

Nos. 1-13-2055, 1-13-3139 (consolidated)

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 05 CR 00352
)	
JERRELL MATTHEWS,)	
)	Honorable
Petitioner-Appellant.)	Neera Lall Walsh,
)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying petitioner's motion for leave to file a successive post-conviction petition, as petitioner did not demonstrate cause pursuant to section 122-1(f) of the Post-Conviction Hearing Act. 725 ILCS 5/122-1 (West 2014).

¶ 2 Petitioner-appellant Jerrell Matthews (petitioner) appeals from the order of the circuit court of Cook County denying his motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). For the following reasons, we affirm the circuit court.

¶ 3

BACKGROUND

¶ 4 Following a bench trial, petitioner was convicted of first degree murder in connection with the September 2004 shooting death of Dushawn Shelby (victim). Dushawn Bradley (codefendant) was also charged in connection with the shooting.

¶ 5 At trial,¹ the State called Derrell Wilson, who testified that he often sold cocaine at the intersection of 87th and Sangamon, and that petitioner and codefendant sold cocaine nearby. On the day of the shooting, Wilson was selling drugs while the victim was at a nearby store with another individual, Lorenzo Dixon. Wilson saw codefendant and another individual he knew as “Nine-O” carrying a bag; Wilson assumed they were carrying guns.

¶ 6 Wilson, the victim and Dixon later encountered codefendant and Nine-O. After codefendant pulled out a gun, Wilson fled with the victim running behind him. After Wilson and the victim entered an alley, petitioner pulled up in a car, pointed a gun at them, and fired several shots. When Wilson noticed the victim was no longer behind him, he returned to the alley and saw the victim on the ground.

¶ 7 On July 1, 2005, Wilson signed a letter (the recantation letter) in the presence of one of petitioner’s trial attorneys, Brian Dosch. The recantation letter stated that police had pressured Wilson to identify petitioner and codefendant as the shooters, “[s]o [Wilson] went along with the story and testified to the story in front of the grand jury.” The recantation letter stated that Wilson did not see the shooter’s face.

¹Our summary of the relevant facts from petitioner’s trial is drawn from this court’s decision on direct appeal, *People v. Matthews*, No. 1-07-2407 (unpublished order under Supreme Court Rule 23), as well as from the trial testimony submitted with petitioner’s motion for leave to file a successive post-conviction petition.

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¶ 8 At trial, Wilson testified that the statements in the recantation letter were untrue, and that he had, in fact, seen petitioner fire the gun. Wilson testified that he signed the recantation letter out of fear, after Nine-O visited his house a number of times. Wilson also testified that Nine-O offered him \$5,000.

¶ 9 Dosch cross-examined Wilson about the meeting at Dosch's office where Wilson signed the recantation letter. Dosch asked Wilson if he remembered arriving at the office with a woman named Mushon Ware²; Wilson responded "I didn't know her name." Wilson also claimed that "Nine-O drove me" to Dosch's office. Wilson also claimed not to remember when Dosch asked him to confirm that another witness, Susan Sanders, was also present at the meeting. Wilson admitted he signed the recantation letter in Dosch's office, but testified that he did not remember reviewing the specific statements in the letter before he signed.

¶ 10 Following the State's case in chief, petitioner's trial counsel called Bruce Thomas as a defense witness. Thomas testified that he was not present at the shooting and that he had never been referred to as "Nine-O." Thomas also denied knowing Wilson, although petitioner's trial counsel did not specifically ask him whether he had threatened Wilson or offered him money to sign the recantation letter.

¶ 11 In rebuttal, the parties stipulated that, if re-called, Detective Dan Stover would testify that in October 2004, Thomas acknowledged that he had formerly been known as "Nine-O."

¶ 12 In finding petitioner guilty, the trial court noted that it credited Wilson's courtroom testimony identifying petitioner as the shooter, despite the recantation letter.

²The trial court transcript refers to this individual as "Mushon Ware" but her name is spelled "Muchore Wear" in the affidavit supplied by Dosch.

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¶ 13 The petitioner's conviction and sentence were affirmed on direct appeal. *People v. Matthews*, No. 1-07-2407 (2009) (unpublished order under Supreme Court Rule 23).

¶ 14 In April 2010, petitioner filed his first post-conviction petition, which was summarily dismissed. This court affirmed. *People v. Matthews*, 2012 IL App (1st) 102191-U.

