

2014 IL App (2d) 130287-U
No. 2-13-0287
Order filed September 30, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-4156
)	
BRIAN D. KUTINAC,)	Honorable
)	Christopher R. Stride,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* Postconviction counsel did not provide defendant with reasonable assistance: despite the availability of the witness whom trial counsel allegedly should have investigated, postconviction counsel did not submit an affidavit or testimony from that witness as required to support defendant's claim.
- ¶ 2 Defendant, Brian D. Kutinac, appeals the denial of his postconviction petition following an evidentiary hearing. He claims that his postconviction counsel provided unreasonable assistance because counsel failed to properly support defendant's claim that his trial counsel was ineffective for failing to investigate and locate pivotal witnesses to support defendant's claim of

innocence.¹ For the reasons that follow, we agree, and, thus, we reverse the denial of defendant's postconviction petition and remand this cause for further proceedings.

¶ 3 The following facts are relevant to resolving the issue raised. Defendant was charged with theft of property over \$300 (720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2008)). The victim, Isabell Samsa, reported that defendant stole some jewelry and a guitar amplifier from her and then pawned these items at Superpawn and Alexander's Jewelry and Loan around September 6, 2008. Defendant pleaded guilty and received probation.

¶ 4 Thereafter, the State petitioned to revoke defendant's probation, defendant admitted to violating the probationary terms, and he received a term of intensive probation. Defendant violated the terms of intensive probation when he failed to return to work release after a drug treatment evaluation, and the State again petitioned to revoke his probation and charged defendant with escape (720 ILCS 5/31-6(a) (West 2010)). Defendant pleaded guilty to escape and admitted violating the terms of intensive probation. Following a sentencing hearing, the court sentenced defendant to consecutive terms of six years' imprisonment.

¶ 5 Subsequently, defendant petitioned for postconviction relief, claiming that (1) the trial court failed to admonish him about MSR and (2) "[c]learly exculpatory evidence had been

¹ In the trial court, postconviction counsel raised a claim regarding mandatory supervised release (MSR). In his initial brief, defendant mentions only that "[o]n the first issue, involving MSR admonishments, post-conviction counsel offered no evidence and no argument." In his reply brief, defendant notes that the State responded to this statement, and then defendant asserts, "However, [defendant] never made this argument [concerning postconviction counsel's failure to support the MSR claim]." Accordingly, here, we do not consider postconviction counsel's assistance as it relates to the MSR issue.

deliberately withheld from the defense counsel.” To support his second claim, defendant attached his presentence investigation report (PSI), which indicated that “employees, at one of the pawn shops, observed [Samsa] with the defendant at the time [the items were pawned], however, they did not have video recordings of them being there together.” Attached to the petition at a later date was a police report that indicated that “Jason [Neuhaus] and other Superpawn employees all said they remembered [Samsa] coming to Superpawn with [defendant] to pawn the tools.”

¶ 6 A few months later, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). In that petition, defendant contended that he did not knowingly and voluntarily plead guilty, because, when he pleaded guilty, evidence concerning the witnesses who saw him at the pawn shop was not disclosed to him. Defendant then claimed that his trial counsel was ineffective, because she did not tell defendant about these witnesses.

¶ 7 Because the trial court did not rule on defendant’s postconviction petition within 90 days after the petition was filed, the petition advanced to the second stage of postconviction proceedings, where counsel was appointed to represent defendant. See *People v. Swamynathan*, 236 Ill. 2d 103, 114 (2010). Appointed counsel filed a supplemental petition and a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). In the supplemental petition, counsel claimed that defendant was not advised about MSR, “his trial counsel rendered ineffective assistance *** in that she failed to ensure that the [d]efendant entered a voluntary and intelligent plea of guilty,” and the State improperly withheld exculpatory evidence. Nothing of substance to support these claims was attached to the supplemental petition. Moreover, counsel

later withdrew defendant's 2-1401 petition, but he did so only after defendant assured the court that that was what defendant wished to do.

¶ 8 The State moved to dismiss the postconviction petition, and, at the hearing on that motion, postconviction counsel withdrew the claim that the State withheld exculpatory evidence. After determining that, "at the end of the day, what the defendant's petition ultimately is alleging is an ineffective assistance of counsel argument," the court denied the State's motion to dismiss, and the petition advanced to the third stage, where the court is required to hold an evidentiary hearing. See 725 ILCS 5/122-6 (West 2010).

