2014 IL App (1st) 120209-U

FIRST DIVISION
August 18, 2014

Nos. 1-12-0209, 1-12-0648 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. HARVEY ALLEN, JR., Petitioner-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 86 CR 901 Honorable Stanley Sacks, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not err in denying petitioner leave to file a successive postconviction petition because petitioner failed to establish cause or prejudice.

¶ 2 Petitioner Harvey Allen, Jr. appeals from an order of the circuit court of Cook County denying him leave to file his second successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Petitioner contends that he sufficiently established cause and prejudice with respect to his claims that his confession was physically coerced by police officers and his trial counsel was ineffective for failing to present

evidence regarding this abuse during his pretrial motion to suppress. For the following reasons, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 This court has previously described the underlying facts of this case in a full opinion. See *People v. Allen*, 249 Ill. App. 3d 1001 (1993). Therefore, we will describe only those facts pertinent to an understanding of the case and necessary for our discussion of the issue on appeal.

¶ 5 Following a jury trial, petitioner Harvey Allen, Jr. was convicted of four counts of first degree murder (Ill. Rev. Stat. 1985, ch. 38, ¶ 9-1) and arson (Ill. Rev. Stat. 1985, ch. 38, ¶ 20-1) and sentenced to concurrent prison terms of natural life and seven years, respectively. Petitioner's convictions arose from a fire in an apartment building in Chicago that occurred in the early morning hours of December 7, 1985, and killed four people.

¶ 6 Before trial, petitioner filed a motion to quash arrest and suppress evidence, and an additional motion to suppress statements. In the motion to quash arrest, petitioner asserted that he was arrested in his apartment without a warrant or probable cause.

¶ 7 In his motion to suppress statements, petitioner alleged that he had been interrogated at home, at the "Third District" police station, at "Area #1 Headquarters" at East 51st Street and South Wentworth Avenue (hereinafter Area 1); and that he was also questioned (and given a polygraph examination) at the police station at East 11th Street and South State Street. After further questioning at Area 1, petitioner said that he was brought home that evening where, during the course of further questioning, unnamed police officers "twisted [his] arms and dragged him up and down the stairs of his home" to coerce a confession. The next afternoon, after being brought back to Area 1, petitioner alleged that a detective kicked him, and a police

officer also physically abused him by "kneeing [him] in the groin" and holding a sharp object to his throat.

¶ 8 The trial court held a hearing on both motions, but petitioner only testified at the hearing regarding his motion to quash arrest. In that hearing, petitioner testified that certain unnamed police officers entered his apartment with their guns drawn, and one officer walked petitioner out of the apartment while holding petitioner's arm. Once outside of his apartment, the officer handcuffed petitioner and walked him downstairs to a police car, again while holding petitioner's arm. Petitioner did not testify as to any physical abuse or torture. Following the hearing, the trial court denied petitioner's motion to quash arrest.

¶ 9 At the hearing on petitioner's motion to suppress statements, the following Chicago police detectives testified: George Carey, Guy Habiak, and James Swistowicz. All three detectives testified that they were assigned to the Area 1 violent crimes unit. Carey and Swistowicz went to petitioner's apartment during their initial investigation, where they met detectives Richard Popovitz and Leo Wilkosz (who were also assigned to Area 1). Carey and Swistowicz testified that at no time did they or any other officer strike petitioner, twist petitioner's arm, or kick petitioner in the groin either (1) when they met petitioner at petitioner's home, (2) at the third district police station, or (3) elsewhere at Area 1.

¶ 10 Habiak testified that he brought petitioner from the first-floor "lockup" at Area 1 to an interview room on the second floor. Habiak asked for and obtained petitioner's consent to search his apartment, so Habiak and his partner, Detective Coffman, drove petitioner from Area 1 to the residence. There, they met detectives Glynn and Regan. Habiak denied dragging petitioner up the stairs to petitioner's apartment or throwing petitioner down the stairs. Habiak further testified that neither he nor anyone in his presence (i) threw petitioner down the stairs, (ii) struck

or kicked petitioner, or (iii) twisted petitioner's arm. Habiak added that neither he nor his partner kicked petitioner in the groin.

¶ 11 Assistant State's Attorney James Kogut also testified at the hearing on petitioner's motion to suppress. Kogut stated that petitioner never indicated to him that the police were physically abusive, nor did Kogut observe any officer being physically abusive to petitioner in Kogut's presence. Kogut also denied physically abusing petitioner "in any way."

¶ 12 At the conclusion of the hearing, the trial court found that petitioner's statements were voluntary and denied the motion to suppress statements. The cause then proceeded to trial.

