2015 IL App (3d) 130912-U

Order filed August 4, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0912 Circuit No. 06-CF-545
WILLIE F. JOHNSON,	)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: State's objection to defendant's motion to file a successive postconviction petition did not constitute reversible error where record did not indicate that the trial court relied upon the objection in reaching its disposition

¶ 2 Defendant, Willie F. Johnson, filed a motion for leave to file a successive postconviction petition. The State filed an objection to defendant's motion. The trial court found that defendant had not met his burden to file a postconviction petition and denied his motion. Defendant

appeals, arguing that the trial court erred in relying on the State's objection to his motion for leave. We affirm.

¶ 3 FACTS

¶ 4 In 2006, a jury found defendant guilty of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2006)). The trial court sentenced defendant to consecutive terms of 15 years' imprisonment. On direct appeal, this court affirmed defendant's convictions. *People v. Johnson,* No. 3-06-0904 (2008) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2009, defendant filed a *pro se* petition for postconviction relief, which was subsequently dismissed as nonmeritorious. Defendant appealed, but later dismissed the appeal voluntarily.

¶ 6 In 2011, defendant filed a petition for relief from judgment pursuant to section 2-1401(c) of the Code of Civil Procedure. See 735 ILCS 5/2-1401(c) (West 2010)). The State's motion to dismiss defendant's section 2-1401 motion was granted. Defendant did not appeal that dismissal.

¶ 7 On September 13, 2013, defendant filed the instant motion for leave to file a successive postconviction petition. In his motion, defendant argued, *inter alia*, that he had newly discovered evidence of actual innocence. Specifically, defendant alleged that Jaz S.—the victim in the case—and her sister Jas. S. had made affidavits that would prove his innocence. The only affidavit attached to defendant's motion was his own.

¶ 8 The State subsequently filed an "Objection to Motion for Leave to File a Successive Post-Conviction Petition." The State objected to defendant's motion on a number of grounds, including that no affidavits other than defendant's had been attached. When the matter came before the trial court, the court observed: "There is no affidavit attached as to actual innocence.

The defendant has not sustained his burden." The court concluded the proceedings by declaring: "I am going to grant the State's motion to dismiss. The defendant is not given leave to file successive post-conviction petitions in this matter." In a written order, the court again stated that "defendant has not met his burden to file such a successive post-conviction [petition.] Therefore defendant's motion is denied."

¶ 9 ANALYSIS

¶ 10 On appeal, defendant argues that the trial court erred in relying upon the State's objection in ruling on his motion for leave to file a successive postconviction petition. Defendant maintains that the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) bars any participation from the State prior to second-stage proceedings, and that a trial court's reliance upon any such participation constitutes reversible error. Because the State's participation at the leave-to-file stage is not barred by the Act, we affirm.

¶ 11 The Act contemplates the filing of only one postconviction petition. *People v. Edwards*, 2012 IL 111711, ¶ 22. Before a defendant may file a successive postconviction petition, he must seek and obtain leave of the court to do so. *Id*. ¶ 24. "Defendant not only has the burden to obtain leave of court, but also 'must submit enough in the way of documentation to allow a circuit court to make that determination.' "[1] *Id*. (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161

[1] In order to receive leave to file a successive postconviction petition, a defendant must demonstrate (1) cause and prejudice for his failure to raise the claim earlier, or (2) actual innocence. Defendant concedes that the merits of his petition are not relevant to this appeal. Accordingly, we need not consider whether defendant satisfied his burden in invoking the "actual innocence" exception to the bar on successive petitions.

(2010)). We review the denial of leave to file a successive postconviction petition *de novo*. *People v. Love*, 2013 IL App (2d) 120600, ¶ 27.

¶ 12 The Act provides for postconviction proceedings in three distinct stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, a defendant files a *pro se* petition, and the trial court determines whether the claims of deprivation of constitutional rights found in that petition are frivolous or patently without merit. *Id*. If the trial court finds that a defendant's petition states the gist of a constitutional claim, the petition is docketed, counsel is appointed for the defendant, and the matter proceeds to the second stage. *People v. Edwards*, 197 Ill. 2d 239, 271 (2001). It is well-settled that the State's participation, via motion or objection, is premature and improper under the Act. See *Gaultney*, 174 Ill. 2d at 419.

