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2019 IL App (3d) 170109-U

Order filed May 29, 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, Henry County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0109
MARK A. CROUCH,)	Circuit No. 08-CF-94
Defendant-Appellant.)	Honorable Carol M. Pentuic, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The record fails to affirmatively show that postconviction counsel complied with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 2 The defendant, Mark A. Crouch, appeals the second-stage dismissal of his postconviction petition. The defendant contends that the record does not clearly and affirmatively show that postconviction counsel provided him with reasonable assistance.

¶ 3 I. BACKGROUND

¶ 4 Following a retrial, a jury found the defendant guilty of controlled substance trafficking (720 ILCS 570/401.1(a) (West 2008)), unlawful possession of a controlled substance with the intent to deliver (*id.* § 401(a)(2)(D)), and unlawful possession of a controlled substance (*id.* § 402(a)(2)(D)). The circuit court merged the counts and sentenced the defendant to 39 years' imprisonment for controlled substance trafficking. The defendant appealed, and this court affirmed the defendant's conviction and sentence. *People v. Crouch*, 2013 IL App (3d) 110639-U.

¶ 5 Subsequently, the defendant filed a *pro se* postconviction petition, which is the subject of this appeal. The circuit court advanced the petition to the second stage and appointed postconviction counsel to represent the defendant. At an initial status hearing, the State informed the court,

“[Defendant] had filed a petition for post-conviction relief, and I think [postconviction counsel] is the third attorney. There's been some prior attorneys that have all withdrawn. [Postconviction counsel] was appointed, and we set it for a status today and had [defendant] writted back from the Department of Corrections [(DOC)] so that [postconviction counsel] could speak to [defendant] face-to-face today and determine how he wants to proceed as far as further scheduling in relation to the petition for post-conviction relief, if he's going to adopt it, make any amendments or changes, and then go from there.”

Postconviction counsel followed by stating,

“Your Honor, I've had a chance to read [defendant's] handwritten post-conviction relief petition. In it he alleges certain issues involving a prior attorney, [trial counsel]. I have written to [trial counsel] about two weeks ago now detailing the

issues that were raised in the post-conviction relief. I haven't heard from him. I was able to talk to him briefly today.

What I'd like to do is set it over for another status. And I know the procedure now for talking to [defendant] in [the DOC] and how I need to get a telephone conference set up with him, so I'm going to do that, talk further with [trial counsel], and I would be ready, I think, by the next status conference to decide how we want to proceed."

The court continued the matter. The report of proceedings from this status hearing does not indicate whether postconviction counsel spoke with the defendant regarding his *pro se* postconviction petition.

¶ 6 Next, postconviction counsel filed an addendum to the defendant's *pro se* postconviction petition raising two additional claims. Postconviction counsel did not file a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). In response, the State filed a motion to dismiss the defendant's postconviction petition. Following the arguments of the parties, the court dismissed the defendant's postconviction petition.

¶ 7 II. ANALYSIS

¶ 8 On appeal, the defendant contends that postconviction counsel failed to provide reasonable assistance. It is well-settled that a defendant is only entitled to a reasonable level of assistance from postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To achieve this level of assistance, Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) requires appointed counsel to (1) consult with the defendant to ascertain his contentions of constitutional deprivations, (2) examine the record of the proceedings of the original trial, and (3) make any

amendments to the *pro se* petition necessary to adequately present the defendant's constitutional contentions.

¶ 9 Compliance with Rule 651(c) is presumed if counsel files a Rule 651(c) certificate. *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10. However, in instances such as the present case, when counsel fails to file a Rule 651(c) certificate, compliance with the rule is not presumed. *People v. Lander*, 215 Ill. 2d 577, 584 (2005). Instead, the record must "clearly and affirmatively show" that appointed counsel complied with Rule 651(c) and provided reasonable assistance. *People v. Rodriguez*, 2015 IL App (2d) 130994, ¶ 19.

¶ 10 Upon review, we find that the record fails to demonstrate that postconviction counsel complied with his duty to consult with the defendant to ascertain his contentions of constitutional deprivation. Here, there are no statements on the record showing that postconviction counsel actually spoke with the defendant about his claims of constitutional deprivations. The only indication that counsel may have consulted with the defendant was counsel's statement that he planned to discuss the matter with the defendant and that counsel knew how to make a conference phone call with the defendant in the DOC. However, this statement only referred to counsel's future desire to speak with the defendant. In other words, nothing in the record shows that such a conversation ever occurred. Without any assurances that counsel did follow through with his plan to speak with the defendant, we cannot say that the record clearly and affirmatively shows that postconviction counsel satisfied the consultation requirement of Rule 651(c). Therefore, we need not discuss whether counsel fulfilled the other duties under Rule 651(c). See *Lander*, 215 Ill. 2d at 585.

¶ 11 In reaching this conclusion, we reject the State's argument that the record indicates that postconviction counsel consulted with the defendant by phone and in person. The State relies on

postconviction counsel’s statement, “I was able to talk to *him* briefly today,” to argue that counsel spoke with the defendant. The State’s argument is misplaced for two reasons. First, counsel’s statement was ambiguous in that it is not clear to whom counsel was referring. We note, however, that this statement was made while postconviction counsel was discussing his efforts to communicate with the defendant’s trial counsel. This context suggests that postconviction counsel was referring to speaking with the defendant’s trial counsel—not the defendant. Second, even if postconviction counsel was referring to a conversation he had with the defendant, his statement does not affirmatively show that he satisfied the consultation requirement. That is, postconviction counsel’s “brief” conversation with the defendant alone is insufficient to clearly and affirmatively demonstrate that he spoke with the defendant regarding his claims of constitutional deprivation.

¶ 12 Finally, we reject the State’s argument that the defendant has forfeited any contention that his postconviction claims were meritorious. Specifically, the State contends that if this court concludes that the record fails to demonstrate substantial compliance with Rule 651(c), then this court should remand only for compliance with the rule and otherwise affirm the dismissal of postconviction petition. The State’s argument ignores our supreme court’s consistent holding 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.” *People v. Suarez*, 224 Ill. 2d 37, 47 (2007) (collecting cases). Therefore, our analysis is focused exclusively on counsel’s compliance with the Rule 651(c) duties and not the merit of the defendant’s underlying claims. Consequently, we hold that this matter must be remanded to the circuit court for further postconviction proceedings where the defendant is entitled to receive reasonable assistance of counsel. *Id.*

¶ 13

III. CONCLUSION

¶ 14

The judgment of the circuit court of Henry County dismissing the defendant's postconviction petition is reversed, and the matter is remanded for the appointment of new counsel. See *People v. Shortridge*, 2012 IL App (4th) 100663, ¶ 16.

¶ 15

Reversed and remanded.