

No. 1-12-2168

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. 05 CR 7050
)	
MARTE HOLLIS,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition affirmed where privately retained postconviction counsel provided a reasonable level of assistance.

¶ 2 Defendant Marte Hollis appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2010)). He contends that his cause should be remanded for further second-stage proceedings because his postconviction counsel failed to

provide a reasonable level of assistance. Specifically, he contends that postconviction counsel failed to present his claims in proper legal form with appropriate supporting documentation, included patently frivolous claims in the petition, and made incorrect statements at the hearing on the State's motion to dismiss the petition.

¶ 3 The record shows that defendant was charged with first degree murder, along with other offenses, in connection with a shooting incident that took place on February 17, 2005, and resulted in the death of Matthew Judkins. At defendant's bench trial, the State presented the testimony of, *inter alia*, Chantelle Moore, defendant's ex-girlfriend and mother of two of his children, and Chanell Moore, Chantelle's teenage daughter from a different relationship.

¶ 4 Chantelle testified that defendant had been her live-in boyfriend for years, but that they had broken up in October 2004. On the night of the incident, Judkins, her friend and coworker, visited her home at approximately 9 p.m. While Judkins sat in her bedroom upstairs, Chantelle took a shower in a bathroom located next to that bedroom. While she was showering, her son announced that defendant had arrived. She told him to tell defendant that she was not at home, but shortly thereafter she saw defendant standing in the hall outside the bathroom door. Defendant told her that he wanted to retrieve his clothes, then he opened her bedroom door. When defendant saw Judkins inside of that room, he asked him what Judkins was doing in his house. Judkins replied that it was not defendant's house, after which Chantelle returned to the bathroom to get dressed, and, while doing so, heard a gunshot. She exited the bathroom and saw defendant standing in the hall, then saw him fire two gunshots at the closed bedroom door, after which defendant fled. Chantelle further testified that she kept a gun in her bedroom closet, but that it would not be visible from the bedroom and that she did not tell Judkins about the gun.

There was a knife on an ottoman next to the chair in which Judkins had been sitting on the night in question because Judkins had been using the knife to cut a cigar.

¶ 5 Chanell testified that at approximately 11 p.m. on the night of the incident she let defendant into her house. Defendant immediately went upstairs, and Chanell saw her mother peer out at him from the bathroom and ask him what he wanted. Defendant did not answer, and instead opened the bedroom door and saw Judkins sitting inside. Defendant asked Judkins "why [are] you here? Why [are] you around my kids?" Chanell then saw defendant pull out a gun, after which Judkins quickly closed the bedroom door. Defendant tried to force the door open, but was unsuccessful. Defendant then fired the gun at the bedroom door and Chanell ran out of the house after the first gunshot. She saw a van idling in front of the house. The door to the van was open and Chanell recognized the driver as defendant's friend Lamont. Chanell then saw defendant run from the house, jump into the van and tell the driver "go, go, go, go."

¶ 6 The State then presented evidence that police investigators discovered that the bedroom door in question had two bullet holes in it, and that the gunshots had been fired from outside the bedroom. Three spent shell casings were found. A knife was found on the ottoman, covered by a coat, and a gun was found in the bedroom closet. The parties stipulated that Dr. J. Scott Denton would testify that Judkins sustained a gunshot wound to the upper chest as well as a gunshot wound to the right leg, neither of which had been fired at close range. Dr. Denton concluded that Judkins died from multiple shotgun¹ wounds.

¹ We note that although the stipulation as reflected in the report of proceedings states that Dr. Denton concluded that Judkins died from multiple "shotgun" wounds, that the text of the stipulation signed by the parties states that Dr. Denton concluded that Judkins died from multiple "gunshot" wounds.

