2019 IL App (2d) 161044-U
No. 2-16-1044
Order filed March 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LLOYD T. THOMAS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 00-CF-2621 Honorable Thomas J. Stanfa, David P. Kliment Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Because defendant's successive postconviction petition had been advanced to the second stage, the State's participation in the trial court's assessment of cause and prejudice was not improper; (2) defendant was entitled to new second-stage proceedings because either his counsel violated Rule 651(c) by failing to allege cause and prejudice in his amended petition or the trial court erred by denying counsel's request for leave to amend the petition to do so after the State raised the issue.

¶ 2 Defendant, Lloyd T. Thomas, appeals from an order of the circuit court of Kane County dismissing his amended successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) for relief from his conviction of three counts of aggravated

criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2000)). Defendant argues that (1) the State improperly participated in the trial court's determination that he had not shown cause and prejudice and (2) he did not receive reasonable assistance from his attorney. We vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 Defendant's conviction was entered on January 3, 2002, and we affirmed the conviction on direct appeal. *People v. Thomas*, No. 2-02-0405 (2003) (unpublished order under Illinois Supreme Court Rule 23). Defendant subsequently filed a petition under the Act. The petition was eventually dismissed and we affirmed the dismissal. *People v. Thomas*, 2013 IL App (2d) 120646. Defendant then filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The trial court dismissed that petition as well, but no appeal was taken.

¶ 5 On July 16, 2014, defendant filed the successive postconviction petition that is the subject of this appeal. On October 15, 2014, the trial court appointed counsel to represent defendant in the postconviction proceedings. The court later entered an order indicating that it had advanced the petition to the second stage of the proceedings (see 725 ILCS 5/122-2.1(b) (West 2014)) when it appointed counsel to represent defendant. Defendant's attorney filed an amended successive postconviction petition, which was accompanied by her certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 6 The State moved to dismiss the amended successive petition, arguing *inter alia* that, because the petition did not satisfy the cause-and-prejudice test (see 725 ILCS 5/122-1(f) (West 2014)), defendant was not entitled to leave to file it. At the hearing on the motion, defendant's attorney argued that the trial court had given defendant leave to file his successive petition when

the court advanced the petition to the second stage. Ruling on the State's motion, the trial court stated that "the request to *file* the successive petition for post-conviction relief is respectfully denied." (Emphasis added.) Defendant's attorney indicated that she believed that, when the trial court advanced the petition to the second stage, it found that cause and prejudice existed. She asked for the opportunity to amend the petition to allege cause and prejudice. The trial court denied the request. In a written order, the trial court stated that proceeding to the second stage "does not abrogate showing of 'cause [and] prejudice' requirement." The order further stated, "[Defendant] is not granted leave to file successive [postconviction petition]; [the State's] motion to dismiss is granted." This appeal followed.

¶ 7 II. ANALYSIS

¶ 8 Before proceeding, we note that defendant has moved to cite *People v. Johnson*, 2018 IL 122227, as additional authority. We ordered the motion taken with the case, and we now grant it.

¶ 9 Turning to the merits, we begin our analysis with a brief review of the legal principles governing proceedings under the Act:

> "The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, the circuit court determines whether the petition is 'frivolous or is patently without merit.' [Citation.] The court makes an independent assessment as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. [Citation.] The court considers the petition's 'substantive virtue' rather than its procedural compliance. [Citation.] If the court determines the petition is frivolous or patently without merit, the court dismisses the petition. [Citation.] If the petition is not dismissed, it will proceed to the second stage. [Citation.]

> At the second stage, the court may appoint counsel to represent an indigent defendant, and counsel may amend the petition if necessary. [Citation.] The State may then file a motion to dismiss the petition. [Citation.] If the State does not file a motion to dismiss or if the court denies the State's motion, the petition will proceed to the third stage and the court will conduct an evidentiary hearing on the merits of the petition. [Citation.]" *People v. Hommerson*, 2014 IL 115638, ¶¶ 7-8.

To survive a second-stage motion to dismiss, the petition must make a substantial showing of a constitutional violation. *People v. York*, 2016 IL App (5th) 130579, ¶ 16.

¶ 10 Subject to an exception that does not apply here, the Act permits a defendant to file only one petition without leave of court, which may be granted "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2014). " 'Cause' refers to some objective factor external to the defense that impeded [the defendant's] efforts to raise the claim in an earlier proceeding. 'Prejudice' refers to a claimed constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process." *People v. Davis*, 2014 IL 115595, ¶ 14; see 725 ILCS 5/122-1(f) (West 2014).

¶ 11 Defendant argues that the trial court's dismissal of this successive postconviction petition must be reversed because the State participated in the trial court's initial determination of whether defendant made a sufficient showing of cause and prejudice. Defendant relies, in part, on *People v. Bailey*, 2017 IL 121450, in which our supreme court held that the State "should not be permitted to participate at the cause and prejudice stage of postconviction proceedings." *Id.* ¶ 24. The *Bailey* court reasoned that, for purposes of deciding whether a defendant should be granted leave to file a successive petition, the cause-and-prejudice test presents a question of law

"to be decided on the pleadings and supporting documentation submitted to the court by the defendant-petitioner, and that no provision is made in the statute for an evidentiary hearing on the issue of cause and prejudice." *Id.* The *Bailey* court stressed that this determination of cause and prejudice "is a preliminary screening to determine whether defendant's *pro se* motion for leave to file a successive postconviction petition adequately alleges facts demonstrating cause and prejudice." *Id.* Because the trial court is capable of making an independent determination of the adequacy of the allegations, the *Bailey* court "[saw] no reason for the State to be involved at the cause and prejudice stage." *Id.* ¶ 25. The *Bailey* court was careful to explain that, when a petition advances to the second stage, the State may then "seek dismissal of the petition on any grounds, including the defendant's failure to prove cause and prejudice for not having raised the claims in the initial postconviction petition." *Id.* ¶ 26.

