2015 IL App (4th) 130369-U

NO. 4-13-0369

FILED
January 7, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTHONY S. HARRIS,	)	No. 05CF1433
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted the office of the State Appellate Defender's motion to withdraw as counsel, concluding the trial court properly denied defendant leave to file a successive postconviction petition where the claims alleged in defendant's petition did not meet the cause-and-prejudice test or the "fundamental miscarriage of justice" exception to overcome the bar against successive postconviction proceedings.

¶ 2 In April 2013, defendant, Anthony S. Harris, filed a petition for leave to file a successive postconviction petition, which the trial court denied. In May 2013, defendant filed a notice of appeal, and the court appointed the office of the State Appellate Defender (OSAD) to represent defendant. On appeal, OSAD moves to withdraw its representation of defendant under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending the appeal is frivolous. We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In August 2005, the State charged defendant by information with one count of robbery (720 ILCS 5/18-1(a) (West 2004)) and one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2004)). In July 2007, prior to the start of trial, the State charged defendant by information with two additional counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2004)). Defendant's trial counsel waived a preliminary hearing on the additional counts. Defense counsel noted, because the defense was consent, the number of counts were irrelevant. We have previously set out the facts adduced at the jury trial as follows:

> "E.P. testified she was chaining her bicycle to a rack outside her college apartment on January 23, 2005, when defendant came up behind her, put his hands over her eyes, and placed what defendant told her was a gun against her back. Defendant asked her for money. However, E.P. told him she did not have any money with her. Defendant said she must have money in her apartment. She unlocked the door to her apartment, and they went into her bedroom. None of her roommates saw the two enter the apartment. E.P. showed defendant she did not have any money in her purse.
>
> Defendant told her to get on the bed. E.P. laid facedown on the bed, with her legs on the floor. Defendant unbuttoned her jeans and pulled them down around her thighs. He attempted to insert his penis into her vagina, but it did not go in. Defendant ordered her to perform oral sex on him. After approximately 30 seconds of oral sex, defendant again touched her vagina. E.P. testified she

pleaded with defendant that she was a virgin. Defendant then inserted his penis into her vagina.

E.P. testified she offered defendant her automatic teller machine (ATM) card and personal identification number (PIN) in hopes defendant would leave. She told defendant she had about $4,000 in her bank account. Defendant took the ATM card and left. Later that day, defendant withdrew $400 from E.P.'s bank account using her ATM card.

E.P's testimony was corroborated by Nurse Guthrie, who testified E.P. exhibited tissue trauma in her vaginal area.

Detective Duane Maxey testified defendant initially denied robbing, having sex with, or even knowing E.P. However, at trial, defendant claimed he engaged in consensual sex with E.P. The parties stipulated defendant's [deoxyribonucleic acid (DNA)] was found on E.P.'s jeans.

Defendant took the stand and testified. According to defendant's testimony, he knew E.P. and had spoken with her at campus bars. Defendant explained he had also previously been to her apartment. One night after the bars closed, he showed up at her apartment, and she let him in. They talked for a while in her bedroom, but nothing sexual took place.

On the day in question, defendant was driving around campus when he saw E.P. near her apartment. Defendant struck up a

conversation with her while she chained up her bike. They talked for 5 to 10 minutes, and then defendant asked if they could go inside because he was cold. E.P. hesitated because her roommates were home. Defendant explained she did not want anyone to know she was involved with someone of his race. E.P. is Caucasian, and defendant is African-American. They went inside, and she took defendant into her bedroom.

According to defendant's testimony, they laid in bed together and talked about a number of subjects, including interracial dating. Defendant testified he asked her if she had ever "done it" before, and she said no. Defendant explained they kissed and "fooled around" and then he asked E.P. if she wanted to have sex. Defendant suggested oral sex, and E.P. said she would try. However, defendant denied putting his fingers or penis in E.P.'s vagina.

Afterward, defendant told E.P. he needed rent money. E.P. said he could borrow some money and gave him her ATM card and PIN. Defendant testified he only withdrew the $400 he needed for rent. He explained he did not return E.P.'s card because he picked up his cousin and decided to go drinking instead." *People v. Harris*, No. 4-07-0821, slip order at 2-4 (July 12, 2010) (unpublished order under Supreme Court Rule 23).

