2018 IL App (5th) 150160-U

NO. 5-15-0160

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Hardin County.
	)	
v.	)	No. 12-CF-68
	)	
REGINA POINDEXTER,	)	Honorable
	)	Paul W. Lamar,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held*: Order dismissing amended postconviction petition affirmed where facts in the petition alleging ineffective assistance of trial counsel are positively rebutted by the record. Mittimus corrected to impose one drug assessment and to reflect pretrial custody credit in the amount of $435.

¶ 2 The defendant, Regina Poindexter, appeals the April 6, 2015, order of the circuit court of Hardin County that dismissed her amended petition for postconviction relief. For the following reasons, we affirm the order and correct the mittimus to impose one drug assessment and to reflect pretrial custody credit in the amount of $435.

¶ 3 FACTS

¶ 4 On October 26, 2012, the defendant was charged, by information, with three counts. Count I charged the defendant with unlawful possession of methamphetamine (720 ILCS 646/60(b)(1) (West 2012)); count II charged her with aggravated unlawful participation in methamphetamine production *id.* § 15(b)(1)(B)); and count III charged her with unlawful disposal of methamphetamine manufacturing waste (*id.* § 45(a)).

¶ 5 The defendant pleaded guilty to all three counts at a plea hearing on January 11, 2013. In exchange for the guilty plea, the defendant agreed to serve 2 years in the Illinois Department of Corrections on count I, 15 years on count II, and 3 years on count III. The defendant further agreed to serve 75% of the sentence on count II. The circuit court ordered the defendant to pay drug assessments in the amounts of $1000 on count I, $3000 on count II, and $500 on count III, and found the defendant was entitled to receive credit for time served in pretrial custody. This sentence was set forth in a judgment entered on January 11, 2013.

¶ 6 On March 19, 2013, the defendant filed a *pro se* motion to reduce sentence, which the circuit court denied as untimely at a hearing on June 28, 2013. The defendant filed a notice of appeal on July 2, 2013, which this court dismissed in an order entered on October 13, 2013. Subsequently, on November 25, 2013, the defendant filed a *pro se* postconviction petition, alleging ineffective assistance of trial counsel. The circuit court appointed postconviction counsel for the defendant on February 28, 2014. Postconviction counsel filed an amended petition for postconviction relief on October 24, 2014. The petition alleged that the defendant's trial counsel was ineffective because he

(1) failed to communicate with the defendant, (2) failed to advise the defendant that her sentence on count II would be served at 75% instead of 50, and (3) only briefly reviewed discovery with the defendant.

¶ 7 On November 21, 2014, the State filed a motion to dismiss the amended petition, which the circuit court granted by docket entry on December 31, 2014. A written order dismissing the defendant's amended postconviction petition and reflecting the findings set forth in the December 31, 2014, docket entry was entered on April 6, 2015. The circuit court stated in the order that the allegations in the amended petition are positively rebutted by the trial record−specifically by the record of the plea agreement.[1] The defendant filed a timely notice of appeal. Additional facts will be provided in our analysis of the issues on appeal.

¶ 8 ANALYSIS

¶ 9 The defendant raises the following issues on appeal: (1) whether postconviction counsel provided unreasonable assistance by failing to make necessary amendments to the *pro se* postconviction petition, (2) whether the circuit court erred by imposing three drug assessments when only one assessment per charging instrument is authorized by statute, and (3) whether the defendant is entitled to a $5 per day credit against the drug assessment for time spent in pretrial custody.

[1]The order indicates that the plea agreement took place on August 29, 2013. This is an error, as both the plea hearing and plea agreement are dated January 11, 2013.

¶ 10 I. *Unreasonable Assistance*

¶ 11 The first issue on appeal is whether the defendant's postconviction counsel provided unreasonable assistance by failing to make necessary amendments to the *pro se* postconviction petition. "This court reviews *de novo* the trial court's dismissal of a postconviction petition without an evidentiary hearing." *People v. Harris*, 366 Ill. App. 3d 1161, 1167 (2006).

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) "provides a defendant with a collateral means to challenge *** her *** sentence for violations of federal or state constitutional rights." *Harris*, 366 Ill. App. 3d at 1166. "In a noncapital case, a postconviction proceeding contains three stages." *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, the circuit court "must first, independently and without considering any argument by the State, decide whether the defendant's petition is 'frivolous or is patently without merit.' " *Harris*, 366 Ill. App. 3d at 1166 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2002)).

