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2016 IL App (3d) 140618-U

Order filed October 4, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0618
v.	)	Circuit No. 08-CF-910
	)	
DALEVONTE D. HEARN,	)	Honorable
	)	F. Michael Meersman,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice O'Brien and Justice McDade concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Postconviction counsel acted unreasonably in failing to fashion the claims included in the amended postconviction petition into proper legal form pursuant to his duties under Illinois Supreme Court Rule 615(c).
- ¶ 2 Defendant, Dalevonte D. Hearn, appeals the dismissal of his postconviction petition at the second stage of postconviction proceedings. Specifically, defendant argues that his appointed postconviction counsel provided an unreasonable level of assistance because the amended

postconviction petition filed by counsel failed to shape defendant's claims into proper legal form. We reverse and remand with directions.

¶ 3

### FACTS

¶ 4

Defendant was charged with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2008)) and aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2008)) for an incident involving a single victim.

¶ 5

At a pretrial hearing, defense counsel indicated that the State had offered to dismiss the attempted first degree murder charge in exchange for defendant pleading guilty to aggravated domestic battery. At a later pretrial hearing, defense counsel stated that defendant refused the offer against the advice of counsel. A trial was held and the jury found defendant guilty of both counts. The trial court sentenced defendant to 30 years' imprisonment for attempted first degree murder, and 14 years' imprisonment for aggravated domestic battery, to be served concurrently. Defense counsel filed a motion to reconsider sentence arguing that the sentence for aggravated domestic battery should be vacated because defendant's aggravated domestic battery conviction merged with his attempted first degree murder conviction. The trial court stated:

"I agree that they merge. And the only reason I gave the sentence for both, is in the unlikely event that the Appellate Court were to, for example, find as a matter of law, the evidence does not support a conviction for attempt murder, they don't have to remand it for sentencing because he's been sentenced on the \*\*\* other offense. I am assuming that if the Appellate Court affirms the attempt murder conviction, they will vacate the sentence on the aggravated domestic battery."

¶ 6

On direct appeal, defendant argued that the trial court should have ordered a *sua sponte* fitness examination or, alternatively, his trial counsel provided ineffective assistance in failing to

request that the court order a fitness examination. Defendant also argued that the trial court erred in failing to conduct a *Krankel* hearing. We affirmed defendant's conviction. *People v. Hearn*, No. 3-09-0994 (2011) (unpublished order under Supreme Court Rule 23).

¶ 7 On February 21, 2012, defendant filed a *pro se* postconviction petition arguing that his constitutional rights were violated when: (1) the State rescinded its plea offer when there was a change of judge; (2) the prosecutor engaged in prosecutorial misconduct; and (3) defendant was denied his right to prepare a defense. Defendant also argued that his trial counsel provided ineffective assistance because trial counsel failed to: (1) properly investigate or prepare for trial; (2) request a competency evaluation of defendant; (3) object when the plea offer was changed; (4) object to the admission of other crimes evidence; (5) object to jury instructions concerning general and specific intent; and (6) “properly defend a mentally ill client with substance abuse issues who could not form the required intent elements to be convicted of these crimes.” Defendant also argued that he received ineffective assistance of appellate counsel because appellate counsel failed to argue the above issues on appeal.

¶ 8 On March 21, 2012, the trial court advanced the petition to the second stage of postconviction proceedings and appointed postconviction counsel. The docket sheet reflects that the trial court reviewed the *pro se* petition and determined that claims contained in the petition were not subject to dismissal at the first stage of postconviction proceedings.

¶ 9 On June 14, 2013, postconviction counsel filed an amended petition for postconviction relief. After setting forth the procedural history of the case, the amended petition stated as follows regarding the substance of defendant's postconviction claims:

“That having met the requirements enumerated by Illinois Supreme Court Rule 651(c), and having certified the same, this pleader avers, on information and

belief, that [defendant's] constitutional rights were violated in the following respect:

A. [Defendant's] right to effective assistance of counsel was violated by attorney Jennifer Gardner in her representation of [defendant] for the following reasons:

1. Counsel failed to order a fitness evaluation of defendant prior to trial.
2. Counsel failed to investigate facts or interview witnesses prior to trial.

B. [Defendant's] right to due process was violated when his plea offer was rescinded by the State when the Honorable Judge Raymond Conklin was assigned to hear the trial.”

¶ 10 The amended postconviction petition contained no further allegations regarding the substance of defendant's claims. The petition stated that defendant sought “incorporation of the Affidavits attached to his *pro se* Petition for Post-Conviction Relief filed on February 21, 2012.”

¶ 11 On the same day, postconviction counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) stating that postconviction counsel consulted with defendant by mail to ascertain his contentions of deprivation of constitutional rights, examined the trial court file and report of proceedings, and made any amendments to defendant's *pro se* petition necessary for adequate presentation of defendant's claims.

¶ 12 The State filed a motion to dismiss. Defendant then filed a second amended petition for postconviction relief. The second amended petition was identical to the amended petition, except it attached an exhibit that contained additional *pro se* arguments that were handwritten. The

handwritten exhibit largely mirrored defendant's *pro se* claims in his initial petition.

Postconviction counsel filed a second Rule 651(c) certificate.

¶ 13 The trial court dismissed the postconviction petition in its entirety. The trial court reasoned that defendant had actively participated in a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997) during which the parties discussed various plea offers. Defense counsel wanted defendant to accept the State's plea offer, but defendant declined. At that time, the State withdrew the offer. Additionally, the trial court reasoned that against the advice of defense counsel, defendant demanded an immediate trial and would not agree to a continuance so defense counsel could further investigate. The trial court concluded: "The Defendant made a bad tactical decision to turn down offered plea deals, would not agree to continuances, and hoped the State would not be ready for trial. The Defendant cannot complain that his own action caused his conviction and sentence."

