2022 IL App (4th) 200419-U

NO. 4-20-0419

FILED
January 18, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KINZIE L. SCHWAB, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Champaign County No. 16CF337 Honorable Jason Matthew Bohm, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding postconviction counsel provided reasonable assistance.

¶ 2 In November 2019, defendant, Kinzie L. Schwab, filed a postconviction petition. In March 2020, the State filed a motion to dismiss the postconviction petition. In August 2020, the trial court granted the State's motion to dismiss.

¶ 3 Defendant appeals, arguing postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017) and provided unreasonable assistance when he failed to include any relevant evidence to support the claim that defendant's trial counsel was ineffective for failing to conduct an adequate pretrial investigation. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In March 2016, the State charged defendant with criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2016)) (count I) and child pornography (720 ILCS 5/11-20.1(a)(1)(i) (West 2016)) (count II). Count I alleged defendant committed an act of sexual penetration with D.H. (born December 14, 1999), who was under the age of 18, by placing his penis in her vagina and defendant was a family member. Count II alleged defendant filmed D.H., whom defendant knew to be under the age of 18, while she was actually engaged in acts of sexual penetration with defendant.

¶ 6 A. Jury Trial

¶ 7 In August 2016, the case proceeded to a jury trial, where defendant was tried *in absentia*.

¶ 8 1. *D.H.*

¶ 9 On direct appeal, this court summarized D.H.'s testimony as follows:

> "D.H. testified she lived with her grandmother until she was eight years old, when she moved to Texas to live with her mother (Dawnyel Schwab), her stepfather (defendant), and her two half-sisters. Dawnyel encouraged D.H. and defendant to participate in father-daughter activities and D.H. eventually called defendant 'dad.' The family moved to Illinois when D.H. was in seventh grade.
>
> D.H. received a computer for her eleventh birthday and began playing games and exploring social media. According to D.H., she posted photographs on a website called 'photo bomb' and started to get comments related to defendant. D.H. formed a

friendship with someone named Alex, and the two exchanged e-mails. D.H. testified, 'as I started talking to the group, or the people, it starts with Alex but it was more eventually, but they started saying things like, ["]we know who [defendant] is. We've known him for a long time. We just wanted to use you to be able to get to him.["] That kind of stuff. And they were, like, threatening me and my mother and my sisters, to do things and stuff like that.' According to D.H., she tried to tell her mother once, but she did not believe D.H.

The people on the Internet began telling D.H. to do sexual things with defendant, like kissing or flirting. They threatened to hurt D.H.'s family if she ever brought up their communications. D.H. began to suspect defendant was sending the messages because the sender knew immediately when D.H. was going outside or jumping on the trampoline instead of doing what they asked her to do. In sixth grade, D.H. received messages telling her to 'go downstairs and hang out.' When D.H. went downstairs, defendant 'came on to' her in the kitchen. D.H. testified he came up behind her, said, 'you know, mom's not home,' and touched her.

D.H. continued to receive messages from 2011 through 2015, and defendant continued to attempt to get physical with D.H. during that time. D.H. testified the messages were 'hopeful' and

stated 'if you just do this, if you just do this, then we'll stop bothering you, we won't hurt your mom, we'll leave your sisters alone.' D.H. was overwhelmed, wanted the messages to stop, and decided to go ahead with the requests.

In 2015, defendant broached the idea of engaging in sexual intercourse and suggested he and D.H. do 'something more than what's already being done.' Between April and June 2015, defendant and D.H. twice went to hotels in Champaign. D.H. identified photographs of the hotel rooms and specifically remembered the view out of one window because it was 'the only thing [she] had to look at while it was happening.' D.H. testified defendant put his penis in her vagina on two occasions. On another occasion, defendant gave D.H. alcohol and she was unsure if they had sexual intercourse. D.H. tried to tell her mother what happened but it did not help.

