2016 IL App (4th) 140190-U

NO. 4-14-0190

FILED
February 23, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MARVIN L. PARKER,	)	No. 10CF334
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The record establishes appointed counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) as the transcript of a relevant hearing was not part of the record below, necessitating the reversal of the order granting appointed counsel's motion to withdraw as counsel and dismissing defendant's postconviction petition.

¶ 2 Defendant, Marvin L. Parker, appeals the order granting appointed counsel's motion to withdraw as counsel and dismissing his *pro se* postconviction petition. Defendant argues the second-stage dismissal was improper because his petition made a substantial showing he was denied his right to self-representation. Defendant also maintains the motion to withdraw as counsel should have been denied because appointed counsel (1) did not address all of the claims made in his *pro se* petition, and (2) failed to comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) by not reviewing a transcript relevant to his self-representation claim.

Defendant further asserts the circuit clerk improperly imposed fines, he is entitled to presentence credit against his sentence, and the $300 restitution order is void. We agree with defendant's argument appointed counsel did not comply with Rule 651(c) and find reversal is required. We reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In April 2010, defendant was charged with financial institution robbery (720 ILCS 5/16H-40 (West 2010)). At some point before the initial status hearing, defendant filed a motion to represent himself. The motion is not part of the record, but the trial court mentioned it during the May 2010 status hearing. The court stated it was not prepared to proceed on "the defendant's motion to represent himself" and set a hearing for June 1, 2010, for the purpose of "having a conversation about [defendant's] ability to represent [himself]."

¶ 5 At the June 1 hearing, the trial court and defendant discussed the motion. The court asked defendant if he desired to represent himself without the assistance of appointed counsel. Defendant averred he did. The court asked about defendant's education level, to which he responded he had earned his high-school equivalency degree. Defendant asserted he was 46 years old and had never represented himself, but he had been in court for previous offenses. Defendant understood representing himself was not a simple matter and there were various technical rules governing the trial. Defendant further understood his attorney was educated and had more experience, but he stated counsel was "only interested in one thing—[my] pleading guilty." Against counsel's wishes, defendant wanted to plead the insanity defense.

¶ 6 Defense counsel, Amy Davis, informed the court she was "not reluctant or refusing to present any viable defense" but stated Terry Killian, M.D., a psychiatrist, examined

defendant and found "no psychiatric defense." When counsel informed defendant of Dr. Killian's findings, defendant indicated "there would be a psychiatric defense and he would present it." Counsel informed defendant pursuing that defense would not be possible without an expert. Counsel further explained a plea deal had been offered. She did not normally propose a plea deal so early in the proceedings, but the State's offer was predicated, in part, on the fact defendant needed expensive surgery and the county did not want to pay for it.

¶ 7 Defendant told the court Dr. Killian was very unprofessional, and the two "got into it from the moment" he entered the room. They disagreed on everything. Defendant stated at the time of the offense, he was not on his medication. He was on his medication at the time of the hearing and "back doing the things [he] normally would do." Defendant requested a second opinion, and defense counsel responded she did not have the money for that.

¶ 8 The trial court asked defendant if he recognized lawyers have substantial experience and training and the prosecution would be represented by an experienced practitioner. The court observed the prosecution would be expected to argue defendant could not pursue an insanity defense without a testifying expert. Defendant stated he understood. The trial court further admonished defendant of the dangers of representing himself. When asked if, knowing these things, defendant continued to want to represent himself, defendant replied he did.

¶ 9 The trial court told defendant, "[T]his is a huge mistake." Defendant stated, "I don't understand why it would be a huge mistake." Defendant articulated, if he could file the motions necessary to get his medical records from previous psychiatrists, and if he had the opportunities to obtain such materials, he did not understand why it was unwise for him to pursue that defense. The court cautioned defendant it would be "very, very difficult" to obtain

these records on his own. Defendant stated he needed an attorney who believed in what he was saying. He did not need an attorney who would not give him "100 percent."

