

2014 IL App (1st) 122314-U
No. 1-12-2314
Order Filed September 26, 2014

SIXTH 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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	No. 03 CR 5944
v.)	
)	
VICENTE GUERRERO,)	
)	Honorable
Defendant-Appellant.)	Jorge Luis Alonso,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Second stage dismissal of the defendant's *pro se* postconviction petition was affirmed. Nothing in the record rebutted the presumption that postconviction counsel provided reasonable assistance to the defendant under Illinois Supreme Court Rule 651(c).

¶ 2 The defendant, Vicente Guerrero, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). On appeal, the defendant contends that: (1) postconviction counsel failed to provide reasonable assistance to him; (2) the mittimus must be corrected to reflect the offense for which the defendant was convicted; and (3) the defendant's conviction and sentence for criminal drug conspiracy must be vacated.

¶ 3 Following a jury trial, the defendant was convicted of criminal drug conspiracy and unlawful possession of a controlled substance (cocaine) with intent to deliver. The evidence at trial established that between February 6 and February 10, 2003, the defendant and other individuals were engaged in activities to facilitate receiving and distributing a large shipment of cocaine. The trial court sentenced the defendant to 25 years' imprisonment on each conviction, to be served concurrently, and imposed a fine of \$500,000. On direct appeal, this court affirmed the defendant's convictions and sentences. See *People v. Guerrero*, No. 1-07-0178 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 On February 25, 2010 the defendant filed a *pro se* postconviction petition. In the petition the defendant acknowledged that his petition was not filed timely under the Act. See 725 ILCS 5/122-1(c) (West 2010) (the defendant's petition was due 6 months and 35 days after his direct appeal was denied, or May 11, 2009).¹ He maintained that "his understanding of the English language is not very good and was under the understanding that his previously

¹ The State maintains that the petition was due May 10, 2009. Regardless of which date, there is no dispute that the petition was filed untimely.

held [*sic*] counsel would complete this petition, thereby causing his lateness." The defendant alleged that his constitutional right to the effective assistance of trial counsel was violated when counsel failed to call an alibi witness, and that he was denied his constitutional right to a fair trial by the prosecutor's statement to the jury that the prosecutor was personally involved in the investigation of the case. The defendant's *pro se* petition was supported by a notarized letter from Hilario Sanchez, who stated that on February 10, 2003, he and his wife worked with the defendant from 12 p.m. until 9 p.m. at Jesse's Place. Mr. Sanchez stated further that he was subpoenaed to testify at the defendant's trial, but he was never called as a witness.

¶ 5 On May 18, 2010, the defendant sent a package of documents containing exhibits to his postconviction petition to the circuit court. The exhibits consisted of letters from the defendant to trial counsel in 2007 and 2008, requesting that counsel send him the common law record and the trial transcripts, a 2009 letter to the American Bar Association seeking help with his case, and two 2009 letters to "Project Innocent." The letters outlined the defendant's inability to obtain the record from his defense counsel and asserted his claim that he was innocent of the offenses for which he was convicted.

¶ 6 On May 25, 2010, the defendant's petition was docketed for further proceedings. Postconviction counsel was appointed for the defendant. On July 28, 2010, the circuit court ordered the release of the common law record and trial transcripts to postconviction counsel. On March 23, 2011, postconviction counsel informed the circuit court that the defendant had requested a copy of the trial record from him and that counsel had told him that "it's not my first priority, I could piecemeal him when I have time parts of the transcript. Apparently he has a problem with that so he sent your Honor a letter asking for the full transcript."

Construing the defendant's letter as a motion for transcripts, the court denied the motion. On June 29, 2011, the defendant filed a *pro se* motion requesting the trial transcripts. In the motion, the defendant alleged that, without the transcripts, he was unable to assist postconviction counsel in identifying the portions of the record supporting his claims. He further alleged that postconviction counsel refused to send him a copy of the entire trial record and would only send those portions of the record requested by the defendant. The defendant pointed out that he had been represented by privately-retained counsel both at trial and on appeal and had paid for the transcripts himself. The record does not reflect whether the court resolved this motion.

¶ 7 On July 26, 2011, postconviction counsel informed the circuit court that he was still reading through the trial record, but the only issue he foresaw concerned the alibi witness the defendant had identified in his *pro se* petition. Counsel requested a continuance to allow him to consult with the defendant and interview the alibi witness.

¶ 8 On February 8, 2012, postconviction counsel informed the court that he needed to obtain an affidavit from another witness. The case was continued to March 7, 2012.

