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2018 IL App (3d) 150730-U

Order filed October 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Respondent-Appellee,	)	
	)	Appeal No. 3-15-0730
v.	)	Circuit No. 07-CF-140
	)	
CHRISTOPHER CARSON,	)	The Honorable
	)	Amy M. Bertani-Tomczak,
Petitioner-Appellant.	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it granted the State's motion to dismiss defendant's postconviction petition.

¶ 2 Petitioner Christopher Carson was convicted of first degree murder. He filed a postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)), and the trial court dismissed the petition at the second-stage, determining that Carson failed to make a substantial showing of a violation of his constitutional rights.

Carson appealed, arguing that (1) the trial court erred when it relied on a suppressed transcript in granting the State's motion to dismiss his postconviction petition; (2) postconviction counsel did not provide a reasonable level of assistance when he failed to attach supporting documents to the amended postconviction petition and, later, requested to strike Carson's fitness claim from the petition; (3) postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017); and (4) Carson made a substantial showing of a constitutional violation necessary to proceed to third-stage postconviction proceedings. We reverse and remand with directions.

¶ 3 FACTS

¶ 4 Petitioner Christopher Carson was arrested for the murder of Carrington Summlion. In November 2006, Carson was indicted on two counts of first degree murder. Carson filed a motion to suppress evidence, arguing that his statements during his interrogation at the Joliet Police Department should be suppressed because they were obtained after Carson requested to speak with an attorney in violation of his fourth, fifth, sixth, and fourteenth amendment rights.

¶ 5 A hearing on the motion to suppress was held. A DVD of Carson's interrogation was submitted into evidence and played in court. The State conceded that the police violated Carson's right to remain silent and that his statements should be suppressed. However, the State informed the court that it would be able to use the statements for impeachment purposes if Carson testified at trial. The trial court granted the motion to suppress.

¶ 6 At trial, the court found Carson guilty and sentenced him to 21 years' imprisonment. Carson filed a direct appeal, arguing that the evidence was sufficient to establish only that defendant committed second degree murder based on mutual combat and that the trial court failed to consider defendant's mutual combat argument. *People v. Carson*, No. 3-09-0195 (2011)

(unpublished summary order under Illinois Supreme Court Rule 23(c)). In its summery order, this court affirmed the trial court's decision.

¶ 7 Carson filed a *pro se* postconviction petition, claiming that (1) trial counsel failed to argue effectively about the admission of Ashlei Edwards' prior inconsistent statements; (2) trial counsel failed to consult with Carson about the nature of his charges, trial strategy, and contents within discovery; (3) trial counsel failed to investigate and secure witness statements; (4) trial counsel failed to investigate Carson's mental condition; (5) Carson's waiver of a jury trial was not made knowingly and intelligently; (6) trial counsel did not adequately advise Carson about his right to testify in his own defense; and (7) trial counsel failed to investigate all of the evidence in Carson's case. Attached to the petition were (a) Carson's affidavit; (b) a police memorandum detailing the recovery of Summlion's phone and a message on the phone about the incident; (c) a memorandum about Edwards' interview with the Will County State's Attorney's Office on May 9, 2008; (d) Carson's school transcript; (e) a letter from Carson's aunt stating that Carson was attending special education classes in school; (f) a police report about Amber Turner's conversation with police; (g) Carson's posttrial motion; (h) a jail visitation log that shows the trial attorney visited Carson one time for 20 minutes; (i) psychiatric medical records; (j) a suicide watch/close observation log dated April 26, 2007; and (k) a portion of the trial transcript.

¶ 8 The trial court advanced the petition to second-stage proceedings. Carson was appointed counsel, who amended the petition but did not file a Rule 651(c) certificate. In the amended petition, Carson argued that trial counsel rendered ineffective assistance when (1) he advised Carson to not testify to avoid impeachment although Carson wanted to testify, (2) he failed to investigate whether Carson was fit to stand trial, and (3) he failed to investigate appropriate

witnesses and present to evidence of Summlion's propensity for violence. He also claimed that appellate counsel rendered ineffective assistance on direct appeal when he failed to raise the issues that the trial court improperly added the burden of retreat to defendant's self-defense claim and that the trial court did not consider Summlion's aggravated unlawful use of a weapon conviction. The only attachments to the amended petition were Carson's own affidavit and the affidavit of Kenny Moore.

¶ 9 The State filed a motion to dismiss the petition. It attached a transcript of Carson's statements to the police, which had previously been suppressed. On May 12, 2015, a hearing on the motion to dismiss was held. Defense counsel moved to strike paragraphs 19 through 31 and paragraphs 33 and 34 from Carson's amended motion:

> "MR. STRZELECKI: Judge, before we proceed with that, for the record, and I have talked to Mr. Carson about this, there are a few paragraphs from our amended petition which I am going to ask to strike at this point in time.
>
> THE COURT: What are those?
>
> MR. STRZELECKI: Judge, they would be paragraphs 19 through –
>
> THE COURT: Are they marked as 19?
>
> MR. STRZELECKI: Yes, in my amended petition. You might be looking at my response.
>
> THE COURT: Okay. 19 through what?
>
> MR. STRZELECKI: Through 31. And then paragraphs 33 and 34.

