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Petition for Rehearing or the
disposition of the same.

2013 IL App (5th) 110039-U

NO. 5-11-0039

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Franklin County.
)	
v.)	No. 88-CF-68
)	
STEPHEN PAUL TRIPP,)	Honorable
)	E. Kyle Vantrease,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Wexsten concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's dismissal of defendant's petition for postconviction relief at the second stage is reversed and the cause remanded for a hearing to determine whether postconviction counsel consulted with defendant as required by Supreme Court Rule 651(c) (eff. Dec. 1, 1984).
- ¶ 2 Defendant, Stephen Paul Tripp, appeals from an order of the circuit court of Franklin County dismissing his successive postconviction petition. On appeal, defendant contends the dismissal of his successive postconviction petition must be reversed because the record does not contain a Supreme Court Rule 651(c) certificate of compliance and because the record fails to affirmatively show that counsel consulted with him or examined the record of proceedings from the trial. We reverse and remand with directions. Both parties have filed motions to supplement the record. For reasons explained below, we allow both motions.

¶ 3 BACKGROUND

¶ 4 On May 5, 1988, defendant was charged by information with four counts of

first-degree murder in the deaths of two separate victims, Rick Stroud and George Brunton, and two counts of theft. On November 28, 1988, defendant pled guilty to all six counts and was later sentenced to two terms of natural-life imprisonment and two five-year terms of imprisonment on the theft counts to be served concurrently with the murder sentences. Defendant did not file a motion to withdraw his guilty plea, nor did he file a direct appeal.

¶ 5 On January 9, 1992, defendant filed a petition for postconviction relief in which he claimed his guilty plea was not knowingly and voluntarily made. The circuit court denied the petition and, on appeal, this court reversed the murder convictions. *People v. Tripp*, 248 Ill. App. 3d 706, 618 N.E.2d 1157 (1993). After remand, a jury found defendant guilty of two counts of murder and one count of theft. Defendant was sentenced to two terms of natural life in prison on the murder convictions and five years on the theft conviction, to run concurrently. This court affirmed the murder conviction and sentences, but vacated the theft conviction. *People v. Tripp*, No. 5-94-0714 (Aug. 22, 1997) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On March 29, 1999, defendant filed a *pro se* postconviction petition in which he alleged, in part, that his appellate counsel provided inadequate representation on direct appeal and that a variety of his constitutional rights were violated because trial counsel provided inadequate assistance. Retained counsel later filed his appearance. The State filed a motion to dismiss, which the circuit court granted.

¶ 7 On July 28, 2005, defendant filed a *pro se* combined motion for leave to file a successive postconviction petition and a proposed petition in which he alleged that he received inadequate assistance of counsel at trial and that his appellate counsel provided inadequate assistance on direct appeal. Defendant filed a motion to supplement his *pro se* postconviction petition in which he argued that the Illinois mandatory natural-life imprisonment statute is unconstitutional. On August 9, 2005, the circuit court entered an

order that defendant's petition be docketed for second stage consideration pursuant to section 122-2.1(b) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1(b) (West 2004)) and gave the State 120 days to respond. On December 6, 2005, the State filed a motion to dismiss the petition as frivolous and patently without merit.

¶ 8 On January 13, 2006, the circuit court filed a written order dismissing the petition as time-barred, as well as on the grounds of *res judicata* and being frivolous and patently without merit. The trial court also denied defendant's motion for court-appointed counsel. On appeal, defendant argued he was entitled to reversal and remand of the case for the appointment of counsel and further proceedings under the Act because the circuit court dismissed his petition without appointing counsel. This court reversed and remanded with directions for the circuit court to determine whether defendant qualified for court-appointed counsel, and, if so, to appoint counsel to represent him. *People v. Tripp*, No. 5-06-0071 (Mar. 21, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶ 9 On August 27, 2008, the circuit court found defendant's claims in the successive petition were barred from consideration under the "cause and prejudice test" and denied defendant's motions for leave to file a successive postconviction petition and for court-appointed counsel. This court reversed the circuit court's denial of defendant's petition for appointment of counsel and the grant of the State's motion to dismiss and remanded with directions for the circuit court to consider whether defendant was indigent and qualified for court-appointed counsel. *People v. Tripp*, No. 5-08-0470 (Jan. 12, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 10 On remand, the circuit court appointed counsel to represent defendant, and counsel filed an amended petition for postconviction relief which raised only the issue of whether the Illinois mandatory natural-life imprisonment statute is unconstitutional. No certificate of compliance with Supreme Court Rule 651(c) was filed. The State filed a motion to dismiss

the petition in which it argued the petition should be dismissed because (1) the trial court never granted leave of court to file a successive petition and (2) the Illinois mandatory natural-life imprisonment statute is constitutional. On January 6, 2011, the circuit court entered an order finding that while defendant was not granted express leave to file a successive postconviction petition, it could be argued that such leave was granted when his petition was ordered docketed, and, therefore, the court decided to address the merits of the amended petition. The circuit court found that a sentence of natural life is constitutional and granted the State's motion to dismiss. Defendant filed a timely notice of appeal.

