2016 IL App (4th) 150547-U

NO. 4-15-0547

FILED
March 2, 2016
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.	)	Sangamon County
SHAI TAN COOK,	)	No. 07CF1314
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly denied defendant's amended motion for leave to file a successive postconviction petition as defendant failed to satisfy the cause-and-prejudice test or demonstrate the fundamental-miscarriage-of-justice exception was applicable to overcome the bar against successive postconviction petitions.

¶ 2 In March 2015, defendant, Shai Tan Cook, filed an amended motion for leave to file a successive postconviction petition. Following a May 2015 hearing, the trial court denied defendant's motion. Defendant appeals, arguing the trial court erred in denying him leave to file a successive postconviction petition as he both satisfied the cause-and-prejudice test and demonstrated the fundamental-miscarriage-of-justice exception was applicable to overcome the bar against successive postconviction petitions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2007, the State charged defendant with 11 offenses relating to his involvement in a fatal vehicle collision on October 28, 2007. Seven of the charges were for aggravated driving under the influence (DUI) premised on defendant's alleged violations of various subsections of the DUI statute: count I charged defendant with driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2006)); count II, driving with a blood alcohol concentration (BAC) of 0.08 or greater (625 ILCS 5/11-501(a)(1) (West 2006)); count III, driving under the combined influence of drugs other than alcohol (625 ILCS 5/11-501(a)(4) (West 2006)); count IV, driving under the combined influence of alcohol and other drugs (625 ILCS 5/11-501(a)(5) (West 2006)); and counts V through VII, driving with any amount of a drug in his system resulting from unlawful consumption (625 ILCS 5/11-501(a)(6) (West 2006)). According to the charges, counts I through V were aggravated on the grounds defendant, while committing a DUI offense, was involved in a motor vehicle accident resulting in the death of another person (625 ILCS 5/11-501(d)(1)(F) (West 2006)); count VI, defendant, while committing a DUI offense, drove a vehicle which he knew or should have known was not covered by liability insurance (625 ILCS 5/11-501(d)(1)(H) (West 2006)); and count VII, defendant, while committing a DUI, operated a vehicle without a driver's license (625 ILCS 5/11-501(d)(1)(G) (West 2006)). The remaining counts charged traffic offenses: count VIII, failure to yield right of way to an emergency vehicle (625 ILCS 5/11-907(a)(1) (West 2006)); count IX, failure to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2006)); count X, operating an uninsured vehicle (625 ILCS 5/3-707(a) (West 2006)); and count XI, driving without a valid license (625 ILCS 5/6-101(a) (West 2006)). Count IX was later dismissed by motion of the State. *People v. Cook*, 2011 IL App (4th) 090875, ¶ 9, 957 N.E.2d 563.

¶ 5 In August 2009, the trial court held a jury trial. We have previously set out the events surrounding the fatal collision as follows:

> "That night, defendant was among a large group of patrons at J.D.'s, a now-defunct bar outside Illiopolis. Before traveling to J.D.'s, defendant had already consumed several alcoholic beverages at a Halloween party. Once there, he continued drinking. All told, by his own accounts, defendant drank at least four or five beers and at least two shots of vodka that night.
>
> The owner of J.D.'s ordered all the patrons to exit the bar when a fight broke out inside. The fight continued in the parking lot, where the other customers were slow to leave. Two police officers who were already at J.D.'s on an unrelated matter attempted to break up the fight. When their efforts stalled, the owner of J.D.'s 'maced everybody.' Illinois State Police trooper Brian McMillen, who was nearby on I-72, responded to a call for backup.
>
> J.D.'s was located south of I-72 on Dye Road, an undivided, two-lane highway with a speed limit of 55 miles per hour. When defendant and his passenger left J.D.'s, they found themselves in a line of traffic traveling north on Dye toward the interstate. The relative position of five of the cars was described in testimony at defendant's trial. The first of these was driven by Aretha Currie, the second by Tamara Apholone, the third by Justin Taylor, the fourth by defendant, and the fifth by Tarise Bryson.

As these drivers headed north, Trooper McMillen drove south on Dye toward J.D.'s from the interstate. When Currie saw Trooper McMillen's car with its overhead lights activated, she drove onto the shoulder and stopped. Apholone did the same. Whether these drivers were able to stop before Trooper McMillen passed in the opposite direction is not revealed by the record.

