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SUMMARY
May 4, 2023

2023COA39

**No. 20CA2167, *People v. Nozolino* — Criminal Procedure —
Postconviction Remedies — Postconviction Counsel**

Relying on the reasoning from *People v. Chalchi-Sevilla*, 2019 COA 75, a division of the court of appeals concludes that if a pro se defendant's postconviction motion contains at least one claim that is not ripe for summary denial and also requests the appointment of counsel, then under Crim. P. 35(c)(3)(IV) and (V), the postconviction court must serve the entire postconviction motion on the prosecutor and public defender's office, affording the latter the opportunity to further investigate the claims and add any claims that have arguable merit. And this service is to be done without first disposing of any claims that the postconviction court determines on initial review do not have arguable merit.

Court of Appeals No. 20CA2167
El Paso County District Court No. 10CR2496
Honorable Paul A. King, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Bruce Joseph Nozolino,

Defendant-Appellant.

ORDERS REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FURMAN
Freyre and Welling, JJ., concur

Announced May 4, 2023

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¶ 1 Defendant, Bruce Joseph Nozolino, appeals the postconviction court's orders denying his Crim. P. 35(c) motion for postconviction relief without a hearing and his request for the appointment of counsel.

¶ 2 We are presented with the issue of what procedure a postconviction court should follow when a pro se party files a multi-claim Crim. P. 35(c) motion in which he requests appointment of counsel and the postconviction court determines, based on its initial review, that some, but not all, of the pro se party's claims have arguable merit. We conclude that, under these circumstances, Crim. P. 35(c)(3)(IV) and (V) require the postconviction court to serve the entire postconviction motion on the prosecutor and public defender's office, affording the latter the opportunity to further investigate all the claims and add any claims that have arguable merit. To clarify, service of the entire motion is to be done without first disposing of the claims that the postconviction court determines on initial review do not have arguable merit. And if postconviction counsel enters, counsel may add new claims or amend any existing claims that have arguable merit.

¶ 3 Because we conclude that the postconviction court did not comply with the procedures of Crim. P. 35(c)(3)(IV) and (V), we reverse the orders and remand the case for the court to forward a complete copy of Nozolino’s motion to the public defender or alternate defense counsel (ADC) to conduct further proceedings in accordance with Crim. P. 35(c)(3)(V).

I. Legal Authority

¶ 4 Crim. P. 35(c)(3)(IV) requires a postconviction court, when reviewing a postconviction motion, to consider, among other things,

whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds that, if true, entitle the party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue.

If the motion, files, and record show to the court’s satisfaction that the defendant is not entitled to relief, the court may deny “the motion” without a hearing. Crim. P. 35(c)(3)(IV); *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003); *People v. Higgins*, 2017 COA 57, ¶ 4.

¶ 5 “If the court does not deny the motion under (IV)” and “[i]f the defendant has requested counsel be appointed in the motion, the court shall cause a complete copy of said motion to be served on the Public Defender.” Crim. P. 35(c)(3)(V). The public defender then has forty-nine days to file a response regarding whether counsel “intends to enter on behalf of the defendant.” *Id.* “In such response, the Public Defender shall identify whether any conflict exists, request any additional time needed to investigate, and add any claims the Public Defender finds to have arguable merit.” *Id.* If a conflict exists, then ADC shall be appointed as the defendant’s counsel for purposes of Crim. P. 35(c)(3)(V). *See People v. Terry*, 2019 COA 9, ¶¶ 12-14, ¶ 12 n.1; *see also* § 21-2-103(1.5)(b), C.R.S. 2022.

