

2018 IL App (1st) 152023-U  
No. 1-15-2023  
Order filed January 19, 2018

Sixth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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|--------------------------------------|---|------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the        |
|                                      | ) | Circuit Court of       |
| Plaintiff-Appellee,                  | ) | Cook County.           |
|                                      | ) |                        |
| v.                                   | ) | No. 08 CR 4348         |
|                                      | ) |                        |
| DEMETRIUS SHELTON,                   | ) | Honorable              |
|                                      | ) | Thomas V. Gainer, Jr., |
| Defendant-Appellant.                 | ) | Judge, presiding.      |

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JUSTICE DELORT delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirm the circuit court's first-stage summary dismissal of defendant's postconviction petition, finding that defendant had no right to the reasonable assistance of counsel during the summary dismissal stage.

¶ 2 Following a jury trial, defendant Demetrius Shelton was convicted of the first degree murder of Douglas Haynes and sentenced to 32 years' imprisonment. On direct appeal, this court affirmed. See *People v. Shelton*, 2013 IL App (1st) 120587-U. Defendant subsequently filed a postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2014)), which the court summarily dismissed at the first stage of the proceedings. On appeal, defendant argues that his postconviction counsel did not provide reasonable assistance because counsel failed to support defendant's postconviction petition with affidavits supporting his underlying claim that his trial counsel "failed to produce evidence that would have severed the causal connection between defendant's actions and the death of Haynes." We affirm.

¶ 3 In defendant's direct appeal, we set forth a detailed account of the evidence adduced at trial. See *Shelton*, 2013 IL App (1st) 120587-U, ¶¶ 4-38. Here, we summarize only the basic facts relevant to this appeal.

¶ 4 The State's theory of the case was that, after 11 p.m. on December 31, 2007, defendant and two other men chased and beat Haynes. Haynes was hospitalized, in a coma, and died of sepsis on January 18, 2008.

¶ 5 At trial, the State presented evidence from several witnesses, including, as relevant here, Dr. J. Lawrence Cogan, the forensic pathologist with the Cook County Medical Examiner's Office who performed Haynes's autopsy.

¶ 6 Cogan testified that he performed Haynes's autopsy on January 19, 2008. In the autopsy report, Cogan concluded that Haynes's death was a "homicide" and was caused by "pneumonia due to amphetamine intoxication with other significant conditions being multiple injuries due to an assault."

¶ 7 Cogan testified that Haynes would not have died if he had not been beaten and that "the assault set up a chain of events which led to [his] death." The assault aggravated his pre-existing heart condition, and Haynes had to be resuscitated by paramedics. He was unconscious and had breathing issues requiring intubation at the hospital. Haynes's urine tested positive for

amphetamines. Eventually, he developed rhabdomyolysis, a “potentially lethal” condition that caused renal failure. Haynes’s liver also started to fail. The intubation allowed bacteria in his airway and he developed pneumonia, “[a]nd then from pneumonia, he started having sepsis, meaning bacteria getting in the blood, and he expired.”

¶ 8 Cogan testified that rhabdomyolysis can be caused by amphetamines, stress, and exercise, among other things. Individuals with sickle cell trait, like Haynes, are also more likely to develop rhabdomyolysis. In Haynes’s case, “[b]asically, \*\*\* because of these preexisting conditions, heart failure, overweight, sickle cell trait, use of amphetamines, all these things set him up for the rhabdomyolysis which eventually killed him.”

¶ 9 Cogan acknowledged that Haynes’s medical records reflected that physicians treating him at the hospital concluded that his death was a result of “[r]habdomyolysis with adult renal failure and liver failure and most probably due to Ecstasy use.”

¶ 10 Cogan testified that if he were to write a new autopsy report, it would be different. After the autopsy, Cogan reviewed the case with prosecutors, who “brought up the question about rhabdomyolysis,” so he conducted research on the internet for rhabdomyolysis and “ran across exercise[-]induced rhabdomyolysis, which [he] had not considered in this particular case.” As a result, Cogan would have stated his conclusion as to Haynes’s death differently. He stated, “If I were to re-word it today, it would probably be rhabdomyolysis due to multiple injuries from assault with other conditions being amphetamines, intoxication. I would downplay the amphetamines.”

