2017 IL App (2d) 150470-U
Nos. 2-15-0470 & 15-1170 cons.
Order filed September 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-3223
ELIAS R. DIAZ,	)	Honorable Leonard J. Wojtecki and James C. Hallock, Judges, Presiding.
Defendant-Appellant.	)	

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied both of defendant's motions for leave to file successive postconviction petitions. In his first motion, defendant did not advance a claim that was cognizable under the Post-Conviction Hearing Act. In his other motion, defendant did not show that there was justification for further proceedings on the issue of ineffective assistance of trial counsel.

¶ 2 Defendant, Elias Diaz, appeals two separate orders denying his motions for leave to file successive petitions under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 1996)) in connection with the shooting death of a young boy. The matter proceeded to a bench trial. The State presented evidence that on November 10, 1996, defendant drove Mark Downs and Ruben Davila to and from a residence in Aurora, Illinois with the intent of shooting a rival gang member, Robert Saltijeral. Downs fired numerous gunshots into the home. As it turned out, Saltijeral no longer resided there, and the gunshots killed six-year-old Nico Contreras. Davila testified against defendant, detailing his own involvement in the shooting while also implicating Downs and defendant. Two other witnesses, Alejandro Solis and Billie Mireles, testified that defendant made inculpatory statements after the murder. Defendant testified on his own behalf and denied participating in the shooting. Downs did not testify. The trial court found defendant guilty and sentenced him to 60 years' imprisonment. Downs was subsequently convicted of murder in separate proceedings.

¶ 5 We affirmed defendant's conviction on direct appeal. *People v. Diaz*, No. 2-09-0199 (unpublished order under Supreme Court Rule 23). In *People v. Diaz*, 2014 IL App (2d) 110877-U (unpublished order under Supreme Court Rule 23), we affirmed the first-stage dismissal of defendant's original postconviction petition; we also affirmed an order denying defendant's second petition to vacate his conviction pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)).

¶ 6 In this consolidated appeal, defendant challenges the orders denying him leave to file his third and fourth postconviction petitions, respectively.

¶ 7 (A) Appeal No. 15-0470

¶ 8 Appeal No. 15-0470 relates to defendant's February 2015 motion for leave to file a third postconviction petition. To understand defendant's arguments on appeal, it is necessary to detail

the events that occurred in connection with defendant's second postconviction petition.

¶ 9 On June 15, 2012, defendant, represented by attorney Stephen L. Richards, filed a postconviction petition alleging actual innocence (the "actual innocence petition"). Defendant attached an affidavit signed by Downs on September 29, 2011. Downs averred that "about a day" after Contreras was murdered, Davila told him that he had committed the shooting alone and that he had done so in an attempt to retaliate against Saltijeral for a previous shooting. Downs learned through his own lawyer that defendant wanted him to testify. Downs' lawyer said that Downs would not testify for defendant, as it was not in Downs' best interest to do so. Although Downs disagreed with his lawyer, he was never interviewed by defendant's counsel, nor was he subpoenaed to testify at defendant's trial.

¶ 10 Defendant also submitted his own affidavit in support of the actual innocence petition. He averred that he asked his trial counsel to call Downs as a witness because he believed that Downs could contradict Davila's trial testimony. However, defendant's attorney did not attempt to contact Downs or subpoena him to testify. Instead, defendant's attorney was informed that Downs would invoke his fifth amendment rights if he were called to testify. According to defendant, he did not know before September 2011 that Downs could have testified that Davila admitted one day after the murder to having committed the murder alone.

¶ 11 On August 20, 2012, the trial court summarily dismissed defendant's actual innocence petition. Richards filed a notice of appeal from that order on defendant's behalf, and the appeal was docketed in this court as No. 12-1056. Shortly thereafter, defendant filed a *pro se* motion in the trial court to reconsider the August 20 order. The trial court denied that motion on October 1, 2012. Defendant filed a *pro se* notice of appeal from the October 1 order, and that appeal was docketed in this court as No. 13-0132.

