2013 IL App (4th) 120574-U

NO. 4-12-0574

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 13, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
KEITH WILLIAM HEER,	)	No. 07CF394
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Because the record rebuts the presumption, raised by the Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)), that postconviction counsel provided defendant a reasonable level of assistance, the second-stage dismissal of the amended postconviction petition is reversed, and this case is remanded for compliance with Rule 651(c).

¶ 2 Defendant, Keith William Heer, is serving a prison sentence of eight years and three months for aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(1)(F) (West 2006)). He appeals from the trial court's dismissal of his amended petition for postconviction relief. We do not reach the merits of the amended petition. Instead, we reverse the trial court's judgment and remand this case for compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 3 I. BACKGROUND

¶ 4 A. The Information

¶ 5 In June 2007, the State filed an information, which had three counts. Counts I and II charged defendant with aggravated driving under the influence of alcohol (625 ILCS 5/11-501(d)(1)(F) (West 2006)). According to these counts, he was driving under the influence of alcohol on June 22, 2007, when he got into a motor vehicle accident, resulting in the deaths of Genevieve H. Heer (count I) and Hunter L. Heer (count II). Count III charged him with reckless homicide (720 ILCS 5/9-3(a) (West 2006)) in that he was driving too fast on this occasion and ran off the road after striking a guardrail.

¶ 6 B. The Guilty Plea

¶ 7 In November 2007, defendant pleaded guilty to count I. In return, the State dismissed the remaining two counts of the information. There was no agreement as to the sentence.

¶ 8 C. The Sentencing Hearing

¶ 9 In January 2008, the trial court held a sentencing hearing. Before imposing a sentence, the court asked the prosecutor what was the minimum amount of time defendant would have to serve in prison despite his good conduct as a prisoner:

> "I suppose the one question that I would have would relate in a way to truth in sentencing on an issue like this. There is a percentage of time that must be served. In other words, what's the real time?
>
> MR. YOUNG [(State's Attorney)]: Fifty. Fifty percent.
>
> THE COURT: Fifty percent?

MR. YOUNG: Day for day.

THE COURT: Day for day. So fourteen equals seven."

On the understanding that the minimum amount of time defendant had to serve was 50%, the court sentenced him to imprisonment for 14 years, evidently intending him to remain in prison a minimum of 7 years ("given the amount of time that you would actually serve on this case, I am going to sentence you to the maximum of 14 years in the Illinois Department of Corrections").

¶ 10 After imposing the sentence of 14 years' imprisonment, the trial court gave defendant some admonitions. The court incorrectly told him that before appealing, he had to file *both* a motion to reduce the sentence and a motion to withdraw the guilty plea. But then the court told him that if he wished to challenge the sentence, he could file one motion or the other. The court said:

> "So at this point, Counsel, I would like some direction from you as to my appeal rights, because, of course, the mittimus will issue as soon as I've read the appeal rights. It would appear to me that this was a negotiated plea but blind to the ultimate charge. So I'm going to give your client both appeal rights—that is, as to a negotiated plea and a blind plea— to make sure that I cover all the bases.
>
> Because you definitely have a right to appeal even when you enter into a plea agreement. Before you do that, there are a couple of things I want you to be aware of. If you—before you take the appeal, within 30 days of today's date, your lawyer or you

would have to file a written motion asking for the judgment entered on this plea to be vacated and for leave to withdraw that plea and give me all the reasons why you should be allowed to do that in your motion.

If the motion is allowed, then the plea, the sentence, the judgment all would be vacated; and a trial date would be set on the charges to which you pled; and at the request of the State, any charges that were dismissed because of the plea agreement would be reinstated and also set for trial.

If you wished to challenge the sentence[]—that is, you wish to have the trial court reconsider the sentence or any aspect of the sentencing hearing—the same thing is true. Again within 30 days you need to file a written motion asking me to reconsider the sentence or again have the judgment vacated and for leave to withdraw your plea.

Now, if you are indigent and cannot afford the transcript of the proceedings or a lawyer to assist you in these matters, both will be provided without any cost to you.

It is important that you understand that in any appeal that you take from the judgment entered on the plea, any issue or claim of error not raised in the motion to reconsider the sentence or to vacate the judgment and withdraw the plea of guilty shall be

deemed waived.

