

No. 1-11-2910

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 Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 99 CR 24185
)	
KEVIN CZECH,)	
)	
Defendant-Appellant.)	Honorable Rickey Jones, Judge Presiding.

Justice Simon delivered the judgment of the court.

Harris, P.J., and Connors, J., concurred in the judgment.

ORDER

¶ 1 *HELD:* Where postconviction petition is prepared by private counsel, appeal claiming unreasonable assistance of postconviction counsel is not supported by Illinois Supreme Court Rule 651(c) and trial court's denial of the postconviction petition is affirmed.

¶ 2 This case is before this court following the trial court's denial of defendant Kevin Czech's postconviction petition following a third-stage hearing. Defendant was convicted of first degree murder and aggravated discharge of a firearm under an accountability theory related to the 1999

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murder of 14 year-old Alonzo Zuniga and sentenced to 42 years' imprisonment. On direct appeal, defendant asserted that he suffered ineffective assistance of trial counsel, prosecutorial misconduct, and excessive sentencing. This court affirmed his convictions and sentence. *People v. Czech*, No. 1-02-0982 (2004) (unpublished order under Supreme Court Rule 23).

¶ 3 On April 5, 2005, defendant, through counsel, filed the underlying postconviction petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2004)). Defendant asserted he was denied his constitutional rights by ineffective assistance of trial and appellate counsel for their failure to raise issues and present evidence in support of his innocence and in mitigation of his sentence. On May 9, 2005, again through counsel, defendant filed an amended postconviction petition and asserted that his right to effective assistance of counsel was violated by appellate counsel's failure to supplement the record to include a report of proceedings that would show that trial counsel labored under a *per se* conflict of interest and failed to raise that issue on appeal. Following a third-stage hearing, the trial court denied the petition and this appeal followed.

¶ 4 Defendant presents one issue for our review on appeal. Defendant argues that postconviction counsel provided unreasonable assistance by forfeiting the meritorious claim that counsel on direct appeal was ineffective for failing to assert that the trial court abused its discretion by removing defendant's chosen counsel where the trial court erroneously determined a *per se* conflict existed and defendant waived any alleged conflict. For the following reasons, we affirm the judgment of the trial court.

¶ 5 I. BACKGROUND

¶ 6 Defendant was charged with first degree murder and aggravated discharge of a weapon

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under an accountability theory related to a September 24, 1999, shooting. Defendant's parents engaged private counsel William Murphy to represent defendant. However, Murphy also represented Danny Garcia, one of the State's witnesses, in an unrelated case and the trial court held a hearing concerning Murphy's representation.

¶ 7 Murphy stated that Garcia came to him from another source and never mentioned defendant to him. Garcia initially told the police that he committed the crime for which defendant was charged but then changed his statement, arguably proving defendant's accountability. Murphy stated that if he only represented Garcia, he would advise him to "take the Fifth Amendment and see what the state would do to help him" and "if he were called to testify, I'd have one of the other attorneys in my office represent him." Ultimately, Murphy argued that "the real test is *** if Kevin would waive this conflict." The trial court stated that Murphy had a *per se* conflict that defendant could not waive, but continued the matter to review the applicable case law.

¶ 8 Murphy, defendant, and Michael Bianucci appeared at the next court date when Murphy identified Bianucci as his "partner" who was hired at the same time and defendant as "our client." Murphy submitted defendant's waiver of the conflict. Murphy stated that he thought Garcia would "take the Fifth Amendment if called here anyway." If Garcia did testify, Bianucci would examine him and the court should exercise its discretion and allow defendant to waive the conflict.

¶ 9 The court questioned defendant concerning his representation and the conflict of interest. Defendant stated that he understood the situation and that it could cause fighting or trouble, but stated that he did not talk to Garcia anymore. Defendant did not have any appreciation of any

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other concerns that would be caused by Murphy's representation of defendant and Garcia. When Murphy asked defendant if he had any concern about his representation, defendant answered "No. I think you'll do the best."

¶ 10 The court concluded that this was a *per se* conflict and could not be waived. It noted that defendant dropped out of high school as a freshman and as an uneducated young layperson with no legal training and had no understanding of the considerations he should be concerned about. The court praised Murphy and opined that if any attorney could walk the "tight rope" in this case, he would be able. However, given the case involved murder charges, case law identifying this scenario as a *per se* conflict that would support reversal on appeal, and the presence of a qualified second attorney already representing defendant, the trial court rejected defendant's waiver and precluded Murphy from representing defendant.

