

2015 IL App (1st) 123272-U
No. 1-12-3272
Order Filed March 27, 2015

SIXTH DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	No. 87 CR 4996
v.)	
)	
MICHAEL GREEN,)	
)	Honorable
Defendant-Appellant.)	Evelyn B. Clay,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order dismissing the defendant's successive postconviction petition was vacated. The defendant did not receive the reasonable assistance of postconviction counsel. The case was remanded for the appointment of counsel, compliance with Illinois Supreme Court Rule 651(c), and further second-stage proceedings.

¶ 2 The defendant, Michael Green, appeals from the dismissal of his successive postconviction petition. On appeal, he contends that he stated a claim of actual innocence based on newly discovered evidence, and that his postconviction counsels did not provide him reasonable assistance. We do not reach the defendant's claim of actual innocence because we agree that he did not receive reasonable assistance from postconviction counsel. We vacate the dismissal of the defendant's successive postconviction petition and remand for further proceedings.

BACKGROUND

I. Trial Court and Direct Appeal Proceedings

¶ 5 The defendant and codefendants, Michael Jackson, L.C. Jackson, Samuel Lee and Lawrence Brantley were indicted and charged with the first degree murder of Mario Hernandez and the armed robbery of Mr. Hernandez and Rudolfo Ramirez. The defendant was tried separately from the other defendants. Following a jury trial, the defendant was found guilty of first degree murder and armed robbery. The jury found the defendant eligible for the death penalty, but following a hearing, the jury declined to impose the death penalty. The trial court sentenced the defendant to natural life for the murder and 30 years on each of the armed robbery convictions. On direct appeal to this court, the defendant's convictions and sentences were affirmed. See *People v. Green*, No. 1-89-1377 (1995) (unpublished order under Supreme Court Rule 23).

II. Collateral Relief Proceedings

¶ 7 Between 1990 and 2001, the defendant filed three petitions pursuant to the Post-Conviction Act (725 ILCS 5/122-1 *et seq.* (West 1995) (the Act)) all of which were dismissed by the trial court, and either not appealed from or affirmed or dismissed on appeal by this court. In 2003, the defendant filed a petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002) (the Code)). The trial court dismissed the petition and this court affirmed.

¶ 8 On December 22, 2004, the defendant filed a section 2-1401 petition, which is the subject of this appeal, and a motion for the appointment of counsel. In support of his petition, the defendant attached the affidavit of his codefendant, Mr. Brantley and a transcript from his sentencing hearing in which defense counsel read into the record an affidavit from codefendant L.C. Jackson, and his own affidavit. On February 16, 2005, assistant public defender, Andrea Monsees (ADP Monsees) filed an appearance on behalf of the defendant. On August 11, 2005, the State filed a motion to dismiss the defendant's section 2-1401 petition.

¶ 9 On November 17, 2005, the trial court entered an order advising the defendant that it intended to recharacterize the defendant's section 2-1401 petition as a postconviction petition. APD Monsees notified the defendant that he could elect to withdraw or amend his petition. On February 16, 2006, APD Monsees informed the trial court that the defendant elected to have his petition treated as a postconviction petition, and the trial court entered an order to that effect. Thereafter, the case was continued from time to time pending the results of APD Monsees' investigation of the defendant's claims.

¶ 10 APD Monsees continued to represent the defendant until February 8, 2008, when Assistant Public Defender Bruce Landrum (APD Landrum) appeared on behalf of the

defendant. APD Landrum was granted a continuance to continue the investigation into the defendant's claims.

¶ 11 On November 6, 2008, the defendant appeared before the trial court with APD Landrum, who informed the court that the defendant was dissatisfied with the lack of progress in his case and requested the appointment of another attorney. The trial court denied the defendant's request. The case was then continued to February 5, 2009. On that date it was continued by agreement to May 7, 2009.

¶ 12 On August 13, 2009, APD Landrum advised the trial court that he was still investigating the case. Because the court and the attorneys were uncertain whether the defendant had been admonished that his section 2-1401 petition was recharacterized as a postconviction petition, the case was continued to October 8, 2009, for the defendant to be given the admonishments.

¶ 13 On October 8, 2009, the assistant State's Attorney, Darren O'Brien (ASA O'Brien), informed the trial court that the State was waiting for APD Landrum to file an amended petition or to file his certificate of compliance with Illinois Supreme Court Rule 651(c) (Ill. St. Ct. R. 651(c) (eff. Dec. 1, 1984)). The case was continued to November 5, 2009, for the filing of an amended petition or the certificate of compliance with Rule 651(c).

