

2013 IL App (2d) 111085-U
No. 2-11-1085
Order filed June 10, 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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Respondent-Appellee,)	
)	
v.)	No. 99-CF-1675
)	
DEWAYNE WESTER,)	Honorable
)	George Bridges,
Petitioner-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court's denial, after a third-stage evidentiary hearing, of defendant's postconviction petition is affirmed. Public defender reimbursement fee is vacated.
- ¶ 2 In 2000, after a jury trial, defendant, Dewayne Wester, was found guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1998)). In his posttrial motion, defendant challenged the trial court's decision to permit certain individuals to testify for the State in rebuttal. The court denied defendant's posttrial motion and sentenced him to 45 years' imprisonment.

¶ 3 On direct appeal, defendant raised three arguments, but did not raise any allegations related to the rebuttal witnesses. This court affirmed defendant's conviction and sentence. *People v. Wester*, No. 2-01-0204 (2002) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2003, defendant, *pro se*, filed a postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2002)).¹ That petition was amended by counsel in 2005, and it raised a claim that the court had erred by allowing a witness to testify in rebuttal. Ultimately, the court dismissed the petition, defendant appealed, and we remanded. *People v. Wester*, No. 2-06-0097 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, defendant received the assistance of counsel, through the public defender's office, who amended the postconviction petition. Later, when private counsel appeared on defendant's behalf, the trial court ordered, pursuant to section 113-3.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/113-3.1(a) (West 2010)), that defendant be assessed a \$750 public defender fee. Further, private counsel amended the postconviction petition. The court denied the State's motion to dismiss the petition, held an evidentiary hearing, and, on September 28, 2011, denied the petition.

¶ 6 Defendant appeals from the denial of his postconviction petition. For ease of understanding defendant's claims, we note that the performance of the following attorneys is being challenged: (1) trial counsel (Michael Conway); (2) direct appeal counsel (Kim Campbell); and (3) private postconviction counsel (Gregory Nikitas). Defendant argues that Nikitas provided ineffective

¹Although unrelated to the issues in this appeal, we note that the petition was summarily dismissed. Defendant appealed, and this court remanded the petition for further proceedings. *People v. Wester*, No. 2-03-0864 (2004) (unpublished order under Supreme Court Rule 23).

assistance where he failed to argue that Campbell was ineffective on direct appeal for failing to argue that Conway was ineffective at trial for failing to object: (1) that the testimony of a rebuttal witness was hearsay; and (2) to the State's comments in closing argument, which referenced the rebuttal witness's testimony. Defendant asks this court to vacate the order denying the amended petition and to remand the cause for additional postconviction proceedings, specifically an evidentiary hearing on the issue of Campbell's ineffectiveness. In addition, defendant asks that we vacate the \$750 public defender reimbursement fee. We affirm the denial of the petition; however, we vacate the public defender fee.

¶ 7

I. BACKGROUND

¶ 8 A detailed recitation of the facts underlying defendant's conviction may be found in our Rule 23 order resolving defendant's direct appeal. For purposes of understanding the present issues, however, we note that the primary issue at trial was whether defendant committed first-degree murder or whether he shot the victim in self-defense. In addition to circumstantial evidence, three witnesses testified that they saw defendant repeatedly shoot the victim; two testified that, immediately preceding the shooting, they heard defendant and the victim argue about money. Defendant testified at trial that he was playing dice (*i.e.*, gambling) with four men in the neighborhood, including the victim, up until the time of the shooting. Defendant testified that the victim took some of the money defendant had won in the dice games, and that, when he tried to get it back, the victim began punching him. Defendant testified that, ultimately, he shot his gun multiple times at the ground to stop the victim's attack.