¶ 9 On March 7, 2012, postconviction counsel presented his Rule 651(c) certificate. Ill. S. Ct. R. 651(c) (eff. Dec. 1 1984). Counsel certified that:

"1. I have communicated with the petitioner, Vicente Guerrero, by phone and letter to ascertain his claims of a deprivation of his constitutional rights.

2. I have examined the transcripts of Petitioner's trial and sentencing.

3. I have examined the Petitioner's *pro se* Petition for Post-Conviction Relief, and as it adequately states his contention of a denial of his constitutional rights, an amended petition has not been prepared."

¶ 10 In granting leave to file the certificate, the circuit court stated as follows:

"THE COURT: Mr. Black [postconviction counsel], I've reviewed the certificate. It is appropriate. It covers all the issues. You had communications with [the defendant] by phone and letter, and he felt that was sufficient?

MR. BLACK: Yes, sir."

¶ 11 On May 9, 2012, the circuit court granted the State's motion for leave to file its motion to dismiss the *pro se* petition which, *inter alia*, raised the issue of the timeliness of the petition. Postconviction counsel requested a continuance to prepare a response and to send a copy of the motion to dismiss to the defendant. On June 26, 2012, postconviction counsel informed the court that he would not be filing a response and was resting on the defendant's *pro se* petition and the Sanchez notarized letter.

¶ 12 On July 24, 2012, the circuit court heard arguments on the motion to dismiss. The State pointed out that the *pro se* petition was untimely filed and that the defendant had not alleged any facts to support his claim that he was not culpably negligent in the late filing of the petition. Moreover, his claim that he was denied a fair trial by the prosecutor's remark was raised and decided in his direct appeal and therefore was *res judicata*. Finally, the defendant's claim that defense counsel's failure to call Mr. Sanchez as a witness was not ineffective assistance of counsel. Mr. Sanchez's affidavit covered only February 10, 2003, the date the defendant was arrested. However, the defendant's involvement in offenses for which he was convicted took place over several days. Therefore, the affidavit does not show the result of the trial would have changed if Mr. Sanchez had been called as a witness.

¶ 13 In response, postconviction counsel conceded that the fair trial claim was barred under the principles of *res judicata*. On the ineffective assistance of trial counsel claim,

postconviction counsel argued that Mr. Sanchez's testimony that the defendant was working at the same time he was seen directing the vehicles to pick up the cocaine, might have persuaded the jury that the defendant's other activities were undertaken to assist his relatives in locating a place to live and not evidence that he was involved in a drug conspiracy. Counsel also stated that he had spoken to other witnesses whose names were provided by the defendant and Mr. Sanchez, but he had no additional affidavits or supplements to the record. When asked by the court to address the timeliness issue, postconviction counsel stated in pertinent part as follows:

"I did have an opportunity to investigate his claims. He asked his lawyer to prepare this affidavit, or this postconviction petition, based on interviews with the lawyer and also documentary evidence, Judge. And I can't supplement or add to the timing in this issue at all at this time."

¶ 14 The circuit court granted the State's motion to dismiss, stating in pertinent part as follows:

"I agree with the State regarding all of the contentions, specifically the timeliness issue. The act envisions a situation where defendants act pro se. The fact that he has a language issue does not change that. And the allegations regarding his attorney and the subjective belief that some attorney was going to deal with it have not been supported by affidavit nor by the record."

¶ 15 This timely appeal followed.

¶ 16 ANALYSIS

¶ 17 I. Compliance with Rule 651(c)

¶ 18 The defendant contends that postconviction counsel failed to comply with Rule 651(c) by failing to amend the *pro se* petition to include factual allegations and to supplement the

petition with an affidavit and documentation to support his lack of culpable negligence in filing an untimely petition.

¶ 19 A. Standard of Review

¶ 20 Dismissal of a postconviction petition at the second stage of postconviction proceedings is reviewed *de novo*. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009). We will not reverse the circuit court's findings of fact regarding whether a petition's untimeliness was due to culpable negligence unless they are manifestly erroneous. *Gerow*, 388 Ill. App. 3d at 527. The ultimate conclusion as to whether the established facts demonstrate culpable negligence is reviewed *de novo*. *Gerow*, 388 Ill. App. 3d at 527.

¶ 21 B. Discussion

¶ 22 The right to counsel in postconviction proceedings is wholly statutory. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Under the Act, a defendant is entitled to a "reasonable level" of assistance. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). To assure the reasonable assistance, Rule 651(c) requires postconviction counsel to: "(1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions." *Perkins*, 229 Ill. 2d at 42; Ill. S. Ct. R.651(c) (eff. Dec. 1, 1984).

