2019 IL App (1st) 161657-U

FIRST DIVISION
May 28, 2019

No. 1-16-1657

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 10875
	)	
REGINALD LOVE,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied the reasonable assistance of postconviction counsel where the amendments he argues counsel should have made to his petitions were not required.

¶ 2 Defendant Reginald Love appeals from the order of the circuit court dismissing his petition for relief filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)). Mr. Love contends that he was denied the reasonable assistance of counsel because postconviction counsel failed to amend his petition to state a claim of actual innocence or to properly present his claim that he was prevented from testifying. Because counsel was not

required to make either of these amendments, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Mr. Love was charged with first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)). The evidence at trial established that, at approximately 4 a.m. on April 10, 2000, Mr. Love was in a black automobile that drove with the lights out toward a parking lot where the victim, Ansah Ofei, was standing. Mr. Love exited the car, approached the victim, and shot him. As Mr. Ofei ran, Mr. Love chased after him, continuing to fire until Mr. Ofei fell to the ground. When Mr. Ofei was on the ground, Mr. Love shot him two more times. Mr. Love then returned to the black car, which drove away.

¶ 5 Two police officers heard the gunshots and drove toward the parking lot. They observed the black car driving by at a high rate of speed with no lights. They followed the car, but did not activate their emergency lights. The car stopped, Mr. Love got out and began running, and the car drove off. A police officer chased Mr. Love, stopped him, and placed him in handcuffs. The officer searched Mr. Love but did not find any weapons.

¶ 6 Another pair of police officers located and stopped the black car. They arrested the driver and returned with the car to the scene of the shooting. There, a witness to the shooting identified Mr. Love as the shooter by his jacket and also identified the car. An initial search of the car did not produce a weapon, but a more thorough search conducted at the police station located two "traps"; one contained a firearm and the other contained ammunition. Forensic testimony matched the weapon to bullets recovered from the victim's body and shell casings recovered from the scene of the shooting. Mr. Love's right hand tested positive for gunshot residue. In a video-recorded statement Mr. Love admitted that he got out of the black car and shot Mr. Ofei.

¶ 7 The jury found Mr. Love guilty of first-degree murder, and the trial court sentenced him

to 60 years' incarceration. On direct appeal, Mr. Love argued that the trial court erred when it denied his motion to quash his arrest and suppress evidence. This court affirmed. *People v. Love*, No. 1-04-1151 (2005) (unpublished order under Supreme Court Rule 23).

¶ 8 On March 16, 2007, Mr. Love filed a *pro se* postconviction petition, raising a number of claims, including that the admission into evidence of his statement to police violated his constitutional rights because he was arrested without probable cause and denied his request for counsel during questioning; trial counsel was ineffective for failing to file a motion to quash arrest based on an unlawful arrest; appellate counsel failed to raise certain claims; and trial counsel conspired with the prosecution, trial court judge, and witnesses to violate Mr. Love's rights and obstruct justice. Mr. Love also alleged in his original *pro se* petition:

> "Court-Appointed counsel on appeal failed to constitutionalise [*sic*] the 'Ineffective Assistance of trial counsel' whereas trial counsel was ineffective for refusing to allow [Mr. Love] to testify, counsel's competency solely with reference to his attempts to suppress evidence and his strategic choices not [to] have [Mr. Love] and or any other witnesses testify requires an inquiry into matters of trial counsel's dealings with the [Mr. Love], matters out-side the trial/common law record."

¶ 9 Mr. Love attached his affidavit in which he stated that he believed the petition to be true and correct, in substance and fact. The court docketed Mr. Love's petition for further proceedings and appointed an assistant public defender to assist Mr. Love. The matter was continued repeatedly for over five years, with no apparent action taken by the assistant public defender.

¶ 10 Finally, on January 22, 2013, the assistant public defender assigned to Mr. Love's case filed an Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012) certificate stating she had

communicated with Mr. Love by phone and mail, examined the trial transcripts, and spoken with trial counsel and, as Mr. Love's *pro se* petition adequately presented his claims, she would not be filing a supplemental petition. Then, on March 13, 2013, privately retained counsel filed an appearance and the public defender withdrew.

