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2017 IL App (3d) 150431-U

Order filed July 3, 2017

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee, )	Peoria County, Illinois.
)	
v. )	Appeal No. 3-15-0431
)	Circuit No. 05-CF-937
LOUIS D. BAILEY, )	
)	The Honorable
Defendant-Appellant. )	David A. Brown,
)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court properly denied defendant's claim of ineffective assistance of trial counsel contained in his postconviction petition where defendant did not allege that he reaffirmed his desire to testify during trial. Defendant was not denied reasonable assistance where postconviction counsel filed Rule 651(c) certificate and supplemented defendant's petition with actual-innocence claim.

¶ 2 Defendant was convicted of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2004). After an unsuccessful appeal, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of trial and appellate counsel. The petition advanced to the second stage of

postconviction proceedings, where postconviction counsel supplemented the petition with a claim of actual innocence. The State filed a motion to dismiss, and the court dismissed defendant's ineffective assistance claims. Defendant's actual-innocence claim proceeded to a third-stage hearing after which the trial court denied it. Defendant appeals, arguing that (1) he was entitled to a third-stage hearing on his claim of ineffective assistance of trial counsel, and (2) his postconviction counsel did not provide reasonable assistance. We affirm.

¶ 3

### FACTS

¶ 4

In September 2005, defendant Louis Bailey, Torlando McDonald and Stephen Bailey were indicted for first degree murder in the shooting death of Darren English. Defendant and Bailey were tried jointly by a jury.

¶ 5

The evidence at trial revealed that police responded to the home of Lavinia Faulkner, English's girlfriend, early in the morning on August 27, 2005, after receiving a 9-1-1 call. The officers found English dead in Faulkner's backyard with a gunshot wound to his head. Inside Faulkner's home, police found evidence of a struggle in the kitchen and bathroom. They also found blood, bullet holes, several 9mm cartridges and evidence of drug dealing in the home.

¶ 6

McDonald testified that he went with defendant to Faulkner's house on August 27, 2005, between 1:00 and 3:00 a.m. Bailey, Faulkner and English were at Faulkner's house when McDonald and defendant arrived. Defendant had a 9mm gun with him.

¶ 7

In Faulkner's house, McDonald saw defendant point his gun at English and heard a click. Defendant and English then began wrestling with each other. They first went into the bathroom, where McDonald heard two gun shots before the gun jammed again. Defendant and English continued struggling and went into the kitchen. McDonald could not see what happened in the

kitchen but heard two more gunshots. After that, McDonald left Faulkner's house. As he ran down the street, he heard two more gunshots that sounded like they were fired outside.

¶ 8 McDonald admitted that he testified at trial pursuant to a deal with the State. In exchange for his trial testimony, the State agreed to dismiss the murder charge against him and sentence him to three years in prison for obstruction of justice.

¶ 9 During the trial, defense counsel stated that defendant did not plan to testify, and defendant agreed. The following exchange took place in court:

“THE COURT: Mr. Louis Bailey, I want to go over this with you. You understand you have the right to testify in your own case but no one can force you to testify. As I understand it, you talked to your attorney about that and you've made the decision at this point in time not to testify in this case, is that correct?

DEFENDANT LOUIS BAILEY: Yes, sir.

THE COURT: Do you have any questions about that at all?

DEFENDANT LOUIS BAILEY: No, sir.”

¶ 10 The jury found defendant guilty of first degree murder. The jury also found that defendant personally discharged a firearm. The court sentenced defendant to a total of 55 years in prison. Defendant filed a motion for a new trial and a motion to reconsider his sentence. The trial court denied both motions. Defendant appealed, arguing that he was not proven guilty beyond a reasonable doubt. We affirmed defendant's conviction. *People v. Bailey*, No. 3-08-0277 (2009) (unpublished order under Supreme Court Rule 23).

¶ 11 Thereafter, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of trial and appellate counsel. Defendant alleged, in part, that “prior to the start of trial he express[ed] his desire to testify” to his trial counsel. Defendant alleged that he would have

testified that English and Faulkner began fighting, and McDonald intervened and shot English. Defendant alleged that “[a]fter expressing his disire [sic] to testify \*\*\*, counsel then threaten[ed] to withdraw from the case and when counsel threaten[ed] to withdraw [he] decided not to testify in that regard.” Those allegations were supported by an affidavit from defendant in which he stated:

“10. I advised my trial attorney prior to trial that I wanted to testify \*\*\*[.] Upon being informed of my testimony, defense counsel stated she did not want me to testify in that regard because there was no evidence to support my claim.

