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Third Division
August 10, 2011

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.)	93 CR 18249
)	
DARRELL COSEY,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

ORDER

HELD: In postconviction proceedings, the appellate court has jurisdiction to consider appeals only from judgments that finally dispose of all claims raised in a petition. The petitioner forfeits all issues not raised in the original or amended petition, and the petitioner cannot raise new claims on appeal. The trial court should dismiss the petition without an evidentiary hearing if the petition refers only to a new witness testifying about facts which other witnesses attested to at the trial.

¶ 1 A jury found the defendant, Darrell Cosey, guilty of murder, and the trial court

sentenced him to 40 years in the penitentiary. This court affirmed the judgment on the direct appeal. Cosey then filed a postconviction petition, and the trial court appointed counsel to assist Cosey with the presentation of his claims. The court dismissed most of the claims without an evidentiary hearing, but it held a hearing on one of the claims. The court then dismissed the petition.

¶ 2 Cosey filed his notice of appeal after the court ruled on the claim for which it held the evidentiary hearing, but in the notice of appeal he challenges only the court's decision not to hear evidence on his claims (1) that counsel provided ineffective assistance on remand at a hearing to determine whether there was attenuation between his initial confession and subsequent confession, and (2) that new evidence requires a new trial.

¶ 3 We hold that the notice of appeal gives us jurisdiction to consider the arguments Cosey raises on appeal. Cosey correctly waited for the final disposition of all the claims he raised in his postconviction petition before appealing from the earlier dismissal of some of the claims without an evidentiary hearing. However, because Cosey, in his postconviction petition and its supplements, failed to raise the arguments he now seeks to raise about ineffective assistance of counsel at the attenuation hearing, we find that he forfeited those issues. Because evidence from Cosey's allegedly new witness is cumulative to the testimony of witnesses presented at trial, we find that the trial court did not err when it decided not to hold an evidentiary hearing concerning the evidence from the new witness. Accordingly, we affirm the trial court's judgment.

¶ 4

BACKGROUND

statements to police.

¶ 9 Trial

¶ 10 At trial, Cosey presented evidence that he acted in self-defense. Cosey testified that on June 18, 1993, he was looking for Carlissa Taylor because he heard she had a conflict with Cosey's sister. He walked up to a group of youths clustered in and around a van and a car. Harrison, who stood near the van, said Carlissa was his girlfriend. Cosey and Harrison had words, and several of the persons with Harrison started approaching Cosey. Someone from the van handed Harrison a gun. As Harrison turned, Cosey shot him. Cosey explained that he carried a gun because he lived in a violent neighborhood. Harrison fell, but he lifted his arm and pointed his gun at Cosey. Cosey then fired the last two shots.

¶ 11 Cosey testified about the circumstances in which he gave the court-reported statement. He told Detective Shine about Harrison's gun, but Shine said he did not believe that Harrison had a gun, and Shine would not let Cosey leave unless he cooperated. Cosey, exhausted and hungover, and believing that Shine would let Cosey go home if Cosey said what Shine wanted, agreed to say that Harrison had no gun.

¶ 12 Several witnesses corroborated the most crucial part of Cosey's testimony. Kalyse Abernathy said she saw the argument between Cosey and Harrison as she got off a bus. She saw Harrison go to the van, and as he turned she saw a gun in his hand. Cosey shot Harrison once, Harrison fell and lifted his gun. Cosey then fired more shots. After Cosey ran off, a boy got out of the van, retrieved the gun from Harrison, and ran off.

¶ 13 Abernathy admitted that she did not speak to police following the shooting. A friend

of hers met Cosey's brother, who sought information about the shooting. Because the friend knew Abernathy had seen the shooting, the friend helped Cosey's brother contact Abernathy a few months before trial.

¶ 14 Dorothy Wilburn said she was with Abernathy on June 18, 1993, and she confirmed Abernathy's account of the shooting and its aftermath. Abernathy helped defense investigators find Wilburn shortly before trial.