¶ 9 Evidence presented at the evidentiary hearing revealed that defendant told his trial attorney that there had to be witnesses who could verify that he was with Samsa when he went to Superpawn. Defendant testified that his trial attorney told him there were no witnesses, that counsel never mentioned Neuhaus, and that he learned about Neuhaus only after he admitted the petition to revoke and the PSI was prepared. Trial counsel testified that she contacted an investigator who worked with the public defender's office and that the investigator made several attempts to contact Superpawn employees who were working when Samsa and defendant went to the store. In particular, the investigator made numerous attempts to contact Neuhaus by leaving his business card with employees at Superpawn and obtaining an address for Neuhaus. Nevertheless, the investigator was never able to get in touch with Neuhaus. Trial counsel also testified that she told defendant before he pleaded guilty that she would continue to work on tracking Neuhaus down if defendant wished to proceed with a trial.

¶ 10 Stipulated testimony and a report prepared by an investigator who was appointed after the court denied the State's motion to dismiss the petition were also admitted at the evidentiary hearing. The stipulated testimony indicated that an officer working on the theft case spoke to

Neuhaus and other employees at Superpawn and that these people remembered defendant coming to the store with Samsa to pawn tools. The stipulated testimony also indicated that Samsa, if called to testify, would state that she did not go to Superpawn with defendant on September 6, 2008, which was the date that the items were allegedly pawned, but was at the store on a different date. Further, the stipulation provided that video recordings of what transpired at Superpawn and Alexander's on September 6, 2008, were made but were recorded over well before the first time defendant appeared in court and the first time an assistant public defender was appointed to represent defendant. According to the investigator's report, Neuhaus had a criminal history, and the investigator obtained a last known address for Neuhaus. However, nothing indicates that the investigator ever contacted Neuhaus.

¶ 11 In closing argument, postconviction counsel argued that defendant's trial counsel was ineffective when she "failed to uncover readily available evidence." Postconviction counsel claimed that, with the report, it was established that within "two or three days, [postconviction counsel's investigator] was able to track down Mr. Neuhaus," who "was not someone that was difficult to find[.]" As far as establishing that defendant was prejudiced by trial counsel's performance, postconviction counsel argued generally that "if [defendant] had known of these witnesses, if he had had a proper investigation of his case, if he had had a more efficient attorney, the defendant would not have pled guilty."

¶ 12 The court denied the petition. In so doing, the court noted that defendant never produced Neuhaus, who still could not be found, or anyone else who "is going to sit in the back of this courtroom, decide to come up, swear under oath and testify that [Samsa] was in that pawn shop with [defendant]." The court went on to note that the failure to find such evidence was "not

through the fault of [defendant's trial counsel.]" Rather, the court specifically found that "[trial counsel] was effective in her representation of [defendant]." This timely appeal followed.

¶ 13 At issue in this appeal is whether the denial of defendant's postconviction petition was proper. Under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), individuals convicted of criminal offenses may challenge their convictions based on constitutional violations. *People v. Domagala*, 2013 IL 113688, ¶ 32. In adjudicating such claims, the Act provides a three-stage process. *People v. English*, 2013 IL 112890, ¶ 23. As noted, this appeal concerns the denial of claims following a third-stage evidentiary hearing. Defendant contends that this denial was improper, because his postconviction counsel provided unreasonable assistance when counsel failed to support defendant's claim that his trial counsel was ineffective for failing to investigate and locate pivotal witnesses to support defendant's claim of innocence. We review *de novo* whether postconviction counsel provided unreasonable assistance. See *People v. Suarez*, 224 Ill. 2d 37, 42 (2007).

¶ 14 In considering the issue raised, we initially observe that the parties have analyzed postconviction counsel's performance under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Although this rule is most often addressed in reference to postconviction counsel's performance at the second stage of postconviction proceedings, no authority suggests that, if the petition advances to an evidentiary hearing, Rule 651(c) no longer applies. *Id.* (providing what postconviction counsel must do, but not specifying time for doing so). Accordingly, we examine postconviction counsel's performance under the Rule 651(c) standard.

¶ 15 The right to counsel in a postconviction proceeding is statutory, not constitutional. *People v. Davis*, 382 Ill. App. 3d 701, 709 (2008). Under the Act, "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, 541 (2009). The duty to provide reasonable assistance requires compliance with the specific obligations described in Rule 651(c). See *Davis*, 382 Ill. App. 3d at 711. That rule provides, in pertinent part, that “[t]he record [on appeal] shall contain a showing, which may be made by the certificate of [the defendant’s] attorney, that the attorney has consulted with [the defendant] either by mail or in person to ascertain his 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 [the defendant’s] contentions.” Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984).

