2015 IL App (1st) 131093-U

THIRD DIVISION
November 18, 2015

No. 1-13-1093

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 26852
	)	
LESHUN SMITH,	)	
	)	The Honorable
Defendant-Appellant.	)	Maura Slattery-Boyle,
	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction attorneys were not unreasonable, and defendant failed to establish a substantial claim of ineffective assistance of trial counsel necessary to warrant a third-stage evidentiary hearing. This court affirmed the dismissal of defendant's second-stage postconviction petition.

¶ 2 This appeal arises from the second-stage dismissal of defendant Leshun Smith's petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). Defendant contends his postconviction attorneys provided unreasonable assistance (see Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)) and the circuit court erred in dismissing his petition because he

made a substantial showing of a constitutional violation that his trial counsel was ineffective for failing to investigate and call mitigation witnesses at sentencing. We affirm.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first degree murder and sentenced to 36 years' imprisonment for the 1999 shooting of Melvin Owens. Trial evidence showed defendant, clad in a hoody sweatshirt, trailed Owens towards a corner store and hid behind a nearby garage. When Owens exited the store, defendant emerged and shot Owens multiple times. Defendant jumped in the rear passenger door of a waiting, getaway van. One witness provided police with the license plate number, which ultimately matched the van in which defendant was a rear passenger and in which the murder weapon was found. Defendant was found by police in the van sitting on the same sweatshirt as described by two witnesses, who then identified defendant in a lineup and at trial. Defendant testified at trial, denying involvement in the murder, but was nonetheless convicted.

¶ 5 At sentencing, Owens' mother presented a victim impact statement for the record. The State acknowledged defendant had no felony background but noted that the murder was calculated, as defendant shot Owens in broad daylight, after lying in wait, then hopped into an escape vehicle. The State argued the facts of the case and the brutality of the murder warranted a sentence in excess of 50 years. In response, defense counsel presented mitigating factors from the presentence investigation report, including that defendant had no felony convictions, was only 19 when he committed the murder, wished to complete his GED and find prison employment, had no drug or alcohol problems, had good behavior, would be a strong candidate for rehabilitative services, and was remorseful over the killing. Defense counsel also noted that defendant's mother was present at the sentencing hearing but stated "I don't believe we will be putting her on for testimony, Judge."

¶ 6 Following this evidence, the judge noted that he was unsure what precipitated the shooting, but "something short of murdering someone might be a better way to handle the situation." The judge noted defendant should have taken a "quick breath *** [to] think about the consequences" of his actions, but Owens "can't take anymore breaths." Based on the evidence and defendant's background, the court sentenced him to 36 years' imprisonment. Defendant filed a motion to reconsider the sentence, in which he effectively questioned the veracity of the victim impact statement. While the statement had painted Owens in a positive light, as kind and helpful, defendant pointed to Owens' rap sheet showing eight felony convictions for drugs and guns, and a police report identifying Owens' gang affiliation. The court denied the motion.

¶ 7 Defendant filed a direct appeal. This court granted appellate counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirmed defendant's conviction, finding no issues of arguable merit, as the identification testimony was sufficient to prove defendant's guilt beyond a reasonable doubt. *People v. Smith*, No. 1-01-3188 (July 18, 2002) (unpublished order under Supreme Court Rule 23). Defendant's petition for leave to appeal (PLA) was denied on December 5, 2002. *People v. Smith*, 202 Ill. 2d 655 (2002).

¶ 8 On May 15, 2003, defendant mailed his *pro se* postconviction petition with notarized proof of service. The petition advanced to second-stage proceedings, where the State moved to dismiss the petition as meritless and untimely. We note that throughout postconviction proceedings, the State erroneously believed defendant did not file a PLA from his direct appeal, which would have made his petition untimely.[1] The State now effectively admits the PLA was

[1] The statute in effect when defendant filed his petition (see *People v. Rissley*, 206 Ill.2d 403, 413 (2003)), provided in relevant part that "[n]o proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed***." 725 ILCS 5/122-1 (West 2002). Assuming, as the State did, that defendant did not file a PLA, he would have needed to file his posconviction petition within 6 months of the "date" for filing the PLA, or by February 8, 2003. See Ill. S. Ct. R. 315(b) (eff. Oct. 1, 1997) (generally, time for filing PLA is 21 days after entry of appellate court judgment provided no exceptions apply). Under this assumption, then, his June 2003 petition would have been untimely.

filed and the petition was timely. That is, defendant's PLA was denied on December 5, 2002, making his petition due 6 months from then or on June 5, 2003. Defendant mailed his petition on May 15, 2003, which we take as the filing date. See 725 ILCS 5/122-1(c) (West 2002); *People v. Saunders*, 261 Ill. App. 3d 700, 703 (1994) (verified mailing date determines when postconviction proceeding has been "commenced" under section 122-1).

