2015 IL App (2d) 130022-U
No. 2-13-0022
Order filed February 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 92-CF-871
ANDREW A. WALDROP,	)	Honorable T. Clinton Hull,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* Given the trial court's ruling on an earlier postconviction petition that was directed against the same judgment, defendant's present petition was successive rather than original (or amended), and thus, given defendant's failure to provide a basis for leave to file it, we modified the court's summary dismissal to an order denying leave.

¶ 2 Defendant, Andrew A. Waldrop, appeals the summary dismissal of a pleading that the trial court construed as an original petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends that, because the pleading was actually a proposed amendment to a postconviction petition that he had filed in

2000, the trial court erred by dismissing it summarily more than 90 days after he filed the 2000 petition (see 725 ILCS 5/122-2.1(a)(2) (West 2012)). Defendant requests that we reverse the judgment and remand the cause for second-stage proceedings under the Act. We affirm the judgment as modified.

¶ 3 On May 22, 1992, defendant was charged with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a) (West 1992)) (case No. 92-CF-871) (1992 case). On August 20, 1992, he pleaded guilty and was sentenced to 48 months' probation. On September 6, 1994, he was charged with first-degree murder (720 ILCS 5/9-1(a)(1) (West 1994)) (case No. 94-CF-1492) (1994 case), and the State petitioned to revoke his probation, based on the new charges.

¶ 4 The 1994 case went to a jury trial. On August 16, 1996, the trial court sentenced defendant to 18 months' imprisonment for three acts of direct contempt. On September 12, 1997, the jury found defendant guilty of first-degree murder. On November 12, 1997, the court sentenced defendant to 60 years' imprisonment; revoked his probation in the 1992 case and resentenced him to 15 years' imprisonment; and made all the sentences (including those for contempt) consecutive.

¶ 5 Defendant filed a direct appeal, *pro se*, in the 1994 case. This court affirmed. *People v. Waldrop*, No. 2-97-1119 (1999) (unpublished order under Supreme Court Rule 23). Defendant appealed separately in the 1992 case, raising only a sentencing-credit issue. This court affirmed. *People v. Waldrop*, No. 2-97-1118 (1999) (unpublished order under Supreme Court Rule 23).

¶ 6 On November 16, 2000, defendant filed a *pro se* petition under the Act. The petition's caption referenced both cases. It noted that, on November 12, 1997, defendant had been sentenced to a total of 76½ years in prison on his convictions (including contempt). The petition's claim of constitutional error consisted of one paragraph, which read:

> "Petitioner asserts that his Constitutional Rights were violated in the following manner: *That in both the Illinois Constitution and U.S. Constitution to Due Process* [*sic*] *were violated, more particularly where Trial Counsel was ineffective in violation of his 6th Amendment Rights, and Due Process violation where Trial Counsel failed to investigate, prepare or present the interest of defendants* [*sic*] *plea, Abuse of Judicial Authority by Trial Court (Judge) who displayed bias, callous and* [*sic*] *a total disregard for fairness to defendant, and Prosecutorial Misconduct who* [*sic*] *willfully engaged in malicious conduct all of which attributed [sic] to the violation of Defendant's Constitutional Rights to a fair and impartial trial particularly, set forth in the Memorandum and Affidavit.*" (Emphasis in original).

We note that the petition did not attach the "[m]emorandum and [a]ffidavit."

¶ 7 On February 14, 2001, the trial court having taken no action on the 2000 petition, defendant filed by mail another *pro se* petition. (The petition was file-stamped on February 21, 2001.) This petition's caption referenced only the 1994 case. It alleged that, "contrary to federal law," the appellate court denied defendant relief; that the State knowingly presented perjured testimony at trial; that the trial court erred in limiting defendant's impeaching evidence; and that the statute under which a State witness had received immunity was unconstitutional. Finally, the petition requested that the trial court "reverse both his sentences" because they were imposed in violation of due process; specifically, defendant asserted in part that his 15-year sentence for aggravated discharge of a firearm was improper, because the trial court had expressed "uncertainty" about its legality and because the appellate court had "reversed" a 15-year sentence imposed on a similarly situated defendant.