¶ 9 To rebut defendant's testimony that he was playing dice before the shooting, the State called several rebuttal witnesses. Defense counsel Conway objected, arguing that: (1) the witnesses had

been present during trial, despite a motion to exclude witnesses; and (2) because neither he nor the State knew “of these people” prior to defendant’s testimony, he had no way of determining if any of the proposed rebuttal witnesses had prior convictions that could be used for impeachment. The court overruled the objection, noting that defendant had, through his testimony, “put these people” into the case as potential witnesses.

¶ 10 Two witnesses testified that, contrary to defendant’s testimony, they did not play any dice games with defendant the day of the shooting. One rebuttal witness testified that her brother was in Alabama the day of the shooting, and that he was not, therefore, playing dice games with defendant.

¶ 11 Finally, the State called the victim’s sister, Sherene Blanchard, to testify in rebuttal. Sherene testified to the substance of a conversation she had with the victim on the morning of the shooting. Conway objected and, in a sidebar, complained that the State was seeking to elicit a statement reflecting that the victim’s argument with defendant may have been about drugs. He objected that the State had not disclosed the statement during discovery. The State replied that it expected Sherene to testify that the victim came to her asking for \$50 because “he [*i.e.*, the victim] had sold drugs and he shorted the guy \$50.” The State claimed that the testimony was relevant because defendant, by claiming that the \$50 at issue came from a dice game, “put the \$50 at issue[.]” Conway again argued that the State had failed to disclose the statement in discovery. The State replied “[e]veryone I asked can you tell me what this is about. They said we heard it was about drugs, but no one would give me a definite [*sic*], and I said I need somebody to give me a definite [*sic*].” The trial court overruled defendant’s objection.

¶ 12 Sherene testified that, the morning of the shooting, the victim asked her whether she had \$50 because he “owed this nigger some money.” When the State asked Sherene if the victim told her

why he owed the money, Conway objected; the court *sustained* the objection. Sherene then testified that she told the victim that she would talk to him about the money after she got off work that day, but that she would not pay his drug debt.

¶ 13 In his closing argument, Conway argued that the shooting happened after the victim took money from defendant during a dice game, and that defendant fired the gun to defend himself. Conway did not mention Sherene's testimony. During its rebuttal argument, the State told the jury that the altercation had nothing to do with a gambling game "because there wasn't [*sic*] no gambling game. *** You heard from [the victim's] sister who gets up here and tells you where the money is coming from. *** [The victim] knew he had to pay up that [debt], pay up that [debt] to [] defendant." Conway did not object to the State's comments. The jury rejected defendant's self-defense theory and convicted him of first-degree murder.

¶ 14 On appeal, defendant, through attorney Campell, challenged the sufficiency of the evidence. This court held that the evidence was sufficient to establish that defendant was the aggressor and did not act in self-defense when he shot the victim. We noted that three witnesses testified to seeing defendant initiate both the confrontation and the physical violence with the victim, and that two of the witnesses overheard defendant and the victim arguing about money. Further, we noted that Sherene had testified that, on the morning of the shooting, the victim asked her for \$50 because he "owed some nigger some money." We noted that there was testimony that defendant continued shooting the gun from across the street, even after the victim was on the ground and, at one point, when the victim was on his knees with his back to defendant. Finally, we stated "the evidence overwhelmingly established that [] defendant was the aggressor in the altercation with [the victim] and that defendant was not in imminent danger of death or great bodily harm when he shot [the

victim.]” Defendant’s direct appeal did not raise as an issue Sherene’s (or any other witnesses’) rebuttal testimony.

¶ 15 In his first postconviction petition, defendant, *pro se*, challenged Sherene’s rebuttal testimony as being improper on the bases that: (1) she was present when defendant had testified; and (2) the State had not provided Conway with the discovery he needed to prepare for her testimony, including information as to whether defendant or the victim sold drugs. Further, defendant argued that he was denied effective assistance of counsel in his direct appeal because counsel did not raise the foregoing issues.

