2019 IL App (3d) 180261-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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-18-0261 Circuit No. 09-CF-2086
RANDALL W. SYLER,	)	Honorable Daniel D. Rippy,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Schmidt and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to rebut the presumption that postconviction counsel provided reasonable assistance.

¶ 2 Defendant, Randall W. Syler, appeals the third-stage dismissal of his postconviction petition. Defendant contends that postconviction counsel failed to provide a reasonable level of assistance. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was found guilty of residential burglary (720 ILCS 5/19-3 (West 2008)). Prior to sentencing, trial counsel filed a motion for a fitness evaluation. In a written order, the court granted the request and indicated that it found a *bona fide* doubt existed as to defendant's fitness to stand trial. The court appointed a county psychologist to determine defendant's fitness. The cause was continued several times.

¶ 5 On August 23, 2010, trial counsel informed the court that she had just obtained the psychologist's report and asked to continue the case. The court inquired, "I haven't seen [the psychologist's report] yet. What is the bottom line on it? Fit?" Trial counsel replied, "The bottom line was that she found him fit to stand trial." Trial counsel then asked for a continuance to prepare for a fitness hearing, which the court allowed. The docket entry corresponding to this date stated,

> "Matter comes on for status as to fitness. Psychological Evaluation tendered to Court is impounded and filed. Defendant found to be fit to stand trial. On motion of the Defendant, matter is continued for hearing on fitness."

¶ 6 The cause was continued several times.

¶ 7 On October 19, 2010, the court stated that the cause was up for sentencing and asked the parties whether any other matters were pending. Trial counsel indicated that she believed that defendant's fitness had been resolved. The court asked if a hearing on defendant's fitness had been held, and trial counsel replied, "Yes, we did it August 23rd."

¶ 8 Ultimately, the court sentenced defendant to 20 years' imprisonment.

¶ 9 Defendant appealed. On appeal, defendant raised three issues. See *People v. Syler*, 2012 Ill App (3d) 100913-U. Relevant to this appeal, is defendant's claim that the circuit court

committed plain error by failing to hold a fitness hearing despite finding a *bona fide* doubt as to his fitness. *Id*. ¶¶ 18-29. This court rejected defendant's argument with the following discussion:

> "In this case, in its written order, the court indicated that it found *bona fide* doubt existed and granted defendant's request for a fitness examination. However, defendant presented no evidence that there was a substantial and legitimate doubt regarding his fitness. Despite the written order indicating that a *bona fide* doubt existed as to defendant's fitness, the record is void of any such indication. It appears that the order was entered in accordance with section 104-11(b) of the Code [of Criminal Procedure of 1963 (725 ILCS 5/104-11(b) (West 2008))] to order defendant to undergo a preliminary fitness evaluation to assist the court in determining whether a *bona fide* doubt existed. There is nothing in the record to support an actual finding of *bona fide* doubt so as to necessitate a fitness hearing.
>
> Moreover, on August 23, 2010, when the case was up for a fitness hearing, defense counsel indicated that the fitness examination resulted in defendant having been found fit. The trial court had previously observed defendant's behavior and demeanor throughout pretrial and trial. There is no indication in the record that defendant behaved irrationally or acted improperly at trial, did not fully understand the nature of the proceedings, or was unable to assist in his own defense. The trial court made an explicit finding that defendant was fit and then, at defendant's request, continued the matter for a fitness hearing. Subsequently, defense counsel did not pursue the issue of defendant's fitness any further, and had even indicated to the court that the issue had been resolved on August 23, 2010.

> Thus, we conclude that although holding a fitness hearing after finding that *bona fide* doubt exists may be mandatory, it is not so fundamental so as to warrant a reversal in this case, where there is no indication in the record that defendant was unfit for trial or sentencing. The court did receive the requested fitness evaluation showing defendant fit. Defendant did not request any additional hearings. Even on appeal, defendant does not point to any evidence that would have been presented at a fitness hearing to support a finding of unfitness. In fact, defendant does not argue that he would have been found unfit at a full fitness hearing. Consequently, defendant has failed to meet his burden of persuasion that the error affected the fairness of his trial or challenged the integrity of the judicial process. Accordingly, defendant's forfeiture of the issue cannot be excused as plain error." *Id*. ¶¶ 27-29.

