FILED
October 4, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150624-U

NO. 4-15-0624

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
THOMAS JAMES SIX,	)	No. 11CF1020
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Postconviction counsel failed to substantially comply with Rule 651(c), and the circuit clerk erroneously imposed several fines, which must be vacated.

¶ 2 Defendant, Thomas James Six, appeals the denial of his postconviction petition for relief from judgment. On appeal, defendant argues, and the State concedes, appointed postconviction counsel failed to substantially comply with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Defendant also argues the circuit clerk impermissibly imposed several fines, which must be vacated. We agree with defendant and reverse the dismissal of his postconviction petition, remand for compliance with Rule 651(c), vacate several clerk-imposed fines, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In December 2011, defendant was arraigned on a four-count indictment, and was represented at the arraignment by attorney Kelly Harms, who was then an assistant public defender. In March 2012, while represented by different counsel, defendant pleaded guilty to one count of violating an order of protection (720 ILCS 5/12-3.4(a)(1) (West Supp. 2011)) and one count of resisting a peace officer (720 ILCS 5/31-1(a) (West 2010)). In accordance with the fully negotiated plea agreement, the trial court sentenced defendant to 126 days in jail, credited with the 126 days in jail already served, and 30 months' probation. In addition, the court assessed several fines, including a $10 violation of order of protection (VOP) fine.

¶ 5 In June 2012, the State filed a petition to revoke defendant's probation. In January 2013, the trial court grated the State's petition, after defendant admitted the allegations contained therein. At this January 2013 hearing, attorney Kelly Harms, who was then an assistant State's Attorney (ASA), appeared on behalf of the State and prosecuted the revocation of defendant's probation. In March 2013, the court resentenced defendant to three years in prison for the violation of the order of protection charge. ASA Kelly Harms represented the State at the resentencing. In April 2013, defendant filed a motion to reconsider his sentence, which the court denied. Defendant appealed, arguing he was deprived of due process when the court did not admonish him about his right to have an appointed counsel represent him at the hearing on the State's petition to revoke his probation. In February 2015, this court affirmed in *People v. Six*, 2015 IL App (4th) 130636-U.

¶ 6 Shortly after defendant filed his motion to reconsider sentence, he filed a *pro se* postconviction petition with the trial court in April 2013. Defendant alleged ineffective

assistance of trial counsel and new evidence demonstrated his innocence. The court appointed postconviction counsel to represent defendant. In February 2015, the State, by ASA Kelly Harms, filed a motion to dismiss defendant's postconviction petition, arguing the allegations contained therein were either frivolous and patently without merit or were forfeited because they were not raised in defendant's direct appeal.

¶ 7 In June 2015, postconviction counsel filed an amended postconviction petition, wherein counsel incorporated defendant's *pro se* allegations and alleged, *inter alia*, ineffective assistance of trial counsel, violation of due process, a *per se* conflict of interest, and improper mandatory supervised release (MSR) admonitions. In July 2015, the State, through ASA Kelly Harms, filed an amended motion to dismiss defendant's amended postconviction petition, wherein the State alleged several arguments were not constitutional in nature, and thus inappropriate for postconviction review, and the remaining arguments were forfeited because they were not raised on direct appeal. In July 2015, the trial court granted the State's motion to dismiss. In addition to relying on the State's written arguments for dismissal, the court concluded defendant failed to "make a substantial showing that a violation of his constitutional rights occurred."

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Rule 651(c)

¶ 11 Defendant argues his postconviction counsel failed to substantially comply with Rule 651(c), which requires remand for further second-stage postconviction proceedings. The State concedes postconviction counsel did not comply with Rule 651(c).

¶ 12 Because a defendant's right to postconviction counsel is wholly statutory the defendant is only entitled to reasonable assistance of counsel, which is measured by counsel's substantial, not strict, compliance with Rule 651(c). *People v. Mason*, 2016 IL App (4th) 140517, ¶ 19, 56 N.E.3d 1141. Rule 651(c) provides, in pertinent part, as follows:

> "The record filed in [the appellate] court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney 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 the 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. Rule 651(c) (eff. Feb. 6, 2013).

