2018 IL App (1st) 152989-U

No. 1-15-2989

Order filed May 9, 2018

Third Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 4391
	)	
MARK BRADSHAW,	)	The Honorable
	)	Michele M. Pitman,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of defendant's postconviction petition on the motion of the State where defendant's petition was untimely filed and not due to a lack of culpable negligence, and counsel provided reasonable assistance under Illinois Supreme Court Rule 651(c). The circuit court did not abuse its discretion in prohibiting discovery.

¶ 2 Following a bench trial, defendant Mark Bradshaw was found guilty of aggravated unlawful use of a weapon (AAUW) and sentenced to eight years' imprisonment. Defendant filed

a notice of appeal on October 25, 2005, but later filed a motion to dismiss his appeal on November 6, 2006. See *People v. Bradshaw*, 1-05-3534 (2006) (Dispositional Order).

¶ 3 Defendant now appeals an order of the circuit court of Cook County dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) on the motion of the State. He argues that his petition was timely filed, counsel provided unreasonable assistance for failing to shape and add constitutional claims in the amended petition, and the trial court abused its discretion in prohibiting discovery. We affirm.

¶ 4 Defendant's conviction stemmed from an undercover narcotics purchase in Harvey, Illinois. At trial, the evidence established that defendant sold suspected narcotics to undercover Officer Antonio Jones in exchange for prerecorded funds. Officer Tony DeBois testified that he was a member of the Special Operations Unit of the Harvey Police Department and Jones's partner. He observed the transaction from nearby, yelled out "Harvey police," and arrested defendant. DeBois recovered a loaded handgun and a bag filled with smaller bags of suspected narcotics from defendant, as well as additional suspected narcotics from a nearby porch. The officers were unable to specifically testify which drugs were recovered from defendant and which were recovered from the porch.

¶ 5 The trial court found defendant guilty of multiple counts of AAUW but not guilty of the narcotics-related charges. The court sentenced defendant to eight years' imprisonment on one count of AUUW, merging the remaining counts. Defendant's motion for a new trial and motion to reconsider sentence were later denied.

¶ 6 Defendant filed a timely notice of appeal on October 25, 2005. After a certificate in lieu of record was filed and after multiple extensions of time to file an appellant brief were granted,

defendant filed a motion to dismiss his appeal on November 6, 2006. This court granted the motion on December 7, 2006. See *People v. Bradshaw*, 1-05-3534 (2006) (Dispositional Order).

¶ 7 On March 13, 2008, defendant filed *pro se* pleading which sought relief under both the Act as well as section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). The petition alleged that the State knowingly used perjured testimony because DeBois was not a police officer at the time of defendant's arrest where he was not listed on the Harvey Police Department personnel roster. He further contended counsel was ineffective for failing to verify DeBois's employment as a police officer. Included with the petition was an affidavit from defendant claiming he was wrongfully convicted and his sister had sent him a newspaper article about DeBois. The affidavit further stated that DeBois had planted the gun on him. The affidavit contained attachments including a portion of DeBois's trial testimony, the results of a Freedom of Information Act request for the Harvey Police Department personnel roster that did not list Jones or DeBois as employees, several articles regarding the Harvey Police Department, an Illinois Law Enforcement Training and Standards document showing DeBois's training history, and a partial transcript of the trial court's ruling.

¶ 8 The circuit court appointed postconviction counsel Daniel Walsh to represent defendant. Counsel sought to subpoena the City of Harvey for records regarding Tony DeBois's status and authority as a police officer for the city. Previously, the court indicated that it would not allow a subpoena for employment records from Harvey as it did not find them relevant. Counsel responded that he would return with a subpoena, explaining that he wanted to "broach the issue" at the current status hearing. The trial court later allowed a subpoena with the exception of one portion that sought an explanation for why DeBois was not listed on the police department's

personnel roster filed with the Illinois Law Enforcement Training Board. The court ruled that this portion of the subpoena was not relevant to the issues raised in defendant's petition.

¶ 9 The case was then transferred to new postconviction counsel Maurice Sykes after attorney Walsh left the postconviction unit. On November 2, 2012, Sykes filed a supplemental petition reiterating defendant's allegations against DeBois and also including allegations that DeBois and the Harvey Police Department engaged in a pattern of corruption. The supplemental petition included various civil rights lawsuit complaints containing allegations of misconduct committed by DeBois. Sykes filed a Supreme Court Rule 651(c) (eff. April 26, 2012) certificate.

