2018 IL App (4th) 160114-U

NO. 4-16-0114

FILED
April 27, 2018
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.	)	Champaign County
JOHN K. WILLIAMSON,	)	No. 12CF612
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the circuit court's first-stage dismissal of defendant's postconviction petition for relief as frivolous and patently without merit.

¶ 2 In April 2012, the State charged defendant by information with armed robbery, a Class X felony (720 ILCS 5/18-2(a)(2) (West 2010)). In June 2013, defendant was tried before a jury on a theory of accountability (720 ILCS 5/5-2(c) (West 2010)). At the conclusion of the trial, defendant was found guilty and sentenced to 30 years' imprisonment. On direct appeal, defendant argued his constitutional right to confront his accusers was violated where the circuit court limited his cross-examination of a witness, Leavell Allen, concerning what defendant alleged was "unusual sentence progression." This court affirmed defendant's conviction and sentence.

¶ 3 On December 15, 2015, defendant filed a postconviction petition for relief. Defendant alleged Allen falsely testified about whether he received consideration for his testimony, thereby depriving defendant of his constitutional right to a fair trial. Defendant supported his allegations with affidavits from his mother and grandmother alleging a detective in the case told them Allen was offered probation in exchange for his testimony. On January 11, 2016, the circuit court dismissed the petition as frivolous and patently without merit. Specifically, it found the issue raised was addressed in this court's ruling on direct appeal. On February 1, 2016, defendant filed a notice of appeal, and on February 8, 2016, the office of the State Appellate Defender (OSAD) was appointed to represent defendant.

¶ 4 I. BACKGROUND

¶ 5 In April 2012, the State charged defendant by information with armed robbery, a Class X felony (720 ILCS 5/18-2(a)(2) (West 2010)). In June 2013, defendant was tried before a jury on a theory of accountability (720 ILCS 5/5-2(c) (West 2010)). The following is a summary of the evidence presented at trial pertinent to this appeal.

¶ 6 A. State's Case in Chief

¶ 7 1. *Sean Harrigan*

¶ 8 Sean Harrigan testified he brought $2300 to gamble at Par-A-Dice casino in East Peoria on April 11, 2012. He won $23,000 and was robbed at gunpoint upon returning to his apartment in Champaign early in the morning on April 12, 2012. Neither party disputed Marvino Mister committed the armed robbery. At a separate trial, a jury found Mister guilty of armed robbery, and this court affirmed his conviction on appeal. *People v. Mister*, 2016 IL App (4th) 130180-B.

¶ 9 2. *Casino Surveillance Footage*

¶ 10 The State introduced video evidence showing defendant and Mister at the casino watching and following Harrigan as the night progressed. James Simmons, a surveillance shift supervisor at the casino, compiled the videos and still images of defendant, Mister, and Harrigan as they moved within the confines of the casino and the parking lot throughout the night. After cashing out his winnings, casino security escorted Harrigan and his friends to their car in the parking lot. The video shows defendant in the lobby area as Harrigan cashes out his winnings, and it shows defendant follow Harrigan and security out of the casino into the parking lot toward his car. Harrigan did not leave immediately, as his friends returned to the casino to use the restroom. Defendant and Mister rode in a silver Pontiac Bonneville. The video shows defendant and Mister leaving the parking lot in the Bonneville at the same time as Harrigan and his friends.

¶ 11 The Bonneville pulled out of the hotel parking lot in front of Harrigan's vehicle. Both vehicles headed toward the intersection and gas station across the street from the hotel. The Bonneville was ahead of Harrigan's vehicle. Harrigan turned into the gas station, but the Bonneville turned down an access road toward a closed business. The Bonneville is out of the camera's view for 1 minute and 41 seconds. At 4:36 a.m., Harrigan's vehicle left the gas station, and the Bonneville reappeared on camera, following behind Harrigan's vehicle. Both vehicles turned toward the Interstate 74 entrance ramp.

¶ 12 3. *Leavall Allen*

¶ 13 The State called Leavell Allen to testify as to his conversations with defendant on the night of the robbery, connecting defendant to Mister after the time defendant claimed to have separated from Mister and within the time Mister committed the armed robbery. Defendant made a motion *in limine* prior to Allen's testimony requesting the court allow defendant to inquire into two of Allen's prior criminal cases for the purposes of impeachment.

