2018 IL App (3d) 150645-U

Order filed May 10, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-15-0645 & 3-15-0646
v.	)	Circuit Nos. 10-CF-74 & 10-CF-129
	)	
SHAQUILLE RONZELL DIGGINS,	)	Honorable
	)	David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court did not err in dismissing petition at second stage of postconviction proceedings.
(2) Postconviction counsel provided reasonable level of assistance.
(3) Contemporaneous filing of notice of appeal and unreasonable assistance of postconviction counsel motion divested trial court of jurisdiction to conduct *Krankel* inquiry.

¶ 2 Defendant, Shaquille Ronzell Diggins, pled guilty to five counts of armed robbery (720 ILCS 5/18-1 (West 2010)) and was sentenced to concurrent terms of 32 years in prison. His postconviction petition, alleging ineffective assistance of trial counsel, was dismissed at the

second stage. On appeal, defendant argues that the trial court erred in dismissing his petition without conducting a third-stage evidentiary hearing and maintains that he was denied reasonable assistance of postconviction counsel. He also argues that his postjudgment motion, claiming ineffective assistance of postconviction counsel, warranted a preliminary *Krankel* inquiry. We affirm.

¶ 3 BACKGROUND

¶ 4 This consolidated appeal involves two Peoria County cases. In appellate case No. 3-15-0645, defendant and co-defendants Marcus Robinson and Bernard Robinson, were charged with home invasion, residential burglary, possession of a stolen motor vehicle and four counts of armed robbery, involving a home invasion that occurred at 334 Hanssler in Peoria (Peoria County case No. 10-CF-74). In appellate case No. 3-15-0646, defendant and the same co-defendants were charged with home invasion, residential burglary, possession of a stolen motor vehicle and armed robbery for an incident that occurred at 307 E. McClure in Peoria on the same day (Peoria County case No. 10-CF-129). Prior to trial, the co-defendants' cases were severed, and the two cases against defendant were joined.

¶ 5 Defendant filed a motion to suppress his statement to investigators, and the motion was denied. His videotaped statement was then presented to the court. In it, defendant admitted that he, Marcus, and Bernard entered two houses on January 19, 2010. At the first house, defendant talked to the victim while the other two searched the residence for valuables. At the second house, he stood by the door while the co-defendants went through the house. Defendant told the investigators that he thought Marcus and Bernard were carrying BB guns.

¶ 6 Defendant entered a plea of guilty to five counts of armed robbery in exchange for concurrent sentences capped at 32 years' imprisonment. At the guilty plea hearing, the trial

court informed defendant that the minimum available sentence was 21 years' imprisonment. The State noted that the minimum sentence was 21 years in prison, based a mandatory 15-year firearm enhancement. In its factual basis, the State demonstrated that defendant admitted that he was present during the home invasions. The factual basis also stated that a victim at the Hanssler residence saw a revolver with bullets in it and a shotgun, and that he knew they were real because he was familiar with guns. The court accepted defendant's plea.

¶ 7 At the sentencing hearing, defendant was informed that the sentencing range for each count of armed robbery was 21 to 32 years in prison. One of the victims from the Hanssler house testified that all three men had guns. Another victim testified that two of the men were holding guns. Defendant then testified that he did not have a gun. He believed Marcus had a shotgun and that Bernard had a small gun. Defendant stated that he "moved stuff" for Marcus and Bernard and he did what they told him to do because he was scared. Defendant claimed that he never held a firearm during the offenses and that he first saw a gun after he entered the first house. Marcus and Bernard also used guns at the second house after they kicked in the door.

¶ 8 Defendant was sentenced to concurrent terms of 32 years on each count of armed robbery. The court informed defendant of his appeal rights. After the admonitions, the following exchange occurred:

> "Counsel: Judge, there's one final thing that Mr. Diggins has asked, that I request the court that if he – before being sent to the Department of Corrections, which I don't believe would be until the earliest next week, he's requesting--.
>
> Defendant: Don't even ask for that bullshit.
>
> Counsel: Okay.
>
> Defendant: This shit--."

The proceedings ended, and defendant did not file a post-plea motion or notice of appeal.

