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2018 IL App (3d) 170268-U

Order filed July 3, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

|                                      |   |   |
|--------------------------------------|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois, |
| Plaintiff-Appellee,                  | ) |   |
| v.                                   | ) | Appeal No. 3-17-0268  |
| C.T. BUCKLEY III,                    | ) | Circuit No. 09-CF-1058  |
| Defendant-Appellant.                 | ) | Honorable Frank R. Fuhr, Judge, Presiding.  |

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

¶ 1 *Held:* Defendant received unreasonable assistance of postconviction counsel. The cause is remanded for the appointment of new postconviction counsel and *de novo* second-stage postconviction proceedings.

¶ 2 Defendant, C.T. Buckley III, appeals from the denial of his postconviction petition.

Defendant argues that the cause must be remanded for *de novo* postconviction proceedings because postconviction counsel did not provide a reasonable level of assistance. We reverse and remand.

## FACTS

¶ 3

¶ 4

At the outset, we note that the facts of defendant's underlying case are readily set forth in defendant's direct appeal, *People v. Buckley*, 2012 IL App (3d) 100944-UB, and first postconviction appeal, *People v. Buckley*, 2015 IL App (3d) 130202-U. Therefore, the facts of this case are limited to those necessary to resolve the issue raised by defendant.

¶ 5

The State charged defendant with two counts of aggravated battery (720 ILCS 5/12-4(b)(8), (b)(10) (West 2008)) and aggravated vehicular hijacking (*id.* § 18-4(a)(1)). The court appointed counsel to represent defendant.

¶ 6

At a pretrial hearing, trial counsel moved for the appointment of an expert to evaluate defendant's mental capacity to commit the charged offenses. The court appointed Dr. Daniel Tranel, a neuropsychologist, to review defendant's medical records. Ultimately, the cause proceeded to a bench trial without mention of Dr. Tranel's findings.

¶ 7

The trial evidence established that defendant initially went to Walgreens to refill his seizure medication. Defendant said that if he did not take the medication, he would suffer a variety of health issues including memory loss and loss of consciousness. In the Walgreens parking lot, defendant saw the victim. Defendant mistook the victim for his former girlfriend. Defendant said that the victim had agreed to give him a ride.

¶ 8

The victim testified that defendant forced his way into her vehicle. Once inside, defendant prevented the victim from exiting the vehicle and forced her to lay on the floorboard. As defendant drove the victim's vehicle, the victim waved her arms to signal the driver of a following truck. Eventually, defendant stopped the vehicle, gave the keys to the victim, exited the car, and walked toward a nearby fire department. The driver of the truck confronted defendant, and defendant said " '[s]he's a crazy bitch. She's my neighbor.' " *Buckley*, 2015 IL

App (3d) 130202-U, ¶ 9. James Bleuer, the driver of the truck, testified that defendant also said “ ‘I’m trying to help [the victim] out.’ ” *Id.* ¶ 11.

¶ 9 Defendant said that he was unable to receive assistance at the fire department and eventually returned to his house. Defendant next remembered waking up in the hospital the next day.

¶ 10 During closing arguments, trial counsel argued that the State had failed to prove defendant’s intent because defendant’s confusion and history of seizures prevented him from manifesting the necessary *mens rea*.

¶ 11 The court found defendant guilty of all three counts. The court sentenced defendant to 5 years’ imprisonment on both counts of aggravated battery and 15 years’ imprisonment for aggravated vehicular hijacking. The court ordered defendant to serve 85% of his sentence for aggravated vehicular hijacking and for defendant to serve the sentences concurrently.