¶ 5 In August 2007, the jury found defendant guilty on all four counts. In September 2007, the trial court sentenced defendant to a 15-year term for robbery and three 30-year terms

for aggravated criminal sexual assault, all to be served consecutively to each other for a total sentence of 105 years in prison.

¶ 6 Defendant appealed, asserting the trial court erred in (1) failing to question the jurors during *voir dire* in compliance with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) regarding the jurors' understanding of the four basic constitutional guarantees afforded criminal defendants at trial, and (2) allowing hearsay testimony at trial. This court rejected defendant's argument and affirmed the judgment. *Harris*, No. 4-07-0821 (February 3, 2009) (unpublished order under Supreme Court Rule 23).

¶ 7 In September 2009, our supreme court denied defendant's petition for leave to appeal but issued a supervisory order (*People v. Harris*, 233 Ill. 2d 576, 914 N.E.2d 489 (2009) (nonprecedential supervisory order on denial of petition for leave to appeal)) directing this court to vacate its order and to reconsider in light of *People v. Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401 (2009). In July 2010, this court concluded *Glasper* did not change the result and affirmed the judgment. *Harris*, No. 4-07-0821 (unpublished order under Supreme Court Rule 23). In January 2011, our supreme court denied defendant's petition for leave to appeal. *People v. Harris*, 239 Ill. 2d 566, 943 N.E.2d 1104 (2011).

¶ 8 In October 2011, defendant, through hired counsel, filed a postconviction petition, contending he was denied effective assistance of trial and appellate counsel. Defendant argued trial counsel failed to (1) object to or seek reconsideration of the trial court's 105-year sentence as being in excess of the statutorily authorized consecutive aggregate maximum, (2) object to or seek reconsideration of the trial court's 105-year sentence as violating the "proportionality clause," (3) challenge the constitutionality of the Illinois speedy-trial statute (725 ILCS 5/103-5 (West 2006)), and (4) object to or request the trial court to comply with Illinois Supreme Court

Rule 431(b) (eff. May 1, 2007) regarding the four *Zehr* principles. Defendant argued appellate counsel failed to raise issues (1) through (3) on direct appeal. Less than a week later, the trial court entered an order summarily dismissing defendant's postconviction petition because his claims were frivolous and patently without merit.

¶ 9 In November 2011, defendant appealed the denial of his initial postconviction petition. On appeal, he argued (1) a trial court may not *sua sponte* dismiss a postconviction petition written and filed by counsel as frivolous or patently without merit, and (2) the postconviction petition was not frivolous or patently without merit. This court rejected defendant's arguments and found (1) a trial court may summarily dismiss a postconviction petition even though it was written and filed by counsel; and (2) on the merits, the petition was frivolous and without merit. *People v. Harris*, 2012 IL App (4th) 111015-U, ¶¶ 27, 33. In November 2012, our supreme court denied defendant's petition for leave to appeal. *People v. Harris*, 981 N.E.2d 1000 (2012).

¶ 10 On April 8, 2013, defendant filed a *pro se* motion for leave to file a successive postconviction petition, alleging ineffective assistance of trial counsel for failing to have a preliminary hearing on the two additional counts charged on the day of trial. Defendant argued the cause for not raising this issue in his initial postconviction petition was hired postconviction counsel "did not see this issue" and "wasn't efficient." Moreover, defendant argued the issue did not arise until he completed a paralegal program, combed through the transcripts, and sought advice from other prison paralegals. Defendant argued he was prejudiced as there was no physical evidence to support the two additional counts and they made him "look bad to a jury."

¶ 11 On April 23, 2013, the trial court entered a written order denying defendant's request to file a successive postconviction petition. The trial court found, based on the initial

postconviction petition, this issue was known by the defendant when it was filed. It also found defendant failed to demonstrate prejudice as the appellate court had previously determined defendant's guilt was overwhelming. *Harris*, 2012 IL App (4th) 111015-U, ¶ 58.

¶ 12 On May 6, 2013, defendant filed a timely notice of appeal from the denial of his motion for leave to file a successive postconviction petition. On May 13, 2013, OSAD was appointed counsel on appeal.

