

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (3d) 100670-U

Order filed October 1, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Tazewell County, Illinois,
)	
v.)	Appeal No. 3-10-0670
)	Circuit No. 94-CF-30
)	
DONALD D. QUICKLE,)	Honorable
)	Richard E. Grawey,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held:* Postconviction counsel was not required to amend defendant's postconviction petition to include a claim of ineffective assistance of appellate counsel for failing to allege a due process violation based on defendant's improper shackling at trial. The improper shackling claim was not raised in the first amended postconviction petition subject to appeal in *People v. Quickle*, No. 3-06-0864 (2008) (unpublished summary order pursuant to Supreme Court Rule 23), and pursuant to this court's order in that case, postconviction counsel was only required to replead the original due process violations that defendant raised in the first amended postconviction petition.

¶ 2 Defendant, Donald D. Quickle, appeals the dismissal of his third amended postconviction petition after a third-stage evidentiary hearing following remand in *People v. Quickle*, No. 3-06-0864 (2008) (unpublished summary order pursuant to Supreme Court Rule 23). In this appeal, defendant does not allege that the dismissal of his amended petition following remand was in error; rather, he argues he was deprived of the reasonable assistance of postconviction counsel with regard to his amended petition. Specifically, he contends his postconviction counsel failed to provide a reasonable level of assistance as required under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) because counsel failed to amend defendant's postconviction petition to include an additional contention that appellate counsel was ineffective for failing to raise a meritorious due process claim, not included in the original postconviction petition filed in 2001, which would have entitled him to relief pursuant to *People v. Boose*, 66 Ill. 2d 261 (1977). We affirm.

¶ 3 FACTS

¶ 4 Defendant was tried and convicted of first degree murder (720 ILCS 5/9-1(a) (West 1994)) and armed robbery (720 ILCS 5/18-2(a) (West 1994)), and was sentenced to consecutive terms of imprisonment of 60 and 30 years, respectively. Prior to jury selection, the trial court denied defendant's request to remove the leg shackles without conducting a hearing pursuant to *Boose*, 66 Ill. 2d 261. On direct appeal, defendant's convictions and sentences were affirmed, but the *Boose* issue was not raised on direct appeal. *People v. Quickle*, No. 3-00-0057 (2001) (unpublished order under Supreme Court Rule 23).

¶ 5 Defendant filed a *pro se* postconviction petition on July 23, 2001. Attorney Mark E. Wertz was appointed to represent defendant and filed the first amended petition for postconviction relief which did not address the shackling issue but did include multiple claims of

ineffective assistance of trial counsel and also alleged twelve violations of due process. The trial court granted the State's motion to dismiss the first amended postconviction petition after finding trial counsel was not deficient in any of the claimed respects, and there was no reasonable probability trial counsel's performance was prejudicial to the defense. Regarding the due process claims, the trial court found each issue could have been raised on direct appeal, and therefore dismissed defendant's postconviction petition.

¶ 6 On appeal, this court affirmed the dismissal of the ineffective assistance of counsel claims, but remanded the postconviction petition for further consideration of the due process issues raised in the amended postconviction petition, but not raised by appellate counsel in the direct appeal. *People v. Quickle*, No. 3-06-0864 (2008) (unpublished order under Supreme Court Rule 23). In that appeal, we found postconviction counsel, Wertz, provided an unreasonable level of assistance because Wertz could have avoided waiver of the due process claims by claiming appellate counsel was ineffective based on the failure to raise the twelve specific due process violations in the direct appeal. Specifically, this court remanded the cause to the trial court "with directions that new post conviction counsel be appointed and that the defendant be allowed to replead his [amended] postconviction petition as to his due process claims." *People v. Quickle*, No. 3-06-0864, pg. 4, (2008) (unpublished order under Supreme Court Rule 23).

