

2018 IL App (1st) 153598-U

No. 1-15-3598

Order filed May 10, 2018

Fourth Division

**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 DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 2346
	)	
DARIUS POLK,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge presiding.

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PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices McBride and Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) and defendant has not rebutted the presumption of compliance with the Rule, counsel provided a reasonable level of assistance and defendant's petition was properly dismissed.

¶ 2 Defendant Darius Polk, who had been convicted of first degree murder and attempted first degree murder, appeals the trial court's second-stage dismissal of his petition for postconviction relief. On appeal, defendant contends that his appointed postconviction counsel

provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Dec. 1, 1984) by failing to amend his petition to allege ineffectiveness of appellate counsel and therefore avoid procedural default under the doctrine of forfeiture.

¶ 3 For the reasons that follow, we affirm the dismissal of defendant's postconviction petition.

¶ 4 Defendant's conviction arose from a shooting that took place on December 12, 2005. The underlying facts of the case are set forth in detail in our decision on direct appeal and will be repeated here only briefly. On the day in question, a man walked up to Kevin Roberts and Arthur Levison, pulled out a gun, and shot them both. Levison died as a result of the shooting and Roberts suffered a gunshot wound to the abdomen. Roberts told police that defendant, whom he knew from the neighborhood, was the shooter, and gave the police a physical description and information about where defendant could be located. Two police officers went to the location and arrested defendant. At the police station, an officer placed defendant in an interview room. Several hours later, defendant gave a videotaped statement to a sergeant in which he implicated himself in the shooting. Roberts thereafter identified defendant in a lineup.

¶ 5 Defendant was charged with six counts of first degree murder, one count of attempted first degree murder, and one count of aggravated battery with a firearm. Defendant filed a motion to suppress his statement, which the trial court denied following a hearing. At trial, the State played an edited video of defendant's confession to the jury.

¶ 6 During deliberations, the trial court stated on the record that there was "an issue about showing the DVD to the jury." The court suggested that it would send one of defendant's attorneys and one of the prosecutors into the jury room to address the problem, with instructions

that they would not talk to any jurors. Before the attorneys went to the jury room, defendant was brought into the courtroom. In defendant's presence, the trial court reported that the jurors indicated they were having difficulty hearing one of the DVDs. The court then sent one of defendant's attorneys and a prosecutor into the jury room to fix it. At first, it appeared that the issue had been resolved. However, shortly thereafter, the jurors reported the same problem. This time, again in defendant's presence, the trial court instructed one of defendant's attorneys, one of the prosecutors, and a prosecutor who was not involved in defendant's case but had some kind of audio-visual expertise to enter the jury room and attempt to "get the thing to work." After their attempt failed, the jury was brought into the courtroom, where the relevant portion of the DVD was played in the presence of the court, the attorneys, and defendant. The jurors then resumed deliberating in the jury room.

¶ 7 The jury found defendant guilty of first degree murder, attempted first degree murder, and aggravated battery with a firearm. The trial court entered judgment on the verdict and denied defendant's posttrial motion. Defendant was sentenced to consecutive prison terms of 25 years for first degree murder, 25 years for personally discharging the firearm that caused the victim's death, and 15 years for attempted first degree murder. The trial court denied defendant's motion to reconsider sentence.

¶ 8 On direct appeal, defendant contended that (1) the trial court erred by denying his motion to suppress his statement where he did not understand his right to remain silent, he invoked his right to counsel, and the totality of the circumstances showed that his statement was the result of police coercion; (2) the trial court abused its discretion by precluding defendant from presenting expert testimony regarding false confessions; (3) the trial court erred by refusing to allow

defendant to question prospective jurors during *voir dire* about their attitudes regarding false confessions; (4) the trial court should have eliminated the “certainty” factor from Illinois Pattern Jury Instructions Criminal, No. 3.15 (4th ed. 2000), where it was an irrelevant factor in this case; and (5) the mittimus should be amended to reflect the correct number of days defendant served in presentence custody. We affirmed and corrected the mittimus. *People v. Polk*, 407 Ill. App. 3d 80 (2010).

