2012 IL App (1st) 101814-U

SIXTH DIVISION
January 27, 2012

No. 1-10-1814

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. 02 CR 18049
	)	
VANCE PATTON,	)	Honorable
	)	John A. Wasilewski,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's postconviction petition was dismissed based on the merits, he was unable to show he received unreasonable assistance of postconviction counsel based on counsel's failure to respond to the State's argument that defendant forfeited the contentions in his petition.

¶ 2 Defendant Vance Patton appeals from the second-stage dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2004). On appeal, defendant contends that postconviction counsel did not fulfill his duties under Illinois

Supreme Court Rule 651(c) (eff. Dec. 1, 1984), because counsel failed to amend defendant's *pro se* petition to adequately respond to the State's motion to dismiss. We affirm.

¶ 3 Defendant was charged with the burglary of an AAMCO Transmission shop located at 9330 South Halsted Street on June 28, 2002. On October 8, 2003, before the jury trial began, defense counsel informed the trial court that defendant's family had received information that there had been additional burglaries at the AAMCO. She requested a continuance, explaining that she was waiting for a response on a subpoena she had issued for the victim witness reports and she believed they possibly contained evidence favorable to defendant. Counsel for the State reported that the complaining witness told her there had been no burglaries subsequent to defendant's arrest. The trial court denied the motion for a continuance.

¶ 4 At trial, Officer Richard Maxwell testified that he saw defendant exiting the front window of the AAMCO at 9330 South Halsted, carrying a shiny metal object. Maxwell pursued defendant, first in his car then eventually on foot. Defendant jumped over a six-foot high fence and dropped the object he was carrying, which was later recovered by the police and identified as an air ratchet. Maxwell returned to his car to continue following defendant and reported defendant's general movements over the radio. Eventually, Maxwell lost sight of defendant. About a minute later, he received a radio call indicating defendant had been apprehended. Maxwell identified the man in custody as the man he had seen climbing out of the window.

¶ 5 Sergeant Carl Riggenbach testified that he received a transmission from Maxwell and drove to 93rd and Halsted Streets to monitor the described pursuit. He drove into an alley and saw defendant come out of a gangway, look in his direction, then run the other way. Riggenbach then heard a commotion coming from the next yard over, exited his car, and started walking toward the gangway. Defendant ran directly into Riggenbach. Riggenbach arrested defendant then notified Maxwell, who arrived almost immediately and identified defendant as the man he

saw climbing out of the window. Riggenbach performed a custodial search of defendant and recovered a mini mag flashlight, a wrench, a socket wrench, and $9 in quarters.

¶ 6 The evidence further established that the front window of the AAMCO was broken, the front office had been ransacked, and the office alarm had been tampered with. David Kaufman, the owner of the AAMCO, identified the recovered air ratchet, mini mag flashlight, wrench and socket wrench as belonging to him. He also testified that money and loose change had been taken. Kaufman had never seen defendant and did not give defendant permission to go into or taking anything from the shop.

¶ 7 The jury found defendant guilty of burglary. The trial court sentenced defendant as a Class X offender based on his criminal history to 12 years in prison.

¶ 8 On direct appeal, defendant only asserted that his sentence was excessive. This court affirmed his conviction and sentence. *People v. Patton*, No. 1-04-0021 (2005) (summary order pursuant to Supreme Court Rule 23).

¶ 9 On August 8, 2005, defendant filed a *pro se* petition for postconviction relief. In his petition, defendant alleged that: (1) he was denied a fair trial by the trial court's refusal to allow a continuance so trial counsel could obtain the police report of a subsequent burglary at the AAMCO; (2) the State committed a *Brady* violation by not turning over the police report; (3) he was denied effective assistance of trial counsel when counsel failed to obtain the police report; and (4) he was denied due process at trial when the police were permitted to show photographs of the tools allegedly dropped by defendant instead of the tools themselves. In support of his petition, defendant attached a police incident report that detailed a burglary that occurred at 9330 South Halsted on September 13, 2002. The front window had been broken and an air ratchet was found next to the window. According to the report, no arrests were made.

¶ 10 The trial court did not take action on defendant's petition within 90 days. On November 4, 2005, the court appointed counsel to represent defendant.

¶ 11 On October 23, 2009, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he consulted with defendant by mail to ascertain defendant's claims, he obtained and examined the proceedings from defendant's trial and sentencing hearing, and no supplemental petition was filed as defendant's petition adequately set forth his claims.

¶ 12 On March 26, 2010, the State filed a motion to dismiss defendant's petition. In it, the State contended that defendant forfeited all claims in his petition because they could have been presented on direct appeal. The State further contended that regardless of forfeiture, each of defendant's claims lacked merit.

