

2011 IL App (2d) 100983-U
No. 2-10-0983
Order filed October 26, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 97-CF-3027
)	
DEMETRIUS WILSON,)	Honorable
)	Thomas M. Schippers,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: The trial court properly denied defendant leave to file a successive postconviction petition, as his first petition established that he then could have raised his proposed claim that a witness had committed perjury.

¶ 1 Defendant, Demetrius Wilson, appeals a judgment denying him permission to file his proposed second petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends that the trial court erred in holding that he did not show cause and prejudice for his failure to raise his claim—that a State witness had committed perjury—in his first postconviction petition. See 725 ILCS 5/122-1(f) (West 2008). We affirm.

¶2 After a jury trial, defendant was convicted of one count of the first-degree murder (720 ILCS 5/9-1(a)(1) (West 1996)) of David Taylor and four counts of the armed robbery (720 ILCS 5/18-2(a) (West 1996)) of Taylor, Jermaine Price, Deon Tramble, and Alexius Brooks. Defendant was sentenced to 40 years' imprisonment for murder and 15 years' imprisonment for the armed robbery of Price, these sentences to run consecutively to one another and to three concurrent 8-year sentences for the other armed robberies. The evidence at trial is set out in our opinion on defendant's first appeal. *People v. Wilson*, 312 Ill. App. 3d 276 (2000). We summarize what is pertinent here.

¶3 On the evening of October 31, 1997, Jemeil Amlet and Keith Calvert were at a gathering hosted by Brandy Owen at her apartment. Taylor, Price, Tramble, Brooks, and Patricia Amann were also there. The testimony of Owen, Price, Tramble, and Amann was consistent on the following points. Calvert mentioned that his gun was outside, and he and Amlet left the building. Shortly afterward, they returned, accompanied by defendant, and entered the living room, where several people were playing cards on the floor. When Owen saw that defendant had a gun, she became upset. Defendant responded, "This ain't s—. This ain't nothing," then discharged the gun into the floor at least four times. Amann ran out of the apartment. Calvert and Amlet ran into the kitchen and returned with knives. Defendant then ordered Taylor, Tramble, and Price to empty the contents of their pockets onto the floor. Amlet and Calvert picked the items up off the floor. The three robbers then entered the kitchen, robbed Brooks of his car keys, and left the building.

¶4 Taylor was shot and killed after he left the building, followed closely by Tramble. Who shot Taylor was contested at trial. The pertinent evidence was as follows. Price testified that he exited the apartment shortly after Taylor and Tramble; that he heard several gunshots and ran back inside; and that, after the firing stopped, he exited and saw Taylor collapse into Tramble's arms. Tramble

testified that, as he approached the door, he heard a shot fired and saw Taylor, wounded in the chest, run back toward him; Taylor collapsed and Tramble caught him. Brian Carder, a police evidence technician, testified that he recovered six spent .45-caliber shell casings from Owen's apartment and one spent .45-caliber shell casing near the door outside. According to Carder, the shell found outside was a different brand from those recovered inside the apartment, but it could have been fired from the same gun. According to Robert Wilson, a firearms examiner, seven bullets recovered from the scene (including the one that hit Taylor) were .45-caliber and had similar class characteristics, and seven cartridge casings were all fired from the same unknown firearm. No gun was recovered.

¶ 5 Amlet's testimony, which he gave after entering a negotiated guilty plea to attempted armed robbery, was as follows. Before initially leaving Owen's apartment, Calvert said that he had to "put his [gun] in the bushes." Amlet and Calvert left, bought marijuana, returned, and left again. They met defendant and invited him to Owen's apartment. Amlet's account of the robberies was essentially consistent with those of the other witnesses. He also testified that he had long been a friend of Calvert but had not known defendant.

¶ 6 Amlet testified that, after the three robbers ran outside, he lost sight of Calvert and did not see him again. Amlet was far behind defendant. He saw defendant fire a gun in his direction. The gunshot struck Taylor, who was about three feet behind Amlet. Taylor ran back and fell.

¶ 7 On appeal, this court reversed defendant's murder conviction and remanded the cause for a new trial on that charge. We held that the trial court erred in answering a jury question so as to allow the jury to convict defendant based on an accountability theory, instead of adhering to its original instruction that the accountability theory was limited to the armed robbery charges. We noted that the State's theory at trial had been that defendant had shot Taylor, as Amlet had testified,

and the defense had attacked this theory by pointing to Amlet's bias and otherwise discrediting him in order to suggest that Calvert may have shot Taylor. *Id.* at 286.

¶ 8 On remand, the State charged defendant with the first-degree murder of Taylor, but this time not only as a principal but also as an accomplice. On November 14, 2000, just before jury selection began, Amlet told the trial judge that he would not testify, even though it meant being held in contempt. The judge told Amlet not to leave the building, but Amlet defied the order. The trial began that day without him. The next day, Amlet could not be located. As a result, the State was allowed to read his testimony from the first trial to the jury. The jury convicted defendant and the trial court sentenced him to 40 years' imprisonment for murder.

¶ 9 On appeal, defendant argued in part that the trial court erred in admitting Amlet's prior testimony. We rejected this argument, holding that, under section 115-10.2 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.2 (West 2000)), Amlet's hearsay testimony was admissible because Amlet had been "unavailable" (725 ILCS 5/115-10.2(a) (West 2000)) as defined in subsection (c) of the statute (725 ILCS 5/115-10.2(c) (West 2000)). *People v. Wilson*, 331 Ill. App. 3d 434 (2001).