¶ 11 On May 5, 2014, retained counsel informed the court that he had located a *pro se* amended petition dated 2008 and was not sure if it had been filed. The parties treated the amended petition as a supplemental petition and Mr. Love's privately retained counsel, with leave of court, filed it on Mr. Love's behalf that day. The supplemental petition contained additional claims, including that Mr. Love was questioned in violation of his right to counsel, he was not promptly provided with a preliminary hearing, he was not properly charged because the State obtained an indictment more than 48 hours after his arrest, the offense of first-degree murder does not exist because the statute creating it was passed in violation of the single subject rule, the State's attorney lacked constitutional authority to prosecute him, and trial counsel was ineffective for failing to file a motion to suppress his identification. The petition also claimed:

> "Trial counsel was erroneously ineffective for telling [Mr. Love] that there was no need for him to testify, because the juries [*sic*] mind was already made up, and that they would not believe his story anyway because he'd already confessed to the crime on tape, and that would only further damage their case."

Mr. Love's supplemental petition was supported by his affidavit averring the contents of the petition "[we]re true in substance and fact."

¶ 12 On May 5, 2014, privately retained counsel filed a Rule 651(c) certificate stating he had examined the record of the trial proceedings, the trial transcripts, and the court filings, and that he had consulted with trial counsel. Counsel averred he had consulted with Mr. Love by phone

"to ascertain his contentions of deprivation of his constitutional rights," reviewed Mr. Love's filings, and concluded that the filings "raised all significant issues and that further amendments [were] not required."

¶ 13 On August 18, 2014, the State filed a motion to dismiss Mr. Love's petition. The State argued that Mr. Love's initial petition was untimely, and that his claims were forfeited, barred by *res judicata*, or without merit.

¶ 14 On October 14, 2015, Mr. Love's privately retained counsel filed a response to the State's motion, arguing that the Act should be interpreted so that Mr. Love's petition was timely, and that, if untimely, this was not the result of Mr. Love's culpable negligence. With respect to timeliness, counsel argued that, "[m]oreover, the Petitioner has raised a claim of actual innocence" and "[t]he limitations period does not apply to a petition advancing a claim of actual innocence." Counsel later moved for a hearing on Mr. Love's claim of "actual innocence," stating, without further elaboration, that "Petitioner has alleged that he is factually innocent of the charge of first degree murder. A claim of factual innocence is a free-standing claim because the conviction of an innocent individual violates due process. [Citations.]"

¶ 15 On March 23, 2016, the circuit court heard arguments on the State's motion to dismiss. During the arguments, the State addressed counsel's actual innocence argument as follows:

> "Now *** as to what he thinks he's claiming is actual innocence, is actually [a] reasonable doubt argument that he makes. This is not an actual innocence petition. There is [*sic*] no affidavits or no documentation to show there is any new evidence that was not known at trial by the Petitioner and it's not a freestanding motion. So therefore, it's not really actual innocence. What he argues is reasonable doubt."

Postconviction counsel responded:

> "Mr. Love has raised numerous claims I think, claims of ineffective assistance both at trial and both with appellate counsel, and I do believe that he raised a claim of innocence that can be addressed or looked into by the court at any point."

¶ 16 The circuit court granted the State's motion in a lengthy written order. It examined Mr. Love's claims and found he failed to make a substantial showing of a violation of his constitutional rights. The court did not disregard any of Mr. Love's claims based on timeliness and did not address actual innocence. The court did, however, address and dismiss what it viewed as Mr. Love's claim that his trial counsel failed to present a "reasonable doubt" defense. Mr. Love timely appealed.

¶ 17 II. ANALYSIS

¶ 18 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2006)) provides a mechanism by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). A postconviction proceeding contains three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the circuit court may dismiss a petition if it determines, within 90 days, that the petition is frivolous or patently without merit. *Id*. If not dismissed at the first stage, the petition advances, as Mr. Love's did, to the second stage. *Id.*

¶ 19 At the second stage, counsel will be appointed for the petitioner, if the petitioner qualifies for appointment. At this stage, counsel may amend the petition as necessary, and the State must either file a motion to dismiss or answer the petition. *Id.* at 10-11. To survive dismissal at the second stage, a petition and any accompanying documentation must make a substantial showing of a constitutional violation. *People v. Bailey*, 2017 IL 121450, ¶ 18. The petitioner's claims

must be liberally construed in light of the trial record, and all factual allegations not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). We review *de novo* the second-stage dismissal of a postconviction petition. *Id.* Mr. Love's claim on appeal is that he was denied reasonable assistance by his privately retained postconviction counsel at the second stage and that his petition should be remanded for further second-stage proceedings with the assistance of new postconviction counsel.

