2018 IL App (1st) 151129-U

No. 1-15-1129

Order filed February 14, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 06 CR 15682
	)	
JAY PIERCE,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel did not provide unreasonable assistance by not either amending the *pro se* petition or withdrawing as counsel. Counsel does not render *per se* unreasonable assistance by standing on the petition.

¶ 2 Following a jury trial, defendant Jay Pierce was convicted of possession of a controlled substance (1 gram or more, but less than 15 grams, of cocaine) with intent to deliver and sentenced to 20 years' imprisonment. We affirmed on direct appeal. *People v. Pierce*, No. 1-07-1698 (2009)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the

dismissal of his *pro se* postconviction petition as amended and supplemented *pro se*. He contends that appointed postconviction counsel provided unreasonable assistance by not either amending his petition or withdrawing as counsel. For the reasons stated below, we affirm.

¶ 3 The evidence at trial was that, after 6 p.m. on June 15, 2006, a police officer saw defendant engage in two hand-to-hand transactions with two people within about 15 minutes, each beginning when a person on foot approached defendant's burgundy Chevrolet. In the first, defendant visibly received money and tendered a golf-ball-sized object. In the second, the other party visibly pocketed a golf-ball-sized object after her transaction with defendant. The officer followed defendant for about five minutes until he parked in a restaurant parking lot. At about 6:30 p.m., another officer saw defendant parking his burgundy Chevrolet in the restaurant lot and parked his unmarked police car behind him. When the officer approached defendant's car, he started to flee on foot. The officer saw a plastic bag, containing a large chunk of a white rocky substance, in his shoe and arrested him. Defendant's post-arrest search found $706 and 28 plastic bags of a white rock-like substance in addition to the aforesaid bag in his shoe. The first officer returned to the parking lot to identify defendant and the burgundy Chevrolet he observed in the hand-to-hand transactions. Weighing and testing of the substance in the bags found 7.1 ounces of cocaine in the bag from defendant's shoe and a total of 5.8 grams of cocaine in the 28 bags. The jury found defendant guilty of possessing more than 5 grams, but less than 15 grams, of cocaine with the intent to deliver. The court sentenced him, as a mandatory Class X offender who committed this offense while on bond for another offense, to 20 years' imprisonment.

¶ 4 On direct appeal, defendant (1) challenged the sufficiency of the evidence of intent to deliver, (2) contended that the State improperly cross-examined a witness and made improper

arguments, (3) claimed a *Batson* jury selection violation (*Batson v. Kentucky*, 476 U.S. 79 (1986)), and (4) contended that his 20-year prison sentence was excessive. *Pierce*, No. 1-07-1698, at 1-2. We found that defendant's two observed hand-to-hand transactions, and the amount of cocaine and money found in his possession upon arrest, supported the jury's inference of intent to deliver. *Id*. at 5-9. We found that his claims of State misconduct were forfeited and that the State's conduct was not improper. *Id*. at 9-17. Regarding the *Batson* claim, we found that there was no showing that the State used its peremptory challenges systematically or disproportionately to exclude black venire members from the jury, and also found that three of the four black venire members who did not become jurors were either excluded for cause or dismissed because the jury was complete. *Id*. at 17-20. We found that defendant's sentence was not excessive in light of his extensive criminal history and that the court duly considered his rehabilitative potential. *Id*. at 20-23.

¶ 5 In March 2009, defendant filed a *pro se* petition for relief from judgment. He claimed that the trial court did not allow him to call a witness who would have impeached a State witness. He did not name the proposed witness in the petition or his attached affidavit. He also claimed ineffectiveness of trial counsel for withdrawing a motion to quash arrest that would have succeeded as the police lacked probable cause, and ineffectiveness of appellate counsel for not raising trial counsel's ineffectiveness on direct appeal. The court denied the petition in May 2009, finding that defendant's claims were matters of trial strategy. The court also found that the uncalled-witness claim was conclusory and undocumented, and that a motion to quash would not have been granted based on the trial evidence, so that his claims were without merit.

¶ 6 Defendant filed another *pro se* petition for relief from judgment on March 24, 2010, though the record contains only a page of the *pro se* memorandum in support of the petition. On April 9, 2010, the court, noting that defendant's petition for relief from judgment was denied in May 2009, denied his March 2010 petition as a successive petition for relief from judgment.

¶ 7 In June 2010, defendant filed a *pro se* postconviction petition. From 2011 through 2014, defendant filed various *pro se* supplements and amendments to his petition.