¶ 12 A review of this court's own records reveals the following about appeals Nos. 12-1056 and 13-0132. See *Auto-Owners Insurance Co. v. Konow*, 2016 IL App (2d) 150860, ¶ 7 (appellate court may take judicial notice of its own records). On October 18, 2012, we entered an order in appeal No. 12-1056 requiring defendant to submit a docketing statement and pay a filing fee within seven days. A copy of that order was sent to Richards. On November 21, 2012, we dismissed the appeal for noncompliance with the October 18 order. There was no further activity in that appeal.

¶ 13 On April 15, 2013, we entered an order in appeal No. 13-0132 allowing defendant 10 days to file both the record on appeal and a brief. A copy of that order was sent to Richards. On May 9, 2013, Richards filed a motion to withdraw as counsel on appeal. He explained that defendant's relatives could not pay the legal fees and that defendant was discharging him as his attorney. On May 10, 2013, we dismissed the appeal for failure to comply with the April 15 order. On June 14, 2013, we denied Richards' motion to withdraw without prejudice to re-filing a motion that complied with applicable rules. There was no further activity in that appeal.

¶ 14 On February 25, 2015, defendant filed a *pro se* motion seeking leave to file a successive postconviction petition (the "February 2015 motion"). He raised five issues, but only his arguments with respect to Richards' representation in connection with the June 2012 actual innocence petition are pertinent to this appeal. Defendant argued as follows. His brother obtained Richards as defendant's counsel on a payment plan. Defendant told Richards that Downs had an affidavit that would be helpful to defendant. Richards told defendant that he would contact Downs. There was no further communication between defendant and Richards. Richards then filed the actual innocence petition on defendant's behalf, and it was dismissed by the trial court due to the lack of corroborating evidence to support Downs' affidavit. Defendant

believed that Richards could have discovered the necessary corroborating evidence had he thoroughly reviewed the records of both defendant's trial and Downs' trial. According to defendant, Richards "then removed himself from [defendant's] case due to [defendant's] brother not being able to uphold financial obligation [*sic*]." In doing so, Richards "failed to notify appellate defenders [*sic*] office to appoint attorney, or to advise [defendant] that he may request for [*sic*] an appointed attorney from the appellate defenders [*sic*] office, thereby abandoning [defendant] to fend for self [*sic*]." Defendant contended that he was thus deprived of reasonable assistance of appellate counsel and was barred from "raising any challenges concerning a reasonable level of assistance of postconviction counsel, in that he failed to comply with [Illinois Supreme Court] Rule 651(c)."

¶ 15 On March 30, 2015, the trial court, Judge Leonard J. Wojtecki presiding, denied defendant leave to file a third postconviction petition. Defendant filed a timely notice of appeal from that order.

¶ 16 (B) Appeal No. 15-1170

¶ 17 On July 10, 2015, defendant filed a motion seeking leave to file a fourth postconviction petition (the "July 2015 motion"). He alleged actual innocence based on newly discovered evidence in the form of an affidavit from Jose Salinas. Defendant further alleged that he was denied the effective assistance of counsel when his trial counsel failed to call Salinas as a witness and failed to discuss Salinas' statements with defendant.

¶ 18 Salinas averred as follows. In late November 2000, he went with a few gang members to Davila's house. When the topic of Contreras' murder came up, Davila broke down and said that "it was all an accident." Davila stated that he was following the orders of Solis and that "the little boy wasn't suppose [*sic*] to be in the room." Davila told Salinas that, to prove his loyalty to

the gang, Davila was "out to get" Saltijeral, who was the leader of a rival gang. When Salinas asked Davila "who he was with," Davila responded that "he was alone."

¶ 19 According to Salinas, he wrote this affidavit for defendant because he knew that defendant was not involved in the Contreras murder. Salinas averred that he did not come forward with this affidavit sooner because he did not want to be a "snitch." Salinas claimed that he could not go on knowing that defendant was imprisoned for something he was not involved in.

¶ 20 Salinas continued:

> "[A]t the both [*sic*] [defendant] and I were both fighting our cases and represented by the same attorney, Kathleen Colton. Kathleen came to the county jail to question me of a statement [*sic*] I made to my ex-wife Cecilia Barraza pertaining to [defendant's] involvement in [the Contreras] murder. I told Kathleen about all the information I had and knew. But told me [*sic*] not to get involved and that she won't be calling me as a witness."

