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).

2015 IL App (4th) 130995-U

NO. 4-13-0995

FILED
August 18, 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.	)	Vermilion County
JOSHUA KRUGER,	)	No. 99CF357
Defendant-Appellant.	)	
	)	Honorable
	)	Michael D. Clary,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in denying defendant's motion for leave to file a successive postconviction petition.

¶ 2 In August 2013, defendant, Joshua Kruger, filed a *pro se* motion for leave to file a successive postconviction petition and attached a copy of the proposed successive postconviction petition. In October 2013, the trial court denied defendant's request for leave to file the successive postconviction petition.

¶ 3 On appeal, defendant argues the trial court erred in denying his motion for leave to file a successive postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Original Trial Court Proceedings

¶ 6 Because the parties are familiar with the facts of the underlying case, we will set

forth only those facts necessary to address the issues in this appeal. In August 1999, a grand jury indicted defendant with seven counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(3) (West 1998)) (counts I to VII) for the death of Peter Godels, two counts of home invasion (720 ILCS 5/12-11(a)(2) (West 1998)) (counts VIII and IX), two counts of residential burglary (720 ILCS 5/19-3(a) (West 1998)) (counts X and XI), and one count of attempt (robbery) (720 ILCS 5/8-4(a), 18-1(a) (West 1998)) (count XII).

¶ 7 Prior to the indictment, the police had obtained information indicating defendant was involved in Godels's death. On July 30, 1999, the police obtained a search warrant for defendant's vehicle, commanding the vehicle be searched and the following items be seized: "clothing belonging to [defendant], clothing bearing evidence of bloodstains, shoes, crowbar, ski mask, and gloves, any bludgeon, tire iron, or object capable of causing the blunt force trauma to the victim or other items which constitute evidence of the offense of [m]urder." During the search of defendant's vehicle, an Illinois State Police crime scene technician removed, *inter alia*, a chrome casing from the front passenger door. In October 1999, Julie Glasner, an Illinois State Police forensic scientist, tested blood from a stain on the chrome casing. Deoxyribonucleic acid (DNA) from the sample was amplified using polymerase chain reaction, and it matched Godels's DNA profile. In February 2000, defendant filed a motion to suppress evidence that resulted from a stop of his vehicle on July 30, 1999. Later, in July 2000, defendant filed a motion to suppress evidence seized as beyond the scope of the warrant issued on July 30, 1999, namely, fingerprints and blood samples. Defendant also argued the warrant did not approve the dismantling of the car. The trial court eventually barred the evidence regarding the DNA test that matched blood found on the chrome casing with Godels's DNA. The State appealed, and this court reversed the trial court's exclusion of the blood and DNA evidence. *People v. Kruger*, 327 Ill. App. 3d 839,

845, 764 N.E.2d 138, 142 (2002).

¶ 8 In February 2002, while the appeal was pending with this court regarding the trial court's exclusion of the evidence, a grand jury entered a second indictment, which reinstated the charges from the original indictment and added four enhanced first degree murder counts based on the following: (1) the victim was 60 years of age or older (count XIII); (2) brutal or heinous behavior (count XIV); (3) aggravating factor under section 9-1(b)(6) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(b)(6) (West 1998)) (murder committed during forcible felony) (count XV); and (4) aggravating factor under section 9-1(b)(16) of the Criminal Code (720 ILCS 5/9-1(b)(16) (West 1998)) (the victim was over 60 and the acts were brutal or heinous) (count XVI). All of the acts were alleged to have occurred between July 14 and 15, 1999.

¶ 9 On January 9, 2003, defense counsel filed a motion for scientific testing, seeking to have a defense expert test the items seized by the police and to obtain and test the blood or hair samples of defendant, Henry Graham, Barbara Johnson, and Jeffery Holmes. The next day, the trial court allowed the motion. On January 24, 2003, defense counsel moved to withdraw the motion for scientific testing. The court inquired whether counsel had discussed the withdrawal with defendant, and counsel indicated he had discussed it with defendant and another attorney. The court allowed defense counsel to withdraw the motion for scientific testing.

¶ 10 During defendant's June 2003 jury trial, the State submitted two theories of first degree murder. "Type A" theorized defendant personally or by accountability performed the acts that caused the death, and he intended to kill or do great bodily harm, knew his acts would cause death, or knew his acts created a strong probability of death (counts I to IV). "Type B" theorized felony murder during the commission or attempted commission of home invasion (count V),

residential burglary (count VI), or robbery (count VII). The State presented numerous witnesses, including Glasner, who testified about the DNA from the blood found on the chrome casing being a match with Godels's DNA. Defendant was convicted on general jury forms, with no specification as to which counts, of (1) first degree murder "Type B" (aggravating factors age, brutal or heinous behavior, and felony murder), (2) home invasion, (3) residential burglary, and (4) attempt (robbery).

