2017 IL App (1st) 143385-U

SIXTH DIVISION
FEBRUARY10, 2017

No. 1-14-3385

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. 08 CR 17887
	)	
JOHN PINKEY,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of postconviction petition at second stage was proper; defendant has failed to rebut postconviction counsel's certificate of compliance with his duty of reasonable assistance.

¶ 2 Following a 2008 bench trial, defendant John Pinkey was convicted of burglary and sentenced as a mandatory Class X offender to nine years' imprisonment. We affirmed his conviction on direct appeal. *People v. Pinkey*, No. 1-09-0224 (2010) (unpublished order under Supreme Court Rule 23). His 2010 *pro se* postconviction petition was summarily dismissed, but we remanded the matter to the trial court for further proceedings. *People v. Pinkey*, No. 1-10-

2944 (2012) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the 2014 dismissal of that petition. He contends that once again we should remand the matter to the trial court for further proceedings because postconviction counsel did not adequately present his meritorious claim that he was unfit to waive counsel for trial. For the reasons stated below, we affirm the judgment of the circuit court of Cook County.

¶ 3 Defendant was charged with burglary allegedly committed on the premises identified in the charge as having occurred on or about September 4, 2008. In an October 2008 court session, defendant expressed a desire to represent himself. The trial court informed him of the charge against him and the applicable sentencing range: while burglary is a Class 2 felony, prior convictions would subject him to sentencing as a mandatory Class X offender. The court advised him of his right to have an attorney represent him and to have counsel appointed if he could not afford an attorney. In reply to the court's questions, defendant stated that he was 40 years old, had two semesters of college education, had previously been represented by attorneys, and had never represented himself in the past. The court also inquired of defendant whether he had "any psychiatric background" and defendant responded "No." Defendant expressed his hope to hire a private attorney and rejected the court's offer to appoint counsel. Thereafter, defendant requested discovery from the State and demanded trial. At the next court session in October, defendant again maintained that he would represent himself and continued to demand trial. After a short recess for defendant to review discovery materials, trial began. Defendant made an opening statement admitting that he was "guilty of being on that property" but denying any other aspect of the burglary charge.

¶ 4 At trial, the owner of the property testified that he had not given defendant permission to enter the premises or remove anything from the unoccupied building which was being renovated. He also testified that copper piping that had been installed in the walls and ceiling had been ripped out and piled on the basement floor, and a boarded-up basement window had been broken open. Police Officer John O'Donnell testified that, when he arrived at the building, he heard clanking and banging from the basement. He looked through an open basement window and saw defendant in the basement holding a piece of copper piping in his hand, with more copper piping on the floor nearby. He ordered defendant to exit the building and arrested him in the backyard. After he was given his *Miranda* warning, defendant told Officer O'Donnell "I didn't kick the board in but I was going to take the copper pipe to a scrap yard." Defendant cross-examined the owner and Officer O'Donnell, and called two other police officers as defense witnesses. He examined them on perceived discrepancies in the police reports. Defendant chose not to testify.

¶ 5 In closing argument, defendant again admitted being on the premises but claimed that he was in the backyard when the police arrived. He told the court that Officer O'Donnell lied when he testified to seeing defendant inside the building. Defendant argued that he committed only trespass at worst and was not guilty of burglary. The court found defendant guilty of burglary. At the next court session, defendant told the court that he had prepared a posttrial motion, however, he asked the court for an attorney. The court appointed counsel to represent defendant. The appointed counsel filed defendant's handwritten motion and argued insufficiency of the evidence at the subsequent posttrial hearing. The court denied the motion and sentenced defendant as a mandatory Class X offender to nine years' imprisonment.

