2014 IL App (4th) 130271-U

NO. 4-13-0271

FILED
October 30, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
SEYON HAYWOOD,	)	No. 06CF288
Defendant-Appellant.	)	
	)	Honorable
	)	Michael D. Clary,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive postconviction petition where defendant's claims did not satisfy the cause-and-prejudice test.

¶ 2 In November 2012, defendant, Seyon Haywood, filed a petition for leave to file a successive postconviction petition, which the Vermilion County circuit court denied. Defendant then filed a late notice of appeal, and the court appointed the office of the State Appellate Defender (OSAD) to represent him. On appeal, OSAD moved to withdraw its representation of defendant under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending this appeal is frivolous. In response to the motion, defendant raised a conflict-of-interest issue. We dismissed the motion to withdraw without prejudice and granted OSAD 21 days to file another *Finley* motion that addressed the potential conflict of interest raised by defendant. OSAD did so, contending no con-

flict of interest exists and defendant's appeal is frivolous. We grant OSAD's amended motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In May 2006, the State charged defendant by information with (1) count I, armed robbery (720 ILCS 5/18-2(a)(2) (West 2006)); (2) count II, home invasion, causing injury (720 ILCS 5/12-11(a)(2) (West 2006)); and (3) count III, home invasion, using a firearm (720 ILCS 5/12-11(a)(3) (West 2006)). All of the counts were based on defendant's alleged actions on May 23, 2006. After an August 2006 bench trial, the trial court found defendant guilty of all three charges. The evidence at defendant's trial had shown defendant entered the home of John Gonzalez, threatened Gonzalez with a gun, and stole money. The court sentenced defendant to concurrent prison terms of 10, 10, and 21 years, respectively.

¶ 5 Defendant appealed, asserting (1) his conviction for one of the home-invasion counts should be vacated because it was a lesser-included offense of the other home-invasion count and (2) the State failed to prove him guilty of the charged offenses beyond a reasonable doubt. This court vacated defendant's conviction and sentence for home invasion as alleged in count II but affirmed his convictions and sentences in all other respects. *People v. Haywood*, No. 4-07-0162 (May 21, 2008) (unpublished order under Supreme Court Rule 23). In November 2008, our supreme court denied defendant's petition for leave to appeal. *People v. Haywood*, 229 Ill. 2d 679, 900 N.E.2d 1121 (2008).

¶ 6 In May 2009, defendant filed a *pro se* postconviction petition, contending he was denied effective assistance of trial counsel because counsel failed to (1) interview Debbie Reed and Steve McGuire; (2) assert the home-invasion charges violated the one-act, one-crime rule; (3) investigate whether State witnesses were under the influence when they testified; and (4) file

pretrial motions. In arguing his ineffective-assistance-of-trial-counsel a claim, defendant raised the case of *People v. Hill*, 294 Ill. App. 3d 962, 691 N.E.2d 797 (1998). In his petition, defendant also argued (1) count I and count III violate double jeopardy, (2) ineffective assistance of appellate counsel on direct appeal, (3) his convictions were a violation of due process, and (4) his home-invasion sentence violated the proportionate-penalties clause (Ill. Const. 1970, art. I, § 11). In his ineffective-assistance-of-appellate-counsel argument, defendant mentioned Deputy Defender Charles Schiedel's July 2007 letter to him that addressed *Hill* and attached a copy of the letter to his petition. In August 2009, the trial court entered an order summarily dismissing defendant's postconviction petition because his claims were frivolous and patently without merit.

¶ 7 Defendant appealed the denial of his initial postconviction petition. On appeal, he only asserted his claim that his trial counsel was ineffective for failing to investigate and call witnesses on his behalf was sufficient to withstand the first stage of the postconviction proceedings. This court found defendant's contention lacked an arguable basis in both law and fact and thus affirmed the summary dismissal of defendant's initial postconviction petition. *People v. Haywood*, No. 4-09-0642 (Mar. 2, 2011) (unpublished order under Supreme Court Rule 23). In September 2011, our supreme court again denied defendant's petition for leave to appeal. *People v. Haywood*, 2011 IL 112396, 955 N.E.2d 475.

