Illinois Official Reports

Appellate Court

People v. Shipp, 2015 IL App (2d) 131309

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DWAYNE SHIPP, Defendant-Appellant.
District & No.	Second District Docket No. 2-13-1309
Filed Rehearing denied	December 1, 2015 January 5, 2016
Decision Under Review	Appeal from the Circuit Court of Kane County, No. 08-CF-1256; the Hon. M. Karen Simpson, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Michael J. Pelletier, Thomas A. Lilien, Alan D. Goldberg, and Chan Woo Yoon, all of State Appellate Defender's Office, of Elgin, for appellant. Joseph H. McMahon, State's Attorney, of St. Charles (Lawrence M. Bauer and Mary Beth Burns, both of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE McLAREN delivered the judgment of the court, with opinion. Presiding Justice Schostok and Justice Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Dwayne Shipp, appeals the trial court's first-stage dismissal of his postconviction petition. Petitioner contends that: (1) trial counsel was ineffective for failing to impeach a witness, Detective Guillermo Trujillo of the Aurora police department, and enter Trujillo's prior inconsistent statement into evidence and (2) defendant has a "freestanding right to reasonable assistance of counsel" at the first stage of postconviction proceedings such that he should be allowed to raise issues of unreasonable assistance of retained postconviction counsel. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Following a jury trial, defendant was found guilty of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)) and two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) arising out of the May 2008 shooting of Robert Franklin. The trial court subsequently found that the aggravated battery with a firearm convictions merged with the attempted first-degree murder conviction and sentenced defendant to a total of 40 years in the Department of Corrections. This court dismissed as moot defendant's direct appeal. See *People v. Shipp*, 2012 IL App (2d) 100754-U (summary order).

¶ 4 With the aid of retained counsel, defendant filed a petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) in July 2013. Defendant alleged that trial counsel provided ineffective assistance in that he failed to impeach Trujillo with a prior inconsistent statement and failed to seek to admit as substantive evidence the police report containing the prior inconsistent statement. Defendant also alleged that appellate counsel was ineffective for failing to raise those same issues on direct appeal. The trial court dismissed the petition, finding that defendant failed to raise the gist of a constitutional claim. This appeal followed.

¶ 5 II. ANALYSIS

¶ 6 Defendant now contends that the trial court erred in dismissing his postconviction petition. The Act establishes a three-stage process for adjudicating a postconviction petition; at the first stage, the trial court, without any input from the State, examines the petition to determine if it alleges a constitutional deprivation that is unrebutted by the record, thereby rendering the petition neither frivolous nor patently without merit. *People v. Cage*, 2013 IL App (2d) 111264, ¶ 9. To survive the first stage, a petitioner need present only the "gist" of a constitutional claim; while this is a low threshold, requiring only a limited amount of detail, the petition must clearly set forth the respects in which the petitioner's constitutional rights were violated. *People v. Jones*, 211 Ill. 2d 140, 144 (2004). Pursuant to section 122-2.1 of the Act, if the trial court determines that the petition is frivolous or patently without merit, it shall dismiss it in a written order. 725 ILCS 5/122-2.1 (West 2012). "If the petition is not dismissed at the first stage, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition." *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 5. If no such

motion is filed, or the motion is denied, the State must answer the petition and the petition proceeds to a hearing wherein the petitioner may present evidence. *People v. Pendleton*, 223 Ill. 2d 458, 472-73 (2006).

¶ 7 Here, the trial court dismissed the petition at the first stage. We review *de novo* a trial court's first-stage dismissal of a postconviction petition. *Cage*, 2013 IL App (2d) 111264, ¶ 9.

¶ 8 Defendant argues that trial counsel was ineffective for failing to impeach Trujillo with his prior inconsistent statement, contained in his police report, and failing to seek admission of that statement as substantive evidence. To prevail on a claim of ineffective assistance, a defendant must show both that: (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 9 On direct examination at trial, Trujillo testified that, at defendant's request, he interviewed defendant during the investigation of the shooting. After refreshing his recollection with his written report, Trujillo testified that defendant asked him why his girlfriend was charged with the same crime when she never touched "the gun." In his written report, a copy of which defendant attached to his petition, Trujillo wrote that defendant asked him why his girlfriend had been charged with the same crime when she never "even touched a handgun."

¶ 10 Defendant argues that Trujillo's testimony that defendant said that his girlfriend never touched "the gun" was much more damaging to his case than his statement contained in the written report that she never touched "a handgun," because it implied that he was present at the shooting and had knowledge about the weapon used in the shooting. Therefore, according to defendant, trial counsel was ineffective for failing to impeach Trujillo with the prior inconsistent statement.

