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2017 IL App (3d) 150249-U

Order filed October 10, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
Plaintiff-Appellee, )	of the 10th Judicial Circuit,
v. )	Peoria County, Illinois.
ANTONIO DURRELL ANDERSON, )	Appeal No. 3-15-0249
Defendant-Appellant. )	Circuit No. 08-CF-1120
	The Honorable
	David A. Brown,
	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Holdridge concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

- ¶ 1 *Held:* Defendant was denied reasonable assistance where his postconviction counsel failed to allege (1) lack of culpable negligence to avoid dismissal of petition for late filing, and (2) ineffective assistance of appellate counsel to avoid waiver.
- ¶ 2 Defendant Antonio Durrell Anderson was convicted of home invasion and armed robbery. After an unsuccessful appeal, defendant filed a *pro se* postconviction petition. The trial court dismissed the petition at the second stage of postconviction proceedings. Defendant



ineffective for failing to raise any of these issues on direct appeal and made no mention of his petition being filed late.

¶ 8 Defendant's petition moved to the second stage of postconviction proceedings. In June 2014, defendant's appointed postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Counsel did not amend defendant's petition.

¶ 9 In January 2015, the State filed a motion to dismiss defendant's *pro se* postconviction petition, arguing that (1) it was not timely filed and devoid of allegations of defendant's lack of culpable negligence, and (2) defendant's claims lacked merit and/or were waived because defendant did not raise them on direct appeal. Defendant's counsel did not file a response.

¶ 10 At the hearing on the State's motion, the State argued that defendant's petition should be dismissed because it was untimely and defendant failed to "make any mention in the petition itself of a lack of culpable negligence." The State further argued that all of defendant's claims lacked merit. In response, with respect to the timeliness issue, defendant's counsel asked the court to consider that in December 2012, defendant was "attempting to do something with this." Counsel further stated that "this petition states actually what [defendant] would want you to know."

¶ 11 The trial court granted the State's motion to dismiss, finding that defendant's petition was untimely and "did not include any explanation \*\*\* as to lack of culpable negligence." The court further explained that many of the issues raised in defendant's petition were waived because they were not raised on direct appeal. However, the court went on to state that, notwithstanding waiver, the issues lacked merit.

¶ 12 ANALYSIS

¶ 13 Under the Postconviction Hearing Act (Act), a postconviction petition must be filed no more than 6 months after the denial of a Petition for Leave to Appeal to the Illinois Supreme Court “unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.” 725 ILCS 5/122-1(c) (West 2012). “Absent allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State’s motion.” *People v. Perkins*, 229 Ill. 2d 34, 43 (2007).

¶ 14 At the second stage of postconviction proceedings, an indigent defendant is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2012). Pursuant to the Act, a defendant is entitled to “reasonable” assistance of counsel. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). To ensure that defendants receive this level of assistance, Illinois Supreme Court Rule 651(c) imposes specific duties on postconviction counsel and requires the record to disclose that counsel has fulfilled the mandatory duties. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18.

¶ 15 Supreme Court Rule 651(c) requires the record in postconviction proceedings to demonstrate that appointed counsel “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 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). Rule 651(c) requires postconviction counsel to file a certificate showing compliance with these requirements. *Id.* Counsel’s certificate of compliance creates a presumption that he complied with the requirements, but that presumption can be rebutted. See *Schlosser*, 2012 IL App (1st) 092523, ¶ 33.

¶ 16 Postconviction counsel is not required to amend a *pro se* postconviction petition. *Turner*, 187 Ill. 2d at 412. However, “Rule 651(c) requires counsel to amend an untimely *pro se* petition

to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence." *Perkins*, 229 Ill. 2d at 49. Postconviction counsel is also required to amend a *pro se* petition to allege ineffective assistance of appellate counsel to avoid the procedural bar of waiver. See *Turner*, 187 Ill. 2d at 413; *Schlosser*, 2012 IL App (1st) 092523, ¶ 22; *People v. Milam*, 2012 IL App (1st) 100832, ¶ 36. It is unreasonable for postconviction counsel not to make a routine amendment to a postconviction petition that would overcome waiver. *Turner*, 187 Ill. 2d at 414; *Schlosser*, 2012 IL App (1st) 092523, ¶¶ 25-26; *Milam*, 2012 IL App (1st) 100832, ¶ 36.