¶ 16 For reasons unrelated here, this court reversed the summary dismissal of defendant’s initial petition and, on remand, counsel was appointed to assist defendant with his claims. Appointed counsel filed a supplemental petition on defendant’s behalf, which argued that the trial court had erred by allowing Sherene to testify in rebuttal because she had been present during defendant’s testimony and because her testimony was a surprise, impairing Conway’s ability to cross-examine her. Further, appointed counsel argued that Campbell was ineffective on direct appeal for not raising the issue. The petition was ultimately dismissed, defendant appealed, and we remanded due to the fact that appointed counsel, at the hearing on the State’s motion to dismiss the petition, had misstated the evidence.

¶ 17 That brings us to the petition at issue here: on remand, defendant was appointed new counsel in the public defender’s office. That attorney filed an amended petition. However, Nikitas subsequently appeared on defendant’s behalf and, thereafter, filed another amended petition.² That

²When Nikitas appeared on defendant’s behalf, the State asked the trial court to assess a public defender’s fee because defendant “has the money to hire and retain private counsel.” Neither

petition alleged that it was improper for the court to have allowed the State to call Sherene as a rebuttal witness, because she was present when defendant testified, her testimony was a surprise to the defense, the State had not previously produced her statement, and the defense was unable to investigate her testimony or prepare any cross-examination. The petition did not allege that direct appeal counsel (Campbell) was ineffective for not raising on direct appeal an issue regarding the rebuttal witnesses. Along with the amended supplemental petition, Nikitas filed a certificate, pursuant to Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)),³ stating that he had “consulted with defendant in person to ascertain [defendant’s] contentions of deprivation of constitutional right,” examined the “court file and the report of the proceedings of the record of the trial and subsequent proceedings including [the] appeal,” and that he had made “any amendments to the petition that are necessary for adequate presentation” of defendant’s arguments.

¶ 18 The trial court denied the State’s motion to dismiss the petition and proceeded to an evidentiary hearing. There, Conway (trial counsel) testified in part that: (1) he recalled objecting at trial to the State’s presentation of rebuttal witnesses who had been present during earlier portions of the trial; (2) the names of those witnesses were unknown to him before they were called to testify; (3) he was “definitely” surprised when the State called the witnesses; and (4) he felt he had been

the public defender who worked on his case, nor defendant was present. The court, without a hearing, assessed against defendant a public defender fee of \$750.

³Rule 651(c) requires counsel to consult with defendant “to ascertain his contentions of deprivation of constitutional right[s], 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 defendant’s contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

deprived of a fair opportunity to prepare for their cross-examination. Nikitas asked Conway if he recalled whether “hearsay testimony was provided by those rebuttal witnesses.” Conway could not recall, but “would like to have believed” that, if there had been hearsay testimony, he would have objected.

¶ 19 Nikitas argued to the court that the rebuttal witnesses had provided “significant testimony,” including that there was “a drug debt that was owed by the victim to the defendant.” This testimony, Nikitas argued, was not effectively “dealt with” on cross-examination, and it suggested that there was a motive for defendant’s actions. Other than Sherene’s testimony, Nikitas argued, there was no evidence that there was a drug debt owed. The State replied that defendant’s testimony opened the door to the rebuttal witnesses.

¶ 20 On September 28, 2011, in a written order, the trial court denied defendant’s postconviction claims. As to the rebuttal witnesses, the court found that: (1) despite their presence during trial, the trial court had properly exercised its discretion in allowing those witnesses to testify; and (2) defendant did not establish that he was prejudiced by the rebuttal testimony. Defendant appeals. For the following reasons, we affirm the denial of defendant’s postconviction petition, but vacate the public defender fee.

¶ 21

II. ANALYSIS

¶ 22

A. Ineffective-Assistance Claim

¶ 23 Defendant argues that Nikitas did not provide him reasonable assistance because he did not amend the postconviction petition to allege that: (1) Conway provided ineffective assistance at trial where he failed to raise a hearsay objection to Sherene’s testimony and failed to object to the State’s closing argument, which asserted that Sherene’s testimony explained defendant’s motive for the

shooting; and (2) Campbell provided ineffective assistance on direct appeal where she did not allege that Conway was ineffective on those grounds.