¶ 8 On July 12, 2001, defendant filed by mail a *pro se* "amended petition" under the Act. (The petition was file-stamped on July 3, 2001.) The caption referenced the 1994 case but not the 1992 case. It alleged that the murder conviction violated due process, because the accountability theory on which it was based had not been raised sufficiently in the indictment; that appellate counsel had been ineffective for failing to raise the foregoing argument; and that trial counsel had been ineffective at both the trial and sentencing. In the latter respect, the petition alleged, trial counsel had failed to investigate or introduce mitigating evidence relating to defendant's personal background. It also alleged that the trial court had abused its discretion in sentencing defendant to "a 76½[-]year" prison term.

¶ 9 The trial court appointed counsel for defendant. On December 19, 2002, counsel filed an "amended petition" under the Act. The caption referenced the 1994 case but not the 1992 case. It raised the following claims: (1) defendant was convicted of murder based on an uncharged theory of accountability; (2) his trial attorney was ineffective for failing to investigate certain defenses; neglecting mitigating evidence, relating to defendant's life and "family background," at sentencing; failing to investigate and call an eyewitness to the alleged murder; and failing to request that the trial court instruct the jury on venue as an element of the offense; (3) appellate counsel was ineffective for failing to raise either of the foregoing issues; and (4) the trial court abused its discretion in giving defendant "a 76½ year prison sentence." Counsel filed an affidavit stating in part that he had been appointed in "the case of [People v. Waldrop], 94CF1492 [*sic*] for purposes of preparing a post-conviction petition."

¶ 10 The State moved to dismiss the December 19, 2002, petition. On January 17, 2003, defendant, through appointed counsel, moved for leave to file a "second amended petition," which was substantively similar to the December 19, 2002, petition. On February 13, 2003,

defendant, through appointed counsel, moved for leave to file a "third amended petition," which was substantively similar to the December 19, 2002, petition. The captions of both motions and both proposed petitions referenced the 1994 case but not the 1992 case. The trial court allowed defendant to file the third amended petition. On April 17, 2003, after a hearing, the court granted the State's motion and dismissed the third amended petition. On appeal, this court reversed and remanded, because defendant's counsel had unreasonably failed to obtain an affidavit from the alleged eyewitness. *People v. Waldrop*, 353 Ill. App. 3d 244 (2004).

¶ 11 On August 16, 2006, on remand, defendant filed a "fourth amended petition." Again, the caption referenced only the 1994 case. The petition raised claims substantially similar to those in the third amended petition. Its argument on sentencing was headed, "Petitioner maintains that the trial [*sic*] abused it's [*sic*] discretion in sentencing him to a 60[-]year prison sentence." However, the body of the argument stated, in part, "Petitioner's *aggregate sentence* heeds evidence in aggravation but fails to adequately consider matters in mitigation. *** [Th]e court abused its discretion in sentencing [defendant] to a term of *76½ years* in prison." (Emphases added.) Also, the claim that trial counsel had been ineffective contended in part that counsel had neglected to introduce mitigating evidence at sentencing. Moreover, the prayer for relief requested "[t]hat sentence [*sic*] be vacated."

¶ 12 The trial court granted the State's motion to dismiss the fourth amended petition. On appeal, this court affirmed. *People v. Waldrop*, No. 2-07-0110 (2009) (unpublished order under Supreme Court Rule 23).

¶ 13 On May 17, 2012, defendant moved for leave to file a successive petition under the Act, the caption referencing only the 1994 case. On August 1, 2012, the trial court "dismissed" the

proposed successive petition, apparently treating it as filed. This court affirmed. *People v. Waldrop*, 2013 IL App (2d) 120919-U (summary order).

