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2017 IL App (3d) 150273-U

Order filed July 21, 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. 3-15-0273
ROBERT L. JACKSON,)	Circuit No. 05-CF-384
Defendant-Appellant.)	Honorable David A. Brown, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel's acts of requesting or acquiescing in continuances for more than four years and failing to amend defendant's *pro se* petition violated Supreme Court Rule 651(c) and resulted in the denial of a reasonable level of assistance.

¶ 2 Defendant, Robert L. Jackson, appeals for an order of the circuit court partially dismissing and partially denying his request for postconviction relief. Because defendant was denied reasonable assistance of postconviction counsel, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with first degree murder (720 ILCS 5/19-1(a)(2) (2004)) for the stabbing death of his boyfriend, David Sims, in April 2005. Public defender Mark Rose represented defendant at a bench trial. The evidence revealed that Sims and defendant had been dating for some time. In the weeks leading up to his death, Sims became violent. He had been arrested for breaking a window in defendant’s house but was released from jail and was living with defendant when he was stabbed.

¶ 5 On April 14, 2005, defendant and Sims spent the evening drinking at a local club. As they were driving home, they were pulled over for a broken tail light. Sims was driving and was issued a ticket because he did not have a valid license. After issuing the ticket, Officer Todd Rusk drove the two men home.

¶ 6 At the house, defendant and Sims got into an argument about the ticket. Sims pushed defendant and screamed at him. Defendant testified that he was terrified and that, as the argument progressed, Sims became more upset and attacked him. At that point, defendant stated that things became “fuzzy.” He felt like someone else was in the room and remembered another person handing him the knife. Defendant did not recall stabbing Sims. Defendant called 9-1-1. Officer Rusk arrived and placed defendant under arrest. The trial court found defendant guilty of first degree murder and concluded that there were no mitigating factors present to reduce the charge to second degree murder.

¶ 7 On June 7, 2007, defense counsel Rose filed a motion for new trial, alleging that the trial court erred in not allowing him to call Officer Rusk to testify that defendant said he acted in self-defense. The trial court denied the motion at a hearing the next day and then sentenced defendant to 24 years in prison.

¶ 8 At the conclusion of the sentencing hearing, Rose requested a transcript of the sentencing proceedings “to allow the filing of a Motion for Reconsideration.” The trial court denied counsel’s request without prejudice and stated that it would reserve the ruling if there was a motion filed. On July 3, 2007, Rose filed a motion to reconsider sentence. The motion was not noticed up for a hearing or ruled on by the trial court, and the proof of service does not indicate that defendant was served with a copy.

¶ 9 In April 2008, a year after his conviction, defendant sent a letter to the circuit clerk asking if he had an appeal pending. The clerk informed him that no notice of appeal had been filed. In response, defendant filed a *pro se* petition for postconviction relief, alleging (1) that Rose was ineffective for prompting defendant to waive a jury trial against his will, and (2) that Rose was ineffective for failing to file an appeal after defendant informed him that he wanted one. Attached to the petition were two affidavits: one from defendant and one from defendant’s brother, Henry Jackson. Both stated that defendant informed Rose that he wanted to file an appeal, that Rose stated he would file one on defendant’s behalf, and that the family believed Rose when he said he would do so.

¶ 10 On November 12, 2008, the trial court docketed the petition for further review. At the status hearing on December 11, the trial court informed the parties that a motion to reconsider had been filed by Rose in July but had not been noticed up for a hearing and was still pending. The court then stated that it would leave the motion to the discretion of the attorneys.

¶ 11 Public defender Marci Straub was appointed as counsel, and the case was continued to January 22, 2009. At a status hearing on May 21, 2009, Straub indicated that she would be filing her Rule 651(c) certificate within the next two weeks. She did not file a certificate. Two months later, the State informed the court that Straub had resigned from the public defender’s office.

¶ 12 On September 17, 2009, public defender Thomas Sheets first appeared on defendant's behalf. At a status hearing five months later, Sheets stated that he was in the process of reviewing defendant's file. Thereafter, Sheets continued or agreed to continue the case numerous times. On March 24, 2011, Sheets filed a Rule 651(c) certificate. He did not file an amended petition.

