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2012 IL App (3d) 110094-U

Order filed September 27, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 14th Judicial Circuit,
Plaintiff-Appellee,) Henry County, Illinois,
)
v.) Appeal No. 3-11-0094
) Circuit No. 07-CF-263
)
RANDY L. PORTER,) Honorable
) Ted J. Hamer,
Defendant-Appellant.) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Postconviction counsel provided reasonable assistance despite misstating the stage of the proceedings at a hearing on defendant's petition for postconviction relief.
- ¶ 2 At jury trial, defendant, Randy L. Porter, was found guilty of felony driving under the influence of alcohol (625 ILCS 5/11-501(a)(2), (c-1)(3) (West 2006)) and felony driving while license revoked (625 ILCS 5/6-303(a), (d-3) (West 2006)). Defendant appealed, and we affirmed the judgment of conviction. *People v. Porter*, No. 3-07-0756 (2009) (unpublished order under

Supreme Court Rule 23). Defendant then filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), claiming that his trial counsel was ineffective. After appointing postconviction counsel, the circuit court dismissed defendant's petition at the second stage of postconviction proceedings. Defendant now appeals the circuit court's decision, arguing that his postconviction counsel provided unreasonable assistance of counsel. We affirm.

¶ 3 BACKGROUND

¶ 4 In August 2007, a jury found defendant guilty of felony driving under the influence of alcohol (625 ILCS 5/11-501(a)(2), (c-1)(3) (West 2006)) and felony driving while license revoked (625 ILCS 5/6-303(a), (d-3) (West 2006)). The court sentenced defendant to concurrent sentences of imprisonment of 12 years for driving under the influence and 3 years for driving while licensed revoked.

¶ 5 At trial, witness testimony established that early in the morning of June 25, 2007, a white Chevrolet pickup truck containing passengers Brandon Magnussen, Kevin Steele, and defendant was driven to the Shell gas station in Kewanee. Shell employee Sara Miller testified that after the truck pulled into the Shell parking lot, she saw defendant exit out of the driver's side door. Defendant then entered the Shell station and attempted to pay for gas with a third-party check, which Shell would not accept. After noticing that defendant was intoxicated, another Shell employee called the police. When police arrived, defendant was the only one of the passengers remaining at the Shell station. Police confirmed that defendant was intoxicated and arrested him for having driven the truck.

¶ 6 Defendant and defendant's witness, Magnussen, testified that Steele was the person

driving the truck that morning. Steele did not testify because he was unavailable. The jury, apparently finding Miller's testimony more credible, convicted defendant. Defendant filed a motion for a new trial, arguing that Magnussen had committed perjury when he testified that Steele had been driving. Contrary to his trial testimony, defendant claimed in his motion that a heretofore unmentioned man by the name of John Hiatt was the real driver. The court denied the motion. Defendant then appealed the judgment of conviction, arguing that he was entitled to a monetary credit for his presentence incarceration. We agreed and modified the mittimus while affirming the conviction. *People v. Porter*, No. 3-07-0756 (2009) (unpublished order under Supreme Court Rule 23).

¶ 7 On May 11, 2009, defendant filed a *pro se* petition for postconviction relief claiming that trial counsel provided ineffective assistance when he failed to ensure that a videotape from the outdoor Shell security camera was entered into evidence. Defendant further claimed that Magnussen had committed perjury when he testified that Steele was driving. Defendant explained that Magnussen lied in order to protect Magnussen's friend, a previously unmentioned man named Justin Potter, whom defendant now claimed was the driver. At the first stage of postconviction proceedings, the circuit court did not summarily dismiss defendant's petition and appointed postconviction counsel to aid defendant in further postconviction proceedings.

¶ 8 During postconviction counsel's representation, counsel communicated with defendant by mail on seven separate occasions. As a result of these communications, counsel twice amended defendant's *pro se* petition. However, defendant later filed a *pro se* motion to remove counsel for neglecting his case. Prior to a hearing on that motion, defendant and counsel met and discussed defendant's case and the work that counsel was doing on defendant's petition. Defendant then

withdrew his motion to remove counsel.

¶ 9 Shortly after the meeting between defendant and counsel, counsel filed an amended petition for postconviction relief. The amended petition argued that trial counsel was ineffective because he failed to secure the Shell security camera videotape; failed to interview Steele before trial; failed to point out the supposed relationship between Magnussen and Potter; and allowed Magnussen to present perjured testimony. Postconviction counsel later filed an affidavit of defendant to support the claims made in the petition.

