2012 IL App (1st) 100305-U

THIRD DIVISION
November 30, 2012

No. 1-10-0305



IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JOHN GALVAN,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>Cook County<br><br>No. 87 CR 8638<br><br>Honorable<br>Mary Margaret Brosnahan,<br>Judge Presiding. |

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Neville and Justice Salone concurred in the judgment.

**ORDER**

¶ 1 *HELD*: The circuit court erred in granting the State's motion to reconsider its motion to dismiss defendant's postconviction petition where the original trial judge denied the State's motion to dismiss and ordered a third-stage evidentiary hearing and the ruling was not erroneous.

¶ 2 Following a jury trial, defendant John Galvan was convicted of aggravated arson and first degree murder. He was sentenced to life imprisonment. This court affirmed both the conviction

(*People v. Galvan*, 244 Ill. App. 3d 298 (1993)) and the second-stage dismissal of defendant's first postconviction petition (*People v. Galvan*, No. 1-96-3094 (1997) (unpublished order under Supreme Court Rule 23)). Defendant filed a successive postconviction petition and was granted a third-stage evidentiary hearing. Following the transfer to another division of the judge who granted the hearing, the subsequently assigned trial court judge granted the State's motion to reconsider the denial of its motion to dismiss and ultimately granted the motion to dismiss. Defendant raises multiple issues on appeal. First, defendant contends that the original ruling granting an evidentiary hearing is the law of the case and the trial court erred in reconsidering the ruling where the facts and issues had not changed and the ruling was not manifestly erroneous. Alternatively, defendant contends that the trial court erred in dismissing his claim of actual innocence where he provided newly discovered affidavits that prove he was not one of the arsonists. Defendant further contends that the trial court erred in dismissing his ineffective assistance of counsel claims where counsel failed to present evidence that his confession was involuntary, failed to call a key witness to testify at trial, failed to present evidence challenging the credibility of the detectives at the suppression hearing and failed to present evidence of threats to burn down the house made by a third party. Finally, defendant contends that the trial court erred in dismissing his claims that the State used its peremptory challenges to strike potential jurors on the basis of race and failed to disclose evidence. For the reasons that follow, we reverse.

¶ 3 BACKGROUND

¶ 4 On September 21, 1986, at approximately 4 a.m., there was a fire at the Martinez

residence on 24th Place in Chicago. The fire killed two young men who were in an attic bedroom. Investigators suspected arson. Defendant and two other young men were arrested nine months after the fire and charged with aggravated arson and first degree murder. Following a jury trial, defendant was convicted and sentenced to life imprisonment without the possibility of parole. The trial transcript is not included in the record on appeal.[1]

¶ 5 For purposes of this appeal, we will include only a brief summary of the facts related to the crime and subsequent trial. The police interviewed three individuals who saw several young men in the alley behind the Martinez residence less than a minute before the fire started. Rene Rodriguez and Jose Ramirez, two young men who were admittedly drunk and allegedly also high, were being helped home by Frank Partida, who had coached many of the young men in the neighborhood in baseball and was on his way home from work. Ramirez, the only one of the three who identified defendant as one of the young men he saw in the alley, was also the only one of the three who testified at defendant's trial. Socorro Flores, a neighbor of the Martinez family and the only eyewitness to the act of starting the fire, also testified at trial. She could not identify any of the individuals responsible, but saw three young men throw a bottle through the window of a first floor porch immediately before the fire started. Flores was asked on the stand if defendant was one of the young men she saw that day and she said no. The arson expert who

[1]At oral argument, counsel for defendant explained that, although this court granted defendant's motion to supplement the record and despite counsel's diligence in following up, defendant has not yet been able to obtain a certified copy of the trial transcript from the clerk's office.

testified at trial testified that the fire originated inside the porch, six to seven feet above ground level. Broken glass was also recovered from the first floor porch in the area where the fire started.