THE COURT: All right. You have talked with your client about that?

MR. STRZELECKI: Yes.

We have discussed that, Mr. Carson?

THE DEFENDANT: Yes.

THE COURT: All right.

MS. GRIFFIN: So the State believes that those would be issues regarding the defendant was not fit at the time of trial and that counsel's failure to have the defendant evaluated for fitness as to ineffective assistance of counsel, correct?

MR. STRZELECKI: Correct.

THE COURT: All right."

¶ 10 In its written order, the trial court denied Carson's postconviction petition and granted the State's motion to dismiss. In particular, the court stated:

"*The State attached to its Motion to Dismiss a copy of the Petitioner's recorded statement that he gave to the police after his arrest. The statement was suppressed by the Court after a hearing filed by the Petitioner's attorney. The recorded statement was admissible for impeachment purposes if the Petitioner testified at his trial.*

In that statement the Petitioner told the police that he was at an old girl friend's house and that they had a sexual encounter. After they had sex, Petitioner's phone rang and petitioner answered

the phone. After the phone call his old girlfriend got mad, believing Petitioner was talking to a girl on the phone. Petitioner stated that he and his old girlfriend fought and Petitioner called Amber to come pick him up. Petition [*sic*] left the residence to wait outside for his ride. Amber arrives, with a child in the car, and the old girlfriend comes outside with a stick to hit Amber's car. Amber leaves the area and returns later. Petitioner stated that his old girlfriend called the victim to come to the area but admits he was not present when the phone call occurred and has no idea what was said in the phone call. Petitioner also stated that at the time he did not know that his old girlfriend had called anybody to come over. When Amber left the victim arrived, got out of his car, left the door open and approached Petitioner with his hands in his pockets. Petitioner never saw a gun. Petitioner said he just went crazy and stabbed the victim with one or two knives and took off running. Petitioner further stated that he wasn't scared and he just reacted. Petitioner admitted that it was the wrong reaction. At other times during the statement the Petitioner indicated that he thought the victim had a firearm in his pocket and the [*sic*] he was in fear for his life. Petitioner also told the police that he was a good liar.

Petitioner admitted that he always carries a knife. Petitioner also stated that before he left the house he took a kitchen knife from the kitchen, maybe two. Petitioner admitted that he left one

knife at the scene and left with the second knife and threw it away. Petitioner also discarded the clothes he was wearing that night. Petitioner stated that he put his clothes and shoes in a dumpster and gave the police the location of the dumpster.

Petitioner also stated that he went to school with the victim and never had a problem with him. Petitioner stated that the victim used [*sic*] to give him rides.

In Petitioner's affidavit ***

* * *

Under any theory, the evidence was overwhelming that Petitioner instigated the combat, that Petitioner and the victim did not fight on equal terms, and that, even if the victim provoked the combat, the Petitioner was armed with one, possibly two knives, and that the victim was unarmed and died from multiple stab wounds.

Petitioner claims trial counsel gave him "flippant" advice to waive his right to testify at his trial. Petitioner claims that he would have testified but for the flippant advice given to him. This court questioned the Petitioner at his trial when the Court was informed by trial counsel that Petitioner was waiving his right to testify at trial. After questioning the Petition [*sic*], this Court accepted his waiver of his right to testify. Petitioner has presented no evidence to support this claim. In fact, between the Petitioner's prior

> conviction, his proposed testimony contained in his affidavit, and *the recorded statement he gave to police*, Petitioner has established that he would have been impeached significantly if he had testified at trial.
>
> At this stage in the proceedings, the Court must determine whether the Petitioner has made a substantial showing of a violation of his constitutional rights. The Court finds that the Petitioner has not sustained his burden and the State's Motion to Dismiss is granted." (Emphases added.)

Carson appealed.

¶ 11 ANALYSIS

¶ 12 On appeal, Carson challenges the trial court's denial of his petition at the second stage of postconviction proceedings. Carson presents four arguments: (1) the trial court erred when it relied on [an unauthenticated] transcript of a suppressed statement in deciding to grant the State's motion to dismiss his postconviction petition; (2) postconviction counsel did not provide a reasonable level of assistance when he failed to attach supporting documents to the amended postconviction petition and, later, requested to strike Carson's fitness claim from the petition; (3) postconviction counsel failed to comply with Rule 651(c); and (4) Carson made a substantial showing of a constitutional violation necessary to proceed to third-stage postconviction proceedings because trial counsel rendered ineffective assistance when he failed to investigate a potential witness and advised Carson not to testify at trial.

