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2018 IL App (3d) 150746-U

Order filed February 23, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 9th Judicial Circuit, Hancock County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0746
GERALD C. SCHMIDT, JR.,)	Circuit No. 08-CF-28
Defendant-Appellant.)	Honorable Richard H. Gambrell, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The record fails to clearly and affirmatively establish that postconviction counsel provided the defendant with reasonable assistance.

¶ 2 The defendant, Gerald C. Schmidt, Jr., appeals the second-stage dismissal of his postconviction petition. The defendant argues that his appointed counsel failed to provide reasonable assistance.

¶ 3 **FACTS**

¶ 4 Because the facts established at trial were described in detail in the defendant's appeal from his conviction and sentence, we only summarize those facts relevant to this appeal. See *People v. Schmidt*, 405 Ill. App. 3d 474 (2010).

¶ 5 At trial, Deputy Joshua Smith testified that he received a report of a suspicious vehicle (truck) on the property of Fuller Fertilizer in Hancock County. Smith arrived at Fuller Fertilizer and then drove to the back of the property where an open-ended Quonset hut was located. Another officer walked the path the truck had taken and two other officers blocked the exit to the property with their squad cars.

¶ 6 As Smith drove through the property, he saw the truck in question, which was registered to the defendant. Smith noticed the engine of the truck was off, but as he approached, the engine started and the truck drove away. The truck continued toward the exit of the property, forcing the two officers blocking the exit to back away to avoid a collision.

¶ 7 Smith continued to follow the truck onto the highway. During the chase, Smith observed the driver of the truck reach for the passenger-side window, open it, and throw a blue container out the window. Eventually, the truck stopped and the driver (the defendant) was arrested. At the time of the arrest, the defendant was covered in a white powder. The white powder was also found covering the front seat of the truck. A police officer collected the powder from the front seat and then sent it to the crime laboratory for testing. Police also searched the Quonset hut on the Fuller Fertilizer property where the defendant was originally observed. Inside and around the hut, officers found a bucket, other containers, plastic gloves, salt, Coleman fuel, Liquid Fire, coffee filters, side cutters, a pocket knife, and battery peelings. All of these items are used in the manufacture of methamphetamine.

¶ 8 The day after the defendant’s arrest, Deputy Charles Shirey returned to the area of the highway where Smith observed the defendant throw a blue container from the truck. Shirey testified that he recovered a blue container (a bowl) with a substance inside. The substance was field tested and indicated the presence of pseudoephedrine. Shirey removed the substance from the bowl and sent it to the crime laboratory for testing. Shirey did not send the blue bowl to the crime laboratory for testing. During his testimony, Shirey acknowledged that the substance removed from the bowl consisted of a white powder and red specks. The residue in the blue bowl, however, was white but did not contain red specks.

¶ 9 Joni Little, a forensic scientist, tested the substance removed from the blue bowl and found that it contained methamphetamine and pseudoephedrine. On cross-examination, Little acknowledged that this substance was white with red specks. When defense counsel asked Little what the red specks were, she answered, “perhaps the pseudoephedrine tablets not thoroughly crushed.” Little could not say exactly what the red specks were because she tested the sample as a whole. Little explained, “It’s pretty common to find in a methamphetamine sample, not all of the pseudoephedrine gets cooked up and so some of its left behind.”

¶ 10 Little further testified that she tested the substance recovered from the defendant’s truck and determined that it contained methamphetamine. Little also tested the substance found on the defendant’s jeans, but the test was negative for the presence of controlled substances.

¶ 11 The jury found the defendant guilty of unlawful use of property (720 ILCS 646/35(a) (West 2008)), unlawful possession of methamphetamine precursor (*Id.* § 20(b)(1)), unlawful possession of methamphetamine (*Id.* § 60(a)), obstructing justice (720 ILCS 5/31-4(a) (West 2008)), and aggravated fleeing or attempting to elude a peace officer (625 ILCS 5/11-204.1(a)(1) (West 2008)).

¶ 12 Thereafter, defense counsel filed a motion to retest the evidence. In the motion, defense counsel alleged that prior to trial he did not know of the existence of the red specks in the substance removed from the blue bowl. The motion noted that the residue in the blue bowl did not contain red specks. Counsel asked that the substance be retested to resolve the question of whether the substance came from the blue bowl as Shirey testified. The State responded that it had complied with the applicable discovery rules and that the defendant's right to independently test the evidence before trial was forfeited on timeliness grounds. Ultimately, the circuit court denied the motion on the basis that the time for testing and examining the evidence was before trial and that there was no indication that the State prevented the defendant from testing the evidence.

