

No. 1-16-1433

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 11845
)	
RAFAEL ALVARADO,)	Honorable
)	Thomas P. Fecarotta,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

Held: Second-stage dismissal of defendant's postconviction petition is reversed, and this matter is remanded for further proceedings, where defendant overcame the presumption of reasonable assistance of postconviction counsel created by counsel's filing of a certificate pursuant to Illinois Supreme Court Rule 651(c).

¶ 1 Defendant-appellant, Rafael Alvarado, appeals from an order of the circuit court which granted the State's second-stage motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2016). Defendant claims postconviction counsel failed to provide him a reasonable level of assistance, as required by

Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). For the following reasons, we vacate the dismissal of defendant's postconviction petition and remand for further proceedings.¹

¶ 2

I. BACKGROUND

¶ 3 Defendant was arrested on June 4, 2009, and he was subsequently charged by indictment with multiple counts of first degree murder and intentional homicide of an unborn child. The various counts of the indictment generally alleged that, on or about June 4, 2009, defendant struck Norma Favela in the head with a hammer, causing the deaths of both Ms. Favela and her unborn child. Several counts contained in the indictment further indicated that the State would seek an extended term sentence for each charged offense, because each resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty.

¶ 4 The matter proceeded to a jury trial in September of 2010. The trial proceedings and the evidence presented at trial were fully set out in our prior order, and need not be restated here. See *People v. Alvarado*, 2012 IL App (1st) 103784-U. At the conclusion of that trial, defendant was found guilty of first degree murder and intentional homicide of an unborn child. The jury also found that the first degree murder of Ms. Favela was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. At a subsequent sentencing hearing, defendant was sentenced to 60 years' imprisonment for first degree murder and 40 years' imprisonment for intentional homicide of an unborn child. The sentences were ordered to be served consecutively.

¶ 5 Defendant filed a direct appeal from his convictions, contending that the trial court erred in denying a motion to suppress and that his constitutional right to confrontation was violated at trial. *Id.* ¶ 2. This court rejected all of defendant's arguments and affirmed his convictions. *Id.*

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

¶ 6 In July 2014, defendant filed the *pro se* petition for postconviction relief at issue here. Therein, defendant asserted a host of claims, including multiple allegations of ineffective assistance of trial and appellate counsel. With respect to defendant's trial counsel, the petitioner included an assertion that "defense counsel conducted no investigation and made no effort to subpoena certain witnesses brought to his attention by petitioner such as death threats to Gerardo Lechuga by Rene Favela [Ms. Favela's brother] ** 'after' the murder. Lechuga was a people's witness against the petitioner and Favela wanted it to remain that way and for Lechuga not to involve him." While the petition was supported by defendant's own sworn affidavit, and that affidavit was signed by a notary, the affidavit did not bear the official seal of the notary.

¶ 7 On October 17, 2014, the circuit court concluded that the petition alleged "matters of constitutional import," and it therefore docketed the petition and appointed the public defender to represent defendant with respect to the postconviction proceedings. On June 19, 2015, the appointed postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Therein, counsel averred that she had: (1) communicated with defendant by mail; (2) reviewed the record and the "notarized *pro se* post conviction petition;" (3) interviewed both of defendant's trial counsels and reviewed trial counsels' records; and (4) concluded that no amendments to the *pro se* petition were required because it adequately presented defendant's constitutional claims.

¶ 8 On September 16, 2015, defendant filed a *pro se* "Motion to Substitute Counsel." Therein, defendant contended: (1) he and postconviction counsel were in disagreement regarding how to prosecute the petition, with counsel refusing to comply with defendant's requests to investigate certain witnesses and subpoena various records; (2) postconviction counsel's communication with defendant was "poor" and "harmful," with counsel operating under a

No. 1-16-1433

conflict of interest; and (3) counsel had “ineffectively stated that she cannot amend the defendant’s *pro se* post-conviction petition.” Attached to the motion were a number of letters exchanged between defendant and postconviction counsel. Those letters reveal that while postconviction counsel initially informed defendant that the *pro se* petition would need to be amended, after further investigation counsel subsequently concluded that no amendments were required because the *pro se* petition contained sufficient factual allegations “to meet the minimum threshold required.” In explaining this decision, postconviction counsel stated that “there are some problems with your contentions. I realize you disagree with my preliminary assessment; however, I have examined the trial testimony in the appellate report of proceedings, and I conclude that your trial attorney exercised permissible trial strategy. While you believe your attorney should have taken certain actions, the law disagrees with you.” Counsel informed defendant that she would file a Rule 651(c) certificate and stand on defendant’s *pro se* petition as it “adequately states your contentions.”

