2017 IL App (1st) 150747-U

No. 1-15-0747

Order filed July 17, 2017

First Division

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. 10 CR 20122
	)	
PETRINA BARNETT,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order granting the State's motion to dismiss defendant's *pro se* postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) is affirmed where defendant's appointed postconviction counsel provided reasonable assistance as contemplated by the Act.

¶ 2 Defendant, Petrina Barnett, appeals from an order of the circuit court, granting the State's motion to dismiss her *pro se* postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends that

her appointed postconviction counsel did not provide reasonable assistance because counsel did not amend her *pro se* petition or advocate on her behalf. For the following reasons, we affirm.

¶ 3 Defendant was arrested on October 19, 2010, and subsequently charged with two counts of first-degree murder for the 2010 stabbing death of Francis Walton. On September 19, 2012, defendant entered into a negotiated plea of guilty to second-degree murder in exchange for a term of 20 years' imprisonment. Defendant's plea to second degree murder was based on her unreasonable belief that her use of deadly force was justified (720 ILCS 5/9-2(a)(2) (West 2010)).

¶ 4 At the plea hearing, the court admonished defendant as follows:

"THE COURT: All right. The Court will endorse this agreement that you have reached with the prosecutor in exchange for your plea of guilty, Ms. Barnett.

Do you wish to accept the prosecutor's offer?

THE DEFENDANT: Okay. Yes.

THE COURT: All right. This is now a Class 1?

THE STATE: It is a Class 1 felony.

THE COURT: This is now a Class 1 felony offense, from an X to a 1, Ms. Barnett. That is due to the agreement, the agreed reduction. In Illinois the penalty for violation of a Class 1 criminal statute, the penalty ranges on a Class 1 felony offense ranges from probation in some cases to incarceration.

The incarceration range in a Class 1 felony offense is 4 to — on this charge, this Class 1 range is 4 to 20 years in the Illinois Department of Corrections followed by two years of mandatory supervised release. This is a 50 percent sentence.

Do you understand the nature of the charge and the range of penalty?

THE DEFENDANT: Okay. You said two years?

THE COURT: Mandatory supervised release which is what we commonly call parole.

THE DEFENDANT: So I have two years parole?

THE COURT: After you have served the sentence.

THE DEFENDANT: Okay.

THE COURT: Now do you understand all that has been said so far?

THE DEFENDANT: Yes. You said I would have to do how much time?"

¶ 5 After explaining that the 20-year agreed upon sentence would be served at "50 percent," the trial court asked, "You know the sentence that was offered to you and which you accepted, 20 years on a Class 1 felony offense. Do you understand all of that?" Defendant responded, "Yes." The court also admonished defendant that in order to plead guilty she must give up her right to a jury and bench trial. Defendant acknowledged understanding those rights and waived them freely and voluntarily. The parties then stipulated to the factual basis for defendant's plea. The court found defendant understood the nature of the charges against her, the possible penalties for the offense, that there was a sufficient factual basis for the plea and that defendant was freely and voluntarily pleading guilty. The court accepted defendant's plea of guilty to second-degree murder and imposed the agreed-upon sentence of 20 years' imprisonment.

¶ 6 The court then admonished defendant of her appeal rights as follows:

"You do have the right to appeal this sentence and judgment of guilty. However, before you can appeal, you must first file a written motion with this

Court within the next 30 days. That would either be a motion seeking reconsideration of this sentence or a motion seeking to take back your plea of guilty.

If this Court allows you, Ms. Barnett, to take back your plea of guilty, then the prosecutor will be allowed to reinstate their original felony charge against you, the Class X.

* * *

The original felony charge against you. Then of course there will have to be a trial.

If you cannot pay for today's transcript, the Court will provide the transcript to you for purpose of appeal and appoint counsel for purpose of appeal upon a finding that you are indigent.

You should include in the motion I just told you about that you need to file before you can appeal, you should include any claim of error that you believe has occurred in this proceeding. Otherwise, such claim of error will be deemed waived for purpose of appeal if it is not in that motion."

¶ 7 Defendant did not file a motion to withdraw her guilty plea or to reconsider her sentence, and she did not attempt to perfect an appeal.

¶ 8 On March 29, 2013, defendant filed a *pro se* postconviction petition for relief under the Act, alleging ineffective assistance of counsel during plea negotiations. In the petition, defendant alleged:

"Inadequate counsel I feel like my rights were violated because I wasn't told by [*sic*] have the proper information I could have gotten probation by my

> case being a Class 1 and I feel violated for it being self-defense and I didn't get that charge."

