2017 IL App (1st) 143848-U

No. 1-14-3848

Order filed June 29, 2017

Fourth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 CR 11388
	)	
JOHN MCDOWELL,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of defendant's *pro se* postconviction petition upon the State's motion to dismiss where he did not rebut the presumption that his appointed postconviction counsel provided reasonable assistance and there was no *bona fide* doubt as to his fitness requiring the court to *sua sponte* conduct a fitness hearing.

¶ 2 Defendant John McDowell appeals an order of the circuit court granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends that the dismissal must be reversed

because: (1) his postconviction counsel provided unreasonable assistance by not amending his *pro se* petition or withdrawing as counsel, and otherwise acquiescing to the State's motion to dismiss; and (2) based on the convoluted *pro se* pleadings he filed, including his postconviction petition, there was a *bona fide* doubt as to his fitness to continue with postconviction proceedings, which required the circuit court to *sua sponte* conduct a fitness hearing. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2007, a grand jury indicted defendant with multiple counts of aggravated criminal sexual abuse and criminal sexual abuse based on alleged instances of inappropriate sexual contact with his five-year-old daughter, D.N. The State ultimately proceeded to a jury trial against him on two counts of aggravated criminal sexual abuse.

¶ 5 The evidence at trial showed that, sometime in January or February of 2007, D.N. visited defendant's apartment with two of her brothers. At some point during the visit, defendant touched her vagina underneath her clothes. D.N. reported his conduct to her mother, Dr. Emily Siffermann, a pediatrician from Stroger Hospital and the Children's Advocacy Center, and Alexandra Levi, a social worker from the Children's Advocacy Center. The police interviewed defendant about the allegation, and he acknowledged its veracity. At trial, however, defendant denied ever inappropriately touching D.N., but acknowledged the admission to the police. He explained that he admitted to the conduct because he was "in a rage" by the accusation, tired and hungry.

¶ 6 The jury found defendant guilty of aggravated criminal sexual abuse based on touching D.N.'s vagina, but the jury acquitted him of another count of aggravated criminal sexual abuse. At his sentencing hearing, the trial court stated that, due to the age of D.N. and the nature of the

offense, the sentencing range was between 3 and 14 years' imprisonment. The court subsequently sentenced defendant to 7 years' imprisonment.

¶ 7 On direct appeal, defendant contested the sufficiency of the evidence to prove that he committed the offense, challenged certain statements admitted at his trial as improper hearsay and argued that the trial court misunderstood the applicable sentencing range for his conviction. *People v. McDowell*, 2012 IL App (1st) 100933-U. We affirmed defendant's conviction, but found that the trial court misinterpreted the applicable sentencing range and its mistake arguably influenced his sentence. *Id.* We accordingly remanded the matter for a new sentencing hearing. *Id.*

¶ 8 On July 26, 2012, after this court had resolved his direct appeal, defendant filed nine *pro se* motions: (1) a motion for the clerk of the court to issue several subpoenas to people involved in his case; (2) a motion for a jury trial; (3) a motion for the return of items seized from him; (4) a motion for a bill of particulars; (5) a motion for the suppression of illegally seized evidence; (6) a motion for "malicious prosecution costs;" (7) a motion for the substitution of judges; (8) a motion alleging the ineffective assistance of trial counsel; and (9) a motion to "dismiss charge" against him. The record does not show that the circuit court ever ruled on these motions.[1]

¶ 9 On September 7, 2012, defendant filed four *pro se* documents captioned with various titles: (1) a "Petition for Post-Conviction Relief;" (2) an "Affidavit;" (3) a "Grievance Complaint," pursuant to "5/10A-10 of the Code;" and (4) a "Notice of Appeal." In each filing, however, defendant made various allegations concerning the charges against him, his trial and

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[1] Defendant concedes on appeal that the circuit court had no authority to rule on these motions and therefore properly ignored them.

his conviction.[2] Defendant's allegations are, at times, convoluted and repetitive, but in these documents, he appeared to claim that: (1) there was insufficient evidence of his guilt due to various witnesses lying; (2) he "was arrested on a charge that held no legitimized structure of convincing evidence" and the police "had no probable cause to arrest" him; (3) after applying a medical cream to D.N. due to her being diagnosed with "scabies," her mother created a "memory" in her mind that he had touched her inappropriately, which was intended to thwart his attempts to obtain custody of D.N.; (4) his trial counsel demonstrated "a practice of legal ineffectiveness" for failing to bring to light the fact that D.N.'s mother only made the allegations against him in order to prevent him from obtaining custody of D.N.; and (5) his trial counsel was ineffective for failing to "subpoena" D.N.'s brothers to testify at his trial. The circuit court docketed defendant's petition and appointed the public defender to represent him.

