

2012 IL App (2d) 110514-U
No. 2-11-0514
Order filed September 5, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
) of Lake County.
Plaintiff-Appellee,)	
)
v.)	No. 06-CF-1371
)
DANIEL GARCIA-CORDOVA,)	Honorable
) George Bridges,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Where defendant did not receive reasonable assistance of postconviction counsel, the trial court's dismissal of defendant's amended postconviction petition without an evidentiary hearing was reversed.

¶ 1 Defendant, Daniel Garcia-Cordova, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)) and sentenced to 24 years' imprisonment. We affirmed on direct appeal. *People v. Garcia-Cordova*, 2011 IL App (2d) 070550-B. Defendant subsequently filed a *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). After appointed counsel filed an amended petition, the trial court dismissed

it on the State's motion without an evidentiary hearing. For the following reasons, we reverse and remand.

¶ 2

BACKGROUND

¶ 3 Defendant filed a *pro se* postconviction petition in which he alleged various violations of his constitutional rights. The trial court found that the petition presented the gist of a constitutional claim and appointed the public defender's office to represent defendant. Postconviction counsel filed an amended petition, alleging that (1) trial counsel was ineffective for failing to investigate "numerous occasion witnesses and character witnesses," including eight named witnesses; (2) trial counsel was ineffective for failing to discuss with defendant, or to submit to the court, jury instructions on lesser-included offenses; (3) appellate counsel was ineffective for failing to argue on direct appeal that defendant was not proven guilty beyond a reasonable doubt; and (4) defendant was denied his right to testify. In the amended petition, counsel referred to affidavits attached to defendant's *pro se* petition. In one affidavit, defendant averred that, if questioned, the victim in the case would say that defendant "never touched her in any way." In another affidavit, defendant averred that his trial counsel would not allow him to testify. In the amended petition, counsel also referred to the affidavit defendant attached to the *pro se* petition that contained defendant's sworn verification of the petition. Counsel did not attach any affidavits to the amended petition.

¶ 4 After the State filed a motion to dismiss the amended petition, the trial court heard argument on the motion. The State began its argument by pointing out the petition's lack of attached affidavits, records, or other evidence in support of defendant's allegations. Defense counsel responded that she had cited the affidavits attached to defendant's *pro se* petition, which was contained in the record. Defense counsel further argued that trial counsel's failure to investigate

witnesses could not be considered a trial tactic, and commented, “It is unclear what could have been uncovered had a full investigation been completed.” In rebuttal, the State countered:

“This is the post-conviction petition. This is where the defendant not only needs to list the witnesses, which he did, but what they would have said, what would have been different? This is not the time we get to get and say [*sic*] put on another trial and say let’s call eight witnesses who live in California or other places to say this is what should have been presented. If the defendant has evidence that should have been presented, it should have been in this post-conviction petition with an affidavit from those witnesses.”

The court took the matter under advisement.

¶ 5 The trial court subsequently entered a written order, granting the State’s motion to dismiss. The court found that defendant failed to make a substantial showing of ineffective assistance of counsel because defendant’s “broad allegations” were “conclusory and unsupported.” Following the denial of his motion to reconsider, defendant timely appeals.

¶ 6 ANALYSIS

¶ 7 Defendant raises one argument on appeal, involving only his postconviction claim of ineffective assistance of trial counsel for failure to investigate witnesses. He contends that he did not receive reasonable assistance of postconviction counsel because counsel failed to provide affidavits or other evidence in support of the claim, failed to explain the reason for the lack of supporting evidence, and failed to offer any explanation as to the value of the witnesses named in the petition.

¶ 8 The Act provides a method by which a criminal defendant may assert that a conviction was the result of “a substantial denial of his or her rights under the Constitution of the United States or

of the State of Illinois or both.” 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A defendant commences proceedings under the Act by filing a petition in the circuit court in which the original proceeding occurred. *Hodges*, 234 Ill. 2d at 9. In noncapital cases, the Act contemplates three stages of proceedings. *Hodges*, 234 Ill. 2d at 10. At the first stage, the trial court shall dismiss the petition in a written order if it determines that the petition “is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. If a petition survives to the second stage, counsel may be appointed to an indigent defendant, and the State may answer or move to dismiss. 725 ILCS 5/122-4, 122-5 (West 2010); *People v. Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 12-13. If the defendant makes a “substantial showing” of a constitutional violation, the petition proceeds to the third stage for an evidentiary hearing. *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 18; 725 ILCS 5/122-6 (West 2010). Our review of the dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 13.

¶ 9 Here, the trial court dismissed defendant’s petition on the State’s motion at the second stage of the proceedings. Although there is no constitutional right to counsel in postconviction proceedings, a defendant who proceeds to the second stage enjoys a statutory right to counsel. *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 18. Counsel must provide “reasonable” assistance. (Internal quotation marks omitted.) *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Reasonable assistance includes compliance with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), which requires counsel to consult with the defendant to ascertain his contentions of deprivation of constitutional rights, to examine the trial record, and to make any amendments to the *pro se* petition that are necessary to adequately present the defendant’s claims. *Nitz*, 2011 IL App (2d) 100031,

¶ 18. Counsel's failure to present the defendant's claims in the appropriate legal form constitutes unreasonable assistance. *Nitz*, 2011 IL App (2d) 100031, ¶ 18. A defendant is not required to show that he was prejudiced by counsel's failure to comply with Rule 651(c). *Nitz*, 2011 IL App (2d) 100031, ¶ 18.