¶ 10 Subsequently, defendant filed a *pro se* postconviction petition. Defendant's petition alleged that his due process rights were violated because the circuit court failed to hold a fitness hearing. Defendant also claimed he received ineffective assistance of counsel where counsel: (1) failed to inform him that he was eligible for an extended-term sentence, which caused him to reject a 10-year plea offer; and (2) incorrectly informed the court that there had been a fitness hearing. The court dismissed the petition at the first stage.

¶ 11 On appeal, this court reversed and remanded for second-stage postconviction proceedings. See *People v. Syler*, 2015 IL App (3d) 130563-U. This court addressed defendant's claim that his counsel provided ineffective assistance for failing to inform defendant that he was subject to a mandatory extended-term sentence. *Id*. ¶¶ 13-24. This court concluded that defendant's claim was sufficient to advance to the second stage in that it alleged that counsel's

performance was deficient for failing to inform defendant of the sentencing range and defendant was arguably prejudiced because he would have accepted a more favorable plea offer. *Id* However, this court did acknowledge that defendant's claim lacked all the essential elements to establish his claim. *Id.* ¶ 24. This court noted that defendant would also have to show that the State would not have cancelled the plea offer and that the court would have accepted the offer. *Id*. Despite this, this court found that defendant's allegations met the low standard of proof to advance to the second stage.

¶ 12 As to defendant's claim regarding his fitness, this court acknowledged that the due process fitness issue had already been litigated in defendant's initial appeal. Therefore, the claim on its face was barred by *res judicata*. *Id*. ¶ 26. However, this court found that defendant's claim in terms of ineffective assistance for failing to insist on holding a fitness hearing was not barred by *res judicata* because it relied on matters outside the record. *Id*. Therefore, this court concluded that the petition sufficiently alleged a claim of ineffective assistance of counsel that should advance to the second stage. *Id.*

¶ 13 On remand, defendant's appointed counsel adopted defendant's *pro se* petition. Later, postconviction counsel asked the court for additional time to investigate and amend the petition. Postconviction counsel later filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Postconviction counsel did not amend defendant's petition.

¶ 14 At a subsequent hearing, postconviction counsel informed the court, "I have been in contact with Ms. Payne, who was the trial counsel. We are in the process of getting the public defender notes on that and send that to her so she can review it."

¶ 15 Ultimately, the circuit court set the petition for a third-stage evidentiary hearing.

¶ 16 Prior to the third-stage hearing, the State filed a notice of an affidavit of defendant's trial counsel in lieu of live testimony because trial counsel was now a judge in Cook County. The notice alleged that "it does not appear that" postconviction counsel contacted trial counsel. Attached to the notice is a document purporting to be an affidavit that indicated that trial counsel had told defendant at the beginning of her representation that he was eligible for an extended-term sentence.[1] Trial counsel also indicated that defendant rejected the State's plea offers with full knowledge that he was subject to an extended-term sentence. As to defendant's fitness, trial counsel's statement indicated that trial counsel obtained defendant's fitness evaluation prior to trial and did not request a formal fitness hearing because the matter was "clearly determined." The document was signed by trial counsel, but not notarized. The State later filed an identical copy of the notice and trial counsel's statement that had a certification clause, but again was not notarized.

¶ 17 At the third-stage hearing, defendant testified that he had never seen the fitness evaluation. Defendant did not provide any support for his claim that he was unfit because he did not know how to obtain such documentation. He also stated that he did not know he was subject to extended-term sentencing until after trial. He denied that counsel ever informed him that he was subject to an extended term sentence. However, defendant claimed that he would have accepted the State's more favorable plea offers had he known that he was subject to an extended-term sentence.

