2012 IL App (1st) 092492-UB

FOURTH DIVISION
April 12, 2012

No. 1-09-2492

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. 81 C 540
	)	
DANNY GHOLSTON,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Post-conviction counsel provided a reasonable level of assistance; judgment affirmed.

¶ 2 Defendant Danny Gholston appeals from an order of the circuit court of Cook County entered on September 2, 2009, denying his *pro se* petition under the *Habeas Corpus* Act (735 ILCS 5/10-101 (West 2010)) and the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that he was deprived of the reasonable assistance of post-conviction counsel.

¶ 3 The record shows that defendant was sentenced to 50 years' imprisonment on his 1981 jury convictions for rape, deviate sexual assault, indecent liberties with a child, robbery and aggravated battery. That judgment was affirmed on direct appeal. *People v. Gholston*, 124 Ill. App. 3d 873 (1984). In an unrelated bench trial in 1982, defendant was convicted of robbery, and sentenced to a consecutive term of 9 years' imprisonment.

¶ 4 In October 1985, defendant filed a *pro se* post-conviction petition which was summarily dismissed. This court reversed that dismissal based on the circuit court's failure to rule within the statutory time limitation, and remanded the cause for further proceedings in May 1988. On remand, defendant was appointed counsel and successfully moved for DNA testing, the results of which were inconclusive.

¶ 5 In 1998, appointed counsel filed a supplemental petition for post-conviction relief, and in 1999, filed a second supplemental petition. The circuit court granted the State's motion to dismiss defendant's post-conviction petition, and on appeal, defendant alleged that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In affirming the circuit court's decision, this court noted that during the many years since his conviction, defendant had been afforded every opportunity to refute the charges and proof against him, and clearly, no due process violation had occurred. *People v. Gholston*, 332 Ill. App. 3d 179, 186 (2002). This court further noted that prisoners should not be misled into believing that every sentence, decided a generation ago by previous fact finders, can be altered through some magic door such as *Apprendi*, and that the fairness and integrity of the criminal justice system depends on meting out the most severe punishment to those inflicting the greatest harm on society. *Gholston*, 332 Ill. App. 3d at 188.

¶ 6 In August 2008, defendant filed a *pro se* petition for a writ of *habeas corpus* alleging that the addition of three years of mandatory supervised release (MSR) to his determinate and specific

sentence was an improper extension of his custody without due process. He maintained that he was not admonished of the MSR term at his sentencing hearing.

¶ 7 On October 21, 2008, the circuit court informed defendant that the proper vehicle for his claim was a post-conviction petition because he was alleging a violation of his constitutional rights. The court further informed defendant that he should file his claim as a post-conviction petition, but noted that the case law dealing with the MSR issue might only apply to guilty plea proceedings. Defendant responded that he filed a *habeas corpus* petition because he should have been released, and his petition would be untimely otherwise. The court replied that it can treat the petition as a *habeas corpus* petition, but it believed that defendant filed his petition improperly and advised him of the appropriate vehicle. The court then stated that it would treat his petition as a post-conviction petition, but would continue the matter for defendant to do research for filing such a petition.

¶ 8 Defendant subsequently filed a *pro se* successive post-conviction petition in which he essentially reiterated the allegations in his *habeas corpus* petition. The post-conviction petition advanced to the second stage because the 90-day period expired, and counsel was appointed.

¶ 9 On July 8, 2009, post-conviction counsel filed a Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate stating that he had communicated with defendant to ascertain his claims of the deprivation of his constitutional rights. He further stated that he examined defendant's petition, which does not state a meritorious claim, and he thus filed a motion to withdraw as counsel. In that motion, counsel explained that the MSR term is required by statute, and that the court has no power to withhold it in imposing a sentence, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005).

¶ 10 The circuit court granted counsel's motion to withdraw, but stated that it might appoint different counsel for defendant. The State responded that defendant never requested leave to file a successive post-conviction petition, and asked the court to dismiss it *sua sponte*, further noting

that there was no merit to the petition as post-conviction counsel explained. The court, in turn, asked the State to submit something in writing.

¶ 11 Defendant then told the court that he wanted his petition treated as a *habeas corpus* petition. The court responded that it would consider the petition as designated by defendant, that if he wants "to treat it as a *habeas*, [it] will deal with it as a *habeas*," but then he will not get an attorney. Defendant replied that he preferred to have his petition treated as a *habeas corpus* petition. The State inquired as to what it was supposed to respond, and the court stated that it would respond to a *habeas corpus* petition.

¶ 12 On July 28, 2009, the State filed a motion to dismiss alleging that regardless of whether the circuit court considers defendant's petition under the Post-Conviction Hearing Act (Post-Conviction Act) or the *Habeas Corpus* Act, defendant's allegations are without merit, unsupported, and waived. The State alleged that under the Post-Conviction Act, the petition was untimely and unsupported, and defendant's allegations were waived because they were not raised on direct appeal. The State further alleged that the issue raised by defendant cannot be reviewed under the *Habeas Corpus* Act, and that his allegations were conclusory.

