

NOTICE

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FILED

June 15, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 141030-U

NO. 4-14-1030

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
ANDREW PINKSTON,)	No. 06CF931
Defendant-Appellant.)	
)	Honorable
)	Scott D. Drazewski,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly dismissed defendant’s amended postconviction petition.

¶ 2 Defendant, Andrew Pinkston, appeals from the trial court’s dismissal of his amended postconviction petition and requests this court remand the matter for an evidentiary hearing. We reject defendant’s request and affirm.

¶ 3 I. BACKGROUND

¶ 4 In December 2006, a jury found defendant guilty of two counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2006)), and, in January 2007, the trial court sentenced him to concurrent 11-year terms of imprisonment. Defendant appealed, and this court affirmed defendant’s convictions and sentences. *People v. Pinkston*, No. 4-07-

0399, 382 Ill. App. 3d 1228, 967 N.E.2d 504 (Aug. 14, 2008) (unpublished order under Supreme Court Rule 23).

¶ 5 In February 2009, defendant filed a *pro se* postconviction petition, raising multiple claims. Defendant alleged, in part, his (1) due process rights were violated by the State improperly withholding discovery relating to payments made to a confidential informant; (2) trial counsel provided ineffective assistance by failing to investigate or call as witnesses Taryn Schroeder and David Harris, who both had exonerating information; and (3) appellate counsel was ineffective for not raising these issues in his previous appeal. As to his claim regarding the exonerating witnesses, defendant alleged Schroeder was the alleged go-between in giving drugs to the informant, and Harris drove him to the location where the alleged drug transaction occurred. Defendant provided affidavits from Schroeder and Harris. Schroeder averred she (1) did not assist defendant or the informant in the sale of drugs, (2) did not witness “any drug transaction or conversation” between the informant and defendant “while in her presence,” and (3) would have come forward and told the truth had she known she was referred to as an accomplice in a drug transaction. Harris averred he (1) went inside the hotel with defendant, (2) “kept [his] eye on [defendant] at all times,” and (3) did not “witness [defendant] give or sell anything to anyone.”

¶ 6 In August 2009, the trial court advanced defendant’s postconviction petition to the second stage of postconviction proceedings and appointed counsel to represent defendant. That same month, the State filed a motion to dismiss defendant’s petition.

¶ 7 In November 2009, the trial court held a hearing on the State’s motion to dismiss. Defendant indicated he wished to proceed *pro se*, which the court allowed. Defendant requested

a continuance to allow him to consider amending his petition, which the court granted.

¶ 8 In December 2009, defendant filed a motion for leave to amend his postconviction petition. Defendant sought to raise additional claims, including a claim of ineffective assistance for trial counsel's failure to utilize the State's discovery disclosures and the fact they lacked any documentation of payments to the informant.

¶ 9 In January 2010, the trial court held a status hearing. The court allowed defendant to amend his postconviction petition to raise the additional claims. The State stood on its motion to dismiss.

¶ 10 In March 2010, the trial court held a hearing on the State's motion to dismiss. The court dismissed all but one of defendant's claims on the grounds they were either meritless, forfeited, or barred by *res judicata*. The only claim allowed to proceed to a third-stage evidentiary hearing was whether trial counsel was ineffective for failing to investigate or call as witnesses Schroeder and Harris. The court indicated such a hearing was necessary to determine (1) whether defendant requested counsel to interview the witnesses, (2) whether counsel interviewed the witnesses, (3) whether it was a matter of trial strategy not to call the witnesses, and (4) the testimony the witnesses would have provided. Defendant requested the opportunity to amend his petition prior to the evidentiary hearing, to which the court indicated it would allow such an amendment "if it relates to the remaining issue." Defendant also requested the opportunity to consider requesting appointed counsel, to which the court set the matter for a status hearing.

¶ 11 In April 2010, the trial court held a status hearing. Defendant requested, and the court appointed, counsel to represent him. The court reiterated defendant's claim of ineffective

assistance for trial counsel's failure to interview or call as witnesses Schroeder and Harris was the only issue allowed to proceed to an evidentiary hearing. At the conclusion of the hearing, defendant indicated he wished to proceed *pro se*, which the court allowed. Defendant then filed a notice of appeal from the court's partial dismissal of the claims raised in his amended postconviction petition.