¶ 9 On September 18, 2015, the circuit court addressed the motion to substitute counsel and concluded that defendant was “not entitled to substitute counsel after a public defender has been appointed.” In response to postconviction counsel’s assertion that defendant appeared to be making a “quasi-*Krankel* allegation,” pursuant to the decision in *People v. Krankel*, 102 Ill. 2d 181 (1984), the circuit court rejected any such argument by concluding “I don’t think *Krankel* would apply to a postconviction petition.”

¶ 10 On February 26, 2016, the State filed a motion to dismiss defendant’s petition. Therein, the State argued—*inter alia*—that defendant’s arguments were forfeited due to the failure to raise them on direct appeal, did not amount to ineffective assistance of trial counsel, or were not properly supported by affidavits as required by the Act.

¶ 11 Postconviction counsel did not file a written response to the motion to dismiss, and the matter proceeded to a May 13, 2016, hearing on that motion. At that hearing, postconviction counsel admitted that she had not received or reviewed the motion to dismiss until that very morning, but indicated that “after reading it, I am prepared. I don’t need to file a response.” Postconviction counsel then suggested that if the State wanted to stand on its motion, she would “have no objection. It’s very well written.”

¶ 12 The State then briefly reiterated the basis for its motion to dismiss, again asserting that defendant’s contentions were forfeited and that the argument that trial counsel improperly failed to investigate certain witnesses was not properly supported by affidavits. In response, postconviction counsel stated—*inter alia*—“[i]n reference to the witnesses, I think the State is referring to Gerardo Lechuga *** who was the People’s witness against petitioner, and I think that speaks for itself why the defense attorney didn’t investigate him. I mean, I’m standing on the petition. *** I don’t think that the claims are waived. They are what they are.”

¶ 13 The circuit court ultimately granted the State’s motion to dismiss. Defendant timely appealed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant does not contest the dismissal of his petition on the merits. Rather, defendant argues that postconviction counsel provided unreasonable assistance under Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Alternatively, defendant contends that this matter should be remanded for a “preliminary *Krankel*-like inquire into the factual basis of Alvarado’s *pro se* claims of unreasonable assistance of post-conviction counsel” raised below. We find the defendant’s first argument dispositive.

¶ 16 The Act provides a mechanism for a criminal defendant to challenge his conviction or sentence based upon a substantial constitutional violation. *People v. Morris*, 236 Ill. 2d 345, 354 (2010). In noncapital cases, the Act provides for a three-step process. *Id.* At the first stage, the trial court must evaluate the petition and determine within 90 days of its filing whether it is frivolous or patently without merit. *Id.* A petition which survives the first stage advances to the second stage where the trial court appoints counsel to represent defendant, and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007).

¶ 17 Under the Act, counsel appointed at the second stage must provide a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To provide a reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), provides that postconviction counsel: (1) consult with defendant—either by mail or in person—to ascertain his claims of deprivation of constitutional rights; (2) examine the trial record; and (3) amend the *pro se* petition where necessary for an adequate presentation of defendant's contentions. *Suarez*, 224 Ill. 2d at 42. Postconviction counsel's compliance with Supreme Court Rule 615(c) is mandatory and generally shown by the filing of a certificate averring to such performance. *Perkins*, 229 Ill. 2d at 50.

¶ 18 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. The burden is on the defendant to overcome this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties imposed by Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23. The presumption of compliance may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007). Where postconviction counsel fails to comply with the requirements of Rule

No. 1-16-1433

651(c), the proper remedy on appeal is to remand for further postconviction proceedings. See *People v. Suarez*, 224 Ill. 2d 37, 47 (2007) (recognizing that 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.”).

¶ 19 Our review of postconviction counsel's compliance with Rule 651(c) is *de novo*. *Jones*, 2011 IL App (1st) 092529, ¶ 19.

