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2017 IL App (3d) 140435-U

Order filed August 11, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0435 Circuit No. 07-CF-160
CLARICE N. HAWKINS,)	
Defendant-Appellant.)	Honorable David A. Brown, Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Holdridge and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* Postconviction counsel failed to provide petitioner with reasonable assistance in compliance with Illinois Supreme Court Rule 651(c).
- ¶ 2 Following a jury trial, defendant, Clarice N. Hawkins, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)) and the unlawful sale of a firearm (720 ILCS 5/24-3(A)(a) (West 2006)). Defendant was sentenced to 65 years of imprisonment for first degree murder and to a consecutive 7-year term of imprisonment for the unlawful sale of firearm. On appeal, this court affirmed defendant's convictions and her 65-year term of imprisonment for

murder but vacated her 7-year term of imprisonment for the unlawful sale of a firearm and remanded for resentencing on that charge. *People v. Hawkins*, No. 3-08-0008 (2009) (unpublished order under Illinois Supreme Court Rule 23). On remand, defendant was resentenced to a consecutive 7-year term of imprisonment for the unlawful sale of a firearm, which this court affirmed on appeal. *People v. Hawkins*, 2014 IL App (3d) 120139-U. While defendant's second appeal was pending, defendant filed a *pro se* postconviction petition and was appointed postconviction counsel. The trial court granted the State's motion to dismiss the postconviction petition. Defendant appealed the second-stage dismissal of her postconviction petition, arguing her appointed postconviction counsel failed to provide her with adequate representation. We reverse and remand.

¶ 3

FACTS

¶ 4

A. Defendant's Trial

¶ 5

Evidence at defendant's jury trial showed defendant and the victim, Semeeka Cotton, smoked crack cocaine together in the early morning hours of November 8, 2006. Later the same morning, defendant shot and killed Semeeka. After the murder, she sold the gun.

¶ 6

Frank L. Hawkins, Jr. testified that defendant was his wife and they had been married for more than 15 years. Frank had a gun and an ammunition collection, which included a 9 mm Taurus semiautomatic handgun and 9mm ammunition with the marking "VPT." Frank kept the Taurus handgun, loaded with 15 rounds, in a bedroom nightstand. He last recalled seeing the weapon in the nightstand in late September or early October of 2006, and first noticed it missing from the nightstand in the first or second week of October of 2006. Frank testified that defendant was home before he left for work on the morning of Seemeka's murder, November 8,

2006, at approximately 8:25 a.m. In a police interview, a few days after the murder, Frank had told police that he last saw defendant on November 8, 2006, around 6:40 a.m.

¶ 7 Semeeka had lived with her boyfriend, Phillip Leggins, in a garage that belonged to Leggins's brother. Leggins testified that prior to his relationship with Semeeka, he had been in six-week relationship with defendant, during which time they got high and had sexual relations. On the morning of November 8, 2006, Leggins awoke at 2:00 or 3:00 a.m. and saw defendant and Semeeka smoking crack together. Defendant had come to his house in the early morning hours of November 8, 2006, for drugs, and defendant and Semeeka "got into a conversation." Defendant was there for about 20 minutes. At 7:15 or 7:20 a.m., Leggins left for work. When he left, Semeeka was awake. When he returned after work, he found Semeeka "laying there."

¶ 8 A firefighter responded to Leggins's garage, where he found Semeeka with rigor mortis in her body, cold, with no pulse, and with a gunshot wound. Shell casings were on the floor.

¶ 9 Inside the garage, police found six spent casings, a fired projectile, copper jacket from a projectile, and lead fragments. The casing were marked with the letters "VPT" and "43" or "44." Police also found a metal crack pipe outside the garage door. Testimony from a police officer and a firearm expert indicated the "VPT" 9mm ammunition was rare and local ammunition retailers did not sell "VPT" 9mm ammunition. An expert firearms witness testified that "VPT" bullets were manufactured in Finland during 1943 and 1944. She also testified that the recovered Taurus handgun had fired the six cartridges found in the garage.

