

NOTICE
Decision filed 03/15/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140471-U

NO. 5-14-0471

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 07-CF-2023
)	
CASSIE HALL,)	Honorable
)	James Hackett,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's postconviction counsel failed to provide reasonable assistance in representing the defendant in her postconviction proceedings because he failed to allege that the defendant was not culpably negligent for failing to bring her petition for postconviction relief in the time required by the Post-Conviction Hearing Act and for failing to attach affidavits supporting the petition.

¶ 2 The defendant, Cassie Hall, appeals the dismissal of her petition for postconviction relief. She argues that her postconviction counsel did not provide reasonable assistance, as required by the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The State concedes that the defendant did not receive reasonable assistance of postconviction counsel. We agree. For the following reasons,

the judgment of the circuit court of Madison County is reversed, and the cause is remanded for further second-stage proceedings, at which new counsel is to be appointed to represent the defendant.

¶ 3

BACKGROUND

¶ 4 On March 3, 2008, the defendant entered an *Alford* (*North Carolina v. Alford*, 400 U.S. 25 (1970)) plea to criminal sexual assault of a child. According to the factual basis, the defendant and her boyfriend, Jacob Fife, sexually abused C.B. on numerous occasions. Although the defendant denied abusing C.B., C.B. made three statements in which she disclosed sexual assault by Fife and the defendant, and Fife gave a statement to police admitting the abuse and implicating the defendant. Following a sentencing hearing, the defendant was sentenced to 18 years' imprisonment. Her motion to reconsider her sentence was denied, and she did not appeal.

¶ 5 Several months later, the defendant filed a *pro se* motion to reduce her sentence, which the circuit court denied following a hearing. The defendant appealed, but this court dismissed the appeal for want of jurisdiction. *People v. Hall*, No. 5-08-0566 (Jan. 9, 2009) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 1, 2010, the defendant filed a *pro se* motion to withdraw her guilty plea, alleging ineffective assistance of plea counsel. On June 10, 2010, the State filed a motion to dismiss the defendant's motion to withdraw her guilty plea, arguing that it was untimely.

¶ 7 On April 26, 2010, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010))

alleging that new evidence had come to light which had it been known at the time of the plea, would have precluded her from pleading guilty and would have prevented the circuit court from accepting the plea. In support of her section 2-1401 petition, the defendant provided two written statements from Fife wherein he admitted he lied about the defendant's involvement in the crime and paid the victim to implicate the defendant.

¶ 8 The court appointed Rand Hale to represent the defendant on her motion to withdraw her guilty plea and her section 2-1401 petition. Over the next three years, Hale requested numerous continuances for time to prepare and due to medical issues. There were also continuances as a result of difficulties the IDOC had transporting the defendant to court and because the judge was in trial. On multiple dates, the defendant sent letters to the court expressing dissatisfaction with Hale, claiming that he was not corresponding with her or providing her the case file. She also requested, *sua sponte*, a status hearing on her section 2-1401 petition.

¶ 9 On July 31, 2013, the State filed a motion to dismiss the defendant's section 2-1401 petition, and a hearing was held on both the petition and the motion to withdraw the plea. Robin Lashley testified that some of the allegations of abuse made by C.B. were said to have occurred in her house. Lashley stated that given the layout of her house, the alleged abuse could not have occurred without her seeing it. Lashley further testified that she was never interviewed by police or the defendant's attorney. The defendant testified that she pleaded guilty because she felt that plea counsel's inadequate representation left her no choice. On August 8, 2013, the circuit court denied the defendant's motion to withdraw her guilty plea and her section 2-1401 petition. At that time, the circuit court

stated that the defendant's ineffective assistance of counsel argument should have been brought pursuant to the Act. The defendant appealed the denial of both her petition to withdraw her guilty plea and her section 2-1401 petition. That appeal was voluntarily dismissed by the defendant. *People v. Hall*, No. 5-13-0399 (Apr. 2, 2015) (unpublished order under Supreme Court Rule 23).

¶ 10 On August 28, 2013, the defendant, through attorney Hale, filed a petition for postconviction relief pursuant to the Act. The defendant alleged that her plea counsel provided ineffective assistance where counsel refused to investigate known witnesses, including Lashley, refused to interview C.B., and refused to discuss the case with the defendant. Hale did not attach any affidavits to support the defendant's allegations or make any argument regarding the untimeliness of the petition. On January 31, 2014, the State filed a motion to dismiss the postconviction petition, arguing that the petition was untimely and that the defendant failed to support her motion with any affidavits. On August 11, 2014, after a hearing on the State's motion to dismiss, the circuit court granted the State's motion. The circuit court found that the postconviction petition was untimely and that the defendant failed to show that the delay was not due to her culpable negligence. The circuit court also found that the defendant failed to support her alleged constitutional deprivations with citations to the record or supporting affidavits. This appeal followed.

