

2012 IL App (1st) 092406-U

THIRD DIVISION

May 23, 2012

Modified Upon Denial of Rehearing October 17, 2012

No. 1-09-2406

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 94 CR 25757
	)	
CLAUDE McGEE,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Steele and Justice Salone concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant failed to show that appellate counsel's failure to obtain transcripts of a pretrial hearing had any prejudicial effect, the trial court's denial of leave to file his successive *pro se* postconviction petition was affirmed.

¶ 2 Claude McGee appeals from the trial court's order denying him leave to file his successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). A jury found McGee guilty on two counts of attempted first degree murder of a police officer, and this court affirmed the convictions on appeal. *People v. McGee*, No. 1-97-0741 (1999)

(unpublished order under Supreme Court Rule 23). Later, this court also affirmed the dismissal of pleadings the trial court construed as a postconviction petition. *People v. McGee*, No. 1-06-3253 (2010) (unpublished order under Supreme Court Rule 23). McGee then filed the pleading at issue on this appeal, a motion for leave to file a successive postconviction petition. McGee alleges in the petition that his counsel for the direct appeal provided ineffective assistance because that attorney failed to order transcripts from the hearing on McGee's motion to quash his arrest. We find that McGee has failed to show prejudice due to the alleged error, and therefore we affirm the trial court's decision to deny the motion for leave to file the successive postconviction petition.

¶ 3 BACKGROUND

¶ 4 On September 10, 1994, Officers Michael Robbins and Talmitch Jackson drove an unmarked police car into an alley on Chicago's south side in response to a report of shots fired. Officers Robbins and Jackson suffered serious injuries when multiple gunshots hit them. Police officers spoke to several witnesses near the scene, and the following morning police officers interviewed Officers Robbins and Jackson in the hospital. Police picked up Anthony Jackson, LaToya Jaco and Alisa Lightner for questioning that day. After discussions with these three witnesses, police arrested McGee, and he discussed the shootings with police.

¶ 5 Motion to Quash Arrest

¶ 6 McGee moved to quash the arrest and suppress his statement on grounds that police coerced Jaco, Lightner and Anthony into making the false statements police used as a basis for arresting McGee. McGee separately moved to suppress his statements on grounds that he did not make the statements voluntarily. The court found his statements voluntary, and on this appeal McGee does not raise any issue related to the ruling that he made his statements voluntarily. The appeal centers on the statements of the witnesses that police used as a basis for arresting McGee.

¶ 7 At the hearing on the motion to quash the arrest, Anthony testified that he belonged to the Mickey Cobras street gang while McGee belonged to an allied gang. Police officers came to Anthony's home at 7 a.m. on September 11, 1994, waking Anthony and his girlfriend, Jaco. According to Anthony, the police "tore up" the house and found more than an ounce of cocaine, and then they took Anthony to the police station. They left Anthony in an interview room, handcuffed, for three hours before starting to question him. They asked him if he had seen McGee on the night of the shooting. Anthony said he did not see McGee, and that although he saw Officers Robbins and Jackson getting shot, he could not see who shot them. The officers told Anthony they would charge him with cocaine possession unless he said he saw McGee shoot Officers Robbins and Jackson. An officer hit Anthony when he repeated that he did not see McGee that night. Police kept Anthony in custody about 20 hours, until 3 a.m. on September 12, 1994. Eventually, Anthony signed a statement that said that he saw McGee shoot Officers Robbins and Jackson.

¶ 8 Jaco's testimony followed a similar arc. She, too, belonged to the Mickey Cobras. Police took her into custody in the morning of September 11, 1994. She sat alone in an interview room for several hours before police came to talk to her. She saw police strike Anthony. She told police she had not seen the shooting. They accused her of lying and threatened to charge her as an accessory to murder. They told her that she could leave if she would say that she saw McGee shoot Officers Robbins and Jackson. She held out for hours, but eventually she signed the statement police wanted her to sign. They released her late that night.

¶ 9 Lightner, another member of the Mickey Cobras, testified at the hearing that police picked her up for questioning around 4 p.m. on September 11, 1994. She told police she did not see who shot Officers Robbins and Jackson. Police told her they did not believe her. They threatened to charge her as an accessory to murder so that she would lose custody of her child, unless she said that

she saw McGee shoot the officers. After some hours of questioning, she signed the statement police wanted her to sign.

¶ 10 Detective George Karl testified that he interviewed Anthony at the police station, and Anthony said that on September 10, 1994, he saw McGee walk into the alley with a gun in his hand, at the same time as the unmarked police car came into the alley. Anthony said he heard numerous gunshots, and when he saw that someone had shot the police officers, he fled from the scene. According to Karl, no one struck Anthony, and no one told Anthony what to say about the shooting. Similarly, Karl testified that Jaco and Lightner voluntarily identified McGee as the man they saw shooting the officers. No police officers threatened Jaco or Lightner in any way, and no officers told Jaco and Lightner what to say about the shooting.

