2012 IL App (4th) 100948-U

Filed 7/13/12

NO. 4-10-0948

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HENRY HOPKINS, Defendant-Appellant.	)	Appeal from Circuit Court of Livingston County No. 96CF93 Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices McCullough and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing the defendant's motion for leave to file a successive postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)).

¶ 2 In November 2010, the trial court dismissed defendant's motion for leave to file a successive postconviction petition under section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2010)). Defendant appeals, arguing (1) a motion for leave to file a petition under section 122-1(f) must only set forth the gist of a meritorious claim of cause and prejudice to be granted, and (2) his motion states the gist of a meritorious claim of cause and prejudice. We disagree with both arguments and affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 1996, the State charged defendant, an inmate in the Illinois Department of

Corrections (DOC), with two counts of aggravated battery (720 ILCS 5/12-4(b)(6) (West 1996)) against Joseph Eustice, an employee of the DOC. In the first count, the State alleged defendant knowingly caused Eustice bodily harm by biting him. In the second count, the State alleged defendant "knowingly made physical contact of an insulting or provoking nature" with Eustice.

¶ 5 In September 1996, a jury trial was held on the charges. Four witnesses, including defendant, testified. Jim Blackard, a correctional lieutenant at the Pontiac Correctional Center, testified he was part of a tactical unit in March 1996 that was called to do a cell extraction of defendant, who had jammed the hatch in his cell. Blackard told defendant three times to exit the cell "and cuff up". Defendant repeatedly refused to comply. Blackard then used "chemical agents on him." Defendant looked as if he were going to throw something, so he was sprayed a second time. Defendant then rushed to the hatch. He was cuffed and removed. Blackard testified upon arrival at the new cell, defendant remained uncooperative, refusing to walk. The officers placed defendant on the ground "to get a better hold onto him." At this point, defendant bit Eustice.

¶ 6 Eustice testified he was a correctional officer and a member of the tactical unit on which Blackard served. Eustice testified defendant bit his hand and would not release it. Eustice screamed, "He's biting me!" This caused defendant to bite even harder. Eustice finally jerked his arm from defendant's mouth.

¶ 7 Eustice testified "it was kind of like a crushing bite." The defendant bit "through the jump suit." Eustice's skin "immediately started turning purple [and] red" and began swelling. Eustice could see teeth marks all around. Eustice testified he had to have follow-up blood tests every three months because "there was a little bit of breaking of the skin."

¶ 8 On cross-examination, Eustice testified it would not surprise him if the notes from the institutional hospital that initially treated Eustice indicated there was no apparent breaking of the skin. Eustice said he was not bleeding.

¶ 9 Charles Roper, the Adjustment-Committee chairman at Pontiac Correctional Center, testified a hearing was held on a disciplinary ticket issued to defendant following the events of March 16, 1996. At that hearing, defendant agreed to talk to the committee. Defendant admitted he bit the correctional officer because chemical agents had been unjustifiably used on him.

¶ 10 At trial, defendant testified he did not bite Eustice. He admitted to jamming the door of his cell.

¶ 11 The jury found defendant guilty of both counts. The trial court sentenced defendant to an extended term of eight years' imprisonment, to be served consecutively to the sentence he was then serving. He appealed, arguing entitlement to 265 days' sentence credit in custody from the date of his charge (through a prison inmate) until his sentencing. This court affirmed. *People v. Hopkins*, No. 4-96-0953 (May 8, 1998) (unpublished order under Supreme Court Rule 23).

¶ 12 In August 2004, defendant filed his initial *pro se* postconviction petition. In this petition, defendant maintained the trial court, at sentencing, improperly relied upon infractions for which he was not convicted and his extended-term sentence was unconstitutional. The trial court summarily dismissed defendant's initial petition, finding it frivolous and patently without merit. On appeal, OSAD moved to withdraw concluding no colorable argument could be made that the trial court erred in summarily dismissing the petition. This court affirmed. *People v.*

Hopkins, No. 4-04-0838 (Dec. 15, 2005) (unpublished order under Supreme Court Rule 23).

¶ 13 In August 2010, defendant sought leave to file a successive postconviction petition under the Act. Defendant attached his successive petition to the motion. In his motion for leave, defendant asserted the cause for his not raising the new claims in his original petition was because when he filed his first petition he did not have his "complete trial transcripts" and, without those transcripts, he could only remember the sentencing. Defendant asserted: "Now I have gotten the rest of my transcript[s] back, I read them and I would like to raise to [*sic*] constitutional issue[s] I couldn't raise earl[ier] because I didn't have the complete transcripts." Defendant maintained the reason he did not have complete transcripts was "from all the transfer[r]ing around to other correctional center[s] and legal paper [*sic*] getting lost." Defendant maintained he was prejudiced by the fact he could not bring his claims sooner. According to defendant, counsel's failure to call the institutional medical personnel who treated the victim prejudiced him because personnel would have testified there was no evidence indicating the correctional officer was bitten. Defendant emphasized "the institutional doctor['s] medical notes noted nothing about bite marks or broken skin."

¶ 14 In his successive postconviction petition, defendant asserted his counsel provided ineffective assistance by not calling the institutional nurse or physician as defense witnesses because they "could" have verified the officer was not bitten. Defendant did not attach an affidavit signed by either the treating nurse or physician and did not explain why he did not provide such affidavit.