¶ 10 In the Rule 651(c) certificate, Sykes stated that (1) he had communicated with defendant by letter, phone, and in-person regarding his claims of deprivation of constitutional rights; (2) he has examined the trial transcripts, procedural history, common law records, and defendant's *pro se* postconviction petition; (3) after investigating the claims, he believes they raise a substantial legal question regarding the deprivation of defendant's constitutional rights; and (4) a supplemental petition will be filed.

¶ 11 Sykes again supplemented the petition on June 7, 2013, to include information that DeBois had been indicted by the Department of Justice. This supplement also contained an affidavit from defendant alleging that DeBois's testimony was not truthful, the gun was not his, and DeBois had a reputation for being a corrupt police officer.

¶ 12 On August 16, 2013, the State filed a motion to dismiss, arguing the petition was untimely filed, the claims regarding the knowing use of perjury and ineffective assistance of counsel were unsupported and meritless, and the allegation that DeBois planted the gun was meritless. Sykes responded by arguing that the evidence attached to his petition was not available

at the alleged due date for the petition and, because he asserted a claim of actual innocence, there is no time limit for filing the petition. He further argued the State's contentions on the merits were not proper for this stage of the proceedings because the merits should be determined at an evidentiary hearing.

¶ 13 On June 27, 2014, Sykes filed a motion for discovery to subpoena the United States Attorney's Office as well as the Federal Bureau of Investigation for records relating to criminal activity of Tony DeBois. In 2015, attorney Renee Norris took over defendant's case. On September 4, 2015, Norris filed a Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate but did not amend or change the petition filed by Sykes. In the certificate, Norris stated (1) she has consulted by defendant by telephone to ascertain his claims of deprivations of his constitutional rights; (2) she has obtained and examined the report of proceedings of defendant's criminal trial; (3) and has determined the supplemental petition filed by Sykes adequately represents defendant's constitutional claims and deprivations.

¶ 14 The same day, following a hearing, the trial court granted the State's motion to dismiss defendant's postconviction petition. The court rejected Norris's arguments, including that defendant made a substantial showing of a constitutional deprivation where he alleged DeBois planted on gun him. The court found that the petition was untimely filed and defendant failed to make a substantial showing of a deprivation of constitutional rights because his claims were unsubstantiated. Defendant filed a timely notice of appeal.

¶ 15 On appeal, defendant first argues that his petition was timely filed but, if it were deemed to be untimely, counsel was unreasonable for failing to allege a lack of culpable negligence in order to avoid procedural default. He further argues that counsel provided unreasonable

assistance for failing to shape defendant's *pro se* claims and for failing to add additional constitutional claims in the amended petition. He also asserts the trial court abused its discretion in prohibiting him from subpoenaing DeBois's employment records from the Harvey Police Department. He asks us to reverse the trial court's order granting the State's motion to dismiss and remand for new second-stage proceedings with the benefit of reasonable assistance of counsel.

¶ 16 The Act provides a procedural mechanism for a defendant to assert a substantial denial of his constitutional rights in the original trial or sentencing. 725 ILCS 5/122-1 (West 2008); *People v. Allen*, 2015 IL 113135, ¶ 20. At the second stage of the postconviction proceedings, the defendant has the burden of making a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35. Further, at this stage, counsel may be appointed and the State may move to dismiss or answer the petition. 725 ILCS 5/122-4, 122-5 (West 2008); *Domagala*, 2013 IL 113688, ¶ 33.

¶ 17 Under the Act, a petitioner is entitled to a " 'reasonable' " level of assistance of counsel. (Internal citations omitted.) *People v. Cotto*, 2016 IL 119006, ¶ 30. If the trial court appoints counsel at the second stage of the postconviction proceeding, appointed counsel must file a certificate showing compliance with Illinois Supreme Court Rule 651(c). *Id.* ¶ 27.

