2018 IL App (4th) 160151-U

NO. 4-16-0151

FILED
May 1, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MANUEL MARTINEZ,	)	No. 10CF1336
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was denied reasonable assistance of postconviction counsel, and vacatur of his fines imposed by the circuit clerk was warranted.

¶ 2 In October 2014, defendant, Manuel Martinez, filed a *pro se* postconviction petition, alleging ineffective assistance of appellate counsel. The postconviction proceedings moved to the second stage, and postconviction counsel filed an amended petition, adding claims of ineffective assistance of trial counsel. The State filed a motion to dismiss defendant's amended postconviction petition. In February 2016, the Champaign County circuit court granted the State's motion and dismissed defendant's amended postconviction petition.

¶ 3 Defendant appeals the denial of his postconviction petition, asserting (1) he was denied reasonable assistance by postconviction counsel, (2) postconviction counsel failed to file a certificate attesting to compliance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013),

and (3) the circuit clerk erred by assessing fines. We reverse in part, vacate in part, and remand the cause with directions.

¶ 4 I. BACKGROUND

¶ 5 In August 2010, the State charged defendant by information with two counts of aggravated criminal sexual abuse of M.M. (720 ILCS 5/12-16(d) (West 2010)) and one count of aggravated criminal sexual abuse of T.M. (720 ILCS 5/12-16(c)(1)(i) (West 2010)). In January 2011, the State also charged defendant by information with one count of predatory criminal sexual assault of a child as to T.M. (720 ILCS 5/12-14.1(a)(1) (West 2010)) and one count of criminal sexual assault of M.M. (720 ILCS 5/12-13(a)(4) (West 2010)).

¶ 6 In October 2010, defendant hired attorney Michael McClellan to represent him, and the circuit court allowed defendant to substitute counsel. In January 2011, the State filed a motion to permit the destruction of evidence necessary to complete deoxyribonucleic acid (DNA) testing, which the court granted. The record indicates McClellan did not receive the results of the DNA testing until early July 2011. At an August 4, 2011, hearing on defendant's motion to reduce bond, at which defendant was present, the prosecutor explained the DNA results showed semen was located in the vaginas of both victims but the results were inconclusive. One out of three males could not be excluded from having produced the DNA. The prosecutor explained defendant was neither identified nor excluded by the DNA test results.

¶ 7 On August 19, 2011, McClellan filed a motion to continue and a motion for leave to withdraw as defense counsel. On August 22, 2011, the circuit court held a hearing, at which it only addressed the motion to continue because McClellan had not given notice of his motion to withdraw as counsel. At the hearing, McClellan stated he first believed, based a conversation with the prosecutor, the DNA evidence was not going to be a factor in this case and did not think

the State was going to use it. McClellan admitted it was his misunderstanding and not the State misleading him. McClellan advised defendant of his erroneous belief. Shortly thereafter, he talked with the prosecutor again and learned the State was going to use the DNA evidence because it did make some ties to defendant. McClellan noted he still did not have a handle on the DNA and defendant could not afford the retention of an expert to analyze the DNA results. The court granted a continuance.

¶ 8 On September 26, 2011, the circuit court held a hearing on McClellan's motion to withdraw as counsel. Defendant did not object to McClellan's withdrawal. The court granted McClellan's motion and appointed the Champaign County public defender's office to represent defendant.

¶ 9 After a lengthy trial in early 2012, a jury found defendant guilty of aggravated criminal sexual abuse of M.M., criminal sexual assault of M.M., aggravated criminal sexual abuse of T.M., and predatory criminal sexual assault of a child as to T.M. In March 2012, the circuit court sentenced defendant to prison terms of 7 years for both aggravated criminal sexual abuse counts, 15 years for criminal sexual assault, and 32 years for predatory criminal sexual assault of a child with the aggravated criminal sexual abuse sentences to be served concurrently with one another and consecutively to the sentences for criminal sexual assault and predatory criminal sexual assault of a child and the sentences for criminal sexual assault and predatory criminal sexual assault of a child to be served consecutively with one another. The court ordered defendant to pay the following: "all of the court costs of these proceedings, including all fines, fees and costs as authorized by statute." The only thing the court specifically ordered defendant to pay was the $250 genetic marker grouping analysis fee. Additionally, the court award defendant 478 days of sentencing credit. Defendant filed a motion to reconsider his sentence.

After an April 2002 hearing, the court reduced defendant's prison term for predatory criminal sexual assault of a child to 22 years and kept the rest of the sentencing judgment the same.

