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2016 IL App (3d) 140773-U

Order filed November 23, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0773
LATONIA L. JONES,	)	Circuit No. 05-CF-439
Defendant-Appellant.	)	Honorable Robert P. Livas, Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Justices Lytton and Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* (1) Defendant did not overcome the presumption that postconviction counsel provided reasonable assistance. (2) Defendant is entitled to \$10 of *per diem* credit.
- ¶ 2 Defendant, Latonia L. Jones, appeals from the second-stage dismissal of her postconviction petition. Defendant argues that: (1) she received unreasonable assistance of postconviction counsel; and (2) the court erroneously did not apply \$10 of *per diem* credit to her street value fine. We affirm and remand with directions.

¶ 3

FACTS

¶ 4 Following a stipulated bench trial, the court found defendant guilty of unlawful distribution of a controlled substance (720 ILCS 570/401(a)(1)(A) (West 2004)). The court sentenced defendant to 10 years' imprisonment and imposed a \$3000 street value fine. The prison sentence was ordered to run consecutive to the sentence imposed in case No. 06-CF-1478. In the written judgment, the court awarded two days of presentence custody credit to defendant.

¶ 5 On November 20, 2009, defendant filed a *pro se* postconviction petition which alleged that she had received ineffective assistance of counsel. The court advanced the petition to the second stage of proceedings and appointed counsel for defendant. Appointed counsel filed an amended petition, which made the following allegations of ineffective assistance of counsel, that trial counsel: (1) failed to challenge the sufficiency of the warrant based on *Franks v. Delaware*, 438 U.S. 154 (1978); (2) failed to file a motion to quash the search warrant and suppress evidence because there was no probable cause for the issuance of the warrant; (3) did not investigate whether defendant should be subject to concurrent rather than consecutive sentencing; and (4) did not advise defendant regarding the legal consequences of a stipulated bench trial. Postconviction counsel further stated:

“[u]nder the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant can demonstrate that [s]he received ineffective assistance of counsel by showing both that counsel’s performance ‘fell below an objective standard of reasonableness’; and that the deficient performance prejudiced the defense.”

The amended petition included the following allegations of prejudice: (1) absent the individual and collective errors, defendant would have been given the chance to request a *Franks* hearing and discover the name of the confidential source and date of the police observation which would

reasonably give rise to a different result; (2) had counsel contested the search warrant, the court would have reassessed the grounds for the warrant and declined to issue it; and (3) disclosure of the confidential informant would have showed a continued investigation and entitled defendant to concurrent sentencing instead of consecutive sentencing. Postconviction counsel also filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that attested that she had consulted with defendant to ascertain defendant's contentions of deprivation of her constitutional rights, examined the report of proceedings, investigated defendant's claims, and made any amendments to the petition that are necessary for an adequate presentation of defendant's contentions.

¶ 6 The State filed a motion to dismiss the amended petition. The motion argued that the amended petition was untimely and her ineffective assistance claims were meritless.

¶ 7 At the hearing on the petition, postconviction counsel argued that a *Franks* motion that challenged the issuance of the search warrant would have been successful and an investigation into the grounds for the search warrant would have revealed facts that required concurrent as opposed to consecutive sentencing. Postconviction counsel also argued that trial counsel's failure to discuss the stipulated bench trial with defendant caused defendant confusion as to the proceedings.

¶ 8 The court found that some of the arguments made by defendant were "rather vague" and that it had repeatedly explained the stipulated bench trial to defendant during the pretrial proceedings. The court concluded "[f]or all those reasons the State gave, I am granting the State's motion to dismiss the defendant's amended postconviction petition." Defendant appeals.

¶ 9 ANALYSIS

¶ 10 I. Assistance of Postconviction Counsel

¶ 11 Defendant argues that postconviction counsel provided unreasonable assistance when she filed an amended petition that alleged ineffective assistance of counsel, but did not “include any viable allegation of prejudice.” Upon review, we find that defendant has failed to overcome the presumption that postconviction counsel provided reasonable assistance. See *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 16.

