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2019 IL App (3d) 160209-U

Order filed March 7, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0209
)	Circuit No. 93-CF-462
WILLIAM HORTON,)	
Defendant-Appellant.)	Honorable Walter D. Braud, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel provided an unreasonable level of assistance where counsel failed to attach any affidavits to the amended postconviction petition, and the record showed that counsel could have obtained an affidavit from defendant concerning his claim that the late filing of his petition was not due to his culpable negligence.

¶ 2 Defendant, William Horton, appeals the dismissal of his amended postconviction petition at the second stage of proceedings. Defendant argues that his postconviction counsel failed to provide the reasonable level of assistance required by Illinois Supreme Court Rule 651(c) (eff.

Feb. 6, 2013) by failing to attach any affidavits to the amended petition. Defendant further argues that the record showed that counsel could have obtained an affidavit from defendant supporting his claim that the late filing of his petition was not due to his culpable negligence. We reverse and remand.

¶ 3

I. BACKGROUND

¶ 4

Following a jury trial, defendant was found guilty of four counts of first degree murder (720 ILCS 5/9-1(a)(2) (West 1992)), one count of attempted first degree murder (*id.* §§ 8-4(a), 9-1), two counts of aggravated battery with a firearm (*id.* § 12-4.2), and two counts of armed robbery (*id.* § 18-2(a)). The circuit court entered sentences of 60 years' imprisonment on one count of first degree murder, 20 years' imprisonment for attempted first degree murder, 20 years' imprisonment on one count of armed robbery, and 20 years' imprisonment on the second count of armed robbery. The sentences for first degree murder and one count of armed robbery were to run concurrently with one another. The sentences for attempted first degree murder and the other count of armed robbery were to run concurrently with one another but consecutive to the other sentences.

¶ 5

On appeal, we affirmed defendant's convictions. *People v. Horton*, No. 3-97-0808 (1999) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6

On May 16, 2007, defendant filed a *pro se* postconviction petition alleging that he received ineffective assistance of appellate counsel in that appellate counsel failed to challenge his convictions under the one-act, one-crime rule and failed to argue that defendant's consecutive sentences were improper. The court advanced defendant's petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. The State filed a

motion to dismiss alleging that defendant's postconviction petition was untimely, and defendant failed to allege facts showing that the delay was not due to his culpable negligence.

¶ 7 Postconviction counsel filed a response to the motion to dismiss on defendant's behalf. The response claimed that defendant's sentence was void and that a void order may be attacked at any time. The response also alleged that the late filing of defendant's *pro se* petition was not due to defendant's culpable negligence.

¶ 8 Defendant's own unnotarized affidavit was attached to the response. The affidavit stated that defendant was unable to obtain assistance from a prison law librarian, and he was informed by an inmate law clerk that there was no other course of action for him to take after his appeal was denied. Defendant was later transferred to another prison, where inmates informed him that his sentence was excessive and that his appellate attorney should have challenged his sentence. Defendant was then transferred to a third prison where he received legal help from other inmates in drafting his *pro se* petition. Defendant was also advised that the constitutionality of a statute could be raised at any time. Defendant stated that the consecutive sentencing statute under which he was sentenced was unconstitutional such that his sentence was void.

¶ 9 The court granted the State's motion to dismiss. The court reasoned that defendant's affidavit and filings did not establish a lack of culpable negligence on defendant's part.

¶ 10 On appeal, we reversed the judgment of the circuit court and remanded the matter for a new second-stage hearing. *People v. Horton*, 2012 IL App (3d) 100410-U, ¶ 26. We found that postconviction counsel had failed to comply with Rule 651(c), and we directed postconviction counsel to fully comply with the rule on remand. *Id.* ¶ 24. Specifically, we ordered postconviction counsel to file an amended postconviction petition including defendant's claims

of constitutional error and defendant's explanation as to why he was not culpably negligent in the untimely filing of his petition. *Id.*

¶ 11 On remand, the court appointed new postconviction counsel to represent defendant. Postconviction counsel filed a certificate of compliance with Rule 651(c). Counsel also filed an amended postconviction petition alleging that defendant received ineffective assistance of appellate counsel in that appellate counsel failed to challenge defendant's convictions under the one-act, one-crime rule. The amended petition also alleged that defendant's due process rights were violated in that the circuit court imposed consecutive sentences.

¶ 12 Regarding defendant's lack of culpable negligence, the amended petition alleged that appellate counsel failed to inform defendant that he could challenge his sentence through the filing of a postconviction petition or of the procedures for filing a postconviction petition. The amended petition asserted that an inmate law clerk incorrectly advised defendant about his right to seek postconviction relief and that defendant was denied access to the prison library and to legal assistance while in prison. The petition stated that defendant was only able to receive assistance and file a *pro se* postconviction petition after he was transferred to a new prison in 2005. The amended petition also alleged that defendant should be allowed to proceed with postconviction proceedings because a void order may be attacked at any time in any court.

¶ 13 No affidavits were filed with the amended petition.

