

2012 IL App (2d) 110012-U
No. 2-11-0012
Order filed June 18, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 91-CF-1001
)	
JAMES E. FILES,)	Honorable
)	James K. Booras,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: The trial court properly denied defendant’s motion for leave to file a successive postconviction petition, as his asserted “cause” was insufficient: although counsel on his original petition had entered an appearance on his direct appeal, he had done so only after briefing had been completed, and thus the proceedings on his first petition were not unduly constrained by commonality of counsel.

¶ 1 Defendant, James E. Files, appeals the denial of his motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He asserts that he met the cause-and-prejudice requirement for the filing of a successive petition because, under the rule in *People v. Flores*, 153 Ill. 2d 26 (1992), a defendant can claim

cause for the filing of a successive petition when he or she had the same counsel for the original petition as on direct appeal. We hold that, because counsel for defendant's original petition did not control defendant's direct appeal, the rule in *Flores* is inapplicable. We therefore affirm the denial of defendant's motion.

¶ 2

I. BACKGROUND

¶ 3 Defendant and David Morley were charged with the attempted murders of Round Lake Beach detectives David Ostertag and Gary Bitler. The circumstances were that a warrant was out for defendant's arrest in relation to vehicle theft charges; Morley had bonded out on the same charges but had failed to appear. Ostertag and Bitler spotted the two at a gas station. A high-speed chase and a shootout followed; Ostertag was shot in the chest. Because Morley and defendant had antagonistic defenses, they had separate trials.

¶ 4 Morley had the first trial. The basis of his defense was that he and defendant were operating a chop shop, were not paying a " 'street tax' " to " 'the syndicate,' " and believed that they were in danger because of the nonpayment. *People v. Morley*, 255 Ill. App. 3d 589, 592 (1994). Morley claimed that, when they saw an unmarked police car in pursuit of their vehicle, they believed that mob enforcers or hit men were chasing them. *Morley*, 255 Ill. App. 3d at 593. Defendant volunteered to testify on Morley's behalf; he was supposed to have been the recipient of the mob threats. The court dissuaded defendant from testifying:

"Defense counsel [for Morley] overheard the trial judge tell Files that he 'had a shot' in his case if he did not testify at [Morley's] trial and that if Files 'testified in this case, there would be two convictions, instead of one.' Files ultimately declined to testify." *Morley*, 255 Ill. App. 3d at 595.

The jury found Morley guilty of two counts of attempted first-degree murder, two counts of aggravated discharge of a firearm, and a single count each of armed violence and aggravated battery with a firearm. *Morley*, 255 Ill. App. 3d at 590. This court reversed the convictions, concluding that the court's admonishments to defendant about the dangers of testifying had gone beyond what was proper and that the lack of defendant's testimony might have prejudiced Morley. This court described the defense as "somewhat unusual," but "not implausible in light of the evidence presented." *Morley*, 255 Ill. App. 3d at 600. (On retrial, Morley was reconvicted.)

¶ 5 Defendant had his trial before the same judge. Defendant did not testify and did not use the defense that the two feared that the police were hit men. The jury found defendant guilty of two counts of attempted murder (Ill. Rev. Stat. 1991, ch. 38, ¶¶ 8-4(a), 9-1(a)(1)), two counts of aggravated discharge of a firearm (Ill. Rev. Stat. 1991, ch. 38, ¶ 24-1.2(a)(2)), one count of aggravated battery with a firearm (Ill. Rev. Stat. 1991, ch. 38, ¶ 12-4.2(a)), and one count of armed violence (Ill. Rev. Stat. 1991, ch. 38, ¶ 33A-2). The court sentenced him to 30 years' imprisonment for the attempted murder of Ostertag and a consecutive 20 years' imprisonment for the attempted murder of Bitler.

¶ 6 On direct appeal, the Office of the State Appellate Defender (OSAD) originally represented defendant. OSAD filed his main brief on April 6, 1993 and his reply brief on July 9, 1993. On February 3, 1994, with only oral argument pending in this court, defendant, represented by Julius Lucius Echeles filed the postconviction petition that we describe below. On February 7, 1994, defendant moved for leave for Echeles to substitute in as appellate counsel. We allowed OSAD to withdraw, but did not allow Echeles to file supplementary briefs. Oral argument took place on October 14, 1994.

¶ 7 Defendant's arguments on appeal were that "(1) the trial court erred when it admitted evidence that a warrant was outstanding against him; (2) the trial court erred when it excluded evidence which was intended to rebut the State's motive evidence; and (3) this court should vacate his unsentenced convictions." *People v. Files*, 260 Ill. App. 3d 618, 620 (1994). This court affirmed the attempted-murder and aggravated-discharge-of-a-firearm convictions, but remanded the matter for the trial court to vacate the convictions of aggravated battery with a firearm and armed violence and to impose sentence on the aggravated-discharge-of-a-firearm conviction. *Files*, 260 Ill. App. 3d at 631.

¶ 8 As noted, defendant filed a postconviction petition on February 3, 1994. He pointed out that, in *Morley*, this court held that the trial court had impaired his codefendant's right to put on a defense when it, speaking to defendant, went beyond proper Fifth Amendment cautions in warning defendant against testifying on his codefendant's behalf. He asserted that the same over-strong admonitions also improperly persuaded him not to testify on his own behalf. This, he said, prevented him from presenting the defense of believing that the police were hit men. Defendant also made claims of ineffective assistance of trial and appellate counsel, but he stated these primarily as arguments that defendant had not forfeited his primary claim. The court dismissed the petition on March 16, 1994. Defendant appealed and this court remanded for reconsideration by a different judge. On remand, the trial court again dismissed the petition.

