

2012 IL App (1st) 101247-U

FIRST DIVISION

June 29, 2012

No. 1-10-1247

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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. 04 CR 13530
)	
KWESI ANDOH,)	
)	Honorable Victoria A. Stewart,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment of the court.

ORDER

¶ 1 **Held:** (1) Dismissal of the postconviction petition without an evidentiary hearing was error where the defendant made a substantial showing that his constitutional right to the effective assistance of counsel was violated; (2) Trial judge did not err by failing to *sua sponte* recuse herself from hearing the defendant's postconviction petition.

¶ 2 Defendant Kwesi Andoh appeals from the second-stage dismissal of his postconviction petition. On appeal he contends that: (1) he was entitled to an evidentiary hearing on his allegation that he was denied his constitutional rights to a jury trial, the right to testify on his own behalf by the ineffective assistance of both trial counsel and appellate counsel; (2) that the trial judge erred by failing to recuse herself from ruling on his postconviction petition; and (3) that postconviction counsel failed to provide reasonable assistance to him. For the reasons set forth below, we hold as follows: defendant Andoh was entitled to an evidentiary hearing on his claim that trial counsel's ineffective assistance caused him to waive his right to a jury trial; defendant Andoh was not entitled to an evidentiary hearing on his claim that the ineffectiveness of trial counsel denied him his right to testify; and the trial judge did not err in failing to recuse herself from ruling on the postconviction petition. In light of our determination of these issues, we do not address the reasonable assistance of postconviction counsel issue. The pertinent facts are set forth below.

¶ 3 BACKGROUND

¶ 4 I. Trial Court and Direct Appeal Proceedings

¶ 5 Defendant Andoh was charged by information with the delivery of less than a gram of a controlled substance (heroin). Codefendant Bobby Spicer was charged with possession of less than a gram of heroin. He pleaded guilty to that offense before Circuit Court Judge Victoria A. Stewart.

¶ 6 Defendant Andoh's case was also before Judge Stewart. Prior to the commencement of trial, Judge Stewart advised defendant Andoh of his right to a jury trial. She then stated for the

record that defendant Andoh had tendered a written jury trial waiver. Defendant Andoh acknowledged on the record that he was waiving his right to a jury trial. The case proceeded as a bench trial.

¶ 7 Chicago police officer Elise Padilla testified that on May 3, 2003, she observed Mr. Spicer approach defendant Andoh and give him an unknown sum of money. Defendant Andoh then placed an item in Mr. Spicer's hand. When Officer Padilla approached Mr. Spicer, he threw something on the ground; it was later determined to be a plastic bag containing heroin. At the time of his arrest, defendant Andoh had money but no drugs in his possession. Defendant Andoh's mother testified that on May 3, 2004, she had given defendant \$100.

¶ 8 Mr. Spicer testified that the heroin was his. He had approached defendant Andoh to borrow a \$1. After defendant Andoh gave him \$1, they shook hands, and the two of them walked together until they went their separate ways. On cross-examination, Mr. Spicer denied that in the factual basis for his guilty plea he acknowledged that he received the heroin from defendant Andoh; all he agreed to was that he possessed the heroin. Judge Stewart granted the prosecutor's motion for a continuance in order to obtain a transcript of Mr. Spicer's guilty plea. Subsequently, the prosecutor chose to rely on his cross-examination of Mr. Spicer.

¶ 9 Following closing arguments, Judge Stewart found defendant Andoh guilty of delivery of a controlled substance. On July 18, 2005, the judge denied defendant Andoh's motion for a new trial, and the case proceeded to the sentencing hearing. Based on defendant Andoh's criminal history, the prosecutor requested a sentence of 10 years' imprisonment. Trial counsel acknowledged that, based on the charge of which he was convicted, defendant Andoh was not

No. 1-10-1247

eligible for probation and that the law required that he be sentenced as a Class X felon. Arguing that the case involved only a small amount of heroin and no violence was involved, trial counsel requested that the court impose the minimum sentence. Judge Stewart noted that defendant Andoh's prior convictions included unlawful use of weapons, for which he received probation, and armed robbery, resisting arrest and attempted armed robbery, for which he received terms of imprisonment. The judge then sentenced defendant Andoh to a term of 10 years' imprisonment.

