

THIRD DIVISION
May 11, 2011

No. 1-08-3255

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 94 CR 7905
)	
EUGENE HARDY,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: Dismissal of successive postconviction petition affirmed over claim that appointed counsel failed to fulfill the obligations mandated by Rule 651(c).

Defendant Eugene Hardy appeals from an order of the circuit court of Cook County denying his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2004). He contends that postconviction counsel rendered unreasonable assistance when

she abandoned his actual innocence claim and focused on the claim that his right to testify was violated, then failed to provide affidavits or other support to satisfy the cause and prejudice test.

The record shows, in relevant part, that defendant was convicted by a jury of attempted first degree murder and armed violence in 1994, and was then sentenced to 50 years' imprisonment. That judgment was affirmed on direct appeal. *People v. Hardy*, No. 1-95-0020 (1996) (unpublished order under Supreme Court Rule 23).

In 2001, defendant filed a *pro se* postconviction petition alleging that his extended term sentence violated the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court summarily dismissed his petition; this court affirmed that dismissal on appeal. *People v. Hardy*, No. 1-01-4459 (2003) (unpublished order under Supreme Court Rule 23).

On August 11, 2005, defendant filed a dual *pro se* petition asking for relief under the Act, as well as under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2004)). In that petition, defendant asserted a claim of actual innocence based on newly discovered evidence, *i.e.*, the signed statement of Rhamal Powell. Powell confessed therein that it was he, not defendant, who stabbed the victim, and that defendant was not involved in any way. Powell also related the details of the

incident, and stated that his mother and his lawyer instructed him not to confess even though he knew of defendant's innocence.

On October 14, 2005, the trial court denied defendant the relief requested under section 2-1401 of the Code for failing to provide a proper affidavit or set forth a meritorious claim. On December 2, 2005, however, the court appointed counsel on his postconviction petition. When the case was called on April 3, 2008, counsel informed the court that defendant had given her the addresses, but no phone numbers, of three out-of-town witnesses. Counsel also stated that although defendant told her his family would attempt to get those numbers, she had not yet received them. The court granted counsel additional time to file her petition so she could try sending letters to each of the addressees with requests for return receipts.

On June 24, 2008, counsel filed a supplemental post-conviction petition alleging that defendant's trial counsel was ineffective for failing to inform him of his right to testify at trial, a claim which counsel asserted was not barred by *res judicata* or forfeiture. Counsel noted defendant's "tender" age at the time of trial, and the lack of any indication in the record that he made a knowing and intelligent waiver of his right to testify.

The State filed a motion to dismiss alleging that defendant's petition was improperly docketed because he failed to

properly request leave to file a successive petition by showing cause and prejudice, and that he had not provided adequate support for his claims. In response, defendant's counsel filed a motion requesting leave to file a successive postconviction petition, asserting, *inter alia*, that defendant could not have reasonably been expected to know of his constitutional rights due to his age at trial (13 years old), and that the denial of his fundamental right to testify at trial was prejudicial. Counsel also filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

The court heard arguments on the State's motion to dismiss, then denied defendant's request for leave to file a successive petition. The court found that defendant failed to show cause and prejudice for not raising the right to testify claim in his earlier postconviction proceedings. In this appeal, defendant contends that postconviction counsel rendered unreasonable assistance when she argued that his right to testify was violated, rather than assert the actual innocence claim contained in his *pro se* petition, and also failed to provide affidavits or other support to satisfy the cause and prejudice test.

The right to postconviction counsel is a matter of legislative grace and defendant is only entitled to a reasonable level of assistance. *People v. Thompson*, 383 Ill. App. 3d 924, 931 (2008). To that end, Rule 651(c) imposes specific duties on

postconviction counsel to ensure that she provides that level of assistance. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The rule requires that postconviction counsel consult with defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

Compliance with Rule 651(c) may be shown by the filing of a certificate representing that counsel's duties have been fulfilled. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). Once this certificate is filed, the presumption exists that defendant received the required representation. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010).

In this case, appointed counsel filed a certificate of compliance with the requirements of the rule, thereby creating the presumption that she provided defendant with the reasonable representation to which he was entitled in this postconviction proceeding. *Mendoza*, 402 Ill. App. 3d at 813. Defendant disputes that conclusion on appeal. He contends that postconviction counsel failed to fulfill her obligations because she argued that his right to testify was violated, rather than develop the actual innocence claim contained in his *pro se*

petition, then failed to provide affidavits or other support to satisfy the cause and prejudice test.