¶ 6 Once the public defender or ADC files a response, the court shall direct the prosecution to respond to the defendant’s claims and the defendant to reply to the prosecution’s response. Crim. P. 35(c)(3)(V). “Thereafter, the court shall grant a prompt hearing on the motion unless, based on the pleadings, the court finds that it is appropriate to enter a ruling containing written findings of fact and conclusions of law.” *Id.*

II. Standards of Review and Reversal

¶ 7 Two standards of review and one standard of reversal guide our analysis. We review a postconviction court’s summary denial of a Crim. P. 35(c) motion for postconviction relief de novo. *People v. Gardner*, 250 P.3d 1262, 1266 (Colo. App. 2010). And we review interpretations of the rules of criminal procedure de novo. *Higgins*, ¶ 11.

¶ 8 If a postconviction court’s order does not comply with the provisions of Crim. P. 35(c)(3)(V), we review for harmless error. *Higgins*, ¶ 16; *People v. Davis*, 2012 COA 14, ¶ 13. “An error is not harmless, as relevant here, if it affected the fairness of the district court proceedings.” *Higgins*, ¶ 16.

¶ 9 We initially reject the People’s assertion that Nozolino’s claim on appeal was not preserved, and thus is subject to plain error review, because he did not challenge the procedure the court implemented in summarily denying his motion. Nozolino requested the appointment of counsel, and his request was itself sufficient to preserve his challenge to the postconviction court’s noncompliance with the procedures of Crim. P. 35(c)(3)(IV) and (V). *See id.* at ¶¶ 6-10.

III. Nozolino's Postconviction Challenge

¶ 10 A jury found Nozolino guilty of first degree murder and thirteen counts of attempted first degree murder. A division of this court affirmed the judgment of conviction on direct appeal. See *People v. Nozolino*, (Colo. App. No. 14CA0800, Jan. 11, 2018) (not published pursuant to C.A.R. 35(e)).

¶ 11 In his Crim. P. 35(c) motion, Nozolino asserted thirteen claims of ineffective assistance of counsel and newly discovered evidence and requested the appointment of postconviction counsel. In an August 2020 order, the postconviction court denied most of Nozolino's claims and appointed counsel to represent him on the surviving claims.

¶ 12 The public defender moved to withdraw as counsel due to a conflict of interest and requested the appointment of ADC. The same day, the prosecution submitted a response to Nozolino's surviving claims and attached documentation refuting these claims. The prosecution asked the court to deny the surviving claims and the motion in its entirety, without a hearing.

¶ 13 The postconviction court granted the public defender's motion to withdraw but said that it would address the appointment of ADC

after it considered the prosecution's submitted argument and documentation.

¶ 14 The postconviction court then ordered Nozolino to file a pro se response to the prosecution's submission. Nozolino filed a response and again requested the appointment of counsel to assist him. The prosecution thereafter filed a reply to Nozolino's pro se response.

¶ 15 In a November 2020 order, the postconviction court denied the claims that were not denied in the August 2020 order and vacated its order appointing counsel on those claims.

IV. Analysis

¶ 16 Nozolino contends, the People concede, and we agree that the postconviction court did not comply with Crim. P. 35(c)(3)(V)'s procedures in resolving the claims not initially denied in the August 2020 order. We therefore reverse the August 2020 order and the November 2020 order and remand the case for further proceedings in accordance with Crim. P. 35(c)(3)(V). *See Higgins*, ¶¶ 13-17; *Davis*, ¶¶ 10-15.

¶ 17 Nozolino asserts that, because the postconviction court did not comply with these procedures, on remand, his entire motion should be provided to ADC and that counsel should be permitted to pursue

all his pro se claims, including the claims denied in the August 2020 order, and to add any other claim of arguable merit.

¶ 18 The People disagree with Nozolino, asserting that the postconviction court's summary denial of some of Nozolino's claims in its August 2020 order was permissible. The People consequently ask us to affirm the denial of these claims.

¶ 19 There seems to be a split of authority on this issue.

