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2019 IL App (3d) 160682-U

Order filed May 8, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0682
ANTHONY K. HAWKINS,)	Circuit No. 08-CF-2169
Defendant-Appellant.)	Honorable Carmen Julia Goodman, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Wright concurred in the judgment
Justice O'Brien, concurred in part and dissented in part.

ORDER

- ¶ 1 *Held:* (1) Defendant failed to provide a record on appeal sufficient to support his assertion that postconviction counsel did not comply with the requirements of Rule 651(c); (2) the circuit court's failure to explicitly state the reasons justifying the shackling of defendant warranted remand for a retrospective *Boose* hearing.
- ¶ 2 A jury convicted defendant, Anthony K. Hawkins, of first degree murder and aggravated unlawful use of a weapon (AUUW). After this court affirmed defendant's convictions and sentences on appeal, he filed a *pro se* postconviction petition. Following a hearing at which

defendant was shackled over his objections, the circuit court denied defendant's petition at the second stage of postconviction proceedings. On appeal, he argues that postconviction counsel failed to comply with the requirements of Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) in that he did not make amendments to defendant's petition necessary for an adequate presentation of defendant's claims. Defendant also argues that the court erred in ordering that he be shackled without stating the reasons supporting the shackling on the record. We remand so that the court may conduct a retrospective hearing pursuant to *People v. Boose*, 66 Ill. 2d 261 (1977).

¶ 3

I. BACKGROUND

¶ 4

The State charged defendant with first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) and AUUW (*id.* § 24-1.6(a)(1)(3)). Before trial, defendant filed a motion to suppress certain statements made to the police after he had invoked his right to counsel.

¶ 5

Prior to the hearing on defendant's motion, the State indicated to the court that it had reviewed the video recording of defendant's interrogation, and suggested that it would be beneficial to the parties as well as the court for a written transcript of the interrogation to be prepared. The State indicated that a person in the Will County sheriff's department was in the process of preparing such a transcript. The court clarified: "This is not a certified transcript that you are obtaining, but simply a layman-trained court reported transcript?" The court also asked: "[Y]ou're not going to suggest what is being provided to the Court is an agreed stipulated transcript but a reference available for the both, the Court and Defense, correct?" The State and defense counsel agreed with the court's clarifications.

¶ 6

At a later court date, the State offered to present the interrogation video recording and transcript to the court in advance of the hearing, so that the court could review them ahead of

time. The State called Detective Jack Ellingham of the Will County sheriff's department, who testified that the video recording and the transcript were true and accurate. Following Ellingham's testimony, the court asked if there were any objections as to foundation. Defense counsel replied: "[W]e do not have an objection to the video." The court responded:

"The video is the only thing that would ever be presented into evidence. The transcript is not evidence. It's an aid to the Court or potentially to a jury at some point; but just like the I.P.I. instructions, if there's any disparity in my observation of what I see and hear on the DVD versus what is in the transcript, it's my duty to rely on my own observations."

The court continuously referred to the prepared transcript as "unofficial."

¶ 7 Following a hearing, the court granted in part and denied in part defendant's motion to suppress. Specifically, the court found that defendant's earliest references to a lawyer, found on page 12 of the transcript, were vague and not sufficient to invoke his right to counsel. However, the court found that later comments, beginning on page 20 of the transcript, *were* sufficient, and ordered that all statements made after that invocation of defendant's rights be suppressed.

¶ 8 The matter proceeded to trial, at which a jury found defendant guilty on both counts. The court subsequently sentenced defendant to terms of 45 years' and 2 years' imprisonment for first degree murder and AUUW, respectively. On appeal, this court affirmed those convictions and sentences. *People v. Hawkins*, 2013 IL App (3d) 110267-U.

¶ 9 On October 11, 2013, defendant filed a *pro se* postconviction petition. Defendant raised numerous issues in his petition, including that appellate counsel had been ineffective for failing to argue on direct appeal that the circuit court had erred by denying in part his motion to suppress. He also asserted that his conviction for AUUW was unconstitutional.

