No. 3--08--0533

Order filed February 14, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
v.	)	No. 91--CF--96
JAMES O. CHANEY,	)	Honorable Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court. Justices O'Brien and Wright concurred in the judgment.

ORDER

Held: A criminal defendant's court-appointed attorney for his petition for relief from judgment did not provide unreasonable assistance by failing: (1) to argue that the petition should have been construed as a successive postconviction petition to avoid its dismissal for untimeliness; and (2) to make an effort to support the petition with evidence.

In 1991, the defendant, James O. Chaney, pled guilty to first degree murder (Ill. Rev. Stat. 1991, ch. 38, par. 9--1(a)(1)). The trial court accepted the plea and sentenced the

defendant to 80 years of imprisonment. Although the defendant initially filed a timely motion to withdraw his guilty plea, he later withdrew the motion. Consequently, the defendant did not file a direct appeal.

In 2001, the defendant filed a *pro se* petition for relief from judgment (735 ILCS 5/2--1401 (West 2000)), which the trial court construed as a postconviction petition. After the defendant's court-appointed counsel filed an amended postconviction petition on the defendant's behalf, the court denied it at the second stage. This court affirmed. *People v. Chaney*, No. 3--02--0793 (2003) (unpublished order under Supreme Court Rule 23).

In 2006, the defendant filed a *pro se* postconviction petition, which the trial court dismissed at the first stage. Again, we affirmed. *People v. Chaney*, No. 3--06--0661 (2007) (unpublished order under Supreme Court Rule 23).

In 2007, the defendant filed a second *pro se* petition for relief from judgment, which is the subject of this appeal. The trial court appointed counsel to represent the defendant concerning the petition. The court granted the State's motion to dismiss the petition on the basis of untimeliness. On appeal, the defendant argues that his court-appointed counsel provided unreasonable assistance by failing to do the following: (1) assert that the trial court should construe the petition as a

successive postconviction petition in order to avoid its dismissal for untimeliness; and (2) make an effort to support the petition with evidence. We affirm.

BACKGROUND

On July 12, 1991, the defendant pled guilty, pursuant to a fully negotiated agreement. At the plea hearing, the State's factual basis stated, among other things, that codefendant Ronald Ludwig, Jr., would have testified that the defendant killed the victim, Everett Wickens, on March 4, 1991, at Wickens's residence by stabbing him multiple times with a knife in the neck, chest, and back. Ludwig and the defendant then stole various items from Wickens's residence. The day after the murder, Ludwig and the defendant set Wickens's residence on fire. After the fire was extinguished by the fire department, Wickens's burned body was identified through dental records. The autopsy showed that Wickens died of his stab wounds before the fire was set. Following the State's factual basis, the court accepted the defendant's guilty plea and imposed the sentence. The court issued the written sentencing order that same day.

On June 27, 2007, the defendant filed the section 2--1401 petition that is the subject of this appeal. In the petition, the defendant argued, among other things, that: (1) his guilty plea was not knowingly and voluntarily given because, at the time of his plea, he had been denied his psychotropic medication for

depression while in the county jail; and (2) he had proof of his actual innocence. The defendant had raised the issue concerning denial of his medications in the motion to withdraw his guilty plea that he later withdrew. Regarding the defendant's actual innocence argument, he contended that in 1995, a prison cellmate told him that Ludwig had admitted to actually murdering Wickens, and Ludwig had convinced the defendant, while the defendant was drunk, that the defendant had committed the murder. The defendant asserted that he could not remember the cellmate's name, but that the name could be obtained by a court order directed to the Menard Correctional Center.

The defendant also asserted that transcripts and discovery documents in his trial record would support his actual innocence claim by showing, among other things: (1) inconsistencies in Ludwig's proposed testimony; and (2) evidence supporting his contention that on the evening of the murder, he was passed out from drunkenness and therefore could not have committed the crime.