According to D.H., defendant was controlling and would not let her leave the house. D.H.'s mother passed away in February 2016, and D.H. began seeing a counselor. D.H. began 'letting out hints' about what defendant did to her and eventually told her counselor and an investigator with the Urbana Police Department what happened. D.H. identified People's exhibit No. 1 as a computer disk containing a video of her and defendant having sexual intercourse in a hotel room. D.H. also identified People's

> exhibit Nos. 8(a) through 8(d), which were photographs depicting defendant's work area in their house and her mother's telephone. Once D.H. had sexual intercourse with defendant, she stopped receiving messages and defendant did not continue to pursue her." *People v. Schwab*, 2019 IL App (4th) 160742-U, ¶¶ 9-14.

D.H. testified two individuals appeared in the video. D.H. identified herself as the female and defendant as the male in the video. D.H. testified the video truly and accurately depicted the events that occurred in the hotel room.

¶ 10 2. *Tim McNaught*

¶ 11 Tim McNaught, an officer with the Urbana Police Department, was qualified as an expert in cell phone forensic examination. In March 2016, McNaught assisted with the execution of a search warrant at defendant's house and recovered an iPhone 4 from defendant's work area. McNaught found a 35-minute video on the iPhone 4 that he burned onto a disk.

¶ 12 3. *Matthew Bain*

¶ 13 Matthew Bain, a juvenile investigator with the Urbana Police Department, testified he received a report that D.H. had been sexually assaulted. While executing a search warrant, Bain asked defendant for his phone, which defendant provided without asking any questions. It was not the same phone McNaught found the video on. Bain interviewed defendant and asked about D.H.'s allegations, which defendant denied. Bain confronted defendant with a record from a Super 8 motel for a one-night stay in May 2015. Defendant claimed he was at the hotel with Lindsay Hall. Defendant had no response when asked why D.H. would make the allegations. Bain informed defendant he had a video of defendant and D.H. having sexual intercourse, and defendant failed to respond.

¶ 14 Bain identified People's exhibit No. 1 as a copy of the video McNaught recovered from the phone found in defendant's house. According to Bain, the video depicted defendant and D.H. having sexual intercourse at a Motel 6 in Urbana. On direct appeal, this court summarized Bain's investigation as follows:

> "Bain testified he viewed the video and searched on the Internet to see if he could find photographs of local hotel rooms that matched the room in the video. Bain identified the motel as the Motel 6 in Urbana. According to Bain, he went to the Motel 6 and asked if a person by defendant's name had checked in there. Bain identified People's exhibit Nos. 5 and 6 as a guest report from Motel 6 from June 17[, 2015,] and a clerk activity log from the same date. Bain testified that Kantilal Patel provided those business records.
>
> The Motel 6 records showed defendant spent the night in room 229. Bain observed room 229 and took photographs of the room from several angles. Bain moved the microwave to confirm his theory that the phone was leaned against it to record the video of defendant and D.H. having sexual intercourse. The video was played, without audio, for the jury." *Schwab*, 2019 IL App (4th) 160742-U, ¶¶ 26-27.

¶ 15 4. *Verdict and Sentence*

¶ 16 During deliberations, the jury asked for "a screen shot of the girl in the video to verify identification of [D.H.]." The trial court informed the jury it was not possible to provide a screen shot and asked the jury to continue deliberations. The jury sent a second question asking

to "review the video through the part where the female and the individual sits on the bed." The record showed the power in the courthouse was out except for emergency lighting. The court ruled the video would not be played again, not because of the power, but because the court thought it would not be appropriate. The court denied the jury's request and asked the jury to continue deliberations. The jury found defendant guilty of criminal sexual assault and child pornography. The court sentenced defendant to a term of 10 years' imprisonment on count I and a consecutive term of 15 years' imprisonment on count II.

¶ 17 B. Direct Appeal

¶ 18 On direct appeal, defendant argued the trial court erred by admitting motel registration records under the business-records exception to the hearsay rule and trial counsel was ineffective for failing to preserve the claim in the posttrial motion. This court affirmed the trial court's judgment. *Schwab*, 2019 IL App (4th) 160742-U, ¶¶ 42, 46.

