

2011 IL App (1st) 093400-U

SECOND DIVISION
August 23, 2011

No. 1-09-3400

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 92 CR 22562
)	
MICHAEL ARMSTRONG,)	Honorable
)	Nicholas Ford,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

HELD: The trial court properly denied defendant leave to file his third successive postconviction petition. Defendant's claims regarding fees assessed pursuant to section 22-105 of the Code of Civil Procedure of 1963 are without merit given our supreme court's recent decision in *People v. Alcozer*, 2011 WL 1049789 (March 24, 2011).

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Defendant Michael Armstrong appeals from the circuit court's denial of his request for leave to file a third successive *pro se* post-conviction petition. Defendant contends on appeal that: (1) the trial court erred in denying him leave to file his third successive postconviction petition; (2) his petition was not frivolous pursuant to 735 ILCS 5/22-105; and (3) the imposition of filing and mailing fees for *pro se* petitioners denies meaningful access to courts. For the following reasons, we affirm the judgment of the circuit court denying defendant leave to file his third successive post-conviction petition.

BACKGROUND

Following a jury trial, defendant was convicted of first degree murder and was sentenced to 50 years' imprisonment. At defendant's jury trial, Officers Webster, Callaghan, and Harris testified that they responded to a call at the 1200 block of West 115th Street in Chicago around 11:15 a.m. on September 17, 1992 and found Larry Lawson lying on the sidewalk, a victim of multiple gunshot wounds. Lawson subsequently died as a result of those gunshot wounds.

At the scene, Officer Webster spoke with Christopher Copeland who related that he was "pretty sure" that defendant had shot Lawson, but that he had not observed the shooting himself. Officers Webster, Callaghan and Harris then proceeded to defendant's home, which was only a few houses from the crime scene, and took the defendant into custody in the back of a squad car for questioning. Having advised the defendant of his rights, the officers took him back to the scene, at which point the Officers testified that a witness, Charles Peters approached the police car and identified

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defendant as the shooter. The officers then transported defendant to the police station for further questioning.

At the police station, defendant was given a gunshot residue test. A police trace analyst, Robert Berk, testified at trial that the defendant's test results demonstrated elevated levels of lead, barium and antimony, which are the three primary elements of gunpowder. Beck further testified, however, that because the level of antimony was slightly below the threshold level necessary for conclusive evidence of firearm discharge, he could not affirmatively state that the defendant had discharged a firearm that morning.

Copeland and Peters testified at trial. Copeland testified that he and Lawson were Gangster Disciples. On the day of the shooting, Copeland, Peters and Lawson went to Kelly's Sub Shop located in a strip mall with a few other store. While they were standing outside of the sub shop, Copeland saw defendant, whom he knew from school, walk out of a grocery store. Defendant was wearing a white jacket and black pants. Copeland went into the grocery store to buy cigarettes and heard gunshots while he was inside. When he came out, he saw Lawson lying on the corner.

Peters testified that he went back into the sub shop, and Copeland went into the grocery store to buy cigarettes, while Lawson remained outside eating a sandwich and talking to a man named "Alpo." Peters was ordering food at the counter when he heard a gunshot. He walked to the doorway and saw defendant standing over Lawson, who was lying on the ground. Lawson was asking defendant "why you doing [sic] this." Defendant shot Lawson twice and started to walk away, but turned and shot Lawson

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once more. When Lawson continued to beg for his life, defendant returned and shot him again.

After defendant left, Peters walked away and told his brother what had happened. Peters' brother went to tell a police officer. Officers drove Peters back to the scene, where a crowd had gathered. Defendant arrived in the back of a squad car several minutes later and Peters identified him as the person who shot Lawson.

Defendant testified that while he and his fiancé were shopping at the mall that morning for baby formula, an early 1980s Oldsmobile entered the parking lot. Lawson said "Hey, Folks," which, according to defendant, is a reference to the Gangster Disciples. Defendant testified that saw someone lean out of the car window and he heard a gunshot. He told his fiancé to remain at the store while he ran home so he would not be recognized as a former gang member. Defendant heard more shots as he was running.