¶ 10 On June 10, 2003, defendant filed a *pro se* petition under the Act. He claimed in part that his trial counsel had been ineffective for "refusing to speak with Jameil [*sic*] Amlet regarding the reason that Amlet was afraid to testify, which would have revealed that Amlet intended on recanting his prior testimony from the first trial." According to the petition, had trial counsel spoken to Amlet, he would have learned that Amlet was afraid to recant his testimony, because he feared being charged with perjury. The petition attached no affidavit from Amlet. It did attach defendant's affidavit, which stated that he had informed his attorney that, if he spoke to Amlet about his unwillingness to appear at the retrial, "counsel would learn that the testimony from the previous trial

by Amlet, [*sic*] was false.” The court later granted the State’s motion to dismiss the petition. This court affirmed, explaining in part that, because we had already held that Amlet’s testimony was properly admitted, defendant’s claim that his counsel was ineffective lacked arguable merit, as any deficient performance had not prejudiced defendant. *People v. Wilson*, No. 2-06-0075, slip order at 2 (2007) (unpublished order under Supreme Court Rule 23).

¶ 11 On April 12, 2007, defendant filed a *pro se* “Motion for No Evidence” asserting that his trial counsel had been ineffective and that the trial court had violated section 115-10.2 of the Code. The motion attached an affidavit from Amlet. The affidavit, dated March 8, 2007, stated as follows. On October 31, 1997, Amlet had been at Owen’s home along with defendant. At no time that day did Amlet see defendant with a gun or any other weapon, and at no time did Amlet see defendant hold or discharge a gun. Amlet had agreed to testify as he did only because the State was threatening to prosecute him for a crime that he did not commit. Before defendant’s retrial began, Amlet felt scared, and he refused to testify against defendant. Before leaving the court, he told the judge and the State that he “would no longer involve [himself] with providing false testimony against [defendant].”

¶ 12 The trial court dismissed the “Motion for No Evidence.” Defendant appealed. We dismissed the appeal, holding that the order was not final, because it allowed defendant to file a new pleading. *People v. Wilson*, No. 2-07-0639 (2009) (unpublished order under Supreme Court Rule 23).

¶ 13 On March 3, 2010, defendant filed a document entitled “Leave to File Successive Post Conviction [*sic*] Petition.” The document raised several claims. As pertinent here, it alleged that “a void judgment exist[ed] pursuant to” section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) because “the facts of the case has [*sic*] changed and that during the time of trial(s), these facts could-not [*sic*] have been known *** because an eyewitness has recanted his

testimony, thus creating perjury and it was due to this eyewitness' testimony [that] plaintiff was found guilty.” The document attached Amlet’s affidavit of March 8, 2007.

¶ 14 The trial court denied defendant leave to file a second petition, explaining that he had shown neither cause for his failure to raise the perjury claim in his first postconviction petition nor prejudice from the alleged error. The court noted that, although defendant now asserted that evidence of Amlet’s perjury had been unavailable when he had filed his first petition, the first petition had alleged that, shortly before the retrial, defendant told his attorney that Amlet had testified falsely at the first trial. We allowed defendant to file a late notice of appeal.

¶ 15 On appeal, defendant contends that he should have been allowed to file his proposed successive postconviction petition, because he satisfied section 122-1(f) of the Act, which reads:

“Only one petition may be filed by a petitioner *** 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 2010).

¶ 16 On our *de novo* review (see *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), *aff’d*, 227 Ill. 2d 39 (2007)), we hold that the trial court properly ruled that defendant failed to meet the “cause” prong of section 122-1(f). Therefore, we need not decide whether he met the “prejudice” prong.

¶ 17 Defendant filed his initial postconviction petition in 2003. The petition claimed that defendant's trial counsel had been ineffective, but it did not specifically claim that defendant's conviction had been tainted by perjury. The petition did not attach an affidavit from Amlet that would have supported any claim of perjury. However, it did allege that, shortly before his retrial began, defendant told his attorney that he believed that Amlet had committed perjury at the first trial. Thus, defendant himself asserted that, as early as November 2000, when his second trial began, he had known that Amlet had testified falsely.

¶ 18 The upshot of these facts is inescapable. As the trial court noted, defendant cannot establish that any objective factor impeded his ability to raise the Amlet-perjury claim in his initial petition—because the initial petition itself shows that, by June 10, 2003 (and long before), defendant was aware of all the facts that he needed to raise that claim. Moreover, defendant supplied no reason why he could not have obtained Amlet's affidavit by the time that he filed the first petition.

¶ 19 We note that, to the extent that defendant's first petition could be said to have raised the claim that Amlet had committed perjury, the trial court still properly denied defendant permission to file a successive petition. If defendant did indeed raise the claim in his first petition, then, logically, he could not demonstrate "cause" for his failure to raise the claim in his first petition. Moreover, he could not meet the "prejudice" prong of section 122-1(f), because the dismissal of his first petition meant that the claim was barred by *res judicata*. See *People v. Blair*, 215 Ill. 2d 427, 443 (2005).

¶ 20 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 21 Affirmed.