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2016 IL App (3d) 140093-U

Order filed April 25, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0093
STEVEN D. PARKS,)	Circuit No. 09-CF-128
Defendant-Appellant.)	Honorable Walter D. Braud, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice O'Brien concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held:* The defendant received unreasonable assistance of postconviction counsel, and the cause is remanded for second-stage proceedings.

¶ 2 The defendant, Steven D. Parks, appeals from the second-stage dismissal of his postconviction petition arguing that he received unreasonable assistance of postconviction counsel and the trial court erred in dismissing his petition.

¶ 3 **FACTS**

¶ 4 In 2009, the defendant was charged by information with driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2), (c)(1) (West 2008)). At the same time, the defendant was facing other charges, including a charge of driving while his license was suspended (DWLS). The defendant pled guilty to the DUI and DWLS charges in September 2009. As part of the fully negotiated guilty plea, the other charges were dismissed and the defendant was sentenced to concurrent sentences of three years' imprisonment for DUI and nine months' imprisonment for DWLS. The defendant did not move to withdraw his plea or pursue a direct appeal.

¶ 5 On March 26, 2010, the defendant filed a *pro se* postconviction petition. The petition proceeded to the second stage because the court failed to rule on it within 90 days. See 725 ILCS 5/122-2.1(a) (West 2010). Postconviction counsel filed an amended petition on December 11, 2012, alleging a single claim of ineffective assistance of counsel stating trial counsel "failed to inform [the defendant] that entering into this plea agreement would cause his driver's license to be revoked for life" and because of this failure, the defendant "entered into the plea agreement unaware of an important collateral consequence of the plea, thereby rendering the plea unintelligently and unknowingly made." The petition stated that because the plea was not intelligently and knowingly made, it was involuntary and void. The petition further incorporated an affidavit that the defendant had attached to his *pro se* petition, which stated that the defendant had read and understood the petition and that all the facts presented were true and correct. Postconviction counsel did not attach any other evidence or affidavits to the amended petition.

¶ 6 The State filed an answer to the amended petition indicating: (1) it had no knowledge of whether the defendant's license was actually revoked for the rest of his life; (2) the defendant's trial counsel could not recall whether he discussed with the defendant the effect of his

conviction; and (3) trial counsel was under no obligation to inform the defendant the effect the conviction would have on his license as it would be a collateral consequence.

¶ 7 Upon hearing argument, the court dismissed the defendant's petition. The defendant appealed and was appointed an attorney from the Office of the State Appellate Defender. The defendant's appointed appellate counsel filed a motion for leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging that an appeal of the case would be frivolous. This court denied the motion.

¶ 8 ANALYSIS

¶ 9 On appeal, the defendant argues that his postconviction counsel provided an unreasonable level of assistance in amending the postconviction petition. We review the second-stage dismissal of a postconviction petition and postconviction counsel's compliance with Rule 651(c) *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 10 A defendant who is appointed counsel for his postconviction proceedings is entitled to a "reasonable level of assistance" of counsel. *Suarez*, 224 Ill. 2d at 42. To attain this "reasonable level of assistance" (*id.*), Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) imposes specific duties that postconviction counsel must follow. Specifically, counsel must show that he or she has: (1) consulted with the defendant to ascertain his constitutional claims; (2) examined the record of trial proceedings; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's claims. *Id.*

¶ 11 Our supreme court has held that remand is required where postconviction counsel failed to fulfill any of these duties, regardless of whether the claims raised in the petition had merit as "where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized." *Suarez*, 224 Ill. 2d at 51.

¶ 12 The single claim alleged in the defendant's amended postconviction petition was ineffective assistance of trial counsel for the failure of trial counsel to inform the defendant that he would be subject to the lifetime revocation of his driver's license. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "A defendant must show there is a reasonable probability that, but for his attorney's errors, he would not have pleaded guilty but would have proceeded with a trial." *People v. Ross*, 2015 IL App (3d) 130077, ¶ 14 (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

¶ 13 The defendant initially alleges that postconviction counsel was unreasonable for failing to make the required showing of prejudice in his ineffective assistance of trial counsel claim. Specifically, the defendant claims that postconviction counsel did not amend the petition to allege that the defendant would have taken the case to trial if counsel had properly informed him of the lifetime driver's license revocation nor did he include an affidavit from the defendant to this effect.

