

NOTICE  
Decision filed 05/15/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 180035-U

NO. 5-18-0035

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 10-CF-1246
	)	
DAVID R. MOORE,	)	Honorable
	)	Jennifer L. Hightower,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Presiding Justice Overstreet and Justice Cates concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's denial of the defendant's petition for postconviction relief is vacated in part and remanded for compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Additionally, we reverse the court's finding in regards to the sentencing credit and remand for further proceedings so that the circuit court may hold an evidentiary hearing to determine the defendant's initial custody date and proper sentencing credit.

¶ 2 This appeal arises from an order issued by the Madison County circuit court on January 3, 2018, denying the defendant's petition for postconviction relief at the third stage of the postconviction proceeding. The defendant raises two issues on appeal. First, he argues that remand is required where the record does not affirmatively show that his postconviction counsel examined the record as required by Illinois Supreme Court Rule

651(c) (eff. Feb. 6, 2013). Next, he argues that this case should be remanded to the trial court so it may determine his initial date of custody and proper sentencing credit for his time served.

¶ 3

### BACKGROUND

¶ 4 On September 6, 2013, the defendant filed a *pro se* petition for postconviction relief claiming ineffective assistance of counsel where counsel failed to investigate his mental competence and ability to enter a guilty plea, and where counsel failed to investigate an insanity defense.

¶ 5 On September 11, 2013, the trial court appointed counsel. Appointed counsel did not file an amended petition or any other pleadings on the defendant's behalf. On September 16, 2013, the State filed a motion to dismiss the petition.

¶ 6 On February 25, 2014, defense counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). The certificate was a form completed by defense counsel. On the form, counsel indicated that he "consulted with the Defendant, *in person* to ascertain [his] contentions of deprivation of constitutional right." (Emphasis in original.) However, counsel did not indicate whether he examined the record of the proceedings at the guilty plea hearing as required by Rule 651(c). The trial court did not address this error in the Rule 651(c) certificate. That same day, the court held a hearing on the State's motion to dismiss.

¶ 7 On March 13, 2014, the trial court dismissed the defendant's petition. On appeal, this court reversed and remanded the petition for a third-stage evidentiary hearing, and

for the trial court to determine the defendant's initial date of custody and proper sentencing credit. See *People v. Moore*, 2016 IL App (5th) 140167-U.

¶ 8 On August 30, 2017, the trial court held an evidentiary hearing. At the hearing, the defendant testified on his own behalf. The trial court then continued the hearing to September 25, 2017, when the defendant's mother would be available to testify. At the second hearing, both the defendant's mother and sister testified for the defendant. Defense counsel entered into evidence the defendant's medical record from St. Elizabeth's Hospital; Dr. Cuneo's fitness report that was prepared prior to the entering of the plea; and a response addressed to the defendant from the Attorney Registration and Disciplinary Commission that he received after reporting his former counsel due to his dissatisfaction with her handling of his case (it had attached to it a response letter from the defendant's former counsel, Judy Steele, and three handwritten letters that were sent by the defendant to Steele).

¶ 9 Judy Steele, the defendant's prior retained counsel who represented him for his plea and sentencing, testified for the State. On cross-examination, the defendant's postconviction counsel, Steve Griffin, questioned Steele about whether she was aware that the defendant, prior to the incident that led to his conviction, walked from Benld to Highland on a summer day in 90 degree weather.<sup>1</sup> He also questioned Steele as to whether she emphasized the fact that one month prior to committing the offense, the defendant had attempted suicide and was subsequently hospitalized, to which she

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<sup>1</sup>Counsel actually asked if she knew the defendant had walked from Highland to Belleville and Steele corrected him that the defendant walked to Highland where the charged offense occurred.

responded, "I would have to taken [*sic*] a look at the transcripts." The State entered into evidence the transcript of the sentencing hearing.

¶ 10 In closing argument, defense counsel argued that "the record is replete with evidence of alcohol abuse, depression, many psychological stressors."

¶ 11 On January 3, 2018, the trial court issued a written order denying the defendant's petition. Additionally, the court found no error in the calculation of the number of days the defendant spent in custody in the Madison County jail for which he should be given credit. The court gave the defendant credit for 634 days.

