

2020 IL App (2d) 170802-U
No. 2-17-0802
Order filed May 8, 2020

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-693
)	
WILLIAM P. CURL,)	Honorable
)	Robbin J. Stuckert,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

- ¶ 1 *Held:* Postconviction counsel did not provide unreasonable assistance at the third-stage hearing by failing to elicit testimony from defendant that trial counsel was ineffective for failing to file a motion to suppress his statements and failing to investigate other suspects: defendant could not support his claims with an evidentiary basis and postconviction counsel did not provide deficient performance for not pursuing them. Further, postconviction counsel did not provide unreasonable assistance by failing to elicit testimony from defendant that he would not have pleaded guilty; defendant did not provide a plausible defense.
- ¶ 2 Defendant, William P. Curl, appeals the denial of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) in connection with his

conviction of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)). He contends that he was denied reasonable assistance of counsel at the third-stage hearing. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On April 3, 2013, defendant entered a negotiated guilty plea under *North Carolina v. Alford*, 400 U.S. 25 (1970). In an “*Alford* plea” a defendant pleads guilty yet continues to proclaim his innocence. Defendant pleaded guilty to one count of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) in exchange for a 37-year prison sentence and the dismissal of other charges.

¶ 5 The factual basis for the plea included that, on October 14, 2010, at approximately 1:00 p.m., Antinette Keller, the victim, told friends that she was going to Prairie Park in De Kalb. She took a large drawing board, her cell phone, and her camera. She wore Vans brand shoes and dELiA brand jeans. Keller never returned from the park. Surveillance video from defendant’s apartment building showed that he left his apartment on October 14, 2010, at 11 a.m. wearing a hooded sweatshirt, eyeglasses, and earphones. Defendant was seen entering the park at approximately 12:30 p.m. and, at 3:06 p.m., he used his cell phone near a cell tower that covered the park. Surveillance video from defendant’s apartment building showed that defendant returned at 5:35 p.m. without his hooded sweatshirt, eyeglasses, or earphones.

¶ 6 On October 18, 2010, the De Kalb Police Department collected evidence in the area of a fire pit. The police recovered many small bone fragments and burnt debris, including burnt camera pieces, cell phone pieces, eyelets from Vans brand shoes, buttons from dELiA brand jeans, a burnt metal piece from a drawing board, earphones, and eyeglass temple pieces. Some pieces were consistent with the type of camera and phone that Keller owned. The eyeglass pieces were consistent with glasses defendant had recently purchased. DNA testing revealed that the bone fragments were the remains of Keller.

¶ 7 On October 19, 2010, five days after the offense, defendant was with friends who saw scratches on his chest. Defendant told them that the scratches were from having sex with a girl that he met in the park. On October 23, 2010, at approximately 8:30 a.m., a detective called defendant to schedule an interview; he left a voicemail asking defendant to return his call. Surveillance video from defendant's apartment building showed him leaving with two large duffel bags at 9:09 a.m. Defendant drove away and was traced to the Mexican border, where he tried to cross but ultimately returned to the United States. He drove to Louisiana where the police found and interviewed him.

¶ 8 Defendant gave three conflicting stories. First, he denied any knowledge of Keller. Second, he stated that he was walking through the park, found Keller already dead, and burned her body. Finally, defendant said that he met Keller in the park and they had a sexual encounter. She suffered a seizure, hit her head, and died, so defendant burned her body. However, Keller had no history of seizures. Defendant admitted to getting scratches from Keller and provided descriptive details about her that had not yet been released to the public, including a description of her shoes and the colors of tattoos on her chest. After the factual basis was given, defendant agreed that it was sufficient to sustain a finding of guilt beyond a reasonable doubt.

