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No. 1-11-2685

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. 90 CR 1823
	)	
JAMES YOUNG,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Lampkin and Rochford concurred in the judgment.

**ORDER**

*Held:* The summary dismissal of the defendant's third successive petition for postconviction relief was affirmed, where he failed to sufficiently demonstrate that his postconviction appellate counsel was ineffective for failing to assert that his second and third-stage postconviction counsel failed to comply with Supreme Court Rule 651(c) and otherwise provided unreasonable assistance.

¶ 1 The defendant, James Young, filed a motion for leave to file his third successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2010)). The circuit court denied the motion and dismissed the petition as frivolous and patently

without merit. The defendant now appeals from that dismissal, and for the reasons that follow, we affirm.

¶ 2 Following a consolidated jury trial, the defendant, along with co-defendants Michael Meyers, James Bannister, Kevin Young, Thomas Carter and Eric Smith, were found guilty of the murders of Dan Williams and Thomas Kaufman, and sentenced to life imprisonment. The defendant's conviction and sentence was affirmed by this court on direct appeal (*People v. Young*, 263 Ill. App. 3d 627 (1994)). The evidence in this case has been detailed in our prior opinion, and is restated here as necessary to address the appeal now before us.

¶ 3 This case arose out of a gang-related shooting at the Stateway Gardens housing complex on the night of November 9, 1989. As Williams, the intended target, approached the building located at 3517 South Federal, a group of men later identified as the defendant and co-defendants began firing at him. He fled across the street towards the entrance of an Illinois Institute of Technology (IIT) building, where he ultimately collapsed and died. Kaufman, a security guard stationed inside the front doors of the IIT building, was struck and killed by stray bullets from the defendants' weapons.

¶ 4 The State's primary eyewitness was Deanda Wilson ("Wilson"), age 12 at the time of the shooting. Wilson identified all of the defendants as members of one particular street gang which was an "enemy" of Wilson's gang. About 10 p.m. on the night of the shooting, Wilson was standing with Willy Simms when he heard people call out "here comes [Young]." He ran to the second-floor porch to observe, and saw the defendants approaching the building. Wilson testified that, at the moment of the shooting, the defendants were wearing hats, but he could identify their faces in the light. He then testified to seeing the defendants shooting at Williams for about 15 seconds, until Williams stumbled towards the IIT building and collapsed. On cross-examination,

Wilson admitted to having told the police that the defendants had their caps pulled down over their faces during the shooting. Wilson further admitted testifying before the grand jury that he could not actually see the defendant and Bannister immediately before the shooting because they were standing on the porch under the building.

¶ 5 The State's theory of the case was that the shooting was to avenge the sexual assault of co-defendant Kevin Young's girlfriend, A.W. A.W. testified that two days prior to the shooting, she was approached by gang members who were rivals of Young's gang, who harassed, kicked, and threw objects at her and then brought her to an apartment and sexually assaulted her. She further testified that, after the assault, she had been treated at Michael Reese Hospital. Later, she informed Young of the identities of the attackers. According to A.W., at about 10 p.m. on November 9, all of the defendants left the apartment, each dressed in black and carrying a gun. A.W. stated that when the men returned approximately 20 minutes later, they were wearing ski masks or stocking caps over their faces.

¶ 6 During discovery, the State had provided the defendants with a written statement that A.W. had given to the police following the shooting, along with a transcript of her grand jury testimony of November 17, 1989. In these prior accounts, A.W. claimed to have been out with a cousin on November 9, and denied any knowledge of the shooting or that she knew the defendant or other co-defendants.

¶ 7 At trial, A.W. admitted that these prior accounts had been untruthful but testified that, at that time, she was motivated by her fear of Young and other gang members at Stateway Gardens. However, she testified that she had been relocated by the State in February of 1990, and had given the true account to the police and an assistant State's Attorney after that point.

¶ 8 On direct appeal, the defendant contended, in relevant part, that he was not proven guilty beyond a reasonable doubt, and that his trial counsel was ineffective for offering the prior inconsistent statements of Wilson and A.W. merely as impeachment rather than substantive evidence. This court rejected these arguments. *Young*, 263 Ill. App. 3d 627.

¶ 9 In June of 1992, Wilson submitted an affidavit recanting his trial and grand jury testimony, and stating that he had been unable to see Bannister, Smith and Meyers during the shooting because they had been wearing masks. Wilson made no recantation as to the defendant, however, and averred that he could see the remaining shooters.