¶ 7 On October 6, 2009, new postconviction counsel, John P. Lonergan, filed a second amended petition for postconviction relief which, consistent with the directions from this court, alleged the same twelve due process claims as the first amended postconviction petition, and also claimed appellate counsel was ineffective based on the failure to recognize these errors. The second amended post conviction petition prepared by attorney Lonergan also included numerous

exhibits and copies of the relevant portions of the transcript necessary to support defendant's due process claims. On May 12, 2010, Lonergan appeared in court and asked for additional time to amend the petition to raise issues he and defendant had not previously discussed. Specifically, Lonergan stated:

"Judge, in speaking with my client this morning, he had a couple of additional issues that he wanted to raise that we did not discuss previously. I want to basically put on the record what those issues are that he wishes to raise, and we're asking for a continuance to properly raise those so the State can have an opportunity to respond before those issues are added."

The additional claims defendant wished to include were: (1) the sentencing court failed to order defendant to serve a period of mandatory supervised release; and (2) defense counsel failed to object to the testimony of Detective David Frank, who testified as a firearm's expert but was originally scheduled to testify concerning only the chain of custody of the murder weapon.

¶ 8 On May 20, 2010, Lonergan filed a third amended postconviction petition to include the additional claims, and the matter proceeded to an evidentiary hearing. Following the hearing, the court denied defendant's third amended postconviction petition, which included contentions appellate counsel was ineffective. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant contends he was again denied the reasonable assistance of postconviction counsel because Lonergan failed to amend the third amended petition to include an additional claim appellate counsel was ineffective for failing to contest the fact that defendant was improperly shackled at his trial, in violation of his due process protections. The State does

not deny defendant's claim regarding the initial *Boose* error is meritorious. Our review is *de novo*. *People v. Suarez*, 224 Ill. 2d 37 (2007).

¶ 11 Thus, we are called upon to decide whether postconviction counsel Lonergan, appointed after remand, provided less than reasonable assistance for failing to ascertain whether there were additional due process violations beyond those noted in the first amended petition prepared by Wertz and subject to the appeal in *People v. Quickle*, No. 3-06-0864 (2008) (unpublished order under Supreme Court Rule 23).

¶ 12 We emphasize a defendant does not have a constitutional right to counsel in postconviction proceedings. *People v. Williams*, 186 Ill. 2d 55 (1999). However, by statute, counsel is provided to indigent defendants who file *pro se* postconviction petitions. 725 ILCS 5/122-4 (West 2010). When counsel is appointed, a postconviction petitioner is entitled to a reasonable level of assistance, rather than the higher standard of assistance which is applicable to trial counsel. *People v. Turner*, 187 Ill. 2d 406 (1999). Defendant "is not entitled to the advocacy of counsel for purposes of exploration, investigation and formulation of potential claims[.]" *People v. Davis*, 156 Ill. 2d 149, 163 (1993). Postconviction counsel is appointed to assist defendant in shaping his complaints into proper legal form and to present those complaints to the court. *People v. Owens*, 139 Ill. 2d 351 (1990). Consequently, "appointed [postconviction] counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner." *Id.* at 164.

¶ 13 In the instant case, pursuant to directions from this court, postconviction counsel following remand was required to replead defendant's first amended postconviction petition to

allege ineffective assistance of appellate counsel with regard to the due process claims raised by defendant in the first amended petition. Based on this court's directive, we conclude attorney Lonergan provided reasonable assistance by repleading those specific due process violations plus additional contentions defendant discussed with counsel after remand, and there was not obligation for attorney Lonergan to search the record for additional due process violations which had escaped detection prior to remand. See *People v. Moore*, 389 Ill. App. 3d 1031 (2009) (holding that, on remand, newly appointed postconviction counsel has no broader scope to search for issues than what was in the mandate issued to the trial court). Moreover, to require postconviction counsel to have discovered the *Boose* claim and subsequently amend the petition contradicts our supreme court's rule that counsel is only required to examine as much of the transcript as required to adequately support defendant's claims. *Davis*, 156 Ill. 2d 149.