¶ 23 In *Perkins*, our supreme court determined that postconviction counsel's duty to amend the *pro se* petition included "alleging any facts that may establish a lack of culpable negligence in the late filing." *Perkins*, 229 Ill. 2d at 43. The court found that "[a]n adequate or proper presentation of a petitioner's substantive claims necessarily includes attempting to overcome

procedural bars, including timeliness, that will result in dismissal of the petition if not rebutted." *Perkins*, 229 Ill. 2d at 44.

¶ 24 Since timeliness of the petition is not at issue at the first stage of postconviction proceedings, the adequacy of the defendant's excuse for failing to file a timely petition does not become relevant until the second stage where counsel is appointed and the State may move to dismiss on timeliness grounds. "The timeliness of the petition and any excuse for a late filing are matters that counsel must provide assistance on at the second stage. That assistance includes amending the petition to allege any available facts showing a delay in filing was not due to the petitioner's culpable negligence as required by the Act." *Perkins*, 229 Ill. 2d at 48; 725 ILCS 5/122-1(c) (West 2010).

¶ 25 In order for postconviction counsel to discharge his or her duty to amend an untimely *pro se* petition, counsel must inquire of the petitioner "whether there is any excuse for the delay in filing" and "must also allege any excuse for the delay in filing apparent from the pleadings and the portions of the record counsel must review to present petitioner's claims." *Perkins*, 229 Ill. 2d at 49-50. Postconviction counsel is required to attempt to get evidentiary support (*People v. Johnson*, 154 Ill. 2d 227, 245 (1993)), but is not required to advance frivolous or spurious claims to fulfill the requirements of Rule 651(c) (*People v. Profit*, 2012 IL App (1st) 101307, ¶23).

¶ 26 In the present case, postconviction counsel filed the certificate mandated by Rule 651(c) that he had complied with each of the duties set forth in the Act. While the filing of a Rule 651(c) certificate gives rise to the presumption that the defendant received the representation required during the second-stage proceedings, the presumption may be rebutted by the record. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 19. It is the defendant's burden to

overcome the presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *Profit*, 2012 IL App (1st) 101307, ¶ 19. Where counsel has filed a certificate, "the question of whether the *pro se* allegations had merit is crucial to determining whether counsel acted unreasonably by not filing an amended petition." *Profit*, 2012 IL App (1st) 101307, ¶23.

¶ 27 In the present case, the defendant maintains that his limited understanding of the English language excused his untimely filing. The record reflects that the defendant's letters to his attorney, the circuit court, the American Bar Association and "Project Innocent" were translated into English by another prison inmate. However, the content of those letters indicates that the defendant was not ignorant of the legal system and that despite his language limitations, he understood and acknowledged that his *pro se* petition was filed untimely. In any event "the Act does not make exceptions for defendants who are illiterate and/or do not speak fluent English." *People v. Cruz*, 2013 IL App (1st) 091944, ¶ 27.

¶ 28 Next, the defendant claims that he believed that his previous attorney was preparing a postconviction petition on his behalf. That claim is contradicted by one of the exhibits the defendant provided to the court. In his May 6, 2009, letter to the American Bar Association, the defendant states that his attorney informed him that his appeal was denied but provided "no explanation as to why or what he'll do next."

¶ 29 The final reason offered by the defendant was that he could not perfect his *pro se* petition without the transcripts. The fact that the defendant still did not have the transcripts when he filed his *pro se* petition, which was advanced to the second-stage of postconviction proceedings, belies his claim that he could not perfect his petition without them. Once counsel was appointed for him, counsel became responsible for assisting the defendant's

presentation of his case. *Perkins*, 229 Ill. 2d at 47. In this case, postconviction counsel was in possession of the transcripts from the defendant's trial. Therefore, the defendant's lack of transcripts at the time he filed his *pro se* petition did not excuse his failure to file his petition timely.

¶ 30 The defendant's reliance on *People v. Paleologos*, 345 Ill. App. 3d 700 (2003), and *People v. Cooper*, 142 Ill. App. 3d 223 (1986) is misplaced. Neither case supports the defendant's argument that his lack of the transcripts from his trial counsel excused the untimely filing of his *pro se* petition.

¶ 31 In *Paleologos*, the defendant's two direct appeals were consolidated. The appeals were still pending at the time the postconviction petition was required to be filed. On review from the dismissal of his postconviction petition as untimely, the appellate court noted that postconviction petitions must be filed even though the direct appeal is still pending. The court further noted that the resolution of the direct appeal was delayed by several factors, including the complexity of the issues and the nine months necessary to obtain the record. Moreover, the postconviction petition included a claim of the ineffective assistance of appellate counsel, and the court was "not inclined to require the defendant to file a postconviction petition alleging ineffective assistance of appellate counsel while his direct appeal is pending." *Paleologos*, 345 Ill. App. 3d at 711. Contrary to the defendant's argument, the delay in obtaining the record was not the reason the court in *Paleologos* determined that the untimely filing of the postconviction petition was not due to the defendant's culpable negligence. *Paleologos*, 345 Ill. App. 3d at 712.

