2017 IL App (4th) 141114-U

NO. 4-14-1114

FILED
February 14, 2017
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.	)	Macon County
CORNELIUS L. JONES,	)	No. 08CF1053
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appellate counsel's motion to withdraw and affirmed the trial court's judgment.

¶ 2 In January 2009, a jury found defendant, Cornelius L. Jones, guilty of first degree murder. In February 2009, the trial court sentenced him to 60 years in prison. This court affirmed on direct appeal. In March 2011, defendant filed a *pro se* petition for postconviction relief, which the trial court summarily dismissed. This court affirmed. In November 2014, defendant filed a motion for leave to file a successive postconviction petition, which the trial court denied in December 2014.

¶ 3 On appeal, the office of the State Appellate Defender (OSAD) moves to withdraw its representation of defendant, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending an appeal in this cause would be without merit. We grant OSAD's motion and affirm the trial

court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In July 2008, the State charged defendant and Dorian Harris by information with six counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)) in connection with the death of Benny Topps. Defendant pleaded not guilty.

¶ 6 In November 2008, defendant filed a motion to suppress evidence, claiming evidence obtained following a traffic stop was inadmissible due to an unlawful search and seizure by the police. In December 2008, the trial court denied the motion.

¶ 7 In January 2009, defendant's jury trial on three counts of first degree murder commenced. Terry Bond testified Benny Topps was one of his best friends. On July 23, 2008, a man with dreadlocks came to a mechanic shop and asked to speak with Benny. Benny walked out with the man. When the men reached a nearby alley, Bond saw the man with the dreadlocks raise "a shiny object in his hand." Bond then heard a shot and then 8 to 10 more. Bond then went out and saw Benny lying in the alley. On cross-examination, Bond stated defendant was the man with the dreadlocks.

¶ 8 Joe Gipson testified he saw a male exit a Cadillac and motion to Benny to come over to him. Gipson saw Benny walk outside without anything in his hands. Gipson told Benny not to go because he saw the man had a gun in his hand. Benny told Gipson not to worry about it and that " 'I got this.' " Gipson saw Benny and the man stand and talk at the back of the car. Benny turned around to walk away when Gipson heard a gunshot. Benny fell down and "the dude came up and finished shooting him."

¶ 9 Lieutenant Topps, Benny's brother, testified he and Benny agreed to pick up cocaine for defendant. Benny traveled to Texas with $45,000 from defendant but returned

without any cocaine or money. Upon Benny's return, Lieutenant described him as being nervous. Lieutenant and his brother discussed giving defendant several vehicles to replace the lost money.

¶ 10 Decatur police officer Steven Carroll testified he responded to a report of a shooting at approximately 10 a.m. on July 23, 2008. Upon arrival, he observed several casings in an alley and near the unresponsive victim, Benny Topps. Decatur police officer Joseph Kish testified he reviewed a surveillance video from a nearby business and observed a tan- or gold-colored Cadillac drive by three times.

¶ 11 Illinois State Police Trooper Anthony Maro testified he was advised of the shooting and that the possible suspect vehicle was a gold Cadillac occupied by a black male with dreadlocks. At approximately 10:40 a.m., Maro executed a traffic stop of a gold Cadillac occupied by two males. An interior inspection of the car revealed "a live round and a spent shell casing on the passenger seat." He also found a black duffel bag containing a dreadlocks wig and a handgun.

¶ 12 Dr. John Ralston, a forensic pathologist, testified he performed an autopsy on Benny Topps. Ralston observed 10 wounds on the body. He stated the "entrance wounds were located posturally on his back," with the possible exception of a wrist wound. One shot passed through Benny's neck, fracturing his cervical spine. Another projectile went from his lower back through his right ventricle and then the right atrium of his heart. Ralston stated this wound "would have been rapidly fatal." Another projectile hit his aorta, "which would have caused massive hemorrhage." Based on a reasonable degree of medical certainty, Ralston opined Benny died from multiple gunshot wounds.