¶ 9 The clerk's notations indicate that following the State's motion to dismiss, the Public Defender's office was appointed in 2004. In 2005, Assistant Public Defender (APD) Daniel Walsh filed a motion to release impounded exhibits and identify the terms of monetary agreements between the State and the identification witnesses who testified against defendant. Over the years, defendant then cycled through several more APDs.

¶ 10 In 2010, APD Davidson filed an amended postconviction petition and a Rule 651(c) certificate stating he had consulted with defendant by mail and phone to ascertain his constitutional deprivations; examined transcripts from defendant's jury trial, the appellate decision, his *pro se* filings, and other evidence; and reviewed applicable law before filing the amended petition, which adequately presented defendant's claims. In the amended petition, defendant asserted that his trial counsel was ineffective for forcing defendant to take a jury trial by threatening to withdraw if defendant insisted on a bench trial and for failing to investigate and call available mitigation witnesses at sentencing. In support of his sentencing claim, defendant attached two notarized affidavits from his mother, Betty Smith. In the first, dated 2003 (and originally attached to defendant's *pro se* petition), Ms. Smith averred in relevant part that she often spoke with defendant's trial attorney and gave counsel the contact information of close friends and family members who would testify as character witnesses. Ms. Smith averred family members were present in court but never called. In the second affidavit, dated 2005, Ms. Smith

listed defendant's positive character traits (like his care for his grandfather and employment) and attested that she was available to testify as to these traits at sentencing, but not called. Defendant also attached the 2005 affidavit of his father, which was similar to Ms. Smith's 2005 affidavit.

¶ 11 In the amended petition, defendant also argued he was entitled to have the sweatshirt and gloves, which were introduced at trial, tested for DNA (see 725 ILCS 5/116-3 (West 2010)). The circuit court ordered counsel to file a separate petition for DNA testing, which he did, and meanwhile held the postconviction proceedings in abeyance until the forensic motion was litigated. In September 2011, the court granted the State's motion to dismiss the DNA petition. Defendant separately appealed that decision, and on March 27, 2014, this court reversed and remanded the cause for DNA testing. *People v. Smith*, 2014 IL App (1st) 113265, ¶ 32. Proceedings on the postconviction petition resumed in the fall of 2011.

¶ 12 In 2012, APD Davidson retired and was replaced by APD Marsha Watt. APD Watt also filed a Rule 651(c) certificate and rested on the amended petition already filed. The State filed an amended motion to dismiss, again arguing in error that the petition was untimely. The State also argued defendant's claims of ineffective assistance of trial counsel were meritless.

¶ 13 On March 19, 2013, the circuit court granted the State's motion. Although the court believed defendant's petition was untimely, "in the interest of fairness and justice," the court proceeded to address the merits of defendant's ineffective assistance of counsel claims. The court held defendant failed to establish the two prongs for ineffective assistance, that defendant's trial counsel objectively unreasonable and defendant was prejudiced. As to defendant's contention that he was coerced into accepting a jury trial, the court stated defendant's "acquiescence by silence indicate[d] a jury trial and that's what he received." As to the failure to

present mitigation witnesses at sentencing, the court found defendant did not meet any of the statutory mitigation factors.

¶ 14 This appeal followed, wherein defendant challenges the dismissal of his postconviction petition and the reasonableness of his postconviction counsel.