¶ 14 While it is true that, if postconviction counsel chooses to raise additional claims, he must do so competently (*People v. Johnson*, 154 Ill. 2d 227 (1993)), there is nothing in this record to indicate counsel in this case elected to investigate additional due process claims which defendant could have raised. Instead, the record demonstrates postconviction counsel presented the same claims defendant's first postconviction counsel raised, and then added two additional issues which defendant specifically mentioned. Counsel then filed a lengthy third amended petition, supported with relevant portions of the transcript, and argued all of defendant's claims at the third-stage hearing. Accordingly, we find that postconviction counsel Lonergan provided a reasonable level of assistance.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, the judgment of the circuit court of Tazewell County is

affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE McDADE, dissenting.

¶ 19 The majority has affirmed the decision of the circuit court of Tazewell County finding that the assistance provided by postconviction counsel was not unreasonable because he complied with the limited duty imposed upon him by this court when remanding this matter following an earlier appeal. I do not agree with that decision and therefore respectfully dissent.

¶ 20 I do not dispute either the facts or the law relied upon by the majority. Rather my disagreement with the decision is grounded in two factors: (1) that the preserved error was plain in those portions of the record that postconviction counsel had to review in order to discharge the duty imposed on him by Illinois Supreme Court rule 615(c) (eff. December 1, 1984), and (2) my belief that our assessment of reasonable assistance is informed by the professional qualities required of every attorney, whether retained or appointed.

¶ 21 In the appeal of the dismissal of defendant's amended postconviction petition this court found that defendant's original postconviction counsel had not complied with rule 651(c) and remanded the matter "with directions that new postconviction counsel be appointed and that the defendant be allowed to replead his postconviction petition as to his due process claims." At no place that I have found in the order did we *limit* the repleading to those due process claims already asserted. Defendant was to have new counsel who was to amend his postconviction petition to replead his due process claims in conformity with rule 651(c).

¶ 22 In pertinent part, rule 651(c) provides:

"The record filed in [the appellate] court shall contain a showing,

which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, 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 presentation of petitioner's contentions."

In order to comply with this rule, it was necessary for counsel to examine pertinent parts of the record of the circuit court proceedings.

¶ 23 As the majority has pointed out, the supreme court has made it clear that postconviction counsel is only obligated to examine those parts of the record that pertain to the contentions the defendant has actually raised because it is the "complaints of a prisoner" that define the scope of counsel's duty. *People v. Pendleton*, 223 Ill. 2d 458 (2006); *People v. Davis*, 156 Ill. 2d 149 (1993). Presumably, those complaints also include claims revealed through the consultation with the defendant that the rule also requires.

¶ 24 In the instant case, in order to perform the duties set out in rule 651(c), counsel would have had to review the post trial motion filed by trial counsel to determine whether the due process claims alleged in defendant's *pro se* petition to have been preserved for review (claims A and B) actually had been. In so doing, it would be evident that defendant had preserved another, clearly meritorious, due process claim that had also not been asserted in defendant's direct appeal.

¶ 25 Nevertheless, there is no indication in the record that defendant ever articulated this particular due process complaint either in his written *pro se* petition or in consultation with either

of his postconviction attorneys. Under the supreme court cases cited by the parties and relied on by the majority, counsel had no obligation to seek out other claims not expressly identified by his client.

¶ 26 As the majority has emphasized in ¶12, *supra*, the supreme court has held that, because a postconviction petitioner’s right to counsel derives from the postconviction statute rather than from the constitution, he is only entitled to “reasonable” assistance rather than the higher standard of “effective” assistance. *People v. Turner*, 187 Ill. 2d 406 (1999); *People v. Williams*, 186 Ill. 2d 55 (1999). The determination of reasonableness is guided by rule 651(c) and under the rule a defendant is “not entitled to the advocacy of counsel for the purposes of exploration, investigation, and formulation of potential claims[.]” *People v. Davis*, 156 Ill. 2d 149, 163 (1993).

¶ 27 But what obligation does counsel have when a meritorious claim is clearly evident in a portion of the record he is already under a duty to review?

