

2019 IL App (1st) 160769-U

No. 1-16-0769

Order filed March 6, 2019

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | Nos. 08 CR 5307 |
| |) | 10 CR 17111 |
| |) | 10 CR 19945 |
| |) | |
| JARYAN GILLS, |) | Honorable |
| |) | Matthew E. Coghlan, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's second-stage dismissal of defendant's postconviction petition is affirmed where postconviction counsel provided reasonable assistance pursuant to Supreme Court Rule 651(c).
- ¶ 2 Defendant Jaryan Gills appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his postconviction petition. On appeal, defendant contends that his postconviction counsel failed to provide reasonable assistance because he did not amend

the *pro se* petition by attaching available documentary evidence to support defendant's claim that he was not fit when he pled guilty. We affirm.

¶ 3 On March 18, 2011, defendant entered negotiated guilty pleas in three cases. In case number 08 CR 5307, defendant pled guilty to one count of first degree murder for shooting a man during a drive-by shooting. In case number 10 CR 17111, defendant pled guilty to one count of wire fraud for perpetrating a scheme in which he manipulated free and unrecorded telephone calls from inside the jail while awaiting trial in the murder case. In case number 10 CR 19945, defendant pled guilty to one count of attempted possession of contraband in a penal institution when a "popper," a playing card wrapped in cloth, was found in the locking mechanism of his jail cell. The trial court sentenced defendant to consecutive prison terms of 23 years, 2 years, and 3 years, respectively, for an aggregate sentence of 28 years' imprisonment. In exchange for defendant's guilty plea in these three cases, the State nol-prossed the delivery of a controlled substance charges in case number 06 CR 26425.

¶ 4 The record from the plea hearing shows that defendant confirmed that he understood the terms of the plea agreement. After each charge was read, defendant stated that he understood the charge and pled guilty. Pursuant to the court's admonishments, defendant confirmed that he understood that by pleading guilty he was waiving several rights including his rights to a trial, to confront the witnesses against him, and to testify. Defendant confirmed that he understood the possible sentences he faced for each charge, and that the sentences had to run consecutively. Defendant verified that other than the plea agreement, no one had made any promises or threats to persuade him to plead guilty. Defendant stated that he was pleading guilty of his own free will. The State presented a factual basis for each charge, and the court entered a guilty finding in

each case. Defendant declined to make a statement in allocution. The court then imposed the agreed sentence.

¶ 5 Immediately thereafter, plea counsel asked the trial court to mark defendant's mittimus for Cermak Health Services (Cermak). Counsel stated that defendant had not had his surgery and that Cermak would address his "medical concerns." A discussion regarding defendant's ailments was held off the record. Thereafter, the court stated that the parties had discussed defendant's need for surgery, that it would mark the mittimus for defendant to be examined for his condition, but that there were no promises it would be done before he was sent to prison. Defendant confirmed that he understood. The court asked defendant if he still wanted to plead guilty. Defendant replied that he was told that the offer would be off the table if he did not accept it that day. The court admonished defendant of his appeal rights, and the requirement to file a written motion to vacate his plea within 30 days. Defendant confirmed that he understood. Defendant did not move to withdraw his guilty pleas, or attempt to appeal from the judgments.

¶ 6 On March 8, 2013, defendant, through his "jailhouse attorney," Robert Fletcher, filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant alleged that his plea counsel rendered ineffective assistance because she failed to investigate his fitness and history of mental illness which required psychotropic medication. Defendant claimed that his mother, Darlene Gills, provided Fletcher with a detailed history of defendant's mental health since childhood. Defendant further alleged that counsel was told the essential facts and knew defendant was housed in the mental health unit at the jail, but did not do any investigation into available medical records, or by interviewing his mother. Counsel would have learned that defendant was taking several psychotropic medications for his

mental illness, which included hallucinations and hearing voices. Counsel also would have learned that defendant was hospitalized multiple times for his mental health, that he previously attempted suicide, and that he suffered from schizophrenia and bipolar disorder. Defendant asserted that he was not fit to enter a guilty plea, and counsel should have requested a fitness hearing. Defendant stated that he attached to his petition medical records and affidavits from him, his mother, and Fletcher. The record does not contain an affidavit from defendant's mother.

