

2013 IL App (2d) 120314-U  
No. 2-12-0314  
Order filed September 30, 2013

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04-CF-2460
	)	
LARRY W. CRUMB,	)	Honorable
	)	Helen S. Rozenberg,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hudson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Postconviction counsel did not provide unreasonable assistance: counsel did provide (though only at the evidentiary hearing) affidavits to support a claim, counsel was not required to provide an affidavit of an unnamed expert, and counsel was not required to provide documents that were already in the record and in any event did not support a claim; (2) the trial court's denial of defendant's claim that trial counsel was ineffective for failing to call character witnesses was not manifestly erroneous: counsel testified to valid strategic reasons for not calling the witnesses, specifically that they lacked sufficient knowledge of defendant's character.

¶ 2 Defendant, Larry W. Crumb, appeals from an order denying his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) for relief from his convictions

of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2004)) and unlawful restraint (720 ILCS 5/10-3(a) (West 2004)). Defendant contends that (1) he did not receive adequate legal representation during the proceedings on his petition, as his postconviction counsel failed to attach documents to support defendant's claims; and (2) his trial counsel was ineffective for failing to call character and reputation witnesses to testify at defendant's jury trial about defendant's truthfulness. We disagree and therefore affirm.

¶ 3 The following facts are relevant to resolving this appeal. At defendant's jury trial, Vicki Ross, defendant's ex-wife, claimed that defendant held her captive in the parties' marital home and sexually assaulted her. Defendant claimed that the sex was consensual and that Ross had lied about what had happened because she wanted a greater share of the parties' marital estate once their divorce was final. Defendant appealed his conviction, and this court vacated a part of the sentencing order but otherwise affirmed. *People v. Crumb*, No. 2-06-0745 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 Soon thereafter, defendant petitioned *pro se* for postconviction relief, arguing, among other things, that his trial counsel was ineffective for (1) failing to call at defendant's trial several character and reputation witnesses to testify about defendant's truthfulness and (2) failing to challenge defendant's fitness to stand trial. Defendant, who indicated that he attempted to secure some documents to support some of his claims, did not attach any supporting documents to his petition.

¶ 5 The trial court advanced defendant's petition to the second stage and appointed counsel to represent defendant. Postconviction counsel filed a supplemental petition and a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). As in the *pro se* petition, postconviction counsel raised issues related to trial counsel's ineffectiveness for failing to call witnesses to (1)

testify about defendant's truthfulness and (2) explain how defendant's mental health could have affected his ability to testify convincingly. Counsel did not attach to the supplemental petition any documents to support these claims or explain why such documents were not attached.

¶ 6 The State moved to dismiss, and the trial court granted that motion with regard to defendant's claim that his trial counsel was ineffective for failing to challenge defendant's fitness to stand trial. However, the court advanced to a third-stage evidentiary hearing defendant's claim that trial counsel was ineffective for failing to call character and reputation witnesses to testify at defendant's jury trial.

¶ 7 At the evidentiary hearing, defendant testified, and postconviction counsel submitted affidavits from three people who would have been willing to testify at defendant's trial about defendant's truthfulness. James Economy, defendant's trial counsel, testified that he had spoken with these witnesses and chose not to call them to testify, because they did not know defendant very well, were not part of defendant's community, or lacked significant personal knowledge of defendant's character. With regard to the other witnesses about which defendant told Economy, Economy stated that these witnesses did not give Economy consistent answers to the questions he asked and did not say anything that Economy believed could be introduced at defendant's trial.

¶ 8 The trial court denied defendant's petition. Concerning defendant's claim that his trial counsel was ineffective for failing to call character and reputation witnesses, the court found that Economy, whom the court deemed more credible than defendant, made the decision not to have such witnesses testify after conducting "a very intelligent and subtle analysis." Specifically, the court noted that Economy's analysis consisted of realizing that "having someone testify and then having objections sustained to their statements or having it shown what kind of a connection [the witnesses]

actually had to \*\*\* defendant might in fact detract from \*\*\* defendant’s case, not add to it, and not support [defendant’s] testimony.” This timely appeal followed.

