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FIFTH DIVISION
December 11, 2015

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. 98 CR 06425
)	
DARNELL BROWN,)	The Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant's successive postconviction petition was properly dismissed following second-stage review where he failed to make a substantial showing to support his claim of unreasonable assistance of postconviction counsel.

¶ 2 Defendant, Darnell Brown, appeals the second-stage dismissal of his successive postconviction petition. Defendant contends the trial court erred in dismissing his successive petition where he made a substantial showing that postconviction counsel provided unreasonable assistance by failing to correctly frame a signed statement written by the trial judge after the trial

ended, which showed that the judge did not apply the correct standard of proof at trial, and by failing to have the trial judge's signed statement notarized. Based on the following, we affirm.

¶ 3

FACTS

¶ 4 On February 12, 1998, defendant broke into the home of G.T., and sexually assaulted, robbed, and unlawfully restrained her. A grand jury charged defendant with aggravated criminal sexual assault, criminal sexual assault, armed robbery, home invasion, aggravated unlawful restraint, and unlawful restraint. At the trial held on October 10, 2000, the State argued that G.T. testified credibly regarding defendant forcing himself into her home at night and threatening to kill and rape her. In contrast, defendant argued the evidence failed to demonstrate that he committed any of the charged offenses. Judge Macellaio ultimately found defendant guilty of all charges, reasoning that defendant and G.T. had no prior relationship and G.T. was not required to show she forcibly rejected defendant. Following trial, defense counsel filed a motion for a new trial, arguing the evidence presented did not prove him guilty beyond a reasonable doubt. The trial court denied the motion.

¶ 5 At defendant's sentencing hearing, the State requested defendant be sentenced to natural life in prison based upon his prior conviction for aggravated criminal sexual assault. Judge Macellaio, however, sentenced defendant to 30 years' imprisonment for aggravated criminal sexual assault and concurrent terms of 30 years' imprisonment each for armed robbery and home invasion, 15 years' imprisonment for criminal sexual assault and 4 years' imprisonment each for aggravated unlawful restraint. In so doing, Judge Macellaio stated:

"After hearing the testimony, basically for me after hearing the trial, after all the evidence was heard, I reached my opinion that defendant was not invited into the victim's apartment. The defendant, therefore, to me committed a home invasion, committed an

armed robbery, committed these sexual offenses. And for this young woman who was working, getting her own apartment, he was her worst nightmare.

Hearing the prior background, seeing how he has ruined another life, again, seeing how the State could put these laws on the books, I think this law which is – the first incident happened in 1998 [*sic*]. This one is 2000 [*sic*]. I think—I [am] suspect [*sic*] of the constitutionality of this form of *ex post facto* law.

Before I heard this argument, I've been going through my mind since last week what I was going to sentence defendant to, and I will sentence him to the same thing which I was going to sentence him to before, which is 30 years Illinois Department of Corrections."

¶ 6 Defendant appealed. During the pendency of his direct appeal, the State petitioned the Illinois Supreme Court for a writ of *mandamus* directing the trial court to sentence defendant to natural life pursuant to section 12-14(d)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/2-12-14(d)(2) (West 1998)). The supreme court issued a conditional writ instructing the trial court to vacate the 30-year term of imprisonment and sentence defendant to natural life imprisonment, conditioned on defendant's conviction being affirmed on appeal. On direct appeal, we affirmed defendant's conviction. *People v. Brown*, No. 1-01-0452 (Aug. 19, 2002) (unpublished pursuant to Supreme Court Rule 23). The supreme court's writ was issued. The trial court subsequently vacated the 30-year sentence and instead sentenced defendant to natural life imprisonment. Brown did not appeal.

¶ 7 On August 14, 2003, Ronald Draper, defendant's trial counsel, filed a petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)) on defendant's behalf claiming that: (1) counsel was ineffective on direct appeal; (2) defendant's life

sentence violated his Sixth, Eighth, and Fourteenth Amendment rights; and (3) defendant's neighbor, Adrienne Gordon, could provide exculpatory testimony. Draper attached an affidavit from Gordon notarized by him.

¶ 8 Defendant's postconviction petition was dismissed following second-stage review. Defendant filed a notice of appeal and Draper was appointed as appellate counsel. Draper, however, failed to file a substance appeal and the case was dismissed for want of prosecution on April 14, 2006. Draper failed to inform defendant of the dismissal. Counsel subsequently was suspended from the practice of law for 30 days based on his conduct.

