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2019 IL App (3d) 160749-U

Order filed June 21, 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. 3-16-0749
WASHINGTON T. GRIFFIN,)	Circuit No. 10-CF-197
Defendant-Appellant.)	Honorable Jeffrey W. O'Connor, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction counsel provided an unreasonable level of assistance where counsel failed to make the amendments to the *pro se* petition necessary to adequately present defendant's claims.

¶ 2 Defendant, Washington T. Griffin, appeals the dismissal of his postconviction petition at the second stage of postconviction proceedings. Specifically, defendant argues that his postconviction counsel provided an unreasonable level of assistance by failing to shape his postconviction claims into the proper legal form. We reverse and remand.

I. BACKGROUND

¶ 3

¶ 4

Defendant was charged with unlawful delivery of a controlled substance within 1000 feet of a public park (720 ILCS 570/407(b)(1) (West 2010)) and unlawful possession of a controlled substance with intent to deliver (*id.* § 401(c)(2)). The controlled substance at issue in both counts was cocaine.

¶ 5

Defendant filed a motion for supplemental discovery pursuant to Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001) and *Brady v. Maryland*, 373 U.S. 83 (1963). The motion discussed a laboratory report prepared by forensic scientist Chris C. Jacobson and dated September 9, 2010. The motion demanded to know the exact location where the object referenced in the report—the corner of a plastic bag—was found. The motion also demanded to know who the fingerprints found on the corner of the plastic bag belonged to.

¶ 6

A hearing was held on defendant’s motion. Defense counsel requested to know where the plastic bag corner was found and whose fingerprints were on it. Defense counsel argued that this information “could be exculpatory evidence within the definition of *Brady v. Maryland*.” The State responded that the laboratory report it provided showed that there were no latent prints suitable for comparison on the object defendant referenced. The court indicated that it had looked at both the State’s and defendant’s copy of the laboratory report. The court asked: “Where is it saying that they have a fingerprint, on that report? I don’t see it.” Defense counsel stated that he did not know.

¶ 7

Defendant pled guilty to unlawful delivery of a controlled substance within 1000 feet of a public park in exchange for the State’s agreement that the sentence would be capped at 30 years’ imprisonment. The State also agreed to dismiss the charge of unlawful possession of a

controlled substance with intent to deliver. After admonishing defendant, the court accepted his guilty plea.

¶ 8 The court sentenced defendant to 25 years' imprisonment. Defendant filed a motion to reconsider his sentence through counsel. Defendant subsequently filed a *pro se* motion to reconsider sentence as well. Defendant did not file a motion to withdraw his plea. The court denied the motion to reconsider defendant's sentence.

¶ 9 On direct appeal, we dismissed defendant's appeal for lack of compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) upon the motion of the Office of the State Appellate Defender. *People v. Griffin*, No. 3-11-0435 (2011) (unpublished minute order).

¶ 10 Defendant filed a *pro se* postconviction petition alleging, *inter alia*, that plea counsel provided ineffective assistance for failing to file a pretrial motion to quash defendant's arrest and suppress evidence based on the fact that the crime laboratory was unable to match defendant's fingerprints to the bags of cocaine submitted by the State. The *pro se* postconviction petition also alleged that plea counsel was ineffective for failing to advise defendant regarding the difference between a blind plea and a plea with a sentencing cap. The petition alleged that defendant would not have accepted a plea agreement with a sentencing cap if he had been advised regarding the affect of a sentencing cap on his ability to appeal his sentence.

¶ 11 The court advanced the matter to the second stage of postconviction proceedings and appointed counsel. Ultimately, postconviction counsel filed a pleading titled "Fourth Amneded [*sic*] Post-Conviction Relief Petition" (amended postconviction petition). Regarding defendant's claims of deprivation of constitutional rights, the amended postconviction petition alleged, in relevant part, as follows:

“5. Defendant/Petitioner plead Guilty only after his trial counsel had, despite the request of Defendant/Petitioner, failed to file a Motion to Quash Arrest and a Motion to Suppress Evidence during the Pre-Trial proceedings. The failure of his counsel to do this denied Defendant/Petitioner Due Process of Law and rendered his counsel ineffective under the standard(s) set in *Strickland v. Washington* *** and its progeny ***.

6. Defendant/Petitioner alleges that he was denied effective counsel when he plead guilty ‘open’ or ‘blind’ because his trial attorney had failed to disclose to him the difference between an ‘open’ and/or ‘blind’ plea and a plea with a cap (an agreement his sentence could not be definite, certain specified number of years). Defendant/Petitioner was denied effective counsel under the standard(s) set in *Strickland* ***.

7. Defendant/Petitioner alleged he was denied effective counsel when [his] trial attorney failed to call witnesses at his sentencing hearing that Defendant/Petitioner had requested to be called.

