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2015 IL App (3d) 130422-U

Order filed May 7, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
A.D., 2015

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	Appeal Nos. 3-13-0422
)	Circuit Nos. 06-CF-20
JAMES EARL WRIGHT, JR.,)	
)	Honorable Stephen Kouri,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant’s postconviction counsel had no obligation to amend defendant’s *pro se* postconviction petition. Postconviction counsel provided reasonable assistance of counsel to defendant during the postconviction proceedings.
- ¶ 2 On appeal, defendant contends he was denied a reasonable level of assistance of postconviction counsel because appointed counsel did not amend his *pro se* postconviction petition, which advanced to a third stage hearing, and failed to call witnesses during the third stage evidentiary hearing before the court. We affirm.

¶ 3

BACKGROUND

¶ 4

On January 31, 2006, the grand jury returned an indictment charging defendant with the October 16, 2004, first degree murder and armed robbery of Nicholas Kaeding (the victim). The State also charged a codefendant, Mario Wright, with theft and obstructing justice for his involvement in the October 16, 2004, incident.

¶ 5

The evidence introduced by the State during defendant's jury trial established the following undisputed events took place on October 16, 2004. Police discovered a nonresponsive person, Nicholas Kaeding, behind the steering wheel of a vehicle that crashed into a tree in a private yard. The victim later died at the hospital. According to the pathologist, the victim had been shot twice and the cause of death resulted from a .22-caliber bullet that passed through the victim's lower right shoulder blade and perforated his lung and aorta.

¶ 6

The State's evidence also included the testimony of defendant's cousin, Mario. Mario testified that, at the time of the shooting, the victim was seated behind the steering wheel of the victim's vehicle and Mario was seated in the front passenger seat next to the victim. Mario testified that defendant, who was seated in the back seat of the victim's car, pulled out a gun and pointed it at the victim. According to Mario, the victim raised his hands and defendant removed \$100 the victim held in his raised right hand. When the victim reached for the gear shift of his car, defendant shot the victim from the back seat of the victim's car.

¶ 7

During cross-examination, defense counsel asked Mario whether he previously told his stepbrother, Antonio Giles, that Mario was the gunman. Mario denied telling his stepbrother, Antonio Giles, that Mario shot the victim and stated he told Giles defendant was the gunman.

¶ 8

After Mario's testimony, the State called Giles as a witness. After the court denied the defense's hearsay objection, Giles testified that Mario told Giles that Mario witnessed defendant

pull a gun on the “white” person, take this person’s money, and then shot the person he robbed. Giles testified that Mario also told him Mario was in the front passenger seat and defendant was in the back seat at the time of the shooting.

¶ 9 In addition, the State’s evidence included a DVD recording of defendant’s statement to police officers, which took place on January 4, 2006. The recording, which was published to the jury, documented that defendant initially denied knowledge of the events surrounding the victim’s death on October 16, 2004. After the police officers displayed a portion of Mario’s recorded statement to defendant,¹ defendant admitted he was seated in the back seat of the victim’s car for the purpose of selling cocaine to the victim, but stated that Mario switched seats with defendant before the shooting. Defendant told the officers he was in the front seat when Mario “upped” a gun while sitting in the back seat of the victim’s car, initiated the robbery, and then Mario shot the victim.

¶ 10 After receiving admonishments from the court regarding defendant’s option whether to testify in his own defense, defendant told the court it was his personal decision not to testify. The defense did not present any witnesses or offer any evidence for the jury’s consideration.

¶ 11 After closing arguments, on November 8, 2006, the jury found defendant guilty of armed robbery and first degree murder. Defense counsel filed a “Motion for New Trial” on December 15, 2006. The motion raised generic grounds for a new trial, without delineating any specific trial errors for the trial court’s consideration. After arguments, the trial court denied defendant’s motion for new trial. On December 21, 2006, the trial court sentenced defendant to serve 25 years’ imprisonment for armed robbery and 60 years’ imprisonment for first degree murder, to be served consecutively.