¶ 9 In September or October 2012, defendant filed a *pro se* postconviction petition, raising claims that (1) the trial court abused its discretion and violated defendant’s due process rights by allowing his videotaped statement to be replayed during jury deliberation; (2) the trial court’s instruction to defense counsel, the prosecutor, and the prosecutor not assigned to defendant’s case to enter the jury room to “correct audio equipment” during jury deliberations denied him his right to a fair trial; (3) trial counsel was ineffective for not objecting to the judge sending the videotape of defendant’s statements into the jury room during deliberations and for not objecting to the videotaped statement being replayed multiple times during deliberations; (4) trial counsel was ineffective for entering the jury room without consulting with defendant and for not objecting when the trial court instructed the attorneys to enter the jury room during deliberations to “correct video equipment”; and (5) defendant was unlawfully seized, detained, and coerced into making an involuntary statement without fully understanding his *Miranda* rights.

¶ 10 Due to an error at the clerk’s office, the trial court did not become aware of defendant’s petition until about a year later. Given the passage of more than 90 days since the petition’s filing, the trial court docketed defendant’s petition and appointed the office of the Cook County

Public Defender. The assistant public defender assigned to defendant's case thereafter filed a Rule 651(c) (eff. Dec. 1, 1984) certificate, which provided as follows:

“1. I have consulted with petitioner, Darius Polk, by mail to ascertain his contentions of deprivations of his constitutional rights.

2. I have obtained and examined the Report of Proceedings concerning Indictment Number 06CR0234601.

3. I have determined that the petition as it is written adequately represents petitioner's constitutional claims and deprivations. Therefore, I will not be supplementing the petition.”

¶ 11 The State filed a motion to dismiss defendant's petition, asserting that defendant's allegations of trial court error and abuse of discretion were barred by the doctrine of waiver, that his allegations of ineffective assistance of trial counsel were without merit, and that his allegation that his statement was illegally seized was barred by the doctrine of *res judicata*. Postconviction counsel did not file a response to the motion to dismiss. Following a hearing, the trial court granted the State's motion.

¶ 12 On appeal, defendant contends that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) because she failed to amend his postconviction petition to allege ineffective assistance of appellate counsel, which he asserts was a routine amendment necessary to avoid procedural default under the doctrine of forfeiture. Defendant argues that amendment was necessary because his postconviction claims were based entirely on the trial record, and thus, barred by forfeiture since they could have been raised on direct appeal.

As relief, defendant seeks to have the dismissal vacated and the cause remanded for appointment of new counsel to represent him at new second-stage proceedings consistent with Rule 651(c).

¶ 13 Under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)), 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 postconviction 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 a defendant’s behalf. *People v. Pendelton*, 223 Ill. 2d 458, 472 (2006); *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 14 The purpose of Rule 651(c) is to ensure that postconviction 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. Profit*, 2012 IL App (1st) 101307, ¶ 18. Our review of an attorney’s compliance with Rule 651(c) is *de novo*. *Id.* ¶ 17.

¶ 15 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *Id.* ¶ 19. Here, postconviction counsel filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received the representation required by the rule, and 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). *Id.*

¶ 16 In the instant case, we cannot find that defendant has rebutted the presumption that counsel provided reasonable assistance. Defendant argues generally that counsel should have amended his postconviction petition so that his claims would not have been barred by forfeiture. However, defendant has not identified which postconviction claim or claims in his petition counsel should have amended, and has not even argued that his claims have merit. Instead, he asserts that the merit of his underlying claims is irrelevant.

¶ 17 In arguing that merit is irrelevant, defendant relies primarily on *People v. Suarez*, 224 Ill. 2d 37 (2007). In that case, our supreme court found that postconviction counsel failed to comply with Rule 651(c) because he did not file a Rule 651(c) certificate and the record did not show he had consulted with the defendant. *Id.* at 40, 44. In these circumstances, the *Suarez* court held that remand was required regardless of whether the claims raised in the petition had merit and that noncompliance with Rule 651(c) may not be excused on the basis of harmless error. *Id.* at 47, 52.

