2012 IL App (5th) 100587-U

NO. 5-10-0587

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 80-CF-5
	)	
RICHARD HOLMAN,	)	Honorable
	)	Charles V. Romani, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Presiding Justice Spomer and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied the defendant leave to file a third petition for postconviction relief.

¶ 2 The defendant, Richard Holman, appeals from the trial court's order denying him leave to file a successive petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 In July 1979, 83-year-old Esther Sepmeyer resided in a rural Madison County farmhouse with her grandson, Rodney.

> "When [Rodney] returned from work on July 13[,] he found his grandmother lying up against her bed with a bullet wound on the right side of her face. The bedroom and kitchen were in disarray. A new Remington semi-automatic .22 caliber rifle had been

taken from its case and a television, stereo turntable, lawn mower[,] and radio were missing." *People v. Holman*, 115 Ill. App. 3d 60, 62 (1983).

Esther was pronounced dead at the scene, and an ensuing homicide investigation led to the arrest of the defendant and Girvies Davis, both of whom made incriminating statements when questioned by the police. Notably, Esther was killed five weeks before the defendant's eighteenth birthday.

¶ 5 In March 1981, a Madison County jury found the defendant guilty of first-degree murder (Ill. Rev. Stat. 1979, ch. 38, ¶ 9-1). At trial, the State's evidence established, *inter alia*, that the defendant's fingerprints had been found on a metal cabinet where the stolen rifle had been stored and that the missing radio and lawnmower had been discovered in Davis's home. The jury also heard that when asked about Esther's murder, the defendant had stated that Davis had shot her, while Davis had claimed that the defendant had done so. The jury was ultimately instructed as to the law of accountability (Ill. Rev. Stat. 1979, ch. 38, ¶ 5-2) and returned a general verdict of guilty.

¶ 6 In April 1981, the cause proceeded to a sentencing hearing, where the State presented evidence that the defendant had two prior convictions for first-degree murder in St. Clair County, *i.e.*, case number 79-CF-592, in which he was tried and convicted of murdering John Ortel, and case number 79-CF-720, in which he was tried and convicted of murdering Frank Cash. Referencing the defendant's prior convictions and arguing that the defendant had consistently demonstrated that he "deserve[d] to be removed from society for the rest of his life," the State subsequently asked the trial court to sentence the defendant to natural life in prison. See Ill. Rev. Stat. 1979, ch. 38, ¶¶ 9-1(b)(3), 1005-8-1(a)(1) (giving the trial court the discretion to impose a natural-life sentence where "the defendant has been convicted of murdering two or more individuals"). The State also commented on the senseless nature of Esther's death. Noting that the defendant was a "very young man," defense counsel urged

the trial court to consider "some other alternative than that requested by the State" and thereby give the defendant a future "opportunity to again participate in society." Thereafter, expressing its agreement with the State's position regarding the defendant's dangerousness and rehabilitative potential, the court sentenced him to natural life.

¶ 7 In April 2001, arguing that his natural-life sentence was imposed in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant filed a petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-8 (West 2000)). In September 2001, the trial court entered a written order dismissing the petition. The defendant subsequently appealed, but for reasons not apparent from the record, the appeal was later dismissed. *People v. Holman*, No. 5-01-0783 (2002).

¶ 8 In December 2001, arguing that the statute under which he had been sentenced had been enacted in violation of the single-subject clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 8(d)), the defendant filed a second petition for postconviction relief pursuant to the Act. In May 2002, the trial court entered a written order dismissing the petition. The defendant subsequently appealed, but again, for reasons not apparent from the record, the appeal was later dismissed. *People v. Holman*, No. 5-02-0370 (2002).

¶ 9 In August 2009, arguing that his natural-life sentence was void, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In November 2009, the trial court entered a written order dismissing the petition. The defendant subsequently appealed, and in November 2011, we affirmed the trial court's judgment. *People v. Holman*, No. 5-09-0678 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In October 2010, the defendant filed a third petition for postconviction relief pursuant to the Act (725 ILCS 5/122-1 to 122-7 (West 2010)) and a motion for leave to file the petition. In his third postconviction petition, the defendant alleged that the statute under

which he had been sentenced was unconstitutional, that the procedure by which he had been sentenced was unconstitutional, and that he was "actually innocent" of the "invalid aggravating factors" upon which his sentence had been based. Notably, the defendant did not claim that his natural-life sentence violated the eighth amendment's prohibition of "cruel and unusual punishments." U.S. Const., amend. VIII.

¶ 11 In November 2010, the trial court entered a written order denying the defendant's motion for leave to file his third petition for postconviction relief. Finding that the constitutional claims set forth in the third petition could have been raised in the defendant's prior petitions, the trial court concluded that the defendant had failed to satisfy the "cause" prong of the Act's cause-and-prejudice test. The court further noted that the defendant's purported claim of "actual innocence" was that he was not "eligible for the sentence [he] received." The present appeal followed.

¶ 12 DISCUSSION

¶ 13 The Act sets forth a procedural mechanism through which a defendant can assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first stage, the trial court independently assesses a defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can move to dismiss his petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2010). If a defendant's petition is not dismissed at the second stage, it proceeds to the third

stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 245.

