2016 IL App (1st) 140007-U

FOURTH DIVISION
August 18, 2016

No. 1-14-0007

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 22909
	)	
ANDREW PULIDO,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's successive postconviction petition failed to meet the cause and prejudice test for relaxing the bar on successive petitions where it failed to allege facts which would support a finding of prejudice as a result of postconviction counsel's failure to raise the defense of involuntary intoxication in defendant's first postconviction petition.

¶ 2 Defendant Andrew Pulido appeals from an order of the trial court denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, defendant contends that the trial court erred because the record established that his claim met the cause-and-prejudice test. He argues that his petition puts forth an arguable claim that he was involuntarily intoxicated at the time of his wife's murder and thus established prejudice. He also argues that his retained postconviction counsel was unreasonable in failing to include the claim in his initial postconviction petition which is sufficient to show cause. We affirm.

¶ 3 The evidence at defendant's jury trial established that Dana Wolf-Pulido, defendant's estranged wife, was found dead in her home on September 10, 2002. According to Wolf-Pulido's neighbor, Rosa Ramirez, she saw a man walking down the street that morning. Subsequently, she identified defendant as the man, including in a photo array, a lineup, and at trial. Defendant looked into the houses and buildings he passed as he walked. As defendant was in front of Wolf-Pulido's home, Ramirez looked down for her keys. When she looked up again, defendant was gone.

¶ 4 According to Alexander Dee, Wolf-Pulido's ex-husband, Wolf-Pulido failed to pick their children up from school that afternoon. Another parent dropped the children off with Dee and he brought them to his house. Throughout the evening, he unsuccessfully attempted to contact Wolf-Pulido by phone, and eventually went to her apartment. Finding the apartment dark, Dee called the police. When officers responded, they entered the apartment and found Wolf-Pulido dead.

¶ 5 Detective Tony Villardita arrived at the apartment at 10 p.m. Wolf-Pulido lay on the couch and had purple marks on her throat. The detective found divorce papers on a coffee table along with the business cards of two detectives. He also found that the caller-id on Wolf-Pulido's phone indicated that defendant's painting company had called at 10:13 a.m. Police technicians investigated the apartment and collected evidence. According to one technician, there were no signs of forced entry to the apartment. A DNA analyst, determined that a liner on Wolf-Pulido's underwear had a semen stain that matched defendant's DNA profile. DNA recovered from under Wolf-Pulido's fingernails failed to exclude defendant.

¶ 6 Patricia Taggart, a friend of defendant, testified he had called her on the morning of the murder and indicated that he was leaving work because he felt unwell. He called Taggart again at 2:14 p.m. He told her, "My life is over. Everything has changed. Nothing is ever going to be the same again." He later stated, "I should have kept my big mouth shut." Taggart testified that over the summer of 2002, defendant stated four or five times that he was thinking of ways to kill Wolf-Pulido. In June, he gave Taggart a blank check and his lawyer's business card in case he needed a lawyer in the future. One week before the murder, defendant had asked Taggart to drive him to Wolf-Pulido's apartment. Defendant looked into the apartment windows and seemed excited that Wolf-Pulido was alone. Defendant later asked her if police officers could get fingerprints from skin or off of someone's neck.

¶ 7 On September 15, 2002, defendant was taken to the hospital. According to a paramedic, defendant had taken 15 sleeping pills. At the hospital, testing indicated that defendant had taken Xanax, and he told doctors that he had taken 10 pills.

¶ 8 At trial, the State also introduced evidence regarding an incident in May 2002. Dee testified he and Wolf-Pulido were attending a school recital. As Dee left the school, he found that the brake line on his car had been cut. He noticed that the brake line on Wolf-Pulido's car had also been cut. Dee saw a suspicious van leaving the parking lot and wrote down its license plate. The van was later identified as belonging to one of defendant's employees. According to the employee, defendant had borrowed the van for an hour on the day of the school recital. When he returned he seemed nervous and told all his workers to say he had been present all day if police officers asked.

¶ 9 Defendant did not testify or present any other evidence at trial.

¶ 10 The jury found defendant guilty of first-degree murder and the trial court sentenced him to 57 years and 4 months' incarceration. On direct appeal, defendant argued, *inter alia*, that the trial court had improperly precluded cross-examination into a term of court supervision imposed on one of the State's DNA experts and had improperly considered the victim impact statement of Wolf-Pulido's daughter at sentencing. This court affirmed defendant's conviction. *People v. Pulido*, No. 1-05-3479 (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 11 Defendant subsequently retained private counsel and filed an initial postconviction petition on May 26, 2009. In the petition, defendant argued that trial counsel was ineffective for numerous reasons, including "fail[ing] to consider, investigate, or present evidence of [his] mental state and ingestion of psychotropic drugs at or near the time of the event and trial." He alleged that trial counsel, while aware of defendant's medical records, did not take any action to investigate or present evidence of his mental state "that would have impacted not only the existence of an affirmative defense, but may have formed the basis of significant mitigation in

this matter." Defendant attached the records of three emergency room visits to his petition. He also attached two psychiatric evaluations to his petition. The first record showed that defendant was diagnosed with depression in July 2002. It noted that defendant "has been on Ativan and Xanax without much effect. He has also most recently been on Paxil, Wellbutrin, and Zoloft but stopped taking these medications because of the way they make him feel." The physician prescribed Effexor, Valium, and Neurotonin. The second evaluation was a follow-up assessment in February 2003. The report noted that defendant had been taking Xanax and Halcion, and the physician recommended defendant also begin taking Effexor. The trial court summarily dismissed the petition in a written order and this court affirmed the dismissal. *People v. Pulido*, No. 1-09-2464 (2011) (unpublished order under Illinois Supreme Court Rule 23).