¶ 15 On April 23, 2012, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), asserting that Wilson gave perjured testimony. This court vacated the trial court's dismissal of that petition as premature. *People v. Matthews*, 2014 IL App (1st) 121913-U. The supreme court reversed, affirming the trial court's dismissal of the section 2-1401 petition. *People v. Matthews*, 2016 IL 118114.

¶ 16 On February 20, 2013, petitioner filed a motion for leave to file a successive post-conviction petition (the motion). Among other arguments, the motion asserted that petitioner's trial counsel was ineffective for failing to adequately question Thomas in order to undermine Wilson's testimony.³ The motion stated that "trial counsel never questioned Thomas about whether he threatened, tried to bribe or knew" Wilson. The motion additionally urged that "after hearing from Wilson and the trial was over, counsel could have sought an affidavit to submit with his motion for a new trial" and that counsel should have obtained supporting affidavits from Ware and Sanders, who witnessed Wilson's recantation.

¶ 17 The motion attached an affidavit from Thomas dated October 26, 2012, in which Thomas stated that he did not know Wilson and never had any interaction with him. The motion also attached an affidavit from Dosch, dated October 2, 2012. Dosch attested that Ware and Sanders were present on July 1, 2005 when he took Wilson's recantation statement and reduced it to

³Although petitioner's first post-conviction petition included claims that his trial counsel was ineffective, the first petition did not allege this particular deficiency.

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writing. Dosch further attested that “[a]t no time did Mr. Wilson appear apprehensive or nervous”; that Wilson “denied any threats or pressure to make any statement”; and that “[t]he person Mr. Wilson identifies as 9-0 or Bruce Thomas was never in my office.”

¶ 18 Petitioner’s motion argued that he could not obtain Dosch’s affidavit earlier, because he only “recently” received a response after having “written numerous letters for several years” to his trial attorneys. The motion also claimed that his incarceration and lack of funds to hire a private investigator had prevented him from locating Thomas sooner. Petitioner submitted his own supporting affidavit, in which he claimed that he had attempted to contact his trial counsel since the summer of 2007 and had tried to locate Thomas since 2008, but was only able to obtain Thomas’ affidavit after petitioner’s mother “recently” encountered Thomas.

¶ 19 On May 9, 2013, the trial court (which was not the same judge who presided over the bench trial) denied petitioner’s motion for leave to file a successive petition. With respect to the petitioner’s claim that trial counsel was ineffective, the trial court found that petitioner did not show either “cause” or “prejudice” to obtain leave under section 122-1(f) of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1(f) (West 2014).

¶ 20 Petitioner mailed a notice of appeal dated June 4, 2013, which was filed on June 11, 2013. The trial court found that the notice of appeal (no. 1-13-2055) was timely based on its mailing date. See Ill. S. Ct. R. 373 (eff. Nov. 1, 2016)). In addition, petitioner moved for leave to file a late notice of appeal (no. 1-13-3139), from the same order which was allowed on October 16, 2013. See Ill. S. Ct. R. 651 (eff. Feb. 6, 2013); Ill. S. Ct. R. 606(c) (eff. Dec. 11, 2014). The appeals were subsequently consolidated.

¶ 21

ANALYSIS

¶ 22 Although petitioner's motion in the trial court asserted numerous grounds for leave to file a successive petition, his appellate argument is limited to his claim that his trial counsel was ineffective "for failing to present evidence to undermine [Wilson's] claim that he recanted his identification of [petitioner] only due to threats and bribery." Petitioner argues that he should be permitted to assert this claim because he meets the cause and prejudice requirements of section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2014)).

¶ 23 "The Act permits the filing of only one [postconviction] petition without leave of court (725 ILCS 5/122-1(f) (West 2010)) and expressly provides that any claim not raised in the original or amended petition is waived [citations.] To initiate a successive postconviction petition, a defendant must first obtain leave of court, and unless a defendant asserts actual innocence, leave of court is demonstrated only when a defendant shows the 'more exacting' standard of cause for his failure to bring the claim in his initial postconviction petition and prejudice resulting from that failure. [Citations.]" *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 16.

¶ 24 Section 122-1(f) of the Act specifies that a petitioner 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." 725 ILCS 5/122-1(f) (West 2014). A petitioner 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.* Both cause and prejudice must be satisfied for the petitioner to obtain leave. *Sutherland*, 2013 IL App (1st) 113072, ¶ 16. We review *de novo* the denial of a motion for leave to file a successive post-conviction petition. See *id.* ¶ 17.