The defendant submitted that when he was transferred from the county jail to prison following sentencing, he was not allowed to take his transcripts and discovery documents with him. The defendant contended that three days after being transferred to prison, one of his family members asked the county jail for these documents, but was told that they had been lost.

Thereafter, the defendant made repeated unsuccessful requests for his transcripts and discovery documents.

On June 27, 2007, the defendant also requested appointment of counsel regarding his section 2--1401 petition because of his indigence. The court appointed the office of the public defender as the defendant's counsel on December 11, 2007.

On February 1, 2008, the State filed a motion to dismiss the defendant's petition on the basis of untimeliness. That same day, Assistant Public Defender Jeff Flanagan appeared on behalf of the defendant at a status hearing and stated that he had just received the State's motion, and therefore had neither spoken with the defendant nor reviewed the record.

The court held the hearing on the State's motion to dismiss on March 11, 2008. Both the defendant and Flanagan were present at the hearing. The court heard arguments from the parties on the basis that the defendant's petition was a section 2--1401 petition. The record does not indicate that the defendant asked either the court or Flanagan to construe the petition as a postconviction petition.

After hearing the arguments, the court stated that during the proceedings on the defendant's section 2--1401 petition, most of the record of the defendant's criminal case had been at the appellate court for the appeal of the defendant's most recent postconviction petition. The appellate court had returned the

record to the trial court on February 6, 2008. The trial court, therefore, had not reviewed most of the record, but would do so before issuing a written ruling on the State's motion. The court took the matter under advisement.

Then, Flanagan stated that the defendant had asked counsel to again request that the defendant be provided with his transcripts and discovery documents. The court noted the request. The record supplied to this court does not indicate whether Flanagan had reviewed the defendant's full record between its return to the trial court from the appellate court and the hearing on the State's motion to dismiss.

In a written order issued on March 17, 2008, the trial court granted the State's motion to dismiss and denied the defendant's request for transcripts and discovery. Later, the court denied the defendant's *pro se* motion to reconsider. The defendant appealed.

ANALYSIS

The defendant submits that his court-appointed counsel for his section 2--1401 petition provided unreasonable assistance by failing to do the following: (1) assert that the trial court should construe the petition as a successive postconviction petition in order to avoid its dismissal for untimeliness; and (2) make an effort to support the petition with evidence. Additionally, the defendant asserts that his appointed attorney

failed to meet the requirements of Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), which is applicable to counsel appointed for postconviction petitions, by showing that counsel: (1) consulted with the defendant concerning his contentions; (2) examined the trial record; and (3) made any amendments to the defendant's *pro se* petition that were necessary for an adequate presentation of the defendant's contentions. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

A section 2--1401 petition is brought under the Code of Civil Procedure. 735 ILCS 5/2--1401 (West 2008). Unlike the provisions of the Post-Conviction Hearing Act (725 ILCS 5/122--1 *et seq*. (West 2008)), section 2--1401 does not provide for the appointment of counsel. Compare 725 ILCS 5/122--4 (West 2008) with 735 ILCS 5/2--1401 (West 2008).

The Illinois Supreme Court has ruled that although indigent criminal defendants may receive appointed counsel to represent them regarding civil actions, such as *mandamus* and *habeas corpus* petitions, appointed counsel is not required in such civil proceedings. *Tedder v. Fairman*, 92 Ill. 2d 216 (1982). In *Tedder*, the court stated that the level of assistance required for such appointed counsel is to exercise due diligence. *Tedder*, 92 Ill. 2d 216. The *Tedder* court did not hold that such appointed counsel must provide reasonable assistance analogous to that for counsel appointed for postconviction petition

proceedings. *Tedder*, 92 Ill. 2d 216. The court in *Tedder* also did not say that counsel appointed for defendants in civil proceedings must meet the requirements of Rule 651(c). *Tedder*, 92 Ill. 2d 216. In *Tedder*, which involved two consolidated cases, our supreme court ordered the appointed attorneys to help the defendants amend their petitions because both trial courts had ruled that the petitions were inadequate. *Tedder*, 92 Ill. 2d 216.

