2019 IL App (1st) 152111-UB

SIXTH DIVISION
May 10, 2019

No. 1-15-2111

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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

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

ORDER

¶ 1 ***Held:*** The circuit court did not err in denying defendant's request for discovery. We affirm the circuit court's first-stage summary dismissal of defendant's postconviction petition, finding that defendant's postconviction counsel provided reasonable assistance.

¶ 2 Following a jury trial, petitioner Reginald Jones was convicted of first degree murder and sentenced to 30 years' imprisonment. We affirmed his conviction and sentence on direct appeal. See *People v. Jones*, 2013 IL App (1st) 113604-U. Defendant later 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 the trial court erred in denying his "motion" for discovery, and that his postconviction counsel did not provide reasonable assistance because that 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 the murder victim. On January 19, 2018, we issued an order affirming the dismissal of defendant's petition. *People v. Jones*, 2018 IL App (1st) 152111-U.[1] We have since vacated the judgment in that decision pursuant to our supreme court's supervisory order directing us to reconsider our decision in light of *People v. Johnson*, 2018 IL 122227 (Nov. 29, 2018) (supervisory order). After considering this case in light of *Johnson*, we again affirm the dismissal of defendant's petition.

¶ 3 BACKGROUND

¶ 4 Our order disposing of defendant's direct appeal contains a detailed account of the evidence adduced at trial. See *Jones*, 2013 IL App (1st) 113604-U, ¶¶ 4-38. Here, we summarize only the basic facts relevant to this appeal.

¶ 5 The State's theory of the case was that, after 11 p.m. on December 31, 2007, defendant and two codefendants, Demetrius Shelton and Terrance Hopkins, chased and beat Haynes. Haynes was hospitalized, fell into a coma, and died of sepsis on January 18, 2008.

¶ 6 Before trial, the State filed its answer to defendant's discovery request indicating that it might introduce Haynes's medical records from Mount Sinai Hospital. At a pretrial hearing on June 12, 2008, the State informed the court that there was "still discovery outstanding, including medical records which we received but being are [*sic*] duplicated for counsel." On October 17,

[1] We also affirmed codefendant Demetrius Shelton's conviction and sentence on direct appeal. See *People v. Shelton*, 2013 IL App (1st) 120587-U.

2008, the State noted that the parties were "pretty much completed with discovery," the only item remaining to be obtained was a "bruise [*sic*] sheet" for codefendant Demetrius Shelton. On November 21, 2008, the State again told the court that "the only piece of outstanding evidence ** has been a bruise sheet for Mr. Shelton" from Cermak Health Services. Defendant's trial counsel did not dispute the State's comment during either the October or November appearances.

¶ 7 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.

¶ 8 Cogan testified that he performed Haynes's autopsy on January 19, 2008. In his 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."

¶ 9 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." Because of the attack, Haynes experienced shortness of breath, collapsed, and became unresponsive. Cogan also testified that Haynes had a number of preexisting conditions, including congestive heart failure, and Cogan noted that the "initial collapse and [cardiac] arrest [was] due to the assault." Paramedics were able to resuscitate Haynes, but 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."

¶ 10 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."

¶ 11 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." Cogan did not testify—nor did any party assert—that Haynes's medical records were incomplete.

¶ 12 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."

¶ 13 The jury convicted defendant of first degree murder and the court sentenced him to 30 years' imprisonment. Defendant fired his trial counsel and retained new counsel during posttrial proceedings. Before retaining new counsel, defendant filed a *pro se* "motion to set aside juries [*sic*] verdict," which alleged Haynes died from complications related to his alleged use of ecstasy and not from the assault. Defendant attached to his motion a six-page unsigned letter to codefendant Shelton's attorney opining that Haynes died from complications due to his ecstasy

use. The letter includes a lengthy "medical summary" discussing the entries in Haynes's medical chart from December 31, 2007 (his admission to the hospital emergency department), through January 18, 2008 (when he was pronounced dead). Defendant's newly retained counsel filed a posttrial motion seeking either reversal, a new trial, or a conviction on a lesser offense. Following a hearing, the trial court denied both motions.

¶ 14 On direct appeal, 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 *Jones*, 2013 IL App (1st) 113604-U, ¶¶ 40-62. This court affirmed. *Id.* at 63.