¶ 12 On direct appeal, defendant raised three arguments: (1) the court erred when it ordered him to serve 85% of his sentence for aggravated vehicular hijacking, (2) his aggravated battery conviction violated the one-act, one-crime doctrine, and (3) the court erroneously imposed a duplicative DNA analysis fee. *Buckley*, 2012 IL App (3d) 100944-UB, ¶¶ 14, 19, 26. We vacated the DNA analysis fee and affirmed defendant’s convictions and sentences. *Id.*

¶ 13 Thereafter, defendant filed a *pro se* postconviction petition. 725 ILCS 5/122-1 *et seq.* (West 2012). Defendant’s *pro se* petition alleged two violations of his constitutional rights. First, defendant was denied his right to due process where the circuit court ordered him to serve 85% of his sentence for aggravated vehicular hijacking without finding that the victim suffered great bodily harm. Second, defendant received ineffective assistance of trial counsel because counsel

failed to file a motion for a mental health evaluation of defendant. The court summarily dismissed the petition.

¶ 14 On appeal, we reversed the circuit court’s dismissal finding that defendant’s postconviction petition presented the gist of a claim that trial counsel had provided ineffective assistance of counsel for pursuing an insanity defense without moving the court to order a mental health examination. *Buckley*, 2015 IL App (3d) 130202-U. We specifically noted that because trial counsel chose to raise an insanity defense, she arguably had a duty to move for a mental health examination to support that defense. *Id.* ¶ 30. We observed that defendant’s lack of supporting affidavits, records, or evidence was not a bar to defendant’s first-stage petition because “it is impossible to know the outcome of the examination without actually conducting it.” *Id.* ¶ 36.

¶ 15 On remand, the court advanced the petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. Postconviction counsel filed an amended postconviction petition and an Illinois Supreme Court Rule 651(c) certificate. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 16 In the opening paragraph of the amended petition, counsel asked that the circuit court “vacate” defendant’s convictions. The amended petition then alleged three deprivations of defendant’s constitutional rights. First, the court violated defendant’s right to due process when it ordered defendant to serve 85% of his sentence for aggravated vehicular hijacking without finding that the victim suffered great bodily harm. In support of this claim, trial counsel argued:

“A Statute provided for a hearing before the court or jury. 725 ILCS 5/10 4-12 or 85% Sentencing. Trial Judge do a finding of Great Bodily Harm caused in process of committing a crime. The court is required to order the defendants

examination 725 ILCS 5/104-13, the person making the examination must file their report 725 ILCS 5/103-16. Also, provided the rtrial [*sic*] judge has made a finding of freat [*sic*] bodily harm to the victim the statement applies to aggravated vehicular hijacking. 725 ILCS 5/115 4-1(e), the trial court lacked authority to impose sentence. Excess portion of sentence is void. Statute under which defendant was sentence [*sic*] is unconstitutional fundamentally unfair, to uphold sentence S.H.A of 85%. Trial court did no finding [*sic*] or bruise on victim. Counseling or great bodily harm.”

Second, the court failed to properly admonish defendant of the applicable sentencing parameters required by Illinois Supreme Court Rule 402 (eff. July 1, 2012). Third, trial counsel was ineffective for failing to request a “psychiatric hearing,” to call witnesses at trial, and to advise the court of the applicable mitigating factors when considering sentencing. In support of the ineffective assistance of counsel allegation, counsel argued:

“Ineffective assistance of trial counsel. Violation of 6th Constitutional Amendment Of assistance of counsel. Violation of 6th Constitutional right of filing a violation of statute, or a truth in sentencing. Code of corrections case law trial court procedures. Guidance 85% Sentencing Order, plus procedures of conviction statute of a trial Judge or medical exam, physician statement beyond reasonable doubt or brief filing or change or sentencing of 720 ILCS 5/18-61 (a) (i) a class felony only. No witness called for trial court to testify in defendants favor, no fire department called for defendant’s trial, as possible witnesses for defendant. Motion of Withdraw filed by public defender Jennifer Gardner, on 09 CF 1058.

Furthermore, at the sentencing hearing held on November 12, 2010, defendant's attorney relied solely on the pre-sentencing investigation and made no attempt to advise the court of factors in mitigation so as to inform the Judge as to why a lower sentence to the Department of Corrections may have been appropriate."