¶ 10 A male friend of defendant testified that in the early summer of 2006, defendant and Semeeka had gotten into an argument. Defendant had told him that Semeeka did not know who she was messing with.

¶ 11 A female neighbor of Leggins testified that she had encountered defendant at 2:00 a.m. on November 8, 2006. Defendant was looking to buy drugs but only had \$15. The neighbor testified that defendant was wearing a gray jogging suit and a cap on backwards. Defendant entered the garage after Semeeka answered the door. Another neighbor testified to hearing five gunshots coming from the direction of the garage at 8:15 a.m. or 8:30 a.m. on the morning of November 8, 2006. The neighbor saw someone who looked like a female trying to lock the garage door. The female was wearing a hat turned backward and a gray jacket and shared the same “height and stuff” as defendant.

¶ 12 A third neighbor, Walter McCall, testified that on a morning in November of 2006, he heard a woman in Leggins’s garage “hollering pretty loud” and then he heard three shots fired and the screaming stopped. After 15-20 seconds, McCall heard two more gunshots. After a few moments, McCall saw someone that looked like a girl in a “black sweat suit” walking in the alley.

¶ 13 Tim Scott testified that in November of 2006 defendant offered to sell him a gun and indicated she had shot somebody with it earlier in the day. Scott went to defendant’s home and got the clip to the gun in exchange for \$100. Later that day, defendant brought the 9mm handgun to Scott’s home. He agreed to pay her the rest of the money at a later date. Brandy Pratt, Scott’s girlfriend at the time, testified that she had driven Scott to defendant’s home around Thanksgiving of 2006, Scott went inside, and he returned with a clip to a gun. She also testified that Scott gave the gun to his brother. A loaded Taurus 9mm handgun was found in the apartment of Scott’s brother, Clifton Blakely. Blakely testified that Scott had given him the gun in November of 2006. Blakely also testified that defendant had come to him for \$20 of crack and said that Scott owed her money for the gun and that she was on the run for a murder.

¶ 14 Defendant testified that she first met Semeeka in the early morning of November 8, 2006. Defendant had loaned her car to a drug dealer, who returned the car to her at 1:50 a.m. and gave her \$15 for gas. At 2:00 a.m., she saw Leggins’s neighbor and asked where she could get some crack. The neighbor knocked on Leggins’s door, and Semeeka answered. Defendant smoked some crack cocaine with Semeeka, and then they left to obtain more drugs. They returned to the garage, and defendant smoked more crack. Defendant drove home at 2:40 a.m. When she got home, her husband was sleeping. She drank a beer and took some sleeping pills. At 8:33 a.m., her husband called her name. At 11:00 a.m., Scott brought her \$50 toward the payment of the 9mm Taurus handgun that she had previously sold to him in September. Defendant acknowledged that the statement she had given to police about the sale of the gun was inconsistent with her trial testimony.

¶ 15 The jury found defendant guilty of first degree murder and the unlawful sale of a firearm, and that defendant had personally discharged a firearm in the commission of the offense. Defendant filed a *pro se* letter alleging ineffective assistance of counsel because: (1) defendant informed her attorney that she wanted to plead guilty to the sale of the handgun; (2) her counsel failed to inform her of the minimum sentence; (3) her counsel refused to introduce evidence that defendant was taking prescription medication for depression and bipolar disorder and was doing crack, which could account for the reason she “blanked out doing any harm to anyone”; and (4) defendant would have entered an “insanity plea of guilty” had she known that she was not going to receive proper representation at trial. The trial court denied defendant’s motion for new trial.

