2012 IL App (1st) 072959-U

THIRD DIVISION
June 27, 2012

No. 1-07-2959

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 92 CR 10084
	)	
NORMA JEFFERSON,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *Held*: Where record reflected postconviction counsel consulted defendant and reviewed record of trial proceedings, resulting in counsel's presentation of five new claims in supplemental petition, absence of Supreme Court Rule 651(c) certificate was harmless in light of demonstrated compliance with rule; the circuit court's dismissal of defendant's petition was affirmed.

¶ 2 Defendant Norma Jefferson appeals the circuit court's grant of the State's motion to dismiss her supplemental petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2000)). On appeal, defendant argues this court should reverse the dismissal of her petition and remand for further second-stage proceedings under the Act because

her postconviction counsel did not file a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) and because the record does not otherwise establish that postconviction counsel complied with Rule 651(c) in presenting defendant's constitutional claims. We affirm.

¶ 3 Following a jury trial in 1995, defendant was convicted of the attempted first degree murder and aggravated battery of her seven-week-old daughter. Defendant was sentenced to an extended term of 35 years in prison. On appeal, defendant argued the admission of evidence that she had agreed to take a polygraph examination before ultimately confessing to the crimes was reversible error. This court affirmed defendant's convictions and sentence. *People v. Jefferson*, No. 1-96-1163 (1997) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court affirmed. *People v. Jefferson*, 184 Ill. 2d 486, 499 (1998).

¶ 4 On March 6, 2001, defendant filed a *pro se* postconviction petition in which she argued her extended-term sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), which held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The circuit court docketed the petition for second-stage postconviction review, and counsel was appointed for defendant. On April 27, 2001, the State moved to dismiss the petition. The proceedings on defendant's *pro se* petition were continued numerous times, with post-conviction counsel appearing and addressing the court over a period of six years. The specific remarks made in open court by postconviction counsel during that time will be set out in detail below in considering defendant's contentions on appeal.

¶ 5 Ultimately, on May 30, 2007, postconviction counsel filed a supplemental petition for postconviction relief. That petition asserted five additional theories for relief, specifically that: (1) defendant was denied a fair trial because the trial judge exhibited bias against her; (2) she did not receive a fair trial due to several instances of prosecutorial misconduct; (3) the evidence

presented at trial was insufficient to sustain defendant's convictions; (4) defendant's sentence was excessive given her age and lack of criminal history; and (5) defendant's appellate counsel was ineffective in failing to raise those issues in the direct appeal. The affidavits of defendant and defendant's mother, Wilmeta Jefferson, were attached to the supplemental petition.

¶ 6 On August 22, 2007, the State moved to dismiss the supplemental petition. On October 16, 2007, the circuit court granted the State's motion.

¶ 7 On appeal, defendant observes that her postconviction counsel did not file a Rule 651(c) certificate and contends the record otherwise fails to establish that counsel satisfied the three requirements of the rule. Defendant thereby asserts her petition should be remanded for further second-stage proceedings under the Act.

¶ 8 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. *People v. Taylor*, 237 Ill. 2d 356, 371-72 (2010). Review of the dismissal of a postconviction petition at the second stage of proceedings is *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 9 The right to counsel in postconviction proceedings is wholly statutory, and a petitioner is entitled to only the "reasonable" level of assistance required by the Act. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To assure that reasonable assistance, Rule 651(c) imposes three specific and mandatory duties on postconviction counsel, namely that 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).

¶ 10 The failure to file a certificate showing compliance with Rule 651(c) is harmless error if the record demonstrates that counsel adequately fulfilled the required duties. *People v. Lander*,

215 Ill. 2d 577, 584 (2005). However, a reviewing court is not entitled to assume that counsel has complied with the rule; rather, there must be an explicit showing in the record that the rule's requirements have been met. *People v. Myers*, 386 Ill. App. 3d 860, 865 (2008); *People v. Carter*, 223 Ill. App. 3d 957, 962 (1992) (rule not met where record contained "no affirmative showing" that counsel had consulted with defendant). Remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record and amending the *pro se* petition, regardless of whether the claims raised in the petition were meritorious. *Suarez*, 224 Ill. 2d at 47.

¶ 11 In the instant case, defendant contends the record does not affirmatively establish counsel's overall compliance with Rule 651(c). We first consider together the requirements that counsel consult with defendant to ascertain her contentions that her constitutional rights were deprived and that counsel examine the record of the trial court proceedings.

¶ 12 The record on appeal provides an explicit showing that between 2001 and 2007, post-conviction counsel satisfied those two duties. The report of proceedings for March 13, 2002, indicates that defendant's counsel told the court he had "read the transcript" and "talked to Norma a number of times." On June 9, 2003, Cook County assistant public defender Lindsey Huge, who eventually prepared and filed the supplemental postconviction petition, informed the court he had "limited communications" with defendant but wished to present additional legal issues. On September 3, 2003, Huge stated he "wanted to submit a supplemental petition" and was "presently investigating witnesses."

¶ 13 On March 2, 2004, Huge said he was "trying to obtain the trial file" and had "been reading through the transcripts and trying to locate witnesses." Huge also stated he was "close to filing a 651(c) certificate." On June 7, 2004, Huge told the court he did not have the supplemental petition "to file today" but he had "gone through most of the record." On

December 7, 2004, unidentified counsel for defendant told the court that counsel "met with the family yesterday" and received an affidavit and that the trial file had been requested twice but not yet received.

¶ 14 On June 7, 2005, Huge told the court that "[w]e still have some affidavits and evidence to gather. I have been waiting a long time with a request for the trial file, which appears I just will not or cannot get. So I am going to proceed and I still have some more affidavits to gather." About 18 months later, on January 16, 2007, Huge stated to the court that he "was able to visit and get a petition from [defendant] last month. I still don't have everything together to file the supplemental [petition] that I need to."