¶ 28 *People v. Jennings*, 345 Ill. App. 3d 265 (2003), cited to us by defendant, held that, under its particular circumstances, an attorney who, in amending the petition, had failed to include a disparate sentencing claim that had not been expressly asserted by the defendant had not provided reasonable assistance. The court stated:

“We are mindful that a defendant is not entitled to the advocacy of postconviction counsel for purposes of ‘exploration, investigation[,] and formulation of potential claims.’ (Citation) Although defendant’s *pro se* postconviction petition did not explicitly claim that an arbitrary and unreasonable disparity existed

between his 60-year sentence and Angela's 56-year sentence, the substance of his ineffective assistance claim and the allegations therein clearly showed that defendant wanted to challenge his sentence. Indeed, at the August 2001 hearing on defendant's postconviction petition, Smith acknowledged that the petition effectively raised a challenge to defendant's sentence. Further, this was not a case where Smith would have had to comb through the entire record to discern this claim. Instead, the September 1999 letter from Welch to defendant's mother, which Smith used to supplement defendant's petition, suggested a disparate sentencing claim by specifically stating that 'while it is true that [defendant] received the most time, you must remember that all defendants were sentenced by different judges.'****" *People v. Jennings*, 345 Ill. App. 3d at 274.

¶ 29 I believe the facts in the instant case support a stronger argument that counsel's assistance was unreasonable than those in *Jennings*. Subparagraphs A-L of paragraph 9 of defendant's amended petition raised twelve allegations of due process violations in relation to his trial and appeal. We have no way of knowing precisely why he or his original counsel did not include the shackling issue, but the petition plainly demonstrates defendant's intent to pursue his available due process violations, including those which alleged his attorney's failure to perfect appeals on preserved meritorious claims. The State does not deny that the shackling issue was meritorious.

¶ 30 With regard to that issue, the trial court had ordered that defendant's handcuffs be

removed during *voir dire*, but deferred to the courtroom deputies to determine whether his legs would continue to be shackled. When one of his trial attorneys had objected to defendant being required to wear leg shackles during his trial, the court reiterated its intent to allow the deputies to make the call. This was a clear violation of *People v. Boose*, 66 Ill. 2d 261 (1977), which requires *the court* to determine, based on defined criteria and pursuant to a hearing, that there are valid reasons for the defendant to be restrained during his trial. The supreme court has held time and again that shackling a defendant during trial, unless a court determines and supports its necessity, violates due process because it negates the presumption of innocence, inhibits defendant's ability to assist counsel with his defense, and offends the dignity of the judicial process. *People v. Urdiales*, 225 Ill. 2d 354 (2007); *People v. Allen*, 222 Ill. 2d 340 (2006); *People v. Boose*, 66 Ill. 2d 261 (1977). See also this court's decision in *People v. Rippatoe*, 408 Ill. App. 3d 1061 (2011). Defendant further preserved this issue by asserting the error in his post-trial motion.

¶ 31 Counsel's rule 651(c) certificate supports a reasonable conclusion that (1) he reviewed that post trial motion in his consideration of those portions of the record related to the issues raised in defendant's *pro se* and amended petitions and (2) he must have seen the preserved but unchallenged shackling error. I am unaware of any requirement of the supreme court that counsel, finding an issue in its rule 651(c) review that has been preserved, is clearly meritorious, and is of the same nature and character as the other complaints the defendant has expressly asserted, has no obligation to raise it.

¶ 32 *People v. Pendleton*, 223 Ill. 2d at 476, would *permit* postconviction counsel to add such a claim or to voluntarily explore or investigate to determine if there are additional meritorious

claims that defendant could assert. I would argue that, while rule 651(c) and the cases interpreting it limit the *scope* of postconviction counsel's duty in amending a *pro se* petition, within that limited scope, an attorney still owes his client the professional qualities of legal knowledge, skill, thoroughness and preparation which together define competence; reasonable diligence; zeal; and commitment to the interests of his client. Those qualities would seem to me to require counsel to amend the petition in the circumstances described above.

¶ 33 For the foregoing reasons, I would find defendant did not receive reasonable assistance in the factual circumstances of this case and I dissent from the majority's contrary decision.