

No. 1-15-2427

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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. 10 CR 21216
)	
CLIFTON JACKSON,)	The Honorable
)	Vincent Gaughan,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying petitioner's motion to file a successive postconviction petition because petitioner failed to establish sufficient cause and prejudice where fundamental fairness required making an exception to the waiver provision of section 122-3 of the Post-Conviction Hearing Act (725 ILCS 5/122-3) (West 2014)). Affirmed.

¶ 2 This appeal arises from the trial court's order denying petitioner Clifton Jackson leave to file a successive petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et*

seq. (West 2014)). On appeal, petitioner contends that the trial court erred in dismissing his successive petition because it demonstrates sufficient cause and prejudice to raise a claim for ineffective assistance of trial counsel, where at the time of the initial filing, petitioner was unable to obtain the affidavit of a witness that trial counsel failed to locate and call to testify during trial. We disagree and affirm.

¶ 3

I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On November 14, 2010, petitioner allegedly kidnapped his ex-girlfriend Lucia Perez and attempted to light the vehicle they occupied on fire. The State charged petitioner with two counts of aggravated kidnapping and one-count each of attempt aggravated arson, aggravated unlawful restraint and unlawful restraint.

¶ 5 At a bench trial, Perez testified that on the night of the incident petitioner arranged a meeting with Perez to exchange their belongings at 87th Street and Halsted Street. When petitioner approached Perez's dark green Crown Victoria, Perez opened the trunk and unlocked the vehicle. Petitioner was carrying a bag which Perez assumed contained her jacket. But instead of throwing the bag into the vehicle, petitioner got into the front passenger seat and immediately "whacked" Perez's right side of her face with his hand. Perez tried to grab her cell phone, but petitioner broke it in half. He then took a can of lighter fluid from his bag and began spraying the backseat. Perez tried to get out of the vehicle, but petitioner pulled her back in by her arm, ordering her to "drive bitch." As she drove down Halsted Street behind a white vehicle, petitioner "was trying to flick a [dark green] lighter." Perez kept putting her hand over the lighter to stop petitioner, who then got two towels out of his bag and sprayed them with lighter fluid. Perez pleaded with petitioner to stop, but he said, "[t]onight we're going to die bitch."

Shortly thereafter, Perez followed the white vehicle into the gas station, got out of her car, and banged on the white vehicle's driver-side window pleading for help. Petitioner came up from behind and pulled Perez by her hair back toward her vehicle. She eventually managed to get in her vehicle and lock the doors, but petitioner grabbed the windshield wiper cover from the vehicle's trunk and began hitting the driver side window until the police arrived. Perez had bruises on her face and arms from "tussling" with petitioner. On cross-examination, Perez admitted that she ended her relationship with petitioner because he was cheating on her with both Pamela Diggs and Shakyra Hunter. Perez contacted these women by telephone before the incident.

¶ 6 Chicago Police Department (CPD) Officer Helena Williams testified that she was working patrol when she got a disturbance call about an incident at the Citgo gas station. She observed a Crown Victoria parked alongside the pumps with a woman sitting in the driver's seat and a man, who she identified as petitioner, standing on the outside driver's side door pulling on the door and punching it. Petitioner also had a green lighter in his hand. As Officer Williams approached, petitioner fled northbound on foot. Officer Williams pursued petitioner and eventually found him hiding between a building and a parked vehicle with a screwdriver in his hand. Officer Williams then deployed her Taser and petitioner screamed it was "only a domestic." Thereafter, Officer Williams searched the Crown Victoria and observed "a strong odor of lighter fluid," a Kingsford lighter fluid can, towels, a broken cell phone, and "some sort of clear liquid doused all over the back of the vehicle."

¶ 7 The testimony of several law enforcement officials revealed the following. CPD Officer Robert Brown testified that he performed a custodial search of petitioner and found two "cigarette" green lighters in his right pants pocket. CPD Detective Graves testified by stipulation

that the inventory found in the vehicle, included a brown bag, a can of lighter fluid, and a metal can with a towel and cloth. Further, he did not observe any fire or physical damage to the vehicle or smell an accelerant. In addition, Illinois State Police (ISP) forensic scientist Julie Wessel lifted three latent fingerprints from the Kingsford lighter fluid can which matched petitioner's fingerprints. ISP forensic scientist Adrienne Bickel also examined a washcloth and hand towel, concluding that the cloths contained a medium petroleum distillate which was a flammable liquid.

¶ 8 In petitioner's case in chief, Hunter testified that Perez called her on the telephone last November approximately two or three times. Perez was "yelling about [petitioner] and me talking to him and, like, just stuff like that." Perez got Hunter's telephone number from petitioner's cell phone. On cross-examination, Hunter testified that she did not feel threatened by Perez or call the police and continued to "kinda sorta" date petitioner.