¶ 11 After deliberations, the jury convicted defendant of first degree murder and the trial court sentenced him to 32 years’ imprisonment. Defendant fired his trial counsel and retained new

counsel during posttrial proceedings. On direct appeal to this court, defendant argued that he was denied the effective assistance of trial counsel because his trial counsel failed to request that the jury receive an involuntary manslaughter jury instruction. See *Shelton*, 2013 IL App (1st) 120587-U, ¶¶ 40-62. This court affirmed. *Id.*

¶ 12 Defendant retained postconviction counsel and filed a request for an extension of time to file a postconviction petition. In a hearing, postconviction counsel explained that:

“We have the petition. What we need—because the entire petition relies on medical records from eight years ago—[are] affidavits from medical caregivers. As I told the court earlier, we do have subpoenas out right now. We’ve had our investigator out to Mt. Sinai [Hospital] a couple times. And of course we need the affidavits from [defendant] which we cannot get because [he is] on lockdown.”

¶ 13 The trial court denied defendant’s request for an extension of time to file his postconviction petition. Instead, the court instructed postconviction counsel to file the petition without affidavits. The court stated it would read the petition and determine whether it contained a constitutional claim and, if it did, would docket it. Once docketed, counsel would “have the opportunity to supplement with the defendant’s affidavits at a later time when [counsel] can get them.”

¶ 14 The following colloquy took place:

“COUNSEL: Okay that’s fine. My only concern was that I believe the statute requires the affidavits of the defendant[] before docketing.

THE COURT: But here. When I take my 90 days, I routinely, when guys in the joint file those petitions, they don't have affidavits. They don't—they just are sitting in their cell writing out a thing. I have to determine whether or not it contains logistic [*sic*] of a constitutional claim. I do that all the time without the necessary supported documents. If I docketed the case, then the attorney who is appointed to represent these guys will come in with all of the appropriate attachments, hopefully, or be [*sic*] will be subjected to their crushing blows on the motion to dismiss.

COUNSEL: Somehow we'll manage.

THE COURT: There's no support for this petition. \*\*\* I would get it in before next week if I were you.”

¶ 15 Defendant subsequently filed his postconviction petition. In it, he argued that he was denied the effective assistance of trial counsel because his counsel failed to rebut Cogan's testimony by calling medical staff that treated Haynes, which “would have defeated the causation element.” He alleged Haynes's rhabdomyolysis was caused by amphetamine use, a conclusion that was supported by peer-reviewed medical journals and affidavits from those who treated Haynes.

¶ 16 On May 22, 2015, the trial court summarily dismissed defendant's postconviction petition. In a written order, the court noted that defendant did not attach any affidavits or peer-reviewed journals and found that, “in the absence of affidavits from any potential experts, petitioner's claim is a bald, conclusory allegation and will not prevail on post-conviction.” The trial court found that, even if it reached the merits, defendant's ineffective assistance of counsel

claim was based on defendant's meritless claim that "the true cause of [Haynes's] death was [his] amphetamine use and not petitioner's actions." This timely appeal followed.

¶ 17 Defendant contends that his private postconviction counsel failed to provide reasonable assistance where counsel did not attach affidavits to his petition to support the claims therein. The State responds that defendant's postconviction counsel provided reasonable assistance "because counsel attempted to secure affidavits and sufficiently supported [defendant's] arguments to meet the low pleading standard of first stage post-conviction proceedings."

¶ 18 The Act generally establishes a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). This appeal relates only to the first stage. At the first stage, the defendant need only present the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Since most petitions at this stage are drafted by *pro se* defendants, the threshold for survival is low. *Id.* A petition may be summarily dismissed if the trial court finds that it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014); *Hodges*, 234 Ill. 2d at 11. If a petition is not summarily dismissed by the circuit court, the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10-11. At the second stage of postconviction proceedings, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2014)) and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2014)). *Hodges*, 234 Ill. 2d at 10-11.

