

No. 1-11-2531

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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. 97 CR 15419
CLIFTON CARROLL,)	
)	
Defendant-Appellant.)	Honorable
)	James B. Linn
)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant did not receive the reasonable assistance of postconviction counsel because counsel did not comply with the requirements of Illinois Supreme Court Rule 651(c), as the record shows that counsel did not attempt to obtain evidentiary support for defendant's postconviction claims.

¶ 2 Defendant Clifton Carroll appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). On appeal, defendant contends that he did not receive the reasonable assistance of postconviction

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counsel, the order dismissing his petition should be reversed, and the matter should be remanded to the circuit court for the appointment of new counsel and further proceedings. Alternatively, defendant contends that his postconviction claims of ineffective assistance of trial counsel and actual innocence should be remanded to the circuit court for a third-stage evidentiary hearing. For the reasons that follow, we reverse the order dismissing defendant's petition and remand the matter for the appointment of new postconviction counsel and further second-stage proceedings.

¶ 3

BACKGROUND

¶ 4 Defendant and codefendant, Johnny Conwell, were charged with the first degree murder of Michael Williams and the attempted first degree murder of Johnell Elem in connection with a shooting that took place in the early morning hours of May 4, 1997. At trial, Elem testified that he was a member of the Gangster Disciples gang and that he was currently serving a 60-year sentence for bank robbery. Elem also testified that around 1:30 a.m. on the night of the shooting, he and Williams, a member of the Black Souls gang, exited the Three Brothers M.C. Lounge and went outside. As Elem was talking to Williams, Elem heard the sound of breaking glass and saw Conwell and defendant crouched down beside a white truck. Elem believed that Conwell and defendant were members of the New Breeds gang, and he and Williams ran away because the New Breeds and Black Souls were feuding at that time. As Elem was running, he saw defendant chasing him and firing a gun at him and saw Conwell firing a semi-automatic gun at Williams. At some point, Elem looked back and saw that defendant had stopped following him and that Conwell and defendant were firing their guns at Williams as he ran into the lounge. Elem talked with police officers on the night of the shooting, but did not tell them that Conwell and defendant were the shooters because he had planned on killing them. On May 13, 1997, Elem viewed a

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lineup and identified Conwell and defendant as the shooters. Elem explained that he identified Conwell and defendant at the lineup because there was no longer any reason to withhold their identities as they had already been arrested. Elem further testified that Derrick Wright was outside the lounge at the time of the incident and ran inside as the shooting took place.

¶ 5 On cross-examination, Elem stated that both shooters were wearing hoods, that Conwell's hood fell off his head during the shooting, and that Conwell and defendant ran into an abandoned building across the street from the lounge after the shooting had ended. Elem also stated that he provided a written statement in which he identified Conwell and defendant as the shooters and that he believed members of the New Breeds gang were responsible for the shootings of a few of his relatives in the weeks leading up to the shooting at issue in this case.

¶ 6 Rashina Fairman, defendant's cousin, testified that she was at the Three Brothers M.C. Lounge on the night of the shooting and that she was 17 years old at that time. Fairman admitted that she implicated defendant as one of the shooters in a handwritten statement and her testimony before a grand jury. However, Fairman testified at trial that the handwritten statement and her grand jury testimony were inaccurate and that she did not review the statement before signing it. On cross-examination, Fairman stated that she was inside the lounge when she heard gunshots coming from outside and that she then saw Williams run inside the lounge through the front door. Fairman looked outside through the open door and saw Conwell and another man, who she believed to be Marvin Crane, a member of the New Breeds who had died prior to trial. Fairman further stated she did not write the handwritten statement, that the statement was not read to her before she signed it, and that she signed the statement because she was asked to and "I was nervous and I was ready to go home."

