2019 IL App (4th) 160816-U

NO. 4-16-0816

FILED
March 29, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
CAREY PETTIGREW	)	No. 09CF46
Defendant-Appellant.	)	
	)	Honorable
	)	Mark Fellheimer,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was denied reasonable assistance of postconviction counsel.

¶ 2 In January 2011, a jury found defendant, Carey Pettigrew, guilty of aggravated battery of a correctional officer. In April 2011, the trial court sentenced defendant to seven years in prison. This court affirmed defendant's conviction and sentence. In March 2015, defendant filed a *pro se* postconviction petition. In February 2016, postconviction counsel filed an amended petition, and the State moved to dismiss. In June 2016, the trial court granted the State's motion to dismiss.

¶ 3 On appeal, defendant argues (1) postconviction counsel provided unreasonable assistance and (2) the circuit clerk improperly imposed various fines. However, defendant withdrew his second argument in light of our supreme court's decision in *People v. Vara*, 2018

IL 121823, ¶ 23, 115 N.E.3d 53. Therefore, we address only defendant's first argument, and we reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In February 2009, the State charged defendant with aggravated battery of a correctional officer (720 ILCS 5/12-4(a), (b)(18) (West 2008)), and the trial court appointed the public defender's office to represent him. In May 2009, defendant filed numerous *pro se* motions, including a motion to (1) dismiss defense counsel and proceed *pro se* and (2) substitute Judge Jennifer H. Bauknecht and "Rehear Preliminary Hearing." On July 8, 2009, following a hearing before Judge Robert M. Travers, the court denied defendant's motion to substitute the judge and returned the cause to Judge Bauknecht. Following a hearing on July 27, 2009, the court granted defendant's motion to proceed *pro se* and set defendant's remaining motions for hearing on September 3, 2009.

¶ 6 Before his September 3, 2009, hearing, defendant filed (1) a motion to suppress statements made without *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)), (2) a motion to compel the Department of Corrections to allow defendant to view two recordings of the February 2009 incident, (3) an amended motion to dismiss, and (4) a motion in which defendant identified 20 individuals he would call to testify at his trial. Following the hearing, the trial court granted defendant's motion to compel and denied defendant's motion to suppress and amended motion to dismiss. The court advised defendant he must seek leave of court to file any additional motions.

¶ 7 Before his next hearing on September 29, 2009, defendant filed multiple motions including a motion (1) to reconsider the trial court's denial of defendant's amended motion to

dismiss and motion for additional discovery, (2) seeking disciplinary records for various correctional officers, (3) for the appointment of a computer specialist to review discovery DVDs, and (4) seeking a private investigator to investigate several witnesses, including the Livingston County State's Attorney.

¶ 8 At the hearing on September 29, 2009, the trial court denied defendant's request to subpoena the Livingston County State's Attorney to testify as a witness at defendant's trial. The court also denied defendant's motions for the appointment of a computer specialist and private investigator. In response, defendant advised the court he would file a second motion for substitution of judge. Defendant further stated, "This is nuts, man. I'm blatantly being black balled. I mean literally." When the court questioned defendant regarding the 20 individuals defendant had identified as witnesses, defendant berated the court in a vulgar manner.

¶ 9 In November 2009, defendant filed multiple motions, including a motion for appointment of counsel and a motion for a fitness examination. On December 4, 2009, defendant filed his second motion to substitute Judge Bauknecht. Following a hearing before Judge Travers in February 2010, the trial court denied defendant's motion to substitute the judge and returned the cause to Judge Bauknecht.

¶ 10 On April 1, 2010, the trial court addressed defendant's motion for a fitness examination. In response to the trial court's inquiry, defendant told the court he filed the motion because he had bipolar disorder, suffered from posttraumatic stress disorder (PTSD), and was on psychotropic medication. The court asked defendant if he was fit for trial "right now." Defendant replied: "No. Because, listen, Your Honor, when you deal with the fitness for to stand trial, first of all, you have to look at, one, am I able to comprehend the proceedings. Yes. And my defense, as which I haven't even got a chance to pretty much show the courts is I am trying

to show that at the occurrence of this crime I was not in my correct state of mind." The court interjected, "I am talking about today," and defendant responded, "Yes I am fine today." The court found defendant was fit to stand trial, stating defendant clearly understood the proceedings. The court noted "a difference between [defendant's] mental health and fitness to stand trial," characterizing defendant's behavior as disruptive and intentional. The court also denied defendant's motion for appointment of counsel, characterizing defendant's motion and "all other motions [as] repetitive, frivolous delay tactics on the part of the defendant." Defendant responded: "Bitch, fuck you." The trial court advised courtroom personnel defendant "may be excused from the courtroom" and defendant replied, "Bitch, I am going to kill you when I get out. I swear to God."