¶ 9 Under the Act, individuals convicted of criminal offenses may challenge their convictions based on constitutional violations. *People v. Domagala*, 2013 IL 113688, ¶ 32. The Act provides a three-stage process for adjudication of postconviction petitions. *People v. English*, 2013 IL 112890, ¶ 23. This appeal concerns the dismissal of a claim at the second stage and the denial of a claim following a third-stage evidentiary hearing. Defendant first argues that his postconviction counsel provided unreasonable assistance when he filed nothing in support of defendant’s claims that trial counsel was ineffective for failing to (1) challenge defendant’s fitness to stand trial and (2) call witnesses to testify about defendant’s character and reputation for truthfulness. Concerning the third-stage denial of the petition, defendant argues that trial counsel was ineffective for failing to call character and reputation witnesses to testify about defendant’s truthfulness. We consider each issue in turn.

¶ 10 The first issue we address is whether postconviction counsel provided unreasonable assistance. We review this issue *de novo*. See *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 11 The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, “defendants are entitled to a reasonable level of assistance, but are not assured of receiving the same level of assistance constitutionally guaranteed to criminal defendants at trial.” *People v. Kegel*, 392 Ill. App. 3d 538, 541 (2009). The duty to provide reasonable assistance requires compliance with the specific obligations described in Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). See *Davis*, 382 Ill. App. 3d at 711. That rule provides, in pertinent part, that “[t]he record [on appeal] shall contain a showing, which may be

made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 12 Here, postconviction counsel filed the required certificate. A Rule 651(c) certificate gives rise to a presumption that postconviction counsel fulfilled his duties, but that presumption may be rebutted by the record. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 19. Defendant contends that, notwithstanding the Rule 651(c) certificate, counsel failed to fulfill his duties by failing to attach to the supplemental petition (1) affidavits of various named witnesses who could have testified about defendant's truthfulness; (2) affidavits from an unnamed expert who could have shed light on defendant's fitness to stand trial; and (3) medical documents from the veteran's hospital that would have supported defendant's claim that he was unfit to stand trial.

¶ 13 Although postconviction counsel must amend a *pro se* petition so as to shape the defendant's claims into proper legal form (*People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007)), counsel's failure to supply necessary affidavits or other evidence will not, in itself, rebut the presumption that arises from the Rule 651(c) certificate. To the contrary, "[i]n the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so." *People v. Johnson*, 154 Ill. 2d 227, 241 (1993); see also *Kirk*, 2012 IL App (1st) 101606, ¶ 25.

¶ 14 Here, defendant failed to rebut the presumption that his postconviction counsel provided reasonable assistance. First, we find unfounded defendant's claim that his postconviction counsel rendered unreasonable assistance because he did not attach to the supplemental petition the affidavits of the various character and reputation witnesses. The record clearly indicates that three such affidavits were presented in support of the petition at the evidentiary hearing, and defendant has not indicated that this was improper. Indeed, although a petition may be dismissed for lack of evidentiary support (*People v. Collins*, 202 Ill. 2d 59, 66 (2002)), no authority suggests that, if the petition advances to an evidentiary hearing, that support may not be provided there. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984) (noting that counsel must make necessary amendments, but not specifying time for doing so). Similarly, defendant's contention that his postconviction counsel acted unreasonably by failing to attach the affidavit of an unnamed expert must fail, as nothing indicates that such an expert even existed. See *Johnson*, 154 Ill. 2d at 247-48 (the defendant has the obligation to inform counsel with specificity of the identity of witnesses who should have been called in his defense, as counsel has no obligation "to engage in a generalized fishing expedition in search of support for claims raised in a petition"). Finally, we find baseless defendant's argument that his postconviction counsel should have attached documents from the veteran's hospital to support his claim that his trial counsel should have challenged his fitness. These documents were contained in the common-law record, and thus no attachment was required. See *People v. Johnson*, 377 Ill. App. 3d 854, 859 (2007). In any event, they did not support defendant's claim, as they were not prepared for the purpose of assessing whether defendant was able to understand the intricacies of a criminal proceeding. Rather, as the record indicates, the documents were prepared to evaluate

defendant for pseudodementia.<sup>1</sup> That assessment was different from assessing defendant's fitness to stand trial. See 725 ILCS 5/104-15(a), (b) (West 2004) (following an evaluation of a defendant's fitness to stand trial, the doctor who made the evaluation shall prepare a report diagnosing the defendant, describing his mental or physical disability, indicating how those maladies impair the defendant's ability to understand the nature and purpose of proceedings brought against him and assist in his defense, and theorizing whether the defendant can attain fitness within one year if properly treated); *People v. Coleman*, 168 Ill. 2d 509, 524 (1995) ("A person can be fit for trial although his mind may be otherwise unsound.").

