



In December 2018, after a hearing on the State's motion to dismiss, the trial court granted the State's motion to dismiss finding defendant raised this issue and this court rejected the issue on direct appeal (*People v. Schutz*, 2017 IL App (4th) 140956, 79 N.E.3d 849) and therefore the issue was barred by *res judicata*.

¶ 3 On appeal, defendant argues, and the State concedes, the trial court's order should be reversed and the matter remanded for further second-stage proceedings where postconviction counsel failed to file an Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) certificate and the record does not otherwise show compliance with Rule 651(c). We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 As we find postconviction counsel's failure to demonstrate substantial compliance with Rule 651(c) requires reversal, we summarize only the facts necessary to the disposition of this appeal.

¶ 6 A. Direct Appeal

¶ 7 In July 2013, the State charged defendant with (1) four counts of criminal sexual assault while holding a position of trust (720 ILCS 5/11-1.20(a)(4) (West 2012)), (2) four counts of criminal sexual assault by force or threat of force (720 ILCS 5/11-1.20(a)(1) (West 2012)), (3) four counts of aggravated criminal sexual assault (720 ILCS 5/11-1.60(d) (West 2012)), and (4) two counts of providing alcohol to a minor (235 ILCS 5/6-16(a)(iii) (West 2012)).

¶ 8 Following a March 2014 bench trial, the trial court found defendant guilty of one count of criminal sexual assault, one count of criminal sexual abuse, and two counts of providing alcohol to a minor. In July 2014, the court sentenced defendant to 12 years' imprisonment.

¶ 9 On direct appeal, defendant argued Foster represented him under a conflict of interest where Foster simultaneously represented defendant and Kristopher Johnson, a prosecution witness. *Schutz*, 2017 IL App (4th) 140956, ¶¶ 19, 34. In June 2017, this court found no conflict of interest and affirmed defendant’s conviction. *Id.* ¶¶ 42, 46.

¶ 10 B. Postconviction Proceedings

¶ 11 In April 2018, defendant filed a *pro se* postconviction petition pursuant to section 122-1 of the Act (725 ILCS 5/122-1 (West 2016)), asserting Foster represented him under a conflict of interest. In June 2018, the trial court advanced defendant’s petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. In November 2018, appointed counsel filed an amended postconviction petition alleging Foster represented defendant under a conflict of interest. Subsequently, the State filed a motion to dismiss defendant’s amended postconviction petition, arguing defendant’s conflict of interest claim was barred by *res judicata*.

¶ 12 In December 2018, after a hearing on the State’s motion to dismiss, the trial court granted the State’s motion to dismiss based on *res judicata* where defendant raised this issue on direct appeal. On January 24, 2019, defendant filed a notice of appeal. On February 13, 2019, this court granted defendant leave to file a late notice of appeal.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues we must remand for further second-stage proceedings because postconviction counsel failed to comply with Rule 651(c). Defendant argues postconviction counsel failed to file the required certificate and the record does not otherwise demonstrate compliance with Rule 651(c).

¶ 16 The State concedes the matter must be remanded where postconviction counsel failed to file a Rule 651(c) certificate and the record does not otherwise affirmatively show compliance with Rule 651(c). However, the State argues the error in this case occurred when the trial court advanced defendant's petition to the second stage given the sole argument in defendant's petition was rejected by this court on direct appeal. The State asserts the proper procedure on remand would be for appointed counsel to withdraw after demonstrating compliance with Rule 651(c). We accept the State's concession, but we decline to deprive defendant of the benefit of the responsibilities Rule 651(c) imposes on appointed counsel.

¶ 17 Under Rule 651(c), postconviction counsel is required to file a certificate indicating he "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. July 1, 2017). "The filing of a facially valid Rule 651(c) certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule." *People v. Beasley*, 2017 IL App (4th) 150291, ¶ 39, 85 N.E.3d 568 (quoting *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 25, 67 N.E.3d 976). "In the absence of such a certificate, 'a clear and affirmative showing of compliance on the record must be present.'" *People v. Smith*, 2016 IL App (4th) 140085, ¶ 33, 50 N.E.3d 353 (quoting *People v. Richardson*, 382 Ill. App. 3d 248, 256, 888 N.E.2d 553, 560 (2008)). Our supreme court has consistently held remand is required when postconviction counsel fails to complete any one of the above duties, regardless of whether the claims raised in the petition have merit. *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007).

Whether an attorney complied with Rule 651(c) is a question we review *de novo*. *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19, 56 N.E.3d 1141.

¶ 18 Here, postconviction counsel failed to file a Rule 651(c) certificate. Thus, there is no presumption of compliance with the rule. Absent a certificate, the record must show clear and affirmative compliance with Rule 651(c). The record fails to show postconviction counsel reviewed the record or consulted with defendant prior to filing the amended petition as mandated by Rule 651(c). “[W]ithout a showing that postconviction counsel fulfilled the rule’s requirements, we cannot conclude that the defendant was provided with adequate representation.” *People v. Myers*, 386 Ill. App. 3d 860, 866, 899 N.E.2d 560, 566 (2008). Counsel’s failure to comply with the requirements of Rule 651(c) requires us to remand this matter to the trial court for further proceedings. On remand, defendant is entitled to new counsel who, after complying with the responsibilities contained within Rule 651(c), shall file the required certificate and, thereafter, file an amended petition or a motion to withdraw as counsel.

¶ 19 III. CONCLUSION

¶ 20 For the foregoing reasons, we reverse the trial court’s judgment and remand for further proceedings consistent with this decision.

¶ 21 Reversed and remanded.