¶ 13 Subsequently, the circuit court sentenced the defendant to concurrent 20-year terms of incarceration for the unlawful use of property and unlawful possession of methamphetamine precursor. In addition, the court sentenced the defendant to concurrent terms of four years' imprisonment for unlawful possession of methamphetamine, two years for obstructing justice, and two years for aggravated fleeing and attempting to elude a peace officer.

¶ 14 The defendant appealed, arguing the unlawful use of property statute was unconstitutional, the charge for possession of methamphetamine precursor was not proven beyond a reasonable doubt, and that his convictions for both unlawful possession of methamphetamine and unlawful possession of a methamphetamine precursor should be vacated because they are lesser-included offenses of unlawful use of property. Appellate counsel did not argue that trial counsel was ineffective for failing to investigate the evidence or that the circuit court violated the defendant's due process rights when it denied the defense's motion to retest the evidence. This court affirmed the defendant's convictions, but vacated the unlawful

possession of methamphetamine conviction based on the one-act, one-crime doctrine. *Schmidt*, 405 Ill. App. 3d 474.

¶ 15 Next, the defendant filed a *pro se* postconviction petition. This petition is the subject of this appeal. In the petition, the defendant raised several claims. Relevant to this appeal are two claims the defendant raised with regard to the substance recovered from the blue bowl. First, the defendant claimed that his trial counsel was ineffective for failing to investigate the substance recovered from the blue bowl. Second, the defendant argued that if counsel was not ineffective, then his due process rights were violated when the circuit court denied counsel's motion to retest the evidence. The defendant did not attach any evidence to his *pro se* petition and did not allege any specific prejudice he suffered from the failure to retest the evidence.

¶ 16 The circuit court advanced the defendant's *pro se* petition to the second stage and appointed counsel to represent the defendant. Appointed counsel amended the defendant's *pro se* petition to include additional issues. Appointed counsel also realleged the defendant's *pro se* claim that trial counsel was ineffective for failing to investigate the substance removed from the blue bowl. The amended petition also realleged the defendant's due process rights were violated when the circuit court denied the defendant's motion to retest the evidence. However, the appointed counsel did not amend the petition to allege that appellate counsel was ineffective for failing to argue that the defendant's due process rights were violated when the circuit court denied the motion to retest the evidence. Appointed counsel did not attach any affidavits or other supporting evidence to the amended petition. Appointed counsel also did not file a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 17 The State filed a motion to dismiss the amended petition. The State contended that the defendant's claims were forfeited because they could have been raised on appeal. The State also

argued that the defendant’s ineffective assistance of counsel claims should be dismissed because the amended petition did not allege the required showing of prejudice.

¶ 18 Appointed counsel responded to the State’s motion. In the response, counsel acknowledged, “the State’s argument essentially is that the Defendant failed the *Strickland* Test and particularly the second prong of the *Strickland* Test in that the State believes that the Defendant has failed to show that but for the errors of Trial Counsel and errors of Counsel on Appeal how the result would have been different.” Counsel then argued,

“[T]he proceedings would have ended up differently had the two exhibits been tested and found not of the same chemical combinations. Had that been done, defense counsel could have argued that the evidence did not come from the same place as the State’s witnesses testified and could have reversed the finding of the jury. Because of the failure to test the exhibits, the Defendant can only surmise what the ultimate outcome would have been had counsel tested the evidence as he should have.”

¶ 19 Following a hearing, the circuit court allowed the State’s motion and dismissed the defendant’s petition.¹ The court found, among other things, “[t]here’s no indication that any deficiencies of the trial counsel prejudiced the defendant, other than the supposition that if there had been a separate test, that something else might have been found, which might have led to further conclusions to be made.”

¶ 20 ANALYSIS

¶ 21 On appeal, the defendant argues that postconviction counsel provided unreasonable assistance in presenting his claims that (1) trial counsel was ineffective for failing to investigate

¹We note that the written order shows that the circuit court denied the defendant’s petition. Given that the petition was disposed of on the State’s motion to dismiss, we treat the circuit court’s disposition as a dismissal—not a denial—of the defendant’s postconviction petition.

the substance Shirey claimed he removed from the blue bowl, and (2) the defendant's due process rights were violated when the circuit court denied trial counsel's posttrial motion to retest the evidence. More specifically, the defendant contends that postconviction counsel failed to attach evidentiary support to show prejudice from trial counsel's failure to investigate the substance removed from the blue bowl. The defendant also asserts that postconviction counsel failed to avoid forfeiture of the defendant's related claim that the circuit court violated the defendant's due process rights when it denied his motion to retest the evidence.

¶ 22 A defendant is only entitled to a reasonable level of assistance from postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To achieve this level of assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires appointed counsel to (1) consult with the petitioner to ascertain his contentions of constitutional deprivations, (2) examine the record of the proceedings of the original trial, and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions.