¶ 9 On August 2, 2013, because the 90-day summary dismissal period had expired, the trial court advanced defendant's petition for further proceedings under the Act and appointed postconviction counsel. On August 22, 2014, counsel filed a Rule 651(c) certificate attesting that she: (1) consulted with defendant regarding defendant's claims of constitutional deprivation; (2) obtained and examined the report of the plea proceedings as well as the trial court file; and (3) examined defendant's *pro se* petition without amending it.

¶ 10 The State filed a motion to dismiss the petition on October 30, 2014. In the motion, the State argued that the record of the plea proceeding established that defendant's plea was knowing and voluntary. The State also argued that defendant's claim of ineffective assistance of plea counsel failed because she could not show prejudice as a result of counsel's allegedly deficient performance. In support of this argument, the State pointed out that defendant pled guilty to a reduced Class 1 felony charge in exchange for a 20-year sentence, and that she could not have received probation for pleading guilty to second-degree murder. The State noted that the amended charge of second-degree murder accounted for defendant's desire to assert self-defense where the charge provided for defendant's unreasonable belief that her use of deadly force was justified.

¶ 11 At a hearing on February 18, 2015, the State rested on its motion to dismiss and postconviction counsel rested on defendant's *pro se* postconviction petition. The circuit court granted the State's motion and issued a written order. In the order, the court found that: (1) defendant's plea was knowing and voluntary; (2) her claim of ineffective assistance of counsel during plea negotiations was frivolous and without merit where it was factually and legally

inaccurate, and that she was not prejudiced as a result of plea counsel's performance; and (3) defendant's claim that she was not able to raise the affirmative defense of self-defense lacked merit because her subjective belief that she was acting in self-defense when she killed Walton was "ingrained" within the second-degree murder statute. Postconviction counsel filed a notice of appeal on defendant's behalf on the same date.

¶ 12 In cases not involving the death penalty, the Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights, and establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 *et seq*. (West 2012); *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first-stage, the court may summarily dismiss the petition without any responsive pleading by the State. *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). If a circuit court does not act within the initial 90-day period, the postconviction petition advances to the second stage where it is docketed by the court and the State must either answer or move to dismiss the petition. *Id.*; *People v. Greer*, 212 Ill. 2d 192, 204 (2004).

¶ 13 The case at bar involves the second-stage of postconviction proceedings. The dismissal of a petition at this stage is warranted only when the allegations in the petition, liberally construed in favor of defendant and in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* the circuit court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Id.*

¶ 14 On appeal, defendant does not challenge the circuit court's rulings on the claims in her *pro se* petition. Rather, she contends that she was denied reasonable assistance of postconviction counsel because counsel did not amend her *pro se* petition, respond to the State's motion to dismiss, or advocate on her behalf at the hearing on the State's motion. Defendant also argues

that if postconviction counsel believed her *pro se* allegations were frivolous, counsel should have moved to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004).

¶ 15 There is no constitutional right to the assistance of counsel during postconviction proceedings. *People v. Cotto*, 2016 IL 119006, ¶ 29. Rather, our supreme court has explained that "[t]he right to assistance of counsel in postconviction proceedings is a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided by the [Act]." *Id.* (quoting *People v. Hardin*, 217 Ill. 2d 289, 299 (2005)). Our supreme court has labeled that level as "reasonable" assistance of postconviction counsel. *Id.* ¶ 30; see also *Hardin*, 217 Ill. 2d at 299; *People v. Owens*, 139 Ill. 2d 351, 359 (1990).

¶ 16 This statutory right to an attorney does not guarantee the same assistance of counsel mandated by the federal or state constitutions. *People v. Munson*, 206 Ill. 2d 104, 137 (2002). At a minimum, postconviction counsel's reasonable assistance includes the duty to ensure that a defendant's claims are adequately presented to the circuit court. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. To this end, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) sets forth postconviction counsel's obligations. *Munson*, 206 Ill 2d at 137. Under Rule 651(c), counsel must: (1) consult with the defendant to ascertain her contentions of deprivation of constitutional rights; (2) examine the record of the relevant proceedings; (3) and amend the petition, if necessary, to ensure that the defendant's contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472.

