

NOTICE

Decision filed 09/19/11. 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.

2011 IL App (5th) 090666-U  
NO. 5-09-0666  
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,	)	Richland County.
	)	
v.	)	No. 05-CF-128
	)	
IRENIA A. COTNER,	)	Honorable
	)	Christopher L. Weber,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Presiding Justice Chapman and Justice Wexstten concurred in the judgment.

**ORDER**

- ¶ 1           *Held:* Where counsel met with defendant, examined the record, and filed a supplemental postconviction petition, failure to include the defendant's *pro se* claims in the supplemental petition does not violate Rule 651(c) when counsel would have had to find individuals and evidence to clarify and support the defendant's contentions.
- ¶ 2           The petitioner, Irenia A. Cotner, appeals the decision of the circuit court of Richland County dismissing her postconviction petition. On appeal, she argues that she received ineffective assistance from her postconviction counsel under Illinois Supreme Court Rule 651 (eff. Dec. 1, 1984). She also argues that the circuit court failed to properly advise her of the consequences of recharacterizing her petition filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) as a postconviction petition. For the following reasons, we affirm the circuit court.
- ¶ 3           The petitioner, Irenia Cotner (Cotner), was charged with murder and

conspiracy to commit murder based on events that transpired on August 23, 2005. A jury trial began on October 23, 2006, where the following evidence was adduced. Only the facts necessary for the disposition of this appeal are provided herein.

¶ 4 In early 2005, Cotner determined that a death hex had been placed on her by Lindsey Kasinger. Cotner told her long-time friends Misty Gangloff and Jenny Wolfe that they were also included in the hex. Between April and August 2005, Cotner met with Jenny and Misty 12 to 15 times to discuss how to end the hex. Cotner told the others that the only way to end the hex was to kill the person who cast it. Misty testified that she drove by Lindsey's residence 8 to 10 times with Cotner and/or Jenny between April and June 2005. At one point, Jenny and Oscar Eck attempted to set fire to Lindsey's residence. Another time, the three women met on the outskirts of town and fired a weapon, purchased by Cotner, through a pillow case and milk jug in an attempt to silence it.

¶ 5 Misty's platonic roommate was Oscar Eck. Oscar met David Linder during the week preceding August 23, 2005, and introduced him to Cotner. That week, Cotner conducted a number of seances, the last of which occurred on the night of the murder. At that seance, Cotner communicated with God and Satan through the flickering of candles. Oscar and David were present at the seance. Cotner told Oscar that he was now included in the hex and that he and his family would die if Lindsey and her unborn child were not killed.

¶ 6 The three created a plan to end the hex. The plan called for Oscar and David to enter Lindsey's residence, kill her and her unborn child, and then take Lindsey's bra to an open road and cast a certain spell that would put an end to the hex. Oscar and David believed that they would be accompanied by five subdemons to protect them from mishaps.

¶ 7 Before Oscar and David left the seance in the early morning of August 23, 2005, Cotner lit a candle and told them that they had to have "all this done" by the time the candle burned down and that if they failed to do so, they would be "taken" instead. Following the seance, David and Oscar drove by Lindsey's residence to see if she was at home, and then they went to Walmart where they purchased masks and gloves. At approximately 3 a.m. on August 23, 2005, they arrived at Lindsey's residence.

¶ 8 Lindsey was living at the home of Lee Jackson, the father of her apparent boyfriend, Jackie Jackson. Jackie had previously dated Cotner for approximately four years. Also residing in Lee Jackson's home at that time were Lee's girlfriend, Jacqueline Bennett, and her son, Joshua Bennett. On the night in question, Lindsey, Jackie, Jacqueline, and Joshua were all in the house; Lee was at work.

¶ 9 Oscar and David entered the residence, wearing gloves and masks, and were armed with knives and pepper spray. As soon as they entered the house, dogs began to bark. Hearing the commotion, Jacqueline entered the kitchen, where she was stabbed in the chest and abdomen by David. Jackie then entered the kitchen from the basement, carrying a shotgun. As he reached the top of the stairs, Jackie saw one masked intruder (Oscar) in the living room and the other (David) in the kitchen. David was on top of Joshua and was making a stabbing motion. Oscar sprayed Jackie in the face with pepper spray, but it had no effect. Jackie then hit Oscar in the face with the end of the shotgun, knocking him to the floor. Subsequently, David approached Jackie and they struggled over the gun. Oscar joined in the struggle for the gun and it discharged, striking David in the abdomen. During the commotion Oscar stabbed himself in the leg and was thrown down the basement stairs by Jackie.

