2015 IL App (5th) 120181-U

NO. 5-12-0181

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Franklin County.
	)	
v.	)	No. 85-CF-60
	)	
RODNEY D. BARNHILL,	)	Honorable
	)	Thomas J. Tedeschi,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Cates and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's successive petition for postconviction relief.

¶ 2 Defendant, Rodney D. Barnhill, appeals from an order of the circuit court of Franklin County denying his motion for leave to file a second successive petition for postconviction relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). The issue raised in this appeal is whether the trial court erred in denying defendant's motion for leave to file a successive postconviction petition. We affirm.

¶ 3 BACKGROUND

¶ 4 In July 1985, defendant was charged with the murder of a 14-year-old girl by strangulation with a coat hanger. Defendant entered an open plea of guilty but mentally ill to the offense of murder (Ill. Rev. Stat. 1985, ch. 38, ¶ 9-1(a)(2) (now 720 ILCS 5/9-1(a)(2) (West 2012))). On July 30, 1986, he was sentenced to a term of natural life in prison. Defendant filed a *pro se* motion to vacate his guilty plea in which he asserted his plea was "made on the understanding and promise that a more lenient sentence would be imposed, and that defendant would not be incarcerated in the penitentiary, but would be placed in a mental health facility." New counsel was appointed, and a hearing was conducted on defendant's motion to vacate his guilty plea, after which the trial court denied defendant's motion.

¶ 5 On direct appeal, defendant argued: (1) that the trial court failed to substantially comply with the requirements of Illinois Supreme Court Rule 402(b) (eff. Feb. 1, 1981) because it failed to ask defendant if he had been promised anything in exchange for his plea of guilty, (2) that his plea was involuntary because his counsel and an investigator promised him that if he pleaded guilty he would be sentenced to a mental health facility rather than prison, (3) that the sentence of natural life was excessive, and (4) that the statute authorizing natural life was unconstitutionally vague. This court affirmed the trial court's judgment and specifically rejected defendant's argument that his plea was involuntary, finding the only evidence of a promise about a sentence to a mental institution was defendant's own self-serving statements. *People v. Barnhill*, 188 Ill. App. 3d 299, 307, 543 N.E.2d 1374, 1379 (1989). Defendant even admitted on cross-

examination "that the judge never told him that any of the possible sentences were to a mental institution." *Barnhill*, 188 Ill. App. 3d at 306, 543 N.E.2d at 1378.

¶ 6 On April 24, 1995, defendant filed a *pro se* complaint for *habeas corpus* relief, but failed to pursue it further.

¶ 7 On June 6, 2000, defendant filed a *pro se* motion for retrial and to vacate sentence in which he complained that even though he was interviewed by a psychiatrist who presented a report, he was denied a necessary fitness hearing where he was on the psychotropic drug Prolixin at the time of his plea. The trial court found that prior to defendant's plea of guilty he was examined by a board-certified psychiatrist who was aware that defendant was taking Prolixin and that the doctor concluded that defendant was competent to understand the charges against him and cooperate in his defense. The trial court found defendant's motion "patently without merit" and denied defendant's motion and refused to appoint counsel. Defendant was given notice of his right to appeal. The appellate defender was appointed to represent defendant. This court affirmed, noting that the trial court considered defendant's motion, "in part, as a postconviction petition." *People v. Barnhill*, No. 5-00-0448 (2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 On March 18, 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition, asserting that his initial *pro se* motion was not given the consideration it deserved considering his "physical and mental restrictions." Once again, defendant alleged that plea counsel led him to believe he would be sent to a mental hospital if he pleaded guilty but mentally ill. The complaint included the affidavits of his

mother and sister, who both alleged that plea counsel told them defendant would be sent to a mental hospital rather than prison if he pleaded guilty but mentally ill. Defendant argued the cause and prejudice test was met because appellate counsel was ineffective for failing to argue the ineffectiveness of plea counsel.

¶ 9 On April 29, 2009, the trial court found that defendant's motion was "merely a rehash of claims he has many times made before this court and the appellate court unsuccessfully" and that it failed to raise any new matters not previously asserted or which the opportunity to assert them was available. The trial court denied defendant's motion for leave to file a successive posttrial motion on the basis that defendant failed to meet the cause and prejudice test. The record indicates defendant was sent the order denying his motion to file a successive postconviction petition, but does not indicate defendant was given any information concerning his right to appeal or the need to file a notice of appeal.