¶ 6 Defendant and his two codefendants signed confessions following their initial interviews with the detectives. Defendant's confession stated that one of the codefendants threw a bottle with gasoline and a lit cloth at the building, it broke but did not ignite, and defendant then walked over to the building and threw a lit cigarette at the wall, causing it to ignite. One codefendant stated that defendant poured gasoline around the outside of the building prior to the fire. At trial, defendant testified that the detective who interviewed him told him that if he said the others threw the bottle and all he did was throw the match, he could go home but if he refused, he would get the death penalty. The jury found defendant guilty of aggravated arson and two counts of first degree murder.

¶ 7 Defendant appealed his conviction, it was affirmed, and he subsequently filed a postconviction petition in 1995, to which he attached an affidavit executed by Partida. The affidavit stated, *inter alia*, that both Ramirez and Rodriguez were high the night of the fire and that, given the distance and darkness, Partida could not identify the individuals in the alley and he was certain Ramirez could not identify them either. The affidavit further stated that the detectives showed Partida a photo of defendant and Partida told them he could not identify anyone. The circuit court granted the State's motion to dismiss the petition, and the ruling was upheld on appeal. In 2001, defendant filed a successive postconviction petition. Defendant also executed an affidavit in 2001 in which he stated that his confession had been coerced and

detailed his treatment by Detective Switski during his interview. The petition was docketed and counsel was appointed.

¶ 8 Defendant then filed three supplemental petitions in March 2003, February 2004, and October 2004. In January 2004, the State filed a special motion to dismiss the successive petition based on timeliness. Defendant filed his February 2004 supplemental petition with his response to the State's motion. The February 2004 supplement included a claim of actual innocence based on a newly executed affidavit by Partida. In the 2004 affidavit, Partida stated that he did not recognize the young men they saw in the alley that night and when he asked Ramirez and Rodriguez who they were, Ramirez stated that he did not know. The affidavit further stated that Partida had known defendant for many years and would have recognized him if he had been in the alley that night. Partida also stated that when the detectives interviewed him, he told them that he knew defendant and that defendant was not there the night of the fire.

¶ 9 Judge Epstein initially presided over defendant's successive postconviction petition and supplemental petitions. On September 24, 2004, Judge Epstein denied the State's special motion to dismiss based on timeliness and set a third-stage evidentiary hearing for December 3, 2004. However, Judge Epstein also granted the State leave to file a supplemental motion to dismiss the petition, stating that the court would address the motion and, if necessary, proceed with the evidentiary hearing on December 3. The State filed a supplemental motion to dismiss. In the same motion, the State also asked the court to reconsider its ruling on the State's previous motion to dismiss. On December 3, 2004, Judge Epstein agreed to continue the case to January 21, 2005, but stated that would be the final date for the evidentiary hearing. The State asked the

court to address a few issues prior to the hearing, namely, the combined motion to reconsider and dismiss, and whether defendant's third supplemental petition had been docketed. Judge Epstein reviewed the third supplemental petition from the bench and stated that he would also allow defendant to present evidence on the issue raised in the supplement. Judge Epstein then asked the State if it had arguments that had not been expressed in writing regarding its combined motion to reconsider and dismiss. When the State replied that it did not, Judge Epstein stated that the court would not be hearing oral argument on the motion and that, in his experience, the only way these matters are adequately disposed of is if there is a full, fair, final hearing. In order to achieve resolution in the case, Judge Epstein stated that he would allow defendant to present evidence on the issues raised in the postconviction petition. The court then ordered the parties to disclose all witnesses they intended to call on January 21 and said that any further request for a continuance to locate additional witnesses needed to be supported by an affidavit clearly detailing why an additional continuance was necessary.

¶ 10 Shortly before the date of the hearing, defendant requested and was granted a continuance to investigate evidence of the pattern and practice of police misconduct at the Chicago Police Department Area 4 headquarters in support of his claim that his confession was coerced. The court ordered that certain police records related to this issue be produced for an *in camera* inspection. The records were received by the court in April 2005. In May 2005, the court granted defendant's motion to inspect evidence in an unrelated criminal case involving an allegedly coerced confession by the same detective who obtained defendant's confession. On June 3, 2005, the court allowed defendant to proceed with DNA testing on evidence from the

unrelated case. The State filed a motion to stay the circuit court's order with the Illinois Supreme Court. The motion was originally granted, but that order was vacated approximately one month later. The State then filed a motion to reinstate the stay, together with a motion for a supervisory order. The motion for a supervisory order requested the supreme court to order Judge Epstein to vacate his order authorizing discovery in the unrelated case and direct him to address the State's motion to dismiss prior to commencing an evidentiary hearing. On September 14, 2005, the supreme court denied both motions.