¶ 15 Crystal Cowan testified that she looked up when she heard the gunshot on June 18. She saw Harrison on the ground, raising a gun. She then saw Cosey shoot Harrison twice. She, too, saw a youth get out of the van and take the gun from Harrison before running off. Shortly before the trial she heard that someone sought persons who witnessed the shooting.

¶ 16 Kiesha Smith, who met Cosey's brother a couple of months before the trial, testified that she heard the shots from a block away. She then saw a young man run to an alley, carrying a gun. When he came out of the alley, he no longer held a gun.

¶ 17 Eddie Taylor, who met Cosey's uncle while playing basketball, testified that he saw Harrison arguing with Cosey on June 18. Eddie heard the shots and then he saw a youth get out of the van, run up to Harrison, and run off to a nearby alley.

¶ 18 The State countered with testimony from three eyewitnesses, including Marsell Hubbard, who saw the shooting and swore Harrison had no gun, and they did not see anyone take anything from Harrison after the shooting.

¶ 19 State witnesses also explained the circumstances surrounding Cosey's court-reported statement. Shine testified that Cosey did not appear groggy or disoriented. After Cosey

acknowledged his rights, he readily admitted that he shot Harrison.

¶ 20 The court permitted an assistant State's Attorney to read Cosey's court-reported statement to the jury. In that statement, Cosey said he found Carlissa, and she said she wanted to fight Cosey's sister. Cosey had words with Carlissa, and Harrison intervened. Harrison's friends also started approaching, and Cosey believed they intended to beat him up. Cosey stepped back and shot Harrison in the stomach. Harrison fell, and when he tried to get up, Cosey shot him again. Cosey admitted that Harrison had no gun.

¶ 21 The doctor who performed the autopsy on Harrison testified that one bullet entered Harrison's back, one entered his thigh, and a third entered below Harrison's rib cage. The shot that entered under the ribs tore through Harrison's heart. In the doctor's opinion, Harrison most likely could not have lifted his arm after he sustained the damage to his heart. The doctor could not tell the order in which the wounds occurred.

¶ 22 The jury found Cosey guilty of murder. In a report submitted to the court before sentencing, defense counsel reported that Cosey lived with his father, and not Turner, from an early age. Cosey's father held wild parties that exposed his children to drugs and adult nudity. When Cosey turned six, his grandmother took custody of him and his siblings. He saw his mother rarely, and when he did, she often used drugs and entertained men in Cosey's presence.

¶ 23 According to the report:

“When Darrell reached the age of 8, their grandmother allowed *** Darrell [and his siblings] to spend the entire summer vacation with their mother. During this

time, Ms. Turner had the children selling drugs and hustling on the street in order to feed them even though she was receiving public-assistance and working a job as well. By 1989, all three children were sleeping in the park with their mother because she used the rent money to bail her boyfriend out of jail ***. On August 16, 1989, these three children were taken into police custody for child neglect and abandonment. ***.

When examined by DCFS, all three kids had visible evidence of abuse resulting from cuts, bruises, welts, and burns to various parts of their body which had been inflicted by the mother's boyfriend.”

The State made Darrell's grandmother his legal guardian. In 1991, when Darrell was 14, his father died from gunshot wounds.

¶ 24 According to the presentence investigation report, Cosey admitted that he ran with a street gang for three years, until police arrested him for this murder. Although he had no prior convictions, he had pending a charge that he committed a second murder about three weeks after Harrison died.

¶ 25 The trial court weighed factors in aggravation and mitigation and sentenced Cosey to 40 years in prison.

¶ 26 Direct Appeal

¶ 27 In the first appeal, this court held that the trial court should have suppressed the initial confession to Shine, partly because no interested adult conferred with Cosey prior to that confession. *People v. Cosey*, No. 1-96-2499 (March 31, 1998) (unpublished order under

Supreme Court Rule 23). This court remanded for a hearing to determine whether attenuation between the initial statement and the court-reported statement justified the decision to admit the court-reported statement into evidence.

¶ 28 At the attenuation hearing, Cosey's grandmother, his legal guardian, testified that police never contacted her following Cosey's arrest. Turner testified that when she arrived at the police station, she saw police give Cosey some food, and then he fell asleep.