¶ 10 Lindsey left the residence and went to a neighbor's house for help. She told

the neighbor that people had broken into her house and they had knives. The neighbor entered the Jackson residence, saw Oscar in the house, and watched him flee into a nearby cornfield. David remained on the kitchen floor and Jackie recognized him as someone he had seen the day before at Cotner's father's residence.

¶ 11 Oscar fled the scene and went to Cotner's house, where he told her that the plan had not worked. Cotner and Oscar then went to Misty's house and told her what had happened. Jenny, who was at work at the time, came home and the group took Oscar to the hospital for treatment for his stab wound. At the hospital, the police interviewed Cotner, and she initially denied any knowledge of a plan to murder Lindsey or the events that occurred at the Jackson residence. Cotner told police that Oscar and David were at her house earlier in the evening and that Oscar left to take Jenny to work and David left when Cotner went to bed. Cotner told the police that she was awoken by Oscar in the early hours of August 23, 2005.

¶ 12 Joshua Bennett died from his wounds on the night of the attack. David died from his wounds a few months later.

¶ 13 The jury found Cotner guilty of first-degree murder, conspiracy to commit first-degree murder, and home invasion. She was sentenced to 50 years' imprisonment for the murder conviction and 7 years' imprisonment for the conspiracy conviction, to be served consecutively. The home invasion conviction was vacated. Cotner appealed, arguing that the court erred in admitting evidence of the arson of Lindsey's residence and that the circuit court erred by not allowing evidence of David's criminal convictions to support her position that David broke into the Jackson house for his own drug-related purposes. This court affirmed her conviction in *People v. Cotner*, No. 5-06-0673 (2008) (unpublished order under Supreme Court Rule 23 (eff. May 30, 2008)).

¶ 14 On February 2, 2009, Cotner filed *pro se* a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). She attached affidavits and other documents to support her petition. The text of the handwritten petition is difficult to read but appears to say:

"Petitioner was unaware that a deal was made for testimony [illegible] was the court. By law all deals must be public record (see attached). Petitioner alibi witness was not called (see attached). Key witness [*sic*] criminal record was not brought out (see attached). All of this has bearing on her case and was cincealed [*sic*]."

¶ 15 Cotner attached numerous documents to her petition. First was a newspaper article about Jenny's case, with a passage about Jenny's sentence highlighted. "[The judge] said the agreement was a 'loose immunity plea' by the state, not a negotiated plea, and that he was not obligated to sentence Wolfe to 25 years or less."

¶ 16 Second was a statement from one of trial counsel's paralegals about a conversation she had with Sheryl Jackson, Lee Jackson's ex-wife and Jackie Jackson's former stepmother. The paralegal stated that Sheryl told her that charges against Jackie had been reduced or dropped several times after Jackie's grandfather visited the State's Attorney's office and the police. This statement was not sworn before a notary and therefore is not an affidavit. *People v. Niezgodna*, 337 Ill. App. 3d 593, 597 (2003).

¶ 17 Also attached to the petition was an affidavit from Angela Howser, an observer during Cotner's trial. Angela stated that during a break on the third day of trial she saw the prosecutor place his hand on Jackie's shoulder "in a somewhat fatherly manner" and say: "Don't worry about that, we'll take care of it; you're doing a good job, just keep it up. I'll make sure everything is okay." Howser also avers, without providing any basis for her knowledge, that Jackie was arrested on October 6, 2006,

and that charges were dropped against him in July 2008.

¶ 18 There was also an affidavit signed by Cotner's mother where she writes at length about sitting outside of the courtroom when the prosecuting attorney walked by while her husband was talking to a potential juror. She also states that her husband told the potential juror that Jackie had raped Cotner. She also mentions that Jackie was involved with drugs and how drugs were involved in this case.

¶ 19 In another affidavit attached to the petition, a man named Josh stated that he was in a car driven by Jackie Jackson on October 1, 2006, when Jackie tried to flee from police. Josh said that marijuana and vodka were in the car and that Jackie threw some it out the window before he was stopped. According to Josh, Jackie was later charged with reckless driving, fleeing the police, and possession of less cannabis than he actually had on him.

¶ 20 These documents and Cotner's handwritten petition composed the majority of her section 2-1401 petition. On March 16, 2009, the court reviewed the *pro se* petition in open court and in Cotner's presence. The court stated that it did not find the petition to be frivolous or patently without merit and docketed the petition for further consideration. The court stated: "I, frankly, have some difficulty discerning or interpreting your petition and the attached affidavits. Actually, the attached affidavits cause me some concern. I don't understand everything that's being alleged there." The court then appointed counsel to represent Cotner with her postconviction petition. The court stated that the State did not have to respond to the petition until counsel had met with Cotner. The court asked whether Cotner understood what was happening and she responded in the affirmative.

