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2014 IL App (3d) 120542-U

Order filed February 4, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF) Appeal from the Circuit Court
ILLINOIS,) of the 10th Judicial Circuit,
) Peoria County, Illinois,
Respondent-Appellee,)
) Appeal No. 3-12-0542
v.) Circuit No. 07-CF-413
)
J.T. YANKAWAY,) Honorable
) Timothy M. Lucas,
Petitioner-Appellant.) Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court improperly granted State's motion to dismiss postconviction petition before ruling on appointed postconviction counsel's motion for leave to withdraw.

¶ 2 Three years after petitioner J.T. Yankaway was convicted of armed violence and sentenced to 15 years in prison, he filed a postconviction petition. The petition survived the first stage of postconviction proceedings. At the second stage of postconviction proceedings, the trial court appointed counsel to represent petitioner, and the State filed a motion to dismiss the petition.

Petitioner's counsel then filed a combined motion for leave to withdraw and motion to dismiss. At a hearing on the motions, petitioner's counsel did not object to the State's motion to dismiss the postconviction petition. The trial court granted the State's motion to dismiss. We reverse and remand.

¶ 3 In February 2008, petitioner J.T. Yankaway was convicted of armed violence and sentenced to 15 years in prison. He appealed his conviction, and we affirmed. *People v. Yankaway*, No. 3-08-0115 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 In March 2011, petitioner filed a postconviction petition, alleging violations of his sixth and fourteenth amendment rights, as well as a motion for extension of time, explaining that he could not file his petition sooner because his prison "was locked down twice" the previous month. At the first stage of postconviction proceedings, the trial court found that the postconviction petition stated the gist of a constitutional claim.

¶ 5 At the second stage of postconviction proceedings, the court appointed counsel to represent petitioner. The State then filed a motion to dismiss the postconviction petition, claiming that it was untimely. Two months later, petitioner's appointed counsel filed a Motion to Dismiss/Leave to Withdraw, asserting that the postconviction petition had no merit.

¶ 6 The trial court held a hearing on the motions. At the hearing, both the State and petitioner's counsel asked the trial court to dismiss the postconviction petition. The trial court granted the State's motion to dismiss, deeming it "without objection in light of the Motion to Dismiss with Leave to Withdraw filed by [petitioner's counsel] ***." Petitioner was not present at the hearing, and nothing in the record suggests that his postconviction counsel notified him of his Motion to Dismiss/Leave to Withdraw.

¶ 7 Illinois' Post-Conviction Hearing Act (Act) provides a procedural mechanism through which a criminal defendant can assert that he was substantially denied his rights under the Constitution of the United States or of the State of Illinois, or both, in the proceedings that resulted in his conviction. *People v. Greer*, 212 Ill. 2d 192, 203 (2004). A postconviction proceeding is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial. *Id.*

¶ 8 The Act provides a three-step process for adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2012). The first step requires the trial court to determine whether the postconviction petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court determines that the petition is frivolous or patently without merit, it dismisses the petition. *Id.* If the court determines that the petition is not frivolous or patently without merit, then the petition proceeds to the second stage of postconviction proceedings. 725 ILCS 5/122-2.1(b) (West 2012); *People v. Hernandez*, 283 Ill. App. 3d 312, 316 (1996). At the second stage, the court may appoint counsel to represent an indigent petitioner. 725 ILCS 5/122-4 (West 2012); *Hernandez*, 383 Ill. App. 3d at 316. Once postconviction counsel is appointed, the State may move to dismiss the petition. 725 ILCS 5/122-5 (West 2012); *Hernandez*, 283 Ill. App. 3d at 316. If the trial court does not dismiss the petition, it proceeds to the third stage where an evidentiary hearing is held. 725 ILCS 5/122-6 (West 2012); *Hernandez*, 283 Ill. App. 3d at 316.

¶ 9 When counsel is appointed to an indigent petitioner for postconviction proceedings, the petitioner is entitled to a "reasonable" level of assistance. *Greer*, 212 Ill. 2d at 204. Postconviction counsel must perform specific duties, as set forth in Supreme Court Rule 651(c). *Greer*, 212 Ill. 2d at 204-05. Rule 651(c) requires that the record demonstrate that appointed counsel "has consulted

with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate representation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 10 To fulfill the duties under Rule 651(c), postconviction counsel is not required to advance frivolous or spurious claims on a petitioner's behalf. *Greer*, 212 Ill. 2d at 205; *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 13. If appointed counsel believes that a petitioner's postconviction petition is frivolous or patently without merit, counsel is ethically obligated to file a motion to withdraw as counsel. *Greer*, 212 Ill. 2d at 209; *Shortridge*, 2012 IL App (4th) 100663, ¶ 15. If postconviction counsel acquiesces to a State's motion to dismiss instead of filing a motion to withdraw as counsel, counsel's conduct represents a "total failure of representation," denying the petitioner the right to reasonable assistance of counsel under the Act. *Shortridge*, 2012 IL App (4th) 100663, ¶ 16 (quoting *People v. Turner*, 187 Ill. 2d 406, 415 (1999)).

¶ 11 When a petitioner is denied reasonable assistance of counsel, it is nearly impossible to determine if the petitioner's postconviction claims have merit. See *Turner*, 187 Ill. 2d at 415; *Shortridge*, 2012 IL App (4th) 100663, ¶ 16. Thus, if a trial court dismisses a postconviction petition, and the appellate court determines that the petitioner was denied reasonable assistance of counsel, the proper remedy is to reverse the trial court's dismissal of the petition. See *Shortridge*, 2012 IL App (4th) 100663, ¶ 16; see also *Turner*, 187 Ill. 2d at 415-16 ("[I]t is improper to affirm the dismissal of a post-conviction petition when this court finds that post-conviction counsel's performance was so deficient that it amounts to virtually no representation at all.").

¶ 12 Here, the State filed a motion to dismiss petitioner's postconviction petition. Two months

later, petitioner's appointed postconviction counsel filed a combined Motion to Dismiss/Leave to Withdraw. At the hearing on the motions, petitioner's counsel agreed that the postconviction petition should be dismissed because it lacked merit. By acquiescing to the State's motion to dismiss, petitioner's counsel failed to provide petitioner reasonable assistance of counsel. See *Shortridge*, 2012 IL App (4th) 100663, ¶¶ 15-16. Petitioner's postconviction counsel represented petitioner at the hearing "in name only" and provided him no meaningful representation. See *Turner*, 187 Ill. 2d at 415. Thus, we reverse the trial court's dismissal of defendant's postconviction petition. See *Turner*, 187 Ill. 2d at 415-16; *Shortridge*, 2012 IL App (4th) 100663, ¶ 15.

¶ 13 On remand, the trial court should grant postconviction counsel's motion for leave to withdraw and appoint new counsel for petitioner before ruling on the State's motion to dismiss. See *Shortridge*, 2012 IL App (4th) 100663, ¶ 15. If petitioner's newly appointed counsel also finds that the petition lacks merit, he should move to withdraw as counsel. See *id.* At that point, the trial court would need to determine whether the record supports counsels' assertions that the petition lacks merit. See *id.* Depending on the court's assessment, the court could dismiss the petition or allow petitioner to proceed *pro se*. See *id.*

¶ 14 The judgment of the trial court of Peoria County is reversed, and the case is remanded for further proceedings consistent with our decision set forth above.

¶ 15 Reversed and remanded with directions.