In the conclusion section of the amended petition, counsel asked that the court "remand and resentence" defendant. The amended petition did not include a verification affidavit or supporting affidavits, record citations, or other evidence.

¶ 17 The State filed a motion to dismiss the amended petition. The State argued that the 85% sentencing issue was addressed in defendant's direct appeal. *Buckley*, 2012 IL App (3d) 100944-UB. Defendant's second claim was unfounded because Rule 402 admonishments only apply when a defendant pleads guilty and defendant was convicted after a bench trial. Finally, the State asserted that trial counsel's decision not to call a psychiatrist to testify for the defense was strategic and defendant failed to show either prong of the *Strickland* ineffective assistance of counsel test.

¶ 18 The court granted the State's motion to dismiss defendant's first two postconviction claims. The court advanced defendant's third claim, that he received ineffective assistance of trial counsel, to an evidentiary hearing.

¶ 19 At the hearing, defendant testified that, at the time of his trial, he took the medication Dilantin for a seizure disorder. Defendant understood the proceedings and felt that he was able to assist in his defense. Defendant said that his ineffective assistance of counsel claim was based partially on trial counsel's refusal to allow him to testify. Defendant also said that trial counsel never requested a psychiatric hearing or a fitness evaluation. Defendant never met with a

licensed psychiatrist. Despite defendant's request, he was not allowed to speak with a psychiatric evaluator before trial.

¶ 20 Trial counsel testified that she knew at the time of trial that defendant took Dilantin for a seizure condition. Trial counsel had also reviewed defendant's medical records. Trial counsel said that she asked the court to appoint Dr. Tranel to review defendant's medical records. Dr. Tranel did not conduct an in-person examination of defendant. From his review of the medical records, Dr. Tranel told trial counsel that he could not testify that defendant suffered from an organic brain disorder. Trial counsel concluded that nothing raised a *bona fide* doubt as to defendant's fitness.

¶ 21 After trial counsel's testimony, postconviction counsel argued that trial counsel failed to fully investigate defendant's medical history and failed to request "any type of psychiatric hearing, fitness examination, behavioral, clinical exam of any kind." Postconviction counsel said that he did not "believe [defendant] could have at the time understood the proceedings and probably couldn't assist his counsel in his own defense."

¶ 22 The court found that Dr. Tranel determined that he did not need to see defendant in person, and therefore, trial counsel made the strategic decision not to call Dr. Tranel to testify or pursue a defense based on mental unfitness. The court denied defendant's postconviction petition. Defendant appeals.

¶ 23 ANALYSIS

¶ 24 Defendant argues that the cause should be remanded for *de novo* second-stage postconviction proceedings including the appointment of new counsel and the filing of a second-amended postconviction petition because postconviction counsel provided unreasonable assistance. Specifically, postconviction counsel (1) made conclusory allegations that trial counsel

was ineffective for failing to request a psychiatric evaluation and call witnesses on defendant's behalf, (2) raised an issue that was barred by *res judicata*, (3) raised a Rule 402(a) admonishment issue that is unwarranted by the record, (4) made unintelligible arguments, and (5) did not file a verification affidavit with the amended petition.

¶ 25 Postconviction counsel need only provide a reasonable level of assistance, which is less than that afforded by the federal or state constitutions. *People v. Munson*, 206 Ill. 2d 104, 137 (2002). Illinois Supreme Court Rule 651(c) outlines postconviction counsel's duties. These include: (1) consultation with defendant to ascertain his contentions of deprivations of constitutional right, (2) examination of the record of the trial proceedings, and (3) amend the petition, if necessary, to ensure that defendant's contentions are adequately presented. *Id.* Additionally, postconviction counsel must ensure that defendant's petition includes the necessary supporting affidavits. *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 19. 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." *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). Stated another way, remand is required where the record demonstrates that postconviction counsel failed to fulfill his duties under Rule 651(c).