In *People v. Pinkonsly*, 207 Ill. 2d 555 (2003), one of the defendant's issues concerned whether counsel appointed for his section 2--1401 petition provided ineffective assistance, under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to argue that one of the defendant's crimes was a lesser included offense of another crime committed by the defendant. In *Pinkonsly*, the Illinois Supreme Court noted that whether a crime is a lesser included offense is a legal question and not a fact question. *Pinkonsly*, 207 Ill. 2d 555. The *Pinkonsly* court also observed that a section 2--1401 petition requires a court to consider fact questions, not legal questions, whereas a postconviction petition requires a court to consider constitutional legal questions rather than fact questions. *Pinkonsly*, 207 Ill. 2d 555.

The court in *Pinkonsly* held that the appellate court had improperly applied the *Strickland* standard to the defendant's

court-appointed attorney's representation. In reversing the appellate court's decision, the *Pinkonsly* court noted:

> "The defendant here is not a postconviction petitioner, but instead a section 2--1401 petitioner. Section 2--1401 does not specify any level of assistance, and the appellate court erroneously applied the *Strickland* standard to the defendant's claim that his section 2--1401 attorney was ineffective." *Pinkonsly*, 207 Ill. 2d at 568.
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> In *obiter dicta*, the *Pinkonsly* court went on to say:
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> "Assuming that the defendant was entitled to the same level of assistance on his section 2--1401 petition as on a postconviction petition, the defendant did not receive unreasonable assistance. The defendant's attorney was not unreasonable for failing to raise a putative legal error in a proceeding where only fact errors are cognizable." *Pinkonsly*, 207 Ill. 2d at 568.

The *Pinkonsly* court did not state that counsel appointed to represent a criminal defendant regarding a section 2--1401 petition must meet the requirements of Rule 651(c). Moreover, our supreme court did not concern itself with whether the record showed that the appointed attorney had: (1) consulted with the defendant concerning his contentions; (2) examined the trial record; or (3) made any amendments to the defendant's *pro se* petition that were necessary for an adequate presentation of the

defendant's contentions. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Pinkonsly*, 207 Ill. 2d 555. The *Pinkonsly* court only commented, in *dicta*, on the attorney's reasonableness regarding failing to present the defendant's lesser included offense argument. Again, we emphasize that the *Pinkonsly* court was only called upon to decide whether the appellate court had improperly applied the *Strickland* standard, but was not asked to decide whether the Rule 651(c) standard applied to attorneys appointed in section 2--1401 proceedings or in any other civil proceedings. See *Pinkonsly*, 207 Ill. 2d 555.

In this case, the trial court appointed counsel to represent the defendant regarding his section 2--1401 petition. Such appointment of counsel, while permitted, was not mandatory because section 2--1401 petitions are civil in nature. See *Tedder*, 92 Ill. 2d 216. The defendant was not entitled to any specific level of assistance under section 2--1401. See *Pinkonsly*, 207 Ill. 2d 555. Under *Tedder*, the attorney was required to exercise due diligence while representing this criminal defendant in a civil proceeding. See *Tedder*, 92 Ill. 2d 216. We see no indication in the record that counsel failed to exercise due diligence in this case. Arguably, under the *dicta* in *Pinkonsly*, counsel was required to provide reasonable assistance with regard to whether the defendant's claim concerned fact questions rather than legal questions. See *Pinkonsly*, 207

Ill. 2d 555. In the instant case, the record does not show that the attorney unreasonably attempted to advance legal rather than fact questions. See *Pinkonsly*, 207 Ill. 2d 555.