¶ 15 As to the consultation requirement, the record indicates that postconviction counsel conferred with defendant on more than one occasion. Defendant nevertheless contends the record must reflect more than just a meeting and must establish substantive communication specifically designed to ascertain the petitioner's constitutional claims. She argues the record "does not specifically demonstrate that counsel actually consulted" her as to her claims.

¶ 16 In asserting that her postconviction counsel's representations failed to satisfy the consultation requirement of Rule 651(c), defendant relies on *People v. Johnson*, 338 Ill. App. 3d 1004 (2003). There, as here, postconviction counsel did not file a certificate of compliance with Rule 651(c); however, counsel in *Johnson* told the court he spoke to the defendant once on the telephone and had no plans "to go actually to speak to" the defendant. *Id.* at 1008. Defendant also cites *People v. Seidler*, 18 Ill. App. 3d 705, 708 (1974), in which postconviction counsel did not satisfy consultation requirement of Rule 651(c) when the only apparent communication between counsel and defendant was a letter to defendant that did not ask about possible grounds for post-conviction relief.

¶ 17 Here, in contrast to the circumstances in *Johnson* and *Seidler*, the record affirmatively reflects that Huge met with defendant several times and thereafter investigated witnesses, procured affidavits and considered and eventually presented additional postconviction issues. Where the record demonstrates communication between postconviction counsel and defendant, the consultation requirement of Rule 651(c) is met. See *People v. Guest*, 166 Ill. 2d 381, 412-13 (1995).

¶ 18 Defendant further contends the record does not affirmatively show that counsel examined the portions of the trial court transcripts necessary to present her constitutional claims. However, the above-quoted remarks, along with the contents of the supplemental petition, establish that postconviction counsel reviewed the trial record. Counsel set forth five new claims of constitutional deprivation in the supplemental petition, including a challenge to the sufficiency of the evidence, a challenge to defendant's 35-year sentence, and an assertion of bias on the part of the trial judge. In the latter claim, postconviction counsel asserted that on "at least 15 different occasions over the course of the two-day jury trial," defendant and her trial counsel "faced unprovoked antagonism from the court which evidenced a clear bias against her." Post-conviction counsel also presented a claim that the prosecutors at defendant's trial committed various acts of misconduct during questioning throughout the trial. Furthermore, postconviction counsel asserted that defendant's counsel on direct appeal had failed to raise these issues, thus exhibiting Huge's familiarity with the substance of defendant's appeal. The supplemental petition quoted and cited to various portions of the trial record in support of those arguments. Counsel also argued those contentions to the court in the hearing on the State's motion to dismiss the supplemental petition. Postconviction counsel only could have developed and argued those claims by obtaining and reviewing the record of the trial proceedings.

¶ 19 An example of postconviction counsel's failure to satisfy the requirement of reviewing the trial record is found in *Myers*. There, postconviction counsel did not file a Rule 651(c) certificate and the record demonstrated counsel did not satisfy the requirement that he adequately review the record. Counsel voiced his expectation that he receive only a copy of the defendant's appellate brief, and counsel stated he did not "know what actually happened" in his client's appeal and had not read the pertinent documents. *Myers*, 386 Ill. App. 3d at 865. This court remanded the case for additional post-conviction proceedings because by failing to adequately review the record, post-conviction counsel did not raise a potentially viable claim that the defendant's appellate counsel was ineffective in failing to raise a sentencing issue on direct appeal. *Id*. at 863-65; see also *People v. Jennings*, 345 Ill. App. 3d 265, 271-72 (2003) (record did not explicitly demonstrate that postconviction counsel examined the trial court record; attorney's bill indicated he spent time reviewing the "file" but it could not be presumed that included a review of the trial record; counsel also failed to make any amendments to defendant's *pro se* petition). Here, unlike in those cases, the record on appeal expressly indicates that defendant's postconviction counsel consulted with defendant to ascertain her contentions of constitutional deprivation and that counsel examined the record of the trial court proceedings.

¶ 20 The third requirement of Rule 651(c) states that counsel must make any amendments to the *pro se* petition necessary to adequately present defendant's contentions. Requiring the amendment of a defendant's claims under Rule 651(c) has been interpreted as mandating that counsel shape a defendant's claims "into appropriate legal form" and requiring that counsel attempt to obtain evidentiary support for those claims. *People v. Johnson*, 154 Ill. 2d 227, 237-45 (1993). Huge did so in preparing the supplemental petition. The *Apprendi* claim in defendant's *pro se* petition lacked viability in that *Apprendi* could not be applied retroactively to

defendant's case. Huge presented five additional issues that reflected his familiarity with the trial court record.

¶ 21 Defendant does not name any witnesses that should have been contacted by counsel or describe any claims that counsel should have made. Moreover, although, as defendant notes, the supplemental petition in this case was not verified, as occurred in *People v. Davis*, 388 Ill. App. 3d 869, 884 (2009), where the defendant attested he read the petition and reviewed it with counsel, defendant does not assert, nor do we conclude, that the absence of such verification by a defendant is dispositive.

¶ 22 In summary, the absence of a Rule 651(c) certificate is harmless if the record demonstrates that postconviction counsel met the rule's requirements of consulting with defendant, examining the record and amending defendant's petition to adequately present her contentions. The record in this case establishes that postconviction counsel provided the reasonable level of assistance required under the Act by meeting with defendant several times and obtaining and examining the trial record to the extent that counsel was able to present five legal claims in a supplemental petition that included a detailed recounting of defendant's trial.

¶ 23 Accordingly, for all of the reasons set out above, we affirm the circuit court's grant of the State's motion to dismiss defendant's postconviction petition.

¶ 24 Affirmed.