2012 IL App (2d) 111208-U
No. 2-11-1208
Order filed August 14, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 98-CF-548
MAURICE DuPREE,	)	Honorable Christopher R. Stride,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: Postconviction counsel did not provide unreasonable assistance: the record showed counsel's compliance with Rule 651(c), and counsel's decision to enter into evidence defendant's affidavit rather than to call him as a live witness was not, on these facts, beyond the bounds of reasonable strategy.

¶ 1 Defendant, Maurice DuPree, appeals a judgment, entered after an evidentiary hearing, denying his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS /122-1 *et seq*. (West 2008)). Defendant argues that his postconviction attorney failed to provide him the reasonable representation that the Act requires. We affirm.

¶ 2 In 1998, defendant confronted, shot, and killed Ramon Friar. The trial court instructed the jury on the affirmative defense of self-defense (720 ILCS 5/7-1(a) (West 1998)), but, for reasons that are controverted and central to the issues here, the court did not instruct the jury on the lesser mitigated charge of second-degree murder based on an unreasonable belief in the need for self-defense (720 ILCS 5/9-2(a)(2) (West 1998)). Defendant was convicted of first-degree murder and sentenced to 40 years in prison . A full account of the trial evidence may be found in either our order on direct appeal affirming the judgment (*People v. DuPree*, No. 2-99-0500 (2005) (unpublished order under Supreme Court Rule 23)) or our opinion reversing the summary dismissal of defendant's postconviction petition and remanding the cause for the proceedings that led to this appeal (*People v. DuPree*, 397 Ill. App. 3d 719 (2010)).

¶ 3 As pertinent here, defendant's postconviction petition, filed September 12, 2007, alleged that his trial attorneys, Theodore Potkonjak and Michael Conway, had violated his right to decide personally whether to tender an instruction that would allow the jury to find defendant guilty of second-degree murder. The petition attached defendant's affidavit, which read as follows:

> "On November 12, 1998, the fourth day of my trial, and after the defense rested our case Judge Walters [*sic*] dismissed the jury[, I was taken from the court room [*sic*] to the holding area. Sitting their [*sic*] for an unknown amount of time, one of my attornies [*sic*] (Michael Conway) came spoke [*sic*] to me. Conway said that we got both second degree instructions in but we have a better chance with just self-defense, and was I sure I wanted to give the jury something to hang their hat on. I told Conway that I want [*sic*] to go home but if I had to be convicted I rather [*sic*] go down for second degree than first. Conway said that he would talk to Ted (Potkonjak) and see what he says [*sic*]. Conway then left. About 10 to 15 minutes

later, Conway returned and said that, [']We've decided to only go with self-defense, it's best for you because with your class one conviction if your [*sic*] [found] guilty you'll be facing murder time any way [*sic*] then you could appeal.['] Conway then steped [*sic*] away from the door saying he had to get back, then left. I did not see him or Ted until the next day at the start of trial or just before trial. Neither said anything about the instructions. When I did next see Ted he asked was I ready to go home, and I was."

¶ 4 The instructions conference at issue was the first of two, the second being held the next morning with defendant present. The first conference included the following colloquy:

"MR. POTKONJAK: *** Judge, we are going to be requesting second degree murder—second degree instructions be in.

THE COURT: They are submitting a second degree.

MR. MORRISON [assistant State's Attorney]: Later on we are, Judge—I guess we are. It's here, Judge, because—

THE COURT: Are you submitting a second degree instruction?

MR. MORRISON: We would first be submitting—our first option would be to submit the instructions to the jury on first degree only."

Eventually, the judge ruled that, because defendant was entitled to an instruction on self-defense, he was also entitled to one on second-degree murder. The following exchange ensued:

"THE COURT: Where there is evidence in the record to support a self-defense instruction, a voluntary manslaughter [the former name for second-degree murder] instruction must also be given if tendered by the defendant. Okay. Let's go.

MR. POTKONJAK: Judge, we've gone through it with my client, and we are going to withdraw the second degree instructions and just go with self-defense.

THE COURT: So you are asking—you are agreeing to proceed only with first degree murder and the self-defense?

