2017 IL App (1st) 142348-U

No. 1-14-2348

Order filed April 10, 2017

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 14641
	)	
MARTINO MOSBY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justices Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment affirmed where defendant did not show cause for failing to raise his benefit of the bargain based challenge to his guilty plea in his prior postconviction petition.

¶ 2 Defendant Martino Mosby, who pled guilty to aggravated battery with a firearm, appeals from the denial of his *pro se* request for leave to file a successive petition for relief under the

Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal, defendant maintains that he showed "cause" and "prejudice" for his failure to raise his constitutional claim that he was deprived of the benefit of his plea bargain in his initial postconviction petition. Alternatively, defendant contends that the instant postconviction petition would not qualify as "successive" under Illinois law and that he stated the gist of a violation of his constitutional rights, which is not barred by the doctrine of *res judicata*.

¶ 3 In defendant's appeal from the dismissal of his *pro se* postconviction petition, we summarized the facts, which we repeat here. *People v. Mosby*, 2013 IL App (1st) 112597-U.

¶ 4 On November 19, 2009, 16-year-old defendant, who was charged as an adult, entered a negotiated plea of guilty to aggravated battery with a firearm and was sentenced to 14 years' imprisonment. Following a conference held pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012), the court told defendant:

> "Mr. Mosby, I indicated in the conference that in exchange for a plea of guilty, I would sentence you to a period of fourteen years in the Illinois Department of Corrections.
>
> That will be the sentence for a charge of aggravated battery with a firearm at 85 percent of that fourteen years, which is nine years."

Defendant then indicated that no one threatened or promised him anything in order to make him plead guilty, and that he was pleading guilty of his own free will.

¶ 5 The parties stipulated to a factual basis for the plea which provided that at 10 p.m. on July 17, 2009, defendant encountered five women walking on the sidewalk near 7447 South Vernon Avenue in Chicago. All of the women would make a positive in-court identification of defendant, who had an ongoing conflict with one of the women, Gabriella Williams. Upon

approaching these women, defendant pulled out a gun, fired it once in the air, then fired it again, hitting Kara Urban in the left leg. Defendant then struck Dominique Parker on the side of the head with the gun. The court accepted the factual basis as sufficient to prove defendant guilty beyond a reasonable doubt, and entered a conviction on that finding. The court then admonished defendant of his appeal rights pursuant to Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001). Defendant indicated that he understood these admonishments. He did not file a postplea motion or an appeal.

¶ 6 On April 29, 2011, defendant filed a *pro se* postconviction petition alleging that his "rights under the Constitution of the United States of Illinois were substantially denied or deadline was not due to his negligence" because he did not receive effective assistance of trial counsel where counsel did not show him how to file motions or petitions. Defendant stated that he sent several letters to the "Judges" starting on November 21, 2009, asking for an appeal, but never received a response. Defendant explained that his filing of the postconviction petition after the due date was not due to his negligence because when he was transferred to the St. Charles Correctional Center on November 20, 2009, "petitioner states attorney" did not show him "how to file motions or petitions," and he was told by his intake counselor to send letters to his judge asking for an appeal. When he contacted "petitioner states attorney" to request an appeal on December 22, 2009, defendant was told that his deadline had passed. Defendant maintained that he therefore filed a motion for a supervisory order to appeal in the Illinois Supreme Court on January 15, 2010, which was denied on March 24, 2011.

¶ 7 The circuit court summarily dismissed defendant's petition. The court noted that defendant did not present any grounds for relief, and instead, simply stated that his constitutional rights were violated, and that he had been asking judges for an appeal, but had not received a

response. In its written order, the court explained that defendant's bald allegation of a constitutional deprivation was insufficient under the Act. The court noted that defendant had not filed a motion to withdraw his guilty plea in the trial court setting out his reasons for withdrawal within 30 days of his plea.

¶ 8 On appeal, defendant contended that he stated the gist of a claim of a deprivation of his constitutional right to appeal where his trial counsel failed to consult with him about an appeal, he was given incorrect advice by the prison intake counselor on how to appeal, and the trial judge, after being informed that defendant wished to appeal, did nothing. He also maintained that his very young age and lack of sophistication rendered the error egregious, and that perfecting an appeal was more challenging because it would have placed his attorney in the untenable position of having to argue his own ineffectiveness where he made no objection to the court's statement that 85% of 14 years was 9 years when, in fact, it was almost 12 years. He argued that all these factors "converged" to deprive him of the right to appeal. Defendant did not claim that the trial court improperly admonished him regarding how to appeal from his guilty plea.