¶ 7 Assistant State's Attorney (ASA) Shital Thakkar testified that after advising defendant of his *Miranda* rights, he interviewed defendant at the police station two days after the shooting. Defendant then agreed to give a videotaped statement, and that statement was consistent with his earlier interview. In that videotaped statement, which was played at trial, defendant admitted to shooting Judkins after going to Chantelle's home to retrieve clothes. Defendant's friend Lamont Beard drove him to Chantelle's home that night, and they saw an unfamiliar truck parked in front of it. Inside the house, defendant saw Judkins sitting in the bedroom, and Judkins "got loud with [him]," and defendant was scared for his life because Judkins had shot at people, including police, and "st[u]ck people up." Thus, "before [they] got to wrestling or whatever," defendant shot him, but he did not recall firing three shots. Defendant backed out of the room, walked out of the house, and jumped into Beard's van. They drove some distance before defendant broke up the gun and threw the pieces into a body of water.

¶ 8 At this point during trial, defense counsel sought to subpoena Officer Rick Anthony of the South Holland police department pursuant to a newly amended witness list. Defense counsel informed the court that she had previously made an effort to discover whether Judkins had any background that could be used to show his aggressive and violent character pursuant to *People v. Lynch*, 104 Ill. 2d 194, 200-02 (1984), but had not discovered any relevant background until recently due to a discrepancy in the spelling of Judkins' last name. Defense counsel made an offer of proof that Officer Anthony would testify regarding an incident that occurred in a South Holland hotel room that led to charges against Judkins for armed violence and various controlled substance offenses. During that incident, Judkins "went" under the bed when police entered the hotel room, and when he was forcibly removed therefrom, police found a loaded gun under the

bed. In relation to this incident, Judkins was convicted for drug related offenses, but not for the charge of armed violence. The trial court found that this evidence was not admissible under *Lynch*, and the trial proceeded.

¶ 9 Lamont Beard testified for the defense that at about 11 p.m. on the night of the incident, he drove defendant to Chantelle's home so that defendant could retrieve his belongings. An unfamiliar truck was parked outside. When defendant entered the home, he did not seem to be angry. A short time later, Beard saw Chanell run screaming from the house. Beard heard loud noises but did not know they were gunshots because the van's windows were closed and he was listening to music. Beard denied leaving the van's engine on or its door open. When defendant walked out of the house shortly after Chanell ran out, he did not have a gun visible. However, Beard had testified before the grand jury that he recognized the gunshots and that defendant ran from the house carrying a gun.

¶ 10 Defendant's account of the night of the incident was substantially similar to his videotaped statement, aside from the following exceptions. Defendant testified that he had personally witnessed Judkins and three others shoot into a crowd of people several months earlier. He also testified that when he saw Judkins in Chantelle's bedroom, there was a knife on the ottoman and a gun on a nearby shelf. Judkins jumped up from the chair and grabbed defendant, who shook loose and stepped back out of the room. When he saw Judkins go toward the closet, where defendant "believed *** the weapon was," defendant feared that Judkins was going to shoot him, so he drew his gun and fired through the open doorway. He then closed the door and fired two more shots into the door because "Judkins could have had the gun" by then and he wanted "to stop him from coming out."

¶ 11 The trial court found defendant guilty of first degree murder. In doing so, the court stated that it was clear that the State had proven the elements of murder, and that the issue was whether "there is second degree or not." The court then recounted portions of defendant's statement and his and Chanell's trial testimony, and found that Chanell's was "very credible," and that the mitigating factors for a second degree finding were not present. The court subsequently sentenced defendant to 45 years' imprisonment.

¶ 12 Defendant filed a direct appeal in which his sole contention was that the trial court erred in denying the admission of evidence, by way of Officer Anthony's testimony, of Judkins' violent and aggressive character that would have supported his self-defense argument that Judkins was the initial aggressor. This court rejected that contention and affirmed his conviction and sentence. *People v. Hollis*, 1-09-1777 (2010) (unpublished order under Supreme Court Rule 23).

¶ 13 Defendant subsequently filed a postconviction petition which was prepared by privately retained counsel. Therein, he argued that trial counsel was ineffective because she (1) failed to properly investigate his case and discover *Lynch* witnesses who could testify to Judkins' violent character; (2) called Beard, who presented damaging testimony, to testify on his behalf; (3) stipulated to the autopsy report that indicated that Judkins was killed by multiple shotgun wounds, contrary to the trial testimony of multiple witnesses that he was killed by gunshot wounds; (4) failed to file a motion to suppress defendant's videotaped confession and any statements made prior to that confession; and (5) failed to file a motion requesting discovery sanctions against the State's Attorney's office when they revealed that the 911 tape had been destroyed.

