

2012 IL App (2d) 100532U
No. 2-10-0532
Order filed February 17, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 02-CF-475
)	
JAVIER A. GONZALEZ,)	Honorable
)	John R. Truitt,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: The trial court erred in dismissing defendant's postconviction petition. Postconviction counsel did not comply with Supreme Court Rule 651(c), where she allowed petitioner's fourth amendment claim to be forfeited by failing to allege that appellate counsel was ineffective for not raising it. Cause reversed and remanded with directions to appoint new postconviction counsel and to allow petitioner to replead his postconviction petition.

¶ 1 Defendant, Javier A. Gonzalez, 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 2002)). He

argues that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). For the following reasons, we reverse and remand with directions.

¶ 2

I. BACKGROUND

¶ 3 A jury found defendant guilty of armed violence (720 ILCS 5/33A-2 (West 2002)) and possession with intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2002)). The trial court sentenced defendant to 25 years' imprisonment. On direct appeal, defendant challenged the sufficiency of the evidence on the armed violence conviction and argued that the mittimus required modification. This court affirmed the conviction and modified the mittimus. *People v. Gonzalez*, No. 2-03-1247 (2005) (unpublished order under Supreme Court Rule 23).

¶ 4 The events leading up to and including defendant's trial were as follows. Prior to trial, defendant moved to quash his arrest and suppress evidence. Rockford police officer Timothy Eschen testified that, during the "morning hours" of February 15, 2002, and in response to a radio dispatch from Officer Steve Allen, he and Officer Stan North arrested defendant. Allen had informed Eschen and North that he had spoken to James Moore at 218 Regan Street. Moore stated that defendant had left that address wearing black jeans and a black coat with a yellow liner and carrying a .38-caliber automatic handgun and a fist-sized bag of drugs. About 15 minutes after receiving the dispatch, Eschen observed a man (*i.e.*, defendant) who matched the description at the 400 block of East State Street, which was about 11 blocks from the Regan Street address. When Eschen and North approached defendant in their squad car, activated the car's overhead lights, exited the car, and identified themselves as police, defendant ran away. Eschen further testified that defendant ran through a parking lot, onto the roof of Rockford Furniture Mart, came back down, and was arrested by other officers. While defendant fled, Eschen observed him making a throwing motion into the

parking lot and heard metal crashing. Eschen retrieved from the area a .38-caliber automatic handgun (from inside a broken pallet), along with pieces of the magazine and bullets. North went onto the roof and found a fist-sized bag of a substance he suspected was cocaine.

¶ 5 Defendant testified that, on February 15, 2002, he was with four men (Prince, Peter, Rico, and Purnell Williams) at the 400 block of East State Street. He conceded running away from police, but denied climbing onto any roof. Defendant also claimed that his later statement to police was involuntary because he was under the influence of drugs (cocaine, alcohol, heroin, and marijuana). Defendant also denied having on his person that day any firearms or drugs and denied signing any written statement.

¶ 6 Moore testified that he lived at 217 Regan Street on the relevant date and that, sometime that morning, a police officer came to his house and asked “where is Javier at?” Moore told the officer that defendant “left walking.” Moore denied telling the officer anything else.

¶ 7 Gary Anderson, a corrections officer, spoke to defendant on the date of his arrest while defendant was in a holding cell. Although defendant appeared “strung out on something,” he was coherent and was able to carry on a detailed conversation. Anderson further testified that defendant told him that he was chased by police and threw the gun one way and the drugs the other way.

¶ 8 The trial court denied defendant’s motion to quash his arrest and suppress evidence, finding “plenty” of probable cause and further finding the police witnesses credible and defendant and Moore incredible.