Defendant's fiancée, Kenya Williams, testified substantially similar to defendant.

The state called Geraldine Delk in rebuttal. Delk testified that after she heard four gunshots, she then looked out of her window and saw a man walking down the street with a gun. The man was wearing a white t-shirt or jacket and dark pants.

After hearing all of the evidence, the jury found defendant guilty of first-degree murder for the death of Larry Lawson. Defendant was sentenced to fifty years' imprisonment.

This court affirmed defendant's conviction and sentence on direct appeal in *People v. Michael Armstrong*, No. 1-94-1007 (1995) (unpublished order pursuant to Supreme Court Rule 23). On January 22, 1997, defendant filed a *pro se* post-

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conviction petition alleging: (1) he was illegally arrested; (2) he was denied effective assistance of counsel because counsel failed to file a motion to quash his arrest; and (3) the trial court considered improper factors in sentencing. The circuit court summarily dismissed the petition on March 12, 1997, because it was both untimely and raised issues that would have been properly before the court on the direct appeal. Defendant appealed and this court affirmed after counsel was allowed to withdraw pursuant to *Pennsylvania v. Finely*, 481 U.S. 441 (1987). *People v. Armstrong*, No. 1-97-1704 (1997) (unpublished order pursuant to Supreme Court Rule 23).

While his appeal from the denial of his first postconviction petition was pending, defendant filed a successive *pro se* postconviction petition on May 15, 1997, wherein he argued that he was denied effective assistance of trial and appellate counsel. The circuit court denied the petition finding it frivolous and patently without merit on July 25, 1997. Defendant's *pro se* motion to file a late notice of appeal was denied on January 7, 1998.

Defendant then filed a second successive *pro se* postconviction petition on May 31, 2006. In this petition, defendant alleged that trial counsel was ineffective for failing to file a motion to quash his arrest and for failing to impeach various prosecution witnesses. Specifically, defendant alleged that he had recently obtained copies of police reports by federal court order in conjunction with his habeas corpus case pending there, which revealed that Peters did not identify defendant at the scene. Rather, the police reports showed that defendant had already been transported to the police station before police ever learned about Peters, that Peters never returned to the scene and Peters never identified defendant while he sat in the back of the squad car. Defendant

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claimed that trial counsel should have used these police reports to quash his arrest and to impeach the testimony of Peters and Officers Webster and Callaghan. In addition, defendant alleged that the State knowingly used perjured testimony to stand uncorrected. Defendant attached a portion of his habeas corpus petition as proof that he only recently obtained these police reports and requested that the court consider the successive petition in the interest of fundamental fairness.

The circuit court denied defendant leave to file the successive petition on July 14, 2006, based on the fact that defendant had not established cause and prejudice as required. Without reaching the merits of defendant's claims, this court affirmed the trial court's denial of leave to file defendant's second successive *pro se* postconviction petition because defendant had failed to file a separate motion requesting leave to file the petition. *People v. Armstrong*, No 1-07-0222 (2008) (unpublished order pursuant to Supreme Court Rule 23).

On July 21, 2009, defendant then filed a motion requesting leave to file a third *pro se* successive petition, which raised the same issues as his earlier 2006 successive post-conviction petition. The circuit court denied defendant leave to file on October 30, 2009, because defendant had failed to satisfy the cause and prejudice test. This appeal follows.

ANALYSIS

Defendant first contends on appeal that the circuit court erred in denying him leave to file a third successive post-conviction hearing because his claims are not barred by *res judicata*. Defendant claims that this court did not render a decision squarely on the merits in regards to his 2006 petition in that the order affirmed the circuit

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court's dismissal of the petition because the defendant had failed to file a separate motion for leave to file. Furthermore, defendant contends that the addition of the police reports constitutes new evidence such that his initial claim for ineffective assistance of counsel should be re-litigated under a relaxed doctrine of *res judicata*.