¶ 9 Four years later, on December 31, 2014, defendant filed a *pro se* postconviction petition (C89-92/C 63-75). In it, he raised two issues: (1) whether he should be allowed to withdraw his plea because his public defender told him he would only be sentenced to 15 years in prison and (2) whether his attorney was ineffective for failing to file post-plea motions and a notice of appeal. In his petition, defendant asserted that he told defense counsel that he wanted to file post-plea motions and a notice of appeal just after he was sentenced and she agreed to do so. He stated that he wrote several letters to her inquiring as to the status of his cases. Defendant claimed he wrote letters on January 15, 2011, March 20, 2012, February 15, 2013, and November 2, 2014. He alleged that he did not receive a response to any of them and that his November 2, 2014, letter was returned to him marked "deceased." Shortly after receiving the returned letter, he contacted the circuit clerk's office and was informed that there were no pending motions in his cases. He then filed his *pro se* petition.

¶ 10 Defendant attached his own affidavit to the petition, averring that defense counsel told him he would not be sentenced to more than 15 years and that he asked her to file a motion to vacate the guilty plea immediately after he was sentenced. The affidavit also stated that defendant instructed defense counsel to file a motion to reconsider sentence and notice of appeal and that counsel told him it would take a while. Defendant did not attach copies of the letters he sent to counsel or the returned mailing from November 2, 2014.

¶ 11 On January 2, 2015, the trial court docketed the petition for further proceedings and appointed assistant public defender Thomas Sheets as counsel. Postconviction counsel filed Supreme Court Rule 651(c) certificates on June 19 and July 31, 2015, stating that he had

consulted with defendant, examined the record, and made any necessary amendments to the *pro se* petition.

¶ 12 On July 31, 2015, the State filed a motion to dismiss, arguing that the petition was not timely, that it was unsupported by proper affidavits, and that the allegations were contradicted by the record. The court heard arguments on the State's motion. At the second stage hearing, postconviction counsel stood on defendant's *pro se* petition, noting that it clearly stated defendant's concerns.

¶ 13 The trial court granted the State's motion to dismiss in a written order, finding that the petition was not timely and that defendant failed to demonstrate a lack of culpable negligence. The court also determined that even if the petition was not untimely the petition should be dismissed because the record "clearly and unequivocally" contradicted defendant's allegations. It found that defendant could not show that he was prejudice by trial counsel's deficient performance.

¶ 14 Three weeks later, defendant filed a notice of appeal. That same day, he also filed a "motion of complaint," asserting that postconviction counsel failed to comply with Supreme Court Rule 65l(c) by neglecting to file an amended petition and failing to investigate his claim that the guns used in the offense were BB guns and not firearms. Both documents, while separately file-stamped, were mailed from the Lawrence Correctional Center and placed in the institutional mail on the same date. The trial court did not rule on defendant's ineffective assistance motion.

¶ 15 ANALYSIS

¶ 16 I. Second-Stage Dismissal

¶ 17 Defendant first argues that the trial court erred in dismissing his postconviction petition at the second stage of the proceedings. He maintains that defense counsel's failure to perfect his right to appeal, in light of defendant's assertion that he asked counsel to file post-plea motions and a notice of appeal, establishes that counsel was ineffective and warrants a third-stage hearing.

¶ 18 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto,* 2016 IL 119006, ¶ 26. At the first stage of the Act, the circuit court must determine whether the petition's claims are frivolous or patently without merit. 725 ILCS 5/122-2.1 (a)(2)(West 2014); *Cotto,* 2016 IL 119006, ¶ 26. If the court does not dismiss the petition at the first stage, it advances the petition to the second stage. *Cotto,* 2016 IL 119006, ¶ 26.

¶ 19 At the second stage, the State has the option to either move to dismiss the defendant's petition or file an answer in response to it. 725 ILCS 5/122-5 (West 2014). At this stage, the circuit court must determine whether the petition and its supporting documentation make a substantial showing of a constitutional violation. *Cotto,* 2016 IL 119006, ¶ 28. A substantial showing is a measure of the legal sufficiency of the petition's allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala,* 2013 IL 113688, ¶ 35. The defendant bears the burden of demonstrating a substantial showing. *Id*. If he fails to meet that burden, the court will dismiss his petition. *Cotto,* 2016 IL 119006, ¶ 28**.** If, however, the court determines that the petition has made a substantial showing, it will advance the petition to the third stage, where an evidentiary hearing is held. *Id*. A conclusory claim that counsel at trial provided ineffective assistance to defendant does not satisfy the standard of establishing that

defendant suffered a substantial deprivation of his rights. *People v. West*, 187 Ill. 2d 418, 426-27 (1999).

¶ 20 In this case, the circuit court dismissed defendant's petition at the second stage upon the State's motion. Dismissal is proper at the second stage unless the petition and accompanying documentation allege a substantial showing of a violation of a defendant's constitutional rights. See *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Defendant argues that his claim that defense counsel was ineffective for failing to file post-plea motions and a notice of appeal on his behalf warrants advancement to the third stage.