¶ 9 At trial, Eschen testified consistently with his testimony from the suppression hearing and North corroborated his testimony. Officer Michael Garnhart of the Rockford police department testified that he heard that officers were chasing defendant, and he went to the scene. Garnhart saw

defendant walking quickly away from the area, and he held defendant at gunpoint until other officers arrived. Defendant wore a black coat with yellow trim. Addressing the large baggie that was recovered from the scene and that contained 22 individually wrapped baggies, a forensic scientist confirmed that the substance found inside tested positive for cocaine.

¶ 10 Rockford police officer Brian Skaggs interviewed defendant and took a written statement in which defendant acknowledged accepting a brick of powder cocaine and a .38-caliber handgun from a woman named Maria for the purpose of selling the drugs. Defendant had met Maria's husband, Jose, in the county jail, and Jose had offered to help defendant make bail if defendant would sell drugs for him. Once he accepted the drugs, defendant went to a friend's house and used some of the cocaine. He then left to find a prostitute named Jody so that he could have a place to stay. Because he was high, defendant became paranoid, and he tossed most of the remaining cocaine into a dumpster behind a Burger King restaurant. Defendant reached Jody's residence, and Jody sold some of the cocaine for him while she was working. Defendant left Jody's residence with the rest of the cocaine and the gun. When police found him, he ran away. He "ditched" the gun and cocaine and climbed onto the roof of a building. After being surrounded by police, he surrendered.

¶ 11 During a recess in the proceedings, defense counsel informed the court that he had tried to locate Prince, Peter, Rico, and Williams, all of whom defendant had said were potential witnesses. Counsel had learned that Prince's name was Bernard Thomas and that Peter's actual name was Jeffrey Cross. Both lived at the Lincoln Hotel, which had since closed. Counsel had no way of finding Cross or Thomas, and Rico and Williams could not be located. Counsel had spoken to Rober Cozio, whom defendant had said would be able to find another potential witness, defendant's brother Gilberto Gonzalez. Cozio did not want to be involved in the case, but provided an address for

Gilberto. During a lunch recess, counsel intended to drive to two potential addresses for Gilberto. After lunch, he reported that he was not able to locate Gilberto. Defendant had claimed that Gilberto would have testified that he spoke to defendant before he was arrested on February 15, 2002, and that, during this conversation, a group of people were with defendant. Counsel declined defendant's request to move for a continuance to locate Gilberto.

¶ 12 Once the proceedings resumed, defendant testified that, on the evening before his arrest, he had been at a party on Regan Street where drugs and alcohol were used. In the morning, he began walking to the Lincoln Hotel with four men, all of whom were staying at the hotel with defendant. Three of the men, Rico, Prince, and Williams, were former patients at Janet Wattles Mental Health Center. Because the hotel had been shut down, defense counsel was unable to locate any of the men. As he and his friends were walking, defendant stopped at one point and called his brother to ask for money; after meeting with his brother, he continued walking.

¶ 13 While the group walked to the hotel, police arrived with the squad car's sirens and lights activated. The four men ran away. However, defendant denied running. He testified that he continued walking. He was approached by an officer and arrested at gunpoint. The remaining men got away. When shown the gun, defendant denied that it was his.

¶ 14 At the public safety building, defendant refused to give a written statement. Instead, he signed papers that he believed were release forms. He denied giving a statement to Skaggs. Defendant denied that he possessed the gun or cocaine on the day he was arrested. However, he conceded that there was a lot of cocaine at the party and that he had been previously convicted of possession of a controlled substance and aggravated battery. On cross-examination, defendant admitted that, at a prior hearing, he had testified that he ran away when the police approached him

and that he did not remember what the police did to him after he was apprehended. Skaggs and Detective Mark Jimenez testified on rebuttal that they interviewed defendant and that he signed copies of his statement, not release forms.

