

Third Division  
September 28, 2011

1-10-0718

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

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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.                                   | ) | 89 CR 7496        |
|                                      | ) |                   |
| DANIEL MAKIEL,                       | ) | Honorable         |
|                                      | ) | Frank Zelezinski, |
| Defendant-Appellant.                 | ) | Judge Presiding.  |

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

**ORDER**

*HELD:* A bare allegation that a defendant did not see transcripts from a co-defendant's trial did not suffice to show cause for failing to raise in an initial postconviction petition issues concerning the failure to present at the defendant's trial evidence that the co-defendant had used to win an acquittal. The trial court correctly denied the defendant leave to file a second, successive postconviction petition because the defendant failed to allege facts showing cause for failing to raise the issues in the initial postconviction petition.

¶ 1 In 1991, a jury found the defendant, Daniel Makiel, guilty of murder and armed robbery. This court affirmed the convictions on the direct appeal. *People v. Makiel*, No. 1-

97-2140 (1998) (unpublished order under Supreme Court Rule 23). Makiel filed a postconviction petition, which the trial court dismissed. Makiel later sought leave to file a second, successive postconviction petition, alleging that newly discovered evidence required a new trial. The allegedly new evidence appeared in the transcript of a co-defendant's trial, a trial that ended before Makiel's trial began. As cause for the failure to raise the new evidence in his initial postconviction petition, Makiel alleged that he did not see the transcript from his co-defendant's trial until November 2008.

¶ 2 We hold that, because Makiel has not alleged facts showing that any impediment prevented him from seeing the transcripts before he filed his initial postconviction petition, he did not sufficiently allege facts showing cause for his failure to raise the issue based on the new evidence in his initial postconviction petition. Accordingly, we affirm the trial court's decision denying him leave to file the successive postconviction petition.

¶ 3 **BACKGROUND**

¶ 4 On October 19, 1988, police found Katherine Hoch, dead from a gunshot wound, in a Mobil gas station she managed in Calumet City. On March 2, 1989, police arrested Todd Hlinko for selling narcotics. After hours of questioning, Hlinko signed a statement in which he said that he, Makiel and Sam Ilich drove to the Mobil station on October 19, 1988, in John Miller's car. Makiel went into the station alone. Hlinko saw Makiel carrying a purse later that night. An employee of the Chicago Streets and Sanitation department had found Hoch's purse, on October 24, 1988, in a trash can about a five minute drive away from John's home.

¶ 5 Following police interviews with some other witnesses, and several more interviews with Hlinko, in which he kept changing his account of the evening of October 19, 1988, the State decided to charge Hlinko, Ilich and Makiel with murdering Hoch. The State proceeded to trial against Ilich first. At Ilich's trial, the State relied largely on the testimony of Allen Martin and John's brother, Shane Miller. Martin testified that he had known Makiel and Ilich for years. He saw Makiel, Ilich and Hlinko in John's car at the Mobil station on October 19, 1988, shortly before the murder took place. Shane testified that late on October 19, 1988, he rode in John's car with Makiel, Ilich and Hlinko. When they crossed a bridge, Hlinko threw a gun out of the car into the river. Later, Makiel told Shane that Makiel had murdered Hoch.

¶ 6 Ilich impeached Martin and Shane with testimony from four witnesses. Three witnesses said Martin admitted he had falsely implicated Makiel and Ilich. The fourth witness said Shane had admitted lying, and he had not seen Makiel, Hlinko or Ilich on the fatal night. The jury acquitted Ilich.

¶ 7 Prosecutors decided to drop the charges against Hlinko and offer him further incentives in exchange for his testimony against Makiel. At Makiel's trial, Hlinko testified that he went into the Mobil station with Makiel on October 19, 1988. Makiel pointed a gun at Hoch and took her into a back room. Hlinko heard a gun shot and then Makiel came out of the back room carrying a purse. Makiel impeached Hlinko with his many different prior statements, and with evidence of the deal he obtained from prosecutors in exchange for his testimony.

¶ 8 Martin and Shane largely repeated the testimony they gave at Ilich's trial, and their testimony corroborated crucial aspects of Hlinko's testimony. Although defense counsel had access to transcripts of Ilich's trial, counsel did not call the witnesses who had impeached Martin and Shane at that trial. No physical evidence tied Makiel, Hlinko or Ilich to the crime. The jury found Makiel guilty of armed robbery and murder. The trial court sentenced Makiel to natural life in prison for the murder, with the sentence to run consecutively to a sentence of 60 years for the armed robbery. This court affirmed the judgment. *People v. Makiel*, No. 1-97-2140 (1998) (unpublished order under Supreme Court Rule 23).