¶ 10 In the present case, defendant argues specifically that counsel provided unreasonable assistance because she failed to comply with Rule 651(c) when she filed a legally inadequate amended petition. According to defendant, the amended petition was legally inadequate because it did not conform to the requirement of section 122-2 of the Act that a postconviction "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached" (725 ILCS 5/122-2 (West 2010)). We agree with defendant.

¶ 11 "A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *People v. Enis*, 194 Ill. 2d 361, 380 (2000). Absent such an affidavit, "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380. In his *pro se* petition, defendant asserted that trial counsel was ineffective for failing to investigate "friends of family" who would "paint a picture" of his character. In the amended petition, counsel specifically identified eight "occasion witnesses and character witnesses" by name. However, counsel neither attached any affidavits in support, nor provided any explanation for her failure to do so. Given that defendant provided counsel with the names of potential witnesses, counsel was obligated to at least attempt to contact the named witnesses. See *People v. Johnson*, 154 Ill. 2d 227, 247-48 (1993) (noting that, while postconviction counsel had no obligation to conduct an independent investigation as to potential witness, where the defendant identified

witnesses by name, counsel should have attempted to contact them). Counsel's failure to attach supporting affidavits, or to explain their absence, does not demonstrate compliance with Rule 651(c). See *Johnson*, 154 Ill. 2d at 245 ("At a minimum, counsel had an obligation to attempt to obtain evidentiary support for claims raised in the post-conviction petition."); *People v. Waldrop*, 353 Ill. App. 3d 244, 251 (2004) (explaining that Rule 651(c) requires at least an attempt to obtain evidentiary support for postconviction claims and stating that "[w]ithout affidavits or other supporting evidence, the trial court had no choice but to dismiss the petition without an evidentiary hearing"). Moreover, without any affidavits from the named witnesses, the trial court could not ascertain how defendant was prejudiced by the alleged ineffectiveness of trial counsel for not investigating the witnesses. See *Enis*, 194 Ill. 2d at 380. On the record before it, the trial court had no choice but to determine that defendant had not made a substantial showing of a constitutional violation and to dismiss the petition. See *Waldrop*, 353 Ill. App. 3d at 251.

¶ 12 Notwithstanding the lack of supporting affidavits, the State, relying on *Kirkpatrick*, maintains that "when ruling on a motion to dismiss a petition not supported by an affidavit, a trial court may reasonably presume that postconviction counsel made a concerted effort to obtain affidavits in support of the claims despite being unable to do so" (*Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 21). Defendant counters that the presumption was flatly contradicted by the record under *Waldrop*.

¶ 13 In *Waldrop*, this court reversed the second-stage dismissal of the defendant's postconviction petition, holding that postconviction counsel provided unreasonable assistance. *Waldrop*, 353 Ill. App. 3d at 251. In amending the defendant's *pro se* petition, counsel did not attach an affidavit from an eyewitness named by the defendant to support his claim of ineffective assistance of trial counsel.

Waldrop, 353 Ill. App. 3d at 248. We acknowledged the presumption that counsel had made a concerted effort to obtain an affidavit but was unable to do so; however, we concluded that the record “flatly contradicted” the presumption. *Waldrop*, 353 Ill. App. 3d at 250. At the hearing on the State’s motion to dismiss, postconviction counsel represented to the trial court that he did not believe that evidentiary support was generally necessary at the second stage of the proceedings. *Waldrop*, 353 Ill. App. 3d at 250. Noting that counsel misapprehended the law, we reasoned that the presumption that he had made a concerted effort to obtain a supporting affidavit was flatly contradicted because counsel did not even think that such effort was necessary. *Waldrop*, 353 Ill. App. 3d at 249-50. Therefore, because counsel failed to obtain an affidavit from the specifically identified witness, we held that his representation “fell below a reasonable level of assistance.” *Waldrop*, 353 Ill. App. 3d at 250.

¶ 14 We distinguished *Waldrop* in *Kirkpatrick* and affirmed the second-stage dismissal of the defendant’s postconviction petition. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶¶ 1, 22. The defendant in *Kirkpatrick* contended that he received unreasonable assistance from postconviction counsel because, *inter alia*, counsel failed to attach any supporting evidence when he amended the defendant’s *pro se* petition. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 18. The defendant’s postconviction petition included a claim that the prosecutor had a conflict of interest. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 4. We noted that the defendant did not identify what additional evidence could have been submitted to support this claim. *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 23. We concluded that, because the record was “devoid of a flat contradiction” (internal quotations omitted) overcoming the presumption that counsel made a concerted effort to obtain supporting documents, the defendant was not denied the reasonable assistance of postconviction counsel.