¶ 11 The court found Karl's testimony credible and the defense witnesses not credible. Based on the credibility determination, the court denied the motion to quash the arrest and suppress the statement.

¶ 12 Trial

¶ 13 At trial, both Officers Robbins and Jackson identified McGee as the man who shot them.

¶ 14 Jaco testified that on September 10, 1994, she and Lightner worked security for the Mickey Cobras. She saw the unmarked police car come into the alley and she heard someone else identify it as a police car. She saw McGee run up to the car and shoot the officers. The next day at the police station, she initially told police she did not know anything about the shooting, but when the officers threatened to charge her with perjury, she told them what she saw.

¶ 15 Jaco explained why her testimony at trial conflicted with her testimony at the hearing on the motion to quash the arrest. According to Jaco, before the hearing on the motion to quash, Anthony told her she needed to lie because some persons had threatened to kill Anthony if they identified McGee as the shooter. She agreed with Anthony and Lightner that all would say they did not see

McGee shooting the officers. After the hearing on the motion to quash, police arrested Anthony for selling drugs. Anthony told Jaco that he had told police that he saw McGee shoot the officers on September 10, 1994, and Jaco needed to corroborate his statement. Jaco's mother also encouraged her to tell the truth, so she decided to tell the court honestly that she saw McGee shoot the officers.

¶ 16 Lightner, too, testified that she worked security for the Mickey Cobras on September 10, 1994, and she saw McGee shoot Officers Robbins and Jackson. Lightner told police about the shooting. Members of the Mickey Cobras threatened to kill her because of the statement she gave police. That threat persuaded her to testify at the hearing on the motion to quash arrest that she had lied at the police station in response to police threats. She changed her story again, after the hearing, when police relocated her to protect her from the Mickey Cobras.

¶ 17 A police officer testified that McGee admitted that he carried a gun into the alley on September 10, 1994, and he heard someone yell that police were approaching. When the officer asked McGee if he shot the officers, McGee slowly nodded. McGee said, "I can't tell you exactly what I did in the alley \*\*\*. And if I tell you what happened, I'm sure I'm going to get at least a hundred years."

¶ 18 The jury found McGee guilty and the court sentenced him to serve two consecutive sentences of 60 years each.

¶ 19 Postconviction Proceedings

¶ 20 On the direct appeal, appellate counsel challenged the ruling on the motion to suppress McGee's statements as coerced, but counsel did not challenge the ruling on the motion to quash the arrest. Appellate counsel also raised issues of sufficiency of the evidence and unfair comments in the prosecutor's closing argument. This court affirmed the convictions. *People v. McGee*, No. 1-97-0741 (1999) (unpublished order under Supreme Court Rule 23).

¶ 21 Between August 2002 and August 2006, McGee filed four requests for trial transcripts. The trial court denied all of the requests, explaining that defendant was not entitled to free transcripts.

¶ 22 McGee filed several pleadings with various captions, and in May 2006, the trial court admonished McGee that it would treat the pleadings as a postconviction petition. The court gave McGee leave to amend, modify or withdraw the pleadings. When McGee failed to amend or modify his petitions, the trial court dismissed defendant's petitions on August 1, 2006. This court affirmed the judgment. *People v. McGee*, No. 1-06-3253 (2010) (unpublished order under Supreme Court Rule 23).

¶ 23 In May 2009, McGee filed his motion for leave to file a successive postconviction petition, alleging that he had not had access to a complete record of pretrial and trial proceedings until shortly before May 2009. He had only recently discovered that his appellate counsel failed to order transcripts from the hearing on defendant's motion to quash arrest. McGee argued that if counsel had ordered the transcript, counsel would have found grounds to challenge the trial court's ruling on the motion, and the argument would have made it reasonably likely that the appellate court would have reversed his convictions.

¶ 24 On July 21, 2009, the trial court entered a written order denying defendant leave to file his successive petition. McGee now appeals.

¶ 25 ANALYSIS

¶ 26 We review *de novo* the trial court's denial of leave to file defendant's successive postconviction petition. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). The Act generally limits a defendant to filing one petition. 725 ILCS 5/122-3 (West 2008); *People v. Guerrero*, 2012 IL 112020, ¶ 15. A petitioner may file a successive postconviction petition if the petition satisfies the cause and prejudice test articulated in section 122-1(f) of the Act. 725 ILCS 5/122-1(f) (West 2008).

