

FIRST DIVISION
September 26, 2011

No. 1-10-1021

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 93 CR 10210
)	
ANTHONY LYNCH,)	Honorable
)	Thomas M. Tucker,
Petitioner-Appellant.)	Judge Presiding.
)	

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: The trial court properly denied defendant leave to file his second successive postconviction petition where defendant did not establish cause and prejudice.

Defendant Anthony Lynch appeals from the circuit court's denial of leave to file his second successive postconviction petition. Defendant argues that the trial court erred in denying him leave to file the petition where he established the requisite cause and prejudice. For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

Defendant was convicted of the murder of Willie Robinson. The history of his case was outlined in *People v. Anthony Lynch*, No. 1-05-0649 (May 18, 2007) (unpublished order pursuant to Supreme Court Rule 23):

"Defendant, Anthony Lynch, ran over Willie Robinson after 10 a.m. on March 27, 1993. At trial defendant presented evidence that he did not intend to kill Robinson. John Koranda and Henry Knackstedt, passengers in the car at the time it hit Robinson, testified for the defense. Only one passenger, David Strickland, testified for the prosecution. Defendant admitted that he saw Robinson for 5 seconds before striking him. Koranda said he saw Robinson perhaps as much as 10 seconds before impact. All agreed that Robinson ran toward the middle of the street, then defendant turned the wheel and struck him. Defendant swore he drove about 45 miles per hour at the time of the impact. Defendant dragged Robinson for several seconds -- Knackstedt said it seemed like 20 seconds, but other evidence put the time closer to 5 seconds while defendant and his passengers heard the body thumping against the car repeatedly. Defendant did not stop until he was a few blocks away. Defendant drove home and thoroughly cleaned the undercarriage of his car the next day

A police officer who viewed the scene shortly after the killing saw zigzagging tire tracks on the street. He found Robinson's hat 40 feet after the start of the tracks. Robinson's body came to rest 250 feet further down the street from the hat. Another officer testified that Knackstedt told him defendant steered his car toward Robinson.

Knackstedt, Koranda and defendant said Robinson fell in front of the car on impact. Strickland and another witness said they saw Robinson on the hood of the car, and defendant zigzagged to get him off the hood and then ran over him. Strickland admitted that he was on probation for possession of narcotics, he faced a second misdemeanor charge, and the State chose not to prosecute a possession charge against him. He swore that the assistant State's Attorney had not made any promises in exchange for his testimony against defendant. He swore that [he] had not even met the assistant State's Attorney by April 1994.

Larry Storts testified that he met defendant in Cook County Jail in 1994. Defendant told him that on March 27, 1993, he noticed a black man walking down the street, and he thought to himself, "ten points." After he hit Robinson he said to himself, "got that nigger." Storts admitted that he hoped for leniency on pending burglary charges because of his testimony, but the prosecutors had not agreed to any specific deal in exchange for his testimony. He could face substantial time because he already had four burglary convictions and one conviction for attempted burglary.

Steven Wilcox testified that he knew Storts from his neighborhood. In June 1994 Storts told Wilcox Storts was going to make up a story against defendant to try to get himself a lighter sentence.

Jose Flecha testified that he, too, met defendant in jail. Defendant told Flecha defendant had driven down a street playing chicken with pedestrians when he "hit a black guy and drove him a block." Flecha admitted he received light sentences on some convictions in exchange for his testimony against defendant.

The defense relied on testimony of defendant, Koranda and Knackstedt that defendant had drunk a substantial amount of alcohol and he had not slept. Knackstedt testified that he did not tell any police officer that defendant steered his car at Robinson. Knackstedt swore that defendant said "Oh shit" after he hit Robinson.

The trial court found defendant guilty of murder and sentenced him to 40 years in prison. On the direct appeal defendant contended that prosecutors did not disclose all of Strickland's convictions and the evidence failed to show defendant's state of mind. We emphasized the testimony of police officers and defense witnesses in finding the evidence sufficient to support the conviction. Defendant and Koranda established that defendant saw Robinson in plenty of time to avoid him. All witnesses agreed that Robinson dashed into the street. The movement makes sense only if defendant had, as Knackstedt told the officer, aimed his car at Robinson. By aiming the car at Robinson while driving

45 miles per hour, defendant knew he created a strong probability of great bodily harm to Robinson. When Robinson tried to avoid the car[,] defendant turned the wheel and struck him. Knackstedt's testimony that defendant said "Oh shit" shows that defendant immediately knew he struck Robinson so he knew he created a strong probability of death as he dragged Robinson hundreds of feet down the street. Defendant knew of the probability of death regardless of whether Robinson initially landed on the hood of the car or he fell under the car on impact, so that defendant dragged Robinson under the car the entire distance. We found that the added impeachment value of another charge against Strickland would not have affected the verdict.

