2012 IL App (1st) 110513-U

SECOND DIVISION
November 13, 2012

No. 1-11-0513

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 17493
	)	
BENARD McKINLEY,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in denying defendant leave to file a successive post-conviction petition where he failed to satisfy the cause and prejudice test.

Defendant Benard[1] McKinley appeals from an order of the circuit court of Cook

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[1] We note that although defendant spells his name as "Benard," certain documents in the record spell it as "Bernard."

County denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq*. (West 2008)). He contends that he sufficiently demonstrated cause and prejudice to file his successive petition, where he alleged, *inter alia*, ineffective assistance of trial counsel who, prior to trial, refused to inform him of any plea deals offered to him by the State.

¶ 2 The record reflects that defendant, and co-defendant Edward Chavera, who is not a party to this appeal, were indicted on charges of first degree murder in a shooting incident that took place on June 24, 2001, and resulted in the death of Abdo Serna-Ibarra. On January 28, 2004, when testimony was set to begin at trial, Chavera pleaded guilty to a reduced charge of second degree murder in exchange for a negotiated sentence of 17 years and 6 months in prison.

¶ 3 Following a jury trial, defendant was found guilty of first degree murder and of personally discharging the firearm that caused the victim's death. He was then sentenced to 50 years' imprisonment for the murder and a consecutive term of 50 years on the enhancement. This court affirmed that judgment on direct appeal. *People v. McKinley*, No. 1-04-2759 (2007) (unpublished order under Supreme Court Rule 23).

¶ 4 On June 2, 2008, defendant filed his initial post-conviction petition, in which he raised 33 issues, comprised of numerous claims of prosecutorial misconduct, abuse of discretion by the trial court, and ineffective assistance of trial counsel. The circuit court summarily dismissed defendant's petition as frivolous and patently without merit on August 8, 2008, and this court

affirmed that dismissal on appeal. *People v. McKinley*, No, 1-08-2790 (2010) (unpublished order under Supreme Court Rule 23).

¶ 5 On August 10, 2009, defendant filed a petition for relief from judgment, in which he argued that the first degree murder statute and firearm sentencing enhancements are unconstitutional. The circuit court denied this petition on September 11, 2009.

¶ 6 On October 29, 2010, defendant mailed a motion for leave to file a successive post-conviction petition, along with a successive post-conviction petition, to the circuit court of Cook County. In his petition, defendant claimed, in relevant part, that he received ineffective assistance of trial counsel who refused to tell him about any plea deals that the State had offered to him. Defendant asserted that, on the day his trial was to begin, he discovered that Chavera had been offered a plea deal for second degree murder and asked his attorney what offer the State had made to him. Counsel responded that, "it does not even matter at this point we are going to trial."

¶ 7 In support of his claim, defendant attached his own affidavit in which he averred that, when he asked his counsel on the day of trial what "plea bargain" the State had come up with for him, counsel stated, "it does not matter well [sic] going to trial anyway," and then left the room. Defendant further averred that when he was drafting his initial post-conviction petition, his trial attorney called him and asked: "[i]f I would have told you prior to trial that if the State attorney had offered second-degree and I told you then, would you have accepted it before trial?" When

he asked counsel if the State had extended an offer, counsel refused to answer the question and quickly changed the subject.

¶ 8 On January 21, 2011, the circuit court denied defendant's motion for leave to file a successive post-conviction petition. The court found that defendant had failed to satisfy the cause and prejudice test set forth by the legislature, and, as to the claim at issue in this appeal, the trial court stated that it "is nothing more than conjecture and would have been rejected if it were included in his initial petition."

¶ 9 On appeal, defendant contends that the circuit court erred in denying his motion for leave to file a successive post-conviction petition because he adequately set forth the gist of a claim sufficient to satisfy both cause and prejudice due to counsel's refusal to inform him of any plea deals the State offered to him prior to trial. Our review of the trial court's denial of leave to file defendant's successive post-conviction petition is *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 10 We initially observe that defendant raised eight claims in his successive post-conviction petition, but, on appeal, he focuses solely on his ineffectiveness claim based on counsel's alleged failure to inform him of any plea deals. In doing so, he has abandoned the remaining claims in his petition and forfeited them on appeal. Ill. S. Ct. R. 341 (h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 11 In general, the Act contemplates the filing of only one petition (*People v. Guerrero*, 2012 IL 112020, ¶ 15), and expressly provides that any claim of substantial denial of constitutional

rights not raised in the original or amended petition is waived (725 ILCS 5/122-3 (West 2008)). A defendant seeking to file a successive post-conviction petition must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2008). Leave to file may be granted where defendant demonstrates cause for his failure to bring the claim in his initial post-conviction petition and prejudice as a result of that failure. 725 ILCS 5/122-1(f) (West 2008); *People v. Tidwell*, 236 Ill. 2d 150, 152 (2010).

¶ 12 Cause may be shown by pleading some objective factor external to the defense that impeded his ability to raise the claim in his initial post-conviction proceeding, and prejudice by demonstrating that the claim not raised so infected the trial that the resulting conviction and sentence violated due process. 725 ILCS 5/122-1(f) (West 2008); *Gillespie*, 407 Ill. App. 3d at 123-24.

¶ 13 Defendant maintains that he made such a showing by setting forth the gist of a claim of cause and prejudice to satisfy the test. In presenting his argument, he refers to the "low threshold" standard applicable to first stage dismissals of post-conviction petitions, which he claims applies to successive petitions. In doing so, he relies on *People v. LaPointe*, 365 Ill. App. 3d 914, 923-24 (2006), *aff'd on other grounds*, 227 Ill. 2d 39 (2007), in which the court held that a petition for leave to file a successive post-conviction petition need only state the gist of a meritorious claim of cause and prejudice.

