2012 IL App (1st) 101218-U

THIRD DIVISION
May 2, 2012

No. 1-10-1218

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. 04 CR 23467
	)	
MAHER ABUHABSAH,	)	The Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

O R D E R

1. *HELD*: The circuit court's second-stage dismissal of defendant's postconviction petition is affirmed where the record shows that postconviction counsel provided reasonable assistance.

2. Maher Abuhabsah, the defendant, appeals from an order of the circuit court granting the State's motion to dismiss his postconviction petition. On appeal, defendant solely contends that the dismissal should be reversed and his petition remanded with an opportunity to re-plead because his

postconviction counsel failed to provide reasonable assistance when he did not amend the petition to adequately present defendant's claims. We affirm.

3. Following a 2006 bench trial, defendant was convicted of residential burglary, kidnaping and criminal trespass to a residence. The trial court found defendant not guilty of the offenses of home invasion, aggravated kidnaping, armed violence and aggravated unlawful restraint. The court merged the criminal trespass to a residence conviction into the residential burglary conviction, and sentenced defendant to concurrent terms of four years' imprisonment, with a recommendation for boot camp, which defendant received.

4. On direct appeal, defendant argued that his trial counsel rendered ineffective assistance because he did not present testimony from defendant, presented testimony that supported the State's case, presented a "pathetic" closing argument, did not present the defenses of necessity and compulsion, failed to seek a substitution of judge, and provided no representation. This court found that defendant's claims were rebutted by the record, and affirmed his conviction and sentence. *People v. Abuhabsah*, No. 1-06-1030 (Feb. 23, 2007) (unpublished order under Supreme Court Rule 23). Defendant did not file a petition for leave to appeal to our supreme court.

5. On September 19, 2008, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq*. (West 2008). Defendant again raised several claims that his trial counsel rendered ineffective assistance. Defendant alleged that counsel was ineffective because he failed to conduct a proper investigation and interview three witnesses, failed to file a motion to quash arrest and suppress defendant's statement, failed to move for a substitution

of judge, failed to object when the State called a detective to testify who was not on the witness list, and failed to object when the State referred to other offenses committed by codefendants that did not involve defendant. Defendant further alleged that he had practiced testifying with his trial counsel several times, told counsel that he wanted to testify, but counsel did not allow him to do so for unknown reasons. In addition, defendant alleged that his due process rights were violated when the State committed prosecutorial misconduct by discussing the offenses that did not involve defendant, and indicating that defendant committed acts which it knew were committed by one of his codefendants.

6. Finally, defendant raised a claim of actual innocence stating that he had newly discovered evidence which proved he did not commit a crime. Defendant asserted that a written statement made by a witness, Anthony Marzec, on the day defendant was arrested indicated that defendant had authority to enter the apartment, and that the female victim left the apartment with defendant and codefendants voluntarily. Defendant stated that he had "cause" for not discovering Marzec's statement earlier because defendant was restricted from speaking with the witnesses in the case, and trial counsel abandoned the defense. Defendant did not attach a copy of Marzec's statement to his petition.

7. Attached to defendant's petition was defendant's draft of a motion to quash arrest and suppress evidence, his draft of a motion to suppress statements, and defendant's affidavit averring to the veracity of the statements made in his postconviction petition. Defendant's *pro se* petition is 30 typed pages and is organized with headings such as "Procedural History," "Issues Presented" and

"Statement of Facts." Within the argument section of his petition, defendant separated his issues with point headings and stated numerous legal rules with case citations in proper Bluebook format. On the first page of his petition, defendant expressly stated that he was "currently on mandatory supervised release."

8. The circuit court appointed postconviction counsel to represent defendant and advanced his petition to second-stage proceedings. At a status hearing, postconviction counsel informed the court that he had reviewed defendant's petition, obtained the trial record, ordered an investigation to locate the witnesses named in defendant's petition, and was in the process of requesting the case files from trial and appellate counsel. At the next court date, counsel reported that he had obtained the case file from trial counsel and that his investigation of the three witnesses was ongoing. On July 17, 2009, counsel submitted a certification pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) attesting to the fact that he consulted with defendant regarding the allegations in his petition and examined the trial record. Counsel further stated that he reviewed the complete case files of both trial and appellate counsel. Counsel also stated that reasonable efforts to contact the three witnesses named in defendant's petition were unsuccessful. Counsel's certification expressly noted that defendant filed his *pro se* postconviction petition on "the last date of the Petitioner's Mandatory Supervised Release period." Counsel concluded that it was not necessary for him to amend defendant's petition to adequately present the claims.

