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2016 IL App (3d) 140548-U

Order filed November 14, 2016

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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,
Plaintiff-Appellee,	)	Peoria County, Illinois.
	)	
	)	Appeal No. 3-14-0548
v.	)	Circuit No. 08-CF-106
	)	
LIONEL DEBOUSE,	)	Honorable
	)	David A. Brown
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Postconviction counsel did not provide reasonable assistance to defendant who filed *pro se* postconviction petition alleging ineffective assistance of trial counsel where postconviction counsel failed to amend defendant's petition to include allegation of prejudice.

¶ 2 Defendant Lionel Debose was charged with first-degree murder. He pled guilty to second-degree murder and was sentenced to 19 years in prison pursuant to a fully-negotiated guilty plea. Defendant filed *pro se* postconviction petitions alleging that he was denied effective assistance of trial counsel. At the second stage of postconviction proceedings, the trial court

dismissed defendant's petitions. Defendant appeals, arguing that his postconviction counsel failed to provide him reasonable assistance. We reverse and remand.

¶ 3 Defendant was charged with first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) for killing Wesley Dorough. He pled guilty to second-degree murder pursuant to a fully negotiated guilty plea. In accordance with the plea agreement, the trial court sentenced defendant to 19 years in prison. At the plea hearing, the trial court admonished defendant in accordance with Illinois Supreme Court 605(c) (eff. Oct. 1, 2001), regarding his rights to appeal and withdraw his guilty plea. Defendant did not file a motion to withdraw his guilty plea or appeal his conviction.

¶ 4 Over a year after entering his guilty plea, defendant filed a *pro se* postconviction petition alleging ineffective assistance of trial counsel. He alleged that his trial counsel failed to (1) fully advise him about the nature of the second-degree murder charge, (2) consult with him about pretrial motions, (3) file pretrial motions, and (4) show or give him copies of discovery. Defendant stated that he told his counsel he killed Dorough but did so in self defense.

¶ 5 In May 2013, defendant filed another *pro se* postconviction petition, again alleging ineffective assistance of trial counsel and including many of the same allegations as his first petition, as well as a new allegation: that neither counsel nor the court informed him that he had 30 days to file a motion to reduce his sentence. Defendant requested a new sentencing hearing.

¶ 6 The petitions advanced to the second stage of postconviction proceedings, and the trial court appointed counsel for defendant. Defendant's postconviction counsel did not amend defendant's petitions but filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 7 The State filed a motion to dismiss defendant’s petitions, arguing that defendant failed to specify how his trial counsel’s performance was deficient and how it prejudiced him. Defendant’s postconviction counsel did not file a response to the State’s motion to dismiss.

¶ 8 At a hearing on the State’s motion to dismiss, the State made the same arguments as those contained in its motion and additionally argued that defendant’s ineffective assistance of counsel claim was waived because defendant did not raise it in a motion to withdraw his guilty plea or on direct appeal. Defendant’s postconviction counsel stated that he stood “on the petitions as filed” but clarified that defendant was only requesting a new sentencing hearing. The State argued that defendant could not be granted a new sentencing hearing because he entered a fully negotiated plea.

¶ 9 The trial court entered an order dismissing defendant’s petitions, finding that defendant’s claims of ineffective assistance of counsel were waived because defendant did not file a motion to withdraw his guilty plea or appeal. Notwithstanding waiver, the court found that defendant “failed to make a showing of either prong of the *Strickland* [v. *Washington*, 466 U.S. 668 (1984)] test.” Finally, the court ruled that defendant had no right to file a motion to reconsider his sentence because he entered a fully negotiated guilty plea and never filed a motion to withdraw his plea.

¶ 10 Defendant argues that his postconviction counsel did not provide him reasonable assistance. He asks us to reverse the trial court’s dismissal of his petition and remand the cause for new second-stage proceedings.

