

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FILED

February 27, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 160010-U

NO. 4-16-0010

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
NICHOLAS CARLOS BROOKS)	No. 09CF801
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant appeals the second-stage dismissal of his amended postconviction petition. We accept the State’s concession that postconviction counsel provided defendant unreasonable assistance, reverse the dismissal, and remand for further second-stage proceedings and the appointment of new counsel.

¶ 2 I. BACKGROUND

¶ 3 In September 2009, a McLean County grand jury indicted defendant, Nicholas Carlos Brooks, on three counts of first degree murder (720 ILCS 5/9–1(a)(1), (a)(2) (West 2008)) and one count of possession of a stolen motor vehicle, a Class 2 felony (625 ILCS 5/4–103(a)(1) (West 2008)).

¶ 4 In December 2010, a jury found defendant guilty of one count of first degree murder and one count of possession of a stolen motor vehicle.

¶ 5 In February 2012, the trial court sentenced defendant to a nonextended term of 60

years in prison for first degree murder and extended-term of 14 years in prison for possession of a stolen motor vehicle, to be served concurrently.

¶ 6 In August 2013, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). In the petition, defendant argued that (1) trial counsel was ineffective for failing to investigate or call as witnesses Ellena Carsell, Jeremy Fields, and Heidi Cummings, (2) appellate counsel was ineffective for failing to raise this claim on direct appeal, and (3) the trial court erred by ordering an extended-term sentence for possession of a stolen motor vehicle. Later that month, the trial court advanced the case to the second-stage of postconviction proceedings.

¶ 7 In January 2014, the trial court appointed counsel. In September 2015, postconviction counsel filed an amended postconviction petition.

¶ 8 In November 2015, the State filed a motion to dismiss the amended petition. The State argued that (1) defendant failed to support his failure to investigate claims with affidavit, as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2014)), and (2) defendant's affidavit explaining what the three witnesses would testify to was insufficient to satisfy the statutory requirement. Additionally, the State argued that the alleged error regarding the trial court's imposing an extended-term sentence was forfeited because the claim could have been raised on direct appeal but was not. In November 2015, the trial court conducted a hearing on the State's motion and granted it.

¶ 9 In December 2015, postconviction counsel filed a motion to reconsider the trial court's grant of the State's motion to dismiss. Later that month, the trial court conducted a hearing on the motion to reconsider, and postconviction counsel filed a Supreme Court Rule 651(c) certificate. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The trial court found no deficient

performance by postconviction counsel and ruled that no error occurred in granting the State's motion to dismiss.

¶ 10 In December 2015, defendant appealed and in January 2016, amended his appeal to include the correct judgment date.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues that postconviction counsel provided unreasonable assistance by failing to amend defendant's *pro se* claim. The State concedes this court should reverse the dismissal of defendant's postconviction petition and remand for further second-stage proceedings and the appointment of new counsel.

¶ 14 The issue on appeal is whether defendant's postconviction counsel was deficient and provided unreasonable assistance. Postconviction counsel must fulfill the duties imposed by Rule 651(c) to present the defendant's constitutional claims. *People v. Lander*, 215 Ill. 2d 577, 585, 831 N.E.2d 596, 600 (2005). Moreover, "section 122-4 of the Post-Conviction Hearing Act and Rule 651 together ensure that post-conviction petitioners will receive a reasonable level of assistance by counsel in post-conviction proceedings." *People v. Owens*, 139 Ill. 2d 351, 361, 564 N.E.2d 1184, 1188 (1990).

¶ 15 Postconviction counsel failed to attach affidavits in support of defendant's claims or explain their absence. Further, postconviction counsel's amended petition only added one new issue regarding grand jury proceedings. Additionally, postconviction counsel failed to overcome the procedural bar to avoid forfeiture through amending the *pro se* claim to allege ineffective assistance of appellate counsel.

¶ 16 "[T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's

claims into proper legal form and presents those claims to the court.” *People v. Perkins*, 229 Ill. 2d 34, 44, 890 N.E.2d 398, 403 (2007). At the second stage of postconviction proceedings, the task “is to move the process forward by cleaning up the defendant's *pro se* claims and presenting them to the court for adjudication.” *People v. Kuehner*, 2015 IL 117695, ¶ 20, 32 N.E.3d 655, 663 (2015). As a result, postconviction counsel did not make amendments to the petition filed *pro se* that were “necessary for an adequate presentation of petitioner’s contention.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The State points out postconviction counsel’s failure to amend the *pro se* petition related to the sentencing error.

¶ 17 If postconviction counsel fails to fulfill his duties under Rule 651(c), a remand for additional postconviction proceedings is required. *People v. Ross*, 2015 IL App (3d) 130077, ¶ 15, 40 N.E.3d 461, 466 (2015). The Illinois Supreme Court “has consistently held that remand 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.” *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007). Thus, “[t]his matter must be remanded to the circuit court for further postconviction proceedings where defendant is entitled to receive reasonable assistance of counsel.” *Lander*, 215 Ill. 2d at 585.

¶ 18 III. CONCLUSION

¶ 19 We accept the State’s concession that postconviction counsel provided defendant unreasonable assistance by failing to amend defendant’s *pro se* claim, reverse the dismissal, and remand for further second-stage proceedings, that is, for the opportunity to replead his postconviction petition with the assistance of new counsel.

¶ 20 Reversed and remanded with directions.