¶ 26 In the instant case, postconviction counsel filed a Rule 651(c) certificate. Generally, the Rule 651(c) certificate creates a presumption that defendant received reasonable assistance of counsel. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). However, in this case, the record defeats that presumption.

¶ 27 The amended postconviction petition includes two meritless claims that indicate postconviction counsel did not conduct an adequate examination of the record. The record



establishes that the 85% sentencing issue was addressed in defendant's direct appeal, and therefore, is barred by *res judicata*. See *People v. Blair*, 215 Ill. 2d 427, 455 (2005) (an issue that is addressed in defendant's direct appeal is barred by *res judicata* from being reraised in a postconviction petition). Further, the Rule 402 admonishment issue is unwarranted because Rule 402 admonishments are only given during guilty plea proceedings and the instant defendant had a bench trial. See Ill. S. Ct. R. 402(a) (eff. July 1, 2012) ("The court shall not accept a *plea of guilty* \*\*\* without first, by addressing the defendant personally in open court, informing him or her of and determining that he or she understands the following." (Emphasis added.)). These two errors indicate that postconviction counsel did not adequately review the record with regard to the specific issues raised by defendant.

¶ 28 The arguments posed in the amended petition further defeat the presumption that postconviction counsel made the necessary amendments to defendant's claims. In particular, the ineffective assistance of counsel claim did not include the two-prong deficient performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) (to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) that deficient performance prejudiced the defense). Instead, this claim included conclusory allegations that trial counsel's performance was deficient for failing to pursue a hearing on defendant's fitness to stand trial, call unspecified witnesses, and argue unnamed factors in mitigation. It included no allegations on the prejudice that resulted from these alleged deficiencies or how correction of these issues would have altered the outcome of the proceeding.

¶ 29 We further note that part of the ineffective assistance of trial counsel argument included incoherent ramblings that served only to detract from defendant's claim. Postconviction counsel

also included a similar incoherent argument in support of the meritless 85% sentencing claim. *Supra* ¶ 16. Accordingly, because the amended petition did not allege the basic elements of an ineffective assistance of trial counsel claim and contained unintelligible supporting arguments, it was not in an appropriate legal form to present defendant's claims.

¶ 30 Finally, we note that postconviction counsel failed to file a verification affidavit with the amended petition as required by section 122-1(b) of the Post-Conviction Hearing Act. 725 ILCS 5/122-1(b) (West 2014). While defendant initially failed to file the verification affidavit with his *pro se* petition, defendant's failure did not excuse postconviction counsel's subsequent failure to fulfill this statutory requirement at the second stage. See *Nitz*, 2011 IL App (2d) 100031, ¶ 19. Without the verification affidavit, defendant's postconviction petition was fatally deficient and could have been dismissed at any time. *Id.*

¶ 31 In light of the above-discussed deficiencies in defendant's amended postconviction petition, we conclude that postconviction counsel's representation was unreasonable. Accordingly, we reverse the denial of defendant's postconviction petition and remand the cause with directions to appoint new counsel and conduct *de novo* second-stage proceedings. In coming to this conclusion, we reject defendant's request to remand for new third-stage proceedings. Counsel's performance was unreasonable on each claim raised in the amended petition, and therefore, the proceedings must begin entirely anew at the second stage.

¶ 32 We recognize the dissent's concerns with our holding; however, we respectfully find the dissent's position to be untenable. The dissent would require defendant to show that he suffered prejudice as a result of counsel's unreasonable representation. That is, defendant's claims had merit, and but for counsel's unreasonable representation, defendant's claims would have prevailed. This position directly conflicts with our supreme court's express and consistent

holding 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.*” (Emphasis added.) *Suarez*, 224 Ill. 2d at 47 (collecting cases). Therefore, our analysis must focus exclusively on counsel’s performance of the Rule 651(c) duties and not the merit of defendant’s underlying claims or defendant’s probability of success on remand.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Rock Island County is reversed and remanded with directions.