¶ 19 C. Postconviction Proceedings

¶ 20 In November 2019, defendant filed a postconviction petition. In relevant part, the petition alleged trial counsel was ineffective for failing to conduct an adequate pretrial investigation and present evidence that (1) the individual in the video was not D.H. but a consenting adult who was part of defendant and his wife's "swingers circle" and (2) "D.H. had a prominent birthmark that would have identified the woman in the video as D.H., if it was in fact her." The petition further alleged ineffective assistance of appellate counsel for failing to raise on direct appeal the State's failure to prove defendant knowingly absented himself from trial.

¶ 21 Defendant attached his own affidavit and an affidavit from his father, Gregory Schwab, to the postconviction petition. In his affidavit, defendant stated that in the fall of 2013, he and his wife, Dawnyel, resumed a "swinger lifestyle" and established new Yahoo and

Craigslist accounts, which they continued to use until 2016. The affidavit went on to state, "In the summer of 2015, Dawnyel wanted to make a sex tape of another woman and me. I was initially against the idea, but I relented and allowed Dawnyel to record the sexual encounter on her cell phone." Defendant averred, "[T]he trial transcripts indicate that D.H. testified twice that the iphone 4 on which the video central to the trial was recovered belonged to Dawnyel. The video that was recovered from that phone was likely the video that Dawnyel's phone shot in June of 2015—not a video of [defendant] and D.H. having a sexual encounter[.]" Defendant further averred there was a doctor who treated him and Dawnyel for syphilis whose testimony would have corroborated his claim about his "swinger" lifestyle. Gregory averred, in part, that D.H. had "specific tattoos and birthmarks that could have been detected, and [defendant's] lawyer never pursued a review of this as far as I know."

¶ 22 In the postconviction petition, counsel noted he had "not had the benefit of reviewing the trial court record (some of which is sealed), as part of his duties under Supreme Count Rule 651(c)." Counsel requested leave to amend the postconviction petition after he reviewed the trial file and otherwise complied with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). In March 2020, postconviction counsel filed a Rule 651(c) certificate.

¶ 23 That same month, the State filed a motion to dismiss defendant's postconviction petition. In part, the State argued defendant's willful absence from the trial prevented him from claiming his attorney was ineffective for failing to call him as a witness. The State further argued that any assertions in defendant's affidavit as to what other witnesses would testify to should be disregarded because it presented only hearsay, which was insufficient to support a postconviction petition. The State asserted the record affirmatively rebutted defendant's assertion that his wife recorded his sexual encounter with an unidentified consenting adult where

the video showed defendant activating and placing the recording device and only depicted defendant and the victim.

¶ 24 The State argued Gregory's assertion that D.H. had birthmarks was unsupported by anything in the record and there was no indication how Gregory knew D.H. had birthmarks. The State asserted there was no indication where the birthmarks were located or why Gregory thought they existed or would appear on the video. The State argued defendant's claims of ineffective assistance of trial counsel were vague and conclusory and did not support a substantial showing of ineffectiveness.

¶ 25 In April 2020, postconviction counsel filed a response to the State's motion to dismiss and a second Rule 651(c) certificate. Counsel argued the statements in defendant's affidavit did not conflict with the record and were sufficient to support defendant's argument that trial counsel provided ineffective assistance by failing to uncover and present evidence from the doctor that defendant engaged in a "swinger" lifestyle. Counsel further argued Gregory's affidavit was sufficient to support defendant's claim that trial counsel was ineffective for failing to uncover and present evidence of D.H.'s birthmarks that would have identified the female in the video. Counsel argued the well-pleaded facts in the petition and accompanying affidavits must be taken as true when determining whether to advance the petition to third-stage proceedings.

¶ 26 In August 2020, the trial court entered a written order granting the State's motion to dismiss defendant's postconviction petition. As to defendant's claim that trial counsel was ineffective for failing to investigate whether the female in the video was a consenting adult who was part of defendant's and his wife's swingers' circle, the court determined this claim was rebutted by the record. The court noted defendant claimed his wife filmed the video but "[t]he

record clearly shows that [defendant] started the video recording function on his phone, leaned it up against a microwave in the hotel room, and left it there." The court also noted there was no allegation that defendant ever informed trial counsel of his theory. The court concluded the claim of ineffective assistance of counsel was clearly rebutted by the record and must be dismissed.

