2013 IL App (2d) 120912-U
No. 2-12-0912
Order filed September 27, 2013
Modified Upon Denial of Rehearing November 6, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Jo Daviess County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 00 CF 16
	)	
GUADALUPE RODRIGUEZ,	)	Honorable
	)	William A. Kelly,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of leave for defendant to file a successive postconviction petition under section 122-1(f) of the Postconviction Hearing Act (725 ILCS 5/122-1(f) (West 2010)) was proper where defendant neither satisfied the cause-and-prejudice test nor articulated a claim of actual innocence.

¶ 2 In this *pro se* appeal, Guadalupe Rodriguez challenges the trial court's judgment denying him leave to file his successive postconviction petition, which he also prepared *pro se*. We affirm.

¶ 3 BACKGROUND

¶ 4 The backdrop of this present proceeding is set forth in our orders resolving defendant's two prior appeals. See *People v. Rodriguez*, Nos. 2-02-0204, 2-03-0176 cons. (unpublished order under Supreme Court Rule 23); *People v. Rodriguez*, No. 2-08-0320 (unpublished order under Supreme Court Rule 23). We recapitulate only what is necessary to resolve this third appeal.

¶ 5 In March 2001, the State filed a superseding indictment charging defendant with numerous sex offenses against R.S., who was born August 28, 1983. Defendant was tried by jury on September 11, 2001. R.S. testified that, over the span of several years, she was sexually abused by defendant, the boyfriend of her mother, D.S. As R.S. described it, the abuse fell into three time-frames. First, in 1992 and 1993, R.S. resided in a single-family home with D.S. and defendant. The home was located in Chestnut Mountain Resort in Hanover, Illinois. R.S. testified that, from January to May 1993, defendant touched her breasts and placed his finger in her vagina. Second, after residing in Wisconsin for several months, D.S. and R.S. again lived with defendant from February 1994 to May 1995, during which period defendant committed the same manner of abuse as before. Third, in May 1995, D.S. and R.S moved to East Dubuque, Illinois, while defendant moved to Dubuque, Iowa. From May 1995 until June 1997, when D.S. and R.S. moved to Minnesota, defendant abused R.S. by having her touch his penis and give him oral sex. On August 28, 1996, defendant had vaginal sex with R.S. for the first time. From this date until June 1997, defendant had vaginal sex with R.S. about 50 times.

¶ 6 R.S. testified that, on June 30, 1999, while she and D.S. were residing in Woodbury, Minnesota, she had an argument with D.S. During the argument, R.S. revealed that defendant had sexually abused her. The police were summoned during the argument, but on that occasion D.S. and R.S. did not inform them of the abuse. Rather, D.S. later informed the police.

¶ 7 During her testimony, R.S. revealed that, since 1999, she had been seeing a sexual abuse counselor, whom she identified only as Cherie. After R.S. finished her testimony, the defense complained that the State had not previously disclosed the names of any sexual abuse counselors that had treated R.S. At the trial court's direction, the State obtained the curriculum vitae of the counselor, whose full name was Cherie Flandrick. The State denied any prior knowledge that R.S. was seeing a sexual abuse counselor. Defendant argued that he was entitled to the records of Flandrick's treatment of R.S. and asked for a continuance to review them. The court ruled that defendant was not entitled to the treatment records.

¶ 8 D.S. testified to her relationship with defendant. She also recounted the June 1999 argument during which R.S. revealed the sexual abuse.

¶ 9 The jury found defendant guilty of one count of aggravated criminal sexual assault (720 ILCS 5/12-14 (West 2000)) (alleging digital penetration of R.S.'s vagina between February 1, 1994, and May 1995), two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000)) (alleging, respectively, oral and vaginal penetration between June 1996 and August 27, 1996), and two counts of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 2000)) (alleging vaginal penetration on and after August 28, 1996). The jury found defendant not guilty of a second count of aggravated criminal sexual assault, which alleged digital penetration of R.S.'s vagina between January 1, 1993, and April 30, 1993. Defendant filed a *pro se* appeal, and we affirmed. See *Rodriguez*, Nos. 2-02-0204 & 2-03-0176 cons.