The Post Conviction Hearing Act (Act) (725 ILCS 5/2-122-1 *et seq.* (West 2006)), allows prisoners to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill.2d 198, 203 (2001). In order for a defendant to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill.2d 500, 528 (1999). The Act provides for the filing of only one petition, in all but very circumscribed situations. Specifically, section 122-1(f) of the Act provides that:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure."
725 ILCS 5/122-1(f) (West 2006).

A court may only grant leave to file a successive postconviction petition where either: (1) the defendant has established both cause and prejudice; or (2) where fundamental fairness requires the allowance of the petition. *People v. Pitsonbarger*, 205 Ill.3d 444, 459 (2002). In order for a defendant to establish the cause prong of the test, a defendant must demonstrate "some objective factor external to the defense [that] impeded his ability to raise the claim in the initial post-conviction proceeding." *People v. Tenner*, 206 Ill.2d 381, 393 (2002). The prejudice prong of the test looks to whether "the claimed constitutional error so infected his trial that the resulting conviction violated

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due process.” *Tenner*, 206 Ill.2d at 393. The applicable standard of review when examining a circuit court’s denial of a successive post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill.2d 366, 388 (1989) (noting that “an appellate court should enjoy the freedom to substitute its judgment for that of the lower court upon the review of a dismissal of a post-conviction petition”).

Defendant has attached two police reports to his third successive postconviction petition. The first report, which was produced by Officers Webster, Callaghan, and Harris, states that defendant had been identified by witnesses, the names of which the report did not disclose. This report does not indicate that the officers spoke with Peters before he identified defendant in the back of the police car when the officers returned to the crime scene from defendant’s house. The second report was prepared by the detectives assigned to the case. The substance of the report includes a narrative description of the events leading up to and following the shooting as described by Peters. The report does not indicate that Peters identified defendant while at the crime scene. Based upon these reports, defendant contends that the arresting officers did not have probable cause to arrest him and therefore trial counsel was ineffective for failing to file a motion to quash arrest.

The doctrine of *res judicata* precludes a subsequent court from entertaining claims that were previously raised and decided on appeal or in a prior case. *People v. West*, 187 Ill.2d 481, 425 (1999). As related to petitions filed under the Act, the doctrine applies such that “a ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition.” *People v. Gosier*, 205 Ill.2d 198, 203 (2001).

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With respect to his claim of ineffective assistance of counsel for failure to file a motion to quash, defendant made the exact same claim based on the same two newly discovered police reports in his second successive postconviction petition as he does here. In fact, the trial court dismissed the petition finding that, even if defendant could establish cause for failing to raise these claims with the support of the police reports, he could not establish prejudice. The trial court remarked that the claim was barred by *res judicata* and lacked merit in that counsel could not be deemed ineffective. When defendant raised this issue in his third successive postconviction petition, which is the subject of this appeal, the trial court dismissed the claim finding that defendant failed to establish cause and prejudice because his claims were barred by *res judicata* and lacked merit.

Defendant also claimed in his second successive postconviction petition, as he does here, that the State allowed perjured testimony to go uncorrected. The trial court found that defendant did not establish cause and prejudice as to this claim as the attached police reports did not lend support to defendant's claim that Peters committed perjury. When defendant raised this issue again in his third successive petition, which is the subject of this appeal, the trial court again denied defendant leave to file because he failed to establish cause and prejudice where the police report did not support his claim that Peters committed perjury.

