2016 IL App (1st) 153566-U

SIXTH DIVISION
November 4, 2016

No. 1-15-3566

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 5116
	)	
SHERRY HALLIGAN,	)	Honorable
	)	Kerry Kennedy,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the dismissal of the postconviction petition of petitioner appellant at the second stage where she failed to make a substantial showing that her trial counsel was burdened by a conflict of interest based on a nexus with her former counsel.

¶ 2 Petitioner-appellant, Sherry Halligan (petitioner), appeals from the second-stage dismissal of her postconviction petition (petition), filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), which alleged a conflict of interest which "attached" to her trial counsel because of a "nexus" with her prior counsel who withdrew after the State indicated that he was a potential witness at trial. On appeal, petitioner argues that the

petition made a substantial showing that trial counsel was encumbered by a *per se* conflict of interest. We affirm.

¶ 3 On February 1, 2003, petitioner, with her attorney present, made both verbal and videotaped statements at the LaGrange police station in which she admitted to shooting Dennis Campbell on or about January 31, 2003. Petitioner was arrested and charged with multiple counts of first degree murder. Petitioner's brother, Darren Halligan, posted her bond. On February 3, 2003, the attorney for petitioner who had accompanied her to the police station entered an appearance. Petitioner failed to appear in court on April 21, 2004, and a warrant was issued for her arrest. In July 2010, petitioner was finally located and taken into custody. Petitioner's private attorney, on August 4, 2010, filed a motion to withdraw on the ground that petitioner had "absented herself from court," and had never contacted him during her period of absence.

¶ 4 At an October 6, 2010, court date, petitioner's attorney informed the circuit court of his motion to withdraw, and that the State had notified him that he was a potential trial witness relating to petitioner's inculpatory statements to the police. Petitioner's attorney explained that another private attorney, who was also present in court, was willing to represent petitioner if her bond was exonerated, and "all or part of the bond [funds] could be turned over to them" as petitioner was without any other source of funds. The court passed the case to allow petitioner's attorney to speak to the clerk of the circuit court about the bond. When the case was recalled, petitioner's attorney stated that, based on his discussions with employees of the clerk's office, the other attorney could move to exonerate the bond and request that bond monies be refunded to him, but the release of the funds would not be immediate. The other attorney told the court that he had also spoken to an employee of the clerk's office about the bond, had talked to petitioner,

and was "familiar with the case." However, that attorney "was reluctant to file an appearance" until he was more certain of the status of the bond. The court continued the case.

¶ 5 On the next court date, November 5, 2010, the court allowed petitioner's original attorney (hereinafter, former counsel) to withdraw, and the other attorney who was present on the prior court date (hereinafter, trial counsel) to file an appearance. The written appearances of former counsel and trial counsel listed identical office addresses but different telephone numbers. The court also granted petitions to exonerate petitioner's bond and to refund the bond monies to trial counsel after receiving the consent of defendant and her brother, as the surety on the bond, in open court.

¶ 6 In our prior order, *People v. Sherry Halligan*, 2014 IL App (1st) 131466, we set forth in detail the evidence at trial, the findings and sentence of the trial court, and the posttrial proceedings. We repeat those portions of our prior order which are relevant here.

¶ 7 At trial, the issues of whether or not petitioner shot and killed the victim, or whether or not he died of multiple gunshot wounds, were uncontested, with petitioner's inculpatory statements being entered into evidence by the State, and petitioner herself admitting to shooting the victim during her trial testimony. Trial counsel stipulated to the foundational proof and chain of custody for a number of the State's evidentiary exhibits, including her statements to police and other physical and forensic evidence.

¶ 8 The State presented evidence during its case-in-chief in the form of petitioner's statements that petitioner and the victim had an intimate relationship prior to the shooting, and that the victim lived in Florida. In January 2003, the victim was traveling to Illinois for work, and he, petitioner, and the victim's employer, Mickey Kovacs, had dinner on the night of January 30, 2003. Thereafter, all three traveled to a hotel where the victim and his employer were

staying. In the victim's room, petitioner and the victim had an argument, one that continued as the victim drove petitioner home. There, the argument continued until petitioner shot the victim with a gun which she had at her residence.