¶ 18 In response, the State presented the trial counsel's statement. Defendant did not object. During the arguments, postconviction counsel stated that the applicable standard was to view the

[1]Both parties agree that the document does not qualify as an affidavit because it was not notarized. See *People v. Ross*, 2015 IL App (3d) 130077, ¶ 16. For convenience, we will simply refer to this document as trial counsel's statement.

evidence "in the light most favorable to the State," but argued that trial counsel's statement contained inaccuracies which called in to question trial counsel's memory. Postconviction counsel also noted the absence of an affidavit from defendant's cocounsel at trial. Ultimately, the circuit court found that defendant failed to meet his burden when viewing the evidence "in the light most favorable to the State." The court, therefore, denied defendant's postconviction petition.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues that postconviction counsel provided unreasonable assistance. The right to counsel during postconviction proceedings is statutory under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)), and petitioners are only entitled to a reasonable level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

> "To assure the reasonable assistance required by the Act, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. [Citation.] Under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary for an adequate presentation of the petitioner's contentions." *People v. Perkins*, 229 Ill. 2d 34, 42 (2007).

Where, as here, postconviction counsel files a Rule 651(c) certificate, there is a presumption that defendant received the representation required by Rule 651(c). *People v. Russell*, 2016 IL App (3d) 140386, ¶ 10. The burden, therefore, is on defendant to rebut this presumption by demonstrating that postconviction counsel failed to substantially comply with the duties required by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 21 Defendant contends that he has rebutted the presumption of substantial compliance. While defendant does not claim that postconviction counsel failed to communicate with him or examine the record of proceedings as required by Rule 651(c), defendant contends postconviction counsel provided unreasonable assistance because he did not amend the petition to adequately plead the essential elements of his claims or attach evidentiary support. Because defendant failed to identify any available facts that would support an amended petition, we find defendant failed to rebut the presumption that postconviction counsel provided reasonable assistance.

¶ 22 Defendant makes several arguments as to why postconviction counsel provided unreasonable assistance, we discuss each in turn. First, defendant claims postconviction counsel was unreasonable for not amending his claim that trial counsel provided ineffective assistance by failing to correctly advise him that he was eligible for extended-term sentencing. Specifically, defendant contends that postconviction counsel should have amended the claim to allege prejudice. That is, postconviction counsel should have amended the petition to allege the State would not have rescinded the offer and that the court would have accepted the offer. See *People v. Hale*, 2013 IL 113140, ¶ 19 (describing the necessary elements of establishing prejudice). As noted above, by filing a Rule 651(c) certificate, we must presume that counsel determined that no amendments could be made to this claim that would render defendant's petition legally and factually sufficient. *Profit*, 2012 IL App (1st) 101307, ¶ 23. Defendant has not pointed to any available evidence that would support an amendment. Therefore, defendant has failed to rebut the presumption that postconviction counsel provided unreasonable assistance as to this issue.

¶ 23 Relying on this court's previous order reversing for second-stage proceedings, defendant also claims that postconviction counsel was unreasonable for failing to amend his claim that his

due process rights were violated where the circuit court failed to hold a fitness hearing. Specifically, defendant contends that postconviction counsel was required to amend this claim to avoid the procedural bar of *res judicata*. However, defendant misconstrues this court's previous order. This court specifically noted that the stand alone fitness claim was barred by *res judicata*. *Syler*, 2015 IL App (3d) 130563-U, ¶ 26. Postconviction counsel, therefore, did not need to amend this claim. Instead, as this court noted, the only fitness claim defendant could make is one couched in terms of ineffective assistance of trial counsel. *Id*. ¶ 27. Defendant raised this claim in his *pro se* postconviction petition, but failed to allege any prejudice. Despite defendant's claim to the contrary, we do not believe postconviction counsel provided unreasonable assistance by failing to amend this claim to allege prejudice. It is important to note that defendant never alleged he was actually unfit or that a fitness hearing would demonstrate that he was unfit. Postconviction counsel was therefore not required to search for evidence that was not identified in defendant's petition. Additionally, defendant has failed to identify any evidence that would support an allegation of prejudice. Indeed, such an argument would be difficult considering defendant was evaluated by a psychologist who concluded that defendant was fit to stand trial. Therefore, we find defendant failed to rebut the presumption that postconviction counsel determined that no amendments could be made to this claim.