¶ 8 On November 19, 2012, defendant filed a motion for leave to file a successive postconviction petition. On December 26, 2012, the trial court entered a written order denying defendant's request to file a successive postconviction petition. The order noted defendant had not identified anything that impeded his ability to bring his claims in his first postconviction petition. In April 2013, defendant filed a timely late notice of appeal from the denial of his motion for leave to file a successive postconviction petition.

¶ 9 In January 2014, OSAD filed a motion to withdraw as counsel on defendant's appeal from the denial of his request to file a successive postconviction petition. This court granted defendant to and including March 3, 2014, to file additional points and authorities. Defendant filed a response, asserting, *inter alia*, a conflict of interest existed because John McCarthy, the OSAD attorney who filed the *Finley* motion, had worked with and was friends with the attorney, Judith Libby, that defendant claimed failed to provide him reasonable assistance during his appeal on the denial of his initial postconviction petition. This court, on its own accord, reinstated the docketing schedule, and the State and defendant filed replies.

¶ 10 In May 2014, this court dismissed the *Finley* motion without prejudice and granted OSAD 21 days to file another *Finley* motion that addressed the potential conflict of interest raised by defendant. In June 2014, OSAD filed an amended *Finley* motion addressing the conflict-of-interest argument. The motion also asserted OSAD had thoroughly reviewed the record and concluded an appeal in this case would be frivolous. Additionally, the motion addressed defendant's arguments and set forth the case's procedural history. OSAD's proof of service indicates defendant was provided with a copy of the motion. Defendant filed a response, asserting OSAD did not sufficiently address the conflict-of-interest issue and his claims have merit. We again reinstated the docketing schedule, and the State and defendant filed replies.

¶ 11 II. ANALYSIS

¶ 12 A. Conflict of Interest

¶ 13 In his response to OSAD's initial *Finley* motion, defendant raised a conflict-of-interest claim, asserting McCarthy refused to raise defendant's claim against Libby because McCarthy was a coworker and friend of Libby. In his amended *Finley* motion, McCarthy notes

Libby has since retired from OSAD but does not deny he was a coworker of hers. However, he denies a conflict of interest exists, and the State agrees with him.

¶ 14 In *People v. Robinson*, 79 Ill. 2d 147, 158-59, 402 N.E.2d 157, 162 (1979), our supreme court held that, in determining whether a conflict of interest exists, individual attorneys who comprise the staff of the public defender, unlike members of a private law firm, are not members of an entity "which should be subject to the rule that if one attorney is disqualified by reason of a conflict of interest then no other member of the entity may continue with the representation." Instead, courts should use a case-by-case examination to determine whether any facts peculiar to the case preclude the representation of the individuals whose interests were allegedly in conflict. See *Robinson*, 79 Ill. 2d at 160, 402 N.E.2d at 162. In *People v. Hardin*, 217 Ill. 2d 289, 303, 840 N.E.2d 1205, 1214-15 (2005), our supreme court further explained some of the relevant factors to consider in determining whether a defendant has sufficiently shown the working relationship between the public defenders creates an appearance of impropriety include whether (1) the two public defenders were trial partners in the defendant's case; (2) they were in hierarchical positions where one supervised or was supervised by the other; or (3) the size, structure, and organization of the office in which they worked affected the closeness of any supervision.

¶ 15 McCarthy states he did not work on defendant's prior appeals; he was never supervised by Libby; and outside of the supervisor relationship, each assistant defender is independently responsible for his or her own work. Moreover, we note the claim defendant seeks to raise against Libby is not cognizable in a successive postconviction petition. Accordingly, under the facts of this case, we find no conflict of interest exists.

¶ 16 While we find no conflict of interest, we note the case of *People v. Black*, 154 Ill. App. 3d 1076, 507 N.E.2d 1237 (1987). There, the reviewing court approved the fifth district office of OSAD transferring a case to the fourth district office because members of the fifth district office would be required to labor under a conflict of interest in asserting the ineffectiveness of colleagues appearing as direct appellate counsel. *Black*, 154 Ill. App. 3d at 1090, 507 N.E.2d at 1246. To avoid the appearance of impropriety, OSAD offices should transfer cases that raise claims of ineffective assistance of counsel by attorneys in their office to a different office of OSAD or, at a minimum, not assign the case to a former coworker of the attorney at issue in the case.