¶ 14 Meanwhile, the trial court had yet to rule specifically on the *pro se* petition that defendant had filed on November 16, 2000, referencing both cases and containing one paragraph of general allegations of ineffective assistance of counsel and trial court error. On October 9, 2012, after the trial court had dismissed his fourth amended petition in the 1994 case, defendant filed a *pro se* petition under the Act. The caption referenced only the 1992 case. It raised the following claims: (1) appellate counsel was ineffective for failing to address "the issues of [defendant's] sentence, or the delay of a hearing within the time frame of a probation violation [*sic*]; (2) appellate counsel was ineffective for failing to raise any issues other than one that had already been raised in the appeal in the 1994 case; (3) defendant's 15-year sentence was excessive and was erroneously imposed as punishment for his probation violations.

¶ 15 On January 3, 2013, the trial court disposed of the petition by a written order. The order noted that the file for case No. 92-CF-871 contained "no further proceedings" after the November 16, 2000, petition, until the petition of October 9, 2012. On the merits, the order stated, in pertinent part, that the new petition failed to attach any verified affidavits (or any affidavits at all) and thus, under *People v. Carr*, 407 Ill. App. 3d 513, 515-16 (2011), was fatally deficient and must be summarily dismissed. See 725 ILCS 5/122-1(b) (West 2012) (affidavit requirement). Furthermore, the lack of any affidavits in support of the claims of error also violated the Act (see 725 ILCS 5/122-2 (West 2012)) and required summary dismissal. Finally, the claims raised in the petition were forfeited, as they could have been raised on direct appeal. The trial court dismissed the *pro se* petition as frivolous.

¶ 16 On appeal, defendant's counsel moved for leave to withdraw (see *Pennsylvania v. Finley*, 481 U.S. 551 (1987)), arguing that the pleading was a successive postconviction petition and that defendant had neither claimed nor proven that he had shown cause for his failure to raise his claims in an earlier petition and prejudice from the alleged constitutional violations (see 725 ILCS 5/122-1(f) (West 2012)). This court denied the motion for leave to withdraw, directing counsel to file a brief addressing "whether the summary dismissal of defendant's October 9, 2012, petition was improper because the trial court did not timely rule on [defendant's] November 6, 2000, petition as to this case and thus whether this was an amended petition ripe for second-stage review." *People v. Waldrop*, No. 2-13-0022 (June 2, 2014) (minute order). We also allowed counsel to address any other nonfrivolous issues. Counsel has filed a brief limited to the issue that we specified in our minute order.

¶ 17 Defendant now contends that the dismissal must be reversed and the cause must be remanded for second-stage proceedings. Defendant asserts that the trial court erred in treating his pleading as a new petition under the Act. Rather, he argues, the pleading, which was concerned only with the 1992 case, must be construed liberally as an amendment to the petition that defendant filed in 2000 and upon which the trial court never acted. Defendant reasons that the 2000 petition, as recently amended, is still pending insofar as it concerns the 1992 case; therefore, under section 122-2.1(a) of the Act (725 ILCS 5/122-2.1(a) (West 2012)), the trial court could not summarily dismiss it more than 90 days after defendant filed the original petition. Because October 9, 2012, is well in excess of 90 days after November 16, 2000, defendant concludes that the summary dismissal cannot stand.

¶ 18 Because this appeal is from the summary dismissal of a petition under the Act, our review is *de novo*. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). We review the trial court's judgment,

not its reasoning. See *People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003). For the following reasons, in the exercise of our power to enter any judgment that the trial court should have entered (see Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994)), we vacate the trial court's judgment; hold that defendant's pleading is not an amendment to the 2000 petition but a proposed successive petition under the Act; and deny defendant leave to file the proposed successive petition.

¶ 19 The premise of defendant's argument is that his 2012 pleading is a proposed amendment to his still-pending 2000 petition, which challenged both the 1992 and 1994 judgments. He reasons that, because all his later petitions under the Act were directed against the 1994 judgment only, the 2012 pleading must be construed liberally as an amendment to the sole petition he had filed against the 1992 judgment. The State counters that the 2000 petition was directed solely against the 1994 judgment, so that the 2012 pleading was actually defendant's first petition directed against the 1992 judgment. Therefore, according to the State, the trial court acted within its authority in dismissing the petition summarily.

