2021 IL App (1st) 162956

FIFTH DIVISION
JULY 30, 2021

No. 1-16-2956

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 05 CR 6560
	)	05 CR 1516
	)	
STEVEN ZIRKO,	)	Honorable
	)	Timothy Chambers,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.
Justice Rochford concurred in the judgment and opinion.
Presiding Justice Delort specially concurred, with opinion.

OPINION

¶ 1 Defendant-appellant Steven Zirko, convicted of two counts of first degree murder and one count of solicitation of murder, appeals the second stage dismissal of his postconviction petition. On appeal, Mr. Zirko argues that (1) his postconviction counsel was involved in a *per se* conflict of interest with respect to his case where counsel argued his own ineffectiveness, (2) counsel failed to provide a reasonable level of assistance where counsel did not attach supporting documents to the postconviction petition, and (3) the motion for substitution of judge was erroneously denied. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 2 BACKGROUND

¶ 3 On December 13, 2004, Mr. Zirko shot and stabbed his ex-girlfriend and her mother in his

ex-girlfriend's home in Glenview.[1] Prior to the murder, he had solicited someone to kill his ex-girlfriend. Mr. Zirko was represented by attorney Stephen Richards at a jury trial, which commenced on June 8, 2009. Mr. Zirko was convicted of two counts of first degree murder and one count of solicitation of murder. After his conviction, Mr. Zirko filed a *pro se* motion for a new trial based on ineffective assistance of trial counsel. Although the motion was stamped "received" by the clerk of the circuit court, the court never ruled on the motion. Meanwhile, defense counsel filed a motion for a new trial, which was denied. Mr. Zirko was sentenced to two natural life sentences for the murders and a concurrent 30-year sentence for solicitation of murder.

¶ 4 On direct appeal, Mr. Zirko was represented by appointed counsel from the Office of the State Appellate Defender. Counsel argued, *inter alia*, that trial counsel was ineffective for requesting that the murder and solicitation of murder charges be joined. *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 57. This court found that argument meritless and affirmed Mr. Zirko's conviction. *Id.* ¶¶ 60, 74.

¶ 5 On October 3, 2013, Mr. Zirko, through his trial counsel Stephen Richards, filed a postconviction petition. A little over one month later, on November 14, 2013, Mr. Zirko moved for substitution of judge for cause. In the motion, he argued that the trial judge had not been impartial during the trial. He then highlighted that the judge had chastised defense counsel for "laughing" and "smirking" during the trial but did not comment on or chastise the assistant state's attorney's similar behavior. In addition, Mr. Zirko alleged that the trial judge commented, in front of the jury, that he needed to "lecture" defense counsel.

¶ 6 In response to the motion for substitution of judge, which was heard by a different judge,

[1]The facts of this case are set forth in detail in *People v. Zirko*, 2012 IL App (1st) 092158. We repeat only those facts necessary to resolve the issues now on appeal.

the trial judge who was the subject of the motion proffered a signed document, purporting to be an affidavit although it was not notarized. In the document, the judge stated that he could be fair and impartial to Mr. Zirko. The judge also denied denigrating defense counsel in front of the jury and further denied that he "allow[ed] laughter and smiles from one side and not the other."

¶ 7 On December 20, 2013, the trial court denied Mr. Zirko's motion for substitution of judge.

¶ 8 On February 18, 2016, attorney Richards filed the second amended postconviction petition at issue here. The petition raised 10 claims of ineffective assistance of appellate counsel, including a claim that appellate counsel failed to argue that the trial court was biased in favor of the State. The petition further raised six claims of ineffective assistance of trial counsel. On May 6, 2016, the State moved to dismiss the second amended petition.

¶ 9 In October 2016, following arguments on the State's motion, the court granted the motion to dismiss the second amended petition. Mr. Zirko timely appealed on October 26, 2016.

¶ 10 On appeal, Mr. Zirko continued to be represented by attorney Richards. In his brief, attorney Richards argued several claims of ineffective assistance of appellate counsel as well as five claims of ineffective assistance of trial counsel (himself) on behalf of Mr. Zirko. Specifically, attorney Richards argued that trial counsel was ineffective for failing to (1) bring Mr. Zirko's *pro se* posttrial claims of ineffective assistance of counsel to the trial court's attention, (2) keep the victims' family members out of the courtroom by subpoenaing them as witnesses and moving to exclude them from the courtroom, (3) investigate and develop a theory of an alternative suspect, (4) introduce photographs of Mr. Zirko's hands following the murder to prove that the cuts on his hands were caused by eczema, and (5) elicit exculpatory evidence from the State's forensic expert. In addition, attorney Richards argued on behalf of Mr. Zirko that he (attorney Richards) provided unreasonable assistance in postconviction proceedings, where he failed to investigate Mr. Zirko's

actual innocence and failed to raise additional claims of ineffective assistance of trial counsel.

