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2017 IL App (3d) 140422-U

Order filed January 6, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Plaintiff-Appellee,)	
)	Appeal No. 3-14-0422
v.)	Circuit No. 05-CF-522
)	
DELVONNE N. FRANKLIN,)	Honorable
)	David A. Brown,
Defendant-Appellant.)	Judge, Presiding.
)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of petition for postconviction relief was reversed and remanded where postconviction counsel failed to make any amendments to the petitioner's *pro se* petition and some simple amendments would have allowed the court to consider the merits of claims that potentially stated constitutional violations.

¶ 2 The defendant, Delvonne Franklin, appealed the second-stage dismissal of his petition for postconviction relief.

¶ 3

FACTS

¶ 4

On June 2, 2005, the defendant was charged with two counts of first degree murder for the shooting death of Jamar Murdock. The facts are more fully set forth in the direct appeal, but essentially, Murdock was shot in the back of the head after arguing with two men. Witnesses identified the defendant as one of the men arguing with Murdock and as the one that shot him. The jury found the defendant guilty. The defendant's motion for a new trial was denied, and the defendant was sentenced to 70 years' imprisonment. The defendant's motion to reconsider his sentence was denied. We affirmed. *People v. Franklin*, No. 3-06-0337 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5

On March 4, 2009, the defendant filed a *pro se* postconviction petition. After a number of continuances, the defendant filed an amended *pro se* petition on September 20, 2013. The amended petition contained nine claims. At a hearing on November 22, 2013, postconviction counsel affirmatively adopted the *pro se* amended petition and the defendant consented to striking all of his prior filings. Postconviction counsel filed a Rule 651(c) certificate. The State filed a motion to dismiss the petition. The case proceeded to a second-stage hearing on the State's motion to dismiss. After the hearing, the trial court entered an order making findings with respect to each of the nine claims and granting the motion to dismiss.

¶ 6

ANALYSIS

¶ 7

The defendant argues that his postconviction counsel provided unreasonable assistance when he stood on the *pro se* petition and failed to make any amendments. Specifically, the defendant argues that the *pro se* amended petition did not adequately present his contentions of constitutional error. The State argues that there were no amendments to the petition that would

state cognizable constitutional issues and postconviction counsel provided a reasonable level of assistance.

¶ 8 At a second stage postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 15. There is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel is wholly statutory and petitioners are only entitled to the level of assistance provided for by the Post-Conviction Hearing Act (Act), which is a reasonable level of assistance. 725 ILCS 5/122-1 et seq. (West 2012); *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Counsel's duties, pursuant to Supreme Court Rule 651(c), include: (1) consulting with the defendant to ascertain his contentions of deprivation of constitutional right, (2) examining the record of the proceedings at the trial, and (3) making any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651 (eff. Dec. 1, 1984); *Schlosser*, 2012 IL App (1st) 092523, ¶ 16. Whether postconviction counsel provided a reasonable level of assistance in compliance with Supreme Court Rule 651(c) is reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). Also, a circuit court's dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Elken*, 2014 IL App (3d) 120580 (1998).

¶ 9 Postconviction counsel is required only to investigate and properly present defendant's claims. *Schlosser*, 2012 IL App (1st) 092523, ¶ 16. While there is no requirement that postconviction counsel must amend a petitioner's *pro se* postconviction petition, Rule 651(c) requires that appointed post-conviction counsel make any amendments that are necessary for an adequate presentation of petitioner's contentions. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). The purpose of Rule 651(c) "is to ensure that counsel shapes the petitioner's claims into proper

legal form and presents those claims to the court.” *Perkins*, 229 Ill.2d at 44. The filing of a certificate in compliance with Rule 651(c) gives rise to the presumption that the defendant received the required representation, but the presumption may be rebutted by the record. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶ 10 The defendant's *pro se* amended petition was essentially addressed by the trial court as nine separate claims, which are also delineated in the defendant's appellate brief. The defendant argues that a number of his claims were deficient because they contained meritless legal theories, were missing essential elements, or lacked evidentiary support; deficiencies that could have been rectified had his postconviction counsel provided reasonable assistance.

¶ 11 For the most part, the *pro se* petition effectively lays out the defendant's legal theories and was an attempt to again challenge the facts of the case. However, there were some simple amendments that would potentially have allowed the court to consider the merits of claims that stated constitutional violations. See *Turner*, 187 Ill. 2d at 414 (Counsel provided unreasonable assistance when he failed to make a routine amendment to the postconviction petition which would have overcome the procedural bar of waiver); see also *People v. Ross*, 2015 IL App (3d) 130077, ¶ 15 (“Postconviction counsel who fails to ensure that the defendant's postconviction petition included the necessary supporting affidavit provides unreasonable assistance of counsel.”). The State argues that the trial court did consider the substantive merits of the claims, but since the amendments were not made, we cannot say claims were adequately presented to the postconviction court. “This court will not speculate whether the trial court would have dismissed the petition without an evidentiary hearing if counsel had adequately performed his duties under Rule 651(c).” *Turner*, 187 Ill. 2d at 416 (citing *Johnson*, 154 Ill.2d 227, 246 (1993)).

¶ 12 The role of postconviction counsel was to present the defendant's claims. We find that the representation of postconviction counsel was not reasonable, and the proper remedy is to remand this cause for further second-stage proceedings.

¶ 13 CONCLUSION

¶ 14 The judgment of the circuit court of Peoria County is reversed and remanded.

¶ 15 Reversed and remanded.