SUMMARY
December 10, 2020

2020C0A171

Nos. 19CA1810, 19CA1811 & 19CA1812, *People v. Marquez* — Criminal Procedure — Postconviction Remedies

This opinion clarifies and extends the conclusions in *People v. Higgins*, 2017 COA 57, and *People v. Terry*, 2019 COA 9, that a postconviction court's duty to comply with Crim. P. 35(c)(3)(V)'s procedure is triggered only when it decides not to summarily deny the defendant's Rule 35(c) motion. A division of the court of appeals applies *Higgins* and *Terry* to hold that even when a postconviction court has appointed postconviction counsel to represent the defendant, it may summarily deny the defendant's Rule 35(c) motion under Rule 35(c)(3)(IV) and (V) without directing the prosecution to respond to the defendant's motion and without conducting a hearing. In doing so, the court must be satisfied that

the motion and the case files and record show that the defendant is not entitled to relief. And it must enter written factual findings and legal conclusions in denying the motion. *See* Crim. P. 35(c)(3)(IV).

COLORADO COURT OF APPEALS **2020C0A171**

Court of Appeals Nos. 19CA1810, 19CA1811 & 19CA1812
Fremont County District Court Nos. 08CR163, 08CR265 & 08CR266
Honorable Lynette M. Wenner, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Raul Hurtado Marquez,

Defendant-Appellant.

ORDERS AFFIRMED

Division VII
Opinion by JUDGE HAWTHORNE*
Bernard, C.J., and Taubman*, J., concur

Announced December 10, 2020

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 This consolidated opinion resolves the appeals in Colorado Court of Appeals case numbers 19CA1810, 19CA1811, and 19CA1812.

¶ 2 In all three appeals, defendant, Raul Hurtado Marquez, appeals the same order of the postconviction court denying his identical Crim. P. 35(c) motions filed in Fremont County District Court case numbers 08CR163, 08CR265, and 08CR266, respectively.

¶ 3 We affirm the orders in all three cases. *See People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006) (an appellate court may affirm on any ground supported by the record). In doing so, we conclude that even when a postconviction court has appointed postconviction counsel to represent the defendant, it may summarily deny the defendant's Rule 35(c) motion under Rule 35(c)(3)(IV) and (V) without directing the prosecution to respond to the defendant's motion and without conducting a hearing.

I. Background

¶ 4 The prosecution filed the three criminal cases against Marquez based on his assaults on correctional officers in prison between December 2007 and June 2008. The prosecution charged him with

second degree assault counts in each case, and with four habitual criminal counts. The Public Defender's Office (the PD's Office) was appointed to represent him.

¶ 5 During pretrial proceedings, the trial court referred Marquez for competency evaluations several times. Evaluations in November 2008 and July 2009 deemed Marquez incompetent to proceed. A different evaluation in April 2009 deemed him competent to proceed.

¶ 6 In October 2009, the trial court found that Marquez had been restored to competency. Another evaluation in January 2010 deemed Marquez competent to proceed, and the trial court again found him competent to proceed.

¶ 7 Days before the April 2010 bench trial, Marquez's public defender filed another motion seeking a competency evaluation and asking the court to continue the trial. The transcripts from the relevant proceedings aren't in the record on appeal. But a minute order in the court file shows that the trial court denied the motion to continue.

¶ 8 At the trial, the court found Marquez guilty of second degree assault in all three cases, and the prosecution dismissed the

habitual criminal counts. The court took judicial notice of Marquez's various competency evaluations.

¶ 9 On direct appeal, a division of this court affirmed the judgments of conviction. *See People v. Marquez*, (Colo. App. No. 10CA2132, July 5, 2012) (not published pursuant to C.A.R. 35(f)) (the direct appeal from Fremont County District Court case number 08CR163); *People v. Marquez*, (Colo. App. No. 10CA2133, July 5, 2012) (not published pursuant to C.A.R. 35(f)) (the direct appeal from Fremont County District Court case numbers 08CR265 and 08CR266).

¶ 10 Between 2013 and mid-2016, Marquez filed several pro se Rule 35(c) motions (the pro se motions). The postconviction court issued written orders summarily denying them.