¶ 15 Having concluded that postconviction counsel did not provide unreasonable assistance, we now consider whether trial counsel was ineffective for failing to call witnesses to testify at defendant's jury trial about defendant's truthfulness. We will reverse the trial court's denial of the claim only if the trial court's decision was manifestly erroneous. *English*, 2013 IL 112890, ¶ 23. Manifest error arises when the error complained of is clearly evident, plain, and indisputable. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 16 Analyzing whether trial counsel was ineffective requires this court to consider the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17

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<sup>1</sup>The term pseudodementia was originally used to "describe reversible cognitive changes that occur in depressed older adults that are often misdiagnosed as dementia," but now the term is "a general term used by psychiatrists to describe patients who present with signs of depression and dementia but who have not been clinically diagnosed with either condition." M. S. Lantz & E. N. Buchalter, *Pseudodementia—Cognitive Decline Caused by Untreated Depression May Be Reversed with Treatment*, *Geriatrics*, Oct. 2001, at 42.

(2009). Under *Strickland*, a defendant who alleges that his counsel was ineffective must establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Wendt*, 283 Ill. App. 3d 947, 951 (1996). In order to succeed on a claim that counsel was ineffective, both prongs of the *Strickland* test must be established. *People v. Colon*, 225 Ill.2d 125, 135 (2007).

¶ 17 To establish the first prong, a defendant must show that his counsel's performance was so inadequate that counsel failed to function as the counsel guaranteed by the sixth amendment. *People v. Nunez*, 325 Ill. App. 3d 35, 42 (2001). "[T]he defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Smith*, 195 Ill. 2d 179, 188 (2000). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.*

¶ 18 A defendant is entitled to reasonable, not perfect, representation, and in recognition of the variety of factors that go into determinations of trial strategy, claims of ineffective assistance of counsel must be judged on a circumstance-specific basis viewed at the time of counsel's conduct, not in hindsight. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. Decisions concerning which witnesses to call at trial and what evidence to present on a defendant's behalf ultimately rest with trial counsel and are afforded great deference on review. *Id.*

¶ 19 Defendant claims that it was necessary for his trial attorney to call character and reputation witnesses at his jury trial, because the trial consisted of a "credibility contest." That is, Ross claimed that defendant attacked her, while defendant contended that the sex between the two of them was consensual and that Ross fabricated the assault in order to obtain a greater share of the parties'



marital estate in the parties' marriage-dissolution case. Given this, defendant argues that "[defendant's] truthfulness was directly at issue." Defendant then argues that counsel was ineffective because he incorrectly believed that he could not establish a proper foundation for the admission of these witnesses' testimony.

¶ 20 We believe that the court's finding that counsel was not ineffective was not manifest error. Most importantly, Economy testified at the evidentiary hearing that, when he spoke to the witnesses defendant identified, the witnesses did not say what defendant assured Economy they would say, and Economy indicated that the witnesses' answers to pertinent questions were not consistent. Moreover, although Economy testified about perceived foundational problems with admitting some of the witnesses' testimony, that was based on the fact that the witnesses were not a part of defendant's community and lacked a proper basis to assess defendant's reputation for honesty within that community. Specifically, Economy indicated that any connection that the witnesses had to defendant, such as going to defendant's house on a limited number of occasions or chitchatting with defendant about the weather, was insufficient and so tangential that what the witnesses had to say would not help defendant's case at all. Given all of that, we must conclude that Economy's decision not to call the witnesses was the product of sound trial strategy. Accordingly, because we need not consider the second prong of *Strickland* (*Colon*, 225 Ill. 2d at 135), we conclude that the trial court's finding that counsel was not ineffective was not manifestly erroneous.

¶ 21 Given all of the above, the judgment of the circuit court of Lake County is affirmed.

¶ 22 Affirmed.