2017 IL App (5th) 140238-U

NO. 5-14-0238

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 94-CF-33
	)	
RICHARD L. LLOYD,	)	Honorable
	)	Eugene E. Gross,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's post conviction petition at the second stage of the proceeding where the defendant met his burden of making a substantial showing of a constitutional violation. We reverse and remand for an evidentiary hearing.

¶ 2 Defendant, Richard L. Lloyd, appeals the order of the circuit court of Randolph County dismissing his second amended petition for post conviction relief. For the reasons that follow, we reverse and remand for an evidentiary hearing.

¶ 3 The defendant was charged with three counts of first degree murder following a November 26, 1993, incident at the Menard Correctional Center, where the defendant was serving a 22-year prison sentence on unrelated charges. He and another inmate were

accused of stabbing an inmate, named James Klinkhammer, with shanks. Rather than proceeding to trial on the charges, the defendant entered into a negotiated plea of guilty to one count of first degree murder in exchange for the State's agreement to dismiss the remaining counts and cap its sentencing recommendation at 60 years.

¶ 4 At the time of the plea, the parties agreed to the following factual basis: On November 26, 1993, a correctional officer discovered inmate Klinkhammer dead in his cell. Prison officials ordered an investigation, and inmates and corrections officers were interviewed. Inmate Stoneking gave a statement that he observed the defendant and inmate Perkins stabbing Klinkhammer with shanks. Inmate Coulter, who was with Stoneking at the time, corroborated this version of events. The defendant was also interviewed. During the interview, the defendant confirmed that he and inmate Perkins went to Klinkhammer's cell, and that Perkins produced a shank and began stabbing Klinkhammer. Inmate Perkins then provided the defendant with a shank, which he used to stab Klinkhammer at least once in the stomach, and twice in the back.

¶ 5 The court accepted the defendant's plea and set the matter for a sentencing hearing. Following the hearing, the court sentenced the defendant to a term of imprisonment of 50 years. This sentence was to run consecutive to the 22-year sentence the defendant was already serving. The defendant filed a motion for reduction and reconsideration of sentence. He did not file a motion to withdraw his guilty plea. The court conducted a hearing on the motion.

¶ 6 At this hearing, the defendant testified that inmates Stoneking and Coulter threatened to kill him later that night if he did not participate in Klinkhammer's murder.

The defendant claimed that Klinkhammer was the chief of a prison gang known as the Northsiders, and that Klinkhammer had already murdered another individual and previously threatened to kill him. The defendant testified that inmates Stoneking and Coulter entered Klinkhammer's cell, and inmate Stoneking began stabbing Klinkhammer. Inmate Stoneking then told the defendant that if he did not start stabbing Klinkhammer, he would "get it." Inmate Stoneking positioned inmate Coulter behind the defendant, and gave the defendant the shank. The defendant admitted that he stabbed Klinkhammer three or four times in the back. He stated that Klinkhammer was armed with a weapon at the time of the murder. The defendant testified that 10 Northsiders approached him later that day and instructed him to confess to the crime. He claimed that he told his trial counsel this version of events at their first meeting, but that counsel told him not to say anything at sentencing. Finally, he stated that he did not inform the court of these events earlier because he was too afraid to testify against other inmates. At the close of the hearing, the court issued its ruling. The trial court denied the motion, noting that the sentence did not deviate from the terms of the negotiations, and that the defendant did not present any evidence in mitigation at the time of sentencing.

¶ 7 The defendant then filed a *pro se* petition for postconviction relief, alleging his actual innocence. He asserted that Klinkhammer and two of his security men attacked him with knives during a heated discussion; that he, in self-defense, pulled out his own knife, and fought back; and that Klinkhammer was killed in the struggle. The defendant further asserted that he did not realize he could have asserted self-defense because his counsel was incompetent, and never explained the difference between first degree murder

and self-defense. The defendant attached six notarized affidavits and two signed statements from fellow inmates in support of this claim. Some of these inmates had been interviewed by investigators shortly after the murder. Other statements were acquired independently by the defendant years later. We need only discuss those affidavits relevant to our resolution of the issues raised in this appeal.

¶ 8 Inmate Bell submitted an affidavit, and averred that he "noticed" the defendant was roughly forced into Klinkhammer's cell against his will and confined behind a closed door. Inmate Bell had provided a statement to prison officials indicating that he saw the defendant and inmate Coulter together on the day of the murder, but did not provide further details. The information in Bell's affidavit did not surface until 2006. Inmate Thornton, who was not interviewed during the murder investigation, signed an affidavit in 2005. In his affidavit, Thornton averred that he had personal knowledge of the events leading up to the attack. Specifically, he stated that he held a position of rank within the Northsiders, and that he knew of everything that was going on in the gang, "including a planned death hit attack that was ordered by a higher ranking member of the Northsiders" against the defendant. Inmate Padilla was not interviewed during the murder investigation. He signed an affidavit in 2010. Padilla averred that he was "aware" that Klinkhammer had stated "[f]irst chance I get I'm going to kill Kentucky" and that Kentucky was the nickname of the defendant. Finally, the defendant wrote in his statement that "since I believed I did something wrong, I let the State do as they desired. Defense counsel did the same."

