

2011 IL App (2d) 100872-U
No. 2-10-0872
Order filed November 15, 2011

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 96-CF-2431
)	
ROBERT T. SAFFOLD,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

Held: Defendant did not receive unreasonable assistance of postconviction counsel: counsel's statement that an earlier ruling that defendant's petition was time-barred was the law of the case was correct, and defendant pointed to no facts on which counsel should have argued for an exception to the law-of-the-case doctrine.

¶ 1 Defendant, Robert T. Saffold, appeals from an order of the circuit court of Winnebago County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)) for relief from his conviction of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1994)). In its motion, the State argued, *inter alia*, that the petition was untimely. Defendant does not dispute the merits of the trial court's decision to dismiss his petition.

Instead, he maintains that the dismissal must be reversed because appointed counsel did not provide the level of representation guaranteed by the Act. According to defendant, counsel's performance was deficient because he labored under the mistaken view that, under the law-of-the-case doctrine, the trial court was bound by an earlier ruling rejecting defendant's argument that his failure to timely file the petition was not the result of culpable negligence. We affirm.

¶ 2 Defendant was found guilty after a jury trial at which he unsuccessfully claimed that he shot the victim, John Crimmins, in self-defense. In March 1998, the trial court imposed a natural-life prison sentence. This court affirmed defendant's conviction and sentence (*People v. Saffold*, No. 2-98-0598 (1999) (unpublished order under Supreme Court Rule 23) (*Saffold I*)) and on May 31, 2000, his petition for leave to appeal to the Illinois Supreme Court was denied. On September 10, 2001, defendant filed his postconviction petition, alleging that he did not receive the effective assistance of counsel at trial or on appeal; that the State knowingly used perjured testimony; and that, in violation of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), his sentence was enhanced to natural life based on facts that were not found beyond a reasonable doubt by the jury.

¶ 3 The trial court appointed an attorney to represent defendant. Pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), that attorney was obligated to "consult[] with [defendant] either by mail or in person to ascertain his contentions of deprivation of constitutional rights, *** examine[] the record of the proceedings at the trial, and [make] any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [defendant's] contentions." However, counsel advised the trial court, in essence, that he wished to obtain a ruling on whether the petition was timely filed before exerting any effort with respect to the merits of the petition. When defendant filed his petition, the Act provided that a postconviction petition must be filed no later than six

months after the denial of a petition for leave to appeal or three years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. 725 ILCS 5/122-1(c) (West 2000). Defendant's petition was filed well outside the six-month period following the denial of his petition for leave to appeal. Counsel indicated to the trial court that he wanted to "avoid having to go through and review everything" and did not want to "have to go through all the work of preparing up an amended petition." Thus instead of complying with Rule 651(c), counsel filed a "Motion to Excuse Untimely Filing of Petition," claiming that defendant's lack of access to the prison law library prevented him from filing his petition in a timely manner. The State, in turn, moved to dismiss the petition as untimely, and the trial court sided with the State.

¶ 4 Concluding that defendant had not received a reasonable level of assistance from counsel (see *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009) (under the Act "defendants are entitled to a reasonable level of assistance, but are not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial")), we reversed the dismissal of the petition. *People v. Saffold*, No. 2-04-0041 (2006) (unpublished order under Supreme Court Rule 23) (*Saffold II*). We noted that "reasonable assistance" includes compliance with Rule 651(c) and that, under the rule of *People v. Lander*, 215 Ill. 2d 577 (2005), the requirement does not depend on whether the defendant timely filed the petition. The *Lander* court reasoned that a petition's untimeliness is an affirmative defense that the State may choose to waive in appropriate cases and that the choice whether to invoke the defense should not be made until the prosecutor has had the opportunity to consider a petition that adequately presents the defendant's claims of constitutional error. *Id.* at 584-85. Compliance with Rule 651(c) is necessary because that rule is designed to ensure that the defendant's claims are adequately presented.

¶ 5 On remand following our decision in *Saffold II*, a new attorney was appointed to represent defendant. That attorney filed a certificate of compliance with Rule 651(c), but did not amend defendant’s *pro se* petition. In open court, counsel explained that, in his judgment, the *pro se* petition adequately presented defendant’s claims. Defendant’s new attorney also indicated that he was adopting prior counsel’s motion to excuse defendant’s failure to timely file the petition. The State again moved to dismiss the petition, challenging both its timeliness and the merits of defendant’s constitutional claims.