¶ 13 In September 2014, OSAD filed a motion for leave to withdraw as counsel on appeal pursuant to *Finley*, 481 U.S. 551. The motion asserted OSAD had thoroughly reviewed the record and concluded any request for review would be without merit. The motion addressed defendant's arguments and set forth the case's procedural history. OSAD's proof of service indicates defendant was provided with a copy of the motion. On its own motion, on August 5, 2014, this court granted defendant until September 4, 2014, to file additional points and authorities. Defendant did not file a response.

¶ 14 II. ANALYSIS

¶ 15 A. Standard for Withdrawal of Counsel

¶ 16 In *Finley*, 481 U.S. at 557, the United States Supreme Court addressed the withdrawal of counsel in collateral postconviction proceedings and held the United States Constitution does not require the full protection of *Anders v. California*, 386 U.S. 738 (1967), with such motions. The Court noted the respondent did not present a due-process violation when her counsel withdrew because her state right to counsel had been satisfied. *Finley*, 481 U.S. at 558. Thus, state law dictates counsel's performance in a postconviction proceeding. The Supreme Court of Illinois has held, in a postconviction proceeding, the Post-Conviction Hearing Act (Postconviction Act) (see 725 ILCS 5/122-1 to 122-7 (West 2012)) entitles a defendant to rea-

sonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995).

¶ 17 In *People v. McKenney*, 255 Ill. App. 3d 644, 646, 627 N.E.2d 715, 717 (1994), the Second District granted appellate counsel's motion to withdraw as counsel on an appeal from a postconviction petition, finding counsel's representation was reasonable. There, the motion stated counsel had reviewed the record and found no issue that would merit relief. *McKenney*, 255 Ill. App. 3d at 646, 627 N.E.2d at 717. The motion also provided the procedural history of the case and the issues raised in the defendant's petition. *McKenney*, 255 Ill. App. 3d at 645, 627 N.E.2d at 716.

¶ 18 B. Leave To File a Successive Postconviction Petition

¶ 19 OSAD asserts defendant's motion for leave to file a successive postconviction petition cannot satisfy the cause-and-prejudice test of section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2012)). The denial of leave to file a successive postconviction petition is reviewed *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25, 966 N.E.2d 417.

¶ 20 The Postconviction Act (725 ILCS 5/122-1 to 122-7 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Relief under the Postconviction Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. The Postconviction Act generally limits a defendant to one postconviction petition and expressly states any claim cognizable under the Postconviction Act that is not raised in the original or amended petition is deemed forfeited. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909. However, there are two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829.

"The first basis for relaxing the bar is when a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier." *Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. Section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2012)) provides the following:

> "Leave of court may be granted 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. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

"[T]he cause-and-prejudice determination [is] made on the pleadings prior to the first stage of postconviction proceedings." *People v. Smith*, 2014 IL 115946, ¶ 33. A petitioner must submit enough in the way of documentation to allow a trial court to determine whether the cause-and-prejudice test has been met. *Smith*, 2014 IL 115946, ¶ 35. Thus, leave of court to file a successive postconviction petition will be denied "when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35.

¶ 21 "The second basis by which the bar to successive postconviction proceedings may be relaxed is what is known as the 'fundamental miscarriage of justice' exception." *Edwards*,

2012 IL 111711, ¶ 23, 969 N.E.2d 829. To demonstrate a "fundamental miscarriage of justice," the petitioner must show actual innocence. *Edwards*, 2012 IL 111711, ¶ 23, 969 N.E.2d 829.

¶ 22 C. Defendant's Successive Postconviction Petition

¶ 23 1. *Cause-and-Prejudice Test*

¶ 24 In his petition for leave to file a successive postconviction petition, defendant presents a claim of ineffective assistance of trial counsel for trial counsel's waiver of a preliminary hearing on the two additional counts filed the day of trial as there was "no sufficient evidence to support the two additional charges." As to cause for his failure to raise this issue in his initial postconviction petition, defendant asserts (1) postconviction counsel failed to raise the issue because he "did not see this issue" and "wasn't efficient"; and (2) the issue did not arise until after defendant completed his paralegal diploma, combed through the trial transcripts, and sought advice through the prison paralegals. Defendant argues he was prejudiced by trial counsel's failure to secure a preliminary hearing on the two counts filed on the day of trial because there was "no physical evidence to support them" and they made him "look bad to a jury."

