2013 IL App (1st) 102524-U

FIFTH DIVISION
April 12, 2013

No. 1-10-2524

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 80 C 6057
	)	
JOSE ESTRADA,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant was properly denied postconviction relief when his petition failed to make a substantial showing of actual innocence. Defendant was not denied the reasonable assistance of postconviction counsel when counsel complied with the requirements of Rule 651(c) and filed a motion to withdraw.

¶ 2 This case comes before us following our remand in 2002 for "further proceedings" on defendant Jose Estrada's successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 1998)). After the appointment of counsel and several years of continuances, the trial court allowed counsel to withdraw and struck the petition on the ground that defendant had not obtained leave of court to file it. On appeal, defendant asks us to

reverse and remand once again. He argues that the trial court failed to comply with this court's mandate, which implicitly ordered that the petition be advanced to the second stage of postconviction proceedings. He also challenges postconviction counsel's representation, arguing that her motion to withdraw was inadequate and that she failed to comply with Rule 651(c) (eff. Dec 1, 1984). We affirm.

¶ 3 Following a bench trial, defendant was found guilty of voluntary manslaughter and armed violence arising from the fatal shooting of the victim Miguel Figueroa in August 1980. Because defendant's postconviction claim is one of actual innocence, it is necessary to set out the trial evidence in some detail.

¶ 4 At trial, the victim's father Teodoro Figueroa testified that on the night in question, the victim and Eduardo Ortiz were talking on the sidewalk in front of the Figueroa home. Figueroa went inside and went to bed. Some time later, he heard a gunshot, screaming, and a car driving away. When he looked out the window, Figueroa saw Ortiz on the street holding his right arm. When he went outside, he saw the victim face-up on the sidewalk. The victim was later pronounced dead at the hospital.

¶ 5 Muhammad Barakat testified that he agreed to give defendant a ride to defendant's girlfriend's house. Defendant sat in the front passenger seat and opened the window. En route, Barakat saw two men standing on a corner drinking and talking. Barakat stopped at a stop sign, then made a right turn. At that point, he heard three or four gunshots which he realized were coming from inside the car. Defendant was holding a gun "or something" and pointing it outside the car. Defendant then told him to "go fast." Defendant later told him that if he said "something," he would be killed by the gang. However, when Barakat later spoke to officers, he told them what had happened.

¶ 6 Detective Ernest Hernandez testified that he took a statement from defendant. In that statement, defendant indicated that he had "done the shooting" while in a car with Barakat. Defendant explained that as the car arrived at an intersection, he saw two people on the sidewalk. One began making gang signs indicating membership in the War Lords gang. At one point, one of the individuals reached behind "like he was going to pull something from his back" and lunged toward the vehicle. Defendant responded by pulling a snub-nosed revolver from beneath the seat and firing several times.

¶ 7 Defendant then testified on his own behalf. He indicated that he recognized the men from an incident where they were part of a group that had chased him and his friends. The group had screamed "War Lord love and Cobra killers."

¶ 8 As the two men started moving toward the car, defendant saw one reach behind his back and bring out some kind of object. Defendant also heard this person say "get him, get him." Defendant told Barakat to speed up. He also reached under the car seat and pulled out a gun. He knew that a gun was under the seat because he saw Barakat place it there. Defendant then "shot crazy" and "let the whole gun go off." He did not look in the direction that he was shooting and did not turn around to see what happened to the men, although he later admitted that one of the men turned and ran when he began shooting. He shot at the men because he was scared and thought they were going to shoot at him.

¶ 9 In rebuttal, the State offered into evidence that in November 1981, defendant was convicted of two counts of murder under indictment 80-6056. Defense counsel stipulated to this information. The trial court ultimately found defendant guilty of voluntary manslaughter and armed violence, and sentenced defendant to 60 years in prison. This prison term in this case was to be served consecutively to the 80-year sentence imposed in Case No. 80-6056.

¶ 10 On appeal, this court reversed defendant's conviction and sentence for armed violence and remanded for sentencing on the voluntary manslaughter conviction. See *People v. Estrada*, No. 1-83-0911 (1984) (unpublished order under Supreme Court Rule 23). In so doing, this court rejected defendant's contention that he was not proven guilty beyond a reasonable doubt of voluntary manslaughter as the evidence at trial was not closely balanced. Specifically, the court determined that it was undisputed that the victim was not the alleged aggressor, that no weapon of any kind was displayed or used against defendant prior to his use of deadly force, and that the victim was running away when fatally shot. *Estrada*, No. 1-83-0911, Order at 5. This court then concluded that there was no support in the record for defendant's contention that he was justified in shooting the victim in the back. *Estrada*, No. 1-83-0911, Order at 5-6. On remand, defendant was sentenced to 14 years in prison for the voluntary manslaughter conviction.