¶ 15 On February 11, 2015, defendant retained postconviction counsel who filed a request for an extension of time to file the postconviction petition on February 20, 2015. On February 25, 2015, at the hearing on counsel's motion, postconviction counsel noted that the petition was due the next day and 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."

¶ 16 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."

¶ 17 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."

¶ 18 Defendant later filed his postconviction petition arguing that he was denied the effective assistance of trial counsel because his counsel failed to rebut Cogan's testimony by calling medical staff who 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 "will be further supported" by affidavits from

those who treated Haynes. In the "Conclusion" section of the petition, defendant asked the court to docket the petition for further proceedings, conduct an evidentiary hearing, reverse his conviction or order a new trial, and grant "other relief as may be appropriate." Defendant further included in this section a single sentence asking for the "authority to obtain subpoenas for witnesses, documents and other discovery necessary to prove the facts alleged."

¶ 19 On May 22, 2015, the circuit court summarily dismissed defendant's postconviction petition. In its written order, the court first 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 court, however, further 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."

¶ 20 On June 19, 2015, defendant filed a motion to reconsider the summary dismissal. In his motion, defendant claimed that he was unaware of the court's order dismissing his petition, and he attached to his motion an affidavit from Latoya King in which she claimed to have witnessed Haynes ingest ecstasy between the time of the fight and the 9-1-1 call. The court informed defendant that his motion was in substance a successive postconviction petition because it had raised a new issue, and it suggested that defendant appeal the summary dismissal of his petition. Defendant subsequently withdrew his successive petition, and this court granted defendant's motion for leave to file a late notice of appeal. This appeal follows.

¶ 21 ANALYSIS

¶ 22 *The Discovery Request*

¶ 23 On appeal, defendant first contends that the circuit court erroneously denied his "motion for discovery" when it "barred Jones from pursuing the only means of substantiating" his postconviction claim of ineffective assistance of counsel. Defendant asks that we direct the circuit court to order Haynes's medical records "be made available to Jones's post-conviction counsel." Although the State notes that the record contains no motion for discovery, defendant claims that his "discovery motion" was incorporated in his postconviction petition when he requested access to Haynes's medical records. Defendant's contention is meritless for multiple reasons.

¶ 24 At the outset, this claim is forfeited. Under the doctrine of invited error, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). The rationale behind this doctrine is that "it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." *Id.* In this case, the record reveals that postconviction counsel explicitly agreed with the trial court to defer issuing subpoenas for medical records, which would be made available if the trial court found that the petition raised the gist of a constitutional claim and docketed the matter for second-stage proceedings. As a result, defendant may not now contend that the circuit court erred in proceeding in a manner that defendant consented to. See *id.* Defendant's claim is therefore forfeited.

¶ 25 Furthermore, it would be unreasonable to hold that defendant's lone sentence in the conclusion of his *petition*, buried amidst his request for (1) further proceedings, (2) leave to amend the petition, (3) an evidentiary hearing, (4) a new trial, (5) outright reversal, and (6) "such

other relief as may be appropriate" constitutes a properly filed *motion* for discovery. It is well established that examples of pleadings are "complaints, petitions, counterclaims, and answers," whereas "[m]otions, briefs, and affidavits are court papers, not pleadings." See B. Garner, A Dictionary of Modern Legal Usage 669 (1995). Here, defendant's petition lodged a collateral attack on his conviction on the basis of ineffective assistance of trial counsel. Defendant supported this claim with numerous citations to articles in "peer-reviewed medical journals" that were published after defendant's conviction. Defendant noted that, in addition to the articles, affidavits from experts would also support his claim that Haynes died as a result of his drug use and not the assault. In essence, defendant's conclusory, single-sentence request was a statement seeking *second-stage* discovery, which memorialized the discussion postconviction counsel had with the circuit court at the February 25, 2015, hearing.

¶ 26 Finally, even assuming, *arguendo*, defendant's isolated request could be construed as an embedded motion, the denial of the motion was not improper.[2] Although neither civil nor criminal discovery rules apply to postconviction proceedings, a trial court nonetheless has the inherent discretionary authority to order discovery in those proceedings. *People v. Hickey*, 204 Ill. 2d 585, 598 (2001) (citing *People v. Fair*, 193 Ill. 2d 256, 264 (2000)). Since postconviction proceedings afford only limited review and there exist in those proceedings a potential for abuse of the discovery process, trial courts should exercise their inherent authority to allow discovery "only after a hearing, on motion of a party, for good cause shown." *People ex rel. Daley v. Fitzgerald*, 123 Ill. 2d 175, 183 (1988).