¶ 18 We reject defendant's argument. Here, in contrast to *Suarez*, postconviction counsel filed a Rule 651(c) certificate, which gives rise to a rebuttable presumption that she performed the duties required by that rule. *Profit*, 2012 IL App (1st) 101307, ¶ 23; *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Because the presumption of reasonable assistance is present, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶ 23. Merit is a crucial consideration because "[f]ulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's

behalf.’ ” *Id.* (quoting *Greer*, 212 Ill. 2d at 205). As our supreme court has explained, if an amendment to a *pro se* petition would only further a frivolous or patently nonmeritorious claim, then it is not a “necessary” amendment within the meaning of Rule 651(c). *Greer*, 212 Ill. 2d at 205.

¶ 19 Postconviction counsel filed a Rule 651(c) certificate in the instant case, thus triggering the presumption of compliance with the Rule. Defendant has not demonstrated that any of his *pro se* claims had merit and, therefore, has failed to rebut the presumption. We cannot find that counsel provided an unreasonable level of assistance. Defendant’s contention fails.

¶ 20 We are mindful of defendant’s argument that his case “cannot be distinguished” from three cases where this court and our supreme court held that postconviction counsel provided unreasonable assistance by failing to amend a petition to include a claim of ineffective assistance of appellate counsel that was necessary to avoid forfeiture. See *People v. Turner*, 187 Ill. 2d 406 (1999); *People v. Schlosser*, 2012 IL App (1st) 092523; *People v. Milam*, 2012 IL App (1st) 100832. We disagree with defendant that these three cases should dictate the result here.

¶ 21 First, in *Turner*, there was no indication that a Rule 651(c) certificate was filed. *Turner*, 187 Ill. 2d at 409-17. Here, in contrast, counsel filed a certificate. Therefore, unlike *Turner*, the presumption of compliance with Rule 651(c) applies in the instant case, and, in turn, “the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition.” *Profit*, 2012 IL App (1st) 101307, ¶ 23.

¶ 22 Second, in *Schlosser*, postconviction counsel admitted to the trial court at the hearing on the State’s motion to dismiss “that he failed to amend the petition to include his defendant’s main claim of ineffective assistance of appellate counsel.” *Schlosser*, 2012 IL App (1st) 092523, ¶ 32.



This court determined that counsel's admission "clearly demonstrate[d]" that he did not comply with the duties imposed by Rule 651(c). *Id.* ¶ 33. No such admission was made in this case, and accordingly, we find no correspondingly clear demonstration of rebuttal of the presumption of compliance.

¶ 23 Finally, in *Milam*, postconviction counsel filed an amended petition alleging that his client's due process rights were violated when the defendant's attorney was prevented from seeing the defendant at the courthouse while he was signing a written confession. *Milam*, 2012 IL App (1st) 100832, ¶ 12. The trial court granted the State's motion to dismiss. *Id.* ¶ 18. On appeal, this court found that where postconviction counsel failed to include an allegation of ineffective assistance of appellate counsel in the amended petition, the trial court was prevented from considering the merits of the defendant's due process claim. *Id.* ¶ 36. We reversed, stating that we were not expressing an opinion on the merits of the defendant's claim, but nevertheless noting that the prejudice to the defendant caused by counsel's failure was palpable, especially because the due process claim was supported by evidence that the defendant's attorney was delayed from seeing the defendant at the courthouse for about 10 minutes, during which time the defendant signed a written confession, as well as by evidence that the defendant was not informed that his attorney was at the courthouse until after he signed the confession. *Id.* ¶¶ 37, 38. Here, in contrast to *Milam*, we cannot make a finding of palpable prejudice, as defendant has not asserted, much less shown through evidence, that there is any merit to any of his *pro se* allegations.

¶ 24 We conclude that defendant has not rebutted the presumption that postconviction counsel substantially complied with the duties set forth in Rule 651(c) and provided the reasonable

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assistance contemplated by the Act. *Profit*, 2012 IL App (1st) 101307, ¶¶ 19, 31. As such, we reject defendant's request that we reverse and remand for new second-stage proceedings.

¶ 25 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 26 Affirmed.