¶ 10 In May 2007, defendant filed a *pro se* postconviction petition under the Postconviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2006)). In the petition, which was nearly 250 pages long, defendant cited numerous purported attachments to the pleading, but in fact included

none.[1] The trial court appointed counsel, who subsequently filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984). The State then moved to dismiss the petition as untimely. In response, defendant asserted that his May 2007 filing was an amendment of a prior postconviction petition filed in 2002 and never ruled upon by the trial court. The court determined that nothing previously filed by defendant qualified as a postconviction petition. Accordingly, the court dismissed the May 2007 petition as untimely. See *Rodriguez*, No. 2-08-0320, at 4-5. Defendant appealed, and the Office of the State Appellate Defender (OSAD) was appointed. After OSAD filed a brief on defendant's behalf, he moved to discharge the agency from representing him. We granted the motion, but nonetheless considered the brief that OSAD had filed. We then affirmed the trial court. *Id.* at 6-8.

¶ 11 On June 11, 2012, defendant, now *pro se* again, filed a document entitled, "Leave to File Second Successive *Pro Se* Petition for Post Conviction Relief And/Or Leave to Amend *Pro Se* Petition for Post Conviction Relief." He also filed a document captioned, "Second Successive And/Or Amended *Pro Se* Petition For Post Conviction Relief." Though defendant suggested that his pleading could be viewed as an amendment, the trial court properly characterized the request as one for leave to file a successive postconviction petition under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)).

¶ 12 The State objected to the request for leave. In a one-sentence written order, the trial court denied leave on the grounds of waiver.

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[1] We incorrectly stated in our 2010 order that the petition included exhibits. See *Rodriguez*, No. 2-08-0320, at 4 (the petition was "242 pages long—not counting the many attached exhibits"). In fact, there were none.

¶ 13 ANALYSIS

¶ 14 Defendant challenges the trial court's denial of leave to file the successive petition. Section 122-1(f) of the Act provides that leave of court is required for any successive postconviction petition. 725 ILCS 5/122-1(f) (West 2010). In the case of claims not raised in a prior postconviction proceeding, there are two potential bases upon which leave may be granted. The first is where the petitioner demonstrates "cause and prejudice," *i.e.*, (1) "identif[ies] an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings"; and (2) "shows prejudice by demonstrating that the claim not raised during his or her initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010). The second (and noncodified) basis rests on a showing of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 23. "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." *Id.* ¶ 32. Evidence is not "newly discovered" if it "could have been discovered sooner through the exercise of due diligence." *Id.* ¶ 37. "[L]eave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner, that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Id.* ¶ 24.

¶ 15 Additionally, leave of court will not be granted for claims previously brought unless they are supported by newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 332-33 (2009).

¶ 16 As for our standard of review, we note that the supreme court recently declined to decide what standard governs leave-to-file determinations concerning actual innocence claims. *People v.*

Edwards, 2012 IL 111711, ¶ 30-31. The two possibilities noted by the court were *de novo* review and review for abuse of discretion. *Id.* ¶ 30. The court held that, under either standard, denial of leave to file was appropriate in the case before it. *Id.* ¶ 31. Our research reveals no decision by the supreme court on the standard of review for cause-and-prejudice determinations. We note that, prior to *Edwards*, our appellate court consistently held, without differentiating the bases for leave to file, that a trial court's determination under section 122-1(f) is reviewed *de novo*. See *People v. Wrice*, 406 Ill. App. 3d 43, 51 (2010); *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010). We hold here that, under either a *de novo* or an abuse-of-discretion standard, denial of leave to appeal was proper.

¶ 17 Defendant's 21-page motion for leave to file specifies 11 "grounds" for relief, and his 86-page postconviction petition states 100 such "grounds." This organization is illusory, for each "ground" contains innumerable individual assertions of error, not all of them related to the "ground" under which they are placed. Moreover, there is substantial overlap among the "grounds." We have done our best to grasp the substance of these pleadings, but their loose organization and opaque style present high barriers to comprehension. Most of the claims—at least as we grasp them—were raised either on direct appeal or in the initial postconviction petition; many were raised in both proceedings.

