2015 IL App (4th) 140441-U

NO. 4-14-0441

FILED
December 9, 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.	)	Coles County
JERRY GERALD OSBORNE,	)	No. 09CF173
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Glenn,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht concurred in the judgment.
Justice Appleton specially concurred.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant's motion for leave to file a successive postconviction petition where defendant failed to show prejudice within the meaning of the Post-Conviction Hearing Act (725 ILCS 5/122-1(f) (West 2012)).

¶ 2 In March 2014, defendant, Jerry Gerald Osborne, filed a motion for leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)), which the trial court denied. Defendant argues the trial court erred in denying his motion for leave because it satisfied the cause-and-prejudice test for filing a successive postconviction petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We note in the underlying criminal case defendant was charged under the name "Jerold Osborne"; however, he has filed documents and appeals, including the instant appeal,

referring to himself as "Jerry Gerald Osborne."

¶ 5 In July 2009, defendant entered into a partially negotiated guilty plea to methamphetamine possession (720 ILCS 646/60(a) (West 2008) (count II), a Class X felony (720 ILCS 646/60(b)(4) (West 2008)). Defendant was eligible for extended-term sentencing of 6 to 60 years in prison due to a prior conviction. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). As part of the plea agreement, the State agreed to dismiss a charge and cap its sentencing recommendation at 30 years in prison.

¶ 6 The presentence investigation report (PSI) reflected defendant had previous felony-drug convictions and an illegal-weapon-possession conviction. He was on parole for methamphetamine distribution at the time he committed the instant offense. Defendant admitted drugs had played a major role in his life, and methamphetamine became his drug of choice. He admitted manufacturing methamphetamine for his own personal use and to give to his friends. He denied ever selling the drug. He stated he had started using methamphetamine about two weeks before his arrest in this case. He admitted he did not have control over his addiction and upon his release from the Department of Corrections (DOC) he had not been able to stay away from people who use drugs. Defendant denied possessing the methamphetamine lab for which he was initially charged in this case. He stated he found the items in a bag on his father's property and was simply trying to dispose of them when he was arrested.

¶ 7 At the January 2010 sentencing hearing, the State called Officer Brett Compton, an inspector with the East Central Illinois Task Force. He testified, as a part of his training and experience, he would recognize a methamphetamine lab if he saw one. On March 26, 2009, Compton was on duty and assisted defendant's parole agent with a parole check. The parole agent had information defendant was involved with methamphetamine. Compton knew

defendant had been on parole for seven or eight months for methamphetamine-related charges and a weapons charge. Compton, the parole agent, and other officers went to defendant's residence, where he lived with his father. The residence was next door to a Head Start preschool located approximately 50 yards away. In addition to the house, there were multiple buildings, including a large shed converted into living space in which defendant had been living.

¶ 8 The parole agent conducted a search of defendant's person and found a match box containing three small Baggies of a powdered substance in defendant's pants pocket. The substance weighed approximately 2.9 grams and later tested positive for methamphetamine. The matchbox also contained three hydrocodone pills. In defendant's jacket pocket, they found a small black digital scale.

¶ 9 Compton and the other officers conducted a search of the shed where defendant was living. During the search, they found the following: (1) 2 glass jars containing a blue-colored liquid weighing 167 grams, which later tested positive for methamphetamine; (2) 2 containers of salt; (3) 2 plastic caps attached to tubing, which Compton stated was a common configuration for a hydrogen chloride generator common in the production of methamphetamine; (4) a spoon with suspected methamphetamine residue; (5) 14 syringes, 3 of which appeared to have been used; (6) a small bag containing 0.2 grams of methamphetamine; and (7) a larger digital scale. Just outside the door of the building, they found a white trash bag containing three coffee filters suspected to have been used to manufacture methamphetamine. The officers also went through a trash can located at the residence. In a white garbage bag near the top of the trash can, they found more hydrogen chloride generators, two cans of Coleman fuel, tops of batteries, several glass jars, and some small pieces of foil. Based on Compton's training and experience, it was his opinion this combination of items were common in the manufacturing of

methamphetamine. The total weight of the four Baggies found on defendant's person and in his residence was approximately 3.1 grams. In Compton's experience, the presence of two digital scales and multiple packages of methamphetamine meant an individual was distributing methamphetamine, not just using it.

