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2017 IL App (3d) 150276-U

Order filed June 7, 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. 3-15-0276
)	Circuit No. 00-CF-1048
DELVANO S. ROBERSON,)	
Defendant-Appellant.)	Honorable David Brown, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court. Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Despite filing an Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate, the record rebuts the presumption that appointed postconviction counsel provided the defendant with reasonable assistance.

¶ 2 The defendant, Delvano S. Roberson, appeals from the second-stage dismissal of his *pro se* postconviction petition. The defendant asserts that appointed postconviction counsel provided unreasonable assistance.

¶ 3 **FACTS**

¶ 4 On October 27, 2000, the State charged the defendant with first degree murder (720 ILCS 5/9-1(a)(2) (West 2000)) for stabbing Tina Vilardi to death. The defendant, represented by plea counsel, filed a motion to receive funds and authorization for Dr. Robert Chapman to examine the defendant for sanity and fitness to stand trial. The motion stated that the defendant had been diagnosed with schizoaffective disorder, bipolar type with psychotic symptoms; atypical psychosis with paranoia and manic life behavior; and organic personality syndrome by three different institutions. The trial court allowed plea counsel's motion for funds and authorized Chapman "to examine the defendant for sanity and fitness for trial."

¶ 5 On June 28, 2001, plea counsel informed the trial court that Chapman had found the defendant unfit to stand trial. The trial court continued the matter for a fitness hearing.

¶ 6 On July 5, 2001, plea counsel provided the State with a copy of Chapman's report. On the same day, the trial court allowed the State to hire its own expert, Dr. Anthony Caterine, to conduct a fitness evaluation of the defendant. In response, the defendant told the court that he was fit, he wanted to proceed to trial, and he objected to any continuance. The court told the defendant that the matter could not go forward until the issue of fitness had been resolved.

¶ 7 On August 30, 2001, the parties appeared in court for a fitness hearing. The trial court noted that a report from Chapman had been mailed to the court. Plea counsel informed the court that he had submitted the report. However, plea counsel asked to exclude Chapman's report from the court file, and requested a continuance for a possible plea agreement.

¶ 8 On September 17, 2001, the defendant entered a fully negotiated plea agreement. The defendant pled guilty to first degree murder in exchange for a 50-year sentence. Plea counsel asked the trial court to carefully admonish the defendant because there were fitness issues. After questioning the defendant, the trial court noted that a report prepared by Caterine (the State's

psychologist) was “in the file” and the report stated that the defendant was able to understand the proceedings and assist in his defense. The trial court then read the charges and informed the defendant of the rights he was waiving by pleading guilty.

¶ 9 Next, the trial court asked the defendant about the effects of his current medications. The defendant told the court that he was not properly medicated and the medication he received was not helping. The trial court then informed the defendant of the potential sentencing ranges. The trial court said that it would hold the defendant over for testimony about the effects of the defendant’s medications. The State responded that Catherine (the State’s psychologist) had interviewed the defendant while he was on his current medications, and had concluded that the medications would not have any effect on the defendant’s fitness. The trial court noted that it understood Catherine’s report, then asked plea counsel if he had any comment. Plea counsel stated that he had nothing to say about Catherine’s findings. The trial court then accepted the plea and sentenced the defendant to 50 years’ imprisonment. In addition, the trial court recommended that the defendant receive psychological treatment while serving his sentence. The defendant did not appeal.

¶ 10 On August 27, 2013 (nine years after the trial court sentenced the defendant), the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). In the petition, the defendant alleged that plea counsel provided ineffective assistance for failing to request a fitness hearing and for allowing him to plead guilty without any inquiry into his fitness. The defendant attached his own affidavit to the petition stating that he was found unfit by Chapman but did not know why the trial court failed to hold a fitness hearing. Also attached to the petition is a copy of a correspondence from the defendant to the public defender’s office stating that the defendant had not received psychiatric

treatment in prison as recommended by the trial court. The petition advanced to the second stage and postconviction counsel was appointed to represent the defendant.

¶ 11 On August 22, 2014, postconviction counsel filed a certificate of compliance in accordance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Postconviction counsel did not amend the defendant's *pro se* petition.