¶ 11

ANALYSIS

¶ 12 Defendant argues in this appeal that the second stage dismissal of his successive postconviction petition must be reversed because the record does not contain a Supreme Court Rule 651(c) certificate of compliance and because the record fails to affirmatively show that his court-appointed counsel consulted with him or examined the record of proceedings at trial. The State replies that contemporaneously with filing a brief in this appeal, it also filed a motion to supplement the record with a Rule 651(c) certificate of compliance and an affidavit of defendant's postconviction counsel in which counsel stated, "That after consulting with the defendant and reviewing the record, including the trial transcripts, I made any amendments to the pro se petition that are necessary for an adequate presentation of [defendant's] contentions." The State insists that by granting the motion to supplement the record, the record's omissions are remedied and there is full compliance with Supreme Court Rule 651(c). The State requests that we affirm the circuit court's denial of defendant's postconviction petitions and tax costs accordingly.

¶ 13 However, on May 29, 2012, defendant objected to the State's motion, arguing that his court-appointed counsel's certificate of compliance and affidavit are contradicted by his own affidavit attached to the amended postconviction petition. On May 31, 2012, the State filed

a motion for leave to respond to this objection. On June 8, 2012, defendant filed a motion for leave to supplement the record with defendant's affidavit, which stated in pertinent part as follows:

"[Counsel] never consulted with me regarding the contentions of constitutional deprivations that I had presented in my pro se post-conviction petition. I did not discuss my post-conviction claims with [counsel] before I received his drafted amended post-conviction petition and affidavit in the mail. I signed the petition and affidavit and returned them to [counsel]."

The State filed an objection to defendant's motion for leave to supplement the record. We ordered the motions to supplement the record taken with the case.

¶ 14 The Act provides that, at a minimum, an attorney appointed to represent an indigent petitioner will ascertain the basis of the petitioner's complaint, shape those complaints into appropriate legal form, and present the petitioner's constitutional arguments to the court. *People v. Richmond*, 188 Ill. 2d 376, 381, 721 N.E.2d 534, 537-38 (1999); *People v. Slaughter*, 39 Ill. 2d 278, 285, 235 N.E.2d 566, 569 (1968). Supreme Court Rule 651(c) outlines the specific duties of appointed counsel in postconviction proceedings and requires that the record in postconviction proceedings demonstrate that appointed counsel "has consulted with petitioner either by mail or in person to ascertain his 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. Dec. 1, 1984). The general rule is to permit the State to supplement the record with a Rule 651(c) certificate during the appeal where the record fails to contain a Rule 651(c) certificate. *People v. Harris*, 50 Ill. 2d 31, 34, 276 N.E.2d 327, 329 (1971); *People v. Waldrop*, 353 Ill. App. 3d 244, 247, 818 N.E.2d 888, 891-92 (2004). Nevertheless, defendant contends that here the late-filed

certificate should not be considered conclusive evidence that postconviction counsel provided reasonable assistance in compliance with Supreme Court Rule 651(c). We agree.

¶ 15 Because counsel was appointed to represent defendant during these postconviction proceedings, defendant is entitled to proper representation by that attorney. *People v. Finklea*, 186 Ill. App. 3d 297, 302, 542 N.E.2d 454, 456 (1989). Here, the late certificate of compliance is contradicted by not only defendant's affidavit attached to his amended postconviction petition, but also by his motion to supplement the record on appeal in which he again swears appointed counsel did not consult with him prior to filing the postconviction petition now in issue. Defendant contends that postconviction counsel did not consult with him, but appointed postconviction counsel insists in his Rule 651(c) certificate that he did consult with defendant. Thus, a factual issue of whether defendant's appointed postconviction counsel complied with Supreme Court Rule 651(c) exists, which we cannot resolve.

¶ 16 Whether postconviction counsel consulted with a defendant is a factual question to be resolved by the trial court. *Finklea*, 186 Ill. App. 3d at 302, 542 N.E.2d at 456. The trial court, not this court, is the correct forum to resolve the factual dispute in issue. As our Illinois Supreme Court has eloquently stated:

"It is mandatory for the protection of the accused, as well as society, that courts of original and appellate jurisdiction confine themselves to their respective spheres. Matters which require fact finding based on oral and written evidence *dehors* the record are primarily within the realm of the circuit court. Appeals from a judgment of that court are the function of reviewing courts, which operate on the record of the lower court." *People v. Frey*, 67 Ill. 2d 77, 85, 364 N.E.2d 46, 49 (1977).

After granting the State's motion to supplement the record and defendant's motion to supplement the record, we are left with a factual conflict in the record.

¶ 17 We find that justice requires us to reverse the order of the circuit court and remand so that a proper record can be made and an evidentiary hearing can be conducted in which appellate counsel is allowed to explain his actions recounted in his affidavit and defendant is allowed to cross-examine postconviction counsel about whether he did consult with defendant concerning his *pro se* allegations of deprivation of constitutional rights. The trial court must rule on the factual issue of whether postconviction counsel complied with Supreme Court Rule 651(c).

¶ 18 For the foregoing reasons, we reverse the judgment of the circuit court of Franklin county and remand for further proceedings consistent with this order.

¶ 19 Reversed and remanded with directions.