

Modified Upon Denial of Rehearing
SECOND DIVISION
February 17, 2015

No. 1-12-3236

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(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Respondent-Appellee,)	
)	
v.)	No. 99 CR 10066
)	
RORY COOK,)	
)	
Petitioner-Appellant.)	Honorable Neera Lall Walsh, Judge Presiding

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err by denying defendant's motion for leave to file a successive postconviction petition. While defendant did establish cause for failing to raise his arguments in his original postconviction petition, he did not establish any resulting prejudice.

¶ 2 Defendant Rory Cook appeals from a judgment of the Circuit Court of Cook County denying his motion for leave to file a successive postconviction petition. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Following a jury trial, defendant Rory Cook was found guilty of first degree murder for killing Brian Keith Bell. The trial judge sentenced defendant to 30 years in prison. Defendant's conviction was affirmed on direct appeal. *People v. Cook*, 352 Ill.App.3d 108 (2004) (petition for leave to appeal denied at 212 Ill.2d 539 (2004)). Defendant filed a postconviction petition which was advanced to the second stage and subsequently dismissed. The dismissal of defendant's postconviction petition was affirmed on appeal. *People v. Cook*, No. 1-11-1551, 2013 IL App (1st) 111551-U (June 27, 2013) (petition for leave to appeal denied at No. 116416, 996 N.E.2d 18 (Table) (September 25, 2013)). Defendant then filed a motion in the trial court seeking leave to file a successive postconviction petition which was denied by written order. Defendant now appeals the denial of his motion for leave to file a successive postconviction petition.

¶ 5 Defendant killed Brian Keith Bell on April 3, 1999. Bell was killed during an altercation between the parties over a \$10 debt supposedly owed by defendant. The evidence adduced at trial was that, on the date of the incident, defendant and Garrett Scruthens were at defendant's apartment drinking alcohol and smoking crack cocaine. Defendant's girlfriend, Dana Hunt, and one of his friends, Darryl Bunch, arrived at defendant's apartment later in the day. Bell was defendant's downstairs neighbor. While coming and going from the apartment to buy more alcohol and crack cocaine that day, defendant had some confrontations with Bell over the \$10 debt. At some point, defendant armed himself with a gun and the parties had another altercation in front of the apartment building. During the altercation, Bell was shot. When the police arrived, they observed defendant straddling Bell and strangling him. Bell died on the way to the hospital and defendant was taken into custody.

¶ 6 One piece of evidence introduced at trial was defendant's confession. Prior to trial, defendant moved to suppress his inculpatory statements. The trial judge denied that motion. In his motion seeking leave to file a successive postconviction petition, defendant contends that the police fabricated his confession. Defendant maintains that he never intended to kill Bell and that Bell's death was the result of a struggle for the gun. Defendant claims that without the fabricated confession, there would have been no evidence that he intended to kill Bell and that, if his confession was not admitted, the jury might have found him guilty of either involuntary manslaughter or second degree murder instead of first degree murder.

¶ 7 After defendant was arrested, he was read his *Miranda* rights and interrogated by Detective Bernatek and Detective Van Witzenberg. Defendant was then transported to meet with Officer Bartik for the purpose of administering a polygraph examination. Before the polygraph examination took place, defendant allegedly confessed so the need for the polygraph examination was, in the investigators' opinion, obviated. Bartik then advised Detective McVicker to come into the room because defendant had something he wanted to tell the detectives. Defendant then gave a confession to McVicker and his partner. Defendant was then transported to be interviewed again by Detectives Van Witzenburg and Arteaga who were later joined by Assistant Cook County State's Attorney Tom Key. Key testified that defendant affirmed that *Miranda* warnings had been administered, but that he reissued the warnings and defendant also signed a pre-printed form waiving the rights afforded by *Miranda*. Key further testified that defendant indicated that he wanted to make a written statement and wanted Key to transcribe it. Defendant admitted signing the statement and initialing each page.