¶ 11 Defendant filed several posttrial motions, one of which challenged, *inter alia*, the admission of the blood and DNA evidence related to the chrome casing of defendant's automobile. In August 2003, the trial court held a joint hearing on defendant's posttrial motions and sentencing. The court denied all of the posttrial motions. As to sentencing, the State requested judgments on counts VI (first degree murder predicated on residential burglary), VIII (home invasion), and XII (attempt (robbery)). The court orally sentenced defendant to concurrent prison terms of natural life for "Type B" first degree murder (apparently on count VI—although unspecified by the court), 30 years for home invasion (count VIII), 15 years for residential burglary (count X), and 5 years for attempt (robbery) (count XII). However, in the August 2003 written judgment order, the court entered judgment of conviction on count IV ("Type A" murder). In September 2003, defendant filed a motion to reconsider his sentence, which the court denied. Defendant appealed.

¶ 12 B. Direct Appeal

¶ 13 On direct appeal, defendant raised eight issues, none of which addressed the State's DNA evidence. See *People v. Kruger*, 363 Ill. App. 3d 1113, 1119, 845 N.E.2d 96, 101 (2006). In March 2006, this court affirmed defendant's convictions but "remand[ed] with directions that the written judgment of sentence be corrected to show defendant was convicted of

and sentenced for count VI, first degree murder, in that he without lawful justification performed the acts that caused the death of Godels while attempting to commit a forcible felony, residential burglary, in violation of section 9-1(a)(3) of the Criminal Code *** (720 ILCS 5/9-1(a)(3) (West 1998))." *Kruger*, 363 Ill. App. 3d at 1124, 845 N.E.2d at 105.

¶ 14 C. First Postconviction Petition

¶ 15 In November 2006, defendant filed a 79-page *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2006)), raising 12 grounds for relief. Among them, defendant asserted (1) his trial counsel was ineffective for (a) failing to hire an expert to testify Godels's blood could have been transferred to defendant's car by someone else and (b) withdrawing defendant's motion for scientific testing to conduct more DNA tests and (2) his appellate counsel was ineffective for failing to challenge the search and seizure of his automobile.

¶ 16 In April 2007, the trial court docketed the petition for stage-two review because the petition had not been acted upon within 90 days as required by statute (725 ILCS 5/122-2.1(a)(2) (West 2006)). The court appointed defendant counsel, Derek Girton, but defendant later requested to proceed *pro se*. While Girton was counsel he filed an August 2008 motion for a court-appointed DNA expert, seeking to have the expert review all of the procedures followed and the conclusion reached by the State's DNA expert. The court denied the motion in November 2008. Girton also filed an amended postconviction petition on defendant's behalf, asserting, *inter alia*, trial counsel was ineffective for failing to hire a DNA expert to challenge the State's testimony regarding the victim's DNA sample in defendant's automobile. The petition alleged a defense expert could have challenged the State's testing procedures and small sample size. After the court allowed defendant to proceed *pro se* in September 2009, defendant filed (1)

a motion for a court-appointed blood-splatter expert and shoeprint expert and (2) an amended *pro se* postconviction petition, which, *inter alia*, repeated Girton's ineffective-assistance-of-counsel claim relating to the DNA expert.

¶ 17 In January 2010, the State filed a motion to dismiss defendant's amended postconviction petition. On April 8, 2010, the trial court dismissed the petition in a written order. On April 26, 2010, defendant filed a "motion to reconsider order," which the court denied.

¶ 18 On appeal from the second-stage dismissal of the postconviction petition, this court vacated defendant's conviction and sentence for residential burglary (count X) and again ordered the trial court to correct defendant's murder conviction to show conviction for first degree murder predicated on residential burglary (count VI). *People v. Kruger*, 2012 IL App (4th) 100866-U, ¶ 21. Additionally, we affirmed the dismissal of defendant's *pro se* postconviction petition in all other respects. *Kruger*, 2012 IL App (4th) 100866-U, ¶ 21.

¶ 19 D. Section 2-1401 Proceedings

¶ 20 In November 2006, defendant filed a *pro se* motion for forensic testing and for a DNA database search, which the trial court denied in October 2010. In October 2011, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), requesting vacatur of the October 2010 judgment that denied his request for a search of the DNA database. In the section 2-1401 petition, defendant asserted his DNA match was based on nine loci plus the sex marker, amelogenin. Defendant's affidavit attached to the petition indicated he learned that information from Glasner's October 1999 report, which he received from the Illinois State Police in August 2011 under a Freedom of Information Act (FOIA) request. Defendant also raised the First District's decision in *People v. Wright*, No. 1-07-3106 (Mar. 26, 2010), which defendant stated addressed nine-loci

matches and DNA. We note the *Wright* decision was withdrawn on June 3, 2011.