¶ 20 We do not agree with either party. Defendant is correct that the 2000 petition applied to the 1992 judgment as well as to the 1994 judgment. Defendant, however, is not correct that the 2000 petition was his sole petition directed against the 1992 judgment. Rather, despite their captioning, other petitions that he filed were also directed, in part, against the 1992 judgment. Moreover, by filing these new petitions and failing for more than a decade (if ever) to request a ruling on the claims in the 2000 petition that challenged the 1992 judgment, defendant abandoned those claims. The result: the original petition is no longer pending, and the 2012 pleading was an unauthorized successive petition in the 1992 case.

¶ 21 We begin our explanation by analyzing and characterizing the various petitions that defendant has filed, insofar as they are pertinent here. We agree with the parties that the

character of these petitions depends not on their labels but on their substantive content. See *Sarkissian v. Chicago Board of Education,* 201 Ill. 2d 95, 102 (2002).

¶ 22 We start with the 2000 petition. The caption referred to both the 1992 and 1994 judgments. The one-paragraph allegation of error, quoted earlier, was less than specific: it did not distinguish between the two judgments and did not allocate any claims between the two cases. Rather, this paragraph alleged in the most general sense that defendant's due process rights were violated; that his trial attorney was ineffective; that the trial judge was biased against him; and that defendant was denied his right to "a fair and impartial trial." Although the last reference suggests that defendant's allegations related solely to his trial, which would limit the petition to the 1994 case, this suggestion loses plausibility in the full context of the paragraph. Moreover, we cannot say that the *pro se* defendant necessarily meant to restrict his allegations of error to the criminal trial on the 1994 charges; as easily, we could assume, reading his pleading liberally in light of its caption and general allegations, that "trial" included as well the trial-court proceedings on the petition to revoke his probation in the 1992 case.

¶ 23 Moreover, that the revocation petition in the 1992 case was based on the charges in the 1994 case shows a further difficulty with construing the 2000 petition as limited to the 1994 case. That narrow construction is inherently implausible, because, as soon as the State sought to revoke defendant's probation, on the basis of the 1994 charges (and defendant's ultimate conviction of one or more charges in that case), the 1992 case became inextricably connected to the 1994 case: the result in the 1994 case would determine defendant's fate (sentence-wise) in the 1992 case. Thus, even if the claims of error in the petition could be construed narrowly as limited to the fairness of defendant's trial in the 1994 case, those claims would still amount to a challenge to the sentence that defendant ultimately received in the 1992 case after the trial court

revoked his probation. In sum, not only does the text of the 2000 petition strongly imply that it was directed against the judgments in both cases, but the *context* of the petition makes that conclusion inescapable.

¶ 24 We agree with defendant, therefore, that the 2000 petition was directed against the judgments in both underlying criminal cases. Nonetheless, we do not agree with defendant that, as of October 6, 2012, the 2000 petition was the sole one that defendant had filed against the 1992 judgment. Defendant's prior petitions were also directed against the 1992 judgment. Whatever their captioning, their substantive contents were, in part, explicit claims against the legitimacy of the judgment in the 1992 case.[1]

¶ 25 The allegations of error in defendant's February 2001 petition primarily challenged the 1994 judgment. However, the petition also sought the reversal of "both his sentences" and argued specifically that the 15-year prison sentence in the 1992 judgment was improper. The July 2001 petition claimed various errors in the proceedings in the 1994 case, but it also asserted that (1) defendant's trial attorney had neglected mitigating evidence that he could have introduced at sentencing; and (2) the trial court had abused its discretion in sentencing defendant to "a 76½ year" prison term. These allegations plainly cover defendant's resentencing in the 1992 case as well as his sentence in the 1994 case. Further, the amended petitions that defendant

[1] Moreover, as challenges to the legitimacy of the 1994 judgment, they were also implicit attacks on one aspect of the ultimate judgment in the 1992 case, *i.e.*, the trial court's grant of the probation-revocation petition and its resentencing of defendant to 15 years' imprisonment for aggravated discharge of a firearm. However, even disregarding the *implicit* attacks on the judgment in the 1992 case, the *explicit* attacks that these petitions made demonstrate that the petitions were directed against that judgment and not solely the judgment in the 1994 case.