¶ 10 On August 18, 2005, defendant Andoh filed a motion to vacate and modify his sentence. *Inter alia*, the motion alleged that the 10-year sentence was imposed in violation of a promised sentence.

¶ 11 With regard to the promised sentence, the motion alleged that on January 31, 2005, assistant State's Attorney Jeffrey Stein (ASA Stein) informed defendant Andoh's attorney, Michael Cole, that Judge Stewart wished to speak with him about defendant Andoh's case. The motion alleged in relevant part as follows:

"27. During this meeting, Judge Stewart told Attorney Cole that in exchange for a guilty plea, she would sentence Mr. Andoh as a class 4 felon to one year for Possession of a controlled substance.

28. [ASA] Stein stated that the charges could not be reduced because Mr. Andoh had prior convictions, if he was found guilty, was eligible to be sentenced as a mandatory class X felon.

29. Judge Stewart replied that she would find him guilty of a possession and sentence him as a class 4 felon.

30. Attorney Cole said that Mr. Andoh would be waiving his right to a jury trial to facilitate this promise and that he accepted this deposition [*sic*] on behalf of Mr. Andoh." The motion further alleged that the defendant waived his right to a jury trial, but after his bench trial, Judge Stewart found him guilty of the delivery of a controlled substance and imposed a 10-year sentence.

¶ 12 On October 14, 2005, the parties appeared for a hearing on defendant Andoh's motion to vacate and modify sentence. After a lengthy argument, Judge Stewart determined that motion had been filed 31 days after defendant Andoh was sentenced and therefore was untimely. Nonetheless, Judge Stewart chose to address the allegations contained in the motion.

¶ 13 With respect to the promised sentence allegation, Judge Stewart stated:

"When Counsel indicated [in his opening statement] there was a possession, I corrected him on the record and indicated to him that the only charge that was before me was a delivery of a controlled substance. There was never a possession of a controlled substance charge."

Judge Stewart noted that attorney Cole never indicated on the record or otherwise that there was a side agreement.

¶ 14 When defendant Andoh responded that he waived a jury trial based on what happened at the January 31, 2005, meeting between the judge and his attorney, Judge Stewart stated:

"I am not responsible for representations that are made by Counsel and I want the record to reflect that your attorney has never been alone with me in this courthouse or any other place and that whenever he has been in my presence, he has been in the presence of the

State and him and I.

MR. COLE: That's right.

* * *

THE COURT: So [attorney Cole] and I have never had illegal conversations, all right, and we never had an illegal - - for me to talk directly to your counsel outside the presence of the State is an illegal conversation. We never engaged in any illegal communications.

THE DEFENDANT: I never said that."

¶ 15 Judge Stewart then addressed attorney Cole, stating as follows:

"You have made certain allegations as to conversations you have had with me and I want the record to be clear I never had a conversation alone with you. I have never been alone with you in this building or outside this building where we could engage in an ex parte communication. My conversations have been with the State with you and I have never discussed this Defendant's waiver of a jury trial with you. I at no time told you that this Defendant would receive a reduced sentence from you. And you have always persisted in your client's not guilty. And, essentially, there would be no reason for us to have that communication absent your saying that your client was guilty."

Judge Stewart then denied defendant Andoh's motion to vacate and modify sentence and appointed the appellate defender to represent him on appeal.

¶ 16 On direct appeal, defendant Andoh challenged only the propriety of certain monetary penalties assessed against him and requested that the mittimus be corrected to reflect the proper amount of time spent in presentence custody. In a summary order, this court affirmed defendant

No. 1-10-1247

Andoh's conviction, modified the monetary portion of his sentence and corrected the mittimus. See *People v. Andoh*, No. 1-05-3426 (2007) (unpublished order under Supreme Court Rule 23).

¶ 17

II. Postconviction Proceedings

¶ 18 On May 16, 2007, defendant Andoh filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006) (the Act)). *Inter alia*, the petition alleged that defendant Andoh waived his rights to a jury trial and the right to testify based on attorney Cole's representation to him that the attorney had an agreement with Judge Stewart as to his sentence. Since the existence of any agreement was then denied by Judge Stewart, defendant Andoh was denied the effective assistance of counsel.