¶ 12 In June 2010, defendant, through appellate counsel, filed a motion to dismiss his appeal as premature. This court granted defendant's motion and remanded "to conduct the evidentiary hearing that had been previously ordered."

¶ 13 In July 2010, the trial court held a status hearing. The court reiterated defendant's claim of ineffective assistance for trial counsel's failure to interview or call as witnesses Schroeder and Harris was the only issue to proceed to an evidentiary hearing. Defendant requested, and the trial court appointed, counsel to represent him.

¶ 14 In August 2010, defendant filed a *pro se* motion for leave to file an amended postconviction petition. Defendant sought to add a claim he was denied a fair trial based on the trial court's admonishments to the jury. During a hearing that same month, the court rejected defendant's *pro se* motion because he was represented by counsel. Defendant's counsel requested a continuance to review the record to determine whether it would support amending defendant's petition to include a claim regarding improper admonishments. Over the State's objection, the court granted a continuance.

¶ 15 In September 2010, defendant filed a *pro se* motion for discovery. Defendant requested, in part, the trial court order the State's Attorney's office, the Bloomington police department, and the Illinois State Police to produce copies of any statements made by all

witnesses, disclose any written or oral promises made by the State to any witness interviewed, provide information regarding the informant, disclose any material or information within its possession which tended to negate his guilt, and provide information with respect to persons questioned, interrogated, or interviewed relating to the charged offense.

¶ 16 At a December 2010 hearing, defendant indicated he wished to proceed *pro se*, which the court allowed.

¶ 17 At a May 2011 hearing, the trial court indicated the next proceeding would be an evidentiary hearing on the limited issue of whether defendant was provided ineffective assistance by trial counsel's failure to interview or call as witnesses Schroeder and Harris. The court also denied defendant's discovery motion, finding discovery was not contemplated in postconviction proceedings. At the conclusion of the proceedings, defendant requested, and the court appointed, counsel to represent him.

¶ 18 In July 2011, the trial court held a status hearing. The court indicated the next step would be to conduct an evidentiary hearing on the only remaining issue of whether defendant was provided ineffective assistance by trial counsel's failure to interview or call as witnesses Schroeder and Harris. Defendant requested additional time to send his appointed counsel proposals to amend his petition, which the court granted.

¶ 19 In October 2011, the trial court held a status hearing. Defendant indicated he wished to proceed *pro se*, which the court allowed. Defendant requested additional time to purchase a typewriter and prepare an amended petition. The State objected to defendant's request, which the court sustained. The court indicated it would move forward on the claim of ineffective assistance, and any additional claims would have to be included in a successive

postconviction petition.

¶ 20 In November 2011, defendant filed with the clerk's office a *pro se* amended postconviction petition, which included a claim of ineffective assistance of trial and appellate counsel for their failure to raise error regarding the trial court's admonishments to the jury.

¶ 21 In December 2011, the trial court held an evidentiary hearing. The court initially rejected the filing of defendant's November 2011 amended petition and then proceeded to a hearing on the issue of whether defendant's trial counsel provided ineffective assistance by failing to interview or call as witnesses Schroeder and Harris. Defendant indicated he was not ready to proceed and requested a continuance, which the court denied. Because defendant failed to examine either of his trial counsel, who were present at the hearing, or present any other evidence, the State sought a directed judgment, which the court granted. The court dismissed defendant's petition, and defendant appealed.

¶ 22 On appeal, defendant argued the trial court abused its discretion when it denied his discovery request because it failed to recognize it had the discretion to grant such a request. *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 2, 989 N.E.2d 298. In reaching our decision, we highlighted the only issue allowed to proceed to an evidentiary hearing concerned whether defendant was provided ineffective assistance by trial counsel's failure to investigate or call as witnesses Schroeder and Harris, and the discovery requested related to any promises, rewards, or threats made by the State to any witnesses or any other material pertaining to defendant's case. *Id.* ¶¶ 5-6. After concluding discovery was contemplated in postconviction proceedings, we found the record was insufficient to support a finding the court would have denied defendant's discovery motion, *in toto*, had it exercised its discretion. *Id.* ¶¶ 13, 17-18. We "remand[ed] for

the limited purpose of allowing the trial court to exercise its discretion on defendant's discovery request and for such further proceedings as may be warranted.” *Id.* ¶ 20.