In his first postconviction petition defendant charged the prosecution with withholding evidence of Strickland's criminal history and of favorable treatment the prosecution afforded Storts. He also claimed that he would have sought a jury trial had he known of all available impeachment of Strickland and Storts. We held that the trial court correctly dismissed the petition as frivolous and patently without merit.

In December 2004 defendant filed his petition for relief from the judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)) combined with a successive postconviction petition (see 725 ILCS 5/122-1(f) (West 2004)). He appended more than 100 exhibits to the petition, including many exhibits consisting of pages from the transcript of his trial. He later added a supplemental petition with yet more exhibits. He has helpfully classified all of his allegations into three major categories: additional

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impeachment of Strickland, additional impeachment of Storts, and additional impeachment of Flecha. Most of the impeachment takes the form of evidence that prosecutors gave very favorable treatment to those three witnesses -- more favorable than prosecutors disclosed before defendant's trial."

People v. Anthony Lynch, No. 1-05-0649 (May 18, 2007) (unpublished order pursuant to Supreme Court Rule 23)

Included in the exhibits that defendant attached to his successive postconviction petition was a letter defendant received from Flecha, who requested \$3500 in exchange for testimony defendant sought concerning the prosecutor. In addition, defendant attached an affidavit from Storts who recanted part of his prior testimony. Storts admitted that the prosecutor had offered him substantial concessions in exchange for his testimony against defendant. This admission contradicted Storts trial testimony that he had not made a deal with the prosecutor in exchange for his testimony.

Defendant requested a new trial or new sentencing hearing because the trial court used Flecha's and Storts' testimony regarding defendant's racial motivation for the crime as aggravation during sentencing. The trial court treated the entire petition as a successive postconviction petition and summarily dismissed it as frivolous and patently without merit.

This court affirmed the judgment of the circuit court, finding that defendant failed to establish the necessary cause and prejudice to be granted leave to file a successive postconviction. *People v. Anthony Lynch*, No. 1-05-0649 (2007) (unpublished order pursuant to Supreme Court Rule 23). In doing so, this court remarked that Flecha's letter "persuasively shows that the court should not believe any testimony Flecha gave at trial or any testimony he might give in later proceedings. * * * Defendant points to no

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indication that the trial court lent any credence to Flecha's testimony." *People v. Anthony Lynch*, No. 1-05-0649 at 7. We also remarked on the affidavit provided by Storts and noted that "Storts has not recanted his essential testimony against defendant. He does not now deny that defendant told him, in prison, that when he saw Robinson he thought, 'ten points,' and when he hit Robinson he thought, 'got that nigger.'" *People v. Anthony Lynch*, No. 1-05-0649 at 10.

Defendant filed the instant second successive postconviction petition on March 9, 2010, wherein he argued that he was entitled to a new sentencing hearing where the trial court relied on testimony from Flecha and Storts during sentencing to find that defendant's actions were racially motivated. Furthermore, defendant offered new evidence that allegedly would impeach Storts' testimony that he and defendant were on the same tier for one week prior to their alleged conversation. Defendant attached his own affidavit, as well as affidavits of Assistant State Appellate Defenders Christopher Smith and Justyna Garbaczewska. The circuit court dismissed defendant's second successive postconviction petition finding that defendant had failed to establish the requisite cause and prejudice.

It is from this judgment that defendant now appeals.

ANALYSIS

Defendant now argues that the trial court erred in dismissing his second successive postconviction petition where the petition established a sufficient showing of cause and prejudice, where he argued that the trial court relied on the perjured testimony of Storts and Flecha, who portrayed defendant as a racist, to aggravate his sentence

The Post Conviction Hearing Act (Act) (725 ILCS 5/2-122-1 *et seq.* (West 2010)),

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allows prisoners to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill.2d 198, 203 (2001). In order for a defendant to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill.2d 500, 528 (1999).

The Act contemplates the filing of only one postconviction petition. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2010). Consequently, all issues actually decided on direct appeal or in an original postconviction petition are barred by the doctrine of *res judicata* and all issues that could have been raised on direct appeal or in an original postconviction petition, but were not, are waived. *People v. Blair*, 215 Ill. 2d 427, 443 (2005); 725 ILCS 5/122-3 (West 2010). Successive postconviction petitions are only allowed when fundamental fairness so requires or when a defendant can establish cause and prejudice for failing to raise the issue in an earlier proceeding. *People v. Lee*, 207 Ill. 2d 1, 4-5 (2003). “The cause-and-prejudice test” is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 (725 ILCS 5/122-3 (West 2010)) so that a claim raised in a successive petition may be considered on its merits. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002); 725 ILCS 5/122-1(f) (West 2010).

Pursuant to the cause-and-prejudice test, the petitioner must show good cause for failing to raise the claimed errors in a prior proceeding and actual prejudice resulting from the claimed errors. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2010) “Cause” is defined as “any objective factor, external to the defense, which impeded the petitioner’s ability to raise a specific claim at the initial postconviction

proceeding.” *Pitsonbarger*, 205 Ill. 2d at 462; 725 ILCS 5/122-1(f) (West 2010).