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¶ 7 Assistant State's Attorney (ASA) Jeff Neslund testified that on May 12, 1997, Fairman provided a handwritten statement regarding the shooting whereby ASA Neslund wrote down the statement provided by Fairman and Fairman reviewed the statement and signed the bottom of each page after having reviewed it. The court allowed ASA Neslund to publish the statement, in which Fairman related that she was outside the lounge at 1:30 a.m. on May 4, 1997, when she saw Conwell and defendant run out from an abandoned building across the street and then pull out handguns and fire them at Williams. Conwell was wearing black pants and a black hooded sweatshirt and the hood flew off his head as he was shooting at Williams. On cross-examination, ASA Neslund stated that Fairman only made one correction to the handwritten statement and did not correct the misspellings of her name.

¶ 8 ASA Lyman testified that on May 23, 1997, he met with Fairman and her mother and examined Fairman before a grand jury. At the grand jury proceeding, Fairman testified that she was outside at the time of the shooting and that she saw Conwell and defendant emerge from an abandoned building across the street and then pull out handguns and fire them at Williams. On cross-examination, ASA Lyman stated that Fairman's mother was not allowed to accompany her into the grand jury room.

¶ 9 Chicago police detective Allen Jaglowski testified that on May 7, 1997, he issued a police bulletin for Conwell and defendant which related that Conwell and defendant might be driving a maroon 1983 Oldsmobile Cutlass. On May 12, 1997, Conwell and defendant were arrested and a 1983 Oldsmobile Cutlass was found in the garage of the house at which the arrests were made. Detective Jaglowski testified that the vehicle was covered in a coat of primer and was wrapped in paper, as though it had just been painted with the primer. Detective Jaglowski then searched an

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apartment at a different location and found a .44 caliber revolver, two .38 caliber guns, colostomy bags, vials of medication which were prescribed for Marvin Crane, and a copy of the police bulletin referring to Conwell and defendant.

¶ 10 The parties stipulated that defendant was using colostomy bags in May 1997, that nine .9 millimeter cartridge casings and one live round were recovered outside the lounge, that a fired bullet was recovered from the front door of the lounge, that a fired bullet was recovered from Williams' clothing, and that Williams suffered five gunshot wounds and died from those injuries. Firearms examiner Laura Fleming testified that none of the guns Jaglowski recovered from the apartment following the arrest of Conwell and defendant could have fired the casings found at the lounge or the bullets recovered from Williams' body.

¶ 11 Tiffany Carroll, defendant's niece, testified for the defense that she and defendant both lived in the same house with her grandmother and that defendant arrived home between 10 and 10:30 p.m. on May 3, 1997, and remained there in his room with his girlfriend and his daughter all night. Tiffany went to bed around 3 a.m. after watching television all night and could see defendant's room from where she was sitting. Tiffany woke up between 6:30 and 7 a.m. the next morning when her uncle picked up defendant from the house.

¶ 12 Based on this evidence, the jury found defendant guilty of the first degree murder of Williams and not guilty of the attempted first degree murder of Elem. Defendant filed a motion for a new trial alleging, *inter alia*, that the court erred by allowing the State to withdraw Wright, who was an eyewitness to the shooting and who Elem testified was present at the shooting, as a witness at the start of trial. During argument on the motion, defense counsel told the court that the defense had previously located Wright and taken a statement in which he related that he

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could identify one of the shooters as Conwell, but could not identify the second shooter, and that he told the police that he thought the second shooter was Crane. Defense counsel also stated that the defense could no longer find Wright "because he did not want to be found." The court denied the motion, stating that the defense could have called Wright as a defense witness and could have asked the court for a continuance to locate him, but failed to do so. Following a hearing, defendant was sentenced to 50 years' imprisonment. On appeal, this court affirmed defendants' conviction holding, *inter alia*, that defense counsel was not constitutionally ineffective for failing to call Wright as a witness because Wright's proposed testimony that he could not identify the second shooter was equivocal and his unavailability was beyond counsel's control. *People v. Carroll*, No. 1-01-3184 (2004) (unpublished order under Supreme Court Rule 23).