¶ 15 ANALYSIS

¶ 16 *Compliance with Rule 651(c)*

¶ 17 Our review of an attorney's compliance with a supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, is *de novo*. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17. The Act serves as a vehicle for inmates to collaterally challenge their convictions and sentences by showing they resulted from a substantial deprivation of federal or state constitutional rights and provides for a three-stage adjudication process. 725 ILCS 5/122-1 (West 2002); *People v. Hommerson*, 2014 IL 115638, ¶ 7; *People v. Harris*, 206 Ill. 2d 1, 12 (2002). Where, as here, an indigent petitioner is appointed counsel at the second stage of postconviction proceedings, counsel must provide only a "reasonable" level of assistance. 725 ILCS 5/122-4 (West 2002); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). To that end, Rule 651(c) requires that postconviction counsel (1) consult with the petitioner by mail or in person to ascertain his contentions of constitutional deprivation; (2) examine the record of the proceeding of the original trial; and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013); *Profit*, 2012 IL App (1st) 101307, ¶ 18. The purpose of this mandatory rule is to ensure that postconviction counsel shapes the defendant's claims into proper legal form and presents them to the court, and substantial compliance with the rule is sufficient. *Perkins*, 229 Ill. 2d at 50; *Profit*, 2012 IL App (1st) 101307, ¶ 18.

¶ 18 Where, as here, counsel files a 651(c) certificate, a rebuttable presumption arises that counsel provided reasonable assistance. *Id*. at ¶ 19. It is defendant's burden to overcome this presumption by demonstrating his attorney's failure to substantially comply with his or her 651(c) duties. *Id*. Defendant concedes both APDs Davidson and Watt filed 651(c) certificates, but contends neither complied with the third prong of the rule when they failed to counter the State's erroneous assertion that defendant's petition was untimely. Relying on *Perkins*, defendant argues the failure to overcome such a procedural bar requires "automatic reversal." *Perkins* held that an adequate or proper presentation of a petitioner's constitutional claims necessarily includes attempting to overcome procedural bars, including timeliness, that will result in dismissal of a petition if not rebutted. *Id*. at 44. Defendant asks that we extend that legal principle here.

¶ 20 We note that the record demonstrates the State and circuit court mistakenly believed no PLA was filed and defendant's petition was untimely. Defense counsel did not respond to the State's amended motion to dismiss or the court's pronouncement regarding untimeliness. Admittedly, it seems an attorney, namely the one representing defendant, should correct such a mistake. Nonetheless, even assuming any error on postconviction counsel's part, we do not believe it warrants reversal because the error did not preclude the circuit court from considering the substantive merits of defendant's constitutional claims. *Cf. People v. Turner*, 187 Ill. 2d 406, 415 (1999) (where counsel failed to make routine amendment to postconviction petition to overcome waiver, court was precluded from considering petitioner's claims on merits and it "directly contributed to the dismissal of the petition without an evidentiary hearing."). In spite of the petition's so-called untimeliness, the court addressed each of defendant's contentions "in the interest of fairness and justice," making clear the dismissal was for reasons other than procedure. See *People v. Mendoza*, 402 Ill. App. 3d 808, 816 (2010) (unverified affidavits attached to

petition were "of no moment when the unverified nature of the affidavits was not a basis for the circuit court's dismissal of the amended petition"); *cf. People v. Johnson*, 154 Ill. 2d 227, 246 (1993) (reviewing court could not presume from the record that trial court would have dismissed postconviction petition at second stage if counsel had complied with 651(c) in case where no certificate was filed).

¶ 21 We thus reject defendant's suggestion that both postconviction attorneys must have been unreasonable in presenting defendant's substantive claims because they failed to rebut the State's untimeliness assertion. The record does not support that conclusion, and both attorneys filed Rule 651(c) certificates. APD Davidson did not simply rest on defendant's *pro se* petition, but shaped defendant's constitutional claims into appropriate legal form with coherent argument, reference to the trial record and attached postconviction petition exhibits, and citation to legal authority. For example, while defendant had raised the gunshot residue and DNA testing issues within the context of a sufficiency of the evidence claim, APD Davidson reframed them under actual innocence and ineffective assistance of trial counsel. As stated, defendant's request for DNA and gunshot residue testing was later considered apart from his petition, and he ultimately prevailed in that request. In addition, while defendant argued his trial attorney failed to secure "charter" (character) witnesses to testify on his behalf under an ineffective assistance of appellate counsel claim, APD Davidson appropriately reframed this issue, arguing trial counsel was ineffective for failing to call available mitigation witnesses at sentencing. In addition, APD Davidson attached an amended affidavit from defendant's mother, Ms. Smith.[2] Whereas her handwritten affidavit attached to defendant's *pro se* petition failed to include what mitigating facts Ms. Smith would have testified to, the amended and typewritten affidavit included those