¶ 14 a. Motion *In Limine*

¶ 15 Defendant's motion sought to introduce Allen's prior convictions for (1) a 2013 charge of aggravated unlawful use of a weapon by a felon, a Class 3 felony; and (2) a 2003 charge of delivery of a controlled substance, a Class 1 felony. Regarding the 2013 charge, defendant's motion noted the State originally charged Allen with armed habitual criminal, a Class X felony, but was ultimately sentenced to 18 months' probation when the charge was reduced to a Class 3 felony. The motion requested the court take judicial notice of the convictions and sentences and publish the "Court files" for these two cases to the jury. Additionally, defendant's motion sought "for the purposes of impeachment and evidence as to credibility" permission to allow defendant to cross-examine Allen "with reference to the classes of felony convictions charged and convicted, *** and as to the sentences entered" in the two cases.

¶ 16 The trial court granted the motion in part, allowing defendant to impeach Allen using Allen's prior convictions and cross-examine him as to the fact he was still on probation. However, the court denied defendant's request to cross-examine Allen regarding (1) the sentence imposed in the 2003 case, and (2) the charges initially filed in the 2013 case and that he pled to a lesser charge.

¶ 17 b. Allen's Testimony

¶ 18 Allen testified on direct as to his 2003 and 2013 felony convictions. He acknowledged the prosecutor questioning him in this case was the same prosecutor in his 2013 case. Allen acknowledged he was on probation for his 2013 conviction and understood his probation could be revoked resulting in his resentencing for the offense. Allen testified he was

not offered anything in the 2013 case for his testimony in this case, but rather, he was only testifying because he was served with a subpoena.

¶ 19 Allen testified he had known defendant for more than five years. He said he spoke with defendant on the phone several times in the early morning of April 12, 2012. Allen testified defendant asked for directions out of Champaign from the campus area and Allen provided him with those directions.

¶ 20 Allen spoke with the officer in this case three times prior to trial regarding the phone calls. He admitted speaking with defendant each time, but initially Allen stated he did not remember what the conversations entailed. Allen testified he was not forthcoming with information regarding the topic of the conversation "[b]ecause that is just not what you do. When you are on the street, you don't do that." Allen first provided the details of the phone calls after the trial commenced but before he took the stand.

¶ 21 After defendant was arrested, he called Allen from a telephone at the Champaign County jail. Allen identified the recorded phone call between himself and defendant as the phone call in question from December 7, 2012. The recording was published to the jury. During the call, defendant asked Allen to testify he never spoke with defendant over the phone in the early morning hours of April 12, 2012. Allen said he could not do that because he already told police he spoke with defendant. Defendant replied nothing in discovery indicated Allen made any such statement. He asked Allen to sign an affidavit stating he did not speak with defendant on the night of the incident. Defendant told Allen to testify his relationship with defendant was based on Allen's engagement to defendant's sister.

¶ 22 Allen never signed any such affidavit or testified to speaking with anyone other than defendant. Allen also testified he was never engaged to defendant's sister. He admitted to

agreeing with much of what defendant said in the phone call from the Champaign County jail but said he did so because defendant was his "homie." Allen testified once he felt he was pulled into something with which he was not involved, he decided to be more forthcoming so as not to risk having his kids taken away from him.

¶ 23 4. *Detective Robb Morris*

¶ 24 The State called Robb Morris, a detective with the Champaign police department, to testify about phone records of a cell phone registered to defendant for the period between April 10, 2012, and April 19, 2012. Records of the cell phone were admitted into evidence. The records indicated defendant's phone was near LeRoy, Illinois, at 5:21 a.m. on April 12, 2012, when a call was placed to Allen. Three more calls from defendant's phone were placed to Allen at 5:48 a.m., 6:06 a.m., and 6:15 a.m. The robbery occurred just before 5:56 a.m. in Champaign. At 7:21 a.m., another call was made to Allen near Morton, Illinois. Detective Morris testified these records assisted in his investigation as it demonstrated defendant's cell phone moved along Interstate 74 between Peoria and Champaign.

¶ 25 Detective Morris testified he spoke with Allen during his investigation. Initially, Allen was evasive when Detective Morris would attempt to get into contact. However, in August 2012, Allen called Detective Morris to tell him Allen spoke with defendant during the phone calls in question. Allen confirmed this information two additional times in January 2013 and June 2013. During Detective Morris' June conversation with Allen, Allen told Detective Morris defendant called him with the purpose of getting directions to Peoria from the campus area of Champaign.

¶ 26 B. Defendant's Case in Chief

¶ 27 1. *Myrine Fleming*

¶ 28 Defendant called his grandmother, Myrine Fleming, to testify. She testified defendant did not have a cell phone on his person when he arrived home at 5:25 a.m. on April 12, 2012. She acknowledged she never told the police defendant was at her home on the morning of April 12, 2012. She was impeached using her 2006 conviction of forgery, a Class 3 felony.

