2011 IL App (4th) 100167-U

Filed 7/27/11

NO. 4–10–0167

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
CALVIN L. SMITH,	)	No. 00CF1349
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court did not err in denying defendant's motion for leave to file a successive postconviction petition and any appeal from that decision would be without merit, we grant OSAD's motion to withdraw as counsel and affirm the court's judgment.

¶ 2 In September 2001, a jury found defendant, Calvin L. Smith, guilty of first degree murder and armed robbery. In December 2001, the trial court sentenced him to a 55-year prison term for first degree murder to run consecutively to a 31-year prison term for armed robbery. Defendant later filed a *pro se* postconviction petition and a petition for relief from judgment, both of which were dismissed by the trial court. In September 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition, which the court denied. Thereafter, the office of the State Appellate Defender (OSAD) was appointed to represent defendant.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant pursuant to

Pennsylvania v. Finley, 481 U.S. 551 (1987), contending an appeal in this cause would be without merit. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 On the night of November 8, 2000, while working as a cashier at the Main Street Convenience store in Bloomington, Mahendra Patel (Mike) received a gunshot wound to the left eye during a robbery and died from that injury. The police later arrested defendant in connection with Mike's death.

¶ 6 In November 2000, a grand jury indicted defendant on single counts of intentional, knowing, and felony murder under various subsections of section 9–1 of the Criminal Code of 1961 (720 ILCS 5/9–1 (West 2000)). The grand jury also indicted defendant on single counts of armed robbery (720 ILCS 5/18–2(a)(4) (West 2000)) and aggravated battery with a firearm (720 ILCS 5/12–4.2(a)(1) (West 2000)). The State later nol-prossed the aggravated-battery indictment. Defendant pleaded not guilty.

¶ 7 In September 2001, defendant's jury trial commenced. As the parties are familiar with the facts of this case, we need only set forth the facts necessary to analyze the issues in this appeal. Bloomington police officer Tommy Lee Walters testified he arrived at the convenience store and observed an open cash register drawer and the victim lying on the floor. He recovered a .22 cartridge shell casing from the pool of the victim's blood. Walters also testified a gun was recovered in an area near the convenience store.

¶ 8 Chris Jacobson, a forensic scientist, testified defendant's fingerprint matched one found on the cash register insert. Jacobson was unable to recover any prints from the recovered gun. Linda Yborra, also a forensic scientist, testified the cartridge found at the scene was fired

from the gun. The parties stipulated the blood on the $113 recovered from defendant belonged to the victim.

¶ 9 Bloomington police detective Clay Wheeler testified he interviewed defendant in November 2000. When defendant was asked if he had any money from the robbery, he reached into his pants pocket and placed some money on the table. He then reached into his sock, removed a wad of cash, and threw the cash on the table, stating it was "dirty money." The videotaped interview was played for the jury. Therein, defendant stated he believed the safety was on the gun when he entered the store with codefendants Robert Goodman and Marvin Alexis and that the gun accidentally discharged. They had only intended to rob the store.

¶ 10 Defendant testified on his own behalf. On November 8, 2000, defendant lived in an apartment in Bloomington. At about 1:30 p.m., Alexis and Goodman stopped by the apartment. According to defendant, Alexis and Goodman wanted to buy a quarter pound of marijuana from him. The pair stated they would be back that night to pick up the marijuana.

¶ 11 At 9 p.m., Alexis and Goodman returned to defendant's apartment and sampled the marijuana. The pair did not purchase any and said they would return in five minutes. At around 9:30 p.m., they came back. Goodman appeared nervous and shook up. He stated he wanted defendant to bring the marijuana to him in 5 to 10 minutes because Goodman wanted to make sure everything was "cool" at the house first. Defendant received between $250 and $260 from Goodman before he left.

¶ 12 Defendant and his cousin, Ethan Bailey, walked over to Goodman's apartment, with defendant concealing the marijuana in his waistband. As they approached, they noticed a lot of police. The police detained the two for about 10 minutes. Defendant then returned to his

apartment and hid the marijuana. He and Bailey then proceeded to the apartment of Samantha Turrentine and Jackie Zimmerman.

¶ 13 After about 10 minutes, defendant left with Turrentine and went to a gas station, where he spent over $40 of the money he received from Goodman. They returned to Turrentine's apartment, where defendant played cards and threw dice. Defendant, along with Zimmerman and Bailey, left the apartment about 1 a.m. and went to a hotel. Defendant paid for the room, but Zimmerman signed for it. The three left the hotel about 1:30 p.m.