¶ 11 The matter advanced to trial with Bianucci representing defendant and Garcia being presented as a State's witness. Defendant was convicted of first degree murder and unlawful discharge of a weapon on an accountability theory and sentenced to 42 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence, rejecting his claims of ineffective assistance of trial counsel, prosecutorial misconduct, and excessive sentencing. *People v. Czech*, No. 1-02-0982 (2004) (unpublished order under Supreme Court Rule 23).

¶ 12 Through counsel, defendant filed a postconviction petition on April 5, 2005, asserting that he was denied his constitutional rights by ineffective assistance of trial and appellate counsel for the failure to raise issues and present evidence in support of his innocence and in mitigation of his sentence. Counsel filed an amended petition on May 9, 2005. Defendant asserted that his right to effective assistance of counsel was violated by appellate counsel's failure to supplement

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the record to include a report of proceedings that would show that trial counsel labored under a *per se* conflict of interest and failed to raise that issue on appeal.

¶ 13 The State moved to dismiss the petition, but the trial court denied that motion, finding that the issue of defendant's right to counsel of choice was a legally viable issue. The court identified the following issues for the hearing: if defendant effectively waived the conflict and was denied counsel of choice; if Bianucci was from the same firm as Murphy or partners such that the conflict could be imputed to him; whether the trial court erred in finding defendant not mentally or intellectually capable to waive the conflict; if defendant was capable, were there legal grounds to preclude waiver; and if Murphy sufficiently explained the conflict to defendant. During a subsequent discussion over discovery issues, the court stated it felt the trial court may have erred in determining a *per se* conflict existed and that would be the "better issue" over defendant's counsel's proffered issue that the conflict was imputed to Bianucci based on his relationship with Murphy.

¶ 14 At the third-stage hearing, defendant presented the testimony of his mother, Debra Czech. Debra testified that she and her husband went to Murphy's office where they met Murphy. The sign outside the office said "Murphy & Associates" as well as other attorneys. Murphy introduced Bianucci as his "partner" who would be working on the case with him. The Czech's engaged Murphy and Bianucci for \$25,000. Both Murphy and Bianucci gave the Czech's their own business cards, identifying each attorney in his own name but with the same office address and telephone number. When Debra called the office she would have to request a specific attorney because several attorneys shared the office space.

¶ 15 On defendant's first court date, both Murphy and Bianucci appeared before the court. On

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subsequent court dates only one of the attorneys would appear. When payments were made, money orders were made to "Murphy & Associates," but cash payments were given to Bianucci. Debra testified that she was unhappy that Murphy was removed from representing defendant because she thought Murphy was more knowledgeable. Murphy and Bianucci explained the court's decision to her and defendant indicated that he would accept Bianucci's representation. Debra testified that Murphy indicated that he would continue to help Bianucci and he continued to show up for defendant's court dates to sit in the gallery with the Czechs and explain the proceedings to them.

¶ 16 Defendant testified that his family retained Murphy and he met both Murphy and Bianucci during their first court appearance. Murphy introduced Bianucci to defendant as his partner. The first time defendant went to visit his attorneys at the office, he met them together. When defendant had to call either attorney, he called the same number. Cash payments were made to whichever attorney was present when the money was due.

¶ 17 Defendant was upset when Murphy was removed and he and his family expressed their concern to Murphy that Bianucci was not experienced enough to handle the case. Defendant testified that Murphy told him not to worry and that he would continue to talk with Bianucci and help him in his representation. Defendant said that Murphy continued to work on his case up through his trial.

¶ 18 Prior to resting, defense counsel requested the court take judicial notice of the record from the May 7, 2001, court proceedings. When Murphy appeared, he informed the court, "I am William P. Murphy. My partner is Michael Bianucci. Kevin Czech, our client, is also present." The defense rested.

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¶ 19 Murphy testified that he had been licensed to practice law for 43 years and had always been a solo practitioner. He hired Bianucci as a law clerk while he was in law school and he worked in the same office after he graduated, but was never a partner. Murphy indicated that he had hired several young attorneys through the years, but every one was hired as an independent contractor. Murphy testified that there were 18 attorneys in the "office bank" and they shared expenses including rent, telephones, and a shared receptionist. Therefore, the attorneys were "partners as far as paying expenses," but separate as to their cases.