¶ 32 In *Cooper*, the defendant's amended postconviction petition alleged that his conviction was based on perjured testimony and requested a copy of the transcript of his trial.² The circuit court denied the request for a transcript and dismissed the petition as frivolous and patently without merit. On appeal, the defendant contended that the court erred in dismissing the petition without providing him with a transcript which would have allowed him to perfect his claim that perjury was committed at trial. *Cooper*, 142 Ill. App. 3d at 227. The reviewing court agreed that the defendant was entitled to a transcript in order to perfect his petition. *Cooper*, 142 Ill. App. 3d at 228-29. In the present case, the defendant's petition was not dismissed as frivolous and patently without merit but was advanced to the second stage where counsel was appointed and furnished with a copy of the trial court record for examination in order to perform his duties in accordance with Rule 651(c). See *Perkins*, 229 Ill. 2d at 47 (once postconviction counsel is, counsel becomes responsible for assisting the defendant with the presentation of his case).

¶ 33 *Perkins* is instructive. In *Perkins*, the supreme court found that while postconviction counsel's arguments were not particularly compelling or were legally without merit, "[t]here was nothing in the record to indicate that petitioner had any other excuse showing that the delay in filing was not due to his culpable negligence. We cannot assume there was some other excuse counsel failed to raise for the delay in filing." *Perkins*, 229 Ill. 2d at 51. Since nothing in the record rebutted postconviction counsel's assertions that no amendments necessary for adequate presentation of the petitioner's claims, the court concluded that counsel had fulfilled his duties under Rule 651(c). *Perkins*, 229 Ill. 2d at 52. Similarly, in the present case, a search of the record revealed no other excuse that postconviction counsel

²Although the Act had been amended, the circuit court in *Cooper* followed the prior postconviction procedure in which the *pro se* petition was immediately docketed and, if requested, counsel appointed. The State could file its motions before a transcript would be ordered. *Cooper*, 142 Ill. 3d at 226.

could raise to argue that the defendant was not culpably negligent in filing his *pro se* petition untimely.

¶ 34 Postconviction counsel is not required to amend the *pro se* petition; only to investigate and present the defendant's claims. *Kirk*, 2012 IL App (1st) 101606, ¶ 21. Postconviction counsel's choice to stand on the allegations of the *pro se* petition did not deny the defendant reasonable assistance. As counsel explained to the circuit court, he investigated the defendant's claims as to the timeliness of the petition and determined that there was nothing to add to the *pro se* petition.

¶ 35 Since the record does not rebut the presumption that postconviction counsel fulfilled his duties in accordance with Rule 651(c) and rendered the defendant reasonable assistance as required by the rule, the dismissal of the defendant's *pro se* petition at the second stage of postconviction proceedings was correct.

¶ 36 II. Correction of the Mittimus

¶ 37 The mittimus stated that the defendant's conviction was for the manufacture and delivery of a controlled substance. However, the defendant's conviction was for possession of a controlled substance with intent to deliver. The parties agree the mittimus must be corrected to reflect the offense for which the defendant was convicted.

¶ 38 III. Vacation of Conviction and Sentence

¶ 39 The defendant was convicted of criminal drug conspiracy and possession of a controlled substance with intent to deliver. The defendant maintains that his conviction and sentence for criminal drug conspiracy must be vacated because he cannot be convicted of both the inchoate offense, criminal drug conspiracy, and the principal offense, possession of a controlled substance with intent to deliver. See 720 ILCS 5/8-5 (West 2002). The State

agrees that one conviction and sentence must be vacated but points out that in sentencing the defendant, the trial court indicated that the criminal drug conspiracy charge should stand.

¶ 40 Our reviewing courts have routinely vacated the inchoate offense rather than the principal offense for which a defendant was convicted. See *People v. Stroud*, 392 Ill. App. 3d 776, 807 (2009) (collected cases). Therefore, we vacate the defendant's conviction and sentence for criminal drug conspiracy.

¶ 41 **CONCLUSION**

¶ 42 The order of the circuit court dismissing the defendant's *pro se* postconviction petition is affirmed. The defendant's conviction for criminal drug conspiracy and 25-year sentence for that conviction only are vacated. We order the mittimus corrected to reflect the defendant's conviction for possession of a controlled substance with intent to deliver.

¶ 43 Affirmed in part, vacated in part; mittimus ordered corrected.