MR. POTKONJAK: Yes, Judge. That's my client's decision after speaking with him."

The judge and counsel then went through the instructions some more. The following exchange ensued:

"THE COURT: Anything else?

MR. POTKONJAK: Now, the only other thing, Judge, I would ask to put on the record is while we were doing this after we had elected not to go second degree Mr. Conway called me over and I spoke with my client again saying he did not realize that your ruling was that he could have second degree and self-defense issues both given at the same time.

THE COURT: My ruling is according to the case that I've been handed he is entitled to it.

MR. POTKONJAK: He thought your ruling was the opposite, you can only have one or the other. I explained to him no, he could have both if he wanted. We had further conversation about that, and notwithstanding the fact that he knows he could have both second degree murder instructions and self-defense instructions, he still made the decision to go with just a self-defense instruction. It's basically now or never.

THE COURT: Okay. See you tomorrow morning."

The next morning, the court held a brief instructions conference. Defendant was present. Morrison submitted two verdict forms, allowing the jury to find defendant either guilty of first-degree murder or not guilty. Conway responded, "No objection."

¶ 5 In summarily dismissing defendant's postconviction petition, the trial court ruled that defendant's claim was refuted by the record because the transcript of the first instructions conference proved that he had been present, had consulted with Potkonjak, and had elected to forgo the instruction on second-degree murder. In reversing the summary dismissal, we held that the inconsistency merely created a conflict in the evidence and that defendant had raised the gist of a claim that his trial counsel had denied him his right to decide personally whether to request the instruction on second-degree murder. *Id*. at 735-36.

¶ 6 On remand, defendant was represented by Stone & Associates, specifically by Jed Stone and Eric Shah. The firm filed its appearance on September 17, 2010. On December 17, 2010, the State moved to dismiss the petition, arguing that defendant's claims were barred by forfeiture and *res judicata* and that his petition was untimely. On January 5, 2011, Shah filed a response to the motion to dismiss, arguing that the issues defendant raised could not have been addressed on the direct appeal and that the history of defendant's diligent attempts to obtain the record and other needed documents proved that the delay in filing the petition had not resulted from his culpable negligence. That day, Shah also moved to transfer to defendant and his attorneys two boxes of legal documents, including trial transcripts, letters to attorneys, and records of incoming and outgoing mail, that defendant had collected in prison and that remained there. On January 7, 2011, the trial court granted defendant's motion.

¶ 7 On March 18, 2011, Shah filed an answer to the State's discovery request. On March 25, 2011, at a hearing, the assistant State's Attorney moved to continue the hearing on the State's motion to dismiss, explaining that he needed more time to go through the documents that defendant had disclosed. Shah stated that the Department of Corrections had sent the two boxes of documents that defendant had sought. He continued, "We've gone through those boxes. We've gone through them with Mr. Dupree [*sic*], and we've isolated documents which we've attached to our discovery disclosure and provided to the State, so they know exactly what we're presenting in terms of evidence at the hearing." The documents are in the common-law record and include transcripts of the instructions conferences; a copy of the *pro se* petition and defendant's memorandum of law in support of the petition; and extensive correspondence between defendant and various agencies, including the State's Attorney's office, the circuit clerk's office, and the post office, from all of whom he had tried to obtain documents.

¶ 8 On April 8, 2011, during his argument on the State's motion to dismiss, Shah summarized the documents that had been retrieved from the prison. He noted that the documents had been sent to his firm's office "a number of weeks back" and that he had "spent some time with Mr. Dupree [*sic*] prior to the last hearing." Shah then described in detail what the documents showed about defendant's attempts to obtain the records that he had seen as necessary to the preparation of his *pro se* petition. On May 12, 2011, the trial court denied the State's motion to dismiss.

¶ 9 On November 7, 2011, the trial court held an evidentiary hearing on defendant's petition. Shah stated that defendant's evidence would consist solely of the affidavit that he had attached to the petition. The affidavit was read into the record, and defendant rested. The State then called Donald Morrison, followed by Potkonjak.