¶ 13 During the next 20 months, the trial court continued the case twelve times as requested by the State and defense counsel. Defendant's presence was waived at every hearing. On November 19, 2012, the State informed the court that it was still reviewing the transcript and preparing its motion to dismiss. The case was again continued without objection by Sheets. The record indicates that the case was continued to January 17, 2013, but does not contain a transcript or court order from that date.

¶ 14 On October 7, 2013, defendant filed a *pro se* motion for transcripts, asking to be informed of the status of his case. In response, the trial court ordered that the case be set for a hearing on December 20 and instructed Sheets to make contact with defendant to discuss the motion and the case. At the December 20 status hearing, Sheets requested a continuance, which the court granted without objection. The report of proceedings does not indicate whether Sheets made contact with defendant prior to the status hearing.

¶ 15 On June 27, 2014, the State filed a motion to dismiss, and a hearing was held. After the hearing, the trial court entered an order dismissing defendant's involuntary jury waiver claim and allowing the claim of ineffective assistance of counsel for failure to file an appeal to proceed to a third-stage hearing.

¶ 16 At the evidentiary hearing on February 13, 2015, defendant testified that immediately after he was sentenced, he asked Rose if he "would be putting in for [his] appeal or did

[defendant] have to do it.” According to defendant, Rose indicated that he would take care of it. When the State asked defendant why he waited so long to ask the clerk about the status of his appeal, he responded that it was because Rose repeatedly told his sister that he was waiting to go before the judge.

¶ 17 Rose testified that he did not file a notice of appeal because defendant never indicated that he wanted him to file an appeal. Rose stated that Jackson was satisfied with his sentence. He testified that he only filed the motion to reconsider to keep the file active in case defendant changed his mind about appealing. He claimed he never asked for a hearing on the motion to reconsider because he never heard anything from defendant. He did not remember talking to any of defendant’s family.

¶ 18 In closing arguments, Sheets argued that Rose’s decision to file a motion to reconsider was consistent with defendant’s desire to appeal the case. The State responded that defendant’s delay in his appeal inquiry validated Rose’s testimony that he really did not want to appeal.

¶ 19 The trial court found Rose’s testimony more credible, finding that defendant did not ask Rose to perfect an appeal on his behalf. The court then stated that counsel’s failure to file an appeal did not constitute deficient performance and dismissed defendant’s postconviction petition.

¶ 20 ANALYSIS

¶ 21 On appeal, defendant claims that he was denied reasonable assistance of postconviction counsel because counsel continued his case for several years and failed to support his claims in an amended petition or at the evidentiary hearing.

¶ 22 The Post-Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (West 2008)) provides a defendant the means to challenge his conviction and sentence for constitutional violations.

People v. Pendleton, 223 Ill. 2d 458, 471 (2006). A defendant must demonstrate that he suffered a substantial deprivation of his constitutional rights in the proceeding that resulted in his conviction and sentence. *Id.* The Act sets forth a three-stage process for adjudicating postconviction petitions. *People v. English*, 2013 IL 112890, ¶ 23. At the third stage, an evidentiary hearing takes place where the defendant may present evidence in support of his petition and the trial court makes fact-finding and credibility determinations. *Pendleton*, 223 Ill. 2d at 472-73. At the evidentiary hearing, a defendant may present affidavits, depositions, oral testimony or other evidence to support a claim of substantial violation of a constitutional right. 725 ILCS 5/122-6 (West 2008). The defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). This court will not reverse a trial court's denial of a postconviction petition after an evidentiary hearing unless it is manifestly erroneous. *English*, 2013 IL 112890, ¶ 23.

¶ 23 The two-prong test for ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), applies to claims against postconviction counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). To prevail on an ineffective assistance claim, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687-88. Where a defendant alleges unreasonable assistance of postconviction counsel, the prejudice prong focuses on whether counsel's deficient performance affected the outcome of the postconviction proceedings. *Hill*, 474 U.S. at 59.