¶ 9 After reviewing the defendant's petition, the circuit court entered an order finding that the petition stated the gist of a constitutional claim, appointed new counsel to represent the defendant, and set the matter for second-stage proceedings. The defendant's postconviction counsel filed an amended petition for postconviction relief asserting three constitutional claims. In the first two claims, the defendant alleged that defense counsel was ineffective for failing to present the defense of self-defense, and for failing to conduct an adequate pretrial investigation. The third claim was a freestanding claim of actual innocence based on the discovery of new, material, and noncumulative evidence of such conclusive character that it would probably change the result on retrial. Postconviction counsel attached a certificate of compliance to the amended petition that stated he consulted with the defendant, reviewed and examined all available court records, and amended the petition following consultations with the defendant. Counsel then filed a second amended petition on September 23, 2013. In the second amended petition, counsel added a section which addressed the defendant's reasons for delay in filing his petition.

¶ 10 Following a hearing, the court granted the State's motion to dismiss the second amended petition. The court found that the affidavits failed to provide "newly discovered" evidence that could not have been collected with diligence, and that the defendant's claims were waived because they could have been raised on direct appeal. This appeal followed.

¶ 11 The threshold issue in this appeal is whether the defendant met his burden to make a substantial showing of a constitutional violation. If so, he is entitled to an evidentiary

hearing.

¶ 12 The Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-stage proceeding in which a defendant may challenge his conviction based on allegations of a substantial denial of constitutional rights. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 27, 40 N.E.3d 1235. During the first stage, a *pro se* petition need only present the "gist" of a constitutional claim to survive a summary dismissal. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Hotwagner*, 2015 IL App (5th) 130525, ¶ 28, 40 N.E.3d 1235. A first-stage petition may be summarily dismissed as frivolous, or patently without merit, only if the petition has no arguable basis in law or fact. 725 ILCS 5/122-2.1(a)(2); *People v. Hodges*, 234 Ill. 2d 1, 11, 912 N.E.2d 1204, 1209 (2009). If the trial court determines that the defendant has asserted the gist of a constitutional claim, the case proceeds to a second stage where the defendant may request the assistance of counsel. 725 ILCS 5/122-2.1(b), 122-4 (West 2012). During the second stage, the defendant must make a substantial showing of a constitutional violation in order to proceed to an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). The trial court makes no findings of fact at this stage because all well-pleaded facts not rebutted by the record are presumed to be true. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. If the defendant meets his burden, his claim proceeds to an evidentiary hearing, and the defendant bears the burden of proving a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 472-73, 861 N.E.2d 999, 1008 (2006). In this case, the defendant's petition was dismissed without an evidentiary hearing. The dismissal of a petition at the second stage

is reviewed *de novo. Coleman*, 183 Ill. 2d at 389, 701 N.E.2d at 1076.

¶ 13 Initially, we consider the defendant's freestanding claim of actual innocence. A claim of actual innocence requires the discovery of new, material, and noncumulative evidence of such conclusive character that it would probably change the result on retrial. *People v. Ortiz,* 235 Ill. 2d 319, 333, 919 N.E.2d 941, 950 (2009). New evidence is evidence that was not available at the time of conviction and could not have been discovered by the defendant sooner through diligence. *Ortiz*, 235 Ill. 2d at 334, 919 N.E.2d at 950. In this case, there appears to be no mention of inmates Thornton or Padilla in the original record. Thornton and Padilla provided affidavits in 2005 and 2010, respectively. Both men claimed to have first-hand knowledge of the events leading up to the murder. Inmate Padilla averred that he was "aware" that the victim stated he would kill the defendant the first chance he got. Inmate Thornton averred that there was a plan by a higher ranking member of the gang to kill the defendant. Testimony of an additional eyewitness, offered in support of a petition for postconviction relief, may constitute newly discovered evidence regarding a freestanding claim of actual innocence. *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 950. In his affidavit, inmate Bell stated that he was an actual eyewitness to the first part of the incident. He averred that he "noticed" the defendant roughly pulled into Klinkhammer's cell against his will and confined behind a closed door. This is information that was not in either of the statements he gave to investigators at the time of the murder. These may constitute newly discovered and noncumulative evidence that was not available at the time of conviction and could not have been discovered by the defendant sooner through diligence.