There are two written notices of appeal that the record can reflect are being tendered to the Defendant."

¶ 11 D. The Correction of the Sentence

¶ 12 In June 2008, defendant's attorney, Thomas A. Bruno, filed a pleading entitled "Motion To Correct Sentence." According to this motion, the parties learned, after the sentencing hearing, that defendant actually would have to serve a minimum of 85% of his prison sentence for aggravated driving under the influence, not 50%. See 730 ILCS 5/3-6-3(a)(2.3) (West 2006). The motion observed that a sentence of 99 months' imprisonment would require him to remain in prison a minimum of 84 months (7 years). Therefore, the motion requested the court to "correct" the sentence by making it "reflect the Court's actual intention" to impose a sentence of 99 months' imprisonment (imprisonment for 8 years and 3 months) instead of 14 years' imprisonment.

¶ 13 In an accompanying memorandum, Bruno invoked section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), a section offering the possibility of relief from judgments despite the passage of more than 30 days after their entry. He pointed out that section 2-1401 applied to criminal cases as well as civil cases. See *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000).

¶ 14 On August 4, 2008, the trial court held a hearing on the "Motion To Correct Sentence." Although Bruno attended this hearing, defendant was not personally present. Young agreed that the trial court "[had] the authority within two years to modify the judgment." See 735 ILCS 5/2-1401(c) (West 2012). The court granted the motion to "correct the sentence," and

on August 26, 2008, the court followed up with an amended sentencing order imposing a sentence of 99 months' imprisonment.

¶ 15 E. The Amended Petition for Postconviction Relief

¶ 16 On January 2, 2009, defendant filed, *pro se*, a petition for postconviction relief.

¶ 17 On January 23, 2009, the trial court appointed Derek Girton to represent defendant in the postconviction proceeding. On November 12, 2009, the court granted Girton's motion to withdraw because of a conflict of interest, and in his place the court appointed John Halloran. On June 24, 2010, Halloran moved to withdraw because he was leaving the active practice of law. On November 1, 2010, the court granted Halloran's motion to withdraw and in his place appointed Robert E. McIntire. On November 29, 2010, McIntire filed an amended petition for postconviction relief—1 year and 10 months after defendant filed his *pro se* petition.

¶ 18 Count I of the amended petition is entitled "Improper Admonition," and it claims the trial court's admonition to defendant in the sentencing hearing "was incorrect in that it was ambiguous as to whether Defendant needed to withdraw his plea in order to challenge the correctness of the sentence." Count I contends that "[s]ince Defendant had pleaded guilty with no agreement as to sentence, [he] should have been clearly admonished that he could challenge the sentence without moving to withdraw his plea of guilty"; the ambiguity in the admonition purportedly violated due process.

¶ 19 Count II of the amended petition is entitled "Ineffective Assistance of Counsel." It alleges that the trial counsel, Bruno, failed to give defendant some important advice after the trial court imposed the sentence. Specifically, count II alleges that Bruno failed to tell defendant three things: (1) if indigent, he could be represented by appointed counsel on appeal; (2) he

could move for a reduction of the sentence without moving to withdraw his guilty plea; and (3) the motion to reduce the sentence had to be filed within 30 days, on pain of losing his right to challenge the sentence on appeal.

¶ 20 The amended petition for postconviction relief was verified, that is, signed by defendant under oath. His verification was notarized. But no separate affidavit was attached to the amended petition.

¶ 21 F. The State's Motion To Dismiss
the Amended Petition for Postconviction Relief