¶ 13 On June 30, 2006, defendant filed a *pro se* petition for postconviction relief, asserting, *inter alia*, that defense counsel was constitutionally ineffective for failing to locate Wright and call him as a witness, that newly discovered evidence established that defendant was actually innocent of the murder of Williams, and that defense counsel was ineffective for failing to object to the admission of evidence of the 1983 Oldsmobile Cutlass. Defendant attached various documents to his petition, including a signed affidavit from an investigator, Edward Torres, who averred that he interviewed Wright on June 22, 2006, in an area of Chicago known as K-Town after having spent four days trying to find him. Defendant also attached a signed affidavit from Wright, in which he averred that he had witnessed the shooting and had identified Conwell as one of the shooters, but did not identify defendant as the second shooter "because I know for a fact that [defendant] was not involved in the shooting. [Defendant] is tall, and the second shooter was shorter than [him]." Wright also averred that he did not remember speaking to

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defense counsel, that he had lived in K-Town since 1999, and that he was living in that area during defendant's trial while "going back and forth from home to home."

¶ 14 On January 11, 2007, the circuit court appointed counsel to represent defendant on his postconviction petition. On August 11, 2011, postconviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certifying that he had consulted with defendant by letter regarding his postconviction claims, examined the report of trial proceedings and defendant's petition, and determined that the petition adequately presented defendant's claims and that nothing could be added by an amended or supplemental petition. That same day, the State filed a motion to dismiss defendant's postconviction petition, and the court conducted a hearing on the motion. At the hearing, the court questioned postconviction counsel regarding defendant's claims, and counsel stated that defendant was raising a number of claims which had already been raised on direct appeal, including that trial counsel was ineffective for failing to call Wright as a witness at trial. The court also questioned postconviction counsel regarding whether he asked trial counsel why Wright was not called as a witness at trial, and postconviction counsel responded that he had not. At the conclusion of the hearing, the court granted the State's motion to dismiss defendant's postconviction petition.

¶ 15

ANALYSIS

¶ 16 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). To be entitled to postconviction relief, a defendant must demonstrate that he suffered a substantial deprivation of his constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008). The

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Act sets forth a three-stage process for adjudicating a postconviction petition. *People v. English*, 2013 IL 112890, ¶ 23. At the second stage of proceedings, the defendant is entitled to counsel, who may amend the defendant's petition, and the State may file a motion to dismiss the petition. *People v. Harper*, 2013 IL App (1st) 102181, ¶ 33. Dismissal of a petition is warranted at the second stage when, taking all well-pleaded facts as true, the defendant fails to make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 17 Defendant contends that postconviction counsel failed to provide a reasonable level of assistance during the second stage of proceedings on his postconviction petition. Under the Act, a defendant is entitled to the reasonable assistance of postconviction counsel and, to ensure that a defendant receives this level of assistance, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes certain duties upon postconviction counsel. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Specifically, Rule 651(c) requires that counsel consult with the defendant to ascertain his claims, examine the record of trial proceedings, and make any amendments to the petition necessary for an adequate presentation of the defendant's claims. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

Counsel may show compliance with Rule 651(c) by filing a certificate assuring that the rule's requirements have been met. *People v. Perkins*, 229 Ill. 2d 34, 50 (2007). The filing of such a certificate gives rise to a presumption that counsel provided the reasonable level of assistance required by the Act, and the defendant must then overcome this presumption by demonstrating that counsel failed to substantially comply with the rule's requirements. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

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¶ 18 In this case, postconviction counsel filed a Rule 651(c) certificate relating that he had consulted with defendant by letter to ascertain his claims, examined defendant's *pro se* petition and the report of trial proceedings, and determined that nothing could be added to defendant's claims by amending or supplementing his petition. Thus, defendant now bears the burden of overcoming the presumption that counsel provided reasonable assistance.

