

No. 1-16-0031

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 00 CR 15718
)	
MANUEL HIDALGO,)	Honorable
)	Evelyn B. Clay,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 **Held:** We affirm the dismissal of petitioner-appellant’s postconviction petition at the second stage because his petition fails to make a substantial showing of a constitutional violation. We also reject petitioner’s claim that his postconviction counsel acted unreasonably when he failed to secure an affidavit from the victim.

¶ 2 Petitioner-appellant, Manuel Hidalgo, was arrested and convicted of predatory criminal sexual assault based on contact between himself and the victim’s vagina. Based on a prior conviction for rape, petitioner was sentenced to a term of natural life imprisonment. On direct appeal, this court affirmed both his conviction and sentence.

¶ 3 In January 2005, petitioner filed a *pro se* postconviction petition. After several procedural delays, in September 2013 petitioner's postconviction petition was docketed for the second stage. The State responded by filing a motion to dismiss. On October 27, 2015, after hearing arguments, the circuit court granted the State's motion to dismiss. This appeal follows.

¶ 4 Petitioner raises two issues on appeal. He argues (1) the circuit court erred in not advancing his petition to a third stage evidentiary hearing, and (2) postconviction counsel failed to provide a reasonable level of assistance by not securing an affidavit from the victim.

¶ 5 After reviewing the record and relevant case law, we affirm the dismissal of petitioner's postconviction petition. The circuit court correctly rejected the portions of the affidavits containing hearsay. The remaining non-hearsay allegations are contradicted by the record before us. We reject his argument postconviction counsel provided an unreasonable level of assistance when he failed to obtain an affidavit from the victim.

¶ 6 JURISDICTION

¶ 7 The circuit court dismissed petitioner's postconviction petition on October 27, 2015. A notice of appeal was filed on November 17, 2015. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rule 651(a). Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 651(a) (eff. Feb. 6, 2013).

¶ 8 BACKGROUND

¶ 9 The facts of this case are adequately set forth in this court's order in the petitioner's direct appeal (*People v. Hidalgo*, No. 1-02-3758 (2004) (unpublished under Illinois Supreme Court Rule 23)) and will be repeated only where necessary for the disposition of this postconviction appeal.

¶ 10 On January 4, 2005 petitioner timely filed his *pro se* postconviction petition which is the subject of this appeal. Petitioner attached to his petition his own affidavit, along with affidavits from the victim's mother and the victim. Petitioner alleged his conviction was based on the knowing use of false testimony from the victim. He claimed this violated his right to due process. To support his claim, petitioner attached two affidavits from the victim's mother, one typed and one handwritten; each alleging the victim had confessed to her that petitioner never touched her in a sexual manner. According to the mother's typed affidavit, the victim asked her mother whether petitioner was in jail because of what the authorities told her to say in court. The victim allegedly told her mother that she made up the story because she did not like it when petitioner and her mother fought. The victim thought the stories would make petitioner leave her mother.

¶ 11 The mother's typed and handwritten affidavits also detail her alleged mistreatment by the state's attorney's office. The mother averred that the assistant state's attorney threatened to have the judge hold her in contempt of court or arrested if she refused to permit the victim to be interviewed by a social worker outside the mother's presence. The mother insisted upon remaining present during the second conversation between the victim and the social worker. The mother claimed she observed how the social worker led the victim to give specific answers. The day after the victim and mother testified in court, the social worker told the mother that she could not offer a victim impact statement, because the judge's hands were "tied at sentencing."

¶ 12 Petitioner also attached a hand-printed note purporting to be from the victim. The note contains no date, no notary stamp, and was not made under oath. The note states, "Manuel shouldn't be in jail because he didn't hurt me. Please let him out Please."

¶ 13 Petitioner further alleged that he never confessed to sexually assaulting the victim, contrary to the trial testimony of Investigator Joseph Agosta of the Chicago police department

and Assistant State's Attorney Colleen Connor. Petitioner gave no written or video recorded statement to support Agosta's and Conner's testimony.