¶ 8 In his proposed successive postconviction petition, Defendant alleges that "Barti[k] falsely

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claimed that Rory Cook orally confessed to him about committing a murder" before the scheduled polygraph examination. Defendant claims that new evidence has come to his attention that supports his position that the purported confession to Bartik was, in fact, fabricated. Along with his motion, defendant submitted evidence which he contends demonstrates that Officer Bartik has falsely claimed that other defendants in similar circumstances confessed to him. Defendant attached to his motion a 2010 article from the Chicago Tribune discussing a civil judgment awarded to Donny McGee in which a jury found Bartik, among others, liable for malicious prosecution in a case where Bartik was alleged to have falsely claimed that McGee confessed. The verdict form from the *McGee* case is attached to defendant's motion. *McGee v. City of Chicago*, No. 08 L 3503 (Cir. Ct. Cook Co.). That verdict was overturned by this Court and the judgment was reversed. *McGee v. City of Chicago*, 2012 IL App (1st) 111084, ¶ 36. Defendant also attached a complaint filed in federal court against Bartik, among others, in *Lanza v. City of Chicago*, No. 08CV5103, 2010 WL 5313483 (N.D. Ill. Dec. 20, 2010). The plaintiff in *Lanza* alleged that Bartik falsely claimed that he had blurted out a confession right before a polygraph examination was to be administered. The *Lanza* plaintiff also alleged that Bartik had falsely claimed that John Fulton and Lamar Blount confessed right before those individuals were to take polygraph examinations. Defendant did not supply any evidence concerning the disposition of the *Lanza* case. Other than the allegations made in the *Lanza* complaint, Defendant did not supply any information concerning John Fulton or Lamar Blount.

¶ 9 Despite the fact that the statement defendant allegedly made to Bartik was not offered at trial, defendant argues that the newly discovered evidence of Bartik's pattern of misconduct establishes cause and prejudice for not raising the argument sooner and, thus, that the trial court

should entertain his successive postconviction petition.

¶ 10

ANALYSIS

¶ 11 Defendant's only contention on appeal is that he satisfied the "cause and prejudice" test in his motion seeking leave to file a successive postconviction petition and, therefore, that the trial court erred by denying his motion. Generally, the Post-Conviction Hearing Act contemplates the filing of only one petition. 725 ILCS 5/122-1(f). Successive petitions are disfavored and to proceed, a petitioner must first obtain leave of court by either asserting actual innocence or satisfying the cause and prejudice test. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 33. To establish cause, a defendant must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceedings. *Id.* To establish prejudice, a defendant must demonstrate that the claim that was not originally raised infected the trial to the extent that the resulting conviction or sentence violated due process. *Id.* In reviewing a motion for leave to file a successive petition, all well-pleaded facts must be taken as true. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25. We review the denial of leave to file a successive postconviction petition *de novo*. *Id.*

¶ 12 The parties dispute what standard a defendant must meet to establish cause and prejudice for purposes of a successive postconviction petition. Defendant contends that we should apply the "gist" standard in which a petition must have merely some arguable basis in law or fact. *People v. Hodges*, 234 Ill.2d 1, 17 (2009). The State contends that we should apply the "more exacting" standard in which a petition must state a colorable claim of a due process violation. The Illinois Supreme Court has made clear that we are to apply a more stringent standard to successive petitions, *People v. Edwards*, 2012 IL 111711, ¶ 25, and we have interpreted that to mean that a

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defendant must set forth a colorable claim for relief, *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 49.

¶ 13 The trial court found that defendant could not establish cause because defendant waived the right to raise the issue of a fabricated confession by not including it in his initial postconviction petition. Any issues that could have been, but were not, raised in the original proceeding or original postconviction petition are waived. *People v. Sanders*, 2014 IL App (1st) 111783, ¶ 19. Here, at each stage of the proceedings defendant maintained that the statement was not a true account of the events according to him and that police misconduct rendered his statement inadmissible. Defendant specifically testified at trial that he "was telling [the officers] how the victim got shot," but that the officers were "making up a story on [him]." In his direct appeal, he acknowledged that defendant contested the admission of his inculpatory statement on the basis that it was concocted. We find no waiver of the claims made in regard to Officer Bartik.