¹ The DVD of defendant’s recorded statements reflects that the police officers played less than one minute of Mario’s recorded statement for defendant.

¶ 12 Defendant filed a timely direct appeal. On direct appeal, this court found plain error did not occur during jury *voir dire* and affirmed defendant's conviction and sentence for first degree murder. However, on review, this court vacated defendant's conviction and sentence for armed robbery based on one-act, one-crime considerations.

¶ 13 On June 1, 2009, defendant filed a 52-page, handwritten, *pro se* petition for postconviction relief (*pro se* postconviction petition) listing 10 specific trial errors resulting in alleged constitutional violations based on the ineffective assistance of trial and appellate counsel. Defendant alleged his trial counsel was ineffective for failing: to call Keneta Woodard and Marcello Wade as alibi witnesses; to call defendant to testify before the jury; and to properly cross-examine the State's witnesses. Defendant also claimed trial counsel was ineffective by opening the door for the State to admit Giles' testimony. Defendant's *pro se* postconviction petition also listed multiple other errors by trial counsel, which are not relevant to this appeal.

¶ 14 With respect to the ineffective assistance of appellate counsel, defendant alleged appellate counsel failed to raise an issue on direct appeal concerning trial counsel's approach during the cross-examination of Mario, which "opened the door" to allow the State to introduce Mario's prior consistent statement identifying defendant as the shooter. Defendant also listed other errors concerning the performance of appellate counsel, which are not relevant to this appeal.

¶ 15 In support of defendant's *pro se* postconviction petition, defendant attached numerous documents including, but not limited to, his own handwritten 2009 affidavit and a handwritten 2009 "Affidavit of Antonio Giles." Later, defendant also filed a typed 2011 "Affidavit" bearing the signature of a purported alibi witness, Keneta Woodard, and a typed 2011 "Affidavit" bearing the signature of Mario Wright.

¶ 16 After multiple status hearings, defendant’s postconviction counsel filed a “Rule 651(c) Certificate” on November 8, 2010,² Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). On April 19, 2009, postconviction counsel advised the court that counsel felt it was not necessary to file an amended postconviction petition since defendant’s *pro se* postconviction petition was well-written and clearly laid out defendant’s claims of error.

¶ 17 The court considered the merits of the State’s motion to dismiss the *pro se* postconviction petition during the second stage hearing. The court took the matter under advisement to consider, in part, whether the contents of Mario’s 2011 affidavit raised a potential trial error of constitutional dimension, thereby requiring a third stage hearing. On April 24, 2012, the court entered a general written order denying the State’s motion to dismiss.

¶ 18 The third stage evidentiary hearing took place on April 12, 2013, nearly one year after the second stage hearing and four years after the 2009 initial filing of the *pro se* postconviction petition. The record indicates Mario was incarcerated in the Department of Corrections in Galesburg, Illinois, but was present in the courtroom for purposes of testifying at the third stage hearing.

¶ 19 Before the hearing began, postconviction counsel advised the court that Mario just informed counsel that Mario did not wish to recant his trial testimony and was denying he approved the 2011 typed affidavit bearing his signature. Postconviction counsel advised the court he was not “going to present it [Mario’s affidavit]” under these circumstances. Postconviction counsel also reminded the court that Mario’s testimony was the “linchpin” during the jury trial and was a key component to the court’s decision to advance the matter to a third stage hearing. Postconviction counsel suggested this new information might cause the court to

² Defendant’s postconviction counsel additionally filed supplemental Rule 651(c) certificates on February 15, 2011 and March 23, 2012.

“reconsider its position about [allowing] the evidentiary hearing,” since the court considered the contents of Mario’s affidavit before denying the State’s motion to dismiss the postconviction petition at the second stage. At this point in the hearing, defendant interjected, “Well, from my knowledge, the paper was sent to me through the mail from Mario Wright, which was sent to Mr. Sheets [defense counsel].”