¶ 13 The evidence adduced at trial indicated that the fire department and the bomb and arson unit determined that the fire was deliberately set by pouring and igniting gasoline in a "Black Flag" insecticide can at the front door of Sherman Young's apartment. Gregory Brooks testified that petitioner gave Young $160 to purchase heroin, but at around 11:30 p.m. on December 6, 1985, Young's sister received several telephone calls from petitioner threatening to harm Young. At about 12:30 a.m. on December 7, 1985, petitioner still had not received his drugs, so he called Brooks, and angrily threatened harm to Young if petitioner did not get either his drugs or the money. Brooks also stated that Young called him at around 4:30 a.m. to inform Brooks that petitioner had set fire to Young's apartment.

¶ 14 The night manager of a local gas station testified that, between 1:30 a.m. and 3 a.m., he and his friend saw petitioner walk up to the station. Petitioner said that he had run out of gasoline and only needed enough to fill the empty Black Flag insecticide can petitioner was holding in his hands. Petitioner filled the can and then walked toward the building that burned, which was about three or four blocks from the gas station, and the fire started soon after. The manager had known petitioner for years, and the manager's friend recognized petitioner from the

neighborhood. Both witnesses identified petitioner from a photo array and identified the jacket petitioner was wearing on the night in question. Further testimony revealed that petitioner confessed to an assistant state's attorney that petitioner had purchased a small amount of gasoline in an insect spray can, went to the door of Young's second-floor apartment, removed the cap from the can, threw the can at the door, dropped a match, and then fled the scene.

¶ 15 A jury convicted petitioner of four counts of murder and arson. He was sentenced to concurrent terms of seven years and natural life imprisonment for the arson and murder charges, respectively. On direct appeal, petitioner raised numerous contentions but did not claim that his inculpatory statements were physically coerced. This court rejected his contentions and affirmed his convictions and sentences. *People v. Allen*, 249 Ill. App. 3d 1001 (1993), *appeal denied*, 152 Ill. 2d 563 (1993), *cert. denied*, 511 U.S. 1075 (1994).

¶ 16 In *People v. Allen*, 322 Ill. App. 3d 724 (2001), *appeal denied*, 198 Ill. 2d 618 (2002), petitioner filed a petition for postconviction relief, alleging various constitutional claims, but he again failed to make any claim that his custodial statements were physically coerced. The trial court granted the State's motion to dismiss his petition, and we affirmed. *Id.*

¶ 17 In *People v. Allen*, No. 1-05-1074, 367 Ill. App. 3d 1087 (2006) (unpublished order under Rule 23), *appeal denied*, 222 Ill. 2d 610 (2007) (table), petitioner filed a successive postconviction petition (and then a supplemental petition), claiming that he was denied due process and equal protection due to postconviction counsel's unreasonable assistance and the ineffective assistance of appellate counsel. As with his previous petitions and his direct appeal, petitioner raised no challenge with respect to his inculpatory statements. We affirmed the trial court's summarily dismissal. *Id.*

¶ 18 On May 26, 2011, petitioner filed the present motion for leave to file a second successive postconviction petition. Petitioner asserted that his confession was physically coerced when police officers (i) dragged him up and down the stairs of his home, (ii) struck him, (iii) kicked him in the groin, and (iv) placed a sharp object against his throat. Petitioner stated that this abuse took place at his apartment and at the third district police station. Petitioner further claimed that trial counsel was constitutionally ineffective for failure to argue this issue during the pretrial hearing on his motion to quash arrest. With respect to cause (for failure to raise this issue in a prior proceeding), petitioner argued that a report issued by Special State's Attorney Edward Egan[1] (hereinafter the Egan report) would now allow petitioner to prove that he was physically abused at "Area 3" and forced to submit a false confession. As to prejudice, petitioner stated that, absent the confession, he would not have been convicted.

¶ 19 Petitioner also alleged that the State used perjured testimony, the trial court improperly admitted hearsay testimony, the State failed to disclose potentially exculpatory telephone records, and that he was prejudiced by the introduction of certain evidence and testimony. Petitioner further argued that his trial and appellate counsel rendered ineffective assistance for failure to address the issues at trial and to raise them on appeal, respectively. In a written order, the trial court denied petitioner leave to file the successive petition.

¶ 20 This appeal followed.

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[1] Petitioner is referring to the Report of the Special State's Attorney, Edward J. Egan. Egan was appointed in 2002 by the presiding judge of the criminal division of the circuit court of Cook County to investigate allegations of, *inter alia*, torture by police officers under the command of Jon Burge at Area 2 and Area 3 police headquarters beginning in 1973.