¶ 14 In an affidavit filed in support of that petition, Lisa Dabbs averred that Judkins was "very dangerous" and was known for robbing various neighborhood residents. She further averred that Judkins robbed defendant's brother at gunpoint, and that he "has known to been [*sic*]" arrested for battery, assault, and drugs, as well as questioned for attempted murder. Dabbs further averred that Judkins was known to "tote guns around."

¶ 15 On December 16, 2011, postconviction counsel filed an amendment to defendant's postconviction petition, which consisted of the affidavit of Ebony Hughes. Therein, Hughes averred that Judkins, whom she knew from the neighborhood, had an aggressive and violent character, had robbed defendant's brother at gunpoint, and was a drug dealer who often used violence to keep people from reporting his crimes. Hughes further averred that Judkins was feared by people in the community because he was unpredictable and violent, and that had she been called to testify at trial, she would have testified to Judkins' reputation for violence in the community and that defendant was afraid of him.

¶ 16 The State filed a motion to dismiss defendant's postconviction petition. At the hearing held thereon, postconviction counsel argued that the petition and attached affidavits make a substantial showing of a constitutional violation. Postconviction counsel also stated that the original affidavit that had been attached to the petition was "basically a statement" and was "not an affidavit. It doesn't purport to be in the form of an affidavit, so it's totally inadequate as to the -- for purposes of attaching an affidavit to a postconviction petition."

¶ 17 The trial court granted the State's motion to dismiss defendant's postconviction petition. In doing so, the court stated, *inter alia*, that the "two affidavits go to *Lynch* material" related to

Judkins' reputation for violence in the community, which would be "nothing but cumulative" of defendant's extensive trial testimony regarding "the *Lynch* information that he had."

¶ 18 On appeal, defendant challenges that dismissal order, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). Defendant does not challenge the dismissal of his postconviction petition on the merits, but rather, contends that his privately retained postconviction counsel failed to provide a reasonable level of assistance, and requests that his cause be remanded for further second-stage postconviction proceedings.

¶ 19 Defendant argues that postconviction counsel did not meet her obligations under Rule 651(c), which specifies the duties of appointed postconviction counsel. However, where, as here, defendant's initial petition was filed by privately retained counsel, Rule 651(c) is inapplicable. *People v. Richmond*, 188 Ill. 2d 376, 382-83 (1999); *People v. Anguiano*, 2013 IL App (1st) 113458, ¶¶ 24-25. That said, the Act provides for a reasonable level of assistance by postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). This standard is applicable to postconviction counsel that are appointed at the second stage of proceedings, as well as to privately retained postconviction counsel who file the initial petition on a defendant's behalf. *Anguiano*, 2013 IL App (1st) 113458, ¶¶ 26-40.

¶ 20 Here, defendant first contends that his privately retained postconviction counsel failed to provide him with a reasonable level of assistance in that she failed to present his claim that trial counsel was ineffective for failing to investigate and present *Lynch* evidence demonstrating Judkins' violent criminal proclivities in proper legal form with appropriate supporting documentation. Specifically, defendant contends that counsel (1) failed to show that defendant knew of the proposed witnesses, Dabbs and Hughes, at the time of trial; (2) did not ensure that

Dabbs' affidavit stated that she would have testified on defendant's behalf at trial; and (3) failed to include an affidavit from defendant attesting that he told his trial attorney about Dabbs and Hughes.

¶ 21 Where a postconviction petition is not supported by affidavits or other documents, a court may reasonably presume that postconviction counsel made a concerted effort to obtain affidavits in support of the claims raised in the petition, but was unable to do so. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993). This presumption will only be disregarded where it is flatly contradicted by the record. *Id.* Such contradiction has been found where counsel admits to the trial court that he failed to carry out defendant's request that he investigate specific witnesses and obtain supporting affidavits from them. *Id.* at 242-43.