¶ 13 Cory Formea, a forensic scientist with the Illinois State Police, testified a

deoxyribonucleic-acid (DNA) profile from the dreadlocks hat/wig matched the DNA profile of defendant. Vickie Reels, a forensic scientist with the Illinois State Police, testified the gun found in the duffel bag fired the bullet casings and bullets recovered by the police.

¶ 14 Defendant testified in his own defense and admitted he had a prior conviction for drug trafficking with a firearm. Benny and Lieutenant Topps are his step-uncles. When Benny came to defendant's mother's house on previous occasions, defendant saw him with a weapon "all the time." Defendant denied talking with Benny about a drug deal, but they did talk about a person in Decatur selling a backhoe. Defendant gave Benny $34,000 in cash to purchase the backhoe. After Benny did not make the purchase, he refused to return defendant's money. Defendant stated Benny threatened him if he came looking for his money.

¶ 15 Defendant and Dorian Harris drove to Decatur in a Cadillac, and defendant brought a gun to protect himself. He stated he kept his dreadlocks hat in the car with him to wear "every now and then." Defendant wore the hat when he found Benny in the garage. Defendant carried his gun because of Benny's prior threat. As they walked to the car, defendant thought Benny had a gun because he knew he carried one "all the time." Defendant stated Benny was "mad and pissed off" and looked over defendant's shoulder "like somebody was coming from behind." This made defendant nervous. Defendant looked back, and when he turned around, Benny "looked like he was trying to reach for something." Defendant thought he was reaching for a gun. Defendant got scared and shot Benny. When asked if he ever saw a gun, defendant stated that after the shooting, Benny fell and something "tumbled to the ground." If defendant had seen a cellular phone in Benny's hand, he "probably would have" shot him because of the "way he was reacting." Defendant shot Benny until he felt "he wasn't able to do nothing to [him]." Defendant stated Benny was "trying to take off running after [he] started

shooting him." After the shooting, defendant "hopped in the car" and left.

¶ 16 On cross-examination, defendant claimed his whole family saw Benny carrying a gun every time he drove a truck. Defendant named these relatives as: Dorena Hollins, John Jones, John Willington, and Ryan Willington. Defendant testified he did not see Benny with a gun prior to the shooting. During a police interview, defendant denied killing Benny. He also did not tell police that Benny owed him money or that he came to Decatur to talk about the backhoe.

¶ 17 During closing arguments, defense counsel argued "there is not one shred of evidence that corroborates Lieutenant Topps' version of anything." Further, counsel asserted "not one person can corroborate that." In rebuttal, the prosecutor noted the presumption of innocence and that defendant had no burden of producing evidence. The trial court overruled two defense objections to the prosecutor's rebuttal about hearing from no one, other than defendant, who had seen Benny with a gun.

¶ 18 Following closing arguments, the jury found defendant guilty of first degree murder. The jury also found defendant personally discharged a firearm that proximately caused the death of another during the commission of the offense.

¶ 19 Defendant filed a motion for a judgment of acquittal or, in the alternative, a motion for a new trial. In February 2009, the trial court denied the posttrial motion. The court then sentenced defendant to 35 years in prison for the offense of first degree murder, along with an additional 25-year enhancement for personally discharging a firearm that proximately caused the death of another person.

¶ 20 On direct appeal, appellate counsel argued (1) the trial court abused its discretion in refusing to instruct the jury on self-defense and (2) the State improperly shifted the burden of

proof during closing argument. *People v. Jones*, No. 4-09-0136 (Oct. 28, 2009) (unpublished order under Supreme Court Rule 23). This court affirmed. In finding the trial court did not abuse its discretion in denying defendant's requested self-defense instruction, this court found the evidence indicated defendant was the initial aggressor and the danger of harm was not imminent. On the issue of closing arguments, we found the issue forfeited because it was not raised in the posttrial motion. We also declined to address the merits since defendant did not ask this court to review the issue under the plain-error doctrine.