¶ 14 The Act generally limits a defendant to one postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). "Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court." *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010). Moreover, "until such time as leave is granted, a successive petition, though received or accepted by the circuit clerk, will not be considered 'filed' for purposes of further proceedings under the Act." *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010).

¶ 15 To obtain leave of court to file a successive petition for postconviction relief, a petitioner must either demonstrate "actual innocence" or satisfy the cause-and-prejudice test codified in section 122-1(f) of the Act. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-24. For purposes of the cause-and-prejudice test, "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 "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." 725 ILCS 5/122-1(f) (West 2010). Both elements of the cause-and-prejudice test must be met "in order for the petitioner to prevail." *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). To demonstrate "actual innocence," a defendant must produce new and reliable evidence that "raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The denial of a motion for leave to file a successive postconviction petition is reviewed *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

¶ 16 Here, when finding that the defendant failed to satisfy the "cause" component of the

cause-and-prejudice test, the trial court rightly concluded that nothing impeded the defendant's ability to raise the constitutional claims set forth in his third postconviction petition in either of his prior petitions. In fact, the arguments set forth in the defendant's third petition are similar to those advanced in his first and second petitions. The trial court also rightly concluded that the defendant's so-called actual-innocence claim was not an actual-innocence claim at all. The trial court thus properly denied the defendant's motion for leave to file his third petition for postconviction relief.

¶ 17 On appeal, citing *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed"), *Graham v. Florida*, __U.S.__, __, 130 S. Ct. 2011, 2030 (2010) (holding that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole"), and *Miller v. Alabama*, __U.S.__, __, 132 S. Ct. 2455, 2469 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"), the defendant argues that because he was 17 when Esther was murdered, his natural-life sentence is unconstitutional and void. This argument is not properly before us, however, and even if it were, we would reject it.

¶ 18 First of all, as the State correctly observes, the defendant raises his eighth amendment claim for the first time on appeal, and he "never confronts the salient issue of whether he actually met the cause-and-prejudice test." "[A]s a general rule[,] arguments raised for the first time on appeal are deemed waived" (*People v. Williams*, 267 Ill. App. 3d 82, 91 (1994)), and under general principles of procedural default, a defendant forfeits appellate review of any issue not raised in his petition for postconviction relief (*People v. Pendleton*, 223 Ill. 2d 458, 475 (2006)). Waiver aside, the defendant's argument also confuses a "void" sentence with a "voidable" one. See *People v. Ramirez*, 361 Ill. App. 3d 450, 454 (2005) (noting that

because the defendant's conviction and sentence were "not void, but merely voidable," he could not "challenge them at any time in any proceeding as he could a void judgment"). Lastly, under the circumstances, the defendant's reliance on *Roper*, *Graham*, and *Miller* is misplaced.

¶ 19 As previously indicated, *Roper* prohibits the imposition of the death penalty on a juvenile offender, but this is not a death penalty case. Under *Simmons*, a juvenile cannot be given a life sentence for a nonhomicide offense, but here, the defendant committed first-degree murder. Under *Miller*, a sentencing scheme is unconstitutional if it requires the imposition of a life sentence on a juvenile convicted of murder, and we recognize that the First District Appellate Court has held that *Miller* applies retroactively to cases on collateral review. *People v. Williams*, 2012 IL App (1st) 111145, ¶¶ 42-56; *People v. Morfin*, 2012 IL App (1st) 103568, ¶¶ 35-59. As stated by the First District, however, the *Miller* Court "refused to declare categorically that a minor cannot receive life imprisonment without parole for a homicide offense," and *Miller* only requires that a juvenile found guilty of murder be afforded a "sentencing hearing where natural life imprisonment is not the only available sentence." *Morfin*, 2012 IL App (1st) 103568, ¶¶ 38, 59.

¶ 20 Here, pursuant to the statutory scheme under which the defendant was sentenced, the trial court had the discretion to impose a natural-life sentence, but a natural-life sentence was not mandatory. See Ill. Rev. Stat. 1979, ch. 38, ¶ 9-1(b)(3), 1005-8-1(a)(1) (providing that where "the defendant has been convicted of murdering two or more individuals," the trial court "may sentence the defendant to a term of natural life imprisonment"). The defendant was thus afforded a sentencing hearing where his age was addressed and "a sentence other than natural life imprisonment" was "available for consideration." *Morfin*, 2012 IL App (1st) 103568, ¶ 56. The defendant's claim that his sentence was imposed in violation of *Miller* is accordingly without merit. *Cf. Williams*, 2012 IL App (1st) 111145, ¶¶ 32, 46-47, 54

(finding a 1996 statutory provision requiring the imposition of a natural-life sentence for 17-year-old defendant convicted of "murdering an individual under 12 years of age" unconstitutional in light of *Miller*); *Morfin*, 2012 IL App (1st) 103568, ¶¶ 11, 33, 56, 58-59 (finding a 2010 statutory provision requiring the imposition of a natural-life sentence for 17-year-old defendant convicted of "murdering more than one victim" unconstitutional in light of *Miller*).

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the trial court's judgment denying the defendant leave to file a third petition for postconviction relief is hereby affirmed.

¶ 23 Affirmed.