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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,)	
)	
v.)	No. 00 CR 9505
)	
EDDIE HILL,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court dismissing second-stage postconviction petition was reversed where the defendant received unreasonable assistance of postconviction counsel; the cause was remanded to allow the defendant to replead his ineffective assistance of trial counsel claim with the assistance of new counsel.

¶ 2 The defendant, Eddie Hill, appeals from the circuit court order which dismissed his second-stage postconviction petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.* (West 2008)). His petition alleged, in part, that he received ineffective assistance of trial counsel when counsel misinformed him of the potential maximum sentence that he faced which led him to reject a plea offer. On appeal, he contends that the circuit court erred in dismissing his ineffective assistance of trial counsel claim where postconviction counsel

failed to amend his petition and include his properly notarized affidavit. For the reasons that follow, we reverse and remand the cause for further proceedings.

¶ 3 Following a bench trial, the defendant was convicted of multiple counts of attempted first-degree murder, aggravated battery with a firearm and aggravated battery, arising from the February 11, 2000, shooting of Cornelius Grant and Antonio Ingram. At trial, the victims testified that, while in the stairwell of their Robert Taylor apartment building, the defendant approached them with a revolver and asked them about joining the Gangster Disciples gang. When the victims expressed no interest, the defendant fired the revolver at the floor. The victims testified that they began running down the stairs, and the defendant fired shots at them, striking Grant in his index finger. The victims proceeded to a fourth-floor apartment, and the defendant pursued them, eventually shooting Grant in his chest and Ingram in his leg. According to the victims, they identified the defendant as the shooter from a photo array shown to them by the police shortly after the incident. At trial, Grant testified that, as a result of his gunshot wound, he was confined to a wheelchair, and Ingram testified that his femur had required a pin to repair the fracture he sustained. After finding the defendant guilty on all charges, the court sentenced him to concurrent and consecutive prison terms totaling 75 years.

¶ 4 The defendant directly appealed his convictions and sentence, arguing that: (1) the evidence was insufficient to sustain his guilt; (2) he received ineffective assistance of trial counsel after counsel failed to move to suppress the photo identifications; (3) the one-act, one-crime rule applied to merge his battery convictions; and (4) his mittimus did not reflect the proper number of days' credit to which he was entitled. This court agreed that the one-act, one-crime rule applied to the defendant's battery convictions and that his mittimus did not accurately reflect his days of credit. *People v. Hill*, No. 1-06-0041 (unpublished order under Supreme

Court Rule 23). Therefore, we affirmed in part, vacated in part, and ordered that the defendant's mittimus be amended to reflect two convictions for attempted first-degree murder with corresponding consecutive sentences of 45 years' imprisonment and 30 years' imprisonment. *Hill*, slip order at pg. 12. We also remanded the cause to the circuit court, directing it to calculate the correct number of days' credit to which the defendant was entitled. *Id.* at pg. 13.

¶ 5 On February 18, 2009, the defendant filed a one-page, *pro se* postconviction petition, which stated no legal or factual basis for relief. The petition was stricken by the circuit court, and the defendant appealed that dismissal under appeal no. 1-09-3491. On March 31, 2011, the defendant filed a motion to dismiss his appeal, and this court granted that motion on April 13, 2011. The record discloses that the circuit court had only received one page of the defendant's petition because of a docketing error. Accordingly, the court placed the defendant's petition back on its docket, advancing it to the second stage and appointing postconviction counsel.

¶ 6 The defendant's petition alleged that his trial counsel misinformed him regarding the possible maximum sentence he faced, causing him to reject the State's plea offer of 20 years' imprisonment. The defendant alleged that, on May 9, 2005, a plea conference was held pursuant to Supreme Court Rule 402 (eff. July 1, 2012) wherein the State offered him a 20-year prison term in exchange for his guilty plea. The petition alleged that defense counsel informed him that he should reject the offer because the State's case was "purely circumstantial" and that he would likely win at trial and because "any sentences he received if found guilty would run concurrently because of the one-act, one-crime rule." However, the defendant stated that the one-act, one-crime rule never applied to the charges related to the separate victims and that he faced consecutive sentences. Additionally, the defendant raised a claim of ineffective assistance of appellate counsel for failing to raise the claim in his direct appeal. Attached to the defendant's

petition was his unnotarized affidavit attesting to the facts he alleged surrounding the plea conference. Specifically, his affidavit states that during the plea conference, "defense counsel *** advised me to turn down the state plea offer of twenty years[] imprisonment because" the State's case was circumstantial and he could win the case. Further, the defendant alleged that trial counsel advised that, if he was found guilty, his sentences would run concurrently under the one-act, one-crime rule. The defendant stated that, had he known that the one-act, one-crime rule would not apply to his case, he would have accepted the State's offer of 20 years. He stated that during plea negotiations, counsel "never informed [him] of the minimum or maximum sentences" that he faced.