¶ 13 Our supreme court has acknowledged that the State's participation in postconviction proceedings prior to the second stage may be harmless error:

> "The mere early filing of a motion or responsive pleading by the State, however, does not *per se* contaminate the circuit court's determination ***. [Citation.] The premature filing of a motion to dismiss does not prevent the circuit court from independently evaluating whether a post-conviction petition is frivolous or patently without merit, as required by the Act. Rather, reversal is required where the record shows that the circuit court sought or relied on input from the State when determining whether the petition is frivolous." *Gaultney*, 174 Ill. 2d at 419.

Where the record gives no indication that the trial court relied on the State's pleading, reviewing courts will presume that the trial court acted properly. *Id*. at 420.

¶ 14 The Act, however, does not explicitly bar the State's participation prior to the first stage. That is, the Act does not specifically prevent the State from filing an objection to or a motion to dismiss a defendant's motion for leave to file a successive petition. See 725 ILCS 5/122-1 *et seq*. (West 2012). Indeed, as defendant acknowledges, courts have repeatedly held that the bar on State participation at the first stage of postconviction proceedings does not extend to the stage at which a defendant seeks leave to file a successive petition. See, *e.g.*, *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009); *People v. Collier*, 387 Ill. App. 3d 630, 640 (2008); *People v. Smith*, 383 Ill. App. 3d 1078, 1089-90 (2008).

¶ 15 Defendant insists that the above-cited cases were decided erroneously, and that the plain language of the Act bars the State's participation at *any time* prior to the second stage, including the leave-to-file stage. We disagree. In *Welch*, we held that the State's participation at the leave-to-file stage was not barred by the Act, noting that "we have not found, any authority prohibiting input from the State at this stage of postconviction proceedings." *Welch*, 392 Ill. App. 3d at 955. Defendant in the instant case has not offered, and we have not found, any opinion issued in the six years since we decided *Welch* that would change our ruling. Though defendant points out that a still-pending proposed amendment to the Act would explicitly bar pleading from the State at this stage (98th Ill. Gen. Assem., House Bill 2961, 2013 Sess.), this proposed legislation actually serves to illustrate that the *current* state of the law does not support defendant's interpretation.

¶ 16 Even if we were to accept defendant's argument that State was barred from filing an objection to defendant's motion for leave to file a successive petition, the record does not indicate that the trial court relied upon that objection in reaching its decision. We may thus presume that the trial court acted properly. See *Gaultney*, 174 Ill. 2d at 419. Accordingly, any

error that may have been committed by the State's filing of an objection to defendant's motion was harmless.

¶ 17 Defendant repeatedly stresses that the trial court stated it was "grant[ing] the State's motion to dismiss," and insists that this is evidence of the court's reliance upon the State's participation. We disagree. The trial court's mistaken reference to a motion to dismiss—the State actually filed an objection—does not speak to the substance of the State's filing, nor does it imply that such a filing influenced the court's decision. Further, in its written order, the trial court did not reference the State at all, instead correctly stating that "defendant's motion is denied."

¶ 18 Defendant also points out that the trial court's grounds for denying leave—that defendant failed to attach any affidavits other than his own—was one of the points stressed in the State's objection. However, this does not imply that the court relied upon the State's objection. The trial court did not deny defendant's motion based upon some intricate point of law suggested by the State, but upon the glaring absence of two important affidavits. It cannot be assumed that the trial court would not have noticed the lack of affidavits but for the State pointing it out in its objection. In fact, the trial court is presumed to know the law and apply it properly. See *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41. Accordingly, we presume the court knew defendant had the burden to "submit enough in the way of documentation to allow a circuit court to make that [leave-to-file] determination" (*Tidwell*, 236 Ill. 2d at 161) without relying on the State's objection.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.