¶ 10 Instead of filing an appeal, defendant filed a *pro se habeas corpus* petition against Donald Gaetz, warden of Menard Correctional Center on May 26, 2009, in which he alleged his plea of guilty but mentally ill was extracted in violation of due process where plea counsel and an investigator "left him with the impression that if he plead [*sic*] guilty, the implied promise of the government–that of being treated in a mental hospital and not sent to prison–would manifest itself." Defendant also alleged that counsel on direct appeal was ineffective regarding his claims of "diminished capacity" and "organic dysfunction." The State moved to dismiss.

¶ 11 On August 3, 2009, the trial court granted the motion to dismiss defendant's *habeas corpus* petition with prejudice. Later, Dave Rednour replaced Donald Gaetz as the warden of Menard and was substituted as the appellee in that appeal. This court affirmed in *Barnhill v. Rednour*, No. 5-09-0441 (2011) (unpublished order pursuant to Supreme Court Rule 23), finding the trial court properly dismissed because defendant failed to show he was entitled to *habeas corpus* relief and that all underlying claims in his complaint were previously litigated and decided adversely to him. We specifically noted that in the future if defendant attempted to raise claims previously litigated, he would be subject to *res judicata* and run "the risk that the document will be found frivolous." *Barnhill*, No. 5-09-0441, order at 6.

¶ 12 On March 2, 2013, defendant filed the instant litigation, another motion for leave to file a successive petition for postconviction relief. In his motion he generally alleged that the trial court did not comply with Supreme Court Rule 402, that his plea of guilty but mentally ill was not voluntary, and that his natural life sentence was excessive. He later argued that because he was taking psychotropic medication at the time of his plea, he was incompetent to stand trial. He again attached the affidavits of his mother and sister. The trial court summarily denied the petition on the basis that defendant failed to raise any new matters not previously asserted and his claims "do not meet the cause and prejudice test." Defendant filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 The issue raised in this appeal is whether the trial court erred in denying defendant's motion for leave to file a successive postconviction petition. Defendant contends the trial court erred in summarily denying his motion to file a successive petition because it stated the gist of a constitutional violation and he has been barred through various errors from receiving counsel's help in shaping his postconviction claim of constitutional error. Defendant contends the trial court ignored defendant's initial postconviction filing, then recharacterized his second filing raising a different issue without giving him an opportunity to withdraw or amend the motion to include his earlier claim and bring his filing into compliance with the Act, and on the third filing failed to give him notice of his appellate rights. Defendant insists that the combined effect of these errors has been to act as an impediment to his ability to raise and fully litigate his claim that his plea was involuntary due to plea counsel's ineffectiveness. Defendant asks that the cause be remanded for appointment of counsel and additional second stage proceedings.

¶ 15 The State responds that defendant's actual successive postconviction petition and accompanying motion for leave to file a successive petition do not contain the claim made in this appeal that his plea was involuntary because it was based upon the false promise by the prosecutor that he would be placed in a mental health facility rather than a prison, but was based only on the claim that because he was taking psychotropic medication at the time of his plea, he was incompetent to stand trial. The State insists the trial court properly denied defendant's motion for leave to file a successive

postconviction petition because defendant can show neither cause for his belated claim that the trial court failed to follow proper statutory procedure in granting him a fitness hearing based upon the fact he was taking psychotropic medication, nor prejudice because defendant's claim is not cognizable under the Act.

¶ 16 A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605, 903 N.E.2d 437, 444 (2009) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328, 637 N.E.2d 1015, 1017 (1994)). The Act contemplates the filing of only one postconviction petition, and obtaining leave of the court is a condition precedent to the filing of a successive postconviction petition. *Simmons*, 388 Ill. App. 3d at 605, 903 N.E.2d at 444-45. The purpose of a postconviction proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not and could not have been determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519, 749 N.E.2d 892, 901 (2001). Therefore, *res judicata* bars consideration of issues that were raised and decided on direct appeal, as well as issues that could have been presented on direct appeal, but were not. *Barrow*, 195 Ill. 2d at 519, 749 N.E.2d at 901.

¶ 17 Pursuant to section 122-1(f) of the Act, leave of the court may be granted only if a defendant "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." 725 ILCS 5/122-1(f) (West 2010). To establish cause, a defendant must identify an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2010); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 460,

793 N.E.2d 609, 620 (2002). To establish prejudice, a defendant must demonstrate that the error not raised in his initial postconviction proceedings so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2010).