¶ 11 Discovery proceeded in preparation for the evidentiary hearing. On April 14, 2006, the State filed a motion to bar defendant from calling certain witnesses in support of his allegations related to the pattern and practice of police misconduct. On May 12, 2006, Judge Epstein denied the motion, stating that he would hear the testimony and expressing his frustration at the length of time it was taking to set a final date for the evidentiary hearing. After several additional continuances, Judge Epstein set July 31, 2006, as the status date to set the final date for the evidentiary hearing.

¶ 12 Judge Epstein was subsequently transferred to the civil division and, for the next 14 months, the case was assigned to several different judges. The State argued before one of the interim judges that it should be granted a hearing on its supplemental motion to dismiss, but the case was transferred again before that judge ruled. In late 2007, the case was assigned to Judge Brosnahan. On September 27, 2007, the parties explained the status of the case to Judge Brosnahan. The State told the court it had been prepared for an evidentiary hearing on the case before Judge Epstein, but argued that Judge Epstein never ruled on the State's motion to dismiss

but simply stated that it should go to an evidentiary hearing. Defendant told the court that Judge Epstein denied the State's motion to reconsider and supplemental motion to dismiss on December 3, 2004. It was discovered that in the process of the various assignments, the record was misplaced and had to be reconstructed. The case was continued while the record was reconstructed and Judge Brosnahan reviewed it.

¶ 13 On May 1, 2008, Judge Brosnahan ruled that, based upon her review of the record, Judge Epstein "unequivocally denied" the State's motion to reconsider and advanced the petition to the third stage. She further found that there was no pending motion to reconsider at that time and continued the case with the stated intention of moving it along to the third-stage evidentiary hearing. The State filed a motion to reconsider the May 1 ruling. On September 23, 2008, Judge Brosnahan reversed her prior ruling. Judge Brosnahan stated that after reviewing the record a second time, she did not believe Judge Epstein had given the State a "fair shake" at the earlier motion to dismiss. Defendant argued that because the State had raised this issue in a motion for a supervisory order to the supreme court and the motion was denied, the law of the case doctrine applied. On September 25, 2008, Judge Brosnahan held that the law of the case doctrine did not apply because there was no ruling on the merits by the supreme court, and upheld her September 23 ruling. The case proceeded to a hearing on the State's supplemental motion to dismiss and, on November 24, 2009, Judge Brosnahan granted the motion. Defendant timely filed this appeal.

¶ 14 ANALYSIS

¶ 15 Defendant first contends that the original ruling to grant defendant an evidentiary hearing is the law of the case and the trial court erred in granting the State's motion to reconsider that

ruling. Defendant argues that our supreme court implicitly affirmed the original ruling when it denied the State's motion for a supervisory order. Defendant further argues that because there was no change to the underlying facts and the ruling was not manifestly erroneous, the trial court should not have reconsidered the ruling. The State responds that the law of the case does not apply to non-final rulings on an issue that has not been fully litigated, and that a trial court has the authority to amend and revise an interlocutory order prior to final judgment, even if the earlier order was entered by a different judge.

¶ 16 As an initial matter, we must address whether Judge Epstein in fact denied the State's motion. Defendant contends that the motion was denied while the State continues to assert that Judge Epstein never ruled on the motion. On September 24, 2004, Judge Epstein denied the State's motion to dismiss based on timeliness and set a date for the third-stage evidentiary hearing, but granted the State leave to file a supplemental motion to dismiss. Judge Epstein stated that the court would address the motion and, if necessary, the merits of defendant's claims on December 3, 2004. The State filed a combined supplemental motion to dismiss and motion to reconsider the denial of its previous motion to dismiss. At the hearing on December 3, Judge Epstein asked the State if it had anything to add to what it had already submitted in writing. When the State replied that it did not, Judge Epstein said there would be no oral arguments on the motion. Judge Epstein went on to state that, in his view, most reversals occur where procedural defaults eliminate the opportunity to present argument and the court was going to allow defendant to present evidence on his claims. He set January 21, 2005 as the final date for the hearing. Although Judge Epstein did not explicitly state that the motion was denied by

uttering the word "denied," a detailed review of the record provides sufficient context to conclude that Judge Epstein decided to deny the State's motion and proceed to a third-stage evidentiary hearing.