¶ 12 On May 2, 2012, defendant filed a successive postconviction petition and a motion seeking leave to file the petition which are the subject of the current appeal. In the successive petition, defendant alleged, *inter alia*, that trial counsel was ineffective for not presenting an involuntary intoxication defense based on his use of "psychotropic drugs, prior, during, and after the time of the murder." Defendant asserted that his medical records showed that he has been on Paxil, Wellbutrin, and Zoloft. He also asserted, "It is well known that these psychotrophic drugs Paxil, Zoloft, and Wellbutrin have hallucinogenic side effects. *** One of the side effects from these drugs is psychosis and this leads to erratic behavior." He stated that when the drugs were taken together it "is well-documented" that the cause "sleepwalking, irritability, hostility, and aggressiveness." He argued that he "could not have possibly presented this [issue] in an earlier petition since this involves a complicated issue of law." He subsequently asserted that

postconviction counsel was "ineffective" for failing to raise the issue in defendant's initial petition.

¶ 13 Defendant attached several medical records in support of his petition. These records included a hospital psychiatric screening form dated July 20, 2002. The form indicated that defendant had been taking Paxil, Celexa, Wellbutrin, Ambien, and Zoloft, "all of which he took for days before stopping." The report noted that defendant was non-compliant in taking his prescribed medications "due to dislike of side effects." It also indicated that defendant reported abusive use of steroids as well as "abusing [and] inappropriately using" prescribed medications. The second record is an initial psychiatric evaluation from July 22, 2002, which was also attached to defendant's initial petition. The record showed that defendant was diagnosed with depression. It noted that defendant "has been on Ativan and Xanax without much effect. He has also most recently been on Paxil, Wellbutrin, and Zoloft but stopped taking these medications because of the way they make him feel." The physician prescribed Effexor, Valium, and Neurotonin. A hospital certification dated August 6, 2002, was also attached. It indicated that defendant was "severely depressed" and required immediate hospitalization.

¶ 14 The trial court denied defendant leave to file his petition, noting that he had "provide[d] no explanation for why he chose not to raise these claims in his initial postconviction petition." It also noted that defendant provided no evidence "that his alleged intoxication rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Defendant appeals.

¶ 15 Defendant contends that the trial court erroneously denied his motion for leave to file a successive postconviction petition because his motion and petition satisfied the cause-and-

prejudice test. He argues that his retained postconviction counsel unreasonably failed to include the claim in the initial petition, and thus defendant was not culpable in the failure to bring the claim. He argues that he established prejudice because his claim has an arguable basis in fact and law due to our supreme court's recognition of an involuntary intoxication caused by prescription drugs in *People v. Hari*, 218 Ill. 2d 275 (2006). The State responds, *inter alia*, that defendant has not shown cause because his retained counsel's actions cannot constitute a cause external to his defense. The State also argues that defendant has failed to establish prejudice because the petition and its accompanying evidence fail to establish the involuntary intoxication defense would apply to defendant's case.

¶ 16 The Act provides a collateral mechanism for a defendant to allege that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 15. The legislature intended the Act to provide defendants only a single petition except where a due process violation compels a successive petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 16. In order to file a successive postconviction petition, a defendant must first seek leave from the trial court to do so. 725 ILCS 5/122-1(f) (West 2012); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Unless defendant alleges actual innocence, leave will be granted only where 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 2012); see also *People v. Ortiz*, 235 Ill. 2d 319, 329-31 (2009). A defendant must prove "cause" by showing an "objective factor external to the defense" that impeded his efforts to raise the claim in an earlier proceeding. *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). Prejudice is shown where the claimed constitutional error "so infected the entire trial that the resulting

conviction or sentence violates due process." *Id.* at 464. The defendant bears the burden of prompting the court to consider whether leave should be granted and " 'submit[ting] enough in the way of documentation to allow a circuit court to make that determination.' " *People v. Edwards*, 2012 IL 111711, ¶ 24, quoting *Tidwell*, 236 Ill. 2d at 161. We review the denial of a motion for leave to file a successive petition *de novo*. See *People v. Wrice*, 2012 IL 111860, ¶ 50.