¶ 15 In November 2010, the trial court denied defendant's motion. The court held defendant failed to satisfy either prong of the cause-and-prejudice test. The court concluded the

following:

> "Although defendant indicates he did not have all of his trial transcripts at the time he filed his first petition, the ability to obtain those transcripts before the original postconviction petition was filed was within the control of the defendant. Furthermore, defendant has failed to set forth a sufficient basis to show that the entire trial and conviction violates due process as required by the prejudice test."

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 This is the second petition defendant has filed under the Act. The Act mandates "[o]nly one petition may be filed by a petitioner under this Article without leave of court." 725 ILCS 5/122-1(f) (West 2010). A court may grant leave to file a second petition "*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 2010). Cause may be shown "by identifying an objective factor that impeded [the prisoner's] ability to raise a specific claim during his or her initial post-conviction proceedings[.]" 725 ILCS 5/122-1(f) (West 2010). Prejudice may be shown "by demonstrating that the claim not raised during [the prisoner's] 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). Our review is *de novo*. See *People v. McDonald*, 405 Ill. App. 3d 131, 135, 937 N.E.2d 778, 783 (2010).

¶ 19 The parties dispute the proper application of the cause-and-prejudice test.

Defendant, citing the Second District's decision in *People v. LaPointe*, 365 Ill. App. 3d 914, 923, 850 N.E.2d 893, 900 (2006), maintains at this stage he must only show the "gist" of a claim of cause and prejudice to be able to file the successive petition in the trial court. The State disagrees and disputes *LaPointe*'s decision to treat the cause-and-prejudice test used in determining whether to permit the filing of a successive postconviction petition the same as it would an initial postconviction petition filed under the Act. The State maintains applying the "gist" standard means defendant's motion for leave could only be denied if it was "frivolous and patently without merit" as to his allegations of cause and prejudice. See *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001) (observing the gist of a constitutional claim will prevent the first-stage dismissal of a postconviction petition as "frivolous and patently without merit"). The State argues such an approach is refuted by language in the Act and by Illinois case law.

¶ 20 In *LaPointe*, the Second District held a motion for leave to file a successive postconviction petition under section 122-1(f) "need state only the gist of a meritorious claim of cause and prejudice." *LaPointe*, 365 Ill. App. 3d at 924, 850 N.E.2d at 901. In reaching this decision, the Second District followed the same principles that apply to the summary dismissal of nonsuccessive petitions, recognizing a defendant, in the first stage of review under the Act, need only present the gist of a meritorious claim and not "provide great detail, construct legal arguments, or cite to legal authority." *LaPointe*, 365 Ill. App. 3d at 923, 850 N.E.2d at 900. The *LaPointe* court concluded, in deciding whether to grant a petitioner leave to file a section 122-1(f) petition, courts "should not impose an undue burden on the defendant," who is often indigent and unschooled in the art of legal drafting. *LaPointe*, 365 Ill. App. 3d at 923, 850 N.E.2d at 900-01.

¶ 21 As we now know, that approach has been rejected by the Supreme Court in *People v. Edwards*, 2012 IL 111711 ¶ 25-27, 2012 WL 1356492, *5.

¶ 22 The Act's disfavor of successive petitions, and the legislature's attempt to dissuade multiple frivolous claims, clearly indicate the "gist" approach incorrectly lowers the threshold for section 122-1(f) successive petitions. This court recently cited *Edwards* in reaching the same result. *People v. Donald Green*, 2012 IL App (4th) 101034, 2012 WL 2061441.

¶ 23 Defendant's motion for leave fails to establish cause and prejudice. For purposes of section 122-1(f), "cause" is "an objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding." *People v. Morgan*, 212 Ill. 2d 148, 153-54, 817 N.E.2d 524, 527 (2004). In his motion, the objective factor defendant points to is he did not have "complete transcripts" from the trial, due to his transfers in the DOC and papers "getting lost." These bare allegations, without more, do not satisfy the cause test. Defendant's aggravated-battery conviction occurred in 1996. Defendant's unsupported assertion it took nearly 14 years for him to obtain complete transcripts is unbelievable. Defendant does not explain his efforts to obtain such transcripts, nor does he explain when he obtained the transcripts. The timing is critical to this claim. Defendant was present at trial. Defendant testified and denied biting Eustice. Defendant is thus charged with knowing no physician or nurse testified.

¶ 24 "Prejudice," for purposes of section 122-1(f), will be found when the defendant can show "the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Morgan*, 212 Ill. 2d at 154, 817 N.E.2d at 527. Defendant has not established prejudice. At trial, the State presented substantial evidence the bite occurred. The victim testified he was bitten. Another officer involved in attempting to move defendant testified

the bite occurred. The correctional employee that oversaw defendant's hearing before the Adjustment Committee testified defendant admitted biting Eustice. The possibility the treating physician or nurse did not see bite marks, when the bite occurred over a jumpsuit, does not undermine the aforementioned testimony.

¶ 25 Defendant did not attach affidavits or other evidence showing how the treating medical personnel would have testified at the trial. Petitions under the Act "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). The Act makes no exception for section 122-1(f) petitions. Without affidavits establishing testimony of the medical personnel, defendant's allegations are unsupported, further undermining his prejudice claim.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court's judgment. We award the State its statutory assessment of $50 as costs of this appeal.

¶ 28 Affirmed.