¶ 17 Under the law of the case doctrine, the parties cannot relitigate issues that have already been decided in the case. *People v. Tenner*, 206 Ill. 2d 381 395 (2002). The doctrine applies to lower courts when a higher court has decided an issue and the underlying facts have not changed (*Weiss v. Waterhouse Sec.*, 208 Ill. 2d 439, 447-49 (2004), as well as to a court's own decisions in a case (*People v. Patterson*, 154 Ill. 2d 414, 468 (1992)). However, the doctrine only applies to final orders. *Id*. at 469.

¶ 18 This court has noted that the supreme court's denial of a motion for a supervisory order "does not have the effect of a ruling on any issue, nor does it support the decision of the lower court." *People ex rel. Madigan v. Illnois Commerce Comm'n*, 407 Ill. App. 3d 207, 218 (2010) (citing *Roth v. St. Elizabeth's Hospital*, 241 Ill. App. 3d 407, 417 (1993)). We have found no authority that would persuade us to depart from this principle; thus, the supreme court's denial of the State's motion for a supervisory order did not operate to establish the ruling in question as the law of the case.

¶ 19 The State correctly points out that the denial of a motion to dismiss is an interlocutory order and, as such, may be modified or revised prior to final judgment. See *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 368 Ill. App. 3d 734, 742 (2006) (citing *Balciunas v. Duff*, 94 Ill. 2d 176, 185 (1983)). In the context of discovery orders in which a successor judge revisits an order that required an exercise of discretion by the previous judge, our supreme court

has noted that the successor judge should not revise or modify such an order without a compelling reason to do so. *Balciunas*, 94 Ill. 2d at 188. In the context of the law of the case doctrine, the United States Supreme Court has noted that, while a court has the power to revisit its own prior decisions, it "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." (Internal quotation marks omitted.) *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

¶ 20 We must determine whether the trial court erred in reversing the previous order denying the State's motion to dismiss and granting an evidentiary hearing. The State urges us to review this order under an abuse of discretion standard. However, unlike situations involving discovery orders where the original order was based on the trial court's discretion, a denial of a motion to dismiss at the second stage of the postconviction proceedings is not a matter of discretion. See *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). In *Coleman*, our supreme court noted, in rejecting an abuse of discretion standard of review, that the circuit court's inquiry at the second stage of postconviction proceedings is limited solely to the sufficiency of the allegations, a legal determination which has never been subject to an abuse of discretion standard of review. *Id*. at 387. Therefore, the decision to grant a second stage motion to dismiss is a matter of law and subject to *de novo* review. *Id*. at 387-88; *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The complication here is that we have found no authority for the standard of review of a denial of a motion to dismiss at the second stage, because such interlocutory orders are not appealable. If

the State's motion to dismiss is denied and the case proceeds to an evidentiary hearing, the ruling following the hearing is reviewed under the manifestly erroneous standard (*Coleman*, 183 Ill. 2d at 384) and the denial of the motion to dismiss is not revisited. However, because our supreme court has made it clear that a decision to either grant or deny a motion to dismiss at the second stage of postconviction proceedings is not a discretionary decision, a subsequent decision to reverse the denial of a motion to dismiss at that stage would also not be discretionary. Moreover, as discussed above, because the denial of a motion to dismiss is an interlocutory order that is not immediately appealable, the law of the case doctrine applicable to a court's own prior decisions also does not apply here. Therefore, because "the question is, essentially, a legal one" (*id*. at 388), our review of the order reversing the denial of the motion to dismiss is *de novo*.