¶ 14 Upon returning to his apartment, defendant went over to Goodman's apartment. Defendant learned from Joseph Matthews that Goodman and Alexis had been arrested. Matthews blamed him for their arrest because they were walking to defendant's apartment to get the marijuana when they were arrested. According to defendant, Matthews told him he had to confess to the crime and threatened to kill him and his family. After his arrest, defendant admitted committing the crime when he learned he had been implicated because he did not have time to warn his mother about the threats. When asked how his fingerprint could have been found on the cash register drawer, defendant stated he owed Mike money for cigarettes and Mike told him on a particular occasion to put the money under the tray in the cash register.

¶ 15 On rebuttal, Joseph Matthews testified he talked to defendant on November 9, 2000, and defendant stated the murder was a mistake. Matthews also stated he did not threaten defendant or tell him to confess. On cross-examination, Matthews admitted he had a felony conviction.

¶ 16 Following closing arguments, the jury found defendant guilty of armed robbery and returned a general verdict for first degree murder. In October 2001, defendant filed a motion

for a new trial, which the trial court denied. In December 2001, the court sentenced defendant to 55 years' imprisonment on one count of first degree murder (knowing) to run consecutively with 31 years' imprisonment for armed robbery. In January 2002, the court denied defendant's motion to reduce sentence.

¶ 17 On appeal, this court affirmed the trial court's judgment with the modification that defendant's knowing-murder conviction should be vacated, his intentional-murder conviction should be reinstated, and the cause remanded for resentencing on the intentional-murder conviction. *People v. Smith*, No. 4–02–0059 (May 20, 2004) (unpublished order under Supreme Court Rule 23). In January 2005, the trial court sentenced defendant to 55 years in prison for intentional first degree murder and a consecutive term of 31 years in prison for armed robbery.

¶ 18 In April 2007, defendant filed a *pro se* petition for postconviction relief under the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 through 122–8 (West 2006)). Defendant alleged, *inter alia*, (1) defense counsel was ineffective for failing to call Amy Klawitter as a defense witness; (2) defense counsel was ineffective for failing to call Ethan Bailey as an alibi witness; and (3) newly discovered evidence in the form of an affidavit from Zachary Porter showed he was innocent of the crime. In July 2007, the trial court dismissed the postconviction petition, finding it frivolous and patently without merit. This court affirmed the dismissal. *People v. Smith*, No. 4–07–0674 (July 23, 2008) (unpublished order under Supreme Court Rule 23).

¶ 19 In September 2007, while his appeal was pending, defendant filed a *pro se* motion seeking posttrial relief under section 2–1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2–1401 (West 2006)). Defendant attached an October 2004 motion to withdraw

guilty plea filed by codefendant Marvin Alexis, wherein Alexis claimed he was actually innocent of first degree murder. Defendant argued that since codefendant originally implicated defendant and had since recanted, Alexis' original statement to police implicating defendant was a lie. Defendant claimed that, if he had this "newly discovered evidence" previously, he could have shown his innocence.

¶ 20 In May 2008, the trial court found defendant's motion was untimely because it was filed more than two years after the judgment of conviction. Further, the court found defendant did not plead any ground that would extend the two-year period under the Procedure Code.

¶ 21 On the merits, the trial court stated any claim by defendant that he confessed involuntarily was a matter that should have been raised on direct appeal or in a postconviction petition. In noting defendant's videotaped confession was played for the jury, the court stated as follows:

> "If the defendant's claim is correct that Marvin Alexis gave false information to the police that resulted in his arrest, and the confession is voluntary, the [section] 2–1401 claim has no merit. However, there are no circumstances in the record that would indicate that the confession was involuntary. A review of State [e]xhibit No. 29 reveals that the defendant was more than willing to talk to the officers because he was upset with co[]defendant Marvin Alexis[,] who gave him the gun used in the murder[,] because defendant claims Mr. Alexis told him the safety was on. Therefore, the text of the confession consisted of defendant admitting

that he shot and killed the victim but complaining that he was misinformed by his co[]defendant as to the status of the safety on the gun."

The court also noted the evidence showed the cash recovered from defendant after the murder contained bloodstains from the victim. The court concluded the evidence of defendant's guilt was overwhelming and found no merit in the motion. Accordingly, the court *sua sponte* entered judgment against defendant. This court affirmed the dismissal. *People v. Smith*, No. 4–08–0430 (April 15, 2009) (unpublished order under Supreme Court Rule 23).

¶ 22 In September 2009, defendant filed a *pro se* motion for leave to file a successive postconviction petition, claiming he had newly discovered evidence of actual innocence. Attached to the motion was an affidavit from defendant's cousin, Ethan Bailey, who stated he was with defendant in their apartment at 10 p.m. on November 8, 2000, when the convenience store was robbed. Bailey stated he was reluctant to make the affidavit because of his fear of going through the interview process again and he did not want to "suffer mistreatment" at the hands of another lawyer that did not care about his cousin's innocence. In addition to the alleged alibi, defendant stated his second piece of newly discovered evidence was the claim the State withheld deoxyribonucleic-acid (DNA) evidence.

