2019 IL App (4th) 170118-U

NO. 4-17-0118

FILED
May 21, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Jersey County
SAMUEL L. PACE,	)	No. 96CF35
Defendant-Appellant.	)	
	)	Honorable
	)	Joshua Aaron Meyer,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: We grant the Office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issues can be raised on appeal. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In June 1997, defendant, Samuel Pace, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West Supp. 1995)). He was sentenced to a term of natural life imprisonment. On direct appeal, we affirmed defendant's conviction and sentence. *People v. Pace*, No. 5-97-0467 (1998) (unpublished order under Illinois Supreme Court Rule 23).

¶ 5 In July 1999, defendant filed a *pro se* petition for postconviction relief, which included 28 allegations of trial counsel error, 17 allegations of appellate counsel error, and 17 allegations of prosecutorial misconduct. In September 1999, the trial court determined several allegations were "of concern" and found other claims were frivolous or patently without merit. Counsel was appointed and on October 30, 2000, filed a "Motion to Vacate Sentence and for New Trial," asserting a claim pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶ 6 In April 2007, appointed counsel filed a "Petition for Voluntary Dismissal Without Prejudice" after concluding "currently there is no colorable argument for a post-conviction petition." Counsel requested the dismissal be with leave to refile if appropriate evidence along with affidavits became available. In June 2007, the trial court dismissed defendant's petition.

¶ 7 In January 2008, defendant filed a *pro se* "Late Motion to Reconsider Dismissal of Post-conviction Petition." Defendant sought to "reinstate" his petition "as a whole." On March 19, 2008, the trial court denied defendant's motion. Defendant appealed, and this court reversed and remanded for further proceedings. *People v. Pace*, 386 Ill. App. 3d 1056, 899 N.E.2d 610 (2008).

¶ 8 In August 2009, newly appointed counsel filed an amended petition for postconviction relief. In October 2009, appointed counsel filed a second amended petition for postconviction relief, which the trial court denied, concluding it was legally inadequate. Defendant appealed from the denial of his second amended petition, and OSAD was appointed to represent him. OSAD subsequently moved to withdraw as counsel on appeal, asserting no issues of arguable merit warranted appeal. This court allowed OSAD's motion. *People v. Pace*, 2012 IL App (4th) 100161-U.

¶ 9 On December 1, 2016, defendant filed a *pro se* motion for leave to file a successive postconviction petition, attaching a proposed petition for postconviction relief to the motion. In his motion and petition, defendant argued he was denied his constitutional right to (1) the effective assistance of counsel, (2) due process of law, and (3) equal protection of the law. On January 20, 2017, the trial court denied defendant's motion.

¶ 10 Defendant appealed the trial court's denial of his motion for leave to file a successive postconviction petition, and OSAD was appointed to represent him on appeal. In November 2018, OSAD moved to withdraw as counsel on appeal. We granted defendant leave to file a response to OSAD's motion on or before December 26, 2018, which he did not do.

¶ 11 II. ANALYSIS

¶ 12 OSAD contends no meritorious argument can be made the trial court erred in denying defendant's motion for leave to file a successive postconviction petition. We agree.

¶ 13 A. Standard of Review

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides a means to collaterally attack a criminal conviction based on a substantial denial of a defendant's state or federal constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Issues adjudicated on direct appeal or a previous collateral proceeding are barred by *res judicata*, and issues that could have been raised but were not are forfeited. *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. The Act contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621

(2002). A defendant must obtain leave from the trial court in order to file a successive petition under the Act. 725 ILCS 5/122-1(f) (West 2014).

¶ 15 To obtain leave to file a successive postconviction petition, a defendant must do one of the following: (1) show cause and prejudice for the failure to raise a claim in his or her earlier petition or (2) set forth a colorable claim of actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459. Cause is defined as "some objective factor external to the defense" that prevented the defendant from raising the claim in an earlier proceeding. (Internal quotation marks omitted.) *Id*. at 460. Prejudice is an error so infectious to the proceedings that the resulting conviction or sentence violates due process. *Id*. at 464. We review *de novo* the denial of a motion for leave to file a successive postconviction petition. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 38, 38 N.E.3d 1256.

¶ 16 B. Ineffective-Assistance-of-Counsel Claim

¶ 17 In his motion for leave to file a successive postconviction petition, defendant first argues he was denied his constitutional right to the effective assistance of counsel. He alleges counsel was ineffective for failing to inform him he could be sentenced to life imprisonment if he rejected the State's 25-year plea offer. Defendant asserts he could not have raised this claim in an earlier proceeding because the legal basis for his ineffective-assistance claim was not available to him until the United States Supreme Court issued its decision in *Lafler v. Cooper*, 566 U.S. 156 (2012).

