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2016 IL App (3d) 150478-U

Order filed August 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Bureau County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0478 Circuit No. 94-CF-37
STEVEN A. TALIANI,	)	
Defendant-Appellant.	)	Honorable Daniel J. Bute, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's successive postconviction petition on the basis that defendant failed to establish cause and prejudice.

¶ 2 Defendant, Steven A. Taliani, appeals the dismissal of his successive postconviction petition, arguing that the trial court erred in determining that defendant failed to establish cause and prejudice. Alternatively, defendant argues that two claims of ineffective assistance of counsel raised in his successive petition were not subject to the cause and prejudice test on various grounds. We affirm.

¶ 3 FACTS

¶ 4 A jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 1992)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 1992)). The trial court sentenced defendant to 70 years' imprisonment for first degree murder and 30 years' imprisonment for aggravated battery with a firearm, to be served consecutively.

¶ 5 On appeal, defendant argued that the trial court should have entered a finding of not guilty by reason of insanity and that his sentence was excessive. We affirmed defendant's conviction and sentence. *People v. Taliani*, No. 3-94-0921 (1995) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant filed a *pro se* postconviction petition arguing that his trial counsel was ineffective for committing approximately 17 different errors. The *pro se* petition also argued that defendant received ineffective assistance of appellate counsel in that counsel failed to raise approximately six different issues. The trial court summarily dismissed defendant's *pro se* postconviction petition. On appeal, we affirmed the summary dismissal of defendant's *pro se* petition. *People v. Taliani*, No. 3-96-0672 (1997) (unpublished order under Supreme Court Rule 23).

¶ 7 On June 1, 2000, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)). The petition alleged that defendant learned that a police officer who had been a State witness in defendant's criminal trial had testified at a civil trial that he believed defendant accidentally shot the victim of defendant's aggravated battery with a firearm conviction. Defendant subsequently filed a request to amend his section 2-1401 petition, raising a claim pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The trial court denied defendant's petition. This court affirmed the trial court's denial of

defendant's section 2-1401 petition. *People v. Taliani*, No. 3-00-0913 (2003) (unpublished order under Supreme Court Rule 23).

¶ 8 On January 17, 2002, while defendant's appeal from the denial of his initial section 2-1401 petition was pending, defendant filed a second section 2-1401 petition. Defendant's second section 2-1401 petition alleged that one trial witness, psychiatrist Dr. Richard Brady, had been convicted of practicing medicine without a license. Defendant contended that if the jury had known about Brady's criminal charges, it would have disregarded his testimony. The State filed a motion to dismiss. On October 16, 2002, defendant filed a pleading entitled "Pro-Se Petion [*sic*] for Relief from Judgement [*sic*] and Pro-Se Petition for Post-Conviction Relief" requesting that the court "incorporate" the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)) "with the collateral statue [*sic*] presently pending." Defendant also filed several requests for appointment of counsel. After defendant filed this motion, it appears that the trial court treated defendant's second section 2-1401 petition as a successive postconviction petition. The trial court appointed postconviction counsel.

¶ 9 On October 6, 2014, postconviction counsel filed an amended petition for postconviction relief. The amended petition argued that defendant received ineffective assistance of trial counsel in that counsel: (1) withdrew defendant's petition for a fitness examination after the petition had been granted; and (2) failed to include a jury instruction for second degree murder and failed to consult with defendant regarding his decision not to offer the instruction. The petition also alleged that defendant's due process rights were violated when police officers were permitted to testify as expert witnesses rather than lay witnesses at trial. Finally, the petition argued that defendant received ineffective assistance of appellate counsel.

¶ 10 The State filed a motion to dismiss. After hearing arguments, the trial court granted the State's motion. The trial court found that defendant had not established cause and prejudice.

¶ 11 ANALYSIS

¶ 12 I. Cause and Prejudice

¶ 13 On appeal, defendant argues that the trial court erred in dismissing his successive postconviction petition. Specifically, defendant contends that he established cause for failing to raise the claims in his successive petition earlier because he had not been allowed one complete opportunity to demonstrate a denial of his constitutional rights. Defendant argues that he showed prejudice in that his constitutional claims remain unheard. For the reasons that follow, we find that defendant has failed to establish cause and prejudice.

¶ 14 Section 122-3 of the Act (725 ILCS 5/122-3 (West 2002)) provides: "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." *Id.*; see also *People v. Guerrero*, 2012 IL 112020, ¶ 17 ("[A] ruling on an initial postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in the initial petition.").

¶ 15 In *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002), our supreme court held that "the cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 so that a claim raised in a successive petition may be considered on its merits." *Id.* "Cause" is defined as " ' "some objective factor external to the defense [that] impeded counsel's efforts" to raise the claim' in an earlier proceeding." *Id.* at 460 (quoting *People v. Flores*, 153 Ill. 2d 264, 279 (1992), quoting *McCleskey v. Zant*, 499 U.S. 467, 493 (1991)).

¶ 16 Defendant believes he has established "cause" due to the fact that he prepared his initial petition without the aid of counsel despite expressly asking for counsel. However, we have recently held that a defendant's "mere failure to recognize his claim cannot be an objective factor external to the defense that prevents one from bringing the claim in defendant's initial postconviction petition." *People v. Jellis*, 2016 IL App (3d) 130779, ¶ 26. See also *People v. Jones*, 2013 IL App (1st) 113263, ¶ 25; see also *People v. Evans*, 2013 IL 113471, ¶ 13 (A defendant's "subjective ignorance of [the law] is not 'an objective factor that impeded' his ability to raise the *** claim sooner."). We also note that because the trial court summarily dismissed defendant's initial *pro se* petition at the first stage of postconviction proceedings, defendant had no right to appointed counsel to assist him with his initial petition under the Act. *People v. Blair*, 215 Ill. 2d 427, 449 (2005) ("The constitutional right to counsel does not apply to postconviction proceedings, and the Act only grants that right during the second stage."). Because the claims contained in defendant's successive postconviction petition could have been raised in his initial petition, said claims are barred under section 122-3 of the Act.

¶ 17 Even assuming that defendant was able to show cause for his failure to raise his claims earlier, his claims would still be barred due to his failure to establish prejudice. To show "prejudice," a petitioner must show that he was "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464. Here, defendant contends that he was prejudiced by the mere fact that the court never heard or considered his claims. Merely arguing that defendant's claims were never heard by the trial court does not show that the claimed errors "so infected the entire trial that the resulting conviction or sentence violates due process." *Id.*

¶ 18 II. Exemption from the Cause and Prejudice Test

¶ 19 Alternatively, defendant presents two arguments that he did not have to establish cause and prejudice with regard to two specific claims contained within his successive postconviction petition. First, defendant contends that, pursuant to the supreme court's holding in *Pitsonbarger*, he was not required to establish cause and prejudice for his claim that trial counsel was ineffective for withdrawing defendant's request for a fitness hearing. In *Pitsonbarger*, the trial court ordered an evidentiary hearing on a claim in the defendant's successive postconviction petition that defendant's trial counsel was ineffective for failing to request a fitness hearing and his appellate counsel was ineffective for failing to raise the issue. *Id.* The trial court in *Pitsonbarger* dismissed the remaining claims raised in the defendant's successive petition. *Id.* at 450. Defendant believes *Pitsonbarger* stands for the proposition that the trial court should have automatically ordered an evidentiary hearing on his fitness claim.

¶ 20 Defendant's interpretation of *Pitsonbarger* is misguided. The *Pitsonbarger* court did not exempt the defendant's fitness claim from the cause and prejudice test. Rather, the *Pitsonbarger* court applied the cause and prejudice test to the claim, concluding that the trial court properly dismissed the claim following the evidentiary hearing because "the prejudice prong of the cause-and-prejudice test was not shown." *Id.* at 475. Additionally, although the trial court in *Pitsonbarger* did order a fitness hearing, the supreme court's decision in *Pitsonbarger* did not hold that a defendant is always entitled to an evidentiary hearing on a claim that trial counsel was ineffective for failing to request a fitness hearing. *Id*. This was not at issue in *Pitsonbarger*. The issue on appeal in *Pitsonbarger* was whether the trial court erred in dismissing the defendant's claim that his trial counsel was ineffective for failing to request a fitness hearing following the evidentiary hearing on that issue. *Id.* at 454. As such, *Pitsonbarger* does not

provide support for defendant's argument that he is entitled to an evidentiary hearing absent a showing of cause and prejudice.

¶ 21 Defendant also argues that the cause and prejudice test does not apply to his claim that his trial counsel was ineffective for failing to offer a jury instruction for the lesser-included offense of second degree murder. Defendant's argument begins with the proposition that he was actually innocent of the offense of first degree murder. Defendant continues, however, that he does not need to establish the elements of a claim of actual innocence because he "does not contend that he is 'actually' innocent [of any crime], but instead innocent of a certain classification of crimes (first degree murder versus second degree murder)." Defendant's argument defies logic and finds no support in Illinois law.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Bureau County.

¶ 24 Affirmed.