¶ 10 The trial court asked defendant "one more time *** whether or not [he wanted] to invest any additional time in trying to get [his] perspective understood by [his] attorney and a little additional time also listening to her assessment of all of the circumstances in [his] case to see if there can be a meeting of the minds." The court stated if defendant did not want to spend more time on the issue, it would rule on the motion. Defendant responded, "As I told you, your Honor, I don't have a problem with Miss Davis as my attorney. All I want to do is just sit down and see what we have and put our heads together and talk about it. Do you know what I'm saying? I'm saying if she's too busy—" The court interrupted and restated defendant's request as wanting additional time with Davis to get his case examined. Defendant responded, "Exactly." The court asked defendant if he was willing then to continue working on the issue. Davis interrupted and suggested a new attorney, as she was retiring in one month. The court agreed. The court set a status hearing for June 11. We note the transcript for the June 1, 2010, hearing became part of the record on appeal upon the motion of the office of the State Appellate Defender (OSAD).

¶ 11 At the June 11, 2010, hearing, the trial court began by stating it believed this was the third status hearing. Defense counsel Davis informed the court the previous hearing was not a status hearing but a hearing on defendant's request to represent himself. Davis informed the court she and defendant had conferred. Davis believed defendant understood her position. Defendant provided Davis with additional places from which she might be able to obtain psychiatric records to furnish Dr. Killian.

¶ 12 In November 2010, defendant reported a "conflict of interest" between his counsel, Carla Barnes, and him. The status hearing began with counsel informing the court Dr. Killian received "quite a few documents" related to defendant and found him fit for trial. Barnes agreed with Dr. Killian's conclusion. At this point, defendant informed the trial court of a conflict of interest. Defendant was upset he was unable to look at discovery. He also stated he was unhappy Dr. Killian did not visit him. Defendant stated his counsel was in a rush to go to trial. The court acknowledged defendant's displeasure with counsel but found nothing in the record suggested counsel was ineffective.

¶ 13 Defendant filed a *pro se* motion to withdraw his attorney on December 2, 2010. Defendant asked the court to withdraw his attorney, Carla Barnes, for ineffective assistance of counsel. Defendant asserted his counsel was incompetent as he was not allowed to review reports despite his requests. Defendant further averred counsel failed to discuss matters with him about his case.

¶ 14 That month, a hearing was held on defendant's *pro se* motion. The trial court observed defendant made a general allegation of a failure to communicate and share reports. At the hearing, defense counsel Barnes testified the county jail logs would show she visited defendant on several occasions. At the last visit, according to Barnes, defendant requested documents from the hospital he visited the night of his arrest. When Barnes sent an intern to the jail with a release to obtain those documents, defendant refused to sign it. Barnes opined she had "gone above and beyond the level of communicating." After reviewing the logs with defendant and counsel, the court found no issues rising to the level of ineffective assistance of counsel. The court determined it did "not have the authority to simply withdraw an attorney because

there's disagreement or discord between the attorney and client." At the close of the hearing, defendant asked, "Can I have a question?" The trial court responded, "You can ask your attorney. That's all for today."

¶ 15 In January 2011, defendant pleaded guilty. The State offered the factual basis, which established defendant approached a bank teller and demanded money. The teller handed defendant a bundle of $1 bills. Defendant exited the bank and walked to the public library, where he was found by police and taken into custody with possession of the $1 bills.

¶ 16 Defendant was sentenced to 13 years' imprisonment. The trial court ordered a Violent Crimes Victims Assistance Fund assessment and $300 in restitution. The court further credited defendant for 407 days spent in presentence custody. Defendant did not pursue a direct appeal.

¶ 17 In January 2013, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant alleged (1) trial counsel provided ineffective assistance for allowing a plea offer of 8 years' imprisonment to expire; (2) he was denied his right to represent himself as a *pro se* litigant; (3) counsel violated the attorney-client privilege by disclosing Dr. Killian's report; (4) defense counsel provided ineffective assistance for taking on the role of prosecutor; and (5) he was entitled to a medical examination by a psychiatrist named by the State. Regarding his claim he was improperly denied his right to represent himself, defendant cited his December 2, 2010, motion to withdraw his attorney. Defendant also alleged "on several appearances the court continuously delayed as well [as] evaded allowing defendant to proceed *pro se* and even on one occasion stated that the court[']s docket entries and files lacked such a filing."