¶ 10 Defendant filed a direct appeal and argued (1) he was denied effective assistance of trial counsel, (2) the circuit court improperly admitted hearsay evidence, and (3) his case should be remanded for a hearing to address his posttrial allegations of ineffective assistance of counsel. This court affirmed the circuit court's judgment. *People v. Martinez*, 2013 IL App (4th) 120337-U.

¶ 11 In October 2014, defendant filed his *pro se* postconviction petition, asserting ineffective assistance of appellate counsel based on appellate counsel's failure to challenge the sufficiency of the evidence. Defendant also filed a motion for preservation of evidence for forensic testing and a motion to allow DNA testing. In February 2015, the circuit court moved defendant's *pro se* postconviction petition to the second stage of the proceedings and appointed counsel to represent him.

¶ 12 In July 2015, postconviction counsel filed an amended postconviction petition, adding several claims of ineffective assistance of trial counsel. Postconviction counsel did not file a Rule 651(c) certificate. In the amended petition, postconviction counsel did state the following: "Counsel was appointed to amend the *pro se* petition and submits such today based on a review of the *pro se* petition, court file, transcripts of proceedings, and consultation with the Defendant." As to the claim at issue on appeal, the amended postconviction petition stated the following:

> "Counsel also misled [defendant] by failing to accurately represent the State's position on [defendant]'s case as to the use of DNA evidence. See hearing transcript excerpts (Exhibit D). The conduct of Counsel prejudiced [defendant] in

> both causing unnecessary delays on [defendant]'s proceedings and hindering [defendant]'s ability to make informed decisions about how to adequately proceed in the above-captioned matter. Such as [defendant]'s rejection of a generous plea bargain deal. (Exhibit J) Counsel's actions substantially denied [defendant] assistance of Counsel."

Exhibit J was a letter from McClellan to John Cesario, senior counsel to the Attorney Registration and Disciplinary Commission. In the letter, McClellan discusses the State's plea offers to defendant, and defendant's maintaining his innocence and wanting to take the case to trial. According to McClellan, the State's last plea offer to defendant was probation and immediate release. McClellan also noted his initial misunderstanding of how the State was going to handle the DNA test results. In August 2015, the State filed a motion to dismiss defendant's motion to allow DNA testing and defendant's amended postconviction petition.

¶ 13 In November 2015, the circuit court entered a written order, allowing the motion to preserve evidence and denying the motion to allow DNA testing. On February 1, 2016, the court entered a 10-page written order, dismissing defendant's amended postconviction petition. The court found McClellan's misunderstanding of the State's intention to use DNA evidence did not affect the outcome of defendant's trial because McClellan withdrew as counsel four months before defendant's trial. Also, on February 1, 2016, the court entered an amended order on defendant's motion to allow DNA testing.

¶ 14 On February 22, 2016, defendant filed a timely notice of appeal, but the notice listed only the denial of the motion to allow DNA testing as the appealed order. On March 25, 2016, defendant filed a timely motion for leave to file an amended notice of appeal, which added the dismissal of his amended postconviction petition. See Ill. S. Ct. Rs. 606 (eff. Dec. 11, 2014),

303(b)(5) (eff. Jan. 1, 2015), and 303(d) (eff. Jan. 1, 2015). This court granted defendant's motion and allowed him to file the amended notice of appeal. Accordingly, we have jurisdiction of defendant's appeal from the dismissal of his postconviction petition under Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013). Defendant did not raise any issues as to the denial of the motion to allow DNA testing, and thus we do not address that judgment.

¶ 15 II. ANALYSIS

¶ 16 A. Reasonable Assistance

¶ 17 Defendant first asserts he was denied reasonable assistance of postconviction counsel because counsel failed to present defendant's affidavit to support his claim of ineffective assistance of trial counsel based on counsel's erroneous advice that led defendant to reject a generous plea offer. Additionally, defendant argues counsel failed to file a Rule 651(c) certificate. We address those issues together. The State contends postconviction counsel substantially complied with Rule 651(c) and could not file the affidavit defendant asserts postconviction counsel should have filed because it would have been contrary to the record.