¶ 9 Makiel filed a postconviction petition . The trial court dismissed the petition without holding an evidentiary hearing. Makiel appealed. This court reversed and remanded for an evidentiary hearing on the allegations of the postconviction petition. *People v. Makiel*, 358 Ill. App. 3d 102 (2005).

¶ 10 After our 2005 decision, Makiel moved for leave to file a second, successive postconviction petition. In the proposed second postconviction petition, Makiel alleged that he had ineffective assistance of trial counsel because trial counsel failed to call as witnesses at Makiel's trial the four witnesses who impeached Martin and Shane at Ilich's trial. Makiel alleged that the transcripts from Ilich's trial included the names of the witnesses and the testimony of the witnesses. According to Makiel's motion for leave to file the successive petition, Makiel's postconviction counsel "was never supplied a copy of Ilich's trial transcripts." The State first introduced the transcripts into evidence in Makiel's proceedings

on December 7, 2007. Makiel said that he first saw the transcripts in November 2008, and once he saw them he quickly decided to file a new postconviction petition.

¶ 11 The trial court denied Makiel leave to file the petition, holding that it lacked jurisdiction because the court had not yet finally disposed of the first postconviction petition. Makiel now appeals from the denial of leave to file the successive postconviction petition.

¶ 12 The trial court held the evidentiary hearing on the initial postconviction petition, and found no grounds for relief. Makiel has separately appealed from that decision, and we resolve that appeal in a separate order.

¶ 13 ANALYSIS

¶ 14 The parties agree that the trial court had jurisdiction to consider Makiel's second postconviction petition, and therefore the trial court erred when it found that it lacked jurisdiction to permit him to file the successive postconviction petition. See *People v. Harris*, 224 Ill. 2d 115, 127 (2007) (trial court has jurisdiction to consider postconviction petition during direct appeal). The State asks us to affirm the denial of leave to file because Makiel failed to show cause and prejudice, as required for a successive postconviction petition. We review *de novo* the denial of leave to file a successive postconviction petition. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006).

¶ 15 The Post-Conviction Hearing Act provides:

"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. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2008).

¶ 16 We follow the holding of *LaPointe* concerning the standards a petition must meet to show grounds for filing a successive postconviction petition. *LaPointe* delineated the standards as follows:

"[I]n deciding whether a section 122-1(f) motion is sufficient, a court should not impose an undue burden on the defendant. We note that, to survive preliminary review on the merits, a petition must present only the 'gist' of a meritorious claim and need not provide great detail, construct legal arguments, or cite to legal authority.

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A motion under section 122-1(f) precedes the preliminary-review stage and thus, like the petition itself, will ordinarily be drafted by a lay person with limited legal skills. Therefore, we hold that a section 122-1(f) motion need state only the gist of a meritorious claim of cause and prejudice." *LaPointe*, 365 Ill. App. 3d at 923-24.

¶ 17 Here, Makiel alleged that he did not see the transcripts from Ilich's trial until

November 2008, and the attorney who assisted him with his initial postconviction petition never saw those transcripts. However, Makiel does not identify any impediment that prevented him from seeing the transcripts before he filed his postconviction petition, or even before his trial. Ilich's trial ended before Makiel's began. Makiel and his attorneys knew of Ilich's acquittal and the attorneys saw the transcripts from Ilich's trial, so they knew about the witnesses who had impeached Martin and Shane. Makiel has not alleged that his attorneys kept the transcripts secret from him. Makiel has not alleged that he ever asked to see the transcripts. Makiel has not alleged that he ever asked the court reporter for a transcript of the testimony from Ilich's trial. Makiel has not alleged that the court reporter who prepared the transcripts from Ilich's trial refused to send him a copy. Because Makiel has not alleged facts that show an objective impediment prevented him from finding out about the witnesses who impeached Martin and Shane at Ilich's trial, we find that he has not shown the kind of cause necessary for bringing a successive postconviction petition. Therefore, we affirm the trial court's decision to deny Makiel leave to file the second postconviction petition.

¶ 18

#### CONCLUSION

¶ 19

We find that Makiel's bare allegation that he did not see the transcripts before November 2008 does not suffice to show that an impediment prevented him from seeing the transcripts before he filed his initial postconviction petition. Because Makiel has not adequately alleged any cause for his failure to raise in his initial postconviction petition the issue of counsel's failure to call witnesses who could impeach Martin and Shane, we affirm

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the trial court's decision to deny his motion for leave to file his successive postconviction petition.

¶ 20            Affirmed.