¶ 15 After he was convicted, defendant moved for a new trial, arguing that the evidence was insufficient to sustain his conviction. He also filed several *pro se* motions, including one that alleged ineffective assistance of trial counsel. On March 14, 2003, the court appointed substitute counsel. At a September 2, 2003, hearing on defendant's motion for a new trial, Gilberto testified that, in December 2002 (the time of defendant's trial), Gilberto lived at 1008 Montague. He did not attend defendant's trial and was not aware that it was taking place. He did not have a telephone. Gilberto further testified that he saw defendant on February 15, 2002, at about 8 or 8:30 a.m., a few blocks away from East State Street. Defendant was talking with two of his friends; they were all standing together. Gilberto gave defendant money that he owed him and left. When Gilberto drove away, defendant was walking with his friends; he did not observe police in the area.

¶ 16 On September 30, 2003, the trial court denied defendant's *pro se* motion for a new trial based on ineffective assistance of trial counsel. On October 31, 2003, the court sentenced defendant to 25 years' imprisonment. On direct appeal, this court affirmed, as modified, the trial court's judgment.

¶ 17 On October 4, 2006, defendant filed a *pro se* petition for postconviction relief, alleging that his rights under the fourth and fourteenth amendments were violated because the State never produced probable cause for his *Terry* detention. He stated: "Even after many attempts by [defendant] to have probable cause being [*sic*] a 911 call and Informant's [*sic*] Testimony subpoenaed to Court to show cause for a [*Terry*] Detention, all attempts have failed[.] [T]he State has refused to show cause for the [*Terry*] Detention." Defendant further alleged that he was denied

his right to effective assistance of *both trial and appellate counsel*, where counsel failed to raise the *Terry* issue. Defendant stated that his exhibits showed his attempts to subpoena 911 call information and Moore's testimony that he never told the police that defendant obtained a gun or drugs. He attached to his *pro se* petition a copy of a June 16, 2005, letter from Steven Wiltgen, his appellate counsel from the appellate defender's office, stating that he was returning the material defendant had sent him and that he would not file it with the court "because I do not believe that it is supported by the law or the facts." Wiltgen suggested that defendant could file it himself. Defendant also attached a copy of a *pro se* "MOTION FOR THE STATE TO SHOW CAUSE FOR THE [*Terry*] DETENTION," which he had filed with this court on June 16, 2005.¹ In that motion, he challenged the State to show probable cause in light of: (1) the 911 call; and (2) Moore's November 6, 2002, testimony at the suppression hearing, wherein Moore testified that he never told the police that defendant had a gun. Defendant attached pages of the transcript of Moore's testimony.

¶ 18 On November 9, 2006, the trial court found that defendant's *pro se* petition stated the gist of a constitutional claim that counsel was ineffective for failing to file certain motions to quash arrest and suppress evidence and to obtain further information on defendant's behalf. The court appointed counsel for defendant.

¶ 19 On March 18, 2008, in an amended postconviction petition, postconviction counsel raised a claim of ineffective assistance of only *trial* counsel, raising 14 bases for this claim, including that trial counsel was ineffective for failing to "raise the issue of probable cause for the [*Terry*] detention used to arrest the Defendant in this case." Counsel did not attach any affidavits to the amended

¹On July 7, 2005, this court denied the motion.

petition, but apparently attached a two-page visitor listing.² On March 25, 2008, postconviction counsel filed her first Rule 651(c) certificate, stating that she consulted with defendant, examined the trial record, and obtained defendant's signature and approval of the amended petition.

¶ 20 On September 24, 2009, the State moved to dismiss defendant's amended postconviction petition. In its motion, the State raised numerous bases to dismiss the petition, including that defendant's claim was procedurally barred, that postconviction counsel failed to attach any affidavits or other evidence supporting the petition's allegations, and that the claim was conclusory, nonfactual, and nonspecific so as not to require an evidentiary hearing.