¶ 11 We disagree. Trial counsel did not fail to impeach Trujillo. On cross-examination, trial counsel asked Trujillo if defendant asked why his girlfriend was charged with the same crime "when she had never even touched a handgun," and Trujillo answered, "That is correct." Trujillo was impeached to the extent possible; he admitted that defendant said what was contained in the report. Defendant admits that the distinction between the phrase "the gun" and the phrase "a handgun" is subtle and that the jury probably did not notice the difference. Indeed, it is so subtle as to be nonexistent. Whether defendant said "the gun" or "a handgun," the practical implication was the same: defendant knew that his girlfriend did not touch the gun used to shoot Franklin, likely because defendant was at the scene. Thus, we reject defendant's argument that impeaching Trujillo with his prior inconsistent statement "would have had a great dramatic effect on the jury." In any event, whether to emphasize the difference between what Trujillo said on direct examination and what he admitted on cross-examination was an issue of trial strategy. Matters of trial strategy are generally immune to claims of ineffective assistance of counsel. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). We find that counsel's performance regarding Trujillo's prior inconsistent

statement did not arguably fall below an objective standard of reasonableness and that defendant was not arguably prejudiced by it. We find no error here.

¶ 12 For the same reasons, we find no merit to defendant's contention that trial counsel was ineffective for failing to seek the introduction of Trujillo's report as substantive evidence. While a party is not precluded from introducing a witness's prior inconsistent statement simply because the witness admits to making the prior statement (*People v. Davis*, 254 Ill. App. 3d 651, 666 (1993)), neither is the prior statement *required* to be introduced into evidence (*People v. Pelegri*, 39 Ill. 2d 568, 576 (1968)). A party "may prefer to have [such] statements clearly brought out and emphasized." *People v. Williams*, 22 Ill. 2d 498, 504 (1961). A party may also prefer not to bring attention to his presence at a crime scene. Again, this is a matter of trial strategy, which is generally immune to claims of ineffective assistance of counsel. *Manning*, 241 Ill. 2d at 327. We find no error here.

¶ 13 Defendant next contends that he was denied reasonable assistance of retained postconviction counsel where counsel did not allege appellate counsel's ineffectiveness for failing to raise on direct appeal three trial issues, involving jury instructions, admission of evidence, and interruption of jury deliberations. Defendant seeks to invoke a "freestanding right to reasonable assistance of counsel"–similar to, but independent of, that provided by Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013)–that would apply to counsel's representation in first-stage postconviction proceedings.

¶ 14 While the sixth amendment to the United States Constitution (U.S. Const., amend. VI) guarantees the right to counsel at trial, it provides no such guarantee at the postconviction level. See *People v. Daniels*, 388 Ill. App. 3d 952, 960 (2009). Instead, assistance of counsel in postconviction proceedings "is a matter of legislative grace and favor." (Internal quotation marks omitted.) *People v. Owens*, 139 Ill. 2d 351, 364 (1990). To that end, the legislature has provided in section 122-4 of the Act:

> "If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, *and the petition is not dismissed pursuant to Section 122-2.1*, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel." (Emphasis added.) 725 ILCS 5/122-4 (West 2012).

¶ 15 Thus, in specifying that the petition is not dismissed pursuant to section 122-2.1 of the Act, the legislature has provided a statutory right to counsel at the second and third stages, but not the first stage, of postconviction proceedings. See *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 6. Although the Act does not specify the quality of legal representation that postconviction counsel must provide, "our supreme court has placed its gloss upon the statute, holding that 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, 540-41 (2009). Further, our supreme court has defined reasonable assistance by imposing the specific obligations described in Rule 651(c):

> "Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken

> and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her 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. Feb. 6, 2013).

¶ 16 Again, the right of reasonable representation provided by Rule 651(c) attaches at the second stage of postconviction proceedings and does not apply when a petition is dismissed at the first stage. Rule 651(c) refers to the "record of the post-conviction proceedings, including a transcript of the evidence, if any." *Id.* In addition, the required showing that the attorney has consulted with the petitioner, examined the record of the proceedings at the trial, and made any amendments to a petition filed *pro se* that are necessary for an adequate presentation of the petitioner's contentions (*id.*) also must be contained *in the record*. There is no record of first-stage postconviction proceedings; the trial court examines the petition independently, without any input from either side. Thus, neither the Act nor the supreme court rule provides any basis for a standard of legal representation at the first stage of postconviction proceedings.

¶ 17 Defendant cites *People v. Bennett*, 394 Ill. App. 3d 350 (2009), to support his argument that a petitioner has a freestanding right to reasonable assistance of counsel at first-stage postconviction proceedings. This reliance is misplaced. In *Bennett*, the petitioner's original postconviction petition, filed by retained counsel, had been summarily dismissed by the trial court, and the petitioner appealed to this court in *People v. Bennett*, No. 2-98-0408 (1999) (unpublished order under Supreme Court Rule 23) (*Bennett I*). This court vacated the dismissal, because "the [trial court's] ruling had violated the requirement that any summary dismissal of the petition be done within 90 days of the petition's filing [citation]." *Bennett*, 394 Ill. App. 3d at 352 (*Bennett II*); see also *Bennett I*, slip order at 4.