¶ 21 In March 2011, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Therein, defendant alleged, *inter alia*, his counsel on direct appeal provided ineffective assistance when he failed to argue the prosecutorial-misconduct claim should be reviewed as plain error and that trial counsel was ineffective for failing to present any mitigating evidence at sentencing, even though defendant had informed him about available witnesses, including Yolanda Wells and Geneva Jones.

¶ 22 Defendant attached notarized affidavits to his petition from himself, Wells, and Jones. In his affidavit, defendant stated he informed trial counsel that Wells and Jones could testify at sentencing on his behalf. Wells stated she was defendant's fiancée and mother of his children. Up until his arrest, she found defendant to be "a committed, devoted and loving fiancé[] and father." She stated defendant was never physically or verbally violent with anyone and she would have testified to her knowledge had she been called.

¶ 23 Jones stated she was Benny's sister and defendant's aunt. She knew defendant as a "devoted and loving nephew," and she never knew him to lie, cheat, or steal from anyone. She stated she had heard Benny make bodily threats on "numerous occasions" and witnessed him

"carry out some of the threats of bodily harm to numerous individuals whom were not aggressors." She also observed Benny use a gun, knives, baseball bats, and bottles to inflict bodily harm. Had she been called as a witness, Jones stated she could have testified to her declarations.

¶ 24 The trial court summarily dismissed defendant's petition. On the issue of ineffective assistance of appellate counsel, the court found the claim was based on an indisputably meritless legal theory as it had been raised on direct appeal. In April 2011, defendant filed a motion to reconsider, which the court denied in October 2012. On appeal, this court affirmed the summary dismissal. *People v. Jones*, 2014 IL App (4th) 121038-U.

¶ 25 In November 2014, defendant filed a *pro se* motion for leave to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2014). Therein, defendant alleged direct appeal counsel had not read the record and stated if counsel had done so, counsel would have raised the suppression issue as plain error because the stop of his car violated the fourth amendment. In his motion, defendant claimed (1) he was denied due process when the trial court denied his motion to suppress; (2) trial counsel was ineffective for not preserving the suppression issue; and (3) direct appeal counsel was ineffective for not raising the suppression as plain error.

¶ 26 In December 2014, the trial court denied defendant's motion for leave to file a successive postconviction petition. The court noted defendant's claims relating to the motion to suppress were not raised in his initial postconviction petition and defendant did not identify an objective factor that impeded his ability to raise the claims therein. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, OSAD has filed a motion to withdraw as counsel and has included a supporting memorandum. Proof of service has been shown on defendant. This court granted

defendant leave to file additional points and authorities on or before October 7, 2016. Defendant filed a supplemental brief, and the State filed a brief as well. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be meritless.

¶ 29 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). Relief under the Act is only available for constitutional deprivations that occurred at the defendant's original trial. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909.

¶ 30 Consistent with the above principles, the "Act generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). The Act expressly provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 620-21 (2002) (stating "the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute"). A defendant faces "immense procedural default hurdles when bringing a successive postconviction petition," which "are lowered only in very limited circumstances" as successive petitions "impede the finality of criminal litigation." *People v. Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709.

¶ 31 A successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2014). To that end, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)) provides, in part, as follows:

> "Leave of court 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."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709. 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 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162, 923 N.E.2d 728, 735 (2010)).

¶ 32 "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). 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).

¶ 33 In the case *sub judice*, defendant filed a motion for leave to file a successive postconviction petition, alleging direct appeal counsel had not read the record and that if counsel had done so, counsel would have raised the suppression issue as plain error because the stop of defendant's car violated the fourth amendment. See U.S. Const., amend. IV. However,

defendant did not explain why this issue was not raised in his initial postconviction proceeding. By failing to show cause for omitting this claim from his first postconviction petition, the trial court correctly dismissed his motion for leave to file a successive petition. Given these facts, OSAD argues no issues of arguable merit can be raised on appeal. Our review of the record reveals OSAD's argument is correct. Accordingly, we conclude no colorable claim can be made that the trial court erred in dismissing defendant's motion.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we grant OSAD's motion and 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.

¶ 36 Affirmed.