¶ 11 On April 15, 2010, defendant appeared before Judge Travers. The trial court appointed new counsel, William Bertram, to represent defendant and held defendant in direct criminal contempt for the filing of a motion on April 9, 2010, in which the court noted defendant referred to Judge Bauknecht "as a nimwit [*sic*], an imbecile, refers to her rulings as bullshit, you call her a bitch, you use the 'F' word in relation to her rulings. This is contemptuous, and I can't ignore this."

¶ 12 As a result of defendant's conduct on April 1, 2010, the State charged defendant with threatening a public official (720 ILCS 5/12-9(a)(1)(i), (a)(2) (West 2010)) (Livingston County case No. 10-CF-85). According to a forensic psychiatric evaluation report prepared by psychiatrist Terry Killian, the Livingston County Public Defender referred defendant for a psychiatric examination in Livingston County case No. 10-CF-85. The trial court entered an order on October 5, 2010, appointing Dr. Killian to conduct an examination of defendant and prepare a report. According to Dr. Killian, he was to conduct a forensic psychiatric evaluation of

defendant "for the purpose of giving opinions regarding [defendant's] current fitness to stand trial and his sanity at the time of the current charge [(April 1, 2010)]." Dr. Killian performed the evaluation on November 23, 2010.

¶ 13 On January 19, 2011, defendant's jury trial commenced on the charge of aggravated battery of a correctional officer. After hearing all of the evidence, the jury found defendant guilty of knowingly kicking correctional officer Joseph Lewis on August 25, 2008. In April 2011, the trial court sentenced defendant to seven years in prison. Defendant appealed, and this court affirmed. *People v. Pettigrew*, 2012 IL App (4th) 110656-U.

¶ 14 On February 28, 2011, Dr. Killian completed his written forensic psychiatric evaluation report. On June 24, 2011, defendant's bench trial commenced on the charge of threatening a public official. The trial court found defendant guilty and later sentenced defendant to seven years in prison. Defendant appealed, and this court affirmed. *People v. Pettigrew*, 2013 IL App (4th) 120080-U.

¶ 15 On March 9, 2015, defendant filed his *pro se* postconviction petition alleging his due process rights were violated because he was denied a fitness hearing on April 1, 2010. Defendant contended his disruptive behavior at hearings on September 29, 2009, and April 1, 2010, raised a *bona fide* doubt as to his competency to stand trial. Defendant also alleged his "newly appointed counsel" was ineffective for failing to obtain a fitness hearing. Defendant attached to his petition a copy of the forensic psychiatric evaluation report completed on February 28, 2011, by Dr. Killian.

¶ 16 According to Dr. Killian's report, defendant was present in a courtroom on April 1, 2010. Defendant's motion for a fitness exam "was denied because the court found that [defendant] was clearly fit to stand trial." Dr. Killian reported that in an interview on April 7,

2010, defendant admitted threatening Judge Bauknecht "out of rage but he didn't really mean it and said it to get out of the courtroom." Defendant "later decided it was a stupid thing to say."

¶ 17 Dr. Killian reviewed defendant's mental health records, dated December 2003 to the date of the evaluation (November 23, 2010). Defendant had been treated by a variety of psychiatrists while incarcerated. Defendant had received a number of diagnoses but none of the psychiatrists referenced psychotic symptoms or diagnosed defendant with a psychotic disorder. According to Dr. Killian, "[n]one of the psychiatrists have ever indicated that [defendant] did not seem capable of making choices for himself."