¶ 27 As to the claim that defense counsel failed to investigate whether D.H. had a prominent birthmark that would have identified her as the female in the video, the trial court determined there was no "statement that [defendant] told his defense attorney that D.H. had a birthmark or that it was not D.H. in the video." The court noted defense counsel's investigation could only be faulted when he failed to pursue information in his possession. Accordingly, the court found defendant failed to adequately plead a constitutional violation. Finally, the court concluded defendant's claim of ineffective assistance of counsel failed where the underlying claim—that the State failed to prove defendant willfully absented himself from trial—was meritless.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues postconviction counsel failed to comply with Rule 651(c) and provided unreasonable assistance when he failed to include any relevant evidence to support the claim that defendant's trial counsel was ineffective for failing to conduct an adequate pretrial investigation. Specifically, defendant argues postconviction counsel failed to support defendant's claim that (1) the video depicted a consenting adult with that person's affidavit and (2) an unidentified doctor's testimony could corroborate his claim of leading a swinger lifestyle with the doctor's affidavit or medical records. Defendant further argues postconviction counsel

failed to support the claim that D.H. had a prominent birthmark where Gregory's affidavit failed to (1) specify how he knew D.H. had a birthmark, (2) detail what the birthmark looked like and where it was on D.H.'s body, and (3) allege that trial counsel was told about the birthmark.

¶ 31 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2018)) provides a collateral means for a defendant to challenge a conviction or sentence for a violation of a federal or state constitutional right. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). At the first stage of postconviction proceedings, the trial court must determine, taking the allegations as true, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2018). At the second stage of postconviction proceedings, "the State may move to dismiss a petition or an amended petition pending before the court." *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1008 (2006). The defendant bears the burden of making a substantial showing of a constitutional violation. *Id.* at 473. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *Id.*

¶ 32 "[A] defendant in postconviction proceedings is entitled to only a 'reasonable' level of assistance, which is less than that afforded by the federal or state constitutions." *Id.* at 472. Pursuant to Rule 651(c), counsel's duties "include consultation with the defendant to ascertain his contentions of deprivation of constitutional right, examination of the record of the proceedings at the trial, and amendment of the petition, if necessary, to ensure that defendant's contentions are adequately presented." *Id.* "Our review of an attorney's compliance with a

supreme court rule, as well as the dismissal of a postconviction petition on motion of the State, is *de novo*." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 17, 974 N.E.2d 813.

¶ 33 The filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that postconviction counsel provided reasonable assistance. *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. With respect to counsel's duty to submit affidavits, the supreme court has stated, "In the ordinary case, a trial court ruling upon a motion to dismiss a [postconviction] petition which is not supported by affidavits or other documents may reasonably presume that [postconviction] counsel made a concerted effort to obtain affidavits in support of the [postconviction] claims, but was unable to do so." *People v. Johnson*, 154 Ill. 2d 227, 241, 609 N.E.2d 304, 311 (1993). The defendant bears the burden of overcoming the presumption of reasonable assistance by demonstrating his attorney's failure to substantially comply with Rule 651(c). *Jones*, 2011 IL App (1st) 092529, ¶ 23.

¶ 34 We turn first to defendant's argument that postconviction counsel provided unreasonable assistance by failing to attach affidavits from an unidentified female and an unidentified doctor. Defendant points to no affirmative evidence in the record to demonstrate postconviction counsel failed to meet his obligations. In *Johnson*, the supreme court held that postconviction counsel failed to comply with Rule 651(c) where counsel "concede[d] that he made no effort to contact the witnesses specifically identified in the *pro se* petition, or to amend the petition with affidavits of such witnesses." *Johnson*, 154 Ill. 2d at 243. Here, unlike *Johnson*, nothing in the record affirmatively indicates postconviction counsel was specifically informed of the names of the female or the doctor. Nor does anything in the record indicate postconviction counsel made no attempt to locate witnesses other than the absence of affidavits of two unidentified witnesses.