¶ 10 In August of 1995, the defendant filed his initial postconviction petition (hereinafter "initial petition"). The petition contained numerous arguments including, in relevant part, that his trial and appellate counsel were ineffective for failing to challenge his indictment as being the product of untruthful and coerced testimony. He further claimed that his trial counsel was ineffective for not going to the scene of the shooting to personally take photographs of the area; failing to secure a witness to contradict the eyewitness testimony of Ruth Wilson; failing to seek a continuance after learning of the change in A.W.'s testimony; and failing to subpoena or question several witnesses, including Gregory Gordon, Mervin Young, Antoinette Berry, Willy Simms, and Darrin Owens. The defendant additionally asserted that he was entitled to a new trial based upon Wilson's recantation. In a separate filing, the defendant asserted that his counsel on direct appeal was ineffective for failing to challenge trial counsel's deficiencies with regard to these issues.

¶ 11 In October of 1995, the defendant's initial petition proceeded to the second stage, and the circuit court appointed assistant Public Defender Brendan Max to represent the defendant. On July 7, 1998, after reviewing the initial petition and trial record, conducting discovery and

interviewing witnesses, Max filed a supplemental postconviction petition with 11 attached exhibits. The supplemental petition restated several issues raised by the defendant in his initial petition and asserted additional claims.

¶ 12 In particular, Max urged that an evidentiary hearing was necessary based upon Wilson's recantation. By April of 1998, Wilson had filed an additional affidavit, also recanting his trial testimony as to the defendant and claiming he did not see him during the shooting. Max attached this affidavit to the supplemental petition and argued that it constituted newly-discovered evidence which could exonerate the defendant. Max also added claims of ineffectiveness of the defendant's trial counsel based upon counsel's failure to impeach Wilson's trial testimony and to undermine the State's theory that the shooting was motivated by the sexual assault of A.W. In particular, Max argued that Michael Reese Hospital possessed no record of ever having admitted or treated A.W. in the period immediately following the alleged assault. In support of this contention, Max attached the affidavit of Peggy Anderson, the record keeper for Michael Reese Hospital.

¶ 13 The State moved to dismiss each of the claims in the defendant's initial petition and supplemental petition, aside from the claim based upon Wilson's recantation. By this point, each of the co-defendants had filed postconviction petitions similarly seeking relief based upon the recantation, and the circuit court accordingly set the matter for a joint, third-stage evidentiary hearing on that issue.

¶ 14 On January 9, 2004, at the conclusion of the third-stage evidentiary hearing, the court denied the requested postconviction relief with regard to the defendant, finding that Wilson's recantation was not credible as to him. The court likewise rejected the defendant's claim of

actual innocence based upon the recantation, finding that A.W.'s testimony provided substantial and important corroboration of Wilson's trial testimony.

¶ 15 On February 11, 2004, a hearing was held on the State's motion to dismiss the remaining claims in the defendant's petition. At that hearing, the defendant was represented by assistant Public Defender Gwendolette Brown, who had replaced Max. Brown argued, in pertinent part, that the defendant's trial counsel was ineffective for failing to impeach A.W. as to the sexual assault. The trial court disagreed, and dismissed the ineffective assistance of counsel claims finding that they failed to meet either prong of the test in *Strickland v. Washington*, 466 U.S. 688 (1984).

¶ 16 The defendant appealed the dismissal of his initial postconviction petition, raising solely the issue of whether a new trial was warranted based upon the "newly discovered evidence" of Wilson's recantation. The defendant was represented in that appeal by assistant Appellate Defender Michael Bennett. The dismissal was affirmed by this court (*People v. Carter*, Nos. 1-04-0859, 1-04-0860, 1-04-0976 (2006) (unpublished order under Rule 23))

¶ 17 On June 4, 2004, the defendant filed a successive *pro se* postconviction petition. In this petition, the defendant asserted, in relevant part, that Brown's representation was unreasonable because she failed to file a discovery motion which, according to the defendant, would have proven that A.W. was "merely assaulted" rather than raped, and that she had thus perjured herself at trial. The petition further argued that Brown was ineffective for failing to present evidence obtained by Max which would show that there was no record of A.W. being at Michael Reese Hospital. The circuit court summarily dismissed this petition on June 24, 2004. No appeal was taken from this dismissal.

¶ 18 On February 17, 2006, the defendant filed his second successive petition, which essentially repeated the claims in his first successive petition, but added that Brown was ineffective for not investigating a potential witness who could have provided an alibi for the defendant at the time of the shooting. The trial court dismissed this petition as frivolous and patently without merit. Bennett again was appointed to represent the defendant on appeal from this petition, filing a motion to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court allowed that motion on November 20, 2007. *People v. Young*, No. 1-06-1372 (order under Rule 23).

¶ 19 On December 10, 2010, the defendant filed the motion for leave to file a third successive postconviction petition (hereinafter "petition") that is the subject of this appeal. In the motion, the defendant again argues his actual innocence based upon the "newly discovered" evidence from Wilson's recantation. He additionally claims that, on appeal from his initial petition, Bennett provided ineffective assistance by failing to challenge any of his contentions apart from those arising from the recantation of Wilson.