¶ 18 Our first inquiry is whether there was cause for defendant's failure to raise his argument in a timely manner. In *Pitsonbarger*, the supreme court stated "a showing that the factual or legal basis for a claim was not reasonably available to counsel *** would constitute cause under [the cause-and-prejudice test]." (Internal quotation marks omitted.) *Pitsonbarger*,

205 Ill. 2d at 460. In other words, cause exists "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of the original procedural default. (Internal quotation marks omitted.) *Id*. at 461.

¶ 19 Defendant's ineffective assistance claim is not novel. In 1997, our supreme court noted it was "*well established* that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial." (Emphasis added.) *People v. Curry*, 178 Ill. 2d 509, 518, 687 N.E.2d 877, 882 (1997). Defendants have the constitutional right to be reasonably informed of the direct consequences of rejecting a plea offer. *Id*. at 528. "Concomitantly, a criminal defense attorney has the obligation to inform his or her client about the maximum and minimum sentences that can be imposed for the offenses with which the defendant is charged." *Id*.

¶ 20 Based on the foregoing, we cannot say defendant's claim is so novel that it lacked a legal basis prior to *Lafler*. Rather, our review establishes there was sufficient case law for defendant to have raised his claim in his initial postconviction petition. Because the legal basis of defendant's ineffective-assistance claim was available to him at the time of his initial postconviction petition, defendant cannot show cause for failure to raise this claim in his original petition and therefore cannot raise it for the first time in a successive petition. See 725 ILCS 5/122-3 (West 2014) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."); see also *People v. Guerrero*, 2012 IL 112020, ¶ 22, 963 N.E.2d 909 (stating the defendant's motion for leave to file a successive petition must be denied where he failed to establish cause under section 122-1(f) of the Act).

¶ 21 C. Due-Process Claim

¶ 22 Defendant next argues he was denied his constitutional right to due process of law when the trial court sentenced him to life imprisonment after the State had offered him a 25-year plea deal. OSAD contends it can make no meritorious argument on appeal as defendant's due process claim is barred by *res judicata*. We agree.

¶ 23 "[A] ruling on an initial postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in the initial petition." *Guerrero*, 2012 IL 112020, ¶ 17. In his initial postconviction petition, defendant alleged the following: "Petitioner was denied his right to a fair trial *** where *** the Petitioner was offered a 25 year plea, he went to trial and was punished for going to trial and given a natural life sentence." Defendant's petition was subsequently amended twice and dismissed by the trial court. Defendant appealed the dismissal, and OSAD was appointed. After reviewing the petition and record, OSAD moved to withdraw as counsel on appeal, asserting no issues of arguable merit warranted appeal. This court allowed OSAD's motion, agreeing no meritorious issues existed in defendant's petition. *People v. Pace*, 2012 IL App (4th) 100161-U.

¶ 24 Our review of the claim defendant seeks to raise in his successive postconviction petition with the claim he raised in his initial postconviction petition reveals they are essentially the same claim. We therefore find defendant's due process argument barred by *res judicata*.

¶ 25 D. Excessive-Sentence Claim

¶ 26 Defendant next argues his sentence is excessive where other defendants sentenced for murder in Jersey County received "a term of 60 years or less," which defendant contends is "far under [his] sentence of natural life ***."

¶ 27 Even assuming defendant could establish cause, he is unable to establish prejudice. Defendant essentially asks this court to find his sentence excessive by employing a

comparative sentencing analysis. In *People v. Fern*, 189 Ill. 2d 48, 62, 723 N.E.2d 207, 214 (1999), our supreme court held "that a claim that a sentence is excessive *must* be based on the particular facts and circumstances of that case. If a sentence is appropriate given the particular facts of that case, *it may not be attacked* on the ground that a lesser sentence was imposed in a similar, but unrelated, case." (Emphases added.)

¶ 28 Defendant's excessive sentence claim is not based on the particular facts and circumstances of his case. Defendant attacks his sentence by contending lesser sentences were imposed in similar, but unrelated, cases. Because defendant attempts to attack his sentence on an improper basis, he cannot establish prejudice.

¶ 29 We find the trial court properly denied defendant's motion for leave to file a successive postconviction petition on these grounds. As any appeal in this matter would be without merit, we grant OSAD's motion to withdraw.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel 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. 55 ILCS 5/4-2002 (West 2016).

¶ 32 Affirmed.