

2011 IL App (1st) 093182-U  
No. 1-09-3182

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FIFTH DIVISION  
July 29, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 31571
	)	
JASON BURGOS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Howse concurred in the judgment.

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**O R D E R**

**HELD:** Defendant's postconviction counsel failed to comply with Rule 651(c) when she did not obtain defendant's affidavit in support of the supplemental petition or explain its absence.

¶ 1 Defendant Jason Burgos appeals from the second stage dismissal of his petition for relief under the Post-Conviction

Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). On appeal, he contends that postconviction counsel's failure to obtain his affidavit in support of the supplemental petition violated Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We reverse and remand.

¶ 2 At trial, the victim Frank Gonzalez testified he saw defendant in a car, turned away, and then heard gunshots. When he looked back, he saw defendant shooting at him. The victim was shot in the hand and the head, and later identified defendant in a lineup as the shooter. During cross-examination, the victim admitted that he had apologized to defendant's mother and signed a document indicating he did not know who shot him. However, the victim then testified that the document was actually false and he only executed it because defendant's brother Christopher "kept bugging" him and he was afraid of gang retaliation.

¶ 3 Daniel McNally testified that when he heard gunfire from the backseat of his car, he turned around and saw defendant with a gun. Although McNally indicated that he immediately reported this incident to his father, a Chicago police officer, the defense later presented testimony indicating that McNally waited a week to tell his father. Ryan Boudreau, McNally's roommate, testified that defendant said he had "lit up" rival gang members.

¶ 4 After a bench trial, defendant was convicted of attempted first degree murder and aggravated battery, and sentenced to 12 years in prison for the attempted murder. This court affirmed that judgment on appeal. *People v. Burgos*, No. 1-04-1396 (2005).

¶ 5 In 2005, defendant filed a *pro se* postconviction petition alleging that trial counsel failed to present the testimony of witnesses Jeanine Pagan, Colleen Vopita, and Hilda Mendez. The petition alleged that Pagan and Vopita would have testified that defendant was at their home at the time of the incident and that Mendez, defendant's mother, would have testified that the victim apologized to her because defendant had nothing to do with the shooting. Additionally, the petition alleged that the victim and McNally could have been impeached by the testimony of the victim's stepson and McNally's father.

¶ 6 The petition further alleged that defendant was denied effective assistance when trial counsel failed to (1) object to certain testimony and exhibits at trial, (2) properly advise defendant regarding his right to a jury trial, (3) permit defendant to testify, (4) test defendant's hands for gunpowder residue, and (5) file a motion to quash the indictment. The petition finally alleged that the State engaged in misconduct when, *inter alia*, it failed to correct the false testimony of McNally and Boudreau and that appellate counsel was ineffective.

¶ 7 The trial court docketed the petition and counsel was appointed. During subsequent hearings, postconviction counsel indicated that an investigation was ongoing and she had contacted two witnesses. At a subsequent hearing, postconviction counsel's supervisor indicated that the interview of one potential witness indicated she would not be "helpful."

¶ 8 In March 2009, counsel filed a certificate pursuant to Rule 651(c), indicating that she had consulted with defendant by mail and phone, reviewed the record, and amended defendant's *pro se* petition by filing a supplemental/amended petition for postconviction relief (the supplemental petition). The supplemental petition incorporated the claims raised in the *pro se* petition and alleged, *inter alia*, that trial counsel failed to communicate with defendant or to interview defendant's mother Hilda Medina or brother Christopher in order to obtain information to impeach the victim. The supplemental petition also alleged that the cumulative effect of the errors raised in the petitions served to deprive defendant of a fair trial.

¶ 9 Attached to the petition were the affidavit of Hilda Medina and records from disciplinary proceedings against trial counsel which culminated in his suspension from the practice of law.

¶ 10 In her affidavit Medina averred that the victim called her to say that defendant did not shoot him, apologized, and said that he would tell the police the truth. However,

several months later, the victim told Christopher that for \$10,000 he would say whatever they wanted him to say. Medina told trial counsel about the "bribe," but he told her not to worry. When she asked counsel whether he was going to present Christopher's testimony, counsel indicated that it was unnecessary. Medina further averred that trial counsel never returned her phone calls, only called her when he wanted money, and only talked with defendant.

¶ 11 The State filed a motion to dismiss. At the hearing on the motion, postconviction counsel disputed the State's allegation that the supplemental petition was not properly supported by highlighting Medina's affidavit. She then stated that defendant's verification attached to the *pro se* petition was essentially an affidavit averring that everything in the petition was true and asked the trial court to accept it as such. After hearing argument, the court granted the State's motion and dismissed the petition.

¶ 12 At the second stage of proceedings under the Act, it is the defendant's burden to make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At this stage, all well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true; we review the dismissal of a petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 13           The Act provides that counsel may be appointed for an indigent defendant at the second stage. 725 ILCS 5/122-4 (West 2004); *Pendleton*, 223 Ill. 2d at 472. After an appointment, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires that appointed counsel: (1) consult with the defendant by mail or in person; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant. See also *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993) (the attorney appointed will ascertain the basis of the defendant's claims, shape those claims into appropriate legal form and present the defendant's constitutional contentions to the court).

