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2018 IL App (3d) 150573-U

Order filed June 12, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0573
MIKAL S. HALL,)	Circuit No. 06-CF-206
Defendant-Appellant.)	Honorable F. Michael Meersman, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* Postconviction counsel failed to provide a reasonable level of assistance where counsel filed an amended postconviction petition devoid of specific, factual allegations.
- ¶ 2 The defendant, Mikal S. Hall, appeals the denial of his postconviction petition at the second stage of postconviction proceedings. Specifically, the defendant argues that counsel failed to set forth any facts in support of the claims raised in the amended postconviction petition or provide evidentiary support for the claims.

3. Counsel failed to investigate facts or interview witnesses prior to trial. [Citations.]

4. Counsel failed to make pre-trial motions. [Citation.]

5. Counsel did not give defendant lawful advice about his right to testify. [Citation.]

6. Counsel agreed to stipulated testimony unfavorable to the defendant.

7. Counsel failed to impeach witnesses at trial where there were contradictory statements that were made. [Citation.]

8. Counsel failed to investigate and present defendant's alibi. [Citation.]

9. Counsel misstated facts during closing argument.

B. [The defendant's] Sixth Amendment right to effective assistance of counsel was violated by appellate attorneys for the following reason:

1. Counsel failed to raise on appeal that defendant was not proven guilty beyond a reasonable doubt.

2. Counsel failed to raise on appeal all claims brought herein that were apparent from the trial court record.

C. Furthermore, [the defendant's] Fifth and Fourteenth Amendment right to Due Process was violated for the following reasons:

1. The State did not run the unknown DNA found at the crime scene through the IDOC database. [Citation.]

2. The State presented deceptive, false, and misleading testimony at the preliminary hearing. [Citations.]

3. The State presented false testimony to the jury. [Citation.]

4. The sentencing court ordered petitioner to serve a term of five years MSR when Illinois law allows for a maximum of three years to be served for first degree murder not resulting in the death penalty or a natural life sentence. [Citation.]

5. The trial court allowed inappropriate photographs to be shown to the jury without defendant's presence in court.

6. Petitioner was not allowed to cross-examine the officer on his investigation into other suspects who admitted culpability. [Citation.]

7. The State did not disclose evidence of favorable DNA testing to trial in violation of the Illinois Supreme Court's rules of discovery. [Citation.]

D. [The defendant's] Sixth Amendment right to an impartial jury was violated for the following reason:

1. The trial court failed to admonish the jury about impeached testimony.

2. The trial court failed to insure by admonishment that the jury did not deliberate or discuss the case.

3. The trial court failed to distinctly inquire whether jurors understood and agreed to defendant's jeopardy rights. [Citations.]”

¶ 7 The State filed a response requesting that the court dismiss or deny the amended petition.

¶ 8 The court dismissed the petition upon finding that the defendant had “failed to set forth grounds which would allege a substantial showing of a Constitutional violation.” The court stated that it had reviewed the original *pro se* postconviction petition and the amended petition. The court reasoned:

“The Motion to Suppress and the Jury Instruction questions were answered by the Appellate Court. The remainder of the Defendant’s allegations are either untrue (the Court did admonish the Defendant about his right to testify) or deal with trial strategy or issues solely within the jury’s decision.”

¶ 9 ANALYSIS

¶ 10 The defendant argues that postconviction counsel provided an unreasonable level of assistance in that counsel filed an amended petition that failed to set forth any facts in support of the claims raised in the petition. The defendant also contends that counsel provided an unreasonable level of assistance in failing to provide evidentiary support for the claims raised in the petition or explain why such evidentiary support could not be provided.

¶ 11 At the second stage of postconviction proceedings, “the petitioner bears the burden of making a substantial showing of a constitutional violation.” *People v. Domagala*, 2013 IL 113688, ¶ 35. This “ ‘substantial showing’ of a constitutional violation *** is a measure of the legal sufficiency of the petition’s well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle [the] petitioner to relief.” (Emphasis in original.) *Id.* “[A]ll well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require [an evidentiary] hearing ***.” *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) guarantees a defendant a reasonable level of assistance from appointed counsel at the second stage of postconviction proceedings. *People v. Greer*, 212 Ill. 2d 192, 204 (2004).

