certificate, the record must explicitly show that he complied with Rule 651(c). *People v. Myers*, 386 Ill. App. 3d 860, 865 (2008).

¶ 20 Rule 651(c) applies to both retained and appointed counsel when representing a defendant who originally filed a *pro se* postconviction petition. *Richmond*, 188 Ill. 2d at 381. However, Rule 651(c) does not apply when retained counsel files the initial petition. *Id.* at 382-83; *Anguiano*, 2013 IL App (1st) 113458, ¶ 25. The purpose of Rule 651(c) is “to ensure that counsel shapes the petitioner’s claims into proper legal form and presents those claims to the court.” *Perkins*, 229 Ill. 2d at 44. Because counsel here drafted and filed an original petition at the first stage, he did not need to shape defendant’s *pro se* petition into proper legal form at the second stage and, thus, the principles of Rule 651(c) do not apply here.

¶ 21 Defendant mailed his *pro se* petition from prison on November 12, 2013. Retained counsel filed a petition on defendant’s behalf on November 15, 2013. The clerk of the circuit court received defendant’s *pro se* petition six days later: November 19, 2013. When a defendant is incarcerated, a postconviction petition is considered “filed” on the day it is placed in the prison mail system. *People v. Johnson*, 232 Ill. App. 3d 882, 884 (1992). Thus, defendant’s *pro se* postconviction petition was considered filed on November 12, 2013, when he mailed it through the prison mail system.

¶ 22 Although defendant technically filed his *pro se* petition first, he had simultaneously retained private counsel, who filed a petition on his behalf prior to the clerk of the circuit court’s receipt of defendant’s *pro se* petition and prior to the circuit court’s docketing of the petition advancing it to the second stage.

¶ 23 Further, the record shows that postconviction counsel not only filed a petition but, also, represented defendant throughout the first stage. At a December 5, 2013, status date, the circuit

court granted counsel leave to file his appearance. Counsel then informed the court that “this is a post-conviction petition, up for the first time.” The court set the case “for initial review.” Two months later, on February 27, 2014, the court docketed the “petition,” advancing it to the second stage, where counsel continued to represent defendant. Thus, defendant did not proceed *pro se* in court at any point during the first stage.

¶ 24 Given these facts, it appears that this is not a situation where the first stage consisted solely of a filed petition where defendant proceeded *pro se*, until: (1) counsel was retained at the first stage after the initial filing to represent him and for the specific purpose to amend the *pro se* petition; or (2) the petition advanced to the second stage, at which time defendant was appointed counsel or retained counsel so that counsel could amend the *pro se* petition. Rather, defendant retained counsel at the first stage, counsel filed a petition on defendant’s behalf in order to initiate the postconviction proceedings, and counsel represented him through the first and second stages. Under these circumstances, we find that Rule 651(c) does not apply, as counsel here was not retained to amend defendant’s *pro se* petition but, rather, to draft and file a petition at the first stage. See *Anguiano*, 2013 IL App (1st) 113458, ¶¶ 11, 24 (“Rule 651(c) applies when a defendant proceeds *pro se* at the first stage and is represented by counsel at the second stage.”); *People v. Bennett*, 394 Ill. App. 3d 350, 351 (2009) (“Because counsel drafted the original petition, *** Rule 651(c) is inapplicable here; the *Richmond* court was clear in stating that Rule 651(c) does not apply when counsel drafted the original petition.”).

¶ 25 Defendant asserts that the applicability of Rule 651(c) does not depend on when counsel was hired but, rather, when the first petition was filed. Defendant cites to *Richmond*, which states: “Rule 651(c) is applicable in these circumstances, when a defendant who files a *pro se* post-conviction petition is later represented by retained counsel in the post-conviction

proceedings.” *Richmond*, 188 Ill. 2d at 381. But, the defendant in *Richmond* “later” retained counsel at the second stage. Here, defendant retained counsel during the first stage in order to file the initial petition on his behalf. Moreover, *Richmond* specifically noted that Rule 651(c) does not apply when, as here, the initial petition was prepared and filed by counsel. *Id.* at 383.