¶ 22 On January 5, 2011, the State filed a motion to dismiss the amended petition for postconviction relief. In its motion, the State offered two reasons for dismissing count I of the amended petition (the count entitled "Improper Admonition"). First, according to the State, the trial court did "clearly admonish [defendant that] his sentence could be reconsidered without withdrawing his plea of guilty." The State quoted this sentence from the admonition: "Again[,] [if you wish to challenge the sentence,] within 30 days you need to file a written motion asking me to reconsider the sentence or again have the judgment vacated and for leave to withdraw your plea." Also, the State noted, the transcript of the sentencing hearing "reflect[ed] that written copies of appeal rights were given to the Defendant." (In this context, the State evidently was referring to the trial court's statement "There are two written notices of appeal that the record can reflect are being tendered to the Defendant.") The State attached to its motion, as exhibit Nos. 1 and 2, the "written appeal rights given to Defendants at Sentencing Hearings in this Circuit Court." Exhibit No. 1 was entitled "Notice of Appeal Rights[,] Plea of Guilty[,] Blind Plea," and in six numbered paragraphs it gave the information set forth in Illinois Supreme Court Rules 605(b)(1) to (6) (eff. Oct. 1, 2001)). Exhibit No. 2 was entitled "Notice of Appeal Rights[,] Plea

of Guilty[,] Negotiated Plea," and in six numbered paragraphs it gave the information set forth in Illinois Supreme Court Rules 605(c)(1) to (6) (eff. Oct. 1, 2001)).

¶ 23 The second reason the State offered for dismissing count I was that under such cases as *People v. Pendleton*, 223 Ill. 2d 458 (2006), and *People v. Breedlove*, 213 Ill. 2d 509 (2004), "the failure to admonish a defendant regarding his appeal rights [did] not violate constitutionally protected rights and, therefore, [did] not raise a question of constitutional dimension."

¶ 24 Those were the State's arguments against count I of the amended petition for postconviction relief. As for count II (entitled "Ineffective Assistance of Counsel"), the State argued the trial court should dismiss that count for two related reasons. First, the State disputed that defendant was constitutionally entitled to have Bruno advise him on his appeal rights. In its motion, the State quoted an observation by the First District: "Our supreme court found a constitutional duty to consult with a defendant about the possibility of an appeal only ' "when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." ' " *People v. Gutierrez*, 387 Ill. App. 3d 1, 5 (2008), quoting *People v. Torres*, 228 Ill. 2d 382, 396 (2008) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000)). According to the State, there was no reason to suppose defendant had wanted to take a direct appeal, and, besides, a direct appeal would have been irrational, considering that defendant had pleaded guilty, he had received the benefit of his bargain (a dismissal of counts II and III of the information), and the sentence was within the permissible statutory range.

¶ 25 Second, the State pointed out that under *People v. Collins*, 202 Ill. 2d 59 (2002), a postconviction petition had to be accompanied by affidavits, records, or other evidence showing that the verified allegations of the petition were capable of objective or independent corroboration. The amended petition was unaccompanied by a separate affidavit. Consequently, there was no evidence that, at the time of the sentencing hearing, defendant was in fact confused about his appeal rights; there was no evidence that he had wanted to take a direct appeal; and there was no evidence of the extent of the consultation between him and Bruno.

¶ 26 G. The Rule 651(c) Certificate

¶ 27 On February 10, 2011, McIntire filed a certificate pursuant to Rule 651(c), in which he certified, *inter alia*, that he had "made any amendments to the petitions filed *pro se* that [were] necessary for an adequate presentation of petitioner's contentions."

¶ 28 H. The Trial Court's Decision on the State's Motion for Dismissal

¶ 29 On March 28, 2011, the trial court entered an order dismissing the "ineffective assistance of counsel claim relating to the alleged failure to discuss the right of appeal or [the right to] reconsider [the] sentence." This language describes count II of the amended petition. The court's reasons for dismissing count II were as follows. First, it was uncorroborated that Bruno actually failed to discuss with defendant his right to move for a reduction of the sentence and his right to take a direct appeal. Defendant's verification of the amended petition could not serve as such corroboration. According to the supreme court, the corroboration had to be in the form of " 'affidavits, records, or other evidence.' " *Collins*, 202 Ill. 2d at 67 (quoting 725 ILCS 5/122-2 (West 2000)). Second, it was uncorroborated that defendant ever expressed to Bruno any interest in taking a direct appeal. The court noted that in *Roe*, 528 U.S. at 480, the Supreme

Court "reject[ed] a bright-line rule that counsel *** always [had to] consult with the defendant regarding an appeal." Instead, the Supreme Court held that "counsel ha[d] a constitutionally imposed duty to consult with the defendant about an appeal when there [was] reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.*

¶ 30 Therefore, the trial court dismissed the claim that Bruno had rendered ineffective assistance by failing to advise defendant of his right to file a motion to reduce the sentence and his right to take a direct appeal.