¶ 11 In September 2016, the PD's Office (which had represented Marquez at trial) filed another Rule 35(c) motion on his behalf and requested that alternate defense counsel be appointed to represent him (the PD's 2016 motion). Although the motion was titled as a Rule 35(b) motion, its substance posited Rule 35(c) claims that Marquez had received ineffective assistance from the public defender who had represented him at trial. The motion argued that

the postconviction proceedings should be effectively reopened because Marquez didn't have the mental capacity to represent himself when he filed the pro se motions.

¶ 12 In October 2016, the postconviction court issued a written order construing the PD's 2016 motion as a Rule 35(c) motion and appointing alternate defense counsel to represent Marquez, explaining as follows:

> Having met the Crim. P. 35(c)[(3)](IV) threshold, the case would be referred to the public defender. However, the public defender has already conducted the review contemplated by Crim. P. 35(c)[(3)](V) and found a conflict and the necessity for the appointment of alternative defense counsel. . . . The motion for appointment of alternative defense counsel is granted. The matter is referred to alternative defense counsel under the provisions of Crim. P. 35(c)[(3)](V).

In March 2017, alternate defense counsel (postconviction counsel) entered her appearance in the case.

¶ 13 Between June 2017 and March 2018, the postconviction court held four status conferences.

¶ 14 In March 2018, postconviction counsel filed a sealed "motion raising competency" (the 2018 motion) requesting a current and a

retrospective competency evaluation, asserting that Marquez was currently incompetent and was also incompetent during his 2010 trial. In September 2018, the postconviction court denied the motion. The record doesn't show that Marquez appealed that ruling.

¶ 15 In May 2019, postconviction counsel filed two documents with the court. The first, a lengthy Rule 35(c) motion (the 2019 motion), claimed that Marquez was incompetent at the time of his trial in 2010, and raised various ineffective assistance of counsel claims. The second document, entitled "Record of Procedural History," recounted the procedural history of the case and argued that the court hadn't set a deadline for postconviction counsel to file the 2019 motion.

¶ 16 In September 2019, the postconviction court summarily denied the 2019 motion. On the same day, the court denied postconviction counsel's "Record of Procedural History," concluding that the 2019 motion was untimely.

II. Standard of Review

¶ 17 We review the summary denial of a Rule 35(c) motion de novo. *People v. Higgins*, 2017 COA 57, ¶ 11. We also review de novo interpretations of Rule 35(c). *Id.*

III. The PD's 2016 Motion

¶ 18 Marquez first contends that, even if the postconviction court properly denied the 2019 motion, its decision to appoint postconviction counsel in 2016 obligated it to (1) require the prosecution to respond to the PD's 2016 motion and (2) hold a hearing on that motion.

¶ 19 We disagree. Even when a postconviction court has appointed postconviction counsel to represent the defendant, it may summarily deny the defendant's Rule 35(c) motion under Rule 35(c)(3)(IV) and (V) without directing the prosecution to respond to the defendant's motion and without conducting a hearing. In doing so, the court must be satisfied that the motion and the case files and record show that the defendant is not entitled to relief. And it must enter written factual findings and legal conclusions in denying the motion. *See* Crim. P. 35(c)(3)(IV) ("If the motion and the files and record of the case show to the satisfaction of the court that the

defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion."); 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.").

¶ 20 When read together, Rule 35(c)(3)(IV) and (V)'s plain language requires the postconviction court to comply with Rule 35(c)(3)(V)'s procedure only when it decides not to summarily deny the defendant's motion. *See Higgins*, ¶ 15 (Under Rule 35(c)(3)(V), "the event that triggers a district court's duty to comply with [the rule's] procedure is its decision not to summarily deny the defendant's motion."); *also see People v. Terry*, 2019 COA 9, ¶ 11 ("However, if the court does not deny the motion, it must order service of the motion on the prosecutor and appoint counsel if the defendant so requests." (citing Crim. P. 35(c)(3)(V))). Granted, *Higgins* addressed the court's duty to serve the defendant's motion on the public defender's office, which had not yet been appointed to represent the defendant in that case. But, here, postconviction counsel had been appointed to assist Marquez in filing a supplemental petition and

had filed the lengthy 2019 motion raising additional issues on his behalf. And *Terry* addressed the procedures followed by the postconviction court as to the only issue in the defendant's postconviction motion that it hadn't summarily denied. The postconviction court here summarily denied Marquez's entire motion. So we see no reason to differ with the *Higgins* and *Terry* divisions' reading of Rule 35(c)(3)(V)'s plain language. The postconviction court decided to summarily deny the 2019 motion, and therefore, its duty to comply with Rule 35(c)(3)(V)'s procedure as to directing the prosecution to respond to Marquez's claims wasn't triggered.

