2023 IL App (5th) 220063-U

NO. 5-22-0063

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 93-CF-204
	)	
DAVID BRIAN FULTON,	)	Honorable Mark W. Stedelin and
	)	Honorable Michael D. McHaney,
Defendant-Appellant.	)	Judges, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant's untimely motion to reconsider his sentence did not invoke any existing statutory remedy and the claims in his petition for leave to file a successive postconviction petition plainly lacked merit, the circuit court properly dismissed the combined pleading. As any argument to the contrary would lack merit, we grant defendant's appointed counsel on appeal leave to withdraw and affirm the circuit court's judgment.

¶ 2 Defendant, David Brian Fulton, appeals the circuit court's orders dismissing his combined "Motion to Reduce Sentence" and petition for leave to file a successive postconviction petition. His appointed appellate counsel, the Office of the State Appellate Defender (OSAD), has concluded that there is no reasonably meritorious argument that the circuit court erred in dismissing defendant's pleading. Accordingly, it has filed a motion to withdraw as counsel along with a supporting memorandum. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). OSAD has

notified defendant of its motion, and this court has provided him with ample opportunity to respond. However, he has not done so. After considering the record on appeal, OSAD's memorandum, and its supporting brief, we agree that this appeal presents no reasonably meritorious issues. Thus, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 In 1993, the State charged defendant with two counts of first degree murder, home invasion, and aggravated criminal sexual assault. Defense counsel requested a fitness examination but, before it could be completed, defendant pleaded guilty to count II of the indictment, which alleged felony. The State dismissed the remaining counts and, by agreement, defendant was sentenced to natural life imprisonment.

¶ 5 Defendant moved to withdraw the plea or, alternatively, to reconsider the sentence. The circuit court declined to allow defendant to withdraw the plea and, because the plea was fully negotiated, refused to consider the part of the motion requesting sentencing relief.

¶ 6 On direct appeal, we held that the circuit court properly refused to consider the motion to the extent it requested reconsideration of the sentence. However, we held that the circuit court did not have the benefit of the supreme court's recent decision in *People v. Evans*, 174 Ill. 2d 320 (1996). Accordingly, we remanded the cause for the circuit court to decide "whether the granting of the motion to withdraw guilty plea is necessary to correct a manifest injustice." *People v. Fulton*, No. 5-95-0121, slip order at 7 (1996) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7 While that appeal was pending, defendant filed a postconviction petition alleging that plea counsel was incompetent. The circuit court summarily dismissed it. This court affirmed, finding

defendant's allegations "nonsensical, not meritorious." *People v. Fulton*, No. 5-95-0563, slip order at 3 (1998) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 8 Following remand, the court appointed Bill Milner to represent defendant on his postplea motions. The circuit court, evidently misunderstanding the reason for the remand, found that defendant's sentence was "just and appropriate" under the circumstances. Defendant again appealed. In that appeal, we observed that:

> "It is clear from the record on remand that the trial court focused on the fairness of the sentence imposed on defendant but did not consider whether the motion to withdraw the guilty plea should have been granted. However, our order made it clear that the purpose of the remand was to determine whether the motion to withdraw the guilty plea should have been granted in order to correct a manifest injustice." *People v. Fulton*, No. 5-98-0074, slip order at 2 (2000) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 9 We thus remanded again for the circuit court to consider "whether the granting of the motion to withdraw guilty plea is necessary to correct a manifest injustice." *Id.* at 3.

¶ 10 Following the second remand, public defender Michael McHaney entered an appearance for defendant. Following a hearing, the circuit court denied defendant's motion to withdraw his plea, finding that "the sentence imposed as a result of [the] negotiated plea was not 'manifestly unjust' and does not merit allowing defendant to withdraw from the plea agreement." Defendant did not file a notice of appeal.

¶ 11 More than 18 years later, on March 23, 2021, defendant filed a pleading entitled "Motion to Reduce Sentence Pursuant to 725 ILCS 5/116-2 2 and Petition for Leave to File Successive Post-Conviction Relief." In the first portion of the pleading, defendant sought a hearing pursuant

to "725 ILCS 5/116-2 2." He contended that he had met the requirements for a hearing under that statute (although no such statute exists).

