2016 IL App (3d) 140437-U

Order filed August 5, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0437
v.	)	Circuit No. 08-CF-62
	)	
MONTERIUS HINKLE,	)	Honorable
	)	David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice O'Brien and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel failed to provide reasonable assistance in compliance with Illinois Supreme Court Rule 651(c) where he failed to amend the defendant's *pro se* postconviction petition to adequately present the defendant's claim that plea counsel erroneously advised him that his sentences in two other cases would run concurrently with his sentence in the instant case. Postconviction counsel did not act unreasonably in failing to amend the defendant's *pro se* petition to include a claim that the trial court considered the wrong sentencing range.

¶ 2 The defendant, Monterius Hinkle, appeals the dismissal of his postconviction petition at the second stage of proceedings. We reverse and remand with directions that the circuit court

allow the defendant the opportunity to replead his postconviction petition with the assistance of new counsel.

¶ 3 FACTS

¶ 4 The defendant was charged by indictment with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2008)); criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)); and unlawful restraint (720 ILCS 5/10-3 (West 2008)). The public defender was appointed.

¶ 5 The defendant entered into a partially negotiated guilty plea agreement in which he pled guilty to aggravated criminal sexual assault in exchange for the State's dismissal of the other two counts. The plea agreement did not include any sentencing provision. At the plea hearing, the following exchange occurred:

> "THE COURT: *** [I]s anyone forcing you, threatening you or coercing you to get you to come to court and plead guilty?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Are you making this decision of your own free will?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Has anyone made any promises to you whatsoever on the possible sentence, or assured you what any sentence is going to be?
>
> THE DEFENDANT: No, sir."

¶ 6 As the factual basis of the plea, the prosecutor stated that the victim would testify that she was 16 years old at the time of the offense. The victim was walking to school one morning when the defendant grabbed her and dragged her through an alley into a house. Inside the house, the defendant choked the victim, forced her to perform oral sex on him, forced her to have sexual intercourse with him, and performed oral sex on her. The defendant let the victim go. The

victim went to a friend's house, called the police, and went to the hospital. The State would also present evidence that a swab taken of a bruise on the victim's breast contained the defendant's DNA.

¶ 7 A sentencing hearing was held. The prosecutor stated that the defendant's possible sentencing range was 15 to 30 years' imprisonment, and requested that the trial court sentence the defendant toward the high end of the range. The trial court sentenced the defendant to 26 years' imprisonment. The trial court reasoned:

> "The Court also in every particular offense views the nature and circumstances of the offense and what this type of offense is. It certainly has built-in serious sentencing factors, the sentencing parameters here being what they are. So to a great extent the legislature takes that into consideration in designing this Class X felony with a very high minimum sentence, even for someone who is before the Court on his first adult felony conviction at age 21."

¶ 8 On appeal, the defendant argued that the trial court improperly considered pending charges against the defendant in aggravation when sentencing him. We affirmed the defendant's conviction and sentence. *People v. Hinkle*, No. 3-09-0164 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 The defendant filed a *pro se* postconviction petition, alleging that he received ineffective assistance of his plea counsel on various grounds. The defendant cited case law setting forth the legal standard for an ineffective assistance of counsel claim. In his petition, the defendant alleged, *inter alia*, that plea counsel was deficient in that he: (1) failed to communicate with the defendant; and (2) incorrectly advised the defendant that he could not raise a claim of ineffective assistance of counsel in a motion to withdraw guilty plea. The petition also stated:

> "Counsel at scheduled court appearances for a change of venue, would only tell the petitioner 'I don't know what to do', 'I have never had a case like this' and 'That the best thing to do was to take a Blind Plea and that whatever sentencing is received, the other two cases would be ran concurrent'."

¶ 10 The petition also stated:

> "So feeling that Defense counsel 'Would Not Defend Him' the petitioner felt compelled to plead guilty in hope that the court would sentence the petitioner to a minimum sentence and that the pending cases would be ran concurrent with whatever the judge sentenced the petitioner too [*sic*] in [the instant case] ***."

¶ 11 The defendant also executed an affidavit, which he filed with his *pro se* postconviction petition. In his affidavit, the defendant stated that his plea counsel did not respond to the defendant's letters or visit him in jail to discuss his case; rather, the only time the defendant spoke with plea counsel was at court during hearings. The defendant also stated that plea counsel advised him that "the best thing [they] could do is take a blind plea and whatever sentencing [the defendant] received on this [case], the other two cases would be ran concurrent." The defendant further explained: "I wasn't promised that the other two cases would be ran concurrent as part of my deal, my attorney just told me that is what would happen. So when asked by the Court, I didn't say the state promised my anything in exchange for my guilty plea ***."