¶ 9 Then, on November 29, 2007, Draper filed a successive postconviction petition on defendant's behalf. The successive petition attempted to incorporate by reference the allegations of the initial petition and additionally alleged ineffective assistance of counsel for Draper's failure to prosecute defendant's appeal from the denial of the initial petition. The successive petition also raised a "new issue" based on a statement attached to the petition that was signed by Judge Macellaio, dated November 10, 2007. The successive petition alleged Judge Macellaio was not aware that a sentence of natural life was required under section 12-4(d)(2) of the Code, and, but for his lack of awareness, Judge Macellaio would not have convicted defendant of aggravated criminal sexual assault. The successive petition claimed that, based on the "affidavit" from Judge Macellaio, defendant's due process rights were violated where "the quantum of *** proof presented at trial was not consistent with due process of law and did not rise to the level of guilt beyond a reasonable doubt to warrant conviction."

¶ 10 Judge Macellaio's statement, which was titled "affidavit," in relevant part, read:

"That in recalling the facts of this case recently in September of 2007 during a telephone conversation with Ronald G. Draper, I stated that I would not have found the

defendant Darnell Brown guilty of aggravated criminal sexual assault had I known at the time of trial that a finding and judgment of guilty would compel me to impose a natural life sentence of incarceration.

The facts and circumstances and the nature of the case do not warrant in reconsidering my judgment do not rise to the level or standard as to proof beyond a reasonable doubt to justify a sentence of natural life."

Judge Macellaio then discussed the evidence presented at trial. He concluded his statement by providing that:

"[All] of the aforementioned facts contribute to my reconsidering that the level of proof as too [*sic*] this case was not proven beyond a reasonable doubt, and do[es] not warrant a sentence of natural life be imposed upon Darnell Brown."

The statement was signed and dated, but not notarized.

¶ 11 On January 17, 2008, Draper was granted permission to withdraw as counsel due to a conflict of interest with his own allegation of ineffective assistance of counsel.

¶ 12 On March 16, 2009, the court *sua sponte* granted defendant leave to file a successive petition and appointed Assistant Public Defender (APD) Michaela Kalisiak. APD Kalisiak appeared before the court for the first time on October 16, 2009, advising the court that she had been unsuccessful in obtaining Draper's trial file. Fifteen months later, on January 12, 2011, APD Kalisiak informed the court that she was finally able to obtain Draper's trial file.

Throughout 2011 and 2012, APD Kalisiak appeared before the court on numerous occasions providing status of her progress on defendant's case. On April 15, 2011, she stated she was reviewing records, transcripts, and other related materials. On July 8, 2011, APD Kalisiak indicated that she conferred with defendant's mother and was working with an investigator to

follow up on witnesses. On November 18, 2011, APD Kalisiak informed the court that she still was trying to locate a witness and waiting for more witness contact information. Then, on August 3, 2012, APD Kalisiak alerted the court that her investigation was almost complete and provided notice of her supplemental petition.

¶ 13 Judge Macellaio died on March 13, 2013.

¶ 14 On June 14, 2013, Kalisiak filed a supplemental successive petition for postconviction relief. In the petition, she claimed: (1) that defendant's appeal from the denial of his initial postconviction petition should be reinstated due to Draper's failure to prosecute the appeal; and (2) that Judge Macellaio's written statement was newly discovered evidence showing defendant had not been proven guilty beyond a reasonable doubt, which was evidence that would change the result on retrial. APD Kalisiak attached several documents in support of the petition, including documents from the ARDC proceedings that detailed Draper's misconduct, the Illinois Supreme Court's order suspending Draper, Judge Macellaio's signed statement, and a notarized affidavit sworn to by Draper. In his affidavit dated June 6, 2013, Draper asserted that in September 2007, he discussed defendant's trial proceedings from October 2000 with Judge Macellaio. The affidavit stated, in pertinent part, that:

"13. I informed Judge Macellaio of the status of this case, and Judge Macellaio stated that if he had known he would be compelled to sentence [defendant] to a natural life sentence, he would not have convicted [defendant];

14. Judge Macellaio further stated that he did not believe the case against [defendant] had been proven beyond a reasonable doubt;

15. Judge Macellaio admitted that he had been swayed by the complainant's emotional demeanor during a portion of her testimony when she was weeping, even though I had argued in closing that he not be influenced by emotion or sympathy;

16. I told Judge Macellaio that, if that was his point of view, would he be willing to sign an affidavit in this case, and Judge Macellaio agreed to do so;

17. On November 10, 2007, Judge Macellaio did sign the affidavit which was subsequently attached to the post conviction petition filed on November 29, 2007."