¶ 8 On June 29, 2010, the court appointed the Public Defender to represent defendant on the postconviction petition and continued the case for counsel to appear. In July 2010, an assistant public defender appeared on the case as postconviction (PC) counsel.[1] The case was continued from time to time, and PC counsel told the court that she was contacting the private attorney who represented defendant at trial, or otherwise investigating for a possible supplemental filing.

¶ 9 On May 27, 2011, PC counsel told the court that defendant had told her that his family had hired an attorney, and she was also told that the attorney would be in court that day. As no private attorney was in court, PC counsel successfully sought a continuance. However, on July 15, 2011, PC counsel told the court that she would still be representing defendant as "there had been some miscommunication between" defendant and his family as to whether counsel had been retained. She also told the court that defendant "at one point" had wanted to represent himself until she spoke with him. She obtained a continuance to examine defendant's supplemental petitions and a new claim raised therein. Defendant withdrew a *pro se* motion challenging PC counsel's representation.

[1] We refer hereafter to postconviction counsel in this case as "PC counsel" while using "postconviction counsel" to refer to postconviction counsel in general or in the abstract.

¶ 10 The case was continued from time to time in 2011 and 2012, with PC counsel informing the court of her investigation efforts such as subpoenaing records, locating witnesses, and obtaining affidavits. On June 28, 2012, PC counsel told the court that defendant wanted to proceed *pro se*. She also told the court that she reviewed defendant's seven claims and performed investigations thereof including interviewing witnesses. After a recess for PC counsel and defendant to discuss her investigation in private, defendant withdrew his request to act *pro se*. At the next session in September 2012, PC counsel told the court that she would be filing a supplemental petition with affidavit after a continuance.

¶ 11 However, on October 19, 2012, PC counsel told the court that defendant was again requesting to act *pro se*. After the court discussed with defendant the implications of representing himself, and briefly recessed, defendant told the court that he did not want to represent himself but believed PC counsel was not representing him properly because she did not want to present all of his claims. The court told defendant that PC counsel has an ethical duty to not sign or present claims she believes to be improper, and to exercise her judgment in evaluating claims. Defendant obtained a continuance to consider his decision. At the next court session on December 7, 2012, defendant confirmed his decision to proceed *pro se* and the court allowed him to do so, discharging the Public Defender as counsel. Defendant represented himself until March 22, 2013, when he asked the court to reappoint counsel and the court appointed the Public Defender. The court admonished defendant that counsel would advise him on the appropriateness of his claims and denied his request for a different assistant public defender. The case was continued for counsel to discuss defendant's additional *pro se* filings with him.

¶ 12 PC counsel reappeared in April 2013. She told the court in July 2013 that various records and documents she had ordered had not yet been delivered, and in October 2013 that she had received them. There were further continuances to obtain additional documents, during which defendant made additional *pro se* filings. In March 2014, and again in May 2014, PC counsel told the court that she had been ready to file her Rule 651(c) certificate until defendant presented an additional *pro se* filing. In May 2014, the court told defendant that it would accept no more *pro se* filings and would accept PC counsel's certificate at the next session in July. However, in July 2014 defendant submitted another filing and PC counsel obtained a continuance to review it.

¶ 13 In August 2014, PC counsel filed her Rule 651(c) certificate. She averred that she (1) consulted defendant in person "to ascertain his contentions of deprivation of his constitutional rights," (2) examined the trial court file, common law record, and report of proceedings in this case, and (3) examined the *pro se* petition and made no amendments thereto.

¶ 14 In October 2014, PC counsel told the court that defendant wanted her to withdraw so he could proceed *pro se*. The court denied defendant's request to represent himself, allowed defendant to make a last *pro se* filing, and denied PC counsel's request to withdraw her certificate on the grounds that the latest filing may be merely duplicative of an earlier filing.

¶ 15 The State filed its motion to dismiss in January 2015. On March 6, 2015, the court heard the State's motion. After the State argued, PC counsel addressed the court: "Within [defendant's] petition, he makes various charges and allegations that support his belief in constitutional violations. We would stand on his petition." The court granted the State's motion, stating that the court had read all of defendant's *pro se* filings. The court found that defendant was properly

charged, his sentence was within the applicable range, and there was no evidence of ineffective assistance of counsel. This appeal followed.

¶ 16 On appeal, defendant contends that PC counsel provided unreasonable assistance by not either amending his petition to advance his various *pro se* claims or withdrawing as counsel.

¶ 17 Neither the federal nor Illinois constitution guarantees assistance of counsel in postconviction proceedings, which are creations of our legislature, so that postconviction counsel is held to a standard of reasonable assistance. *People v. Cotto*, 2016 IL 119006, ¶¶ 29-30; *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 50. Reasonable assistance is a lower standard than effective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *Zareski*, ¶ 50, citing *Cotto*, ¶ 29. "Strictly speaking, a defendant is entitled to less from postconviction counsel than from direct appeal or trial counsel. The flip side of this principle is that it should be even more difficult for a defendant to prove that he or she received unreasonable assistance than to prove that he or she received ineffective assistance under *Strickland*." *Zareski*, ¶ 50.

