

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2019 IL App (4th) 180141-U

NO. 4-18-0141

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 22, 2019
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Livingston County |
| JIMMY TILLEY, |) | No. 09CF39 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Jennifer Hartmann |
| |) | Bauknecht, |
| |) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court’s order dismissing defendant’s amended postconviction petition is vacated as defendant’s appointed counsel failed to comply with Illinois Supreme Court Rule 651(c).

¶ 2 In January 2018, the trial court granted the State’s motion to dismiss defendant’s amended postconviction petition during the second stage of proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2016)). Defendant appeals, arguing the court’s dismissal order should be reversed and this case remanded for a third-stage evidentiary hearing because he made a substantial showing (1) his trial counsel was ineffective for failing to present known mitigation evidence at sentencing and (2) his appellate counsel was also ineffective. In the alternative, defendant argues the trial court’s order dismissing defendant’s amended postconviction petition should be reversed because postconviction counsel

did not file an Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) certificate and the record does not show substantial compliance with the rule. We vacate the court's dismissal order, accepting the State's concession defendant's appointed counsel failed to comply with Rule 651(c), remand this case for further second-stage postconviction proceedings, and direct the trial court to provide defendant new postconviction counsel with leave to amend and add supporting documentation, as he or she deems necessary, in support of defendant's claims.

¶ 3

I. BACKGROUND

¶ 4 In November 2009, defendant was found guilty of participating in the production of 100 grams or more but less than 400 grams of a substance containing methamphetamine (720 ILCS 646/15(a)(1) (West 2008)). In December 2009, the trial court sentenced defendant to 24 years in prison and 3 years of mandatory supervised release. The court also ordered defendant to pay various fines, fees, and assessments.

¶ 5 On direct appeal, defendant argued he was entitled to \$1,630 in presentence custody credit against his drug assessment based on 326 days he spent in presentence custody. This court affirmed as modified and remanded the case for the trial court to amend the sentencing judgment to reflect the credit. *People v. Tilley*, No. 4-10-0586 (Jan. 27, 2012) (unpublished summary order under Illinois Supreme Court Rule 23(c)(2)).

¶ 6 In April 2012, defendant filed a *pro se* postconviction petition pursuant to the Act, alleging in part that (1) trial counsel was ineffective for failing to argue his 24-year sentence was unconstitutionally disproportionate to the severity of the offense; (2) counsel was ineffective for failing to contact Dr. Swink and use Dr. Swink's affidavit and an affidavit from a local pharmacist as evidence in mitigation that defendant had a drug addiction and sought treatment; and (3) appellate counsel was ineffective for not raising these arguments on direct appeal.

Defendant stated he did not attach the affidavits of Dr. Swink and the local pharmacist to his petition because he gave them to trial counsel and no longer had access to them. *People v. Tilley*, 2013 IL App (4th) 120606-U, ¶ 15.

¶ 7 In June 2012, the trial court summarily dismissed defendant's petition, finding the petition frivolous and patently without merit. The court also found defendant failed to show his trial or appellate counsel's performance fell below an objective standard of reasonableness. *Tilley*, 2013 IL App (4th) 120606-U, ¶ 16.

¶ 8 Defendant appealed the trial court's summary dismissal. The State conceded defendant's postconviction petition raised an arguably meritorious claim of ineffective assistance of counsel as to the presentation of mitigation evidence at defendant's sentencing hearing. The State asked this court to reverse the trial court's summary dismissal and remand the case for second-stage proceedings. *Tilley*, 2013 IL App (4th) 120606-U, ¶ 18. This court agreed, stating:

“Here, defendant's postconviction petition raised an arguably meritorious claim of ineffective assistance of counsel. At sentencing, the trial court found no factors in mitigation. However, it is arguable that evidence regarding the circumstances of defendant's drug addiction and his prior attempts to treat it may have placed his background and recent offenses in a better light.” *Tilley*, 2013 IL App (4th) 120606-U, ¶ 23.

This court did not discuss the remainder of defendant's claims as defendant's petition in its entirety had to be docketed for second-stage proceedings under the Act. *Tilley*, 2013 IL App (4th) 120606-U, ¶ 24. On remand, counsel could be appointed for defendant and his petition amended. *Tilley*, 2013 IL App (4th) 120606-U, ¶ 25. This court noted: “At the second stage, the trial court ‘must determine whether the petition and any accompanying documentation make a

substantial showing of a constitutional violation.’ [Citation.] If a substantial showing of a constitutional violation is set forth, the cause will proceed to the third stage and an evidentiary hearing on the merits of the petition.” *Tilley*, 2013 IL App (4th) 120606-U, ¶ 25.

¶ 9 In June 2014, on remand, the trial court appointed postconviction counsel to represent defendant. On July 19, 2017, defendant’s appointed counsel filed an amended petition for postconviction relief on defendant’s behalf.

¶ 10 Defendant’s amended postconviction petition presented an argument his Sixth Amendment right to the effective assistance of counsel was violated because his trial counsel did not move to bar drug evidence, did not make an argument regarding the constitutionality of defendant’s sentence, and did not present evidence regarding statutory mitigating factors, including his drug addiction or corresponding medical condition. According to defendant’s amended petition, trial counsel’s failure to introduce mitigating evidence was objectively unreasonable and prejudiced defendant because the court found no mitigating factors existed. Defendant’s amended postconviction petition made no argument his appellate counsel was ineffective.

¶ 11 On September 26, 2017, the State filed a motion to dismiss defendant’s amended petition for postconviction relief.

¶ 12 On January 25, 2018, the trial court entered an order granting the State’s motion to dismiss defendant’s amended postconviction petition.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues the trial court erred in dismissing his amended postconviction petition and asks this court to reverse the court’s dismissal and remand this case for a third-stage evidentiary hearing. In the alternative, defendant asks this court to reverse the

dismissal of defendant's amended petition and remand for further second-stage proceedings because his postconviction counsel did not file a Rule 651(c) certificate and the record does not show clear and affirmative compliance with Rule 651.

¶ 15 The State argues the trial court properly dismissed defendant's amended petition as written. However, citing *People v. Johnson*, 154 Ill. 2d 227, 245, 609 N.E.2d 304, 312 (1993), the State concedes the case should be remanded to the trial court for further second stage postconviction proceedings because postconviction counsel failed to comply with Rule 651(c). According to the State, defendant's appointed counsel failed to attach any affidavits to the amended petition even though the amended petition referred to "readily available evidence." In addition, citing *People v. Schlosser*, 2017 IL App (1st) 150355, 82 N.E.3d 683, the State suggests we order the trial court to appoint new counsel to represent defendant.

¶ 16 We accept the State's concession, vacate the trial court's dismissal order, and remand the case for additional second-stage postconviction proceedings. We also agree with the State's suggestion with regard to appointed counsel and order the trial court on remand to appoint new counsel to represent defendant. We note defendant's substantive arguments on appeal are not based on the amended petition filed by defendant's appointed counsel but instead are based on defendant's *pro se* postconviction petition. While we make no determination on the merits of defendant's claims in his *pro se* postconviction petition, the fact his appellate counsel relies on defendant's *pro se* petition instead of the amended petition filed by appointed counsel in the trial court supports appointing new counsel for defendant on remand in this case.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we vacate the dismissal of defendant's amended postconviction petition, remand the case for further second-stage postconviction proceedings,

and order the trial court to provide defendant new postconviction counsel with leave to amend and add supporting documentation, as he or she deems necessary, in support of defendant's claims.

¶ 19 Remanded with Directions.