¶ 24 As a corollary to the duty to amend, defendant also claims postconviction counsel failed to investigate his claims. Defendant contends that the record demonstrates that postconviction counsel never attempted to contact his trial counsel and obtain her affidavit. His argument, however, is contradicted by the record. While the State made a passing reference that it did not believe that postconviction counsel had contacted defendant's trial counsel, we note that postconviction counsel explicitly stated that he was in contact with defendant's trial counsel. The

State's passing statement is insufficient to rebut the presumption that postconviction counsel provided a reasonable level of assistance. Moreover, the record shows that trial counsel's testimony would not be favorable to defendant. Postconviction counsel did not need to explain why he failed to obtain trial counsel's affidavit, because the State presented trial counsel's statement.

¶ 25 Similarly, defendant argues postconviction counsel was unreasonable because he did not contact or obtain cocounsel's affidavit. Defendant did not name cocounsel in his *pro se* petition, allege that cocounsel provided ineffective assistance, or allege that cocounsel had personal knowledge relevant to defendant's claims. To the contrary, defendant's *pro se* petition specifically identified trial counsel as providing ineffective assistance. Postconviction counsel had no duty to locate witnesses not specifically identified by defendant and " 'has no obligation *** to engage in a generalized fishing expedition in search of support for claims raised in a petition.' " *People v. Williams*, 186 Ill. 2d 55, 61 (1999) (quoting *People v. Johnson*, 154 Ill. 2d 227, 248 (1993)). It is the defendant's burden to inform postconviction counsel, with specificity, of the identity of the witnesses who should have been called and generally the information the witnesses would have offered. Only then does postconviction counsel have a duty to attempt to contact those witnesses to obtain affidavits for the purpose of shaping the allegations in the petition into appropriate legal form. *People v. Moore*, 189 Ill. 2d 521, 542-43 (2000); *Williams*, 186 Ill. 2d at 61; *Johnson*, 154 Ill. 2d at 247-48. Postconviction counsel, therefore, had no duty to contact cocounsel.

¶ 26 Defendant also contends that postconviction counsel made an unreasonable "amendment" to his petition at the third-stage hearing by arguing that the court should view the evidence in the light most favorable to the State when making its determination. Defendant contends that

postconviction counsel's incorrect statement was unreasonable because the standard at a third-stage hearing is whether defendant has established a constitutional deprivation by the preponderance of the evidence. See *People v. Coleman*, 2013 IL 113307, ¶ 92. We do not find postconviction counsel's lone misstatement sufficient to rebut the presumption that counsel performed reasonably. Defendant's postconviction petition would not have succeeded under the correct preponderance of the evidence standard. As defendant acknowledges, his claims were legally and factually deficient. And, as discussed above, defendant has failed to point to any evidence that would have supported an amended petition. Accordingly, we find defendant has failed to rebut the presumption that postconviction counsel complied with the duties set forth by Rule 651(c).

¶ 27 In reaching our conclusion, we reject defendant's contention that if postconviction counsel could not amend the *pro se* petition, he should have withdrawn as counsel. As we noted in *People v. Malone*, 2017 IL App (3d) 140165, while postconviction counsel is permitted to withdraw if he concludes the allegations in a postconviction petition are meritless, counsel is not *compelled* to withdraw under such circumstances. See also *People v. Greer*, 212 Ill. 2d 192, 211 (2004). It is permissible, as occurred here, for counsel to stand on the allegations of the *pro se* petition. Moreover, while postconviction counsel's failure to withdraw in light of a meritless petition may speak to counsel's ethical duties, it speaks nothing to counsel's presumption of reasonable assistance under Rule 651(c).

¶ 28 III. CONCLUSION

¶ 29 The judgment of the circuit court of Will County is affirmed.

¶ 30 Affirmed.