¶ 21 Defendant also submitted his own affidavit in support of his motion for leave to file a fourth postconviction petition. He attested as follows. Salinas' affidavit was not available to him until he personally spoke with Salinas, as defendant had not been aware of the information in the affidavit or that Salinas had given this information to defendant's trial counsel. Trial counsel's failure to discuss Salinas' statements with defendant deprived him of his ability to have input as to his defense. Additionally, if counsel had a conflict of interest due to representing both defendant and Salinas in different matters, defendant would have fired her. Counsel deprived him of his opportunity to do so by withholding information from him.

¶ 22 On September 16, 2015, the court, Judge James C. Hallock presiding, denied defendant's motion for leave to file a fourth postconviction petition. Defendant filed a motion for reconsideration, which the court denied. Defendant timely appealed.

¶ 23 II. ANALYSIS

¶ 24 "[T]he Act provides a statutory remedy to criminal defendants who claim that substantial violations of their constitutional rights occurred at trial." *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act contemplates a single postconviction proceeding (*Edwards*, 2012 IL 111711, ¶ 22), and a defendant must obtain leave of court before filing a successive petition (725 ILCS 5/122-1(f) (West 2016)). A defendant waives any claims that were not raised in the original postconviction petition (725 ILCS 5/122-3 (West 2016)), and this statutory bar may be relaxed only " 'when fundamental fairness so requires' " (*People v. Coleman*, 2013 IL 113307, ¶ 81 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002))).

¶ 25 To raise a defaulted claim, a defendant must either satisfy the "cause-and-prejudice test" or advance a claim of actual innocence. *Coleman*, 2013 IL 113307, ¶ 82-83. "Cause" means "an objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding." *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). "Prejudice" requires the defendant to show that "the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Morgan*, 212 Ill. 2d at 154. To prevail under a theory of actual innocence, the defendant must present evidence that is "newly discovered," which means that it was not available at the time of trial and could not have been discovered sooner through diligence. *Morgan*, 212 Ill. 2d at 154. Such evidence must also be "material and noncumulative" and "of such conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154.

¶ 26 A trial court should deny leave to file a successive postconviction petition "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. We review *de novo* the decision to deny leave to file a successive petition. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 74-75.

¶ 27 (A) Appeal No. 15-0470

¶ 28 Defendant acknowledges that his February 2015 motion for leave to file a successive postconviction petition "does not directly allege a cognizable claim under the [Act] because it does not allege that any constitutional violation occurred in the proceedings which resulted in [his] conviction." Nevertheless, he argues that his claim "dovetails with the actual innocence claim" he raised in his June 2012 petition. He thus argues that he satisfied the cause-and-prejudice test by alleging that he was denied appellate review of his earlier actual innocence petition due to Richards' abandonment of the cause on appeal.

¶ 29 Specifically, defendant submits that he demonstrated cause for failing to raise his abandonment claim sooner, given that this claim was not available before the appeals were dismissed. With respect to prejudice, he notes that the Illinois Constitution gave him the right to appeal the order dismissing the June 2012 actual innocence petition. He maintains that *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and its progeny—which involved defendants who were deprived of *direct appeals* due to the ineffective assistance of their counsel—should apply here, because "Richards' abandonment of the appeal[s] caused essentially the same prejudice to [defendant]." Accordingly, he submits that the deprivation of his constitutional right to appeal the order pertaining to the actual innocence petition establishes prejudice for purposes of the

cause-and-prejudice test. Alternatively, if this court does not presume prejudice, defendant proposes that there was a reasonable probability that he would have been successful on appeal but for Richards' inaction.

¶ 30 The State responds that the claim defendant advances is not cognizable under the Act. We agree with the State.