¶ 29 Cosey testified that he felt a little better after his mother came to the station, although he did not speak to her much. When police resumed questioning Cosey in his mother's presence, he simply repeated the statement he had already made to Shine, because he did not believe that repetition of the statement would change anything.

¶ 30 The trial court held that the presence of Cosey's mother sufficiently attenuated the court-reported statement from the initial statement, thereby rendering the court-reported statement admissible. On appeal this court affirmed the finding, and on that basis this court affirmed the conviction and sentence. *People v. Cosey*, No. 1-96-2499 & No. 1-01-2103 (Cons.) (Nov. 27, 2002) (unpublished order under Supreme Court Rule 23).

¶ 31 Postconviction Petition

¶ 32 On October 10, 2003, Cosey filed a postconviction petition in which he alleged that new evidence warranted a new trial. The trial court dismissed the petition as frivolous and patently without merit. This court reversed the judgment and remanded the case for further proceedings. *People v. Cosey*, No. 1-04-0765 (Aug. 30, 2005) (unpublished order under Supreme Court Rule 23).

¶ 33 In January 2007, Cosey filed a supplemental postconviction petition, in which he alleged that defense counsel provided ineffective assistance at the attenuation hearing, because counsel should have added two other detectives as witnesses who would have supported Cosey's testimony about the course of the interview, and counsel failed to investigate to determine the time of Cosey's arrest. He also contended that the court erred in finding attenuation, especially because Turner had lost her parental rights, and therefore police violated the Juvenile Court Act (705 ILCS 405/5-6 (West 1992)) by failing to contact Cosey's parents.

¶ 34 The public defender filed a further supplement to Cosey's postconviction petition, elaborating on the significance of the new evidence. Cosey supplied affidavits from Deborah Morris and Kwanna Bradley. Morris swore that she spoke to Hubbard, one of the State's key witnesses at the trial, and he admitted that he took a gun from his friend's hand after his friend got shot, and he felt pressured to say the things he said in court. Bradley said she heard the shots on June 18, 1993, and she saw a gun in Harrison's hand. She saw someone get out of the van and take the gun from Harrison. She then went to Harrison and held him as he died. She did not come forward with this evidence before the trial because gang members threatened to kill her and her family.

¶ 35 The State moved to dismiss the postconviction petition as insufficient to merit an evidentiary hearing. On March 25, 2008, the trial court struck all of Cosey's claims, except the claim based on Morris's affidavit. The court set the matter for an evidentiary hearing to determine whether Morris's testimony warranted a new trial. When Cosey proved unable

to produce Morris for the hearing, the court entered a final judgment denying the postconviction petition on April 6, 2009. Cosey filed his notice of appeal on April 29, 2009.

¶ 36 ANALYSIS

¶ 37 Jurisdiction

¶ 38 On appeal, Cosey argues that the trial court should have held an evidentiary hearing to determine whether Cosey received effective assistance of counsel for the attenuation hearing, and to determine whether Bradley’s testimony warranted a new trial. The State points out that the trial court dismissed the claims related to Bradley’s affidavit, and the claims related to assistance of counsel at the attenuation hearing, in the order entered on March 25, 2008. The State contends that Cosey needed to appeal from the dismissal of these claims within 30 days after entry of the order dated March 25, 2008. According to the State, the notice of appeal filed in April of 2009 comes more than a year too late, and this court lacks jurisdiction to consider Cosey’s arguments.

¶ 39 According to Supreme Court Rule 606(b), “the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from[.]” Ill. S. Ct. R. 606(b) (eff. March 20, 2009). A final judgment is “a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit.” *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 119 (1978). A party who seeks to challenge a ruling on a postconviction petition must appeal from the final disposition of the petition, the pleading that frames the issues for that proceeding, even if the order disposing of the postconviction petition does not conclude the