¶ 11 On appeal, the defendant argues that she did not receive reasonable assistance of postconviction counsel as required by the Act. The defendant points out that attorney Hale did not make any argument that she was not culpably negligent for the delay in

bringing her postconviction petition and did not provide any witness affidavits to support her allegations. The defendant requests that this court reverse the circuit court and remand for further proceedings where she is to be represented by new counsel. The defendant argues that new counsel should be appointed on remand because whoever represents her on her postconviction petition will be required to allege that Hale negligently represented the defendant in her section 2-1401 petition, causing undue delay in discovering that she should have brought a postconviction petition. She believes it is unreasonable to expect Hale to argue his own ineffective assistance in prosecuting her section 2-1401 petition. The State agrees that the circuit court's order should be reversed and the matter remanded for further proceedings where the defendant is represented by new postconviction counsel.

¶ 12

ANALYSIS

¶ 13 The Act allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). "If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2012). The Act provides a multi-stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the

first stage, the court determines if the petition presents a gist of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition for failing to state the gist of a constitutional violation, the petition moves to second-stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings, the circuit court is not to engage in any fact-finding. *Id.* at 380-81. All facts not rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 14 Generally, postconviction petitions are filed by prisoners *pro se*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). In second-stage proceedings, counsel is appointed to represent petitioners who are unable to procure counsel on their own. 725 ILCS 5/122-4 (West 2012). Supreme Court Rule 651(c) (eff. Feb. 6, 2013) establishes a minimum standard of representation that is required of an attorney who is appointed to represent a petitioner in second-stage proceedings. Rule 651(c) requires, among other things, a showing in the record:

"that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, 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. Feb. 6, 2013).

When private counsel represents a petitioner at the first stage, Rule 651(c) does not apply. *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 24. Nevertheless, the standard of representation required of postconviction counsel is no less when the original petition is filed by an attorney instead of a *pro se* petitioner. *Id.* ¶¶ 26-27, 29. A petitioner is entitled to reasonable representation in postconviction proceedings. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). "An adequate or proper presentation of a [postconviction] petitioner's substantive claims necessarily includes attempting to overcome procedural bars, including timeliness, that will result in dismissal of a petition if not rebutted." *People v. Perkins*, 229 Ill. 2d 34, 44 (2007). Reasonable representation "requires counsel to amend an untimely *** petition to allege any available facts necessary to establish that the delay was not due to the petitioner's culpable negligence." *Id.* at 49. By failing to make any argument that the defendant's delay in bringing her postconviction petition was not due to her culpable negligence, attorney Hale failed to provide the reasonable level of assistance contemplated by the Act.

¶ 15 Failure to include an affidavit from the petitioner can constitute unreasonable assistance of counsel. *Turner*, 187 Ill. 2d at 410. A court dismissing a second-stage postconviction petition can "presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so," unless the record belies such a presumption. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993). There is no question that in this case, in which the defendant alleged ineffective

assistance of plea counsel, based in part on receiving no communication from her trial counsel, that an affidavit stating so from the defendant was required. Attorney Hale provided no affidavit from the defendant. Additionally, Hale was aware of the affidavit from Fife attached to the section 2-1401 petition indicating that the defendant was innocent. A claim of actual innocence may be made in a petition under the Act. 725 ILCS 5/122-1(c) (West 2012). Furthermore, a claim of actual innocence is not subject to the three-year time limit for filing a petition, yet Hale did not include the affidavit from Fife. Therefore, the record rebuts the presumption that Hale made an effort to include the necessary and available affidavits.

¶ 16 "[I]t contravenes human nature to expect counsel to adequately argue his own ineffectiveness." *People v. White*, 322 Ill. App. 3d 982, 987-88 (2001) (citing *People v. Janes*, 168 Ill. 2d 382, 386 (1995)). In the circumstances of this case, possible arguments to show that the defendant was not culpably negligent in bringing her postconviction petition include: Hale was negligent in allowing the section 2-1401 proceedings to languish for over three years, and Hale should have recognized that the allegations of the section 2-1401 petition needed to be brought in a postconviction petition. We take no position on whether these are valid arguments, but they are arguments that might be raised in support of the timeliness of the defendant's postconviction petition. Therefore, it is necessary to appoint new counsel on remand.

¶ 17 **CONCLUSION**

¶ 18 The defendant was entitled to reasonable assistance of counsel in the prosecution of her postconviction petition. She did not receive reasonable representation. Therefore,

the judgment of the circuit court of Madison County is reversed, and the cause is remanded for further second-stage proceedings. The circuit court is directed to appoint new postconviction counsel and allow that counsel to amend the defendant's petition prior to any proceedings on any second-stage motions the State may file. We do not take any position on whether the defendant was culpably negligent in failing to bring her petition or whether the defendant's postconviction petition has merit. These are issues to be decided by the circuit court.

¶ 19 Reversed and remanded with directions.