¶ 29 2. *Defendant*

¶ 30 Defendant testified on his own behalf. He claimed he was at the casino to pursue women. Defendant testified he met a girl, Alicia, at the casino and was loitering around the casino because they planned to meet. He stated he did "not particularly" notice Harrigan's group leaving the casino with a security guard.

¶ 31 Defendant testified both men drove to the casino, but because Mister was drinking and smoking marijuana, defendant did not want Mister to drive. Defendant, driving Mister's car, drove around the hotel parking lot and made a few turns because Mister was looking for his cell phone. Defendant testified Mister asked him to drive across the street and then, once there, Mister told defendant he was going somewhere else and told defendant to get out of the car. Defendant said he then walked back across the street, entered his own vehicle, and drove to his grandmother's apartment and went to sleep.

¶ 32 Defendant testified Mister gave defendant his cell phone back to him later in the day on April 12, 2012. Defendant denied helping Mister with the armed robbery. Defendant denied making the calls sent from his cell phone in the early morning hours of April 12, 2012. Defendant told Allen he wanted him to come and tell the truth during his phone call from the jail on December 7, 2012. Defendant claimed Allen lied on the stand.

¶ 33 C. Jury Verdict, Posttrial Motion, and Sentencing

¶ 34 Following deliberations, the jury found defendant guilty of armed robbery. In July 2013, defendant filed a motion for a judgment of acquittal or for a new trial. The motion asserted the trial court erred in preventing defendant from inquiring into Allen's "unusual" sentencing during cross-examination.

¶ 35 The motion alleged during the early pendency of the case, the State provided supplemental discovery to defendant, giving notice of prospective testimony from Allen and acknowledging his criminal history, including 3 prior felony convictions: (1) possession with intent to deliver a controlled substance, a Class 2 felony, stemming from a 2000 case; (2) possession of a controlled substance, a Class 4 felony, stemming from a 2000 case; and (3) delivery of a controlled substance, a Class 1 felony, stemming from a 2003 case. Supplemental discovery also indicated a pending Class X felony for armed habitual criminal stemming from a 2013 case. Defendant alleged the sentences for Allen's three convictions followed "a typical progression in sentence severity for a progression of felony offenses." However, as this case was set for trial, the State dismissed the pending Class X felony charge, and Allen entered a guilty plea to a Class 2 felony. The Class 2 felony would be "nonprobationable" due to his previous Class 2 felony. Nevertheless, Allen later entered a plea agreement to a Class 3 felony and was sentenced to 18 months' probation.

¶ 36 Defendant's posttrial motion highlighted the alleged unusual sentencing as "24 months[']] probation, then 3 years[']] imprisonment, then 12 years[']] imprisonment, then 18 months]']] probation." Defendant argued, although the trial court has wide latitude to impose reasonable limits on cross-examination, the trial court erred in preventing defendant from inquiring into the "unusual" sentence because there were no concerns of harassment, prejudice, confusion of the issues, witness's safety, or interrogation that were repetitive or of little

relevance. Defendant asserted this error mandated acquittal or a new trial as the limitation on impeachment deprived the jury of material necessary for fair consideration of the case.

¶ 37 The trial court conducted a hearing on defendant's motion and sentencing. With regard to the alleged "unusual" sentencing on Allen's 2013 case, the State stated, in relevant part:

> "It was a case where the [S]tate moved to continue as the gun was still at the laboratory for [deoxyribonucleic acid] and fingerprint testing. The defendant had been in custody 66 days, and this court denied the [S]tate's motion for further testing, but at that time the case was resolved for probation.
>
> So any unusualness of the sentencing that would have come out would have been false, if that information was allowed to be solicited."

The court denied defendant's motion and sentenced him to 30 years' imprisonment, with credit for 462 days served in custody. The court also stated, "[t]hat gives him credit for $2,310 for any mandatory fines that need to be imposed." The court did not impose the mandatory fines.

¶ 38 D. Direct Appeal and Postconviction Petition

¶ 39 On direct appeal, defendant argued (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of armed robbery, and (2) his constitutional right to confront his accusers was violated when the circuit court limited his cross-examination of Allen about his sentence regarding the 2013 case in light of his previous criminal history. On the second issue this court found,

> "[T]he trial court did not entirely bar cross-examination of Allen as to his potential for bias or motivation. [Citation] During Allen's

> testimony, the jury was informed of the following: (1) Allen had two prior felony convictions; (2) Allen was currently serving a sentence of probation on his 2013 conviction; (3) the prosecutor questioning Allen prosecuted Allen in his 2013 case; (4) Allen understood, should he violate the terms of his probation, he may be resentenced; (5) the only reason Allen was present to testify was because he was served with a subpoena; and (6) Allen acknowledged he first disclosed the details of the phone calls from the early morning of April 12, 2012, after the trial commenced, while in the State's Attorney's office. *** In reviewing what defendant was allowed to do, and based on the evidence and testimony elicited at trial, the jury had sufficient information to make a discriminating appraisal of the witness." *People v. Williamson*, 2015 IL App (4th) 130640-U, ¶ 105 (Apr. 17, 2015) (unpublished order under Supreme Court Rule 23).