¶ 21 In her oral ruling on September 23, 2008, Judge Brosnahan stated that she was granting the State's motion to reconsider the prior ruling because she did not believe Judge Epstein had given the State a "fair shake" at its earlier motion to dismiss. In her written ruling of November 24, 2009, Judge Brosnahan characterized her September 23 ruling as being based on the finding that Judge Epstein had "impermissibly collapsed the second and third stages" of the postconviction process. Judge Brosnahan further stated that it appeared that the State's motion to dismiss had never been addressed in any meaningful manner. Therefore, we must determine whether Judge Brosnahan erred in concluding that Judge Epstein's prior ruling was erroneous.

¶ 22 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq*. (West 2008)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there was a substantial denial of a federal or state constitutional right in the proceeding which resulted

in his or her conviction. 725 ILCS 5/122–1(a) (West 2008); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). The Act generally contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2008); *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002); *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). However, fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. *Pitsonbarger*, 205 Ill. 2d at 459. Where a defendant sets forth a claim of actual innocence, the defendant is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009).

¶ 23 Postconviction proceedings may consist of up to three stages. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the circuit court is required to dismiss petitions that are frivolous and patently without merit. *Harris*, 224 Ill. 2d at 126. A petition must present "the gist of a constitutional claim" to survive beyond the first stage. *Id.* At stage two, the circuit court may appoint counsel for the defendant and the State may move to dismiss the petition. *Id.* At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Id.* A petition that is not dismissed at the second stage proceeds to the third stage where the circuit court conducts an evidentiary hearing. *Id.*

¶ 24 At both the second and third stages of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. At the second stage of the proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Id.* The circuit court does not engage in fact-finding or credibility determinations at the dismissal stage; rather, such determinations are made at the evidentiary stage. *Coleman*, 183 Ill. 2d at 385.

¶ 25 Defendant contends that Judge Epstein ruled there was substantial evidence entitling him to a hearing. The State argues that Judge Brosnahan correctly determined that Judge Epstein impermissibly collapsed the second and third stages because he never considered whether defendant's claims were properly before the court. The State further argues that the record supports Judge Brosnahan's conclusion that Judge Epstein failed to follow the procedural requirements of the Act.

¶ 26 We agree that it would have been preferable if Judge Epstein had explicitly addressed the elements of cause and prejudice for the ineffective assistance claims and if he had explicitly stated that defendant made a substantial showing of a constitutional violation in support of those claims and his actual innocence claim. However, it is well settled that the trial court is presumed to know the law and apply it properly. See, *e.g.*, *People v. Howery*, 178 Ill. 2d 1, 32 (1997); *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 41. The presumption is rebutted only where the record shows strong affirmative evidence to the contrary. *Howery*, 178 Ill. 2d at 32. The record is clear that Judge Epstein read and considered the State's motion to dismiss. His comments also clearly indicate that he rejected the State's arguments for dismissal on procedural grounds. The trial court is not required to explain its ruling on each point. We are not persuaded by the comments highlighted by the State that Judge Epstein did not follow the requirements of the Act. The State points to portions of Judge Epstein's comments that, without context, could lead to one conclusion but, when considered comprehensively, do not support that conclusion. Upon review of the record and the entirety of Judge Epstein's comments, we conclude that the record does not support the State's contention that Judge Epstein failed to follow the procedural

requirements of the Act. While some of his comments were arguably inartful and attributable to his obvious frustration with the length of the postconviction proceedings and the ongoing delay to which both sides contributed, Judge Epstein was speaking extemporaneously from the bench and other comments make it clear that he considered the State's arguments, gave the State the opportunity to add anything it had not included in writing, ruled that defendant's claims were not procedurally barred, and determined that defendant was entitled to a hearing on the merits of his claims. Judge Epstein's various comments at the subsequent hearings over the 16-18 months prior to his transfer also support the interpretation that he determined that defendant had made a substantial showing of a constitutional violation and was entitled to a hearing on his claims. Thus, we conclude that Judge Epstein's denial of the State's motion to dismiss was not erroneous.

¶ 27 While we commend Judge Brosnahan for her thorough and conscientious consideration of the record, the prior ruling, and defendant's claims, we hold that the trial court erred in reversing the denial of the motion to dismiss. This cause is remanded for a third-stage evidentiary hearing on defendant's postconviction claims.

¶ 28 Reversed and remanded.