¶ 26 Although Rule 651(c) does not apply to the second stage proceedings here, defendant is, nevertheless, entitled to a reasonable level of assistance of counsel at the second stage. *Cotto*, 2016 IL 119006, ¶ 42. Rule 651(c) is merely a vehicle for ensuring this level of assistance at the second stage. *Anguiano*, 2013 IL App (1st) 113458, ¶ 37. *Perkins*, 229 Ill. 2d at 42 (“To assure the reasonable assistance required by the Act, *** Rule 651(c) imposes specific duties on postconviction counsel.”). Thus, to determine whether counsel provided a reasonable level of assistance, we will examine his representation under the guidelines of Rule 651(c). Further, if Rule 651(c) does apply here, the absence of a Rule 651(c) certificate is excused where postconviction counsel was in substantial compliance with the rule’s requirements. *People v. Johnson*, 154 Ill. 2d 227, 238 (1993).

¶ 27 As discussed, under Rule 651(c), “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.” *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18 (citing Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984) and *Perkins*, 229 Ill. 2d at 42). We find that counsel here complied with the requirements of Rule 651(c) and, therefore, defendant was provided with a reasonable level of assistance.

¶ 28 As to the first requirement of Rule 651(c), the record shows that postconviction counsel filed a postconviction petition on defendant's behalf and represented him in court at the first stage. Therefore and necessarily, counsel must have communicated with defendant, not only to agree to represent him and draft an original petition on his behalf but, also, to ascertain the claims to be asserted in the petition. Further, at the oral argument on the State's motion to dismiss the postconviction petition, counsel told the court that he reviewed "things that were in the court file and some of the things that were obtained by the petitioner before he retained me on the Freedom of Information Act [FOIA] request." This statement implies that counsel consulted with defendant regarding his claims, as he reviewed "things" separate from the court file, *i.e.*, material obtained by defendant pursuant to defendant's FOIA request.

¶ 29 As to the second requirement of Rule 651(c), the record demonstrates that postconviction counsel had examined the record of trial court proceedings. For example, in the petition, counsel referenced, quoted, and cited various transcripts of trial court proceedings, including trial counsel's testimony at the hearing relating to defendant's request to withdraw his guilty plea. Postconviction counsel also cited trial counsel's statement made at a pretrial court date. Further, in paragraph 10 of the petition, counsel expressly mentioned his review of the record of trial court proceedings and his conclusions, stating:

"The record of proceedings that took place before the commencement of the jury trial in this cause which was interrupted and terminated by the defendant's entering a plea of guilty to a lesser included offense clearly demonstrate a somewhat rocky, if not acerbic, relationship between the defendant and his trial counsel."

Given postconviction counsel's citations and references to the trial court proceedings, we conclude that he adequately examined the record of those proceedings.

¶ 30 As to the third requirement of Rule 651(c), that postconviction counsel must make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions” (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Turner*, 187 Ill. 2d 406, 412 (1999)), postconviction counsel is not required to amend a *pro se* petition, but “is only required to investigate and present the defendant’s claims.” *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 21.

¶ 31 Here, postconviction counsel actually drafted and filed a petition on behalf of defendant at the first stage. Because counsel presented defendant’s claims in his own drafted petition after he was retained at the first stage, he necessarily already had shaped defendant’s claims in proper legal form. See *Bennett*, 394 Ill. App. 3d at 354 (“Certainly, the amendment duty of Rule 651(c) is, by its own terms, inapplicable when counsel drafted the original petition: the rule refers to ‘ma[king] any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.’ ” (quoting Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2103))).

¶ 32 Moreover, counsel’s petition asserted several claims that were not included in defendant’s *pro se* petition. At no point did postconviction counsel disavow the claims in defendant’s *pro se* petition. In fact, the court noted that defendant’s *pro se* petition was “supplemented” by postconviction counsel’s petition and addressed the claims in both petitions in deciding the State’s motion to dismiss. We, thus, conclude that postconviction counsel adequately fulfilled his duties under the third requirement of Rule 651(c).

¶ 33 Accordingly, for the foregoing reasons, we find that postconviction counsel provided a reasonable level of assistance of counsel as there was substantial compliance with the requirements set forth in Rule 651(c). We, therefore, affirm the circuit court’s dismissal of the postconviction petitions.

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¶ 34 Affirmed.