

2019 IL App (1st) 152023-UB

No. 1-15-2023

Order filed May 10, 2019

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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PRESIDING JUSTICE DELORT delivered the judgment of the court.  
Justices Hoffman and Connors concurred in the judgment.

**ORDER**

¶ 1 **Held:** We affirm the circuit court's first-stage summary dismissal of defendant's postconviction petition finding defendant was not denied 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 the circuit court sentenced him to 32 years' imprisonment. On direct appeal, this court affirmed. See *People v. Shelton*, 2013 IL App (1st) 120587-U. Defendant

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.

¶ 3 On appeal, defendant argued that his postconviction counsel failed to 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 affirmed (*People v. Shelton*, 2018 IL App (1st) 152023-U), and defendant petitioned for leave to appeal to the supreme court. In January 2019, the Illinois Supreme Court denied defendant’s petition for leave to appeal, but issued a supervisory order directing us to vacate our 2018 judgment and reconsider our decision in light of *People v. Johnson*, 2018 IL 122227. We vacated our prior judgment, and we affirm again.

¶ 4 In defendant’s direct appeal, we set forth a detailed recitation of the evidence adduced at trial, and do not restate all of those facts here. See *Shelton*, 2013 IL App (1st) 120587-U, ¶¶ 4-38. Instead, we only present the facts relevant to defendant’s appeal.

¶ 5 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.

¶ 6 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.

¶ 7 Cogan testified that he performed Haynes’s autopsy on January 19, 2008, and wrote an autopsy report. In Cogan’s report, he 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.”

¶ 8 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 caused congestive heart failure 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.”

¶ 9 Cogan testified that rhabdomyolysis can be caused by, *inter alia*, amphetamines, stress, and exercise, such as “individuals running marathons.” 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.”

¶ 10 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.”

¶ 11 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

No. 1-15-2023

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.”

¶ 12 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, *inter alia*, that he was denied the effective assistance of trial counsel where 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.* ¶ 74.

¶ 13 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.”

¶ 14 The circuit 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.”

¶ 15 The following colloquy took place:

“[POSTCONVICTION 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.

[POSTCONVICTION COUNSEL]: Somehow we’ll manage.

THE COURT: There’s no support for this petition. So your request for extension of time to file a PC is denied. I would get it in before next week if I were you.”

¶ 16 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 that there was evidence that was not produced which broke the causal connection between defendant’s actions and Haynes’s death, a conclusion that “will be further supported” by peer-reviewed medical journals and affidavits from those who treated Haynes.

¶ 17 On May 22, 2015, the circuit 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 circuit 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.

¶ 18 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." We affirm.

¶ 19 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.

¶ 20 The right to the assistance of counsel at trial is derived from the sixth amendment of the United States Constitution (U.S. Const., amend. VI). In contrast, the assistance of counsel in postconviction proceedings "is a matter of legislative grace and favor which may be altered by

the legislature at will.” (Internal quotation marks omitted.) *People v. Owens*, 139 Ill. 2d 351, 364 (1990). Because the right to counsel in postconviction proceedings is derived from a statute rather than the Constitution, postconviction petitioners are guaranteed only the level of assistance that the statute provides. *Id.* “Section 122-4 of the [Act] and Supreme Court Rule 651 provide post-conviction petitioners with a *reasonable* level of assistance in post-conviction proceedings, but do not guarantee that they will receive the same level of assistance that the Constitution guarantees to defendants at trial.” (Emphasis in the original.) *Id.* A petitioner is entitled to the reasonable assistance of counsel at all stages of postconviction proceedings, including the first stage. See *People v. Johnson*, 2018 IL 122227, ¶ 23.

¶ 21 The distinction between effective assistance and reasonable assistance is based upon the different role counsel plays in a trial compared to post-conviction proceedings. *Owens*, 139 Ill. 2d at 364. “At trial, counsel acts as a shield to protect defendants from being ‘haled into court’ by the State and stripped of their presumption of innocence” (*id.* (quoting *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974))), whereas postconviction petitioners “have already been stripped of the presumption of innocence, and have generally failed to obtain relief on appellate review of their convictions” (*id.* at 365). Furthermore, the petitioner, not the State, initiates the postconviction proceeding, by claiming that constitutional violations occurred at his trial. *Id.* Counsel is thus appointed to represent postconviction petitioners, “not to protect them from the prosecutorial forces of the State, but to shape their complaints into the proper legal form and to present those complaints to the court.” *Id.* Because Supreme Court Rule 651(c) (eff. Feb. 6 2013) provides requirements for counsel’s actions that are uniquely directed at second-stage proceedings, during the first stage a *Strickland*-like analysis is the appropriate standard. *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 59, *appeal denied*, No. 122653 (Nov. 22, 2017); see also *Strickland v.*

*Washington*, 466 U.S. 668 (1984). Thus, we will examine not only whether postconviction counsel should have included affidavits, but also whether counsel's failure to do so prejudiced defendant. See *Zareski*, 2017 IL App (1st) 150836, ¶ 61.