¶ 11 After the completion of appellate briefing in this court, on the court's own motion, we requested supplemental briefing on the issue of whether attorney Richards had a conflict of interest in that he was arguing his own ineffectiveness. Attached to attorney Richards's supplemental brief was an affidavit from Mr. Zirko asking for new counsel to be appointed to represent him instead of attorney Richards. In light of Mr. Zirko's affidavit requesting new counsel, we did not reach the issue of whether attorney Richards had a conflict of interest and, instead, granted Mr. Zirko's request to appoint new counsel. We appointed the Office of the State Appellate Defender (OSAD) to represent Mr. Zirko and further ordered appointed counsel to either supplement or stand on attorney Richards's original appellate brief.

¶ 12 OSAD supplemented attorney Richards's brief, arguing that attorney Richards did not provide reasonable assistance because (1) he had a conflict of interest and (2) he failed to attach supporting documentation to Mr. Zirko's postconviction petition. OSAD also argued that the trial court erred in denying Mr. Zirko's motion for substitution of judge. Supplemental briefing is now complete, and this case is ripe for resolution.

¶ 13 ANALYSIS

¶ 14 We note that we have jurisdiction to review this matter, as Mr. Zirko timely appealed the dismissal of his postconviction petition. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. July 1, 2017).

¶ 15 The Post-Conviction Hearing Act (Act) allows a defendant who is imprisoned in a penitentiary to challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1 (West 2016); see also *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). The Act establishes a three-stage process for adjudicating a postconviction petition.

See 725 ILCS 5/122-1 *et seq.* (West 2016). During the first stage, the trial court must independently review the petition, taking the allegations as true, in order to determine whether the petition is frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9; 725 ILCS 5/122-2.1(a)(2) (West 2016)). If the petition survives dismissal at this stage, it advances to the second stage, where counsel may be appointed and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). At the second stage, the defendant must make a substantial showing of a constitutional violation in order to proceed to the third and final stage of the postconviction process and obtain an evidentiary hearing. *Id.* (citing 725 ILCS 5/122-6 (West 2016)).

¶ 16 There is no constitutional right to counsel in postconviction proceedings, and as such, a postconviction petitioner cannot claim sixth amendment ineffective assistance of counsel in such proceedings. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). Instead, a petitioner is entitled only to the level of assistance of counsel provided by the Act. *Id.* That assistance has been defined by Illinois courts as a *reasonable* level of assistance of counsel. *Id.*; see also *People v. Schlosser*, 2012 IL App (1st) 092523, ¶ 18. The right to reasonable assistance of postconviction counsel includes the right to conflict-free representation. See *People v. Hardin*, 217 Ill. 2d 289, 300 (2005). Conflict-free representation, in turn, is " 'assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations.' " *People v. Green*, 2020 IL 125005, ¶ 20 (quoting *People v. Spreitzer*, 123 Ill. 2d 1, 13-14 (1988)).

¶ 17 On appeal, Mr. Zirko argues that he did not receive the reasonable assistance of his retained postconviction counsel, attorney Stephen Richards, where counsel had a conflict of interest. Mr. Zirko further argues that attorney Richards provided unreasonable assistance where he did not attach the necessary documents or affidavits to support Mr. Zirko's postconviction claims.

¶ 18 There are two categories of conflicts of interest: actual and *per se.* In his supplemental brief, Mr. Zirko alleges a *per se* conflict of interest, which occurs where facts about a defense attorney's status, by themselves, lead to a disabling conflict. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). Our supreme court has identified three categories of *per se* conflicts: (1) where defense counsel has an association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who was personally involved in the defendant's prosecution. *Id.* at 143-44. When there is a *per se* conflict of interest, the defendant need not show that his counsel's performance was affected by the conflict: prejudice is presumed. *People v. Carr*, 2020 IL App (1st) 171484, ¶ 26. Furthermore, a *per se* conflict results in automatic reversal unless a defendant waives his right to conflict-free counsel. *Id.*