¶ 14 On November 5, 2009, the defendant appeared before the trial court. The defendant informed the court that he had not spoken to APD Landrum. The case was then continued to November 16, 2009. On that date, assistant State's Attorney Terry Reilly (ASA Reilly) informed the court that he had not spoken with APD Landrum. The court continued the case to December 21, 2009. However, on December 3, 2009, a different circuit court judge ordered the case continued by agreement to March 4, 2010.

- ¶ 15 On December 21, 2009, the defendant appeared before the trial court. No attorney appeared for the defendant. The defendant had filed a motion to proceed *pro se* and to vacate the reclassification of his section 2-1401 petition to a postconviction petition. The court granted the defendant's motion to proceed *pro se* and continued the case to March 4, 2010.
- ¶ 16 On March 4, 2010, APD Landrum appeared before the trial court. He advised the court that on February 16, 206, the defendant had elected to have his section 2-1401 petition treated as a postconviction petition. APD Landrum then stated to the court that he had "just started the investigation and I'm about to conclude it. I think that when we come back to court, I will be able to file a 651(c)." The trial court continued the case to June 3, 2010 by agreement.
- ¶ 17 On June 3, 2010, the attorneys and the defendant appeared before the trial court. APD Landrum advised the judge that he had expected to file his 651(c), but the defendant wished to represent himself and had filed a *pro se* amended petition. Despite the fact that on December 21, 2009, she granted the defendant's motion to represent himself, the trial court denied the defendant leave to file the petition and admonished him that he was not permitted to file *pro se* petitions while he was represented by counsel. The case was continued by agreement to September 9, 2010, for the filing of APD Landrum's certificate of compliance with Rule 651(c).
- ¶ 18 On September 9, 2010, the attorneys and the defendant appeared before the trial court. APD Landrum advised the judge that he had completed his investigation and was prepared to file his R. 651(c) certificate at the next court date. However, the defendant indicated to him that he wished to represent himself. The defendant confirmed to the trial court that he wished to represent himself. After advising the defendant of the dangers of representing, the

trial court granted the defendant's request to proceed *pro se*. The court granted leave to APD Landrum to withdraw as the defendant's attorney, but then continued the case to November 10, 2010, for the filing of the certificate of compliance with Rule 651(c).

¶ 19 On November 10, 2010, the defendant appeared before the trial court. The court informed the defendant that while APD Landrum was no longer with the public defender's office, the public defender was still representing him. When the defendant stated that he had a petition to file, the court stated that the defendant had an attorney and the defendant would not be allowed to file any pleadings *pro se*. The court further advised the defendant that his new attorney would be contacting him. However, on November 12, ASA Abraham advised the trial court that APD Landrum was still with the public defender's office. On November 30, 2010, the defendant appeared before the trial court. The court informed him that his attorney had not appeared and that the case was continued to December 16, 2010.

¶ 20 On March 3, 2011, the defendant appeared and requested to proceed *pro se* and for leave to file an amended successive postconviction petition. The trial court ordered the State to respond by May 31, 2011, and continued the case to June 30, 2011. On June 30, 2011, the case was heard by a different judge. ASA Reilly informed the judge that the trial transcript (the transcript) was so old it had been destroyed, and the defendant had the only copy of the transcript. The judge ordered the defendant to bring his copy of the transcript to the next court date.

¶ 21 On August 2, 2011, the defendant and ASA Reilly appeared. The defendant did not bring his copy of the transcript because the law library was shut down. ASA Reilly pointed out to the trial court that the defendant's petition was a successive postconviction petition and the issue before the court was whether the court would grant leave to the defendant to file his

successive petition. The trial court acknowledged that it had allowed the defendant to proceed on his successive petition and that the State was now required to file a response. The proceedings were continued to October 20, 2011, for the defendant to bring his copy of the transcript to court. On that date, the defendant appeared without the transcript. The trial court continued the case for the production of the transcript.

¶ 22 On January 19, 2012, the defendant and the State were before the trial court. The court granted the defendant leave to file an amended affidavit, and ordered the State to respond to the successive petition no later than March 16, 2012, and continued the case to April 27, 2012, to set a date for argument. On April 27, 2012, the defendant and ASA Shelley Keane appeared before the trial court. ASA Keane informed the court that she had just received the file and was not prepared to respond to the petition. The court ordered ASA Keane to file a response to the petition within 30 days and set June 21, 2012, for argument on the petition. On June 21, 2012, ASA Keane informed the trial court that the response to the supplemental petition was being reviewed by her supervisor. The court continued the case to July 27, 2012 for argument.