¶ 22 In this case, defendant's postconviction counsel provided reasonable assistance at the first stage of proceedings. "In the ordinary case, a trial court ruling upon a motion to dismiss a post-conviction petition which is not supported by affidavits or other documents 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).

¶ 23 The record in this case firmly establishes that postconviction counsel made a concerted effort to obtain affidavits. Specifically, she initially sought an extension of time to file the petition because defendant had recently retained her firm and she was concerned that the deadline to file the petition would arrive before she would be able to obtain affidavits. Counsel informed the trial court that she had already issued subpoenas to obtain the necessary evidentiary support, she had sent an investigator to the victim's treating hospital "a couple of times," and she attempted to obtain an affidavit from defendant but was unable to do so because the prison where he was incarcerated was on lockdown.

¶ 24 The court denied her request for additional time and instead suggested that she file the petition without the supporting affidavits. The court informed counsel that it would then review the petition—which it does "all the time without the necessary support[ing] documents"—and determine whether there was the gist of a constitutional claim. If so, it would docket the petition for further proceedings and allow counsel to "come in with all of the appropriate attachments." Thus the record shows counsel made a concerted effort to supplement the petition with affidavits



and filed the petition without them only as directed by the circuit court. Further, the circuit court summarily dismissed the petition not merely because of a lack of affidavits, but also because defendant's claim of a lack of causation was "meritless."

¶ 25 Defendant relies upon *People v. Warren*, 2016 IL App (1st) 090884-C, for the proposition that failing to obtain affidavits detailing newly discovered evidence constitutes unreasonable assistance but his reliance is misplaced. The court in *Warren* "confined" its holding to "the unique instance where retained counsel unreasonably failed to make any record whatsoever of the proffered evidence, \*\*\*." *Id.* ¶ 141. In particular, the court noted that the defendant's privately retained counsel claimed that the sole reason he failed to submit affidavits of four proposed witnesses that he had met with was because the limitations period "was about to run," but the court observed that counsel had had four years to amend the petition to include the affidavits (or explain their absence), but counsel "inexplicably failed to do so." *Id.* ¶ 142. Here, by contrast, defendant's postconviction counsel had not four years, but scarcely two weeks in which to review the record and draft the petition. In addition, counsel provided a record when she discussed the proffered evidence at the hearing on her motion for an extension of time and in the text of the petition itself. Defendant's reliance upon *Warren* is therefore unavailing.

¶ 26 Finally, we cannot hold that defendant suffered any prejudice from this alleged omission. See *Zareski*, 2017 IL App (1st) 150836, ¶ 60 (holding that, "in evaluating the performance of postconviction counsel, whether the petitioner was prejudiced (at a minimum) should be part of the inquiry"); see also *Johnson*, 2018 IL 122227, ¶ 24 ("If the circuit court determines the claims raised in defendant's supplemented motion to reconsider are frivolous or patently without merit, then the failure to include those claims would not amount to a denial of reasonable assistance of counsel, and defendant would not be entitled to relief."). It is well established that

postconviction proceedings are limited “to constitutional matters which have not been, and could not have been, previously adjudicated.” *People v. Winsett*, 153 Ill. 2d 335, 346 (1992). Thus, issues that were raised on direct appeal are barred by *res judicata*, and those that could have been raised but were not are barred by waiver. *People v. Hickey*, 204 Ill. 2d 585,595 (2001).

¶ 27 On direct appeal, defendant claimed that his trial counsel was ineffective for (1) failing to request a jury instruction on involuntary manslaughter and (2) employing “an unreasonable and deficient trial strategy by attacking the cause of Haynes’s death.” *Shelton*, 2013 IL App (1st) 120587-U, ¶¶ 41-42. Defendant supported his claim, in part, by arguing that information regarding Haynes’s health would have assisted the trial court in determining whether defendant acted recklessly. *Id.* ¶ 61. We rejected this claim, however, noting that “it is hornbook law that a ‘defendant takes his victim as he finds him,’ and that, as long as “Shelton’s acts ‘contribute[d] to the death, there is still sufficient proof of causation, despite the preexisting health condition.’ ” *Id.* ¶ 61 (quoting *People v. Brackett*, 117 Ill. 2d 170, 178 (1987)). Because we squarely rejected any claim that the victim’s underlying health problems would have exonerated defendant from the brutality of the beating he inflicted upon Haynes, counsel’s attempt to resurrect this issue in a postconviction petition would be barred. See *Hickey*, 204 Ill. 2d at 595. Because postconviction counsel’s claim, even with the omitted affidavits, would have been rejected, defendant cannot establish that he was prejudiced from this purported omission (see *Zareski*, 2017 IL App (1st) 150836, ¶ 60).

¶ 28 In sum, there is no support for defendant’s claim that postconviction counsel’s assistance was unreasonable. Therefore, we are compelled to reject his claim. The judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.