Behind Currie and Apholone, Taylor steered his entire car into the southbound lane. He and Trooper McMillen unsuccessfully attempted to avoid colliding. Trooper McMillen's car was traveling 93 miles per hour and Taylor's 30 miles per hour. The passenger sides of their cars made contact, sending Trooper McMillen's car into the northbound lane at 83 miles per hour and disabling his car's electrical functions, including its headlights and overhead lights. As it skidded into the lane of oncoming traffic, Trooper McMillen's car spun clockwise a quarter turn, throwing its tail end onto the shoulder and leaving its front end in the roadway. Defendant's car then struck the driver-side passenger compartment of Trooper McMillen's car perpendicularly. Defendant had cut his speed from 45 to 38 miles per hour before impact; Trooper McMillen's car, spinning out of control, had slowed to 77 miles per hour. Behind defendant, Bryson had begun slowing when he first noticed Trooper McMillen's police lights—by his account, approximately 5 or 10 seconds before the accident; when he anticipated

> the second collision, he steered his car into the field abutting the shoulder to avoid further collision. Trooper McMillen was killed upon the impact of his car with defendant's. Defendant and his passenger sustained injuries requiring hospitalization. Taylor was uninjured.
>
> Both Taylor and defendant were intoxicated at the time of the accident. Taylor had a [BAC] of 0.164 and some 'over-the-counter cold medicine' was detected in his system. Based on samples taken at the hospital, defendant's BAC was determined to have been between 0.109 and 0.119 at the time of the accident. Tests also revealed the presence of the controlled substances ketamine and methylenedioxymethamphetamine (MDMA) in defendant's blood and urine, respectively." *Cook*, 2011 IL App (4th) 090875, ¶¶ 3-8, 957 N.E.2d 563.

¶ 6 Following defendant's trial, a jury convicted him of counts I, II, IV, VI through VIII, X, and XI, as charged. Additionally, defendant was convicted of DUI under count V. In October 2009, the trial court sentenced defendant to (1) 14 years' imprisonment each on counts I, II, and IV; (2) 365 days in jail on count V; (3) 6 years' imprisonment each on counts VI and VII; and (4) statutory fines on counts VIII, X, and XI. All sentences were to be served concurrently. *Cook*, 2011 IL App (4th) 090875, ¶ 10, 957 N.E.2d 563.

¶ 7 Defendant appealed his convictions on counts I, II, and IV. *Cook*, 2011 IL App (4th) 090875, ¶ 11, 957 N.E.2d 563. We rejected defendant's argument the State failed to prove him guilty of aggravated DUI on all three counts but, upon finding his convictions violated the

one act, one crime rule, we vacated his convictions on counts II and IV. *Cook*, 2011 IL App (4th) 090875, ¶¶ 14, 36, 957 N.E.2d 563.

¶ 8 In February 2012, defendant filed a *pro se* postconviction petition, alleging his constitutional rights were violated as indicated in his posttrial motion, which he attached to the petition. In May 2012, the trial court dismissed defendant's petition at the first stage of postconviction proceedings, and defendant appealed. In February 2013, defendant filed a motion to dismiss his appeal, which this court granted.

¶ 9 In November 2014, defendant, through counsel, filed a motion for leave to file a successive postconviction petition. Following a January 2015 hearing, the trial court denied defendant's motion but granted leave to amend. A written order was entered in March 2015.

¶ 10 In April 2015, defendant filed an amended motion for leave to file a successive postconviction petition. Defendant's amended motion addressed (1) four bases he intended to present as ineffective-assistance-of-trial-counsel claims in a successive postconviction petition, (2) the alleged cause for failing to present those claims in his initial postconviction petition, (3) the alleged prejudice he suffered by trial counsel's alleged failures, and (4) separate claims of actual innocence.

¶ 11 As to the bases of his ineffective-assistance claims, defendant alleged trial counsel provided ineffective assistance by (1) failing to interview and introduce an expert to testify Trooper McMillen was killed during the first collision with Taylor, (2) failing to make Trooper McMillen's unsafe operation of his squad car an issue at trial, (3) failing to interview and introduce an expert to testify he did not have MDMA or ketamine in his system at the time of the collision, and (4) a combination of various trial errors and omissions. Defendant alleged these claims were supported by affidavits he had attached to a proposed successive postconviction pe-

tition. As to the cause of his failure to raise his claims in his initial postconviction petition, defendant alleged, in relevant part, his imprisonment prevented him from the benefit of and access to counsel, an investigator, occurrence and expert witnesses, trial counsel, and adequate funds. As to prejudice, defendant alleged, without trial counsel's errors, the (1) jury could have concluded the collision with his vehicle was not the proximate cause of Trooper McMillen's death, nor was he under the influence of MDMA and ketamine at the time of the collision; and (2) outcome of his trial would have been different.