¶ 18 We begin with the claims that were previously raised and for which defendant does not purport to possess newly discovered evidence. These include the claims that (1) the police and the prosecution were motivated by racial animus against defendant, a Hispanic, since they failed to investigate similar abuse allegations against a Caucasian man; (2) there was no Illinois jurisdiction in the case because defendant's alleged acts, if they occurred at all, took place in Wisconsin or Iowa; (3) defendant's right to a speedy trial was infringed; (4) the trial judge was unfit to preside over defendant's trial because of personal scandal and moral turpitude; (5) the superseding indictment was

not presented to the jury, and, moreover, that indictment, along with the jury instructions and verdict forms, were flawed for lack of specificity; (6) Jo Daviess County officials, acting from racial bias, insured that no minorities served on the grand jury or the venire panel; (7) defendant was denied the required number of peremptory challenges; (8) the police neglected their duty to report R.S.'s allegations of abuse to the Department of Children and Family Services; (9) the prosecution wrongfully withheld various items of discovery, including the transcript and videotape of an interview with police and the final page of Detective John Korth's police report; (10) defendant's interview with the police was recorded without his consent; (11) the police intentionally misrepresented that defendant was interviewed by John Korth rather than Detective Kieffer, who had a motive for revenge against defendant stemming from a love triangle; (12) Jo Daviess County officials altered police reports and trial transcripts to excise potentially exculpatory testimony; (13) the evidence was insufficient to prove criminal sexual assault, as defendant did not continue to "h[o]ld a position of trust, authority or supervision in relation to [R.S.]" (720 ILCS 5/12-13(a)(4) (West 2000)) once he and R.S. began living apart in May 1995 ; (14) the statute creating the offense of predatory criminal sexual assault was not in effect when defendant committed the alleged offenses under that statute; (15) Linda Healy, a sexual abuse counselor, was erroneously permitted to testify generally about the psychology of abused children; and (16) defendant was wrongfully denied access to the records of D.S.'s counseling sessions with Flandrick; (17) Flandrick's curriculum vitae was fabricated by the State; and (18) the trial judge and jury were distracted by the terrorist attack on New York City, which occurred on the morning of trial. Defendant also asserts that his trial counsel was ineffective for failing to pursue the foregoing claims. We hold that all of these claims are

waived because defendant previously raised them and does not claim to possess any pertinent newly-discovered evidence.

¶ 19 A second class of claims in the successive petition is accompanied by what defendant claims is newly discovered evidence, but which was cited in, yet not attached to, his first petition. There are two such claims. First, defendant claimed to have attached to his first petition an affidavit from Mary Henrickson, a manager in a St. Paul, Minnesota hospital system, who averred that United Behavioral Health Center (United Health) closed in June 1991. Defendant suggested that the 1991 closure cast doubt not only on R.S.'s testimony that she began treatment with Flandrick in Minnesota in 1999, but also on Flandrick's curriculum vitae, which the State produced mid-trial. (Evidently, defendant believed that Flandrick claimed to have worked at United Health sometime after 1991.)

¶ 20 Second, defendant claimed to have attached an affidavit from Peter Scarano, principal of Hanover Middle School, who represented that R.S. attended that school beginning in August 1994. Scarano explained that on school days R.S. was picked up by bus at 7 a.m. and dropped off by bus at 4 p.m. Defendant claimed that Scarano's representations undercut R.S.'s testimony that she and D.S. returned to Illinois in February 1994 and also tended to prove that there was no point during the day that R.S. was home alone with defendant.

¶ 21 In his successive petition, defendant reasserted both claims and now included the affidavits from Henrickson and Scarano. Both claims are waived, however, because defendant points to no objective factor that impeded him from attaching the affidavits to his initial petition. As noted, the petition had no exhibits at all. Defendant insists that he did attach exhibits and that "conspirators" excised them. Defendant does not substantiate this accusation, and we have no way of verifying it. Therefore, defendant has failed to meet the cause-and-prejudice test with respect to these claims.