9. On that same date, defendant informed the circuit court that postconviction counsel had little interest in his case and had advised him that his arguments had little chance of advancing to further

proceedings. Defendant said that postconviction counsel told him that he was not obligated to interview trial counsel, and that his case was now basically a civil matter because he had served his time. Counsel informed the court that, although he was not required to do so, he obtained and reviewed the case files from both trial and appellate counsel. Counsel clarified that his comment that this case was a civil matter was only in relation to defendant's required appearance in court. Counsel affirmed for the court that his investigator was in contact with defendant on a regular basis, that there was no further information regarding the whereabouts of the three witnesses named in the petition, and that defendant was advised of that fact. The circuit court found that, based on postconviction counsel's certification and his statements in court, counsel had done what he could with the case and had complied with his obligations.

10. The State subsequently moved to dismiss defendant's postconviction petition arguing that the petition was untimely filed, that defendant lacked standing to file the petition because he was no longer serving mandatory supervised release (MSR), and that his petition was moot because he had already served his sentence. Alternatively, the State argued that the allegations raised in defendant's petition were without merit. The State asserted that defendant's claim of actual innocence was not supported with any evidence such as an affidavit or statement, was waived because Marzec's statement was available at the time of trial, and was actually a reasonable doubt argument. The State denied that it committed prosecutorial misconduct and argued that defendant did not appear to understand that he was accountable for the actions of his codefendants at the time he participated in the residential burglary and kidnaping offenses. Finally, the State argued that defendant's claims that

trial counsel rendered ineffective assistance were unsupported, belied by the record, and demonstrated that defendant did not understand the law or the defense presented at trial.

11. At the hearing on the State's motion to dismiss, postconviction counsel again confirmed for the court that his attempts at locating the witnesses named in defendant's petition were unsuccessful. The State reviewed the arguments presented in its motion and added that defendant was improperly using his petition as an attempt to purge a criminal conviction from his record. The State further asserted that defendant filed his postconviction petition on the last day of his MSR term. Postconviction counsel responded that defendant filed his petition when he had two days remaining in his term of MSR, and therefore, had standing to file his petition. Counsel commented that defendant's *pro se* petition was well-written, well-argued, fact-specific and very detailed. Counsel further informed the court that defendant told him that he erroneously thought he had three years from the date of his conviction to file his petition. Counsel acknowledged that defendant did not allege a lack of culpable negligence for his untimely petition, and argued that defendant filed his petition in good faith based on the law as he understood it. The circuit court remarked that defendant's petition was very detailed and appeared as though he had the assistance of an attorney to draft it due to the large amount of case law cited and his arguments regarding ineffective assistance of counsel.

12. The circuit court initially found that defendant's petition was procedurally barred because he was no longer serving MSR. Alternatively, the court found that defendant failed to make a substantial showing that his constitutional rights were violated. The court found that defendant's

failure to attach Marzec's statement to his postconviction petition was fatal to his claim of actual innocence. The court expressly noted that postconviction counsel attempted to locate Marzec, but was unsuccessful. The circuit court also found that defendant's allegations showed that he was confused regarding the facts of his case, and that DNA evidence related to his codefendants' sexual assault of the victim after defendant left the apartment had no relevance to defendant's case. In addition, the court found that defendant's claims that trial counsel rendered ineffective assistance were based on matters in the record, and thus, waived. Accordingly, the circuit court granted the State's motion and dismissed defendant's postconviction petition.

13. On appeal, defendant solely contends that the dismissal of his petition should be reversed and his petition should be remanded with an opportunity to re-plead because his postconviction counsel failed to provide reasonable assistance when he did not amend the petition to adequately present defendant's claims. Defendant asserts that counsel should have amended his *pro se* petition to assert standing to file the petition, or attached documentation to support such claim. Defendant also argues that counsel should have "reshaped" his allegations regarding timeliness and lack of culpable negligence into proper legal form. In addition, defendant argues that postconviction counsel should have added a claim alleging ineffective assistance of appellate counsel because appellate counsel failed to raise an issue on direct appeal arguing that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence.