¶ 20 First, we agree with defendant that the rebuttable presumption that postconviction counsel provided reasonable assistance during the second-stage proceedings below, created by the filing of a Rule 651(c) certificate, was overcome by clear evidence that postconviction counsel failed to amend the *pro se* petition to include a properly notarized affidavit.

¶ 21 Section 122–1(b) of the Act provides that “[t]he proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) *verified by affidavit*.” (Emphasis added.) 725 ILCS 5/122–1(b) (West 2016). The verification affidavit, “like all pleading verifications, confirms that the allegations are brought truthfully and in good faith.” *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Affidavits filed pursuant to the Act must be properly notarized to be valid. *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003). Proper notarization requires inclusion of “the official seal of office” of the notary. 5 ILCS 312/6-103(a) (West 2016). A trial court may properly dismiss a postconviction petition where the petition does not comply with the requirements of the Act. *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 22 In addition, while it is true that there is no *requirement* that postconviction counsel amend a petitioner's *pro se* postconviction petition (*People v. Spreitzer*, 143 Ill. 2d 210, 221

No. 1-16-1433

(1991), Rule 651(c) does plainly require that appointed postconviction counsel make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions.” 134 Ill. 2d R. 651(c) (eff. Feb. 6, 2013); see also *People v. Johnson*, 154 Ill. 2d 227, 238 (1993) (postconviction counsel must shape petitioner's complaints *in pro se* petition into “appropriate legal form”). This includes a requirement that appointed postconviction counsel “remedy procedural defects,” which in turn includes a requirement to remedy an “invalid affidavit.” *People v. Turner*, 2012 IL App (2d) 100819, ¶ 41. The failure to remedy an invalid verification affidavit attached to a defendant’s *pro se* postconviction petition has been recognized—standing alone—to constitute unreasonable assistance and a failure to fulfill the duties required by Rule 651(c). *People v. Nitz*, 2011 IL App (2d) 100031, ¶¶ 17-19; *People v. Ross*, 2015 IL App (3d) 130077, ¶¶ 15-17 (vacated on other grounds, *People v. Young*, 2018 IL 122598, ¶ 25).

¶ 23 Here, it is undisputed that the verification affidavit attached to defendant’s *pro se* petition was not properly notarized and was therefore invalid. Moreover, despite the contention in postconviction counsel’s Rule 651(c) certificate that she had reviewed the “notarized *pro se* post conviction petition,” it is also undisputed that postconviction counsel did not amend the petition to include a properly notarized verification affidavit. In light of the above authority, we agree with defendant that this failure on the part of postconviction counsel constituted a failure to comply with the mandatory requirements of Rule 651(c). Because postconviction counsel failed to fulfill her “duties under Rule 651(c), specifically her duty to provide a proper supporting affidavit, a remand for additional postconviction proceedings is required. *Ross*, 2015 IL App (3d) 130077, ¶ 15. Indeed, in at least one instance, the proper remedy for such a failure was

No. 1-16-1433

recognized to be a “remand for appointment of new counsel to amend the petition as necessary and provide the proper verifying affidavit.” *Nitz*, 2011 IL App (2d) 100031, ¶ 19.

¶ 24 In addition to this failure on the part of postconviction counsel, defendant also claims that postconviction counsel actively opposed his petition, which also mandates a remand.

¶ 25 As this court has previously recognized: “Postconviction counsel is not required to advance frivolous or spurious claims and ‘is only required to investigate and properly present the petitioner's claims.’” [Citations.] “[E]thical obligations prohibit counsel from doing so if the claims are frivolous or spurious.” [Citation.] “The question remains what should counsel do if counsel investigates the claims but finds them without merit.” [Citation.] Illinois case law provides options: (1) ‘stand on the allegations in the *pro se* petition and inform the court of the reason the petition was not amended’ or (2) withdraw as counsel. [Citation.] ‘In both of these scenarios, the allegations in the *pro se* petition remain[] to proceed according to the parameters of the Act.’ ” *People v. Perry*, 2017 IL App (1st) 150587, ¶ 26; *People v. Shortridge*, 2012 IL App (4th) 100663, ¶¶ 13-16 (same).