¶ 24 In postconviction proceedings, a defendant is only entitled to reasonable assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 137 (2002). Postconviction counsel is required to (1) consult with the defendant to determine what he contends are his constitutional deprivations,

(2) examine the record of prior proceedings, and (3) make amendments to the petition as necessary. *Id.* Counsel is required to file an affidavit certifying that he complied with these requirements. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. Counsel’s certificate creates a presumption that he complied with the rule, which can be rebutted. *Id.* ¶ 33.

¶ 25 Postconviction counsel is not required to amend a postconviction petition. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). To prove inadequate representation for a failure to amend, defendant must show that his unamended petition for postconviction relief could have been amended to state a case on which relief could be granted. *People v. Wren*, 223 Ill. App. 3d 722, 731 (1992). Postconviction counsel who fails to ensure that the defendant's postconviction petition included the necessary supporting affidavit provides unreasonable assistance of counsel. *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 19. Moreover, it is unreasonable for postconviction counsel not to make a routine amendment to a postconviction petition that would overcome the procedural bar of waiver. *Turner*, 187 Ill. 2d at 414. “[A] defendant is not required to make a positive showing that his counsel's failure to comply with Rule 651(c) caused prejudice.” *Nitz*, 2011 IL App (2d) 100031, ¶ 18.

¶ 26 Our supreme court has consistently held that remand is required where postconviction counsel fails 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. *People v. Suarez*, 224 Ill. 2d 37, 47 (2007); see also *Turner*, 187 Ill. 2d at 416-17. Our analysis does not depend on whether the defendant’s *pro se* petition did or did not contain potentially meritorious issues. *Suarez*, 224 Ill. 2d at 51. Rather, it is guided by “the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized.” *Id.*

¶ 27 Here, the record shows that postconviction counsel failed to adequately comply with the duties outlined in Rule 651(c). Sheets repeatedly continued, or agreed to continue, defendant's case for almost four years, without discussing the case with defendant or examining the record of proceedings. His unexcused acts of requesting or acquiescing in the continuance of defendant's postconviction case for so long demonstrates that Sheets failed to provide reasonable assistance.

¶ 28 Counsel's failure to amend the petition also resulted in the denial of reasonable assistance. Postconviction counsel failed to amend the petition to include an allegation of prejudice and an explanation that the jury waiver issue should not be barred procedurally because defendant never had a direct appeal. The State's argument that the jury waiver claim lacked merit does not overcome the standard on review. See *Suarez*, 224 Ill. 2d at 47 (where counsel failed to fulfill duties of Rule 651(c), remand is required regardless of whether the claims raised in the petition had merit).

¶ 29 In addition, counsel failed to provide any assistance at the third-stage hearing to prove that Rose was at fault for not filing an appeal on defendant's behalf. Sheets implied that Rose's motion to reconsider sentence was consistent with a request from defendant to file an appeal. However, he neglected to cross-examine Rose to address his failure to follow procedural rules or pursue a ruling on the motion. Postconviction counsel's failure to ensure that defendant's claims were adequately presented at the hearing further supports our conclusion that he provided unreasonable assistance. We therefore reverse the partial denial and partial dismissal of defendant's postconviction petition and remand for the appointment of new counsel.

¶ 30 Last, we would be remiss if we did not address the outstanding motion to reconsider sentence filed on July 3, 2007, that is still pending in the trial court. The State argues that the motion has been abandoned, but we find no abandonment. Abandonment is only presumed

absent circumstances indicating otherwise. See *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007). In this case, it was defense counsel who failed to follow the proper notice procedure and failed to inform his client that he filed a motion to reconsider. Defendant could not have abandoned a motion that he did not know existed, nor could he have brought it to the trial court's attention. Accordingly, on remand newly appointed counsel should notice the motion for a hearing so that it may be ruled on by the trial court.

¶ 31

CONCLUSION

¶ 32

The judgment of the circuit court of Peoria County is reversed, and the cause is remanded for further proceedings.

¶ 33

Reversed and remanded.