¶ 18 Our supreme court codified the duties of postconviction counsel appointed or retained on a *pro se* petition in Supreme Court Rule 651(c). *Cotto*, ¶ 27; *Zareski*, ¶ 51. The Rule provides that, in an appeal from a postconviction proceeding:

> "The record filed in [the appellate] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney 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 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. July 1, 2017).

A facially-valid Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel complied with the Rule and provided reasonable assistance. *People v. Wallace*, 2016 IL App (1st) 142758, ¶¶ 25-26. The defendant then bears the burden of showing that counsel failed to substantially comply with the Rule, with the proviso that counsel is not required to advance frivolous claims. *Id.*, ¶¶ 26, 31.

¶ 19 In *People v. Greer*, 212 Ill. 2d 192, 195-96 (2004), a defendant whose postconviction counsel was allowed to withdraw contended on appeal that there was no authority for withdrawal in a postconviction case and that he was deprived of his right to counsel by the withdrawal. The *Greer* court held that "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," which provides that an attorney's signature on a pleading or motion is a certificate that the document is grounded in fact and warranted by the law or a good-faith argument to change the law. *Id*. at 205. In rejecting the proposition that counsel could certify under Rule 651(c) that the petition does not require amendment and then present the claims in the petition, the court stated "How can counsel, ethically, 'present the petitioner's contentions' when counsel *knows* those contentions are frivolous? Obviously, the answer is counsel cannot." (Emphasis in original.) *Id*. at 206.

¶ 20 After discussing at length the purpose of appointing counsel on postconviction petitions, the *Greer* court stated that it was "confident that the legislature did not intend to require appointed counsel to continue representation of a postconviction defendant after counsel

determines that defendant's petition is frivolous and patently without merit. Nothing in the Act requires the attorney to do so, and the attorney is clearly *prohibited* from doing so by his or her ethical obligations." (Emphasis in original.) *Id*. at 209. Turning to the case before it, the *Greer* court found that the particular claims in the petition were indeed meritless. *Id*. at 210-11.

> "Under the circumstances, the Act presents no impediment to withdrawal of counsel. Although we hasten to emphasize that *** an attorney moving to withdraw should make some effort to explain *why* defendant's claims are frivolous or patently without merit, it nonetheless appears that counsel fulfilled his duties as prescribed by Rule 651(c), and the record before us supports counsel's assessment that the defendant's postconviction claims were frivolous and without merit. Consequently, though the procedure in the circuit court leaves something to be desired, defense counsel should be allowed to withdraw, and we affirm the judgment of the appellate court in that respect." (Emphasis in original.) *Id*. at 211-12.

¶ 21 Since *Greer*, our supreme court and this court have addressed the holding therein. "In *Greer*, the issue was whether postconviction counsel *may* seek to withdraw as counsel due to a petition's lack of merit. This court determined that such a procedure was *permissible*, noting that under [Supreme Court] Rule 137 counsel could not ethically pursue claims that were frivolous and patently without merit." (Emphasis added.) *People v. Suarez*, 224 Ill. 2d 37, 43 (2007), citing *Greer* at 209. In *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008), this court observed that Rule 651(c) does not require postconviction counsel to amend a *pro se* petition while ethical obligations prohibit counsel from amending a frivolous claim. The *Pace* court stated that counsel faced with meritless claims may withdraw under *Greer* or stand on the petition, both of which

allow the defendant's claims to proceed to examination by the court. *Id*. See also *People v. Perry*, 2017 IL App (1st) 150587, ¶ 39 (reiterating that counsel "with an ethical dilemma" may move to withdraw or stand on the petition). This court has stated, noting the *Greer* court's statement that postconviction counsel should explain why a defendant's *claims* are frivolous or patently without merit, that:

> "the critical point in this passage is the court's description of a proper motion to withdraw. Counsel must make an effort to explain why the petitioner's 'claims' are frivolous – we draw attention to the use of the plural noun. Given the ethical concerns underlying the court's reasoning [citation], 'claims' logically must mean *all* of the petitioner's claims. This is because *any* claim that will potentially allow counsel to produce a nonfrivolous amended petition is sufficient to give counsel an ethical basis to continue representation." (Emphasis in original.) *People v. Komes*, 2011 IL App (2d) 100014, ¶ 29, citing *Greer* at 205-07, 211-12.