¶ 12 Defendant argued that the Supreme Court, in *Miller v. Alabama*, 567 U.S. 460 (2012), had held that imposing a life sentence on a juvenile offender violated the eighth amendment's prohibition against cruel and unusual punishment. He acknowledged that he was 19 years old and legally an adult when he committed the crime of which he was convicted but contended that Illinois legislative enactments and caselaw had extended *Miller*'s rationale to "emerging adults" and those with mental illnesses.

¶ 13 Defendant also sought leave to file a successive postconviction petition. He first argued that, under *Miller*, his natural-life sentence was cruel and unusual punishment in violation of the eighth amendment because he committed the offense when he was 20 years old and had a history of mental illness.

¶ 14 Defendant raised two additional, apparently related, issues. He contended that defense counsel was ineffective for failing to advise him that he was not eligible for an extended-term sentence because the State had not notified him via the charging instrument that it was seeking an enhanced sentence. See 725 ILCS 5/111-3(c-5) (West 2020). He further contended that the State's failure to so advise him deprived him of due process and equal protection.

¶ 15 On December 15, 2021, the circuit court, per Judge Mark W. Stedelin, denied defendant leave to file a successive postconviction petition. The court ruled that all of defendant's claims either could have been raised earlier or lacked substantive merit.

¶ 16 The State moved to dismiss the portion of defendant's pleading requesting a reduction in the sentence. The State asserted that, despite diligent research, it had been unable to locate a statute

corresponding to 725 ILCS 5/116-2 2. Further, the State argued, citing a different statute, that only the prosecution could seek to reduce a sentence more than 30 days after it was imposed.

¶ 17 On January 12, 2022, the circuit court, per Judge Michael D. McHaney, who had recently ascended to the bench, conducted a hearing on defendant's motion. The court denied defendant's motion for a continuance and granted the motion to dismiss. Defendant appeals.

¶ 18 ANALYSIS

¶ 19 OSAD concludes that no reasonably meritorious argument exists that the circuit court erred in dismissing defendant's combined motion. OSAD contends that defendant's request for a hearing to reduce his sentence cites a nonexistent statute and provides no other legal basis to reconsider his sentence more than 25 years after it was imposed. It further concludes that defendant failed to establish cause and prejudice sufficient to justify filing a successive postconviction petition, given that all of his claims either could have been raised earlier or lacked substantive merit in any event. Finally, OSAD observes that any procedural irregularities do not provide a basis to reverse the circuit court's orders. We agree.

¶ 20 OSAD first contends that Judge Michael McHaney, who represented defendant during a portion of the proceedings, presided over a hearing at which he dismissed defendant's motion to reduce his sentence, but concludes that this does not warrant reversal.

¶ 21 At the relevant time, Rule 63 of the Code of Judicial Conduct provided that, to avoid the "appearance of impropriety," a trial judge should recuse himself or herself where the judge "served as a lawyer in the matter in controversy." Ill. S. Ct. Code of Jud. Conduct R. 63(C)(1)(a), (b) (now 2.11(A)(5)(a), (b) (eff. Jan. 1, 2023)). The supreme court has made clear, however, that the rule does not create a personal right which a defendant can enforce.

¶ 22 To be sure, a party to a case may ask the assigned judge to recuse himself, but the decision "rests *exclusively within the determination of the individual judge*." (Emphasis in original.) *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 45. A criminal defendant may also move for a substitution of judge for cause pursuant to section 114-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5(d) (West 2020)). In the latter case, the party seeking substitution must establish the judge's actual bias. *People v. Patterson*, 192 Ill. 2d 93, 131 (2000).

¶ 23 Here, defendant did neither. Nothing in the record suggests that Judge McHaney even realized that he had previously represented defendant while a public defender and no one at the hearing raised the issue. Moreover, nothing in the record suggests that Judge McHaney actually was biased against his former client. As we discuss more fully below, he merely granted the State's motion to dismiss a pleading that sought a nonexistent remedy.