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¶ 25 We first address whether petitioner demonstrated “cause” with respect to his ineffective assistance claim, which is based on his assertions that (1) trial counsel failed to adequately question Thomas to impeach Wilson, and (2) that his trial counsel otherwise “fail[ed] to provide evidence about the circumstances of Wilson’s recantation in [Dosch’s] office.” Petitioner argues that he could not have raised these claims earlier without the Dosch and Thomas affidavits, because he needed “proof from someone who was there [when Wilson signed the recantation], such as Dosch, as well as proof from Thomas that he had had no contact with Wilson and that he did not bribe or threaten him to recant.” He asserts that his inability to obtain the affidavits was an “objective obstacle” constituting cause under section 122-1(f) of the Act.

¶ 26 The State responds that petitioner cannot demonstrate cause merely by citing his imprisonment or by asserting numerous undocumented prior attempts to contact Dosch. Alternatively, the State urges that petitioner cannot demonstrate cause because his ineffective assistance claim could have been raised earlier, even without the Dosch and Thomas affidavits.

¶ 27 We agree with the State’s second argument. The factual basis for the claimed deficiencies by trial counsel were evident from the trial proceedings, regardless of the affidavits. To the extent petitioner claims that Thomas should have been more thoroughly questioned in order to impeach Wilson’s testimony during the State’s case in chief, any purported deficiency in his counsel’s examination of Thomas would be self-evident from the trial proceedings. As observed by the trial court in denying petitioner’s motion, it was apparent that petitioner’s trial counsel “could have questioned Thomas further on Wilson’s accusation of threats and bribery if [counsel] had wanted to.” At any time thereafter, including direct appeal, petitioner could have raised the claim that his counsel was ineffective in examining Thomas.

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¶ 28 The same reasoning applies to petitioner’s argument that his trial counsel failed to elicit any additional evidence about the circumstances of Wilson’s recantation. Dosch’s cross-examination of Wilson made clear that Dosch was present when Wilson signed the recantation letter in his office. In turn, it was apparent that Dosch had personal knowledge of Wilson’s demeanor and statements during the meeting, and would know of any other witnesses to that meeting. In fact, Dosch’s cross-examination of Wilson specifically identified Wear and Sanders as witnesses to the meeting. Thus, to the extent petitioner suggests that Dosch should have elicited additional evidence to impeach Wilson, the basis for that claim was also apparent from the time of trial.

¶ 29 As the alleged deficiencies by petitioner’s trial counsel could have been raised on direct appeal, petitioner cannot demonstrate cause under section 122-1(f) of the Act. See *People v. Terry*, 2016 IL App (1st) 140555, ¶¶ 31- 33 (petitioner did not show cause where the “claim that he was physically coerced into confessing could have been raised on direct appeal” and petitioner “k[new] all of the facts necessary to raise this claim prior to the filing of his initial petition”). Although the Dosch and Thomas affidavits may corroborate petitioner’s contention that his trial counsel could have elicited further testimony to impeach Wilson, that is not equivalent to demonstrating cause for failing to raise the claim sooner. See *id.* ¶ 35 (noting that although a report regarding police misconduct “may *** serve to corroborate the general proposition that Chicago police officers used physical coercion *** this additional evidence does not explain why defendant could not have raised this specific claim in his first post[-]conviction proceeding. [Citation.]”).

¶ 30 We agree with the State and the trial court that the ineffective assistance claim asserted in petitioner’s motion could have been raised earlier, even without the Dosch and Thomas

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affidavits. In turn, we conclude petitioner has not identified an “objective factor” that constitutes cause under section 122-1(f) of the Act. 725 ILCS 5/122-1(f) (West 2014). Further, as both the cause and prejudice prongs of section 122-1(f) must be met to obtain leave to file a successive post-conviction petition, petitioner’s failure to demonstrate cause eliminates the need to address the parties’ arguments regarding the prejudice requirement. See *People v. Brown*, 225 Ill. 2d 188, 207 (2007) (holding “it is not necessary” for a court to consider the prejudice prong if it has already found that the cause prong is not met).

¶ 31 As petitioner did not establish cause as required by section 122-1(f) of the Act, the motion for leave to file a successive post-conviction petition was properly denied.

¶ 32 For the foregoing reasons, we affirm the circuit court of Cook County.

¶ 33 Affirmed.