¶ 16 At sentencing, defendant’s attorney requested that the trial court impose the minimum sentence of 45 years of imprisonment for first degree murder. As part the presentence investigation (PSI) report, defendant had submitted a 23-page letter describing her abusive

parents and mistreatment by her extended family, first husband, current husband, and various employers. At the sentencing hearing, defendant indicated that she did not receive a fair trial because she had wanted to plead guilty to the sale of the gun charge but her counsel did not pursue the guilty plea. Defendant also indicated that her counsel did not question defense witnesses effectively. Defense counsel explained that she did not want defendant to plead guilty to the sale of the gun on or about November 10, 2006, because an integral part of the defense was that defendant had sold the gun prior to the murder. Defendant's counsel also indicated that she could not ask a number of questions that defendant wanted asked of defense witnesses because those questions called for hearsay.

¶ 17 The trial court sentenced defendant to a 40-year term of imprisonment for first degree murder plus an additional 25 years of imprisonment for a mandatory firearm enhancement. The trial court also sentenced defendant to a consecutive term of the maximum seven-years of imprisonment for the unlawful sale of the gun.

¶ 18 On appeal, defendant challenged the sufficiency of the evidence for first degree murder, argued the trial court did not properly question potential jurors during *voir dire*, erred in failing to appoint new counsel after she raised claims of ineffective assistance of counsel, and erred in sentencing. *People v. Hawkins*, No. 3-08-0008 (2009) (unpublished order under Supreme Court Rule 23). This court vacated defendant's sentence of seven years of imprisonment for the unlawful sale of a firearm and remanded for a new sentencing hearing. *Id.* (vacating defendant's sentence because the trial court erroneously believed the sentence would run concurrent with the sentence imposed for first degree murder and failed to reevaluate the sentence upon being informed consecutive sentences were mandatory).

¶ 19 B. Remand for Resentencing

¶ 20 On remand, defense counsel indicated he was “not familiar specifically with the facts and circumstances of the underlying case” but after hearing the State’s argument she would agree the sale of the gun by defendant was aggravated by a possible motive to conceal the murder. Defendant’s counsel also failed to offer any mitigating evidence where the record detailed defendant’s history of mental health issues, which included defendant suffering from bipolar disorder and depression. The trial court again sentenced defendant to a consecutive seven-year term of imprisonment for the unlawful sale of a firearm.

¶ 21 On appeal, defendant argued that her counsel provided ineffective assistance at her sentencing hearing on remand where counsel: (1) admitted she was unfamiliar with the case; (2) conceded to the State’s theory of defendant’s motive that defendant sold the gun to conceal the murder despite defendant’s testimony that she had sold the gun for crack; (3) failed to offer mitigating evidence; and (4) failed to file a motion to reconsider sentence. *People v. Hawkins*, 2014 IL App (3d) 120139-U, ¶ 2 (*Hawkins II*). This court affirmed the trial court’s judgment, finding that while counsel’s performance was deficient, defendant was not prejudiced by counsel’s errors. *Id.* ¶¶ 11-13 (citing *People v. Albanese*, 104 Ill. 2d 504, 525 (1984) (providing that to establish ineffective assistance of counsel, a defendant must show counsel’s representation fell below an objective standard of reasonableness and there was a reasonable probability that but for counsel’s unprofessional errors the result of the proceedings would have been different)).

¶ 22 C. Postconviction Petition & Second Stage Dismissal

¶ 23 Defendant filed a 137-page *pro se* petition for postconviction relief and included supporting documents of various portions of the record and other documents. In her *pro se* petition, defendant alleged ineffective assistance of counsel, violations of due process, and illegal

search and seizures, by claiming: (1) her counsel failed to present her mental health history of involvement with psychiatrists and psychologists, medications, being diagnosed with bipolar disorder and depression, and “hear[ing] sounds”; (2) failed to allow her to plead guilty to the improper sale of a gun charge and, but for counsel’s error, defendant would not have been found guilty of murder; (3) her counsel failed to ask (a) defense witness Larry Jones certain crucial questions claiming she could not ask those questions because the answers called for hearsay, and (b) defense witness Frank Hawkins to produce his calendar in support of defendant’s alibi that she was home at the time of the murder; and (4) her counsel contradicted defendant’s testimony in that defendant testified that she was never addicted to crack cocaine and her marital problems were not crack related, but her counsel argued that defendant was “heavily into crack cocaine use”;¹ (5) her counsel refused to subpoena defendant’s psychiatrist and psychologist regarding her mental state and medications as a matter of trial strategy because her counsel did not want the jury to think that defendant “was so out of it” that defendant would not have known what she