¶ 9 On July 13, 2010, defendant filed a motion for leave to file a successive postconviction petition. He asserted that he had cause to file a second petition under the rule in *Flores*, which recognizes that, when postconviction counsel and appellate counsel are the same person, the conflict of interest will effectively prevent a defendant from making any claim based on ineffective assistance

of appellate counsel. He further argued that trial counsel had been ineffective for failing to call the witness whom Morley used on the practices of the mob. Finally, he asserted that trial counsel had been ineffective for failing to get the transcript of Morley's trial to use to impeach Ostertag. He noted that, among other things, Ostertag had testified at Morley's trial that, after he was shot, he only *heard* gunfire, whereas at defendant's trial, he testified to *seeing* defendant shooting at his partner. The court denied defendant's motion, and defendant timely appealed.

¶ 10

II. ANALYSIS

¶ 11 On appeal, defendant asserts that he stated the gist of cause based on the *Flores* rule and the gist of prejudice based on Ostertag's differing testimony in the two trials. The State's response contains multiple arguments. Among other things, it argues that defendant cannot show cause based on the *Flores* rule when postconviction counsel did control the direct appeal. We agree.

¶ 12 To obtain leave to file a successive postconviction petition, a defendant must show "cause" and "prejudice." 725 ILCS 5/122-1(f) (West 2010). "Cause" is "an objective factor that impeded [the defendant's] ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f)(1) (West 2010). "Prejudice" requires a showing 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)(2) (West 2010). This court has held that a "section 122-1(f) motion need state only the gist of a meritorious claim of cause and prejudice." *People v. LaPointe*, 365 Ill. App. 3d 914, 924 (2006), *aff'd* 227 Ill. 2d 39 (2007). There is, however, disagreement on the point. See *People v. Edwards*, 2012 IL App (1st) 091651 ¶¶ 21-23 (reviewing cases and disagreeing with the "gist" standard). Review of a section 122-1(f) motion denial is *de novo*. *LaPointe*, 365 Ill. App. 3d at 923.

¶ 13 One form of cause, recognized by the *Flores* court, is representation of a defendant by the same counsel on direct appeal and on the original postconviction petition. The analysis in *Flores* recognizes that counsel cannot be expected to make a claim of his or her own ineffectiveness:

“Petitioner asserts that prior appellate counsel’s omission of certain errors on direct appeal and in the first post-conviction proceeding constituted ineffective assistance. The State argues that the alleged errors which underlie defendant’s ineffective-assistance claims could have been raised in defendant’s first post-conviction proceeding. The State urges that defendant couches the alleged errors in a claim of ineffective assistance merely to avoid the bar of *res judicata* and waiver.

True, the errors which underlie petitioner’s current post-conviction claims of ineffective assistance could have been raised in the prior post-trial proceedings. However, it is the failure to raise those claimed errors which forms the basis of defendant’s ineffectiveness claim. Obviously, because defendant’s ineffective-assistance claims concern errors which allegedly occurred on direct appeal and in the first post-conviction proceeding, and are asserted against the attorney who represented defendant in those proceedings, defendant’s present claims *could not have been raised in those prior proceedings*. Thus, defendant’s ineffectiveness claims are neither *res judicata* [citation] nor waived [citation]. [Citation.] Moreover, *** this court noted its earlier suggestion that the doctrine of waiver ought not to bar consideration of issues under the Act where the alleged waiver stems from incompetency of appellate counsel. The court stated that this ‘notion comports with related holdings that waiver will not apply where it would act as a denial of due process [citations].’ ” (Emphasis in original.) *Flores*, 153 Ill. 2d at 281-82.

This reasoning assumes that one lawyer controls the issues raised both on direct review and in the original postconviction petition.

¶ 14 The time line of this case shows that such a conflict cannot be a problem here. To review, the appellate defender filed the primary brief on April 6, 1993, and the reply brief on July 9, 1993. Echeles filed the original postconviction petition on February 3, 1994. Echeles moved to replace the appellate defender on February 7, 1994. Oral argument took place on October 14, 1994.

¶ 15 Based on this sequence, one can safely presume that the appellate briefs and the original petition were prepared completely independently. In particular, we note that the petition was complete before Echeles even sought to participate in the appeal. Defendant argues that “Echeles, who ratified original [appellate] counsel’s actions” by seeking to supplement, rather than withdraw, the appellate briefs, “would not be expected to allege either his or [original appellate counsel’s] ineffective assistance in a post-conviction petition.” The flaw in this argument is that Echeles prepared the petition *before* filing any motion in this court; he had not “ratified” the briefs until after he filed the petition. Moreover, Echeles *did* raise claims of ineffective assistance of appellate counsel in the original petition. Nothing in this unusual sequence suggests the kind of conflict that is the basis for the *Flores* rule, so the rule is inapplicable here.

¶ 16 In his reply brief, defendant has asked that we consider the Supreme Court’s decision in *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309 (2012), a case concerning the federal version of the “cause” requirement. (The case was released after defendant filed his initial brief.) Nothing in *Martinez* negates the problem with chronology and causation that dooms defendant’s argument.

¶ 17

III. CONCLUSION

¶ 18 Because defendant's motion for leave to file a successive postconviction petition failed to state a claim for cause under the rule in *Flores*, its denial was proper.

¶ 19 Affirmed.