¶ 23 On July 27, 2012, the defendant and ASA Keane appeared before the trial court. The defendant advised the court that he had received the State's motion to dismiss the previous evening and was not prepared to argue his case. The defendant requested a 30-day continuance. The case was continued by agreement to August 31, 2012, for argument.

¶ 24 On August 31, 2012, the trial court heard arguments on the State's motion to dismiss. The court issued a written order granting the State's motion to dismiss the defendant's successive postconviction petition on October 12, 2012. This appeal followed.

¶ 25

ANALYSIS

¶ 26 While the Act contemplates the filing of only one postconviction petition, there are two exceptions: where the defendant can establish cause and prejudice for failing to raise the claim sooner or where the defendant sets forth a colorable claim of actual innocence. *People v. Harper*, 2013 IL App (1st) 102181, ¶ 35. A defendant seeking to file a successive postconviction petition must first obtain leave of court to do so. See 725 ILCS 5/122-1(f) (West 2004). In this case, the record reflects that the defendant raised a claim of actual innocence and ineffective assistance of defense counsel. Judge Clay allowed him to file his petition, appointed counsel for him and ordered the State to respond to his successive postconviction petition. Therefore the defendant's case was at the second stage of postconviction proceedings when it was dismissed.

¶ 27 Where the defendant has been appointed counsel in postconviction proceedings, the Act provides for a reasonable level of assistance. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. Rule 651(c) imposes specific duties on postconviction counsel to ensure that a defendant receives reasonable assistance. Postconviction counsel must (1) consult with the defendant to ascertain his contentions of deprivation of constitutional right, (2) examine the record of the proceedings at the trial and (3) make any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's contentions. *Schlosser*, 2012 IL App (1st) 092523, ¶¶ 16, 18. In addition, postconviction counsel must file an affidavit certifying that he complied with the requirements under the Rule.

¶ 28 "Our supreme court's Rule 651(c) analysis has been driven, not by whether a defendant's claims have any merit or if he can establish prejudice but by the understanding that when postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel conferred by the Act cannot be fully realized." *Schlosser*, 2012 IL

App (1st) 092523, ¶ 32 (citing *People v. Suarez*, 224 Ill. 2d 37, 47 (2007)). Our supreme court has also declared " 'it is improper to affirm the dismissal of a postconviction petition when this court finds that postconviction counsel's performance was so deficient that it amounts to virtually no representation at all.' " *Schlosser*, 2012 IL App (1st) 092523, ¶ 32 (quoting *People v. Turner*, 187 Ill. 2d 406, 415-16 (1999)).

¶ 29 The defendant contends that he received ineffective assistance of postconviction counsel. On the basis of the record, we agree.

¶ 30 Between 2004 and 2010, the defendant was represented by postconviction counsel. By 2010, the investigation into the defendant's claims was still ongoing, though no details of the investigation were placed on the record. Postconviction counsel made no amendments to the successive postconviction petition and never filed a Rule 651(c) certificate despite the multiple continuances to do so.

¶ 31 The multiple judges in this case in addition to the delays between court dates led to confusion. Continuance after continuance was granted even when postconviction counsel simply failed to appear. The trial court appeared not to recall the orders it entered, denying the defendant leave to file *pro se* pleadings after it had twice granted the defendant's motion to represent himself and had allowed APD Landrum to withdraw.

¶ 32 The State's attempts to blame the defendant for the delays by his requests to proceed *pro se* and the difficulty in obtaining the transcript from the defendant fail. Given the history of this case, the defendant's decision to represent himself was understandable. Moreover, at the time the problem with the transcript was raised in 2011, the case had been pending for almost 7 years. Significantly, the problem with obtaining the transcript was that it was so old it had been destroyed.

¶ 33 We conclude that the defendant did not receive the reasonable assistance of postconviction counsel as set forth in Rule 651(c). We vacate the dismissal of the defendant's successive postconviction petition and remand for the appointment of counsel for the defendant. Counsel shall amend the petition or file a Rule 651(c) certificate. Upon the filing of an amended petition or the Rule 651(c) certificate, the trial court shall then conduct a second-stage evaluation.

¶ 34 For all the reasons stated above, the dismissal of the defendant's successive postconviction petition is vacated and the case is remanded with directions.

¶ 35 Vacated; cause remanded with directions.