¶ 12 Defendant's amended motion further alleged the "newly discovered" evidence contained in the affidavits, either separately or in combination, demonstrated his actual innocence. In relevant part, defendant asserted Dr. John Peterson's affidavit demonstrated his actual innocence of all convictions based on the presence of controlled substances in his system. Dr. Peterson opined, based on his review of defendant's medical records from October 27, 2007, through November 15, 2007; two laboratory reports dated October 30, 2007, and December 27, 2007; and the trial testimony of a forensic scientist, as follows: (1) the test results did not show the presence of MDMA in defendant's system at the time of the collision; (2) he could not rule out a false-positive ketamine result in defendant's blood sample; and (3) other explanations existed for the presence of ketamine in defendant's urine, including errors in collecting the urine sample and the possible undocumented use of ketamine in defendant's treatment.

¶ 13 Following a May 2015 hearing, the trial court denied defendant's amended motion for leave to file a successive postconviction petition as defendant failed to (1) demonstrate cause and prejudice for failing to raise his claims in his initial postconviction petition, or (2) present newly discovered evidence supporting a claim of actual innocence.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues the trial court erred in denying his amended motion for leave to file a successive postconviction petition as he both satisfied the cause-and-prejudice test and demonstrated the fundamental-miscarriage-of-justice exception was applicable to overcome the bar against successive postconviction petitions. We review *de novo* the trial court's denial of defendant's motion. See *People v. Shotts*, 2015 IL App (4th) 130695, ¶ 66, 33 N.E.3d 313.

¶ 17 A. Leave To File a Successive Postconviction Petition

¶ 18 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides criminal defendants a manner 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. The Act contemplates the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2014)), and any claim not raised in the initial petition is deemed forfeited (725 ILCS 5/122-3 (West 2014)). *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909.

¶ 19 Our supreme court has identified two bases upon which the statutory bar against successive postconviction petitions 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 [defendant] can establish 'cause and prejudice' for the failure to raise the claim earlier." *Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829; 725 ILCS 5/122-1(f) (West 2014) (codifying the cause-and-prejudice test). "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.

¶ 20 Successive postconviction petitions are disfavored by Illinois courts. *People v. Smith*, 2014 IL 115946, ¶ 31, 21 N.E.3d 1172. "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. Crenshaw*, 2015 IL App (4th) 131035, ¶ 27, 38 N.E.3d 1256 (quoting *People v. Tenner*, 206 Ill. 2d 381, 392, 794 N.E.2d 238, 245 (2002)).

¶ 21 B. Cause-and-Prejudice Test

¶ 22 Defendant asserts the trial court erred in denying his amended motion as he satisfied the cause-and-prejudice test to overcome the bar against successive postconviction petitions. In response, the State asserts the trial court's judgment was correct in all respects as defendant failed to demonstrate either cause or prejudice.

¶ 23 We initially reject defendant's contention the State "waived" (forfeited) its "cause" argument. Although the State focused on the prejudice prong of the cause-and-prejudice test before the trial court, it did not concede or adopt defendant's argument he demonstrated cause. The State did not argue in the trial court a theory inconsistent with its position before this court. As the trial court denied defendant's amended motion in part for defendant's failure to satisfy the cause prong of the cause-and-prejudice test, the State may advance such an argument on appeal in support of the trial court's judgment. See *People v. Walker*, 177 Ill. App. 3d 743, 746, 532 N.E.2d 447, 448-49 (1988); *People v. Hieber*, 258 Ill. App. 3d 144, 151, 629 N.E.2d 235, 239 (1994).

¶ 24 Under the cause-and-prejudice test, leave of court may be granted only if a defendant demonstrates both cause for his or her failure to bring a claim in an initial postconviction petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2014). To estab-

lish cause, a defendant must demonstrate an objective factor, external to the defense, impeded his or her ability to raise a claim during initial postconviction proceedings. *People v. Evans*, 2013 IL 113471, ¶ 10, 989 N.E.2d 1096; 725 ILCS 5/122-1(f)(1) (West 2014). On appeal, defendant asserts the following bases established cause for his failure to raise his ineffective-assistance-of-counsel claims in his initial postconviction petition: he (1) had no benefit of counsel, (2) had no benefit of an investigator, (3) had no access to expert or occurrence witnesses, (4) had no opportunity to question trial counsel, and (5) lacked sufficient funds to conduct an investigation. Defendant presents this court with no authority for the proposition these bases are sufficient to serve as objective factors to overcome the bar against successive postconviction petitions. Rather, defendant requests we examine the policy behind permitting successive postconviction petitions and adopt the logic behind the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012), which found a procedural default will not bar a federal *habeas* court from hearing a substantial claim of ineffective assistance at trial if the defendant did not have counsel at the initial-review collateral proceeding and the state law required claims of ineffective assistance to be raised during initial-review collateral proceedings.