¶ 19 Defendant Andoh supported his petition with his own affidavit in which he averred that he informed attorney Cole that he wanted a jury trial but that attorney Cole told him he did not need a jury trial because of the agreement with Judge Stewart. Defendant Andoh averred that he was not informed of the specifics of that agreement and, on the advice of attorney Cole, he waived his right to a jury trial.

¶ 20 The petition was also supported with two affidavits from attorney Cole. In the first affidavit, attorney Cole averred that Judge Stewart stated that in exchange for a guilty plea, she would sentence Mr. Andoh as a class 4 felon to one year for possession of a controlled substance. When the prosecutor responded that the charges could not be reduced because Mr. Andoh had prior convictions, Judge Stewart replied that she would find defendant Andoh guilty of a possession and sentence him as a class 4 felon. Attorney Cole further averred that he told Judge Stewart that defendant Andoh would be waiving his right to a jury trial to facilitate this promise

No. 1-10-1247

and that he accepted this disposition on behalf of his client.

¶ 21 In a second affidavit, attorney Cole added additional averments. He averred that defendant Andoh had insisted on a jury trial. He further averred that he told defendant Andoh that "based on my understanding of the conversation I had with Judge Stewart and ASA Stein, that if he waived his right to a jury trial and took a bench trial and was found guilty after a bench trial, he would only be found guilty of possession of a controlled substance, a class 4 felony and not delivery of a controlled substance, which would ultimately mean a lower sentence." He further averred that after informing defendant Andoh of the "understanding I believed had been reached between myself, the ASA, and the Judge, Mr. Andoh changed his mind and decided to take a bench trial."

¶ 22 Judge Stewart did not rule on the *pro se* petition but appointed counsel for defendant Andoh. Postconviction counsel filed an amended petition, which alleged that attorney Cole failed to provide effective assistance of counsel because he caused the petitioner to waive his right to a jury trial based on a non-existent agreement with Judge Stewart. The amended petition also alleged that defendant Andoh was denied the effective assistance of appellate counsel by counsel's failure to raise the jury waiver issue on appeal. The State filed a motion to dismiss. Following a hearing on the motion, Judge Stewart dismissed the amended postconviction petition.

¶ 23 This appeal followed.

¶ 24

ANALYSIS

¶ 25

I. Second-Stage Dismissal of Postconviction Petition

¶ 26

A. *Standard of Review*

¶ 27 We review the second-stage dismissal of a postconviction petition *de novo*. See *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 28

B. *Discussion*

¶ 29 Defendant Andoh contends that the ineffectiveness of his trial counsel caused him to forgo his right to a jury trial and his right to testify on his own behalf. He further contends that his appellate counsel was ineffective for failing to raise the denial of these rights on appeal.

¶ 30 At the second stage of postconviction proceedings, the defendant bears the burden of making a substantial showing that his constitutional right or rights have been violated. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A defendant is not entitled to an evidentiary hearing unless he makes a substantial showing of a violation of a constitutional right. *Coleman*, 183 Ill. 2d at 381. Therefore, a defendant's allegations in the petition must be supported by the record in the case or by accompanying affidavits. *Coleman*, 183 Ill. 2d at 381. At this stage of the proceedings, the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional violation requiring relief under the Act. *Coleman*, 183 Ill. 2d at 380. The court does not engage in any fact-finding because all well-pleaded facts are taken as true at this stage of the proceedings. *Coleman*, 183 Ill. 2d at 380-81. Dismissal of a postconviction petition is warranted "only when the petition's allegations of fact liberally construed in favor of the petitioner and in light of the original trial record fail to

No. 1-10-1247

make a substantial showing of imprisonment in violation of the state or federal constitution."

Coleman, 183 Ill. 2d at 382.

¶ 31 Ineffective assistance of counsel claims are evaluated under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Scott*, 2011 IL App (1st), 100122, ¶ 27. Under *Strickland*, a defendant must establish both a deficiency in counsel's performance and that the deficiency resulted in substantial prejudice to the defendant. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 27.