¶ 17 "The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Here, counsel filed a Rule 651(c) certificate and, thus, the presumption exists that defendant received reasonable representation. The burden of overcoming this presumption is on

defendant who must demonstrate her counsel's failure to substantially comply with the duties mandated by Rule 651(c). See *id.*

¶ 18 Defendant, essentially, argues that she has rebutted the presumption of substantial compliance because counsel did not amend her *pro se* petition, respond to the State's motion to dismiss, or advocate on her behalf at the hearing on the State's motion. We disagree.

¶ 19 In order to determine whether counsel acted unreasonably by not amending her petition, this court considers the "crucial" question of whether defendant's *pro se* allegations had merit. *Id.* ¶ 23. As our supreme court in *Greer* explained: "fulfillment of the third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf. If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not necessary within the meaning of the rule." *Greer*, 212 Ill. 2d at 205.

¶ 20 In this court, defendant does not challenge the circuit court's determination that her *pro se* allegations lacked merit or offer any arguments counsel could have made in support of her contentions. This is not surprising given that the record of the plea proceedings, as noted by the circuit court, contradicts defendant's *pro se* claim of ineffective assistance of plea counsel. As mentioned, compliance with the duty to amend the petition does not require postconviction counsel to advance frivolous or spurious claims. *Pendleton*, 223 Ill. 2d at 472. Accordingly, the record does not rebut the presumption that postconviction counsel satisfied her Rule 651(c) obligations and, under the circumstances at bar, we will not find that postconviction counsel provided unreasonable assistance in failing to make unspecified arguments. See *Profit*, 2012 IL App (1st) at ¶ 29.

¶ 21 Defendant nevertheless argues that postconviction counsel provided deficient representation because she did not amend the *pro se* petition to *add* a claim that the trial court improperly advised defendant of her appeal rights. Defendant points out that, when the trial court accepted her guilty plea and imposed sentence, the court improperly advised her that she could appeal "this judgment and sentence" if she filed "a motion seeking reconsideration of this sentence or a motion seeking to take back [her] plea of guilty." Defendant maintains that the trial court improperly admonished her that she had a right to a transcript and the assistance of counsel "for purpose of appeal" without explaining that she was entitled to the transcript and an attorney to help her with her postplea motion.

¶ 22 Our supreme court has held that " '[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims.' " (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 472 (quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993)). Defendant's *pro se* postconviction petition did not raise any issue with the trial court's admonishments regarding her right to appeal. This aside, the record shows that defendant did not attempt to perfect an appeal. Defendant also did not attempt to file any post-plea motions, request a transcript or the assistance of counsel for any purpose, let alone "for purpose of appeal." In light of defendant's failure to file any post-plea motions or attempt to file a direct appeal, we cannot say that postconviction counsel rendered unreasonable assistance under the Act by not amending defendant's *pro se* petition to include the admonishment issue.

¶ 23 In so finding, we are mindful of defendant's contention that if postconviction counsel believed defendant's petition was frivolous, counsel should have moved to withdraw pursuant to *Greer*. However, this court has held that although *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." *People v. Malone*, 2017 IL App (3d) 140165, ¶ 12 (citing *Greer*, 212 Ill. 2d at 211).

¶ 24 Defendant nevertheless argues that counsel's failure to file a *Greer* motion prejudiced her because it: (1) deprived her of the opportunity to make arguments on behalf of her *pro se* contentions; and (2) precluded her from hiring an attorney who could have amended her petition to *add* the improper admonishment claim. In setting forth this argument, defendant has again not suggested what, if any, arguments or amendments retained counsel could have made to more adequately advance her *pro se* claims. With respect to the admonishment claim, we find no support in the record that defendant desired to raise this issue where she did not: attempt to file any post-plea motion; attempt to perfect a direct appeal; or include this issue in her *pro se* petition.

¶ 25 In reaching this conclusion, we reject defendant's reliance on *People v. Shortridge*, 2012 IL App (4th) 100663. The *Shortridge* court found that the defendant's appointed counsel should have moved to withdraw as postconviction counsel rather than "confess the State's motion to dismiss." *Shortridge*, 2012 IL App (4th) 100663, ¶¶ 6, 14. Here, unlike in *Shortridge*, postconviction counsel did not "confess the motion to dismiss." *Id.* ¶ 6. Moreover, at no point in this case did defendant's postconviction counsel express that defendant's postconviction claims were without merit, as did counsel in *Shortridge*. As a result, counsel here provided reasonable representation. *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 39.

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.