[2] It is unclear whether APD Davidson or his predecessor, APD Walsh, secured affidavits from defendant's parents. The record suggests APD Walsh represented defendant until 2007, when APD Davidson began appearing on defendant's behalf instead.

facts. APD Davidson also attached a similar affidavit from defendant's father, which was not attached to defendant's *pro se* petition. APD Watt essentially rested on the amended postconviction petition. In short, the record reveals defendant's postconviction attorneys were otherwise eminently reasonable in their representation.

¶ 22 In that sense, we cannot credit defendant's contention that his postconviction attorneys were unreasonable for not attaching defendant's own affidavit stating that trial counsel improperly forced him to take a jury trial. Defendant speculates that but for this alleged procedural oversight, his claim could have succeeded. Here, APD Davidson attached defendant's original *pro se* petition, and pointed to defendant's sworn statement therein, that trial counsel threatened to withdraw if he chose a bench trial. This factual assertion was sufficient to support the claim of constitutional deprivation for the purposes of a postconviction petition, even if the claim did not otherwise have legal merit, for a court must accept as true all well-pled facts in the petition. See 725 ILCS 5/122-2 (West 2002) ("The petition shall have attached thereto affidavits, records, or *other evidence* supporting its allegations." (Emphasis added.)); *People v. Domagala*, 2013 IL 113688, ¶ 35. We can infer from defendant's factual assertion that the only other supporting evidence defendant could have sought would be from his own trial counsel. See, *e.g.*, *People v. Williams*, 47 Ill. 2d 1, 4 (1970) (postconviction claims sufficiently alleged where only other affidavit petitioner could have sought beyond his own sworn statement was his attorney's); see also *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005) (same); *cf. People v. Barr*, 200 Ill. App. 3d 1077, 1080 (1990) (affidavits of alibi witnesses required for evidentiary hearing and not simply defendant's own affidavit). Defendant does not now identify how the form of an affidavit necessarily would have provided more objective or independent corroboration of his claim. In light of counsel's 651(c) certificate and the record, we presume that had there been

additional facts to support the constitutional claim, counsel would have included them. See *Johnson*, 154 Ill. 2d at 241. Defendant does not now argue that he otherwise made a substantial showing of a constitutional violation regarding this specific claim. His argument therefore fails.

¶ 23 Defendant contests the length of time this case remained at second-stage proceedings, suggesting it was due to the unreasonableness of counsel. The clerks notes indicate the Public Defender's office was appointed in 2004, and many status hearings took place thereafter. Nonetheless, we have only the report of proceedings from February 7, 2005, wherein postconviction counsel requested impounded exhibits, as well as the report of proceedings from August 19, 2010, through September 29, 2011, and October 17, 2011, through March 19, 2013 (when the petition was dismissed). The report of proceedings from 2010/2011 reveals defendant's petition was held in abeyance on the court's order while the parties litigated the DNA issue separately and that the State had difficulty locating the record, all contributing to delay. After the court's dismissal of the DNA motion, postconviction proceedings resumed in 2011-2013, during which time the State again had difficulty obtaining the record, the Assistant State's Attorney handling the case was transferred, and APD Davidson retired.

¶ 23 It is the appellant's burden to supply a sufficiently complete record to support his claim of error, and we resolve any doubts arising from the incomplete record against defendant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); *People v. Benson*, 256 Ill. App. 3d 560, 562 (1994). Given the incomplete record, we will not speculate about what occurred between 2004 and 2010. Moreover, the limited record actually contradicts defendant's claim regarding delays due to unreasonableness of counsel and shows defendant's attorneys advocated on his behalf, filed an amended petition, DNA petition, and 651(c) certificates. This case is distinguishable from *People v. Lyons*, 46 Ill. 2d 172 (1970), on which defendant relies, wherein the

postconviction counsel was deemed unreasonable when he moved for continuances six times over a year, declared at the final hearing that he was "not ready to proceed," and made no reply to the State's motion to dismiss, all apparently without having filed a Rule 651(c) certificate. Apart from the fact that public defenders' caseload is likely far different than some 45 years ago, the supreme court has not again referenced *Lyons*. While we cannot condone how long the typical postconviction case takes, neither the Act nor 651(c) expressly addresses time limits for petitions, and we believe the matter is better left to the legislature than this court. See *People v. Evans*, 2013 IL 113471, ¶ 18 (the legislature should provide statutory guidance where none exists). For the reasons above, defendant has not fulfilled his burden of overcoming the presumption that his postconviction attorneys were reasonable in their representation of him.