¶ 23 In August 2013, the trial court held a status hearing. The court initially noted the matter was remanded for it to consider defendant’s September 2010 discovery motion. The court indicated the matter was “redocketed” and it would address “the issues anew.” At that time, defendant, although previously released on parole in January 2013, was incarcerated on a parole violation. He was expected to complete his sentence in March 2014. Defendant requested, and the court appointed, counsel to represent him.

¶ 24 In October 2013, the trial court held a hearing on defendant’s September 2010 discovery motion. Defendant, through counsel, maintained the discovery requested was “relevant to his claim.” The State asserted the discovery requested was irrelevant to the issue relating to Schroeder and Harris. The court acknowledged it was “not relitigating the entire matter,” but it found defense counsel had the right to review the majority of the discovery requested to determine whether “any relevant information [existed] relating to the *** remaining issue [in defendant’s amended] postconviction petition.” The court also noted the discovery requested may be relevant because “defendant has, in essence, a pending petition, [and] it may well be *** appointed counsel *** request[s] that that petition be amended in some manner.”

¶ 25 In December 2013, the State presented defendant’s counsel with discovery.

¶ 26 On January 21, 2014, the trial court held a status hearing. Defendant’s counsel sought to withdraw her representation as defendant wished to proceed *pro se*. Defendant’s counsel indicated she would provide defendant with the discovery presented by the State. The court inquired as to the State’s position on the status of defendant’s amended postconviction

petition, to which the State indicated no petition was pending because this court's order remanding the matter did not vacate the dismissal of defendant's petition, but rather, it only required the trial court to rule on defendant's discovery request. Defendant's counsel suggested she believed a new petition would have to be filed, occasioned by defendant's review of the discovery. The court questioned defendant as to how much time he would need, once his counsel provided him with the discovery, to file an amended postconviction petition. Defendant requested, and the court granted, 60 days to file an amended petition. The court further granted defendant's counsel's request to withdraw her representation of defendant.

¶ 27 On March 12, 2014, defendant completed his sentence.

¶ 28 On March 27, 2014, defendant filed with the clerk's office a *pro se* amended postconviction petition. Defendant alleged (1) the State failed to tender discovery records of payments made to a confidential informant, thereby crippling his ability to impeach the witness; and (2) his trial and appellate counsel provided ineffective assistance by failing to raise error regarding the trial court's admonishments to the jury. Defendant's amended petition omitted his claim of ineffective assistance for trial counsel's failure to investigate or call as witnesses Schroeder and Harris.

¶ 29 That same day, the trial court held a status hearing. The court initially noted defendant filed his amended petition outside the allotted 60-day period, but also it had the discretion to allow a late filing. The State objected to the court allowing the amended petition to be filed because defendant no longer had standing upon completing his sentence. The court allowed defendant to file his amended petition and construed the State's objection as an oral motion to dismiss for lack of standing. The court continued the matter to allow the parties to

submit authority on whether defendant had standing to “proceed upon the amended petition” or “any type of petition for postconviction relief” after the completion of his sentence.

¶ 30 In April 2014, the trial court held a hearing on the State’s oral motion to dismiss defendant’s amended postconviction petition. The State presented the court with case law in support of its request for dismissal. Defendant, who was unprepared, requested counsel be appointed and the matter be continued, both of which the court granted.

¶ 31 On July 8, 2014, defendant, through counsel, filed with the clerk’s office a second amended postconviction petition. Defendant alleged his (1) trial counsel provided ineffective assistance by failing to pursue a “line of inquiry” relating to the State’s failure to tender discovery records of payments made to a confidential informant, and (2) trial and appellate counsel provided ineffective assistance by failing to raise the trial court’s improper admonishment to the jury. In addition, defendant asserted a claim of actual innocence based on the affidavits of Schroeder and Harris. Defendant attached to his petition the affidavits of Schroeder and Harris, as well as a copy of an alleged transcript from his trial. Defendant’s second amended postconviction petition omitted any claim of ineffective assistance for trial counsel’s failure to call as witnesses Schroeder and Harris.

