2014 IL App (1st) 123127-U

SECOND DIVISION
June 30, 2014

No. 1-12-3127

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 94 CR 19098
	)	
SHAMON MILLER,	)	Honorable
	)	William H. Hooks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant leave to file his successive postconviction petition.

¶ 2 Defendant, Shamon Miller, appeals from the circuit court's denial of his request for leave to file a successive postconviction petition. Before this court, defendant argues that the circuit court erred in denying him leave to file his successive postconviction petition because he had established cause for failing to include his ineffective assistance of counsel claim in his initial petition and that he was prejudiced by the omission of that claim from his petition. For the

following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first degree, aggravated battery with a firearm, and two counts of aggravated discharge of a firearm and was sentenced to an aggregate sentence of 50 years' imprisonment. According to witnesses, at about 8:30 p.m. on June 16, 1994, defendant was the front passenger in a car that pulled up alongside a vehicle being driven by James Banks. Brothers, Dennis, Ronny and Donny Henderson were passengers in Banks' car. Defendant fired 10 to 15 shots out of the passenger window and into Banks' car, injuring Dennis and killing Banks.

¶ 5 Shalynn Pickens testified for defendant. She testified that defendant was with her during the shooting and that her mother, Onie Pickens, who lived downstairs from her saw defendant when he arrived at their house in the afternoon and again when he left the house later that night. Although she learned of defendant's arrest on the day it occurred, she never told the police or the State that defendant was with her that night. This court affirmed defendant's conviction on December 11, 1998. *People v. Shamon Miller*, No. 97-0898 (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant filed a *pro se* postconviction petition on May 3, 2010, wherein he alleged that the statute he was sentenced under was unconstitutional and the trial court improperly instructed the jury. The trial court dismissed the petition at the first stage as frivolous and patently without merit. This court affirmed the dismissal of defendant's *pro se* petition on April 10, 2013. *People v. Miller*, 2013 IL App (1st) 113766-U.

¶ 7 Defendant filed the instant successive postconviction petition on April 27, 2012. In the

petition, defendant raised claims of actual innocence and ineffective assistance of counsel for failing to present the testimony of two alibi witneses, Onie Pickens, Shalynn Picken's mother, and his own mother, Yolanda McClinton. Defendant attached affidavits to his petition from both women in support of his argument that counsel was ineffective for failing to call them as alibi witnesess. In her affidavit, Yolanda McClinton averred that she called Shalynn's house at 10:15 p.m. on the night of the shooting and spoke with defendant and that he returned home at 10:50 p.m. that same night and remained there until the next morning. Yolanda stated that she was called as an alibi witness but never testified despite the fact that she told defendant's attorney that she wanted to testify as to defendant's whereabouts that night. In her affidavit, Onie Pickens stated that on the day of the shooting, she answered the door between 4:00 p.m. and 5:00 p.m., and let defendant into the house to see her daughter Shalynn. She let defendant out of the house about 10:00 p.m. or 10:30 p.m. that same evening. Onie stated that defendant's attorney never asked her to testify although defendant had asked her to be an alibi witness. Had she been notified, she would have testified on defendant's behalf. Defendant claimed that he did not raise these claims in his first postconviction petition because he lacked the financial resources to hire a lawyer and the petition was dismissed at the first stage before counsel was appointed.

¶ 8 On August 28, 2012, the circuit court denied defendant leave to file his supplemental petition in a written order. The court found that defendant had not set forth a freestanding claim of actual innocence because the evidence upon which he relied did not qualify as new and the claim was not freestanding because he attempted to link it to his claims of ineffective assistance of counsel. Furthermore, the court found Onie's and Yolanda's testimony would have been cumulative. It is from this order that defendant now appeals.

¶ 9 ANALYSIS

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

¶ 11 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 forfeited. *People v. Blair*, 215 Ill. 2d 427, 443 (2005); 725 ILCS 5/122-3 (West 2010).