¶ 14 The State responds that defendant's invocation of the "gist" standard in these circumstances transgresses the cause and prejudice standard, which the Illinois supreme court has

stated is "more exacting" than the gist standard, citing *People v. Conick*, 232 Ill. 2d 132, 142 (2008). We agree.

¶ 15 The supreme court recently rejected the argument that successive post-conviction petitions should be evaluated under the same first-stage standard as an initial post-conviction petition. *People v. Walter Edwards*, 2012 IL 111711, ¶¶ 25-29. In reaching its decision, the court relied on the language and legislative history of the Act, as well as the well-settled rule that successive post-conviction petitions are disfavored. *Edwards*, 2012 IL 111711, ¶¶ 26-29.[2] As such, rather than merely presenting the gist of a claim, defendant must make a "more exacting" showing of cause and prejudice to merit leave to file a successive post-conviction petition. See *Conick*, 232 Ill. 2d at 142; see also *People v. Wayne Edwards*, 2012 IL App (1st) 091651, ¶ 22.

¶ 16 Defendant also maintains that all well-pleaded facts in his petition must be taken as true, relying on *People v. Ward*, 187 Ill. 2d 249, 255 (1999) and *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009). The State responds that, because first-stage post-conviction principles do not apply here and defendant bears the burden of establishing cause and prejudice, the court need not assume the truth of the allegations in defendant's successive petition.

¶ 17 In *Ward*, the supreme court noted that, at the dismissal stage of post-conviction proceedings, all well-pleaded facts in the petition and supporting affidavits must be taken as true.

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[2] We note that the applicable pleading standard for successive post-conviction petitions that are subject to the cause and prejudice test, as opposed to petitions claiming actual innocence, as was the case in *Walter Edwards*, is currently pending before the Illinois Supreme Court in *People v. Evans*, 2011 IL App (1st) 100391-U, *appeal allowed*, No. 113471 (Jan. 25, 2012).

187 Ill. 2d at 255. In *Williams*, this court made the same observation in the context of the first-stage review of a successive post-conviction petition alleging actual innocence. 392 Ill. App. 3d at 366-67. Because the defendant in *Williams* alleged actual innocence, he was excused from demonstrating cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009).

¶ 18 Here, unlike *Ward*, defendant had not yet reached the dismissal stage of proceedings because he had not been granted leave to file his successive post-conviction petition, as required by section 122-1(f) of the Act, nor, as in *Williams*, had he alleged actual innocence. Accordingly, we find that neither case supports defendant's proposition, and his reliance thereon misplaced. Defendant's citation to *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002), does not warrant a different conclusion, as the quote which defendant makes in his reply brief refers to the standard for determining whether an evidentiary hearing is warranted, and not to the question of cause and prejudice.

¶ 19 Moreover, in order for defendant to prevail on his motion, he was required to satisfy both prongs of the cause and prejudice test. *Guerrero*, 2012 IL 112020, ¶ 15. For the following reasons, we find that he failed to do so.

¶ 20 As to cause, defendant contends that he was unaware of the factual basis for his claim at the time he filed his initial post-conviction petition. Although he concedes that he "cannot state with absolute certainty at this point in the proceedings that a plea offer was in fact tendered and ignored by counsel," he maintains that the factual basis for his claim is that "the State may have offered him, through discussions with counsel, a plea deal to second degree murder."

¶ 21 He claims that, prior to the telephone conversation with his attorney, in which counsel asked him whether he would have accepted a plea offer for second degree murder if he had been told about one, he "had no way of knowing" that the State *may have* extended a plea deal to him. This claim is contradicted by the record, however, which shows that in his motion for leave to file his successive petition, defendant stated that this conversation took place after he "had already drafted his initial petition." In his attached affidavit, defendant stated that this telephone conversation took place after he was "denied [his] direct appeal and [he] was drafting [his] post-conviction petition the best [he] knew how." This description of the timing of events indicates that the conversation took place when he was in the process of drafting his initial post-conviction petition, rather than after it was filed. Accordingly, defendant could have included this claim in the petition he was drafting at that time, and thus failed to establish cause for not doing so.

¶ 22 In an attempt to minimize the effect of his use of the word "drafted" instead of the word "filed," defendant argues that this case should not turn on an unskilled petitioner's use of a legal term of art, and that "common sense" dictates that he would have included this claim in his initial petition if he had been aware of it at that time. Even assuming that defendant inadvertently used the word "drafted" instead of "filed," he nevertheless failed to establish that he was unaware of the factual basis for his claim at the time he filed his initial post-conviction petition.

¶ 23 The allegations in defendant's successive petition and attached affidavit demonstrate that he suspected that the State *may have* extended an offer to him – the factual basis for his claim – on the day his trial was scheduled to begin, which was well before he filed his initial petition. In

his successive petition, defendant stated that prior to trial, upon learning of Chavera's offer from the State, he asked counsel what the State had offered to him, which indicates that defendant suspected that he had also been extended an offer from the State. In his affidavit, defendant averred that counsel's response at that time was, "it does not matter well [sic] going to trial anyway." These statements, while substantively inconclusive, defeat defendant's claim that the factual basis for his claim was not available to him on direct appeal or at the time he filed his original post-conviction petition. Defendant thus failed to show cause for his failure to raise this claim in his initial proceeding; and, accordingly, we need not address whether he sufficiently established prejudice. *People v. Williams*, 394 Ill. App. 3d 236, 246 (2009).

¶ 24 For the foregoing reasons, we affirm the judgement of the trial court.

¶ 25 Affirmed.