¶ 14 In support of his argument that he has established cause, defendant maintains that at the time he filed his original postconviction petition, evidence of Officer Bartik's pattern of misconduct was not available to him. Defendant's first postconviction petition was filed on May 4, 2005. There is no indication that defendant knew or should have known of the alleged pattern of misconduct prior to October 2005 when he was sent a letter concerning Bartik's alleged misconduct. The documents attached to defendant's motion for leave to file a successive petition also show that the evidence of Bartik's alleged pattern of misconduct was not reasonably available to defendant at the time of trial or when he filed his initial postconviction petition. The Chicago Tribune article was published in 2010 and both the *McGee* and *Lanza* cases were filed in 2008. A defendant's lack of evidence that an officer has committed misconduct in circumstances similar to

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those of the defendant can serve as objective cause for failing to fully raise the claim in prior proceedings. See *People v. Almodovar*, 2013 IL App (1st) 101476, ¶¶ 64-68. The documents attached to the motion constitute new information that is material and not merely cumulative and the information was not discoverable through due diligence prior to trial or when the original postconviction petition was filed. We find that defendant established cause for failing to raise the issue of Bartik's alleged misconduct in his initial postconviction petition.

¶ 15 Having found that defendant established cause for failing to raise his argument in his original postconviction petition, we must determine whether defendant has established prejudice. Prejudice exists where the defendant can show that the claimed constitutional error so infected his trial that the resulting conviction violated due process. *People v. Croom*, 2012 IL App (4th) 100932, ¶ 25. Here, even if defendant is able to prove all of his allegations concerning Bartik, he cannot demonstrate that the admission of his inculpatory statement at trial constituted a due process violation.

¶ 16 Throughout the course of defendant's lengthy proceedings, he has provided the courts with a moving target in order to suit his expediencies. For example, defendant originally asserted that he only confessed because he was promised that he would only be charged with aggravated battery if he did so. He also originally stated that he did not submit to the polygraph examination because he did not have an attorney, not because there was a fabricated confession. The shifting narrative continues here. In his proposed successive petition, defendant alleged that Bartik "falsely claimed that [he] orally confessed." Defendant's argument was presented in such a way as to suggest that he never confessed to Bartik, but that Bartik fabricated *the fact* that he confessed. That allegation was in line with all of the cases defendant relied upon in his motion: that Bartik

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falsely claimed the defendant confessed to him, but the defendant actually never did. However, at other times, such as in his petition for rehearing, defendant suggests that Bartik created a false *narrative* and made him repeat it. That allegation is not in line with any of the cases defendant relies upon to support his claim that he has cause to proceed on a successive petition. Neither Lanza nor McGee claimed that Bartik forced them to accept and repeat some narrative that he created. The allegations in those cases were that "Bartik falsely claimed that [the plaintiff] orally confessed to him," when the plaintiff did not confess at all. Defendant also offers a third option, that Bartik "interfer[ed] with his ability to decide whether or not to incriminate himself." That is: that he did actually confess, that he incriminated himself, but only because of something done by Bartik. These positions are mutually exclusive. The lack of a clear claim alone would be enough to say that defendant has not set forth a colorable claim for relief, because his claim itself is indecipherable.

¶ 17 Defendant's first theory is that Bartik "falsely claimed that [defendant] orally confessed." That theory fails because Detective McVicker, who the trial court found to be credible, testified that Bartik called him into the room where he was questioning defendant and told him simply that defendant "had something he wanted to tell [the officers]." Then defendant concededly confessed to McVicker. Defendant also concedes and the evidence shows that he then spoke with Detectives Van Witzenburg and Arteaga and confessed to them as well. Defendant also acknowledges that he subsequently gave a written inculpatory statement that was transcribed by Assistant State's Attorney Key. Thus, if Bartik fabricated the fact that defendant confessed, that fabrication was of no consequence because defendant went on to confess many more times with his own narrative.