¶ 10 After defendant was arrested, Compton had an opportunity to talk to defendant after he waved his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)). Defendant told Compton on March 23, 2009, an unknown taller male in a newer black car had driven through the alley by defendant's house and thrown a large black trash bag into his yard. When defendant looked inside, he saw the Coleman fuel, hoses, and jars, which he recognized as items used to manufacture methamphetamine. Defendant said he had been craving methamphetamine, so he took one of the jars containing the blue liquid and microwaved it to extract methamphetamine. The extracted methamphetamine made defendant sick. Compton testified no black trash bag had been found during the search.

¶ 11 Defendant told Compton his friend, John Moody, had given him a black satchel approximately a week and a half prior to March 23, 2009. On the night of March 22, 2009, Moody told defendant to get rid of the black satchel because parole agents would be conducting a parole check on him. Compton recognized Moody's name as a person involved with methamphetamine. Defendant told Compton he had started using methamphetamine again for approximately a month prior to March 22, 2009. He had used it approximately 15 to 20 times in a one-week period.

¶ 12 Defendant made a statement in allocution. He stated he had been released from DOC in July 2008. During his incarceration, defendant spent two years in the Gateway drug program. After release, defendant was sober for nine months and thought he had his addiction

under control. Defendant ran into some problems and eventually ended up right back where he had started. Defendant stated he had been found eligible for the drug-court program and expressed a desire to be placed in that program. Defendant told the court he only used the drugs.

¶ 13 The trial court considered the evidence, the PSI, the financial impact of incarceration, arguments in mitigation and aggravation, and defendant's statement in allocution. While the court noted its belief in the benefit of drug court, it felt defendant's inability to be honest was the biggest impediment to his ability to be successful in drug court. It was clear to the court defendant had not been honest in his statements to the police, in his PSI, or in his statement in allocution when he said he was "just using." These statements did not comport with the evidence found at the scene, which clearly showed defendant had been manufacturing methamphetamine in amounts greater than for personal use. The court also felt defendant had not accepted responsibility for his actions. The court stated a sentence to drug court would deprecate the seriousness of defendant's conduct and be inconsistent with the ends of justice. The court noted the available range of a DOC sentence was 6 to 60 years. The court sentenced defendant to 22 years in the DOC with a recommendation he receive drug treatment while imprisoned.

¶ 14 In February 2010, defendant filed a motion to reconsider his sentence. In July 2010, the trial court denied the motion. On direct appeal, this court remanded for further proceedings pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) for two compliance errors. Defendant should have filed a motion to withdraw his guilty plea rather than a motion to reconsider his sentence because defendant had entered into a negotiated plea. Further, defense counsel failed to file a certificate in compliance with Rule 604(d). *People v. Osborne*, No. 4-10-0531 (Jan. 6, 2011) (unpublished order under Supreme Court Rule 23).

¶ 15 On remand, in March 2011, defense counsel filed a Rule 604(d) certificate. Counsel did not file a new postplea motion. At a hearing after remand, defendant indicated he intended to stand on the arguments made in his earlier motion to reduce his sentence. The trial court denied the motion. In July 2011, pursuant to an agreed motion for summary remand, this court remanded the case again, instructing the trial court to properly admonish defendant pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001) to make clear to defendant he needed to file a motion in compliance with Rule 604(d), *i.e.*, a motion to withdraw his guilty plea. *People v. Osborne*, No. 4-11-0183 (July 7, 2011).