¶ 9 We affirmed the circuit court's dismissal of defendant's initial *pro se* postconviction. After construing the *pro se* claims liberally as required under *People v. Hodges*, 234 Ill. 2d 1, 21 (2009), we found that defendant's *pro se* petition did not allege the denial of the right to appeal claim raised by appellate counsel and that he could not raise such a claim for the first time on appeal. *Mosby*, 2013 IL App (1st) 112597-U, ¶ 11. We explained that defendant's unsupported allegation that he notified the court that he desired to appeal his plea was self-serving, and insufficient to support an arguable claim of ineffective assistance of trial counsel to warrant relief under the Act. *Id.* ¶ 18.

¶ 10 We then addressed defendant's claim on appeal that a duty to consult with him regarding an appeal arose because there were nonfrivolous grounds for an appeal where the trial court misled defendant regarding the consequences of the plea. *Id.* ¶ 20. Appellate counsel argued that defendant's plea was involuntary because the trial court misinformed him that 85% of 14 years was 9 years, when in fact it was about 12 years. *Id.* We determined "that defendant ha[d] improperly expanded upon the claim raised in his petition," and thereby he had "essentially rais[ed] a new issue." *Id.* Accordingly, we found that defendant had "waived his claim that nonfrivolous grounds for appealing existed where he did not raise this allegation in his petition." *Id.* We further noted that "defendant was clearly admonished that he would have to serve 85% of the 14-year sentence, and the court's simple miscalculation did not render his plea involuntary where defendant was otherwise properly admonished." *Id.*

¶ 11 In March 2014, defendant filed the instant *pro se* "petition [for] leave to file a successive post-conviction relief." Defendant alleged that he was "denied the benefit of his plea bargain" because "during a 402 conference" the court and his defense counsel "were in agreement with [defendant] being sentenced to 14 years at 85 percent [citation] which is nine years." However, "The Illinois Department of Corrections [had] calculated that [defendant] serve 12 years which [was] not part of [defendant's] plea." Defendant requested that corrections "be made to his original plea bargain and that he not continue to be misled." Defendant explained that he was prevented from "knowing that 85 percent of 14 years is almost 12 years, not 9 years," because he was "uneducated and a minor during his incarceration at the juvenile facility" where he did not have access to a law library.

¶ 12 The circuit court issued a written order denying defendant leave to file a successive postconviction petition because he did not raise the benefit of the bargain claim in his earlier

postconviction petition and he failed show "cause" and "prejudice" as required by the Act. Regarding "cause," the court reasoned that although the claim was available to defendant when he filed his initial petition, he did not allege that the "facts underlying his claim were withheld from him or that the claim [was] based on newly discovered evidence." The circuit court found that defendant had not shown "prejudice" because this court previously considered and rejected his claim when we stated that "[T]he [trial] court's simple miscalculation did not render his plea involuntary where defendant was otherwise properly admonished." *Mosby*, 2013 IL App (1st) 112597-U, ¶ 20.

¶ 13 On appeal, defendant maintains that the circuit court erred in denying him leave to file a second postconviction petition so that he could raise his benefit of the bargain claim.

¶ 14 Whether abuse of discretion or *de novo* review applies to decisions granting or denying leave to file successive postconviction petitions is unclear. *People v. Edwards*, 2012 IL 111711, ¶ 30. In *Edwards*, the court pointed out that decisions granting or denying leave of court are generally reviewed for abuse of discretion. *Id.* However, the *Edwards* court recognized that the requirement that a successive postconviction petition based on a claim of actual innocence must state a colorable claim, as a matter of law, suggests *de novo* review. *Id.* Although our supreme court has not resolved the question, we need not address the issue here because defendant's claim fails under either standard. See *id.*; *People v. Calhoun*, 2016 IL App (1st) 141021, ¶ 32.

¶ 15 Only one postconviction proceeding is contemplated under the Act (*Edwards*, 2012 IL 111711, ¶ 22) and a defendant seeking to file a successive postconviction petition must first obtain leave of court (*People v. Tidwell*, 236 Ill. 2d 150, 157 (2010)). The bar against successive postconviction proceedings should not be relaxed unless: (1) a defendant can establish "cause and prejudice" for the failure to raise the claim earlier; or (2) he can show actual innocence under

the "fundamental miscarriage of justice" exception. *Edwards*, 2012 IL 111711, ¶¶ 22, 23. "A defendant shows cause 'by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' " *People v. Wrice*, 2012 IL 111860, ¶ 48 (quoting 725 ILCS 5/122–1(f) (West 2014)). To establish "cause" a defendant must articulate why he could not have discovered the claim earlier through the exercise of due diligence. *People v. Wideman*, 2016 IL App (1st) 123092, ¶ 72. A defendant shows prejudice by demonstrating that the claim so infected the trial that the resulting conviction or sentence violated due process. *Wrice*, 2012 IL 111860, ¶ 48.