Contrary to the defendant's arguments, neither *Tedder* nor *Pinkonsly* required the attorney in the present case: (1) to argue that the defendant's section 2--1401 petition be construed as a postconviction petition; or (2) to make an effort to gather evidence to support the petition. See *Tedder*, 92 Ill. 2d 216; *Pinkonsly*, 207 Ill. 2d 555. Furthermore, the record shows that the defendant discussed his case with his appointed attorney by asking him to request his discovery and transcripts from the court at the hearing on the State's motion to dismiss. We observe that the defendant failed to ask either his attorney or the court to construe his petition as a postconviction petition in order to avoid its dismissal for untimeliness at that hearing. Therefore, he has forfeited his argument on appeal concerning construing his 2--1401 petition as a postconviction petition, because he failed to raise this issue in the trial court when he clearly had the opportunity to do so. See *Women's Athletic Club of Chicago v. Hulman*, 31 Ill. 2d 449 (1964). Consequently, we hold that the defendant's appointed attorney for his section 2--1401 petition did not fail either to exercise due diligence or to provide reasonable assistance. See *Tedder*, 92 Ill. 2d 216; *Pinkonsly*, 207 Ill. 2d 555.

The defendant contends that *People v. Stoffel*, No. 108500 (Ill. Dec. 23, 2010), stands for the proposition that the attorney appointed for his section 2--1401 petition was required to meet the standard for appointed counsel in Rule 651(c). We disagree. *Stoffel* is factually distinguishable from the present case. In *Stoffel*, the trial court ordered the attorney appointed for a section 2--1401 petition to file a Rule 651(c) certificate, but ruled on the petition as a section 2--1401 petition rather than as a postconviction petition. The Illinois Supreme Court stated that once the trial court ordered the attorney to file a Rule 651(c) certificate, it had effectively construed the petition as a postconviction petition. The *Stoffel* court held that the trial court erred by ruling on the petition under section 2--1401 after having construed it as a postconviction petition. *Stoffel*, No. 108500.

In the instant case, unlike the situation in *Stoffel*, the trial court did not order the appointed attorney to file a Rule 651(c) certificate. Therefore, the holding of *Stoffel* is inapplicable to the present case. Moreover, the holding of *Stoffel* tends to show that the requirements of Rule 651(c) are applicable only to attorneys appointed for postconviction petitions. See *Stoffel*, No. 108500. On its face, Rule 651(c) applies only to postconviction proceedings.

Additionally, we observe that even if the instant defendant's section 2--1401 petition had been construed as a successive postconviction petition, the petition would have failed, nonetheless. In order to submit a successive postconviction petition, the petition must pass the cause and prejudice test. *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002). The defendant must show the cause for failing to raise his issues in earlier proceedings and actual prejudice resulting from the errors alleged in the petition. *Pitsonbarger*, 205 Ill. 2d 444.

In the present case, the defendant contended in his petition that he had newly acquired proof of his actual innocence. However, because the defendant pled guilty, he forfeited all nonjurisdictional arguments, including contentions of actual innocence, unless he could show that his guilty plea was coerced. See *People v. Barnslater*, 373 Ill. App. 3d 512 (2007). In the instant case, the defendant could not show that his guilty plea was coerced because of the alleged deprivation of his psychotropic medications at the time of the plea. The defendant had forfeited inclusion of such an argument in a successive postconviction petition because he could have raised this issue in an earlier proceeding, such as his withdrawn motion to withdraw the guilty plea or his prior section 2--1401 or postconviction petitions. See *Pitsonbarger*, 205 Ill. 2d 444. Because the defendant could not show that his guilty plea was

coerced, he forfeited his actual innocence argument by pleading guilty. See *Barnslater*, 373 Ill. App. 3d 512. Even if the defendant's appointed counsel had argued that his section 2--1401 petition should have been construed as a successive postconviction petition, it would have failed to pass the cause and prejudice test. Thus, the defendant's appointed counsel could not have provided unreasonable assistance by failing to make this futile argument. See *Pinkonsly*, 207 Ill. 2d 555.

Additionally, the attorney in this case could not have provided unreasonable assistance by failing to make an effort to gather evidence, even if the petition was construed as a postconviction petition. Making an effort to gather evidence to support a defendant's petition is not one of the requirements of Rule 651(c). See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Tazewell County circuit court dismissing the defendant's section 2--1401 petition for untimeliness.

Affirmed.