¶ 20 The assistance of counsel during postconviction proceedings is not a constitutional right, but rather a matter of " 'legislative grace.' " *People v. Bell*, 2014 IL App (3d) 120637, ¶ 10 (quoting *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003)). A petitioner is not entitled to the effective assistance of counsel constitutionally required at trial or on direct appeal. *Id.* Instead, the Act requires only that counsel provide a "reasonable level of assistance" during all stages of postconviction proceedings. See *People v Johnson*, 2018 IL 122227, ¶ 18.

¶ 21 The parameters of a "reasonable level of assistance" are set by Rule 651(c) (eff. Feb. 6 2013), which provides in relevant part:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

¶ 22 The filing of a Rule 651(c) certificate by postconviction counsel creates a presumption that counsel complied with the rule and the petitioner received reasonable assistance. *Bell*, 2014 IL App (3d) 120637, ¶ 10. It is Mr. Love's burden to overcome this presumption by

demonstrating his attorney's failure to substantially comply with the duties mandated by the rule. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. We review *de novo* whether a supreme court rule has been complied with. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 19. Mr. Love argues that he rebutted the Rule 651(c) presumption by showing that his counsel failed to make two specific amendments that were necessary to adequately present his postconviction claims.

¶ 23 Mr. Love first argues that counsel failed to amend the petition to include his "actual innocence" claim. Mr. Love argues that, although counsel told the court in his written response to the State's motion to dismiss that Mr. Love's petitions asserted a claim of "actual innocence" and that counsel used the word "innocence" again during oral argument on the motion, counsel never amended the petitions to set forth a claim of actual innocence. We reject this argument.

¶ 24 It is well-settled that "[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *People v. Davis,* 156 Ill. 2d 149, 164 (1993). "Rule 651(c) only requires postconviction counsel to examine as much of the record 'as is necessary to adequately present and support those constitutional claims *raised by the petitioner*.' " (Emphasis added.) *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) (quoting *Davis*, 156 Ill. 2d at 164). Counsel is not required to amend a defendant's *pro se* petitions to add claims not implicated in the petitions. *People v. Turner*, 187 Ill. 2d 406, 412 (1999). Although "postconviction counsel *may* conduct a broader examination of the record [citation], and may raise additional issues if he or she so chooses, there is no obligation to do so." *Pendleton*, 223 Ill. 2d 458, 476.

¶ 25 While Mr. Love is quite correct that his counsel made reference to "actual innocence," the reality is that there was no claim in either Mr. Love's initial postconviction petition or in his supplemental petition that could be construed as a claim of actual innocence. Our review of Mr.

Love's *pro se* postconviction petitions, liberally construed in light of the trial record (*Hall,* 217 Ill. 2d at 334), shows Mr. Love did not raise anything close to an actual innocence claim. A free-standing claim of actual innocence requires a defendant to present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Nothing in Mr. Love's petitions suggests such evidence exists, let alone sets forth such evidence. And in his arguments on appeal, Mr. Love has identified nothing in the petitions, or elsewhere in the record, suggesting a source of such evidence. Thus, to present a claim of actual innocence, postconviction counsel would have to have gone beyond reviewing the record in search of newly discovered evidence that Mr. Love himself did not raise or present. See *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) (defining newly discovered evidence of actual innocence as evidence that has been discovered since trial and that the defendant could not have discovered sooner through due diligence). Counsel was not required to amend Mr. Love's *pro se* petitions to add a claim of actual innocence, as no such claim was raised in the petitions, explicitly or implicitly.

¶ 26 In reaching this conclusion, we reject Mr. Love's reliance on *People v. Kirk*, 2012 IL App (1st) 101606, and *People v. Schlosser*, 2012 IL App (1st) 092523. Mr. Love relies on those cases to support his argument that a lawyer's performance is "particularly unreasonable" when he orally asserts a claim but does not include it in an amended petition. However, those cases simply do not support that proposition.

¶ 27 In *Kirk* and *Schlosser*, the circuit court found that postconviction counsel failed to provide reasonable assistance when counsel orally argued that the petitioners had received ineffective assistance of appellate counsel but failed to add those claims to the postconviction petitions. Notably, in both cases a claim of ineffective assistance of appellate counsel was the

necessary predicate to get around the forfeiture of the petitioner's postconviction claims based on errors at trial that had not been raised on direct appeal. See *Kirk*, 2012 IL App (1st) 101606, ¶ 13; *Schlosser*, 2012 IL App (1st) 092523, ¶ 27.