¶ 27 McGee argues that he need only state the mere gist of an arguable claim of cause and prejudice to have the right to file a successive postconviction petition. The Illinois Supreme Court, in *People v. Walter Edwards*, 2012 IL 111711, ¶¶ 25, 29 (filed April 19, 2012), expressly rejected the standard McGee espouses. The *Walter Edwards* court held that when deciding whether to permit a petitioner to file a successive postconviction petition, the trial court must apply standards more stringent than those applicable to an initial postconviction. *Walter Edwards*, 2012 IL 111711, ¶¶ 26, 27, 29. In accord with the supreme court's holding, this court found that a trial court must require a "more exacting" or "substantial" showing of cause and prejudice before granting a petitioner leave to file a successive postconviction petition. *People v. Wayne Edwards*, 2012 IL App (1st) 091651, ¶¶ 22, 32.

¶ 28 In our first order on this appeal, we affirmed the trial court's decision based on a finding that McGee failed to show cause for failing to raise in his initial postconviction petition the issues he addresses in his proposed successive postconviction petition. McGee, in a petition for rehearing, pointed out that we misconstrued some of the evidence showing that he had cause for failing to raise in his initial postconviction petition his appellate counsel's failure to order complete transcripts of the hearing on the motion to quash the arrest. On rehearing, we assume that McGee showed sufficient cause for his successive postconviction petition, and we address instead only the issue of prejudice.

¶ 29 McGee argues that if appellate counsel had ordered transcripts of the hearing on the motion to quash the arrest, counsel should have argued that the trial court erred when it denied the motion to quash. Counsel should have challenged the court's credibility determinations because no one should have believed Detective Karl's testimony. According to McGee, the court should not have believed Karl because Karl "claimed that these witnesses, gang members all, came right in and ratted out their comrade – for no articulated reason. Circumstantial evidence also suggests coercion: all

of these witnesses supposedly sat around in Area 2 of their own free will throughout the day and late into the night, an implausible scenario."

¶ 30 In opposition to Karl's testimony, at the hearing on the motion to quash the arrest, McGee presented the testimony of Anthony, Jaco and Lightner. All three admitted they had joined the Mickey Cobras, and Anthony identified McGee as a member of an allied gang. They admitted they signed statements at the police station identifying McGee as the shooter, but at the hearing on the motion to quash, they said they did so under duress. Anthony did not testify at trial, but both Jaco and Lightner testified at trial and retracted the testimony they gave at the hearing on the motion to quash. They both admitted that they told police, honestly, that they saw McGee shoot Officers Robbins and Jackson. At trial, Jaco said police put some pressure on her, by threatening to charge her with perjury, and that testimony conflicts to some extent with Karl's testimony from the hearing on the motion to quash. But Jaco and Lightner both explained that pressure from gang members caused them to lie at the hearing on the motion to quash.

¶ 31 If appellate counsel, on the direct appeal, had challenged the ruling on the motion to quash the arrest, the appellate court would have evaluated the credibility of the testimony at that hearing in light of all of the evidence at trial. See *People v. Redd*, 135 Ill. 2d 252, 289 (1990). The appellate court would also need to defer to the trial court's credibility assessments, because "the trial court is in a superior position to determine and weigh the credibility of witnesses, observe the witnesses' demeanor, and resolve conflicts in the witnesses' testimony." *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). The appellate court must uphold the trial court's findings of fact unless the findings are against the manifest weight of the evidence. *People v. Pitman*, 211 Ill. 2d 502, 512 (2004).

¶ 32 When comparing the credibility of Karl's testimony with the testimony of Anthony and the testimony that Jaco and Lightner retracted, with credible explanations for why they lied at the hearing on the motion to quash the arrest, we see no substantial likelihood that this court would have

found that the manifest weight of the evidence required a finding that police coerced Anthony, Jaco and Lightner into providing the statements that formed the basis for arresting McGee. Thus, even if appellate counsel had ordered the transcripts from the hearing and raised all of the arguments McGee now poses for reversal, the appellate court would likely have found no error in the decision to deny the motion to quash the arrest and suppress McGee's statements. Therefore, McGee has not made a substantial showing of prejudice due to appellate counsel's alleged errors. After reconsideration of our decision in light of McGee's petition for rehearing, we affirm the decision to deny the motion for leave to file a successive postconviction petition because McGee has failed to meet the prejudice prong of the cause and prejudice test.

¶ 33 CONCLUSION

¶ 34 McGee has not shown a substantial likelihood that he would have achieved a better result if his appellate counsel had ordered the transcripts from the hearing on the motion to quash the arrest and challenged the ruling on that motion. Because McGee cannot meet the prejudice prong of the cause and prejudice test for successive postconviction petitions, we affirm the decision to deny McGee leave to file his successive postconviction petition.

¶ 35 Affirmed.