¶ 6 On direct appeal, defendant contended that his initial waiver of counsel was ineffective because the court failed to admonish him properly regarding the Class X sentencing range, and therefore his waiver was not knowingly, intelligently, and voluntarily made. See Ill. S. Ct. R. 401 (eff. July 1, 1984). We affirmed the trial court's judgment, finding the court's admonishments were substantially correct. *Pinkey*, No. 1-09-0224, at 5-6. We stated, "[u]nder these circumstances, we find that the defendant's waiver of counsel was knowing, voluntary, and intelligent." *Id.* at 6.

¶ 7 In July 2010, defendant filed his *pro se* postconviction petition alleging in relevant part that he was not mentally fit to represent himself at trial because he had been diagnosed as being manic depressive, delusional, and dysphoric, and was under the influence of psychotropic medications before and after trial. The petition was supported with documents showing that he had been provisionally diagnosed with "depressive disorder" in January 2008, was diagnosed in February 2008 with depression, psychotic symptoms and opioid dependence, and as of February 2008 had been prescribed 100 mg of the antidepressant Trazodone, 40 mg of the antidepressant Celexa, and 3 mg of Risperdal, which is prescribed for schizophrenia and bipolar disorder.

¶ 8 The trial court summarily dismissed the postconviction petition in August 2010, noting that defendant demanded to represent himself, maintained that demand into trial, and never informed the trial court of the mental health issues now alleged in his petition. However, this court found on appeal that defendant's claim of unfitness to waive counsel was not frivolous or patently without merit. We found that the petition presented arguable factual support for his claim that he was receiving psychotropic medication before trial. *Pinkey*, No. 1-10-2944, ¶¶ 14-15. We also found that his rational behavior at trial did not completely refute the contention that

he lacked the mental capacity to present his defense *pro se,* nor did his representation to the trial court that he had no psychiatric history positively rebut his claim because he had documented psychiatric history and arguably denied his mental illness due to his mental illness. *Id.*, ¶ 16. We therefore remanded the case for further postconviction proceedings while expressly disclaiming any opinion on whether defendant would be able to proceed to an evidentiary hearing. *Id.*, ¶ 17.

¶ 9 In July 2012, following remand, the trial court appointed counsel for defendant. In March 2013, the court asked counsel if he wanted a forensic clinical examination of defendant; counsel replied that "[w]e were discussing that" but had not yet decided. In November 2013, counsel mentioned "seeking an expert from our office." In February 2014, postconviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that he communicated with defendant by mail, telephone and in person regarding his claims, reviewed the record and petition, investigated defendant's claims and found that they raised substantial questions of deprivation of rights, and concluded that a supplemental petition would not be filed.

¶ 10 The State moved to dismiss the petition, arguing *res judicata* from this court's conclusion on direct appeal that defendant waived counsel knowingly and voluntarily, and forfeiture from defendant not raising the instant claim on direct appeal alongside all of the other challenges to his waiver of counsel. The State argued that defendant's denial of any psychiatric history during his waiver of counsel positively rebutted the instant claim, and his documentation of mental health diagnoses and medication in January and February 2008 did not support a mental-health attack on his October 2008 waiver of counsel.

¶ 11 The trial court heard the motion to dismiss defendant's petition in September 2014. Counsel told the court that he had "not recently" been successful in contacting defendant by

telephone or mail. Following arguments by the parties, the court granted the motion. In relevant part, the court found that it "never had a *bona fide* doubt as to [defendant's] fitness" during the trial proceedings and that the documentation of his medications "from the way he conducted himself at trial [showed him] to be fit with medication." The court found that defendant's petition did not make a substantial showing of a constitutional violation. This timely appeal followed. Accordingly, we have jurisdiction to resolve this case.

¶ 12 On appeal, defendant contends that his petition should be remanded for further proceedings because postconviction counsel did not adequately present his meritorious claim that he was mentally unfit to waive counsel for trial. In particular, he contends that it is reversible error for postconviction counsel to not have requested a retrospective fitness examination.

