2018 IL App (4th) 160195-U

NO. 4-16-0195

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 29, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
RONALD W. THIELE,	)	No. 10CF144
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was denied reasonable assistance of postconviction counsel.

¶ 2 In December 2012, defendant, Ronald W. Thiele, filed a *pro se* postconviction petition. In February 2013, the Livingston County circuit court dismissed defendant's petition as frivolous and patently without merit. Defendant appealed the dismissal, and this court reversed the first-stage dismissal and remanded the cause for further proceedings. *People v. Thiele*, 2014 IL App (4th) 130173-U.

¶ 3 On remand, appointed counsel filed an amended postconviction petition. In August 2015, the State filed a motion to dismiss defendant's amended postconviction petition. In February 2016, the circuit court granted the State's motion to dismiss. Defendant appeals, contending he was denied reasonable assistance of postconviction counsel. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In June 2010, a grand jury indicted defendant with two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1), (d) (West 2010)) and one count of unlawful possession of a controlled substance with the intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2010)). The unlawful-delivery counts alleged that, on May 24 and 27, 2010, defendant knowingly delivered heroin to a confidential source (later identified as Tace Meints). The count of unlawful possession with the intent to deliver asserted that, on May 29, 2010, defendant knowingly possessed with the intent to deliver 15 grams or more but less than 100 grams of a substance containing heroin.

¶ 6 The evidence presented at defendant's trial that provides a background for defendant's postconviction claims is set forth below. Meints testified on behalf of the State and described the two controlled buys he made from defendant, whom Meints had known all of his life. During the first buy, Meints bought two bags of heroin for $60. During the second buy, Meints observed defendant first sell Brad Haab eight or nine bags of heroin for $200. Meints also bought $200 worth of heroin. While Meints was in defendant's home for the second buy, he observed defendant inject himself with heroin. Meints admitted to using heroin at defendant's home on prior occasions.

¶ 7 On May 29, 2010, the police executed a search warrant for defendant's home. Deputy Brad DeMoss testified defendant and his girlfriend, Megan Johns, were both sleeping when they entered the home. DeMoss recovered syringes from multiple locations in the home. The police also found bags containing heroin in the pocket of defendant's jeans. In total, 149 small bags of heroin were recovered from defendant's pocket. Inspector Mike Willis testified defendant's wallet was also in the jeans and it contained $148. Willis interviewed defendant,

and defendant was adamant the heroin was all his. Defendant had purchased the heroin in Cicero, Illinois, the day before the search. He had paid $1000 for 13 packs of 14 individual Ziploc bags of heroin. Defendant gave Willis the names of the people to whom defendant had been selling heroin. Defendant admitted to being a heroin addict and stated he sold heroin to support his heroin habit. Willis admitted the police did not find any weapons, scales, ledgers, packaging materials, and items used in "cutting narcotics." However, Willis further testified they often did not find cutting items or scales with heroin because the sellers are purchasing heroin already packaged for sale. Defendant admitted to using eight or nine bags of heroin at a time. While 8 to 9 bags of heroin were a lot for one use, Willis had known users who claimed to use 15 to 16 bags at a time.

¶ 8 Michelle Dieke, a forensic scientist with the Illinois State Police, testified the State's exhibit No. 1 contained a tenth of a gram of a substance containing heroin. Aaron Roemer, also a forensic scientist with the Illinois State Police, testified the State's exhibit No. 2 was a plastic bag with nine smaller plastic bags containing an off-white powder. The powder from all nine bags weighed 1.2 grams and tested positive for heroin. The State's exhibit No. 3 was a larger plastic bag with other bags inside and contained a total of 149 small bags of white powder. Roemer weighed the powder contained in 120 of the small bags and found the powder weighed 15.4 grams. The powder in the other 29 bags weighed 7.5 grams. Roemer tested the powder in the 120 bags and found it tested positive for heroin. He did not test the other 29 bags. Most of the small bags were in groups of 14 tethered together with tape.

¶ 9 Defendant presented the testimony of his girlfriend Johns. Johns testified defendant used heroin about three times a day. She also noted Meints was defendant's friend and coworker. According to Johns, in the two months prior to defendant's arrest, Meints was at

defendant's home at least five times a week and would use heroin every time he came to the house. Meints also kept clothing and a motorcycle at defendant's home. According to Johns, the heroin found during the search all belonged to defendant.

¶ 10 In closing argument, defense counsel argued the evidence did not show defendant intended to sell more than 15 grams of heroin because a large portion of it was for his personal use.