¶ 20 On July 20, 2011, the circuit court dismissed the petition as frivolous and patently without merit. The instant appeal followed.

¶ 21 The defendant argues that his counsel on appeal from his postconviction petitions was ineffective for failing to brief the meritorious claim that Max and Brown failed to provide reasonable assistance in his postconviction proceedings. Specifically, appellate counsel did not assert the issue that, during the second and third-stage postconviction proceedings, Max and Brown failed to comply with Illinois Supreme Court Rule 651(c). The defendant further argues that such deficiency prejudiced him because it impaired his ability to properly address the constitutional infirmities that arose during his trial.

¶ 22 The purpose of the Act is to allow a defendant to assert that, in the proceedings which resulted in his conviction or sentence, there was a substantial denial of his rights under the federal or state constitutions, or both. 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). In general, the Act permits the filing of only one postconviction petition unless the petitioner obtains leave of court to file a successive petition. 725 ILCS 5/122-1(f) (West 2008); *People v. Smith*, 2014 IL 115946 ¶ 33; *People v. Davis*, 2014 IL 115595 ¶14. A petitioner faces "immense procedural default hurdles" in obtaining such leave, because successive petitions encumber the finality of criminal litigation. *Davis*, 2014 IL 115595 at ¶ 14. Leave is granted only when fundamental fairness so requires, or, put another way, when the defendant demonstrates cause for his failure to bring the claim in his initial postconviction proceeding, and prejudice which results from that failure. 725 ILCS 5/122-1(f) (West 2010); *Smith*, 2014 IL 115946 ¶ 33. "Cause" denotes an objective factor external to the defense which impaired counsel's ability to raise the claim in an earlier proceeding. *Id.* "Prejudice" refers to a constitutional error which "so infected the entire trial that the resulting conviction or sentence violates due process." *Id.*, citing 725 ILCS 5/122-1(f) (West 2012). Both elements of the test must be satisfied to justify relief under the Act. *Davis*, ¶ 14 . Our review from the summary denial of a motion for leave to file a supplemental petition is *de novo*. See *People v. Delton*, 227 Ill. 2d 247, 255 (2008).

¶ 23 Criminal defendants are entitled to an appeal as a matter of constitutional right, and correspondingly, to effective assistance of appellate counsel. *People v. Flores*, 153 Ill. 2d 264, 277 (1992) (*modified*, *Pitsonbarger*, 205 Ill. 2d 444). Where a defendant files a successive postconviction petition raising a valid claim of ineffective assistance of appellate counsel, which could not have been raised in a prior post trial proceeding, the defendant is entitled to



consideration of that claim under the Act. *Id.* at 281-82. Although attorney error short of ineffective assistance will not satisfy the cause and prejudice test, constitutionally ineffective assistance does constitute "cause" under the cause and prejudice test. *Id.* at 280.

¶ 24 In order to establish ineffective assistance, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and that (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 326–27 (2011) (citing *Strickland*, 466 U.S. at 694). In order to satisfy the deficient-performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate that he was not functioning as “counsel” as guaranteed by the sixth amendment. *Id.* at 327. Second, a defendant must demonstrate that counsel's deficient performance substantially prejudiced his defense. To demonstrate prejudice, a defendant must show a reasonable probability that “but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 326, citing *Strickland*, 466 U.S. at 694.

¶ 25 The defendant argues that appellate counsel was ineffective for failing to assert both Max's and Brown's noncompliance with Rule 651(c). In particular, he points out that neither attorney filed a certificate of compliance as required under the Rule, and further contends that "nothing on the record affirmatively demonstrates" either attorney personally consulted with the defendant or otherwise complied with the Rule. We disagree.

¶ 26 A defendant's right to postconviction counsel derives not from the constitution but from the Act. Once counsel is appointed, the defendant is entitled only to the level of assistance that the Act mandates, which is a "reasonable level" of assistance. 725 ILCS 5/122 (West 2008); see *People v. Greer*, 212 Ill. 2d 192, 204 (2004); *People v. McNeal*, 194 Ill. 2d 135, 142 (2000).

Rule 651(c) was enacted to ensure that appointed counsel provide the appropriate level of assistance, and states as follows:

"The record filed in [the appellate] 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 rights, has examined the record of the 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."

¶ 27 The essential role of appointed postconviction counsel, which enables the Act to perform its function, is to ascertain the basis of the defendant's complaints, shape those complaints into appropriate legal form and present them to the court. *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968). Compliance with the rule may be shown by a certificate filed by the petitioner's attorney (*People v. Perkins*, 229 Ill. 2d 34, 50 (2007)). However, as recognized by the defendant, the absence of such a certificate does not automatically render counsel's assistance unreasonable, particularly where the record sufficiently establishes that counsel otherwise fulfilled his duties under the Rule. *People v. Johnson*, 154 Ill. 2d 227, 238 (1993).