¶ 12 On February 11, 2015, the State filed a motion to dismiss the defendant's petition. The State argued that the petition was untimely and the defendant failed to explain why the filing was late or whether the defendant lacked culpable negligence in the late filing. The State also argued that the defendant forfeited the fitness issue because he did not raise the issue at the plea hearing, in a motion to withdraw his guilty plea, or on appeal. Regarding the merits, the State contended, in relevant part, that the defendant could not show a reasonable probability that absent plea counsel's failure to request a fitness hearing, the trial court would have found him unfit.

¶ 13 At the hearing on the State's motion to dismiss, the court invited argument from postconviction counsel. Counsel responded, "Your Honor, I would simply say this. I read his petition. It states what he wants you to know. I have had the opportunity to confer with him as required by law, I've seen the transcripts involved and the other things that have been requested by the Court in this matter, and I will stand on what has been previously filed." The court then asked postconviction counsel if he had any response to the State's argument that the petition was untimely. Postconviction counsel replied, "No." The court took the matter under advisement.

¶ 14 While the matter was under advisement, the defendant filed a *pro se* response to the State's motion to dismiss. The defendant argued, in relevant part, that the trial court should reject the State's untimeliness argument because he was not culpably negligent for filing the petition in

an untimely manner. Specifically, the defendant argued that he had been diagnosed with several mental disorders and was unable to understand the intricacies of the Act.

¶ 15 Ultimately, the trial court granted the State’s motion to dismiss. The trial court noted that it did not consider the defendant’s *pro se* response to the State’s motion because he was represented by counsel. The trial court granted the State’s motion on three grounds. First, the court found the defendant’s petition untimely and that the defendant had failed to allege a lack of culpable negligence. Second, the court found the fitness issue had been forfeited because the defendant did not raise the issue on appeal. Third, the trial court found that plea counsel’s performance was deficient for failing to raise a *bona fide* doubt of fitness. However, the court concluded that there was “no substantial showing of prejudice. There is nothing to suggest the outcome of the case would have been different.” Thus, even absent timeliness and forfeiture, it would grant the State’s motion.

¶ 16 ANALYSIS

¶ 17 On appeal, the defendant argues that postconviction counsel failed to provide reasonable assistance in presenting his *pro se* claim that plea counsel was ineffective for failing to request a fitness hearing. Specifically, the defendant argues that postconviction counsel failed to make amendments to his *pro se* petition that were necessary to: (1) counter the State’s argument that the petition was untimely, (2) address the issue of forfeiture, and (3) allege that the defendant was prejudiced by plea counsel’s ineffective assistance.

¶ 18 A defendant is only entitled to a reasonable level of assistance from postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To achieve this level of assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires postconviction counsel to: (1) consult with the petitioner to ascertain his contentions of constitutional deprivation; (2) examine the

record of the proceeding of the original trial; and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions.

¶ 19 Here, the defendant acknowledges that postconviction counsel is presumed to have provided the defendant reasonable assistance because he filed a Rule 651(c) certificate. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). However, he argues the record rebuts this presumption with respect to postconviction counsel's third duty to make any amendments to the *pro se* petition that are necessary to adequately present the defendant's contentions. *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007).

¶ 20 First, the defendant argues that postconviction counsel acted unreasonably by failing to amend the petition to counter the State's argument that his petition was untimely. A postconviction petition may not be brought more than three years after a defendant's conviction if the defendant does not pursue a direct appeal, unless the defendant alleges facts showing that the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1(c) (West 2012). Absent an allegation of a lack of culpable negligence, the trial court must dismiss the petition as untimely upon the State's motion. *People v. Bocclair*, 202 Ill. 2d 89, 101 (2002).

¶ 21 Here, the State moved to dismiss the defendant's petition as untimely because the defendant filed the petition beyond the three-year period. Postconviction counsel failed to make any argument to counter the State's timelines allegation. Postconviction counsel's Rule 651(c) duty to make amendments necessary for an adequate presentation of a petitioner's contentions includes alleging facts that may establish a lack of culpable negligence in the late filing. *Perkins*, 229 Ill. 2d at 43. We find sufficient facts exist for postconviction counsel to assert the nonfrivolous claim that the defendant was not culpably negligent for his late filing. The defendant was diagnosed as having several mental disorders and had been deemed unfit to stand

trial by one evaluating psychologist. In addition, the trial court ordered that the defendant receive mental health treatment while serving his sentence. However, according to the defendant's correspondence with the public defender's office (attached to the petition), the defendant was not receiving treatment. Additionally, the defendant filed a *pro se* response to the State's motion to dismiss (which the trial court did not consider in ruling on the motion) in which he asserted that he was not culpably negligent for delaying the filing of his petition because he had been diagnosed with several mental disorders and was unable to understand the Act. Postconviction counsel should have amended the petition to allege that the untimely filing was not due to the defendant's culpable negligence.

