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2019 IL App (3d) 170213-U

Order filed January 22, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	Appeal No. 3-17-0213
v.)	Circuit No. 01-CF-1211
JASON LAMONT JACKSON,)	Honorable
Defendant-Appellant.)	Paul P. Gilfillan, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* Remand was required where the record showed that counsel failed to comply with the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).
- ¶ 2 Defendant, Jason Lamont Jackson, appeals the denial of his initial postconviction petition and his successive postconviction petition. Defendant argues that the matter should be remanded because counsel failed to comply with the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) during the proceedings on his initial postconviction petition. Defendant also argues that the matter should be remanded for a third-stage evidentiary hearing on his successive

postconviction petition. We vacate the circuit court's orders denying defendant's initial postconviction petition, granting leave to file a successive postconviction petition, and denying the successive postconviction petition. We remand the matter with directions.

¶ 3

I. BACKGROUND

¶ 4

A. Trial

¶ 5 Following a jury trial, defendant was convicted of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2000)) and unlawful possession of a weapon by a felon (*id.* § 24-1.1(a)). The court sentenced defendant to concurrent terms of 38 years' imprisonment for attempted first degree murder and 7 years' imprisonment for unlawful possession of weapon by a felon.

¶ 6 On direct appeal, we affirmed defendant's convictions. *People v. Jackson*, No. 3-02-0986 (2004) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7

B. Proceedings on the Initial Postconviction Petition

¶ 8 On March 28, 2005, defendant filed a *pro se* postconviction petition asserting claims of ineffective assistance of trial and appellate counsel. The *pro se* petition also asserted a claim of actual innocence based on the affidavit of Karl Nelms. The circuit court summarily dismissed the petition.

¶ 9 On appeal, we reversed the circuit court's summary dismissal. *People v. Jackson*, No. 3-05-0301 (2007) (unpublished order under Illinois Supreme Court Rule 23). We held that defendant stated the gist of a claim of actual innocence, and we remanded the matter for further postconviction proceedings. The order stated: "The petition is sufficient to state the gist of a constitutional claim of actual innocence and defendant is entitled to an evidentiary hearing thereon." *Id.* One justice specially concurred to emphasize that the appellate court was not ruling

on the substantive merits of defendant's petition but rather was remanding for second-stage proceedings. The third justice dissented.

¶ 10 The matter was remanded to the circuit court. On September 24, 2007, the court entered an order setting the matter for second-stage postconviction proceedings and appointing the public defender. Over the course of more than four years, appointed counsel requested and received many continuances. During that time, several different public defenders were assigned to defendant's case. On July 8, 2013, defendant filed a *pro se* motion for appointment of new counsel alleging that his postconviction petition had lain dormant since 2007. The court ordered the case to be reassigned to a new attorney in the public defender's office.

¶ 11 On July 8, 2013, defendant filed a *pro se* supplemental postconviction petition. The record does not indicate that counsel ever adopted this supplemental petition.

¶ 12 On November 8, 2013, appointed counsel advised the circuit court that he and the assistant State's Attorney believed that "this is ripe for a third-stage hearing" based on the order of the appellate court. Counsel stated that the appellate court's order required an evidentiary hearing on Nelms's affidavit, so counsel needed to locate Nelms and bring him in for an evidentiary hearing. The State agreed. The assistant State's Attorney stated: "[The Third District] remanded it explicitly for an evidentiary hearing on the Nelms affidavit, the newly discovered evidence, the evidence of actual innocence, so there is no second stage to be had. I don't think we could have any other proceedings." The court continued the case.

¶ 13 At the next status hearing, appointed counsel said he had been unable to locate Nelms and requested a continuance. Defendant advised the court that he believed appointed counsel and the State were incorrect in interpreting the appellate court's order to limit the proceedings to an evidentiary hearing on Nelms's testimony. Defendant stated: "Now, this causes a grave concern

for me, your Honor, because what this does is waives the rest of my issues that's in my post-conviction petition." The court said that it would read the appellate court's order. The matter was continued several times while counsel attempted to locate Nelms.

¶ 14 Approximately one month later, defendant filed a *pro se* "Motion to Clarify Objection." The motion stated that defendant disagreed with his counsel's interpretation of the appellate court's order. Defendant believed the appellate court's order permitted all the claims in his initial and supplemental postconviction petitions to advance to the second stage of proceedings. Defendant asserted: "[G]iven that [defense counsel] is aligned with [the State] regarding the Appellate order, the petitioner is essentially on his own regarding his interpretation of the Appellate order."

¶ 15 At the next status hearing, the court advised defendant that he could not be represented by counsel and proceed *pro se* on his motion at the same time. Defendant said that he wanted counsel to continue representing him. The matter was continued several times for defense counsel to attempt to locate Nelms.

¶ 16 At a hearing on March 20, 2015, defense counsel said that he had not been able to locate Nelms, and counsel requested a general continuance. Defendant said he believed that he had lost Nelms as a witness due to the delays in court proceedings. Defendant requested to proceed *pro se*. Defendant stated that he did not believe his "innocence [was] dependent just upon *** Nelms." Defendant said he did not trust appointed counsel, and he had difficulty contacting appointed counsel. The court allowed defendant to proceed *pro se*.