¶ 14           The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore*, 189 Ill. 2d 521, 541 (2000). When a Rule 651(c) certificate is filed, the presumption exists that the defendant received the representation that the rule requires him to receive during second stage proceedings under the Act. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). This presumption can be overcome when a defendant contends that postconviction counsel failed to comply with one of the specific duties outlined in the rule. *People v. Mendoza*, 402 Ill. App. 3d 808, 814 (2010).

¶ 15           Here, defendant contends that postconviction counsel's failure to obtain his affidavit to support his

postconviction claims violated Rule 651(c)'s requirement that counsel make any necessary amendments to the claims raised in the *pro se* petition.

¶ 16           The State responds that defendant was not prejudiced by this omission because it was not the basis upon which the trial court dismissed the supplemental petition. Rather, the State highlights the trial court's ruling that defendant's allegations were legally inadequate because he did not contend that when the time came to testify, he told trial counsel that he wished to testify and because the record indicated defendant had been admonished by the trial court regarding his right to testify and had indicated that he understood this right. Essentially, the State argues that because defendant's claim had no merit, it was not unreasonable assistance for postconviction counsel to not obtain his affidavit. We disagree.

¶ 17           Our supreme court has determined that remand is required when postconviction counsel failed to fulfill the duties imposed by Rule 651(c), regardless of whether the claims raised in a postconviction petition have merit and has consistently declined to excuse noncompliance with Rule 651(c) on the basis of harmless error. *People v. Suarez*, 224 Ill. 2d 37, 47, 51 (2007). Rather, the court has held that Rule 651(c) analysis is informed by the belief that if postconviction counsel does not adequately comply with the duties imposed by the rule, the limited right to

counsel under the Act is not "fully realized" regardless of whether a defendant's claim is potentially meritorious. *Suarez*, 224 Ill. 2d at 51.

¶ 18 Here, defendant's *pro se* petition alleged that trial counsel did not permit defendant to testify, and the supplemental petition alleged that trial counsel failed to communicate with defendant. However, the facts to support these claims were neither included in the petitions nor in an affidavit in support. Although postconviction counsel filed a 651(c) certificate indicating that she had consulted with defendant by mail and phone, she did not explain why defendant's affidavit was not attached to the supplemental petition. Rather, at the hearing on the motion to dismiss, she argued that the supplemental petition was properly supported by highlighting Medina's affidavit and asking the court to accept defendant's verification attached to the *pro se* petition as an affidavit.

¶ 19 This court's decision in *People v. Waldrop*, 353 Ill. App. 3d 244 (2004) is instructive. There, the defendant alleged in his *pro se* postconviction petition that his trial counsel failed to contact an eyewitness and supported the allegation with a police report indicating that an officer spoke to an eyewitness who did not want to become involved. Although postconviction counsel realleged the claim in the amended petition, it was not supported by an affidavit explaining the witness's potential

testimony or the absence of such documentation. *Waldrop*, 353 Ill. App. 3d at 250. On appeal, this court determined that postconviction counsel's belief that he did not have to seek an affidavit from the witness named in the *pro se* petition because the defendant's verification was sufficient evidentiary support to establish a substantial showing of a constitutional violation was wrong, and that this erroneous belief caused postconviction counsel's representation to fall below the reasonable level of assistance required by the Act. *Waldrop*, 353 Ill. App. 3d at 250-51.

¶ 20 In the instant case, postconviction counsel argued that the verification attached to the *pro se* petition was essentially an affidavit and asked the court to accept it as defendant's affidavit. Although the record does not reveal whether postconviction counsel simply failed to obtain defendant's affidavit or mistakenly believed that defendant's verification alone was sufficient evidentiary support to make a substantial showing of a constitutional violation (see *Waldrop*, 353 Ill. App. 3d at 250), at a minimum counsel was obligated to try to obtain support for the claims raised in the petition.

¶ 21 It is conceivable that defendant's affidavit could have contained facts to support the claims that trial counsel refused to permit defendant to testify and did not communicate with defendant. The failure to obtain such evidentiary support

or to explain its omission fell below a reasonable level of assistance and left the trial court with no choice other than dismissal. See *Waldrop*, 353 Ill. App. 3d 249, citing *People v. Treadway*, 245 Ill. App. 3d 1023, 1025 (1993) (affidavits in support of a postconviction petition must identify with reasonable certainty the sources, character and availability of the alleged evidence supporting a defendant's allegations; a petition unsupported by such documents is generally dismissed without an evidentiary hearing unless the defendant's allegations are uncontradicted and clearly supported by the record). Accordingly, we conclude that this cause must be remanded to the trial court so that postconviction counsel may comply with Rule 651(c).

¶ 22 Accordingly, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings.

¶ 23 Reversed and remanded.