¶ 24 Specifically, defendant argues that, in contrast to the other rebuttal witnesses, who disputed his testimony about the dice game, the State had no legitimate reason to call Sherene as a rebuttal witness. Rather, defendant asserts, the State wanted Sherene to testify about the victim's request for \$50 to pay a drug debt to "some nigger," who remained unidentified, so that the jury would jump to the conclusion that the victim owed defendant money, thereby giving defendant a motive to find and shoot him. Defendant concedes that the trial court had discretion to permit motive evidence in rebuttal; however, he argues that Sherene's rebuttal testimony was inadmissible because it was unreliable and irrelevant hearsay. He notes that the probative value of the testimony depended on the truth of the assertion that the victim told Sherene he owed someone money in connection with a drug deal; however, Conway did not specifically object to this testimony as hearsay.

¶ 25 Defendant further argues that the record reflects that Nikitas realized that Sherene's testimony was hearsay and that its value as motive evidence depended on it being used as hearsay, yet he unreasonably failed to amend the petition to raise ineffective assistance claims against Conway and Campbell. Those ineffective claims had substantial merit, he argues, because, if counsel had objected and those objections had been sustained, the State would have had no motive evidence and the jury would have been more likely to accept defendant's version of events. Defendant notes that, while two witnesses stated that defendant and the victim were arguing over money, neither testified to hearing anything about defendant trying to collect a drug debt. Defendant concludes, "[a]t the very least, the jury may have had a reasonable doubt as to whether [he] fired the

shots without lawful justification and with the mental state required to prove him guilty of first degree murder instead of involuntary manslaughter.” We disagree.

¶ 26 First, we establish the proper framework: defendant does not challenge the trial court’s substantive rulings in its dismissal, after an evidentiary hearing, of the postconviction petition. Accordingly, despite defendant’s contentions that the State had no legitimate reason to call Sherene, he is not appealing the issue of the propriety of the court’s decision to allow her to testify. Rather, defendant’s argument here concerns an allegation *not raised* below. While, generally, an issue not raised in a postconviction petition is forfeited (see *e.g.*, *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006)), defendant’s argument on appeal is premised on the fact that his postconviction counsel did not amend the petition to raise certain issues; namely, ineffective assistance of counsel. As such, the specific issue defendant raises for our consideration is whether postconviction counsel Nikitas provided unreasonable assistance where he failed to amend the postconviction petition to allege, essentially, two ineffective-assistance claims (*i.e.*, against appellate counsel Campbell for not challenging Conway’s trial performance).

¶ 27 A defendant has no constitutional right to effective assistance of counsel in a postconviction setting; rather, he or she has only a statutory right to *reasonable* assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). The question whether a defendant was afforded the reasonable assistance of counsel is subject to *de novo* review. *People v. Crane*, 195 Ill. 2d 42, 51 (2001).

¶ 28 Here, defendant’s claim that Nikitas did not provide reasonable assistance where he did not amend the petition to allege ineffective assistance on the bases currently alleged fails. We note first that “[p]ostconviction counsel is only required to investigate and properly present the *petitioner’s* claims.” (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993). Defendant did not,

in his *pro se* petition, allege ineffective assistance (against either Conway or Campbell) based on Conway's failure to object, on hearsay grounds or during closing argument, to Sherene's testimony; rather, he argued that the rebuttal testimony was improper due to the witnesses' presence during trial and the element of surprise, and that Campbell was ineffective for not raising these issues on direct appeal. Nikitas, in turn, amended the petition to flesh out those claims. Defendant argues that it was unreasonable for Nikitas not to further add that: (1) Conway should have objected that Sherene's testimony contained hearsay and should have objected during the State's closing argument, which referenced her testimony; and (2) Campbell was ineffective for not arguing on direct appeal that Conway was ineffective on those bases. However, Rule 651(c) requires only that postconviction counsel examine the record to adequately present and support the constitutional claims raised by the petition. *Id.* Further, while postconviction counsel "may raise additional issues if he or she so chooses, there is no obligation to do so." *Pendleton*, 223 Ill. 2d at 476.