filed through counsel in 2002, 2003, and 2006 all asserted that defendant's trial attorney had failed to investigate or present mitigating evidence at defendant's sentencing. These allegations were neither explicitly nor implicitly limited to defendant's sentence for murder in the 1994 case; they referenced aspects of defendant's personal life and "family background" that would undoubtedly be germane to the severity of his sentence in either case. Moreover, as noted, the 2006 petition, the one ultimately the subject of a final judgment that was not disturbed on appeal, challenged defendant's aggregate 76½-year sentence, on grounds not limited to one underlying criminal case.

¶ 26 We conclude, therefore, that, after November 16, 2000, but before October 6, 2012, defendant filed several amended or successive postconviction petitions directed against the judgment in the 1992 case. Moreover, the trial court ruled on all of these petitions, denying defendant the relief that he had requested against his 15-year sentence for aggravated discharge of a firearm. When defendant filed his latest petition in 2012, it was not his first under the Act. It was a successive petition, and defendant had neither requested nor received leave to file it.

¶ 27 Defendant, however, maintains that the 2012 pleading, which he labeled as a petition for relief under the Act, and which postdated several other petitions that he had filed in the same case, should be construed as an amendment to the petition that he had filed 12 years earlier and never requested a hearing on. We cannot agree. Nowhere in the 2012 pleading did defendant request that the trial court treat the document as an amendment to his 2000 petition.

¶ 28 More important, nowhere in the 2012 pleading did defendant even *mention* the 2000 petition. The pleading consisted of 20 paragraphs. The first five paragraphs summarized the trial-court proceedings in both cases. The sixth paragraph stated that, on defendant's direct appeal, this court affirmed. The seventh paragraph alleged that defendant's constitutional rights

had been violated "in the following manner." The remaining paragraphs set out specific claims of constitutional violations, including ineffective assistance of trial counsel, ineffective assistance of counsel on direct appeal, and trial-court prejudice. Nothing in the pleading refers to the 2000 petition or any proceedings on it, or to the trial court's failure to rule on those parts of the 2000 petition that touched on the judgment in the 1992 case.

¶ 29 We acknowledge defendant's status as a *pro se* litigant (albeit one who had acquired considerable experience in filing *pro se* petitions, as well as substantial guidance from the several amended petitions that experienced counsel filed on his behalf). Nonetheless, we would engage in a gratuitous fiction by characterizing the 2012 pleading as an amendment to a petition that defendant filed 12 years earlier and to which he omitted the slightest reference.

¶ 30 Moreover, to allow defendant to file the 2012 pleading as a mere "amendment" to his original pleading would enable him to do an end run around section 122-1(f)'s requirement that a successive petition receive the trial court's approval before it is considered filed. Under section 122-1(f), "[o]nly one petition may be filed by a petitioner under this Article without leave of court." 725 ILCS 5/122-1(f) (West 2012). By the time that defendant filed his 2012 pleading, he had not only filed more than one petition against the judgment that sentenced him to 15 years' imprisonment for aggravated discharge of a firearm; he had received a final judgment on the 2006 "fourth amended petition," which had originated in the February 2001 petition. Characterizing defendant's latest petition directed against the judgment in the 1992 case as an amendment to his first petition would ignore what happened in between and would treat section 122-1(f) as a nullity. We decline to do so.

¶ 31 For the foregoing reasons, the judgment of the circuit court of Kane County is modified from a summary dismissal of the 2012 pleading, which the trial court improperly treated as an

original petition, to an order denying defendant leave of court to file his proposed successive petition under the Act.[2]

¶ 32 Affirmed as modified.

[2] We recognize that defendant was not required to file a *motion* for leave. See *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010). However, defendant was required to "submit enough in the way of documentation" to allow the trial court to determine whether to grant leave. *Id.* at 161. Defendant did not do so. As defendant's counsel pointed out in his *Finley* motion, defendant failed to allege cause and prejudice in his 2012 petition. It is on this basis that leave to file a successive petition must be denied.