APD Kalisiak also filed an Illinois Supreme Court Rule 651(c) certification indicating her compliance with the Rule.

¶ 15 On July 12, 2013, the State filed a motion to dismiss defendant's successive postconviction petition. The State argued that defendant's claim for ineffective assistance of postconviction counsel lacked merit, and defendant's "reasonable doubt" arguments based on Judge Macellaio's signed statement also failed. In response, APD Kalisiak filed a response arguing that Draper's performance was unreasonable and that defendant's initial petition should be reinstated on that basis. Counsel also requested that the court overlook the lack of notarization of Judge Macellaio's affidavit "in the interests of justice." She maintained that it was now impossible for her to have Judge Macellaio's signed statement notarized, as he was deceased. APD Kalisiak additionally requested that the court consider Draper's affidavit since it corroborated the authenticity of Judge Macellaio's signed statement.

¶ 16 On September 6, 2013, the trial court granted the State's motion to dismiss. The court agreed with the State that Draper's performance, as postconviction appellate counsel, could not form an independent basis for relief. With regard to the claim that Judge Macellaio's statement

constituted newly discovered evidence demonstrating defendant was not proven guilty beyond a reasonable doubt, the court said:

"[T]he entire Judge Macellaio affidavit, first of all, the affidavit is not an affidavit. It's just a statement of facts. It's not notarized. ***.

***. In this case, as courts have held, an un-notarized affidavit pursuant to Supreme Court Rule 315 has no legal effect because it's not notarized. An affidavit simply is a declaration in writing before some person who has authority under the law to administer oaths.

Second of all, the affidavit doesn't state that if called to testify, I would find, would testify to the following. Nothing in there to that effect.

Third of all, the big problem here is that—Judge Macellaio died. This affidavit was signed by Judge Macellaio allegedly in 2007. I believe Judge Macellaio passed away approximately sometime in 2012, I believe, and there was plenty of opportunity, in fact, if that was the case to have Judge Macellaio, have that go before a notary and have that statement or that affidavit, if you want to call it that, notarized. That was never done, so it's defective on its face.

Second of all, assuming that it was notarized, I don't think it meets the requirements of the newly discovered evidence. It's basically something that, I just can't put my head on. Judge Macellaio hears the case, finds the guy guilty, and decides to not give him the mandatory life sentence. And he knows at the time of sentencing that he has to give him a life sentence, but he says, na, I think that statute is unconstitutional. I am not going to follow it. So he gives him 30 years.

Well, the Supreme Court thought otherwise. On a mandamus action, sends it back, and says, hey, you found the guy guilty. The statute says you have to do this. The statute has been declared constitutional. It's not a violation of the constitutional rights and, therefore, you must sentence him to life in prison. So he does that.

And now six, seven years later, after he does that, he says, oh, you know what, thinking about it, I should have -- I don't think this guy was guilty, so I am filing an affidavit to that effect. It doesn't make any sense. You can't do that.

It's just -- the deliberate [*sic*] of the process of a finder of fact cannot be changed seven years later, otherwise every jury in the United States would be doing that. Defense attorneys would be going to jurors that were on this case, hey, don't you think you should change your mind about that. And then there would be a myriads [*sic*], the gates will be opened, the flood gates will be opened up to challenge any kind of decision or any kind of verdict. It's not possible."

Defendant now appeals.

¶ 17

ANALYSIS

¶ 18 Defendant contends his postconviction counsel failed to provide reasonable assistance, resulting in the dismissal of his successive postconviction petition.