¶ 21 On May 24, 2010, the trial court granted the State's motion. The court noted that many of the issues the parties addressed had previously been raised in defendant's posttrial motion and ruled on (*i.e.*, denied) by the court; accordingly, they were barred. The judge also noted that he had presided over defendant's trial and was familiar with the arguments defendant raised. Without specifying any, the court also found that defendant's arguments could have been raised on direct appeal and were, therefore, barred ("there's also the estoppel element"). The judge stated: "There's no new material, no new allegations that couldn't have been raised on appeal, and they weren't, so to that extent, those that weren't raised are estopped." Addressing the merits of the ineffective-assistance-of-trial-counsel claim, the court also generally commented that defendant was a "difficult client" for his trial counsel and that trial counsel did an "excellent job." The court found that neither prong of *Strickland* was satisfied: "It was a strong, strong circumstantial case, the foot chase, the

²The common-law record does not contain a copy of this document, but at the hearing on the State's motion to dismiss, the parties agreed that postconviction counsel did attach this document.

finding of the contraband, and quite frankly, the defendant didn't help himself much either by, basically, the defendant almost seemed to be, gee, I was high, I don't remember any of this.”

¶ 22 On May 27, 2010, postconviction counsel filed an amended Rule 651(c) certificate, adding that she had made any amendments to defendant's *pro se* petition that were necessary for an adequate presentation of his contentions. Defendant appeals.

¶ 23

II. ANALYSIS

¶ 24 Defendant claims that postconviction counsel did not provide reasonable assistance of counsel as mandated by Rule 651(c). We review *de novo* compliance with a supreme court rule, as we do a second-stage dismissal of a postconviction petition. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 25 The Act provides a remedy to criminal defendants who have suffered substantial violations of their constitutional rights. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). It contains a three-stage mechanism for a defendant who alleges that he or she suffered a substantial deprivation of his or her constitutional rights. At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2002). At this stage, the petition need present only a limited amount of detail so as to set forth the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the petition survives initial review, it advances, as defendant's petition did here, to the second stage, where the trial court appoints counsel for the defendant, if necessary (725 ILCS 5/122-4 (West 2002)), and the State may file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2002)).

¶ 26 At the second stage of the proceedings, “[i]f the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage.” *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009). To survive dismissal, the petition must make a substantial showing of a constitutional violation. *Edwards*, 197 Ill. 2d at 246. The trial court is foreclosed from engaging in any fact finding at this stage, because all well-pleaded facts are to be taken as true, unless they are rebutted by the record. *Wheeler*, 392 Ill. App. 3d at 308. A postconviction petitioner is not entitled to an evidentiary hearing as a matter of right, and, to require an evidentiary hearing, the petition’s allegations must be supported by the record or by accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 27 Turning to the focus of defendant’s appeal, in a postconviction proceeding, there is no constitutional right to the assistance of counsel; rather, the right to counsel is wholly statutory. *Suarez*, 224 Ill. 2d at 42; see 725 ILCS 5/122-4 (West 2002). Petitioners are entitled only to the level of assistance provided by the Act, which provides for a reasonable level of assistance. *People v. Turner*, 187 Ill. 2d 406, 410 (1999); *People v. Flores*, 153 Ill. 2d 264, 276 (1992). To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes three duties on postconviction counsel. The record or a filed certificate must disclose that postconviction “counsel: (1) consulted with the petitioner [by mail or in person] to ascertain [the petitioner’s] contentions of constitutional deprivation; (2) examined the record of the proceedings of the original trial; and (3) made any amendments to the *pro se* petition necessary to adequately present the petitioner’s constitutional contentions.” *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Compliance with the rule is mandatory and, as noted, may be shown by a certificate filed by postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007).

¶ 28 Here, postconviction counsel filed a certificate pursuant to Rule 651(c), asserting that she consulted by mail with defendant concerning the allegations in his postconviction petition; that she examined the record of proceedings at the trial; and that she sent an amended petition to defendant and that he “indicated his approval of it and signed it.” The filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). A defendant may overcome this presumption by demonstrating counsel’s failure to substantially comply with the duties mandated by the rule. See *People v. Richardson*, 382 Ill. App. 3d 248, 257 (2008).