¶ 32 The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *Scott*, 2011 IL App (1st) 100122, ¶ 27. A claim of ineffective assistance of counsel for failing to raise an issue on appeal must contain allegations that such failure was objectively unreasonable and that counsel's decision prejudiced the defendant. *Scott*, 2011 IL App (1st) 100122, ¶ 28. In order to determine if the defendant was prejudiced by appellate counsel's failure to raise an issue, the reviewing court examines the merits of the underlying issue. *Scott*, 2011 IL App (1st) 100122, ¶ 28.

¶ 33 1. Jury Trial Waiver

¶ 34 When a defendant challenges the validity of a jury waiver by alleging the ineffective assistance of counsel, the court must determine: "(1) whether counsel's performance fell below an objective standard of reasonableness; and (2) 'whether there exists a reasonable likelihood that the defendant would not have waived his jury right in the absence of the alleged error.'" *People v. Batrez*, 334 Ill. App. 3d 772, 782 (2002) (quoting *People v. Maxwell*, 148 Ill. 2d 116, 142-42 (1992)).

¶ 35 The decision whether to waive a jury trial belongs to the defendant. *People v. Smith*, 326 Ill. App. 3d 831, 847-48 (2001). Trial counsel's recommendation to a defendant regarding the choice of a jury or bench trial is considered a matter of trial strategy and tactics and does not constitute ineffective assistance. *People v. Hobson*, 386 Ill. App. 3d 221, 243 (2008).

¶ 36 In *Hobson*, the defendant alleged that he waived his right to a jury trial because his attorney told him he knew the trial judge and that the judge would find him not guilty since it was a simple claim of self-defense. This court determined that the attorney's advice to waive a jury trial was not unreasonable as it was based on the attorney's knowledge that the trial judge was sympathetic, while a jury was unknown and unpredictable. Trial counsel's advice "constituted a prediction based upon counsel's evaluation of the mitigating circumstances of the case which counsel intended to assert on behalf of defendant and his knowledge by reputation and/or by experience of the trial judge's previous record." *Hobson*, 386 Ill. App. 3d at 243.

¶ 37 Taking the allegations contained in the motion to vacate and modify sentence and supported by attorney Cole's affidavit as true, no agreement was reached between Judge Stewart and attorney Cole as to the sentence to be imposed on defendant Andoh. Judge Stewart stated that, in exchange for a plea of guilty to possession of a controlled substance, she would sentence the defendant to one year's imprisonment. However, the prosecutor refused to consider reducing the charge. Judge Stewart responded that she would find the defendant guilty of possession and sentence him as a class four felon.

¶ 38 In his second affidavit, attorney Cole refers to his "understanding" based on his conversation with Judge Stewart and the prosecutor that if defendant Andoh waived a jury trial,

No. 1-10-1247

and was found guilty after a bench trial, he would be subject to a lesser penalty. Regardless of what attorney Cole "understood," according to Judge Stewart's statements and ASA Stein's representations, there was no agreement that if defendant Andoh waived a jury trial and took a bench trial, he would only be found guilty of possession of a controlled substance and sentenced accordingly.

¶ 39 Unlike defense counsel in *Hobson*, attorney Cole's representation to defendant Andoh with respect to waiving his right to a jury trial was not trial strategy or tactics based on attorney Cole's prior experience with Judge Stewart and how she might view the defense he would present on defendant Andoh's behalf. Instead, it was based on attorney Cole's mistaken belief that, if defendant Andoh agreed to waive his right to a jury trial and took a bench trial, Judge Stewart had agreed to find him guilty of possession rather than delivery and sentence him accordingly. Rather than a "prediction" as was the case in *Hobson*, defendant Andoh was given misinformation by attorney Cole which caused him to give up his right to a jury trial.

¶ 40 While *Smith* was an appeal from a first-stage dismissal, we find it instructive. In that case, the defendant alleged that he waived his right to a jury trial based on his attorney's advice to take a bench trial because the trial judge owed him a favor, and the judge would have information not available to a jury. This court determined that the defendant's un rebutted allegations as to his reason for waiving a jury trial did not constitute valid grounds for his jury waiver. The court stated as follows:

"When defense counsel informs the court that his client waives a jury, it is the professional responsibility of defense counsel to insure that the waiver is knowingly and

understandingly consented to by his client. By allegedly advising defendant that it would be better to take a bench trial because the judge owed him a favor and would have information not available to the jury, trial counsel would have been acting in a professionally unreasonable manner." *Smith*, 326 Ill. App. 3d at 848.

