

No. 1-17-0105

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 25021
)	
ELI CUNNINGHAM,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* We affirm the circuit court's second-stage dismissal of the defendant's postconviction petition because the defendant failed to make a substantial showing that his counsel was ineffective.
- ¶ 2 The defendant, Eli Cunningham, appeals from an order of the circuit court of Cook County, granting the State's motion to dismiss his petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) at the second stage of

proceedings. On appeal, he contends that the circuit court erred in the following ways: (1) by finding that he was culpably negligent in failing to timely file his postconviction petition; (2) by finding that he did not make a substantial showing that both his trial attorney was ineffective for failing to move to suppress the defendant's inculpatory statements and his appellate counsel was ineffective for failing to raise his trial counsel's ineffectiveness on appeal. For the reasons that follow, we affirm.

¶ 3 In November 2003, the defendant was charged by indictment with one count of attempted first-degree murder and five counts of aggravated battery for intentionally striking his cousin, Sylvester Daniels, with a vehicle.

¶ 4 The following facts relevant to the disposition of this appeal were derived from the defendant's bench trial.

¶ 5 On the evening of October 24, 2003, Daniels, after a night of heavy drinking, pushed his cousin, who is the defendant's father, outside of a bar. The defendant, who had just arrived, approached Daniels and the two argued. Daniels struck the defendant. The two men were separated and Daniels started walking away from the bar in the direction of his apartment. The defendant then returned to his car.

¶ 6 As Daniels walked away, he walked on the parkway—the grassy area between the sidewalk and the road. The defendant's car struck Daniels, injuring him. There was conflicting evidence as to whether the defendant's girlfriend was in the car at the time of the incident and also whether there was a pole near where Daniels was struck. As a result of his injuries, Daniels's right leg was amputated below the knee.

¶ 7 Assistant State’s Attorney (ASA) Douglas Harvath testified that, after the police arrested the defendant, he interviewed him. ASA Harvath testified that he informed the defendant of his *Miranda* rights, after which the defendant waived his rights and voluntarily spoke with him. During the interview, the defendant told him that he “accelerated the car towards [Daniels]” and “turned the steering wheel of the car, went up onto the sidewalk and ran into [Daniels],” before driving away. The defendant refused to sign a statement for ASA Harvath and the interrogation was not recorded.

¶ 8 The defendant testified that, following his altercation with Daniels at the bar, he left in his car. At one point, he brought his car to a stop and bent down to pick something up. When he next looked up, he saw Daniels, standing near a pole, and he appeared to be pointing something at him. The defendant stated, “I thought I seen [*sic*] a gun,” so he ducked down, pressing the accelerator to flee. The defendant testified that he left the scene, believing that he had crashed into a pole.

¶ 9 The defendant also testified with regard to his communications with ASA Harvath. According to the defendant, the only time he spoke with ASA Harvath was to request an attorney. ASA Harvath responded by telling the defendant it was not his duty to call the defendant’s attorney. The defendant denied making any of the statements that ASA Harvath attributed to him.

¶ 10 The circuit court found the defendant guilty on all counts and merged the aggravated battery counts into the attempted murder charge. While announcing a finding of guilt, the circuit court stated that he did not find the defendant’s testimony “believable.” The defendant was

sentenced to 16 years' imprisonment. We affirmed the defendant's conviction on direct appeal. *People v. Cunningham*, 376 Ill. App. 3d 298 (2007).

¶ 11 On February 28, 2008, the circuit court granted a motion permitting the defendant's private counsel, Jennifer Bonjean, to remove the record on appeal for review. The motion stated that the defendant had retained Bonjean "for the purpose of *** preparing a post-conviction on his behalf."