¹ Defendant attached transcripts wherein she testified she did crack as a result of her depression because she had a “very traumatic life,” was tired of society rejecting her, lost multiple jobs, and had a husband that did not support her. She testified that she went to the “crack community” to have people that would listen to her. Defendant also testified she did not even like crack or how it made people act. Defendant also attached the transcript of her counsel’s argument at sentencing that the murder of Semeeka, who was the mother of six children, was a tragedy, but defendant had unresolved issues from her childhood and admitted getting involved in crack, and that narcotics “take[] control over an individual” and defendant had been “heavily into the use of crack cocaine.”

had done;² (6) her counsel failed to file a motion to suppress defendant's statement to police and failed to challenge whether it had been coerced;³ (7) her counsel failed to point out inconsistencies in the testimony of a State's witness during post trial motions and during sentencing;⁴ (8) her counsel, as a public defender, solicited \$10,000 to represent defendant,

² Defendant attached transcripts of her counsel indicating that it was part of her trial strategy to refrain from presenting evidence of defendant's prescription medications because those types of medication and combined with defendant's testimony that she took other medication with beer after smoking crack may have indicated to the jury that defendant was so out of it she did not know what she had done. Defendant also attached the affidavit of her husband indicating that defendant could not keep a job, was depressed for most of their marriage, was difficult to communicate with, and became angry when she was off her medication.

³ Defendant attached transcripts with her attorney indicating she had not filed a motion to suppress defendant's statement because there was no reason to believe that defendant's statement was not freely given, with defendant noting that her counsel had conversely argued that the jury should not hear some things on the video that had been said before defendant was *Mirandized*.

⁴ Defendant attached a transcript of the prosecutor arguing that David Williams testified regarding the defendant's state of mind in late summer of 2006 by testifying that following an argument between the victim and defendant in the summer of 2006, defendant told Williams that Semeeka did not know who she was messing with. He also testified that he and defendant "sure have" smoked crack together, he had not smoked crack for two years, and he last smoked crack in the summer of 2006 with defendant, so maybe he had been clean for one year rather than two years. Defendant's attorney cross-examined David, and David indicated he was not sure if the conversation was in 2006 or in 2005.

which defendant paid but did not know it was a crime to do so;⁵ (9) her counsel indicated to the trial court that she had spoken with two defense witnesses (Larry Jones and Frank Hawkins (defendant's husband)) before trial but counsel had not actually spoken with them prior to trial; (10) she was denied due process where her attorney was allowed to continue to represent her during her motion to reconsider the sentence hearing despite defendant's claims of ineffective assistance of counsel and her counsel's failure to make any argument in support of the motion;⁶ (11) she was denied "due process" when the "trial court improperly weighed mitigating factors," as evidenced by the trial court stating defendant was selfish, blamed everybody else for her problems, and did not care about anybody other than herself, despite testimony of a detective from the community and her own testimony that showed otherwise and despite letters of support "not whatsoever" indicating she was selfish; (12) she was denied "due process" where the trial court made prejudicial remarks about her character when he found McCall's testimony credible of hearing screaming, three shots, and then 15 to 20 seconds later hearing two more shots, and the trial judge found defendant had "finished off [the victim] in a deadly, cold-blooded, animalistic manner," despite McCall's testimony that he did not see the shooter's face, could not recall the month he heard the shots, and did not know the height, weight, or race of the female shooter; (13) she was denied her right to due process when the trial court made prejudicial remarks that defendant knew what she was doing when she was doing a premeditated cold-

⁵ Defendant attached an affidavit indicating that her attorney would not represent her until her attorney was paid \$10,000, and defendant did, in fact, pay her attorney \$10,000.