¶ 24 *Substantial Constitutional Violation*

¶ 25 Finally, defendant contends he established a claim of substantial constitutional violation that his trial counsel was ineffective for failing to investigate and present mitigation witnesses at sentencing and he is entitled to an evidentiary hearing. See *Hall*, 217 Ill. 2d at 334. Defendant contends, had counsel called live mitigation witnesses, like his mother and father, defendant would have obtained a lesser sentence than 36 years. He thus maintains he met the familiar standard under *Strickland v. Washington*, 466 U.S. 668 (1984), by showing that his counsel was deficient and he was substantially prejudiced by the deficient performance, or stated differently, a reasonable probability existed that defendant's sentence was affected by the poor performance. See *People v. Steidl*, 177 Ill. 2d 239, 250, 257 (1997).

¶ 26 We observe that failure to offer evidence in mitigation does not itself demonstrate deficient performance. *People v. Orange*, 168 Ill. 2d 138, 167-68 (1995); *People v. Simon*, 2014 IL App (1st) 130567, ¶ 71. And, decisions about whether to call certain witnesses on a

defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel, which enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). Even assuming any deficiency, defendant still must demonstrate prejudice to sustain the claim. *Simon*, 2014 IL App (1st) 130567, ¶ 71.

¶ 27 Here, we must presume defense counsel had a sound strategic reason for presenting mitigating facts gleaned from defendant's PSI, rather than testimony from defendant's parents, especially given that counsel had repeatedly spoken with Ms. Smith (according to Ms. Smith's own affidavit) and Ms. Smith was present in court, thus giving trial counsel the opportunity to view her demeanor. See *Enis*, 194 Ill. 2d at 378. We further note that to the extent defendant claims trial counsel should have called "other witnesses" in mitigation, he has not included an affidavit from these witnesses, let alone identified them or what facts they would offer in mitigation, making such a claim insufficient. *Id*. at 380 (noting a claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness). In addition, the live testimony defendant asserts his mother and father could have presented was similar to that in the PSI, so defendant cannot establish prejudice. See *Simon*, 2014 IL App (1st) 130567, ¶ 71 (reaching similar conclusion). Like the affidavits, per the PSI, defendant presented positive traits in that he had no felony background, a good relationship with his parents, and no gang affiliations. The PSI similarly highlighted his work history, and participation in educational programs. Given the trial court's focus on the seriousness of the offense, however, we do not believe the additional mitigating facts his mother and father wished to offer – namely that defendant was a peaceful student, cared for his grandfather, was close with his sister, and good with her children, and had job applications pending when arrested – or live testimony would have affected his 36-year sentence, which was substantially below the 60-year maximum.

See *People v. Coleman*, 168 Ill. 2d 509, 538-39 (1995) (a reviewing court must assess prejudice in a realistic manner based on the totality of the evidence, including the aggravating evidence); *People v. Collins*, 106 Ill. 2d 237, 274 (1985) (noting it's insufficient to show errors had some conceivable effect on the proceeding's outcome, otherwise virtually every act or omission of counsel would meet that test). This is especially true based on the natural bias of defendant's parents. See *People v. Jackson*, 200 Ill. App. 3d 92, 101 (1990), *affirmed* 149 Ill. 2d 540 (1992). In other words, the value of this "new" mitigating evidence when compared to that already presented and the seriousness of the crime, was insufficient, and there was not a reasonable probability that the testimony of defendant's parents would have influenced the court at sentencing. Thus, even taking defendant's allegations in his postconviction petition as true, and liberally construed in light of the trial record (see *Hall*, 217 Ill. 2d at 334), defendant has failed to establish a substantial constitutional violation.

¶ 28 CONCLUSION

¶ 29 For the reasons stated, we affirm the second-stage dismissal of defendant's postconviction petition.

¶ 30 Affirmed.