2016 IL App (5th) 150092-U

NO. 5-15-0092

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 11-CF-19
	)	
MICHAEL L. JUDS,	)	Honorable
	)	William J. Becker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Where the defendant's notice of appeal for his postconviction petition was timely filed, this court has jurisdiction to hear the defendant's appeal; however, where the defendant was not denied the reasonable assistance of postconviction counsel and did not make a substantial showing of constitutional violation, the trial court properly denied the petition.

¶ 2 The defendant, Michael L. Juds, appeals the denial of his petition for postconviction relief filed pursuant to section 122-1 of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2014)), arguing that his postconviction counsel failed to provide reasonable assistance by inadequately filing the postconviction petition and by failing to obtain affidavits from witnesses in support of the petition. The

defendant also alleges that the trial court erred in denying his petition, as he pled sufficient facts to justify the petition's proceeding to an evidentiary hearing on the issue of ineffective assistance of trial counsel. For the reasons that follow, we affirm.

¶ 3 On February 7, 2011, the defendant was charged by information with a single count of attempted first-degree murder. He was thereafter indicted by a grand jury for the offense on February 18, 2011. On February 10, 2011, a motion for appointment of a psychiatrist/psychologist to determine the defendant's fitness to stand trial was filed; on February 16, 2011, the trial court found that a *bona fide* doubt of fitness existed and granted the motion. On March 16, 2011, the court held a hearing on the issue and found that the defendant was fit to stand trial.

¶ 4 On June 7, 2011, the defendant entered into a fully negotiated plea agreement with the State with the assistance of his court-appointed counsel, Stewart Freeman. The defendant agreed to plead guilty but mentally ill to the count alleged in the information in exchange for a 20-year sentence in the Illinois Department of Corrections, to be served at 85% with 3 years' mandatory supervised release.

¶ 5 On June 6, 2014, the defendant's privately retained counsel, Nate Nieman, filed a postconviction relief petition on behalf of the defendant. Attached to the petition was the defendant's handwritten affidavit which set forth the facts to support his claims for relief. A reading of the affidavit's contents reflects, and the parties agree, that the seventh page of the eight-page affidavit is missing from the record and appears to have never been filed with the remainder of the affidavit.

¶ 6 The postconviction petition alleged that the defendant's constitutional rights were violated because he was denied the effective assistance of his trial counsel. The petition alleged that Freeman labored under a conflict of interest when representing the defendant, as Freeman had prosecuted the defendant in a felony case in Marion, Illinois, for which the defendant had been acquitted. The petition also stated that Freeman failed to interview witnesses and discover readily available and potentially exculpatory evidence, as Freeman had advised the defendant that he "had 'no defense' period," despite the defendant's insistence that he lacked the requisite mental state to commit the crime; the petition also alleged that Freeman also did not challenge the veracity of witness statements despite the defendant's request to do so. It was also alleged that Freeman failed to keep the defendant reasonably informed of the State's evidence against him, as Freeman only gave the defendant excerpts from witness statements; no copies of evidence, discovery, or paperwork of any kind pertaining to the defendant's case were shared. The petition asserted that but for Freeman's erroneous advice, the defendant would not have entered a plea of guilty and instead would have chosen to proceed with a trial. As a result of these alleged errors, the defendant asserted that Freeman provided ineffective assistance of counsel and his guilty plea was unknowingly and involuntarily made.

¶ 7 On September 26, 2014, the State filed a motion to dismiss the petition, arguing that because the defendant failed to file a direct appeal, his allegations regarding ineffective assistance of counsel were waived. The State also asserted that the defendant's allegations were speculative, conclusory, and even if accepted as true, do not

rise to the level of the substantial deprivation of a constitutional right as required for postconviction relief.