¶ 14 Here, the defendant's amended postconviction petition does not allege that the defendant would not have pled guilty had his trial counsel informed him of the lifetime driver's license revocation. Further, postconviction counsel did not attach an affidavit from the defendant stating that he would have gone to trial if he was aware of the consequences of his plea. Significantly, counsel also failed to state why he did not attach such an affidavit to the amended petition. See 725 ILCS 5/122-2 (West 2012) (a postconviction petition must include affidavits, records, or other evidence supporting the allegations or shall state why the same are not attached). As such, the defendant's claim of ineffective assistance of trial counsel was insufficient on a pleading

basis as it failed to allege prejudice. The result of this failure is that the amended petition was subject to dismissal on this pleading ground alone. Stated another way, postconviction counsel's failure resulted in defendant's claim being tendered to the court in a facially defective fashion.

¶ 15 While we acknowledge that postconviction counsel submitted a Rule 651(c) certificate, we find the above facts rebut the presumption of compliance with the rule. See *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 16 ("The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance."). "[T]he purpose of Rule 651(c) is to ensure that postconviction counsel: (1) ascertains the bases of the postconviction petitioner's complaints, (2) shapes those complaints into proper legal form, and (3) presents those complaints to the court." *People v. Rossi*, 387 Ill. App. 3d 1054, 1058 (2009) (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003)). By failing to allege prejudice or include a supporting affidavit, postconviction counsel failed to shape the claim of ineffective assistance of trial counsel into proper form and thus did not comply with the requirements of Rule 651(c). See *Ross*, 2015 IL App (3d) 130077, ¶ 16-20 (postconviction counsel failed to adequately present the defendant's claim for ineffective assistance of trial counsel where counsel did not amend the defendant's *pro se* petition to include an affidavit or any evidence establishing prejudice). Accordingly, we find that the representation of postconviction counsel was unreasonable.

¶ 16 In coming to this conclusion, we also find postconviction counsel was unreasonable for failing to provide any evidence that the driver's license of the defendant was in fact revoked for life. Counsel's amended petition did not give any reason for the omission. See 725 ILCS 5/122-2 (West 2012). In order to adequately present the defendant's claim, counsel should have included evidence to show that the defendant was actually subject to the lifetime driver's license

revocation. Absent such evidence, the defendant cannot establish actual prejudice. The amended petition is facially defective on this basis as well.

¶ 17 Lastly, both the defendant and the State tender extensive arguments with regard to whether the lifetime revocation of the driver's license of the defendant is a direct or collateral consequence of the guilty plea. As postconviction counsel failed to comply with the procedural mandate of Rule 651(c), we do not reach this substantive question. *Suarez*, 224 Ill. 2d at 47-51. Because postconviction counsel provided unreasonable assistance in failing to comply with Rule 651(c), we reverse the court's dismissal and remand the cause with directions to appoint new postconviction counsel and conduct *de novo* second-stage proceedings. Pursuant to *Suarez*, we remand solely for compliance with Supreme Court Rule 651(c) and do not consider whether the claims raised in the petition had merit. See *id.*

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Rock Island County is reversed and remanded with directions.

¶ 20 Reversed and remanded with directions.

¶ 21 JUSTICE WRIGHT, dissenting.

¶ 22 I respectfully dissent on two grounds. First, the record on appeal reveals defense counsel's actions substantially complied with the requirements of Rule 651(c). Therefore, I cannot agree that remand is in order.

¶ 23 Next, I will optimistically assume, for the sake of argument, that defendant is correct and his Illinois driver's license will be revoked for the balance of his lifetime. However, based on defendant's very poor driving record, I respectfully observe that defendant's privilege to drive was revoked, perhaps for his lifetime, before the negotiated agreement was presented to the trial

court in this case. For example, the record on appeal reveals that defendant's driving record before this felony DUI, included three DUI convictions from 1988, 1990, and 1991 and a fourth 2004 conviction for OWI in the State of Iowa. Was defendant truly surprised to learn that his fifth DUI offense, committed while he was released on bond for DWLR in case No. 08-CF-0633, would extend the duration of his revoked privilege to drive?

¶ 24 In addition, I note that the negotiated agreement in this case added a 2008 misdemeanor DWLR in case No. 08-CF-0633 together with another 2009 DWLR conviction in case No. 09-TR-2925. Importantly, defendant has not challenged the propriety of his latest 2008 and 2009 DWLR convictions. Based on common sense alone, I respectfully suggest the additional 2008 and 2009 misdemeanor convictions for DWLR would have resulted in the same serious, but collateral consequences, to defendant's inability to have his driving privileges reinstated during his lifetime.

¶ 25 Regardless, existing case law did not require defense counsel to advise his client that the revocation of his privilege to drive would be indefinitely extended following a conviction for his fifth DUI. For these reasons, I respectfully dissent.