¶ 10 On May 16, 2013, the State appeared in court and informed the circuit court that there had been a remand from the appellate court for a new sentencing hearing on defendant's conviction for aggravated criminal sexual abuse. The court acknowledged the remand and observed that defendant also had the pending postconviction matter. It stated that it would hold defendant's postconviction matter "in abeyance" in order to conduct the new sentencing hearing.

¶ 11 On that same date, postconviction counsel filed a Rule 651(c) certificate, which stated that: "In accordance with Supreme Court Rule 651(c), I certify that I examined Mr. McDowell's Post-Conviction Petition and the record. I consulted with him [by] mail, by phone, and in person and have determined that his Post-Conviction Petition adequately presents his issues."

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[2] Although defendant filed four separate documents with only one titled as a postconviction petition, it appears that both the circuit court and the State considered all four documents when ascertaining his alleged claims.

¶ 12 On June 6, 2013, the circuit court held the new sentencing hearing wherein postconviction counsel represented defendant. After both parties presented their arguments and defendant spoke in allocution, the court again sentenced him to seven years' imprisonment.

¶ 13 Three months later, the State filed a motion to dismiss defendant's petition. In its motion, the State characterized defendant's claims as: (1) "reasonable doubt;" (2) improper admission of D.N.'s outcry statements; (3) the "trial court's advertisement or lack of advertisement;" and (4) ineffective assistance of trial counsel for failing to "win the trial," "cross-examine" and "call witnesses." Because the State's arguments in support of its motion are not relevant to the resolution of this appeal, we need not discuss them.

¶ 14 On October 22, 2013, the parties appeared in court for argument on the State's motion to dismiss. The State observed that it was "very hard to find the issues within [defendant's] petition," but determined the document was "simply a petition of a person who was just unhappy with their trial." It further stated that the petition was "really a petition of reasonable doubt and now wanting to testify at a time when the case is all done and over with." The State concluded that such contentions were not proper for postconviction matters and requested the circuit court to dismiss the petition. Postconviction counsel acknowledged not filing a response to the State's motion. He stated that he "reviewed the petition carefully," had "spoken with the defendant and corresponded with him by [mail]," and would "stand on his petition." The circuit court took the matter under advisement and subsequently continued defendant's postconviction matter on various dates.

¶ 15 On March 6, 2014, the parties appeared in court and, after a discussion off the record, the circuit court stated that it would "withhold any order that [it] was anticipating entering on this case, and see what happened" at the following court date. On the next court date, postconviction

counsel reminded the court that it postponed ruling on the State's motion to dismiss pending his "further investigation." Counsel informed the court that he was "making progress," had "contacted a witness" but needed to contact an additional one, and anticipated filing an amended petition on defendant's behalf.

¶ 16 At the next two court dates, postconviction counsel updated the circuit court on the progress of his investigation and stated he would have to contact defendant in order to proceed. On October 21, 2014, the parties appeared in court, and postconviction counsel stated: "Judge, you had indicated that you were at one point ready to rule. We asked for some time to investigate. Our investigation came up dry, so we're back where we were." The court told the parties that it would rule on the State's motion to dismiss in three weeks.

¶ 17 On November 13, 2014, the circuit court entered a written order, granting the State's motion to dismiss. The court observed that the petition's "claims [were] convoluted and difficult to discern," characterizing them as: (1) the State failed to prove defendant's guilt beyond a reasonable doubt; (2) the police did not have probable cause to arrest him; (3) his trial counsel was ineffective for failing to call D.N.'s brothers as witnesses; and (4) his trial counsel was ineffective for failing to cross-examine D.N.'s mother with evidence that she was an unfit parent. Following the court's dismissal of defendant's postconviction petition, he appealed.