⁶ Defendant attached a transcript showing that at the hearing on defendant's motion to reconsider sentence, her attorney indicated "the motion speaks for itself."

blooded killing and that she finished off the victim in a deadly, cold-blooded, animalistic manner, when there was no evidence that she was at the scene of the murder and there was no physical evidence implicating her, the only eyewitness never identified her as the shooter, evidence against her was circumstantial, and the State failed to prove her guilty beyond a reasonable doubt; and (14) her constitutional rights were violated by an illegal search and seizure where police claimed her husband allowed police into their home and had signed a written consent but the consent form was never produced.

¶ 24 The circuit court docketed the *pro se* petition for further consideration and appointed postconviction counsel. The State filed a motion to dismiss. Defendant filed a motion for a change of postconviction counsel because “counsel was acting too busy” to represent her and she felt as if she were unrepresented. Defendant’s postconviction counsel filed a Rule 651(c) certificate, in which he averred that he: (a) consulted with the defendant by mail or phone to ascertain her contentions of deprivation of constitutional rights; (b) examined the record of the proceedings at trial; and (c) made necessary amendments to the *pro se* petition.

¶ 25 At the hearing on defendant’s petition, the trial court acknowledged defendant’s postconviction counsel had filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2012) indicating counsel had consulted with defendant, examined the record of the proceedings, and made any amendments to defendant’s *pro se* petition that were necessary. The trial court asked defendant’s counsel if it was correct that he had, in fact, complied with the requirements of Rule 651, and postconviction counsel responded, “[a]ccurate.” The State argued the petition should be dismissed because: a “great deal” of the issues raised in the petition had been addressed on direct appeal, or could have been raised on direct appeal and, therefore, were were barred by waiver or *res judicata*, and defendant’s ineffective assistance of counsel claims did not

meet the *Strickland* standard of establishing ineffective assistance of counsel by showing counsel’s representation fell below an objective standard of reasonableness and that but for counsel’s unprofessional errors the result of the proceedings would have been different. See *Strickland v. Washington*, 466 U.S. 688 (1984); *Albanese*, 104 Ill. 2d at 525.

¶ 26 In response, defendant’s postconviction counsel requested the trial court deny the State’s motion to dismiss and indicated he was going to stand on defendant’s *pro se* petition for postconviction relief. He stated:

“After reviewing [the *pro se* postconviction petition]—it is very well written. It lays forth a number of—and articulates a number of claims that she makes, regarding trial counsel. It is well-supported. And I believe it should be given every consideration. Thank you very much.”

¶ 27 In addressing the petition, the trial court noted the *pro se* petition was “not well developed in terms of explanation” and most claims were “followed by documents of various sorts, often portions of transcripts that are not clearly designated as to what day or proceeding the transcript was taken from.” The trial court found that many of defendant’s claims were waived because those issues could have been raised on direct appeal. The trial court also found defendant failed to present sufficient facts in support of her claims. The trial court dismissed each of the 14 claims raised in defendant’s *pro se* postconviction petition, finding defendant failed to make a substantial showing of a constitutional violation.

¶ 28 Defendant appealed.

¶ 29 ANALYSIS

¶ 30 On appeal, defendant argues that her postconviction counsel provided her with representation “in name only” and requests that this court remand this matter with direction for

her postconviction counsel to comply with duties of postconviction counsel set forth in Supreme Court Rule 651(c). The State argues that defendant's postconviction counsel provided the reasonable level of assistance required by Rule 651(c).

¶ 31 The Post-Conviction Hearing Act (Postconviction Act) provides for a three-stage proceeding by which criminal defendants may collaterally challenge their convictions by presenting claims that the convictions resulted from the denial of a constitutional right. 725 ILCS 5/122-1 *et seq.* (West 2016). In this case, defendant's petition was dismissed at the second-stage, where she had the burden to make a substantial showing of a constitutional violation. See *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10.