“Prejudice” is defined as an error so infectious to the proceedings that the resulting conviction violates due process. *Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f) (West 2010). A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under *res judicata* and waiver. *Pitsonbarger*, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2010). We review the trial court’s denial of a motion to file a successive postconviction petition *de novo*. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006).

At the forefront we note that defendant had raised this exact issue in his first successive postconviction petition, and therefore the issue should be barred by the doctrine of *res judicata*. However, defendant attempts to circumvent *res judicata* by arguing that appellate counsel was ineffective. Specifically, defendant faults appellate counsel for not raising the issue that the trial court considered Storts' and Flecha's perjured testimony regarding defendant's racial motivation as aggravation during sentencing on appeal from the denial of his first successive postconviction petition.

In support, defendant has attached an affidavit of Assistant State Appellate Defender Christopher M. Smith, who represented defendant on appeal from the summary dismissal of his successive postconviction petition. Mr. Smith averred that defendant attached, to his petition, affidavits and other documentary evidence supporting his allegations that the three witnesses falsely testified that defendant ran over the victim out of racial animus. Defendant's successive petition included the issue that the trial court issued a 40-year sentence to punish defendant for his alleged racist motive. Despite defendant's request that Mr. Smith include defendant's *pro se* sentencing claim as a free standing ground for relief, Mr. Smith declined to raise the

issue as a free standing claim. Instead, Mr. Smith raised the sentencing issue in the context of the materiality prong of his undisclosed evidence argument.

The doctrine of *res judicata* precludes a subsequent court from entertaining claims that were previously raised and decided on appeal or in a prior case. *People v. West*, 187 Ill.2d 481, 425 (1999). As related to petitions filed under the Act, the doctrine applies such that “a ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition.” *People v. Gosier*, 205 Ill.2d 198, 203 (2001). However, the doctrines of *res judicata* and waiver or forfeiture are relaxed in three situations: where fundamental fairness so requires; where the alleged waiver stems from a claim of ineffective assistance of appellate counsel; or where the facts relating to the postconviction claim do not appear on the face of the original record. *Blair*, 215 Ill. 2d at 443.

Although Mr. Smith did not raise the sentencing issue as a free standing claim on appeal from the denial of defendant's first successive postconviction petition, the issue was raised on appeal. Mr. Smith averred that he included the issue of the alleged perjured testimony and its affect on defendant's sentencing hearing in conjunction with the "materiality prong of *Brady*." Specifically, the appellate brief stated:

"The perjury of Strickland, Storts, and Flecha also infected Lynch's sentencing hearing. See *People v. Vasquez*, 313 Ill. App. 3d 82, 100, 728 N.E.2d 1213 (2d Dist. 2000) (explaining that, in some *Brady* cases, "the relevant inquiry was not how the particular trial judge would subjectively evaluate the undisclosed or false evidence but, rather, how the absence of the evidence might have affected the outcome from an objective standpoint"). Absent the false testimony of its witnesses, the prosecution

would not have been able to compare Lynch to James Earl Ray in its argument in aggravation. Nor could the State have argued that "he did hit him because he was black."

We decline to relax the doctrine of *res judicata* and again consider the effect of the alleged perjured testimony on defendant's sentence based on defendant's current allegation of ineffective assistance of appellate counsel. Defendant's argument was raised in his first successive postconviction petition and was raised on appeal. As a result, defendant cannot establish the requisite cause and prejudice.

Even if defendant's claim was not barred by *res judicata*, his claim would still fail. Defendant's entire argument is premised on evidence that "Larry Storts and Jose Flecha, the only witnesses who testified that Lynch said his actions were racially motivated, had now admitted that they lied at Lynch's trial." Defendant claims that the trial court improperly relied on defendant's racial motive, which was supplied by Flecha and Storts, in imposing a 40-year sentence. However, despite his assertion that Storts and Flecha recanted their testimony, defendant did not include an affidavit from either Storts or Flecha in conjunction with the instant petition.

The necessity of attaching "affidavits, records, or other evidence" to the petition is addressed in section 122-2 of the Act, which provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence *supporting its allegations* or shall state why the same are not attached." (Emphasis added.) 725 ILCS 5/122-2 (West 2010); *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Without these affidavits from Storts or Flecha, defendant has no basis to assert that Storts or Flecha perjured themselves or recanted their testimony. In addition, without these affidavits, defendant lacks support for his argument that the trial court improperly relied on Storts' or Flecha's perjured

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testimony regarding defendant's racial motivation in imposing a 40-year sentence.

Consequently, defendant has failed to establish the necessary cause and prejudice and the circuit court properly denied defendant leave to file his second successive postconviction petition.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

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