¶ 13 I. Police Interview Transcript

¶ 14 First, Carson argues that the trial court improperly relied on a transcript of Carson's statements to police when it granted the State's motion to dismiss his postconviction petition at the second stage because the transcript was not a part of the record of the original trial. The State counters, arguing that the transcript is a part of the record because a DVD of the police interview was played in open court during a hearing on Carson's motion to suppress. The State further claims that although the statements were suppressed, the record shows that it still had an opportunity to use his statements for impeachment purposes if Carson had testified. Lastly, the State contends that, even if the transcript was outside the record, the trial court may still consider it. The State advances these contentions without any affirmative citation to statutory or common law that supports its claims.

¶ 15 At the dismissal stage of the postconviction proceedings, the trial court is "concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). The trial court is precluded from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceedings. *Id.* at 380-81. "[A]t the second stage of the post-conviction process the circuit court may resolve the State's motion to dismiss a petition based on the facts in the record and supporting materials in defendant's petition." *People v. Makiel*, 358 Ill. App. 3d 102, 111 (2005). Motions to dismiss are generally limited to consideration of the petitioner's allegations and the record. *Id.* The prosecution may not provide evidentiary materials and the circuit court is not to consider evidence introduced by the State. *Id.*

¶ 16 The Postconviction Hearing Act contemplates that, at the dismissal stage, "the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken

by the appellate court in such proceedings and any transcripts of such proceeding." 725 ILCS 5/122-2.1 (West 2016). Moreover, our supreme court established that the trial court's consideration of the record includes trial transcript and the transcript of other proceedings. *People v. Morris*, 43 Ill. 2d 124, 128 (1969) (finding that the trial court's grant of a State's motion to dismiss is proper when the trial court based its decision on the allegations in the pleadings and the transcript of the trial and other proceedings); *People v. Derengowski*, 44 Ill. 2d 476, 478-78 (same); *People v. Griffin*, 148 Ill. 2d 45, 53-54 (1992) (same); *People v. Spicer*, 47 Ill. 2d 114, 118 (1970) ("nonmeritorious petitions may be dismissed without a hearing on the basis of what is contained in the petition and what is revealed in the record of the trial or other proceedings"); *People v. Sanders*, 2016 IL 118123, ¶ 43 ("The Act itself contemplates that the trial court will look only to the record of the subject petitioner's case.").

¶ 17 Here, the statements within the police transcript produced by the State were not a part of the record of proceedings. The State filed a motion to dismiss Carson's postconviction petition at the second stage of postconviction proceedings, attaching a transcript of Carson's police interview. The State was attempting to use the statements contained in the police transcript to contradict the allegations in the petition. The trial court granted the motion to dismiss, relying on the police transcript as a basis for its decision. Although the DVD was played in court at the suppression hearing, the contents of neither the DVD nor the transcript are contained in the suppression hearing transcript. The contents in the DVD and transcript are not contained in the trial transcript as the statements within the DVD and transcript were suppressed and, despite the State argument that it had to ability to submit the statements at trial for impeachment purposes, it never did so. Furthermore, Carson did not attach the police transcript to his postconviction petition.

¶ 18 If the State chooses to submit the police transcript, it may do so at the third stage of postconviction proceedings where additional evidence may be needed for the trial court to make factual and credibility determinations. See *Coleman*, 183 Ill. 2d at 390-391. However, the trial court does not engage in fact finding and cannot consider evidentiary material outside of the petition or record of proceedings at the second stage of postconviction proceedings. *Makiel*, 358 Ill. App. 3d at 111. Therefore, we hold that the State improperly attached the unauthenticated transcript that contained suppressed statements to its motion to dismiss and that the trial court improperly considered the evidence introduced by the State in arriving at its ruling during the second stage of postconviction proceedings. Accordingly, we reverse the order of the trial court on this basis.

¶ 19 II. Postconviction Counsel

¶ 20 We next address Carson's claim that postconviction counsel failed to attach certain documents to his amended petition that would support his claim that he was unfit to stand trial, including his medical records, drug information, and a list of his medication; a letter from his aunt stating that he was taking special education classes; his school records; and his jail records showing that he was on suicide watch. Carson also claims that postconviction counsel provided an unreasonable level of assistance when he asked the court to strike Carson's fitness claim from the petition.