¶ 19 The Act provides a means by which a defendant may challenge his conviction or sentence as a substantial violation of his constitutional rights. *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction petition for relief is a collateral proceeding, not an appeal from the underlying conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21. At the second stage of postconviction proceedings, appointed counsel from the court may supplement or amend defendant's initial petition, and the State may move to dismiss. 725 ILCS 5/122-4, 122-5 (West

2002). In order to survive the motion to dismiss, the defendant must make a "substantial showing" that his constitutional rights were violated, relying on the trial record or appropriate affidavits as support. *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). On review, the allegations of the defendant's petition will be taken as true, but nonfactual and nonspecific assertions, which are merely conclusions, are insufficient. *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007) (citing *People v. Rissley*, 206 Ill. 2d 403, 412 (2003)). The postconviction court accepts as true all assertions that are not directly rebutted by the original trial record. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 385 (1998). This court reviews the dismissal of a postconviction petition *de novo*. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 45.

¶ 20 There is no constitutional right to the assistance of postconviction counsel; the right to counsel is entirely based on the Act (725 ILCS 5/122-4 (West 2002)) and a defendant is entitled only to the level of assistance provided for by the Act. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 13. In a postconviction proceeding, defendant is entitled only to a "reasonable" level of assistance, which is less than that afforded by the federal and state constitutions. *People v. Munson*, 206 Ill. 2d 104, 137 (2002). More specifically, to establish a reasonable level of assistance, Illinois Supreme Court Rule 651(c) imposes three duties on postconviction counsel. Rule 651(c) provides that appointed counsel must: (1) consult with defendant to ascertain his contentions of constitutional deprivation; (2) examine the record of the trial proceedings; and (3) amend the petition, if necessary, to ensure defendant's contentions are adequately presented. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Fulfillment of the third obligation does not require counsel to advance frivolous or spurious claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Substantial compliance with Rule 651(c) is considered sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Moreover, the filing of a 651(c) certificate creates a presumption of

compliance with the rule. *People v. Mendoza*, 402 Ill. App. 3d 808, 813 (2010). To overcome that presumption, a defendant bears the burden of showing that counsel failed "to substantially comply with the duties mandated by Rule 651(c)." *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 21 Defendant contends that APD Kalisiak provided unreasonable assistance of postconviction counsel when she did not correctly frame the trial judge's signed statement and failed to have the signed statement notarized. Defendant asserts that the judge's statement showed he did not apply the correct standard of proof at trial, namely, proof beyond a reasonable doubt, and defendant's due process rights were violated as a result. The State responds that defendant's petition for postconviction relief was properly dismissed where the APD's Rule 651(c) certification and the postconviction record established that defendant was provided with reasonable assistance.

¶ 22 We conclude that defendant failed to substantially show he received unreasonable assistance of postconviction counsel. In the present case, postconviction counsel submitted her Supreme Court Rule 651(c) certificate when she filed defendant's supplemental petition. APD Kalisiak stated that she communicated with defendant with regard to his claims, reviewed his trial proceedings, examined his petition for postconviction relief, and filed a supplemental petition "which adequately presents [defendant's] issues." APD Kalisiak's Rule 651(c) certificate established her compliance with the rule and the fulfillment of her professional responsibility owed to defendant pursuant to the Act. *People v. McNeal*, 194 Ill. 2d 135, 143-44 (2000) ("the certificate of compliance submitted by postconviction counsel demonstrated that counsel satisfied the requirements of Rule 651(c)").

¶ 23 Notwithstanding, defendant attempts to rebut the presumption provided by APD Kalisiak's Rule 651(c) certificate by asserting that postconviction counsel's failure to correctly frame the trial judge's signed statement and her failure to have the statement notarized constituted unreasonable assistance. We turn first to defendant's argument regarding postconviction counsel's framing of Judge Macellaio's statement. Defendant argues that APD Kalisiak should have framed the judge's statement in a way that proved his due process rights were violated. According to defendant, APD Kalisiak erred in framing Judge Macellaio's statement as "newly discovered evidence" and arguing the trial evidence was insufficient. Defendant argues that Judge Macellaio's statement instead demonstrated the judge failed to apply the proper evidentiary standard in convicting defendant. Defendant avers that the statement revealed Judge Macellaio improperly evaluated defendant's guilt in conjunction with defendant's potential sentence.