¶ 8 On October 21, 2014, the trial court heard argument on the State's motion to dismiss the defendant's postconviction petition. With respect to the defendant's allegations regarding Freeman's conflict of interest, the court found that no actual malice existed on Freeman's part and that according to the petition, Freeman prosecuted the defendant approximately 14 years before he represented him. The court noted that "frankly, I don't know that there's an attorney in Clinton County who could practice [if a conflict of interest existed in every case where an attorney represented a defendant that he has prosecuted in the past] since most of the bars have taken turns being state's attorney or assistan[t] state's attorneys at one point in the past." The court stated that the defendant did not raise an issue with regard to the plea.

¶ 9 However, while the trial court agreed that the defendant's affidavit was "somewhat sketchy and perhaps speculative on what the [witnesses] would have said," the court told Nieman that it was going to "dismiss [the petition] without prejudice to your right to the refile and attach affidavits from the witnesses who [the defendant alleges] would have provided exculpatory information had they been interviewed. So it will be dismissed with leave to refile within 60 days." Nieman asked the judge to clarify, inquiring when the court's decision would become final and appealable if the defendant was unable to obtain the affidavits within 60 days. The court responded that it assumed that Nieman would be the one attempting to obtain the affidavits, and "[i]f you're not able to obtain it within 60 days, I would assume you're going to be able to come back to the Court and

request some additional *** time. *** [I]f you want to tell me you're not going to try and get affidavits from them, then I'll make it final and appealable now." Nieman responded that he was going to attempt to get the affidavits, and the court reiterated that "the cause is dismissed without prejudice to your right to refile and supplement with additional affidavits."

¶ 10 A motion filed by Nieman on December 15, 2014, requested an extension for the defendant's deadline for filing the witnesses' affidavits, stating that at the hearing, "the Court dismissed all claims in defendant's Petition for Post-Conviction Relief with the exception of (A)(b), which concerned counsel's failure to interview and call [the desired witnesses]." The motion stated that the court had given the defendant 60 days to obtain the witnesses' affidavits, and that the court indicated that it would extend this deadline by request. The motion requested a 60-day extension, as the defendant had recently obtained addresses for both witnesses and a phone number for one. The motion then stated that "[i]f we cannot secure their affidavits in 60 days, defendant intends to file a pleading indicating this and asking the court to render a final, appealable judgment." Despite the trial court's phrasing of the order at the hearing, that same day, the court granted the defendant's motion.

¶ 11 In a letter dated March 2, 2015, Nieman stated that they were unable to establish contact with the witnesses, and enclosed a draft of a final and appealable order. On March 10, 2015, the trial court entered an order denying the defendant's petition. The defendant filed his notice of appeal on March 16, 2015.

¶ 12 The first issue we must address on appeal is whether we have the jurisdiction to hear it, as we are required to dismiss an appeal if notice is untimely provided. *In re Application of County Treasurer*, 208 Ill. App. 3d 561, 564 (1990).

¶ 13 The State notes that at the hearing on the postconviction petition, the trial court's language unambiguously dismissed the petition with leave to "refile" a petition with attached affidavits. The State asserts that while the trial court's disposition of the defendant's petition was admittedly unclear, the trial court's oral order of dismissal was a final order that should have been appealed within 30 days pursuant to Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008). As notice of appeal was not filed until March 16, 2015, far beyond 30 days after the October 21, 2014, hearing date, but within 30 days of the court's March 10, 2015, written order denying the petition, the State concludes that it "defer[s] to the judgment of this Court to determine whether, under these circumstances, jurisdiction over defendant's appeal has properly attached in this Court."

¶ 14 The State is correct in noting that the oral pronouncement of the judge is the judgment of the court while the written order is merely evidence of that judgment, and that generally, when the oral pronouncement of a sentence and the written order are in conflict, the oral pronouncement of the court controls. *People v. Lewis*, 379 Ill. App. 3d 829, 837 (2008). However, when the written order of judgment is arguably inconsistent with an oral pronouncement of the court in rendering a judgment but is consistent with the court's intent in rendering the judgment, the written order will be enforced. *People v. Ryan*, 283 Ill. App. 3d 165, 171 (1996); *People v. D'Angelo*, 223 Ill. App. 3d 754, 784 (1992).