¶ 12 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). A defendant must meet a "more exacting" or "substantial" showing of cause and prejudice to be granted leave to file a successive postconviction petition. *People v. Edwards*, 2012 IL 111711 ¶ 22, 32. A "gist" of a claim of

cause and prejudice is insufficient. *Id*. at ¶25, 29. "While the test for initial petitions to survive summary dismissal is that the petition states the gist of a meritorious claim—that is, a claim of arguable merit—the cause and prejudice test for successive petitions is more exacting than the gist or arguable merit standard." *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26.

¶ 13 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 principals. *Pitsonbarger*, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2010). "Where a defendant fails to first satisfy the requirements under section 122-1(f), a reviewing court does not reach the merits or consider whether his successive postconviction petition states the gist of a constitutional claim." *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009). We review the trial court's denial of a motion to file a successive postconviction petition *de novo*. *People v. Thompson*, 383 Ill. App. 3d 924 (2008).

¶ 14 Relying on *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. _, 133 S. Ct. 1309 (2012), defendant argues that he should be excused from showing cause for failing to raise his ineffective assistance of counsel claim in his prior postconviction petition because he

was not represented by counsel.

¶ 15 In *Martinez*, while recognizing its prior ruling that an attorney's ineffectiveness in a postconviction proceeding cannot stand as the basis for cause to excuse procedural default in a federal habeas corpus proceeding (see *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991)), the Supreme Court carved a "narrow exception" to that rule given Arizona's rules of criminal procedure, precluding defendants from raising ineffective assistance of counsel claims on direct appeal. The Court ruled that a prisoner may establish cause for default in a federal habeas corpus proceedings where: (1) the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial or (2) appointed counsel in the initial-review collateral proceeding, when the claim should have been raised, was ineffective under *Strickland* standards. *Martinez*, 566 U.S. at ——, 132 S.Ct. at 1318. The *Martinez* court emphasized that its ruling was based in equity rather than in the constitution and that its holding only applied to cases where a state's procedural law prevented a defendant from raising an ineffective assistance claim on direct appeal. *Martinez*, 566 U.S. at ——, 132 S.Ct. at 1319; see also *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (there is no constitutional right to an attorney in state postconviction proceedings).

¶ 16 Subsequently, in *Trevino*, the Supreme Court extended the rule in *Martinez* finding that the exception made in *Martinez* applied not only to situations where defendants were prevented from raising ineffective assistance of counsel claims on direct appeal, but also to situations similar to those in Texas where the state procedural framework made it unlikely that a defendant would have a meaningful opportunity to raise a ineffective assistance of counsel claim on direct appeal. *Trevino*, 133 S. Ct. at 1921.

¶ 17 This court in *People v. Sutherland*, 2013 IL App (1st) 113072, addressed and rejected the exact argument advanced by defendant here. The *Sutherland* court found the defendant's reliance on *Martinez* and *Trevino* was misplaced because Illinois' criminal procedure generally allows for ineffective assistance claims to be raised after trial and on direct appeal. See *People v. Krankel*, 102 Ill.2d 181, 188–89 (1984); see also *People v. Miller*, 2013 IL App (1st) 111147, ¶ 41 (recognizing this distinction). Furthermore, the *Sutherland* court recognized that our supreme court has long held that prisoners do not have a constitutional right to be represented by counsel in postconviction proceedings, even when an ineffective assistance claim is raised by a *pro s*e defendant at the first stage of the postconviction process. *Sutherland*, 2013 IL App (1st) 113072, ¶ 19 (citing *People v. Suarez*, 224 Ill.2d 37, 42 (2007); *People v. Porter*, 122 Ill.2d 64, 75–77 (1988); *People v. Ligon*, 239 Ill.2d 94, 113 (2010)). Instead, counsel is only appointed at the second stage of postconviction proceedings. 725 ILCS 5/122–4 (West 2010). We find no reason to depart from the well-reasoned holding in *Sutherland* and find that defendant is not excused from showing cause for failing to raise his ineffective assistance of counsel claim in his prior postconviction petition.

¶ 18 A defendant must establish cause and prejudice in order to be granted leave to file a successive postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2010). Because defendant has not established cause, we need not determine whether he has established prejudice. Accordingly, we affirm the judgment of the circuit court.

¶ 19 CONCLUSION

¶ 20 Based on the foregoing, the judgment of the circuit court is affirmed.

¶ 21 Affirmed.