¶ 19 Mr. Zirko maintains that his attorney, Mr. Richards, served as both trial counsel and postconviction counsel and therefore had a conflict of interest. Mr. Zirko argues that, on appeal from the dismissal of his postconviction petition at the second stage, attorney Richards argued his own ineffectiveness as trial and postconviction counsel. Needless to say, this does not fall into the three categories of *per se* conflicts of interest identified by our supreme court in *Hernandez*. Mr. Zirko urges us to create a fourth category for *per se* conflicts of interest, which he asserts arises when an attorney alleges his own ineffectiveness. But our supreme court has expressly rejected arguments for the creation of additional categories and unequivocally stated that it would only recognize the three categories outlined in *Hernandez* as the bright-line test for determining *per se* conflicts of interest. *Green*, 2020 IL 125005, ¶ 43; see also *In re Br. M.*, 2021 IL 125969, ¶ 55 (referring to the *Hernandez* categories as a "closed set" and stating "any other situations may be examined for an actual conflict of interest").

¶ 20 Responding to these cases, as well as questions from the court during oral argument, Mr. Zirko contended that we should also consider whether attorney Richards had an *actual* conflict of interest in representing Mr. Zirko. However, because Mr. Zirko did not make an argument regarding an *actual* conflict of interest in his appellate brief, this court, on its own motion, ordered him to submit supplemental briefing on whether attorney Richards had an actual conflict of interest. We set an appropriate briefing schedule in order to allow Mr. Zirko ample time to supplement his brief and the State the opportunity to respond to his new argument. Mr. Zirko, without explanation, failed to take advantage of this opportunity. Therefore, any argument regarding an *actual* conflict of interest is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (points not raised in initial brief and argued for the first time during oral argument are forfeited).

¶ 21 Next, Mr. Zirko argues that, regardless of whether a *per se* conflict of interest existed, attorney Richards nevertheless provided unreasonable assistance. The parties initially dispute the standard by which we should evaluate attorney Richards's representation. The State maintains that, in order to succeed on this claim, Mr. Zirko must show not only that attorney Richards's assistance was unreasonable but that Mr. Zirko was prejudiced thereby. In other words, he must show that if attorney Richards had provided reasonable assistance, in the form of attaching evidence and other documentation in support of the postconviction petition's allegation, then the trial court would have granted Mr. Zirko an evidentiary hearing. Mr. Zirko disagrees with the State's contention and argues that he is entitled to new second stage proceedings regardless of whether his underlying claims have merit. We agree with the State.

¶ 22 Mr. Zirko relies on *People v. Suarez*, 224 Ill. 2d 37, 47 (2007), for the proposition that he is not required to show prejudice in order to support an unreasonable assistance claim where postconviction counsel failed to attach affidavits and supporting documentation. But *Suarez*

considered *appointed* counsel's noncompliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) in concluding that counsel's performance was unreasonable regardless of the underlying merits of the postconviction petition. *Suarez*, 224 Ill. 2d at 51-52. Here, postconviction counsel was not appointed but *retained*. While retained postconviction counsel must also provide a reasonable level of assistance, he is not required to comply with Rule 651(c). See *People v. Cotto*, 2016 IL 119006, ¶ 41. This court, in a matter of first impression, recently held that it would evaluate unreasonable assistance claims involving retained postconviction counsel under a "*Strickland*-like analysis," *i.e.*, that it would consider the merits of the underlying claim before allowing postconviction relief on this basis. *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 59. We follow this approach.

¶ 23 In this case, Mr. Zirko does not argue that he was prejudiced by attorney Richards's allegedly unreasonable assistance. Instead, he insists that he is not required to show prejudice, citing *People v. Brown*, 2017 IL App (3d) 140921. But *Brown* is wholly inapposite. There, this court considered whether defense counsel had an actual conflict of interest preventing her from effectively arguing her own ineffectiveness. *Id.* ¶¶ 33-34. *Brown* did not imply that an attorney provides unreasonable assistance whenever she suffers from a conflict of interest. Indeed, *Brown* was before this court on *direct appeal* (*id.* ¶ 1) and so did not even consider the "reasonable assistance" standard *postconviction* counsel is required to meet. Simply stated, without a showing of prejudice, we cannot conclude that attorney Richards provided unreasonable assistance. See *Zareski*, 2017 IL App (1st) 150836, ¶ 61.