As previously discussed, this court affirmed the trial court's denial of leave to file defendant's second successive postconviction petition, in which defendant raised the exact same claims raised here. However, the court affirmed the judgment of the trial court on grounds different than those relied upon by the trial court, namely that

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"petitioner failed to comply with the statutory requirement to seek leave to file the instant petition. As such, the petition is rendered frivolous as it has no arguable basis in the law." *People v. Armstrong*, No. 1-07-0222 (2009) p. 5. In so ruling, this court stated "we have intentionally chosen not to discuss (1) the substance of the claims set forth in Petitioner's May 2006 post-conviction petition, or (2) the reasons given by the trial court for doing so. We omitted those topics because none of them matters."¹

Defendant attempts to take advantage of this court's ruling in *People v. Armstrong*, No. 1-07-0222, affirming the trial court's denial of leave to file his second successive postconviction, by raising the exact same claims again in hopes that this court will rule on the merits of those claims. However, we find no support for doing so. Defendant should not be granted another "bite of the apple" because this court affirmed the dismissal of defendant's second successive postconviction petition on grounds that differed from those of the trial court. The dismissal of defendant's second successive postconviction petition was affirmed. Therefore, the issues raised in the petition presently before this court are barred by the doctrine of *res judicata*.

Furthermore, contrary to defendant's assertion, the cause and prejudice test is inapplicable to issues raised in earlier proceedings. As Justice Freeman reasoned in his special concurrence in *People v. Tenner*:

"It appears to me that the court views the issue raised in this proceeding as the same issue defendant presented in his earlier state post-conviction

¹Subsequent to *People v. Armstrong*, No. 1-07-0222, our supreme court decided *People v. Tidwell*, 236 Ill. 2d 150 (2010), wherein the court found that a separate motion requesting leave to file a successive postconviction petition was not required.

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proceeding. [Citation omitted]. If this is the case, I believe that the cause and prejudice test would be inapplicable since the test is couched in terms of 'cause' for the failure to raise a claim in an earlier proceeding and prejudice resulting therefrom.[Citation omitted]. An issue that was previously litigated and is raised anew in a successive proceeding can never fall under the ambit of the cause and prejudice test because the issue had, indeed, been raised in the earlier proceeding. I believe it is this fact which makes the cause and prejudice test inapplicable in the present case. * * * New claims, *i.e.*, those never before raised, are subject to waiver, or more appropriately procedural default, and would be excused only if the petitioner established both cause and prejudice for the failure to raise the issue sooner. On the other hand, same claims, *i.e.* those issues raised in a previous post-conviction action, fall prey to the procedural bar of *res judicata*." *Tenner*, 206 Ill. 2d at 399 (Freeman, J., specially concurring).

Even if defendant's "same claims" could be considered under the cause and prejudice test, defendant's petition still fails as defendant cannot establish cause or prejudice. To establish cause, defendant must present some objective factor external to the defense that impeded his ability to raise the claim in the initial post-conviction proceeding. *Tenner*, 206 Ill. 2d at 393. The fact that defendant did not have access to the police reports at the time he filed his initial postconviction petition does not establish the requisite cause.

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Even assuming cause was established, defendant cannot establish any prejudice as a result of his failure to raise these claims in an earlier proceeding. In order to establish prejudice, the defendant must show that “the claimed constitutional error so infected his trial that the resulting conviction violated due process.” *Tenner*, 206 Ill.2d at 393.

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must show that: (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there exists a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 687. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984).

The question of whether to file a motion to quash arrest is traditionally considered a matter of trial strategy. *People v. Sterling*, 357 Ill. App. 3d 235, 247 (2005). A “trial counsel's strategic decisions during the course of the proceedings are generally protected by a strong presumption that the attorney's decisions reflect sound trial strategy rather than incompetence.” *People v. Wiley*, 165 Ill. 2d 281, 289 (2004). To prevail on a claim that trial counsel was ineffective for failing to file a motion to quash, a defendant must show that there is a reasonable probability that the motion would have been granted and the outcome of the trial would have been different. *Sterling*, 357 Ill. App. 3d at 247.