¶ 11 Under the Post-conviction Hearing Act, a defendant is entitled to reasonable assistance of counsel in postconviction proceedings. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). To ensure that defendants receive this level of assistance, Illinois Supreme Court Rule 651(c) imposes

specific duties on postconviction counsel and requires that the record disclose that counsel fulfilled mandatory duties. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. Supreme Court Rule 651(c) requires that the record in postconviction proceedings demonstrate that appointed counsel “has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Supreme Court Rule 651(c) requires postconviction counsel to file an affidavit certifying compliance with these requirements. *Schlosser*, 2012 IL App (1st) 092523, ¶ 18. Counsel’s Rule 651(c) certificate of compliance creates a presumption that postconviction counsel complied with the requirements, but that presumption can be rebutted. *Id.* ¶ 33. Counsel cannot fulfill his Rule 651(c) duties simply by filing a certificate if he has not provided adequate assistance. *Id.*

¶ 12           There is no requirement that postconviction counsel amend a *pro se* postconviction petition. *Turner*, 187 Ill. 2d at 412. However, Rule 651(c) requires the record on appeal to show that counsel made amendments to the *pro se* petition that were necessary for an adequate presentation of defendant’s contentions. *Schlosser*, 2012 IL App (1st) 092523, ¶ 21. Postconviction counsel must shape claims raised by a defendant in a *pro se* petition into “appropriate legal form.” *People v. Johnson*, 154 Ill. 2d 227, 238 (1993). Failure by postconviction counsel to amend a *pro se* petition to fully and adequately present defendant’s constitutional claims rebuts the presumption that postconviction counsel complied with Rule 651(c) and amounts to unreasonable assistance of counsel. See *Turner*, 187 Ill. 2d at 413-14; *People v. Groszek*, 2016 IL App (3d) 140455, ¶ 14; *Schlosser*, 2012 IL App (1st) 092523, ¶ 33.

¶ 13 To establish a claim of ineffective assistance of counsel, the defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). At the second stage of postconviction proceedings, the defendant need only make a substantial showing of both of the *Strickland* prongs to warrant an evidentiary hearing. *Groszek*, 2016 IL App (3d) 140455, ¶ 13.

¶ 14 When a defendant alleges ineffective assistance of counsel in a *pro se* postconviction petition, postconviction counsel must make sure that the petition includes allegations supporting both prongs of the *Strickland* analysis. *Id.* ¶ 14. If a *pro se* petition contains only allegations of deficient performance, postconviction counsel must amend the petition to allege that trial counsel's performance affected the outcome of the proceeding. See *id.* Failure to do so constitutes unreasonable representation by postconviction counsel. See *id.*

¶ 15 When postconviction counsel fails to provide reasonable assistance, it is inappropriate to speculate whether the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). *Turner*, 187 Ill. 2d at 416. It is improper to determine the merit of a postconviction petition where counsel has not shaped the defendant's claims into the appropriate legal form. *Id.* at 416-17. When a defendant has been denied reasonable assistance of postconviction counsel, the case should be remanded to give the trial court an opportunity to evaluate the claims in the postconviction petition once counsel has made any amendments necessary for an adequate presentation of petitioner's contentions. *Id.* at 417.

¶ 16 Here, defendant's *pro se* postconviction petition alleging ineffective assistance of trial counsel contained several allegations of trial counsel's deficient performance. However, the

petition contained no allegation that defendant suffered prejudice as a result. Absent such an allegation, defendant's petition could not satisfy the "substantial" showing of ineffective assistance required to advance to an evidentiary hearing. See *Groszek*, 2016 IL App (3d) 140455, ¶ 14. Postconviction counsel could have easily amended defendant's petition to include an allegation that trial counsel's performance affected the outcome of the proceeding and that absent counsel's errors, defendant would not have pled guilty. See *id.* Postconviction counsel's failure to amend the petition to allege the second prong of the *Strickland* analysis was unreasonable. See *id.*

¶ 17 Because postconviction counsel provided unreasonable assistance to defendant, we will not speculate whether the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c). See *Turner*, 187 Ill. 2d at 416. Instead, we reverse the trial court's dismissal of defendant's petition and remand the cause to give the trial court an opportunity to evaluate the claims in the postconviction petition once counsel has made any amendments necessary for an adequate presentation of petitioner's contentions. See *id.* at 417.

¶ 18 The judgment of the circuit court of Peoria County is reversed and the cause is remanded.

¶ 19 Reversed; cause remanded.