¶ 22 We find that *Greer* allows postconviction counsel to withdraw where the petition cannot be amended to state any meritorious claim but does not hold that counsel *must* withdraw and *cannot* stand on the *pro se* petition without amendment after filing a Rule 651(c) certificate. See *People v. Malone*, 2017 IL App (3d) 140165, ¶ 12 (reaching the same conclusion). We find nothing in *Greer* contrary to our statement in *Pace* that counsel faced with nonmeritorious claims may either withdraw or stand on the unamended petition. While the *Greer* court noted that counsel cannot ethically *present* claims that counsel knows to be frivolous, counsel who stands on claims is not presenting or pursuing them but allowing them to speak for themselves. In that

light, we reject defendant's argument that postconviction counsel standing on the petition deprives a defendant of his day in court on his postconviction claims.

¶ 23 On the aforesaid basis – standing on the petition allows the *pro se* claims to speak for themselves – we distinguish *People v. Shortridge*, 2012 IL App (4th) 100663, and *People v. Elken*, 2014 IL App (3d) 120580, cited by defendant. In *Shortridge*, postconviction counsel did not either stand on the petition or move to withdraw but "confessed" the State's motion to dismiss. *Shortridge*, ¶ 6. Conceding or confessing a motion to dismiss is not the same as standing on the petition as defendant argues; the former places counsel in opposition to the defendant and renders the motion to dismiss an agreed motion, the latter does not. See *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 39 (expressly distinguishing standing on the petition from the concession in *Shortridge*). In *Elken*, counsel did not either stand on the petition or move to withdraw but argued at length and with success – the court dismissed the petition – why the claims in the petition were meritless. *Elken*, ¶¶ 19-21. Unlike standing on the petition, the actions of counsel in *Shortridge* and *Elken* did not allow the defendant's claims to speak for themselves but opposed them without "the opportunity to prepare for such an attack on his petition" that a motion to withdraw would provide. *Elken*, ¶ 36. See also *Perry*, ¶ 39 (counsel who withdrew a supporting affidavit could have stood on the petition or moved to withdraw as counsel but instead "removed the factual support from defendant's petition and then tacitly agreed with the State's oral motion to dismiss the petition" while depriving him of "the opportunity to respond to his counsel's actions"). Stated another way, *Shortridge* and *Elken* do not contradict *Pace* but hold that counsel faced with a meritless petition should not undertake a third course of action that is neither standing nor withdrawing. In this regard, we find that PC counsel referring to defendant's *pro se*

claims as his claims was not a concession as in *Shortridge* and *Elken*. PC counsel did not set herself in opposition to defendant's claims merely by stating that they were his claims.

¶ 24 Defendant argues that standing on the petition "resulted in a cursory review and dismissal of [his] claims – the type of treatment that the United States Supreme Court attempted to avoid by deciding *Anders.*" *Anders v. California*, 386 U.S. 738 (1967). However, *Anders* protects the right to effective assistance, while the reasonable assistance required of postconviction counsel is less than effective assistance. *Greer* at 209. In light of the ethical duties of counsel, we find the lesser standard that defendant decries – he argues that postconviction counsel standing on the petition deprives a defendant of argument by counsel in support of his claims – to be consistent with the lesser right being protected.

¶ 25 We take particular note of the *Greer* court's emphasis on counsel who "*knows*" the defendant's claims are frivolous, and our statement in *Komes* that counsel may ethically proceed rather than withdraw if any of the defendant's claims is not frivolous. Defendant's contention herein is binary: counsel must either amend the petition because the claims are meritorious or withdraw because they are not. That argument does not allow for the existence of meritorious *pro se* claims that do not require amendment to be adequately presented, such as those based on the record and not requiring affidavits or the like. See *Malone*, ¶ 11 ("postconviction counsel provided reasonable assistance in that he reviewed the record and could not *or did not* need to make any amendments to the petition to adequately present the defendant's claims")(Emphasis added).

¶ 26 Here, PC counsel filed her Rule 651(c) certificate and thereby created a rebuttable presumption that she provided reasonable assistance. While defendant bears the burden of

overcoming that presumption, he "does not make any recommendation as to how counsel could have improved the petition, other than stating that counsel did not" amend it. *Malone*, ¶ 10. In other words, defendant does not contend that PC counsel rendered unreasonable assistance by not making particular amendments to support specific claims of merit, but that PC counsel not amending his petition, and standing on his claims at the hearing on the State's motion to dismiss, was *per se* unreasonable. For the reasons stated above, we hold to the contrary. We conclude that defendant has failed to rebut the presumption and to establish that PC counsel did not provide reasonable assistance.

¶ 27 Accordingly, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.