

2011 IL App (1st) 092519-U  
No. 1-09-2519

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FIFTH DIVISION  
July 29, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 26354
	)	
KELVIN NORWOOD,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Joseph Gordon and Howse concurred in the judgment.

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**O R D E R**

*HELD:* Denial of defendant's *pro se* motion for leave to file a successive post-conviction petition affirmed where the absence of supporting documentation requested by defendant did not prevent, or excuse, him from presenting allegation of ineffective assistance of trial counsel in the initial petition.

¶ 1 Defendant Kelvin Norwood appeals from an order of the circuit court of Cook County denying his motion for leave to file a successive post-conviction petition. He contends that this ruling should be reversed and the matter remanded for further proceedings because he demonstrated cause-and-prejudice for filing his successive petition alleging ineffective assistance of trial counsel.

¶ 2 The record shows that at his 2003 jury trial for murder and arson, the State presented evidence that defendant's mother, Maryanne Norwood, rented an apartment above her landlords, Willie and Hazel Hubbard, who allowed defendant to move into the upstairs apartment after meeting him in December 1999. Days before her death, Maryanne told her sister that she did not want defendant to stay in her apartment any longer; defendant had lost his job, was depressed, and wanted to get high. During the evening of January 31, 2000, firefighters responding to a fire in the apartment discovered the lifeless body of Maryanne in her bedroom. She had died of multiple stab wounds and her apartment was burned afterward. Mr. Hubbard had summoned the fire department after the hallway smoke alarm sounded and he encountered defendant standing three feet away in the smoke-filled hallway with something under his arm. Although Mr. Hubbard underwent surgery to remove a tumor behind his left

eye about one year after the fire, he maintained that his vision at the time of the incident was unaffected.

¶ 3           The jury found defendant guilty of first degree murder, committed in an exceptionally brutal or heinous manner indicative of wanton cruelty, and aggravated arson. The trial court sentenced him to an extended term of 100 years' imprisonment for first degree murder and a consecutive term of 20 years' imprisonment for aggravated arson.

¶ 4           On direct appeal, we affirmed defendant's convictions and sentences over his claims that the trial court improperly admitted evidence of his other crimes and bad acts; the State minimized its burden of proof during closing argument; and the trial court improperly denied his motion to waive a jury determination of the wanton cruelty, extended-term sentencing issue. *People v. Norwood*, 362 Ill. App. 3d 1121 (2005), *appeal denied*, 219 Ill. 2d 586 (2006).

¶ 5           In October 2006, defendant filed his initial *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)) alleging that his convictions were void because they were based on the "1992 Illinois Compiled Statutes as amended," which were never in effect, and prosecutorial misconduct when the State misrepresented the facts during the hearing on his motion to suppress suggestive identification evidence. The circuit court

summarily dismissed the petition, and defendant appealed. The assistant State Appellate Defender, who was appointed to represent defendant, reviewed his petition and advised him that there were no issues of arguable merit, then filed a motion for summary disposition to correct defendant's mittimus, which this court allowed. *People v. Norwood*, No. 1-06-3511 (2007) (dispositional order).

¶ 6 On June 2, 2009, defendant filed the instant *pro se* motion for leave to file a successive post-conviction petition and attached to that his successive petition primarily alleging ineffective assistance of counsel. In his motion, defendant asserted that cause and prejudice existed with respect to his ineffective assistance of counsel claim because the necessary police reports and a 2001 deposition transcript of Willie Hubbard were withheld from him and were only obtained after his diligent efforts. As pertinent here, defendant alleged in his successive petition that trial counsel failed to effectively cross-examine Willie Hubbard about his evidence deposition, where it was revealed that Hubbard underwent surgery to remove a tumor behind his left eye 10 months after observing defendant on the night of the incident.

¶ 7 Alternatively, defendant asserted, in his motion for leave to file the successive petition, that his procedural default should be excused because he is "supplementing his

ineffective assistance of counsel claim with a claim of actual innocence." The actual innocence claim, he argued, "is used as a 'gateway' to overcome procedural default in order to reinstate the ineffective assistance of counsel claim and render it cognizable."

¶ 8 Defendant attached his own affidavit in support of his motion in which he related his diligent efforts to obtain the necessary documents for his ineffectiveness claim, stating that in early 2007, he wrote to counsel, who represented him on appeal of his initial post-conviction petition, and received the deposition transcript of Willie Hubbard and one page of a police report in September 2007. Counsel advised him, however, that she could not give him a copy of all the discovery because of budget constraints and the policy of the Office.

¶ 9 On August 14, 2009, the circuit court denied defendant leave to file the successive post-conviction petition. The court found no legal basis for defendant's assertion that discovery materials were wrongfully withheld from him "by the court, counsel and the clerk" because the discovery rules require disclosure to defense counsel, not defendant, and any such materials must remain in the exclusive custody of defense counsel. The court particularly found that defendant's inability to obtain the materials sooner did not constitute cause for failing to present the ineffective assistance claim in his

initial post-conviction petition, and "he also fails to show he is prejudiced in any way by not being able to raise these claims now since none of his claims have any arguable merit whatsoever." The court noted that defendant's allegations of ineffective assistance concerned trial strategies or were otherwise unsupported by the record or by affidavits.