¶ 13 On September 2, 2009, defendant argued his *habeas corpus* petition before the court. The court then denied defendant leave to file a successive post-conviction petition, noted that defendant chose to file his petition as a *habeas corpus* petition, and denied the *habeas corpus* petition. Defendant indicated that he wanted to appeal, and the court stated that since it was also dealing with the successive post-conviction petition issue in its ruling, it would appoint the State Appellate Defender's office. Defendant subsequently filed his notice of appeal in which he indicated that he was appealing the judgment/order entered on September 2, 2009, and that the nature of the order being appealed from was "*habeas corpus* relief." In the brief filed in this

court, defendant solely challenges the adequacy of the representation provided by his appointed counsel in the post-conviction proceedings.

¶ 14 As an initial matter, the State contends in a footnote that we do not have jurisdiction over defendant's appeal because he did not specify in his notice of appeal that he was appealing the denial of his post-conviction petition but rather, the denial of his *habeas corpus* petition. Defendant responds that it is apparent that he was appealing the denial of his post-conviction petition because counsel was appointed for this appeal which is not done in *habeas corpus* appeals, and the transcript of the proceedings shows that all parties were aware that defendant's notice of appeal "was related to the circuit court's dismissal of his successive post-conviction petition."

¶ 15 Our jurisdiction to review a trial court's judgment in a criminal matter is governed by Supreme Court Rule 606 (eff. March 20, 2009). *People v. Baskin*, 213 Ill. App. 3d 477, 485 (1991)). That rule specifically provides that if the appeal is not from a conviction, the notice of appeal shall describe the "nature of the order appealed from." Ill. S. Ct. R. 606(d). A notice of appeal should be liberally construed (*People v. Smith*, 228 Ill. 2d 95, 104-05 (2008)), and is sufficient to confer jurisdiction upon the reviewing court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal (*People v. Decaluw*, 405 Ill. App. 3d 256, 263 (2010)).

¶ 16 Here, defendant stated in his *pro se* notice of appeal that he was appealing the denial of his *habeas corpus* petition. The notice, however, lists the date of judgment as September 2, 2009. On that date, the court denied defendant's petition under the *Habeas Corpus* Act *and* also denied defendant leave to file a successive post-conviction petition under the Act. The notice thus properly informed the prevailing party that defendant sought review of the trial court's judgment on September 2, 2009, which included its decision under the Act. In reaching that

conclusion, we find it noteworthy that the circuit court appointed defendant counsel for purposes of appeal since it had also ruled on his post-conviction petition. Accordingly, we have jurisdiction to consider defendant's post-conviction related claim.

¶ 17 In asserting the denial of reasonable assistance of post-conviction counsel, defendant contends that there is nothing in the record reflecting that his counsel examined the record of his trial proceedings as required by Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and that counsel's omission in his Rule 651(c) certificate regarding this requirement suggests his tacit admission that he failed to examine the trial record. We observe that defendant has raised no issue regarding the merits of his petition or that counsel failed to abide by the other requirements of Rule 651(c), and, accordingly, he has waived those issues for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 18 The Act provides for a reasonable level of assistance to post-conviction petitioners. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To that end, Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)) imposes specific duties on post-conviction counsel to ensure that level of assistance. *Suarez*, 224 Ill. 2d at 42. That rule provides, in relevant part, that counsel shall examine the record of proceedings at the trial. The rule, however, does not require, to substantially comply with the rule, that appointed post-conviction counsel examine the entirety of a petitioner's trial proceedings, but rather, as much of the transcript of proceedings necessary to adequately present and support those constitutional claims raised by defendant. *People v. Davis*, 156 Ill. 2d 149, 164 (1993).

¶ 19 Here, defendant alleged in his *pro se* successive post-conviction petition that the addition of three years of MSR to his determinate and specific sentence was an improper extension of his custody without due process. He maintained that he was not admonished of the MSR term at his sentencing hearing. Review of the entirety of the trial proceedings was therefore not necessary to

adequately present and support defendant's claim(*Davis*, 156 Ill. 2d at 164), which was clearly meritless. The MSR admonition requirement applies only to guilty pleas (Supreme Court Rule 402(a) (eff. July 1, 1997)), and to those cases which were not finalized prior to the date *Whitfield* was announced (December 20, 2005) (*People v. Morris*, 236 Ill. 2d 345, 366 (2010)).

¶ 20 In this case, defendant was found guilty following a jury trial in 1981, and that judgment was affirmed in 1984. It was thus readily apparent that defendant's claim was not viable, and counsel's representation will not be found unreasonable where he would only have advanced a frivolous or spurious claim. *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 21 Furthermore, and contrary to defendant's contention, counsel was not required to examine the record to determine if there were any other potential sentencing or admonishment issues requiring amendments to his petition. *Davis*, 156 Ill. 2d at 163-64. As noted by our supreme court, post-conviction counsel is only required to investigate and properly present the *petitioner's* claims (*Davis*, 156 Ill. 2d at 164), which in this case was solely defendant's MSR contention. There is no requirement to amend the petition (*People v. Jennings*, 345 Ill. App. 3d 265, 272 (2003)) or to raise new claims (*People v. Ramey*, 393 Ill. App. 3d 661, 668-69 (2009)).

¶ 22 Based on the above, we find defendant's claim of unreasonable assistance of post-conviction counsel without merit, and affirm the order of the circuit court of Cook County denying him leave to file a successive post-conviction petition.

¶ 23 Affirmed.