¶ 17 B. Standard for Withdrawal of Counsel

¶ 18 In *Finley*, 481 U.S. at 557, the United States Supreme Court addressed the withdrawal of counsel in collateral postconviction proceedings and held the United States Constitution does not require the full protection of *Anders v. California*, 386 U.S. 738 (1967), with such motions. The Court noted the respondent did not present a due-process violation when her counsel withdrew because her state right to counsel had been satisfied. *Finley*, 481 U.S. at 558. Thus, state law dictates counsel's performance in a postconviction proceeding. The Supreme Court of Illinois has held that, in a postconviction proceeding, the Post-Conviction Hearing Act (Postconviction Act) (see 725 ILCS 5/art. 122 (West 2012)) entitles a defendant to reasonable representation. *People v. Guest*, 166 Ill. 2d 381, 412, 655 N.E.2d 873, 887 (1995).

¶ 19 In *People v. McKenney*, 255 Ill. App. 3d 644, 646, 627 N.E.2d 715, 717 (1994), the Second District granted appellate counsel's motion to withdraw as counsel on an appeal from a postconviction petition, finding counsel's representation was reasonable. There, the motion stated counsel had reviewed the record and found no issue that would merit relief. *McKenney*,

255 Ill. App. 3d at 645, 627 N.E.2d at 716. The motion also provided the procedural history of the case and the issues raised in the defendant's petition. *McKenney*, 255 Ill. App. 3d at 645, 627 N.E.2d at 716.

¶ 20 C. Leave To File a Successive Postconviction Petition

¶ 21 OSAD asserts defendant's motion for leave to file a successive postconviction petition cannot satisfy the cause-and-prejudice test of section 122-1(f) of Postconviction Act (725 ILCS 5/122-1(f) (West 2012)). Defendant disagrees and claims his motion did satisfy the cause-and-prejudice test. When the trial court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 22 The Postconviction Act (725 ILCS 5/art. 122 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Relief under the Postconviction Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Moreover, the Postconviction Act generally limits a defendant to one postconviction petition and expressly states any claim cognizable under the Postconviction Act that is not raised in the original or amended petition is deemed forfeited. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909 (citing 725 ILCS 5/122-3 (West 2006)). However, section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2012)) provides the following:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a

> petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner 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; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909. In determining whether a defendant has established cause and prejudice, the trial court may review the " 'contents of the petition submitted.' " *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12, 954 N.E.2d 365 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162, 923 N.E.2d 728, 735 (2010)).

¶ 23 In his petition for leave to file a successive postconviction petition, defendant asserts (1) he has newly discovered evidence supporting his claim of ineffective assistance of counsel on direct appeal, (2) his counsel on appeal from his first postconviction petition did not provide him reasonable assistance, (3) the trial court failed to admonish him about his mandatory supervised release (MSR) term, and (4) he was denied the right to be present at his preliminary hearing.

¶ 24 As to the first issue, we agree with the trial court that the November 2010 affidavit by Schiedel was not newly discovered evidence as it reiterated the same information set forth

in Schiedel's July 10, 2007, letter to defendant that was addressed in and attached to his initial postconviction petition. Accordingly, this issue was raised in his initial postconviction petition, and thus defendant can neither establish cause nor prejudice with this claim.

¶ 25 Defendant's second issue, challenging his counsel's representation of him during his appeal from the denial of his first postconviction petition, is not cognizable under the Postconviction Act. Our supreme court has stated the postconviction process does not provide a forum in which a defendant can challenge the conduct of counsel at an earlier postconviction proceeding. *People v. Szabo*, 186 Ill. 2d 19, 26, 708 N.E.2d 1096, 1100 (1998). As stated, relief under the Postconviction Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Accordingly, this issue also does not satisfy the cause-and-prejudice test.

¶ 26 Regarding defendant's MSR and preliminary-hearing claims, defendant fails to cite any objective factor that impeded his ability to raise the claims in his initial postconviction petition. Accordingly, he has failed to show cause as to those issues.

¶ 27 In *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 621 (2002), our supreme court recognized the statutory bar of the cause-and-prejudice test may be relaxed when fundamental fairness so requires. "To demonstrate such a miscarriage of justice, a petitioner must show actual innocence ***." *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. In his petition, defendant did not make a claim of actual innocence.

¶ 28 Accordingly, we find the trial court properly denied defendant's petition for leave to file a successive postconviction petition.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the Vermilion County circuit court's judgment.

As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed.