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FIFTH DIVISION
June 24, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 89 CR 2894
)	
RAMON DELGADO,)	The Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Burke concurred in the judgment.

ORDER

¶1 *HELD:* Defendant failed to satisfy the requisite cause and prejudice test for filing his third successive postconviction petition where he was not entitled to the assistance of postconviction counsel in drafting his prior petitions that had been summarily dismissed and where defendant had repeatedly raised the underlying claim of ineffective assistance of trial counsel.

¶2 In 1992, defendant, Ramon Delgado, was found guilty of two counts of first-degree murder following a jury trial and sentenced to natural life imprisonment without the possibility

of parole. This court affirmed defendant's conviction and sentence on direct appeal. *People v. Delgado*, 282 Ill. App. 3d 851 (1996). The current appeal follows the denial of defendant's motion for leave to file a third successive postconviction petition. See *People v. Delgado*, 2013 IL App (1st) 122368-U; *People v. Delgado*, No. 1-06-2499 (2007) (dismissed for want of prosecution); *People v. Delgado*, No. 1-03-1874 (2005), No. 1-01-3456 (2002), No. 1-97-2954 (1999) (unpublished orders under Supreme Court Rule 23). In this appeal, defendant contends he sufficiently demonstrated cause and prejudice for leave to file his third successive postconviction petition where the trial court failed to appoint an attorney to represent him throughout his postconviction proceedings in violation of his due process rights. Based on the following, we affirm.

¶3

FACTS

¶4 We briefly summarize the trial evidence. On January 12, 1989, defendant fatally stabbed two individuals. Prior to the offense, the two victims, another individual, and defendant were ingesting cocaine in the victims' apartment when defendant became angry and accused the others of stealing his cocaine. The police were called and defendant left the apartment. Defendant, however, returned later with more cocaine. As he, the victims, and the fourth individual prepared to ingest his cocaine, defendant became angry again and stabbed the victims. Defendant subsequently provided incriminating statements to the police and an assistant state's attorney, but later testified at trial that he stabbed the victims in self-defense.

¶5 On direct appeal, defendant argued that he was improperly denied a jury instruction on second-degree murder based on provocation and that the trial court improperly admitted the medical examiner's testimony regarding cocaine found in the victims' bodies. *Delgado*, 282 Ill. App. 3d at 852. We affirmed defendant's conviction and sentence. *Id.* at 859.

¶6 In his original *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)) and subsequent supplemental petition, defendant asserted a number of allegations of ineffective assistance of counsel. In relevant part, defendant alleged trial counsel, Richard Beuke, failed to properly raise the defense of voluntary intoxication and failed to present readily available evidence sufficient to establish that defense. The trial court summarily dismissed defendant's petition and supplement as without merit. On January 25, 1999, this court affirmed the dismissal of defendant's initial postconviction petition and supplement. *Delgado*, No. 1-97-2954.

¶7 Defendant subsequently filed a second postconviction petition (his first successive petition) claiming his natural life sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and his trial counsel was ineffective for failing to present evidence of voluntary intoxication. The trial court also summarily dismissed defendant's first successive postconviction petition. We affirmed that decision on June 7, 2002. *Delgado*, No. 1-01-3456.

¶8 Then, on March 8, 2003, defendant filed a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 1988)), arguing that his natural life sentence exceeded the statutory maximum authorized by law. The trial court *sua sponte* dismissed defendant's petition as untimely under section 2-1401(c). On appeal, we affirmed the trial court's dismissal of defendant's section 2-1401 petition. *Delgado*, 1-03-1874.

¶9 Defendant filed his next *pro se* postconviction petition on November 16, 2011, again claiming his trial counsel was ineffective for failing to raise the defense of voluntary intoxication and for failing to present readily available evidence sufficient to establish that defense. Defendant additionally filed a motion to add missing pages and exhibits from his original postconviction petition, including defendant's medical records and doctors' reports, which he

claimed were not considered by the trial court prior to the dismissal of his initial postconviction petition. In June 2012, the trial court summarily dismissed the petition as frivolous and patently without merit and additionally found that defendant failed to satisfy the cause and prejudice test. In its written order, the trial court found that defendant's claims were barred by the doctrine of *res judicata* and that his trial counsel's decision to pursue a theory of self-defense over a theory of voluntary intoxication did not support a claim of ineffective assistance of counsel. The court also found that there was little evidence to support a claim of voluntary intoxication; thus, even had it been presented as a theory of defense, the theory was unlikely to succeed. On December 27, 2013, this court affirmed the dismissal of defendant's second successive postconviction petition. *Delgado*, 2013 IL App (1st) 122368-U.

¶10 On December 17, 2012, prior to this court's issuance of our decision related to defendant's second successive postconviction petition, defendant requested leave to file his third¹ successive postconviction petition, the subject of which underlies this appeal. In his third successive postconviction petition, defendant alleged that his trial and appellate attorneys were ineffective. In particular, defendant again claimed his trial counsel Beuke was ineffective for failing to present a defense of drug-induced intoxication, as well as for failing to present defenses of diminished capacity or temporary insanity. Defendant additionally claimed again that pages of his original postconviction petition were missing, and not considered by the trial court, supporting his alleged chronic drug use. On March 1, 2013, in a written order, the trial court denied defendant leave to file his third successive postconviction petition. In summarily dismissing defendant's petition, the trial court stated:

¹ The State refers to this successive postconviction petition as defendant's fourth successive postconviction petition. However, because defendant's section 2-1401 petition for relief from judgment raised a claim unrelated to those raised in defendant's postconviction petitions and because it was based on a different statute, we will not consider the section 2-1401 petition as a successive postconviction petition for purposes of this appeal.