¶ 10 The court appointed counsel, advancing defendant’s petition to the second stage of postconviction proceedings. Counsel subsequently filed a petition for relief from judgment, alleging that defendant’s AUUW conviction should be vacated under *People v. Aguilar*, 2013 IL 112116. The court granted that petition and vacated defendant’s conviction.

¶ 11 Months later, counsel filed a motion to withdraw. In the motion, counsel stated that he had reviewed the record and defendant’s *pro se* postconviction petition, and that he had met with defendant in person to ascertain his contentions of error. Counsel concluded that there were no nonfrivolous arguments to be made on defendant’s behalf. With respect to the ineffectiveness of appellate counsel, postconviction counsel asserted that “the trial court’s decision is in accordance with applicable case law.” The circuit court found that counsel had complied with the requirements of Rule 651(c) and granted counsel’s motion to withdraw.

¶ 12 The State subsequently filed a motion to dismiss the postconviction petition. Defendant, now proceeding *pro se* at the second stage, filed a response. At the hearing on the State’s motion, defendant repeatedly requested that he be unshackled so that he could maneuver through his notes and other paperwork. The court declined defendant’s requests, but never provided any reason for doing so. The court ultimately granted the State’s motion to dismiss.

¶ 13 II. ANALYSIS

¶ 14 Defendant raises two arguments on appeal. First, he argues that postconviction counsel failed to file a Rule 651(c) certificate and that the record does not otherwise demonstrate that counsel complied with the requirements of that rule. Defendant maintains that this failure requires a remand for further second-stage proceedings. Defendant also argues that the court’s decision to keep him shackled during the second-stage hearing, absent any justification on the

record, was in violation of the requirements set forth by our supreme court in *Boose*. We address each argument in turn.

¶ 15 A. Rule 651(c)

¶ 16 Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires that a record contain a showing that postconviction counsel (1) consulted with the petitioner to ascertain his contentions of error, (2) examined the record of the proceedings at trial, and (3) “made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Counsel may make this showing by way of a Rule 651(c) certificate. *Id.* Such a certificate creates a rebuttable presumption of compliance with the rule. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). The certificate is not required, however, so long as satisfaction of the three requirements may still be found on the record. See Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

¶ 17 Defendant first asserts that counsel’s motion to withdraw does not constitute a Rule 651(c) certificate. Next, he argues that “the record reflects that counsel failed to make amendments to the *pro se* petition that were necessary for the adequate presentation of [defendant’s] claims.” Specifically, defendant contends that his claim of ineffectiveness of appellate counsel was viable and meritorious, and that counsel’s filing of a motion to withdraw alleging that all remaining claims were frivolous demonstrates a failure to comply with the third requirement of Rule 651(c).

¶ 18 Whether appellate counsel was ineffective turns, of course, on whether a challenge to the circuit court’s original suppression ruling would itself have been meritorious on direct appeal. Accordingly, the majority of defendant’s briefing on this issue is properly devoted to fifth amendment case law. His argument on appeal mirrors that originally made at the suppression

hearing, that his statements found on page 12 of the transcript were sufficient to invoke his right to counsel, requiring suppression of any statements that followed.

¶ 19 In making this argument, defendant relies extensively and exclusively on the transcript of the interrogation video. In a footnote to defendant’s brief, present appellate counsel explained: “The full interrogation video used during the motion to suppress hearing, containing [defendant’s] invocation of counsel, is not contained in the appeal record. Once appellate counsel has obtained the video, a certified copy will be filed with the court.” To date, however, no video has been filed. Defendant’s argument hinges entirely on the transcript.

¶ 20 The circuit court repeatedly made clear that the transcript in this case was not evidence. It was created by a member of the Will County sheriff’s department, was not certified, and was only ever intended to be used as an aid for the court and parties. Moreover, it should be noted that the copy of the transcript appearing on the record is heavily annotated, replete with underlines, strikeouts, highlights, and other notes. Under these circumstances, we find that it would be wholly inappropriate for this court to determine whether certain statements by defendant rose to the level of invoking his right to counsel.