¶ 23 Compliance with Supreme Court Rule 651(c) is presumed when counsel files a Rule 651(c) certificate. However, in instances such as the present case, when counsel fails to file a Rule 651(c) certificate, the record must "clearly and affirmatively show" that appointed counsel complied with Rule 651(c) and provided reasonable assistance. *People v. Rodriguez*, 2015 IL App (2d) 130994, ¶ 19. The defendant contends that the record does not clearly and affirmatively show that counsel complied with his third duty—to make any amendments to the *pro se* petition that are necessary to present the defendant's contentions. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶ 24 As to the defendant's first claim, his *pro se* petition alleged that trial counsel was ineffective because he failed to investigate the substance removed from the blue bowl. The

defendant identified the specific evidence that he argued should be retested: the substance removed from the blue bowl and the residue that remained in the blue bowl. The defendant noted that the residue in the blue bowl was white, however the substance Shirey claimed he removed from the blue bowl was white *and contained* red specks. According to the defendant's petition, the substance presented at trial did not actually come from the blue bowl (contrary to Shirey's testimony).

¶ 25 A review of the above allegations put postconviction counsel on notice of the evidence needed to support the defendant's claim. "Postconviction counsel had an obligation to, at a minimum, 'attempt to obtain evidentiary support for claims raised in the post-conviction petition.' " *People v. Thompson*, 2016 IL App (3d) 150644, ¶ 24 (quoting *People v. Johnson*, 154 Ill. 2d 227, 245 (1993)). Postconviction counsel, however, failed to take any steps to obtain or perform additional testing. Postconviction counsel could have moved for discovery to have this evidence tested. *People v. Johnson*, 205 Ill. 2d 381, 408 (2002). Postconviction counsel also could have moved for the court to appoint an expert to test the evidence. *People v. Wilson*, 191 Ill. 2d 363, 370 (2000). Instead, postconviction counsel decided to merely speculate that additional testing could have changed the result of the trial, but failed to present any evidentiary support. The consequence of appointed counsel's deficiency is clear, when claims in a petition are "not supported by affidavits, records or other evidence, the trial court [has] no choice but to dismiss the post-conviction petition without an evidentiary hearing." *Johnson*, 154 Ill. 2d at 245.

¶ 26 The defendant's second claim in his *pro se* petition alleged that his due process rights were violated when the circuit court denied trial counsel's posttrial motion to retest the substance Shirey claimed he removed from the blue bowl. This claim was based on the record on appeal, and therefore, was procedurally defaulted because it was not raised on appeal from the

defendant's convictions and sentences. Postconviction counsel had an obligation to amend this claim to allege that appellate counsel was ineffective for failing to make the argument on appeal. See *People v. Turner*, 187 Ill. 2d 406, 413 (1999) (counsel's failure to amend a postconviction petition to allege ineffective assistance of appellate counsel prevented the circuit court from considering the merits of the defendant's claims and directly contributed to the dismissal of the petition without an evidentiary hearing). Instead, postconviction counsel did not allege ineffective assistance of appellate counsel, but merely presented the defendant's claim as a due process violation. Postconviction counsel's unreasonable assistance resulted in the circuit court having to dismiss the claim on forfeiture grounds.

¶ 27 In light of the above, we find the record does not clearly and affirmatively show that postconviction counsel complied with the third requirement of Rule 651(c) that counsel make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. Therefore, we need not discuss whether counsel fulfilled the other duties under Rule 651(c). See *People v. Lander*, 215 Ill. 2d 577, 585 (2005). This matter must be remanded to the circuit court for further postconviction proceedings where the defendant is entitled to receive reasonable assistance of counsel. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007).

¶ 28 In reaching this conclusion, we reject the State's argument that postconviction counsel provided reasonable assistance because even if the red specks were further tested, it "would not have changed the outcome of defendant's trial." First, the State's argument is improper because it attacks the substantive merits of the defendant's petition. The supreme court consistently remands for further proceedings when counsel fails to provide reasonable assistance regardless of the merits of the petition. See *id.* (collecting cases). Second, the State's reliance on the fact that the substance removed from the blue bowl was already tested is misplaced. The defendant

requested further testing to show possible contamination of the substance. This would call into question the source of the substance and suggest possible tampering. In other words, if the substance did not come from the blue bowl, it would not matter what the substance contained. Further, the evidence at trial established that the residue in the blue bowl was never tested.

¶ 29

CONCLUSION

¶ 30

The judgment of the circuit court of Hancock County is reversed and the matter is remanded for further proceedings.

¶ 31

Reversed and remanded.