¶ 21 At the second stage of postconviction proceedings, an indigent petitioner is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2002). The right to counsel in postconviction proceedings is wholly statutory. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Therefore, a petitioner is entitled only to the level of assistance required by the Act. *Id.* "The Act provides for a 'reasonable' level of assistance, which Illinois courts have held is lower than the standard given

under federal and state constitutions." *Id.*; *People v. Perry*, 2017 IL App (1st) 150587, ¶ 26. Rule 651(c) imposes specific duties on postconviction counsel. *Id.* Under Rule 651(c), counsel must: (1) consult with the petitioner either by mail or in person to ascertain the contentions of deprivation of constitutional rights; (2) examine the record of the trial court proceedings; and (3) make any amendments to the pro se petition necessary for an adequate presentation of the petitioner's contentions. *Id.*

¶ 22 Postconviction counsel's responsibility is to adequately present those claims which the petitioner raises. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). Counsel need only ascertain the basis of petitioner's complaints, put them into appropriate legal form and present them to the court. *People v. Rials*, 345 Ill. App. 3d 636, 642 (2003). "Postconviction counsel is not required to advance frivolous or spurious claims and is only required to investigate and properly present the petitioner's claims." *Perry*, 2017 IL App (1st) 150587, ¶ 26. Ethical obligations prohibit counsel from presenting petitioner's claims if the claims are frivolous or spurious. *Id.* "Whether postconviction counsel satisfied the Rule 651(c) obligations is a question we review *de novo*." *People v. Miller*, 2017 IL App (3d) 140977, ¶ 46.

¶ 23 Here, appointed postconviction counsel failed to properly present Carson's fitness claim when he moved to strike the argument from the petition. In the amended petition, Carson claims that he had a learning disability and that, when he was taken into custody, he was administered Zoloft (for depression), Celexa (an anti-depressant), and Risperdal (for schizophrenia). During his trial, he experienced side effects from the medication, especially from the Zoloft, that, along with his learning disabilities, caused him to experience extreme confusion. As a result, Carson was not able to adequately understand the nature of the proceedings against him, knowingly and intelligently waive his right to a jury trial, and knowingly and intelligently waive his right to

testify. Counsel later moved to strike the fitness argument from the petition altogether without explanation. We find no basis for counsel's motion to strike especially when the trial court had already found Carson's fitness claim meritorious during the first stage of postconviction proceedings. See *People v. Edwards,* 197 Ill. 2d 239, 244 (2001) ("[a]t the first stage, the circuit court must independently review the post-conviction petition within 90 days of its filing and determine whether 'the petition is frivolous or is patently without merit" (quoting 725 ILCS 5/122-2.1(a)(2) (West 1998)).

¶ 24 Furthermore, we believe the attachments Carson references in his initial postconviction petition would have supported his fitness claim. Carson's aunt's letter and his school records showed that he had a mental disability; the medical records showed that he was seeking treatment for his disability; the list of side effects revealed that the medication he was taking could have caused the confusion he claimed to have experienced during trial[1]; and the suicide watch record showed that the jail questioned Carson's mental stability before trial.

¶ 25 The State claims that Carson invited the error because he had acknowledged that he had a conversation with his postconviction counsel about dismissing the fitness claim. Under the invited error doctrine, " 'an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *People v. Henderson*, 2017 IL App (3d) 150550, ¶ 36 (quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003)). Although defendant acknowledged that he discussed striking the fitness claim with his counsel, we cannot, given his claimed mental challenges, determine with a meaningful degree of certainty that he understood he was agreeing to strike the claim from his postconviction petition. While it appears from the

[1] In *People v. Miller*, 2017 IL App (3d) 140977, ¶¶ 49-50, this court held that the defendant's list of side effects had "almost no probative value" and did not address defendant's state of mind at trial. However, we find that a list of side effects can be used to support a defendant's argument that he was taking that medication and was experiencing those side effects during trial. Thus, we decline to follow the holding in *Miller*.

transcript that he and his attorney had discussed the claim, it was not clear he understood he was striking it. See *People v. Carter*, 208 Ill. 2d 309, 319 (2003) (determining that defendant "unequivocally opposed" the giving of a lesser-offense instruction and, therefore, invited the alleged error); *People v. Velez*, 388 Ill. App. 3d 493, 503 (2009) (finding that defendant invited the alleged error when he agreed to withdraw a motion and assured the trial court that he wished to withdraw the motion). Therefore, we reject the State's invited error argument and rule that postconviction counsel rendered an unreasonable level of assistance when he moved to strike Carson's fitness claim and failed to include the aforementioned attachments to the amended postconviction petition. Accordingly, we reverse the trial court's dismissal on this basis as well and remand this case for new second-stage proceedings.

¶ 26 Because we are remanding this matter for new second-stage proceedings, we decline to address Carson's ineffective assistance of trial counsel claims and whether the record clearly and affirmatively showed that postconviction counsel complied with Rule 651(c). We direct postconviction counsel to comply with the requirements of Rule 651(c) certificate on remand and caution the State to comply with the statutory restrictions regarding evidentiary material should it file another motion to dismiss.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is reversed and remanded with directions.

¶ 29 Reversed and remanded with directions.