¶ 16 In August 2011, the trial court admonished defendant pursuant to Rule 605(c), and specifically advised him he had to file a motion to withdraw his guilty plea rather than a motion to reduce his sentence. In September 2011, defendant filed a "motion to withdraw guilty plea and/or motion to reconsider sentence" in which he alleged (1) he pleaded guilty believing he would receive a sentence of 15 years or less, or a sentence to drug court, or a combination of both; (2) had a jury tried his case, it may not have found the State's evidence sufficient to prove him guilty beyond a reasonable doubt; and (3) the trial court did not give adequate consideration to his health, the cost of incarceration, or his potential for rehabilitation when the court sentenced him to 22 years in DOC. Defense counsel filed a new Rule 604(d) certificate.

¶ 17 At the May 2012 hearing on the motion to withdraw the plea, the trial court struck any reference to a motion to reconsider sentence because this case involved a negotiated plea. Following arguments of counsel, the court denied the motion. Defendant appealed. In October 2012, this court allowed defendant's motion for summary remand and directed the trial court to vacate the anti-crime and street-value fines and hold a hearing to determine the proper amount of the street-value fine. In November 2012, per agreement of the parties, the trial court vacated the

anti-crime-fund and street-value fines.

¶ 18 In January 2013, defendant filed a *pro se* postconviction petition alleging, *inter alia*, he was denied effective assistance of counsel because his attorney (1) failed to present an important witness, Jamie Miller, and (2) had a conflict of interest because Miller was counsel's niece, causing him to refuse to call Miller to testify on defendant's behalf. Defendant maintained, had Miller been called, "the court could have had a different outlook on his decision[,] which was influenced by [defendant's] attorney." Defendant further alleged his attorney told Miller to stay away from defendant and cut all ties with him, thus showing ineffective assistance of counsel and counsel's conflict of interest. Defendant only attached his own affidavit to the postconviction petition.

¶ 19 In January 2013, the trial court dismissed the postconviction petition as frivolous and without merit. The court noted defendant's petition did not challenge the plea or sentence, and defendant failed to attach any affidavit setting forth facts to support his claim Miller could have testified about any relevant or admissible facts as to defendant's guilt or to any sentence consideration.

¶ 20 On appeal, we granted the Office of the State Appellate Defender's (OSAD) motion to withdraw as counsel on appeal, finding no meritorious issues could be raised on appeal, and affirmed the trial court's judgment. *People v. Osborne*, 2014 IL App (4th) 130140-U (unpublished order under Supreme Court Rule 23).

¶ 21 In March 2014, defendant filed a *pro se* motion for leave to file a successive postconviction petition along with a successive petition. In his motion, defendant alleged (1) his appointed counsel "enticed" him by instructing him to plead guilty and promising him he would receive "a combo-package sentence of not more than six years"; (2) his initial postconviction

petition was written with the assistance of a "jail-house lawyer" because no other assistance was made available to him; (3) he sought appointment of counsel from the trial court for assistance with his petition and with locating Miller to obtain her affidavit; (4) on appeal from dismissal of his initial petition, defendant believed OSAD would assist him in locating Miller and obtaining her affidavit; (5) with the assistance of his family, defendant was able to obtain Miller's affidavits (dated November 16, 2013), which were turned over to OSAD; (6) in January 2014, OSAD filed a motion to withdraw as counsel on appeal and defendant was informed "newly discovered information could not be presented on appeal"; (7) throughout his entire case, defendant's right to due process had been denied; (8) he has shown his trial counsel's performance was deficient for failing to present mitigating evidence, for counsel's conflict of interest, and counsel's obstruction of justice; (9) he has been prejudiced thereby; and (10) he has been denied his constitutional rights.