¶ 18 Pursuant to Rule 651(c), counsel is required to: (1) consult with the defendant to ascertain his contentions of how he was deprived of his constitutional rights, (2) examine the record of the trial court proceedings, (3) and make "any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant's] contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 14. A counsel's filing of a Rule

651(c) certificate gives rise to a rebuttal presumption that counsel performed the requisite duties under the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 23. An attorney's substantial compliance with Rule 651(c) is sufficient. *Id.* ¶ 18. We review an attorney's compliance *de novo*. *Blanchard*, 2015 IL App (1st) 132281, ¶ 14. Here, we note that postconviction counsel Sykes and Norris each filed their own certificate of compliance with Rule 651(c).

¶ 19 Defendant first argues that his postconviction petition was timely filed and, therefore, postconviction counsel was unreasonable for failing to argue this to the trial court. Section 122-1(c) of the Act provides, in pertinent part, three scenarios which we have labeled for our analysis and which give rise to individual deadlines to file a postconviction petition:

> "[Scenario 1] When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. [Scenario 2] If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. [Scenario 3] If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years after 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 2008).

¶ 20 Defendant invokes "Scenario 3" and argues that his petition was timely filed on March 24, 2008 because he did not "file a direct appeal" and the filing was less than three years from

the date of his conviction on October 25, 2005. To address the issue, we must examine the statutory language to determine the meaning of "file a direct appeal." In cases involving statutory interpretation, the intent of the legislature is given primary concern. *In re Shelby R.*, 2013 IL 114994, ¶ 32. Courts analyze the statute in its entirety, providing the statutory language its plain and ordinary meaning. *People v. Beachem*, 229 Ill. 2d 237, 243 (2008).

¶ 21 We note that defendant filed a notice of appeal, a certificate in lieu of record, and numerous motions for an extension of time to file an appellant's brief. He later filed a motion to withdraw his direct appeal, which this court granted. See *People v. Bradshaw*, 1-05-3534 (2006) (Dispositional Order). Our supreme court's decision in *People v. Johnson*, 2017 IL 120310, is instructive on the timing requirements for postconviction petitions.

¶ 22 In *Johnson*, the defendant argued there was no time limit for filing his postconviction petition where he filed a direct appeal in the appellate court but did not file a petition for leave to appeal to the Illinois Supreme Court. *Johnson*, 2017 IL 120310 ¶ 17. On appeal, our supreme court acknowledged that a plain reading of section 122-1(c) of the Act does not provide for a time limit when a defendant appeals his conviction to the appellate court but not to the Illinois Supreme Court. *Id.* ¶ 20. Viewing the legislative history of section 122-1(c), the court found that providing no time limit was "at odds with the purpose of the statute," which sought to establish deadlines for the filing of postconviction petitions. *Id.* ¶ 21. It therefore read into the statute a time limit of six months from the deadline to file a petition for leave to appeal to file a postconviction petition in situations where a defendant does not appeal his conviction to the Illinois Supreme Court. *Id.* ¶ 24.

¶ 23 Defendant does not assert, and the record does not support, that he is entitled to a six-month deadline after the conclusion of proceedings in the United States Supreme Court under "Scenario 1," as he did not pursue any appeal in that court. Recognizing that the court in *Johnson* found that the purpose of section 122-1(c) is to provide for filing deadlines for postconviction petitions, defendant's petition must therefore be filed by one of the two remaining scenarios.

¶ 24 Relevant here, in analyzing section 122-1(c) of the Act, the *Johnson* court found, "[t]he statute even provides a three-year deadline for filing a petition when no notice of appeal is filed." *Johnson*, 2017 IL 120310, ¶ 23. As our supreme court specifically found that a three-year deadline applies for when no notice of appeal is filed, we reject defendant's argument that he is entitled to a three-year deadline under "Scenario 3" because he chose not to fully litigate his appeal. Here, as defendant did file a notice of appeal, the fact that he did not litigate his appeal and chose to voluntarily dismiss it does not mean that he "[did] not file a direct appeal" as contemplated by section 122-1(c) of the Act. 725 ILCS 5/122-1(c) (West 2008).

¶ 25 Therefore, defendant's postconviction must have been filed pursuant to the time requirements under "Scenario 2," which provides that a postconviction petition must be filed within six months of the date for filing a petition for *certiorari* or a petition for leave to appeal." *Johnson*, 2017 IL 120310, ¶ 24. Here, defendant chose not to litigate his appeal to conclusion. We believe that for timing purposes treating his voluntary dismissal as an affirmance is consistent with *Johnson*. Accordingly, because defendant did file a notice of appeal on direct appeal, he was required to file his postconviction petition by July 11, 2007, which was six months after a petition for leave to appeal would have been due had his case been affirmed rather than dismissed. See 725 ILCS 5/122-1(c) (West 2008); see also *Johnson*, 2017 IL 120310, ¶ 24.