¶ 29 Defendant acknowledges the general proposition that postconviction counsel is not obligated to scour the record to add new claims. *People v. Komes*, 2011 IL App (2d) 100014, ¶ 32. However, defendant argues that counsel still remains charged with ascertaining those claims that a defendant may have, but nevertheless failed to properly state in the original petition, and to fill omissions in the petition. See *id.* at ¶ 33. Here, defendant argues, where Nikitas's comments at the hearing suggested that he recognized Sherene's testimony was hearsay, his failure to bolster an already-alleged ineffective-assistance claim with that argument was unreasonable. We disagree.

¶ 30 Preliminarily, *Komes* concerned the sufficiency of an appointed counsel's motion to withdraw, at the second stage, based on the alleged frivolity of the defendant's claims, where the record did not reflect even that counsel had satisfied Rule 651(c)'s requirement. *Id.* In contrast, here,

Nikitas clearly fulfilled his obligations under Rule 651(c) and provided reasonable assistance to defendant in presenting his claims. Ultimately, the crux of defendant's claim is that Sherene's rebuttal testimony was improper and inadmissible. Nikitas presented that overarching issue, and it was fully considered below. It is true that Nikitas did not amend the petition to specifically allege that Sherene's testimony contained hearsay, or that Conway was ineffective for not objecting to the State's closing argument that relied on Sherene's testimony. However, Nikitas argued to the court that Sherene's rebuttal testimony was improper because she was present and it was a surprise, that it contained significant, damaging allegations, and that her testimony was not sufficiently "dealt with" on cross-examination. Further, when examining Conway about the rebuttal witnesses' testimony, Nikitas raised the question of hearsay within that testimony, albeit briefly.

¶ 31 Finally, we disagree with defendant that, even if Nikitas had amended the petition to raise these arguments, he would have prevailed on the petition. Postconviction counsel is not required to "advance frivolous or spurious claims on defendant's behalf." *Pendleton*, 223 Ill. 2d at 472. For a postconviction petition to state a constitutional claim of ineffective assistance of counsel, it must allege facts to show that counsel's performance was objectively unreasonable (*i.e.*, deficient performance) *and* that it is reasonably probable that, but for counsel's deficient performance, the result of the proceeding would have been different (*i.e.*, prejudice). *People v. DuPree*, 397 Ill. App. 3d 719, 735 (2010); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, the petition must allege facts to show that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 32 There is simply no *reasonable* probability, in light of the entirety of the trial evidence, that, had Nikitas alleged that Campbell and Conway were ineffective, basing those claims ultimately on Conway's failure to challenge the hearsay in Sherene's testimony or the State's comments in closing, the result of trial would have been different. We agree with the State that Sherene's rebuttal testimony simply was not essential to defendant's conviction. In other words, even had Sherene not testified, the result would have been the same. As we noted in our Rule 23 order resolving defendant's direct appeal, the issue at trial was first-degree murder versus self-defense; there was sufficient evidence for the jury to reject defendant's self-defense argument. Defendant makes much about the "drug-debt" testimony that came in through Sherene's testimony and the State's closing argument. He notes that even the State asserted that it "needed" Sherene's testimony in order to establish motive. However, there is a distinction between the State asserting that, to establish motive, it needs a particular witness's testimony to do so, and the "need" to establish motive. In other words, it may be true that, without Sherene's testimony the State lacked specific evidence regarding motive. However, the State was not required to prove motive in the first place. See *e.g.*, *People v. Ward*, 154 Ill. 2d 272, 320 (1992). Further, comments regarding a "drug debt" were, frankly, minimal. In fact, when the State asked Sherene if the victim told her *why* he owed someone money, Conway *objected*, presumably on hearsay grounds, and that objection was sustained. Instead, it was Sherene who recounted that *she* told the victim she would not pay his drug debt. Although the State hinted that the motive was a "drug debt" in its closing argument, it did not specifically use those words.