14. Initially, the State asserts that because counsel filed a valid 651(c) certificate, defendant is precluded from raising the claim that he was denied reasonable assistance from postconviction

counsel because it is not a free-standing constitutional claim that is cognizable under the Act as there is no constitutional right to counsel in postconviction proceedings. The State relies on the holding in *People v. Mendoza*, 402 Ill. App. 3d 808 (2010). In *Mendoza*, the defendant did not claim that his postconviction counsel failed to comply with any of her duties under Rule 651(c). Instead, the defendant made a general claim that counsel failed to provide reasonable assistance when she filed an amended petition that "watered down" his key argument and failed to attach affidavits to the petition. *Mendoza*, 402 Ill. App. 3d at 811. The *Mendoza* court held that absent an allegation that postconviction counsel violated a specific duty under Rule 651(c), the defendant's general claim that counsel provided unreasonable assistance was precluded by the valid 651(c) certificate filed by counsel. *Mendoza*, 402 Ill. App. 3d at 821.

15. We find that the *Mendoza* holding does not apply in this case. Under Supreme Court Rule 651(c), postconviction counsel is required to consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, examine the record of proceedings from the trial, and amend the defendant's *pro se* petition as necessary to adequately present the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Here, defendant specifically argues that postconviction counsel failed to amend his *pro se* petition to adequately present his claims. Defendant has thereby alleged that counsel violated one of his specific duties under Rule 651(c), and defendant's claim may be reviewed by this court.

16. The State also claims that defendant is prohibited from raising his contention before this court because defendants are barred from raising new issues for the first time on appeal. The State

is correct that, in general, an issue not alleged in a postconviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). However, the waiver language contained in section 122-3 of the Act (725 ILCS 5/122-3 (West 2008)) has never been viewed as "an ironclad bar." *Id.* It is well-established that on appeal from the dismissal of a postconviction petition, defendant may assert that his postconviction counsel failed to provide him with the reasonable level of assistance required by the Act, even where that is the sole issue raised on appeal. See *People v. Turner*, 187 Ill. 2d 406, 410 (1999) (on appeal from the second-stage dismissal of his postconviction petition, the defendant's only argument was that his postconviction counsel failed to provide him with reasonable assistance). Accordingly, we reject the State's assertion that defendant's contention should be procedurally barred here.

17. Alternatively, the State argues that postconviction counsel did provide defendant with reasonable assistance and that there was no need for counsel to amend defendant's petition. The State maintains that counsel's certificate and the record show that counsel fulfilled his obligations under Rule 651(c) and did the best he could with the facts available to him.

18. We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The interpretation of a supreme court rule, including whether counsel fulfilled his duties under Rule 651(c), is also reviewed *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). The reviewing court may affirm the circuit court's dismissal of a postconviction petition on any basis shown in the record. *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008).

19. At second-stage postconviction proceedings, an indigent defendant is entitled to representation by appointed counsel. 725 ILCS 5/122-4 (West 2008); *People v. Lander*, 215 Ill. 2d 577, 583 (2005). Postconviction counsel is required to provide defendant with a "reasonable level of assistance." *Lander,* 215 Ill. 2d at 583. Pursuant to Supreme Court Rule 651(c), postconviction counsel has a duty to consult with defendant to ascertain his contentions of constitutional deprivation, examine the trial record, and, where necessary, amend the *pro se* petition to adequately present defendant's contentions. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Compliance with these duties may be shown by a certificate filed by postconviction counsel. Rule 651(c); *Lander*, 215 Ill. 2d at 584. Counsel is obligated to amend defendant's *pro se* petition only where it is necessary to "properly present the *petitioner's* claims." (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 472, quoting *People v. Davis*, 156 Ill. 2d 149, 164 (1993). In fulfilling his obligations, counsel is not required to advance frivolous or spurious claims on defendant's behalf. *Pendleton*, 223 Ill. 2d at 472. Although postconviction counsel may raise additional claims if he so chooses, he is under no obligation to do so. *Pendleton*, 223 Ill. 2d at 476.

20. A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 128 (2007). Defendant must demonstrate that he suffered a substantial deprivation of a federal or state constitutional right in the proceeding that produced his conviction or sentence in order to be entitled to postconviction relief. *Pendleton*, 223 Ill. 2d at 471.