¶ 24 The record demonstrates APD Kalisiak provided reasonable assistance in framing defendant's postconviction claim. APD Kalisiak's supplemental petition mirrored the original petition in asserting that Judge Macellaio's "affidavit" proved defendant had been denied his constitutional right to due process at trial because the judge no longer believed defendant had been proven guilty beyond a reasonable doubt. The supplemental petition also contended that the judge's "affidavit" was newly discovered evidence that could possibly change the result at a retrial. APD Kalisiak attached a sworn affidavit from Draper, which discussed the circumstances surrounding the preparation and submission of Judge Macellaio's "affidavit." Draper specified that the judge told him "if he had known he would be compelled to sentence [defendant] to a natural life sentence, he would not have convicted [defendant]." The supplemental petition, therefore, adequately advised the postconviction court that defendant was challenging the

standard of proof applied at his trial. In other words, in substantial compliance with Rule 651(c), APD Kalisiak amended defendant's successive petition to adequately present his claims.

¶ 25 Moreover, we find defendant failed to sufficiently support his postconviction claim, which was entirely based on Judge Macellaio's statement. The statement does not qualify as an affidavit, and defendant failed to establish why a notarized affidavit was not obtained. See 725 ILCS 5/122-2 (West 2002) ("[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached"). For over 100 years, Illinois courts have consistently defined an "affidavit" as "a declaration, on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths." *Harris v. Lester*, 80 Ill. 307, 311 (1875). A statement that does not appear to have been sworn before an authorized individual is not considered an affidavit. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002); *People v. Smith*, 22 Ill. App. 3d 377, 380. Here, Judge Macellaio's statement was not notarized, written under oath, or sworn to an officer of the court capable of administering an oath. The statement, which had no basis of independent verification after the death of Judge Macellaio, was deficient. More importantly, as discussed in conjunction with defendant's second contention, Judge Macellaio's statement need not be considered as true because it was positively rebutted by the record.

¶ 26 Seemingly in recognition of the deficiency of the statement, defendant additionally contends that APD Kalisiak was unreasonable for failing to obtain a notarized affidavit from Judge Macellaio. In response, the State asserts that the circuit court dismissed defendant's successive postconviction petition not only because Judge Macellaio's statement was deficient as an affidavit, but also because the substance of the statement did not substantially show a constitutional deprivation even if the statement had been notarized.

¶ 27 Following our review of the record, we agree with the State. More specifically, we find that the substance of Judge Macellaio's statement was contradicted by the trial record. The trial transcript expressly demonstrates that Judge Macellaio found defendant guilty based on the evidence, stating "after listening to the facts of the case" in announcing his ruling. Moreover, Judge Macellaio denied defendant's motion for a new trial, necessarily finding the evidence supported defendant's conviction. In addition, at the sentencing hearing, Judge Macellaio stated, "[a]fter hearing the testimony, *** after all the evidence was heard, I reached my opinion." In contrast, the judge's written statement in 2007 was simply a *reconsideration* of whether reasonable doubt was satisfied in the trial court. The statement provided that "[t]he facts and circumstances and nature of the case do not warrant in *reconsidering my judgment* do not rise to the level or standard of proof beyond a reasonable doubt to justify a sentence of natural life." The statement continued, "all of the aforementioned facts contribute to my *re-considering* that the level of proof as too this case was not proven beyond a reasonable doubt." Accordingly, the transcripts from the trial, the motion for a new trial, and the sentencing hearing, along with Judge Macellaio's statement revealed that, in 2000, he assessed whether the evidence established defendant's guilt beyond a reasonable doubt. In fact, the statement—generated seven years after trial—simply demonstrated that a conversation with defense counsel caused Judge Macellaio to reconsider his original finding in conjunction with the fact that defendant was serving a natural life sentence due to his prior record. Despite defendant's argument, the statement does not demonstrate that Judge Macellaio applied the wrong standard of proof *at the time of trial*.

¶ 28 We, therefore, find that, even if APD Kalisiak had obtained a notarized affidavit from Judge Macellaio, defendant could not establish he suffered a constitutional deprivation at trial. As a result, defendant failed to allege APD Kalisiak's assistance was less than reasonable as

provided by the Act. See *People v. Anguiano*, 2013 IL App (1) 113458, ¶ 49 (citing *People v. Perkins*, 229 Ill. 2d 34, 51 (2007)) (although a counsel's argument may not have been particularly compelling, it appears to have been the best option available).

¶ 29 In sum, we conclude that defendant's successive petition was properly dismissed following second-stage review.

¶ 30

CONCLUSION

¶ 31 We affirm the second-stage dismissal of defendant's amended postconviction petition where he failed to make a substantial showing to support his claim of unreasonable assistance of postconviction counsel.

¶ 32 Affirmed.