¶ 23 Defendant attached a *pro se* postconviction petition to the motion, alleging (1) trial counsel was ineffective for failing to call Bailey at trial; (2) the State withheld DNA evidence; (3) both trial and appellate counsel were ineffective for not raising the issue of the DNA testing; (4) the appellate court erred in finding the admission of defendant's statement was harmless error; and (5) trial counsel was ineffective in not telling the jury that Alexis and

Goodman pleaded guilty.

¶ 24 In February 2010, the trial court denied the motion for leave to file a successive postconviction petition. The court found defendant had raised some of the issues in prior proceedings and the claims of actual innocence were not based upon any newly discovered evidence. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, OSAD has filed a motion to withdraw as counsel and has included a supporting memorandum pursuant to *Finley*. Proof of service has been shown on defendant. This court granted defendant leave to file additional points and authorities on or before April 7, 2011. He has done so, and the State has also filed a brief. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be without merit.

¶ 27 A. The Act and Successive Postconviction Petitions

¶ 28 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived." *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002).

¶ 29 The Act "generally contemplates the filing of only one postconviction petition."

People v. Ortiz, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009); *People v. Flores*, 153 Ill. 2d 264, 273, 606 N.E.2d 1078, 1083 (1992); see also 725 ILCS 5/122–1(f) (West 2008) (only one postconviction petition may be filed without leave of the court). "[A] ruling on an initial post[]conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000). The denial of a defendant's motion to file a successive postconviction petition is reviewed *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 30 The statutory bar to filing successive postconviction petitions, however, will be relaxed when fundamental fairness so requires. *Flores*, 153 Ill. 2d at 274, 606 N.E.2d at 1083.

> "To establish that fundamental fairness requires that a successive postconviction petition be considered on the merits, the defendant must show both cause and prejudice with respect to each claim presented. See [*Pitsonbarger*], 205 Ill. 2d at 460-61[, 793 N.E.2d at 621-22]. 'For purposes of this test, "cause" is further defined as some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding, and "prejudice" is defined as an error which so infected the entire trial that the resulting conviction violates due process. *Flores*, 153 Ill. 2d at 279[, 606 N.E.2d at 1085].' " *People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003) (quoting *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29).

¶ 31 Even if a defendant is unable to show cause and prejudice, the failure to raise a

claim in an earlier petition will be excused " 'if necessary to prevent a fundamental miscarriage of justice.' " *Ortiz*, 235 Ill. 2d at 329, 919 N.E.2d at 947 (quoting *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621). In non-death penalty cases, a petitioner must show actual innocence to demonstrate a miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. To support a claim of actual innocence, "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.' " *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 950 (quoting *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004)).

¶ 32 B. Newly Discovered Evidence

¶ 33 1. *Bailey's Affidavit*

¶ 34 In seeking to file his successive postconviction petition, defendant alleged Bailey's affidavit offered newly discovered evidence. In the affidavit, Bailey stated defendant was with him in their apartment at the time the robbery and shooting took place. Bailey's potential testimony, however, was not newly discovered evidence. As defendant admitted in his motion and Bailey admitted in his affidavit, Bailey was interviewed by a defense investigator prior to trial. Thus, Bailey's claim that defendant was with him at the time of the crime could have been discovered prior to trial.

¶ 35 Even if Bailey's testimony was not available at trial, the evidence was not of such a conclusive character that it would probably change the result of the trial. The evidence against defendant was overwhelming given his confession, his admission the money found on his person came from the armed robbery, the victim's blood on the money, and defendant's fingerprints on the cash drawer. As defendant failed to set forth evidence to allege a claim of actual innocence,

the trial court did not err in denying his motion for leave to file a successive postconviction petition on this ground.

¶ 36 2. *DNA Evidence*

¶ 37 Defendant also argued as newly discovered evidence that the State withheld DNA evidence by not attempting to match his known blood samples with the droplets of blood found on the floor of the convenience store. However, this issue was raised in defendant's first postconviction petition, which the trial court found frivolous and patently without merit. Thus, the issue is *res judicata* and could not be raised in a successive postconviction petition. Considering the overwhelming evidence against him, defendant failed to show he had material evidence that was newly discovered and would likely have changed the outcome of the trial. Thus, the trial court did not err in denying his motion for leave to file a successive postconviction petition on this ground. Accordingly, we need not analyze the issues raised in the successive postconviction petition since leave to file that petition was properly denied. As any appeal is this matter would be without merit, we grant OSAD's motion to withdraw.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.