¶ 18 II. ANALYSIS

¶ 19 A. The Post-Conviction Hearing Act

¶ 20 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage of the Act, the circuit court must determine whether the petition's claims are frivolous or patently without

merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Cotto*, 2016 IL 119006, ¶ 26. If the court does not dismiss the petition at the first stage, it advances the petition to the second stage. *Cotto*, 2016 IL 119006, ¶ 26.

¶ 21 At the second stage, the State has the option to either move to dismiss the defendant's petition or file an answer in response to it. 725 ILCS 5/122-5 (West 2012). At this stage, the circuit court must determine whether the petition and its supporting documentation make a substantial showing of a constitutional violation. *Cotto*, 2016 IL 119006, ¶ 28. A substantial showing is a measure of the legal sufficiency of the petition's allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. The defendant bears the burden of demonstrating a substantial showing. *Id.* If he fails to make this showing, the court will dismiss his petition. *Cotto*, 2016 IL 119006, ¶ 28. If, however, the court determines that the petition has made a substantial showing, it will advance the petition to the third stage, where an evidentiary hearing is held. *Id.* In this case, the circuit court dismissed defendant's petition at the second stage upon the State's motion.

¶ 22 B. Postconviction Counsel's Assistance

¶ 23 Defendant first contends that his postconviction counsel provided unreasonable assistance where counsel failed to amend his *pro se* petition, which he describes as "utter incoherence," in order to shape the claims into proper form, did not respond in writing to the State's motion and did not respond orally during argument on the State's motion. Defendant asserts that, given counsel's inaction, an adversarial proceeding between the State and defendant was resolved without one of the adversaries. He posits that counsel's passivity suggests that counsel did not believe his claims had any merit, in which case counsel was required to withdraw from representing him. Because counsel neither advocated for defendant nor withdrew from the

case, defendant argues that counsel did not meet the standards of representation required by Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013), and his case must be remanded for further second-stage proceedings and compliance with the rule.

¶ 24 At the second stage of the Act, indigent defendants have a statutory right to appointed postconviction counsel. 725 ILCS 5/122-4 (West 2012). This right entitles defendants to a " 'reasonable' " level of assistance (*Cotto*, 2016 IL 119006, ¶ 30), which is less than the level of assistance that the constitution guarantees to defendants at trial. *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990). To ensure defendants receive reasonable assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes three specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 25 Under Rule 651(c), counsel is required to: (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights; (2) examine the record of the trial court proceedings; and (3) make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant's] contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Counsel's compliance with the rule may be shown either from the record or a certificate filed by counsel. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 14. Counsel's obligation is to ensure that the claims raised in the *pro se* petition are shaped into proper legal form for presentation to the circuit court. *People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007). Counsel, however, is not required to embark "on a 'fishing expedition' to find facts and evidence outside the record that might support the defendant's claims." *People v. Malone*, 2017 IL App (3d) 140165, ¶ 10 (citing *People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005)). In fact, postconviction counsel is not required to amend the defendant's *pro se* petition, as ethical obligations would prevent counsel from amending a petition to advance "frivolous or spurious claims" on the

defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004); *Malone*, 2017 IL App (3d) 140165, ¶ 10. If counsel determines that the claims made in a *pro se* petition are frivolous, counsel may "stand[]" on the *pro se* allegations or seek to withdraw as counsel. *Malone*, 2017 IL App (3d) 140165, ¶ 10.

¶ 26 Substantial compliance with Rule 651(c) is sufficient, and we review counsel's compliance *de novo*. *Blanchard*, 2015 IL App (1st) 132281, ¶ 15. When postconviction counsel files a Rule 651(c) certificate asserting his compliance with the rule, a presumption exists that he provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It is the defendant's burden to overcome this presumption. *Id.*

¶ 27 Initially, defendant impliedly argues that the presumption should not apply in this case. He asserts that, because postconviction counsel filed the Rule 651(c) certificate before the State filed its motion to dismiss, the certificate offers no insight into counsel's compliance with Rule 651(c) as it relates to the State's motion. However, defendant cites no authority for the proposition that counsel must file an amended Rule 651(c) certificate after the State files a motion to dismiss or wait to file the certificate until such time. Moreover, counsel is required to meet the requirements of Rule 651(c) only once. See *People v. Marshall*, 375 Ill. App. 3d 670, 682 (2007). Consequently, the presumption that postconviction counsel provided reasonable assistance exists in this case.