Moreover, because the affidavits are not newly-discovered evidence, they cannot support a claim of actual innocence.

¶ 22 A third set of claims in the successive petition relies on materials that were not referenced in the first petition, but for which leave to file was, nonetheless, properly denied. These materials consist of (1) a September 1992 certificate of health for R.S., which contains an ambiguous handwritten notation that defendant interprets as "No hymen"; (2) a federal district court docket showing the June 1999 resolution of a bankruptcy petition filed by D.S.; (3) the 1996-1997 school calendar for East Dubuque school district number 119; and (4) a June 30, 1999, juvenile police report from Woodbury, Minnesota authorities, noting "escalating behavioral problems" with R.S. and recommending Red Cross intervention.

¶ 23 The dates of these materials suggest they were available to defendant when he filed his first petition. We have difficulty pinpointing defendant's explanation for not submitting them in that earlier proceeding. At one point, he appears to claim that government officials conspired to suppress the materials and that postconviction counsel was at fault for not pointing out the conspiracy. At another point, defendant seems to assume that the materials were, in fact, available during the first proceeding and that postconviction counsel was at fault for not including them.

¶ 24 Defendant does not explain, and we have no way of verifying, in what way these materials were unavailable to him during the first postconviction proceeding. Assuming, then, that they were indeed available, defendant has not established how postconviction counsel was at fault for not including them. The right to postconviction counsel is a matter of legislative grace, and a postconviction petitioner is only entitled to a reasonable level of assistance. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 18. Rule 651(c) imposes specific duties on postconviction counsel to ensure that counsel provides that reasonable level of assistance. *Id.* The rule requires that postconviction

counsel consult with the defendant to ascertain his contentions of the deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. See Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). The filing of a Rule 651(c) certificate gives rise to the presumption that the defendant received the required representation during second-stage proceedings, though the presumption may be rebutted by the record. *Kirk*, 2012 IL App (1st) 101606, ¶ 19.

¶ 25 Here, postconviction counsel filed a Rule 651(c) certificate, giving rise to the presumption that counsel provided a reasonable level of assistance. At the hearing on the State's motion to dismiss the first petition, counsel asserted that she attempted to communicate with defendant by letter. Specifically, counsel asked defendant why he did not file his petition before 2007. Also, because the copy of the petition that counsel received did not contain any of the multiple exhibits cited therein, she asked defendant to send her copies of the documents. According to counsel, defendant made no reply to her inquiry. Defendant admitted in court that he received counsel's letter and did not answer it. Defendant explained that he had been given no notice that his prior counsel had been discharged. Defendant also noted that postconviction counsel's correspondence erroneously designated his case as "2006-CF-16" instead of "2000-CF-16." Even after offering these rationales, however, defendant acknowledged that he "could have probably corresponded with [counsel]," but claimed she was "inefficient." The trial court correctly found that defendant unjustifiably failed to cooperate with counsel. Moreover, defendant has not explained to us how counsel could have known to include exhibits (1) through (4) (as numbered above, *supra* ¶ 22) unless defendant alerted her to them.

¶ 26 Accordingly, we hold that, with respect to the exhibits that were neither included with nor referenced within the first petition, defendant has not demonstrated cause for their noninclusion or

established that they are newly discovered evidence. See *People v. French*, 210 Ill. App. 3d 681, 689 (1991) ("if a postconviction petitioner refuses to cooperate with his or her attorney, the petitioner cannot complaint of inadequate representation which is attributable to his or her conduct").

¶ 27 We emphasize that the operation of waiver here is not impacted by the mere fact that the first petition was dismissed as untimely, without a resolution on the merits. Defendant had the opportunity in that proceeding to state claims based on materials available to him at the time. See *People v. Britt-el*, 206 Ill. 2d 331, 337 (2002) (despite fact that defendant's initial petition was dismissed as untimely and, strictly speaking, there was no "merits-based ruling," he "received every procedural right, including the opportunity to have his claims heard on the merits, which was available to him at the time his first postconviction petition was filed"; therefore, the waiver principle operated to bar claims that were or could have been raised in the initial petition).