¶ 20 On the one hand, in *People v. Terry*, 2019 COA 9, the postconviction court denied three of the defendant's four postconviction claims and appointed counsel to address the remaining claim. *Id.* at ¶ 6. ADC filed a supplemental motion, raising additional postconviction claims. *Id.* at ¶ 7. The court then determined that five of the defendant's six claims did not entitle him to relief and ordered the prosecution to respond to the remaining claim, which the defendant ultimately withdrew. *Id.*

¶ 21 On appeal, the defendant challenged only the postconviction court's second order denying his five supplemented claims without first requiring the prosecution to respond. *Id.* at ¶¶ 8-9, 16. A division of this court concluded that the postconviction court's

denial complied with the procedures of Crim. P. 35(c)(3)(V) or that any noncompliance with the Rule was harmless. *Id.* at ¶¶ 17-21.

¶ 22 But in resolving that distinct issue, the division also said that, after determining three of the defendant’s four pro se claims lacked merit, the postconviction court “properly served both the Public Defender’s Office and the prosecution with the motion, instructing appointed defense counsel to address only issues on which it had not ruled.” *Id.* at ¶ 15.

¶ 23 On the other hand, in *People v. Chalchi-Sevilla*, 2019 COA 75, the postconviction court summarily denied the defendant’s two postconviction claims and his request for the appointment of counsel. *Id.* at ¶¶ 4-5. A division of this court determined that the postconviction court erred by denying one of the claims without appointing counsel and conducting an evidentiary hearing. *Id.* at ¶ 20.

¶ 24 The division then determined that it need not address the merits of the postconviction court’s denial of the defendant’s other claim because, “based on [its] construction and understanding of Crim. P. 35(c)(3)(IV) and (V), if a defendant’s pro se Crim. P. 35(c) motion presents at least one potentially meritorious claim, the

postconviction court shall provide ‘a complete copy’ of the motion to appointed counsel.” *Id.* at ¶ 25 (quoting Crim. P. 35(c)(3)(V)).

“Because [the defendant’s] first claim had potential merit, the postconviction court should have proceeded to Crim. P. 35(c)(3)(V) by referring the complete pro se motion to counsel and allowing counsel to supplement any potentially meritorious claims.” *Id.* at ¶ 26. The division thus remanded the case for further proceedings regarding the first claim under Crim. P. 35(c)(3)(V) and concluded that, on remand, postconviction counsel could determine whether to continue to pursue the defendant’s second claim. *Id.* at ¶¶ 22-24, 26-27.

¶ 25 We agree with *Chalchi-Sevilla* for two reasons.

¶ 26 First, we note that the *Terry* division was not tasked with answering the question presented in *Chalchi-Sevilla* (and in this case) and that, therefore, *Terry*’s relevant language was unnecessary to the resolution of that appeal. *See Sullivan v. People*, 2020 CO 58, ¶ 21 n.5 (Obiter dictum is “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it

may be considered persuasive).” (quoting Black’s Law Dictionary 569 (11th ed. 2019))).

¶ 27 Second, as *Chalchi-Sevilla* notes, Crim. P. 35(c)(3)(IV) and (V) involve a court’s denial of the defendant’s “motion,” and not of the specific claims raised therein. When “the motion” is not denied under Crim. P. 35(c)(3)(IV), subsection (V) requires that a “complete copy of said motion” be served on the public defender. *See Higgins*, ¶ 15 (“[T]he event that triggers a district court’s duty to comply with Crim. P. 35(c)(3)(V)’s procedure is its decision not to summarily deny the defendant’s motion.”).

¶ 28 Thus we agree with *Chalchi-Sevilla* that Crim. P. 35(c)(3)(IV) and (V) require a postconviction court to allow appointed counsel, when requested, to respond to all claims raised in a pro se motion if the “motion” cannot be summarily denied because it contains at least one claim that is not subject to denial under Crim. P. 35(c)(3)(IV). *See Davis*, ¶ 14 (“[T]he procedures mandated by Crim. P. 35(c)(3)(V) inure to the defendant’s benefit”); *see also Higgins*, ¶ 17 (“[T]he district court’s decision not to send [the defendant’s] postconviction motion to the public defender’s office

deprived [the defendant] of the opportunity to have the public defender's office respond or add any claims with arguable merit.”).