¶ 18 On remand, new counsel was appointed, and three amended petitions were filed. After a third-stage hearing, the trial court denied the petition, leading to the appeal in *Bennett II*. In that appeal, the petitioner argued that appointed counsel failed to file a Rule 651(c) certificate and that the record did not show that counsel read the necessary parts of the record. *Bennett II*, 394 Ill. App. 3d at 353. This court concluded that it "need not address that argument, as we conclude that Rule 651(c) is inapplicable when the original petition was not *pro se*." *Id*.

¶ 19 The question in *Bennett II* was whether Rule 651(c) applied to later-appointed counsel where retained counsel filed the initial postconviction petition. After considering our supreme court's holding in *People v. Richmond*, 188 Ill. 2d 376 (1999), this court concluded that Rule 651(c) did not apply in such a situation, although we noted "reservations" about applying *Richmond* under the circumstances:

> "The *Richmond* court presumably further deemed that the contractual terms of a private representation that produces a postconviction petition would provide an adequate substitute for Rule 651(c)'s explicit imposition of other duties. We note our concern that, when, as here, counsel drafts a petition as an incident to his or her representation of the petitioner in the original proceeding, the terms of the representation provide little assurance that the petitioner will get a full chance to present all of his or her claims. Here, our holding in the first postconviction appeal

> reflected our conclusion that the circumstances of the petition's drafting had failed to give defendant a proper opportunity to file a complete original petition. Thus, even as we follow the *Richmond* rule, we have reservations about the wisdom of applying it under these circumstances." *Bennett II*, 394 Ill. App. 3d at 354.

¶ 20 Defendant argues that, in the passage above, this court "implied that counsel had a duty to provide reasonable assistance when drafting the initial petition even if the protections from Rule 651(c) did not technically apply." Then, in the very next sentence, defendant leaps to the conclusion that the same passage "strongly suggests that a petitioner has a freestanding right to reasonable assistance of counsel at the first stage of post-conviction proceedings." Leaps of logic aside, we first note that *Bennett II* did not involve first-stage postconviction proceedings; the third amended petition was dismissed after a third-stage hearing. Again, the question in *Bennett II* was whether later-appointed counsel was required to follow the strictures of Rule 651(c) where retained counsel filed the initial petition. It did not address assistance of counsel at the first stage.

¶ 21 While admitting that in *Bennett II* "this Court did not affirmatively arrive at this conclusion," defendant also argues that we "did acknowledge that a standard of performance may exist independent of Rule 651(c)," based on the following passage:

> "Defendant, in her appellate briefs, has asserted only that postconviction counsel did not satisfy the requirements of Rule 651(c) and does not argue that counsel's representation was unreasonable independent of the rule's requirements. We thus will not consider that possibility." *Id.* at 355.

¶ 22 We fail to see how an issue that in *Bennett II* we specifically noted had not been raised and specifically declined to consider lends any support to defendant's claim in this case. *Bennett* provides no support for defendant's claim that some right to reasonable representation at first-stage proceedings exists.

¶ 23 Defendant is also somewhat disingenuous in his analysis of *Bennett II*. This court vacated the first-stage dismissal in *Bennett I* because "the ruling had violated the requirement that any summary dismissal of the petition be done within 90 days of the petition's filing." *Id.* at 352. This court also "noted that defendant likely had not had a full opportunity to state all of her possible claims," because of the confused procedural history of the case. *Id*. However, defendant here fails to even mention the 90-day violation as a cause for this court's analysis in *Bennett II* and baldly asserts that "the summary dismissal of the [*Bennett*] defendant's initial petition was reversed on the basis that counsel had only done cursory work in preparing the petition and had denied the defendant a chance to fully present her claims." Advocacy is one thing, inaccurately representing the basis for a disposition is another and is not acceptable.

¶ 24 Neither statute nor case law provide for a freestanding right to reasonable assistance of counsel at first-stage postconviction proceedings. Thus, we need not address defendant's claims regarding unreasonable assistance of postconviction counsel.

¶ 25 Defendant is not necessarily without recourse here. Successive postconviction petitions may be allowed "where the proceedings on the initial petition were deficient in some fundamental way." *People v. Orange*, 195 Ill. 2d 437, 449 (2001). Defendant acknowledges this but finds that proceeding in that manner would be "a waste of time and judicial resources" and laments that "he would be compelled to cite his counsel's unreasonable

assistance in order to satisfy the cause and prejudice test." We can only note that defendant is not obligated to waste his time thusly.

¶ 26 III. CONCLUSION

¶ 27 The judgment of the circuit court of Kane County is affirmed.

¶ 28 Affirmed.