¶ 35 Reversed and remanded with directions.

¶ 36 JUSTICE SCHMIDT, dissenting:

¶ 37 I dissent from the majority’s judgment because it misconstrues Rule 651(c)’s reasonable assistance standard. As the majority notes, postconviction counsel’s Rule 651(c) certificate created “a presumption that defendant received reasonable assistance of counsel.” *Supra* ¶ 26. The record does not defeat this presumption. Nothing in the record shows counsel neglected to review the record; the majority merely speculates that this was the case. Nor does the record indicate that counsel failed to *adequately* present defendant’s claims.

¶ 38 The majority first states that two claims in defendant’s petition—the sentencing issue barred by *res judicata* and the inapplicable Rule 402 admonishment issue—“indicate that postconviction counsel did not adequately review the record” (*supra* ¶ 27) as Rule 651(c) requires. There are many reasons why lawyers might plead and argue losing claims; the majority merely speculates that these claims resulted from counsel’s failure to review the record. Moreover, the two losing claims had no detrimental effect on defendant. From defendant’s

perspective, the worst possible outcome is losing the claims—the same outcome that would have occurred if counsel omitted them from the petition. Lawyers who file frivolous claims might have to answer to the Attorney Registration and Disciplinary Commission (ARDC) for ethical violations, but asserting losing claims in a postconviction petition neither undermines defendants’ rights nor render counsel’s assistance unreasonable.

¶ 39           The majority also believes that counsel failed to present defendant’s claim in proper legal form, as Rule 651(c) requires. The majority cites two examples: the petition’s “incoherent ramblings” that “detract[ed] from defendant’s claim” (*supra* ¶ 29), and the petition’s lack of a prejudice allegation to support defendant’s ineffective assistance of trial counsel claim under *Strickland*. Although I would not award high marks to this petition in a legal writing course, its poor construction did not render counsel’s representation unreasonable under Rule 651(c).

¶ 40           The “incoherent” allegations in defendant’s petition carry little weight in this case. Rule 651(c) does not deem effective legal writing an element of reasonable representation; whether an allegation’s prose is persuasive or “detracts” from its claims offers little to no insight as to whether counsel provided reasonable assistance. Postconviction counsel must *adequately* present the defendant’s claims (Ill. S. Ct. R. 651(c) (eff. July 1, 2017)). That means counsel must ensure the trial court understands the petition’s claims and the legal grounds that support them. Nothing in the record indicates that the court misunderstood defendant’s claims or applied incorrect legal principles due to the petition’s “incoherent” allegations.

¶ 41           Nor does the record suggest that the trial court improperly applied the *Strickland* test because the petition failed to allege how trial counsel’s allegedly ineffective assistance prejudiced defendant. In fact, the court held a third stage evidentiary hearing on this claim. At the hearing, trial counsel testified that an expert in neurology reviewed defendant’s medical

records and found no organic condition that would affect defendant's fitness to stand trial. Trial counsel also testified that defendant assisted in his defense; counsel never developed a *bona fide* doubt of defendant's fitness. Defendant admitted during the hearing that he understood the trial proceedings and assisted in his defense. Postconviction counsel's presentation of defendant's claim in the petition had no bearing on the trial court's determination.

¶ 42           It is also obvious that the lack of a verification affidavit had no bearing on this case. The majority states: "Without the verification affidavit, defendant's postconviction petition was fatally deficient and could have been dismissed at any time." *Supra* ¶ 30. But, the trial court did not dismiss defendant's petition; this issue is irrelevant.

¶ 43           The majority's decision to remand requires postconviction counsel to plead and argue the same claims with the same evidence, just in a more aesthetic and persuasive form. More importantly, the majority's judgment requires the trial court to spend resources considering the same claims and evidence that it already fully and fairly considered. Counsel provided reasonable representation under Rule 651(c) and preserved defendant's postconviction rights. I would affirm the trial court's judgment.