¶ 10 Morrison testified on direct examination as follows. At defendant's trial, he and Kelly Collins had represented the State; Potkonjak and Conway had represented defendant; and Steven Walter had been the judge. At the end of the day on November 12, 1998, there was a jury instructions conference. Defendant was present the entire time. At the conference, the "main issue" was whether to instruct the jury on second-degree murder. Potkonjak, defendant's "lead attorney," was arguing "vociferously" for the instruction; Morrison and Kelly opposed it. Potkonjak wanted instructions on both prongs of second-degree murder, "unreasonable belief in self-defense" and "sudden and intense passion" (see 720 ILCS 5/9-2(a)(1), (a)(2) (West 1996)). Judge Walter "wasn't really buying" the second prong.

¶ 11 Morrison testified that there was a recess, during which Judge Walter did research on the self-defense prong of the second-degree murder statute. After the recess, there was more argument, and Judge Walter stated that he was going to give the instruction on second-degree murder based on an unreasonable belief in the need for self-defense. Shortly thereafter, Potkonjak went back to the defense counsel table and talked to defendant. (For most of the conference, Conway had been sitting with defendant or going back and forth between defendant and Potkonjak.) Morrison could not hear what they were saying. The conversation took between 30 seconds and five minutes. When Potkonjak returned to the bench, he was "even whiter and pastier than he usually is." He told the judge that the defense did not want an instruction on second-degree murder. Judge Walter said something to the effect of "it's all or nothing," and Potkonjak agreed. Morrison felt relieved, because he did not think that the jury would accept the self-defense argument on the evidence at trial. Morrison reiterated that defendant had been present throughout the conference.

¶ 12 Morrison testified on cross-examination that he had been present during the whole conference. Morrison did not recall whether defendant had been "brought up to the bench" during the conference, but he had no recollection of that happening or of the judge admonishing defendant personally about the jury-instruction issue. On redirect examination, Morrison reiterated that defendant had attended both instructions conferences.

¶ 13 Potkonjak testified that he had been defendant's lead trial counsel. At the conference on November 12, 1998, defendant was present. Initially, the defense strategy was to seek an instruction on second-degree murder. However, the defense eventually decided to forgo the instruction and restrict the jury's options to first-degree murder and acquittal based on self-defense. Asked why the strategy was changed, Potkonjak testified, "That was my client's call." After the judge allowed the instruction on second-degree murder, Potkonjak spoke with defendant, and defendant said, "[N]o, let's just go with the first degree." Defendant made his choice against Potkonjak's advice; Potkonjak believed that, although defendant might be acquitted based on self-defense, it was wise "to go with the second degree, because obviously it would cut the potential of his losses."

¶ 14 Potkonjak explained that, initially, defendant had been unaware that the court could instruct the jury on both self-defense and second-degree murder based on the unreasonable belief in self-defense; however, Potkonjak cleared up that misapprehension. Nonetheless, defendant still wanted to forgo the instruction on second-degree murder. Defendant had been sitting at the counsel table during the conference, but Potkonjak did not believe that Judge Walter ever admonished him about his personal right to decide whether to tender the instruction on second-degree murder. Potkonjak recalled that he had discussed the matter with defendant "in depth"; defendant was "pretty intelligent"; and Potkonjak had no doubt that defendant had understood all of his options.

¶ 15 In arguments, Shah stressed that, whether or not defendant had attended the first jury instructions conference, the evidence showed that the trial judge had never admonished him of his personal right to decide whether to request an instruction on second-degree murder. He added that defendant's attorneys had made the decision for him. In response, the State observed that the testimony proved that, contrary to what he had alleged in his affidavit, defendant had been present throughout the first (and crucial) jury instructions conference; that Potkonjak had obtained a ruling allowing defendant to tender an instruction on second-degree murder; that, shortly afterward, Potkonjak and defendant discussed at length whether to do so; and that, despite Potkonjak's advice, defendant knowingly elected not to tender the instruction. The trial judge ruled for the State. The judge explained that the case came down to credibility: defendant's affidavit told one story, the testimony of Morrison and Potkonjak told another, and the trial record, as this court had noted, was inconclusive. The judge found that the testimony of Morrison and Potkonjak, especially the latter, established that defendant had been present at both jury instructions conferences. Moreover, Potkonjak's testimony proved that he and defendant had discussed whether to tender an instruction on second-degree murder and that the consultation had cleared up any confusion over the matter. Morrison's testimony corroborated Potkonjak's account.