¶ 14 On June 18, 2007, the public defender filed a supplemental petition to petitioner's *pro se* postconviction petition. This supplemental petition attached an additional affidavit from the mother in which she indicated that her ex-husband and his new wife "incited and fabricated" the allegations. The amended petition again asserted the victim's testimony was false and the State was complicit in its presentation. The amended petition claimed a denial of due process in that sexual penetration could not occur because clothing or a towel came between petitioner and the victim.

¶ 15 In September 2010, the trial court issued an order *nunc pro tunc* to January 13, 2005, summarily dismissing the original postconviction petition. Defendant appealed the dismissal. On appeal, the parties entered into an Agreed Motion for Summary Disposition, which reversed the dismissal and remanded the proceedings to the circuit court for a second stage postconviction hearing. On remand, new postconviction counsel was appointed. Appointed counsel filed a Rule 651(c) certificate adopting the *pro se* petition, the public defender's supplemental petition and the amended supplemental petition. The State filed a motion to dismiss.

¶ 16 The circuit court then held a hearing on the State's motion to dismiss. At the argument on the motion to dismiss, petitioner withdrew the undated note from the victim. The circuit court granted the State's motion on October 27, 2015.

¶ 17 This timely appeal followed.

¶ 18 ANALYSIS

¶ 19 The Post-Conviction Hearing Act creates a procedural instrument allowing a criminally convicted individual to assert a substantial denial of his constitutional rights in the proceedings

which resulted in the conviction. 735 ILCS 5/122-1 (West 2016). A postconviction action represents a collateral attack on a conviction and sentence (*People v. Brisbon*, 164 Ill. 2d 236, 242 (1995)) and, as such, does not act as a replacement for a direct appeal (*People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Illinois case law holds that a postconviction proceeding is limited to “constitutional matters that have not been, nor could have been, previously adjudicated.” *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 20 A postconviction proceeding progresses in three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Within 90 days of an individual filing a postconviction petition, a first stage proceeding occurs during which the circuit court reviews the petition, taking all allegations as true, and determines whether “the petition is frivolous or is patently without merit.” *People v. Hodges*, 234 Ill. 2d 1, 11 (2009) quoting *Edwards*, 197 Ill. 2d at 244. If the circuit court determines the petition is frivolous or patently without merit, then the court will dismiss it via a written order. 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed at this stage, the circuit court advances it to the second stage, where it will appoint counsel to represent an indigent individual (725 ILCS 5/122-4 (West 2016)) and the State will either move to dismiss or answer (725 ILCS 5/122-5 (West 2016)). At the second stage, the circuit court takes “all well-pled facts that are not positively rebutted by the trial record” as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The petition must make a substantial showing that a constitutional right was violated in order to proceed to a third stage evidentiary hearing. 725 ILCS 5/122-6 (West 2016). The petition at issue in this case was dismissed at the second stage and we review a second stage dismissal of a petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 21 In his first issue, petitioner contends the circuit court erred in not advancing his petition to the third stage. He argues the attached affidavits from the mother and the victim make a

substantial showing his constitutional rights were violated because the affidavits demonstrate the State relied on perjured testimony. The record contains three affidavits from the victim's mother. Two affidavits were attached to petitioner's *pro se* postconviction petition while a third was attached to the supplemental petition filed in June 2007. Petitioner also attached an affidavit from the victim to the *pro se* postconviction petition.

¶ 22 Initially, we conclude the purported affidavit of the victim does not meet the applicable legal standards and cannot be relied upon as part of the postconviction petition. Under Illinois law, an affidavit consists of a "statement sworn to before a person who has authority under the law to administer oaths." *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002). The document from the victim is undated, unsworn, and was not made before "a person who has authority under the law to administer oaths." These deficiencies render it inadmissible.

