2017 IL App (4th) 150208-U

NO. 4-15-0208

FILED
April 10, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
DARROLD W. FRISBIE, JR.,	)	No. 10CF212
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Drummond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Because the record, which lacks a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), does not explicitly show that postconviction counsel fulfilled the duties listed in that rule, remand is required for compliance with that rule.

¶ 2 Defendant, Darrold W. Frisbie, Jr., petitioned for postconviction relief (see 725 ILCS 5/122-1 to 122-7 (West 2014)), and the trial court granted a motion by the State to dismiss his petition. Defendant appeals because (1) the record lacks a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and (2) in the absence of such a certificate, the record fails to show that postconviction counsel performed the duties listed in that rule. The State concedes the necessity of remanding this case for the purpose of showing, on the record, substantial compliance with Rule 651(c). In our *de novo* review (see *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 25), we conclude that the State's concession is correct. Therefore, we

reverse the trial court's judgment, and we remand this case for second-stage proceedings, with the appointment of new postconviction counsel and the filing of the required certificate.

¶ 3 I. BACKGROUND

¶ 4 A. The Charges

¶ 5 The State charged defendant with five counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)), one count of unlawful delivery of a controlled substance (720 ILCS 570/401(g) (West 2010)), one count of unlawful possession of drug paraphernalia (720 ILCS 600/3.5 (West 2010)), and one count of unlawful possession of methamphetamine (720 ILCS 646/60(b)(2)(A) (West 2010)).

¶ 6 B. The Jury Trial

¶ 7 In February 2011, the jury trial was held. M.M. testified that in April 2010, when he was 16, he and defendant had sex and consumed drugs together in the basement of defendant's house.

¶ 8 The jury found defendant guilty of two counts of aggravated criminal sexual abuse and of all three drug-related counts.

¶ 9 C. The Sentence

¶ 10 In May 2011, the trial court sentenced defendant to five concurrent terms of imprisonment: 5 years, 5 years, 3 years, 3 years, and 364 days.

¶ 11 D. The Late Notice of Appeal, Dismissed on Defendant's Motion

¶ 12 In July 2012, more than a year after he was sentenced, defendant filed a notice of appeal. The office of the State Appellate Defender was appointed to represent him. Later that same month, we granted a motion by defendant to dismiss the appeal. *People v. Frisbie*, No. 4-12-0661 (July 26, 2012) (dismissed on defendant's motion).

¶ 13 E. Postconviction Proceedings

¶ 14 In April 2014, defendant filed a petition for postconviction relief, in which he made the following claims: (1) trial counsel was ineffective by failing to hire a specialist in the analysis of deoxyribonucleic acid (DNA), given trial counsel's admission that he lacked the knowledge to proceed without such a specialist; (2) trial counsel was ineffective by failing to file a motion to suppress evidence of a telephone call between defendant and M.M.; (3) trial counsel was ineffective by failing to file a motion to suppress DNA evidence; (4) the State failed to prove defendant's guilt beyond a reasonable doubt; (5) the trial court erred by excluding family members from the courtroom; (6) the court erred by allowing hearsay evidence and by failing to hold a hearing pursuant to section 115-10(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(b) (West 2010)); and (7) trial counsel was ineffective by failing to file a motion to suppress the evidence obtained through a warrant to search defendant's house.

¶ 15 The trial court docketed the *pro se* petition and appointed postconviction counsel, Holly J. Henze. She never made any amendment to the petition.

¶ 16 In February 2015, the State filed a motion to dismiss the petition. On the authority of *People v. Smith*, 195 Ill. 2d 179, 187 (2000); *People v. West*, 187 Ill. 2d 418, 425 (1999); and *McClain v. People*, 15 Ill. App. 3d 929, 933 (1973), that State argued that because defendant never took a direct appeal, "[a]ll of the issues stated [were] waived," or, more precisely, forfeited or procedurally defaulted (see *People v. Blair*, 215 Ill. 2d 427, 443-44 n.2 (2005)). Also, in the conclusion of the motion, the State added: "Furthermore, the stated grounds do not make a substantial showing of a constitutional violation."

¶ 17 Henze filed a response to the State's motion for dismissal, and the response stated merely this. For six months after the sentencing hearing, defendant was under the belief that his

trial counsel, Richard F. Scholz, had filed a notice of appeal and that Scholz was pursuing the appeal on his behalf. During the six months after the guilty verdict, defendant "was not receiving the correct medications, was mentally unstable, and did not have the ability to understand the appeals process."