¶ 32 On July 21, 2014, the trial court held a status hearing. The State argued no pending petition existed because this court did not reverse or vacate the trial court’s previous dismissal of defendant’s postconviction petition, and defendant lacked standing to file an “amended petition” after completing his sentence. Defendant’s counsel suggested the amended petition was timely filed given the remand but indicated she would need additional time to complete research as she did not expect the matter to proceed to argument at the hearing. The

court continued the matter to allow defendant to file a written response or additional authority in support of his position.

¶ 33 In August 2014, defendant, through counsel, filed a written response to the State's oral motion to dismiss. Defendant asserted, citing *People v. Jones*, 2012 IL App (1st) 093180, 969 N.E.2d 482, he had standing to proceed on his amended postconviction petition because his initial petition was timely filed.

¶ 34 In September 2014, the State filed a written reply to defendant's response to its oral motion to dismiss. The State maintained, citing *People v. Carrera*, 239 Ill. 2d 241, 940 N.E.2d 1111 (2010), no pending petition existed because this court did not reverse or vacate the trial court's previous dismissal of defendant's postconviction petition, and defendant lacked standing to file an amended petition after completing his sentence. Alternatively, the State argued dismissal was appropriate because (1) the affidavits did not support a claim of actual innocence because they were not newly discovered evidence, as demonstrated by defendant's February 2009 postconviction petition; (2) *res judicata* barred any claim relating to the State withholding evidence of a payment to its informant given the court's March 2010 ruling; (3) defendant's wrongful admonition claim failed to consider the jury instructions and the entirety of the record; and (4) the filing of the amended petition was untimely.

¶ 35 In November 2014, the trial court held a hearing on the State's oral motion to dismiss. The court held, relying on *People v. Henderson*, 2011 IL App (1st) 090923, 961 N.E.2d 407, defendant lost standing to proceed with his petition after completing his sentence. In its written order, the court indicated it was granting the State's motion to dismiss defendant's amended and second amended postconviction petitions.

¶ 36 This appeal followed.

¶ 37 II. ANALYSIS

¶ 38 On appeal, defendant argues the trial court erroneously dismissed his amended postconviction petition on standing grounds and requests this court remand the matter for an evidentiary hearing.

¶ 39 It is undisputed defendant had standing to file his original postconviction petition in February 2009, while serving a period of imprisonment. See 725 ILCS 5/122-1(a) (West 2008). It is also undisputed defendant pursued his amended and second amended postconviction petitions after he completed his sentence. The trial court, relying on *Henderson*, 2011 IL App (1st) 090923, 961 N.E.2d 407, found defendant lost standing to proceed on his amended petitions after completing his sentence. Neither the State nor defendant addresses *Henderson*. In fact, both parties present argument in support of their respective positions under *Jones*, 2012 IL App (1st) 093180, 969 N.E.2d 482, which rejected the court's holding in *Henderson*. Regardless, because the court's dismissal may be affirmed on other grounds, we need not take a position on the split between *Henderson* and *Jones* at this time. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139 (a reviewing court may affirm a trial court's dismissal on any grounds substantiated by the record).

¶ 40 Defendant concedes this court's prior opinion did not explicitly reverse or vacate the dismissal of the claims raised in his original amended postconviction petition and only remanded for the trial court to exercise its discretion on his discovery motion. Defendant asserts, however, by partially granting his discovery motion, his original amended postconviction petition was revived and he was entitled to the "further proceedings" this court ordered.

Defendant maintains he “should have been put back in the position he was in prior to the trial court’s erroneous ruling on the discovery motion and a new third[-]stage hearing should have been held with or without the filing of an amended petition.”

¶ 41 After dismissing all but defendant’s claim of ineffective assistance for trial counsel’s failure to investigate or call as witnesses Schroeder and Harris, defendant filed a discovery motion. The trial court denied defendant’s discovery motion based on the belief discovery was not allowed in postconviction proceedings. Following an evidentiary hearing on defendant’s remaining postconviction claim, the court dismissed defendant’s postconviction petition because he failed to present any evidence at the hearing.