The court held that the defendant alleged sufficient facts to establish the attorney's deficient performance under the first prong of *Strickland*. The court further found that the prejudice prong of the *Strickland* test was met, finding a reasonable likelihood that the defendant would not have waived his right to a jury trial, absent the alleged deficient performance and erroneous advice of his attorney. *Smith*, 326 Ill. App. 3d at 848.

¶ 41 Likewise, in the present case, defendant Andoh's decision to waive his right to a jury trial was not "knowingly and understandingly" made because it was based on a nonexistent agreement, which in turn was based on attorney Cole's misunderstanding of the conversation he had with ASA Stein and Judge Stewart. Based on these unrebutted factual allegations, which we must take as true at this stage of the proceedings, we conclude that by informing defendant Andoh of a nonexistent agreement for a promised sentence, attorney Cole acted in a professionally unreasonable manner. Defendant Andoh has satisfied the first prong of the *Strickland* test.

¶ 42 As to the prejudice prong, the State maintains that defendant Andoh had already determined to take a bench trial prior to the January 31, 2005, meeting between attorney Cole, ASA Stein and Judge Stewart. The State points out that at the December 17, 2004, status date, the case was continued by agreement for a bench trial. However, the record reveals that neither

attorney Cole nor defendant Andoh was present on that date. Moreover, on February 18, 2005, when Judge Stewart set the case for trial, she asked whether it would be a bench trial.

¶ 43 The State also argues that defendant Andoh cannot establish prejudice because there was no reasonable probability that the jury would have reached a different conclusion than Judge Stewart did. However, the fact that the outcome would have been the same whether the defendant was tried by a jury or the court is not relevant to the question of prejudice under *Strickland*. *People v. Barkes*, 399 Ill. App. 3d 980, 988 (2010).

¶ 44 Defendant Andoh's allegation that he insisted on a jury trial until attorney Cole informed him of the "agreement" with Judge Stewart was not rebutted by the record and was supported by attorney Cole's affidavits, as well as defendant Andoh's. Under the prejudice prong of the *Strickland* test, we find a reasonable likelihood that defendant Andoh would not have waived his right to a jury trial in the absence of the alleged deficient performance and erroneous advice of attorney Cole.

¶ 45 We conclude that defendant Andoh satisfied both the deficiency and the prejudice prongs of the *Strickland* test and made a substantial showing of the violation of his constitutional right to the effective assistance of counsel. We further conclude that as this issue has merit, defendant Andoh has made a substantial showing of the violation of his constitutional right to the effective assistance of appellate counsel. Therefore, he is entitled to an evidentiary hearing on his claim that attorney Cole's ineffective assistance caused him to waive his right to a jury trial.

¶ 46 2. Waiver of Right to Testify

¶ 47 Defendant Andoh contends that attorney Cole's ineffectiveness deprived him of his

constitutional right to testify on his own behalf. According to his affidavit, attorney Cole told him that his testimony was not needed because of the agreement with Judge Stewart and that, if defendant Andoh did testify it would nullify any agreement the attorney had made on his behalf. Neither of attorney Cole's affidavits addressed the issue of defendant Andoh's right to testify.

¶ 48 The decision as to whether to testify on one's own behalf belongs to the defendant but should be made with the advice of counsel. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). "Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify." *Youngblood*, 389 Ill. App. 3d at 217. "A defendant making a postconviction claim that trial counsel was ineffective for refusing to allow the defendant to testify must allege that he 'made a "contemporaneous assertion *** of his right to testify." ' " *Barkes*, 399 Ill. App. 3d at 989 (quoting *Youngblood*, 389 Ill. App. 3d at 217, quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

¶ 49 Defendant Andoh alleged that he repeatedly demanded to testify and supported his allegation with his affidavit. However, in order to satisfy the prejudice prong of the *Strickland* test, a defendant must set forth what his testimony would be and how it would refute the State's case against him. In *Barkes*, the defendant asserted that he wanted to testify to refute the allegations made by the victim and to show that she had a motive for testifying. The reviewing court concluded that the defendant did not establish prejudice. Since the defendant did not specify which allegations he would refute, his assertion could be disregarded as conclusory. Moreover, he did not indicate that if he were called to testify, he would have denied having

sexual intercourse with the victim or that he was not in a position of trust, authority or supervision over her, the central issues in the case. *Barkes*, 399 Ill. App. 3d at 989-90; see also *Youngblood*, 389 Ill. App. 3d 218-19 (no prejudice where defendant's proposed testimony had no bearing on a factual issue at trial).