This court further found any error in limiting defendant's cross-examination was harmless. *Id.* ¶¶ 106-07. It affirmed defendant's conviction and prison sentence. *Id.* ¶112.

¶ 40 On December 30, 2015, defendant filed a *pro se* postconviction petition for relief. Defendant claimed a violation of his due process right to a fair trial by the alleged false testimony Allen provided at trial concerning whether he received any consideration for his testimony. Defendant noted Allen specifically testified to not receiving anything in exchange for his testimony against defendant. However, defendant asserts Detective Morris told defendant's

mother and grandmother he offered Allen probation on the Class X felony gun case in exchange for his testimony.

¶ 41 Defendant attached affidavits from his mother, Maurina Hunt, and his grandmother, Fleming. Both claimed, while serving a subpoena to compel Fleming to testify, Detective Morris told them he had promised Allen probation on the 2013 charge if he testified against defendant. He also allegedly told them both he threatened Allen with prison time if he refused to testify against defendant. Both Hunt and Fleming claim the events occurred on June 17, 2013, but before defendant's trial. The jury returned a guilty verdict against defendant on June 13, 2013. Fleming's affidavit states she told Detective Morris "the truth is the truth and that's how I will testify." Despite the inconsistency in dates, we take the proposition as true this conversation happened before defendant's trial given: (1) Fleming's statement regarding her future testimony; (2) Hunt's statement Detective Morris served the subpoena on Fleming in order to compel her to testify at defendant's trial; and (3) defendant's petition for postconviction relief, which states the conversation between Detective Morris, Fleming, and Hunt occurred before trial.

¶ 42 On January 11, 2016, the circuit court dismissed the petition as frivolous and patently without merit. Specifically, it found the issue defendant raised was barred by *res judicata* as it had been addressed in defendant's direct appeal.

¶ 43 On February 8, 2016, OSAD was appointed to represent defendant.

¶ 44 This appeal followed.

¶ 45 II. ANALYSIS

¶ 46 On appeal, defendant argues the trial court improperly dismissed his postconviction petition on the finding it was frivolous and patently without merit. The State

asserts it was properly dismissed on the basis of *res judicata* as defendant's petition asserts a mere rewording of the issue of Allen's testimony, which was adjudicated on appeal.

¶ 47 A. Standard of Review

¶ 48 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a remedy to criminal defendants alleging a substantial violation of their constitutional rights occurred at trial. *People v. Brisbon*, 164 Ill. 2d 236, 242, 647 N.E.2d 935, 937 (1995). First, the trial court must determine whether the petition is "frivolous or is patently without merit" by looking at defendant's petition without considering any argument by the State. 725 ILCS 5/122-2.1(a)(2) (West 2014). The terms "frivolous" and "patently without merit" in the Act encompass claims already litigated or which could have been raised in prior proceedings but were not. *People v. Blair*, 215 Ill. 2d 427, 442, 831 N.E.2d 604, 614 (2005). To survive dismissal at the initial stage of the postconviction proceeding, the petition need only present the gist of a constitutional claim. *People v. Palmer*, 352 Ill. App. 3d 877, 883, 817 N.E.2d 129, 135 (2004). A circuit court may review prior proceedings in a case to determine whether the court already decided defendant's postconviction claims or whether defendant could have raised the issue and thus rebut the presumption the petition states the gist of a constitutional claim. *Blair*, 352 Ill. App. 3d at 446. "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014). "The court should examine those records to determine whether the allegations are positively rebutted by the record." *Palmer*, 352 Ill. App. 3d at 883. We review the trial court's decision to dismiss the postconviction petition *de novo*. *Id*.

¶ 49 B. Defendant's Claim is Barred by the Doctrine of *Res Judicata*

¶ 50 Defendant argues the trial court improperly dismissed his postconviction motion at the first stage because it was distinct from the issues raised on direct appeal. He argues his postconviction petition alleges the testimony was a violation of his due process rights whereas his direct appeal analyzed the motion *in limine* under the confrontation clause.

