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2014 IL App (3d) 120377-U

Order filed March 18, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of the 10th Judicial Circuit, |
| |) | Peoria County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | Appeal No. 3-12-0377 |
| v. |) | Circuit No. 05-CF-194 |
| |) | |
| RODERICK JORDAN, |) | Honorable |
| |) | Stephen A. Kouri, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err when it dismissed defendant's postconviction petition. (2) Postconviction counsel did not fail to comply with the dictates of Illinois Supreme Court Rule 651(c).

¶ 2 Defendant, Roderick Jordan, was convicted of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)), unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2004)), and two counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2004)). On appeal, this court reversed one of defendant's convictions for home invasion and otherwise affirmed. *People v. Jordan*, No. 3-08-0187 (2010) (unpublished order under Supreme

Court Rule 23). Thereafter, defendant filed a postconviction petition. The trial court dismissed the petition at the second stage. Defendant appeals, arguing that: (1) the trial court's dismissal was error; and (2) postconviction counsel did not adequately represent him. We affirm.

¶ 3

FACTS

¶ 4 At defendant's bench trial, Thomas Whitby testified that he was at his residence with his fiancée, Monica Ortega, when they heard a knock on the door. As Ortega opened the door, Whitby saw a handgun protrude into the residence. He then saw defendant, whom he recognized as a relative of one of his friends. Defendant grabbed Ortega's hair and dragged her toward Whitby. When defendant neared, he slammed the barrel of the gun in Whitby's eye and demanded money, drugs, and anything else of value in the home. Whitby grabbed the gun and punched defendant, who fell backwards. The gun fell to the ground, and defendant grabbed it and fired a shot toward Whitby. The bullet hit the floor a few inches from Whitby. After the first shot was fired, Whitby stood up and slapped the gun away from defendant. The gun discharged and fired a second shot into the couch. Whitby then took the gun and hit defendant with it. Defendant fled the home as Whitby fired in his direction.

¶ 5 Police officer Eric Ellis also testified for the prosecution. He arrived at the scene of the incident as part of the crime scene investigation. After being informed that at least two shots had been fired in the house, he began searching for firearm evidence. He discovered a projectile hole in the floor and a projectile in the rug underneath the couch. Thereafter, Ellis had a brief conversation with Whitby. On cross-examination, Ellis stated that when he asked Whitby about the bullet hole in the floor, Whitby said that a struggle had occurred and the gun had discharged during the altercation. Ellis testified that he was not a detective and his conversation with Whitby did not go into great depth.

¶ 6 At the conclusion of the trial, the court found defendant guilty of unlawful use of a weapon by a felon, unlawful possession of a controlled substance, and two counts of home invasion. With regards to the two counts of home invasion, the trial court found that defendant had personally discharged the gun during the incident. Defendant was sentenced to 34 years on both counts of home invasion, 6 years for unlawful use of a weapon by a felon, and 4 years for unlawful possession of a controlled substance.

¶ 7 On appeal, this court vacated one conviction for home invasion and affirmed defendant's other convictions. *Jordan*, No. 3-08-0187. Thereafter, defendant filed a *pro se* postconviction petition. The petition alleged that: (1) trial counsel was ineffective for failing to impeach Whitby with a police report that indicated he had said the gun went off during a struggle; (2) the State used perjured testimony to establish that defendant intentionally fired the gun; and (3) trial counsel was ineffective for failing to seek, as a prior inconsistent statement, substantive admission of Whitby's statement to Ellis that the gun went off during a struggle. Defendant argued that he was prejudiced by the errors because his home invasion sentence included a 20-year add-on based on the court's finding that he had personally discharged a firearm.

¶ 8 The petition proceeded to the second stage, where counsel was appointed to assist defendant. Postconviction counsel filed a Rule 651(c) certificate indicating that he had consulted with defendant to ascertain his contentions of deprivation of his constitutional rights, examined the record of proceedings, and made any amendments necessary for an adequate presentation of defendant's claims. Thereafter, the State filed a motion to dismiss. On the same day as the State's filing, postconviction counsel filed a motion for dismissal and leave to withdraw. In his motion, postconviction counsel stated that he had reviewed the petition and the record, spoken with defendant, and concluded that trial counsel was not ineffective. Specifically, postconviction counsel stated that trial counsel used sound trial strategy when he: (1) declined to impeach

Whitby with his statements made to Ellis, and (2) decided not to seek substantive admission of those statements. Further, postconviction counsel determined that defendant could not establish perjury simply by pointing out that trial testimony did not exactly duplicate a written police report.