¶ 24 Finally, we address Mr. Zirko's argument that the court erred in denying his motion for substitution of judge. There is no absolute right to a substitution of judge in postconviction proceedings. *People v. Hall*, 157 Ill. 2d 324, 331 (1993). Rather, there is a preference for the judge

who presided over a defendant's trial to also preside over the postconviction proceedings. *Id.* In order to obtain a different judge for postconviction proceedings, the defendant must show that allowing the same judge to preside over the case would result in "substantial prejudice." *People v. Townsend*, 2020 IL App (1st) 171024, ¶ 49. Prejudice means " 'animosity, hostility, ill will, or distrust towards [the] defendant.' " *Id.* (quoting *People v. Patterson*, 192 Ill. 2d 93, 131 (2000)). We review a trial court's ruling on a motion for substitution of judge under the manifest weight of the evidence standard. *People v. Mercado*, 244 Ill. App. 3d 1040, 1047 (1993). A decision is against the manifest weight of the evidence where it is clearly erroneous or where the record reflects the opposite conclusion. *Id.*

¶ 25 Here, Mr. Zirko argues that the trial judge was prejudiced against him because during the trial, the judge "denigrated" defense counsel by admonishing counsel to refrain from smirking or laughing, and further that the judge claimed that he needed to "lecture" defense counsel. According to Mr. Zirko, the trial judge did not admonish counsel for the State for similar behavior. This behavior, even if it occurred, does not necessarily reflect "animosity, hostility [or] ill will" towards Mr. Zirko. We cannot say that the trial judge's admonishment "denigrate[d]" defense counsel. On the contrary, it appears to have ensured that the courtroom proceedings retained sufficient solemnity and dignity.[2] Likewise, the trial judge's expression of frustration by remarking that he had to lecture defense counsel is neither directed to nor indicative of hostility towards Mr. Zirko. Rather, it appeared to be an effort by the trial judge to maintain appropriate decorum in his

[2]The trial judge, in an unnotarized "affidavit," denied admonishing defense counsel for laughing. As Mr. Zirko correctly points out, this is contradicted by the record; however, the trial court, with a different judge presiding, did not consider the affidavit in its ruling that the trial judge who was the subject of the motion was not prejudiced against Mr. Zirko, so as to support a substitution of judge.

courtroom. That is his role. Nothing in the record supports or suggests that the trial judge bore ill will to Mr. Zirko because of Mr. Zirko's trial counsel's conduct.

¶ 26 Mr. Zirko also argues that the trial judge should have recused himself to avoid the appearance of bias. We note that Mr. Zirko did not file a motion for recusal, only a motion for substitution of judge for cause. As our supreme court has noted, "recusal and substitution for cause are not the same thing." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45. While we review a trial judge's decision regarding recusal for an abuse of discretion, "[t]here is no abuse of discretion [simply because] the judge does not recuse himself on his own motion." *Chesler v. People*, 309 Ill. App. 3d 145, 154 (1999). In looking at the totality of circumstances in this case, we see no reason to deviate from this well-settled principle. Therefore, this argument likewise fails.

¶ 27 CONCLUSION

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

¶ 29 Affirmed.

¶ 30 PRESIDING JUSTICE DELORT, specially concurring:

¶ 31 As the majority correctly notes, our supreme court has expressly refused to expand the categories of *per se* conflicts of interest beyond the three bases set forth in *People v. Hernandez*, 231 Ill. 2d 134, 143-44 (2008), namely (1) where defense counsel has an association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who was personally involved in the defendant's prosecution. The conflict Zirko raises here does not fall within those three categories.

¶ 32 Zirko makes a strong and persuasive argument that the three bases of *per se* conflict should be expanded to include cases where the attorney who defended the petitioner at trial is arguing his

own ineffectiveness. In my view, such conduct is a textbook example of a conflict of interest. However, our supreme court has so explicitly limited the *per se* conflict doctrine that we cannot do so on our own. See *supra* ¶ 19.

¶ 33 That leaves the possibility of granting Zirko relief on the basis that his trial attorney's conduct amounted to an actual (as opposed to *per se* conflict). But, as the majority explains, he did not raise that claim even though we gave him an opportunity to amend his brief to do so. See *supra* ¶ 20. In light of Zirko's forfeiture, I join the majority's order and merely express my view that the supreme court should consider expanding the *per se* conflict doctrine to include situations where, like here, the trial attorney argues his own ineffectiveness.

No. 1-16-2956

Cite as:	*People v. Zirko*, 2021 IL App (1st) 162956
Decision Under Review:	Appeal from the Circuit Court of Cook County, Nos. 05-CR-6560, 05-CR-1516; the Hon. Timothy Chambers, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Stephen L. Gentry, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, John E. Nowak, and Jessica R. Ball, Assistant State's Attorneys, of counsel), for the People.