¶ 13 On May 21, 2010, the trial court held a hearing on the State's motion to dismiss. Defense counsel stood on defendant's petition but also argued that the attached police report showed that burglaries occurred after defendant's arrest, contrary to the AAMCO owner's statement, and showed the same point of entry was used in the subsequent burglary.

¶ 14 The trial court granted the State's motion and dismissed defendant's petition. Specifically, the court observed that the trial evidence was overwhelming and that it was unlikely any evidence of the subsequent burglary would have been admissible or would have impacted the trial result.

¶ 15 On appeal, defendant contends that his postconviction counsel did not comply with Rule 651(c) because he failed to amend defendant's petition to adequately respond to the State's motion to dismiss. Specifically, defendant claims that counsel should have amended the petition to respond to the State's contention that defendant forfeited the issues in his petition. Defendant observes that counsel filed a Rule 651(c) certificate before the State filed its motion to dismiss.

¶ 16 The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 17 The right to postconviction counsel is statutory, not constitutional. 725 ILCS 5/122-4 (West 2004); *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). The Act requires that postconviction counsel provide a reasonable level of assistance to defendant. *Id*. Whether such assistance was reasonable is determined by postconviction counsel's performance of the specific three duties articulated in Rule 651(c), which requires that counsel: (1) consult with the defendant to ascertain his contentions of any constitutional deprivations; (2) examine the record of the trial proceedings; and (3) make any amendments to the *pro se* petition necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Suarez*, 224 Ill. 2d at 42. However, postconviction counsel is not required to amend the *pro se* petition if he finds amendments are unnecessary. *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1999).

¶ 18 Counsel may demonstrate compliance with Rule 651(c) by filing a certificate stating that he has fulfilled his duties. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Where, as here, counsel files a certificate, a presumption is created that counsel has complied with the rule. *Id*.

¶ 19 Initially, the State contends that defendant's claim is not a viable free-standing claim that can be heard on appeal because defendant does not attack the sufficiency of the Rule 651(c) certificate. See *People v. Mendoza*, 402 Ill. App. 3d 808, 816-17 (2010) (the defendant's claim was improper on appeal where he made a general claim of unreasonable assistance of counsel but did not allege counsel's failure to comply with Rule 651(c)). We disagree with the State and observe that, here, defendant specifically invoked Rule 651(c) in making his claim of unreasonable assistance of counsel, claiming that his counsel did not adequately amend his petition in compliance with the rule.

¶ 20 Turning to the merits of the appeal, defendant argues that counsel should have responded to the State's argument that he forfeited the issues in his petition. However, the record clearly demonstrates that the petition was not dismissed based on forfeiture. Rather, the trial court dismissed defendant's petition based on its findings that his contentions were meritless. Defendant fails to cite to any evidence to show that his petition had merit and therefore defendant is unable to show his postconviction counsel's conduct was unreasonable under the facts here. See *Spreitzer*, 143 Ill. 2d at 222-23 (finding that the defendant was unable to show he received unreasonable assistance of postconviction counsel where he asserted his counsel should have provided evidentiary support for the substantive contentions of his petition but his petition was dismissed based on *res judicata* and waiver, and the defendant did not provide evidence that his petition should not have been dismissed based on *res judicata* or waiver). Under these circumstances, we find that defendant is unable to show he received unreasonable assistance of counsel.

¶ 21 Furthermore, we find defendant's reliance on *People v. Perkins*, 229 Ill. 2d 34 (2007), to be unavailing. In *Perkins*, the defendant's petition was dismissed as untimely after appointment of counsel. *Perkins*, 229 Ill. 2d at 39-40. On appeal, the defendant asserted that he did not receive reasonable assistance because his counsel failed to amend his petition to assert a lack of culpable negligence to overcome the timeliness issue. *Perkins*, 229 Ill. 2d at 40. The supreme court held that postconviction counsel's duty to make any amendments needed necessarily included alleging facts to establish a lack of culpable negligence if the petition was filed late, in order to overcome the procedural bar. *Perkins*, 229 Ill. 2d at 43. Defendant analogizes the facts of *Perkins* to the current case; however *Perkins* is distinguishable. The defendant in *Perkins* based his claim of unreasonable assistance on his counsel's failure to address the petition's untimeliness, which was the basis for the petition's dismissal. In contrast, here defendant's

petition was dismissed based on its merits, not on forfeiture. Defendant only contends that his counsel failed to properly amend his petition to address forfeiture but makes no effort to show that his petition should have succeeded on the merits. Most notably, the *Perkins* court held that postconviction counsel's certificate was sufficient to comply with Rule 651(c) (*Perkins*, 229 Ill. 2d at 52-53) even though counsel filed a Rule 651(c) certificate *before* the State filed its motion to dismiss (*Perkins*, 229 Ill. 2d at 38-39).

¶ 22 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 23 Affirmed.