¶ 7 On August 16, 2012, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), stating that she had consulted with the defendant, obtained and examined the "report of proceedings of his guilty plea and sentencing," and had determined that no amendments to the defendant's *pro se* petition were necessary.

¶ 8 The record contains a transcript from May 9, 2005, in which the court asked defense counsel "[w]e did have a 402 conference *** Did you convey that offer?". Defense counsel stated that he did and that the offer was rejected. No details of the offer are contained in the record.

¶ 9 On November 15, 2012, the State filed a motion to dismiss the defendant's petition, arguing that the petition was not properly verified by affidavit and that his claims lacked merit.

¶ 10 On January 24, 2013, postconviction counsel informed the court that she had no plans to file a response to the State's motion or to file an amended petition.

¶ 11 On March 18, 2013, the defendant filed a *pro se* motion to supplement his petition and included a notarized affidavit which stated that he had been having a "hard time getting [his]

court appoint[ed] attorney to provide a reasonable level of assistance according to S. Ct. Rule 651(c)." In the defendant's supplemental petition, he adopted and restated his initial claims and attached his notarized affidavit attesting to the facts included in his petition.

¶ 12 On March 25, 2013, the court stated on the record that it had received the defendant's *pro se* documents, but the court noted that he was represented by postconviction counsel. There is no ruling on the defendant's *pro se* motion contained in the record.

¶ 13 On April 11, 2013, the circuit court granted the State's motion to dismiss the defendant's petition. The court stated, *inter alia*, that it could not consider the defendant's unnotarized affidavit in considering his ineffective assistance of trial counsel claim. Thus, the court concluded that, even if counsel's performance was deficient during the plea conference, the defendant failed to establish that he was prejudiced by failing to include a notarized affidavit. This appeal followed.

¶ 14 The Act provides a means by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). At the second stage of postconviction proceedings, the relevant question is whether the allegations in the defendant's petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates an evidentiary hearing. *People v. Cheers*, 389 Ill. App. 3d 1016, 1024 (2009). All well-pleaded facts in the petition and affidavits are taken as true, but assertions that amount to conclusions add nothing to the required showing to trigger an evidentiary hearing under the Act. *Id.*

¶ 15 During the second-stage, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2006); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007), *as modified on denial of reh'g* (May 27, 2008). The defendant's right to postconviction counsel is wholly statutory in nature

and the Act provides for only a "reasonable" level of assistance. *Perkins*, 229 Ill. 2d at 42. To assure the reasonable assistance required by the Act, Rule 651(c) imposes specific duties on postconviction counsel, including: (1) consultation with the defendant to ascertain his contentions of a deprivation of a constitutional right, (2) examination of the record of the proceedings at the trial, and (3) amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented. Ill. S.Ct. R. 651(c); *Pendleton*, 223 Ill. 2d at 472; *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 40 (applying Rule 651(c) duties to private counsel during second-stage proceedings where initial petition was filed *pro se*).

¶ 16 The purpose of this mandatory rule is to ensure that postconviction counsel shapes the defendant's claims into proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 50. "The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. In this case, postconviction counsel filed a Rule 651(c) certification, thus giving rise to the presumption that the defendant received the representation required by the rule. *Id.* It is the defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *Id.* "Our review of an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, is *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 1.

¶ 17 The defendant argues that, had postconviction counsel filed an amended petition with his notarized affidavit, his petition would not have been dismissed. The State contends that the defendant cannot overcome the presumption that he received reasonable assistance where counsel is not required to amend a claim that has no chance of advancing. The State asserts that there was no independent support for the defendant's self-serving allegations that he would have

accepted a 20-year plea deal had his trial counsel properly informed him of the possible consecutive sentences he faced.¹ We disagree with the State.