¶ 15 When Nieman pressed the trial court during the hearing to specifically identify when the order of dismissal would become final and appealable, the court's somewhat elusive response potentially led to the impression that the dismissal of the petition would be stayed during the pendency of the defendant's attempts to obtain the affidavits. This impression was reinforced: first, when the defendant's motion for extension of time to obtain the affidavits was granted, particularly in light of the language of the defendant's motion; again, when the defendant's efforts proved fruitless, the court entered a written order denying, as opposed to dismissing, the petition. As we find that the intent of the trial court and the understanding of the parties is best served by finding that the final and appealable order was the March 10, 2015, written denial of the defendant's petition, we conclude that the defendant's March 16, 2015, notice of appeal was well within the 30-day window prescribed by Supreme Court Rule 303(a)(1). As such, the notice of appeal was not untimely, and we may properly consider the substantive matters raised in the defendant's petition on appeal.

¶ 16 The Act provides a three-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 of the proceeding, 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." *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). 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). A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381. We review the dismissal of a postconviction petition *de novo*. *Id.* at 387-89.

¶ 17 The defendant first asserts that his privately retained postconviction counsel failed to provide reasonable assistance of counsel in the preparing and filing of his petition, as his counsel failed to file the entire affidavit, which was an essential part of the petition. The State responds that the defendant was not denied reasonable assistance, as the record fails to demonstrate that anyone was even aware of the missing page, and because it had no material effect on the trial court's decision to dismiss the petition.

¶ 18 Before conducting this review, however, we must address the parties' arguments regarding the level of assistance to which the defendant is entitled. Because the right to counsel in postconviction proceedings is wholly statutory (see 725 ILCS 5/122-4 (West 2014)), postconviction petitioners are entitled only to the level of assistance provided by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Our courts have held that section 122-4 of the Act and Supreme Court Rule 651 together ensure that postconviction defendants receive a "reasonable level of assistance." *People v. Owens*, 139 Ill. 2d 351,

364 (1990). This is a lesser standard of representation than that required under the sixth amendment. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006).

¶ 19 However, there is some dispute regarding whether the defendant is even entitled to "reasonable assistance," as Nieman was not appointed to the defendant's case and thus was not subject to the requirements enumerated by Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) (outlining the specific duties of appointed counsel in postconviction proceedings, namely, (1) consulting with the defendant to ascertain his or her contentions of deprivation of constitutional rights; (2) examining the record of the proceedings at trial; and (3) making any amendments to the petition filed *pro se* that are necessary for an adequate presentation of defendant's contentions). See *People v. Csaszar*, 2013 IL App (1st) 100467, ¶¶ 18-20 (finding that although a *pro se* defendant has a right to reasonable assistance from appointed counsel, where a private attorney was hired by the defendant to draft and file a postconviction petition, neither the Act nor case law supports the claim that the State is required to provide reasonable assistance of counsel for any petitioner able to hire his own postconviction counsel) and *People v. Cotto*, 2015 IL App (1st) 123489, ¶ 10 (same), *appeal allowed*, No. 119006 (Ill. May 27, 2015); contra *People v. Anguiano*, 2013 IL App (1st) 113458, ¶¶ 34-35 (finding that neither the Act nor case law creates a distinction between appointed and retained counsel with regard to a defendant's right to a reasonable level of assistance). However, we may assume *arguendo* that the defendant was entitled to reasonable assistance, as we conclude that Nieman's failure to file one page of the defendant's affidavit did not render his assistance unreasonable.