¶ 21 Defendant initially claims that he did not need to make any showing of prejudice to warrant a hearing on a claim that counsel was ineffective for not filing a requested postplea motion or notice of appeal. That may be true at the first stage. See *Edwards,* 197 Ill. 2d at 246. But it is not true at the second stage. *Id.* at 258; see also *People v. Hughes,* 329 Ill. App. 3d 322, 325 (2002); *West*, 187 Ill. 2d at 426-27. At the second stage, a defendant must make a substantial showing of a constitutional violation. To merit an evidentiary hearing on his claim that he told trial counsel to file a motion to withdraw and notice of appeal and that counsel was ineffective for failing to do so, a defendant has to make a substantial showing to that effect. *Edwards*, 197 Ill. 2d at 258. Such a showing necessarily entails "some explanation of the grounds that could have been presented in the motion to withdraw the plea." *Id.*; see also *People v. Gomez,* 409 Ill. App. 3d 335, 340 (2011) (defendant must present evidence of grounds that could have been raised in the motion to withdraw the plea to advance to an evidentiary hearing).

¶ 22 In the alternative, defendant argues that he provided an explanation of the grounds that could have been raised in the motion to withdraw the plea by stating that he was promised a sentence of 15 years or less and that the weapons used in the offenses did not constitute firearms.

¶ 23 Here, the record demonstrates that at the plea hearing defendant was told and acknowledged that his plea would subject him to at least 21 years in prison and possibly up to 32 years in prison because a firearm enhancement applied. The record also shows that defendant was not eligible for a 15-year sentence under his plea. Thus, the court properly concluded that, even if the petition was not untimely, defendant failed to make a substantial showing that counsel was ineffective for failing to file a motion to withdraw on that basis.

¶ 24 On appeal, defendant argues that he could have sought to withdraw his plea on the ground that the weapons used in the offenses did not constitute firearms and therefore he was only subject to a range of 6 to 30 years. Defendant's postconviction petition does not make this argument. Where the postconviction court was not presented with the argument as a reason for advancing the petition, it cannot be said that the court erred in dismissing it. See 725 ILCS 5/122-2 (West 2014) (petition must clearly identify alleged constitutional violations). Defendant's petition only described a ground for a motion to withdraw and a notice of appeal based on a sentencing promise of 15 years' or less, which is contradicted by the record. Thus, a third-stage evidentiary hearing on the claim that plea counsel was ineffective was not warranted.

¶ 25 II. Unreasonable Assistance

¶ 26 Defendant claims that he was denied a reasonable level of assistance of postconviction counsel because counsel did not amend his *pro se* petition to (1) overcome the timeliness limitation and (2) allege that defendant was prejudiced by defense counsel's failure to file post-plea motions and a notice of appeal.

¶ 27 At the second stage of the Act, indigent defendants have a statutory right to appointed postconviction counsel. 725 ILCS 5/122-4 (West 2014). This right entitles defendants to a

"reasonable" level of assistance, which is less than the level of assistance that the constitution guarantees to defendants at trial. *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990).

¶ 28 To ensure defendants receive reasonable assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes three specific duties on postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Counsel is required to (1) consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, (2) examine the record of the trial court proceedings, and (3) make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant's] contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Counsel's compliance with the rule may be shown either from the record or a certificate filed by counsel. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 14.

¶ 29 Counsel's obligation is to ensure that the claims raised in the *pro se* petition are shaped into proper legal form for presentation to the circuit court. *People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007). However, postconviction counsel is not required to amend a defendant's *pro se* petition to advance "frivolous or spurious claims" on the defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004); *People v. Malone*, 2017 IL App (3d) 140165, ¶ 10. If counsel determines that the claims made in a *pro se* petition are frivolous, counsel may stand on the *pro se* allegations or seek to withdraw as counsel. *Malone*, 2017 IL App (3d) 140165, ¶ 10.

¶ 30 Substantial compliance with Rule 651(c) (eff. Feb. 6, 2013) is sufficient, and we review counsel's compliance *de novo*. *Blanchard*, 2015 IL App (1st) 132281, ¶ 15. When postconviction counsel files a Rule 651(c) certificate asserting his or her compliance with the rule, a presumption exists that counsel provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It is the defendant's burden to overcome this presumption. *Id.* Whether

the *pro se* allegations had merit is crucial in determining whether counsel acted unreasonably by not filing an amended petition. *Id.* ¶ 23.