\*\*\*

12. After going back and forth for a while on this issue my counsel \*\*\* then threaten[ed to] withdraw from the case [be]cause we didn’t see eye to eye. Based on counsel’s attempt to withdraw I did not testify.”

¶ 12 Defendant’s *pro se* petition advanced to the second stage of postconviction proceedings, and postconviction counsel was appointed to represent defendant. Defendant’s postconviction counsel filed a Rule 651(c) certificate in February 2011. Defendant’s case was reassigned to two different attorneys and then reassigned to his original postconviction counsel in September 2013. In July 2014, postconviction counsel filed a “supplement” to defendant’s *pro se* postconviction petition, which stated in pertinent part:

“3. Recently, Torlando McDonald has executed a[n] affidavit recanting his trial testimony.

4. This document is new to the defense and in light of the fact, that, Defendant was not apprehended at the scene, there was no confession, there is no forensic evidence linking him to the death of English, it is

fundamentally unfair and a violation of Due Process not to grant  
Defendant a[n] evidentiary hearing and[/]or new trial.”

Attached to the “supplement” was an affidavit from McDonald in which he stated that he had never been to Faulkner’s house and was not there when English was killed.

¶ 13 The State filed a motion to dismiss defendant’s postconviction petition. A second-stage hearing was held in July 2014. At the hearing, postconviction counsel referred to the supplemental claim as “a claim of actual innocence based on this newly discovered item.” The trial court entered an order dismissing defendant’s ineffective-assistance claims but advancing the supplemental claim to the third stage because it stated the gist of an actual-innocence claim.

¶ 14 At the beginning of the third-stage hearing, the trial court referred to defendant’s claim as one of “actual innocence.” At the hearing, McDonald and several police officers testified. After the hearing, the court denied defendant’s actual-innocence claim, finding McDonald’s testimony and affidavit “entirely incredible.”

¶ 15 ANALYSIS

¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2014)) “provides a three-stage process for adjudicating [postconviction] petitions.” *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the trial court summarily dismisses the petition if it determines that it is “frivolous or is patently without merit.” 725 ILCS 5/122–2.1(a)(2) (West 2014). If the petition survives the first stage, it advances to the second stage, at which time the trial court appoints counsel for an indigent defendant. *Cotto*, 2016 IL 119006, ¶ 26; see also 725 ILCS 5/122–4 (West 2014).

¶ 17 At the second stage, the trial court determines whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v.*

*Edwards*, 197 Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. *Id.* If, however, a substantial showing of a constitutional violation is shown, the petition is advanced to the third stage, where the trial court conducts an evidentiary hearing. *Edwards*, 197 Ill.2d at 246; *Pendleton*, 223 Ill.2d at 472-73; see 725 ILCS 5/122–6 (West 2006).

¶ 18 At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill.2d at 473. At the hearing, the trial court “may receive proof by affidavits, depositions, oral testimony, or other evidence,” and “may order the [defendant] brought before the court.” 725 ILCS 5/122–6 (West 2006).

¶ 19 I. Effective Assistance of Trial Counsel

¶ 20 Defendant argues that he was entitled to a third-stage evidentiary hearing on his claim that his trial counsel was ineffective for refusing to allow him to testify.

¶ 21 “A criminal defendant has a fundamental right to decide whether to testify.” *People v. Lester*, 261 Ill. App. 3d 1075, 1079 (1994) (citing *People v. Brown*, 54 Ill. 2d 21, 23-24 (1973)). Although an attorney may advise a defendant whether to testify, the decision is ultimately for the defendant. *Id.* Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 22 When a defendant alleges in a postconviction petition that his trial counsel was ineffective for refusing to allow him to testify at trial, the claim should proceed to an evidentiary hearing only if the defendant alleges that he reiterated his desire to testify to his attorney “during the trial.” *Youngblood*, 389 Ill. App. 3d at 217; see also *People v. Thompkins*, 161 Ill. 2d 148, 177 (1994) (court correctly rejected defendant’s postconviction claim of ineffective assistance where nothing in record showed defendant reaffirmed his intention to testify after trial began);

*Brown*, 54 Ill. 2d at 24 (court properly denied evidentiary hearing to defendant who failed to assert his right to testify despite advice to the contrary “when the time came for him to testify”). “[T]o obtain an evidentiary hearing based on a claim that a defendant was prevented by his attorney from testifying at trial, a post-conviction petitioner must allege in his affidavit that ‘when the time came for him to testify, [he] told his lawyer that he wanted to do so despite advice to the contrary.’ ” *Lester*, 261 Ill. App. 3d at 1079. Absent an allegation that defendant asserted his right to testify during trial, “defendant has not stated the gist of a claim that his right to testify was violated by counsel.” *Youngblood*, 389 Ill. App. 3d at 217. “When a defendant’s postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant’s trial, the defendant made ‘a contemporaneous assertion \*\*\* of his right to testify.’ ” *Id.* (quoting *Brown*, 54 Ill. 2d at 24).