[2] Defendant does not claim that the circuit court's summary dismissal of the postconviction petition failed to address the purported motion.

¶ 27 Notably, our supreme court has affirmed the denial of a defendant's discovery request where that request went beyond the limited scope of postconviction proceedings and amounted to, in essence, a " 'fishing expedition.' " *Hickey*, 204 Ill. 2d at 598 (quoting *People v. Enis*, 194 Ill. 2d 361, 415 (2000)). "In deciding whether to permit the taking of a discovery deposition, the circuit judge should consider, among other relevant circumstances, the issues presented in the post-conviction petition, the scope of the discovery sought, the length of time between the conviction and the post-conviction proceeding, the burden that the deposition would impose on the opposing party and on the witness, and the availability of the desired evidence through other sources." *Fitzgerald*, 123 Ill. 2d at 183-84. A trial court's denial of a request for discovery in a postconviction proceeding will not be reversed absent an abuse of discretion. *Hickey*, 204 Ill. 2d at 598. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 28 In this case, the court did not abuse its discretion. Defendant claims that his discovery request was "specific and narrowly tailored," but in fact the request was little more than a fishing expedition of the type criticized in *Hickey*. In this case, the discovery that defendant sought (and the questions regarding that potential evidence) consisted of the victim's medical records, precisely the information that was known—and used—at the time of trial. "Post-conviction proceedings are limited to considerations of constitutional matters which have not been, and could not have been, previously adjudicated." *Hickey*, 204 Ill. 2d at 598-99 (citing *People v. Winsett*, 153 Ill.2d 335, 346 (1992)). As noted above, the evidence defendant requested (the victim's medical records) existed at the time of trial, and the issue defendant raised regarding this evidence (the victim's death by means other than the assault) was also raised at his trial. As

such, we cannot hold that the trial court's denial of defendant's request for discovery was arbitrary, fanciful, unreasonable, or one that no reasonable person would take. See *Caffey,* 205 Ill. 2d at 89.

¶ 29 *Unreasonable Assistance of Postconviction Counsel*

¶ 30 Next, 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."

¶ 31 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.

¶ 32 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). Since 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.

¶ 33 This distinction is based upon the different role counsel plays in a trial compared to post-conviction proceedings. *Id.* "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.* Since Supreme Court Rule 651(c) (eff. Feb. 6 2013) provides requirements for counsel's actions that are uniquely directed at second-stage

proceedings, a *Strickland*-like analysis during the first stage 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.

¶ 34 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).

¶ 35 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. 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." In this case, however, the trial 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."[3]

¶ 36 Defendant relies upon *People v. Warren*, 2016 IL App (1st) 090884-C, 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.* 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.

¶ 37 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"), *appeal denied*, No. 122653 (Nov. 22, 2017); 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

[3] Defendant omitted this last point from the statement of facts in his opening brief, in violation of Supreme Court Rule 341(h)(6). See Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016) (requiring the statement of facts in the appellant's brief to be stated "accurately and fairly").

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. *Hickey*, 204 Ill. 2d at 595.

¶ 38 On direct appeal, defendant claimed that his trial counsel was ineffective for (1) failing to request a jury instruction involuntary manslaughter and (2) employing "an unreasonable and deficient trial strategy by attacking the cause of Haynes's death." *Jones*, 2013 IL App (1st) 113604-U, ¶¶ 41-42. Defendant supported his claim, in part, by arguing that information regarding Haynes's health would have assisted the circuit court in determining whether defendant acted recklessly. *Id.* ¶ 59. 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 "Jones's acts 'contribute[d] to the death, there is still sufficient proof of causation, despite the preexisting health condition.' " *Id.* ¶ 59 (quoting *People v. Brackett*, 117 Ill. 2d 170, 178 (1987)). Since 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. Since 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).

¶ 39 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.

¶ 40 CONCLUSION

¶ 41 The circuit court did not err in dismissing the postconviction petition.

¶ 42 Affirmed.