¶ 28 *Kirk* and *Schlosser* do not hold that any claim asserted or referenced by counsel at argument should also be made part of an amended petition. Rather, they recognize that, under Rule 651(c), counsel has the duty to amend a *pro se* petition to avoid a procedural default where, as in those cases, this can be done by simply adding an allegation that appellate counsel's representation was ineffective. *Kirk*, 2012 IL App (1st) 101606, ¶ 30 (citing *People v. Turner*, 187 Ill. 2d 406, 412-14 (1999)); *Schlosser*, 2012 IL App (1st) 092523, ¶ 25 (same). This is the sort of routine amendment contemplated by Rule 651(c) that can be made with "ease" and is required by Rule 651(c) when it is necessary to avoid forfeiture of a claim based on a trial error. *Turner*, 187 Ill. 2d at 413.

¶ 29 Unlike in *Kirk* and *Schlosser*, the amendment Mr. Love faults postconviction counsel for failing to make here is far from routine. In order to allege actual innocence, counsel would have to have—without any support for such a theory in Mr. Love's petition—discovered and presented new, noncumulative, material evidence of such conclusive nature that it would probably have changed the result on retrial. See *Ortiz*, 235 Ill. 2d at 333. There is simply no comparison between the sort of routine amendment to allege ineffective assistance of appellate counsel, as in *Kirk* and *Schlosser*, and the investigation and discovery of evidence that would support an actual innocence claim here.

¶ 30 It is true that in this case, as in *Kirk* and *Schlosse*r, the claim that Mr. Love contends should have been added would have avoided a potential procedural hurdle. Here, that hurdle was that Mr. Love's initial petition was untimely and timeliness is not a bar to a claim of actual

innocence. 725 ILCS 5/122-1(c) (West 2006) (six-month period for filing postconviction petition "does not apply to a petition advancing a claim of actual innocence"). But, in this case, the trial court considered Mr. Love's claims on their merits and did not disregard his petition on the basis of timeliness. In *Kirk* and *Schlosser*, a claim of ineffective assistance of counsel was the necessary predicate for the trial court even to reach the merits of the petitioner's other claims. *Kirk*, 2012 IL App (1st) 101606, ¶ 31; *Schlosser*, 2012 IL App (1st) 092523, ¶ 22. Those cases are simply not relevant here.

¶ 31 Mr. Love's second argument is that postconviction counsel failed to provide reasonable assistance because counsel did not amend Mr. Love's *pro se* petitions to "explain" or more adequately present Mr. Love's allegation of ineffective assistance of trial counsel for failing to allow Mr. Love to testify. Mr. Love's original petition alleged that he wanted to testify but his trial counsel refused to allow him to do so. Mr. Love's supplemental petition alleged that Mr. Love chose not to testify after counsel gave him erroneous advice, specifically that the jury would not believe his testimony because he had confessed on "tape" and his testimony at trial would "only further damage" his case. The trial court addressed this claim on the merits and determined that the allegations regarding Mr. Love's right to testify were "conclusory" and that Mr. Love had failed to demonstrate how he was arguably prejudiced.

¶ 32 Even if postconviction counsel could have made Mr. Love's right to testify claim clearer and less "conclusory," this would not have overcome the more fundamental problem with this claim, which was that Mr. Love cannot demonstrate any prejudice, *i.e.*, that had he testified, there is a reasonable probability that the outcome of his trial would have been different. *People v. Lacy*, 407 Ill. App. 3d 442, 456–57 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). If Mr. Love fails to satisfy either prong of the *Strickland* test—deficient performance by

counsel or resulting prejudice—his ineffective assistance of counsel claim fails. *People v. Enis*, 194 Ill. 2d 361, 377 (2000) (citing *Strickland*, 466 U.S. at 697).

¶ 33 Given the overwhelming evidence against Mr. Love, including a witness who identified him as the shooter and his own videotaped confession that was corroborated by the trial evidence, his testimony at trial is highly unlikely to have changed the jury's verdict. Thus, even if postconviction counsel had reconciled the two conflicting versions of Mr. Love's claim regarding the decision not to have him testify and provided cohesive details in support of that claim, counsel would have had to add an unsupported claim of prejudice in order to shape Mr. Love's claims into legal form. Postconviction counsel is not required to advance frivolous or meritless claims. *People v. Greer*, 212 Ill. 2d 192, 205 (2004).

¶ 34 III. CONCLUSION

¶ 35 For the foregoing reasons, we conclude that Mr. Love has not overcome the presumption of reasonable assistance created by postconviction counsel's filing of a Rule 651(c) certificate. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.