¶ 31 The Act provides relief in situations where there was a substantial denial of the petitioner's constitutional rights "in the proceedings which resulted in his or her conviction." 725 ILCS 5/122-1(a)(1) (West 2016). Defendant is not complaining about the representation he received at trial or on direct appeal. Instead, he alleges ineffective assistance of postconviction counsel for allowing a postconviction appeal to be dismissed. But unlike a direct appeal from a criminal conviction, there is no constitutional right to assistance of counsel in postconviction proceedings, and any provision of counsel is merely a reflection of legislative grace. *People v. Cotto*, 2016 IL 119006, ¶ 29; see also *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Our supreme court has explicitly held that "a petitioner's claim of ineffective assistance of post-conviction counsel at a prior post-conviction proceeding does not present a basis upon which relief may be granted under the Act." *People v. Flores*, 153 Ill. 2d 264, 277 (1992). Defendant's reliance on cases addressing the right to a direct appeal is thus misguided. Although a defendant has the right to appeal from final orders in postconviction proceedings (see Ill. Const. 1970, art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court ***."), the deprivation of that right is not a constitutional violation that is connected to "the proceedings which resulted in [the defendant's] conviction." 725 ILCS 5/122-1(a)(1) (West 2016).

¶ 32 To the extent that defendant's claim of ineffective assistance of postconviction counsel "dovetails" with his June 2012 actual innocence petition, that actual innocence claim is *res judicata*, having been rejected by the trial court. See *Flores*, 153 Ill. 2d at 274 (a court's ruling on a postconviction petition has *res judicata* effect as to the claims that were raised in that petition).

¶ 33 For these reasons, we affirm the order denying defendant's February 2015 motion for leave to file a successive postconviction petition. If defendant continues to believe that there was merit to the actual innocence claim that he presented to the trial court in 2012, we note that he is free to petition the supreme court to invoke its supervisory authority to reinstate appeals Nos. 12-1056 and 13-0132. See *People v. Lyles*, 217 Ill. 2d 210, 217-218 (2005).

¶ 34 (B) Appeal No. 15-1170

¶ 35 Defendant also argues that the trial court erroneously denied his July 2015 motion for leave to file a successive postconviction petition, which was supported by Salinas' affidavit. According to defendant, he demonstrated cause for failing to present his claim of ineffective assistance earlier, given that he was not aware until 2015 that Salinas' testimony was available or that such information had been disclosed to his trial counsel. He submits that Salinas' proffered testimony would have corroborated his own testimony and bolstered certain other evidence while contradicting the testimony of Solis and Davila.

¶ 36 As noted above, "cause" means "an objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding." *Morgan*, 212 Ill. 2d at 153. We agree that defendant showed cause for failing to raise his claim in an earlier proceeding, given his contention of ineffective assistance of counsel and his allegation that Salinas relayed information to defendant's counsel which she did not in turn relate to defendant. See *People v.*

Mitchell, 2012 IL App (1st) 100907, ¶ 52 ("Because a reasonably diligent defendant may rely on his attorney to conduct his defense, ineffective assistance of counsel constitutes cause for a defendant's failure to raise an issue at a stage of proceedings for which he has relied on his counsel."). Defendant's affidavit supports that he was not previously aware of Salinas' potential testimony.

¶ 37 "Prejudice," for purposes of the cause-and-prejudice test, requires a defendant to show that "the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Morgan*, 212 Ill. 2d at 154. Defendant attempts to meet the prejudice requirement by arguing ineffective assistance of trial counsel for failing to investigate and present Salinas as a witness. That argument, in turn, implicates the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to show ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that such deficiency prejudiced the defense. *Strickland*, 466 U.S at 687. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 38 We hold that defendant was not prejudiced by his counsel's conduct within the meaning of *Strickland*. As a result, he cannot satisfy the prejudice requirement of the cause-and-prejudice test, and the trial court properly denied his July 2015 motion for leave to file a successive postconviction petition.

¶ 39 "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel." *People v. West*, 187 Ill. 2d 418, 432

(1999). Such decisions are "viewed as matters of trial strategy" and "are generally immune from claims of ineffective assistance of counsel." *West*, 187 Ill. 2d at 432.