¶ 13 "If the circuit court does not dismiss the petition as 'frivolous or *** patently without merit [citation], the petition advances to the second stage, where counsel may be appointed to an indigent defendant [citation], and where the State, as respondent, enters the litigation' [citation]." *Tate*, 2012 IL 112214, ¶ 10. "At this second stage, the circuit court must determine whether the petition and any accompanying documentation make 'a substantial showing of a constitutional violation.' " *Id*. (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). "If no such showing is made, the petition is dismissed." *Id*.

¶ 14 Also "[a]t the second stage of postconviction review, all well-pleaded facts not positively rebutted by the trial record are to be taken as true." *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 32. "It is only through reviewing the record of the trial court proceedings that a trial court can determine whether the allegations in a postconviction petition are positively rebutted by the record." *People v. Jefferson*, 345 Ill. App. 3d 60, 76 (2003). "If the claims made in a petition are positively rebutted by the record, they should not be taken as true." *Id*. "Rather, those claims that are positively rebutted by the original trial court record are patently without merit" (*id*.) and therefore subject to summary dismissal. *Id*. at 77.

¶ 15 "Under the Act, postconviction counsel is required to provide a defendant who has filed a petition with a reasonable level of assistance." *Rivera*, 2016 IL App (1st) 132573, ¶ 35. "Those duties include consultation with the defendant to ascertain [her] contentions of a deprivation of constitutional rights, examination of the record of proceedings and trial, and the amendment of the defendant's petition if such amendment is necessary to adequately present those contentions." *Id*.

¶ 16 Moreover, "[t]he Illinois Supreme Court has held that Rule 651(c) requires the record on appeal to show that counsel made amendments to the *pro se* petition which were necessary for an adequate presentation of [the] defendant's contentions." *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 21. "Postconviction counsel must meet these procedural requirements in order to present a constitutional claim adequately under the Act." *Id.* "The filing of a certificate under Rule 651(c) by postconviction counsel signifies those duties have been fulfilled and creates a rebuttable presumption that

postconviction counsel has provided the reasonable assistance contemplated by the Act." *Rivera*, 2016 IL App (1st) 132573, ¶ 36. "A defendant has the burden of overcoming that presumption by demonstrating that counsel failed to substantially comply with the duties set out in Rule 651(c)." *Id*. The record as a whole may also demonstrate compliance with Rule 651(c). See *People v. Richmond*, 188 Ill. 2d 376, 380 (1999).

¶ 17 Here, the circuit court granted the State's motion to dismiss the amended postconviction petition because it found the allegations of ineffective assistance of trial counsel in the amended postconviction petition were positively rebutted by the record, specifically by the record of the January 11, 2013, plea hearing and agreement. Accordingly, the circuit court made no finding of a constitutional violation and the defendant's case did not advance to the third stage for an evidentiary hearing.

¶ 18 On appeal, the defendant contends that, despite filing a certificate—pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013)—her postconviction counsel provided unreasonable assistance because, although an amended postconviction petition was filed, counsel failed to support the claims of the amended postconviction petition with evidence or allegations of prejudice, thereby leaving the circuit court no choice but to dismiss the petition without an evidentiary hearing.

¶ 19 The defendant specifies that postconviction counsel failed to allege facts, failed to address evidence, and failed to allege that the defendant would not have pleaded guilty but for trial counsel's deficient performance. To show ineffective assistance of trial counsel, the defendant must show that (1) trial counsel's performance fell below an objective standard of reasonableness and (2) the performance prejudiced the defendant by

creating a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668, 688-90 (1984).

¶ 20 Here, postconviction counsel filed a Rule 651(c) certificate, thereby creating a rebuttable presumption that the defendant was provided reasonable assistance. See *Rivera*, 2016 IL App (1st) 132573, ¶ 36. We find the defendant did not rebut this presumption as required. See *id*. We further find that, besides the filed certificate, the record also demonstrates compliance with Rule 651(c). See *Richmond*, 188 Ill. 2d at 380.

¶ 21 After reviewing the plea hearing and agreement, we find the circuit court correctly concluded that the allegations of the petition are positively rebutted by the record. First, the petition alleges that defendant's trial counsel failed to communicate with the defendant while she was incarcerated in the county jail awaiting trial. However, trial counsel stated as follows at the plea hearing:

> "Your Honor, after having reviewed all the discovery and spending quite some time with my client today, we have accepted the State's offer as stated. I did want to inform the Court that we've spent [a] considerable amount of time today in negotiations and reviewing the evidence, and our acceptance of the State's offer is based upon review of all that evidence."