¶ 25 a. Cause

¶ 26 Defendant asserts postconviction counsel failed to raise the claim of ineffective assistance of trial counsel for trial counsel's waiver of a preliminary hearing on the two additional counts because he "did not see this issue" and "wasn't efficient." Contrary to what defendant argues, postconviction counsel did notice trial counsel's decision to waive a preliminary hearing on the additional two counts. Postconviction counsel drafted the initial postconviction petition. Paragraph three of the petition noted, "[o]n the same day of trial, another information was filed charging 2 more counts of [a]ggravated [s]exual [a]ssault (Class X) arising from the same incident. The [defendant's] court appointed attorney waived preliminary hearing on those 2 counts."

Defendant's postconviction counsel also asserted a claim of ineffective assistance of trial counsel in the initial postconviction petition based on four alleged incidents of deficient performance. Therefore, the initial postconviction petition clearly indicates defendant's postconviction counsel (1) had knowledge of trial counsel's decision to waive preliminary hearing and (2) refrained from presenting the issue as an allegation of ineffective assistance of counsel.

¶ 27 Having found postconviction counsel clearly had knowledge of the facts and law necessary to present a claim of ineffective assistance of counsel for trial counsel's waiver of a preliminary hearing, we next address whether postconviction counsel "wasn't efficient" for failing to raise this issue and, if so, whether this can be considered cause under section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2012)).

¶ 28 Prior to reaching defendant's argument as to the degree of representation required of postconviction counsel in drafting an initial postconviction petition, we first question whether *any* deficiency in postconviction counsel's performance may be considered grounds for cause under the cause-and-prejudice test. Here, defendant's initial postconviction petition was prepared by an attorney whom defendant retained for that purpose. Thereafter, the petition was summarily dismissed as being frivolous and patently without merit. The cause never proceeded to second-stage proceedings under section 122-2.1 of the Postconviction Act (725 ILCS 5/122-2.1 (West 2012)).

¶ 29 In *People v. Kegel*, 392 Ill. App. 3d 538, 913 N.E.2d 30 (2009), on appeal from the trial court's summary dismissal of a initial postconviction petition filed by counsel, the defendant argued his postconviction counsel failed to provide a reasonable level of assistance. *Kegel*, 392 Ill. App. 3d at 539, 913 N.E.2d at 31. The court held the right to counsel never arose where the trial court summarily dismissed the defendant's initial postconviction petition, which

was drafted by retained counsel. *Kegel*, 392 Ill. App. 3d at 541, 913 N.E.2d at 32. Rather, the right to counsel arises only if the petition survived summary dismissal under section 122-2.1 of the Postconviction Act (725 ILCS 5/122-2.1 (West 2008)). *Kegel*, 392 Ill. App. 3d at 540, 913 N.E.2d at 32. The court reasoned, if the statutory right to counsel attached at the first stage of postconviction proceedings, it would result in disparate treatment of defendants depending on whether they could afford counsel. *Kegel*, 392 Ill. App. 3d at 541, 913 N.E.2d at 32. However, the court did note, "[w]e express no view on whether the quality of postconviction counsel's performance could establish cause" under the cause-and-prejudice test. *Kegel*, 392 Ill. App. 3d at 542, 913 N.E.2d at 33; see also *People v. Csaszar*, 2013 IL App (1st) 100467, ¶ 23, 2 N.E.3d 435 ("[W]e express no opinion as to whether postconviction counsel's alleged failings can establish cause for the failure of the initial postconviction petition to raise the issues [defendant] seeks to raise.").

¶ 30 Even if, *arguendo*, we were to find postconviction counsel's performance can be considered grounds for cause under the cause-and-prejudice test, defendant has (1) argued a standard of performance that our courts have never adopted, and (2) failed to demonstrate postconviction counsel's performance was unreasonable under the reasonable-assistance-of-counsel standard. First, defendant argues an "efficient" standard that has never been applied to postconviction counsel. See *People v. Anguiano*, 2013 IL App (1st) 113458, ¶ 19, 4 N.E.3d 483 (discussing the three standards our courts have previously applied to postconviction counsel's performance). We decline to impose such a standard.