¶ 12 On August 27, 2008, Bonjean filed a postconviction petition in the defendant's name. The certificate of service indicated that Bonjean personally filed the petition with the clerk of the Circuit Court of Cook County. The petition was labeled "*pro se*," and, according to the last page, was respectfully submitted by "S/Eli Cunningham," but was not otherwise signed. Bonjean's name did not appear anywhere on the petition. On October 22, 2008, the circuit court summarily dismissed the petition and issued an order pursuant to section 5/22-105 of the Code of Civil Procedure (Code) (735 ILCS 5/22-105 (2008)) that assessed court costs and fees against the defendant for filing a frivolous pleading. The defendant appealed, and his appeal was docketed as No. 1-08-3501.

¶ 13 On February 19, 2010, while appeal No. 1-08-3501 was pending, the defendant filed a *pro se* motion to reconsider, alleging that he did not retain Bonjean as his attorney, nor was she authorized to file a postconviction petition on his behalf. The defendant requested that the circuit court vacate the dismissal order, allow the withdrawal of the postconviction petition, and grant him leave to re-file a postconviction petition.

¶ 14 In support of his motion, the defendant attached two letters that he received from Bonjean. According to her letter dated February 15, 2008, Bonjean obtained the briefs filed in

the defendant's case and requested the transcripts. Bonjean stated in this letter that she would arrange a meeting with the defendant to discuss potential postconviction issues. In the letter dated July 1, 2008, Bonjean stated that she received the transcripts and that, once she had read the transcripts, she would arrange to call and visit with the defendant. She also informed him that his postconviction petition was due at the end of August 2008.

¶ 15 On March 31, 2010, the circuit court denied the defendant's motion to reconsider, finding that it was untimely and that the court had no jurisdiction to reconsider the dismissal of the petition. The defendant appealed (appeal No. 1-10-1036), arguing that the postconviction petition was invalid because he did not sign it. On May 13, 2011, this court consolidated appeal Nos. 1-08-3501 and 1-10-1036.

¶ 16 On appeal, we dismissed case No. 1-08-3501 for lack of jurisdiction because we found that the defendant had filed a timely motion to reconsider and we affirmed the denial of the defendant's motion to reconsider the dismissal of his postconviction petition in case No. 1-10-1036. *People v. Cunningham*, Nos. 1-08-3501 and 1-10-1036 (consolidated) (unpublished order under Supreme Court Rule 23).

¶ 17 The defendant next filed a petition for leave to appeal to the supreme court. The supreme court denied the petition for leave to appeal but issued a supervisory order that directed this court to vacate its order in case No. 1-10-1036, affirming the denial of the defendant's motion to reconsider the dismissal of his postconviction petition. *People v. Cunningham*, No. 113991, May 30, 2012 (supervisory order). The supreme court directed this court to remand the matter to the circuit court for an evidentiary hearing on the defendant's motion to reconsider, including a determination of whether the petition was filed with the defendant's knowledge and

authorization, and if not, whether the petition should be stricken or withdrawn. Pursuant to the supervisory order, we vacated the May 13, 2011 consolidation and our decision in case No. 1-10-1036 and remanded the matter to the circuit court.

¶ 18 On remand, the circuit court appointed an assistant public defender to represent the defendant. An evidentiary hearing was held on January 3, 2013, during which the defendant testified as follows. The defendant wrote a letter to Bonjean in April 2007 about the possibility of retaining her to file a postconviction petition. Bonjean responded to his letter on February 15, 2008. The defendant sent Bonjean another letter on February 21, 2008, outlining his postconviction claims. From that point on, the defendant spoke to Bonjean at least three times via telephone. He also received a letter from Bonjean on July 1, 2008, where she stated that she would arrange a visit with him. The defendant next spoke to Bonjean by phone on August 7, 2008. According to the defendant, he only authorized Bonjean to file a motion for an extension of time. On September 26, 2008, the defendant wrote Bonjean a letter, in which he stated that “we need to get the postconviction petition filed.” In October 2008, the defendant was alerted that Bonjean had filed a postconviction petition on his behalf when he received notice that the circuit court had summarily dismissed the petition. The defendant stated that he did not file a subsequent petition because he knew that “you can only file one.” On cross-examination, the defendant acknowledged that he was aware that the deadline to file his postconviction petition was August 27, 2008.