We find that these statements positively rebut the defendant's allegation in her petition that trial counsel failed to communicate with her before the trial.

¶ 22 Second, the petition alleges that trial counsel failed to advise the defendant that her sentence pertaining to count II would be served at 75% and not 50%. Again, this

allegation is positively rebutted by the record. At the plea hearing, the State's attorney set forth the details of the plea agreement, which included, in relevant part: "Count II is the offense of aggravated participation of methamphetamine production ***, a sentence of 15 years with three years MSR. *** Also it would be further ordered that *** [the] defendant would serve 75 percent in regard to Count II only ***." Subsequently, the defendant's attorney stated as quoted above, confirming that the negotiated plea offer had been reviewed in detail with the defendant prior to the proceeding, which encompassed a "considerable amount of time." Moreover, the circuit court questioned the defendant to ensure that she had agreed to what had been explained by the State's attorney. The defendant replied that she did, in fact, agree to those terms and that nothing had been omitted. We find that these statements positively rebut the defendant's allegation in her petition that trial counsel failed to advise her that her sentence for count II would be served at 75%.

¶ 23 Finally, the defendant alleges in her petition that her trial counsel "only briefly reviewed the Discovery provided by the State's Attorney with the Defendant." This, as with the first allegation, is rebutted by the defendant's trial counsel's statement that he spent considerable amounts of time reviewing all of the evidence and the negotiations in detail. Accordingly, we find the defendant's allegation that trial counsel only briefly reviewed the discovery with her is positively rebutted by the record.

¶ 24 The defendant emphasizes that the presumption of reasonable assistance is rebutted when postconviction counsel fails to support a petition with affidavits, records, or other evidence. See *People v. Turner*, 187 Ill. 2d 406, 414 (1999). While this may be

so, we add that " '[n]either paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law, or consume the time and the energies of the court or the opposing party by advancing frivolous arguments.' " *People v. Greer*, 212 Ill. 2d 192, 207 (2004) (quoting *McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988)). Here, there is no evidence in the record that postconviction counsel could have included in the petition to show that the defendant was prejudiced by trial counsel's performance when all of the allegations are clearly rebutted by the record of the plea hearing. To reiterate, "claims that are positively rebutted by the original trial court record are patently without merit." *Jefferson*, 345 Ill. App. 3d at 76. For these reasons, we find the defendant failed to rebut the presumption that her postconviction counsel provided reasonable assistance. See *Rivera*, 2016 IL App (1st) 132573, ¶ 36. See also *Richmond*, 188 Ill. 2d at 380.

¶ 25 II. *Drug Assessments*

¶ 26 The second issue on appeal is whether the circuit court erred by imposing three drug assessments when only one assessment per charging instrument is authorized by statute. Section 80(g) of the Methamphetamine Control and Community Protection Act states that "[t]he court shall not impose more than one assessment per complaint, indictment, or information." 720 ILCS 646/80(g) (West 2014).

¶ 27 Here, the State concedes that the defendant was ordered to pay three assessments, but because there was only one charging instrument, only one assessment was authorized. Because this court has the authority to correct the mittimus, at any time and without remanding the matter to the circuit court (see, *e.g. People v. Harper*, 387 Ill. App. 3d 240,

244 (2008)), the mittimus in this case must be corrected to impose only one assessment. Accordingly, we correct the mittimus to reflect the same.

¶ 28 III. *Pretrial Custody Credit*

¶ 29 The final issue on appeal is whether the defendant is entitled to a $5 per day credit against her drug assessment for time spent in pretrial custody. Section 110-14(a) of the Code of Criminal Procedure of 1963 provides, in relevant part, that "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2014).

¶ 30 Here, the State concedes that the defendant was assessed three different fines, was incarcerated on a bailable offense, and is entitled to 87 days of credit for her time spent in pretrial custody. The State further concedes that the defendant did not receive the $435 credit and is entitled to receive it. Again, because we have the authority to correct the mittimus at any time and without remanding the matter to the circuit court (see *Harper*, 387 Ill. App. 3d at 244), the mittimus in this case must be corrected to reflect the proper amount of presentence custody. Therefore, as stipulated by the parties, we correct the mittimus to reflect a credit of $435, comprising $5 per day for 87 days.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, we affirm the April 6, 2015, judgment of the circuit court of Hardin County that dismissed the defendant's postconviction petition, and we correct the mittimus to reflect one drug assessment and a pretrial custody credit in the amount of $435.

¶ 33 Affirmed; mittimus corrected.