¶ 13 In postconviction proceedings where the defendant has counsel, the defendant has the statutory right to the reasonable assistance of counsel. *People v. Cotto*, 2016 IL 119006, ¶ 30. To protect that right, Supreme Court Rule 651(c) provides:

> "The record [in a postconviction appeal] shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, 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." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 14 The purpose of Rule 651(c) is to ensure that counsel shapes a defendant's claims into proper legal form and presents those claims to the court. *People v. Perkins*, 229 Ill. 2d 34, 44 (2007), *as modified on denial of rehearing* (May 27, 2008). Rule 651(c) requires that counsel show he took the necessary steps to secure adequate representation of the defendant's claims, which necessarily includes attempting to overcome procedural bars that would result in dismissal of a petition if not rebutted. *Id.*

¶ 15 A Rule 651(c) certificate creates a rebuttable presumption that postconviction counsel rendered reasonable assistance, and a petitioning defendant bears the burden of rebutting the presumption by showing that counsel did not substantially comply with his duties under Rule 651(c). *People v. Wallace*, 2016 IL App (1st) 142758, ¶ 26.

> "A court may reasonably presume postconviction counsel made a concerted effort to obtain evidence in support of postconviction claims, but was unsuccessful. [Citation.] Moreover, although several parts of the record reflect that defendant was hospitalized at some point prior to his plea and that mental health records exist, nothing in the record establishes the substance of those medical records. Without any indication of whether those documents would have actually benefitted defendant's claim that he was mentally unfit to plead guilty, we will not assume that counsel was unreasonable in not attaching them to his petition." *Id.*, ¶ 27.

¶ 16 Here, defendant had the burden of showing that postconviction counsel did not provide reasonable assistance despite counsel's Rule 651(c) certificate to the contrary. Further, while we

note that postconviction counsel did not seek, nor provide an expert psychiatric examination of defendant, even if he had done so, the trial court was not bound by the expert's opinion. Notably, mental illness by itself is insufficient to render a person unfit to make a knowing waiver of his right to counsel. Further, counsel informed the court that he intended to seek input from in-house experts regarding defendant's psychiatric condition and presumably his ability to make a knowing waiver. We can presume that this action would have been subsumed into counsel's Rule 651(c) certificate. We cannot conclude that counsel acted unreasonably when the trial court expressed in no uncertain terms, that it would not have ordered a fitness hearing. The court – with the same judge presiding at trial and later ruling upon defendant's petition – found in dismissing the defendant's petition that it had no *bona fide* doubt of defendant's fitness at any time in the original proceedings. A fitness hearing is required only upon a *bona fide* doubt of a defendant's fitness, and a defendant is not presumed unfit merely because he is receiving psychotropic medication. 725 ILCS 5/104-11(a), -21(a) (West 2014). Stated another way, we find no indication in the record that a retrospective clinical examination of defendant would have advanced his claim of unfitness to waive counsel nearly six years before. It is clear from the trial court's comments that the court was not going to hold a fitness hearing as it believed there was no indication that such a hearing was necessary. The question raised by defendant's petition was not whether he was mentally ill in October 2008 but whether he was fit to waive counsel. The circuit court concluded that he was fit to make such a waiver, and defendant has failed to show that he could have changed that conclusion if postconviction counsel had sought a retrospective psychiatric evaluation from the court that was very familiar with defendant and all aspects of the proceedings.

¶ 17 Our decision is not affected by *People v. Rodriguez*, 2015 IL App (2d) 130994, cited by defendant as it differs from the instant case significantly. In *Rodriguez*, the defendant's contention indicates that postconviction counsel had not filed a Rule 651(c) certificate. Therefore counsel in *Rodriguez* had the burden of affirmatively showing from the record that he had complied with Rule 651(c). *Id.*, ¶¶ 14, 19. By contrast, postconviction counsel in this case did file a Rule 651(c) certificate so that defendant bears the burden of affirmatively refuting the rebuttable presumption of compliance by counsel. For the reasons stated we find that he has not done so.

¶ 18 Accordingly, the judgment of the circuit court Cook County is affirmed.

¶ 19 Affirmed.