¶ 21 In November 2011, the trial court *sua sponte* denied defendant's section 2-1401 petition on the merits. Defendant appealed the court's denial. In a March 1, 2013, summary order, this court reversed the trial court's denial because (1) defendant had not properly served the State and (2) the court's denial occurred prior to the expiration of the 30-day period the State had to respond to the petition. *People v. Kruger*, No. 4-11-1033 (Mar. 1, 2013) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 22 On remand, defendant filed a motion for leave to file an amended section 2-1401 petition, which the trial court allowed in April 2013. However, defendant did not file one before the trial court again ruled on his original section 2-1401 petition. In October 2013, the court again entered a *sua sponte* order on defendant's section 2-1401 petition. In its order, the court first noted defendant had still not properly served the State with his section 2-1401 petition, and thus it dismissed defendant's petition for want of prosecution. The court further noted that, even if the petition was not dismissed for want of prosecution, the petition was ripe for adjudication and should be denied on the merits. Defendant appealed, and the case was partially filed on August 5, 2015, with a second disposition pending.

¶ 23 E. Leave To File a Successive Postconviction Petition

¶ 24 In August 2013, defendant filed a motion for leave to file a successive postconviction petition. In his motion, defendant argued he did not receive reasonable assistance of postconviction counsel due to counsel's failure to challenge the DNA match in defendant's case because it was a "partial profile" and only involved nine loci. Defendant noted an Internet search in 2008 would have turned up numerous sources that could have aided counsel's research. He further relied on the *Wright* decision and the Second District's decision in *People v. Watson*,

2012 IL App (2d) 091328, ¶¶ 25-36, 965 N.E.2d 474, which found ineffective assistance of trial counsel based on counsel's failure to challenge the State's evidence the defendant's DNA matched the crime-scene DNA at only seven loci. Defendant also noted he had only recently received the DNA documents in his case pursuant to a FOIA request. Defendant attached to his motion a July 2008 letter from Girton to the Attorney Registration and Disciplinary Commission (ARDC), which was made in response to a complaint defendant made to the ARDC about Girton's representation. In the letter, Girton explained he had been researching DNA evidence, specifically the small sample size and counsel's failure to hire an expert. He was also looking for any other potential issues related to the DNA findings in defendant's case. Girton ended the letter by noting he would seek to withdraw as counsel in light of defendant's ARDC complaint. The record indicates Girton did file a motion to withdraw as counsel in July 2008 but withdrew the motion after meeting with defendant. In September 2009, at defendant's request, the court did vacate Girton's representation of defendant in his postconviction proceedings.

¶ 25 In his proposed successive postconviction petition, defendant asserted (1) a due-process violation based on the State's knowing use of false testimony because Glasner testified the DNA in his case was a match, when in fact it was a partial profile; (2) a due-process violation based on the destruction of all of the amplified DNA during testing; (3) ineffective assistance of trial counsel based on counsel's failure to adequately investigate and research the DNA evidence in defendant's case, which was only a partial profile; and (4) a due-process violation based on the cumulative errors at his trial. Defendant attached numerous documents to his proposed successive postconviction petition, including an April 2013 letter from Karl Reich, chief scientific officer of Independent Forensics. Reich indicated the Federal Bureau of Investigation (FBI) had used 13 loci to determine identity since December 1997, and other literature refers to

the FBI using 13 loci in 1999. He also stated nine loci cannot be considered a match and that "understanding was well known to many experts, particularly those with a broader understanding of the uses of DNA identification, even back in 2003."

¶ 26 In October 2013, the trial court entered an order denying defendant's request for leave to file a successive postconviction petition. The court first found defendant did not identify any objective factors as to why he could not have obtained the publications and information he was presenting during his initial postconviction proceedings. It also found no prejudice existed because the cases cited by defendant did not support the proposition a substantial deprivation of rights occurred. The court also noted defendant had been searching for a way to challenge the DNA evidence since before his trial, and the successive postconviction petition alleged the same claims that had already been adjudicated.

¶ 27 On November 6, 2013, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Feb. 6, 2013). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Thus, this court has jurisdiction of the cause pursuant to Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant argues the trial court erred in denying his motion for leave to file a successive postconviction petition, in which he argued he did not receive reasonable assistance of postconviction counsel due to counsel's failure to challenge the DNA match in defendant's case because it was a "partial profile" and only involved nine loci. We disagree.

¶ 30 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state

constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). Relief under the Act is only available for constitutional deprivations that occurred at the defendant's original trial. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909.