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¶ 18 Defendant's second theory is that Bartik "fabricated a false confession" narrative and forced him to accept and repeat it. That theory fails first of all because there would not have even been cause under the cause and prejudice test. That theory is unsupported by the new evidence on which defendant's claims are based. Moreover, it has been defendant's contention throughout the proceedings not that he was forced to repeat a narrative created by Bartik, but that he was tricked into confessing to his own narrative. Defendant stated originally that he gave an inculpatory statement because he was told he would only be charged with aggravated battery if he did so. Importantly, defendant testified that he gave that inculpatory statement prior to meeting with Bartik. Thus, according to defendant's own testimony, it would have been impossible for Bartik to have created the narrative. Thus, the evidence related to Bartik's alleged misconduct in other cases would have been of no consequence and there is no prejudice.

¶ 19 Defendant's third theory is that he did actually incriminate himself, but only because Bartik "interfere[ed] with his ability to decide" whether to do so. That theory fails because it is unsupported by any facts. Moreover, both the trial court and this Court have already found that defendant's statement to Assistant State's Attorney Key was voluntary. None of the allegations concerning Bartik change that calculus or call that result into question. Regardless of the theory asserted, defendant fails to make the required factual connection between the allegedly improper conduct of Bartik and the confession that was admitted at trial and, thus, he fails to make out any colorable claim that the statement admitted at trial was involuntary or that it constituted a violation of his due process rights.

¶ 20 The general test of voluntariness is whether the defendant made a statement freely and without compulsion or inducement of any sort or whether his or her will was overcome at the time

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of the confession. *People v. Gilliam*, 172 Ill.2d 484, 500 (1996). In determining whether a confession is voluntary, we examine the totality of the circumstances, including the defendant's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning, the legality and duration of the detention, the duration of the questioning, and any physical or mental abuse by police, including threats or promises; no single factor is dispositive. *Id.*

¶ 21 An examination of the record reveals that defendant was given his *Miranda* warnings at least six times, once when he was initially arrested and again before each interview where an incriminating statement was made. Defendant was the one who indicated that he wanted to make a written statement. Defendant told Assistant State's Attorney Key that he had been "treated fine" by the officers. As defendant and Key prepared the statement, defendant reviewed it and made corrections to it and eventually signed it and initialed each page. The written statement and the unrebutted testimony of Assistant State's Attorney Key provide strong evidence that the statement was made voluntarily. The evidence also shows that Defendant had extensive experience with the criminal justice system, having been held in custody overnight on 65 prior occasions.

¶ 22 Moreover, contrary to defendant's argument that his confession was the only evidence of intent, there was plenty of other evidence from which a jury could have concluded that defendant intended to kill Bell. For example, Dana Hunt, defendant's girlfriend, testified that defendant's friend, Daryl Bunch, made multiple statements throughout the day encouraging defendant to shoot Bell, including that defendant "should pop him" before giving defendant a gun. Hunt further testified that, directly after those statements were made by Bunch, defendant stated that if Bell started any trouble, he would put Bell "to sleep" and that he would "pop" Bell if Bell continued to

harass him. Additionally, the evidence showed that defendant shot Bell three times, cutting against his argument that the shooting was a result of a struggle over the gun. When the police arrived, despite having shot Bell three times, the police found defendant still straddling Bell and strangling him which would be an unusual act if defendant did not want to kill Bell. There was also evidence that defendant gave the weapon to a friend to hide, another factor cutting against inadvertence or self-defense, and evidencing a consciousness of guilt. In short, as we observed on direct appeal, even without the confession, the record is replete with statements and other evidence that defendant intended to kill Bell.

¶ 23 Defendant has offered three mutually exclusive justifications for why he confessed. In postconviction proceedings, the petitioner bears the burden of establishing a substantial deprivation of his constitutional rights. *People v. Coleman*, 206 Ill.2d 261, 277 (2002). Leave to file a successive postconviction petition should be granted when the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. *Edwards*, 2012 IL 111711, at ¶ 24-25, 31-33. Defendant has not done so here. Defendant's claims in these successive postconviction proceedings are indecipherable or perhaps they are *post-hoc* explanations attempting to take advantage of Bartik's alleged conduct in other cases. Either way, defendant has failed to meet his burden and the trial court did not err by denying defendant's motion for leave to file a successive petition.

¶ 24 CONCLUSION

¶ 25 Accordingly, we affirm the judgment of the Circuit Court of Cook County.

¶ 26 Affirmed.