Kirkpatrick, 2012 IL App (2d) 100898, ¶ 24.

¶ 15 In the instant case, we hold that, as in *Waldrop* and unlike *Kirkpatrick*, the presumption—that counsel made a concerted effort to obtain affidavits in support of defendant’s claims, but was unable to do so—was flatly contradicted by the record. At the hearing on the State’s motion to dismiss, postconviction counsel responded to the State’s argument about the lack of supporting affidavits by asserting that the amended petition included references to the affidavits attached to the *pro se* petition.¹ Counsel also specifically referenced the affidavit containing defendant’s sworn verification, even quoting it in full. Counsel’s statements indicate that she thought such reference was sufficient. Additionally, in arguing that trial counsel’s failure to investigate could not be considered a matter of trial strategy, postconviction counsel commented, “It is unclear what could have been uncovered had a full investigation been completed.” Implicit in this comment is that postconviction counsel herself did not complete a “full investigation.” Counsel’s comments reveal

¹We need not address whether incorporation of affidavits by reference complies with section 122-2. One affidavit addressed what the victim allegedly would have said upon further investigation, and the other addressed defendant’s decision not to testify. Neither supports defendant’s claim of ineffective assistance of trial counsel for failure to investigate character witnesses. Nor can the affidavit containing defendant’s sworn verification substitute for the supporting documentation required under section 122-2. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Thus, even if counsel could properly incorporate the affidavits by reference into the amended petition, they did not constitute evidence supporting the allegation at issue as required under the Act. See 725 ILCS 5/122-2 (West 2010) (“The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.”).

that, like counsel in *Waldrop*, she misapprehended the law, erroneously believing that additional evidentiary support was unnecessary at the second stage of proceedings.

¶ 16 Nonetheless, the State maintains that the instant case is akin to *Kirkpatrick*—devoid of any flat contradiction countering the presumption that counsel made a concerted effort to obtain supporting documents. The State notes that the record reveals that, after it argued that reference to the *pro se* petition’s affidavits was insufficient, postconviction counsel responded and had an opportunity to argue. The State points out that “no inquiry was made of whether defense counsel had attempted to obtain such affidavits” and the State did not raise the lack of affidavits from the named witnesses until its rebuttal argument. The State’s argument is less than clear. *Kirkpatrick* did not involve a postconviction claim of ineffective assistance of trial counsel for failure to investigate witnesses and simply stands for the unremarkable proposition that the presumption applies unless flatly contradicted by the record. As explained above, the record here does flatly contradict the presumption. To the extent that the State’s position is that the presumption was not contradicted because postconviction counsel never explicitly mentioned the lack of specific affidavits from the named witnesses, we decline to extend *Kirkpatrick* to support it.

¶ 17 Finally, it is important to note that postconviction counsel chose to include defendant’s *pro se* ineffective-assistance-of-counsel claim when she amended the petition. If counsel thought that this claim lacked merit, she was not required to include it in the amended petition. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (“If amendments to a *pro se* postconviction petition would only further a frivolous or patently nonmeritorious claim, they are not ‘necessary’ within the meaning of the rule [651(c)].”). Indeed, if counsel thought the claim lacked merit, she should not have included it. See *Kirkpatrick*, 2012 IL App (2d) 100898, ¶ 23 (“However, because that [*pro se*] claim lacked

merit, counsel properly did not reallege it in his amended petition.”). The fact that counsel amended defendant’s *pro se* claim reveals that she believed it had some degree of merit. See *People v. Pace*, 386 Ill. App. 3d 1056, 1062 (2008) (stating that “ethical obligations prohibit counsel from [amending *pro se* claims] if the claims are frivolous or spurious”). Having made the decision to amend the claim, counsel obligated herself to present it in a legally adequate form, which required at least an attempt to contact the named witnesses. See *Johnson*, 154 Ill. 2d at 248 (stating that counsel should have attempted to contact witnesses named by the defendant). Counsel’s performance in choosing to amend the *pro se* claim by specifically identifying witnesses, without including supporting affidavits from the witnesses, explaining why she was unable to obtain such affidavits, including an affidavit from defendant explaining generally what the witnesses’ testimony would have been, or even alleging prejudice in any form, prevented the trial court from meaningfully reviewing it. See *People v. Turner*, 187 Ill. 2d 406, 413 (1999). While we reach no decision as to the merits of defendant’s underlying claim, we hold that counsel’s inadequate presentation of the claim fell short of reasonable assistance. See *Johnson*, 154 Ill. 2d at 238 (stating that postconviction counsel must “shape [the defendant’s] complaints into appropriate legal form”).

¶ 18 For the foregoing reasons, the judgment of the circuit court of Lake County is reversed and remanded for further second-stage proceedings to allow postconviction counsel to comply with Rule 651(c). See *Johnson*, 154 Ill. 2d at 249 (remanding to the trial court to permit postconviction counsel to comply with Rule 651(c)); *Waldrop*, 353 Ill. App. 3d at 251 (same). We decline defendant’s invitation to remand for appointment of new counsel.

¶ 19 Reversed and remanded.