¶ 40 Conspicuously absent from Salinas' affidavit is any indication that he was willing to testify on defendant's behalf at the time of trial. Salinas claimed that he told defendant's counsel (who was also his own counsel in a separate proceeding) "about all the information [he] had and knew." However, he also asserted that he did not come forward with an affidavit for defendant sooner because he did not want to be a "snitch." If Salinas was unwilling prior to 2015 to provide information in an affidavit, there is no reason to expect that he was willing to share that same information in open court at defendant's 2008 trial.

¶ 41 Furthermore, it is not clear from Salinas' affidavit that Davila meant to imply that defendant played *no part* in the Contreras shooting. According to Salinas, in November 2000, Davila told him: (1) "it was all an accident"; (2) Davila was following orders from Solis; (3) Contreras "wasn't suppose [*sic*] to be in the room"; (4) Davila was "out to get" Saltijeral, who was the leader of a rival gang; and (5) the reason for Davila's actions was to prove his loyalty to his new gang. According to Salinas, when he asked Davila "who he was with," Davila "said he was alone." None of the statements attributed to Davila in Salinas' affidavit explicitly excluded defendant as the getaway driver in the Contreras murder, which was the State's theory at trial. Specifically, it is not clear from Salinas' affidavit whether Davila was saying that he was "alone" at the moment the shooting occurred (which would not necessarily exclude the possibility that defendant was waiting in the car) or that he was "alone" in the sense that defendant played no role whatsoever in the crime.

¶ 42 Even assuming that Davila intended to imply to Salinas that defendant played no part whatsoever in the shooting, it is doubtful that Salinas' testimony would have been admitted at

trial. In arguing that Salinas' testimony would have "corroborat[ed]" or "bolstered" certain evidence while "contradict[ing]" other evidence, defendant assumes that Salinas' testimony was admissible as substantive evidence. But he offers no theory for admitting such testimony. Salinas did not claim to have any personal knowledge of the shooting, and anything that Davila told him about the shooting was hearsay. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015) (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). To that end, "an unsworn, out-of-court declaration that the declarant committed the crime, and not the defendant on trial, is generally inadmissible, even though the declaration is against the declarant's penal interest." *People v. Tenney*, 205 Ill. 2d 411, 433 (2002). Defendant does not argue that Davila's statement to Salinas would have been admissible as an exception to that general rule, and any argument that he might have raised along those lines is forfeited. See Ill. S. Ct R. 341(h)(7) (eff. Jan 1, 2016) (points not argued in the appellant's brief are waived and may not be raised in a petition for rehearing).

¶ 43 At any rate, the ultimate question in determining the admissibility of an extrajudicial confession is " 'whether it was made under circumstances which provide considerable assurance of its reliability by objective indicia of trustworthiness.' " *Tenney*, 205 Ill. 2d at 435 (quoting *People v. Thomas*, 171 Ill. 2d 207, 216 (1996)). Nothing in Salinas' account of his discussion with Davila, which occurred four years after the Contreras murder, appears to reflect considerable assurances of reliability by objective indicia of trustworthiness. A defendant suffers no prejudice from his counsel's failure to present inadmissible evidence. See *People v. Pecoraro*, 175 Ill. 2d 294, 323 (1997) (where the results of a polygraph test would have been

inadmissible, trial counsel's alleged failure to discover the results of that test did not prejudice the defendant under the *Strickland* standard).

¶ 44 A trial court should deny leave to file a successive postconviction petition "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." *Smith*, 2014 IL 115946, ¶ 35. As explained above, there is substantial reason to doubt that Salinas would have testified about his conversation with Davila had defendant's counsel called him at trial. Additionally, it is not clear from Salinas' affidavit that Davila intended to imply that defendant played no role whatsoever in the murder. Defendant also offers no insight as to how his counsel could have introduced Salinas' testimony into evidence, and it is doubtful that the proffered testimony would have been admitted. Under these circumstances, there is no indication that trial counsel's failure to call Salinas as a witness was anything other than reasonable trial strategy. Defendant's July 2015 motion for leave to file a successive postconviction petition, along with its supporting documentation, was insufficient to justify further proceedings on the issue of ineffective assistance of trial counsel.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgments of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 47 Affirmed.