¶ 16 The judge credited Potkonjak's recollection of his discussion with defendant and thus found that defendant had not been denied his right to decide whether to tender an instruction on second-degree murder. To Shah, the judge explained, "[Y]ou're asking me to disregard the testimony of trial counsel, the prosecutor, and rely on the silence of the record in finding that there's a substantial showing of a constitutional violation. I can't do that in light of the testimony that I heard." Finding that defendant's trial counsel had not rendered objectively unreasonable representation, the judge

did not reach the prejudice prong of defendant's claim of ineffective assistance and denied the postconviction petition. Defendant timely appealed.

¶ 17 On appeal, defendant contends that the judgment must be reversed because his postconviction counsel did not render the reasonable assistance to which defendant was entitled under Illinois law. Defendant claims two crucial deficiencies in counsel's representation: (1) counsel failed to file a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and the record does not otherwise demonstrate compliance with the rule; and (2) counsel unreasonably relied on defendant's affidavit as the sole evidence in defendant's case, instead of having defendant testify at the hearing on the petition. For the reasons that follow, we disagree.

¶ 18 Because a postconviction petitioner does not have a sixth amendment right to the effective assistance of counsel, he is entitled to representation only as provided by state law. *Pennsylvania v. Finley*, 481 U.S. 551, 558-59 (1987). In Illinois, this is reasonable representation. *People v. Lee*, 251 Ill. App. 3d 63, 65 (1993). Reasonable representation includes compliance with Rule 651(c), under which the record must contain a showing, which may be made by the attorney's certificate, that (1) the attorney has consulted with the defendant either by mail or in person to ascertain his contentions of the deprivation of constitutional rights; (2) the attorney has examined the record of proceedings at the trial; and (3) the attorney has made any amendments to the *pro se* petition that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Counsel's failure to file a certificate of compliance is harmless error if the record establishes that counsel complied with the rule. *People v. Szabo*, 144 Ill. 2d 525, 532 (1991).

¶ 19 Although defendant is correct that his postconviction counsel did not file a Rule 651(c) certificate, we conclude that counsel did comply with the rule's three requirements. First, the record

demonstrates that Shah consulted with defendant about the issues in the case. At the April 8, 2011, hearing, Shah told the court that he and defendant had together gone over the two boxes of documents that had been obtained from the prison where defendant was incarcerated. These documents were numerous and related to various aspects of the case, including what happened at defendant's trial. Further, in general, Shah demonstrated his familiarity with the issues in the case on remand, which were relatively straightforward and set out quite comprehensibly in the *pro se* petition. Thus, the record shows that Shah consulted with defendant as required.

¶ 20 We cannot say for sure that Shah consulted with defendant either personally or by mail at any other time than the meeting that he mentioned on the record. However, in *People v. Turner*, 187 Ill. 2d 406, 411 (1999), the supreme court held that nothing in Rule 651(c) or the case law requires a certain number of meetings between counsel and his client. Indeed, the court held that, in that case, counsel satisfied Rule 651(c) by meeting with the defendant once in two years, as nothing indicated that more than one meeting had been necessary in order for the attorney to understand the defendant's claims. *Id*.

¶ 21 Second, the record shows that Shah reviewed the report of proceedings from defendant's trial. Shah filed a transcript of the crucial instructions conference as part of the defense's discovery disclosure, and the transcript of the evidentiary hearing on defendant's petition demonstrates that he was familiar with the pertinent parts of the trial record. Third, although Shah did not actually amend the *pro se* petition, that did not amount to unreasonable assistance unless defendant can show how the petition should have been amended. See *People v. Rankins*, 277 Ill. App. 3d 561, 564 (1996). Defendant does not suggest how the petition could have been strengthened materially by amendment. Defendant's petition raised one arguably meritorious claim, which was relatively straightforward and

was set out intelligibly in the *pro se* petition. Thus, we conclude that defendant's postconviction counsel complied with Rule 651(c), and we reject defendant's first claim of error.