¶ 9 On July 22, 2013, defendant filed a *pro se* motion to withdraw the plea. The motion was denied, and defendant appealed. We allowed counsel to withdraw and affirmed the judgment. *People v. Curl*, No. 2-13-1020 (2014) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 10 In May 2015, defendant filed a *pro se* post-conviction petition alleging that his trial counsel was ineffective because he (1) filed only “boiler-plate” motions; (2) coerced defendant into accepting the *Alford* plea and abandoned investigating an alibi defense because of media coverage

of the case; (3) failed to investigate other suspects; (4) failed to file a motion to suppress statements; and (5) failed to request a fitness hearing. Defendant also claimed that he was coerced to plead guilty because an assistant state's attorney threatened to prosecute defendant's son if defendant did not accept the plea offer. Defendant alleged that there were at least two other suspects in the crime. He alleged that Keller's roommate reported that Keller's boyfriend was angry at Keller because she had been impregnated by another man and had recently terminated the pregnancy. Defendant also alleged that a homeless person who had been camping near the crime scene had threatened to kill defendant's sister and burn down her house if she continued to talk to the police about him. Defendant stated that he was in the process of obtaining evidence to support his claims through Freedom of Information Act (FOIA) requests. He attached an exhibit of a FOIA request filed with the De Kalb Police Department and the department's response that it could not identify the specific documents that defendant was seeking. Defendant also attached an affidavit from his sister averring that she tried to obtain police reports about the homeless man and was told that no reports existed.

¶ 11 The trial court advanced the petition to the second stage of postconviction proceedings and appointed counsel, who filed a certificate under Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) stating that he consulted with defendant to ascertain his contentions, that he examined the record of the proceedings of the trial court, and that amendments to the *pro se* petition were unnecessary. On September 16, 2016, postconviction counsel filed a supplemental petition alleging that: (1) defendant's trial counsel failed to investigate and discuss the evidence and a possible defense with defendant; (2) defendant did not fully comprehend the sentence; (3) defendant's mental health made it impossible for him to understand the proceedings; (4) trial counsel failed to determine whether defendant was taking his medication at the time of the plea;

(5) trial counsel failed to file a motion to suppress statements; and (6) appellate counsel was ineffective for failing to raise these issues on appeal. Defendant also alleged that, had trial counsel discussed a possible defense with him, he would not have pleaded guilty and would have gone to trial. The claim regarding appellate counsel was later withdrawn. The State moved to dismiss, the motion was denied, and the petition was set for a third-stage hearing.

¶ 12 Defendant testified at the hearing but was not asked if he would have not pleaded guilty had his trial counsel performed adequately. Defendant also was not asked about the investigation of other suspects. The State called multiple witnesses who refuted defendant's claims. In a written order, the postconviction court found that defendant had failed to show deficient performance by his trial counsel and failed to show prejudice. In particular, the postconviction court noted that defendant had presented no evidence to support his claims concerning other suspects or a plausible defense. Defendant appeals.

¶ 13

II. ANALYSIS

¶ 14 Defendant contends that postconviction counsel provided unreasonable assistance at his evidentiary hearing by (1) not eliciting testimony that defendant would have not pleaded guilty but for trial counsel's deficient performance and (2) not presenting any evidence that trial counsel was ineffective for failing to investigate and present evidence of other suspects. He concludes that we must reverse the denial and remand the cause for a new hearing on the petition, regardless of the underlying merits of his claims. We note that defendant does not contest the postconviction court's findings.

¶ 15 The Act provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The Act sets forth three stages of proceedings. *Id.* at 471-72. At the first stage, the trial court independently reviews

the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. *Id.* If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472. Defense counsel may amend the defendant's petition to ensure that his or her contentions are adequately presented. *Id.* At the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Id.* If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, where the court holds a hearing at which evidence may be presented. *Id.* at 472-73. "At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. English*, 406 Ill. App. 3d 943, 951-52 (2010). On appeal from the third stage, we will not reverse a trial court's judgment that is based on fact-finding and credibility determinations unless that judgment is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. " 'Manifestly erroneous means arbitrary, unreasonable and not based on the evidence.' " *People v. Ceja*, 204 Ill. 2d 332, 347 (2003) (quoting *People v. Wells*, 182 Ill. 2d 471, 481 (1998)).