¶ 18 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. At the first stage, the circuit court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2014). If the court does not dismiss the petition, it proceeds to the

second stage, where, the court may appoint counsel for an indigent defendant. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. At both the second and third stages of the postconviction proceedings, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 19 In postconviction proceedings, the right to counsel is wholly statutory, and the Postconviction Act only requires counsel to provide a defendant with a " 'reasonable level of assistance.' " *People v. Lander*, 215 Ill. 2d 577, 583, 831 N.E.2d 596, 600 (2005) (quoting *People v. Owens*, 139 Ill. 2d 351, 364, 564 N.E.2d 1184, 1189 (1990)). Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) "imposes specific obligations on postconviction counsel to assure the reasonable level of assistance required by the [Postconviction] Act." *Lander*, 215 Ill. 2d at 584, 831 N.E.2d at 600. Under that rule, postconviction counsel must (1) consult with the defendant either by mail or in person to ascertain the contentions of deprivation of constitutional rights, (2) examine the record of the circuit court proceedings, and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the defendant's contentions. *People v. Perkins*, 229 Ill. 2d 34, 42, 890 N.E.2d 398, 403 (2007). Our supreme court has consistently held remand is required when postconviction counsel fails to complete any one of the above

duties, "regardless of whether the claims raised in the petition have merit." *People v. Suarez*, 224 Ill. 2d 37, 47, 862 N.E.2d 977, 982 (2007). Additionally, "[f]ulfillment of the third obligation does not require counsel to advance frivolous or spurious claims on defendant's behalf." *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Moreover, "while appointed counsel is under no obligation to add new claims to a *pro se* petition in carrying out his duty to provide reasonable assistance under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), he is free to do so." *People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 64, 981 N.E.2d 470. We note the State does not assert the adequate presentation of the defendant's contentions requirement of 651(c) is inapplicable to new claims raised by postconviction counsel.

¶ 20 Postconviction counsel's filing of a Rule 651(c) certificate raises a presumption that counsel provided reasonable assistance under the Postconviction Act, namely, that counsel adequately investigated, amended, and properly presented the defendant's claims. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. In this case, postconviction counsel did not provide such a certificate, and thus the presumption does not arise. The defendant bears the burden of demonstrating that his attorney failed to comply with the duties mandated in Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23. This court reviews *de novo* whether an attorney complied with Rule 651(c). *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 15, 43 N.E.3d 1077.

¶ 21 In defendant's amended postconviction petition, postconviction counsel added the claim defendant received ineffective assistance of trial counsel from McClellan because McClellan failed to accurately represent the State's position on the use of DNA evidence in this case, which caused unnecessary delays in the proceedings and hindered defendant's ability to make informed decisions. Specifically, the petition noted defendant's "rejection of a generous

plea bargain deal." In support of the allegation, postconviction counsel attached to the amended petition (1) McClellan's letter to the Attorney Registration and Disciplinary Commission and (2) the transcript from the August 22, 2011, pretrial hearing. Defendant asserts postconviction counsel did not provide reasonable assistance because counsel did not also attach an affidavit from defendant, attesting he would have accepted a plea agreement if he had been correctly informed about the DNA evidence against him.

¶ 22 Our supreme court has laid out specific requirements for establishing the prejudice prong of the *Strickland* test for claims of ineffective assistance of counsel during plea negotiations. See *People v. Hale*, 2013 IL 113140, ¶¶ 18-20, 996 N.E.2d 607. With such claims, the defendant must demonstrate a reasonable probability exists (1) the defendant would have accepted the State's plea offer absent counsel's deficient performance and (2) the defendant's guilty plea would have been entered without the prosecution rescinding the offer or the circuit court's refusing to accept the parties' agreement. *Hale*, 2013 IL 113140, ¶¶ 19-20. As to the first requirement, our supreme court has explained it requires "more than a defendant's own subjective, self-serving testimony." (Internal quotation marks omitted.) *Hale*, 2013 IL 113140, ¶ 18 (quoting *People v. Curry*, 178 Ill. 2d 509, 531, 687 N.E.2d 877, 888 (1997)). The defendant must also provide " 'independent, objective confirmation that defendant's rejection of the proffered plea was based upon counsel's erroneous advice,' and not on other considerations." *Hale*, 2013 IL 113140, ¶ 18 (quoting *Curry*, 178 Ill. 2d at 532, 687 N.E.2d at 888). Our supreme court further noted "[t]he disparity between the sentence a defendant faced and a significantly shorter plea offer can be considered supportive of a defendant's claim of prejudice." *Hale*, 2013 IL 113140, ¶ 18.