¶ 18 It is well-established that postconviction counsel has a duty to attempt to overcome procedural bars to the defendant's claims, including alleging any facts that may establish a lack of culpable negligence in the late filing of a petition as required by section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2012); *Perkins*, 229 Ill. 2d at 43) or filing a properly notarized affidavit as required by section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2012); *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 19). In this case, postconviction counsel failed to address any potential procedural defects in the defendant's petition, including amending his petition to include a notarized affidavit or responding to the State's motion to dismiss. Even the defendant himself attempted to address the State's motion by filing an amended petition which included his properly notarized affidavit. However, the circuit court disregarded the defendant's *pro se* motion because he was represented by postconviction counsel, and it dismissed his petition, noting that it could not consider the facts contained in the defendant's unnotarized affidavit. While the filing of a Rule 651(c) certification gives rise to the presumption that reasonable assistance was rendered, we find that, under the facts of this case, the defendant has overcome that presumption where counsel could have filed an amended petition to include a notarized

¹ We note that, in its brief, the State misunderstands the law applicable to unreasonable assistance of counsel claims, arguing that the defendant may not assert a "free standing claim of unreasonable assistance of post-conviction counsel for the first time" on "direct appeal." This is not a direct appeal, but rather an appeal of a dismissal of a second-stage postconviction petition. Thus, the defendant may assert an unreasonable assistance claim.

affidavit after reviewing the initial petition, or even after the State raised the defect in its motion to dismiss.

¶ 19 In so holding, we reject the State's argument that postconviction counsel was not required to amend the defendant's petition where his claim had "no chance of advancing" based solely on his self-serving allegations. Ineffective assistance of counsel claims are judged under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011). Under *Strickland*, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and that (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 688, 694). In order to satisfy the deficient-performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate that he did not receive the "counsel" guaranteed by the sixth amendment. *Id.* at 327. To satisfy the prejudice prong, a defendant must show a reasonable probability that the result of the proceeding would have been different or show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* (citing *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)). An ineffective-assistance-of-counsel claim fails if either prong of *Strickland* is not met. *People v. Nitz*, 143 Ill. 2d 82, 109 (1991).

¶ 20 The State contends that the defendant's statements in his affidavit are " 'subjective, self-serving, and * * * insufficient to satisfy the *Strickland* requirement for prejudice.' " *People v. Curry*, 178 Ill. 2d 509, 531 (1997) (quoting *Turner v. Tennessee*, 858 F.2d 1201, 1206 (6th Cir.1988), vacated on other grounds, 492 U.S. 902 (1989)). The State argues that, unlike in *Curry* where there was supporting evidence of the defendant's claim, the defendant's allegations are wholly unsupported. We note, however, that *Curry* involved a direct appeal after the trial

court conducted an evidentiary hearing, and at this stage of postconviction proceedings, the defendant is not required to prove his ineffective assistance of counsel claim, but rather demonstrate a substantial showing of a constitutional deprivation. The defendant's petition and affidavit state that he was not informed of the maximum potential sentence he faced, and that had he been properly informed, he would have accepted the State's offer of 20 years. There is nothing in the record specifically refuting the defendant's allegations as the only reference to the Rule 402 conference was a vague colloquy confirming that an offer was presented to the defendant and rejected. On the record before us, the defendant's allegations would have been sufficient to warrant an evidentiary hearing on this issue had the circuit court been able to consider the defendant's affidavit. See *People v. Barkes*, 399 Ill. App. 3d 980, 992 (2010) (finding that the defendant's petition and affidavit were sufficient to warrant a third-stage evidentiary hearing where they pled both prongs of *Strickland*; namely, that his counsel failed to advise him that he faced consecutive sentences and that he would have accepted the State's 25-year plea deal had he known). Thus, we reject the State's contention that the defendant's claim would not have advanced even if postconviction counsel had amended the petition to include his notarized affidavit.

¶ 21 Based on the foregoing reasons, we reverse the judgment of the circuit court and remand the cause with the direction that the court allow the defendant the opportunity to amend his postconviction petition with the assistance of new counsel. See *People v. Turner*, 187 Ill. 2d 406, 417 (1999) (reversing dismissal of second-stage petition where the defendant received unreasonable assistance of postconviction counsel and remanding the cause with direction to allow the defendant to replead his claims with the assistance of new counsel).

¶ 22 Reversed and remanded.