¶ 32 At the second stage of the postconviction proceedings, the court may appoint counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2016). There is no constitutional right to the assistance of counsel in postconviction proceedings. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). Rather, the right to counsel in postconviction proceedings is statutory and requires counsel to provide a reasonable level of assistance. 725 ILCS 5/122-1 *et seq.* (West 2016)); *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Illinois Supreme Court Rule 651(c) sets forth specific duties required of counsel toward the end of providing reasonable assistance in postconviction proceedings. Under Rule 651(c), appointed postconviction counsel is required to file a certificate attesting that he or she consulted with the defendant, examined the record of the trial proceedings, and made any necessary amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of defendant's contentions. Ill. S. Ct. R. 651(c).

¶ 33 Postconviction counsel is required to investigate and present petitioner's claims. *Russell*, 2016 IL App (3d) 140386, ¶ 10. While there is no requirement that postconviction counsel must amend a petitioner's *pro se* postconviction petition, under Rule 651(c) postconviction counsel is

plainly required to make any amendments to the *pro se* petition necessary for the adequate presentation of petitioner's contentions. *Turner*, 187 Ill. 2d at 412. If amendments would only further a frivolous or patently meritless claim, then an amendment is not "necessary" within the meaning of Rule 651(c). *Russell*, 2016 IL App (3d) 140386, ¶ 10 (citing *People v. Greer*, 212 Ill. 2d 192, 205 (2004)). Postconviction counsel filing a Rule 651(c) certificate gives rise to the presumption that defendant received the required representation from counsel, but the presumption may be rebutted by the record. *Russell*, 2016 IL App (3d) 140386, ¶ 10 (citing *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007)). The question of whether counsel provided the reasonable assistance required by Rule 651(c) is reviewed *de novo*. *Suarez*, 224 Ill. 2d at 41-42.

¶ 34 In this case, the circuit court dismissed defendant's postconviction petition because defendant failed to make a substantial showing of a constitutional violation. The trial court noted defendant's *pro se* claims had not been well-explained and the attached documentation was mostly portions of transcripts that had not been clearly designated as to what day or proceeding the transcript pertained. Postconviction counsel failed to make amendments to the *pro se* claims necessary for an adequate representation of those claims and failed to attach proper affidavits or other evidence to support defendant's claims. See *Turner*, 187 Ill. 2d at 412 (providing the *pro se* petition should have been amended by counsel to include essential elements of the *pro se* petitioner's claims); *People v. Johnson*, 154 Ill. 2d 227, 245 (1993) (when allegations in defendant's petition are not supported by affidavits, records or other evidence, the trial court has no choice but to dismiss the postconviction petition without an evidentiary hearing). Additionally, postconviction counsel failed to allege ineffective assistance of appellate counsel for failing to raise petitioner's claims on direct appeal, so as to avoid the claims being barred by

the waiver doctrine. *Turner*, 187 Ill. 2d at 413 (the failure of postconviction counsel to make “routine amendments” to a postconviction petition, such as to allege ineffective assistance of appellate counsel for failing to raise a claim on direct appeal, prevents the trial court from considering the merits of petitioner’s claims and directly contributes to the dismissal of the petition without an evidentiary hearing).

¶ 35 Here, the record rebuts the presumption that postconviction counsel provided reasonable assistance. Postconviction counsel’s failure to make any amendments to the *pro se* postconviction petition violated Rule 651(c)’s requirement that counsel make amendments necessary for the adequate presentation of petitioner’s contentions. It is improper to affirm the dismissal of a postconviction petition when postconviction counsel’s performance was so deficient that it amounted to virtually no representation at all. *Id.* at 416. A reviewing court will not speculate whether the trial court would have dismissed the petition without proceeding to an evidentiary hearing if counsel had adequately performed his duties in accordance with Rule 651(c). *Id.* The petitioner must be given the opportunity to replead her postconviction petition with the benefit of the reasonable assistance of counsel. See *id.* at 417.

¶ 36 CONCLUSION

¶ 37 The judgment of the circuit court of Peoria County is reversed and this cause is remanded.

¶ 38 Reversed and remanded.