¶ 31 The trial court held, however, that defendant's "ineffective assistance of counsel claim relating to the improper advi[c]e regarding good-time credit [did] raise an issue of constitutional dimension sufficient to survive the State's motion to dismiss." (But this was a claim in the *pro se* petition, not in the amended petition. See *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996) ("Where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn."); *People v. Phelps*, 51 Ill. 2d 35, 38 (1972) (a claim included in the *pro se* petition for postconviction relief but omitted in the amended petition was "not before the court").).

¶ 32 But what about count I of the amended petition, the count entitled "Improper Admonition"? The trial court did not explicitly dismiss that count in its written order. Nevertheless, as we will explain, the court addressed that count in a subsequent hearing on defendant's motion for reconsideration.

¶ 33 I. Defendant's Motion for Reconsideration and for Permission To Supplement the Amended Petition With an Affidavit

¶ 34 On April 26, 2011, defendant filed a motion for reconsideration of the dismissal of count II of the amended petition, arguing that under *People v. Williams*, 47 Ill. 2d 1 (1970), the mere verification of the amended petition was sufficient corroboration of its allegations. Alternatively, pursuant to section 122-5 of the Post-Conviction Hearing Act (725 ILCS 5/122-5 (West 2012)), defendant requested permission to file a separate affidavit in support of count II.

¶ 35 On October 12, 2011, the trial court held a hearing on the motion for reconsideration. After hearing arguments, the trial court again noted the lack of any evidence that defendant had intended or desired to take a direct appeal. The court continued:

> "In fact his recourse procedurally would have first been a motion to reconsider the sentence, of which he was admonished. I agree the admonishments by the trial court—and I wasn't the judge involved in the case, so I have to go back and look at this from a cold transcript—but the admonishments by the trial court were somewhat confusing. But, in fact, what he got were dual admonishments, and he was clearly admonished about the opportunity to file a motion to reconsider [the] sentence. That's in the transcript, and that would have been the procedural recourse that he had to pursue."

¶ 36 Thus, in the second stage of the postconviction proceeding, the trial court rejected the theory in count I of the amended petition. In count I, defendant alleged that the court had violated his right to due process by incorrectly admonishing him that he had to withdraw his

guilty plea in order to challenge the sentence, whereas the court should have clearly admonished him that he could challenge the sentence without withdrawing his guilty plea. In denying the motion for reconsideration, the court addressed that claim. The court held that although the admonitions were "somewhat confusing," the court had "clearly admonished [defendant] about the opportunity to file a motion to reconsider [the] sentence." It seems the court thereby effectively disposed of count I.

¶ 37 As for count II of the amended petition, the trial court stated it was unconvinced by defendant's citation of *Williams*, considering that *Collins* had distinguished *Williams* (see *Collins*, 202 Ill. 2d at 68). In the court's view, an affidavit or some other form of evidence extrinsic to the amended petition was essential to corroborating that defendant had wished to take a direct appeal.

¶ 38 As for defendant's alternative request to supplement the amended petition with such an affidavit, the trial court ruled:

> "I think [defendant] may have the right to provide an explanation for why he was not able to [submit an affidavit] previously; but, no, I don't believe that he can now attempt to supplement the record simply by submitting an affidavit of his own saying that he wanted to appeal. That's clearly self-serving and is in reaction to the ruling of the court.
>
> Had it been submitted prior to the motion, it could have some substantive weight. Now it's essentially waiting to find out why I lose and trying to make it better. That he can't do."

Therefore, the court denied the motion for reconsideration and set the remaining claim for an evidentiary hearing: the claim that Bruno had rendered ineffective assistance by incorrectly advising defendant he would receive day-for-day credit for good conduct in prison.

¶ 39 J. The Evidentiary Hearing

¶ 40 On June 22, 2012, the trial court held a third-stage evidentiary hearing. In the hearing, defendant testified that when he pleaded guilty to count I of the information, he believed he would be eligible for day-for-day credit for good conduct. As it turned out, he had to serve a minimum of 85% of his sentence, and this made him ineligible for extra good-conduct credits he otherwise would have earned for completing classes and counseling during his imprisonment. He calculated that if coursework counted—and it would have counted if his minimum time in prison were 50%—he could have potentially reduced his prison sentence by an additional two years and three months. He requested the trial court to award him postconviction relief by reducing his sentence accordingly.