¶ 19 Although the State does not raise this argument, this court has consistently rejected claims based on the failure of postconviction counsel to provide reasonable assistance at the first stage of postconviction proceedings. See, e.g., *People v. Johnson*, 2017 IL App (4th) 160449 ¶

36, *pet. for leave to appeal allowed* No. 122227 (Sept. 27, 2017); *People v. Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 27; *People v. Shipp*, 2015 IL App (2d) 131309, ¶¶ 15-16; *People v. Kegel*, 392 Ill. App 3d 538, 540-41 (2009). The *Kegel* court reasoned that recognizing a right to the assistance of counsel at first stage proceedings would shift the burdens on petitioners in favor of those able to afford counsel in a manner the legislature did not contemplate. *Kegel*, 392 Ill. App. 3d at 541.

“A prisoner whose retained attorney filed a fatally defective petition would be entitled to reversal of the summary dismissal of the petition if the attorney did not provide “reasonable assistance.” In contrast, an indigent defendant with no assistance of counsel who filed a petition suffering the same defect would have no basis for reversal. The General Assembly could not have intended such a result.” *Id.*

¶ 20 Defendant relies on the following language in *People v. Cotto*, 2016 IL 119006, ¶ 32 to support his contention that he is entitled to the reasonable assistance of counsel:

“This court has also required reasonable assistance from privately retained postconviction counsel at the first and second stage of postconviction proceedings. See *People v. Mitchell*, 189 Ill.2d 312, 358 (2000) (reviewing retained counsel’s performance under the reasonable assistance standard). Notably, this court has never held that the reasonable assistance standard is inapplicable to a postconviction defendant who retained private counsel or otherwise distinguished between appointed and retained counsel for purposes of that standard.” *Id.*

However, a Third District panel considered and rejected a similar claim in *Garcia-Rocha*. The *Garcia-Rocha* court noted that the quoted language in *Cotto* relied on *Mitchell*, which involved

the death penalty, where petitioners were entitled to the assistance of counsel by statute. *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 29. The *Garcia-Rocha* court concluded: “Therefore, we find that any right to reasonable assistance of counsel that the *Mitchell* petitioner may have had at the first stage of proceedings does not apply to the defendant in the instant case, who had no statutory right to counsel at the first stage of proceedings.” *Id.*

¶ 21 The Fourth District recently followed the decision in *Garcia-Rocha* in *Johnson*, 2017 IL App (4th) 160449, ¶¶ 40–41. In that case the court found, citing *Kegal* and *Garcia-Rocha* that:

“(1) neither the Act nor case law indicates a prisoner sentenced to a term of imprisonment is entitled to reasonable assistance at the first stage of postconviction proceedings, (2) to find such an entitlement would require us to judicially disengage the guarantee of reasonable assistance from the underlying right to counsel at second-stage proceedings so that the former can exist independently of the latter, and (3) awarding such an entitlement would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel.” *Id.* ¶ 41.

The court further considered the same comment in *Cotto* that defendant relies upon in this case and held that “[w]e further decline to find such an entitlement based on an unclear comment by the supreme court in a case where (1) the court was not tasked with considering the issue; (2) the comment relied on distinguishable precedent; and (3) the court cited, but did not reject, the Second District’s holding in *Kegal*.” *Id.*

¶ 22 We agree with the reasoning of *Garcia-Rocha* and *Johnson* and conclude that a postconviction petitioner who retains counsel at the first stage of proceedings has no right to the reasonable assistance of counsel. Our holding, places such litigants on equal footing with the



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majority of postconviction petitioners who are forced to proceed *pro se*. See *Cotto*, 2016 IL 119006, ¶ 42 (“We hold that there is no difference between appointed and privately retained counsel in applying the reasonable level of assistance standard to postconviction proceedings.”) Accordingly, because defendant had no right to reasonable assistance of counsel, the alleged failure to fulfill that right does not entitle defendant to further proceedings under the Act.

¶ 23 Affirmed.