¶ 22 Here, defendant takes issue with the fact that Dabbs' affidavit was not more specific in certain respects, and that postconviction counsel did not show that he knew about Hughes and Dabbs at the time of trial or include an affidavit from him establishing that he told trial counsel about both witnesses and their *Lynch*-related testimony. However, pursuant to *Johnson*, we presume that postconviction counsel made a concerted effort to obtain the necessary, and sufficiently detailed, documents in support of the claims raised in the postconviction petition, but was unable to do so. Here, there is nothing in the record that contradicts this presumption. Any argument that counsel could have obtained a more detailed affidavit from Dabbs or that defendant indeed knew about Dabbs and Hughes at the time of trial and told his trial counsel about them is based on sheer speculation. Notably, in their affidavits, neither Dabbs nor Hughes state when they informed defendant about their knowledge. In sum, nothing in the record here establishes or suggests that counsel did not make an effort to obtain the necessary documents in

support of defendant's claims (*People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25), and we thus find that counsel provided a reasonable level of assistance.

¶ 23 Defendant also argues that postconviction counsel failed to provide a reasonable level of assistance in that every claim she included in the petition aside from the *Lynch*-based claim was patently frivolous. Specifically, defendant contends that (1) trial counsel's decision to call Beard to testify at trial was a matter of trial strategy that is largely immune to an ineffectiveness challenge; (2) the discovery sanction-related claim is largely speculative; (3) the motion to suppress-related claim is factually and legally baseless, and (4) the claim related to the autopsy report stipulation was based merely on the singular erroneous mention of the phrase "shotgun wounds" in the transcript and is insufficient to demonstrate that the judge had any confusion about the manner and cause of Judkins' death.

¶ 24 Counsel is presumed to know the law. *People v. Perkins*, 229 Ill. 2d 34, 51 (2007). Further, where the record shows that under the circumstances the arguments postconviction counsel raised were the best options available, we will not find the counsel rendered an unreasonable level of assistance even if the arguments ultimately lacked legal merit or were not particularly compelling. *Id.*, see also *Anguiano*, 2013 IL App (1st) 113458, ¶ 49. Here, although the claims postconviction counsel raised in the petition may not have been particularly compelling and were ultimately found to be without legal merit, the fact remains that in raising them postconviction counsel was pursuing the best options available to her based on the facts and circumstances of this case, and was thus zealously advocating for her client. We do not find this to constitute an unreasonable level of assistance.

¶ 25 Defendant finally argues that postconviction counsel failed to provide a reasonable level of assistance in that she made incorrect statements at the hearing on the State's motion to dismiss. Defendant points to counsel's statement that Dabbs' affidavit was "basically a statement" and "not an affidavit" and was thus "inadequate" for the purpose of "attaching an affidavit to a postconviction petition."

¶ 26 In assessing the adequacy of defendant's legal assistance, a reviewing court will not consider isolated instances of alleged deficiencies, but rather, on the totality of the circumstances as reflected by the entirety of the record. *People v. Hobson*, 386 Ill. App. 3d 221, 237 (2008). Here, although postconviction counsel made the above quoted statements at the hearing on the State's motion to dismiss, the record shows that at that same hearing she also referred to the document that Dabbs signed as an "affidavit" in that she argued that the petition and the two attached affidavits made a substantial showing of a constitutional violation. Further, the record shows that in arriving at its decision, the circuit court treated the document that Dabbs signed as an affidavit. This is reflected by the court's statement that the contents of the "two affidavits" was cumulative to the *Lynch*-related testimony defendant had given at trial.

¶ 27 We do not find postconviction counsel's above quoted statement regarding Dabbs' affidavit to be unreasonable assistance, particularly where the record reflects that the document in question is hand written on what appears to be notebook paper, and, unlike Hughes' typed affidavit, does not bear the title of "affidavit" or include a section stating that the undersigned was duly sworn on oath and that the contents of the document are true and correct to the best of her knowledge. Under these circumstances, counsel's statement was an acknowledgment of the readily apparent differences between the two affidavits.

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¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.