¶ 20 Without the guidance of Rule 651(c) in determining what constitutes reasonable assistance (as this rule does not apply to the defendant's retained counsel), we conclude that the defendant was not denied reasonable assistance because he fails to identify how the missing page negatively affected his proceedings. The defendant argues that his attorney's failure to file the entire affidavit "should be considered a *per se* violation by counsel of his duty to provide reasonable assistance." However, "reasonable assistance" is judged to be a lesser standard of representation than that required under the sixth amendment (*People v. Pendleton*, 223 Ill. 2d 458, 472 (2006)), which requires that a defendant show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *People v. Evans*, 209 Ill. 2d 194, 220-21 (2004). It follows that the defendant must, at the very least, be able to demonstrate that the alleged failure to provide reasonable assistance was prejudicial; *i.e.*, that a reasonable probability existed that, but for Nieman's unprofessional errors, the result of the proceeding would have been different. *Id.* at 219-20.

¶ 21 Here, Nieman did not fail to file an affidavit, which would have been fatal to the petition. See 725 ILCS 5/122-2 (West 2012) (stating that the petition *shall* have attached "affidavits, records, or other evidence supporting its allegations or *shall* state why the same are not attached" (emphasis added)). He instead failed to file a single page of the affidavit, which appeared to have prejudiced the defendant in no way: the record reflects that the State did not move to dismiss on the basis of the defendant's defective affidavit, nor did the trial court rely on the missing page as a basis for its decision. Thus, we find that Nieman's failure to file one of the pages from the affidavit attached to the defendant's

postconviction petition had no effect on the outcome of the proceeding and thus cannot support the defendant's claim of unreasonable assistance in this regard.

¶ 22 The defendant also asserts that his postconviction counsel failed to provide reasonable assistance of counsel where he failed to obtain the affidavits from the witnesses in support of his petition. However, based on our conclusion regarding jurisdiction, *supra*, the court's intention was to allow Nieman to supplement or amend the petition to add the affidavits, and the petition was denied only after counsel failed to obtain them. The Act accounts for the fact that counsel may not be able to obtain affidavits. See 725 ILCS 5/122-2 (West 2012) (stating that the petition shall have attached "affidavits, records, or other evidence supporting its allegations *or shall state why the same are not attached*" (emphasis added)). The defendant's petition was not dismissed because his counsel intentionally or mistakenly ignored this requirement; it is clear that Nieman undertook efforts to obtain those affidavits, as evidenced by his statements at the hearing, his motion to extend the deadline for filing the affidavits, and his letter. The record is also clear that, despite having addresses and a phone number, Nieman was unsuccessful in these attempts; however, nothing in the record refutes the presumption that Nieman undertook this task in good faith. We cannot say that Nieman failed to provide the defendant with reasonable assistance.

¶ 23 The defendant next argues that the trial court erred in finding that there were not sufficient ultimate facts to justify the petition's proceeding to an evidentiary hearing. As stated above, a petition advances to the third stage only if the defendant sets forth a substantial showing of a constitutional violation, and we conduct a *de novo* review of the

trial court's decision. *Coleman*, 183 Ill. 2d at 381; *People v. Harris*, 224 Ill. 2d 115, 126 (2007).

¶ 24 The defendant presents multiple arguments asserting that the representation of his trial counsel, Freeman, fell below the constitutionally mandated standard. Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Strickland* requires a defendant to show both that (1) his attorney's performance fell below an objective standard of reasonableness and (2) the attorney's deficient performance resulted in prejudice to the defendant; the failure to satisfy either element will preclude a finding of ineffective assistance of counsel. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 25 The defendant first claims that he was denied effective representation where Freeman prosecuted him in an unrelated 1998 case where the defendant was acquitted, arguing that Freeman's lingering resentment over his failed prosecution created a conflict of interest that impaired the defendant's right to effective assistance of counsel. The defendant additionally notes that his other claimed issues of ineffectiveness−that Freeman failed to interview witnesses and discover readily available and potentially exculpatory evidence−support his claim that Freeman labored under a conflict of interest.