¶ 35 Moreover, postconviction counsel had no duty to conduct a search for the unidentified witnesses. Also in *Johnson*, the supreme court rejected the argument that postconviction counsel had an obligation to locate witnesses not specifically identified or to conduct an investigation to discover witnesses who might offer evidentiary support for a claim. *Id.* at 247. "While [postconviction] counsel has an obligation to present a *petitioner's claims* in appropriate legal form, he is under no obligation to actively search for sources outside the record that might support general claims raised in a [postconviction] petition. The petitioner has the obligation to inform counsel with specificity of the identity of witnesses who should have been called in his defense." (Emphasis in original.) *Id.* at 247-48.

¶ 36 Here, where counsel filed a Rule 651(c) certificate, defendant has not addressed the presumption "that [postconviction] counsel made a concerted effort to obtain affidavits in support of the [postconviction] claims, but was unable to do so." *Id.* at 241. In his reply brief, defendant "acknowledges that if [postconviction] counsel was not made aware of the identities of the alleged woman and doctor at issue in the petition, any argument that trial counsel performed unreasonably by not going on a fishing expedition to locate those unknown witnesses would lack legal merit." Defendant goes on to argue that postconviction counsel must have been informed of the identities of these witnesses because, if he had not, he would have filed a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192, 211-12, 817 N.E.2d 511, 523 (2004). Because counsel did not file a motion to withdraw, defendant argues, it is not reasonable to assume that defendant did not disclose the witnesses' identities. Defendant's argument that postconviction counsel did not file a motion to withdraw because he knew the identities of the female and the doctor is entirely speculative.

¶ 37 Moreover, defendant's argument ignores the fact that the trial court dismissed this claim of ineffective assistance of counsel not because it was unsupported by affidavits but because it was rebutted by the record. The postconviction petition quoted from defendant's affidavit at length and alleged defendant and his wife, Dawnyel, were engaged in a swinger lifestyle and Dawnyel wanted to make a sex tape of defendant and another woman. Defendant averred he "relented and allowed Dawnyel to record the sexual encounter on her phone." Defendant further averred this was likely the video that was shown to the jury.

¶ 38 As the trial court correctly concluded, defendant's assertion that the video was filmed by his wife and depicted a consensual encounter with an adult is rebutted by the video itself. The video clearly shows only two people. The video also shows defendant turning on the recording function on the phone and propping it up against what Officer Bain later confirmed was a microwave. Because the video shows defendant personally recorded the video, it cannot be the video defendant "allowed Dawnyel to record *** on her phone." Because this claim is positively rebutted by the record, we conclude the trial court did not err in dismissing this claim in the postconviction petition.

¶ 39 Defendant also asserts postconviction counsel provided unreasonable assistance where counsel failed to properly support the claim that trial counsel was ineffective for failing to investigate and present evidence of a prominent birthmark D.H. allegedly had. Here, postconviction counsel raised the issue regarding the birthmark in the petition. Counsel supported the allegation with Gregory's affidavit, which failed to include an averment that trial counsel had knowledge of the birthmark. As noted above, postconviction counsel is not obligated to conduct a search for sources outside the record that might support the defendant's claim. *Johnson*, 154 Ill. 2d at 247-48. Counsel attached Gregory's affidavit in support of this

claim; although the affidavit was adequate to support the claim about the birthmark, it failed to allege trial counsel had knowledge of said birthmark. This inadequacy cannot be attributed to unreasonable assistance—postconviction counsel did not personally have this knowledge, and it is defendant's responsibility to provide such information. See *People v. Moore*, 189 Ill. 2d 521, 542, 727 N.E.2d 348, 359 (2000) (stating postconviction counsel had no obligation to seek out an expert witness or conduct a fishing expedition for evidence regarding a chain of custody claim because the defendant is responsible for providing such information). Accordingly, we find postconviction counsel's performance did not fall below the statutory requirement of reasonable assistance.

¶ 40 Defendant argues postconviction counsel's unreasonable assistance is further demonstrated by his failure to include two additional claims of ineffective assistance of appellate counsel for failing to argue (1) the trial court erred by refusing to allow the jury to view the video after it requested to view it and (2) the improper admission of other-crimes evidence at trial. Defendant acknowledges these claims are not properly before this court, but he raises them to "provide further context to his claim that [postconviction] counsel provided unreasonable assistance." As these issues are not properly before this court, we decline to address these claims.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.