¶ 10 On appeal, defendant challenges the propriety of the circuit court's denial of his motion for leave to file a successive post-conviction petition. Because defendant has abandoned most of the grounds for relief that he asserted in his motion for leave to file a successive petition, including any claim of actual innocence, we do not consider them here. *People v. LaPointe*, 365 Ill. App. 3d 914, 922-23 (2006), *aff'd*, 227 Ill. 2d 39 (2007); Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 11 Defendant contends that cause existed for not presenting his allegation that trial counsel failed to effectively cross-examine Hubbard in his initial petition because "it was not until September of 2007, after the dismissal of his initial petition, that he finally received the deposition testimony of Willie Hubbard from Assistant Appellate Defender Pamela Rubeo." He also disputes the circuit court's determination that he failed to show prejudice "primarily because of the failure to submit affidavits of individuals to prove his claim of ineffective assistance of counsel for failure to

investigate and adequately litigate the issue of Willie Hubbard's ability to visually identify defendant at the crime scene."

¶ 12 The Act contemplates the filing of only one post-conviction petition without leave of court (725 ILCS 5/122-1(f) (West 2008)), and expressly provides that any claim not raised in that petition is waived (725 ILCS 5/122-3 (West 2008)). *People v. English*, 403 Ill. App. 3d 121, 130 (2010). However, the waiver provision of section 122-3 of the Act can be relaxed where fundamental fairness so requires (*People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002)), and a successive petition can be considered on its merits if it meets the cause and prejudice test set forth in section 122-1(f) of the Act (*People v. Williams*, 392 Ill. App. 3d 359, 366 (2009)). We review *de novo* the denial of defendant's motion for leave to file a successive post-conviction petition. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 13 Like the test for ineffective assistance of counsel (*Strickland v. Washington*, 466 U.S. 668, 686 (1984)), the cause-and-prejudice test has two requirements that must be met with respect to each claim in a successive petition. *People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008). "Cause" has been defined as an objective factor, external to the defense, that impeded counsel's efforts to raise the claim in an earlier proceeding. *Williams*, 392 Ill. App. 3d at 366, citing, *Pitsonbarger*, 205 Ill. 2d at 460. When cause is based on a

fundamental deficiency in the initial post-conviction proceeding, defendant must show that the deficiency directly affected his ability to raise the ineffectiveness claim now asserted.

*Thompson*, 383 Ill. App. 3d at 929, *citing*, *People v.*

*Pitsonbarger*, 205 Ill. 2d 444, 462 (2002).

¶ 14 According to defendant, the underlying basis of his ineffective assistance claim is "evidence concerning Mr. Hubbard's vision and the impact it would have had upon defendant's trial." He argues that his allegation of ineffectiveness based on trial counsel's failure to cross-examine Mr. Hubbard effectively about his identification on the night of the incident was not possible until he received the deposition testimony of Mr. Hubbard. We disagree.

¶ 15 The lack of a tangible copy of Mr. Hubbard's deposition testimony did not prevent defendant from presenting this claim in his initial post-conviction petition. *People v. Williams*, 394 Ill. App. 3d 236, 245 (2009). Section 122-2 of the Act provides that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." (Emphasis added.) 725 ILCS 5/122-2 (West 2008). Defendant, thus, could have, but did not, explain in his initial petition that his counsel failed to comply with his request for the supporting documentation to advance a claim of ineffectiveness. *Williams*, 394 Ill. App. 3d

at 245-46. The record also shows that evidence regarding Mr. Hubbard's operation was brought out during trial, and that Mr. Hubbard "insisted \*\*\* that his vision at the time of the offense was unaffected." *Norwood*, 362 Ill. App. 3d at 1125.

¶ 16 In addition, defendant's own affidavit establishes that he was aware of the underlying basis for his ineffective assistance claim when he filed his initial petition, if not before. Under these circumstances, we conclude that his inability to obtain the discovery documents until after his initial petition was dismissed, did not prevent him from raising his ineffective assistance claim in his initial petition and did not constitute cause under section 122-1(f). *Williams*, 394 Ill. App. 3d at 246.

¶ 17 We are, otherwise, unpersuaded by defendant's attempt to analogize his case to *People v. Harris*, 224 Ill. 2d 115, 134 (2007), where the supreme court observed that a successive post-conviction petition is the proper means for a defendant to assert a claim of ineffective assistance of appellate counsel when the statute of limitations forced him to file the initial petition while the direct appeal was pending. As discussed, defendant here alleged ineffective assistance of trial counsel and because he was aware of the underlying basis for his claim of ineffectiveness when he filed his initial petition, the absence of the supporting documents that he sought

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did not excuse or prevent him from presenting the claim in the initial petition. Having determined that defendant has not established cause, we need not address whether he established prejudice. *Williams*, 394 Ill. App. 3d at 246.

¶ 18 For the reasons stated, we find that the circuit court did not err in denying defendant's motion for leave to file a successive post-conviction petition, and we affirm its judgment to that effect.

¶ 19 Affirmed.