¶ 50 In his *pro se* petition, defendant Andoh alleged only that if he had been allowed to testify, he "could have effectively relayed to the court the fact[s] as they truly happened." As was the case in *Barkes*, defendant Andoh's allegation was conclusory, and he failed to state that, if called to testify, he would have denied selling heroin to Mr. Spicer, the central issue in this case. Therefore, defendant Andoh failed to satisfy the prejudice prong of the *Strickland* test.

¶ 51 Defendant Andoh's reliance on *People v. Lester*, 261 Ill. App. 3d 1075 (1994), and *People v. Nix*, 150 Ill. App. 3d 48 (1986), is misplaced. In *Nix*, the Third District Appellate Court held that the defendant was entitled to an evidentiary hearing on his claim of ineffectiveness of counsel where the defendant alleged that counsel failed to inform him that he had the right to decide whether or not to testify. See *Nix*, 150 Ill. App. 3d at 50-51. In *Lester*, the Second District Appellate court relied on *Nix* to conclude that the defendant's allegation that he did not testify because his attorney told him it would jeopardize his appeal was a strong indication of ineffective assistance of counsel and entitled the defendant to an evidentiary hearing. *Lester*, 261 Ill. App. 3d at 1079-80. Recently, the second district declined to follow *Lester*, *inter alia*, because of "the decision's complete failure to address the prejudice prong of the ineffective-assistance-of-counsel test." *People v. Buchanan*, 403 Ill. App. 3d 600, 608 (2010). For the same reason, the decisions in *Lester* and *Nix* do not support defendant Andoh's argument that his

failure to testify resulted from the ineffectiveness of attorney Cole.

¶ 52 Since defendant Andoh failed to establish the prejudice prong of the *Strickland* test, he is not entitled to an evidentiary hearing on his claim that attorney Cole's ineffective assistance caused him to waive his right to testify in his own behalf.

¶ 53 II. Judge Stewart's Failure to Recuse Herself

¶ 54 Defendant Andoh contends that Judge Stewart erred when she failed to *sua sponte* recuse herself from ruling on his postconviction petition. He maintains that she was a material witness to the alleged sentencing agreement, and she relied on the transcript of Mr. Spicer's guilty plea in finding the defendant guilty. Defendant Andoh never filed a motion for substitution of judge or objected to Judge Stewart hearing his postconviction petition.

¶ 55 A defendant has no absolute right to a substitution of judge in a postconviction proceeding. *People v. Harvey*, 379 Ill. App. 3d 518, 522 (2008). The judge who presided over the defendant's trial should hear the postconviction petition unless it is shown that the judge is substantially prejudiced. *Harvey*, 379 Ill. App. 3d at 522. Where there may be an appearance of prejudice, such as where the judge has knowledge outside the record concerning the truth or falsity of the allegations made and where the judge may be called as a material witness, a judge must recuse himself from the postconviction proceedings. *Harvey*, 379 Ill. App. 3d at 522 (citing *People v. Wilson*, 37 Ill. 2d 617, 621 (1967)).

¶ 56 A similar issue was addressed in *People v. Jones*, 24 Ill. App. 3d 1052 (1974). In *Jones*, the defendant maintained that the trial judge should have *sua sponte* recused himself from hearing his postconviction petition because the judge presided over the defendant's trial and

based on the allegations of the petition, he might have been a material witness with knowledge outside the record as to their truth or falsity. The reviewing court found that "the defendant was fully aware of the fact that it was the same judge sitting but, nonetheless, he did not move for a substitution of judges as was his right, nor did he voice any objection or make any motion to seek the judge's disqualification, nor did he at any time during the post-conviction hearing request that the trial judge appear as a witness." *Jones*, 24 Ill. App. 3d at 1056.