¶ 42 Defendant appealed, raising the sole issue of whether the trial court abused its discretion when it denied his discovery request. *Pinkston*, 2013 IL App (4th) 111147, ¶ 2, 989 N.E.2d 298. In reaching our decision, we stated the only issue allowed to proceed to an evidentiary hearing concerned whether defendant was provided ineffective assistance by trial counsel’s failure to investigate or call as witnesses Schroeder and Harris, and the discovery requested related to any promises, rewards, or threats made by the State to any witnesses, or any other material pertaining to defendant’s case. *Id.* ¶¶ 5-6. After concluding discovery was contemplated in postconviction proceedings, we found the record was insufficient to support a finding the trial court would have denied defendant’s discovery motion, *in toto*, had it exercised its discretion. *Id.* ¶¶ 13, 17-18. We “remand[ed] for the limited purpose of allowing the trial court to exercise its discretion on defendant’s discovery request and for such further proceedings as may be warranted.” *Id.* ¶ 20.

¶ 43 On remand, the trial court, in exercising its discretion, partially granted

defendant's discovery motion. The court found defendant's appointed counsel had the right to review the majority of the discovery requested to determine whether "any relevant information [existed] relating to the *** remaining issue [in defendant's] postconviction petition." We agree with defendant, by partially granting defendant's discovery motion, the trial court effectively revived his claim of ineffective assistance for trial counsel's failure to investigate or call as witnesses Schroeder and Harris. At that point, defendant was entitled to an evidentiary hearing on his revived postconviction claim.

¶ 44 Following discovery, however, defendant elected to pursue amended and second amended postconviction petitions, which raised new claims and omitted any claim of ineffective assistance for trial counsel's failure to interview or call as witnesses Schroeder and Harris. The State contends defendant should be barred from complaining the trial court failed to hold, *sua sponte*, a new evidentiary hearing under the doctrine of invited error. We agree. "[A]n accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003). After receiving the requested discovery, defendant abandoned his pending claim of ineffective assistance to pursue other claims. See *People v. Sandoval-Carrillo*, 2016 IL App (2d) 140332, ¶ 40, 59 N.E.3d 797. In reaching this conclusion, we reject outright defendant's suggestion his claim of actual innocence based on Schroeder's and Harris's affidavits preserved his claim of ineffective assistance.

¶ 45 Defendant further suggests the trial court had the discretion to allow him to amend his postconviction petition to raise additional claims on remand. See *People v. Smith*, 2013 IL App (4th) 110220, ¶ 23, 986 N.E.2d 1274; 725 ILCS 5/122-5 (West 2014) ("The court

may in its discretion make such order as to amendment of the petition *** as shall be appropriate, just and reasonable and as is generally provided in civil cases.”). We disagree. It is “the duty of the court to which the cause is remanded to examine the reviewing court's opinion and to proceed in conformity with the views expressed in it.” *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 353, 781 N.E.2d 1072, 1079 (2002). This court remanded the matter for the court to exercise its discretion on defendant's September 2010 discovery motion. *Pinkston*, 2013 IL App (4th) 111147, ¶ 20, 989 N.E.2d 298. At the time defendant’s discovery motion was filed, all claims, except his claim of ineffective assistance for trial counsel’s failure to investigate or call as witnesses Schroeder and Harris, had been dismissed, and his remaining claim was awaiting an evidentiary hearing. Following discovery, the court had the discretion to allow defendant to amend his postconviction petition if it related to his remaining claim, but it did not have the discretion to allow defendant to, in effect, restart his postconviction proceedings by pursuing new claims. Rather, those claims would be subject to a successive postconviction petition.

¶ 46 Because defendant abandoned his claim of ineffective assistance for trial counsel’s failure to investigate or call as witnesses Schroeder and Harris, the trial court’s dismissal of defendant’s postconviction petition was proper.

¶ 47 III. CONCLUSION

¶ 48 We affirm the trial court’s judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 49 Affirmed.