

No. 1-12-0915

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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
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 01-CR-15906
	)	
GEORGE FRISON,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Rochford and Delort concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The judgment of the circuit court was affirmed where it properly denied the defendant's motion for leave to file a successive postconviction petition.
- ¶ 2 The defendant, George Frison, appeals from the circuit court order which denied him leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.*) (West 2012)). The defendant argues that he satisfied the cause-and-prejudice test where he claimed that, in his appeal of the dismissal of his initial postconviction petition, postconviction appellate counsel provided unreasonable assistance for failing to argue the

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ineffectiveness of his trial and appellate counsel. The defendant's ineffective-assistance-of-counsel claim stems from his trial counsel's misrepresentation of the time between the crime and his arrest during the course of hearing on the defendant's motion to quash his arrest and suppress evidence. We affirm.

¶ 3 The defendant was charged, along with codefendants Anthony Mason and Edward Ware, with the first degree murder of Kennedy Brooks and the aggravated battery with a firearm of Eddie Baker in connection with a shooting incident in the early morning hours of June 6, 2001. Prior to trial, the defendant moved to quash his arrest and suppress his videotaped statement to police on the ground that the police arrested him and searched his home without a warrant in violation of the fourth amendment. At the hearing on the motion to suppress, Detective Michael O'Donnell testified that officers arrived at the defendant's residence between 6:00 a.m. and 6:30 a.m. on June 6, approximately six hours after the murder. He testified that officers went to the front and rear entries of the building and that Detective Joseph Struck knocked on the front door for several minutes until a female voice answered. The officers identified themselves as police. Detective O'Donnell saw the back door open, the defendant appear holding a pair of boots, and the door close and lock. O'Donnell testified that he then forced the back door open and proceeded to the basement. O'Donnell testified that there were several guns in the defendant's immediate vicinity at the time of the arrest.

¶ 4 Detective Joseph Struck testified that he and five other officers went to the defendant's apartment on June 7, 2001, following Baker's identification of the defendant as one of the men involved in the shooting. Detective Struck admitted that the police did not have an arrest or search

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warrant at the time. Later that day, Detective Struck returned to the residence and recovered a .25 caliber semiautomatic pistol, which was linked to the murder of Brooks. He testified that the owner of the building allowed him to enter the basement where the gun was recovered.

¶ 5 Considering the totality of the circumstances, the trial court denied the motion to quash the arrest and suppress evidence, finding that exigent circumstances existed. Specifically, the court noted that the police arrested the defendant only 6 to 6 ½ hours after the crime and after a victim identified him as one of the offenders. The court noted that it was unlikely the police could obtain a warrant between midnight (the time of the crime) and 6 a.m.; the offense was grave; the defendant could have been armed; and Baker's information was reliable. Defense counsel did not identify the error in the timing of events, as the search and arrest occurred in the morning hours of June 7, not June 6, which was actually 30 hours after the crime.

¶ 6 At trial, the State presented evidence that, at approximately 11:50 p.m. on the night of June 5, 2001, the defendant and codefendants Mason and Ware drove to the intersection of 43rd Street and Michigan Avenue, where they had previously arranged to purchase narcotics from Baker and Brooks. Baker testified that he and Brooks were in a van and when the defendant and Mason got into the van, the defendant pulled out a gun and demanded the drugs. Mason also pulled out a gun and started shooting. Baker, who was shot in the right leg, exited the van and ran down an alley. He heard three additional gunshots, but he did not observe who fired the shots. Baker ran home and was later taken to the hospital. Brooks died of multiple gunshot wounds, and his body was found lying in the street near the intersection.

¶ 7 The defendant's videotaped statement was published to the jury. In that statement, the

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defendant admitted that he arranged to purchase 100 grams of heroin from Brooks, but that he and his codefendants intended to rob Brooks of the drugs. The defendant also admitted that both he and Mason were armed with loaded guns when they entered the van. The defendant stated that he struggled with Baker, who grabbed his arm as he started to pull out his gun. Mason then started shooting, and Baker and Brooks ran from the van. After the defendant returned to the car, Ware took a handgun and pursued Brooks, telling him to turn over the drugs. The defendant stated that he drove off after hearing a gunshot. In his statement, the defendant acknowledged that he did not observe Baker or Brooks with a weapon. At trial, the defendant testified contrary to his videotaped statement. He said that Baker and Brooks robbed him at gunpoint during the drug transaction that he had arranged on behalf of Ware. According to the defendant, he agreed to make the videotaped statement because the police told him that they would get him medical attention for his heroin-withdrawal symptoms and would not harass his family if he cooperated.