¶ 22 Second, the defendant argues that postconviction counsel acted unreasonably by failing to amend the petition to assert that the defendant had not forfeited the fitness issue. The State responds that the defendant forfeited the issue because he failed to raise the issue on appeal.

¶ 23 Generally, where a defendant has previously taken an appeal, the judgment of the reviewing court is *res judicata* as to all issues actually decided by the court, and any other claims that could have been presented to the reviewing court, if not presented, are forfeited. *People v. Flores*, 153 Ill. 2d 264, 274 (1992). However, this rule does not strictly apply where, as is the case here, the defendant failed to previously appeal. While a defendant's failure to take an appeal forfeited claims based on mere error in the trial, the defendant is " 'still entitled to assert those constitutional rights which the Post[c]onviction Act is designed to protect and preserve.' " *People v. Brooks*, 371 Ill. App. 3d 482, 485 (2007) (quoting *People v. Rose*, 43 Ill. 2d 273, 279 (1969)). Like postconviction counsel's duty to overcome the issue of timeliness, Rule 651(c) also imposes a duty on postconviction counsel to attempt to overcome the procedural bar of forfeiture. *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 44. It was therefore unreasonable

for postconviction counsel to fail to make the routine amendment to address the State's forfeiture argument. *People v. Turner*, 187 Ill. 2d 406, 414 (1999).

¶ 24 Third, the defendant argues that postconviction counsel acted unreasonably by failing to amend the petition to allege that he was prejudiced by plea counsel's ineffectiveness. In his reply brief, the defendant acknowledges that his *pro se* petition did include an allegation of prejudice. However, the defendant contends that he set forth the incorrect legal standard required to establish prejudice, and postconviction counsel was required to amend the petition to assert the correct legal standard.

¶ 25 To establish a claim of ineffective assistance of counsel, the defendant must show: (1) counsel's performance was objectively unreasonable, and (2) the defendant suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The question here is whether postconviction counsel was required to amend the petition to adequately present the defendant's claim that he was prejudiced by plea counsel's deficient performance.

¶ 26 Prejudice means "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In this regard, the defendant's *pro se* petition alleged that plea counsel failed to request a fitness hearing and, had a hearing been held, he probably would have been found unfit. This is a higher standard than he was required to meet. In order to claim prejudice in this context, the petitioner must allege that facts existed at the time of his trial which raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense. *People v. Eddmonds*, 143 Ill. 2d 501, 512-13 (1991). In other words, the defendant was required to show that had counsel not performed deficiently, the trial court would have found a *bona fide* doubt existed regarding the defendant's fitness, and would have held a hearing on the matter. *Id.* The duty imposed by Rule

651(c) includes the requirement that postconviction counsel make amendments to the petition to include the essential elements of the defendant's claim. See *Turner*, 187 Ill. 2d at 412-13.

Because postconviction counsel failed to make such an amendment, the trial court was not apprised of the appropriate standard. Consequently, the court dismissed the petition based on the inappropriate standard set forth in the defendant's *pro se* petition, finding "[t]here is nothing to suggest the outcome of the case would have been different." Postconviction counsel therefore acted unreasonably by failing to amend the petition to set forth the appropriate standard.

¶ 27 Viewing postconviction counsel's failure to address the above issues as a whole, we find the record rebuts the presumption that counsel provided the defendant with reasonable assistance. Consequently, we hold that this matter must be remanded in order for new appointed counsel to adequately complete the duties mandated by Rule 651(c). See, e.g., *People v. Suarez*, 224 Ill. 2d 37, 46 (2007). "[R]emand 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." (Emphasis added.) *Id.* at 47.

¶ 28 CONCLUSION

¶ 29 The judgment of the trial court of Peoria County dismissing the defendant's postconviction petition is reversed, and the matter is remanded for the appointment of new counsel. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 16.

¶ 30 Reversed and remanded.