¶ 28 With regard to Max, we note that none of the defendant's successive petitions contain any allegation that he failed to consult with the defendant, failed to assert the defendant's arguments, or otherwise provided unreasonable representation to the defendant. Had the defendant desired to challenge Max's performance under Rule 651 or on any other basis, he could have done so in his successive petition of June 4, 2004. However, as there is no such claim in that petition, the matter was forfeited. See *Pitsonbarger*, 205 Ill. 2d at 456. Similarly, his appellate counsel

cannot be deemed ineffective for having failed to brief such a contention where it was never asserted by the defendant in the first instance.

¶ 29 The defendant asserts that Brown's failure to comply with Rule 651 is evidenced by (1) her failure to file a certificate stating that she consulted with the defendant; (2) her failure to further investigate his alibi defense; and (3) the fact that she "mishandled" her argument at the February 11, 2004, hearing on the State's motion to dismiss the supplemental petition. With regard to the last claim, the defendant argues that Brown did not properly challenge trial counsel's failure to adequately impeach A.W. with the medical records from Michael Reese Hospital.

¶ 30 We point out that, as with Max, there is no suggestion in the defendant's successive petitions that Brown failed to consult with him. Regardless of this, we have held that, where it is clear from the record that counsel at the second stage of postconviction proceedings has complied with the tasks required under Rule 651(c), it is unnecessary for counsel at the third stage to repeat the same steps. *People v. Marshall*, 375 Ill. App. 3d 670, 682 (2007). The requirements of Rule 651(c) need be met only once, and not by attorneys representing a defendant at each stage of the postconviction proceedings. *Id.*

¶ 31 Brown represented the defendant exclusively in the third-stage hearings and relied upon the assertions and arguments prepared by Max in the supplemental initial petition. Our review of the record demonstrates that Max sufficiently complied with the mandates of Rule 651(c). He had a thorough understanding of the claims asserted in the defendant's *pro se* petition, and, after conducting discovery, prepared a supplemental petition that competently reshaped and argued those claims. During an initial status conference, Max reported to the court that he had personally located and interviewed witnesses that he determined were necessary as he began

drafting the supplemental petition. He later reported that he had undertaken "significant investigations," spoken with witnesses, reviewed documents and read a transcript of two thousand pages, and that he required additional time to locate more witnesses in order to "complete the briefing." He vigorously argued for, and successfully obtained, an evidentiary hearing with regard to Wilson's recantation, and also stressed for the court Wilson's inherent unreliability at trial. We conclude, based upon our review of the record, that Max sufficiently consulted with the defendant and otherwise provided the assistance demanded under Rule 651(c). It was therefore unnecessary for Brown to repeat the same steps performed by Max.

¶ 32 With regard to the alleged alibi defense, there was no legal basis for either Max or Brown to have conducted any further investigation on this issue, because it had been forfeited. First, we point out that there is no reference to any purported alibi witnesses or defense in the defendant's initial petition. Rather, in his third petition, the defendant claimed for the first time that his trial counsel was ineffective for failing to pursue the alibi defense. Regardless, in order to have been arguably entitled to postconviction relief, postconviction counsel would have needed to demonstrate that the defendant's alibi defense was based upon matters outside of the trial record, or that it otherwise could not have been adjudicated in his direct appeal. See, e.g., *People v. Easley*, 192 Ill. 2d 307, 315–16 (2000); *People v. Alberts*, 383 Ill. App. 3d 374, 376 (2008); *People v. Morris*, 229 Ill. App. 3d 144, 167 (1992). In this case, there is absolutely no basis to conclude that the alibi defense was newly discovered, or that it was not otherwise known to trial counsel and properly discounted as lacking in merit. To the contrary, the defendant's third petition states that his trial counsel attempted to contact one of the alibi witnesses but was unable to do so. As there is no indication that the alibi defense was based on evidence *dehors* the record, the petition would have been subject to dismissal on postconviction based upon forfeiture. See

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*Pitsonbarger*, 205 Ill. 2d at 456 (issues raised and decided on direct appeal are barred from consideration under *res judicata*; issues that could have been raised, but were not, are deemed forfeited.)

¶ 33 Finally, Brown's choice of argument at the February 11 hearing fails to demonstrate unreasonable representation or any lack of compliance with Rule 651(c). She elected to stand upon the arguments as asserted in the supplemental petition, each of which were properly asserted and legally framed. The focus of her argument at the hearing was a matter of legal strategy and subject to her discretion. As we have already concluded that Max sufficiently complied with the Rule in preparing the supplemental petition, we find no basis for reversal on this issue. Accordingly, we also find that the defendant has failed to establish a defective performance on the part of his appellate postconviction counsel, and need not reach his argument that he was prejudiced by counsel's performance.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court dismissing the defendant's third successive petition.

¶ 35 Affirmed.