¶ 14 ANALYSIS

¶ 15 Defendant argues that he was deprived of the reasonable assistance of postconviction counsel because postconviction counsel failed to shape his *pro se* postconviction claims into proper legal form. We agree.

¶ 16 "The Post-Conviction Hearing Act contemplates the assistance of an attorney, if requested by an indigent petitioner, to insure that if the petitioner has any constitutional claims of merit they will be properly recognized, developed and articulated in the post-conviction proceedings." *People v. King*, 39 Ill. 2d 295, 297 (1968). Our supreme court has held that "a defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006) (citing *People v. Munson*, 206 Ill. 2d 104, 137 (2002)).

¶ 17 At the second stage of postconviction proceedings, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires that postconviction counsel: (1) “[consult] with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights,” (2) “[examine] the record of the proceedings at the trial,” and (3) “[make] any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Where postconviction counsel files a Rule 651(c) certificate, there is a “presumption that the defendant received the required representation, but the presumption may be rebutted by the record.” *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10.

¶ 18 We find that the record in this case rebuts the presumption that postconviction counsel complied with Rule 651(c) because the amended postconviction petition filed by postconviction counsel did not shape defendant’s claims into proper legal form.<sup>1</sup> Rather, the amended petition merely alleged in a conclusory fashion that (1) defendant’s due process rights were violated when the State rescinded its plea offer following a change of judge and (2) defendant received ineffective assistance of trial counsel. The petition did not make any specific allegations supporting the claim that the State’s withdrawal of a plea offer upon a change of judge violated defendant’s due process rights.

¶ 19 With regard to the ineffective assistance of trial counsel claim, the amended petition alleged that trial counsel failed to (1) order a fitness evaluation of defendant and (2) investigate facts or interview witnesses prior to trial. However, the amended petition made no allegations regarding the ultimate success of a fitness evaluation had one been ordered. Similarly, the

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<sup>1</sup>We recognize that postconviction counsel later filed a second amended postconviction petition. The parties agree that this filing was a nullity for a variety of reasons, including failure to seek leave of court pursuant to section 122-5 of the Post-Conviction Hearing Act (725 ILCS 5/122-5 (West 2012)). Therefore, we refer to the amended petition rather than the second amended petition throughout this order. We further note that the second amended petition was nearly identical to the amended petition except that it incorporated additional *pro se* arguments of defendant.

petition made no allegations regarding the specific facts and witnesses that trial counsel failed to investigate and discover. The amended petition also failed to allege that defendant was prejudiced by trial counsel's alleged deficiencies. Prejudice is an essential element of an ineffective assistance of counsel claim. See *People v. Pugh*, 157 Ill. 2d 1, 14 (1993) ("To establish that a defendant was deprived of effective assistance of counsel, a defendant must establish both that his attorney's performance was deficient and that the defendant suffered prejudice as a result.").

¶ 20 Additionally, postconviction counsel failed to attach any affidavits, records, or other evidence supporting the allegations in the petition or to state why these items were not attached, as required by section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2012)). We note that the amended petition sought to incorporate the affidavits attached to defendant's *pro se* petition, but there were no affidavits attached to the *pro se* petition.

¶ 21 In light of the above inadequacies, we find that postconviction counsel failed to adequately present defendant's *pro se* contentions in an amended petition as required by Rule 651(c).

¶ 22 We reject the State's contention that we should affirm the trial court's order dismissing the amended postconviction petition on the basis that the issues were meritless, forfeited, or barred by the doctrine of *res judicata*. Postconviction counsel's failure to comply with Rule 651(c) may not be excused on the basis of harmless error. *People v. Suarez*, 224 Ill. 2d 37, 51 (2007). Rather, our 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.* at 47.

¶ 23 In rejecting the State’s argument, we find the case on which it relies, namely *People v. Profit*, 2012 IL App (1st) 101307, to be distinguishable. In *Profit*, the court held that the merit of the defendant’s *pro se* allegations was relevant in determining whether postconviction counsel acted unreasonably in failing to raise the issues in an amended petition. *Id.* ¶ 23. Here, because postconviction counsel raised three of defendant’s *pro se* claims in an amended petition, we presume that postconviction counsel did not find these issues to be frivolous or patently nonmeritorious. Thus, it was unreasonable for postconviction counsel to generically raise these claims in the amended petition but fail to put them into proper legal form.

¶ 24 Finally, we reject defendant’s argument that postconviction counsel provided unreasonable assistance in failing to identify and raise a one-act, one-crime issue that was not raised by defendant in his *pro se* petition. Specifically, defendant argues that postconviction counsel should have argued that the trial court violated the one-act, one-crime rule when it recognized that the aggravated domestic battery conviction should be merged with the attempted murder conviction but nonetheless imposed a sentence on the aggravated battery conviction. We make no finding regarding the merits of this potential one-act, one-crime issue. Rather, we hold that postconviction counsel had no duty to raise the issue because “[p]ost-conviction counsel is only required to investigate and properly present the *petitioner’s* claims.” (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993). “While postconviction counsel \*\*\* may raise additional issues if he or she so chooses, there is no obligation to do so.” *Pendleton*, 223 Ill. 2d at 476.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Rock Island County dismissing defendant’s amended postconviction petition is reversed. We remand the matter to the trial court with directions to



conduct new second-stage proceedings, allowing defendant to replead his postconviction claims with the assistance of new counsel.

¶ 27           Reversed and remanded with directions.