2012 IL App (2d) 100886-U
No. 2-10-0886
Order filed May 16, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-3272
JOSEPH L. WILKINS,	)	Honorable Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed defendant's postconviction petition, as it was best characterized as a successive petition that did not satisfy the cause-and-prejudice test; to the extent that it was an amended petition, the court lacked jurisdiction of it because of the pendency of the appeal of the dismissal of the original petition. We affirmed the judgment of the trial court.

¶ 1 Defendant, Joseph L. Wilkins, appeals from an order of the circuit court of Du Page County summarily dismissing a petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/art. 122 (West 2010)). Because we conclude that the petition was an improper successive filing, we affirm.

¶ 2 Following a jury trial, defendant was found guilty of two counts of unlawful use of a credit card (720 ILCS 250/8 (West 2006)) and was sentenced to concurrent seven-year prison terms. Evidence at trial included the testimony of Alonzo Glover, who had previously pleaded guilty to a charge of burglary stemming from the theft of a credit card from the victim's workplace. Glover testified that on September 2, 2007, at approximately 3:30 a.m., he went to a Meijer store in Naperville along with defendant, Emery Jones, and another individual. According to Glover, defendant used the stolen credit card to purchase a video game console and some clothing. Glover further testified that later that day defendant used the stolen credit card to purchase gift cards, and possibly another video game console, at the Meijer store. Records kept by the issuer of the credit card indicate that on the date in question the card was used in a transaction at 3:38 a.m. and in several transactions taking place between 11:30 a.m. and noon. A Meijer sales clerk identified defendant as resembling an individual who purchased gift cards between 11 a.m. and noon on September 2, 2007. Defendant testified that he not was present at the Meijer store when the stolen credit card was used. Indeed, he claimed that he had never been to a Meijer store. He also denied that he had ever used the credit card in question.

¶ 3 We affirmed defendant's conviction. *People v. Wilkins*, No. 2-08-0488 (2010) (unpublished order under Supreme Court Rule 23) (*Wilkins I*). On September 14, 2009, defendant sent a letter to the trial court in which he asserted, among other things, that his trial attorney was ineffective because he did not contact Jones, who would have testified that defendant was not present when the stolen credit card was used. On October 6, 2009, the trial court advised defendant that the letter would be treated as a postconviction petition. On that same date, defendant filed a document simply entitled "Post Conviction." The trial court characterized the document as an "addendum" to the

postconviction petition. Defendant did not submit any affidavits in support of his claims for postconviction relief.

¶ 4 On October 16, 2009, the trial court summarily dismissed the petition. Defendant filed a notice of appeal on November 13, 2009. On June 3, 2010, while the appeal was pending, defendant filed a motion for leave to file a late postconviction petition. The motion stated that the time for filing a petition under the Act had expired. As reasons for his delay in filing the petition, defendant stated as follows:

> "Due to my claim of actual innocence. The knowing use of perjured testimony by the State. Also ineffective assistance of trial counsel *** by not calling my witnesses. I had to use outside means to contact the people who could verify my alibi with these affidavits and other proof. And I do and have had witnesses all alone [*sic*] who were never called. Which will clear me. Two witness affidavits have been added to the Post Conviction. And a Police statement with slander, also a third affidavit to expose evidence left out."

¶ 5 Attached to the motion were photocopies of the September 14, 2009, letter (which the trial court had treated as a postconviction petition) and the document defendant filed on October 6, 2009 (which the trial court had treated as an addendum to the petition). Defendant also attached his own affidavit, as well as affidavits from his mother, Christine Wilkins, and from Jones. According to defendant's affidavit, his trial attorney refused to call Christine Wilkins to testify, although she was present in the courtroom. Defendant's affidavit further indicated that trial counsel told defendant that he did not think it was necessary to call Jones. According to Jones's affidavit, defendant was not present at the Meijer store when the stolen credit card was used. Christine Wilkins's affidavit stated that defendant was with her at church from 10 a.m. until noon on September 2, 2007. In a

written order entered on July 30, 2010, the trial court found that defendant's motion "incorporates his successive post-conviction petition, which consists of the original post-conviction petition *** with several changes and 3 affidavits." In the same order, the trial court granted defendant leave to file the successive petition, but then summarily dismissed it. Defendant filed a timely notice of appeal. During the pendency of this appeal, we affirmed the summary dismissal of defendant's original postconviction petition. *People v. Wilkins*, 2011 IL App (2d) 091183-U (unpublished order under Supreme Court Rule 23) (*Wilkins II*). We ruled, in part, that the petition was deficient because it was not supported by affidavits or other evidence as required by section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)).