¶ 17 On May 15, 2015, the court held a third-stage evidentiary hearing. Defendant did not call any witnesses. Defendant filed a *pro se* supplemental petition regarding his claim of actual innocence. Defendant said he believed that all the claims in his postconviction petition had

survived after the appellate court's order. The court said its interpretation of the appellate court's order was that the appellate court had only remanded on the issue of actual innocence. However, the parties discussed the claims of ineffective assistance of counsel which defendant had raised in his *pro se* petition. The court took the matter under advisement.

¶ 18 On June 23, 2015, the court filed a written order denying defendant's postconviction petition in its entirety. The court considered the actual innocence claim based on Nelms's affidavit and defendant's claims of ineffective assistance of trial and appellate counsel. The court stated that it believed defendant's claims of ineffective assistance counsel were barred by the doctrine of *res judicata* based on the appellate court's order. The court stated that even if it did consider those issues, it would find them to be meritless.

¶ 19 On July 20, 2015, defendant filed a petition for reconsideration. Defendant filed several pleadings inquiring about the status of his petition for reconsideration. On March 15, 2017, the circuit court denied defendant's petition for reconsideration.

¶ 20 C. Proceedings on the Successive Postconviction Petition

¶ 21 On February 22, 2016, defendant filed a *pro se* motion for leave to file a successive postconviction petition. The court granted the motion. Defendant filed a *pro se* successive postconviction petition alleging that he met Davett Fisher in September 2015. The successive petition alleged that Fisher saw Paul Green discharge the weapon on the night of the incident. Defendant attached the notarized affidavit of Fisher to his successive petition. The court advanced the successive petition to the second stage of postconviction proceedings. The State filed a motion to dismiss. On March 15, 2017, the court denied the successive postconviction petition in the same order in which it denied the petition for reconsideration relating to the initial postconviction petition.

¶ 22

II. ANALYSIS

¶ 23 Defendant argues that we must remand the matter for compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) in the proceedings on the initial postconviction petition.

¶ 24 “[T]here is no constitutional right to assistance of counsel during postconviction proceedings.” *People v. Cotto*, 2016 IL 119006, ¶ 29. However, postconviction defendants are entitled to a reasonable level assistance of counsel under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)). *Cotto*, 2016 IL 119006, ¶ 30. To ensure that postconviction defendants receive a reasonable level of assistance, Rule 651(c) imposes certain duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Specifically, Rule 651(c) provides that appointed counsel must consult with the petitioner “by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights,” examine the record of the trial proceedings, and make any amendments to the *pro se* petition “that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). 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.

¶ 25 In the instant case, it is apparent from the record that appointed counsel did not comply with the duties set forth in Rule 651(c) due to counsel’s interpretation of our prior order. That is, it is apparent that counsel did not consult with defendant regarding his contentions of deprivation of constitutional rights other than the actual innocence claim based on Nelms’s affidavit. Also, it is clear that counsel did not believe that he had a duty to make any necessary changes to the *pro se* petition to adequately set forth defendant’s claims, as counsel believed the only

proceeding to be held on remand was a third-stage evidentiary hearing on the actual innocence claim. Since the record shows that counsel did not comply with the requirements of Rule 651(c), attributable to some confusion arising out of our previous order, we remand the case for new second-stage proceedings on the initial postconviction petition.

¶ 26 We acknowledge that our prior order remanding the matter for further postconviction proceedings was subject to some fair but conflicting interpretations of our intent. With the benefit of hindsight, it appears our prior order remanded the matter generally for second-stage proceedings rather than an evidentiary hearing on only one issue at the third-stage level. Any other interpretation would not result in a consensus on the remedy since the only concurring justice wrote separately to clarify that the matter was being remanded for second-stage proceedings.

¶ 27 In reaching our holding, we recognize that defendant elected to proceed *pro se* prior to the court's ruling on his initial petition. It is clear from this record that defendant elected to proceed *pro se* largely due to his frustration over counsel's erroneous belief that the only matter before the court on remand was an evidentiary hearing on the actual innocence claim related to Nelms's affidavit. As we have discussed, counsel's confusion was partially justified. Having clarified the procedural posture of this case, remand is appropriate to reset the starting point for the postconviction proceedings and to have defendant benefit from the services of counsel who is in compliance with Rule 651(c).

¶ 28 Finally, we note that the circuit court erroneously granted defendant leave to file a successive postconviction petition while his first petition was still pending. We vacate the court's orders granting defendant leave to file a successive postconviction petition and denying the successive petition. Accordingly, we do not address defendant's argument that the circuit court

erred by not holding a third-stage evidentiary hearing on his successive petition. We note that defendant is not foreclosed from reasserting the actual innocence claim raised in his successive petition on remand in an amended initial postconviction petition on remand.

¶ 29

III. CONCLUSION

¶ 30

For the foregoing reasons, we vacate the judgments of the circuit court of Peoria County denying the initial postconviction petition following the third-stage evidentiary hearing, granting leave to file a successive postconviction petition, and denying the successive postconviction petition. We remand the matter with directions that the court appoint new counsel and hold new second-stage proceedings on defendant's initial postconviction petition. Counsel is directed to comply with the requirements of Rule 651(c).

¶ 31

Vacated and remanded with directions.