¶ 16 "There is no constitutional right to counsel in postconviction proceedings." *People v. Johnson*, 2018 IL 122227, ¶ 16 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *People v. Moore*, 189 Ill. 2d 521, 541 (2000)). "Thus, defendants are guaranteed only the level of assistance provided for by the Act." *Id.* The Act guarantees only a reasonable level of assistance, which is less than that afforded by the federal or state constitutions. *Pendleton*, 223 Ill. 2d at 472.

¶ 17 To ensure that defendants receive reasonable assistance, Rule 651(c) imposes specific duties on postconviction counsel and requires that the record disclose that counsel has fulfilled

these duties. *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. Rule 651(c) imposes three duties on appointed postconviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Postconviction counsel must show that he (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations, (2) examined the record of the trial proceedings, and (3) made any amendments to the *pro se* petition necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff. July 1, 2017). The purpose of the rule is to ensure that postconviction counsel shapes the defendant's claims into proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 43-44.

¶ 18 There are two ways appointed postconviction counsel may comply with Rule 651(c). Counsel may file a certificate to show that the requirements of the rule were complied with, or the record may demonstrate that counsel complied with those provisions. *People v. Richmond*, 188 Ill. 2d 376, 380 (1999). Although counsel must ensure that the *pro se* claims are shaped into proper legal form for presentation (*Perkins*, 229 Ill. 2d at 43-44), counsel is not required to embark “on a ‘fishing expedition’ to find facts and evidence outside the record that might support the defendant's claims.” *People v. Malone*, 2017 IL App (3d) 140165, ¶ 10 (citing *People v. Vasquez*, 356 Ill. App. 3d 420, 425 (2005)). In fact, counsel is not required to amend the defendant's *pro se* petition, as ethical obligations would prevent counsel from amending a petition to advance “frivolous or spurious claims” on the defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004); *Malone*, 2017 IL App (3d) 140165, ¶ 10. If counsel determines that the claims made in a *pro se* petition are frivolous, counsel may “stand[]” on the *pro se* allegations or seek to withdraw as counsel. *Malone*, 2017 IL App (3d) 140165, ¶ 10. When counsel files a Rule 651(c) certificate asserting his compliance with the rule, the postconviction court presumes that he provided reasonable

assistance. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19. It is the defendant's burden to overcome the presumption. *Id.*

¶ 19 Defendant contends that he is not required to show that his underlying claims had merit because Rule 651(c) governs counsel's performance at the third stage. If counsel fails to comply with Rule 651(c) at the second stage of postconviction proceedings, the defendant is not required to show that his claims had merit or that he was prejudiced by the lack of compliance. *People v. Pabello*, 2019 IL App (2d) 170867, ¶ 25. "Nor is counsel's lack of compliance subject to harmless-error analysis." *Id.* "Thus, if counsel failed to comply with Rule 651(c), a remand for additional postconviction proceedings is required." *Id.* (citing *People v. Suarez*, 224 Ill. 2d 37, 47 (2007)).

¶ 20 However, we held in *Pabello* that, once Rule 651(c)'s requirements have been met at the second stage, further compliance at the third stage is not required, as counsel does not perform the duties required by Rule 651(c). Instead, at the third stage, counsel argues the merits of the petition as formulated during the second stage. *Id.* ¶ 27. Thus, counsel's performance at the third stage is measured by the overarching reasonableness standard generally applicable to a postconviction proceeding. *Id.* ¶ 35.