¶ 18 In May 2013, the trial court ordered the postconviction petition docketed for further consideration as 90 days elapsed since the filing and the court had not examined the petition or ruled on it (see 725 ILCS 5/122-2.1(b) (West 2012)). The court appointed counsel to represent defendant.

¶ 19 In October 2013, defendant's appointed counsel, W. Keith Davis, filed a motion to withdraw as defendant's counsel. Counsel alleged he had carefully considered all the issues and found none meritorious. Counsel summarized defendant's *pro se* arguments, indicating defendant's arguments centered on the plea offer. Counsel did not address defendant's remaining *pro se* contentions. In addition, counsel filed a certificate pursuant to Rule 651(c), asserting he "examined the record of proceedings at trial" and "made any amendments to the *pro se* Petition necessary for adequate presentation of [defendant's] proceedings."

¶ 20 In response, defendant filed a document challenging Davis's motion to withdraw. Defendant argued appointed counsel failed to address the other contentions of his postconviction petition. Defendant requested the immediate removal of Davis as counsel.

¶ 21 New counsel, Corey Luckman, was appointed to represent defendant. At the February 2014 hearing, Luckman adopted Davis's views. Luckman stated he reviewed the record of the case and agreed defendant's contentions lacked merit. Luckman reported he read the "entirety of the record, because [he had] a complete file on it." The court asked whether defendant's contentions were properly characterized. Luckman opined the two positions "do dovetail." Luckman explained the issues regarding the plea and defendant's contention regarding the delay in a response to the plea offer. When the court allowed defendant the opportunity to respond, defendant explained he had a tumor and did not remember having robbed a bank.

Defendant explained he did not know the plea offer would expire while he waited for records to arrive.

¶ 22 The trial court granted the motion to withdraw and dismissed defendant's petition. The docket sheet states, "[defense] counsel filing updated 651(c) certificate within 1 day." Neither the record nor the docket sheet shows Luckman complied with this mandate.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant asserts multiple challenges against the trial court's decision to grant appointed counsel's motion to withdraw and to dismiss his petition. Defendant first argues his petition should not have been dismissed because he made a substantial showing his right to represent himself was violated. Defendant next contends, under *People v. Kuehner*, 2015 IL 117695, ¶ 28, 32 N.E.3d 685, appointed counsel's motion to withdraw was inadequate because appointed counsel failed to address each claim raised in the *pro se* postconviction petition. In the alternative, defendant argues dismissal is mandated by *People v. Greer*, 212 Ill. 2d 192, 817 N.E.2d 511 (2004), because the record shows appointed counsel failed to comply with Rule 651(c) and the record shows his claims are not frivolous.

¶ 26 We need not address defendant's arguments in the order in which he presents them. The latter arguments address the sufficiency of the representation defendant received in the initial postconviction proceedings. Since we find defendant's representation inadequate, remand is necessary. On remand, the trial court will first consider the sufficiency of any claims raised.

¶ 27 We now turn to the sufficiency of the motion to withdraw. Defendant's argument

presents an interesting legal question on the prerequisites for a sufficient motion to withdraw as counsel in proceedings under the Act. Recently, our supreme court held counsel appointed after a judicial finding the petition was neither frivolous nor patently without merit (725 ILCS 5/122-2.1 (West 2010)) must, on a motion to withdraw, provide "at least some explanation as to why all of the claims set forth in that petition are so lacking in legal and factual support as to compel his or her withdrawal from the case." *Kuehner,* 2015 IL 117695, ¶ 27, 32 N.E.3d 655. *Kuehner,* however, left open the question of whether the same mandate applies to counsel appointed under the Act after 90 days have passed without a judicial determination of frivolity or merit—the relevant question here. Previously, this question was addressed in *Greer*. See *Greer*, 212 Ill. 2d at 200, 817 N.E.2d at 516. The *Greer* court did not reverse based on counsel's failure to address each of the defendant's claims, but advised appointed counsel should "make some effort to explain *why* defendant's claims are frivolous or patently without merit." (Emphasis in original.) See *Id*. at 212, 817 N.E.2d at 523. Instead, the court affirmed the order granting counsel's motion to withdraw, finding the order proper because counsel fulfilled his Rule 651(c) duties and defendant's postconviction claims were frivolous and patently without merit. *Id.*