¶ 12 Approximately four months after the defendant filed his *pro se* postconviction petition, the trial court appointed the public defender and docketed the petition for further proceedings. The State filed a motion to dismiss, arguing that: (1) the record belied the defendant's claims; (2)

the defendant forfeited his claims of error; and (3) the defendant's claim of ineffective assistance of counsel failed both prongs of the *Strickland* analysis.

¶ 13 The defendant's postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he had: (1) consulted with the defendant in person and by telephone to ascertain the defendant's contentions of error; (2) examined the record of proceedings in the trial court; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's claims. Postconviction counsel did not file an amended petition.

¶ 14 At a hearing held on the State's motion to dismiss, postconviction counsel stated:

> "The only thing additional that I would comment on is in particular, I'd direct the Court's attention to the middle of Page 2 of the attached affidavit, which is [the defendant's] own affidavit. There is some reference to a claim or promise that was made to him by his defense attorney in regards to whether the sentence in this case would run concurrently with the sentence in two other pending rape cases that were charged and pending at the time; and I'd also highlight that when I reviewed the transcript of the partial plea agreement in regards to this case and this rape charge, I didn't see any mention by the trial judge questioning my client as to whether there were any promises made or secret promises or anything, so I think that may raise an issue and may be meritorious of a third-stage hearing to flush that out; but as to all the other issues, I'd simply stand on his petition and ask that the Court grant it and dismiss the State's motion to dismiss."

¶ 15 After taking the matter under advisement, the trial court entered a written ruling granting the State's motion to dismiss. With regard to the defendant's claim that his plea counsel told him

that his sentences in pending cases would run concurrently with his sentence in the instant case, the trial court reasoned:

> "Defendant appears to assert that his counsel incorrectly told him his sentences on other cases would run concurrent with any sentence he received in this case. At this stage of the proceedings, the court must accept as true this allegation. However, in order for Defendant's claim to survive a Second Stage motion to dismiss, he must make a showing of both prongs under the *Strickland* test. Defendant fails to make any showing, even by mere allegation, that this advice was incorrect. Absent some type of showing that he received something other than concurrent sentences on the other case(s), he has failed to make a showing of either prong of the *Strickland* test. Therefore, there is no need for an evidentiary hearing on this portion of his claim."

¶ 16 The defendant appealed, and the Office of the State Appellate Defender (OSAD) was appointed as counsel. Appointed counsel filed a motion for leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), arguing that an appeal in this case would be frivolous. We denied OSAD's motion and ordered OSAD to brief the issue of whether postconviction counsel provided unreasonable assistance in failing to amend the *pro se* petition to adequately set forth the claim that plea counsel provided ineffective assistance in erroneously advising the defendant that the sentences in his other cases would run concurrently with the sentence in the instant case. We also directed OSAD to brief the issue of whether the defendant made a substantial showing of ineffective assistance of plea counsel based on counsel's alleged failure to communicate with the defendant or, alternatively, whether postconviction counsel

could have amended the *pro se* petition to make a substantial showing of ineffective assistance of counsel.

¶ 17 ANALYSIS

¶ 18 On appeal, the defendant argues that he was denied the reasonable assistance of postconviction counsel in that counsel failed to amend the defendant's *pro se* postconviction petition.

¶ 19 The defendant first argues that postconviction counsel provided unreasonable assistance in failing to amend his *pro se* postconviction petition to adequately set forth his claim that his plea counsel provided ineffective assistance in erroneously advising him that his upcoming sentences in two other pending cases would run concurrently with his sentence in the instant case. Stated another way, the defendant contends plea counsel's advice at the time the defendant entered his plea—namely, that the sentences in the defendant's other then-pending cases would run concurrently with his sentence in the instant case—was ultimately incorrect as the defendant was subsequently ordered to serve his other sentences consecutively with his sentence in this case. The defendant concludes postconviction counsel's failure to amend his *pro se* petition to allege he subsequently received consecutive sentences in his other pending cases was unreasonable.

¶ 20 Our supreme court has held that "a defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006) (citing *People v. Munson*, 206 Ill. 2d 104, 137 (2002)). At the second stage of postconviction proceedings, "[co]unsel'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 defendant's contentions are adequately presented." *Id.*; Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

> "Fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. 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. Moreover, the mere filing of an amended petition by counsel under such circumstances would appear to violate the proscriptions of Supreme Court Rule 137 [citation]." *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 21 Here, the defendant's *pro se* ineffective assistance of plea counsel claim was not in proper form. "To establish a claim of ineffective assistance of counsel in the plea process, the defendant must show counsel's performance was deficient and that the deficient performance resulted in prejudice." *People v. Hughes*, 2012 IL 112817, ¶ 44. The defendant's *pro se* petition failed to explicitly allege that plea counsel's advice concerning concurrent sentences was incorrect and that the defendant *actually* received consecutive sentences in his other pending cases. Additionally, the *pro se* petition failed to allege that the defendant was prejudiced by plea counsel's erroneous advice. Prejudice is a necessary element of an ineffective assistance of counsel claim. *People v. Guzman*, 2014 IL App (3d) 090464, ¶ 40. To demonstrate prejudice in the plea context, a defendant "must show ' "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." ' " *Hughes*, 2012 IL 112817, ¶ 63 (quoting *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1384-85 (2012), quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Thus, the pertinent

question on appeal is whether postconviction counsel was unreasonable for failing to amend the defendant's improperly formatted *pro se* claim of ineffective assistance of plea counsel.