¶ 9 Thereafter, petitioner returned the victim's car to his hotel and returned to her home. She then covered the victim's body with a sheet, changed clothes, and placed her old clothes and the gun in a white plastic bag. Petitioner drove for two hours south on Interstate 55 before throwing the white bag out the window. After making a number of stops, petitioner began her return trip. She, thereafter, contacted her brother, who contacted former counsel. On January 31, 2003, petitioner and former counsel met with officers of the LaGrange Police Department and she provided the statements introduced at trial.

¶ 10 Petitioner's brother, Darren Halligan, testified that, in 2003, he owned a black Pontiac Grand Am and petitioner owned a white 2001 Dodge Stratus. On the day of the murder, petitioner contacted him and asked to switch cars. Mr. Halligan complied.

¶ 11 The State also introduced evidence regarding petitioner's flight from prosecution and her ultimate arrest in Palos Hills, Illinois, living under an assumed name, and possessing false identification. Finally, the State introduced evidence—through the testimony of Jessie McQueen, the victim's former long-time girlfriend in Florida—that the victim had a reputation for peacefulness and had never been violent or abusive during their relationship.

¶ 12 Petitioner testified that her father was abusive toward her mother and that she had been involved in a number of violent and physically abusive relationships as an adult. These included her relationship with the victim, who would force her to have sexual relations with him. Petitioner further testified that the argument she and the victim had on the night of the shooting involved the victim's demand that she have sex with Mr. Kovacs. That argument began at the

hotel and continued as the victim drove her home. At her home, petitioner shot the victim with a gun she stored there, after he physically assaulted her and threatened to kill her. On cross-examination, petitioner acknowledged numerous inconsistencies between her trial testimony and her prior statements, including whether or not her argument with the victim was sex-related, and whether or not he actually threatened to kill her.

¶ 13 Petitioner also presented the testimony of two expert witnesses: Dr. Karla Fisher, a psychologist with an expertise in the psychological effects of domestic violence; and Dr. Steven Rothke, a licensed clinical psychologist. Dr. Fisher diagnosed petitioner with Battered Woman Syndrome (BWS) and Dr. Rothke diagnosed her with cognitive disorder due to traumatic brain injury, as well as features of post-concussion syndrome (PCS). Neither of petitioner's expert witnesses diagnosed her with Post Traumatic Stress Disorder (PTSD).

¶ 14 In rebuttal, the State presented the testimony of two employees of the Cook County Forensic Clinical Services Division: Dr. Cooper, an expert in forensic psychology; and Dr. Lourgos, an expert in clinical psychiatry. In their opinions, petitioner did not suffer from either BWS or PTSW.

¶ 15 The trial court found petitioner guilty of first degree murder, and further found that she had personally discharged a firearm during the commission of that offense. The trial court specifically noted there was no dispute that petitioner had actually shot and killed the victim, and that "[t]he only issue here is whether or not she intended to kill the victim or whether she was under a reasonable belief that her life was in danger in which case she would be found not guilty by reason of self-defense or whether or not she was under an unreasonable belief that her life was in danger, and if so, then she would be guilty of something less than first-degree murder." In resolving those questions, the trial court concluded that the State's expert witnesses were more

reliable than those presented by the defense, and that petitioner herself was not a credible witness. The trial court further concluded that petitioner's actions immediately after the shooting and in fleeing from prosecution were not consistent with her claims of self-defense and having suffered from BWS.

¶ 16 After denying petitioner's motion for a new trial, the trial court sentenced her to a total term of 45 years' imprisonment, which included a 25-year sentence enhancement for her use of a firearm.