¶ 23 Postconviction counsel added the claim of ineffective assistance of counsel during

the plea negotiation process to defendant's amended postconviction petition but included only brief, bare allegations as to prejudice. Thus, while counsel does not have to advance frivolous claims, postconviction counsel's raising the issue indicates counsel thought the claim had merit. The amended petition does not address the two requirements to establish prejudice set forth by our supreme court in *Hale*. Moreover, postconviction counsel failed to attach all of the necessary documents to the amended petition supporting a claim of prejudice during plea negotiations. The State contends defendant can never establish prejudice and could not have provided defendant's affidavit because the record shows defendant persisted in his innocence. While postconviction counsel cannot suborn perjury, the mere fact defendant persisted in his innocence does not itself prohibit defendant from establishing prejudice. As defendant notes, Illinois courts are not barred from accepting guilty pleas from a defendant who asserts his innocence. *People v. Cabrera*, 402 Ill. App. 3d 440, 451, 932 N.E.2d 528, 540 (2010). Here, postconviction counsel decided to raise this claim of ineffective assistance of counsel but did not make an adequate presentation of the claim.

¶ 24 Accordingly, we find postconviction counsel failed to comply with Rule 651(c), in that counsel did not make the necessary amendments for an adequate presentation of defendant's claims. Thus, defendant was denied reasonable assistance of postconviction counsel. We reverse the circuit court's judgment dismissing defendant's postconviction petition and remand the case for further second-stage proceedings under the Postconviction Act. The circuit court should appoint defendant new counsel, who shall comply with Rule 651(c) and file a certificate pursuant to the rule. Our decision is in no way a comment on the merits of this claim or defendant's postconviction petition as a whole.

¶ 25 B. Fines

¶ 26 Additionally, defendant asks this court to vacate the fines improperly imposed by the circuit clerk, or alternatively, to apply the *per diem* credit toward the applicable fines. The State contends the fines are voidable, and thus defendant's argument is forfeited. However, the State agrees defendant is entitled to the credit. The record shows the circuit court did not impose any fines.

¶ 27 "Although circuit clerks can have statutory authority to impose a fee, they lack authority to impose a fine, because the imposition of a fine is exclusively a judicial act." (Emphases omitted.) *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912. Thus, "any fines imposed by the circuit clerk are void from their inception." *People v. Larue*, 2014 IL App (4th) 120595, ¶ 56, 10 N.E.3d 959. Our supreme court's decision in *People v. Castleberry*, 2015 IL 116916, ¶ 1, 43 N.E.3d 932, which abolished the void sentencing rule, does not change the aforementioned holding. Fines imposed by the circuit clerk are still void, and we have jurisdiction to rule on any amount improperly imposed. See *People v. Gutierrez*, 2012 IL 111590, ¶ 14, 962 N.E.2d 437 (stating "the appellate court had jurisdiction to act on void orders of the circuit clerk"). Moreover, a void judgment can be challenged " 'at any time or in any court, either directly or collaterally.' " *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103, 776 N.E.2d 195, 201 (2002) (quoting *Barnard v. Michael*, 392 Ill. 130, 135, 63 N.E.2d 858, 862 (1945)). Thus, if the circuit clerk imposed the assessments and the assessments are fines, we can address the assessments in this appeal.

We agree with defendant the following are fines: (1) the $50 court finance assessment (*Smith*, 2014 IL App (4th) 121118, ¶ 54); (2) the $10 arrestee's medical costs assessment (*Larue*, 2014 IL App (4th) 120595, ¶ 57); (3) the $5 drug court program assessment (*People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 138, 55 N.E.3d 117); (4) the $4 assessment

under the Violent Crime Victims Assistance Act (*Warren*, 2016 IL App (4th) 120721-B, ¶ 142); (5) the $10 State Police operations assessment (*People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030); (5) the $30 juvenile expungement assessment, which is listed on the clerk's printout as a $10 assessment for the Clerk Operations and Administrative Fund, a $10 assessment for the State's Attorney Office Fund (the $10 assessment for the State's Attorney is included in the $40 charge listed for the State's Attorney on the clerk's printout), and a $10 assessment for the State Police Services Fund (*Warren*, 2016 IL App (4th) 120721-B, ¶ 134); and (6) the $10 traffic/criminal surcharge (*Warren*, 2016 IL App (4th) 120721-B, ¶ 129).

¶ 28 Since the aforementioned fines were not imposed by the circuit court, they are void and must be vacated. Thus, we need not address the *per diem* credit.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we vacate the aforementioned fines imposed by the circuit clerk, reverse the Champaign County circuit court's dismissal of defendant's amended postconviction petition, and remand the cause with directions.

¶ 31 Reversed in part and vacated in part; cause remanded with directions.