¶ 22 Defendant's successive postconviction petition basically reiterates the allegations in his motion for leave to file the successive petition and makes the following additional allegations: (1) during the plea proceedings, his counsel failed to produce Miller for testimony; (2) counsel influenced Miller, his niece, against testifying, telling her to cut all ties with defendant; (3) counsel obstructed justice by preventing a witness who had knowledge material to the case from testifying, thereby concealing or withholding information; (4) defendant was in continual disagreement with the sentence imposed; (5) defendant is entitled to the effective assistance of counsel and has now shown through the affidavits of Miller his counsel was incompetent; (6) he was prejudiced by such incompetence because "the picture that is reflected by the record is one of inaccuracy"; and, finally, (7) defendant should not have been sentenced to 22 years. Attached to the petition were two affidavits by Miller. The first affidavit states:

"That on or around March 18, 2009, I was with [defendant] and I saw him carry a garbage bag up front of the little house that he was living in. He told me that one of his buddies left this bag of stuff and he had to get rid of it. He was pretty upset with his buddies for dropping the bag off. I saw what was in the bag as [defendant] was trying to clean it up and dispose of what was in it."

The second affidavit stated as follows:

"That I was in contact with my uncle, 'Lonnie Lutz' who was the Coles County Public Defender about [defendant's] case. After Uncle Lonnie was assigned to [defendant's] case, he told me to stay away from [defendant] and to cut all ties with him and not to contact him anymore."

¶ 23 In April 2014, the trial court denied defendant's motion to file a successive petition. In so doing, the court stated,

"Attached to his proposed [s]uccessive [p]ost[]conviction [r]elief are two (2) separate affidavits dated November 16, 2013[,] signed by Jamie Miller. Neither affidavit, even if accepted as true, sets forth a sufficient basis for the court to find that a meritorious issue could be raised. Neither affidavit supports a claim of actual innocence under the law."

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues the trial court erred in denying his motion for leave to file a successive postconviction petition. The State disagrees. 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).

¶ 27 The 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 Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Id.* The Act generally limits a defendant to one postconviction petition. *Id.* ¶ 15, 963 N.E.2d 909. Section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) provides the following:

> "Leave of court [to file a successive postconviction petition] 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."

¶ 28 " 'Successive postconviction petitions are disfavored under the Act[,] and a

defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court.' " *People v. Smith*, 2013 IL App (4th) 110220, ¶ 20, 986 N.E.2d 1224 (quoting *People v. Gillespie*, 407 Ill. App.3d 113, 123, 941 N.E.2d 441, 451).

¶ 29 "In seeking leave of court, a petitioner must demonstrate 'cause for his * * * failure to bring the claim in his * * * initial post[ ]conviction proceedings and prejudice result[ing] from that failure.' " *People v. Green*, 2012 IL App (4th) 101034, ¶ 28, 970 N.E.2d 101 (quoting 725 ILCS 5/122-1(f) (West 2010)). Or, a defendant may forgo the cause-and-prejudice test by setting forth a claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 330-31, 919 N.E.2d 941, 947 (2009). Here, defendant has not claimed actual innocence. He has opted to argue the cause-and-prejudice test applies.

¶ 30 "Cause" can be "any objective factor, external to the defense, which impeded the [defendant's] ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462, 793 N.E.2d 609, 622 (2002). "Prejudice" is "an error which so infected the entire trial that the resulting conviction violates due process." *People v. Britt-El*, 206 Ill. 2d 331, 339, 794 N.E.2d 204, 209 (2002). 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, 372 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162, 923 N.E.2d 728, 735 (2010)). Like the test for ineffectiveness of counsel, the cause-and-prejudice test is composed of two elements, both of which must be met in order for the defendant to prevail. *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624.

¶ 31 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." *People v. Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172.