¶ 7 Defendant also alleged that plea counsel was ineffective because she failed to inform the trial court of his mental deficiencies, she failed to file a motion to suppress his statements on the basis that he did not have a probable cause hearing within 48 hours of his arrest, she failed to object to the factual basis for the murder offense, and she failed to file a motion to withdraw the guilty plea based on his unfitness and because the facts did not support the factual basis that he was the principle shooter.

¶ 8 Defendant attached to his petition three medical documents from the Illinois Department of Corrections (IDOC). The first is an IDOC mental health diagnostic and treatment note dated March 21, 2011. It indicates that defendant's psychiatric history shows that he suffered from depression for many years and was hospitalized multiple times. It further indicates that defendant was "alert and oriented," had good eye contact, was appropriately dressed and groomed, his speech was normal, and no thought form disorder was noted. The report stated that defendant had auditory hallucinations, but no delusions or visual hallucinations. His concentration was rated as good, and his judgment and insight as fair.

¶ 9 The second document is an IDOC mental health intake evaluation form dated March 22, 2011. Defendant reported that he suffered from mental health and emotional issues such as

depression and anxiety, and was first treated at the age of 12 or younger. He had received treatment for “schizophrenia, bipolar disorder.” Defendant was taking Prozac, Risperdal and Sinequan for mental health and emotional issues. Defendant reported that he tried to harm himself in the past, but had no recent thoughts of self harm or harming others. He had heard voices and had “seen things” in the past, but was not presently experiencing hallucinations. Defendant suffered head trauma in a 2007 automobile accident. Defendant reported that he used heroin and drank two pints of alcohol daily. The evaluator found that defendant’s mood and affect was depressed, but that he was cooperative, alert and oriented. The evaluator diagnosed defendant with alcohol abuse, opioid dependence, and bipolar disorder.

¶ 10 The third document was another IDOC mental health diagnostic and treatment note for a psychiatric evaluation dated July 27, 2011. It indicates that defendant was taking Prozac, and was “overall doing well but has a hard time sleeping at night.” It states that defendant was oriented to the process, stable, and was normal in his thought processes and content, insight/judgment, cognition, alertness, orientation, speech, affect, and psychomotor level.

¶ 11 On April 18, 2013, defendant supplemented his petition with affidavits from himself and Fletcher. Defendant averred that Fletcher was handling his “legal papers” because he did not know how to do so himself. He further stated that he told Fletcher to speak with his mother because his lawyer knew that he was taking medication for mental health problems, and that he sometimes did not take his medication. Fletcher averred that due to defendant’s inability to assist with his postconviction petition in any meaningful manner, Fletcher gleaned the factual basis of the claims from defendant’s records, police reports, the plea hearing transcript, and from Gills, defendant’s mother. Gills told Fletcher that defendant’s mental condition made him delusional,

that he lacked the ability to pay attention for an extended period of time, that he took various medications for his mental conditions, and that he stopped taking his medication immediately prior to his “trial.” Fletcher further stated that although defendant was taking several medications for his mental condition, he pretended to take the medication but spit it out.

¶ 12 On April 23, 2013, the circuit court appointed counsel to represent defendant and advanced defendant’s postconviction petition to the second-stage proceedings. At various status dates over the next two years, postconviction counsel informed the court that defendant had asked him to look at a couple of issues and had given him a list of people to investigate. Counsel stated that defendant was “a very active client.” In December 2014, defendant gave counsel some documents which counsel wanted to present to plea counsel to inquire about her opinion. In February 2015, counsel again stated that he needed to show the documents defendant had given him to plea counsel. The documents indicated that defendant had substantial medical care before he pled guilty. Postconviction counsel stated “I need to have her comment on that.”

¶ 13 On April 15, 2015, postconviction counsel filed a certificate of compliance pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Counsel stated that he communicated with defendant via letter to ascertain his claims of deprivation of his constitutional rights, and examined the transcript from defendant’s plea hearing and sentencing. Counsel also stated that he examined defendant’s *pro se* petition and found that it adequately presented his issues, and therefore, a supplemental petition would not be filed.

¶ 14 The State moved to dismiss defendant’s postconviction petition arguing that he failed to state a constitutional claim under the Act, and that he had not shown that he suffered prejudice. The State argued that defendant’s allegation challenging his fitness was forfeited because he

could have raised it on direct appeal. The State further argued that a defendant does not have a right to a fitness hearing merely because he is taking psychotropic medication. The State argued that the transcript from the plea hearing demonstrated that defendant understood the proceedings, and therefore, was fit at the time of his plea. The State also argued that some of defendant's claims were rendered moot by his guilty plea.

