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2012 IL App (3d) 100099-U

Order filed March 22, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellee,)	Rock Island County, Illinois,
)	
v.)	Appeal No. 3-10-0099
)	Circuit No. 04-CF-307
)	
ANTWAN D. PRICE,)	Honorable
)	Walter D. Braud,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Vicki Wright concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held:* The record does not establish that defendant's postconviction counsel failed to comply with the requirements of Illinois Supreme Court Rule 651(c).

¶ 2 Defendant, Antwan D. Price, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)) and aggravated battery (720 ILCS 5/12-4(b)(1) (West 2004)). Following his conviction and sentence, defendant filed a postconviction petition that was denied by the trial court after an evidentiary hearing. Defendant appeals, arguing that his postconviction counsel

¶ 15 JUSTICE O'BRIEN, dissenting:

¶ 16 I respectfully dissent from the majority because I believe the record demonstrates that post conviction counsel did nothing to investigate the petitioner's claim of systematic under representation of African-Americans from jury venire in Rock Island County. The majority correctly notes that counsel is not required to advance frivolous or spurious claims on defendants' behalf. *People v. Pendelton*, 223 Ill. 2d 458 (2006). However, some investigation is necessary to determine whether the claim has merit or is frivolous. Here, the record demonstrates that counsel did nothing to determine the veracity of the claim. To that end, I would find the complete lack of any investigation on petitioner's behalf by counsel soundly rebuts the presumption of compliance with the rule of this matter created by counsel when completed Rule 651 (c) certificate was filed.

¶ 17 I therefore conclude that counsel has not fulfilled his duties under the rule. I would reverse the decision of the circuit court and remand the matter for appointment of new post conviction counsel and a new evidentiary hearing.

failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We affirm.

¶ 3

FACTS

¶ 4 Defendant, an African-American, was charged with one count of first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)) and one count of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2004)). The cause proceeded to a jury trial. No member of the jury venire was a minority. Ultimately, the jury found defendant guilty of both counts. The trial court sentenced defendant to 38 years for first degree murder and 4 years for aggravated battery. Defendant's conviction and sentence were affirmed by this court in *People v. Price*, No. 3-05-0190 (2006) (unpublished order under Supreme Court Rule 23).

¶ 5 On December 3, 2007, defendant filed a timely *pro se* postconviction petition. Counsel was appointed, and an amended petition was filed on July 6, 2009. The amended petition raised two issues: (1) that trial counsel was ineffective for, among other things, failing to call Sara Wiestart as a witness and failing to remove inattentive and sleeping jurors; and (2) that defendant's right to equal protection was violated because there were no African-Americans on the jury venire or petit jury.

¶ 6 Along with the amended petition, postconviction counsel filed a form stating that he had complied with the requirements of Illinois Supreme Court Rule 651(c). Counsel also incorporated the exhibits defendant had attached to his *pro se* petition. Those exhibits included an affidavit attesting to the fact that there were no minority jurors at defendant's trial and census data from the year 2000 showing that African-Americans account for 7.5%, and minorities 12.6%, of Rock Island County's population.

¶ 7 Following a review of counsel's amended petition, the trial court granted defendant an

evidentiary hearing. At the hearing, the court initially addressed the claim that defendant was denied a fair trial because of racial discrimination in the composition of the jury pool.

Postconviction counsel and the State presented arguments, and the court ruled for the State. The hearing continued with the defense calling two witnesses. Postconviction counsel elicited testimony from defendant that he felt he did not receive a trial by a jury of 12 people because one of the jurors had fallen asleep. Defendant also testified as to why Wiestart's testimony would have been exculpatory. At the conclusion of the evidentiary hearing, the court dismissed defendant's petition. Defendant appeals.

¶ 8

ANALYSIS

¶ 9 Defendant argues that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec.1, 1984). Specifically, defendant argues that counsel: (1) did not investigate or produce any evidentiary support for the claim that defendant was denied a fair trial because the jury venire contained no African-Americans; (2) inexplicably elicited testimony from defendant that undermined a claim raised in the amended petition; and (3) failed to attach an affidavit from Wiestart to the amended petition.

¶ 10 A defendant in a postconviction proceeding is entitled to a reasonable level of assistance. *People v. Munson*, 206 Ill. 2d 104 (2002). Counsel's duties, pursuant to Rule 651(c), include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the proceedings at the trial, and amendment of the petition, if necessary, to ensure that the defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458 (2006). The assistance required at the postconviction stage is less than that afforded by the federal or state constitutions; thus, postconviction counsel is only required to

investigate and properly present the petitioner's claims. *Id.* Counsel is not required to advance frivolous or spurious claims on defendant's behalf. *Id.* Further, counsel's filing of a Rule 651(c) certificate creates a presumption of compliance with the rule that defendant can overcome if the record indicates that counsel did not comply with the rule. *People v. Perkins*, 229 Ill. 2d 34 (2007).

¶ 11 Here, we do not believe that anything in the record contradicts counsel's certificate asserting that he had complied with the requirements of Rule 651(c). Nothing in the record indicates that postconviction counsel failed to investigate defendant's claims regarding the lack of African-Americans on the jury venire. There is no indication that relevant evidence actually existed that counsel failed to present, and he certainly was not required to make up evidence. Further, we do not find that counsel's questioning of defendant or the lack of an affidavit from Wiestart made counsel's performance unreasonable. Therefore, we must give effect to counsel's official representation that he had complied with the requirements of Rule 651(c) and conclude that he fulfilled his duties under the rule.

¶ 12 CONCLUSION

¶ 13 The judgment of the circuit court of Rock Island County is affirmed.

¶ 14 Affirmed.