¶ 21 ANALYSIS

¶ 22 On appeal, petitioner contends that the trial court erred in denying him leave to file a second successive postconviction petition, in which he claimed that (i) his confession was the product of physical coercion and (ii) his trial counsel was ineffective for failing to present evidence of this during the motion to quash arrest. Petitioner argues that he satisfied the "cause" portion of the cause-and-prejudice test because the Egan report (which he asserts is newly discovered evidence that corroborates his claim that his confession resulted from police torture) was not released to the public until July 19, 2006, after the filing of his first successive petition. Petitioner adds that the Egan report corroborates his claim of abuse and establishes prejudice.

¶ 23 The Act allows a defendant to challenge a conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). An action for postconviction relief is a collateral proceeding rather than an appeal from the underlying judgment. *People v. Williams*, 186 Ill. 2d 55, 62 (1999). Principles of *res judicata* and waiver will limit the range of issues available to a postconviction petitioner " 'to constitutional matters which have not been, and could not have been, previously adjudicated.' " *People v. Scott*, 194 Ill. 2d 268, 273-74 (2000) (quoting *People v. Winsett*, 153 Ill. 2d 335, 346 (1992)). Accordingly, rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised in the earlier proceedings, but were not, will ordinarily be deemed waived. *Id.* at 274; 725 ILCS 5/122-3 (West 2010).

¶ 24 Moreover, the Act provides that only one petition may be filed by a petitioner without leave of court. 725 ILCS 5/122-1(f) (West 2010). The granting of leave to file a successive petition is defined in terms of the cause-and-prejudice test, where cause is defined as some objective factor external to the defense that impeded efforts to raise the claim in an earlier

proceeding, and prejudice occurs where the alleged error "so infected" the trial that the resulting conviction or sentence violates due process. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458-60, 464 (2002); 725 ILCS 5/122-1(f) (West 2010). "The cause-and-prejudice test, like the test for ineffective assistance of counsel [citation], is composed of two elements, both of which must be met in order for the petitioner to prevail." *Id.* at 464. The cause-and-prejudice test is a "more exacting standard" than the " 'gist' standard," under which initial postconviction petitions are reviewed. *People v. Conick*, 232 Ill. 2d 132, 142 (2008). Although the supreme court has not determined whether the appropriate standard of review is *de novo* or an abuse of discretion (see *People v. Edwards*, 2012 IL 111711, ¶ 30), we need not resolve this matter because petitioner's claim fails under either standard.

¶ 25 In this case, petitioner failed to establish cause and prejudice for his failure to raise either claim on direct appeal or in his prior postconviction petitions. While the Egan report revealed the widespread physical abuse and torture of arrestees at Area 2 and Area 3 by then-commander Jon Burge and officers under his command, the testimony in this case reveals that petitioner was never interrogated at either Area 2 or Area 3, where Burge was the supervising officer, and which was repeatedly referred to in the Egan report. Instead, petitioner was initially brought to *District* 3, which is within Area 1,[2] where Burge was never the supervising detective and which was never mentioned in the Egan report. In addition, none of the detectives or police officers involved in petitioner's arrest and questioning were named in the Egan report, nor are

[2] See 1985 Annual Report, Chicago Police Department Annual Reports, 24 (Sept. 1, 1986), *available at* https://portal.chicagopolice.org/portal/page/portal/ClearPath/News/Statistical%20Reports/Annual%20Reports/1985_AR.pdf (last visited August 1, 2014). This court may take judicial notice of information on a governmental website even though the information was not in the record on appeal. See *People v. Clark*, 406 Ill. App. 3d 622, 633-34 (2010) (reliability of "mainstream Internet sites" such as MapQuest and Google Maps warrant judicial notice).

petitioner's claims of physical abuse similar to the conduct revealed in the Egan report. Finally, there was no medical evidence or testimony supporting petitioner's claim. Although petitioner insists that the Egan report meets the standard for newly discovered evidence and it cannot be expected to be an encyclopedic compendium of police torture, it is well established that such evidence must be "new, material, and noncumulative, and it must be of such conclusive character that it would probably change the result on retrial." *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001). In this case, the Egan report is neither material nor would it change the result on retrial.

¶ 26 Moreover, as our supreme court held, "while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent." *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). Here, however, petitioner provided nothing: he merely asserted that his confession was the result of torture at the hands of unspecified "police officers" and a "detective." Consequently, the trial court did not err in denying petitioner's motion for leave to file a second successive postconviction petition. See *id.* at 258 (holding that "broad conclusory" allegations are not allowed under the Act); see also *People v. Rogers*, 197 Ill. 2d 216, 222 (2001) (noting that reviewing courts have consistently upheld the first-stage dismissal of a postconviction petition when the record from the original trial proceedings contradicts the defendant's allegations).

