2013 IL App (1st) 120374-U

THIRD DIVISION
June 12, 2013

No. 1-12-0374

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. 03 CR 3929
	)	
GEORGE MACK,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Neville and Justice Sterba concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant was not denied the reasonable assistance of postconviction counsel when, after investigating defendant's claim of ineffective assistance of trial counsel and finding nothing to support the claim, counsel chose not to amend defendant's *pro se* postconviction petition. The fees imposed for filing a pleading which lacks a basis in law and fact must be vacated when this court previously remanded the cause for second-stage proceedings under the Post-Conviction Hearing Act.

¶ 2 Defendant George Mack 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 2006)). On appeal, he contends that postconviction counsel provided unreasonable assistance pursuant to

Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to obtain and attach defendant's affidavit to the instant petition. He also contests the imposition of certain fees imposed pursuant to section 22-105 of the Code of Civil Procedure (the Code) (735 ILCS 5/22-105 (West 2010)). We affirm and vacate the fees.

¶ 3 Following a bench trial, defendant was convicted of armed robbery, aggravated unlawful restraint, and two counts of aggravated battery. He was subsequently sentenced to four concurrent 27-year prison terms. On appeal, this court vacated one of the aggravated battery convictions and remanded the cause for resentencing on the aggravated unlawful restraint conviction and the remaining aggravated battery conviction. See *People v. Mack*, No. 1-04-0951 (2005) (unpublished order under Supreme Court Rule 23). On remand, defendant was resentenced to two concurrent five-year terms of imprisonment. These sentences were to run concurrent to the previously imposed 27-year sentence for armed robbery.

¶ 4 In 2007, defendant filed a *pro se* postconviction petition alleging, *inter alia*, that he was denied effective assistance of counsel when trial counsel did not disclose a plea bargain. Specifically, the petition alleged that immediately before trial, trial counsel told defendant that the State wanted to offer defendant a "cop out." Although counsel then went to speak with the State, counsel never relayed the details of the plea offer to defendant, and defendant was never given the opportunity to accept or reject the plea offer, which defendant was "quite sure" was less than 27 years. The handwritten petition ended with the following statement, "I swear that the facts stated in this petition are true and correct in substance and in fact." The petition was signed and notarized. The circuit court subsequently summarily dismissed the petition as frivolous and patently without merit. On appeal, this court reversed that judgment and remanded for second-stage proceedings under the Act. See *People v. Mack*, No. 1-08-1266 (2010) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, the petition was docketed and postconviction counsel was appointed. In April 2011, postconviction counsel filed a certificate pursuant to Rule 651(c), stating that he had consulted with defendant and examined the record and defendant's *pro se* petition. Counsel asserted that he would not be filing an amended petition because the *pro se* petition adequately presented defendant's issues for review. The State then filed a motion to dismiss.

¶ 6 At a hearing on the State's motion, postconviction counsel informed the court that trial counsel's affidavit was not before the court because trial counsel had "no recollection" of an offer being made. Postconviction counsel's review of trial counsel's trial file and the court clerk's computer system did not contain any indication regarding an offer. During the course of his investigation, postconviction counsel also spoke to an assistant State's Attorney and reviewed the State's trial notebook, however, he found no evidence of "any kind of an offer being made." Postconviction counsel indicated that his investigation was complete and that he had found "nothing" that supported defendant's claims. Therefore, postconviction counsel rested on defendant's *pro se* postconviction petition.

¶ 7 In granting the State's motion to dismiss the circuit court stated, in pertinent part, that defendant had failed to provide a basis to support his claim of ineffective assistance of counsel. The court then assessed defendant $105 in fees pursuant to section 22-105 of the Code (735 ILCS 5/22-105 (West 2010)), based upon the court's finding that the claims raised in defendant's petition were frivolous and patently without merit.

¶ 8 On appeal, 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.

¶ 9 This court reviews an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 10 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore,* 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (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 to present the defendant's claims to the court. The purpose of the rule is to ensure that postconviction counsel shapes a defendant's allegations into a proper legal form and then presents them to the court. *Profit*, 2012 IL App (1st) 101307, ¶ 18. An attorney's substantial compliance with the rule is sufficient. *Profit*, 2012 IL App (1st) 101307, ¶ 18.

¶ 11 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). A defendant has the burden to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 12 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, thus creating a presumption that defendant received the representation required by the rule at the second stage of proceedings. *Rossi*, 387 Ill. App. 3d at 1060. However, defendant contends that he has rebutted the presumption of substantial compliance when counsel failed to make certain necessary amendments to his *pro se* postconviction petition. Specifically, he contends that he was denied reasonable assistance of postconviction counsel when counsel failed to obtain defendant's

affidavit in support of his postconviction claims. Defendant contends that the absence of such an affidavit was fatal to his postconviction petition.

¶ 13 The State responds that postconviction counsel complied with his duties pursuant to Rule 651(c) when, after investigating defendant's claim of ineffective assistance of trial counsel and finding "nothing" to support defendant's claims, counsel chose not to amend defendant's *pro se* petition. In other words, the State argues that because postconviction counsel's investigation failed to discover any support for defendant's claims, it was not unreasonable for postconviction counsel not to obtain defendant's affidavit. We agree.

¶ 14 The "question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably." *Profit*, 2012 IL App (1st) 101307, ¶ 23. Our supreme court has held that counsel's fulfilment of his duties under Rule 651(c) does not require counsel to advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). In fact, if amendments to a *pro se* postconviction petition "would only further a frivolous or patently nonmeritorious claim, they are not 'necessary' within the meaning of the rule." *Greer*, 212 Ill. 2d at 205. Thus, the determination of whether counsel acted unreasonably rests upon whether the claim at issue had merit. See *Profit*, 2012 IL App (1st) 101307, ¶ 23.