¶ 21 Here, postconviction counsel complied with Rule 651(c) at the second stage. Thus, to prevail on his petition at the third stage, defendant was required to show that there was merit to his underlying claims. In his petition, defendant alleged ineffective assistance based on trial counsel's omissions. To prevail on that claim, defendant must demonstrate that trial counsel's performance was deficient, and that the deficiency caused prejudice. *Id.* ¶ 38 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Specifically, he must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

(citing *Strickland*, 466 U.S. at 694). Although a defendant must satisfy both prongs, a court may dispose of an ineffectiveness claim based on a lack of prejudice. *Id.* In the context of a guilty plea, a defendant must show that, absent his counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). However, a bare allegation that the defendant would not have pleaded guilty and insisted on a trial is insufficient. *People v. Rissley*, 206 Ill. 2d 403, 458 (2003). The defendant must also claim actual innocence or articulate a plausible defense that could have been raised at trial. *Id.* at 459-60.

¶ 22 In contrast, the level of assistance required under the Act at the third stage of postconviction proceedings is not as coextensive as that required by *Strickland*. *Pabello*, 2019 IL App. (2d) 170867, ¶ 36. Regardless, it is appropriate to measure postconviction counsel's performance at the third stage against the *Strickland* standard and, if it passes, it necessarily meets the lesser reasonableness standard. See *id.* at ¶¶ 36-37.

¶ 23 Mindful of these principles, we consider defendant's claim of unreasonable postconviction assistance in terms of counsel's advocacy of the claim of ineffectiveness of trial counsel. First, defendant argues that postconviction counsel unreasonably failed to elicit testimony that defendant would have insisted on going to trial if trial counsel had performed certain tasks that he requested. Specifically, the petition alleged that trial counsel did not carry out defendant's request to investigate and explain to defendant the evidence and a possible defense. Second, defendant argues that postconviction counsel unreasonably failed to elicit testimony that trial counsel should have filed a motion to suppress defendant's statements. Third, defendant argues that postconviction counsel unreasonably failed to pursue his claim that trial counsel was ineffective

for failing to investigate and present evidence of other suspects. The postconviction court found that defendant did not establish deficient performance by trial counsel on these matters.

¶ 24 Where a petition is not supported by affidavits or other evidence, a court generally will presume that postconviction counsel made a concerted, but unsuccessful, effort to obtain affidavits in support of the postconviction claims. *People v. Johnson*, 154 Ill. 2d 227, 241 (1993). Thus, we presume that postconviction counsel made a concerted effort to pursue the allegations of ineffectiveness of trial counsel but determined that they lacked an evidentiary basis. We conclude that postconviction counsel was not unreasonable for not pursuing them further at the hearing.

¶ 25 Defendant argues that postconviction counsel should have inquired about “the most important issue” of trial counsel’s failure to file a motion to suppress statements. However, defendant does not explain what should have been included in such a motion. We consider the point forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (points not argued on appeal are forfeited).

¶ 26 Moreover, nothing in the record indicates other suspects that would provide a plausible defense or sufficiently support a claim of actual innocence. Defendant and his sister sought documents to support their theory but were told that the documents either did not exist or could not be located. Defendant did not follow up on his requests or show how the information about other suspects would contradict the overwhelming evidence of his guilt provided in the factual basis for the plea. At best, defendant speculates that other people were involved in the offense. Postconviction counsel was not required to go on a fishing expedition or pursue frivolous claims. Accordingly, he acted reasonably in choosing to simply stand on the allegations in the petition.

¶ 27 Defendant contends that, in evaluating the performance of postconviction counsel and trial counsel, we should disregard the factual basis for the plea because it was not subject to cross-

examination. However, defendant agreed at the guilty plea hearing that the factual basis sustained a finding of guilt beyond a reasonable doubt, and he has not disputed its accuracy. His speculation regarding other suspects would not overcome the overwhelming evidence of his guilt. Thus, postconviction counsel's decision not to ask questions about them was not unreasonable, and defendant could not show deficient performance or prejudice.

¶ 28

III. CONCLUSION

¶ 29 We conclude that postconviction counsel did not render unreasonable assistance at the third stage evidentiary hearing. Accordingly, the judgment of the circuit court of De Kalb County is affirmed.

¶ 30 Affirmed.