¶ 25 We find the legislative intent is clear; the bases advanced by defendant cannot be considered cause to relax the bar against successive postconviction petitions. As previously indicated, the Act contemplates the filing of only one postconviction petition without leave to file an amended petition. 725 ILCS 5/122-1(f) (West 2014). The Act further provides any claim not raised in an initial postconviction petition is deemed forfeited. 725 ILCS 5/122-3 (West 2014). Successive postconviction petitions are disfavored by Illinois courts and leave of court will be granted in only "very limited circumstances" as successive petitions plague the finality of criminal litigation. *Tenner*, 206 Ill. 2d at 392, 794 N.E.2d at 245. Allowing successive postconviction

petitions to proceed on such bases would circumvent the legislature's intent by consuming the procedural default provisions of the Act and undermining the finality of criminal litigation. A defendant who elects to file a *pro se* postconviction petition is responsible for the results of his actions, and such actions cannot serve as cause to allow a successive petition to move forward. See *Evans*, 2013 IL 113471, ¶ 13, 989 N.E.2d 1096 (defendant's subjective ignorance of the law is not an objective factor that impeded his ability to raise his claims in his initial postconviction petition).

¶ 26 As defendant failed to demonstrate cause for his failure to raise his claims in his initial postconviction petition, we need not reach whether he has demonstrated prejudice. See *People v. Love*, 2013 IL App (2d) 120600, ¶ 50, 2 N.E.3d 628.

¶ 27 C. Fundamental-Miscarriage-of-Justice Exception

¶ 28 Defendant asserts the trial court erred in denying his amended motion as he demonstrated the fundamental-miscarriage-of-justice exception was applicable to overcome the bar against successive postconviction petitions. On appeal, the only basis defendant asserts satisfied this exception relates to the affidavit of Dr. Peterson. Specifically, defendant asserts Dr. Peterson's affidavit, which indicated he had no MDMA in his system and may have had no ketamine in his system, supports his freestanding claim of actual innocence of all convictions based on the presence of controlled substances.

¶ 29 Even where a defendant cannot show cause and prejudice, his or her failure to raise a claim in an earlier petition may be excused to prevent a fundamental miscarriage of justice. *People v. Ortiz*, 235 Ill. 2d 319, 330, 919 N.E.2d 941, 948 (2009). A fundamental miscarriage of justice occurs where a defendant can set forth a claim of actual innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). "[T]he hallmark of 'actual

innocence' means 'total vindication,' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636, 900 N.E.2d 396, 403 (2008). The evidence of innocence must be (1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of such a conclusive character it would probably change the result on retrial. *Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829; *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004). "[L]eave of court should be granted when the [defendant's] supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Edwards*, 2012 IL 111711, ¶ 24, 969 N.E.2d 829 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

¶ 30 At or prior to trial, defendant was on notice (1) hospital blood and urine screens reported negative for drug indications, (2) he had previously stated to a police officer he had not consumed drugs "in over a month", (3) an Illinois State Police preliminary urine screening showed ketamine and MDMA, and (4) an Illinois State Police blood test showed no MDMA but ketamine at less than 12.5 micrograms per liter. Although the opinion evidence did not materialize until after the dismissal of defendant's initial postconviction petition, evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial. See *Collier*, 387 Ill. App. 3d. at 637, 900 N.E.2d at 403. Defendant likewise has failed to meet his burden of showing similar expert testimony could not have been discovered before trial with due diligence. See *People v. Snow*, 2012 IL App (4th) 110415, ¶ 22, 964 N.E.2d 1139. The opinions in Dr. Peterson's affidavit, measured against the State's evidence, address considerations of credibility that go to reasonable doubt, not actual innocence. See *People v. Green*, 2012 IL App (4th) 101034, ¶ 36, 970 N.E.2d 101. Dr. Peterson's affidavit is insufficient to serve as basis for a freestanding claim of actual innocence.

¶ 31 The trial court properly denied defendant's amended motion for leave to file a successive postconviction petition as defendant failed to satisfy the cause-and-prejudice test or demonstrate the fundamental-miscarriage-of-justice exception was applicable to overcome the bar against successive postconviction petitions.

¶ 32 III. CONCLUSION

¶ 33 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. 55 ILCS 5/4-2002 (West 2014).

¶ 34 Affirmed.