¶ 32 A. Cause

¶ 33 Defendant argues he showed "cause" for failing to provide the required documentation with his initial postconviction petition because he was not able to locate Miller prior to filing his initial petition. He maintains his defense counsel, who was Miller's uncle, told her not to get involved with defendant and to stay away from him. In Miller's second affidavit, she corroborates these allegations, stating defense counsel told her to "stay away," "cut all ties," and "not to contact" defendant. Defendant maintains his family was able to locate Miller and obtain her affidavits after he had filed his initial postconviction petition. We need not determine whether defendant has met the cause prong of the cause-and-prejudice test because, as discussed below, defendant has not established prejudice.

¶ 34 B. Prejudice

¶ 35 Defendant claims he has met the "prejudice" prong of the cause-and-prejudice test because his defense counsel provided him ineffective assistance by denying defendant Miller's testimony, which defendant maintains would have "made an impact at the very least on the sentence." Ineffective-assistance-of-counsel claims are governed by the familiar two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255-56 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both counsel's performance was deficient and the deficient performance prejudiced the defendant. *Strickland*,

466 U.S. at 687. Put another way, the defendant must show counsel's performance was "objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Petrenko*, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198, 1203 (2010) (quoting *Strickland*, 466 U.S. at 694). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 36 We need not decide whether counsel's failure to present Miller's testimony was unreasonable because defendant has failed to show her testimony would have made a difference in the sentence he received. On appeal, defendant argues Miller's testimony "would have provided mitigating information regarding [defendant's] character" particularly in light of the fact the trial court found defendant had been dishonest. Defendant maintains Miller's testimony "would have shown that [defendant] was not dishonest since it would have supported his story he told the police about how he came into possession of the methamphetamine manufacturing materials," *i.e.*, someone had tossed the methamphetamine manufacturing materials onto his front yard a few days prior to his arrest.

¶ 37 According to Miller's affidavits, on or about March 18, 2009, she saw defendant carry a garbage bag in front of his house. Defendant told Miller a friend had left the bag, and he had to get rid of it. Defendant was upset. Miller saw the contents of the bag "as defendant was trying to clean it up and dispose of what was in it." However, more than a week later, on March 26, 2009, defendant was arrested after a search revealed defendant was in possession of well over 100 grams of methamphetamine and numerous materials known to be used in the manufacture of methamphetamine. Defendant told the police the garbage bag was thrown into the alley by his yard by a tall male in a black car on March 23, 2009; but, he also told the police

a friend had given him a "black satchel" about a week and a half before his arrest. The night before his arrest, the friend warned defendant to get rid of the satchel because of an impending parole check. Regardless of when or how defendant came into possession of these items and what he allegedly told Miller about them, he clearly did not follow that stated intent. Instead, defendant admittedly manufactured methamphetamine out of these items and was still in possession of them when he was arrested several days later.

¶ 38 Even if Miller testified at sentencing consistent with her affidavit, the inconsistencies between her story and defendant's story would have further supported the trial court's finding defendant had been dishonest throughout this case. Had Miller testified, it would not have resulted in a shorter sentence. Therefore, defendant can neither meet the prejudice prong of the *Strickland* ineffective-assistance-of-counsel test nor the prejudice prong of the cause-and-prejudice test.

¶ 39 "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). 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) of the Act. 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).

¶ 40 III. CONCLUSION

¶ 41 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.

¶ 42 Affirmed.

¶ 43 JUSTICE APPLETON, specially concurring.

¶ 44 I concur with the majority but write separately to raise a concern about the proceedings below.

¶ 45 Although, procedurally, we cannot reach the issue, I am a little concerned by the possibility that defense counsel might have allowed his relationship with his niece—more specifically, his anxious desire that she not be associated with defendant in any way—to influence his strategic decision whether to call her as a witness in the sentencing hearing. Arguably, it would have made sense to call her, to show at least that defendant asserted that a friend threw the bag of methamphetamine-manufacturing materials into his yard, a story that otherwise might have seemed an impudent falsehood. I am unable to say, though, that the omission of her testimony "so infected the trial that the resulting *** sentence violated due process." 725 ILCS 5/122-1(f) (West 2012).