¶ 9 Following the filing of the motions by the State and by postconviction counsel, the trial court granted the State's motion to dismiss. Defendant appeals.

¶ 10 ANALYSIS

¶ 11 Defendant first claims that the trial court erred when it dismissed his postconviction petition at the second stage. Specifically, defendant argues that his petition made a substantial showing of ineffective assistance of trial counsel.

¶ 12 A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). It is not a substitute for, or an addendum to, a direct appeal. *People v. West*, 187 Ill. 2d 418 (1999). Therefore, the scope of a postconviction petition is limited to constitutional matters that neither have been, nor could have been, previously adjudicated. *Id.* Any issue that could have been raised on direct appeal, but was not, is procedurally defaulted. *Id.* A trial court's dismissal of a postconviction petition at the second stage is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366 (1998).

¶ 13 Here, defendant argued in his postconviction petition that trial counsel was ineffective for failing to impeach a witness with a prior inconsistent statement and for failing to seek substantive admission of that statement. Further, defendant alleged that the statement proved that the State used perjured testimony. It is undisputed that the statement was known at the time of trial and at the time of defendant's appeal. However, despite this knowledge, the issues were not raised on appeal. Therefore, we conclude that the dismissal of defendant's postconviction petition was proper because the issues were procedurally defaulted. See *West*, 187 Ill. 2d 418.

¶ 14 Defendant next claims that postconviction counsel performed unreasonably by failing to amend his *pro se* postconviction petition. While there is no requirement that postconviction counsel amend a *pro se* petition, counsel has a duty to provide reasonable assistance, and Illinois Supreme Court Rule 651(c) does require that appointed counsel make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." *People v. Turner*, 187 Ill. 2d 406, 410 (1999); Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Rule 651(c) also requires counsel to make a showing that he has consulted with the petitioner to ascertain his contentions of deprivation of constitutional rights and that he has examined the record of the proceedings at trial. *Id.* Failure to comply with the requirements of Rule 651(c) can result in the reversal of the trial court's order dismissing a postconviction petition. See *Turner*, 187 Ill. 2d 406.

¶ 15 Here, defendant argues that Rule 651(c) required postconviction counsel to amend his petition to include a claim of ineffective assistance of appellate counsel for failing to argue the issues defendant raised in his petition. Defendant claims that counsel's failure to amend the petition proves that counsel did not provide adequate representation as required by Rule 651(c). Defendant cites *Turner*, 187 Ill. 2d 406, for the proposition that failure to amend a *pro se* postconviction petition to include a claim of ineffective assistance of appellate counsel can result in a finding of inadequate representation under Rule 651(c).

¶ 16 Despite some similarities, we find this case is distinguishable from *Turner*. In *Turner*, there was little assurance that postconviction counsel had complied with the spirit or the letter of Rule 651. Here, postconviction counsel filed a motion to dismiss and leave to withdraw. In doing so, counsel represented to the court that he had reviewed the petition and the record, communicated with defendant, and concluded that the allegations in defendant's petition had no merit. In the motion, counsel specifically referenced defendant's claims, including those that

trial counsel was ineffective for failing to impeach a witness with a prior inconsistent statement and for failing to seek substantive admission of that statement. Counsel noted that the claims lacked merit because trial counsel's actions represented trial strategy and the State did not use perjured testimony.

¶ 17 The presence of the motion in this case distinguishes it from cases like *Turner* where postconviction counsel failed to do anything. It shows that counsel did represent defendant as required by Rule 651(c) and that his failure to amend the petition was based on his resolution that the underlying claim of ineffective assistance of trial counsel lacked merit. It is well established that counsel need not raise nonmeritorious issues. See *People v. Easley*, 192 Ill. 2d 307 (2000). Additionally, the record supports counsel's conclusion that the alleged errors lacked merit, as the evidence at issue was cumulative of other evidence defense counsel introduced. We conclude that counsel's representation was reasonable and complied with the dictates of Rule 651(c).

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is affirmed.

¶ 20 Affirmed.