¶ 31 Consistent with the above principles, the "Act generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). The Act expressly provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 620-21 (2002) (stating "the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute"). A defendant faces "immense procedural default hurdles when bringing a successive post-conviction petition," which "are lowered in very limited circumstances" as successive petitions "plague the finality of criminal litigation." *People v. Tenner*, 206 Ill. 2d 381, 392, 794 N.E.2d 238, 245 (2002). However, our supreme court has found "the statutory bar to a successive postconviction petition will be relaxed when fundamental fairness so requires." *People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003).

¶ 32 A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2012). To that end, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) provides, in part, as follows:

> "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."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909. In determining whether a defendant has established cause and prejudice, the trial court may review the " 'contents of the petition submitted.' " *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12, 954 N.E.2d 365 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162, 923 N.E.2d 728, 735 (2010)).

¶ 33 "Where a defendant fails to first satisfy the requirements under section 122-1(f), a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955, 912 N.E.2d 756, 762 (2009). This court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 34 A. The Cause Prong

¶ 35 In the case *sub judice*, defendant argues he demonstrated cause where the report upon which the State's DNA expert based her conclusion that blood recovered from defendant's vehicle was a "match" to the victim had previously not been available to defendant, as he obtained it through a FOIA request after the filing of his initial petition. Defendant also argues he established cause because the implication of the DNA test results on his conviction were not

apparent to him, a layperson, until the Second District's 2012 decision in *Watson* showed that the nine-loci partial profile could be deficient in certain circumstances.

¶ 36 We find defendant has failed to establish the cause prong. In his motion for leave to file a successive petition, defendant claimed counsel was ineffective for failing to raise the issue of partial-profile DNA evidence even though "a simple internet search by counsel in 2008 would have turned up numerous sources that could have aided him in his research." However, it should be noted defendant was the last to file an amended postconviction petition, in October 2009. Therefore, as defendant has pointed out the necessary information was available in 2008, he could have raised this issue in his October 2009 amended petition. Moreover, defendant offered no explanation for his failure to do so in his motion for leave to file a successive petition.

¶ 37 Defendant's reliance on *Watson* is unavailing. In that case, the appellate court found trial counsel was ineffective for failing to contest the DNA evidence presented by the State. *Watson*, 2012 IL App (2d) 091328, ¶¶ 32-36, 965 N.E.2d 474. However, the DNA evidence was the only evidence offered against the defendant. *Watson*, 2012 IL App (2d) 091328, ¶ 30, 965 N.E.2d 474. Here, this court found "overwhelming evidence of defendant's guilt." *Kruger*, 363 Ill. App. 3d at 1123, 845 N.E.2d at 104. Included in that evidence were multiple witnesses who testified defendant planned to rob the victim on the night of the murder and two witnesses, including defendant's girlfriend, who testified he admitted killing the victim. Thus, *Watson* is factually distinguishable and does not support the cause prong.

¶ 38 Defendant's attempt to establish cause based on the information he received via his FOIA request in 2013 is also unavailing. Defendant provided no reason why he was prevented from obtaining these documents earlier. The letter from the Illinois State Police granting defendant's FOIA request indicates he did not even request the documents until July

2011. Defendant fails to explain the eight-year delay between his conviction and his pursuit of these documents when, as he noted, "the dangers of partial matches have been known for over a decade." See *People v. Wright*, 2012 IL App (1st) 073106, ¶ 83, 971 N.E.2d 549. As defendant failed to provide any objective factors that impeded his ability to raise a specific claim during his initial postconviction proceeding, the trial court did not err in finding he failed to establish the cause prong of the cause-and-prejudice test.

¶ 39 B. The Prejudice Prong

¶ 40 Even if it could be said defendant established cause, we find he cannot meet the prejudice prong of the cause-and-prejudice test. Defendant argues trial counsel's failure to question the State's DNA witness regarding the partial-profile DNA comparison and argue to the jury against the characterization that there was a "match" amounted to sufficient prejudice. However, the cases relied on by defendant offer little support to his claim. Partial-profile DNA matches would go to the weight of the evidence rather than its admissibility and, given the multiple witnesses testifying to defendant's involvement and admissions in killing the victim, any less weight attributed to the partial profile match would not have changed the outcome of the trial. Thus, defendant has failed to demonstrate this claim not raised in the initial postconviction proceeding so infected the trial that the resulting conviction violated due process.

¶ 41 We hold the trial court correctly denied defendant leave to file his successive postconviction petition because he did not meet the requirements of section 122-1(f). 725 ILCS 5/122-1(f) (West 2012). We therefore do not reach the merits of defendant's successive petition as it was not considered filed. See *People v. LaPointe*, 227 Ill. 2d 39, 44, 879 N.E.2d 275, 278 (2007).

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 44 Affirmed.