¶ 17 Petitioner appealed her conviction and sentence. See *Halligan*, 2014 IL App (1st) 131466. On appeal, petitioner argued that she was not proven guilty beyond a reasonable doubt because there was no evidence of deliberation or premeditation prior to the shooting and killing of the victim. *Id.* ¶ 28. Petitioner also contended that she could not be convicted of first degree murder because the evidence established that she suffered from BWS and acted in self-defense. *Id.* Petitioner alleged that she was convicted based upon improperly introduced evidence where the trial court allowed evidence of her flight and use of an assumed name to obtain a fraudulent identification card (*id.* ¶¶ 33-34), and evidence of written reports by expert witnesses that included irrelevant opinions regarding her sanity at the time of the shooting (*id.* ¶ 37). Petitioner also raised a claim that the State had committed several prosecutorial errors. Lastly, petitioner argued that her trial counsel was ineffective for: (1) stipulating to evidence; (2) not making more objections during the State's direct examination of the witnesses; (3) failing to further cross-examine witnesses; and (4) failing to present the testimony of the victim's former employer. *Id.* ¶¶ 57-64.

¶ 18 This court held that the trial evidence was properly admitted, established all of the elements of the offense of first degree murder beyond a reasonable doubt, and did not show that

petitioner acted in self-defense or suffered from BWS. *Id.* ¶¶ 23-40. We also held that there was no merit to petitioner's claims of prosecutorial error because: (1) petitioner had forfeited the issue and failed to argue that it should be reviewed under the plain-error doctrine; (2) under the plain-error doctrine, the evidence against petitioner was "overwhelming," and the State's conduct did not amount to structural error; and (3) petitioner's "assertions [were] either meritless or did not prejudice [petitioner] in any way." *Id.* ¶¶ 41-51. Finally, this court rejected petitioner's claims of ineffectiveness of counsel, holding that petitioner was merely attacking trial counsel's trial strategy, failed to demonstrate prejudice, and failed to properly support her arguments with legal authority. *Id.* ¶¶ 53-66. This court affirmed petitioner's conviction and sentence.

¶ 19 On April 25, 2015, by the same counsel who had pursued her appeal, petitioner filed a postconviction petition which raised a claim that because of the "nexus" between them, trial counsel operated under the same conflict of interest as that of former counsel. Specifically, petitioner alleged that the conflict which led former counsel to withdraw attached to trial counsel because: (1) the two attorneys "occupied law offices" at the same address; (2) former counsel spoke to trial counsel about his willingness to accept the case; (3) the two attorneys discussed the availability of petitioner's bond to pay trial counsel's fees; and (4) former counsel investigated and discussed with trial counsel the procedure for and time frame for obtaining the release of petitioner's bond money. The petition was supported by the affidavits of petitioner and her brother.

¶ 20 In her affidavit, petitioner stated that she and her brother went to the office of former counsel on January 31, 2003. She had never before met former counsel; her brother found his name by looking in a telephone directory. At the October 6, 2010, court proceedings petitioner learned that former counsel had a conflict of interest and could not represent her. She

"understood that [she] had to be represented by [trial counsel], although he was in the same law office as [former counsel]." It was not explained to her that former counsel may need to be questioned during trial about her statements to the police. She understood that the bond funds which had been posted by her brother would be made available to pay trial counsel; she had no other available funds to pay trial counsel. In his affidavit, petitioner's brother stated his belief that former counsel arranged for trial counsel to be present in court on November 5, 2010, when former counsel was allowed to withdraw his appearance.

¶ 21 The petition advanced to the second stage of postconviction proceedings. On October 2, 2015, the State filed a motion to dismiss the petition arguing that petitioner had forfeited the claim of ineffectiveness based on a conflict of interest because she failed to raise the issue on direct appeal. The State also argued that petitioner failed to show the existence of a conflict, failed to demonstrate that trial counsel suffered from the same conflict of interest as former counsel, and failed to demonstrate prejudice.