¶ 19 Defendant alleged in count one of his *pro se* petition that trial counsel was ineffective for failing to locate Wright and call him as a witness at trial. To prevail on his ineffective assistance claim, defendant was required to show that trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Defendant asserted that trial counsel's failure to locate Wright and call him as a witness was objectively unreasonable because the affidavits provided by Wright and Torres established that counsel could have located Wright had he taken reasonable investigatory steps to do so and that counsel's deficient performance prejudiced defendant because the State's identification evidence, which consisted of Elem's testimony and Fairman's statement and grand jury testimony, was weak and would have been contradicted by Wright's testimony. Defendant also asserted that his ineffective assistance claim was not barred by the doctrine of *res judicata* because the claim was supported by the affidavits of Wright and Torres, which were not part of the record on direct appeal.

¶ 20 In count two, defendant alleged that Wright's affidavit established that defendant was actually innocent of the first degree murder of Williams. A defendant may assert a freestanding claim of actual innocence based upon newly discovered evidence in a postconviction petition. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). The evidence relied upon in support of such

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a claim must be newly discovered, material, noncumulative, and of such a conclusive character that it would probably change the result of a retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Evidence is "newly discovered" if it was not available at the defendant's original trial and it could not have been discovered sooner. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Defendant asserted that the information in Wright's affidavit was newly discovered because Wright could not be located by trial counsel prior to trial and that the evidence was material, noncumulative, and of such a conclusive character as to probably change the result of a retrial because Wright was an eyewitness to the shooting and his affidavit contradicted the testimony of Elem and the statement and grand jury testimony of Fairman and corroborated the trial testimony of Fairman and Tiffany Carroll.

¶ 21 Defendant asserts that the record establishes that postconviction counsel violated Rule 651(c) by failing to contact trial counsel and obtain information regarding the steps taken by trial counsel to locate Wright prior to trial and by failing to amend defendant's *pro se* petition with that information. Defendant maintains that such information would have supported his petition regardless of whether it showed that trial counsel took reasonable steps to locate Wright because the evidence would have supported his ineffective assistance claim if it showed that trial counsel was deficient for not taking adequate steps to locate Wright and would have supported his actual innocence claim if it showed that Wright could not be found prior to trial despite trial counsel's reasonable attempts to do so.

¶ 22 The State responds that postconviction counsel was not required to amend defendant's petition with evidence regarding trial counsel's efforts to locate Wright prior to trial and call him as a witness because defendant's ineffective assistance claim was barred by the doctrine of *res*

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judicata. A claim which has been raised and decided on direct appeal is barred from being raised in a postconviction petition by the doctrine of *res judicata*. *English*, 2013 IL 112890, ¶ 22. A postconviction claim which is barred by *res judicata* is frivolous (*People v. Alcozer*, 241 Ill. 2d 248, 258 (2011)), and Rule 651(c) does not require postconviction counsel to advance frivolous claims on the defendant's behalf (*Pendleton*, 223 Ill. 2d at 472). However, *res judicata* does not apply to a postconviction claim when the facts relating to the claim do not appear on the face of the record on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005).

¶ 23 As an initial matter, the State does not assert that defendant's actual innocence claim is barred by *res judicata* and, in any event, defendant's actual innocence claim could not implicate *res judicata* because such a claim must be based on newly discovered evidence. In addition, defendant's ineffective assistance claim was based on the affidavits of Wright and Torres, which were not a part of the record on direct appeal. Although the appellate record included counsel's statement during argument on defendant's posttrial motion that Wright had informed counsel that he could not identify the second shooter, Wright's affidavit contains the additional averment that he was certain that defendant was not the second shooter because defendant was tall and the second shooter was shorter than him. Thus, Wright's affidavit contains information that was not part of the appellate record and contradicts this court's determination on appeal that Wright's proposed testimony was equivocal. Moreover, any information postconviction counsel would have obtained regarding trial counsel's attempt to locate Wright prior to trial is information that was not in the record on direct appeal and, as such, defendant's ineffective assistance claim was not barred by *res judicata*.