criminal proceedings against the defendant. *People v. Fikara*, 345 Ill. App. 3d 144, 151 (2003). In *Fikara*, the defendant raised several issues in his postconviction petition, including sentencing issues. The trial court dismissed most of the defendant's postconviction claims, but granted the defendant a new sentencing hearing. Following the resentencing, the defendant sought to challenge the trial court's dismissal of some claims he raised in his postconviction petition. The appellate court found that it lacked jurisdiction to consider the claims, because the defendant failed to file a timely notice of appeal from the final disposition of his postconviction petition. *Fikara*, 345 Ill. App. 3d at 151-52; see also *People v. Scott*, 194 Ill. 2d 268, 278-79 (when trial court ruled, after an evidentiary hearing on a postconviction petition, that the defendant should have a new sentencing hearing, judgment disposing of the postconviction petition was immediately appealable; supreme court assumed jurisdiction to consider other claims dismissed earlier, without an evidentiary hearing).

¶ 40 Here, the order of March 25, 2008, did not dispose of all of the claims Cosey raised in the postconviction petition. Because the March 25, 2008, order did not finally determine the rights of the parties on all of the claims raised in the postconviction petition, the order did not qualify as a final judgment within the meaning of Rule 606(b). Supreme Court Rule 304(a) permits some appeals from orders that dispose of some claims in cases involving multiple claims. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). However, Rule 304(a) does not apply to criminal proceedings. Ill. S. Ct. R. 612 (eff. Sept. 1, 2006). Although postconviction proceedings in some respects have the nature of civil cases, our supreme court has held that rules of civil procedure do not apply to proceedings under the Act. *People v.*

Clements, 38 Ill.2d 213, 215-16 (1967). Only Supreme Court Rule 604 (Ill. S. Ct. R. 604 (eff. July 1, 2006)) permits an appeal from an order in a criminal proceeding that does not dispose of all the claims raised in that proceeding, but Rule 604 does not apply here.

¶ 41 The State compares this case to *People v. Smith*, 228 Ill. 2d 95 (2008). In *Smith*, the trial court entered a judgment disposing of the defendant's postconviction petition on February 21, 2006, and the defendant filed a notice of appeal on March 20, 2006. However, the notice of appeal listed only the judgment of conviction, entered on November 10, 2004, as the judgment the defendant sought to appeal. Our supreme court remanded the case to the appellate court for the court to consider whether the defendant had amended his petition to identify properly the judgment he sought to appeal. *Smith*, 228 Ill. 2d at 105-06. We do not see *Smith* as authority for challenging our jurisdiction here. Cosey correctly identified the final judgment entered on April 6, 2009, as the judgment from which he appealed. We have jurisdiction to consider all orders that form a procedural step in the progression leading to that final judgment, including the order of March 25, 2008. See *People ex rel. Alvarez v. Price*, 408 Ill. App. 3d 457, 465 (2011). Therefore, we find that the March 25, 2008, order dismissing most of the claims raised in the postconviction petition became final and appealable only when the court entered the judgment on April 6, 2009, that disposed of all of Cosey's postconviction claims. Accordingly, the April 29, 2009, notice of appeal confers jurisdiction on this court to consider Cosey's challenge to the court's dismissal of his postconviction petition.

¶ 42

Ineffective Assistance of Counsel

¶ 43 Cosey contends that his attorney at the attenuation hearing provided ineffective assistance in two respects: (1) counsel failed to argue that Turner did not qualify as an adult concerned with Cosey's welfare for purposes of determining the voluntariness of his statement (see *In re G.O.*, 191 Ill. 2d 37, 55 (2000)); and (2) counsel failed to present scientific evidence of the special vulnerability of minors to suggestion, and minors' inability to appreciate the consequences of their confessions. Because the court dismissed all claims concerning ineffective assistance of counsel without hearing evidence concerning the claims, we review the dismissal *de novo*. *People v. Lander*, 215 Ill. 2d 577, 583 (2005).

¶ 44 The State points out that Cosey now seeks to raise two arguments that he did not raise in his postconviction petition or its supplements. Cosey argued in his postconviction petition that officers violated the Juvenile Court Act (705 ILCS 405/5-6 (West 1992)) because they never attempted to contact his legal guardian, his grandmother, and contacting his mother did not count as contacting a "parent" because his mother had lost all parental rights with respect to Cosey.