¶ 11 At the end of the trial, a jury found defendant guilty of all three charges. Defendant filed a motion for new trial and judgment of acquittal. On March 16, 2011, the circuit court held a joint hearing on defendant's posttrial motion and sentencing. The court denied defendant's posttrial motion and sentenced him to concurrent prison terms of 10 years and 25 years on the two counts of unlawful delivery of a controlled substance and 41 years for unlawful possession of a controlled substance with the intent to deliver. Defendant filed a motion to reconsider his sentences, which the court denied. Defendant appealed, and this court affirmed his convictions and sentences. *People v. Thiele*, 2012 IL App (4th) 110410-U.

¶ 12 On December 19, 2012, defendant filed his *pro se* postconviction petition with exhibits, raising numerous claims of error. In February 2013, the circuit court dismissed the petition at the first stage of the proceedings. Defendant appealed, and this court reversed the dismissal and remanded the cause for further proceedings. *Thiele*, 2014 IL App (4th) 130173-U.

¶ 13 On remand, appointed counsel filed an amended postconviction petition in June 2015. The amended postconviction petition asserted defendant was denied his right to (1) effective assistance of trial counsel, (2) effective assistance of appellate counsel, and (3) an impartial jury. The amended petition also raised a claim of actual innocence. As to the claim of ineffective assistance of trial counsel, the petition contended trial counsel failed to do the

following: (1) investigate and present Haab as a witness, (2) include Jessica Brown as a witness in discovery, (3) object to prejudicial comments by prospective juror Lynn Masching, (4) strike juror Barbara Wilkinson, (5) present a lesser-included-offense instruction, (6) challenge the State's instruction No. 12, (7) object to perjured testimony from Willis, (8) present character witnesses, and (9) object or respond to the circuit court's use of improper aggravating factors. Additionally, the petition alleged trial counsel coerced, lied, threatened, and intimidated defendant into not testifying at trial. Attached to the amended postconviction petition were affidavits by defendant (only one of which was notarized), police reports involving Meints, and letters from defendant's appellate counsel. Postconviction counsel filed a certificate under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), which stated the following:

> "I *** have consulted with the Petitioner by phone and mail to ascertain his contentions of error in the sentence, his contentions of deprivation of constitutional rights, have examined the trial court file and report of proceedings of the plea of guilty, and have made any amendments to the initially filed motion necessary for adequate presentation of any defects in those proceedings."

¶ 14 In August 2015, the State filed a motion to dismiss the amended postconviction petition, contending defendant failed to make a substantial showing his constitutional rights were violated. Defendant filed a response to the motion to dismiss, addressing each issue but did not include any new supporting documents. In December 2015, the circuit court held a hearing on the State's motion to dismiss.

¶ 15 On February 19, 2016, the circuit court entered a written order granting the State's motion to dismiss the amended postconviction petition. The court noted defendant's claims regarding potential witness Haab and alleged character witnesses were not supported by

affidavits. It further found the issue of Brown's testimony was addressed on direct appeal. As to the issue related to the lesser-included-offense instruction, the court found that argument fell short of establishing a substantial denial of his rights. It noted defendant's entire defense was he was a heavy heroin user and the amount of heroin found on him was for his personal use only. The court described it as "an all or nothing defense."

¶ 16 On March 10, 2016, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Dec. 11, 2014). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 17 II. ANALYSIS

¶ 18 Defendant asserts he was denied reasonable assistance of postconviction counsel because postconviction counsel filed an invalid Rule 651(c) petition and did not amend his petition to adequately present his constitutional claims. The State disagrees.

¶ 19 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition, it proceeds to the

second stage, where the court may appoint counsel for an indigent defendant. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. At both the second and third stages of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 20 In postconviction proceedings, the right to counsel is wholly statutory, and the Postconviction Act only requires counsel to provide a defendant with a " 'reasonable level of assistance.' " *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005) (quoting *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990)). Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) "imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the [Postconviction] Act." *Lander*, 215 Ill. 2d at 584, 831 N.E.2d at 600. Under that rule, postconviction counsel must (1) consult with the defendant either by mail or in person to ascertain the contentions of deprivation of constitutional rights, (2) examine the record of the circuit court proceedings, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's contentions. *People v. Perkins*, 229 Ill. 2d 34, 42, 890 N.E.2d 398, 403 (2007). "Fulfillment of the third obligation does not require counsel to advance frivolous or spurious claims on defendant's behalf."

Pendleton, 223 Ill. 2d at 472, 861 N.E.2d at 1007. The defendant bears the burden of demonstrating that his attorney failed to comply with the duties mandated in Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. Our supreme court has consistently held remand is required when postconviction counsel failed to complete any one of the above duties, "regardless of whether the claims raised in the petition had merit." *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007). This court reviews *de novo* whether an attorney complied with Rule 651(c). *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15, 43 N.E.3d 1077.