¶ 31 Here, counsel filed a Rule 651(c) certificate and defendant has not rebutted the presumption of reasonable assistance. Regarding timeliness, defendant alleges that counsel should have amended the petition to allege a lack of culpable negligence based on the letters he wrote to his attorney asking about the status of his cases. However, counsel was not required to amend the petition to include those facts because those facts were already set forth in the petition.

¶ 32 Defendant further alleges that postconviction counsel should have attached the letters to demonstrate a lack of culpable negligence. The record does not demonstrate that counsel could have attached the letters and neglected to do so. Moreover, attaching the letters would not have caused the allegation in the petition to become a meritorious showing of a lack of culpable negligence. Defendant sent four letters to counsel between January 2011 and November 2014. He received no response from counsel and waited four years before contacting the clerk's office. Thus, defendant was culpably negligent in assuming that a post-plea motion or notice of appeal had been filed. Accordingly, counsel's failure to attach the letters does not overcome the presumption of reasonable assistance.

¶ 33 Defendant also claims that counsel's assistance was unreasonable because postconviction counsel failed to amend the petition to include support for his argument that defense counsel was ineffective for failing to file post-plea motions and a notice of appeal. Specifically, he argues that counsel should have amended the petition to allege that the weapons used in the offenses were not firearms as defined in the enhancement statute. However, postconviction counsel was not obligated to add an allegation that defense counsel should have filed post-plea motions

alleging that firearms were not used when such an argument would not have entitled defendant to withdraw his guilty plea. See *Profit*, 2012 IL App (1st) 101307, ¶ 23 (whether the *pro se* allegations had merit is crucial in determining whether counsel acted unreasonably in failing to amend petition). In this case, the record affirmatively contradicts the argument that the weapons were not firearms. The factual basis for the plea described the firearm used by the co-defendants and plea discussions included the application of the firearm enhancement on that basis. Defendant's pro se allegation claiming that the weapons were BB guns lacks merit and fails to rebut the presumption that postconviction counsel provided a reasonable level of assistance under Rule 651(c).

¶ 34 III. *Krankel* Inquiry

¶ 35 Defendant argues that the trial court had a duty to inquire into his *pro se* postjudgment claims of unreasonable assistance of postconviction counsel.

¶ 36 When a defendant makes *pro se* posttrial claims of ineffective assistance of counsel, the trial court must conduct an initial inquiry into those claims. *People v. Krankel,* 102 Ill. 2d 181, 188-89 (1984). Generally, an express claim of ineffective assistance of counsel is all that is necessary to trigger a *Krankel* inquiry. *People v. Ayres,* 2017 IL 120071, ¶ 21.

¶ 37 Once a notice of appeal has been filed, the trial court loses jurisdiction of the case and jurisdiction attaches instanter in the appellate court. *People v. Patrick,* 2011 IL 111666, ¶ 39. A ruling made by the circuit court in the absence of jurisdiction is void. *People v. Flowers,* 208 Ill. 2d 291, 306 (2003).

¶ 38 Defendant did not raise his unreasonable assistance of counsel claim before the notice of appeal was filed. Instead, he filed them contemporaneously, on the same day. Once the notice of appeal was filed, the trial court lost jurisdiction. Defendant argues that the court had a duty to

conduct a *Krankel* inquiry, but if it had, any ruling as a result of that inquiry would be void. See *People v. Darr,* 2018 IL App (3d) 150562, ¶ 93.

¶ 39 Defendant maintains that the trial court should have considered the substance of his *Krankel* motion as a "motion directed against the judgment" in accordance with Illinois Supreme Court Rule 606(b). See Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014). We disagree. In *Patrick*, our supreme court expressly stated that when a notice of appeal is filed, "the trial court loses jurisdiction of the case and may not entertain a *Krankel* motion." *Patrick,* 2011 IL 111666, ¶ 30. The court made no reference to Rule 606(b) or whether a *Krankel* motion might render the notice of appeal ineffectual under the rule. Here, when defendant filed his notice of appeal contemporaneously with his "motion of complaint," asserting that postconviction counsel failed to comply with Supreme Court Rule 651(c), he perfected his appeal and deprived the trial court of jurisdiction.[1]

¶ 40 CONCLUSION

¶ 41 The judgment of the circuit court of Peoria County is affirmed.

¶ 42 Affirmed.

[1] The trial court's failure to address defendant's unreasonable assistance claims does not prevent him from raising those same claims on appeal, which he has done in this case.