An attorney's Rule 651(c) certificate creates the rebuttable presumption the attorney complied with the rule. See *People v. Perkins*, 229 Ill. 2d 34, 52, 890 N.E.2d 398, 408 (2007). Whether an attorney complied with Rule 651(c) is a question we review *de novo*. *Mason*, 2016 IL App (4th) 140517, ¶ 19, 56 N.E.3d 1141.

¶ 13 Defendant argues postconviction counsel's performance was deficient because counsel did not file a Rule 651(c) certificate and the record does not clearly or affirmatively show counsel (1) consulted with him, (2) examined the record of the proceedings, or (3) made the necessary amendments to the *pro se* petition to adequately present his claims. Defendant admits the record implicitly indicates postconviction counsel may have consulted with him and examined the record (a question is created because the record was allegedly with this court throughout most of the postconviction proceedings because defendant's direct appeal was

pending at the same time), but he maintains the record is devoid of any affirmative indication postconviction counsel actually did so. Defendant also argues postconviction counsel should have amended his *pro se* petition to properly address a conflict of interest claim and an erroneous MSR admonishment claim.

¶ 14 In the spirit of candor, the State concedes postconviction counsel's performance was deficient, citing *People v. Miller*, 199 Ill. 2d 541, 771 N.E.2d 386 (2002). In *Miller*, the Illinois Supreme Court concluded a *per se* conflict of interest arises where a "court-appointed attorney who represent[s] [the] defendant as defense counsel later act[s] as the prosecutor in the same criminal case," and prejudice is presumed in such a case. *Id.* at 545-46, 771 N.E.2d at 388–89. According to the State, postconviction counsel should have amended defendant's *pro se* petition to include a claim of ineffective assistance of appellate counsel for appellate counsel's failure to raise a *per se* conflict of interest argument on direct appeal.

¶ 15 Here, attorney Kelly Harms represented defendant as a court-appointed public defender at defendant's arraignment and later prosecuted the revocation of defendant's probation he received in the same case. As in *Miller*, Harms acted as both defense counsel and prosecutor at different times in defendant's case, which constituted a *per se* conflict of interest. See *id.* at 546, 771 N.E.2d at 388-89. Though the amended postconviction petition included an allegation of a *per se* conflict based on Harms's involvement in the case, the argument was barred by forfeiture due to appellate counsel's failure to raise the issue on direct appeal, as the State pointed out in its motion to dismiss defendant's postconviction petition.

¶ 16 However, postconviction counsel failed to allege ineffective assistance of appellate counsel based on this forfeiture. We do note postconviction counsel labeled the

paragraph concerning the *per se* conflict claim "Conflict of interest and ineffective assistance of counsel." However, the substance of the section does not develop the allegation of ineffective assistance of counsel or indicate which counsel (trial or appellate) was ineffective. Postconviction counsel also did not develop this claim at the hearing on the State's motion to dismiss defendant's postconviction petition. Merely stating "ineffective assistance of counsel" in a section heading is insufficient to allege a claim of ineffective assistance of counsel. Because Rule 651(c) requires postconviction counsel to amend a defendant's *pro se* petition to adequately present the defendant's claims, postconviction counsel here failed to substantially comply with Rule 651(c) by failing to properly and adequately allege ineffective assistance of appellate counsel. We therefore accept the State's concession and need not address defendant's remaining allegations of postconviction counsel's failure to substantially comply with Rule 651(c).

¶ 17 The State "takes no position as to whether Harms'[s] involvement as prosecutor during the postconviction proceedings constituted a *per se* conflict of interest that would warrant a remand for further second-stage proceedings on that independent ground." In response, defendant maintains remand is proper because postconviction counsel's performance was deficient and therefore not in compliance with Rule 651(c). We agree with defendant. Where postconviction counsel fails to substantially comply with Rule 651(c), "the appropriate remedy is to reverse the judgment of the trial court and remand this cause for compliance with Rule 651(c)." *Mason*, 2016 IL App (4th) 140517, ¶ 25, 56 N.E.3d 1141.

