2015 IL App (4th) 131053-U

NO. 4-13-1053

FILED
August 5, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
WESLEY ALLEN FULLERLOVE,	)	No. 09CF495
Defendant-Appellant.	)	
	)	Honorable
	)	Charles G. Reynard,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: We grant appointed counsel's motion to withdraw and affirm the trial court's second-stage dismissal of defendant's postconviction petition where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 Because we previously addressed the factual background of defendant's criminal case in *People v. Fullerlove*, 2011 IL App (4th) 100743-U, only those facts necessary for this appeal are set forth in detail.

¶ 5 In June 2009, a grand jury indicted defendant on one count of aggravated battery

with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) (count I), one count of aggravated battery (720 ILCS 5/12-4(b)(8) (West 2008)) (count II), and one count of unlawful restraint (720 ILCS 5/10-3 (West 2008)) (count III).

¶ 6 At defendant's April 2010 jury trial, witness Dexter McCraney testified he had a prior theft conviction, two prior forgery convictions, and two pending forgery cases.

¶ 7 McCraney stated he went to Fade 'Em Barbershop on June 5, 2009, with his best friend, Paul Washington. While he was getting his hair cut by Jamonte Stewart, three men walked into the barbershop. One of the men, whom McCraney identified as defendant, came over to the barber chair in which McCraney was sitting and put his right hand on McCraney's chest right under his neck. McCraney testified he could not get up from the barber chair. At the same time, a man, who was later identified as Cordell Avant by another witness, started fighting with Washington, who was standing near McCraney. McCraney did not know what the third man did. On cross-examination, McCraney denied he had told the police the third man had helped defendant hold him down in the barber chair and he was unable to get out of the chair to help Washington due to being held down by the two men. He further denied having given the police a description of his assailant as a man approximately six feet tall, approximately 200 pounds, approximately 27 years old, with light skin and a bald head. The parties stipulated McCraney did make such statements to the police.

¶ 8 At some point, a shot rang out. At first, McCraney testified he did not see the gun, but he later testified he saw the gun in Avant's hand. After the single shot, the three men ran out of the barbershop. McCraney indicated the incident all happened very fast. After the men ran out, McCraney realized he had been shot in the leg.

¶ 9 McCraney testified he had seen defendant before that day but not the shooter. He had no idea why the men would want to harm him. During the incident, no words were spoken between the men.

¶ 10 Washington testified only two men entered the barbershop. Cassius Crittendon, one of the owners of the barbershop, greeted defendant, and defendant responded with a nod. Defendant then went to the barber chair where McCraney was sitting and began to attack and fight McCraney. Avant approached Washington and swung at him. Washington jumped back and avoided the swing. Avant then pulled out a gun from his waistband and appeared to point it at Washington. Washington ducked for cover. After the single gunshot, Avant and defendant ran out of the barbershop. Washington also testified the men did not speak to each other during the incident.

¶ 11 Crittendon and barber Jamonte Stewart testified essentially to the same facts as had McCraney and Washington. They identified defendant as a regular customer of the barbershop. They testified defendant and Avant entered the barbershop at the same time and stayed there until Avant fired the shot. Each testified defendant moved away from McCraney when Avant pulled the gun.

¶ 12 At the close of the State's case, the State agreed to a directed verdict as to the aggravated-battery charge because no evidence was presented showing McCraney had been punched. The trial court denied defendant's directed-verdict motion as to the other two charges. At the conclusion of the trial, the jury found defendant guilty of the two remaining charges.

¶ 13 Defendant filed a motion for acquittal or, in the alternative, a new trial. At a joint hearing in July 2010, the court denied defendant's posttrial motion and sentenced defendant to

concurrent prison terms of 16 years for aggravated battery with a firearm and 3 years for unlawful restraint. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 14 On direct appeal, defendant argued the State failed to prove him guilty beyond a reasonable doubt of aggravated battery with a firearm on an accountability theory because its evidence was insufficient to show he aided or abetted the man who shot McCraney. In October 2011, we affirmed the trial court's judgment. *Fullerlove*, 2011 IL App (4th) 100743-U. In January 2012, a petition for leave to appeal was denied. *People v. Fullerlove*, No. 113430, 963 N.E.2d 248 (2012).

¶ 15 On October 26, 2012, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In his petition, defendant argued his trial counsel was ineffective for failing to (1) impeach McCraney with his prior convictions; (2) impeach McCraney with his prior inconsistent statements; and (3) call eyewitness Melvin Knox, who defendant alleged would have testified defendant had left the barbershop before Avant shot McCraney. Defendant further alleged his appellate counsel was ineffective for failing to argue trial counsel's ineffective assistance on direct appeal.