Accordingly, defendant's postconviction petition filed on March 24, 2008 was therefore untimely.

¶ 26 Alternatively, defendant argues postconviction counsel was unreasonable for failing to allege a lack of culpable negligence in order to avoid procedural default. In order to avoid dismissal of an untimely postconviction petition, the defendant must show that the delay in filing the petition was not due to his own culpable negligence. *People v. Ramirez*, 361 Ill. App. 3d 450, 453 (2005). Culpable negligence refers to " 'something greater than ordinary negligence and is akin to recklessness.' " *Johnson*, 2017 IL 120310, ¶ 26 (quoting *People v. Boclair*, 202 Ill. 2d 89, 108 (2002)). Counsel is required under Rule 651(c) to "allege available facts on the lack of culpable negligence to avoid the procedural bar of untimeliness." *People v. Perkins*, 229 Ill. 2d 34, 44 (2007).

¶ 27 Defendant's petition does not argue that he was not culpably negligent in failing to timely file his postconviction petition. Moreover, postconviction counsel did not seek leave to amend the petition even after the State moved to dismiss the petition on, among other things, grounds of untimeliness. See *Perkins*, 229 Ill. 2d at 48-49. Rather, in defendant's response to the State's motion to dismiss, defendant claimed that "it is very clear" that the new evidence defendant relies on was not available on the date defendant's postconviction petition was due. He further asserted that he has made a claim of actual innocence by arguing the gun was planted on him by DeBois and, thus, there is no time limit for filing the petition. Further, counsel Norris argued at the hearing on the State's motion to dismiss that defendant was not aware of the evidence, now attached to his postconviction petition, at the time his petition was due.

¶ 28 Here, we find defendant has not rebutted the presumption he received reasonable assistance from postconviction counsel. In reaching this conclusion, we find *Perkins*, relied on by the State, to be instructive. In *Perkins*, postconviction counsel filed a Rule 651(c) certificate contending that he had met with defendant to ascertain defendant's contentions regarding the deprivation of his constitutional rights, examined the record, and determined that no amendments to the *pro se* petition were required. *Perkins*, 229 Ill. 2d at 38. The defendant's petition did not address whether it was timely filed. See *id.* The State moved to dismiss the petition on timeliness grounds and, at the hearing on the motion, defendant's postconviction counsel argued the merits of the petition as well as a claim that the petition was timely filed. *Id.* at 38-39. The trial court dismissed the petition as untimely, but the appellate court vacated the dismissal, finding counsel violated Rule 651(c). *Id.* at 39-40.

¶ 29 Our supreme court first found that counsel is required, under Rule 651(c) to amend an untimely *pro se* petition to allege that the delay was not due to the defendant's culpable negligence. *Id.* at 49. However, viewing the record, counsel had provided reasonable assistance. *Id.* at 52. The court found that counsel had, "in effect," argued the delay in filing was not due to defendant's culpable negligence. *Id.* at 51. The court further found:

> "Counsel's argument may not have been particularly compelling and his other arguments may have been legally without merit. Those factors, however, do not demonstrate that there was some other excuse counsel could have raised for the delay in filing. There is nothing in the record to indicate that petitioner had any other excuse showing the delay in filing was not due to his culpable negligence." *Id.*

¶ 30 Similar to *Perkins*, both counsels Sykes and Norris here, in response to the motion to dismiss and at the hearing on the motion, argued the petition was timely. Counsels noted that the evidence defendant was relying upon was not known at the time the petition was filed and further, there was a claim of actual innocence not subject to timeliness. Therefore, counsels, "in effect" argued that defendant was not culpably negligent, and there is nothing in the record to suggest defendant had any other reasons to excuse his late filing. As both Sykes and Norris filed certificates of compliance with Rule 651(c), giving rise to a rebuttable presumption that counsel provided reasonable assistance, defendant cannot overcome that burden. See *Profit*, 2012 IL App (1st) 101307, ¶ 23.