¶ 20 At the court’s request, postconviction counsel called Mario to testify in order to determine, by means of sworn testimony, whether the 2011 affidavit bearing Mario’s signature was authentic. While under oath, Mario stated that his testimony during defendant’s jury trial was true and he did not want to recant or “take back” any of his prior testimony as asserted in the affidavit bearing his signature. In addition, Mario advised the judge that the signature on the 2011 affidavit appeared to be his signature, but Mario stated he did not see or approve of the contents of the typed document purporting to be his affidavit.

¶ 21 Other than Mario’s testimony requested by the trial judge, postconviction counsel did not call any other witness. The State presented argument regarding the affidavit from Keneta Woodard, which stated defendant was with her at the time of the shooting. The State argued defendant’s pretrial statement to the police admitted that defendant was present at the scene of the shooting, thereby negating that alibi defense. Postconviction counsel did not present arguments to the court. However the trial court also allowed defendant to make an unsworn statement prior to the court’s ruling. During his unsworn statement, defendant again told the court, “That affidavit was signed by that man [Mario].” Defendant told the court he wanted to obtain additional alibi affidavits from witnesses, but defense counsel did not get in contact with all of them. Additionally, defendant asserted the State violated his Miranda rights and defendant

felt pressured to make that statement to the police. Following defendant's unsworn statement, the court took the matter under advisement.

¶ 22 On April 30, 2013, the court entered a written summary order denying defendant's *pro se* postconviction petition without providing the reasons for the denial. Defendant filed a timely notice of appeal challenging the court's denial of his *pro se* postconviction petition.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues his appointed postconviction counsel did not provide a reasonable level of assistance of counsel throughout the postconviction proceedings, which began in 2009 and concluded with the third stage evidentiary hearing in April of 2013. Specifically, on appeal, defendant alleges postconviction counsel's unreasonable assistance began when counsel failed to amend the *pro se* postconviction petition to challenge the effectiveness of both trial and appellate counsel. Further, defendant contends postconviction counsel's unreasonable assistance continued when counsel failed to call alibi witnesses to testify before the court during the third stage evidentiary hearing.

¶ 25 It is well established that a defendant does not have a constitutional right to the assistance of counsel during postconviction proceedings, however, the Post-Conviction Hearing Act (the Act), provides for the appointment of counsel to indigent defendants who file *pro se* postconviction petitions (725 ILCS 5/122-4 (West 2008)); *People v. Moore*, 189 Ill. 2d 521, 541 (2000). Thus, the right to postconviction counsel is wholly statutory and defendants are only entitled to a reasonable level of assistance of counsel as provided for by the Act. *Id.*; *People v. Turner*, 187 Ill. 2d 406, 410 (1999).

¶ 26 To ensure that postconviction petitioners receive this level of assistance, Supreme Court Rule 651(c) imposes specific duties on postconviction counsel. Ill. S. Ct. R. 651(c) (eff. Dec. 1,

1984). Specifically, Rule 651(c) requires that postconviction counsel: (1) consult with the petitioner to ascertain his contentions of constitutional deprivation; (2) examine the record of the proceedings of the original trial; and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. *Id.* Further, Rule 651(c) requires postconviction counsel to file an affidavit certifying that he or she has complied with these requirements. *Id.*

¶ 27 We review postconviction counsel's compliance with Rule 651(c), providing reasonable assistance of counsel during postconviction proceedings, *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007). The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with these statutory duties. *Id.*

¶ 28 In this case, postconviction counsel filed not one, but three, separate Rule 651(c) certificates on November 8, 2010, February 15, 2011, and March 23, 2012, during the years the *pro se* postconviction petition remained pending. These multiple Rule 651(c) certificates each raised a rebuttable presumption that postconviction counsel provided reasonable assistance of counsel during the entire postconviction proceedings. See *Profit*, 2012 IL App (1st) 101307, ¶ 19. We note that postconviction counsel successfully argued the *pro se* postconviction petition to the court such that the *pro se* postconviction petition and supporting affidavits survived both the first and second stages of postconviction proceedings. Due to postconviction counsel's efforts, the *pro se* postconviction petition advanced to the third stage.