¶ 19 Next, Bonjean testified that, after communicating with the defendant and his family, she “agreed to represent him to determine whether he had a post-conviction petition that [she] considered worthy of representing him on.” According to Bonjean, the defendant’s primary

claim was that his trial counsel had inadequately presented his self-defense claim and he provided her with the names of potential witnesses who would support his claim, including his girlfriend. Bonjean testified that she conducted an investigation but was unable to locate the defendant's girlfriend or any other witness to support the defendant's claims. She stated that, when she spoke with the defendant on the phone on August 7, 2008, she warned him of the "rapidly approaching" deadline. She also informed him that his claims required evidentiary support and provided him with the following two options: 1) wait until she could obtain the affidavit from his alleged witnesses and file the petition late or 2) timely file the petition without evidentiary support and then supplement the petition with the evidence before it is ruled upon. Bonjean testified that, based on her conversation with the defendant, she understood that he agreed that she should take the latter option and file the unsupported petition. She stated that the defendant was certain that he could obtain an affidavit from his girlfriend. Bonjean acknowledged that she filed the unsupported petition and stated that she was "acting under a good faith belief in [the defendant] as is my obligation as his attorney that [his girlfriend] would, in fact, provide that affidavit."

¶ 20 At the close of evidence, the circuit court stated that it was "absolutely clear" that the defendant and Bonjean entered into an agreement for her to represent him on his postconviction petition and that they had an attorney-client relationship. The circuit court found that Bonjean believed that she was acting according to the defendant's wishes, based on their August 7, 2008 phone call, when she filed an unsupported postconviction petition on his behalf, but that the defendant had a different understanding of their discussion. The circuit court noted that, in the defendant's letter to Bonjean on September 26, 2008, he stated "we need to get the

postconviction petition filed,” which showed that he did not know that Bonjean had already filed a postconviction petition on his behalf. Ultimately, the circuit court granted the defendant’s motion to reconsider and struck the postconviction petition filed on August 27, 2008, vacated the dismissal order and the assessment of costs and fees, and “in short, *** [placed the defendant] back in a position [he was in] *** had the petition never been filed.” The circuit court informed the defendant that, if he filed a postconviction petition, he would still “be subject to the Statute of Limitations as to why it was—was not filed in a timely fashion.”

¶ 21 On February 15, 2013, the defendant filed the *pro se* postconviction petition that is the subject of this appeal. In that petition, the defendant alleged that, *inter alia*, he was denied effective assistance of trial and appellate counsel. Relevant to this appeal, the defendant alleged that trial counsel was ineffective for failing to file a motion to suppress inculpatory statements he made to ASA Harvath and that his appellate counsel was ineffective for failing to raise that same issue on appeal. The defendant attached his own affidavit to the petition, averring that, during his interview with ASA Harvath, he requested an attorney. The defendant also denied that he made the statements that ASA Harvath attributed to him.

¶ 22 The circuit court advanced the defendant’s petition to the second stage, and the defendant was appointed postconviction counsel who filed a supplemental petition that alleged the absence of culpable negligence for the untimely filing of the defendant’s petition. According to the supplemental petition, the defendant had cause for failing to file his petition from April 2007, through January 4, 2013, because, during that period, he was either reasonably relying on assistance of private counsel or litigating to have the unauthorized petition stricken.

¶ 23 The State filed a motion to dismiss the postconviction petition, arguing that the petition was untimely and the defendant could not establish his lack of culpable negligence. The State further argued that the defendant's various claims of ineffective assistance of trial and appellate counsel were without merit.