¶ 24 The State also responds that postconviction counsel was not required to seek evidence of

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trial counsel's alleged failure to take adequate steps to locate Wright because defendant did not provide postconviction counsel with any information on that matter. In *People v. Johnson*, 154 Ill. 2d 227, 239 (1993), our supreme court considered whether the defendant was denied the reasonable assistance of postconviction counsel where the defendant alleged in his petition that trial counsel was ineffective for failing to call certain witnesses and postconviction counsel did not interview any of the witnesses named in the petition or obtain any evidence in support of the defendant's claims. The court held that postconviction counsel failed to adequately comply with Rule 651(c) because counsel made no effort to contact the witnesses identified in the defendant's petition or to amend the petition with affidavits from those witnesses. *Id.* at 243. In doing so, the court stated that although a court could usually assume that a postconviction counsel made a concerted effort to obtain evidence in support of a defendant's claim, that presumption was contradicted in that case because postconviction counsel had admitted that he made no attempt to contact the individuals identified in the petition. *Id.* at 241-43. The court explained that, "[a]t a minimum, counsel had an obligation to attempt to obtain evidentiary support for claims raised in the post-conviction petition." *Id.* at 245. The court, however, also stated that postconviction counsel was not required to search for evidence outside the record that might support general claims raised in the petition or conduct a "generalized fishing expedition" in search of such evidence. *Id.* at 247-48.

¶ 25 In this case, although postconviction counsel filed a Rule 651(c) certificate relating that defendant's claims were adequately presented in his *pro se* petition, counsel admitted during the hearing on the State's motion to dismiss the petition that he had not asked trial counsel why Wright was not called as a witness at trial. Thus, the presumption that postconviction counsel

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made a concerted effort to obtain evidence in support of defendant's claims is contradicted by the record insofar as it indicates that postconviction counsel did not make any attempt to obtain information from trial counsel regarding the failure to call Wright as a witness or locate him prior to trial. While we agree with the State that postconviction counsel was not required to conduct a "fishing expedition," no such undertaking was required to attempt to obtain evidentiary support for defendant's claims because postconviction counsel would have only needed to contact trial counsel regarding the specific issue of the steps that were taken to locate Wright prior to trial and the reason he was not called as a witness. Pursuant to the holding in *Johnson*, postconviction counsel had an obligation to attempt to obtain evidentiary support for the claims raised in defendant's petition. As any information trial counsel would have provided regarding the steps taken to locate Wright prior to trial would have supported defendant's petition by either supporting defendant's ineffective assistance claim or his actual innocence claim, postconviction counsel was required to at least attempt to obtain such information from trial counsel to comply with the requirements of Rule 651(c). The record discloses, however, that counsel made no such attempt, and we conclude that postconviction counsel did not comply with the requirements of Rule 651(c) and that defendant was denied the reasonable assistance of postconviction counsel.

¶ 26 Our supreme court has consistently held that remand is required when postconviction counsel has not complied with the requirements of Rule 651(c) (*Suarez*, 224 Ill. 2d at 47), as a reviewing court will not speculate whether the circuit court would have dismissed the defendant's petition without an evidentiary hearing if the defendant had received the reasonable assistance of postconviction counsel (*People v. Turner*, 187 Ill. 2d 406, 416 (1999)). As such, we need not consider the additional claims raised by defendant in this appeal, as we must remand the matter

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to the circuit court for the appointment of new counsel and further proceedings under the Act.

¶ 27

CONCLUSION

¶ 28 Accordingly, we reverse the second-stage dismissal of defendant's postconviction petition and remand the matter to the circuit court for the appointment of new postconviction counsel and further second-stage proceedings.

¶ 29 Reversed and remanded.