¶ 6 The controversy in this appeal stems from the following remarks made by defendant’s attorney at the hearing on the State’s motion:

“I think the focal point of this matter is the timeliness issue. ***

The law of the case is that the untimely filing of [defendant’s] petition or his motion to exclude [sic] that was denied. The petition itself I believe has some merit. However, I think the Court has already ruled on this. ***

Now, I have reviewed the file and the record. I have corresponded with [defendant] and filed a 651(c) certificate. *** However, I think the Court has already ruled on whether or not we can go forward with the petition or an amended petition, because it’s not timely.” (Emphasis added.)

¶ 7 When the case was later before the court for status, and prior to the court’s ruling on the motion to dismiss, defendant’s attorney stated, “the real issue is whether or not *** the Court follows its original decision in denying the motion for relief from late filing. I complied with Rule 651(c), but we still have that original finding by the Court ***.”

¶ 8 Defendant argues that the attorney appointed to represent him on remand from *Saffold II* did not provide a reasonable level of assistance. According to defendant, his attorney “made a

fundamental error about the scope of his representation by believing that the law-of-the-case doctrine barred reconsideration of the question of whether [defendant] was culpably negligent for the untimely filing of his petition.” We have held that, under the law-of-the-case doctrine, “ ‘a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.’ ” *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 284 Ill. App. 3d 627, 632 (1996) (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987)); *cf. Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 547 (1997) (failure to challenge a legal decision when there is an opportunity to do so renders the decision the law of the case). “However, ‘invoking the law of the case might still not preclude reconsideration of an earlier judge’s order if the facts before the court changed or error or injustice were manifest.’ ” *Aardvark Art, Inc.*, 284 Ill. App. 3d at 633 (quoting *People v. Williams*, 138 Ill. 2d 377, 392 (1990)).

¶ 9 Defendant does not dispute that, in *Saffold II*, he could have argued that the trial court’s decision to dismiss his petition was incorrect on the merits but chose to argue only that the failure of his first postconviction attorney to comply with Rule 651(c) deprived him of his right to a reasonable level of assistance from counsel. Accordingly, per *Aardvark Art, Inc.* and *Williams*, the law-of-the-case doctrine would preclude reconsideration of whether the petition was time-barred unless the facts had changed or error or injustice were manifest. Defendant argues that the law-of-the-case doctrine did not preclude the trial court from reconsidering its ruling that defendant’s petition was untimely. Defendant maintains that, as a result of his first attorney’s failure to review the trial record, facts that had not previously been “unearthed” could have been urged on remand

to bolster the previously rejected argument that defendant's failure to timely file the petition was not due to his culpable negligence.

¶ 10 From a purely hypothetical standpoint, defendant's reasoning seems sound. If the failure of defendant's first postconviction attorney to comply with his obligations under Rule 651(c) kept the trial court from considering facts tending to defeat the State's argument that the petition was time-barred, it would be unjust to apply the law-of-the-case doctrine to preclude the trial court from reconsidering its ruling in light of such facts. But defendant has not identified any additional facts of record that might have affected the trial court's ruling, so his argument remains in the hypothetical realm. In the absence of such facts, defendant's new attorney could do nothing but reassert defendant's original position that his lack of access to the law library excused his failure to file his petition within the applicable time frame. That is just what counsel did, by adopting the "Motion to Excuse Untimely Filing of Petition" that his predecessor had filed.

¶ 11 If the trial record contains no facts that might have affected the trial court's original ruling on the motion—and defendant has not pointed to any—then counsel's acknowledgment that the prior ruling was the law of the case was a correct statement of the law as set forth in our opinion in *Aardvark Art, Inc.* Obviously, counsel's accurate statement of the law is no evidence that, as defendant insists, counsel "made a fundamental error about the scope of his representation." In examining counsel's performance, we begin with the presumption that he understood the pertinent legal principles. See *People v. Perkins*, 229 Ill. 2d 34, 51 (2007). Consonant with that presumption, we must conclude that, when counsel acknowledged that the trial court's prior ruling was the law of the case, it was not because he was unaware of the exception to the law-of-the-case doctrine permitting a ruling to be challenged on the basis of "changed facts," but because, upon review of

the trial record, counsel found no facts that would trigger that exception. That defendant points to no such facts only bolsters our conclusion.

¶ 12 In sum, we find nothing to substantiate defendant's assertion that his attorney misunderstood the parameters of the law-of-the-case doctrine. The trial court had previously ruled that defendant's petition was time-barred. Defendant could have challenged that ruling in *Saffold II*, but he did not. Pursuant to *Aardvark Art, Inc.*, the ruling was the law of the case. And although defendant is correct to note that the law-of-the-case doctrine is not absolute, he points to nothing establishing that any exception applies in this case.

¶ 13 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 14 Affirmed.