¶ 41 After hearing the evidence and the arguments, the trial court found that in the sentencing hearing, all the participants—the prosecutor, defense counsel, and the trial court—labored under the misconception that defendant would have to serve a minimum of 50% of his prison sentence (instead of 85%). The court further found that when the court and counsel subsequently attempted to fix this problem in the resentencing hearing, defendant's constitutional rights were violated in that the hearing was held in his absence. The court declined, however, to further reduce defendant's sentence. The amount of good-conduct credit he would have earned if the minimum time were 50% instead of 85% was a matter of speculation, depending on whether he would have continued to obey prison rules and take classes. Instead, the court held that the

only fitting remedy would be to allow him to withdraw his guilty plea, if he wished to do so.

¶ 42 Evidently, defendant does not wish to do so.

¶ 43 II. ANALYSIS

¶ 44 The trial court disposed of both counts of the amended petition in the second stage of the postconviction proceeding. See *People v. Lara*, 317 Ill. App. 3d 905, 907-08 (2000) (describing the three stages of a postconviction proceeding). In other words, the court disposed of the amended petition on the pleadings. "[I]t is error to dismiss a postconviction petition on the pleadings where there has been inadequate representation by counsel." *People v. Suarez*, 224 Ill. 2d 37, 47 (2007).

¶ 45 In this case, McIntire filed a Rule 651(c) certificate, which raises a presumption that he provided defendant the reasonable level of assistance to which he was entitled under statutory law. See *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Like all presumptions, however, this presumption is rebuttable. See *id.* In our *de novo* review (*Suarez*, 224 Ill. 2d at 41-42), we conclude that defendant has rebutted the presumption.

¶ 46 One of the duties of postconviction counsel is to "ma[k]e any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). This duty includes adding to the petition any necessary affidavits if such affidavits can be obtained. *People v. Johnson*, 154 Ill. 2d 227, 243 (1993); *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2004).

¶ 47 It appears to be undisputed that under *Collins*, 202 Ill. 2d at 67, defendant could not rely on his verified petition to establish such facts as his desire to take a direct appeal and Bruno's failure to advise him that he could move for a reduction of his sentence without moving

to withdraw his guilty plea; rather, the parties understand *Collins* as requiring defendant to set forth those facts in a separate affidavit. Those facts were essential to count II of the amended petition, at the least. McIntire never procured a separate affidavit from defendant, although, in his motion for reconsideration, he admitted such an affidavit was procurable: he offered to remedy the deficiency by supplying an affidavit—an offer the trial court refused on the ground that an affidavit, at this juncture, would be self-serving and unbelievable. But see *People v. Harris*, 2013 IL App (1st) 111351, ¶ 47 ("The circuit court does not engage in fact-finding or credibility determinations at the second stage; rather, such determinations are made at the evidentiary stage."). So, by his own admission, McIntire did not "present the defendant's post-conviction claims to the court in appropriate legal form." *Johnson*, 154 Ill. 2d at 245.

¶ 48 The State says: "While postconviction counsel did not attach an affidavit to the petition to support his claim, defendant cannot establish how he was prejudiced." The State argues that, ultimately, "a motion to reconsider would not have been successful," anyway. The State overlooks, though, that in *Suarez* the supreme court refused to excuse noncompliance with Rule 651(c) as harmless error. *Suarez*, 224 Ill. 2d at 47. The supreme court "has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit." *Id.*

¶ 49 In sum, McIntire raised a claim that, under *Collins*, required corroboration by a separate affidavit. By his own admission, McIntire could have procured such an affidavit from defendant; but he did not do so. *Ergo*, Rule 651(c) is unfulfilled. Until that rule is fulfilled, the merits of defendant's claims are unreachable. See *id.*

¶ 50 III. CONCLUSION

¶ 51 For the foregoing reasons, we reverse the trial court's judgment and remand this case for compliance with Rule 651(c).

¶ 52 Reversed; cause remanded.