¶ 23 While technical defects rendered the document inadmissible, the victim's statement does not support petitioner's claim. The document merely states, "[t]his letter is to say that Manuel shouldn't be in jail because he didn't hurt me. Please let him out Please." "Affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character and availability of the alleged evidence supporting the petition's allegations." *People v. Delton*, 227 Ill. 2d 247, 254 (2008). Petitioner's postconviction claim is based on the state actors pressuring the victim into providing false testimony, but the statement attributed to the victim makes no mention of her trial testimony or interaction with the assistant state's attorney or social worker. It does not say she lied. Furthermore, petitioner was not accused nor convicted of "hurting" the victim; rather, he was accused of licking the minor victim's vagina. Based on the technical defects and the vague statement, the purported affidavit of the victim cannot be relied upon to support the claim made in the postconviction petition.

¶ 24 Petitioner also relies on three affidavits executed by the victim's mother. Attached to the *pro se* postconviction petition were two affidavits from the victim's mother. One is handwritten, while the other is typed.¹ Both discuss conversations the mother had with her daughter as well as conversations the mother allegedly had with various State personnel during the trial. The third affidavit attached to the supplemental postconviction petition filed by counsel expands on the previously filed two. It discusses three DCFS investigations and the mother's claim her ex-husband may have influenced the victim.

¶ 25 After reviewing each affidavit, we agree with the circuit court that they are insufficient and cannot be relied up by petitioner to support his claims. All of the conversations alleged to have occurred between the mother and the victim are hearsay and inadmissible. *People v. Brown*, 2014 IL App (1st) 122549, ¶ 58 (hearsay statements cannot be used to support a claim under the Postconviction Act). The conversations between the mother and the state's attorney as well as the mother and the social worker are hearsay. After removing the hearsay from the affidavits, none of the other statements made by the mother support petitioner's allegation that the State induced false testimony from the victim. Neither the DCFS investigations nor the alleged animosity of the ex-husband are relevant to petitioner's claim that the State knowingly elicited false testimony from the victim.

¶ 26 We also agree with the State that the allegations of false testimony are rebutted by the record. *Pendleton*, 223 Ill. 2d at 473 (only facts not positively rebutted by the record are taken as true). The record establishes the victim told the mother's friend and then the mother of petitioner's sexual abuse before the mother contacted authorities. At both the section 115-10 hearing and the trial, the friend and mother testified how the victim initially detailed the abuse to

¹ The handwritten affidavit is difficult to read but appears to mirror the allegations contained in the typed affidavit submitted at the same time. Petitioner does not point out any meaningful difference between the two.

them. While testifying at the section 115-10 hearing and then again at trial, the mother never claimed the victim denied the abuse nor did she testify to any undue influence from her ex-husband. She also never mentioned any improper conduct from the State's agents.

¶ 27 The petitioner's own allegation that the physical contact between him and the victim "was absolutely moral and appropriate" is also contradicted by the record. Both the Chicago police officer and assistant state's attorney testified to defendant's admissions of sexual conduct with the victim. While petitioner claims these individuals were biased against him, he fails to support this claim with any evidence in the record. *People v. Domagala*, 2013 IL 113688, ¶ 35 (a claim makes a substantial showing when it is supported by independent corroborative evidence).

¶ 28 After accounting for the deficiencies in the attached documentation, we agree with the circuit court that petitioner's postconviction petition fails to make a substantial showing of a constitutional violation. Accordingly, the circuit court did not err in dismissing the petition at the second stage.