¶ 18 A postconviction proceeding has three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). At the first stage, the circuit court must, within 90 days of filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445. If the court does not dismiss the petition as either frivolous or patently without merit, then the petition advances to the second stage where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2010)) and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2010)). *Edwards*, 197 Ill. 2d at 245-46, 757 N.E.2d at 446. Here, the trial court dismissed at the first stage.

¶ 19 Even assuming *arguendo* that defendant properly raised the issue of the voluntariness of his plea, we point out that this issue has been previously addressed. On direct appeal, defendant's second argument was that his plea of guilty but mentally ill was involuntary and must be vacated because he had been promised by his attorney and an employee of the sheriff's department that if he pled guilty he would be sentenced to a mental institution rather than prison. *Barnhill*, 188 Ill. App. 3d at 305-06, 543 N.E.2d at 1377. In rejecting defendant's argument, this court specifically stated:

> "The circuit court extensively admonished the defendant as to the possible penalties he could receive, ranging from a term of 20 to 40 years to natural life imprisonment. The judge did not state that the defendant could be sent to a mental institution as a possible sentence. This admonishment was sufficient to advise the defendant that he was to be given a prison sentence. Additionally, the defendant's question to the judge, during the judge's admonishments regarding possible penalties, where he asked, 'How many years do you think I'll get?' indicated that the defendant knew that he was going to receive a prison sentence rather than being sent to a mental institution. The defendant stated, upon being questioned by the court, that he was not being forced in any way to enter his plea of guilty and that he was doing so voluntarily and freely." *Barnhill*, 188 Ill. App. 3d at 307, 543 N.E.2d at 1378.

Defendant's claim of involuntariness has been rejected on numerous occasions by the circuit court as well as this court.

¶ 20 The only "new" documentation or evidence provided by defendant is the affidavits of his sister and mother. However, in order to constitute newly discovered evidence, each document must not have been available at defendant's original trial and the defendant must not have been able to discover it sooner through diligence. *Simmons*, 388 Ill. App. 3d at 614, 903 N.E.2d at 451. Additionally, the evidence must be material, noncumulative, and of such conclusive character that it would probably change the result. *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004). Under this standard, the affidavits by defendant's sister and mother are not new evidence because

this evidence was certainly discoverable before now. Defendant has not shown cause for failure to produce the affidavits earlier, nor has he shown prejudice. The affidavits are merely cumulative of his own testimony and would not likely change the result, as both defendant's sister and mother would be considered biased.

¶ 21 Likewise, we are unconvinced by defendant's argument that because he was taking psychotropic medication, he was incompetent to stand trial and his plea was involuntary. We agree with the trial court that defendant's motion and petition fail to establish either cause or prejudice. Defendant's claim is based upon his taking of the psychotropic medication Prolixin. The record shows that Dr. Thomas Flynn's 1985 competency report specifically notes that defendant advised him that he had been taking Prolixin for nine months. Thus, the trial court was aware defendant was taking a psychotropic drug, but still found him fit to stand trial.

¶ 22 Furthermore, we point out that postconviction relief is granted only for a substantial deprivation of constitutional rights. The statute in effect at the time of defendant's plea entitling a defendant on psychotropic medications to a fitness hearing (Ill. Rev. Stat. 1985, ch. 38, ¶ 104-21(a)) was changed so that a defendant who is receiving psychotropic medication is not presumed to be unfit to stand trial solely because he is taking those drugs. See 725 ILCS 5/104-21(a) (West 1998). Therefore, defendant's right to a fitness hearing based upon the fact that he was taking psychotropic medication was merely a statutory right and not a constitutional right, and an "allegation of a deprivation of a statutory right is not a proper claim under the Act." *People v. Mitchell*, 189 Ill. 2d 312, 329, 727 N.E.2d 254, 265 (2000).

¶ 23 The record here shows the trial court was aware defendant was taking psychotropic medication. A fitness hearing was conducted, after which defendant was found fit to stand trial. Moreover, defendant's right to a fitness hearing based upon the use of psychotropic medication was merely a statutory right and, as such, defendant has failed to establish that he suffered prejudice to permit the filing of a successive petition for postconviction relief.

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Franklin County.

¶ 25 Affirmed.