¶ 11 Defendant filed his initial postconviction petition in January 1998, about 15 years after he was convicted. He alleged that he acted in self-defense and was therefore actually innocent. Attached to the petition was the affidavit of Louis Edgar Ortiz. In his affidavit Ortiz averred that he was with the victim on the night of the shooting. When he saw the car in which defendant was a passenger, he pulled out a gun and "faked" as though he was going to fire the gun. At that point, gunshots came from the car so Ortiz and the victim ran away. Ortiz averred that he never told police about his actions, that he felt deep regret, and that defendant was innocent of the "intent to murder." The trial court summarily dismissed the petition on the basis of untimeliness. This was done prior to our supreme court's decision in *People v. Boclair,* 202 Ill. 2d 89, 99 (2002), holding that the Act does not authorize the first stage dismissal of a postconviction petition on the basis of untimeliness. Defendant did not appeal.

¶ 12 Defendant did, however, file a successive petition in September 1999, alleging that he was actually innocent and that he had been denied due process when his first postconviction

petition had been dismissed as untimely. Attached to the petition was a copy of the Ortiz affidavit which had been attached to defendant's first postconviction petition. The record indicates that the circuit court denied defendant postconviction relief on May 25, 2000. On appeal, defendant was granted summary remand for "further proceedings" pursuant to the Act. See *People v. Estrada*, No. 1-00-2262 (2002) (Dispositional Order). Although the order in the record provides no explanation as to why this court summarily remanded the cause, both parties represent it was because the trial court failed to rule on the petition within 90 days of its filing. This was done prior to our supreme court's opinion in *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007), concluding that the 90-day rule does not apply to successive petitions.

¶ 13 Following our remand, in October 2002, defendant filed a supplemental *pro se* petition alleging that he had been denied effective assistance of trial counsel by counsel's failure to investigate Ortiz. The supplemental petition reiterated defendant's claim of actual innocence.

¶ 14 The Public Defender was appointed in November 2002, and postconviction counsel first appeared upon defendant's behalf in May 2003. At that hearing, the State indicated that the cause had been remanded because "it went past ninety days, and so now it's in second stage proceedings [the State thought] based on the Appellate Court order but they don't really say."

¶ 15 The cause was continued as postconviction counsel attempted to obtain the transcripts. In November 2009, postconviction counsel requested a continuance based upon her scheduled interview with the affiant Ortiz. The record indicates that after speaking with Ortiz, postconviction counsel wrote to defendant regarding her analysis of the case. At a subsequent hearing, postconviction counsel indicated that she still needed to speak with defendant. At a later hearing, counsel indicated that she had spoken with defendant about her analysis of the case, but that she needed to write to him regarding a development. In June 2010, postconviction counsel filed a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), stating that upon

investigation she could not substantiate the claims contained in defendant's *pro se* successive postconviction petition and that her ethical obligations prevented her from presenting a petition without a basis in fact.

¶ 16 The State then filed a memorandum of law asking the court to *sua sponte* dismiss defendant's successive *pro se* petition because he failed to seek the court's leave to file the petition and because the petition failed to meet the requirements of the cause and prejudice test. In the alternative, the State indicated it "would be happy to file its motion to dismiss." The court subsequently denied defendant relief under the Act, because the court could not determine from its own records and transcripts whether leave to file the successive petition had ever been granted. The court also granted postconviction counsel's motion to withdraw.

¶ 17 On appeal, defendant asks this court to reverse and remand for "proper" second stage proceedings under the Act. He contends that the court's order striking the petition was void as it exceeded the scope of this court's order remanding the case. He further argues that he did not need to seek leave of court to file his *pro se* successive petition because there was no such requirement in 1999.

¶ 18 Although the State concedes that defendant was not required to seek leave of court to file his successive *pro se* petition because it was filed before the enaction of section 122-1(f) of the Act (see P.A. 93-493, § 5, eff. Jan. 1, 2004), the State argues that this court may affirm the petition's dismissal on any basis supported by the record.

¶ 19 Initially, this court rejects defendant's claim that this cause must be remanded for "proper" second stage proceedings under the Act as a careful review of the record reveals that second stage proceedings have already occurred. In other words, the petition was docketed and postconviction counsel was appointed. See 725 ILCS 5/122-2.1(b), 122–4 (West 1998). Although defendant is correct that when he filed the instant *pro se* successive postconviction in

1999, he was not required to seek leave of court, the State is also correct that this court may affirm the circuit court on any basis that is supported by the record. *People v Green*, 2012 IL App (4th) 101034, ¶ 30 (a reviewing court may affirm on any basis supported by the record if the judgment is correct). In the case at bar, the circuit court properly denied defendant postconviction relief because he failed to make a substantial showing of actual innocence.