¶ 20 Murphy testified that it was his belief and practice that a murder case should never be tried alone. Therefore, he asked Bianucci to assist him on defendant's case as a trial partner. Murphy explained that any reference to any other attorney he worked with as a "partner" or an "associate" was in the general sense and that he was a solo practitioner. While he could not recall the financial arrangement he made with Bianucci, he did not receive any compensation after he was conflicted out of the case.

¶ 21 Bianucci did not represent Garcia and had "nothing to do with the case" so Murphy stated that there was no concern of a conflict. Murphy further stated that he did not think that even he had a conflict as he did not even recall anything of his representation of Garcia and that it was inconsequential. Murphy testified that he remained interested in the case and had no concerns that Bianucci could handle the matter. Murphy did not work on the case after being removed and his law clerk assisted Bianucci.

¶ 22 Bianucci also testified that he was always a solo practitioner and that he never held a joint bank account or trust account with any other attorney. Murphy tendered his trial file to Bianucci after being removed and Bianucci represented defendant. The attorneys split payments

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from defendant before Murphy's removal and then Bianucci received all the payments afterward. Bianucci received his final payment was received from defendant's posted bond money. At the time of the hearing Bianucci no longer had an office at the same location as Murphy, but was allowed to utilize the conference room and secretarial services when he was in the city.

¶ 23 Following closing arguments, the trial court denied the petition. The court concluded that "Mr. Murphy and Mr. Bianucci were not members of a law firm" and the conflict could not be imputed on Bianucci. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Defendant presents a single issue for our review but breaks that issue into two separate arguments. First, defendant contends that postconviction counsel provided unreasonable assistance at the evidentiary hearing. Defendant also argues that, underlying his claim of unreasonable assistance, is the claim that his counsel on direct appeal was ineffective for failing to argue that the trial court erred in determining that the conflict with Murphy's representation of State witness Daniel Garcia was a *per se* conflict and could not be waived. We may dispose of this appeal upon review of this first issue.

¶ 26 The Act provides a means for a criminal defendant to seek relief where he has suffered a substantial denial of his constitutional rights. *People v. Rossi*, 387 Ill. App. 3d 1054, 1059 (2009). A defendant has a constitutional right to counsel at trial and on direct appeal; however, the right to postconviction counsel is derived from the Act as there is no constitutional right to counsel in postconviction proceedings. *Id.*; 725 ILCS 5/11-4 (West 2012). The Act provides for a reasonable level of assistance of counsel, for which the supreme court enacted Rule 651(c) to

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impose certain duties on postconviction counsel and ensure a reasonable level of assistance.

People v. Perkins, 42 Ill. 2d 34, 42 (2008).

¶ 27 Rule 651(c) states in full:

"(c) Record for Indigents; Appointment of Counsel. Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional right, has examined the record of proceedings at the trial, and has made any amendments to the petitions filed pro se that are necessary for an adequate presentation of petitioner's contentions." Ill. Sup. Ct. R. 651(c) (eff. April 26, 2012).

¶ 28 Defendant asserts that he suffered unreasonable assistance of postconviction counsel for failing to advance the issue of whether there was a "*per se*" conflict that could not be waived as identified by the trial court. Defendant concedes that such a claim under the Act arises pursuant to Rule 651(c) and that the Rule has been interpreted to apply only to where a petition is filed *pro se* and counsel is later appointed. See *People v. Richmond*, 188 Ill. 2d 376, 383 (1999);

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People v. Bennett, 394 Ill. App. 3d 350, 354 (2009). Defendant points to *dicta* in *Bennett* to argue that, "in the interest of fairness, a petitioner should be able to advance a claim of unreasonable assistance outside of the Rule." However, *Bennett* did not provide such an avenue for appeal, rather it read *Richmond* as other court's have and found Rule 651(c) inapplicable to counsel because he prepared and filed the initial petition rather than amending a pro se petition. *Bennett*, 394 Ill. App. 3d at 354-55.

¶ 29 This rule applies here as private counsel prepared defendant's postconviction petition and defendant's claim is not cognizable as a freestanding claim. To form a legal basis for such a claim, Rule 651(c) would need to be interpreted to apply to all petitions. Based on plain language of the Rule and the court's language in *Richmond*, that is not the case and the judgment of the trial court is affirmed.

¶ 30

III. CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 32 Affirmed.