¶ 21 “The appellant bears the burden of presenting an adequate record to support its claim of error. [Citation.] Any doubts stemming from an inadequate record will be construed against the appellant.” *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). The failure to provide a sufficient record must be construed against the appellant. *Id.* Here, defendant’s claim that he sufficiently invoked counsel—the basis for his claim that his ineffectiveness argument was meritorious—necessarily turns on the video recording of his interrogation, the only actual evidence of his statements.¹

¹We note that the record does contain one interrogation room video, apparently the one played at defendant’s trial. Each of defendant’s references to a lawyer has been redacted from the video, rendering it irrelevant with respect to the present issue.

Absent that video, we must “presume[] that the trial court’s judgment conforms to the law and has a sufficient factual basis.” *People v. Odumuyiwa*, 188 Ill. App. 3d 40, 45-46, (1989). We therefore presume not only that the original circuit court was correct in denying in part defendant’s motion, but that the postconviction court acted correctly in agreeing that there was no nonfrivolous argument to be made regarding ineffectiveness of appellate counsel. The record thus demonstrates that counsel did not fail to make any amendments to defendant’s petition that would be necessary for the adequate presentation of his claims. Accordingly, we affirm the circuit court’s second-stage dismissal, subject to our ruling with respect to defendant’s second argument below.

¶ 22

B. *Boose*

¶ 23

Defendant next argues that he was shackled without justification, in contravention of *Boose*. The State agrees and confesses error. The parties, however, dispute the proper remedy. Defendant urges that the circuit court’s denial of his petition at the second stage should be reversed, and the matter remanded for a new second-stage hearing, to be preceded by a *Boose* hearing if necessary. The State argues that the matter should be remanded only for a retrospective *Boose* hearing, with the matter only proceeding to a new second-stage hearing if the court determines that defendant should not have, in fact, been shackled at the original hearing.

¶ 24

In *Boose*, our supreme court held that the continued in-court shackling of a defendant must be accompanied by “a showing of necessity on the record.” *Boose*, 66 Ill. 2d at 268. The court further promulgated a list of the factors a court should consider in reaching such a decision. *Id.* at 266-67. In the present case, the court provided no reasons for the continued shackling of

defendant, and there is otherwise no indication that the court considered the *Boose* factors. We accept the State’s confession of error and find that remand is indeed required.

¶ 25 We further find the appropriate remedy is a retrospective *Boose* hearing. In the case of either proposed remedy, the circuit court’s first undertaking will be to determine whether shackling is appropriate under *Boose*. See *People v. Johnson*, 356 Ill. App. 3d 208 (2005). In the event that the court concludes that defendant *should* be shackled, the holding of a new second stage-hearing—in all ways identical to the first such hearing—would be a wholly unnecessary, and a complete waste of judicial resources. Therefore, it is only necessary for the court to hold a new second-stage hearing if it concludes that defendant should *not* be shackled.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we affirm in part the judgment of the circuit court of Will County and remand with directions.

¶ 28 Affirmed in part and remanded with directions.

¶ 29 JUSTICE O’BRIEN, concurring in part and dissenting in part:

¶ 30 I concur with the majority’s decision to remand this matter for a retroactive *Boose* hearing, but write separately as I disagree with the majority’s determination that the record adequately demonstrates appellate counsel’s compliance with Illinois Supreme Court Rule 651(c).

¶ 31 As the majority points out, in order to adequately review whether the defendant’s claim that he invoked his right to counsel earlier in the interrogation than was determined by the trial court, it is necessary to view the police interrogation video. Likewise, in order for postconviction counsel to satisfy the requirements of Illinois Supreme Court Rule 651(c) the record must contain a showing that he or she examined the record of proceedings at trial. See Ill. S. Ct. R.

651(c) (eff. Feb. 6, 2013). There is nothing in the record that demonstrates postconviction counsel reviewed that video tape. Therefore, postconviction counsel cannot demonstrate he examined the record of the proceedings at trial in a manner that would satisfy the requirements of Rule 651(c). I would reverse the trial court's dismissal of the defendant's second stage postconviction petition and remand to the trial court for further proceedings.