¶ 28 An answer as to whether appointed counsel should have addressed each claim is not required, as we find appointed counsel failed to meet the underlying task of complying with Rule 651(c). Rule 651(c) was created "to ensure that all indigents are provided proper representation when presenting claims of constitutional deprivation under the [Act]." *People v. Brown*, 52 Ill. 2d 227, 230, 287 N.E.2d 663, 665 (1972). The rule mandates the record show "the attorney has consulted with petitioner *** to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the 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). Such a showing may be established by a certificate filed by appointed counsel. *Id.* When a certificate is filed, a presumption arises appointed counsel complied with the rule's requirements. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 41, 33 N.E.2d 1256.

¶ 29 Defendant argues the record shows counsel did not comply with Rule 651(c), despite his certificate's statement to the contrary. Defendant points to his claim in his postconviction petition he was improperly denied his repeated requests to represent himself. Defendant then argues, despite this claim and record references to the June 1, 2010, hearing on the issue, appointed counsel did not review the transcript because it was not part of the record until OSAD moved to add it on appeal. Defendant argues counsel could not have fully considered his claim without review of this transcript, which shows the trial court and defendant had a lengthy discussion—stretching approximately 20 pages—on this topic.

¶ 30 The State does not dispute appointed counsel did not review the transcript. The State contends, however, the missing transcript was not an essential part of the record necessary for the reasonable representation of defendant. The State argues defendant "ended up abandoning his mid-2010 request for self-representation" and defendant's claim was patently without merit.

¶ 31 We disagree with the State's conclusion the missing transcript was not an essential part of the record for appointed counsel's review. In his *pro se* petition, defendant set forth a claim he was improperly denied his right of self-representation. Defendant not only pointed to his December 2, 2010, motion to withdraw his attorney but also averred "on several appearances

the court continuously delayed as well [as] evaded allowing defendant to proceed *pro se* and even on one occasion stated that the court[']s docket entries and files lacked such a filing." A review of this argument should have put counsel on notice to review the record for information related to this claim. The record contains at least two references to the June 1, 2010, hearing on defendant's first motion. In May 2010, in a transcript of record below, the trial court stated a hearing would be held on defendant's request to represent himself on June 1, 2010. At a July 2010 status hearing, counsel reminded the trial court of the previous hearing in which defendant's request to represent himself was discussed. Despite these references and defendant's claim, neither of defendant's two appointed attorneys requested the transcript.

¶ 32 Also unconvincing is the State's argument review of the transcript was unnecessary because it shows defendant abandoned his claim and the issue lacks merit. The State's argument is based on harmless error. Case law establishes, once it is determined counsel did not comply with Rule 651(c), harmless-error analysis is improper. See *People v. Suarez*, 224 Ill. 2d 37, 51, 862 N.E.2d 977, 985 (2007) ("We have consistently declined the State's invitation to excuse noncompliance with the rule on the basis of harmless error."); see also *Brown*, 52 Ill. 2d at 230, 287 N.E.2d at 665 ("The fulfillment of this design would not be encouraged were we to ignore the rule's nonobservance in those cases appealed to this court."). Reversible error occurred when counsel, despite defendant's claim regarding repeated denials of his requests to represent himself, failed to review the transcripts relevant to this claim.

¶ 33 This case is remanded to insure appointed counsel complies with Rule 651(c) and provides defendant with the representation to which he is entitled. See *Suarez*, 224 Ill. 2d at 52, 862 N.E.2d at 985. On remand, the trial court should appoint new counsel to review defendant's

claims and address other issues raised in defendant's appeal, including his arguments related to fines, presentencing credit, and restitution.

¶ 34 III. CONCLUSION

¶ 35 We reverse the trial court's judgment and remand for appointment of new counsel and further proceedings.

¶ 36 Reversed and remanded.