¶ 45 In his postconviction petition, Cosey raised no argument as to whether Turner qualified as a concerned adult, and he did not suggest that counsel provided ineffective assistance because counsel failed to argue that Cosey had no opportunity to confer with a concerned adult before he made the court-reported statement admitted into evidence against him. Neither did Cosey suggest in his postconviction petition or its supplements that counsel for attenuation needed to present scientific evidence about the special vulnerability of minors.

¶ 46 Section 122-3 of the Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2006). Our supreme court has clarified that a postconviction petitioner may not assert on appeal any issue not raised in the postconviction petition and its amendments, unless the petitioner shows that the unraised issue involves a matter of fundamental fairness. *People v. Jones*, 213 Ill. 2d 498, 505 (2004). We find no fundamental unfairness here. Accordingly, we find that Cosey forfeited both of his arguments concerning the effectiveness of his counsel at the attenuation hearing. See *People v. Cummings*, 375 Ill. App. 3d 513, 517 (2007).

¶ 47 Cosey asks us to review the issues despite the forfeiture because his postconviction counsel should have amended his petition to raise these claims. But the Act only requires postconviction counsel "to investigate and properly present the *petitioner's* claims." (Emphasis in original.) *People v. Davis*, 156 Ill. 2d 149, 164 (1993). "While postconviction counsel *may* conduct a broader examination of the record (citation), and may raise additional issues if he or she so chooses, there is no obligation to do so." (Emphasis in original.) *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). Postconviction counsel here helped reformulate and clarify the claims Cosey raised in his postconviction petition and its supplements. The Act requires no more. We will not address in this appeal the forfeited issues Cosey seeks to raise concerning the assistance of counsel for the attenuation hearing.

¶ 48 Bradley's Affidavit

¶ 49 Finally, Cosey argues that the trial court should have held an evidentiary hearing to

determine whether the newly discovered evidence from Bradley warrants a new trial. Again, we review the issue *de novo*. *Lander*, 215 Ill. 2d at 583. “For new evidence to warrant a new trial, the evidence (1) must be of such conclusive character that it will probably change the result on retrial; (2) must be material to the issue, not merely cumulative; and (3) must have been discovered since trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier.” *People v. Orange*, 195 Ill. 2d 437, 450-51 (2001).

¶ 50 The trial court dismissed the claim because it found the evidence from Bradley cumulative of the evidence at trial. Abernathy, Wilburn and Cowan all testified at trial that they saw Harrison lift his arm to point a gun at Cosey before Cosey fired the last two shots into Harrison. They also testified that they saw a young man take the gun from Harrison and run off with it. Cosey argues that Bradley’s testimony would differ from that of Abernathy, Wilburn and Cowan because threats from gang members persuaded Bradley not to tell police what she saw, and because Bradley stood so close to Harrison that she went over to Harrison and held him as he died.

¶ 51 A court properly excludes evidence as cumulative when the evidence “adds nothing to what was already before the jury.” *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). We agree with the trial court that Cosey already presented, at trial, witnesses who testified to every significant fact Bradley described about the shooting. The possibility that a jury might find Bradley more credible than other defense witnesses does not change the cumulative nature of her testimony. Accordingly, we hold that the trial court did not err when it dismissed,

without hearing evidence, Cosey's claim based on Bradley's affidavit.

¶ 52

CONCLUSION

¶ 53

We have jurisdiction to consider Cosey's appeal because he filed a timely notice of appeal after the trial court entered a judgment that finally disposed of all of the claims Cosey raised in his postconviction petition. Cosey forfeited issues – concerning attenuation counsel's duty to argue that Turner did not count as a concerned adult, and that scientific evidence showed adolescents are especially vulnerable to adult interrogations – by failing to raise those issues in his postconviction petition and its supplements. The trial court did not err when it dismissed the claim that Bradley's expected testimony required a new trial, because Bradley's affidavit presented only evidence cumulative to the trial evidence. Accordingly, we affirm the judgment of the trial court.

¶ 54

Affirmed.