¶ 17 When postconviction counsel fails to provide reasonable assistance, it is inappropriate to speculate whether the trial court would have dismissed the petition if counsel had adequately performed his duties under Rule 651(c). *Turner*, 187 Ill. 2d at 416. Instead, the case should be remanded to give the trial court an opportunity to evaluate the claims in the postconviction petition once counsel has made any amendments necessary for an adequate presentation of petitioner's contentions. *Id.* at 417.

¶ 18 Here, the record rebuts the presumption of reasonable assistance created by postconviction counsel's Rule 651(c) certificate. The record shows that the trial court dismissed defendant's postconviction petition, in part, because it was untimely and "did not include any explanation \*\*\* as to lack of culpable negligence." Postconviction counsel could have corrected that deficiency by amending the petition or filing a response to the State's motion, asserting that defendant was not culpably negligent for his untimely filing. See *People v. Cotto*, 2016 IL 119006, ¶ 47; *People v. Davis*, 382 Ill. App. 3d 701, 713 (2008). Because postconviction counsel failed to allege that defendant was not culpably negligent in filing his petition, defendant was denied reasonable assistance of counsel.



dismissed the petition if counsel had adequately performed his duties under Rule 651(c).” *Supra* ¶ 17. There is no need to speculate here. The trial court, while observing that the petition was untimely, also addressed the merits and found the petition frivolous and patently without merit. The majority goes on to assert that postconviction counsel “could have corrected that deficiency [lack of culpable negligence in a late filing] by amending the petition or filing a response to the State’s motion, asserting that defendant was not culpably negligent for his untimely filing.” *Supra* ¶ 18. I am not sure on what basis the majority assumes that there were any facts to support such an amendment or response.

¶ 26 The majority acknowledges that the trial court must have an opportunity to evaluate the claims in defendant’s postconviction petition once counsel has made any amendments necessary for an adequate presentation of defendant’s contentions. *Supra* ¶ 20. I believe that the majority here, as well as in *Russell*, 2016 IL App. (3d) 140386, relied upon by the majority, afford *Turner* too broad of a reading. *Turner* involved a scenario where postconviction counsel in a capital case failed to amend petitioner’s *pro se* petition to allege ineffective assistance of appellate counsel and trial counsel to avoid the bars of either waiver and *res judicata*. The trial court in *Turner* dismissed the postconviction petition at the second stage without a hearing. The trial court held that the claims in petitioner’s postconviction petition were waived because they could have been raised on direct appeal. *Turner*, 187 Ill. 2d at 412-13. In the case at bar, the only allegation of ineffective assistance of postconviction counsel is the failure to amend the petition to overcome either a waiver based upon failure to raise the issues on direct appeal, or timeliness by failing to amend the postconviction petition to allege a lack of culpable negligence. The trial court noted that, notwithstanding any procedural bar to the postconviction petition, the petition was meritless. “The mere allegation of a constitutional violation is insufficient to justify an

evidentiary hearing; a petitioner is entitled to an evidentiary hearing on a post-conviction claim ‘only if he has made a substantial showing, based on the record and supporting affidavits, that his constitutional rights were violated.’ ” (Emphasis in original.) *Id.* at 415 (quoting *People v. Erickson*, 183 Ill. 2d 213, 222 (1998)). This case is different from those cases such as *Turner* wherein postconviction counsel’s ineffective assistance prevented the trial court from addressing the merits of petitioner’s claims.

¶ 27 This dissent acknowledges that the supreme court “has consistently held that remand is required where postconviction counsel failed to fulfill the duties of consultation, examining the record, and amendment of the *pro se* petition, regardless of whether the claims raised in the petition had merit. [Citations.]” *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). On appeal, defendant claims only that postconviction counsel failed to adequately amend the petition to avoid the procedural bars. There is no allegation suggesting that postconviction counsel failed to consult with defendant, examine the records, or amend the *pro se* petition with respect to substantive issues.

¶ 28 In cases such as the one before us, where the trial court, notwithstanding some procedural bar, has examined the petition and the record, and found the petition to be frivolously and patently without merit, it makes no sense to remand. This is a zero sum proposition. There are only so many public defenders, only so many hours in the day, and justice would be better served by allowing those limited resources to be used on cases that may have merit.

¶ 29 I would affirm.