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2011 IL App (3d) 090989-U

Order filed December 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-09-0989
v.	)	Circuit No. 02-CF-958
	)	
RON M. McCLAIN,	)	Honorable
	)	Carla Alessio-Policandriotes
Defendant-Appellant.	)	Judge Presiding

JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's amended second successive postconviction petition at the second stage of the proceedings.

¶ 2 Defendant, Ronald McClain, appeals from the dismissal of his second successive postconviction petition following the second stage of the proceedings. Defendant's successive petition raises a claim of due process violation, alleging that he was forced to wear a stun belt throughout his jury trial absent a trial court's determination regarding the manifest necessity of the security device. We affirm.

¶ 3 In May 2002, a jury found defendant guilty of aggravated arson. The trial judge sentenced him to a 12-year term of imprisonment. On direct appeal, defendant argued that his trial counsel rendered ineffective assistance, that the prosecutor committed misconduct, and that his 12-year sentence was excessive. This court affirmed defendant's conviction and sentence. *People v. McClain*, No. 3-03-0496 (2005) (unpublished order under Supreme Court Rule 23).

¶ 4 In January 2005, while his direct appeal was still pending, defendant filed his first *pro se* postconviction petition, alleging that his counsel provided ineffective assistance when the counsel failed to object to defendant wearing a stun belt throughout his trial. Defendant further alleged that his due process right to a fair trial had been violated. The trial court dismissed defendant's petition as frivolous and patently without merit and this court affirmed that dismissal. In March 2007, defendant obtained three forms through the Freedom of Information Act request, showing that he was required to wear a stun belt in the trial.

¶ 5 In May 2007, defendant filed the first successive *pro se* postconviction petition realleging his previous claim regarding the use of the stun belt. In June 2007, the trial court denied defendant leave to file his first successive postconviction petition, and this court granted appellate counsel's motion to withdraw. *People v. McClain*, No. 3-07-0580 (2008) (unpublished order under Supreme Court Rule 23).

¶ 6 In October 2008, while the appeal on defendant's first successive postconviction petition was still pending, defendant filed a second successive postconviction petition, which, like his first postconviction petition and first successive petition, alleged ineffective assistance of counsel. Defendant moved for leave to file a second successive postconviction petition, and the trial court granted his request.

¶ 7 In December 2008, defendant amended his second successive postconviction petition, alleging that his fear that the belt would become visible to the jury, or that it would be activated, thus coercing him into waiving his fundamental right to testify during the trial. Defendant further contended that had he not worn a stun belt, he would have testified that he lacked the requisite *mens rea* to commit the offense where he acted recklessly, not knowingly. The State filed a motion to dismiss on the grounds that defendant failed to satisfy the cause and prejudice requirement and that defendant's petition was untimely and barred by *res judicata*. The trial court granted the State's motion and dismissed the petition.

¶ 8 STANDARD OF REVIEW

¶ 9 A trial judge's dismissal of a postconviction petition at the second stage of the proceeding is subject to *de novo* review. *People v. Coleman*, 183 Ill.2d 366 (1988).

¶ 10 ANALYSIS

¶ 11 I

¶ 12 The Post-Conviction Hearing Act (Act) provides for a three stage review process in noncapital cases. 725 ILCS 5/122-1 *et seq*. (West 2008). At the first stage, the court evaluates the petition on its face to determine whether it is "frivolous or patently without merit," and, based on that finding, either summarily dismisses the petition or dockets it for further review. 725 ILCS 5/122-2.1(b) (West 2008). If the petition survives the first stage, an attorney is appointed to assist the petitioner, and the petition proceeds to the second stage. 725 ILCS 5/122-4 (West 2008). At that stage, counsel may amend the petition and the State may move to dismiss it. 725 ILCS 5/122-5 (West 2008). If the petition is not dismissed at the second stage, it proceeds to an evidentiary hearing where the burden is on the petitioner to establish a substantial deprivation of a constitutional right. 725 ILCS 5/122-6 (West 2008).

¶ 13 The Act contemplates the filing of a single postconviction petition. A narrow exception to the rule prohibiting successive postconviction petitions holds that a claim presented in a successive petition may be considered when proceedings on the initial petition were deficient in some fundamental way. *People v. Britt-El*, 206 Ill. 2d 331, 339 (2002); *People v. Sanders*, 393 Ill. App. 3d 152 (2009).

¶ 14 Under the Act, a successive postconviction petition is not considered filed until leave to file the successive petition is granted by the trial court. 725 ILCS 5/122-1(f) (West 2008). The court must review the petition under the "cause-and-prejudice" test to determine whether fundamental fairness requires that a successive petition be filed. *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002). The petitioner must demonstrate that some external factors impeded efforts to raise the claim in the initial postconviction proceedings and that application of waiver would deny the petitioner consideration of an error that "so infected the entire trial that the resulting conviction or sentence violates due process." *Id.* at 464.

¶ 15 Defendant argues that the cause and prejudice test applies to a trial judge's decision to allow the filing of a successive postconviction petition. The State responds that the trial court correctly applied the cause and prejudice test in the second stage of the review and that defendant failed to meet the test.

¶ 16 The cause and prejudice test applies when the trial court determines whether to grant a petitioner leave to file a successive petition. 725 ILCS 5/122-1(f) (West 2008); *Pitsonbarger*, 205 Ill. 2d at 460. After leave to file a successive postconviction petition has been granted, the court and the parties proceed to the merits of the claims. 725 ILCS 5/122-2.1 (West 2008). The defendant is not required to satisfy the cause and prejudice test multiple times. See 725 ILCS 5/122-1(f) (West 2008).

¶ 17 In the instant case, the trial court granted defendant's motion for leave to file the petition. Defendant's petition was docketed and had already proceeded to the second stage of the review. By allowing the filing, the court resolved the cause and prejudice test.

¶ 18 II

¶ 19 "[A]ll issues actually decided on direct appeal are *res judicata*." *People v. Mahaffey*, 194 Ill.2d 154, 170 (2000). When a court decides an action by addressing the merits of the defendant's claims, the defendant is barred from raising the issues again in a subsequent postconviction petition. *People v. Silagy*, 116 Ill. 2d 357, 365 (1987).

¶ 20 The State contends that defendant's stun belt claim is barred by *res judicata* because defendant raised it in his previous postconviction petitions. Defendant argues that although he had previously raised his due process claim in the original and first successive postconviction petitions, *res judicata* does not apply to the amended second postconviction petition because the previous two petitions were dismissed on procedural grounds.

¶ 21 Defendant raised several issues in the original postconviction petition, including claims that he was forced to wear a stun belt at trial, that an unnamed deputy sheriff threatened to shock defendant with the belt, and that trial counsel was ineffective for failing to object to the use of the belt. Defendant's first postconviction petition was dismissed because the trial court found the petition to be wholly frivolous and patently without merit, a decision on the merits of defendant's claims. Defendant appealed the dismissal to this court, and we affirmed the trial court's decision. *McClain*, No. 3-03-0496. Further, defendant admitted in his amended second successive petition that the trial court considered the claims presented in the original postconviction petition. Therefore, *res judicata* bars defendant's amended second successive postconviction petition.

¶ 22 In light of our decision affirming the trial court on the issue of *res judicata*, we need not address the issue of timeliness raised by defendant.

¶ 23 CONCLUSION

¶ 24 The decision of the circuit court of the Will County is affirmed.

¶ 25 Affirm.