¶ 24 OSAD next contends that the circuit court's denial of defendant's motion to reduce sentence was proper. Generally, a defendant wishing to challenge his sentence must file a motion to that effect within 30 days. *People v. Bonds*, 317 Ill. App. 3d 411, 415 (2000). Defendant's motion cites "725 ILCS 5/116-2 2," but the Code contains no such section. Perhaps the closest is section 116-2(b)(2) which allows the filing, within 30 days of the judgment, of a motion asserting that the "court is without jurisdiction of the cause." 725 ILCS 5/116-2(b)(2) (West 2020). Defendant here makes no such claim.

¶ 25 OSAD, as did the State below, points out that the Code gives the State the right to seek a lower sentence at any time, but does not give a concomitant right to defendants. *Id.* § 122-9(a). As defendant cited no statutory basis for the circuit court to reduce his sentence nearly 20 years after imposing it, the court properly dismissed that portion of the motion.

¶ 26 Next, OSAD points out that another of defendant's former attorneys, Bill Milner, became the Marion County State's Attorney while defendant's *pro se* motion was pending. Counsel suggests, however, that this did not create a disabling conflict of interest. We agree.

¶ 27 A *per se* conflict arises when defense counsel has some tie to a person or entity that would benefit from a verdict unfavorable to the defendant. *People v. Sanders*, 294 Ill. App. 3d 734, 736 (1998) (citing *People v. Spreitzer*, 123 Ill. 2d 1, 16 (1988)). A conflict is *per se* disabling when counsel has had a prior or contemporaneous association with the prosecution or the victim. *Id.* Where a conflict is "actual," but not *per se* disabling, either the conflict must be brought to the circuit court's attention, or, on appeal, the defendant must show actual prejudice. *Id.* If the issue is not raised at trial, it is deemed waived. *Id.*

¶ 28 In *People v. Courtney*, 288 Ill. App. 3d 1025 (1997), the defendant's former counsel became the state's attorney of Kankakee County. The prosecutor assigned to the case brought the issue to the court's attention and assured the court that the Attorney General's office would be taking over the prosecution. However, just before trial, the prosecutor announced without explanation that the Attorney General's office would not be entering the case and that the State was ready for trial. The defendant did not object at that point but raised the issue in a posttrial motion and on appeal. Under those circumstances, the appellate court overlooked the forfeiture and reversed the defendant's conviction. *Id.* at 1031, 1037.

¶ 29 The court distinguished *Courtney* in *Sanders*, another case involving the same attorney. The court noted that defendant had never raised the issue in the trial court. On appeal, he did not assert actual prejudice and the record revealed none. *Sanders*, 294 Ill. App. 3d at 737-38. Thus, the court declined to overlook the forfeiture.

¶ 30 This case is far more like *Sanders* than *Courtney*. Defendant never raised the issue in the circuit court, and the record reveals no possibility of prejudice. Milner's stint as state's attorney was neither prior to nor contemporaneous with his representation of defendant. Moreover, Milner's participation in the case as state's attorney was minimal. His name appeared on one pleading while an assistant appeared for the prosecution at a status hearing at which nothing of substance was done. By the next court date, Timothy Hudspeth had replaced Milner as Marion County State's Attorney. As defendant forfeited the issue and the record does not show any actual prejudice to defendant, there is no reasonably meritorious argument for reversal on this basis.

¶ 31 OSAD finally concludes that the circuit court did not err by denying defendant leave to file a successive postconviction petition. We agree.

¶ 32 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)) provides a mechanism by which a criminal defendant may assert that his conviction resulted from a substantial denial of his constitutional rights. *Id.* § 122-1(a); *People v. Delton*, 227 Ill. 2d 247, 253 (2008).