¶ 22 On October 30, 2015, petitioner filed a pleading entitled: "Petitioner's Memorandum of Authorities in Support of Her Post-Conviction Petition" (memorandum). The memorandum set forth "supplemental facts" concerning the abusive relationship between petitioner and the victim, and argued that forfeiture rules did not apply or should be relaxed as to her conflict of interest claim. The memorandum also asserted that trial counsel was ineffective based on several deficiencies including the decision to: (1) not cross-examine petitioner's brother; (2) not call the victim's employer as a witness; (3) stipulate to evidence; and (4) not file a motion to suppress petitioner's statement. The State filed a supplemental motion to dismiss based on the memorandum, arguing that *res judicata* applied to several of petitioner's examples of alleged ineffectiveness of trial counsel.

¶ 23 After a hearing on the State's motion to dismiss, the matter was continued for ruling and for the court to review the transcripts, arguments, and pleadings. On December 11, 2015, the postconviction court granted the State's motion to dismiss the petition. Petitioner appeals.

¶ 24 On appeal, petitioner argues that the petition set forth a claim that her constitutional right to effective counsel was violated in that trial counsel had a *per se* conflict of interest because of his association with former counsel and that the petition should have proceeded to the third stage.

¶ 25 The Act provides a procedure by which a defendant may assert that her conviction was the result of a substantial denial of her constitutional rights. *People v Delton*, 221 Ill. 2d 247, 253 (2008). Postconviction proceedings begin with the filing of a petition which must clearly set forth its basis and must attach affidavits, records, or other evidence supporting its allegations. *People v. Rogers*, 197 Ill 2d 216, 221 (2001). At the first stage, a petition need only set forth the "gist" of a constitutional claim. *People v. Edwards*, 197 Ill 2d 239, 244 (2001). "The relevant question raised during a second-stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which requires an evidentiary hearing." *People v. Brown*, 2015 IL App (1st) 122940, ¶ 44 (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)). In making that determination, the petition's well-pled facts are taken as true, unless positively rebutted by the trial record. *Id*.; *People v. Graham*, 2012 IL App (1st) 102351, ¶ 31. We review the dismissal of a postconviction petition at the second stage *de novo*. *Id*. We may affirm a second-stage dismissal "on any basis supported by the record." *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008).

¶ 26 The sixth amendment right to effective counsel includes the right to representation by counsel which is free of any conflicts of interest. *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988)

(citing *People v. Washington*, 101 Ill. 2d 104, 110 (1984)). "Illinois recognizes two classes of impermissible attorney conflicts of interest." *People v. Gacho*, 2012 IL App (1st) 091675, ¶ 27 (citing *Spreitzer*, 123 Ill. 2d at 14)). The first class, termed: " '*per se* conflicts' consist[s] of those 'certain facts [that] engender, *by themselves*, a disabling conflict.' [Citation.]" (Emphasis in original.) *Id*. ¶ 28. Our supreme court has recognized the existence of a *per se* conflict where: (1) a trial counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) was a former prosecutor and was involved personally in the prosecution of the defendant. *People v. Hernandez*, 231 Ill. 2d 134, 143 (2008). Where there is *per se* conflict, a defendant's conviction will be reversed without the need to show prejudice or that the conflict affected the attorney's representation. *Gacho*, 2012 IL App (1st) 091675, ¶ 28; *People v. Taylor*, 237 Ill. 2d 356, 374-75 (2010). "When the record shows that the facts are undisputed, the issue of whether a *per se* conflict exists is a legal question that this court reviews *de novo*." *People v. Fields*, 2012 IL 112438, ¶ 19 (citing *Hernandez*, 231 Ill. 2d at 144).

¶ 27 The second class involves an actual conflict of interest which adversely affected a counsel's representation of the defendant. *Gacho*, 2012 IL App (1st) 091675, ¶ 29 (citing *Spreitzer*, 123 Ill. 2d at 17-18). To establish an actual conflict defendant must show "'some specific defect in *** counsel's strategy, tactics, or decision making attributable to [a] conflict.'" *People v. Morales*, 209 Ill. 2d 340, 349 (quoting *Spreitzer*, 123 Ill. 2d at 18).

¶ 28 Petitioner argues that a *per se* conflict of interest exists here because trial counsel had a prior or contemporaneous association with an entity assisting the prosecution based on his relationship with former counsel.