21. Postconviction proceedings must be initiated within the time limitations specified in section 122-1(c) of the Act (725 ILCS 5/122-1(c) (West 2008)), unless defendant alleges facts showing that the delay in filing his petition was not due to his culpable negligence. *Lander*, 215 Ill. 2d at 586. Our supreme court defined "culpable negligence" as conduct greater than ordinary negligence and akin to recklessness. *People v. Boclair*, 202 Ill. 2d 89, 108 (2002). It is solely defendant's obligation to know the time limitations for filing his postconviction petition, and his ignorance of the law or his legal rights will not excuse a delay in filing. *Lander*, 215 Ill. 2d at 588-89.

22. Here, we find that postconviction counsel provided defendant with a reasonable level of assistance and complied with the requirements of Rule 651(c). First, there was no need for counsel to amend defendant's *pro se* petition to assert a claim of standing to file the petition. On the first page of his *pro se* petition, defendant expressly stated that he was "currently on mandatory supervised release." Thus, defendant's petition sufficiently asserted standing. Furthermore, in his Rule 651(c) certification, counsel expressly noted that defendant filed his *pro se* postconviction petition on "the last date of the Petitioner's Mandatory Supervised Release period." The State subsequently raised the issue of standing in its motion to dismiss defendant's petition, claiming that defendant lacked standing to file the petition because he was no longer serving MSR. However, at the hearing on that motion, the State acknowledged that defendant filed his petition on the last day of his MSR term. Counsel then responded that defendant actually had two days remaining in his MSR term and argued that he had standing to file his petition. Regardless if defendant had one or two days left in his MSR term, at this point, it became undisputed that defendant filed his petition

while he was still serving MSR, and therefore, had standing. The record thus shows that postconviction counsel sufficiently argued against the State's challenge to defendant's standing to file the petition. The circuit court's finding that defendant's petition was procedurally barred because he was no longer serving MSR was incorrect. However, that ruling does not affect the disposition in this case as the court also found that defendant failed to make a substantial showing that his constitutional rights were violated.

23. Second, we find that there was no need for counsel to "reshape" defendant's allegations regarding timeliness and lack of culpable negligence into proper legal form. Defendant did not address the issue of timeliness or lack of culpable negligence in his *pro se* petition. The record shows, however, that defendant subsequently told counsel that he erroneously thought he had three years from the date of his conviction to file his petition. Counsel shared defendant's honest explanation with the circuit court at the hearing on the State's motion to dismiss, and argued that defendant filed his petition in good faith based on the law as he understood it. The record thus reveals that, based on his consultation with defendant, counsel had no reason to amend the *pro se* petition as the explanation defendant provided him would not support a claim that he was not culpably negligent for the untimeliness of his petition. Counsel was not required to advance a frivolous claim. Accordingly, counsel's decision not to amend defendant's petition with a frivolous claim that defendant was not culpably negligent was reasonable. We further note that the circuit court did not address the issue of timeliness in its ruling. Therefore, counsel's decision not to amend the petition regarding this issue had no adverse affect on the court's ruling.

24. Finally, we reject defendant's contention that postconviction counsel should have amended his *pro se* petition to add a claim alleging ineffective assistance of appellate counsel for failing to raise an issue on direct appeal arguing that trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence. In his petition, defendant alleged that his trial counsel rendered ineffective assistance when he failed to file such motion. Defendant stated that he drafted a motion to suppress and asked trial counsel to file it. Defendant expressly acknowledged that trial counsel "reviewed the motion and felt it was not necessary to file the motion." Defendant's petition thus showed that trial counsel made a strategic decision not to file that motion. Such decisions do not constitute ineffective assistance. Consequently, a claim that counsel was ineffective for not filing that motion would have been frivolous. As stated above, counsel is not required to advance frivolous claims on defendant's behalf. Accordingly, postconviction counsel's decision not to amend defendant's petition to raise such a claim was reasonable.

25. We further note that both postconviction counsel and the circuit court commented on the high quality of defendant's *pro se* petition. Counsel told the court that the petition was well-written, well-argued, fact-specific and very detailed. The circuit court agreed that the petition was very detailed and said it appeared as though defendant had the assistance of an attorney to draft it due to the large amount of case law cited and his arguments regarding ineffective assistance of counsel. Defendant's petition is 30 typed pages, and is well-organized and well-written. The record thus shows that counsel determined, in part, that the high quality of defendant's *pro se* petition deemed it unnecessary for him to amend it. We find that this determination was reasonable. Our review of the record thus

shows that counsel provided defendant with the reasonable assistance contemplated by the Act, and there is no evidence to support defendant's claim to the contrary.

26. For these reasons, we affirm the judgment of the circuit court of Cook County.

27. Affirmed.