¶ 6 Proceedings under the Act are divided into three stages. Initially, the trial court conducts an independent examination of the petition to determine whether it should be docketed for further proceedings. See 725 ILCS 5/122-2.1 (West 2008). The Act provides for summary dismissal of the petition if the trial court, after examining the petition, concludes that it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous or patently without merit if it "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Defendant argues that, in accordance with these principles, his petition should have been docketed for further proceedings. He contends that the allegations of his petition provide an arguable basis for claims of ineffective assistance of counsel at trial. Under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming a deprivation of the right to the effective assistance of counsel must establish that counsel's performance "fell below an objective standard of reasonableness" and that the deficient performance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Id.* at 688, 694. Defendant contends that, in light of his allegation that his attorney failed to present exculpatory evidence (*i.e.*, the testimony of Jones and Christine Wilkins), it is arguable that counsel's performance was not objectively reasonable. Defendant further contends that the exculpatory testimony in question "would have strongly supported [defendant's] denial of involvement in the unauthorized use of the stolen credit card, leading to a reasonable likelihood of acquittal."

¶ 7 The State responds that the petition at issue here was properly dismissed for one of two reasons that are independent of the issue of whether the petition was frivolous or patently without merit. First, the State argues that the petition was nothing more than an attempt to amend or supplement defendant's original postconviction petition—the letter/petition filed on September 14, 2009, and the October 6, 2009, addendum—and was thus part of the original postconviction proceeding. Because the trial court lost jurisdiction over the original postconviction proceeding when defendant perfected his appeal from the summary dismissal of the original petition (see, *e.g.*, *People v. Walker*, 395 Ill. App. 3d 860, 867 (2009), *leave to appeal granted*, 236 Ill. 2d 542 (2010) ("upon becoming effective, a notice of appeal shifts jurisdiction from the trial court to the appellate court")), the State contends that the dismissal of the June 3, 2010, petition was proper.

¶ 8 Second, the State argues that, if the petition initiated a separate postconviction proceeding, the dismissal should be affirmed pursuant to the principles governing the filing of successive postconviction petitions. Generally, a successive petition may be filed only with leave of court. 725 ILCS 5/122-1(f) (West 2010). Leave to file a successive petition will be granted only if the defendant "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." *Id.* "Cause" and "prejudice" are defined as follows:

> "[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." *Id.*

A successive petition may be filed without a showing of cause and prejudice when the petition raises a legitimate claim of actual innocence (*People v. Lofton*, 2011 IL App (1st) 100118, ¶ 33), but defendant acknowledges that he did not assert such a claim.

¶ 9 If the premise of the State's first argument—that the June 3, 2010, petition merely amended or supplemented the prior petition—were correct, we would agree with the State that the trial court would have had no alternative but to strike or dismiss the petition for lack of jurisdiction. That the trial court dismissed the petition for different reasons would be of no consequence, however, because we review the judgment of the trial court, not the reasons given for the judgment. See *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 35. Defendant disputes the premise stated above. According to defendant, the trial court properly treated the June 3, 2010, petition as a successive petition and did not exceed its jurisdiction in ruling on the merits of the petition. Thus, in defendant's view, the merits of defendant's petition are properly before this court. As explained below, although we are inclined to agree with defendant that the trial court did not exceed its jurisdiction, we also agree with the State that defendant's failure to demonstrate cause and prejudice precludes consideration of the petition on the merits.

¶ 10 We briefly explored the distinction between an amended postconviction petition and a supplemental postconviction petition in *People v. Golden*, 369 Ill. App. 3d 639, 647 (2006), *vacated on other grounds*, 229 Ill. 2d 277 (2008). In *Golden* we observed that "[t]he difference between an 'amended' petition and a 'successive' petition is not clear from the cases." *Id.* We posited that "a petition must be deemed a successive petition if the prior petition was ruled on" but also noted that our supreme court's decision in *People v. Whitehead*, 169 Ill. 2d 355 (1996), seemed to "undercut" that idea. *Golden*, 369 Ill. App. 3d at 647. Here, however, we believe that the approach suggested in *Golden* yields a result that can easily be reconciled with the result in *Whitehead*.

¶ 11 In *Whitehead*, the defendant, who had been sentenced to death for murder, filed a *pro se* postconviction petition. With the assistance of appointed counsel he subsequently filed an amended petition, a second amended petition, and an "addition" to the second amended petition. After the trial court dismissed the second amended petition and the addition thereto, defendant sought a stay of the ruling so that he could enlist the aid of the Capital Resource Center in preparing an amended pleading. After the trial court denied the request, the defendant filed a notice of appeal to the Illinois Supreme Court. During the pendency of the appeal, the defendant filed a third amended petition with the assistance of the Capital Resource Center. The defendant then requested a stay of the appeal pending the disposition of the third amended petition. The trial court dismissed the third amended petition, the defendant appealed, and our supreme court consolidated that appeal with the appeal from the dismissal of the second amended petition and the addition. *Whitehead*, 169 Ill. 2d at 365-68.