¶ 10 The State filed a motion to dismiss the petition, which was granted by the circuit court. At the hearing on the motion to dismiss, postconviction counsel erroneously referred to the postconviction proceedings as being in the first stage, when in fact they had progressed to the second stage. Despite counsel's error, the court applied the proper standard for evaluating a second-stage motion to dismiss and dismissed the petition.

¶ 11 In dismissing the petition, the court decided that defendant's claims about trial counsel's performance were unfounded. The court reasoned that defendant's claims of perjury on the part of Magnussen were meritless because defendant had testified at trial to the same facts as Magnussen, and perjury on the part of Magnussen would imply perjury by defendant. In addition, trial counsel would have had no reason to suspect that Magnussen was committing perjury. Defendant requested that Magnussen testify, and Magnussen testified to the same facts as defendant.

¶ 12 The claims about Potter being the driver were found meritless because there was no evidence, and nothing in the petition to establish, that anyone named Justin Potter even existed. In addition, defendant had testified at trial that Steele was the driver. The court explained that

the videotape had not been produced because the security camera outside the Shell station was a nonfunctioning camera used only to give the impression to customers that their actions were being recorded. The circuit court therefore found the petition did not establish a substantial claim of a constitutional violation and dismissed the petition.

¶ 13 Defendant now appeals, claiming that his postconviction counsel provided unreasonable assistance.

¶ 14 ANALYSIS

¶ 15 Defendant claims that the circuit court's dismissal of his petition for postconviction relief resulted from the unreasonable assistance of his postconviction counsel.

¶ 16 The Act divides the postconviction process into three separate stages. 725 ILCS 5/122-1 *et seq.* (West 2010). At the first stage, the court must summarily dismiss a defendant's petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court does not summarily dismiss the petition at the first stage, the petition advances to the second stage. At the second stage, counsel may be appointed for the defendant (725 ILCS 5/122-4 (West 2010)), and the State has the opportunity to file responsive pleadings (725 ILCS 5/122-5 (West 2010)). The court then determines whether the petition makes a substantial showing of a constitutional violation. If no such showing is made, the court must dismiss the petition. If a substantial showing is made, the petition advances to the third stage, where the court conducts an evidentiary hearing on the petition's claims. 725 ILCS 5/122-6 (West 2010).

¶ 17 The Act requires that appointed counsel in postconviction proceedings provide a "reasonable" level of assistance. *People v. Munson*, 206 Ill. 2d 104, 137 (2002). The right to counsel in postconviction proceedings is entirely statutory. *People v. Lander*, 215 Ill. 2d 577

(2005); 725 ILCS 5/122-4 (West 2010). The reasonable assistance required by the Act is less demanding than the effective assistance required of trial and appellate counsel by the federal and state constitutions. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 18 To ensure that reasonable assistance is provided, Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) imposes specific duties on postconviction counsel. Counsel must: (1) consult with the defendant either by mail or in person concerning the deprivation of his constitutional rights; (2) examine the records of the trial court proceedings; and (3) make any amendments to a petition filed *pro se* that are necessary for an adequate presentation of the defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). An adequate petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). Compliance with the requirements of Rule 651(c) can be shown by a certificate of compliance filed by postconviction counsel. The failure to file such a certificate is harmless error if the record shows that postconviction counsel complied with the required duties of Rule 651(c). *Lander*, 215 Ill. 2d 577 (citing *People v. Williams*, 186 Ill. 2d 55 (1999)).

¶ 19 In the present case, although counsel did not file a certificate of compliance, the record establishes that he fulfilled the requirements of Rule 651(c).

¶ 20 First, counsel consulted with defendant about the deprivation of his constitutional rights. The record establishes that counsel corresponded with defendant by mail on seven separate occasions and met with defendant in person prior to a hearing on February 16, 2010. Particularly relevant is a letter from counsel to defendant dated November 9, 2009, in which counsel writes:

"I received your letter of November 5, 2009. I am returning your copies of the

information you sent to me (Judgment - Sentence to Illinois Department of Corrections and the Single or concurrent Determinate Sentence Under 1978 Law and Jail Credit). I also enclose a second rough draft of the revised Post-Conviction Relief Petition to reflect the information you have given me. Please review this and get back to me. I will be in contact with you."

This correspondence shows that postconviction counsel was communicating with defendant about the contents of defendant's petition for postconviction relief.