¶ 15 At a hearing on the motion to dismiss, the State argued the same points presented in its written motion. The State emphasized that there was no belief or reasonable suspicion at any point in time that defendant was not fit, or that he required a fitness hearing to enter his guilty plea. The State pointed out that defendant was able to interact with the court, and responded to questions and admonishments in a reasonable and appropriate manner.

¶ 16 Postconviction counsel argued that defendant made plea counsel fully aware of his long mental health history and referred her to his mother. However, when postconviction counsel interviewed plea counsel, she only recalled that defendant "seemed a little depressed because of the guilty plea." Postconviction counsel examined plea counsel's file and found "no indication" that she had pursued defendant's claim that he was mentally ill and taking medication at the time. Counsel argued "Cermak medical records would indicate he was at the time, and she did not do her duty. We need to put her on the stand, your Honor, and present her with documents and give her explanation why she did not pursue it at that time." Counsel argued that defendant was not mentally competent to enter his guilty plea, and that plea counsel did not insure that he received a full examination. Counsel asserted that defendant's postconviction petition provided a detailed history of defendant's mental health issues and showed that he informed plea counsel of his condition, but she failed to follow through. Counsel claimed that if defendant had received a

mental health examination, he “probably” would have been found not competent to plead guilty. Counsel argued that the claims in defendant’s petition and the affidavits he provided show that plea counsel should have had defendant examined before she “pressured” him to plead guilty.

¶ 17 In rebuttal, the State pointed out that defendant did not present an affidavit from plea counsel, and asserted that if postconviction counsel had an affidavit, he should have attached it to defendant’s petition. The State asserted that postconviction counsel did not provide any evidentiary support for his argument. Other than defendant’s own conclusory statements, there was no evidentiary support that there was a *bona fide* doubt as to defendant’s fitness to plead guilty. The circuit court asked postconviction counsel if he had an affidavit from plea counsel, and he confirmed that he did not.

¶ 18 The trial court found that there was no *bona fide* doubt of defendant’s fitness to plead guilty. The court stated that at all times during the plea hearing, defendant was lucid, coherent, demonstrated that he understood the nature and purpose of the proceedings against him, and had full knowledge of the consequences of his actions. Defendant did not display any irrational behavior or an unusual demeanor. The court further found that the mental health evaluation forms defendant attached to his petition did not support his claims as they described defendant as alert, and did not raise a *bona fide* doubt of his fitness. The court further stated that while plea counsel mentioned some “medical concerns” to the court, it was only done to extend defendant’s stay at Cermak, not to show that he was mentally unfit or that his plea was involuntary. The court noted that defendant purported to include affidavits from his mother and plea counsel, but no such affidavits were attached. The trial court found that defendant’s numerous claims of

ineffective assistance of plea counsel were without merit. Accordingly, the circuit court granted the State's motion and dismissed defendant's postconviction petition.

¶ 19 On appeal, defendant contends that postconviction counsel failed to provide reasonable assistance because he did not amend the *pro se* petition by attaching available documentary evidence to support defendant's allegation that he was not fit when he pled guilty, and that plea counsel was aware of that fact. Defendant claims that postconviction counsel discovered new evidence during his investigation. He argues that counsel then failed to support the petition with the very documents he relied upon when arguing against dismissal, specifically, an affidavit from plea counsel, notes and documents from plea counsel's file, and medical records from Cermak. Defendant asserts that this court should reverse the dismissal of his postconviction petition and remand the case for further second-stage proceedings with new counsel.

¶ 20 The State responds that by filing the 651(c) certificate, postconviction counsel invoked the rebuttable presumption that he provided defendant with reasonable assistance. The State argues that defendant failed to meet his burden to rebut that presumption because his claim that counsel discovered new evidence is based on conjecture and speculation. The State claims that defendant has asked this court to presume that such evidence exists when it does not. It further asserts that the record shows that defendant's mental health issues had no affect on his fitness to plead guilty.

¶ 21 We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The interpretation of a supreme court rule, including whether counsel fulfilled his duties under Rule 651(c), is also reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). The reviewing

court may affirm the circuit court's dismissal of a postconviction petition on any basis shown in the record. *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008).