¶ 21 On August 3, 2009, counsel filed a supplemental petition. On September 22, 2009, the court asked Cotner's counsel if the amended petition replaced the original

*pro se* filing, and counsel responded: "That's correct, your Honor. The supplemental is what we are moving forward on." Cotner was present in court and did not object to this statement. The supplemental petition filed by counsel presented 39 grounds for relief, including citations to the record. None of the 39 grounds incorporated Cotner's assertions from the *pro se* petition. No affidavits were attached to the supplemental petition. Counsel stated that he was relying solely on the trial record to support his claims of error and prejudice. The State then filed a motion to dismiss, which was granted after the stage-two hearing on November 23, 2009. It is from this dismissal that Cotner appeals.

¶ 22 On appeal, Cotner first argues that she received ineffective assistance of postconviction counsel under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Cotner argues that she received ineffective assistance from her postconviction counsel because the allegations from her *pro se* petition, specifically that of a "deal" between the State and Jackie Jackson, were not included in the supplemental petition. She also argues that the court's recharacterization of her *pro se* petition as a postconviction petition did not comply with *People v. Shellstrom*, 216 Ill. 2d 45 (2005). We will address these contentions in turn.

¶ 23 We begin by noting how Rule 651 fits into the postconviction framework. At the first stage of postconviction proceedings, the circuit court reviews the petition and may summarily dismiss it if the court determines it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). The process at this stage "measures a petition's substantive virtue rather than its procedural compliance." *People v. Boclair*, 202 Ill. 2d 89, 102 (2002). The focus is on whether the petition presents the "gist of a constitutional claim." *Boclair*, 202 Ill. 2d at 99-100. If not dismissed at the first stage, the circuit court must docket the claim for further consideration. 725 ILCS

5/122-2.1(b) (West 2010).

¶ 24 At the second stage of proceedings, an indigent petitioner is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2010). The right to counsel in postconviction proceedings is wholly statutory, and a petitioner is only entitled to the level of assistance required by the statute. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). The statute provides for a "reasonable" level of assistance. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). To ensure the reasonable assistance required by the postconviction act, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights, (2) examine the record of the trial court proceedings, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The question of whether postconviction counsel's performance was "reasonable" under Rule 651(c) is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 25 Counsel may file with the court a certificate of compliance with Rule 651, representing that the duties listed in the certificate have been met. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). This certificate creates a presumption of compliance. *Lander*, 215 Ill. 2d at 584. While the certificate is not irrefutable proof that the requirements of Rule 651(c) have been met, proof rebutting it must be found in the record. *Perkins*, 229 Ill. 2d at 52. In this case, postconviction counsel filed a Rule 651(c) certificate stating, "I have both consulted with Defendant by mail and in person to discuss all contentions of deprivation of constitutional right, have examined the record of proceedings at trial, and have filed a Supplemental Petition for Post



Conviction Relief necessary for the adequate presentation of the Defendant's contentions."

¶ 26 Postconviction counsel's duty under Rule 651(c) is to shape the *pro se* petitioner's claims into the proper legal form. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). It is not the duty of counsel to explore, investigate, or formulate potential new claims. *Davis*, 156 Ill. 2d at 163. Postconviction counsel has no obligation to engage in a generalized "fishing expedition" in search of support for claims raised in a postconviction petition. *People v. Williams*, 186 Ill. 2d 55, 61 (1999). In *People v. Johnson*, 154 Ill. 2d 227, 247 (1993), the supreme court stated, "While post-conviction counsel has an obligation to present a *petitioner's claims* in appropriate legal form, he is under no obligation to actively search for sources outside the record that might support general claims raised in a post-conviction petition." (Emphasis in original.) The *Johnson* court continued by saying that it is the petitioner's responsibility to specifically identify witnesses who could provide supporting testimony as well as a brief summary of what they would say. *Johnson*, 154 Ill. 2d at 247-48. Only then does "counsel [have] an obligation to attempt to contact those witnesses who might provide information needed to support a potentially meritorious claim raised in the post-conviction petition." *Johnson*, 154 Ill. 2d at 248. Further, to establish that postconviction counsel provided inadequate representation, the defendant must show that the *pro se* petition could have been amended to state a claim upon which relief could have been granted. *People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005).

¶ 27 We now turn to the facts in this case. Cotner filed a nearly illegible handwritten petition with numerous supporting documents. The petition fails to name any individual with specificity and simply refers to "a deal" for testimony. The

supporting documents do not define Cotner's argument; instead, they raise a host of issues including immunity pleas, dropped charges, juror misconduct, drug use, and sexual abuse.