¶ 8 On June 1, 2005, the jury found the defendant guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2000)). The trial court sentenced the defendant to an aggregate sentence of 42 years' imprisonment.

¶ 9 On direct appeal, the defendant argued that the trial court erred by: (1) admitting gang-related evidence; (2) allowing a photograph depicting other-crimes evidence to be taken into the jury room; and (3) refusing to instruct the jury that the testimony of an accomplice should be viewed with suspicion. He also argued that the evidence was insufficient to sustain his convictions. We rejected the defendant's claims and affirmed his convictions and sentence. *People v. Frison*, No. 1-05-2561 (Dec. 4, 2007) (unpublished order under Supreme Court Rule 23).

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¶ 10 On March 24, 2009, the defendant filed a *pro se* postconviction petition pursuant to the Act, claiming that he had been denied the right to effective assistance of counsel. Among the various claims, the defendant asserted that: his appellate counsel was ineffective for failing to raise unspecified "meritorious" claims; trial counsel was ineffective because he was intoxicated during trial and failed to interview and call several witnesses; and trial counsel stipulated during the hearing on his motion to suppress that the time between the murder and his warrantless arrest was six hours when it was actually 30 hours. The trial court dismissed the defendant's petition, finding the issues raised were frivolous and patently without merit. Regarding the time discrepancy during the suppression hearing, the court noted that, while defense counsel incorrectly agreed to the six-hour time window, the defendant could not demonstrate that the outcome of his trial would have been different had the motion been granted. The court further stated that the defendant's confession was "far too attenuated from his arrest" even had the motion to quash his arrest been granted.

¶ 11 The defendant appealed the dismissal, abandoning eight of his 10 claims and arguing only that two of his claims should advance to second-stage proceedings. Those two claims of ineffective assistance of counsel alleged that trial counsel was intoxicated during trial and failed to call certain witnesses to corroborate the defendant's alleged heroin problem. We rejected the defendant's arguments and affirmed the circuit court's dismissal of his postconviction petition. *People v. Frison*, No. 1-09-1810 (June 27, 2011) (unpublished order under Supreme Court Rule 23).

¶ 12 On January 5, 2012, the defendant filed a *pro se* motion for leave to file a successive postconviction petition. In his motion, the defendant asserted a claim of actual innocence yet restated only the arguments contained in his initial petition, including that trial counsel erroneously

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agreed that the arrest took place 6 to 6 ½ hours after the crime and that appellate counsel failed to raise the issue on appeal. On February 23, 2012, the circuit court denied the defendant's motion, concluding that none of the defendant's claims constituted a claim of actual innocence. The defendant timely appealed from that order.

¶ 13 On appeal, the defendant abandons his actual innocence argument and argues only that one claim of ineffective assistance of counsel should advance to second-stage proceedings. He argues that trial counsel's misrepresentation that his arrest took place six hours after the crime during the hearing on his motion to quash his arrest constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The defendant further argues that appellate counsel's failure to raise the issue in his direct appeal also satisfies *Strickland* and postconviction counsel's failure to raise it in his initial postconviction appeal violated his right to reasonable assistance of counsel. We disagree.

¶ 14 The Act provides a means by which a criminal defendant can assert that "in the proceedings which resulted in his \*\*\* conviction there was a substantial denial" of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Evans*, 2013 IL 113471, ¶ 10. The Act permits the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2012)), and it provides that any claim not raised in the original petition is waived (725 ILCS 5/122-3 (West 2012)). *Evans*, 2013 IL 113471, ¶ 10. To initiate a successive postconviction proceeding, the defendant must first obtain leave of court, which is granted only when he demonstrates cause for his failure to bring the claim in his initial petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f); *Evans*, 2013 IL 113471, ¶ 10. To show cause, the defendant must identify an objective factor that impeded his

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ability to raise a specific claim during the initial postconviction proceeding. 725 ILCS 5/122-1(f); *Evans*, 2013 IL 113471, ¶ 10. To show prejudice, the defendant must demonstrate that the claim not raised during his initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f); *Evans*, 2013 IL 113471, ¶ 10.