¶ 20 At the second stage of proceedings under the Act, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made the defendant's petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards,* 197 Ill. 2d 239, 246 (2001). All well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Hall,* 217 Ill. 2d 324, 334 (2005) (all factual allegations that are not positively rebutted by the record are accepted as true). This court reviews the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 21 A freestanding claim of actual innocence is cognizable under the Act because a wrongful conviction of an innocent person violates due process under the Illinois Constitution. *People v. Washington,* 171 Ill. 2d 475, 489 (1996). A defendant can raise a freestanding claim of actual innocence based on newly discovered evidence in a postconviction proceeding. *People v. Ortiz,* 235 Ill. 2d 319, 333 (2009). In *Ortiz,* our supreme court determined that to assert a claim of actual innocence based on newly discovered evidence, a defendant must show that the evidence was (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result at retrial. *Ortiz,* 235 Ill. 2d at 333. Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Ortiz,* 235 Ill. 2d at 334.

¶ 22 Thus, here, the relevant inquiry is whether defendant has made a substantial showing of actual innocence such that a third-stage evidentiary hearing is warranted. *People v. Lofton,* 2011 IL App (1st) 100118, ¶ 34; see also *People v. Harris*, 224 Ill. 2d 115, 126 (2007) (at the second stage, the inquiry is whether the petition establishes a substantial showing of a constitutional violation). However, even accepting that Ortiz's affidavit constitutes new evidence that is not cumulative of what was presented at trial, *i.e.*, Ortiz really did pull out a gun, defendant's claim must fail as the facts contained in the affidavit are not of such a conclusive character that they would change the result if defendant was retried. See *Ortiz,* 235 Ill. 2d at 333. Although the affidavit purports to exonerate defendant by establishing that he was innocent of the "intent to murder," the affidavit merely states that Ortiz did in fact pull out a gun that night and "fake" like he was going to fire it. Ortiz does not aver that he fired the weapon.

¶ 23 At trial, defendant testified that he recognized the victim and Ortiz from a prior altercation during which defendant and his friends were chased by members of a rival gang. He further explained that after he saw Ortiz reach back and pull out an object which defendant believed was a gun, defendant responded by shooting at the men because he was afraid and thought that the men were going to shoot him. Defendant now apparently argues, relying on Ortiz's affidavit, that because Ortiz had a gun he was therefore justified in shooting at Ortiz and the victim.

¶ 24 However, contrary to defendant's assertion, it is unclear whether Ortiz's testimony would change the result of a retrial when there is no indication that Ortiz did anything other than pull out a gun and "fake" as though he was going to fire it. The potential addition of Ortiz's testimony that he did in fact pull out a gun would still require the fact finder to determine whether defendant was justified at shooting randomly at two people merely because several weeks before those two men were part of a group that chased defendant and his friends when it remains

undisputed that the victim did not have a weapon and the victim was running away as he was shot. See *Estrada*, No. 83-0911, Order at 5-6 (the reasonableness of a person's belief that it was necessary to use deadly force to prevent death or great bodily harm is a question of fact). Because the facts contained in Ortiz's affidavit are not of such a conclusive character that they would probably change the outcome of a retrial, defendant has failed to make a substantial showing of a freestanding claim of actual innocence (*Lofton,* 2011 IL App (1st) 100118, ¶ 40), and the circuit court properly denied him postconviction relief.

¶ 25 Defendant next contends that he was denied the reasonable assistance of postconviction counsel when counsel withdrew without indicating her compliance with Rule 651(c).

¶ 26 The Act requires only a reasonable level of assistance by counsel during postconviction proceedings. *People v. Moore,* 189 Ill. 2d 521, 541 (2000). In order to ensure this reasonable level of assistance, Supreme Court Rule 651(c) (eff. Dec. 1, 1984), requires appointed counsel to: (1) consult with the defendant by mail or in person to determine the defendant's claims of constitutional deprivation; (2) examine the record of the challenged proceedings; and (3) make any amendments that are "necessary" to the petition previously filed by the *pro se* defendant to present the defendant's claims to the court. See also *People v. Johnson*, 154 Ill. 2d 227, 237-38 (1993) (the attorney appointed will ascertain the basis of the defendant's claims, shape those claims into appropriate legal form and present the defendant's constitutional contentions to the court). Postconviction counsel is not required to amend a defendant's *pro se* postconviction petition (*People v. Turner,* 187 Ill. 2d 406, 412 (1999)); rather, counsel is only required to investigate and present the defendant's claims (*Pendleton,* 223 Ill. 2d at 475). Furthermore, counsel is not required to advance frivolous or spurious claims. *People v. Greer,* 212 Ill. 2d 192, 205 (2004).