¶ 22 A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 128 (2007). Defendant must demonstrate that he suffered a substantial deprivation of a constitutional right in the proceeding that produced his conviction or sentence in order to be entitled to postconviction relief. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006).

¶ 23 At second-stage postconviction proceedings, an indigent defendant is entitled to representation by appointed counsel. 725 ILCS 5/122-4 (West 2006); *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Postconviction counsel is required to provide defendant with a "reasonable level of assistance." *Lander*, 215 Ill. 2d at 583.

¶ 24 Pursuant to Supreme Court Rule 651(c), postconviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant's contentions. *Pendleton*, 223 Ill. 2d at 472. Compliance with these duties may be shown by a certificate filed by postconviction counsel. Rule 651(c); *Lander*, 215 Ill. 2d at 584. Counsel's substantial compliance with Rule 651(c) is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. A Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance. *Profit*, 2012 IL App (1st) 101307 at ¶ 19.

¶ 25 Here, postconviction counsel filed a Rule 651(c) certificate stating that he communicated with defendant via letter to ascertain his claims of deprivation of his constitutional rights, and

examined the transcript from defendant's plea hearing and sentencing. Counsel further stated that he examined defendant's *pro se* petition and found that it adequately presented his issues, and therefore, a supplemental petition would not be filed. Accordingly, the presumption exists that counsel provided defendant with the reasonable level of assistance required by the rule. The burden, therefore, is on defendant to rebut this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307 at ¶ 19.

¶ 26 In this case, defendant has failed to meet his burden. Defendant's claim that postconviction counsel discovered additional documentary evidence that supported the allegations in his petition is belied by the record. Defendant argues that postconviction counsel should have attached an affidavit from plea counsel purportedly affirming that she was aware that defendant was suffering from mental illness and taking medication that rendered him unfit to plead guilty. The record shows, however, that postconviction counsel told the court that he did not have an affidavit from plea counsel. Postconviction counsel stated that when he interviewed plea counsel, she only recalled that defendant "seemed a little depressed because of the guilty plea." In other words, plea counsel did not tell postconviction counsel that defendant informed her of his mental illness, or that she questioned his fitness to plead guilty. She therefore could not have provided an affidavit to support defendant's claim. Accordingly, since postconviction counsel did not have an affidavit from plea counsel, nor would he have been able to obtain one that supported defendant's claim, counsel's failure to attach an affidavit to defendant's petition did not constitute unreasonable assistance.

¶ 27 Nor does the record show that postconviction counsel obtained notes and documents from plea counsel's file that supported defendant's claim. Postconviction counsel stated that he examined plea counsel's file and found "no indication" that she had pursued defendant's claim that he was mentally ill and taking medication at the time of his plea. Postconviction counsel said nothing about finding notes or documents in the file that substantiated defendant's claim that plea counsel was aware of his mental illness. There is no indication in the record that any such documents exist. Therefore, postconviction counsel's failure to attach documents from plea counsel's file cannot be considered unreasonable assistance.

¶ 28 Similarly, the record does not show that postconviction counsel discovered additional medical records from Cermak that supported the allegations in defendant's petition. Counsel argued that plea counsel failed to pursue defendant's claim that he was mentally ill and taking medication at the time of his plea. Counsel then argued "Cermak medical records would indicate he was at the time, and she did not do her duty." This remark by counsel does not establish that he discovered additional medical records that revealed new information about defendant's mental health condition. Defendant had already attached to his petition the IDOC mental health documents that had been completed a few days after his guilty plea, likely upon his arrival at the prison. Those records indicated that defendant had suffered from depression and anxiety for many years, and was taking Prozac, Risperdal and Sinequan for his mental health and emotional issues. Those documents, however, also indicated that defendant was "alert and oriented," cooperative, and exhibited no thought form disorder. The record thus shows that medical documentation regarding defendant's mental health history and the medication he was taking at the time of his plea was already attached to his petition. Whether there are additional records

from Cermak is speculative. Accordingly, we cannot find that counsel's failure to attach additional medical documentation to defendant's petition constituted unreasonable assistance.

¶ 29 Based on our review of the record, we conclude that defendant has not rebutted the presumption that postconviction counsel substantially complied with the duties required in Rule 651(c) and provided the reasonable assistance contemplated by the Act. *Profit*, 2012 IL App (1st) 101307 at ¶ 19.

¶ 30 For these reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition following second-stage proceedings.

¶ 31 Affirmed.