¶ 22 We acknowledge that where, as here, postconviction counsel filed a Rule 651(c) certificate, there is a rebuttable presumption that the defendant received reasonable assistance of postconviction counsel. *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10. Stated another way, because postconviction counsel filed a Rule 651(c) certificate, we begin with the presumption that counsel decided not to amend the *pro se* claim of ineffective assistance of counsel because he found the claim to be frivolous. Upon review, however, we find that the record rebuts this presumption.

¶ 23 We find the decision in *People v. Kirk*, 2012 IL App (1st) 101606, instructive. In *Kirk*, the defendant filed a *pro se* postconviction petition arguing that his trial counsel was ineffective, and the public defender was appointed to represent him. *Id.* ¶¶ 7, 9. An assistant public defender filed a Rule 651(c) certificate stating, *inter alia*, that she was not filing an amended petition because the *pro se* petition adequately presented the defendant's issues. *Id.* ¶ 10. At a hearing on the State's motion to dismiss, a different public defender argued for the first time that the defendant's appellate counsel was ineffective. *Id.* ¶ 13. In so arguing, the public defender opined that he did not believe the petition presented a nonmeritorious issue. *Id.*

¶ 24 The *Kirk* court held that it was unreasonable for postconviction counsel not to amend the defendant's *pro se* petition to include the claim of ineffective assistance of appellate counsel that postconviction counsel argued orally. *Id.* ¶ 31. In reaching its holding, the *Kirk* court rejected the State's argument that the court must presume, pursuant to the Rule 651(c) certificate, that postconviction counsel determined that no amendments could be made to the petition that would render it legally and factually sufficient absent evidence that the defendant's *pro se* claims were

" '*actually* salvageable.' " (Emphasis in original.) *Id.* ¶ 32. In rejecting the State's argument, the *Kirk* court reasoned that postconviction counsel had represented to the trial court that his oral claim of ineffective assistance of appellate counsel had merit despite the filing of the Rule 651(c) certificate. *Id.*

¶ 25 At the hearing on the State's motion to dismiss in the instant case, postconviction counsel argued that the defendant's claim that his plea counsel promised that the sentences in the defendant's other cases would run concurrently with the sentence in this case "may raise an issue and may be meritorious of a third-stage hearing to flush that out." Like in *Kirk*, we find that postconviction counsel's willingness to argue the potential merit of this issue to the trial court rebuts the presumption that he failed to file an amended petition because he concluded that the issue was meritless. As the record shows that postconviction counsel believed that the defendant's claim had enough merit to warrant an evidentiary hearing to "flush [it] out," it was unreasonable for counsel not to file an amended petition putting this claim into proper form.

¶ 26 We also note that postconviction counsel could have easily obtained information establishing that the defendant was ordered to serve his other sentences consecutively with his sentence in the instant case. Information posted on the Web Site of the Illinois Department of Corrections (DOC) shows that the defendant was sentenced to 30 years' imprisonment for predatory criminal sexual assault and 15 years' imprisonment for criminal sexual assault in two other 2008 cases in addition to his sentence in the instant case. The Web Site states that the defendant's projected parole date is in 2068, indicating that the sentences in the other two cases run consecutively to the sentence imposed in the instant case. At the defendant's request, we take judicial notice of this information. See *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 49 (the appellate court may take judicial notice of information on the DOC's official Web Site).

This readily-available information also acts to rebut the presumption that postconviction counsel's failure to amend the defendant's *pro se* claim of ineffective assistance of plea counsel was because he found, after investigation, that it was frivolous.

¶ 27 Under these circumstances, we find that the defendant was deprived reasonable assistance of postconviction counsel with regard to his claim that plea counsel incorrectly advised him that his sentences in his other cases would run concurrently with his sentence in the instant case. Specifically, postconviction counsel acted unreasonably in failing to amend the defendant's *pro se* petition to include properly-supported allegations that the defendant: (1) actually received consecutive sentences in his other pending cases; and (2) would not have pleaded guilty absent trial counsel's erroneous advice. Accordingly, we remand this cause to the trial court with directions to allow the defendant the opportunity to replead his postconviction petition with the assistance of new counsel.