¶ 16 In support of his petition, defendant attached several police reports and portions of trial testimony. A police report written by Detective Shawn Campbell recounted a conversation he had with Jaclyn Miller. Miller told Campbell she had previously spoken with Melvin Knox, who told her (1) he had been in the barbershop at the time of the shooting; (2) defendant had been in the barbershop before the shooting and argued with McCraney; (3) defendant left; and (4) sometime after defendant left, Avant entered the shop and shot McCraney. Defendant also attached his own affidavit in which he alleged he told his trial counsel about what

Knox would say and had Knox appear at several pretrial court dates, but counsel never interviewed Knox. Defendant did not attach an affidavit from Knox.

¶ 17 On November 28, 2012, the trial court docketed the petition and appointed counsel to represent defendant. Postconviction counsel obtained extensions until August 1, 2013, to investigate and amend the petition. On August 1, 2013, counsel informed the trial court he would adopt the *pro se* petition without amendment.

¶ 18 On September 16, 2013, the State filed a motion to dismiss, arguing (1) the record showed the State had introduced McCraney's convictions during his direct examination, (2) the record showed trial counsel impeached McCraney with his prior inconsistent statements, (3) defendant's failure to attach an affidavit from Knox was fatal to any claim counsel was ineffective for failing to call Knox, and (4) appellate counsel could not be found ineffective for failing to raise these frivolous issues.

¶ 19 At the October 30, 2013, hearing on the petition, postconviction counsel filed a certificate in compliance with Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012). The trial court asked counsel about his efforts to obtain an affidavit from Knox. Counsel advised the court his investigator had made "fairly extensive efforts" to locate Knox but had been unable to do so. Counsel advised the court the investigator had acted diligently and counsel did not believe it would be possible to locate Knox even if given more time. Counsel conceded the record refuted both of the other claims regarding impeachment of McCraney. The court granted the State's motion to dismiss.

¶ 20 In November 2013, defendant filed a notice of appeal. In April 2015, OSAD moved to withdraw, "pursuant to *Pennsylvania v. Finley*[, 481 U.S. 551 (1987)]." On its own

motion, this court granted defendant leave to file additional points and authorities by May 4, 2015. Defendant has not done so. After examining the record, we grant OSAD's motion and affirm the trial court's judgment.

¶ 21 II. ANALYSIS

¶ 22 OSAD moves to withdraw, arguing no meritorious arguments can be raised on appeal.

¶ 23 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 24 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 25 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure the defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2010). A petition may be

dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the State filed a motion to dismiss, and the court granted the motion. We review the trial court's second-stage dismissal *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 26 In the case *sub judice*, defendant argued in his postconviction petition his trial counsel was ineffective for failing to (1) impeach McCraney with his prior convictions; (2) impeach McCraney with his prior inconsistent statements; and (3) call eyewitness Melvin Knox, who defendant alleged would have testified defendant had left the barbershop before Avant shot McCraney. Defendant further alleged his appellate counsel was ineffective for failing to argue trial counsel's ineffective assistance on direct appeal.

¶ 27 OSAD has considered raising the following issues on appeal but found them to be without merit: (1) whether the trial court erred in dismissing defendant's postconviction petition and (2) whether postconviction counsel complied with the requirements of Rule 651(c).

¶ 28 A. Whether the Trial Court Erred in Dismissing the Postconviction Petition

¶ 29 1. *Claims of Ineffective Assistance for Failure To Impeach McCraney*

¶ 30 It is well-settled dismissal of a postconviction petition may be upheld when the record from the original trial proceedings contradicts the allegations in the defendant's petition. *People v. Rogers*, 197 Ill. 2d 216, 222, 756 N.E.2d 831, 834 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 382, 701 N.E.2d 1063, 1072 (1998), and *People v. Jones*, 66 Ill. 2d 152, 157, 361

N.E.2d 1104, 1106 (1977)).

¶ 31 Here, defendant's allegations his trial counsel was ineffective for failing to impeach McCraney with his prior convictions and his prior inconsistent statements are belied by the trial court record. The record establishes McCraney admitted to his prior convictions on direct examination. Further, defendant's trial counsel impeached McCraney with his prior inconsistent statements to the police when he questioned him about who was holding him down in the chair and the description of his assailant. The parties later stipulated McCraney had made such statements to the police. Therefore, the trial court did not err when it dismissed defendant's claims his trial counsel was ineffective for failing to impeach McCraney.