¶ 28 We briefly turn to each attachment to the petition. As to Angela Howser's statement that the prosecutor put his hand on Jackie's back in a "somewhat fatherly manner" on the third day of trial, it is important to note that Jackie testified on the first day of trial. Further, it bears noting that Jackie was one of the victims in this case and that his "stepbrother," Joshua Bennett, was killed. Further, there is nothing in the record indicating that Jackie was an unwilling witness or that a "deal" was necessary for him to testify. As to the other documents attached to the petition, Cotner's mother's affidavit is rambling and raises issues from rape to drug use but makes no mention of a "deal." Josh's affidavit addresses Jackie's arrest in October 2006 but only states that he was charged for possession of less cannabis than he actually had on him. Cotner did not attach a copy of Jackie's criminal record, nor did she provide documentation that charges were dropped against him. As she notes in her appellate brief, however, this information is readily available online and could have been attached to her petition.

¶ 29 We find Cotner's arguments to be too generalized to hoist the burden of exploration and investigation of the claim onto postconviction counsel. While Cotner may have found an issue worthy of review, she failed to do the necessary work to provide counsel with a clearly defined claim. As the *Johnson* court noted, postconviction counsel is under no obligation to actively search for sources outside of the record that might support general claims raised in the postconviction petition. *Johnson*, 154 Ill. 2d 247-48. Here, Cotner merely alleges that Jackie Jackson was arrested in October 2006 and that the charges were dropped two years later. Not only

does Cotner fail to provide documentation of Jackie's arrest, she fails to provide documentation that charges were filed and/or dropped. Further, she fails to provide any names, records, or other supporting information linking the dismissal of the charges to a "deal" with the State in this case. At best, Cotner found two facts that could, potentially, be connected to her case.

¶ 30 It is settled law that postconviction counsel is not obligated to engage in a generalized "fishing expedition" in search of evidentiary support for claims raised in a postconviction petition. *Williams*, 186 Ill. 2d at 61. Fishing, however, is precisely what postconviction counsel would have had to do to find support for Cotner's claims. Had Cotner provided a list of specific witnesses and their likely testimony, counsel would have been obligated to contact those individuals. *Johnson*, 154 Ill. 2d at 247-48. This was not the case. Here, Cotner mentioned "a deal" for testimony but did not clarify to whom she was referring. The documents and affidavits attached to her petition did not clarify her claim. Instead, the attachments raise a host of issues concerning a number of individuals.

¶ 31 In the instant case, counsel filed a supplemental petition and certificate of compliance with the court. It is undisputed that postconviction counsel reviewed the record and communicated with Cotner. Because her *pro se* petition failed to provide counsel with a clear claim so as to trigger his responsibility to contact specific witnesses with known information, we find that Cotner received effective assistance of postconviction counsel under Rule 651(c).

¶ 32 Second, Cotner alleges that the court failed to comply with the procedural requirements outlined in *People v. Shellstrom*, 216 Ill. 2d 45 (2005), when it recharacterized her *pro se* section 2-1401 petition as a postconviction petition. *Shellstrom* requires the circuit court to inform defendants of the potential

consequences of recharacterization. Specifically, the circuit court must: (1) notify the *pro se* litigant of the court's intent to recharacterize the pleading, (2) warn the litigant of the consequences of recharacterization, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has. *Shellstrom*, 216 Ill. 2d at 57.

¶ 33 This issue was addressed by the supreme court in *People v. Stoffel*, 239 Ill. 2d 314 (2010). In *Stoffel*, the supreme court stated that where "a defendant's *pro se* petition is not summarily dismissed but is instead advanced for further review, and counsel is appointed to represent the defendant, *Shellstrom* admonitions are unnecessary." *Stoffel*, 239 Ill. 2d at 328. The court explained that *Shellstrom* warnings are intended to inform *pro se* petitioners, whose petitions have been dismissed, of the limitations on the filing of successive postconviction petitions and the need to include all possible postconviction claims in their initial petition. *Stoffel*, 239 Ill. 2d at 328. In situations such as the instant one, however, this role is filled by appointed counsel who is required to consult with the defendant and make any amendments to the *pro se* petition that are necessary. *Stoffel*, 239 Ill. 2d at 328. Thus, as the *Stoffel* court noted, "[T]he concerns raised in *Shellstrom* do not apply when counsel is present [citation], and the absence of admonitions in no way prejudices the defendant." *Stoffel*, 239 Ill. 2d at 328.

¶ 34 In light of the foregoing, we affirm the decision of the circuit court of Richland County.

¶ 35 Affirmed.