¶ 16 Regarding "cause," defendant contends that he did not know his "effective sentence was 12 years at the time he filed his first *pro se* petition," and that he could not have discovered his claim because: (1) it was reasonable for him to rely upon the court's calculation, which defense counsel and the State did not question; (2) he did not have access to his transcripts; and (3) he was not capable of recalculating his sentence because he was an "uneducated" minor and he did not have access to a law library or assistance drafting his *pro se* motions. Defendant contends that he established "prejudice" because the petition shows that "he received a more onerous sentence than the one he was told he would receive."

¶ 17 Here, although defendant alleges that he did not become aware of the circuit court's miscalculation until after he filed his first postconviction petition, all of the facts necessary to determine the error were available to him immediately upon being sentenced. Thus, through the exercise of reasonable diligence, defendant should have been able to discover that 9 is not 85% of 14. See *People v. Evans*, 2013 IL 113471, ¶ 13 (finding that "as a matter of law" a defendant's subjective ignorance of the fact that the law required his sentence to include three years of mandatory supervised release was not "an objective factor that impeded" his ability to raise his

claim sooner). Accordingly, we find that defendant has not shown "cause" for his failure to bring the claim in his previous postconviction petition. See *People v. Jones*, 2013 IL App (1st) 113263, ¶ 25 ("Merely failing to recognize your claim cannot be an objective factor external to the defense that prevents one from bringing the claim in the initial postconviction petition."). Because we find that defendant did not show "cause," we affirm the circuit court's denial of defendant's request for leave to file the successive postconviction petition without addressing the "prejudice" prong. See *People v. Love*, 2013 IL App (2d) 120600, ¶ 50.

¶ 18 Defendant next maintains that the instant postconviction petition would not be successive within the meaning of the Act because his prior petition sought only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness. Thus, defendant argues that he was not required to show "cause" and "prejudice." We disagree.

¶ 19 To support his argument, defendant cites *People v. Little*, 2012 IL App (5th) 100547. The defendant in *Little* appealed his convictions and sentence after he was sentenced to two consecutive three-year terms of imprisonment. *Little*, 2012 IL App (5th) 100547, ¶ 3. His convictions were affirmed and his case was remanded for resentencing because it was "not clear from the record what motivated the trial court to order that the sentences" be served consecutively. *Id.* ¶ 4. On remand, the trial court resentenced the defendant and again imposed consecutive three-year terms. *Id.* The defendant was ultimately granted leave to file a late notice of appeal from the resentencing order as a result of filing a *pro se* postconviction petition alleging his trial counsel was ineffective for failing to file a notice of appeal. *Id.* ¶¶ 6, 8. After the judgment of the trial court was affirmed, the defendant filed a second *pro se* postconviction petition claiming, *inter alia*, his appellate counsel was ineffective for proceeding on direct appeal without a complete and adequate record. *Id.* ¶ 9. The circuit court construed the defendant's

petition as a request for leave to file a successive postconviction petition and denied the petition. *Id.* ¶ 10.

¶ 20 On appeal from the circuit court's denial of leave to file a successive petition, the *Little* court explained that the reference to "one petition *** without leave of court" in section 122-1(f) of the Act denotes "one complete opportunity to collaterally attack 'the proceedings which resulted in his or her conviction.' " *Id.* ¶ 21 (quoting 725 ILCS 5/122-1(a)(1), (f) (West 2010)). The court reasoned that where this complete opportunity had been denied to a defendant because he "used an initial petition solely to reinstate his right to a direct appeal that was forfeited through no fault of his own, he should be 'restored to the procedural posture he would have enjoyed if he had been represented by effective counsel.' " *Id.* (quoting *Urinyi v. United States*, 607 F. 3d 318, 321 (2d Cir. 2010)). Therefore, the *Little* court held that "where a defendant files an initial postconviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness, a subsequent petition is not a successive petition for purposes of section 122-1(f)" of the Act. *Id.* ¶ 19; see also *People v. Wilson*, 2014 IL App (1st) 113570, ¶¶ 39, 40 (following *Little* in a case with "substantially similar" facts); but see *Love*, 2013 IL App (2d) 120600, ¶ 37 (declining to follow *Little* where the defendant was not denied the right to a direct appeal).

¶ 21 Here, unlike in *Little* and *Wilson*, defendant's initial petition alleging ineffective assistance of counsel for "failing to inform him how to file motions or petitions to appeal his plea" was not granted. Thus, there were no new proceedings, such as the direct appeals in *Wilson* and *Little*, and we find that defendant was afforded "one complete opportunity to collaterally attack 'the proceedings which resulted in his or her conviction.' " *Little*, 2012 IL App (5th) 100547, ¶ 21 (quoting *Urinyi*, 607 F. 3d at 321). Accordingly, the exception to section 122-1(f)'s

"leave of court" requirement expressed in *Little* and *Wilson* does not apply in this case and we find that defendant's second postconviction petition was successive and could not be filed without leave of court.

¶ 22 As a result, we need not address defendant's alternative argument that his claims would not be barred by *res judicata* if the instant petition was not successive under Illinois law.

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.