2019 IL App (4th) 170104-U

NO. 4-17-0104

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 8, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
GREGORY L. SMITH,	)	No. 06CF1089
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of defendant's successive postconviction petition because it was frivolous and patently without merit.

¶ 2 In April 2007, a jury convicted defendant, Gregory L. Smith, of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)), aggravated battery (*id.* § 12-4(b)(1)), and attempt (murder) (*id.* § 8-4, 9-1(a)(1)). The trial court sentenced defendant to 20 years in prison. In October 2008, defendant filed a postconviction petition, and the trial court dismissed the petition as frivolous and patently without merit.

¶ 3 In December 2016, defendant *pro se* filed a motion for leave to file a successive postconviction petition, claiming the State fraudulently obtained the grand jury indictment for attempt (murder). In January 2017, the trial court dismissed the petition.

¶ 4 Defendant appeals, arguing the trial court erred by denying his motion for leave to

file a successive postconviction petition. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Defendant's Conviction and Direct Appeal

¶ 7 On November 15, 2006, a grand jury indicted defendant, Gregory L. Smith, for aggravated domestic battery (*id.* § 12-3.3(a)), aggravated battery (*id.* § 12-4(b)(1)), and domestic battery (*id.* § 12-3.2(a)(1)). The State later dismissed the domestic battery charge. On November 21, 2006, a grand jury indicted defendant for attempt (murder) (*id.* § 8-4, 9-1(a)(1)). Following a trial in April 2007, the jury found defendant guilty of attempt (murder), aggravated domestic battery, and aggravated battery. The trial court merged defendant's convictions and sentenced him to 20 years in prison for attempt (murder). This court affirmed defendant's conviction on direct appeal. *People v. Smith*, No. 4-07-0742 (Aug. 14, 2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 8 B. The First Postconviction Petition

¶ 9 In October 2008, defendant *pro se* filed a postconviction petition arguing his trial counsel provided ineffective assistance of counsel. The trial court summarily dismissed the petition, and defendant appealed. On appeal, defendant's appointed counsel filed a motion to withdraw, asserting there were no meritorious arguments on appeal. This court granted counsel's motion to dismiss and affirmed the trial court's judgment. *People v. Smith*, No. 4-09-0954 (Aug. 30, 2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 10 C. The *Habeas Corpus* Petition

¶ 11 In October 2014, defendant *pro se* filed a petition for writ of *habeas corpus*, alleging that the bill of indictment charging defendant with attempt (murder) was defective because he was unable to obtain a transcript of the November 21, 2006, grand jury proceedings. Defend-

ant asserted the indictment was void and the trial court "lacked jurisdiction" as a result. The trial court denied the petition, finding it was "frivolous," and this court affirmed. *People v. Smith*, No. 4-14-1000 (Dec. 9, 2015) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 12 D. The Second Postconviction Petition

¶ 13 In December 2016, defendant *pro se* filed a motion for leave to file a successive postconviction petition. Defendant alleged that the State violated his due process rights by adding the attempt charge without actually conducting further grand jury proceedings. Defendant claimed he had spent two years trying to obtain a transcript of the November 21, 2006, grand jury proceedings but he had been unsuccessful. Defendant attached a copy of the McLean County State's Attorney's office response to his Freedom of Information Act (FOIA) (5 ILCS 140 *et seq* (West 2016)) request that indicated the State did not have a copy of the transcript. Defendant also attached letters and responses from various people and agencies that demonstrated his efforts to obtain the transcript.

¶ 14 E. The Trial Court's Order

¶ 15 In January 2017, the trial court issued a written order denying defendant's motion for leave to file a successive postconviction petition. The court found that defendant's arguments were precluded because he failed to raise them in his prior postconviction petition despite the ability to do so. Additionally, the court found that the indictment was valid on its face and defendant did not present any evidence that indicated to the contrary. Based on these findings, the trial court concluded defendant failed to establish the cause and prejudice required to file a successive postconviction petition.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant appeals, arguing the trial court erred by denying his motion for leave to file a successive postconviction petition. Therefore, defendant claims he has met the cause-and-prejudice test. We disagree and affirm.

¶ 19 A. The Standard of Review and Applicable Law

¶ 20 The Post-Conviction Hearing Act (Act) provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). The Act contemplates the filing of only one postconviction petition and expressly provides that " '[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.' " *Crenshaw*, 2015 IL App (4th) 131035, ¶ 27 (quoting 725 ILCS 5/122-3 (West 2012)). However, a trial court may grant a defendant leave to file a successive postconviction petition if (1) the defendant demonstrates cause for his failure to bring the claim in the initial petition and (2) prejudice results from that failure. *Id.* ¶ 28. The Illinois Supreme Court has described the cause and prejudice test as follows:

> "To show cause, a defendant must identify 'an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' [Citation.] To show prejudice, a defendant must demonstrate '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.' [Citation.]" *People v. Evans*, 2013 IL 113471, ¶ 10, 989 N.E.2d 1096.