¶ 33 The Act contemplates the filing of only one postconviction petition and provides in section 122-3 (725 ILCS 5/122-3 (West 2020)) that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." *People v. Bailey*, 2017 IL 121450, ¶ 15. To file a successive petition, a defendant must obtain leave of court, which may be granted where the defendant demonstrates cause for his or her failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure. 725 ILCS 5/122-1(f) (West 2020). "Cause" in this context refers to any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial postconviction proceeding. *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). "Prejudice" means that the issue not raised

so infected the trial that the resulting conviction or sentence violates due process. 725 ILCS 5/122-1(f) West 2020).

¶ 34 OSAD preliminarily notes that the State attempted to file a response to defendant's motion. This was improper. See *Bailey*, 2017 IL 121450, ¶ 24 (State should not be permitted to participate at the cause and prejudice stage of successive postconviction proceedings because the Act "contemplates an independent determination by" the circuit court). The circuit court recognized this and struck the State's response without considering it. Thus, there is no meritorious claim of error.

¶ 35 Substantively, the court did not err in dismissing the petition because defendant did not establish cause and prejudice. His claim was that his natural-life sentence was cruel and unusual punishment in violation of the eighth amendment as interpreted by *Miller* because, when he committed the offense, he was 20 years old with a history of mental illness. As noted, *Miller* applies solely to juveniles. The Illinois Supreme Court has suggested that an emerging adult over the age of 18 could raise an as-applied challenge to his life sentence under either the eighth amendment or the proportionate penalties clause of the Illinois Constitution of 1970, if he demonstrates particular facts showing that the sentencing court should have given greater weight to his youth and attendant characteristics. *People v. Harris*, 2018 IL 121932, ¶¶ 46-61.

¶ 36 But even if defendant could make such a showing, his claim still could not succeed due to his guilty plea. A defendant's voluntary guilty plea waives any constitutional claim under *Miller*, even when the plea preceded *Miller*. *People v. Jones*, 2021 IL 126432, ¶¶ 18-26. *Jones* cited the familiar rule that "a voluntary guilty plea waives all non-jurisdictional errors or irregularities, *including constitutional ones.*" (Emphasis in original and internal quotation marks omitted.) *Id.* ¶ 20. The court explained that:

> "Fundamentally, plea agreements are contracts, and principles of waiver apply equally to them. *People v. Absher*, 242 Ill. 2d 77, 87 (2011). Entering into a contract is generally 'a bet on the future.' *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016). '[A] classic guilty plea permits a defendant to gain a present benefit in return for the risk that he may have to [forgo] future favorable legal developments.' *Id.*" *Id.* ¶ 21.

¶ 37 Thus, defendant's voluntary, fully-negotiated guilty plea waived the right to take advantage of future developments in the law. See also *People v. Summers*, 2023 IL App (5th) 190486-U, ¶¶ 17-19.

¶ 38 Defendant's second and third claims both revolve around the assertion that the State failed to place defendant on notice via the charging instrument that it intended to seek an enhanced sentence as required by section 111-3(c-5) of the Code. Defendant asserted that the State violated his due process and equal protection rights by failing to so notify him and that defense counsel was ineffective for failing to point this out to him.

¶ 39 Again, however, defendant attempts to take advantage of substantive law that did not exist when he pleaded guilty. The legislature added section 111-3(c-5) to the Code in 2001 in response to the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *People v. Jones*, 2016 IL 119391, ¶ 14 (citing Pub. Act 91-953 (eff. Feb. 23, 2001)). It follows that defense counsel could not have been ineffective for failing to advise defendant of a statute that would not come into existence for eight more years. See *People v. Morgan*, 2015 IL App (1st) 131938, ¶ 77 (effective counsel need not be clairvoyant). Further, the law in effect at the time of defendant's guilty plea did not require the State to include such an allegation in the charging instrument. Moreover, the record shows that by the time of the guilty plea defendant was well aware that the State was seeking an enhanced sentence.

¶ 40 As all of defendant's contentions lacked substantive merit, he did not show prejudice by being unable to raise them in a successive postconviction petition. Any argument to the contrary would plainly lack merit.

¶ 41 CONCLUSION

¶ 42 As this appeal presents no issue of arguable merit, we grant OSAD leave to withdraw and affirm the circuit court's judgment.

¶ 43 Motion granted; judgment affirmed.