¶ 29 Contrary to the People's assertion, nothing in Crim. P. 35(c)(3)(IV) permits a court to partially resolve a postconviction motion by summarily denying some claims and initiating Crim. P. 35(c)(3)(V)'s procedures for other claims. Rather, if a defendant's postconviction *motion* contains at least one claim that is not subject to summary denial under Crim. P. 35(c)(3)(IV), then the motion cannot be summarily denied, and the complete copy of the motion must be subjected to the procedures of Crim. P. 35(c)(3)(V).

¶ 30 The People also argue that interpreting Crim. P. 35(c)(3)(V) to require a postconviction court to forward an entire motion containing some potentially meritorious claims and some wholly unfounded claims to the public defender's office conflicts with the law on the statutory right to postconviction counsel because a defendant is entitled to representation by counsel only on a “motion [that] contains claims that are not wholly unfounded.” See §§ 21-1-103, -104, C.R.S. 2022. We disagree.

¶ 31 In *Silva v. People*, 156 P.3d 1164 (Colo. 2007), the Colorado Supreme Court recognized “a limited statutory right to post-

conviction counsel for meritorious Crim. P. 35(c) motions.” *Id.* at 1168. The court held that “the statutory right is limited to cases where a Crim. P. 35(c) petition is not wholly unfounded as judged by the trial court.” *Id.*

¶ 32 The court then noted that Crim. P. 35(c)(3)(V) requires the public defender to review a “complete copy of said motion” and to state “whether [it] intends to enter on behalf of the defendant.” *Id.* The court thus held that “the statutory right is also limited if the state public defender’s office finds the Crim. P. 35(c) motion without merit.” *Id.*

¶ 33 The court concluded that, “the [S]tate public defender’s office must find that a defendant’s Crim. P. 35(c) motion has arguable merit before the statutory right to post-conviction counsel is triggered.” *Id.*

¶ 34 Contrary to the People’s argument, then, Crim. P. 35(c)(3)(IV) and (V) demonstrate that the statutory right to postconviction counsel is triggered when the “motion” or “petition” is not wholly unfounded. Thus, if a motion survives summary denial under Crim. P. 35(c)(3)(IV) because it contains at least one potentially meritorious claim, the motion is not wholly unfounded, even though

it may contain some wholly unfounded claims. Therefore, forwarding the motion to the public defender's office under Crim. P. 35(c)(3)(V) would not run afoul of *Silva*.

¶ 35 But more importantly, we note that, although our reading of Crim. P. 35(c)(3)(IV) and (V) could require the public defender or ADC to review a motion that contains some wholly unfounded claims, *Silva* makes clear that the statutory right to postconviction counsel is not triggered during this review. Rather, the review is conducted so the public defender or ADC can determine whether the motion has arguable merit to warrant the appointment of postconviction counsel. And if the public defender or ADC determines that the motion has arguable merit (and the right to counsel is consequently triggered), appointed counsel would be under no obligation to thereafter prosecute those claims that are wholly unfounded. § 21-1-104(2) ("In no case . . . shall the state public defender be required to prosecute any appeal or other remedy unless the state public defender is satisfied first that there is arguable merit to the proceeding.").

¶ 36 Therefore, we conclude that, because the postconviction court did not summarily deny Nozolino's motion pursuant to Crim. P.

35(c)(3)(IV), the court erred by not providing a complete copy of the motion to ADC. And in order “to put the train back on the tracks at the point it derailed,” *Chalchi-Sevilla*, ¶ 23, we hold that, on remand, the court shall forward a complete copy of Nozolino’s motion to ADC and that counsel may consider all the claims asserted therein.

V. Conclusion

¶ 37 The orders are reversed, and the case is remanded for the postconviction court to forward Nozolino’s Crim. P. 35(c) motion to ADC and to conduct further proceedings under Crim. P. 35(c)(3)(V).

JUDGE FREYRE and JUDGE WELLING concur.