¶ 24 Following a second-stage hearing, the circuit court granted the State's motion to dismiss, finding the petition untimely and the individual allegations without merit. As to timeliness, the circuit court noted that the defendant was trying to "have it both ways" by asserting that private counsel was not his lawyer or authorized "to do anything," while at the same time arguing that he reasonably relied on her as his lawyer and thus did not file a postconviction petition. With regard to the merits, the circuit court found that the defendant failed to make a substantial showing of any constitutional violation. Relevant to this appeal, the circuit court found that the defendant did not make a substantial showing that his trial counsel was ineffective for failing to file a motion to suppress his inculpatory statement because there was no showing that the motion would have been successful or that, even if the motion had been successful, the outcome of the trial would have changed.

¶ 25 The defendant appealed the second-stage dismissal to this court, arguing that he was not culpably negligent for failing to file a timely postconviction petition because he relied on the advice of private counsel during the filing period and that his postconviction counsel's Rule 651(c) certificate was facially deficient. We reversed and remanded the matter to the circuit court based on postconviction counsel's failure to comply with Rule 651(c). *People v. Cunningham*, 2016 IL App (1st) 140297-U.

¶ 26 On remand, the defendant’s postconviction counsel filed a new Rule 651(c), stating that he had “examined the record of the proceedings at trial[.]” The State moved the circuit court to reinstate its prior ruling and the defendant rested on his prior arguments. The circuit court granted the State’s motion and again dismissed the petition.

¶ 27 The defendant filed the instant appeal, arguing that he alleged sufficient facts to establish that his untimely filing was not due to his culpable negligence and that he made a substantial showing that both his trial and appellate counsel were ineffective. The State responds that the defendant failed to prove that he was not culpably negligent in failing to file a timely postconviction petition and, alternatively, that the defendant failed to make substantial showing that his trial and appellate counsel were ineffective. We first address whether the defendant’s postconviction petition should be dismissed for being untimely filed.

¶ 28 The Act provides a procedural mechanism through which a petitioner may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2012). At the first stage of a postconviction proceeding, the circuit court independently reviews the defendant’s petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the postconviction petition is not summarily dismissed, as here, it advances to the second stage, where the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id.* at 10-11 n. 3. At the second stage of proceedings, the postconviction court takes “all well-pleaded facts that are not positively rebutted by the trial record” as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition fails to make a

substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the postconviction petition advances to the third stage where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012).

¶ 29 At the second stage, the State may also, as it did here, move to dismiss a petition as being untimely. *People v. Perkins*, 229 Ill. 2d 34, 48 (2007), as modified on denial of reh’g (May 27, 2008). “If a postconviction petition is not filed within the limitations period, the Act requires the defendant to allege facts showing the delay was not due to his or her culpable negligence. [Citation.] Absent allegations of lack of culpable negligence, the Act directs the trial court to dismiss the petition as untimely at the second stage upon the State’s motion. [Citations.] The State may move to dismiss after petitioner’s counsel has made any necessary amendments. [Citation.]” *Id.* at 43. The circuit court’s dismissal of a petition at the second stage due to a petitioner’s failure to sufficiently allege a lack of culpable negligence is reviewed *de novo*. *People v. Wilburn*, 338 Ill. App. 3d 1075, 1077 (2003).

¶ 30 Here, it is undisputed that the defendant’s postconviction petition was not timely filed. Pursuant to section 122-1(c) of the Act, the defendant had to file his petition six months after the date his petition for a writ of *certiorari* would have been due. 725 ILCS 5/122-1(c) (West 2008); *People v. Johnson*, 2017 IL 120310, ¶ 24. The parties agree, as do we, that the deadline for the defendant to file his petition was August 27, 2008. The defendant filed his *pro se* petition on February 15, 2013. Thus, the relevant question is whether the defendant alleged sufficient facts showing that the delay was not due to his culpable negligence. We conclude that he did.

¶ 31 The defendant bears the “heavy burden” to affirmatively show why the tardiness of the petition was not due to his culpable negligence. *People v. Gunartt*, 327 Ill. App. 3d 550, 552

(2002). The phrase “culpable negligence” contemplates “something greater than ordinary negligence and is akin to recklessness.” *People v. Bocclair*, 202 Ill. 2d 89, 108 (2002). While not intentional conduct, culpable negligence entails a “blameable neglect” that involves a disregard of the consequences likely to flow from one’s actions. *People v. Lander*, 215 Ill. 2d 577, 586 (2005).