¶ 18 As to defendant's fitness to stand trial, Dr. Killian stated: "In my view, [defendant] is marginally fit to stand trial. He demonstrated a very clear understanding of the nature and purpose of the proceedings against him and of court proceedings in general, and he appears to be of at least average intelligence. The only question with regard to his fitness is whether he can keep his temper in control while in court. *** [Defendant] is probably not fit at this time to represent himself pro se because his temper is too much of a problem." As to defendant's sanity, Dr. Killian stated: "[T]here can be little doubt that [defendant] does not suffer from the type of psychiatric illness which would render him incapable of appreciating the criminality of his behavior. His aggressive behavior is not the result of a psychotic illness but is the result of his bad temper." Although Dr. Killian opined defendant suffered from severe PTSD, Dr. Killian stated defendant's PTSD "does not exonerate" defendant but "should be kept in mind in disposition of his case and does, in my opinion, provide mitigation."

¶ 19 In June 2015, the trial court appointed defendant's trial counsel to represent defendant in his postconviction proceeding. In February 2016, postconviction counsel filed an amended postconviction petition arguing defendant's due process rights were violated because

he was denied a fitness hearing. Postconviction counsel attached to the amended postconviction petition the forensic psychiatric evaluation report prepared by Dr. Killian. Postconviction counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), which stated the following:

> "I, William H. Bertram, the attorney of record in this case, have consulted with the Petitioner by phone, mail, and in person to ascertain his contentions of error in the sentence, his contentions of deprivation of constitutional rights, have examined the trial court file and proceedings of the plea of guilty, and have made any amendments to the initially filed motion necessary for adequate presentation of any defects in those proceedings."

¶ 20 In June 2016, the State filed a motion to dismiss the amended postconviction petition, alleging (1) the petition was untimely, (2) the issue could have been raised on direct appeal, and (3) defendant failed to make a substantial showing his constitutional rights were violated. With regard to the constitutional claim, the State noted Dr. Killian found defendant (1) marginally fit to stand trial, (2) demonstrated a very clear understanding of the nature and purpose of the proceedings against him and of court proceedings in general, and (3) did not suffer from the type of psychiatric illness that would render him incapable of appreciating the criminality of his behavior. Defendant filed a response to the motion to dismiss, addressing each issue.

¶ 21 Following a hearing on October 27, 2016, the trial court granted the State's motion to dismiss the amended postconviction petition for two reasons: (1) the issue should have been raised on direct appeal and (2) defendant failed to make a substantial showing of a constitutional violation.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Standard of Review

¶ 25 On appeal, defendant challenges the second-stage dismissal of his amended postconviction petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007.

¶ 26 At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court doesn't dismiss the petition, it proceeds to the second stage, where the court may appoint counsel for an indigent defendant. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 27 With the second stage of the postconviction proceedings, the trial court is concerned only with determining whether the petition's allegations sufficiently show a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a dismissal hearing, the court is prohibited from engaging in any fact-finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 28 B. Reasonable Assistance

¶ 29 Defendant first argues his counsel provided unreasonable assistance by failing to file a proper certificate under Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). In postconviction proceedings, the right to counsel is wholly statutory, and the Postconviction Act only requires counsel to provide a defendant with a " 'reasonable level of assistance.' " *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005) (quoting *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990)). To ensure counsel provides that reasonable level of assistance, Rule 651(c) imposes specific duties on postconviction counsel. *People v. Suarez*,

224 Ill. 2d 37, 42, 862 N.E.2d 977, 979 (2007). Rule 651(c) requires postconviction counsel to (1) consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, (2) examine the record of the proceedings at trial, and (3) make any amendments to the defendant's *pro se* petition necessary for the adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). "Fulfillment of the third obligation does not require counsel to advance frivolous or spurious claims on defendant's behalf." *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. The defendant bears the burden of demonstrating that his attorney failed to comply with the duties mandated in Rule 651(c). *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. Our supreme court has consistently held remand is required when postconviction counsel failed to complete any one of the above duties, "regardless of whether the claims raised in the petition had merit." *Suarez*, 224 Ill. 2d at 47, 862 N.E.2d at 982.