¶ 31 Having determined that defendant's petition was untimely and was not due to a lack of culpable negligence, we need not consider the merits of defendant's claims that he was provided unreasonable assistance of counsel. See *People v. Stoecker*, 384 Ill. App. 3d 289, 294 (2008); see also *People v. Johnson*, 2015 (2d) 131029, ¶ 29, *aff'd*, 2017 IL 120310, ¶ 35.

¶ 32 Defendant further contends that counsel could have raised an actual innocence claim based on the allegation that DeBois planted the gun, and the failure to do so constitutes unreasonable assistance. He asserts this is especially true where an actual innocence claim would defeat procedural bars such as untimeliness. However, under Rule 651(c), counsel is not required to advance frivolous or spurious claims on the defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). In order to raise a claim of actual innocence, the defendant must point to evidence that is new, material and noncumulative, which is of such a conclusive character that it would likely change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96.

¶ 33 Here, defendant's affidavit and the allegations contained therein cannot be considered newly discovered. Evidence is "newly discovered" if it has been discovered since the time of trial and the defendant could not have discovered it sooner through due diligence. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). Further, evidence is not considered newly discovered "if it presents facts already known to the defendant, even if the source of those facts was unknown, unavailable or uncooperative." *People v. English*, 2014 IL App (1st) 102732-B, ¶ 49. In his affidavit filed with his *pro se* petition, defendant avers that DeBois planted the gun. Thus, defendant's affidavit does not qualify as newly discovered evidence because defendant would have known at the time of trial the gun was not his and, moreover, that DeBois had planted it on him.

¶ 34 Finally, defendant argues the trial court abused its discretion in prohibiting him from subpoenaing the Harvey Police Department for Officer DeBois's employment records. In the context of a postconviction proceeding, discovery should only be granted upon a showing of "good cause." *People v. Johnson*, 205 Ill. 2d 381, 408 (2002). Good cause is shown by "considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and on any witnesses, and the availability of the evidence through other sources." *Id.* We review the trial court's denial of a postconviction discovery request for an abuse of discretion. *People v. Lucas*, 203 Ill. 2d 410, 429 (2002). No abuse of discretion occurs where the request "ranges beyond the limited scope of a post-conviction proceeding and amounts to a 'fishing expedition.' " *Johnson*, 205 Ill. 2d at 408 (quoting *People v. Enis*, 194 Ill. 2d 361, 415 (2000)).

¶ 35 Here, we first note the common law record does not contain the subpoena defendant sought to issue to the Harvey Police Department. The record only contains the motion to subpoena employment records. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 36 From what we can gather from the report of proceedings, the trial court, at a status hearing, informed defense counsel it would not allow a subpoena for employment records from the Harvey Police Department as it did not find them relevant. Counsel responded that he would return with a subpoena, explaining that he wanted to "broach the issue" at the current status hearing. At a subsequent hearing, the trial court did allow a subpoena for records regarding Tony DeBois's status and authority as a police officer for the city. The trial court allowed this with the exception of one portion of the subpoena that sought an explanation for why DeBois was not listed on the police department's personnel roster filed with the Illinois Law Enforcement Training Board. The court ruled that this portion of the subpoena was not relevant to the issues raised in defendant's petition.

¶ 37 Here, based on the report of proceedings, we do not find the circuit court abused its discretion in refusing to allow defendant to subpoena the Harvey Police Department for Officer DeBois's employment records. The court viewed defendant's proposed subpoena and determined that one portion, which sought an explanation from the Harvey Police Department, was not relevant to the issues contained in defendant's petition. We cannot say the trial court abused its discretion where it viewed the subpoena and properly limited the scope. The subpoena sought an explanation from the Harvey Police Department as to *why* DeBois did not appear on the roster,

which exceeded the scope of the ultimate issue: whether DeBois was employed by the Harvey Police Department at the time of defendant's arrest. The Harvey Police Department's explanation was therefore not relevant. Further, without the subpoena defendant sought to issue to the Harvey Police Department, we are unable to determine what specific portion of the subpoena the court would not allow. In the absence of a complete record on appeal, we must presume the trial court acted in accordance with the law. See *People v. Fair*, 193 Ill. 2d 256, 264 (2000).

¶ 38 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.