¶ 57 The record reflects that on March 6, 2009, defendant Andoh, who was no longer in custody, was present in court and was therefore aware that Judge Stewart was presiding over postconviction proceedings in his case. On December 4, 2009, defendant Andoh was before Judge Stewart who admonished him as to the possible consequences if his postconviction petition were to be granted. At no time prior to Judge Stewart's granting of the State's motion to dismiss did defendant Andoh object to Judge Stewart hearing his postconviction petition. Therefore, defendant Andoh forfeited his right to object to Judge Stewart presiding over the postconviction proceedings in this case and may not raise the issue for the first time on appeal. *Jones*, 24 Ill. App. 3d at 1056.

¶ 58 In the absence of forfeiture, the record does not support defendant Andoh's contention that Judge Stewart was required to recuse herself. According to the amended postconviction petition, there was no agreement between attorney Cole and Judge Stewart, thus eliminating any obvious reason for calling her as a witness.

¶ 59 There is also no evidence in the record that Judge Stewart relied on the transcript from Mr. Spicer's guilty plea in finding defendant Andoh guilty of the delivery of a controlled

substance. Defendant Andoh states in his brief that "Judge Stewart relied on[Mr.] Spicer's alleged inconsistencies between his testimony and plea when she found that [Mr.] Spicer was not credible as he had changed his story from his guilty plea." However, the record reflects that it was the prosecutor who made that argument on rebuttal. In finding defendant Andoh guilty of the delivery of a controlled substance, Judge Stewart relied on the testimony of Officer Padilla stating she found the officer's testimony "to be exceptionally credible."

¶ 60 The decisions in *People v. Washington*, 38 Ill. 2d 446 (1967), and *Wilson* are distinguishable. In *Washington*, the defendant pleaded guilty to murder and was sentenced to 25 years' imprisonment. In his postconviction petition, he alleged that his plea of guilty was based on a representation by his attorney that an agreement to a 14-year sentence had been reached with the prosecutor and the trial court. The supreme court held that if such an agreement existed, the defendant's guilty plea could not stand. As the defendant's allegation as to the agreement was un rebutted, further proceedings were necessary to determine the truth or falsity of the defendant's allegation. Because the trial judge would either be a material witness or had knowledge outside the record as to the truth or falsity of the allegations of the petition, the court ordered the proceedings transferred to another judge. *Washington*, 38 Ill. 2d at 451.

¶ 61 In *Wilson*, after pleading guilty to murder, the defendant was sentenced to death. In his postconviction petition, the defendant alleged that he pleaded guilty because the trial judge told his attorney that, for sentencing purposes, the defendant would be better off pleading guilty then taking a bench trial. The same trial judge heard the postconviction petition and denied the petition as well as the defendant's motion for a change of venue. The supreme court remanded

the case holding that the trial judge should have granted the motion for change of venue based on the allegations of the off-the-record conversation with the defendant's attorney, in which case, the trial judge would be a material witness or have knowledge outside the record. *Wilson*, 37 Ill. 2d at 621.

¶ 62 In both *Washington* and *Wilson*, the allegations that the defendants entered guilty pleas based on off-the-record discussions were unrebutted and required the trial judges' testimony because those allegations concerned the judges' participation. In the present case, defendant Andoh's amended petition conceded that no agreement existed. Based on the allegations of the amended petition, we fail to find any necessity for Judge Stewart to be called as a witness at the evidentiary hearing in the present case, and no evidence that she possessed any off-the-record information that would require that she recuse herself from hearing the postconviction petition.

¶ 63 We conclude that Judge Stewart was not required to *sua sponte* recuse herself from hearing defendant Andoh's postconviction petition. However, to avoid any appearance of impropriety, on remand, the case should be assigned to another judge.

¶ 64 CONCLUSION

¶ 65 The order dismissing the amended postconviction petition is reversed, and the cause is remanded for an evidentiary hearing to determine whether defendant Andoh's waiver of his right to a jury trial resulted from the ineffective assistance of trial counsel.

¶ 66 Reversed and remanded with directions.

No. 1-10-1247