¶ 15 The cause-and-prejudice test is applied to individual claims, not to the petition as a whole. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 20. When assessing whether a defendant has satisfied the cause-and-prejudice test, Illinois courts have generally adhered to the "more exacting" standard outlined above rather than the "gist" standard used to review initial petitions. *Edwards*, 2012 IL App (1st) 091651, ¶ 21; *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26. Further, because a proceeding brought under the Act is a collateral attack on a judgment of conviction, all issues actually decided on direct appeal or that have been ruled on in an initial postconviction petition are barred by *res judicata*, and all issues that could have been raised in the original proceeding but were not are waived. *People v. Thompson*, 383 Ill. App. 3d 924, 931, 890 N.E.2d 1119 (2008); *People v. Orange*, 195 Ill. 2d 437, 447-48, 749 N.E.2d 932 (2001). We review *de novo* the circuit court's denial of leave to file a successive postconviction petition. *Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 16 Here, the defendant raised the issue of trial counsel's ineffectiveness during the motion to quash and appellate counsel's failure to raise the issue in his direct appeal in his initial postconviction petition, which was dismissed as frivolous and patently without merit. Therefore, as the State argues, the defendant's claims of ineffectiveness of trial and appellate counsel are barred by *res judicata*. See *Thompson*, 383 Ill. App. 3d at 931 (finding the defendant's allegations were barred by

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*res judicata* because the allegations in the successive petition were identical to those raised in his initial petition). To the extent the defendant now claims that postconviction counsel provided unreasonable assistance by failing to argue the issue in the appeal of his initial petition's dismissal, we conclude the defendant fails to satisfy the cause-and-prejudice test.

¶ 17 A defendant is entitled only to a reasonable level of assistance during postconviction proceedings, which is less than the effective-assistance level afforded by the federal and state constitutions. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999 (2006). In order to succeed on such a claim, a defendant must establish that he was prejudiced by postconviction counsel's failure to raise the issue in the appeal of the dismissal of his initial petition such that his conviction violates due process. See *Thompson*, 383 Ill. App. 3d at 932 (considering whether postconviction counsel's failure to raise certain issues in the defendant's initial petition prejudiced him such that his conviction violated due process and affirming denial of the defendant's motion for leave to file successive petition). Thus, the defendant must show that had postconviction appellate counsel raised the argument pertaining to the error during the suppression hearing, it would have succeeded. Stated otherwise, postconviction appellate counsel would have been able to show that trial and appellate counsel were ineffective. Like the cause-and-prejudice standard, an ineffective-assistance-of-counsel claim also requires a showing of prejudice.

¶ 18 In order to establish a claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth in *Strickland* and prove (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) absent counsel's deficient performance, there was a reasonable probability that the outcome of his trial would have been different. *People v. Lacy*, 407

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Ill. App. 3d 442, 456, 943 N.E.2d 303 (2011). The defendant's claim of ineffective assistance of counsel may be disposed of if he fails to satisfy either prong. *Id.* at 457. Further, ineffective assistance of appellate counsel is determined under the same standard as a claim of ineffective assistance of trial counsel. *Id.* "Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit." *Id.* Therefore, unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise an issue on appeal. *Id.*

¶ 19 In this case, while it is clear from the record that defense counsel erred in his understanding of the timing of the defendant's arrest at the hearing on his pretrial motion, the defendant has failed to establish that the outcome of his trial would have been different had the trial court granted the motion and excluded the defendant's taped confession. Even without the defendant's confession, the State presented sufficient evidence to sustain the defendant's conviction. Baker, an eyewitness and victim of the crime, testified that the defendant and his codefendants were involved in the shooting during the drug transaction; Baker's testimony alone was sufficient to convict the defendant. See *People v. Lewis*, 165 Ill. 2d 305, 356, 651 N.E.2d 72, 96 (1995) ("a single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification"). Additionally, the police found the gun used in the murder in a separate search after the building owner allowed them to enter the defendant's apartment. Further, the defendant fails to establish that the trial court's ruling on the motion would have been different had counsel not mistaken the timing of the arrest. In addition to the time factor, the trial court had noted other reasons supporting its denial of the motion, including that the

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defendant was implicated in a grave offense and could have been armed, and that Baker's information was reliable. Given these facts, the defendant's claim that trial counsel rendered ineffective assistance fails on the prejudice prong of *Strickland*. Because the underlying issue has no merit, there is no prejudice under *Strickland* from appellate counsel's failure to raise the issue in the defendant's direct appeal. It then follows that postconviction counsel's failure to raise the issue in the appeal of the dismissal of the defendant's initial petition was not unreasonable. Accordingly, the defendant has failed to demonstrate that the claim not raised during his initial postconviction appeal so infected the trial that his conviction or sentence violated due process. Thus, the circuit court did not err in denying the defendant's motion for leave to file a successive postconviction petition.

¶ 20 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.