¶ 12 Unlike in *Bailey*, where the State participated in the preliminary screening for cause and prejudice, in this case the State participated only after the petition advanced to the second stage. From every appearance, the trial court simply did not conduct any preliminary screening. Although the trial court should not have dispensed with the preliminary screening,[1] the error was favorable to defendant. More importantly, despite the trial court's failure to conduct the preliminary screening, the fact remains that the matter reached the second stage. To now remand for the preliminary screening would be an empty ritual of no conceivable benefit to defendant. Even if the trial court granted leave to file the petition, the State would undoubtedly renew its motion to dismiss because of defendant's failure to show cause and prejudice, in which case defendant would be in exactly the same position as he was prior to this appeal. Furthermore,

[1] We do note, though, that defendant failed to move for leave to file his successive petition.

unlike in *Bailey*, defendant had the assistance of counsel in connection with the determination of cause and prejudice. The *Bailey* court stated, "permitting the State to argue against a finding of cause and prejudice at this preliminary stage, *when the defendant is not represented by counsel*, is inequitable, fundamentally unfair, and raises due process concerns." (Emphasis added.) *Id.* ¶ 27. Because defendant was represented by counsel, those considerations do not exist here. For all these reasons, we reject defendant's argument that the case must be remanded because of the State's participation in the determination of cause and prejudice.

¶ 13 Defendant next contends that postconviction counsel did not provide the level of assistance to which he was entitled. Counsel appointed to represent a defendant in postconviction proceedings must provide a " reasonable' level of attorney assistance." *Johnson*, 2018 IL 122227, ¶ 16. To that end, Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) provides that "[t]he record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

¶ 14 Defendant argues that counsel's performance was unreasonable because she failed to amend the petition to make a showing of cause and prejudice. Counsel in postconviction proceedings must amend the defendant's petition to overcome any procedural barriers to consideration of the merits of the petition. *People v. Perkins*, 229 Ill. 2d 34, 49 (2007). However, the absence of such an amendment does not necessarily establish unreasonable assistance. If there simply are no grounds for establishing cause and prejudice, counsel's failure

to amend the petition is not unreasonable. Courts rely, in the first instance, on counsel's Rule 651(c) certificate to establish that counsel did all that he or she could reasonably do to overcome procedural barriers to consideration of the merits of the petition. Thus, counsel's Rule 651(c) certificate creates a presumption that he or she fulfilled his or her duties, including the duty to amend the petition. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 15 It is not entirely clear, however, that cause and prejudice need to be alleged in an amended successive petition. *Bailey* establishes that leave to file a successive petition does not foreclose the State from revisiting the question of cause and prejudice. It does not necessarily follow, however, that the amended petition must *anticipate* that the State will revisit the issue. For the moment, we assume that it does and that an amended successive petition must allege facts showing cause and prejudice. If that assumption is correct, a proper Rule 651(c) certificate (such as the one filed here) would create a presumption that counsel provided reasonable assistance. If counsel did not amend the petition to include allegations of cause and prejudice, it would be presumed that counsel could not have reasonably done so. Significantly, however, the presumption is rebuttable.[2] Here, the presumption is rebutted because counsel herself acknowledged that she did not realize that the petition needed to be amended. Under these circumstances, it is impossible to determine that counsel actually "made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R, 651(c) (eff. July 1, 2017). A remand would thus be required.

[2] *Profit* illustrates this point. In *Profit*, the defendant's amended successive petition did not allege cause and prejudice. Although the *Profit* court relied on the presumption arising from counsel's Rule 651(c) certificate, the court observed that the presumption could have been overcome had the defendant identified grounds for establishing cause and prejudice.

¶ 16 As noted, however, it is possible that counsel was correct, *i.e.* that it was not necessary to amend the petition anticipatorily to address an issue—cause and prejudice—that the State *might* revisit. In that event, counsel provided reasonable assistance by asking for an opportunity to further amend the petition, and it was error for the trial court to refuse to do so. See 725 ILCS 5/122-5 (West 2014); *People c.* Cruz, 2013 IL 113399, ¶ 33 (Freeman, J., specially concurring, joined by Burke, J.). That error would require a remand.

¶ 17 III. CONCLUSION

¶ 18 For the foregoing reasons, under these unusual facts, we vacate the order of the circuit court of Kane County dismissing defendant's successive postconviction petition. On remand, counsel shall file a new Rule 651(c) certificate. Counsel may amend the petition. The State may renew its motion to dismiss, and if it does so, the trial court shall hold a hearing on the motion.

¶ 19 Vacated and remanded with directions.