¶ 21 Counsel also obtained and filed an affidavit of defendant, which would have required communication between counsel and defendant concerning the constitutional challenge that defendant raised in his petition. Considering that a single meeting with a defendant can suffice to meet the consultation requirement of Rule 651(c) (*People v. Turner*, 187 Ill. 2d 406 (1999)), the record establishes that postconviction counsel's actions met his duty of consultation.

¶ 22 Second, counsel adequately examined the trial record. This duty requires counsel to examine "as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the petitioner." *People v. Davis*, 156 Ill. 2d 149, 164 (1993). In the amended petition for postconviction relief, counsel cites to the trial court proceedings and uses the contents of those proceedings in support of defendant's constitutional claims. Counsel therefore engaged in an examination of the record sufficient to present and support defendant's claims.

¶ 23 Third, counsel made all amendments to the *pro se* petition necessary to adequately present defendant's contentions. The amended petition laid out with specificity the alleged deficiencies in trial counsel's performance. The petition claims that these deficiencies deprived

defendant of his constitutional right to effective assistance of counsel in violation of the federal and Illinois Constitutions. The circuit court dismissed the amended petition, not as a result of counsel's failure to adequately present defendant's claims, but because defendant's claims could not be substantiated by the record.

¶ 24 Defendant claims that despite complying with Rule 651, postconviction counsel did not provide a reasonable level of assistance because at the hearing on the postconviction petition, counsel incorrectly referred to the posture of the proceedings as in the first stage when they were actually in the second stage. At the hearing, counsel stated:

"I think we've met the first stage to survive the motion to dismiss.

That doesn't mean we'll ever be successful at the second stage or the third stage.

Obviously, I wouldn't file this unless I was trying to succeed on it, but those are still separate issues, the second stage and the third stage."

Defendant claims that because counsel was mistaken as to the stage of the proceedings, he did not provide defendant with the reasonable assistance of counsel.

¶ 25 We find that counsel's error did not cause the assistance he provided to be unreasonable.

Defendant argues that counsel's misconception of the proper stage resulted in unreasonable assistance because different standards of dismissal are applied at stage one and stage two. At stage one, a defendant's petition need establish only the " 'gist of a constitutional claim.' "

People v. Edwards, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). In contrast, at stage two, the petition and affidavit(s) supporting it must establish a "substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005) (citing *People v. Coleman*, 183 Ill. 2d 366 (1998)). Defendant claims that because counsel was

misguided about the stage of the proceedings, he put forth only enough in the petition to establish the gist of a constitutional violation, rather than a substantial showing. Had counsel been aware of the appropriate standard, defendant argues, he could have included additional arguments and affidavits to establish a substantial showing and thereby survive dismissal. We find that counsel could not have included anything more in his petition that would have resulted in a substantial showing of a constitutional violation. Therefore, his misquoting the proper stage of proceedings did not affect the reasonableness of his assistance.

¶ 26 Defendant's claim that trial counsel was ineffective for not addressing the alleged perjury on the part of Magnussen could not have been presented more effectively by postconviction counsel. Trial counsel had no reason to believe that Magnussen was committing perjury when he testified that Steele was the driver because defendant testified to the same fact. Only after trial did defendant claim that someone other than Steele had been driving. There was no way for trial counsel to have knowledge of the supposed perjury at the time of trial. In addition, a claim by trial counsel that Magnussen committed perjury would result in the conclusion that defendant also committed perjury. Defendant cannot claim that trial counsel was ineffective for failing to imply that defendant had committed perjury. Therefore, there was nothing more that postconviction counsel could have argued to establish that trial counsel was ineffective.

¶ 27 Defendant's second claim—that trial counsel was ineffective for failing to secure the videotape from the Shell station's outdoor security camera—likewise could not have been presented any more effectively by postconviction counsel. After the videotape was originally subpoenaed for trial, counsel discovered that the outdoor camera was nonfunctional. There is little that postconviction counsel could have done to establish that trial counsel was ineffective

for failing to secure a videotape that never existed. Counsel's impression of the stage of the proceedings did not hinder defendant's argument that trial counsel was ineffective. A substantial showing of a constitutional claim could not have been presented on these facts.

¶ 28

CONCLUSION

¶ 29 Postconviction counsel complied with the requirements of Rule 651(c) and provided reasonable assistance of counsel. Counsel's belief as to whether the governing standard was the gist of a constitutional claim or a substantial showing of a constitutional claim had no bearing on the reasonableness of counsel's assistance. The judgment of the circuit court of Henry County is affirmed.

¶ 30 Affirmed.