¶ 12 After recounting the procedural background of the case, the *Whitehead* court offered the following analysis:

> "At this juncture, we note that the Post-Conviction Hearing Act allows for amendment of a post-conviction petition [citation], yet contemplates the filing of one post-conviction petition [citations]. Section 122-3 provides that '[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.' [Citation.] *** Nonetheless, section 122-3 is not an ironclad bar to multiple post-conviction petitions. [Citation.] The filing of successive petitions has been allowed where the proceedings on the initial petition were deficient in some fundamental way. [Citations.] Further, this court has also held that the objective of finality must yield in circumstances where fundamental fairness so requires. [Citation.]
>
> The procedural circumstances of this case are somewhat unusual. It is not clear that the trial court construed the third-amended petition as a separate and successive petition. The trial court ruled on issues it had previously decided. Also, when presented with the opportunity to find remaining issues waived on the basis of a successive filing, the trial court specifically declined to do so. Defendant's first appeal before this court also apparently remained dormant for three years during the pendency of the proceedings on the third-amended petition and is now consolidated. Consequently, in our view, given these unusual circumstances and to ensure that defendant obtains one complete opportunity to show a substantial denial of constitutional rights [citation] the third-amended petition stands." *Whitehead*, 169 Ill. 2d at 368-69.

¶ 13 In contrast, in this case the trial court expressly characterized the June 3, 2010, petition as "successive," and the appeal from the dismissal of the first petition proceeded without any interruption on account of the June 3, 2010, petition. Under these circumstances, we believe that the

Whitehead court would have reached a different result. Accordingly, we believe that the June 3, 2010, petition initiated a successive postconviction proceeding that was permissible only with leave of court properly granted in accordance with section 122-1(f)'s cause-and-prejudice standard.

¶ 14 Although the trial court found that grounds existed for granting defendant leave to file a successive petition, we agree with the State that we are not bound by that finding. In *People v. English*, 403 Ill. App. 3d 121 (2010), cited by the State, the trial court denied the defendant's second postconviction petition on the merits after an evidentiary hearing. The appellate court affirmed. It did so, however, because the defendant had not established grounds for filing a successive petition. Notably, the State had moved for dismissal of the petition on that basis, but the trial court denied the motion and chose to reach the merits of the petition. *Id.* at 128-32.

¶ 15 The *English* court reasoned that the claims of ineffective assistance of counsel in the defendant's second postconviction petition either had been forfeited or were barred by the doctrine of *res judicata* and that the defendant therefore could not satisfy the cause prong of the cause-and-prejudice test. *Id.* at 130. "Ordinarily, postconviction relief is limited by considerations of [forfeiture] and *res judicata* 'to constitutional matters which have not been, and could not have been, previously adjudicated.' " *People v. Davis*, 377 Ill. App. 3d 735, 744 (2007) (quoting *People v. Winsett*, 153 Ill. 2d 335, 346 (1992)). The *English* court observed that the ineffective-assistance-of-counsel claims—which stemmed from trial counsel's failure to call certain witnesses—had been raised or could have been raised in the first petition.

¶ 16 Defendant argues that *English* is distinguishable because our judgment in *Wilkins II* "should not be considered a substantive ruling on the merits of [defendant's] claim, but rather as affirming its dismissal because [defendant] failed to fulfill the procedural pleading requirements." The

argument suggests that cause for filing a successive petition exists whenever an earlier petition was dismissed on procedural grounds. That simply is not the case. As seen, cause exists when the defendant identifies "an *objective factor* that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." (Emphasis added.) 725 ILCS 5/122-1(f)(1) (West 2010). An "objective factor" is one that is external to the defense. See *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009). In this case, there was nothing "external" to the defense that impeded defendant's ability to raise his claims. The impediment here was a failure of the defense itself, to wit, defendant's failure to comply with the Act's procedural requirements when he filed his first petition.

¶ 17 In summary, we are of the view that the petition at issue here was a successive filing subject to dismissal for failure to satisfy the cause-and-prejudice test. Because the criteria for distinguishing successive petitions from amended petitions are not precisely clear, we note that, even to the extent that the petition here was of the latter variety, the petition was properly dismissed inasmuch as the trial court would have lacked jurisdiction to consider it on the merits.

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 19 Affirmed.