¶ 12 The Post Conviction Hearing Act (Act) provides a three-stage proceeding through which a criminal defendant may challenge her conviction by presenting claims that the conviction was the result of a denial of her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014). To warrant third-stage evidentiary hearing, a petitioner who alleges a claim of ineffective assistance of counsel must make a substantial showing that: (1) counsel’s performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. See *People v. Hall*, 217 Ill. 2d 324, 334-335 (2005) (dismissal of a second-stage petition is warranted where the petitioner failed to make a substantial showing of a constitutional violation).

¶ 13 Under section 122-4 of the Act, at the second stage of proceedings, the court may appoint counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2014). Appointed counsel may then amend the *pro se* petition, and the State may file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2014). Appointed counsel is required to file a certificate that shows compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). *People v. Cotto*, 2016 IL 119006, ¶ 27. Rule 651(c) requires counsel to attest that she consulted with defendant, examined the record of trial proceedings, and made any necessary amendments to the *pro se* petition. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). A defendant’s right to postconviction counsel is

wholly statutory, and therefore, a defendant is “guaranteed only the level of assistance provided by the [Act].” *People v. Hardin*, 217 Ill. 2d 289, 299 (2005). Our supreme court has held that the Act entitles a defendant to the “reasonable” assistance of postconviction counsel. *Id.* The filing of a Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel provided reasonable assistance. *Blanchard*, 2015 IL App (1st) 132281, ¶ 16. Defendant bears the burden to overcome this presumption. *Id.*

¶ 14 Initially, we find that postconviction counsel filed a compliant Rule 651(c) certificate. Therefore, defendant must overcome the presumption that postconviction counsel’s performance was reasonable. *Id.* We further find that defendant’s argument misconstrues the reasonable assistance standard. Rule 651(c) provides the baseline by which postconviction counsel’s actions are measured. Rule 651(c) requires that counsel adequately present petitioner’s *pro se* claims and otherwise provide reasonable assistance. See *People v. Nelson*, 2016 IL App (4th) 140168, ¶ 15. Defendant’s assertion, that postconviction counsel must present claims which are ultimately “viable,” equates the reasonable performance standard with success on the merits. Such a high standard is inconsistent with both the pleading requirements of second-stage postconviction proceedings, and the reasonable assistance standard.

¶ 15 After reviewing the amended postconviction petition, we find that the petition contained several allegations of prejudice which satisfied the reasonable assistance standard. The amended petition properly set forth the legal standard for ineffective assistance of counsel as described in *Strickland*, 466 U.S. at 694, which included the legal allegation that trial counsel’s “deficient performance prejudiced the defense.” Postconviction counsel also made the following factual allegations in support of the prejudice element: (1) had trial counsel filed a motion to quash the search warrant and suppress evidence, the court would have reassessed the information

supporting the warrant and determined that it should not have been granted; (2) disclosure of the confidential informant would have shown that defendant was not subject to consecutive sentencing because this offense was part of a continued investigation, therefore, defendant's sentence would have been imposed concurrently; and (3) absent the individual and cumulative effects of trial counsel's errors, defendant would have had a reasonable probability of a different result. Additionally, postconviction counsel's argument at the hearing included allegations of prejudice. In light of this record, we find that defendant has not overcome the presumption that postconviction counsel provided reasonable assistance.

¶ 16 II. \$5-per-day Credit

¶ 17 Defendant argues that she is entitled to offset her fines by \$10 via application of two days of \$5-per-day credit. The State concedes that defendant is entitled to the credit.

¶ 18 Section 110-14 of the Code of Criminal Procedure of 1963 (Code) allows a "person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense \*\*\* a credit of \$5 for each day so incarcerated." 725 ILCS 5/110-14(a) (West 2014). The credit is applicable only to a defendant's fines. *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006).

¶ 19 Here, the judgment states that the court awarded two days of presentence custody credit to defendant. Therefore, under section 110-14 of the Code, defendant also accrued \$10 of monetary credit. Accordingly, we remand the cause with direction for the clerk to apply \$10 of credit to defendant's street value fine.

¶ 20 CONCLUSION

¶ 21 The judgment of the circuit court of Will County is affirmed and remanded with directions.

Affirmed and remanded with directions.