¶ 31 Second, even if we apply the reasonable-level-of-assistance standard in determining whether postconviction counsel's performance in drafting an initial postconviction petition can be considered cause, defendant has failed to demonstrate postconviction counsel's perfor-

mance was unreasonable. Defendant asserts postconviction counsel's performance was "inefficient" in waiving a preliminary hearing on the two additional counts because the evidence presented was insufficient to support the two additional counts. At a preliminary hearing, the State must present enough evidence to demonstrate probable cause to believe the defendant has committed the offense with which he is charged. "[W]hether probable cause exists is governed by commonsense considerations, and the calculation concerns the probability of criminal activity, rather than proof beyond a reasonable doubt. [Citation.] 'Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false.' " *People v. Jackson*, 232 Ill. 2d 246, 275, 903 N.E.2d 388, 403 (2009) (quoting *People v. Wear*, 229 Ill. 2d 545, 564, 893 N.E.2d 631, 643 (2008)).

¶ 32 Here, defendant argues the evidence was insufficient because (1) "the rape kit exam" showed no signs of penetration, (2) redness of the vaginal area could have been caused from test swabbing, (3) the victim checked a "no" box on a form when asked whether there was penetration by a finger, and (4) "the Hyman [*sic*] was intact." However, physical evidence of a sexual assault is not required to prove commission of a sex crime. *People v. Stevens*, 188 Ill. App. 3d 865, 881, 544 N.E.2d 1208, 1219-20 (1989). E.P. testified defendant placed his penis in her mouth, placed his finger in her vagina, and placed his penis in her vagina. Physical evidence of defendant's DNA was found on the jeans E.P. wore on the day of the assault. After hearing all of the evidence, including the evidence defendant highlights above, and weighing the credibility and demeanor of the witnesses, the jury found defendant guilty beyond a reasonable doubt on all four counts. This court further confirmed on appeal, stating "the evidence of defendant's guilt was overwhelming." *Harris*, 2012 IL App (4th) 111015-U, ¶ 58. If postconviction counsel asserted defendant's argument, he would be claiming not only were the jury's and appellate court's

decisions in error, but the evidence was lacking to such a degree the probable-cause standard could not be met. Postconviction counsel's decision to refrain from making this assertion was wholly reasonable.

¶ 33 Defendant further argues the cause for failing to raise this issue during the initial postconviction petition was the issue did not arise until after defendant completed his paralegal diploma, combed through the trial transcripts, and sought advice through the prison paralegals. "Ignorance of the law or legal rights will not excuse a delay in filing a lawsuit." *People v. Lander*, 215 Ill. 2d 577, 588, 831 N.E.2d 596, 603 (2005). Here, ignorance of the law is precisely the "cause" defendant asserts to justify his failure to include the present claim in his initial postconviction petition. See, *e.g.*, *People v. Evans*, 2013 IL 113471, ¶ 12, 989 N.E.2d 1096. Defendant's subjective ignorance of the law is not an objective factor that impeded his ability to raise the issue in his initial postconviction petition.

¶ 34 Therefore, defendant has failed to demonstrate an objective factor that impeded his ability raise an ineffective-assistance-of-counsel claim based on trial counsel's waiver of a preliminary hearing on the two additional counts in his initial postconviction petition.

¶ 35 b. Prejudice

¶ 36 Although we have found defendant failed to satisfy the cause prong of the cause-and-prejudice test, we also find defendant failed to satisfy the prejudice prong. Defendant argues he was prejudiced by trial counsel's failure to secure a preliminary hearing on the two additional counts filed on the day of trial because "no physical evidence *** support[ed] them" and they made him "look bad to a jury." In essence, defendant argues the evidence as to the two additional counts would be insufficient to meet the probable-cause standard set out above, and having allowed these counts to proceed without sufficient evidence made him "look bad to a jury." As

discussed previously, the evidence presented and the findings of the jury and the appellate court are contrary to defendant's argument. Therefore, even if cause could have been shown, defendant has failed to demonstrate how trial counsel's waiver of a preliminary hearing on the two additional counts "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012).

¶ 37 2. *Fundamental Fairness*

¶ 38 In *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 621 (2002), our supreme court recognized the statutory bar of the cause-and-prejudice test may be relaxed when fundamental fairness so requires. "To demonstrate such a miscarriage of justice, a petitioner must show actual innocence ***." *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. In his petition, defendant did not make a claim of actual innocence.

¶ 39 Accordingly, we find the trial court properly denied defendant's petition for leave to file a successive postconviction petition.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 42 Affirmed.