¶ 29 We first address the State's argument that petitioner forfeited her conflict of interest claim for failing to raise the issue on direct appeal. Petitioner responds that the transcripts relating to the relevant proceedings on October 6 and November 5, 2010, were not obtained by her postconviction counsel until after the prior appeal was completed, and suggests that the forfeiture rules should be relaxed.

¶ 30 Because a postconviction petition under the Act is a collateral attack on the trial court proceedings, "issues that could have been raised on direct appeal but were not are forfeited." *People v. Petrenko*, 237 Ill. 2d 490, 499 (citing *People v. Enis*, 194 Ill. 2d 361, 375 (2000)). The rules of forfeiture may be relaxed where fundamental fairness so requires. *People v. Steidl*, 177 Ill. 2d 239, 250 (1997). The right to effective and conflict-free counsel is a fundamental right. *People v. Stoval*, 40 Ill. 2d 109, 111 (1968). Under the circumstances here—where postconviction appellate counsel did not represent petitioner at the time that former counsel withdrew, and trial counsel appeared, and the relevant transcripts were not available to him—we will relax the rules of forfeiture, in the interests of fundamental fairness, and consider the issue. See *People v. Lawson*, 163 Ill. 2d 187, 207-08 (1994) (citing *People v. Pendleton*, 52 Ill. App. 3d 241, 245 (1977) (where court relaxed forfeiture rules when counsel entered case without knowledge of the alleged conflict and pertinent transcripts were not yet available)).

¶ 31 Before further addressing the merits, however, we note that petitioner does not argue that former counsel and trial counsel were "members of the same firm." In fact, in her reply brief, petitioner specifically states that this is not her contention. Further, petitioner does not argue that a *per se* conflict of interest existed because trial counsel had a prior or contemporaneous association with the victim or the prosecution, was involved personally in the prosecution of petitioner, or provided legal representation for a witness for the State, including former counsel.

Finally, petitioner does not contend that former counsel or trial counsel would have benefitted from her guilty verdict.

¶ 32 In her brief, petitioner does argue that "both attorneys had offices in the same suburban building and were not strangers to each other." She also points out that former counsel and trial counsel "were jointly interested in obtaining a bond refund," and that former counsel "actively pursued a bond refund even while he was in the process of withdrawing as counsel." In determining whether a *per se* conflict exists, a court must look to the " 'facts about a defense attorney's status' " and consider whether those facts " 'engender, *by themselves*, a disabling conflict.' " *Morales*, 209 Ill. 2d at 346 (quoting *Spreitzer*, 123 Ill. 2d at 14).

¶ 33 Petitioner essentially raises an issue as to whether trial counsel's "nexus" with former counsel can be seen as a prior or contemporaneous association with an entity assisting the prosecution. Our supreme court's decision in *Fields*, 2012 IL 112438, guides our analysis.

¶ 34 The defendant in *Fields* was charged with criminal sexual assault of a victim under 18 years of age. *Id*. ¶ 4. Prior to trial, the circuit court granted the State leave to admit evidence that, in 2007, the defendant had been convicted of the criminal sexual abuse of C.S., who was nine years old at the time. *Id*. ¶ 5. At trial, the State introduced into evidence a certified copy of the conviction and presented the testimony of C.S. *Id*. ¶ 7. On direct appeal, the defendant argued that trial counsel had a *per se* conflict because he had served as a guardian *ad litem* for C.S. in a case that ended in 2002 or 2003. *Id*. ¶ 9. An issue before our supreme court was, whether the appellate court had properly found that C.S. was an "entity" assisting the State. *Id*. ¶ 27. The supreme court found that "a prosecution witness necessarily cannot also be an 'entity assisting the prosecution,' " (*id*. ¶ 29), and that "the phrase 'entity assisting the prosecution' was intended to encompass only organizational clients." *Id*. ¶ 32; *c.f.*, *People v Washington*, 101 Ill. 2d 104

(1984) (conflict recognized where defense counsel was employed part-time for the municipality where the defendant was being prosecuted and police officers from the municipality testified for prosecution).