¶ 28 Additionally, the record buttresses the presumption that postconviction counsel provided reasonable assistance. After counsel filed his Rule 651(c) certificate, in which he certified that he had "consulted" with defendant, reviewed the record and determined that defendant's petition adequately presented his issues, the State filed its motion to dismiss. During argument on the motion, counsel stated that he reviewed defendant's petition "carefully" and discussed the case

with him. Later, the circuit court postponed ruling on the State's motion, apparently at the behest of counsel who was conducting a "further investigation" of defendant's case. Over the course of the next several months, counsel continued to investigate defendant's case, including contacting witnesses. At one point, counsel anticipated filing an amended petition based on his progress, but eventually concluded that his investigation "came up dry" and did not amend the petition.

¶ 29 Despite the Rule 651(c) certificate filed by postconviction counsel certifying his compliance with the rule and his statements on the record corroborating such compliance, defendant raises several arguments in an attempt to show that counsel provided unreasonable assistance. First, defendant argues that, if counsel believed his *pro se* allegations had merit, counsel should have amended the allegations in order to better present them for evaluation. On the other hand, defendant asserts that, if counsel did not believe the allegations had merit, he had an obligation to withdraw as counsel pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004). In essence, defendant posits that counsel could not simply stand on his *pro se* petition, but rather had two legally recognizable options and chose neither.

¶ 30 Recently, in *People v. Malone*, 2017 IL App (3d) 140165, ¶ 12, this court rejected the very same argument raised by defendant. We observed that, while our supreme court's decision in *Greer* "allows postconviction counsel to withdraw when the allegations of the petition are without merit and frivolous, it does not *compel* withdrawal under such circumstances." (Emphasis in original). *Id.* (citing *Greer*, 212 Ill. 2d at 211). Consequently, postconviction counsel could stand on the allegations raised in defendant's *pro se* petition, and counsel was therefore not unreasonable for doing so.

¶ 31 Defendant next argues that postconviction counsel was unreasonable because he did not file a written response, or argue orally in response, to the State's motion to dismiss, thus

presenting no opposition to the State's dispositive motion. Defendant cites no authority for the proposition that counsel must respond to the State's motion to dismiss, and there is no directive in Rule 651(c) itself. See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). As discussed, if counsel believed the claims raised in defendant's *pro se* petition lacked merit, counsel could simply stand on the petition. See *Malone*, 2017 IL App (3d) 140165, ¶¶ 10, 12. It follows that, under such circumstances, counsel could choose not to respond, orally or in writing, to the State's motion to dismiss. Postconviction counsel was therefore not unreasonable for failing to respond to the State's motion.

¶ 32 Defendant also highlights postconviction counsel's Rule 651(c) certificate in which counsel certified that defendant's *pro se* petition adequately presented his claims. Yet defendant argues that portions of his petition were "streams of gibberish" and points out that the circuit court and the State did not even characterize his claims in the same manner. While it is true that their characterizations of defendant's claims were not identical, they both agreed that he alleged there was insufficient evidence of his guilt and his trial counsel had been ineffective in various ways. The fact that both the court and the State were able to discern some of defendant's claims in the same manner demonstrates that his *pro se* allegations were adequately presented. Moreover, defendant fails to identify any amendments that could have been made to better present his claims. See *Malone*, 2017 IL App (3d) 140165, ¶ 10 (finding a defendant failed to rebut the presumption that his counsel provided reasonable assistance, in part, where he failed to "make any recommendation as to how counsel could have improved the petition").

¶ 33 Lastly, defendant posits that, because postconviction counsel filed his Rule 651(c) certificate before the State filed its motion to dismiss and before counsel asked the circuit court to postpone ruling on the motion pending his further investigation, counsel "virtually admitted

that his Rule 651(c) certificate was premature, if not actually false." However, defendant ignores the possibility that counsel had complied with Rule 651(c) prior to filing the certificate and then, upon learning additional information, commenced the "further investigation" he discussed with the court. The filing of a Rule 651(c) certificate does not forbid counsel from conducting a further investigation, if necessary. More importantly, we will not impugn counsel's credibility based on mere speculation. Accordingly, defendant has failed to overcome the presumption that his postconviction counsel provided reasonable assistance.