¶ 18 In March 2015, the trial court held a hearing on the State's motion for dismissal. The prosecutor, Anita M. Rodriguez, observed that even though, in the sentencing hearing, the court admonished defendant he had 30 days to file either a motion to reduce the sentence or a notice of appeal, defendant filed neither. She argued that "defendant ha[d] waived all of [the] issues [in his postconviction petition] by not taking a direct appeal and raising those issues on direct appeal." Consequently, she concluded, "the filing of the [p]ostconviction [p]etition [was] not timely and [it was] unallowed [*sic*] because he did not raise those issues first on direct appeal." Waiver (more precisely, forfeiture or procedural default) was the only argument Rodriguez made in the hearing.

¶ 19 Henze responded: "As far as argument, I can tell the Court that I have no counter-authority to argue in terms of the cites and the statutes that Ms. Rodriguez has cited and stated in her motion. I can only provide a reason or reasons as to why a [m]otion to [r]econsider or a [n]otice of [a]ppeal [was] not timely filed. Those reasons are contained *** in our [previously filed written] response ***. We have no further argument; just provide a reason why those timely motions or [n]otice of [a]ppeal were not filed."

¶ 20 The trial court asked Henze why defendant did not "file something in December of 2011 after the period of disability that [he was] claiming for six months." Henze answered: "I believe that in some point in time he did file a [n]otice of [a]ppeal, and it was either dismissed or voluntarily withdrawn; I'm not sure exactly what happened then." Defendant "had been told

several times by individuals in the Department of Corrections that he had no right to file anything." The court asked Henze if she "ha[d] any case which support[ed] [defendant's] position." She answered no; she was "just offering the reasons."

¶ 21 Looking through its file, the trial court noted that on July 13, 2012, defendant filed a notice of appeal but that on July 30, 2012, on his motion, the appellate court dismissed the appeal. After conferring with defendant at the counsel table, Henze explained to the trial court that defendant had filed the notice of appeal "to try to somehow get the transcripts."

¶ 22 The trial court ruled: "Based upon the authorities cited by the State, the [m]otion to [d]ismiss is allowed."

¶ 23 Henze requested the filing of a notice of appeal and the appointment of appellate counsel.

¶ 24 As previously noted, she never filed a certificate pursuant to Rule 651(c).

¶ 25 II. ANALYSIS

¶ 26 By filing a Rule 651(c) certificate, Henze would have certified that she had (1) consulted with defendant, either by mail or in person, to ascertain the contentions of deprivations of constitutional rights; (2) examined the record of the trial court proceedings; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of his contentions. See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The omission of this certificate is harmless only if the record shows that she did (1), (2), and (3). See *People v. Guest*, 166 Ill. 2d 381, 412 (1995); *People v. Peoples*, 346 Ill. App. 3d 258, 262 (2004). "If counsel fails to file a certificate of compliance with Rule 651(c), a reviewing court is not entitled to assume that counsel has complied with the rule; rather, there must be an explicit showing in

the record that the rule's requirements have been met." *People v. Myers*, 386 Ill. App. 3d 860, 865 (2008). The record does not appear to contain an explicit showing of (1), (2), and (3).

¶ 27 What the record does explicitly show is an apparent unawareness of our decision in *People v. Brooks*, 371 Ill. App. 3d 482 (2007). In that case, we held: "[W]hen a defendant never appeals, the rule that a defendant cannot raise any issue in a postconviction petition that he or she could have made on direct appeal is inapplicable." *Brooks*, 371 Ill. App. 3d at 486. Filing a late notice of appeal and then voluntarily withdrawing it two weeks later, before any briefs are filed, is like filing no appeal at all. As in *Brooks*, there never was any direct review. We question whether it was "reasonable assistance" to allow the State's forfeiture argument to go legally unchallenged, since it was apparently inconsistent with *Brooks*. *Myers*, 386 Ill. App. 3d at 865. The only argument the State made in the hearing on the motion for dismissal could have been easily shot down, or so it would seem.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we reverse the trial court's judgment, and we remand this case for second-stage proceedings, including the appointment of new postconviction counsel and the filing of a certificate pursuant to Rule 651(c).

¶ 30 Reversed and remanded.