¶ 35 Thus, any relationship between trial counsel and former counsel, even if former counsel was a potential witness for the State, did not constitute a relationship with an "entity" assisting the State. This basis for establishing a *per se* conflict is inapplicable here.

¶ 36 Petitioner also maintains that the relationship between trial counsel and former counsel subliminally influenced trial counsel's strategies, including his failure to challenge the admissibility of petitioner's inculpatory statements as former counsel was present at the time those statements were made.

¶ 37 Again, *Fields*, is helpful to our analysis, in which our supreme court explained that the justification for the "*per se* conflict rule" was set forth in *Hernandez* as follows:

> " 'We explained the justification underlying the *per se* rule in *Spreitzer*. First, we noted that counsel's knowledge that a result favorable to his other client or association would inevitably conflict with defendant's interest "*might* '*subliminally*' affect counsel's performance in ways [that are] difficult to detect and demonstrate." *Spreitzer*, 123 Ill. 2d at 16 ***. Also, we noted the possibility that counsel's conflict would subject him to
>
> " 'later charges that his representation was not completely faithful.' [Citations.]" (Emphasis added.) *Fields*, 2012 IL 112438, ¶ 40 (quoting *Hernandez*, 231 Ill. 2d at 143).

However, the justification for the *per se* conflict rule does not create "an additional, alternate basis for finding a *per se* conflict." *Id*. ¶ 41. Petitioner has thus not substantially shown that trial counsel labored under a *per se* conflict of interest, based on the possibility trial counsel may have been subliminally influenced by his connections with former counsel.

¶ 38 As noted above, even where a *per se* conflict does not exist, a defendant may raise a claim of an actual conflict of interest. *Morales*, 209 Ill 2d at 348. "To do so, he must show 'some specific defect in his counsel's strategy, tactics, or decision making attributable to [a] conflict.' " *Id.* at 349 (quoting *Spreitzer*, 123 Ill. 2d at 18). However, "[s]peculative allegations and conclusory statements are not sufficient to establish that an actual conflict of interest affected counsel's performance." *Id*. (citing *People v. Williams*, 139 Ill. 2d 1, 12 (1990)).

¶ 39 The State maintains that petitioner has not argued in her initial brief that an actual conflict of interest existed and, therefore, this issue was forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). In her reply brief, petitioner did not directly address the forfeiture argument, but asserted that "the thrust of [her] claim is that a conflict existed which prevented her from receiving a fair trial." Further, in response to the State's argument on appeal that she did not set forth "specific instances" of trial counsel's deficiencies which may be attributable to any conflict, petitioner replied that the conflict "deter[red trial] counsel from exercising the whole plethora of trial strategy, that is available to counsel in representing a client charged with murder." Petitioner did not raise or discuss any of the points set forth in her memorandum below, or make any argument supported by authority that an actual conflict was the reason that trial counsel did not challenge the admissibility of her inculpatory statements. Therefore, these claims have indeed been forfeited. Ill. S. Ct. R. 347(7) (eff. Jan. 1, 2016).

¶ 40 Petitioner's argument lacks the specificity required and has failed to substantially show an actual conflict of interest existed. Further, we lack a sufficient record on appeal to review a claim of an actual conflict of interest. Except for the few pleadings, orders and transcripts of proceedings pertinent to the motion to withdraw and the petition, the record on appeal is devoid of all other pretrial and posttrial pleadings, orders, and the transcripts of court proceedings,

including the trial proceedings. As the appellant, petitioner had the duty to provide this court with a record sufficient to review the issues on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Id*. Therefore, even if petitioner raised on appeal a claim of an actual conflict, because the inadequate record before us makes it impossible for us to determine whether such a conflict existed and whether it had adversely impacted trial counsel's performance, we must presume that no conflict or prejudice existed.

¶ 41 In conclusion, we affirm the dismissal of the petition at the second stage as petitioner failed to make a substantial showing that trial counsel labored under either a *per se* or actual conflict of interest.

¶ 42 Affirmed.