¶ 29 Defendant argues that postconviction counsel violated Rule 651(c) by failing to amend his *pro se* petition to present defendant’s fourth amendment claim in appropriate legal form, where counsel allowed the claim to be forfeited by failing to allege that *appellate* counsel was ineffective for not raising it. We agree.

¶ 30 Generally, where postconviction claims could have been raised on direct appeal but were not, they are forfeited. *Turner*, 187 Ill. 2d at 412-13. However, if postconviction counsel amends the postconviction petition to allege ineffective assistance of *appellate* counsel for failing to raise the petitioner’s claims on direct appeal, the claims are not procedurally barred. *Id.* at 413.

¶ 31 Here, in his *pro se* postconviction petition, defendant raised the claim that he was denied his right to effective assistance of *both trial and appellate counsel*, where counsel failed to raise the *Terry* issue. In her amended postconviction petition, postconviction counsel alleged only that *trial* counsel was ineffective in several respects, including for failing to raise the *Terry* issue. Postconviction counsel’s failure constitutes unreasonable assistance under Rule 651(c). See *People v. Kluppelberg*, 327 Ill. App. 3d 939, 947 (2002) (postconviction counsel’s failure to allege

“appellate counsel’s ineffectiveness, especially where it was properly alleged in the *pro se* petition, was patently unreasonable”); see also *Turner*, 187 Ill. 2d at 413-14 (holding that postconviction counsel’s failure to allege ineffective assistance of appellate counsel “prevented the circuit court from considering the merits of petitioner’s claims and directly contributed to the dismissal of the petition without an evidentiary hearing” and noting that postconviction counsel’s failure to “make a routine amendment to [a] post-conviction petition which would overcome the procedural bar of waiver” constitutes unreasonable assistance in violation of Rule 651(c)).

¶ 32 The State urges that defendant suffered no prejudice, because the trial court, in addition to determining that the *Terry* issue was forfeited, also considered the merits of the claim, which the State asserts (at length) the court correctly found lacking. Our supreme court has rejected this argument. See *Turner*, 187 Ill. 2d at 415-16 (rejecting State’s argument that the petitioner failed to demonstrate prejudice because his underlying claim lacked merit; noting that “the prejudice to petitioner is palpable” by postconviction counsel’s failure to overcome forfeiture; also, refusing to speculate whether the trial court would have dismissed the petition if counsel had adequately performed his duties under Rule 651(c)); see also *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 18 (“a defendant is not required to make a positive showing that his counsel’s failure to comply with Rule 651(c) caused prejudice”). Compliance with Rule 651(c) must be shown regardless of whether the claims made in the petitioner’s *pro se* or amended postconviction petition are viable. *Suarez*, 224 Ill. 2d at 47, 51-52 (“remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit”). This is so because the rationale behind the rule is that the limited right to counsel under the Act cannot be fully realized where postconviction counsel does

not adequately complete his or her duties under the rule. *Id.* at 43-44, 51 (rejecting claim that postconviction counsel fulfilled the duty to consult with the defendant, where counsel merely filed a supplemental petition that re-alleged the defendant’s claims “in more detail” and made “legal arguments that were lacking in the *pro se* petition” but consisted of only general allegations to support a new claim). Noncompliance with Rule 651(c) may not be excused on the basis of harmless error. *Id.* at 52.

¶ 33 Finally, we note that, because we are remanding on the basis of postconviction counsel’s failure to allege appellate counsel’s ineffectiveness and for failing to attach to the petition certain documentation, we need not address defendant’s remaining arguments. *Kluppelberg*, 327 Ill. App. 3d at 947-48 (declining to address remaining issues and remanding for appointment of new postconviction counsel and to allow the petitioner to replead his postconviction petition).

¶ 34

III. CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court of Winnebago County is reversed and the cause is remanded to the circuit court with directions to appoint new postconviction counsel and that petitioner be allowed to replead his postconviction petition.

¶ 36 Reversed and remanded with directions.