¶ 18 B. Fines and Fees

¶ 19 Defendant also argues the circuit clerk impermissibly imposed several fines. Those assessments include (1) an $80 lump sum surcharge, (2) a $50 court systems fee, and (3) a

$5 State Police operations assistance fee. Defendant concedes the trial court imposed a $10 VOP fine, but he contests the amount of the fine appearing in the circuit clerk's assessment sheet, which reflects a $20 assessment rather than the $10 assessment imposed by the court and reflected in the supplemental sentencing order. The State, without citation to any authority, argues the fines were properly imposed because the sentencing order, which was signed by the trial judge, states the defendant shall "[p]ay all fines, restitution, costs, fees and mandatory assessments, including VCVA, as set forth in the fine/cost sheet provided by the McLean County Circuit Clerk." In response, defendant argues "[t]he State cites no authority for this proposition, perhaps because none exists" and requests we consider the State's argument forfeited, citing Illinois Supreme Court Rules 341(h)(7), (i) (eff. Feb. 6, 2013).

¶ 20 We honor the State's forfeiture. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring the argument to "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"). Notwithstanding, we stress the fact this court has long held a blanket statement by the trial court ordering the defendant to pay all applicable fines and fees is insufficient to impose any specific fine. See *People v. Isaacson*, 409 Ill. App. 3d 1079, 1085, 950 N.E.2d 1183, 1189-90 (2011); *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 89, 55 N.E.3d 117 ("[W]hen the trial court ordered defendant to 'pay all fines, fees, and costs as authorized by statute,' it improperly delegated its power to impose a sentence to the circuit clerk."). Despite *Warren*'s clarity, the State has continuously proffered this argument and this court has continuously rejected it, albeit many times in unpublished orders pursuant to Illinois Supreme Court Rule 23(b) (eff. July 1, 2011). See *People v. Crow*, 2017 IL App (4th) 150274-U, ¶ 14; *People v. Payne*, 2017 IL App (4th) 150443-U, ¶

13; *People v. Monroe*, 2016 IL App (4th) 140522-U, ¶ 22; *People v. Karmatzis*, 2016 IL App (4th) 140641-U, ¶ 33; *People v. Taylor*, 2017 IL App (4th) 150236-U, ¶ 34. We thus reiterate our holding in *Warren*, which held a blanket statement by the trial court ordering the defendant to pay all applicable fines and fees is insufficient to impose fines.

¶ 21 The assessments defendant challenges are fines, which were not imposed by the trial court at the sentencing hearing, in the sentencing judgment, or in the supplemental sentencing order. See *People v. Hible*, 2016 IL App (4th) 131096, ¶ 24, 53 N.E.3d 319 (holding the lump sum surcharge is a fine); *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30, 74 N.E.3d 15 (holding the court systems fee is a fine); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030 (holding the State Police operations assistance fee is a fine). We conclude the circuit clerk impermissibly imposed these fines and increased or incorrectly recorded the VOP fine to be $20. We therefore vacate the (1) $80 lump sum surcharge, (2) $50 court systems fee, and (3) $5 State Police operations assistance fee and remand with directions to the trial court to instruct the circuit clerk to correct its records to reflect the $10 VOP fine imposed by the court.

¶ 22 III. CONCLUSION

¶ 23 We reverse the trial court's judgment and remand for compliance with Rule 651(c). We also vacate the (1) $80 lump sum surcharge, (2) $50 court systems fee, and (3) $5 State Police operations assistance fee and remand with directions to the trial court to instruct the circuit clerk to correct its records to reflect the $10 VOP fine imposed by the court.

¶ 24 Reversed and vacated; cause remanded with directions.