¶ 21 A defendant does not need to "establish cause and prejudice conclusively prior to being granted leave to file a successive petition ***." *People v. Smith*, 2014 IL 115946, ¶ 29, 21

N.E.3d 1172. But the cause-and-prejudice test presents a higher burden than the frivolous or patently without merit standard applied at first-stage proceedings. *Id.* ¶ 35. A defendant must "submit enough in the way of documentation to allow a circuit court to make" the cause-and-prejudice determination. *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734-35 (2010). A trial court should deny leave to file a successive postconviction petition "[w]hen 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. A trial court's denial of leave to file a successive postconviction petition presents a question of law that appellate courts review *de novo*. *People v. Bailey*, 2017 IL 121450, ¶ 13, 102 N.E.3d 114.

¶ 22 B. Cause

¶ 23 Defendant first argues that he established the "cause" prong of the cause-and-prejudice test because he had no reason to suspect the November 21, 2006, grand jury indictment was fraudulently procured until 2014 when he sought a copy of the transcript and the State could not provide it. Defendant claims the indictment is valid on its face and therefore he had no reason to question its validity when he filed his first petition in 2008. Defendant points out that he attached documentation that demonstrated his extensive efforts to obtain the transcript.

¶ 24 The State responds that defendant could have raised this issue in his initial petition. The State notes that defendant provides no explanation for why he waited until 2014 to request the transcript for the November 21, 2006, grand jury proceedings. Specifically, the State argues that nothing prevented defendant from requesting the transcripts at any time, and therefore the trial court's finding that "[defendant] failed to identify any objective factor which im-

peded his effort to raise the claim in the earlier proceeding" was correct.

¶ 25 We agree with the State. Nothing external prevented defendant from obtaining the transcript. *Evans*, 2013 IL 113471, ¶ 10. In other words, nothing prevented defendant from *requesting* the transcript at any point. Therefore, defendant failed to establish cause for his failure to bring this claim in his initial postconviction petition.

¶ 26 Further, we disagree with defendant that the facial validity of the indictment was enough to demonstrate "cause." Defendant points out that the State only provided the November 15, 2006, transcript in its Rule 412 disclosures in support of the indictments despite the fact that the State informed the trial court in open court that it received "additional information" that it believed justified an attempt (murder) indictment. If the lack of a transcript is indicative of fraud, as defendant claims, he should have known at that time that there was a need to investigate further.

¶ 27 C. Prejudice

¶ 28 Even assuming defendant satisfied the "cause" prong, defendant has not demonstrated prejudice. Defendant claims the totality of the circumstances behind his inability to obtain the November 21, 2006, transcript, taken as true, states a sufficient factual basis in support of his allegation that the indictment was fraudulently obtained. We disagree.

¶ 29 "An indictment is presumed valid, in the absence of evidence to the contrary, when it is returned by a legally constituted jury." *People v. Bell*, 2013 IL App (3d) 120328, ¶ 7, 989 N.E.2d 1211 (citing *People v. Whitlow*, 89 Ill. 2d 322, 331, 433 N.E.2d 629, 632 (1982)). An indictment that is valid on its face does not need to show compliance with other statutory requirements. *Id.* ¶ 8. The failure to provide a record of the proceedings or other documentation rebutting the presumption of validity is fatal to a defendant's challenge of an indictment. *Id.*

¶¶ 9-10; *People v. Kliner*, 2015 IL App (1st) 122285, ¶¶ 14-17, 24 N.E.3d 1256.

¶ 30 Defendant has not overcome his burden of providing documentation to rebut the presumption of the indictment's validity. Although we recognize defendant has limited means while in jail, he did not provide a statement from the grand jury foreperson, the listed witness, or even his defense counsel to support his claim. The standard for successive postconviction petitions is higher than initial petitions, and a defendant is required to provide sufficient documentation. Defendant failed to do so here, and the trial court properly denied his motion for leave to file a successive postconviction petition.

¶ 31 Further, defendant concedes the indictment is valid on its face. The mere absence of a transcript of the proceedings is not sufficient to rebut the presumption of validity. *Bell*, 2013 IL App (3d) 120328, ¶¶ 9-10. The State's response to a FOIA request stating that it does not possess the transcript does not support the inference that no transcript ever existed, much less that the grand jury never met. For example, in response to a request for the transcript, defendant's trial counsel stated that Illinois Supreme Court Rule 415 (eff. Oct. 1, 1971) prevented him from providing discovery to defendant. Counsel never indicated that he did not have the transcript or that he never received the transcript. Accordingly, defendant failed to establish he was prejudiced, and the trial court properly denied his request to file a successive postconviction petition.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, 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(a) (West 2016).

¶ 34 Affirmed.