¶ 30 Compliance with Rule 651(c) is mandatory and *may be* shown by the filing of a certificate representing that counsel has fulfilled the duties. *People v. Perkins*, 229 Ill. 2d 34, 50, 890 N.E.2d 398, 407 (2007). The certificate provision is not a rule of strict compliance, and thus, the failure to file a proper affidavit certifying compliance with Rule 651(c) is harmless if the record demonstrates postconviction counsel adequately fulfilled his or her duties. *People v. Williams*, 186 Ill. 2d 55, 59 n.1, 708 N.E.2d 1152, 1154 n.1 (1999).

¶ 31 In this case, postconviction counsel did file a Rule 651(c) certificate, but defendant contends it failed to comply with the duties mandated in Rule 651(c). "The filing of a facially valid Rule 651(c) certificate creates a rebuttable presumption that counsel acted reasonably and complied with the rule." *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 25, 67 N.E.3d 976.

¶ 32 Here, the 651(c) certificate stated the second requirement as counsel "examined the trial court file and report of proceedings of the plea of guilty." Although counsel's certificate indicated he examined guilty plea proceedings, defendant was found guilty after a trial. The certificate does not indicate counsel examined the record of the proceedings at trial as required by Rule 651(c). Thus, we find postconviction counsel failed to file a certificate representing counsel fulfilled his duties under the second requirement of Rule 651(c) and any presumption that counsel provided reasonable assistance under the Postconviction Act does not arise.

¶ 33 Moreover, the appellate record also does not demonstrate postconviction counsel adequately fulfilled his duties under the second requirement of Rule 651(c). The record does not contain a statement by postconviction counsel that he reviewed the necessary trial records. We do not find counsel's reference in the amended postconviction petition to a disruption on April 1, 2010, caused by defendant, to satisfy the second requirement under Rule 651(c). Nor do we find persuasive the State's argument postconviction counsel was "familiar" with the record because he represented defendant at trial. We note counsel referenced in the amended postconviction petition a jury trial and sentencing before Judge Bauknecht. Judge Bauknecht did not conduct defendant's jury trial and did not sentence defendant for aggravated battery of a correctional officer. Thus, we find postconviction counsel failed to comply with the second requirement of Rule 651(c), and defendant did not receive the reasonable assistance he is entitled to under the Postconviction Act.

¶ 34 Additionally, the record indicates counsel did not comply with the third requirement of Rule 651(c). Defendant argues postconviction counsel failed to amend the petition into a proper legal form. The supreme court has noted, "the purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those

claims to the court." *Perkins*, 229 Ill. 2d at 44, 890 N.E.2d at 403 (2007). The duty to adequately present a defendant's claims "necessarily includes attempting to overcome procedural bars *** that will result in dismissal of a petition if not rebutted." *Perkins*, 229 Ill. 2d at 44, 890 N.E.2d at 403; see also *People v. Turner*, 187 Ill. 2d 406, 413, 719 N.E.2d 725, 729 (1999) (stating Rule 651(c) requires counsel to amend a petition to allege ineffective assistance of appellate counsel to avoid the procedural bar of forfeiture). Counsel failed to amend defendant's *pro se* postconviction petition to allege ineffective assistance of appellate counsel to overcome the procedural bar of forfeiture. The State contends counsel was not obligated to advance a meritless claim. We note our supreme court has consistently held 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. See *Suarez*, 224 Ill. 2d at 47, 862 N.E.2d at 982. We find the failure to make this routine amendment constitutes unreasonable assistance in violation of Rule 651(c).

¶ 35 Accordingly, we reverse the trial court's dismissal of defendant's postconviction petition and remand for further second-stage proceedings, during which defendant is permitted to amend his postconviction petition with a claim of ineffective assistance of appellate counsel. See *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 35, 973 N.E.2d 960. Our decision should not be construed as any indication of whether the allegations set forth in defendant's petition have merit. Moreover, if newly appointed counsel, after complying with Rule 651(c), determines defendant's claims lack merit, then counsel may move to withdraw as counsel. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 15, 964 N.E.2d 679.

¶ 36 Finally, because we are remanding on the basis of postconviction counsel's failure to comply with Rule 651(c) and ordering new counsel be appointed upon remand, we do not address defendant's *per se* conflict argument.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we reverse the Livingston County circuit court's dismissal of defendant's petition at the second stage of postconviction proceedings and remand the cause for further proceedings.

¶ 39 Reversed and remanded with directions.