¶ 51 It is well-established any issues considered by the reviewing court on direct appeal are barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). "Our supreme court has consistently upheld the first-stage dismissal of a postconviction petition when the record from the original trial proceedings contradicts defendant's allegations." *Palmer*, 253 Ill. App. 3d at 883. Issues raised on direct appeal are barred. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 452 (2004). Defendant cannot avoid *res judicata* by adding additional allegations encompassed by a previously adjudicated issue. *Palmer*, 253 Ill. App. 3d at 884. The doctrine of *res judicata* is relaxed where the facts relating to the claim do not appear on the face of the original appellate record. *Williams*, 209 Ill. 2d at 233. However, the general rule states for a defendant to obtain postconviction relief based on newly discovered evidence, the evidence must have been unavailable at trial and could not have been discovered sooner through due diligence. *People v. Coleman*, 2013 IL 113307, ¶ 96, 966 N.E.2d 617.

¶ 52 Defendant's postconviction petition for relief is properly barred by the doctrine of *res judicata* based on the issues raised and decided by this court on direct appeal. On direct appeal, defendant contended the trial court's denial of his request to explore Allen's "unusual sentence progression" during cross-examination was in error and required defendant's conviction be reversed. In his postconviction petition, defendant alleged "[f]alse testimony was put forth by *** Allen, regarding his motivations and bias in testifying against [defendant]." Further,

defendant stated "Allen testified he was not offered anything in his 2013 case in exchange for his testimony against [defendant]."

¶ 53 This court, in defendant's direct appeal, addressed the issue of false testimony.

> "Sufficient evidence to question Allen's testimony was presented by the prosecution, developed by the defense, and then argued by the defense in closing argument. Allen's testimony was corroborated. Officer Morris testified he spoke with Allen on three occasions, during each of which Allen indicated he spoke with defendant on the phone during the early morning hours of April 12, 2012. Further, the first time Allen disclosed this information to Officer Morris was in August 2012. Allen was not charged with the offense for which he was serving probation until 2013. Allen's testimony was also consistent. He never indicated he spoke with anyone other than defendant during the early morning hours of April 12, 2012. The record indicates the jury was presented with sufficient evidence of Allen's potential for bias and criminal record, including the probation sentence he was then serving." *Williamson*, 2015 IL App (4th) 130640-U, ¶ 106.

Defendant claims new information was brought to his attention since his direct appeal, namely his grandmother and mother claiming, before trial, Officer Morris told them the State offered Allen a deal and essentially forced him to testify. As this court pointed out, Allen was not charged with the offense for which he allegedly received a plea deal when he initially spoke with Officer Morris. There was no plea deal to offer him at that point. Allen's statements regarding

defendant remained consistent before and after he was charged in the 2013 case. Nothing in the record other than the affidavits provided by defendant indicate the State offered any sort of deal or exerted pressure on Allen to secure his testimony. The affidavits themselves are subject to question. Both women allege the conversation happened June 13, 2017, and Officer Morris was present to serve a subpoena on Fleming to require her to testify at defendant's trial. Defendant's trial was over by the alleged date of the conversation. Defendant's affidavits only established two of his relatives had allegedly been told there were promises made to Allen by a police officer. Such hearsay representations are insufficient to require the trial court to advance this case to the second stage of postconviction proceedings. *People v. Wallace*, 2015 IL App (3d) 130489, ¶¶ 25-29, 42 N.E.3d 945.

¶ 54 Contrasting what occurred on direct appeal with the "new" information defendant claims to have obtained since that time leaves little room to argue defendant's claims in his postconviction petition are more than a mere rewording of issues raised and adjudicated on direct appeal. Even taking the affidavits as true and construing them liberally in favor of defendant, the claim has already been brought before this court and a final judgment on the merits was issued.

¶ 55 Further, even with the relaxed application of *res judicata* on claims not apparent on the face of the appellate record, defendant will still be barred from attempting to raise this issue in a postconviction petition for relief. The relaxed application applies only when the evidence was not and could not have been presented at trial or discovered before trial. Here, defendant's grandmother and his mother both contend this information was brought to their attention before trial. Defendant corroborates this timeline in his postconviction petition. Defendant's grandmother testified at trial. At no point during the preparation for trial did she bring this encounter to the attention of defendant's counsel. Fleming and Hunt came forward

with this information after defendant was unsuccessful on direct appeal. Accordingly, we find the petition was properly dismissed.

¶ 56 III. CONCLUSION

¶ 57 We affirm the circuit court's dismissal of defendant's postconviction petition for relief as frivolous and patently without merit.

¶ 58 Affirmed.