¶ 16 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23. Here, postconviction counsel filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received the representation required by that rule. It is defendant’s burden to overcome this presumption by establishing that postconviction counsel failed to substantially comply with the duties delineated in Rule 651(c). *Id.*

¶ 17 Defendant maintains that he has rebutted the presumption of substantial compliance. He argues that, notwithstanding the Rule 651(c) certificate, counsel failed to fulfill his duties when counsel did not supplement the petition with affidavits from Neuhaus or other employees at Superpawn who could verify that Samsa was at the store with defendant when defendant pawned her property.

¶ 18 Although postconviction counsel must amend a *pro se* petition so as to shape the defendant’s claims into proper legal form (*People v. Perkins*, 229 Ill. 2d 34, 43-44 (2007)), counsel’s failure to supply necessary affidavits or other evidence will not, in itself, rebut the

presumption that arises from the Rule 651(c) certificate. To the contrary, when necessary affidavits are lacking, courts “may reasonably presume that post-conviction counsel made a concerted effort to obtain affidavits in support of the post-conviction claims, but was unable to do so.” *People v. Johnson*, 154 Ill. 2d 227, 241 (1993); see also *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25. Nevertheless, if the record “flatly contradict[s]” that presumption by, for example, establishing that postconviction counsel was mistaken about the applicable law, a court must conclude that postconviction counsel provided unreasonable assistance. See *People v. Waldrop*, 353 Ill. App. 3d 244, 250 (2005).

¶ 19 Here, in addressing whether postconviction counsel provided unreasonable assistance in failing to support defendant’s claim of ineffective assistance of trial counsel, we observe that an ineffective-assistance claim involving a challenge to a guilty plea is governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). Under *Strickland*, a defendant must establish that his attorney’s representation fell below an objective standard of reasonableness and that the defendant was prejudiced by this deficient performance. *Strickland*, 466 U.S. at 687-88. The failure to satisfy either prong of *Strickland* precludes a court from finding that counsel was ineffective. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). Thus, we may resolve the issue of trial counsel’s ineffectiveness on the basis that the defendant did not suffer prejudice, without considering whether counsel’s performance was also constitutionally deficient. *People v. Goodwin*, 2012 IL App (4th) 100513, ¶ 36.

¶ 20 “To establish prejudice, a defendant must show that there is a ‘reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’ ” *Rissley*, 206 Ill. 2d at 457 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). A bare allegation that the defendant would have pleaded not guilty and insisted on a trial if his counsel

had not been deficient is not enough to establish prejudice. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Id.* at 335-36.

¶ 21 Here, postconviction counsel argued that trial counsel was ineffective for failing to investigate Neuhaus, pointing out that Neuhaus was reachable. However, a claim that trial counsel was ineffective for failing to investigate a witness requires an affidavit of the witness whom counsel allegedly should have investigated. See *Johnson*, 154 Ill. 2d at 243. Postconviction counsel here did not provide an affidavit from Neuhaus, and the stipulated testimony of the investigator was not a valid substitute. As a result, postconviction counsel did not support defendant's ineffective-assistance claim. Although we generally assume that counsel tried but failed to obtain an affidavit (*id.* at 241), that proposition is rebutted here, as postconviction counsel argued that Neuhaus was reachable and counsel failed to contact him. Accordingly, the presumption that, because postconviction counsel filed a Rule 651(c) certificate, counsel provided reasonable assistance, is also rebutted. See *Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 22 The State argues that postconviction counsel's failure to obtain an affidavit or present testimony from Neuhaus was not unreasonable. Specifically, the State asserts that "[o]nce [postconviction counsel's] investigation was completed, it was not unreasonable for post-conviction counsel to have ended his pursuit of Jason Neuhaus, who simply could not have been a credible witness, as acknowledged by post-conviction counsel." The State's argument is misplaced. Such concerns go to the weight of the evidence, which is immaterial in assessing whether postconviction counsel provided reasonable assistance. See *Suarez*, 224 Ill. 2d at 47.

¶ 23 In conclusion, because counsel did not provide reasonable assistance, we must remand this cause for a new evidentiary hearing. See *People v. Rankins*, 277 Ill. App. 3d 561, 564-65 (1996). On remand, the State may raise its claim concerning modifying the mittimus to reflect the court's imposition of one year of MSR.

¶ 24 For these reasons, the judgment of the circuit court of Lake County is reversed, and this cause is remanded for further proceedings.

¶ 25 Reversed and remanded.