¶ 22 Defendant also argues that Shah rendered unreasonable assistance in that, at the evidentiary hearing, he relied on defendant's postconviction petition's affidavit instead of having defendant testify. Defendant does not contend that the substance of his testimony would have differed in any way from what he stated in the affidavit, and he does not contend that the stipulation was substantively inadequate. He plainly does not assert that his memory of the crucial jury instructions conference was better in 2011 than it had been in 2007.

¶ 23 We cannot say that defendant has shown that Shah's decision was not reasonable strategy. There were cogent reasons why Shah might have decided to rely on the affidavit rather than have defendant testify. Unlike this court, Shah would have had some idea whether defendant would make an effective live witness. Further, by declining to call defendant, Shah avoided subjecting him to cross-examination and thus to unfavorable admissions or impeachment. Since defendant did not tell us what his live testimony would have added substantively, we are in no position to conclude that Shah acted unreasonably in declining to elicit it.

¶ 24 Defendant relies on *People v. Mejia*, 247 Ill. App. 3d 55 (1993), holding that the defendant's trial attorney was ineffective for stipulating to certain impeaching testimony instead of calling the witnesses in order to discredit the primary State witnesses' account of the crucial events. The majority stressed that the stipulation took up "all of 2½ pages of transcript" and that a stipulation is a " 'time saving' device used to admit necessary, but foundational or peripheral evidence which *** is not a point of contention ***. A stipulation is no match for in-court live impeachment and is not properly used for that purpose." *Id*. at 65.

¶ 25 We find defendant's reliance on *Mejia* misplaced, for two reasons. First, that case is distinguishable, as it involved a jury trial with a substantial amount of evidence, not a short evidentiary hearing before a judge. The appellate court noted its concern that the defendant's attorney entered into the stipulation " 'so as not to delay this trial in any form' " and that the stipulation was entered into the record on the morning after the State had rested and "after the jury had been waiting at least one hour for the proceedings to begin." *Id*. at 64. Further, the appellate court was concerned that, by entering into the stipulation, the State's key witnesses were not "confronted with their prior, inconsistent statements before the eyes of the trier of fact." *Id*. at 65. Here, we cannot assume that Shah relied on the affidavit solely to save time, so we shall not ignore the plausible strategic reasons that he may well have had for proceeding as he did.

¶ 26 Second, to the extent that defendant seeks to posit a *per se* rule that proceeding by stipulation or affidavit rather than testimony is unreasonable, neither case law nor common sense supports that audacious generalization. We do not read *Mejia* so broadly, given the court's attention to the specific facts of the case. Further, in *People v. Eggleston*, 363 Ill. App. 3d 220 (2006), the court held that the defendant's attorney was not ineffective for stipulating to the testimony of a defense witness rather than calling her to testify. The court explained that the live testimony "would not have added any more than the stipulation already covered" and that it would have subjected the witness to cross-examination that could have discredited her. *Id*. at 227. Much the same can be said here.

¶ 27 There is no compelling reason to hold that deciding to proceed by way of affidavit or stipulation rather than live testimony is necessarily unreasonable; the reasonableness of the decision depends on the facts of the case. Here, we have no grounds to conclude that Shah's decision was unreasonable.

¶ 28 Defendant also cites *People v. Hernandez*, 298 Ill. App. 3d 36 (1998), in which the appellate court reversed the dismissal of a postconviction petition in which the defendant relied on an affidavit by a recanting State witness. The appellate court reasoned that the postconviction judge, who had not been involved in the defendant's trial, had no basis on which to discredit the recanting witness until an evidentiary hearing was held. *Id*. at 40. As applied to the very different context here, *Hernandez* at most holds that a judge who sees and hears a witness testify is better able to evaluate the witness's credibility than had the judge relied solely on the witness's affidavit. While that proposition is indisputable, it may also be exactly why Shah decided not to have defendant testify at the hearing; he may well have concluded that the judge would not react favorably to defendant's demeanor, to say nothing of any inconsistencies between his testimony and his affidavit. That evaluation was purely a strategic decision, and we see no basis upon which it could establish unreasonable assistance.

¶ 29 The judgment of the circuit court of Lake County is affirmed.

¶ 30 Affirmed.