¶ 21 Postconviction counsel's filing of a Rule 651(c) certificate raises a presumption that counsel provided reasonable assistance under the Postconviction Act—namely, that counsel adequately investigated, amended, and properly presented the defendant's claims. *Jones*, 2011 IL App (1st) 092529, ¶ 23. In this case, postconviction counsel did provide a certificate, but defendant contends it is invalid as it makes reference to the report of proceedings of a guilty plea and he was found guilty after a trial. We note the certificate does not indicate counsel reviewed the report of proceedings for defendant's trial and sentencing hearing. The appellate record also does not contain a statement by postconviction counsel he reviewed the necessary trial records. Thus, we agree with the State postconviction counsel's Rule 651(c) certificate does not indicate postconviction counsel complied with the second requirement of Rule 651(c), and thus the presumption does not arise in this case.

¶ 22 Additionally, the record indicates counsel did not comply with the third requirement of Rule 651(c). On appeal from the first-stage dismissal of his postconviction petition, this court found defendant's ineffective assistance of trial counsel claim based on counsel's failure to advise him that he had the right to request a lesser-included-offense

instruction and the consequences of not filing one stated the gist of a constitutional claim. *Thiele*, 2014 IL App (4th) 130173-U, ¶¶ 18, 19. This court further noted defendant supported the assertion with his own affidavit, and we explained why trial counsel's affidavit was not required. *Thiele*, 2014 IL App (4th) 130173-U, ¶¶ 18, 19. On remand, defense counsel failed to include that issue in defendant's amended postconviction petition. On appeal from the second-stage dismissal, the State concedes postconviction counsel did not include that issue in the amended postconviction petition but contends counsel was not obligated to advance frivolous or spurious claims. However, this court had already found the issue was not frivolous and had some support from an affidavit by defendant. Moreover, postconviction counsel raised a different lesser-included-offense instruction and advanced many issues that defendant raised that did not have any support. Thus, we disagree with the State that postconviction counsel found the issue meritless. We also disagree with the State's assertion defendant's affidavit indicates he did discuss offering a lesser-included-offense instruction with his trial counsel. Defendant's affidavit only indicates they discussed what the State would have to do if it did not offer a lesser-included-offense instruction.

¶ 23 In addition to not including the ineffective assistance of counsel claim that this court found stated the gist of a constitutional claim, postconviction counsel made numerous other errors. First, postconviction counsel failed to support the amended postconviction petition with a verification affidavit as required by section 122-1(b) of the Postconviction Act (725 ILCS 5/122-1(b) (West 2012)). Second, postconviction counsel attached three affidavits by defendant that were not notarized. To be valid, an affidavit filed pursuant to the Postconviction Act must be notarized. See *People v. Niezgoda*, 337 Ill. App. 3d 593, 597, 786 N.E.2d 256, 259 (2003). Third, postconviction counsel failed to attach affidavits from Haab, Brown, and defendant's

alleged character witnesses, *i.e.*, his mother, sister, and girlfriend. To support a claim of ineffective assistance of counsel for failure to call a witness, a defendant must attach an affidavit from the proposed witness who would have testified. See *People v. Johnson*, 183 Ill. 2d 176, 192, 700 N.E.2d 996, 1004 (1998). Without such an affidavit, a court cannot determine whether the proposed witness could have provided any information or testimony favorable to the defendant. *Johnson*, 183 Ill. 2d at 192, 700 N.E.2d at 1004. Last, in the amended postconviction petition, postconviction counsel did not assert how the alleged errors prejudiced defendant. This court analyzes ineffective assistance of counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163.

¶ 24 Here, while postconviction counsel organized and explained what defendant believed trial counsel did wrong in the trial proceedings, postconviction counsel failed to amend the petition in a manner that alleged both prongs of the *Strickland* test and then did not support the allegations with affidavits. If the unsupported claims were meritless, postconviction counsel did not need to include them in the amended petition, as Rule 651(c) does not require postconviction counsel to assert frivolous or meritless claims on the defendant's behalf. See *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Thus, we find postconviction counsel also failed to satisfy the requirements of Rule 651(c) by not making the necessary amendments to defendant's *pro se* petition to produce an adequate presentation of defendant's contentions. Accordingly, remand is warranted, "regardless of whether the claims raised in the petition had merit." *Suarez*, 224 Ill. 2d at 47, 862 N.E.2d at 982. The State asserts the remand requirement

of *Suarez* does not apply in this situation because counsel filed a Rule 651(c) certificate. However, we have found counsel's certificate was invalid and decline to address the merits of defendant's postconviction claims.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the Livingston County circuit court's dismissal of defendant's petition at the second stage of the postconviction proceedings and remand the cause for further proceedings.

¶ 27 Reversed and remanded.