¶ 14 The State filed an answer to the amended petition alleging that defendant's convictions were not covered under the one-act, one-crime rule. The answer also stated that defendant's consecutive sentences were proper, and the sentences were not excessive. Finally, the answer asserted that defendant failed to show that his failure to file his postconviction petition in a timely manner was not due to his culpable negligence.

¶ 15 Upon hearing arguments, the court dismissed the amended petition. Specifically, the court stated: “I’ve considered the arguments, considered the petitions and the answer, reviewed the law applicable, and the petition for post-conviction relief is denied. The petition is dismissed.”

¶ 16 Defendant appeals.¹

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that postconviction counsel failed to provide the reasonable level of assistance required by the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) and Rule 651(c) where counsel failed to file any affidavit in support of defendant’s claims along with the amended postconviction petition. Defendant argues that the record shows that counsel could have filed an affidavit from defendant supporting the allegations in the amended petition that the late filing of the petition was not due to defendant’s culpable negligence because defendant’s prior postconviction counsel had filed such an affidavit with his response to the State’s motion to dismiss. We find that postconviction counsel provided an unreasonable level of assistance in failing to attach any affidavit to defendant’s petition.

¶ 19 At the second stage of postconviction proceedings, a petitioner must make a substantial showing of a violation of constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). “To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits.” *Id.* The Act provides that a postconviction petition shall be verified by affidavit. 725 ILCS 5/122-1(b) (West 2014). The Act also provides: “The petition

¹On appeal, the Office of the State Appellate Defender filed a “Notice of Missing Exhibit” stating that State exhibit No. 1, a poster-sized diagram of the crime scene, had been lost or misplaced. The “Notice of Missing Exhibit” indicated that the parties agreed that the misplaced exhibit had no bearing on the issues under consideration in this appeal. Accordingly, we proceed to address the merits of defendant’s appeal in the absence of the missing exhibit.

shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.” *Id.* § 122-2. Where a postconviction petition is filed outside of the applicable time limitation, the Act requires the petitioner to “allege[] facts showing that the delay was not due to his or her culpable negligence.” *Id.* § 122-1(c).

¶ 20 In postconviction proceedings, there is no constitutional right to counsel. *People v. Cotto*, 2016 IL 119006, ¶ 29. However, postconviction petitioners are entitled to a reasonable level of assistance of postconviction counsel. *Id.* ¶ 30. “To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel.” *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Specifically, Rule 651(c) requires that counsel consult with the petitioner to ascertain his or her contentions of deprivation of constitutional rights, examine the record of proceedings at the trial, and make any amendments to the *pro se* petition that are necessary for an adequate presentation of the petitioner’s contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). “The filing of a certificate in compliance with Rule 651(c) gives rise to the presumption that the defendant received the required representation, but the presumption may be rebutted by the record.” *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10. The issue of whether postconviction counsel provided a reasonable level of assistance pursuant to Rule 651(c) is reviewed *de novo*. *Id.*

¶ 21 Here, the record rebuts the presumption that postconviction counsel complied with Rule 651(c). Normally, when a postconviction petition is not supported by affidavits or other documents, the court may reasonably presume that counsel attempted to obtain supporting affidavits but was unable to do so. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993). However, in this case, the record shows that counsel could have submitted an affidavit from defendant supporting his claim that his delay in filing his postconviction petition was not due to his

culpable negligence. Defendant's prior postconviction counsel had previously filed such an affidavit in support of his response to the State's motion to dismiss, albeit an unnotarized one. However, defendant's second postconviction counsel failed to attach any affidavit to the amended petition. Accordingly, postconviction counsel failed to make the necessary amendments to the *pro se* petition to adequately presentation of the petitioner's contentions, as required by Rule 651(c). See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 22 As we have found that postconviction counsel failed to comply with the requirements of Rule 651(c) by failing to file any affidavit in support of defendant's claims, we must remand the matter for new second-stage proceedings regardless of whether defendant's underlying claims had merit. A postconviction attorney's failure to comply with the requirements of Rule 651(c) may not be excused on the basis of harmless error. See *Suarez*, 224 Ill. 2d at 51-52. Rather, our 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." *Id.* at 47.

¶ 23 In reaching our decision, we reject the State's argument that the Act only required postconviction counsel to allege facts in the amended petition tending to show that the late filing of the petition was not due to defendant's culpable negligence. The State cites *People v. Perkins*, 229 Ill. 2d 34 (2007) in support of this proposition. However, *Perkins* merely held that Rule 651(c) requires that postconviction counsel amend an untimely petition to allege any facts that may establish a lack of culpable negligence in the late filing of a postconviction petition. *Id.* at 43. *Perkins* did not concern postconviction counsel's failure to file a supporting affidavit, and the *Perkins* court did not address that issue. Nothing in *Perkins* suggests that postconviction counsel

is not required to file an affidavit supporting the allegations of lack of culpable negligence when such an affidavit is available. See 725 ILCS 5/122-2 (West 2014).

¶ 24

III. CONCLUSION

¶ 25

The judgment of the circuit court of Rock Island County is reversed. The cause is remanded to the circuit court for the appointment of new postconviction counsel and new second-stage postconviction proceedings in full compliance with Rule 651(c).

¶ 26

Reversed and remanded.