¶ 34 C. Defendant's Fitness for Postconviction Proceedings

¶ 35 Defendant next contends that, based on his myriad of *pro se* pleadings, including his postconviction petition, which the circuit court noted was "convoluted" and the State observed "very hard to find the issues within," there was a *bona fide* doubt as to his fitness to continue with postconviction proceedings. Given this, defendant argues that the court was required to *sua sponte* conduct a hearing to determine his fitness prior to granting the State's motion to dismiss. Because the court failed to conduct a hearing, defendant asserts that its dismissal order must be vacated and his cause remanded for a fitness hearing.

¶ 36 Section 122-4 of the Act (725 ILCS 5/122-4 (West 2012)), which governs the appointment of postconviction counsel, and Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013) work in tandem to "ensure that post-conviction petitioners *** receive a reasonable level of assistance by counsel in post-conviction proceedings." *Owens*, 139 Ill. 2d at 359. However, these provisions are "not satisfied where appointed counsel cannot determine whether a post-conviction petitioner has any viable claims, because the petitioner's mental disease or defect renders him incapable of communicating in a rational manner." *Id.* at 359-60. In such cases, "

'the appointment of an attorney is but an empty formality.' " *Id.* at 360 (quoting *People v. Garrison*, 43 Ill. 2d 121, 123 (1969)).

¶ 37 Although a defendant may have mental disturbances or require psychiatric treatment, he may still be competent to participate in postconviction proceedings. *Id.* at 362. He will be considered unfit for postconviction proceedings "only if he demonstrates that he, because of a mental condition, is unable to communicate with his post-conviction counsel in the manner contemplated by section 122-4 of the [Act] and Supreme Court Rule 651." *Id.* at 363. If the circuit court finds a *bona fide* doubt exists as to the defendant's ability to communicate with postconviction counsel, it may hold a hearing on the issue. *Id.* at 365. Because the defendant must have been deemed competent to be tried and sentenced, he is presumed to be fit during postconviction proceedings. *People v. Simpson*, 204 Ill. 2d 536, 550 (2001); *Owens*, 139 Ill. 2d at 362.

¶ 38 Initially, the parties dispute the standard of review applicable to defendant's claim. Generally, the circuit court's finding that a defendant is fit for postconviction proceedings is reviewed for an abuse of discretion. See *People v. Shum*, 207 Ill. 2d 47, 62 (2003). However, defendant argues that, because there was no hearing conducted on his fitness and thus no factual determinations made by the circuit court, the issue of whether his *pro se* pleadings raised a *bona fide* doubt as to his fitness is a strictly legal question. The State, meanwhile, argues that, in addition to reviewing defendant's pleadings, the court had the opportunity to observe him during the new sentencing hearing. The State therefore posits that the court was in the best position to determine whether there was a *bona fide* doubt as to his fitness, and we should review the court's failure to hold a fitness hearing for an abuse of discretion. We need not resolve this dispute because under either standard of review our conclusion would be the same.

¶ 39 In this case, we must presume that defendant was fit at the time of his postconviction proceedings and could competently communicate his allegations with postconviction counsel. See *Simpson*, 204 Ill. 2d at 550; *Owens*, 139 Ill. 2d at 362. It is true that both the circuit court and the State commented that the allegations contained in defendant's *pro se* petition were difficult to discern. Similarly, our review of defendant's nine *pro se* motions filed before his postconviction petition reveal equally rambling and convoluted claims. However, this does not necessarily mean that defendant was unable to communicate his allegations with postconviction counsel. Notably, counsel never made a comment during postconviction proceedings indicating that defendant was having difficulty communicating his allegations. To the contrary, in both counsel's Rule 651(c) certificate and on the record during postconviction proceedings, counsel stated that he had been able to discuss the case with defendant. Furthermore, during defendant's new sentencing hearing, he spoke in allocution and was able to intelligibly communicate his thoughts to the court. Given the presumption that defendant was fit at the time of postconviction proceedings and the lack of any evidence that he was unable to communicate his allegations with counsel, there was no *bona fide* doubt as to his fitness requiring the circuit court to *sua sponte* hold a fitness hearing.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we affirm the circuit court of Cook County's dismissal of defendant's postconviction petition.

¶ 42 Affirmed.