¶ 12 ANALYSIS

¶ 13 The first issue on appeal concerns the interpretation of an Illinois Supreme Court rule; therefore, our review is *de novo*. *People v. Henderson*, 217 Ill. 2d 449, 458 (2005).

¶ 14 A defendant does not have a constitutional right to counsel in postconviction proceedings. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The right to counsel is wholly statutory, and a defendant is only entitled to the level of assistance provided for in the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). *Suarez*, 224 Ill. 2d at 42. Under the Act, once counsel is appointed, a defendant is entitled to a reasonable level of assistance. *Id.* Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes certain duties on postconviction counsel to ensure that the defendant receives a reasonable level of assistance under the Act. *Id.* Rule 651(c) requires that postconviction counsel certify, or the record affirmatively show, that counsel: (1) consulted with the petitioner either in person or by mail to ascertain his contentions of the deprivation of constitutional rights; (2) examined the trial record; and (3) amended the postconviction

petition if necessary to adequately present the petitioner's claims. *People v. Johnson*, 338 Ill. App. 3d 1004, 1008 (2003). At issue here is whether counsel examined the trial record as required by the rule.

¶ 15 Rule 651(c) is a rule of procedure and not a suggestion; therefore, it is imperative that counsel follow the rule and that courts require compliance with it. *People v. Treadway*, 245 Ill. App. 3d 1023, 1027 (1993). If counsel fails to file a satisfactory certificate of compliance with Rule 651(c), a reviewing court cannot assume that counsel has complied with the rule. *People v. Carter*, 223 Ill. App. 3d 957, 962 (1992). Instead, there must be an explicit showing in the record that the rule's requirements have been met. *Id.* As the supreme court has previously stated, "remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit." *Suarez*, 224 Ill. 2d at 47.

¶ 16 Here, the State concedes that the form filed by defense counsel failed to satisfy the requirements of Rule 651(c). The State argues, however, that remand in this case is not necessary as the record affirmatively demonstrates that counsel reviewed the record. We disagree. The record demonstrates that defense counsel reviewed the fitness report prepared by Dr. Cuneo, and the medical records from St. Elizabeth's regarding the defendant's suicide attempt. However, the State points to nothing, nor could the court find anything, in the record that affirmatively demonstrates that postconviction counsel reviewed the report of proceedings from the plea or the sentencing hearings. In fact, the record seems to indicate that counsel did not review the report of proceedings for the

sentencing hearing because his line of questioning on cross-examination regarding what Steele presented in favor of mitigation was of no consequence considering she did in fact address all of the points brought up by counsel as factors in mitigation. At sentencing, Steele argued:

"By the addendum that the State and the Court received, you can take notice that May 11th, right before, a month before this occurred, Mr. Moore was going through substantial psychological issues that resulted in a suicide attempt. He was hospitalized and the medical records are part of the record.

When he got out of the hospital, he stop [*sic*] taking his anti-depressant medication. He was having a hard time. He was having issues because of a breakup with Regina and he missed his son Isaiah. It was really hot in June and he hitchhiked from Benld all the way to Highland. He didn't know what he was doing."

¶ 17 As we have previously noted, postconviction counsel did state in closing argument that "the record is replete with evidence of alcohol abuse, depression, many psychological stressors." However, this is not an affirmative showing that counsel reviewed any of the reports of proceedings. This merely shows, as we have already noted, that counsel reviewed the St. Elizabeth's medical records and the report from Dr. Cuneo that were offered into evidence.

¶ 18 Therefore, as to the first issue, we vacate the denial of the postconviction petition and remand for compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 19 As to the second issue, both the defendant and the State agree that the defendant should have received credit for at least 650 days for the time he spent in Madison County jail prior to sentencing. Additionally, the defendant stabbed himself after attacking the victim and was immediately hospitalized for treatment of his self-inflicted wounds. There is a question of fact as to whether the defendant was in custody during this

hospitalization as it occurred after the charged conduct and police were already on the scene when he stabbed himself. Therefore, an evidentiary hearing is necessary to determine the defendant's initial custody date and proper sentencing credit. Accordingly, we reverse the court's finding in regard to the sentencing credit and remand for further proceedings.

¶ 20 Therefore, the order of the circuit court of Madison County is vacated in part, reversed in part, and remanded for further proceedings.

¶ 21 Vacated in part, reversed in part, and remanded.