¶ 27 Here, the record indicates that after counsel obtained the relevant transcripts, interviewed the affiant, and spoke with defendant, she filed a motion to withdraw because she could not substantiate defendant's claim and believed she could not ethically present a petition that had no basis in fact. While defendant is correct that the postconviction counsel did not file a Rule 651(c) certificate, the record indicates that postconviction counsel complied with the requirements of the Rule.

¶ 28 *People v. Greer,* 212 Ill. 2d 192 (2004), is instructive. There, appointed counsel filed a motion to withdraw stating, *inter alia,* that after reviewing the record and the transcripts of proceedings and interviewing the relevant parties and the defendant he could find no meritorious issue for review, that he could not " 'properly substantiate' " the defendant's claims, and that the defendant's allegations were without merit. *Greer,* 212 Ill. 2d at 200. The court subsequently granted the attorney's motion to withdraw.

¶ 29 Our supreme court noted, in pertinent part, that fulfilling the third obligation under Rule 651(c) does not require postconviction counsel "to advance frivolous or spurious claims," because such amendments would not qualify as "necessary" within the rule's meaning. *Greer,* 212 Ill. 2d at 205 (further determining that filing such an amended petition might violate Supreme Court Rule 137 (eff. Feb. 1, 1994), which states that an attorney's signature certifies that after a reasonable inquiry, counsel believes that the pleading or motion is grounded in fact and warranted by existing law or a good-faith argument for the extension or reversal of existing law). Therefore, the Act did not prevent appointed counsel from withdrawing if counsel determined that a defendant's petition was frivolous or patently without merit such that ethical obligations would actually prohibit the attorney from continuing representation of the defendant. *Greer,* 212 Ill. 2d at 209. Although the inability of postconviction counsel to " 'properly substantiate' " a defendant's claims was not the standard by which counsel should judge a defendant's claims and

counsel should make some effort to explain why a defendant's claims were frivolous or patently without merit, the court determined that the record in that case supported counsel's conclusion that the defendant's claims were frivolous and patently without merit. *Greer,* 212 Ill. 2d at 211-12.

¶ 30 Here, postconviction counsel, through the motion for leave to withdraw and her statements to the court regarding her investigation of defendant's claims, clearly satisfied the requirements of *Greer* in that counsel interviewed Ortiz, spoke with defendant, and ultimately filed a motion to withdraw stating that after investigation she could not substantiate the claims contained in defendant's petition. Although the *Greer* court stated that postconviction counsel seeking leave to withdraw should make "some effort" to explain why counsel concluded that a defendant's claims are frivolous or patently without merit, it also stated that the motion was properly granted when the record indicated that postconviction counsel had complied with Rule 651(c). *Greer*, 212 Ill. 2d at 212. Similarly, here, postconviction counsel satisfied her Rule 651(c) duties by stating that she had discussed defendant's postconviction claims with him, had obtained relevant transcripts, and had interviewed the person whose affidavit supported defendant's claim of actual innocence. While postconviction counsel's decision not to elaborate on her reasoning as to why defendant's claim of actual innocence had no merit left "something to be desired" (*Greer,* 212 Ill. 2d at 212), she took the procedural steps necessary for a motion to withdraw.

¶ 31 Defendant finally contends that the trial court erred when it granted postconviction counsel's motion to withdraw because the motion did not identify or analyze his claims and because counsel did not comply with the requirements of Supreme Court Rule 651(c).

¶ 32 Although our supreme court determined that a proper motion to withdraw should include an explanation as to why all of a defendant's claims were frivolous or patently without merit,

(*Greer,* 212 Ill. 2d at 211-12), this court has previously determined that *Greer* permits a reviewing court to affirm the grant of leave to withdraw despite an insufficient motion when, for one, the record shows that postconviction counsel complied with Rule 651(c). See *People v. Komes*, 2011 IL App (2d) 100014, ¶ 1. This is because, in some circumstances, the futility of the representation is clear in spite of the flaws in counsel's motion to withdraw. *Komes*, 2011 IL App (2d) 100014, ¶ 30. In those cases where the record reveals that postconviction counsel fulfilled the obligations of Rule 651(c) and that the claims in the original petition were patently without merit, "it serves no purpose to reverse a grant of leave to withdraw simply because of insufficiencies in the motion." *Komes*, 2011 IL App (2d) 100014, ¶ 30.

¶ 33 Here, although the motion did not include an explanation as to why postconviction counsel believed that defendant's claim of actual innocence was frivolous and patently without merit, the record reveals that she complied with the requirements of Rule 651(c) when she discussed defendant's claims with him, interviewed the person whose affidavit purportedly supported his claim of actual innocence, and ultimately stated that she could not present a petition that lacked a basis in fact. Accordingly, because the record indicates that postconviction counsel complied with the requirements of Rule 651(c), this court affirms the circuit court's grant of leave to withdraw despite the insufficiencies of the motion. See *Komes*, 2011 IL App (2d) 100014, ¶ 30.

¶ 34 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.