“To assure the reasonable assistance required by the Act, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. [Citation.] Under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner’s contentions.” *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

See also Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). “ ‘The purpose of [Rule 651(c)] is to ensure that postconviction counsel shapes the defendant’s claims into a proper legal form and presents them to the court.’ ” *People v. Dixon*, 2018 IL App (3d) 150630, ¶ 14 (quoting *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18). “ ‘The [Act] can not [*sic*] perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court.’ ” *People v. Richmond*, 188 Ill. 2d 376, 381 (1999) (quoting *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968)).

¶ 13 Where, as here, postconviction counsel files a Rule 651(c) certificate, there is a presumption that the defendant received the representation required by Rule 651(c). *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10. However, that presumption may be rebutted by the record. *Id.*

¶ 14 Here, the record rebuts the presumption that postconviction counsel made the necessary amendments to the *pro se* petition to adequately present the defendant’s claims. The amended

petition is bereft of any factual allegations to support the claims raised therein. Rather, the amended petition contained merely general, conclusory descriptions of the legal claims it raised. For example, the amended petition alleged that trial counsel was ineffective for failing to call witnesses that would have corroborated the defendant's defense, but the amended petition does not indicate who these witnesses were or describe what their testimony would have been. Also, the amended petition alleges that trial counsel was ineffective for failing to investigate and present the defendant's alibi, but fails to allege what the alibi was or what evidence could have been presented. Absent specific, factual allegations in the amended petition, "there was virtually nothing for the circuit court to take as true at the second stage." *Dixon*, 2018 IL App (3d) 150630, ¶ 20. Thus, postconviction counsel failed to shape the defendant's claims into proper legal form.

¶ 15 As in *Dixon*, we emphasize that postconviction counsel did not provide an unreasonable level of assistance for failing to plead *sufficient* facts to ultimately require the granting of relief. See *id.* ¶ 21; see also *People v. Spreitzer*, 143 Ill. 2d 210, 221 (1991). Rather, it was counsel's failure to allege *any* specific facts in the amended petition that rendered counsel's level of assistance unreasonable. *Dixon*, 2018 IL App (3d) 150630, ¶ 21. We also note that it is not necessary for postconviction counsel to include all claims raised in a *pro se* postconviction petition in an amended petition. See *id.* ¶ 22. Rather, counsel is only required to amend the petition to further claims that are not frivolous. *Id.* Because counsel filed an amended petition in this case, we assume that he found that the claims contained therein were not frivolous. *Id.*

¶ 16 We reject the State's argument that "post-conviction counsel substantially complied with Rule 651 by amending the petition to cite cases, statutes, and Supreme Court Rules." The citations to authority in the amended petition did nothing to shape the defendant's claims into

appropriate legal form. See 725 ILCS 5/122-2 (West 2014) (“Argument and citations and discussion of authorities shall be omitted from the [postconviction] petition.”).

¶ 17 We also reject the State’s argument that “[i]t is apparent that the amended petition was meant to be read with the original petition, which is exactly what the trial court did.” Nothing in the amended petition made it “apparent” that it was meant to be read in conjunction with the *pro se* petition. The amended petition did not seek to incorporate the *pro se* petition by reference. Moreover, it is “axiomatic that amended pleadings supersede prior pleadings.” *People v. Bernard*, 2014 IL App (2d) 130924, ¶ 10; see also *People v. Cross*, 144 Ill. App. 3d 409, 412 (1986) (“[A]s a general rule, an amendment which is complete in itself and which makes no reference to the prior pleading supersedes it, and the original pleading ceases to be a part of the record, being in effect abandoned or withdrawn.”). The fact that the circuit court may have read the *pro se* petition along with the amended petition does not excuse counsel from putting the defendant’s postconviction claims into proper legal form.

¶ 18 The defendant also argues that his counsel provided unreasonable assistance in failing to attach supporting affidavits to the petition.

“In the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so.”

People v. Johnson, 154 Ill. 2d 227, 241 (1993).

Here, postconviction counsel failed to attach any affidavits or other supporting documents to the petition. Counsel did not even submit the defendant’s own affidavit. It is unclear on this record whether postconviction counsel could have obtained other affidavits or evidence in support of