“In the present case, petitioner has failed to demonstrate that the rule prohibiting successive petitions should be relaxed. Petitioner claims pages were missing from his initial petition which dealt with his drug use and his attorney’s ineffectiveness for failing to present a defense of drug induced intoxication, diminished capacity, or temporary insanity. Yet, this claim has been adjudicated and dismissed a total of four times and petitioner, consequently, has suffered no prejudice from these alleged missing pages in his initial petition. Clearly, had this claim been adjudicated then, it would have not afforded him any relief as it has failed to do so in each subsequent collateral filing. Simply put, the jury was apprised of the fact that petitioner had smoked cocaine prior to the murder through his own testimony. Petitioner testified at trial that he stabbed the victim in self-defense after the victim came after him with a knife when petitioner accused him of stealing his cocaine. Thus, his suggested drug induced intoxication, diminished capacity, or temporary insanity defense would not have been viable and his attorney was not ineffective for failing to present it. Likewise, appellate counsel was not ineffective for failing to raise this issue on appeal. Petitioner also claims his first attorney, Phillip Fowler[,] was ineffective but on what grounds is not clear. He merely provides this court with the facts surrounding Fowler’s withdrawal from representation. Once again, petitioner’s claims are completely without merit and patent duplications of previous filings with this court. As such, he has failed to satisfy cause and prejudice.”

The trial court denied defendant’s motion to reconsider its March 1, 2013, order. This timely appeal followed.

¶11

ANALYSIS

¶12 Defendant contends his third successive postconviction petition sufficiently demonstrated cause and prejudice where the trial court failed to appoint counsel to assist him in preparing any of his prior postconviction petitions thereby depriving him of meaningful access to postconviction relief in violation of his due process rights.

¶13 The Act provides a remedy for a criminal defendant to challenge his original trial or sentencing hearing as a violation of his constitutional rights. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). The filing of a postconviction petition institutes a collateral proceeding rather than an appeal of the underlying judgment. *Id.* As a result, a postconviction proceeding only permits review of constitutional issues that were not, and could not have been, adjudicated on direct appeal. *Id.* at 456. Issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*, while issues that could have been raised, but were not, are considered waived. *Id.*

¶14 The Act contemplates the filing of only one postconviction petition. *People v. Flores*, 153 Ill. 2d 264, 273 (1992). The filing of a successive postconviction petition, however, may be allowed where the proceedings on the initial petition were fundamentally deficient. *Id.* at 273-74. Section 122-1(f) of the Act addresses successive postconviction petitions, such as the one in this appeal:

“Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of the court may be granted only if a petitioner 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. For purposes of this subsection (f): (1) 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 (2) 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 1998).

After analyzing the statute and the relevant law interpreting the statute, our supreme court has held in *Smith* that “leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentations submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings.” *Id.* ¶ 35. The interpretation and application of section 122-1(f) of the Act involves questions of law, which we review *de novo*. *People v. Smith*, 2014 IL 115946, ¶ 21.

¶15 In terms of cause, defendant argues that his lack of access to meaningful postconviction representation deprived him of the ability to establish that his trial counsel failed to present a voluntary intoxication defense even though his initial attorney had evidence to support the defense. Defendant explains that his first counsel ultimately was unable to represent him at trial and his second trial attorney only had two months to prepare for trial, which prevented him from having “the wherewithal to review the medical records that had already been gathered in order to present the voluntary intoxication defense.” Defendant argues that he established prejudice where his entire trial was “infected with error” due to the limited time his second counsel had to prepare for trial.

¶16 Based on our review of the record, we conclude that defendant failed to satisfy the requisite cause and prejudice test. Most notably, defendant failed to establish that he was entitled to the assistance of postconviction counsel for his third successive petition. Defendant

cites no section of the Act or supporting case law providing a right to counsel under the circumstances of this case. *Cf.* 725 ILCS 5/122-4 (West 1998) (providing that counsel shall be appointed for indigent defendants sentenced to terms of imprisonment *if the petition is not dismissed* pursuant to section 122-2.1 of the Act).

¶17 Moreover, defendant cannot establish cause where his original postconviction petition and supplement contained claims that his second attorney Beuke failed to properly raise the defense of voluntary intoxication and failed to present readily available evidence sufficient to establish that defense. Accordingly, even without the assistance of appointed counsel, defendant already presented the ineffective assistance claim in his original postconviction petition, as well as in two of his prior successive petitions, that he continues to pursue in his latest successive petition. We recognize that defendant alleges his first postconviction petition was incomplete when it was considered and dismissed by the trial court; however, defendant's claim regarding the missing pages, which included his medical records and doctors' reports, was included in his second successive petition, as well as his third successive petition. All of defendant's postconviction petitions raising the claim of ineffective assistance of counsel for failing to present a voluntary intoxication defendant were dismissed by the trial court and affirmed by this court on appeal. " 'A ruling on a post-conviction petition has *res judicata* effect with respect to all claims that were raised or *could have been raised* in the initial petition.' " (Emphasis in original.) *Flores*, 153 Ill. 2d at 274 (1992) (quoting *People v. Free*, 122 Ill. 2d 367, 376 (1989)). We, therefore, find defendant's ineffective assistance claim asserted in his third successive postconviction petition was barred by the doctrine of *res judicata*. As a result, defendant cannot establish the cause prong of the cause-and-prejudice test. Accordingly, we affirm the trial court's denial of defendant's motion for leave to file his third successive postconviction petition.

¶18

CONCLUSION

¶19 We affirm the trial court's denial of defendant's motion for leave to file his third successive postconviction petition.

¶20 Affirmed.