¶ 33 Finally, the critical point is that, under either theory of the case, defendant's or the State's, the evidence reflected that, during the altercation, defendant was trying to collect money from the

victim (either because the victim took defendant's gambling money or due to the victim's drug debt). Accordingly, under either theory, the jury heard evidence of a motive, *i.e.*, defendant trying to recapture his money. The question, therefore, became one of credibility. Given that three eyewitnesses saw defendant initiate the confrontation and shoot the victim, including when the victim was on the ground and not facing defendant, and given that the witnesses with whom defendant claimed to be playing dice specifically denied that claim, the evidence was sufficient for the jury to reject defendant's version of events.

¶ 34 Accordingly, even if Conway had *specifically* objected to Sherene's testimony on hearsay grounds or had objected to the State's closing argument, the result of the trial would not have been different. Thus, if Campbell had raised this claim on direct appeal, it would have failed because, without establishing prejudice, defendant's ineffective-assistance claim fails. As such, had Nikitas raised these claims in the postconviction petition, they, too, would have failed. In sum, Nikitas did not provide unreasonable assistance by failing to amend the postconviction petition to add the ineffective-assistance claims alleged here.

¶ 35 B. Public Defender Fee

¶ 36 Defendant next argues that the trial court improperly imposed the \$750 public defender fee. He submits that a fee pursuant to section 113-3.1 of the Code may not be imposed in a postconviction proceeding and, further, that the fee must be vacated because the trial court imposed the fee without holding a hearing, as required by the statute. The State agrees with defendant, asserting that, even if the fee is allowed in a postconviction setting, the matter would require a remand for a hearing. Nevertheless, the State concludes that this court should vacate the fee.

¶ 37 Section 113-3.1(a) provides:

“Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant’s financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court’s own motion or on motion of the State’s Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level.”
725 ILCS 5/113-3.1(a) (West 2010).

¶ 38 We need not answer the question whether section 113-3.1 permits the trial court to impose a reimbursement fee in a postconviction setting. Under the circumstances of this case, as the State concedes, even if the statute authorizes reimbursement to postconviction counsel, it is clear that, before imposing a public defender reimbursement fee, the trial court must hold a hearing to determine a defendant’s ability to pay. See *e.g.*, *People v. Gutierrez*, 2012 IL 111590, ¶ 17; *People v. Love*, 177 Ill. 2d 550, 563 (1997). No such hearing occurred here. Rather, without defendant or his public defender present, the court imposed the fee at the State’s request after private counsel, Nikitas, appeared on defendant’s behalf. As the parties note, there was no inquiry into defendant’s ability to pay the fee, his fee arrangement with Nikitas, or whether, in fact, defendant, as opposed to another person, was responsible for paying for Nikitas’s services.

¶ 39 The question, therefore, becomes one of remedy. When a public defender fee is vacated on appeal, the matter may be remanded for a hearing on defendant’s ability to pay. See, *e.g.*, *Love*, 177

Ill. 2d at 565; *People v. Fitzpatrick*, 2011 IL App (2d) 100463, ¶ 14. However, as the State here agrees with defendant’s interpretation of the issue and requests, in its conclusion, that we “vacate the \$750 public defender reimbursement fee,” we vacate the fee without a remand.

¶ 40

III. CONCLUSION

¶ 41 Accordingly, the judgment of the circuit court of Lake County is affirmed in part and vacated in part.

¶ 42 Affirmed in part; vacated in part.