¶ 15 Here, defendant's *pro se* petition alleged, *inter alia*, that although trial counsel told him that the State wanted to offer defendant a "cop out," counsel never shared any details of the offer with defendant or gave him the chance to accept or reject the offer. However, trial counsel told postconviction counsel that he had "no recollection" of an offer, and postconviction counsel was unable to discover any notes or indications of an offer in either trial counsel's trial notes, the State's trial notebook or the clerk of court's computer system. Thus, counsel did not amend the instant petition and explained why trial counsel's affidavit was not attached. See *People v. Hall*, 217 Ill. 2d 324, 333 (2005) (the failure to attach independent corroborating documentation or

explain its absence may be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, in addition to his own, was that of his attorney).

¶ 16 In the case at bar, postconviction counsel did not merely stand on defendant's petition; rather, he informed the court of his investigation and its results. As postconviction counsel's investigation revealed nothing to support defendant's claim of ineffective assistance of counsel, he properly informed the circuit court of this fact. See *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (when postconviction counsel investigates a defendant's claims and finds them without merit, it is acceptable to stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended). Although postconviction counsel must amend a *pro se* petition in order to shape the defendant's claims into proper legal form (*People v. Perkins,* 229 Ill. 2d 34, 43-44 (2007)), counsel's failure to supply certain affidavits or other evidence in support of the petition will not, in itself, rebut the presumption that arises from the Rule 651(c) certificate. Rather, ordinarily, a court ruling on a motion to dismiss a petition which is not supported by affidavits or other documents may reasonably presume that counsel undertook "a concerted effort" to obtain affidavits in support of the defendant's postconviction claims, but was unable to do so. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993); see also *People v. Kirk,* 2012 IL App (1st) 101606, ¶ 25. Here, because the results of counsel's investigation revealed that no one could corroborate defendant's contention that the State wanted to offer him a "cop out," counsel did not amend the petition or present affidavits in support of defendant's claim to the court. Under these circumstances, defendant has not rebutted the presumption that counsel provided reasonable assistance under Rule 651(c). *Rossi*, 387 Ill. App. 3d at 1060.

¶ 17 Defendant, however, relies on *People v. Hall,* 217 Ill. 2d 324, 336 (2005), to argue that if postconviction counsel had obtained his affidavit this matter would have proceeded to an

evidentiary hearing because the State assumed the truth of defendant's factual allegations by moving to dismiss the petition.

¶ 18 In that case, the defendant argued that the circuit court erred in dismissing his petition because he made a substantial showing that his guilty plea was involuntary when his attorney erroneously advised him that he did not have a valid defense to aggravated kidnaping based on a lack of knowledge that a child was inside the car at issue. The allegations in his petition and affidavit "described in detail" meetings at which only he and his attorney were present. *Hall,* 217 Ill. 2d at 333. Our supreme court determined that the petition had been dismissed in error because taking the defendant's factual allegation as true, something that the State did by filing a motion to dismiss the petition, defendant had articulated a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d 335-36.

¶ 19 Although *Hall* recognized that a petition supported solely by a defendant's affidavit may be sufficient to establish a substantial showing of a constitutional violation, contrary to defendant's assertion, that case does not require that postconviction counsel must file such an affidavit in order to provide reasonable assistance. We cannot conclude that the failure to present an affidavit was unreasonable under the facts of this case simply because an affidavit from the defendant was sufficient to warrant an evidentiary hearing under the facts of that case.

¶ 20 Finally, this court rejects defendant's contention that because postconviction counsel chose not to amend the instant petition, counsel should have filed a motion to withdraw as counsel pursuant to *People v. Greer,* 212 Ill. 2d 192 (2004). In *Greer,* our supreme court noted that it was not clear that postconviction counsel's inability to obtain affidavits in support of a defendant's *pro se* claims would justify a motion to withdraw. *Greer*, 212 Ill. 2d at 211-12 ("the inability of postconviction counsel to 'properly substantiate' a defendant's claims is *not* the standard by which counsel should judge the viability of a defendant's postconviction claims"

(emphasis in original)). In other words, although *Greer* permits postconviction counsel to withdraw, it does not require such an action merely because counsel cannot obtain affidavits in support of a defendant's postconviction claims.

¶ 21 In the case at bar, postconviction counsel filed a Rule 651(c) certificate, thus triggering the presumption that defendant received the representation that the rule requires him to receive during second stage proceedings under the Act (*Rossi*, 387 Ill. App. 3d at 1060), and, as discussed above, defendant has failed to rebut this presumption (see *Profit*, 2012 IL App (1st) 101307, ¶ 19). Consequently, defendant has failed to establish that he was denied the reasonable assistance of postconviction counsel (*Moore,* 189 Ill. 2d at 541), and the dismissal of defendant's petition was proper.

¶ 22 Defendant next contends, and the State concedes, that the circuit court erred when it imposed fees in the amount of $105 pursuant to section 22-105 of the Code (see 735 ILCS 5/22-105 (West 2010)), because this court had previously determined that the instant petition was not frivolous and patently without merit and remanded for second-stage proceedings under the Act. We agree. Based upon this court's prior finding that this cause should proceed to second-stage proceedings under the Act (see *Mack*, No. 1-08-1266, Order at 8), the $105 in fees imposed pursuant to section 22-105 must be vacated as these fees may only be assessed for filing a pleading that lacks a basis in law or fact. 735 ILCS 5/22-105(b)(1) (West 2010). Therefore, this court vacates the fees.

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Cook County and vacate the $105 in fees imposed pursuant to section 22-105 of the Code.

¶ 24 Affirmed; fees vacated.