¶ 28 In coming to this conclusion, we reject the State's argument that the record contradicts the defendant's contention that plea counsel incorrectly advised him that the sentences in his other cases would run concurrently with his sentence in the instant case. Specifically, the State points to the portion of the defendant's plea hearing when the trial court asked the defendant if "anyone made any promises to [him] whatsoever on the possible sentence, or assured [him] what any sentence [was] going to be" and the defendant replied, "No, sir." The defendant explained in his affidavit that he did not consider plea counsel's statement regarding concurrent sentences to be a promise. Rather, the defendant claimed "[his] attorney just told [him] that is what would happen." A reasonable interpretation of the statements in the defendant's affidavit is that plea counsel misadvised the defendant regarding the law, not the terms of his plea agreement.

¶ 29 We also reject the State's argument that we should affirm the dismissal of the defendant's petition on the ground that the defendant would not have been able to satisfy the prejudice prong of an ineffective assistance of counsel claim even if postconviction counsel had amended the petition to include an allegation that he received consecutive sentences in his other cases. We find the decision in *People v. Johnson*, 154 Ill. 2d 227 (1993), instructive. The *Johnson* court held that postconviction counsel failed to provide the defendant with a reasonable level of assistance where the defendant identified witnesses who would support his *pro se* allegations, and postconviction counsel made no effort to obtain affidavits from the identified witnesses. *Id.* at 245. In response to the State's argument that the trial court could have dismissed the defendant's petition for other reasons, the *Johnson* court reasoned as follows:

> "While it is true that the trial court *might* have found grounds, other than the absence of supporting affidavits, to dismiss the defendant's claims, it is not apparent from the record that the trial court *did* dismiss the claims on such grounds. [Citation] The trial court here concluded that the allegations in the petition relating to counsel's performance at trial did not warrant an evidentiary hearing. It is entirely possible that the trial court would have reached this same conclusion even if counsel had contacted the witnesses named in the petition and attached affidavits in support of the post-conviction claims. We cannot simply presume, however, that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). It is the duty of the trial court, and not this court, to determine on the basis of a complete record whether the post-conviction claims require an evidentiary hearing. Therefore, we are unpersuaded by the State's argument that

the trial court's decision should be affirmed even if post-conviction counsel failed to adequately represent the defendant." (Emphasis in original.) *Id.* at 245-46.

¶ 30 In the instant case, as in *Johnson*, the trial court might have dismissed the defendant's petition on other grounds—including failure to establish prejudice—even if postconviction counsel amended the petition to include an allegation that the defendant received consecutive sentences and attached documentation supporting that claim. However, the sole basis shown in the record on which the trial court dismissed this claim was that the defendant failed to show that he actually received consecutive sentences. Like in *Johnson*, "[w]e cannot simply presume *** that the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c)." *Id.* at 246.

¶ 31 Additionally, postconviction counsel's failure to comply with Rule 651(c) may not be excused on the basis of harmless error. *People v. Suarez*, 224 Ill. 2d 37, 51 (2007). Rather, our supreme court "has consistently held that 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." *Id.* at 47; see also *People v. Ross*, 2015 IL App (3d) 130077, ¶ 15. Therefore, we hold that the determination as to whether the defendant can show prejudice is one that should be made by the trial court after the defendant has an opportunity to file an amended petition that presents his claim in proper form, as required by Rule 651(c).

¶ 32 We now turn to the defendant's second argument on appeal—namely that postconviction counsel provided unreasonable assistance in failing to amend his petition to add an argument that the trial court considered the wrong sentencing range when sentencing the defendant. Specifically, the defendant argues that although his statutory sentencing range was 6 to 30 years'

imprisonment, the prosecutor stated at the sentencing hearing that the range was 15 to 30 years' imprisonment and the trial court believed the range was 15 to 30 years when sentencing the defendant. We find that postconviction counsel did not provide unreasonable assistance in failing to add this claim, as "[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993); see also *Pendleton*, 223 Ill. 2d at 476 ("While postconviction counsel *** may raise additional issues if he or she so chooses, there is no obligation to do so.").

¶ 33 Lastly, we do not reach the defendant's substantive argument that he should have received a third-stage evidentiary hearing on his claim of ineffective assistance of plea counsel based on counsel's failure to meet and consult with him, resulting in an involuntary guilty plea. As we have found that insufficient second-stage proceedings were held in the first instance, we are remanding for the appointment of new counsel and the opportunity to replead the defendant's postconviction claims. The decision of whether the defendant's claims advance to third-stage proceedings can only be made after he has been afforded reasonable assistance at the second stage.[1]

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Peoria County dismissing the defendant's postconviction petition is reversed and the cause is remanded to the circuit court with directions to allow the defendant the opportunity to replead his postconviction petition with the assistance of new counsel.

¶ 36 Reversed and remanded with directions.

---

[1]We note that the defendant does not argue on appeal that he received unreasonable assistance of postconviction counsel with regard to this issue.