8. Defendant/Petitioner alleges his trial counsel improperly referred to the cocaine he allegedly possessed as ‘rock’ and ‘crack’ cocaine when in fact it was not, therefore prejudicing the judge against him. *** Defendant/Petitioner further alleges this error illustrates that his trial counsel failed to adequately and thoroughly investigate Defendant/Petitioner’s case and competently present evidence in Defendant/Petitioner’s favor. Defendant/Petitioner alleges his trial counsel’s performance was ineffective under the *Strickland* test ***.

9. Defendant/Petitioner alleges that after he was sentenced herein, he duly and timely filed a notice of appeal.

10. Defendant/Petitioner was granted an appellate attorney and it was then when the Defendant/Petitioner learned from his appellate attorney that his appeal had to be dismissed do [sic] to the ineffective assistance of counsel of his trial attorney. ***

11. Defendant/Petitioner alleges that his sentence was far in excess of what his trial attorney told him he should expect to receive, that he would not receive the maximum sentence or any sentence near it, and that he would likely receive a sentence of TEN (10) years. Defendant/Petitioner alleges that the sentence he received herein (twenty-five (25) years) was too harsh and so inconsistent with the facts of this case that it was an error and was constitutionally defective.

12. Defendant/Petitioner alleges that the prosecution violated the standard in *Brady v. Maryland* ***, in that it did not disclose certain potentially exculpatory evidence (State Police fingerprint report(s)) to the defense.”

¶ 12 Defendant’s affidavit was attached to the amended petition. The affidavit stated, in relevant part:

“5. I asked my trial attorney numerous times before trial if I could get a ‘cap’ on my possible sentence. My trial attorney advised me to plead ‘open’ and/or ‘blind’ and that this would produce the same outcome as a cap. I understood that I would likely receive a sentence of no more than TEN (10) years, much less than the maximum sentence or a sentence of twenty-five (25) years.

6. I met on multiple occasions, with [plea counsel] and provided [plea counsel] with the names I wanted called at trial. None of these witnesses were called.”

¶ 13 An affidavit from defendant’s brother was also attached to the amended petition. The affidavit stated that defendant’s brother heard defendant provide his plea counsel with the names of witnesses he wanted called at his sentencing hearing, but none of the witnesses were called. The affidavit did not set forth the names of the witnesses.

¶ 14 The State filed a motion to dismiss the amended postconviction petition. At a hearing on the State’s motion, the State argued that the amended petition did not set forth sufficient factual details to support the claims it raised. The State also argued that defendant’s claim that plea counsel failed to secure a sentencing cap was contradicted by the record because defendant’s plea agreement contained a 30-year sentencing cap. The State argued that defendant’s claim that the State committed a *Brady* violation by failing to disclose exculpatory evidence was not supported by the record because the item at issue was disclosed during discovery and was not exculpatory. The court granted the State’s motion to dismiss.

¶ 15 II. ANALYSIS

¶ 16 Defendant argues that his postconviction counsel provided an unreasonable level of assistance by failing to shape his *pro se* postconviction claims into proper legal form. We find that counsel provided an unreasonable level of assistance in that he failed to make the necessary amendments to defendant’s *pro se* petition to adequately set forth defendant’s claims.

¶ 17 There is no constitutional right to the assistance of counsel during postconviction proceedings. *People v. Cotto*, 2016 IL 119006, ¶ 29. However, postconviction petitioners have a statutory right to a reasonable level of assistance of counsel under the Post-Conviction Hearing

Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). *Cotto*, 2016 IL 119006, ¶ 30. To ensure that postconviction petitioners receive a reasonable level of assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes certain duties on postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Rule 651(c) provides, in relevant part:

“The record *** shall contain a showing, which may be made by certificate of petitioner’s attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner’s contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

Our supreme court has “repeatedly held that the purpose of Rule 651(c) is to ensure that counsel shapes the petitioner’s claims into proper legal form and presents those claims to the court.” *Perkins*, 229 Ill. 2d at 43-44.

¶ 18 Postconviction counsel may file a certificate to show that he or she complied with the requirements of Rule 651(c), or the record as a whole may demonstrate that counsel complied with the rule. *People v. Richmond*, 188 Ill. 2d 376, 380 (1999). “A filed Rule 651(c) certificate creates a presumption of compliance that can be rebutted by the record.” *People v. Marshall*, 375 Ill. App. 3d 670, 680 (2007). See also *People v. Lander*, 215 Ill. 2d 577, 584 (2005) (“The failure to file a certificate showing compliance with Rule 651(c) is harmless error if the record demonstrates that counsel adequately fulfilled the required duties.”).

¶ 19 In the instant case, postconviction counsel failed to file a Rule 651(c) certificate, so there is no presumption that counsel complied with the rule. Where, as here, postconviction counsel

fails to file a Rule 651(c) certificate, “the record must clearly and affirmatively show that [counsel] complied with the rule and provided reasonable assistance.” *People v. Rodriguez*, 2015 IL App (2d) 130994, ¶ 19.