¶ 21 In arguing the contrary, Marquez relies on *Higgins* and *People v. Nguyen*, 80 P.3d 903 (Colo. App. 2003). But in interpreting Rule 35(c)(3)(V), *Higgins* concluded that a postconviction court may not direct a response from the prosecution under the rule without also appointing postconviction counsel for the defendant. *See Higgins*, ¶¶ 12-15 (citing *People v. Davis*, 2012 COA 14, ¶¶ 4-12). As noted, the court appointed postconviction counsel for Marquez. *See Terry*, ¶ 20 (concluding that *Higgins* was distinguishable because postconviction counsel was appointed for the defendant).

¶ 22 *Nguyen* also doesn't support Marquez's argument. The fact that the division in *Nguyen* remanded the case for an evidentiary hearing under the circumstances there doesn't mean that a postconviction court, as a matter of law, must require the prosecution to respond and must hold an evidentiary hearing if it appoints counsel for a defendant under Rule 35(c)(3)(V). As noted above, Rule 35(c)(3)(V) provides that "the court shall grant a prompt hearing on the motion *unless*, based on the pleadings, the court finds that it is appropriate" to issue an order ruling on the motion without a hearing. (Emphasis added.) *See also Terry*, ¶ 17 (a postconviction court need only require the prosecution to respond to postconviction claims that have arguable merit).

IV. The 2019 Motion

¶ 23 We affirm the postconviction court's order denying the 2019 motion for three reasons.

¶ 24 First, we discern no error in the court's denying the 2019 motion because it wasn't filed within the forty-nine-day time limit under Rule 35(c)(3)(V). The obligations of the PD's Office under Rule 35(c)(3)(V) apply with equal force to postconviction counsel who is appointed to represent a defendant under Rule 35(c)(3)(V).

See Terry, ¶¶ 11-14, ¶ 12 n.1. So, within forty-nine days of being appointed, counsel must either file a Rule 35(c) motion or seek an extension of time to do so.

¶ 25 Under some circumstances, a court may choose to excuse appointed counsel's failure to comply with the forty-nine-day deadline. But the postconviction court wasn't required to do so here, where the 2019 motion was filed *more than two years* after postconviction counsel was appointed.

¶ 26 Second, the 2019 motion was successive of the 2018 motion. *See* Crim. P. 35(c)(3)(VI), (VII); *Aarness*, 150 P.3d at 1277; *People v. Vondra*, 240 P.3d 493, 494-95 (Colo. App. 2010) (affirming the denial of a Rule 35(c) motion on the alternative ground that it was successive). The 2018 motion, although not titled as a Rule 35(c) motion, raised a Rule 35(c) claim that Marquez was incompetent at the time of his guilty plea. *See People v. Collier*, 151 P.3d 668, 670 (Colo. App. 2006) (the substance of a postconviction motion controls how it is designated under Rule 35). So the 2019 motion is properly construed as the *second* Rule 35(c) motion that postconviction counsel filed on Marquez's behalf. And postconviction counsel hasn't cited a legal basis for filing an

"intermediate" motion in 2018 and then waiting fourteen months to file the 2019 motion.

¶ 27 And third, even if we were to reach the merits of Marquez's claims, his alleged incompetency at the time of trial isn't an issue to continually relitigate in postconviction proceedings. Also, as to Marquez's ineffective assistance claims, the record before us — which does not include the transcripts from the pretrial proceedings or the trial transcripts — is inadequate for us to evaluate those claims. *See Schuster v. Zwicker*, 659 P.2d 687, 690 (Colo. 1983) ("It is the obligation of the party asserting error in a judgment to present a record that discloses that error, for a judgment is presumed to be correct until the contrary affirmatively appears.").

V. Conclusion

¶ 28 The orders are affirmed.

CHIEF JUDGE BERNARD and JUDGE TAUBMAN concur.