¶ 17 We begin our analysis by recognizing the change in the law of involuntary intoxication, which defendant alleges supports his claim for postconviction relief. Section 6-3 of the Criminal Code of 1961 (720 ILCS 5/6-3 West (2002)) indicates that an individual is not criminally responsible for conduct if the individual is in a state of intoxication and "such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." At the time of defendant's trial, Illinois did not recognize the application of section 6-3 to cases where a defendant became intoxicated due to the unwarned side-effects resulting from the use of prescribed medication. See, *e.g.*, *People v. Rogers*, 123 Ill. 2d 487, 508 (1988) ("[T]he General Assembly, in using the expression 'involuntary intoxication,' was contemplating intoxication induced by some external influence such as trick, artifice or force."), *overruled*, *Hari*, 218 Ill. 2d at 294. However, prior to the filing of defendant's initial postconviction petition, our supreme court recognized that a defendant is involuntarily intoxicated within the meaning of the defense where the individual's condition results from an unexpected and unwarned adverse side effect of a prescription drug taken on a doctor's orders. *Hari*, 218 Ill. 2d at 294-95.

¶ 18 Defendant argues on appeal that, because the law of involuntary intoxication has changed since his trial and direct appeal, that the unreasonable assistance of postconviction counsel during the preparation of his initial postconviction petition, *i.e.*, the failure to include an argument based on that change in the law, constitutes cause for failing to include the issue in his initial postconviction petition. As to defendant's claim regarding prejudice, although his petition used the term ineffective assistance, he has disavowed such a claim on appeal, but has not identified the *constitutional* theory upon which he is basing his claim of prejudice. We ultimately conclude that it is unnecessary to discuss defendant's cause arguments because his prejudice claim, whatever its constitutional underpinnings, cannot survive scrutiny.

¶ 19 It has been clearly established that a defendant must meet both prongs of the cause-and-prejudice test before he should be granted leave to file a successive postconviction petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15, (citing *People v. Thompson*, 383 Ill. App. 3d 924, 929 (2008)). Accordingly, we need only examine the prejudice prong and may skip over the issue of cause if doing so is more efficient. See *Thompson*, 383 Ill. App. 3d at 929-30. If defendant cannot establish prejudice, then we cannot conclude the trial court erred when it denied him leave to file his successive postconviction petition.

¶ 20 In order to establish prejudice, defendant must show that he was "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." See *Pitsonbarger*, 205 Ill. 2d at 464. Our review of defendant's allegation of prejudice is hindered by his failure to clearly articulate, on appeal, the constitutional basis for his claim of error. Defendant's petition quite clearly alleged that trial counsel was ineffective for failing to raise an involuntary intoxication defense. The State responds to this allegation by citing *People*

v. Alberts, 383 Ill. App. 3d 374, 385 (2008) and arguing that defendant cannot establish ineffective assistance of counsel because it was not unreasonable to forego raising a defense that had not been recognized by Illinois courts. Defendant, apparently acknowledging *Alberts,* responds that he "explicitly rejected such an argument in his opening brief." Therefore, we are not called upon to determine whether trial counsel's actions were ineffective.

¶ 21 Recognizing that defendant's claim is not grounded in ineffective assistance of counsel, forces us to ask, upon what legal basis is defendant demanding we overturn his conviction? *Pitsonbarger* reminds us that a defendant must allege some violation of due process (see *Pitsonbarger*¸ 205 Ill. 2d at 464) and the Act reminds us that a defendant is entitled to relief if "there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both" (735 ILCS 5/122-1(a)(1) (West 2012)). Defendant, however, merely argues, without citation to authority, that: "The prejudice part of the cause-and-prejudice analysis is that the claim [defendant] raises here has merit and very well may exonerate him if raised at a new trial." This argument is meaningless because it fails to recognize defendant's obligation to identify a constitutional error that would entitle him to a new trial. It is not enough to simply allege that a defendant has new evidence or a new legal theory and believes that the outcome of a new trial would be different.

¶ 22 Regardless of the clarity, or lack thereof, with which defendant has presented his appellate arguments, we find them lacking in substance. To the extent that defendant argues that his claim "has merit" or "may well demonstrate his innocence," we note that the essence of the *Hari* defense is that a defendant took prescription medication in accordance with a doctor's order and that an unexpected and unwarned side effect deprived the defendant of substantial capacity

either to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. See *Hari*, 218 Ill. 2d at 295. Defendant's petition fails to allege any facts which would bring him within the defense.

¶ 23 For example, defendant fails to allege that he took prescription drugs in accordance with a doctor's orders. His petition alleges that he was prescribed numerous medications, but defendant never alleges that he actually used these drugs, much less so that he used them in accordance with a doctor's orders. Moreover, defendant's petition alleges that these drugs are known to have numerous deleterious side effects, but he fails to make the basic allegation that he, himself, suffered from these side effects or that they were severe enough to leave him incapable of conforming his behavior to the law. Defendant's claim on appeal is supported only by a series of assumptions unsupported by factual allegation. Defendant identifies drugs with potential side effects and alleges that those drugs were prescribed to him. However defendant then asks this court to assume that, he took the drugs, that he suffered from unwarned side effects, and that these side effects caused him to murder his ex-wife. We have carefully read defendant's successive postconviction petition and these essential allegations of fact are simply not in the petition. Accordingly he has not established prejudice as defined in *Pitsonbarger.*

¶ 24 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 25 Affirmed.