¶ 32 The defendant contends that he met his burden to allege sufficient facts showing that the delay in filing his petition was not due to his culpable negligence. Specifically, he argues that the facts show that he reasonably relied on his belief that Bonjean was going to file a motion for an extension of time and, once he discovered that she instead filed an unauthorized, frivolous petition, he “followed the procedures provided him by our laws.” We agree.

¶ 33 A review of the record shows that, six months before the deadline for filing his postconviction petition, the defendant and Bonjean entered into an attorney-client relationship. At some point, Bonjean informed the defendant that the deadline for filing his postconviction petition was at the end of August 2008. As the circuit court found, following an August 7, 2008 phone call with Bonjean, the defendant understood that Bonjean was going to file a motion for an extension of time. Instead, she filed an unsigned “*pro se*” postconviction petition on his behalf. Once the defendant learned that Bonjean had filed the unauthorized and unsupported petition and that it had been summarily dismissed, he appealed and, subsequently, filed a motion to reconsider the summary dismissal of his petition. The defendant did not file a subsequent petition because he knew that successive petitions were barred under the Act. When the unauthorized petition was struck by the circuit court, the defendant filed the instant postconviction petition a month later. Given this evidence, we conclude that the defendant’s

conduct did not entail “blameable neglect” or a disregard of the consequences likely to flow from his actions. *People v. Lander*, 215 Ill. 2d 577, 586 (2005). Therefore, we conclude that the circuit court erred in dismissing his petition because it was untimely filed.

¶ 34 Having determined that the defendant alleged sufficient facts to show that he was not culpably negligent in untimely filing his postconviction petition, we turn now to the merits of his postconviction petition. The defendant contends that he made a substantial showing that his trial counsel was ineffective for failing to litigate a motion to suppress inculpatory statements he made to ASA Harvath. He also alleges that his appellate counsel was ineffective for failing to raise his trial counsel’s ineffectiveness on appeal.

¶ 35 Claims of ineffective assistance are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland*). To prevail on a claim of ineffective assistance, a defendant must demonstrate that counsel’s performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant 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.* at 694. A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill.2d 264, 283-84 (1992). However, it is well-settled that the court need not determine whether counsel’s performance was constitutionally deficient if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 36 To establish prejudice resulting from counsel's failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted and (2) the outcome of the trial would have been different had the evidence been suppressed. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005) (citing *People v. Orange*, 168 Ill. 2d 138, 153 (1995)). "A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness." *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 37 Here, the defendant cannot satisfy the *Strickland* test because he failed to show that, even if his trial counsel had filed a motion to suppress, the motion would have succeeded. The record shows that, during the defendant's bench trial, the trier-of-fact considered the defendant's testimony that ASA Harvath continued to question him after he asked for an attorney and that ASA Harvath's testimony regarding the defendant's subsequent inculpatory statement was fabricated. The circuit court found that the defendant was not credible, stating that it did not find the defendant's testimony "believable." As the circuit court's ruling indicates that it rejected the defendant's argument at trial that ASA Harvath's testimony was fabricated, there is nothing in the record to suggest that a different result would have been reached in a pretrial motion to suppress. Because the defendant has failed to show that there is a reasonable probability that a motion to suppress would have succeeded, his claim of ineffective assistance necessarily fails. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 38 Because we have determined that the defendant's trial counsel was not ineffective for failing to litigate a motion to suppress, we also conclude that the trial court did not err in dismissing defendant's claim that his appellate counsel was ineffective for failing to raise this

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issue on appeal. *People v. Childress*, 191 Ill. 2d 168, 175 (2000) (“Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel’s failure to raise it on direct appeal.”).

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.