The facts adduced at trial, however, demonstrate that the officers had probable cause to arrest the defendant based upon the totality of the circumstances. *People v.*

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Downey, 198 Ill.App.3d 704, 715 (1990) (“Probable cause exists when the totality of the circumstances known to the arresting officers is such that a reasonably prudent person would believe that the suspect is committing or has committed a crime.”). Here, the arresting officers spoke with Copeland shortly after arriving on the scene. Copeland stated that he was pretty sure that the defendant had shot Lawson because he saw him just before and just after the shooting wearing the same type of clothing that another woman, with whom he spoke directly after shooting, had identified as that worn by the shooter. Furthermore, the detectives’ report stipulates that the officers had spoken with Peters who identified the defendant by name before the visual identification, which according to the testimony and additional police reports took place either at the crime scene or shortly thereafter at the police station. As such, based upon conversations with two witnesses, the arresting officers had established probable cause to arrest the defendant. Therefore, defense counsel could not be considered ineffective for failing to file a motion to quash.

Furthermore, defendant cannot establish prejudice as to his claim that the State allowed perjured testimony to go uncorrected. It is well established that the State’s knowing use of perjured testimony to obtain a criminal conviction violates a defendant’s right to due process of law. *People v. Olinger*, 176 Ill. 2d 326 (1997). “A conviction obtained by the knowing use of false testimony [will] be set aside if there is a reasonable likelihood that the false testimony could have affected the verdict.” *People v. Thurman*, 337 Ill. App. 3d 1029, 1032 (2003). These principles are also applicable

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when the State, while not soliciting false testimony, fails to correct it when it occurs. *Thurman*, 337 Ill. App. 3d at 1032.

Nevertheless, the police reports do not support defendant's claim that Peters committed perjury. At trial, Peters testified that he saw defendant shoot Lawson and then made an identification of defendant while defendant was seated in the back seat of a police car. The police report does not support defendant's allegation that Peters' testimony was untrue. The report indicates that Peters saw defendant shoot Lawson and when Lawson begged for his life, defendant returned and shot him again. Although the report does not indicate that Peters identified defendant while defendant sat in the back of a police car, there is nothing contained in the police report that refutes that assertion.

Defendant also urges this court to relax the doctrine of *res judicata* and to consider the police reports as new evidence. Our supreme court has recognized that "in the interests of fundamental fairness, the doctrine of *res judicata* can be relaxed if the defendant presents substantial new evidence." *People v. Patterson*, 192 Ill.2d 93, 139 (2000). Evidence is considered newly discovered if it is: (1) material and not only cumulative; (2) likely change the outcome if a new trial were ordered; and (3) either not discovered or not discoverable through due diligence during the trial. *Patterson*, 369 Ill. App. 3d at 15.

However, the Act does not allow a defendant to escape the doctrine of *res judicata* and advance previously rejected claims with self-described new evidence. *Tenner*, 206 Ill. 2d at 398. The police reports are not newly discovered evidence, where

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defendant relied on them to support the claims advanced in his second successive postconviction petition. Furthermore, the information contained in the police reports would not have changed the outcome of the trial where the police had probable cause to arrest defendant and there was no evidence that Peters committed perjury.

Finally, defendant contends that the imposition of \$105 in filing fees and the circuit court's order notifying the Illinois Department of Corrections that defendant filed a frivolous petition should be reversed where the petition is not frivolous for purposes of section 22-105 of the Code of Civil Procedure of 1963. 735 ILCS 5/22-105 (West 2008). Defendant further contends that the order assessing the fee must be vacated because it violates his due process and equal protection rights.

As previously discussed, defendant's third successive petition is frivolous. Moreover, in his reply brief, defendant has acknowledged that recently in *People v. Alcozer*, 2011 WL 1049789 (March 24, 2011), our supreme court upheld the constitutionality of section 22-105 finding no due process or equal protection violation. Consequently, defendant's claims regarding the fees assessed pursuant to section 22-105 are without merit.

For the foregoing reasons, the judgement of the circuit court denying defendant leave to file his third successive postconviction petition is affirmed.

Affirmed.