¶ 32 2. *Claim of Ineffective Assistance for Failure To Call Knox*

¶ 33 Section 122-2 of the Act requires the petition to "clearly set forth the respects in which petitioner's constitutional rights were violated" and it "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). "[T]he purpose of section 122-2 is to show a defendant's postconviciton allegations are capable of objective or independent corroboration." *Hall*, 217 Ill. 2d at 333, 841 N.E.2d at 919 (citing *People v. Collins*, 202 Ill. 2d 59, 67, 782 N.E.2d 195, 199 (2002)). Further, the affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations. *People v. Johnson*, 154 Ill. 2d 227, 240, 609 N.E.2d 304, 310 (1993).

> "In order to support a claim of failure to investigate and call a witness, a defendant must tender an affidavit from the individual

> who would have testified. Without such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided any information or testimony favorable to defendant. [Citations.] Because defendant has failed to provide an affidavit from [the proposed witness], further consideration of his purported testimony is unnecessary. [Citation.]" *People v. Johnson*, 183 Ill. 2d 176, 192, 700 N.E.2d 996, 1004 (1998).

¶ 34 Here, defendant did not attach an affidavit from Knox, nor did he explain in his petition why he had not done so. Instead, defendant attached his own affidavit indicating the purported testimony he believed Knox would give, which cannot objectively or independently corroborate Knox's alleged testimony. Defendant also attached a page from a supplemental police report reflecting an interview with Jaclyn Miller during which she reported what Knox had told her about the day of the shooting. This constitutes double hearsay. Consequently, neither of these documents can replace an affidavit from Knox.

¶ 35 Further, at the hearing on the petition, postconviction counsel advised the court he had not been able to locate Knox, despite his investigator's diligent efforts to find Knox. Counsel further advised the court he did not believe Knox could be found even if he was given more time to search. Consequently, Knox would not have been available to testify at an evidentiary hearing.

¶ 36 Therefore, the trial court did not err when it dismissed defendant's claim his trial counsel was ineffective for failing to call Knox.

¶ 37 3. *Claim of Ineffective Assistance of Appellate Counsel*

¶ 38 In his petition, defendant alleged he received ineffective assistance of appellate counsel " 'to the extent appellate counsel failed to raise' the above noted issues." Because we have already concluded the underlying issues defendant raised are without merit, we conclude he has not shown appellate counsel provided ineffective assistance when counsel failed to raise the issues on appeal. See *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975, 991 (2000) (unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise the issues on appeal.)

¶ 39 Therefore, the trial court did not err when it dismissed defendant's claim his appellate counsel was ineffective for failing to raise the above issues on direct appeal.

¶ 40 B. Whether Postconviction Counsel Complied With Rule 651(c)

¶ 41 Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) outlines appointed counsel's specific duties in postconviction proceedings. *People v. Turner*, 187 Ill. 2d 406, 410, 719 N.E.2d 725, 728 (1999). Rule 651(c) requires the record in postconviction proceedings to demonstrate appointed counsel "has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, 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." Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012). "The purpose of the rule is to ensure that postconviction counsel shapes the defendant's claims into a proper legal form and presents them to the court." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18, 974 N.E.2d 813. A rebuttable presumption counsel provided reasonable assistance is created when postconviction counsel files a Rule 651(c) certificate. *Id.* ¶ 19, 974 N.E.2d 813.

¶ 42 The Illinois Supreme Court has held, " '[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims.' " (Emphasis in original.) *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007 (quoting *People v. Davis*, 156 Ill. 2d 149, 164, 619 N.E.2d 750, 758 (1993)). In other words, counsel need only examine the record to the extent necessary to adequately present and support those constitutional claims raised in the defendant's petition. *Id*. at 475, 861 N.E.2d at 1009. "While postconviction counsel *may* conduct a broader examination of the record (*Davis*, 156 Ill. 2d at 164[, 619 N.E.2d at 758]), and may raise additional issues if he or she so chooses, there is no obligation to do so." (Emphasis in original.) *Id*. at 476, 861 N.E.2d at 1009. Further, fulfillment of the obligation to amend a petition filed *pro se* does not require counsel to advance frivolous or spurious claims on defendant's behalf. *Id.* at 472, 861 N.E.2d at 1007.

¶ 43 Here, appointed counsel filed a certificate of compliance with Rule 651(c), assuring the trial court he complied with each of the requirements of the rule. Counsel informed the court he would not be making any amendments to defendant's *pro se* petition. At the hearing on the petition, counsel correctly conceded the record refuted defendant's claims regarding impeachment of McCraney and advised the court he had been unsuccessful in locating Knox despite his investigator's diligent efforts to do so. Therefore, any amendment to defendant's unsupported *pro se* petition to include an affidavit from Knox was not possible and did not constitute a failure on the part of counsel to comply with Rule 651(c).

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 46 Affirmed.