¶ 29 Next, we consider whether defendant has rebutted this presumption arising out of the Rule 651(c) certificates filed by counsel for purposes of this appeal. On appeal, defendant

asserts the *pro se* postconviction petition prepared by defendant did not allege appellate counsel's ineffectiveness with respect to "Ground Seven" of his petition and should have triggered an amendment from appointed postconviction counsel. We find no merit to this contention since "Ground Seven" of defendant's *pro se* postconviction petition clearly stated, "App counsel failed to raise claim [pertaining to the admission of a codefendant's prior consistent statement] on appeal." Since "Ground Seven" identified appellate counsel's omission on direct appeal, an amendment was not necessary.

¶ 30 Further, we reject defendant's argument because the case law provides that postconviction counsel has no obligation to amend a defendant's *pro se* postconviction petition. *Turner*, 187 Ill. 2d at 412; *People v. Rials*, 345 Ill. App. 3d 636, 641 (2003). Here, the record reveals postconviction counsel stated he reviewed defendant's *pro se* postconviction petition and we have no reason to believe counsel did not carefully review the petition. After reviewing the *pro se* postconviction petition, we conclude that pleading adequately identified and described the purported ineffective assistance of both trial and appellate counsel in the case at bar. Consequently, we conclude postconviction counsel provided a reasonable level of representation over the course of several years while the *pro se* postconviction petition was pending before the trial court.

¶ 31 Next, we consider whether postconviction counsel provided unreasonable assistance by failing to call certain witnesses to testify during the third stage evidentiary hearing. First, the record reveals that Mario was present in court on the day of the third stage hearing. Presumably, the efforts of postconviction counsel brought Mario, who was incarcerated in Galesburg, Illinois, to court for the third stage hearing on April 12, 2013. However, before the hearing began, postconviction counsel learned that Mario was claiming his 2011 affidavit was not authentic.

¶ 32 Clearly, both postconviction counsel and the trial court treated Mario's affidavit as authentic for purposes of the first and second stages of postconviction proceedings. In fact, referencing Mario's affidavit, the trial court took the matter under advisement to consider Mario's affidavit, and others, before denying the State's motion to dismiss the postconviction petition at the second stage hearing.

¶ 33 Postconviction counsel was confronted with an unexpected situation on the date of the hearing. Placing Mario on the witness stand was certain to raise an issue suggesting defendant potentially submitted a false affidavit to the trial court. Further, if postconviction counsel called Mario to testify during the third stage hearing, postconviction counsel knew Mario would now confirm his trial testimony, to his client's disadvantage. Based on the unusual facts of record, we conclude postconviction counsel had a valid reason for *not* calling Mario to the witness stand because his potential testimony before the court would be damaging to the defense. We note the trial court specifically directed postconviction counsel to place Mario on the witness stand for purposes of making a record for further review, which has been very helpful to this court. Once sworn, as anticipated by postconviction counsel, Mario testified that he neither reviewed nor approved the affidavit bearing Mario's signature, submitted by defendant to the trial court. Further, Mario testified that his prior testimony during defendant's trial was truthful. We conclude this approach by postconviction counsel was not unreasonable.

¶ 34 Next, we consider whether postconviction counsel should have called other alibi witnesses to the stand during the third stage evidentiary hearing as defendant contends. The law provides that the trial court can rely on affidavits during the third stage evidentiary hearing. 725 ILCS 5/122-6 (West 2008). Thus, the failure to call witnesses to testify did not prevent the trial court from considering the facts set out in the affidavits submitted by the alibi witnesses.

¶ 40

Affirmed.