¶ 23 Here, defendant alleged in his affidavit and petition that he told his counsel “prior to trial” that he wanted to testify. Defendant failed to allege that he reaffirmed his desire to testify after the trial began. Thus, his claim of ineffective assistance was properly rejected by the trial court at the second stage of postconviction proceedings. See *Thompkins*, 161 Ill. 2d at 177; *Brown*, 54 Ill. 2d at 24; *Youngblood*, 389 Ill. App. 3d at 217; *Lester*, 261 Ill. App. 3d at 1079.

¶ 24 II. Reasonable Assistance of Postconviction Counsel

¶ 25 Defendant argues that we should remand for further third-stage postconviction proceedings because he was denied reasonable assistance of postconviction counsel.

¶ 26 A defendant has no constitutional right to the assistance of counsel in postconviction proceedings. *Cotto*, 2016 IL 119006, ¶ 29. The Act guarantees “only a ‘reasonable’ level of assistance.” *Pendleton*, 223 Ill.2d at 472 (quoting *People v. Munson*, 206 Ill.2d 104, 137 (2002)).

To ensure that defendants receive reasonable assistance, Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) imposes specific duties on postconviction counsel and requires that the record disclose that counsel has fulfilled these mandatory duties. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18.

¶ 27 Rule 651(c) requires that the record in postconviction proceedings demonstrate that appointed counsel “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). Supreme Court Rule 651(c) requires postconviction counsel to file an affidavit certifying that he has complied with these requirements. *Schlosser*, 2012 IL App (1st) 092523, ¶ 18. Counsel’s certificate of compliance creates a presumption that he complied with the requirements, but that presumption can be rebutted. See *id.* ¶ 33.

¶ 28 Postconviction counsel is not required to amend a postconviction petition to add claims not already implicated in the *pro se* petition or to explore or formulate potential claims. *Pendleton*, 223 Ill. 2d at 475-76. Counsel’s duties are limited to ascertaining the claims raised in the defendant’s petition and shaping those claims into “appropriate legal form.” *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993).

¶ 29 The Due Process Clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. 1, § 2) affords postconviction petitioners the right to assert a claim of actual innocence based on newly discovered evidence. *People v. Parker*, 2012 IL App (1st) 101809, ¶ 80. A codefendant’s exculpatory affidavit can constitute “new evidence.” *Id.* ¶¶ 83-84.



¶ 30 Here, postconviction counsel filed a Rule 651(c) certificate. Thus, the presumption exists that defendant received reasonable assistance, and it is defendant's burden to overcome the presumption by demonstrating his attorney's failure to substantially comply with the duties mandated by Rule 651(c). *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. Defendant contends that he has overcome the presumption of reasonable assistance because his counsel (1) filed his Rule 651(c) certificate more than three years before he amended defendant's postconviction petition, and (2) failed to put the supplemental claim into "proper legal form." We reject both of these contentions.

¶ 31 First, postconviction counsel filed a Rule 651(c) certificate stating that he consulted with defendant by mail and in person to ascertain his claims, examined the record of proceedings and "made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions." While this certificate was filed three years before counsel added the supplemental actual-innocence claim, counsel had no obligation to file a new Rule 651(c) certificate. Nothing in Rule 651(c) provides that a certificate expires or becomes ineffective after a certain amount of time, and we refuse to read such a provision into the rule. See *People v. Taylor*, 388 Ill. App. 3d 169, 180 (2009) (supreme court rules are to be construed and applied according to their plain language). When postconviction counsel files a Rule 651(c) certificate, it is effective throughout postconviction proceedings no matter how long they take.

¶ 32 Additionally, defendant's contention that counsel's supplemental claim was not in "proper legal form" is not supported by the record. At the second and third-stage hearings on defendant's petition, both postconviction counsel and the trial court referred to counsel's supplemental claim as one of "actual innocence." In its order following the second-stage hearing, the trial court discussed the requirements for an actual-innocence claim and advanced

the supplemental claim to the third stage, finding that it stated the gist of an actual-innocence claim. Because the trial court understood counsel’s supplemental claim to be one of actual innocence and advanced it to the third stage of postconviction proceedings, defendant’s contention that the claim was not in “proper legal form” is contradicted by the record. Defendant has failed to rebut the presumption created by counsel’s Rule 651(c) certificate.

¶ 33

#### CONCLUSION

¶ 34

The judgment of the circuit court of Peoria County is affirmed.

¶ 35

Affirmed.