¶ 26 What postconviction counsel is not permitted to do in such circumstances is to continue to represent a defendant and either take “affirmative action that damage[s] defendant's claims” (*Perry*, 2017 IL App (1st) 150587, ¶ 26), “confess the State's motion to dismiss” (*Shortridge*, 2012 IL App (4th) 100663, ¶ 14), or “tacitly” agree with the State's motion to dismiss a postconviction petition at the second stage (*Perry*, 2017 IL App (1st) 150587, ¶ 39). Such actions are not permitted because they: (1) fail to comport with the requirements of Rule 651(c); and (2) fail to provide a defendant with an opportunity to respond to his counsel's actions prior to dismissal of a postconviction petition. *Id.* Where postconviction counsel is found to have engaged in such activity, the proper remedy on appeal is to “reverse the dismissal of defendant's

No. 1-16-1433

postconviction petition and remand for new second stage proceedings on his original *pro se* *** postconviction petition with new counsel appointed to represent defendant. New counsel will have the opportunity to review defendant's petition and the record and either proceed in his or her representation or move to withdraw, allowing defendant an opportunity to respond.” *Perry*, 2017 IL App (1st) 150587, ¶ 39.

¶ 27 Here, the record reveals that appointed postconviction counsel appears to have had questions as to the merits of the allegations contained in defendant’s *pro se* petition. In correspondence with defendant, postconviction counsel stated that “there are some problems with your contentions. I realize you disagree with my preliminary assessment; however, I have examined the trial testimony in the appellate report of proceedings, and I conclude that your trial attorney exercised permissible trial strategy. While you believe your attorney should have taken certain actions, the law disagrees with you.” Counsel then informed defendant that she would file a Rule 651(c) certificate and stand on defendant’s *pro se* petition as it “adequately states your contentions.” There was nothing wrong with these actions, or this plan of action. *Perry*, 2017 IL App (1st) 150587, ¶ 26.

¶ 28 Defendant argues on appeal that this is not what postconviction counsel ultimately did, however. Rather, at the hearing on the State’s motion to dismiss, defendant notes that postconviction counsel: (1) in the context of stating that she would have no objection to the State standing on its motion to dismiss, described the State’s motion as “very well written;” and (2) prior to stating that she was “standing on the petition,” offered argument that directly undercut defendant’s argument that trial counsel improperly failed to investigate Mr. Lechuga as a witness, asserting that the fact that he was “the People’s witness against petitioner *** speaks for itself why the defense attorney didn’t investigate him.”

¶ 29 We find that postconviction counsel's actions clearly did not reach the level of a complete confession to the State's motion to dismiss, and we seriously question whether they even amounted to a tacit agreement with the State's motion to dismiss the postconviction petition at the second stage. Despite the comments of postconviction counsel highlighted by defendant on appeal, our review of the record as a whole indicates that counsel appears to have essentially stood on the allegations contained in the *pro se* petition. Such a course of action is permitted under Rule 651(c). *Perry*, 2017 IL App (1st) 150587, ¶ 26.

¶ 30 Ultimately, we need not decide whether postconviction counsel's actions at the hearing on the motion to dismiss warrant a remand for further proceedings and the appointment of new counsel. As noted above, counsel's failure to amend defendant's petition to include a proper verification affidavit supports this result. *Supra*, ¶ 23. Defendant has specifically requested this relief, and as our supreme court recognized under slightly different circumstances: "In light of the history of this case, we deem that a reasonable request and therefore direct the trial court to appoint new postconviction counsel on remand." *People v. Kuehner*, 2015 IL 117695, ¶ 25.

¶ 31 In so ruling, we reject the State's argument that such a result is not warranted because defendant has not demonstrated any prejudice because his petition lacked merit. As we noted above, 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." *Suarez*, 224 Ill. 2d at 47; see also *Turner*, 187 Ill. 2d at 416–17. If postconviction counsel fails to fulfill his duties under Rule 651), a remand for additional postconviction proceedings is required. *Suarez*, 224 Ill. 2d at 47, 51-52; *Turner*, 187 Ill. 2d at 416-17; *Nitz*, 2011 IL App (2d) 100031, ¶ 18.

No. 1-16-1433

¶ 32 Finally, we note that, because we are remanding on the basis of postconviction counsel's clear failure to comply with Rule 651(c) and ordering that new counsel be appointed upon remand, we need not address defendant's alternative argument that this matter should be remanded for a "*Krankel*-like" hearing.

¶ 33

III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the judgment of the circuit court and remand for further proceedings consistent with this order.

¶ 35 Reversed and remanded.