¶ 29 In his second issue, petitioner contends that if his postconviction petition fails, then his postconviction counsel provided unreasonable assistance. Under Illinois law, a defendant has no constitutional right to the assistance of counsel in postconviction proceedings. *People v. Johnson*, 154 Ill. 2d 227, 237 (1993). In recognition of this, the postconviction statute allows for the appointment of an attorney to represent an indigent petitioner to "ascertain the basis of the petitioner's complaints, shape those complaints into appropriate legal form and present the prisoner's constitutional contentions to the court." *Id.* citing *People v. Owens*, 139 Ill. 2d 351, 359 (1990). In order to help effectuate this, Supreme Court Rule 651(c) requires postconviction counsel to disclose: (1) petitioner has been consulted to ascertain the contentions of constitutional deprivations; (2) the record of proceeding from the trial has been reviewed; and (3)

necessary amendments to the *pro se* petition have been made to adequately present petitioner's constitutional contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). In order to comply with the rule, postconviction counsel must file an affidavit attesting to the above requirements. *Id.* A court will review postconviction counsel's compliance with Rule 651(c) *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 41-42 (2007).

¶ 30 Despite the presence of a Rule 651(c) affidavit from postconviction counsel, petitioner argues that his postconviction counsel acted unreasonably when he failed to comply with the third requirement of Rule 651(c). Specifically, petitioner contends counsel failed to obtain a signed and notarized affidavit from the victim to replace the unsworn and undated document attached to the *pro se* petition. Where a postconviction counsel files a Rule 651(c) affidavit attesting that he consulted the petitioner, examined the trial record, and concluded the filings on record adequately set forth a petitioner's claim, "the certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during the second-stage proceedings under the Act." *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Where such an affidavit is present, as it is here, the burden "falls to defendant to overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c)." *Id.*

¶ 31 After reviewing petitioner's argument and the record before us, we conclude petitioner has failed to overcome the presumption that postconviction counsel complied with Rule 651(c). The Rule 651(c) affidavit filed by counsel states (1) counsel has consulted with petitioner by mail, (2) counsel examined the record from trial, and (3) counsel determined "the petition, the supplemental petition, and the petition to amend-supplemental" adequately represented

petitioner's claims. Through this affidavit, postconviction counsel attested to his compliance with the rule.

¶ 32 Importantly, the rule does not require postconviction counsel to make a “comprehensive recounting” of all efforts undertaken on petitioner's behalf. *Jones*, 2011 IL App (1st) 092529, ¶ 24. Postconviction counsel was obviously aware of the note written by the victim because at the hearing on the petition, he informed the court that it would be withdrawn. The record further demonstrates postconviction counsel talked with the victim's mother. At the hearing, counsel stated, “I spoke with the [mother]. She fully owns this affidavit and everything that's contained inside it.” Based on the filings and proceedings below, we reject petitioner's bare allegation that postconviction counsel was ineffective for failing to secure the affidavit of the victim.

¶ 33 In rejecting petitioner's argument, we find the cases he relies upon to be distinguishable from the case before us. In *People v. Nitz*, 2011 IL App (2d) 100031, ¶¶16-19, this court concluded postconviction counsel had violated Rule 651(c) when counsel failed to secure a notarized affidavit from petitioner in compliance with the affidavit requirements found in section 122-1(b). Unlike *Nitz*, the affidavit at issue here does not belong to the petitioner and compliance with section 122-1(b) is not at issue. In *People v. Johnson*, 154 Ill. 2d 227, 239-41 (1993), our supreme court found postconviction counsel acted unreasonably when he failed to file a Rule 651(c) affidavit and filed a supplemental affidavit to the record in which he admitted he “made no effort to investigate the claims raised in the *** petition or to obtain affidavits from any of the witnesses specifically identified in the defendant's *pro se* petition.” The postconviction counsel in *Johnson* also admitted at the hearing on the State's motion to dismiss that he made no effort to secure affidavits. *Id.* at 242-43. Unlike the postconviction counsel in *Johnson*, the postconviction

counsel in this matter did file a Rule 651(c) affidavit and the record affirmatively demonstrates he reached out to individuals identified by petitioner.

¶ 34 Based on this record, petitioner has failed to overcome the presumption that postconviction counsel substantially complied with the duties set forth in Rule 651(c).

¶ 35

CONCLUSION

¶ 36 For the foregoing reasons, we affirm the dismissal of petitioner's postconviction petition at the second stage.

¶ 37 Affirmed.