¶ 20 The record does not clearly and affirmatively show that counsel complied with the requirement of Rule 651(c) that he make the necessary amendments to the *pro se* petition to adequately present defendant’s contentions of deprivation of constitutional rights. The amended postconviction petition filed by postconviction counsel primarily contained conclusory allegations bereft of factual detail, and it failed to allege the essential elements of many of the claims it raised. See *People v. Turner*, 187 Ill. 2d 406, 413 (1999) (holding that postconviction counsel failed to make the necessary amendments to the *pro se* postconviction where postconviction counsel failed to amend the *pro se* petition to include the essential elements of the defendant’s claims). Also, several of the allegations in the petition are contradicted by the record. Due to these deficiencies in the amended postconviction petition, we find that postconviction counsel failed to shape defendant’s claims into the proper legal form and present them to the court. See *Perkins*, 229 Ill. 2d at 43-44.

¶ 21 For example, the amended petition alleged that plea counsel was ineffective for failing to file a motion to quash arrest and suppress evidence, but it did not indicate what evidence defendant sought to have suppressed or allege what basis, if any, existed for such a motion. It also failed to allege any facts tending to show that defendant was prejudiced by counsel’s failure to file such a motion, which was an essential element of defendant’s ineffective assistance of counsel claim. See *Turner*, 187 Ill. 2d at 413; see also *People v. Henderson*, 2013 IL 114040, ¶ 15 (“[W]here an ineffectiveness claim is based on counsel’s failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant must demonstrate that the

unargued suppression motion is meritorious, and that a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed.”).

¶ 22 The amended petition also alleged that plea counsel was ineffective for not calling witnesses at the sentencing hearing that defendant requested him to call. However, the petition did not give the names of the witnesses, indicate what their testimony would have been, or indicate how defendant was prejudiced by plea counsel’s failure to call the witnesses. The State contends that postconviction counsel had no duty to locate witnesses not specifically identified by defendant. However, the record does not show whether defendant failed to identify these witnesses to postconviction counsel or whether counsel merely failed to adequately present this claim. Because postconviction counsel failed to file a Rule 651(c) certificate, we do not presume that counsel complied with the duties set forth in the rule absent an affirmative showing on the record. See *Rodriguez*, 2015 IL App (2d) 130994, ¶ 19.

¶ 23 Also, postconviction counsel did not adequately set forth defendant’s *pro se* claim that his plea counsel was ineffective for failing to advise him of a sentencing cap on his ability to appeal his sentence. In the *pro se* petition, defendant alleged that he would not have accepted a plea agreement with a cap if he had understood the effects on his appeal rights. However, in the amended petition, postconviction counsel alleged that defendant was “denied effective counsel when he plead guilty ‘open’ or ‘blind’ because his trial attorney had failed to disclose the difference between an ‘open’ and/or ‘blind’ plea and a plea with a cap.” Counsel filed an affidavit from defendant along with the amended petition stating that defendant asked his plea counsel numerous times if he could get a sentencing cap, but plea counsel advised defendant to enter an open plea instead.

¶ 24 The version of this claim set forth in the amended petition was meritless and was contradicted by the record. The record shows that defendant entered a partially negotiated guilty plea with a sentencing cap rather than an open plea. Specifically, the record shows that the State agreed to a sentencing cap of 30 years' imprisonment and dismissal of one of the charges in exchange for defendant's guilty plea. Thus, any claim that plea counsel was ineffective for advising defendant to enter an open plea rather than a plea with a sentencing cap would necessarily fail because defendant would be unable to show prejudice. We also note that postconviction counsel's characterization of the plea as an open plea indicates that counsel did not adequately review the record as required by Rule 651(c).

¶ 25 Additionally, postconviction counsel's inclusion of the *Brady* claim in the amended petition suggests that he did not adequately review the record. In the amended petition, counsel alleged that the State failed to disclose potentially exculpatory evidence, namely, a state police fingerprint report. However, the record shows that a laboratory report showing that no fingerprints were suitable for comparison was turned over to the defense and was discussed by the parties at a pretrial hearing.

¶ 26 As a final matter, we note that defendant argues that the amended petition did not contain sufficient citations to authority, while the State argues that the inclusion of case law citations showed that postconviction counsel properly amended the *pro se* petition. However, the Act provides that “[a]rgument and citations and discussion of authorities shall be omitted from the petition.” 725 ILCS 5/122-2 (West 2012). Accordingly, postconviction counsel's citation to legal authority in the amended petition did not factor in to our analysis of the adequacy of the petition.

¶ 27

III. CONCLUSION

¶ 28 Because postconviction counsel failed to file a Rule 651(c) certificate and the record does not show that counsel made the amendments to the *pro se* petition that were necessary to adequately present defendant's claims, remand is required regardless of whether defendant's postconviction claims had merit. See *People v. Suarez*, 224 Ill. 2d 37, 47 (2007). Accordingly, the judgment of the circuit court of Henry County dismissing the amended postconviction petition is reversed, and the matter is remanded for the appointment of new counsel and new second-stage proceedings in compliance with Rule 651(c).

¶ 29 Reversed and remanded.