The responsibility of postconviction counsel is to investigate and present the claims raised by defendant, and compliance with Rule 651(c) only requires that she examine the transcript of proceedings to the extent necessary to adequately present those claims. *People v. Davis*, 156 Ill. 2d 149, 164-65 (1993). Here, defendant asserted a claim of actual innocence based on the signed statement of Powell, which was not a sworn affidavit, as required. 725 ILCS 5/122-2 (West 2004). The record further shows that counsel initially attempted to obtain contact information for the witnesses defendant claimed would offer support for his claim of actual innocence. Counsel also asked the court for additional time to file a supplemental petition so that she could make a further attempt to contact those witnesses. The fact that the supplemental petition she subsequently filed alleged a different claim leads to the conclusion that counsel was ultimately unable to gather any support for defendant's actual innocence claim from the list given to her by defendant or from the purported affiant, despite her clear efforts to do so.

Counsel then attempted to salvage defendant's petition by alleging a new claim of ineffective assistance of counsel in the supplemental petition based on his failure to testify. The State

filed a motion to dismiss alleging that defendant failed to properly request leave to file his successive petition by showing the requisite cause and prejudice for the new claim. 725 ILCS 5/122-1(f) (West 2004). Counsel responded by filing a motion requesting leave to file a successive postconviction petition claiming that defendant could not have reasonably been expected to know of his constitutional rights due to his age at trial (13 years old), and that he was prejudiced by the denial of his fundamental right to testify.

To obtain leave to file a successive petition under the Act, defendant must show cause and prejudice by "identifying an objective factor" which impeded his ability to raise the claim in his initial postconviction proceedings, and "demonstrating" that the claim so infected his trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f)(1)-(2) (West 2004). Here, counsel identified defendant's young age as the reason he was unable to raise his constitutional claims earlier, and alleged resulting prejudice from the denial of his "fundamental" right to testify on his own behalf at trial. Through these efforts, counsel sufficiently addressed the cause and prejudice requirement and provided reasonable representation in the preparation of defendant's supplemental petition. *Mendoza*, 402 Ill. App. 3d at 813.

Defendant, nonetheless, calls our attention to additional facts in the record which, he claims, show cause and prejudice, which counsel allegedly failed to raise. He first points to the fact that his age may have impacted his understanding of his right to testify. However, counsel expressly stated this in both the supplemental petition and the motion requesting leave to file a successive petition. Thus, it is unclear what more defendant is proposing on that issue. Moreover, even though the argument was not particularly compelling, there is nothing in the record indicating that defendant had some other excuse to explain the delay in filing. We cannot assume there was some excuse that counsel failed to raise. *Perkins*, 229 Ill. 2d at 51.

Defendant also claims that the violation of his right to testify was prejudicial where he could have rebutted the "critical" testimony of a State's witness, and where the victim did not identify him at trial. We initially note that, although the victim did not make an in-court identification of defendant at trial, she did identify the photograph of him that she chose from the photo array that was shown to her after the incident.

Nevertheless, defendant advances the same argument made by counsel, *i.e.*, that defendant was prejudiced where he was denied his fundamental right to testify, but adding a specific purpose for his purported testimony. However, defendant has actually added nothing substantive, because it is obvious that had he

testified on his own behalf, it would have been to rebut the State's case. Thus, it appears that counsel presented the best option available (*Perkins*, 229 Ill. 2d at 51-52), and based on the facts of this case, we find defendant's contentions insufficient to overcome the presumption that counsel fulfilled her duties under Rule 651(c) Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)) (*Mendoza*, 402 Ill. App. 3d at 813).

We also find this case distinguishable from *People v. Robinson*, 324 Ill. App. 3d 553, 556-57 (2001), cited by defendant, where counsel failed to argue that the untimely filing of defendant's nonsuccessive petition was due to his obvious mental problems, rather than his culpable negligence. In this case, counsel clearly introduced facts in an attempt to establish the requisite cause and prejudice to allow the successive petition and, in doing so, provided the reasonable representation mandated by Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)) *Mendoza*, 402 Ill. App. 3d at 813.

For the foregoing reasons, we affirm the order of the circuit court of Cook County denying defendant leave to file a successive postconviction petition.

Affirmed.