¶ 26 A defendant's right to effective assistance of counsel includes the right to conflict-free representation. *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). The Illinois Supreme Court had identified two categories of conflicts of interest: *per se* and actual. *Id.* A *per se* conflict exists (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense

counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant. *Id.* If a *per se* conflict is found, there is no need to show that the conflict affected the attorney's actual performance; unless a defendant waives his or her right to conflict-free representation, a *per se* conflict of interest is grounds for automatic reversal. *Id*. at 374-75.

¶ 27 None of the enumerated categories are applicable to the defendant's case. No evidence reflects that Freeman had a prior association with the prosecution, witnesses, or that he contemporaneously represented a prosecution witness. While the record reflects that Freeman was a former prosecutor, he had served Marion County and prosecuted the defendant 15 years earlier on a charge unrelated to the defendant's charge in Clinton County. Thus, the facts do not support a finding of a *per se* conflict of interest.

¶ 28 As the defendant cannot demonstrate a *per se* conflict of interest, he must therefore make a substantial showing that there existed an actual conflict of interest. An "actual" conflict of interest generally, although not exclusively, involves joint or multiple representation of codefendants. *Taylor*, 237 Ill. 2d at 375. In this situation, the accused need not prove prejudice in that the conflict contributed to his conviction; however, the defendant must point to some specific defect in his counsel's strategy, tactics, or decision-making attributable to the conflict. *Id*. at 375-76.

¶ 29 However, the defendant's only specific assertion−that Freeman maintained a vendetta against him from an unsuccessful prosecution 15 years ago and thus "could have labored under *** unconscious influences"−is highly speculative based on his proffered

evidence, and it is well established that speculative allegations and conclusory statements are not sufficient to establish that a conflict of interest affected counsel's performance. *People v. Williams*, 139 Ill. 2d 1, 12 (1990). Apart from this claim, the defendant offers no definitive defects in his counsel's strategy or tactics related to his conflict-of-interest allegations. We find that the defendant also fails to establish an actual conflict of interest.

¶ 30 The defendant also claims that it was potentially ineffective assistance of counsel for Freeman "not to have investigated possible defenses or interview the State's witnesses known to Mr. Freeman to determine whether their statements were credible and whether there were potential exculpatory witnesses present in the bar the night of the occurrence." However, under the second prong of *Strickland*, the defendant is required to demonstrate that his counsel's representation was so prejudicial that there is a reasonable probability that absent the errors, the outcome would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Evans*, 209 Ill. 2d at 220. This requires a substantial, not just conceivable, likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

¶ 31 The defendant fails to identify those exculpatory witnesses and possible defenses that counsel purportedly ignored, or how they would have impacted the case or influenced the defendant's decision to plead guilty. In regards to the State's witnesses that Freeman failed to interview to determine their credibility, as we previously discussed, the defendant's postconviction counsel attempted but ultimately failed to obtain these affidavits. As such, the defendant fails to establish how Freeman's actions prejudiced

him, and the court correctly determined that the defendant failed to make a substantial showing of a constitutional violation.

¶ 32 Finally, the defendant claims that Freeman failed to keep him reasonably informed of the evidence by sharing only selected excerpts of the discovery, and as a consequence he "could not assist in his defense when he was unaware of the evidence that the State intended to produce at trial." The defendant notes that while he does not have a constitutional right to read discovery, he does have a right to be reasonably informed. See *People v. Mena*, 337 Ill. App. 3d 868, 872 (2003). However, the record rebuts the defendant's contention on this point; when questioned by the court during his plea hearing as to whether he had a chance to go over discovery with his attorney, "police reports, the witnesses' statements, things of that type," the defendant agreed that he had. Thus, the defendant cannot demonstrate that Freeman's conduct was unreasonable or prejudicial.

¶ 33 Based on the foregoing, we affirm the decision of the circuit court of Clinton County.

¶ 34 Affirmed.