¶ 14 Where the defendant pled guilty, a claim of actual innocence must also be accompanied by a showing that the plea was not knowing and voluntary. *People v. Knight*, 405 Ill. App. 3d 461, 466-67, 937 N.E.2d 789, 794 (2010). In the defendant's statement, he basically claimed that his defense counsel "let the State do as they desired." We interpret this as a claim that the defendant was not represented by counsel at all. The defendant further claimed that 10 Northsiders approached him after the murder and instructed him to confess to the crime. The defendant asserted that he did not inform the court of his alternate theory earlier because he was too afraid to testify against other inmates. These allegations are sufficient to show that the plea was not knowing and voluntary.

¶ 15 We now consider whether the defendant was culpably negligent in filing his petitions late. A petitioner must commence post conviction proceedings within the time frame outlined in the Act or allege sufficient facts to demonstrate the delay was not due to the defendant's culpable negligence. 725 ILCS 5/122-1(c) (West 2012). The culpably negligent standard is generally defined as "greater than ordinary negligence and is akin to recklessness." *People v. Boclair*, 202 Ill. 2d 89, 108, 789 N.E.2d 734, 745 (2002). Section 12 of the defendant's second amended petition addresses the reasons for the late filing, asserting that,

> "[the defendant] had been actively collecting evidence, affidavits, and statements up to the filing of this petition. Said actions have taken place by mail only, with no control over a timely response. Furthermore, [the defendant] has been restricted in his capability of accessing information and sending mail due to his classification and continuous transfers throughout the corrections system. [The defendant] is not an attorney with an understanding of the

Post-Conviction process or time limit demands related thereto."

Boclair makes clear that ignorance of the law will not excuse a delayed filing. *Boclair*, 202 Ill. 2d 89, 789 N.E.2d 734. Thus, we are not persuaded by the defendant's assertion that because he is not an attorney, he has no understanding of the postconviction process. We are, however, persuaded by the defendant's claim that he has been steadily advancing his case by collecting evidence, affidavits, and statements. He attributes the delay to the lack of control over the affiants' response time, restrictions in his capability to access information, and repeated transfers within the Department of Corrections. The facts, as alleged, are sufficient to show the delay was not necessarily due to culpable negligence. Accordingly, we find that the defendant properly asserted a free standing claim of actual innocence.

¶ 16 Next, we address the defendant's allegations of ineffective assistance of counsel. To prove an ineffective assistance of counsel claim, a defendant must prove: (1) the defense attorney's representation fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by the deficient representation. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 125 Ill. 2d 100, 531 N.E.2d 17 (1988).

¶ 17 First, the defendant asserts that his attorney "failed to present a defense of self-defense." 720 ILCS 5/7-1(a) (West 2012). In order to be effective, defense counsel must independently investigate any possible defenses. *People v. Domagala*, 2013 IL 113688, ¶ 38, 987 N.E.2d 767. The defendant testified at the motion for reduction and reconsideration of sentence that he told his trial counsel at their first meeting that

Stoneking and Coulter threatened to kill him if he did not participate in the killing of Klinkhammer. He now claims that three individuals attacked him in a prison cell and that he killed Klinkhammer in self-defense. The defendant contends that his trial counsel never discussed affirmative defenses at all. In his *pro se* petition, the defendant claims that defense counsel was incompetent and never explained the difference between first degree murder and self-defense. In his written statement, the defendant makes factual allegations that are equivalent to not being represented by counsel at all. Based upon these factual allegations, we find the defendant made a substantial showing that counsel was ineffective.

¶ 18 The defendant further alleges that counsel failed to conduct an adequate pretrial investigation. Counsel has a duty to conduct "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. The defendant submitted six notarized affidavits and two signed statements from individuals claiming to have been present on the day of the murder. The defendant alleges in his petition that none of these individuals were ever called, contacted, interviewed, or in any way investigated by defense counsel. These factual allegations are presumed to be true because they are well-pleaded and unrebutted by the record. In fact, the allegations appear to have some support in the record. At the conclusion of his representation of the defendant, defense counsel filed a certified petition for attorney fees. Attached to this petition is an accounting of all actions performed by defense counsel on behalf of the defendant. Defense counsel did not document any meetings or phone calls with potential witnesses. Accordingly, we find that the defendant made a substantial

showing of a constitutional violation with regard to the second ineffective assistance of counsel claim.

¶ 19 Finally, we address whether counsel complied with Supreme Court Rule 651(c). Prior to the second-stage proceeding, counsel must consult with the defendant to ascertain any contentions of error, thoroughly examine the trial record, make any necessary amendments to the *pro se* petitions, and file a certificate of compliance stating these duties were fulfilled. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). Noncompliance with Rule 651(c) constitutes harmless error where the record demonstrates counsel adequately fulfilled these duties. *People v. Lander*, 215 Ill. 2d 577, 831 N.E.2d 596 (2005).

¶ 20 Despite not explicitly citing to Rule 651(c), defendant's appointed counsel filed a certificate of compliance confirming he consulted with the defendant, reviewed and examined all available court records, and amended the petition according and pursuant to his consultations with the defendant. Thus, the record demonstrates counsel adequately fulfilled these duties.

¶ 21 Reversed and remanded.