¶ 28 Unlike the first two sets of materials, which predate not only defendant's May 2007 initial petition but even his 2001 trial, one document submitted by defendant is dated subsequent to his May 2007 petition. The document is a July 15, 2007, letter from a lawyer representing Susan Scalzo, an Illinois attorney whom defendant's trial counsel had mentioned in support of his July 2000 motion for admission *pro hac vice* to serve as counsel for defendant. Trial counsel represented in his affidavit that he could "retain Illinois counsel and ha[d] contacted the firm of Coghlan, Kukanos & Cook, by Susan M. Scalzo." The July 2007 letter, which purports to be a response to defendant's March 2007 inquiry to Scalzo about her involvement at trial, states that Scalzo does not recall being contacted in support of trial counsel's admission motion or having any involvement in defendant's case. Defendant contends that, if his trial counsel was not authorized to appear in Illinois courts, then his conviction is invalid. This claim, however, is waived because defendant does not explain why he did not inquire earlier into his trial counsel's authorization to appear in his case.

¶ 29 Moving to the remaining allegations in the successive petition, we note that defendant emphasizes in particular a claim of actual innocence based on his skin deformity, which he terms "skin-tags" or "dingoberries." He attaches photographs of the body parts that have the skin condition. This evidence, however, is cumulative. First, at trial, D.S. was shown photographs of defendant's skin condition (perhaps the very photographs defendant has attached to the successive petition) and asked if she recalled seeing the condition. Moreover, the trial court permitted defendant to bare some of his body for the jury to observe (apparently outside the presence of the witnesses). Defendant suggests that his skin condition is relevant to R.S.'s credibility, for if, as she claimed, defendant was naked on some of the occasions when the abuse occurred, she surely would have recalled the deformity. According to defendant, R.S. was actually asked at trial whether she recalled anything unusual about defendant's skin, and she answered no. Defendant claims that "official conspirators" excised this exculpatory testimony. As it happened, defendant brought this very same allegation of conspiracy in his first petition, and the successive petition does not add anything material to it. As noted, the photographs he now submits are cumulative of the trial evidence. Accordingly, since this claim of actual innocence is waived, the trial court correctly denied leave to bring it.

¶ 30 Defendant also alleges in his successive petition that he received inadequate counsel on his first petition. He claims that postconviction counsel failed to consult with him, neglected to review the record, and failed to amend the petition to include claims of constitutional deprivation. None of these complaints withstands scrutiny; defendant has not overcome the presumption that counsel provided a reasonable level of assistance.

¶ 31 First, as noted above (*supra* ¶ 25), defendant acknowledged to the trial court that counsel contacted him, and he offered no plausible justification for failing to reply. Second, defendant

adduces nothing to overcome the presumption that counsel read the record. Finally, defendant does not appear to identify any amendment that he believes counsel should (or could) have made even in the absence of consultation with him. Rather, the claims he insists postconviction counsel wrongfully omitted from his petition all appear to be based on documents that counsel would not have known existed without defendant's input—which he withheld without adequate reason. See *French*, 210 Ill. App. at 689.

¶ 32 Finally, defendant's successive petition alleges that he received ineffective assistance of counsel on appeal from the dismissal of his first petition. Defendant claims that appellate counsel was ineffective for failing to communicate with him and for raising only one "non-constitutional" issue on appeal. As for the failure to communicate, we note that defendant did complain to us, during the pendency of his second appeal, that OSAD was failing to answer his inquiries. At defendant's request, we discharged OSAD, but we nonetheless considered the brief it had filed on defendant's behalf. See *Rodriguez*, No. 2-08-0320, at 6-7. Defendant, however, has not demonstrated prejudice from any communication shortfalls with appellate counsel, for he does not specify what additional claims appellate counsel should have made.

¶ 33 CONCLUSION

¶ 34 Based on the foregoing, we hold that, under either a *de novo* or abuse-of-direction standard, the trial court did not err in denying defendant leave to file his successive postconviction petition. Therefore, we affirm the judgment of the circuit court of Jo Daviess County.

¶ 35 Affirmed.