¶ 27 Finally, our decision is unaffected by petitioner's citation to *People v. Wrice*, 2012 IL 111860. In *Wrice*, the petitioner consistently claimed he was physically abused while in custody at Area 2 in his pretrial suppression hearing, at trial, and in both his initial and two successive postconviction petitions. *Id.* ¶¶ 7-8, 29-31, 39-41. In addition, the petitioner's claims of abuse were notably similar to those of other arrestees questioned at Areas 2 and 3, and the officers

involved were identified in other allegations of torture. *Id.* ¶ 43. Finally, the petitioner in *Wrice* provided medical testimony from a paramedic and physician that supported his claim of physical abuse while in custody. *Id.* ¶¶ 10-11, 35. Here, by contrast, (i) petitioner never testified that he was physically abused at either pretrial hearing, at trial, on direct appeal, or in his prior postconviction petitions; (ii) petitioner's claims were dissimilar to the claims of Area 2 or 3 arrestees and the officers involved in his case were never identified in the Egan report; and (iii) there was no medical evidence to corroborate petitioner's claims of physical abuse. *Wrice* is therefore factually distinguishable, and petitioner's contention is meritless.

¶ 28 Petitioner also contends that he established cause and prejudice with respect to his claim that his trial counsel was ineffective for failure to pursue his abuse allegations "in the trial court," notably during the pretrial hearing on the motion to quash.

¶ 29 Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that (i) counsel's performance was deficient and (ii) the deficient performance prejudiced the defendant. *Id.* (citing *Strickland*, 466 U.S. at 687). More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 496-97; *Strickland*, 466 U.S. at 690, 694. The failure to establish either prong (of the *Strickland* test), however, is fatal to the claim. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (citing *Strickland*, 466 U.S. at 697). With respect to pretrial motions to suppress, a petitioner meets the prejudice prong of *Strickland* by showing

that, had trial counsel not committed the alleged error, his motion to suppress would have been granted *and* the outcome of his trial would have been different had the evidence been suppressed. See *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Finally, matters of trial strategy are generally immune from claims of ineffective assistance of counsel except where the trial strategy results in no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 432-33 (1999).

¶ 30 Here, petitioner's claim centers on the alleged failure of trial counsel to pursue the torture claim at the pretrial hearings on his motion to quash arrest and his motion to suppress statements. Clearly, petitioner could have raised this matter on direct appeal or in his initial postconviction petition but did not. As a result, this claim is forfeited. See *Scott*, 194 Ill. 2d at 274.

¶ 31 Petitioner argues, however, that the Egan report rescues this claim from waiver. We disagree. As noted above, petitioner's allegations of physical abuse bear no resemblance to the abuse described in the Egan report, either in terms of location, perpetrator, or type of abuse. Furthermore, petitioner testified at the hearing on his motion to quash arrest, but failed to substantiate any claim of improper conduct. When asked to describe the circumstances of his alleged arrest at his apartment, petitioner merely stated that he was handcuffed and a police officer only held his arm while petitioner walked downstairs to a waiting police car. In addition, petitioner provided no evidence at the hearing on his motion to suppress statements; rather, every police officer involved in petitioner's arrest and interview, as well as the assistant state's attorney who took petitioner's statement, denied physically abusing petitioner at any time. Under these facts, we cannot say that the motion to suppress would have been granted had trial counsel attempted to argue the issue of petitioner's alleged physical abuse at the hearing on the motion to quash arrest. Thus, trial counsel was not ineffective for failing to pursue what would have been a claim of physical abuse with no evidence to support it. See *People v. Williams*, 147 Ill. 2d 173,

238-39 (1991) ("defense counsel is not required to undertake fruitless efforts to demonstrate his effectiveness").

¶ 32 In addition, petitioner cannot show that, had the motion to suppress been granted and his inculpatory statement been suppressed, the result of his trial would have been different. At trial, the fire that killed the four victims was caused by gasoline and a Black Flag insecticide can was found near the source of the fire. Witness testimony established that petitioner had threatened an individual who lived in the building that was set afire shortly before the fire; petitioner was seen filling a Black Flag insecticide can with gasoline and then walking in the direction of the building immediately before the fire; and the individual who lived in the building told another person that petitioner had set his apartment on fire. Therefore, even had petitioner's statement been suppressed, the outcome of his trial would not have been different. Consequently, we must reject petitioner's final contention of error.

¶ 33 CONCLUSION

¶ 34 The trial court did not err in denying petitioner leave to file a successive postconviction petition because petitioner failed to establish cause or prejudice. Accordingly, we affirm the judgment of the trial court.

¶ 35 Affirmed.