¶ 9 Subsequently, the trial court found petitioner guilty on all four counts. At the post-trial hearing, petitioner requested that his trial counsel be dismissed for ineffective assistance because she failed to call Diggs as a witness and present petitioner's telephone records. Defense counsel stated that she did in fact subpoena telephone records for the two numbers petitioner provided, but the first number was not subscribed to petitioner and the second number was for a church rectory. In addition, although petitioner told defense counsel that Diggs was incarcerated in Indiana, counsel could not locate Diggs at any county jail or at her last known address. Thus, the trial court denied petitioner's motion, as well as his amended motion for a new trial.

¶ 10 At sentencing, the trial court considered not only petitioner's past convictions for attempted murder and robbery, but his remorseful statement. The trial court then sentenced petitioner to 18 years imprisonment with three years mandatory supervised release. The court

also entered an order of protection barring petitioner from contacting Perez and her family. Petitioner then filed a direct appeal. Thereafter, the State Appellate Defender filed a motion to withdraw as counsel under *Anders v. California*, 386 U.S. 738 (1967). Defendant failed to respond and we affirmed the trial court's judgment granting the withdrawal. *People v. Jackson*, 2012 IL App (1st) 113014-U.

¶ 11 Consequently, on February 7, 2013, petitioner filed a *pro se* petition for postconviction relief alleging, in pertinent part, that trial counsel was ineffective for (1) failing to adequately advise petitioner about his right to testify at trial; (2) stipulating to the testimony of Detective Graves; and (3) failing to properly investigate, prepare a defense and prepare for trial. Specifically, petitioner argued that trial counsel made no efforts to locate petitioner's telephone records or secure Diggs as a trial witness. The trial court summarily dismissed the petition, noting that petitioner "failed to submit an affidavit from Pamela Diggs or attach a copy of relevant phone records." In addition, petitioner "failed to explain the significance of Diggs' testimony, or the relevance of the phone records."

¶ 12 On January 30, 2015, petitioner filed a motion for leave to file a successive petition for postconviction relief, including a successive petition, affidavits of Diggs, petitioner's sister Ebony Fairley, and petitioner himself. Petitioner contended that his trial counsel was ineffective for failing to call Diggs to testify at trial because her testimony would have discredited Perez's credibility and bolstered Hunter's testimony. In her affidavit, Diggs attested that she was incarcerated in the Indiana Department of Corrections at the time of petitioner's trial. She received several text messages from Perez threatening to physically harm Diggs and have petitioner "locked up" if they did not discontinue their relationship. Further, Fairly attested that

on September 14, 2014¹, she went on the internet and was able to locate a record of Diggs in the Indiana Department of Corrections. The trial court then denied petitioner's request to file a successive petition. Thereafter, we granted petitioner's request to file a late notice of appeal.

¶ 13

II. ANALYSIS

¶ 14 On appeal, the Act allows review of a petitioner's claim where there was a "substantial denial of his * * * rights" under either, or both, the Illinois Constitution or United States Constitution in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a)(1) (West 2014). Postconviction petitions are subject to the doctrine of *res judicata*, so that all issues actually decided on direct appeal or in the original postconviction petition are barred from being re-litigated in subsequent petitions. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). At the first stage, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2014); *People v. Sawczenko*, 328 Ill. App. 3d 888, 892 (2002). The petition may only be dismissed as frivolous or patently without merit if the petition has no arguable basis either in law or fact, meaning that it is based on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009).

¶ 15 The Act generally limits a petitioner from filing one postconviction petition and provides that "any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2014). Consequently, a defendant faces immense procedural default hurdles when bringing a successive postconviction petition. *People v. Jones*, 191 Ill. 2d 194, 198 (2000). These hurdles, however, are lowered in very limited circumstances "where fundamental fairness so requires." *People v. Flores*, 153 Ill. 2d 264, 274

¹ We note that the offender data search attached to petitioner's successive petition in the record on appeal was conducted on July 28, 2014.

(1992). The cause-and-prejudice test is the analytical tool used to determine whether fundamental fairness requires a court to make an exception to the waiver provision of section 122-3 of the Act and to consider a claim raised in a successive postconviction petition on its merits. 725 ILCS 5/122-3 (West 2014); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Under this test, claims "are barred unless the [petitioner] can establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error." *People v. Tenner*, 206 Ill. 2d 381, 393 (2002). To establish "cause," the petitioner must show that "some objective factor external to the defense impeded his ability to raise the claim in the initial post-conviction proceeding." *Id.* Further, to establish "prejudice," the petitioner must demonstrate that "the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Id.* Our review of the trial court's dismissal of leave to file a successive postconviction petition is *de novo*. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009).

¶ 16 We initially observe that petitioner's claim is barred by both *res judicata* and the doctrine of waiver as petitioner already raised his ineffective assistance of trial counsel claim in his initial *pro se* postconviction petition. See *Pitsonbarger*, 205 Ill. 2d at 455-56 (*res judicata* and the doctrine of waiver limit postconviction relief to constitutional claims that have not been and could not have been raised earlier). Thus, we must consider whether petitioner has sufficient cause and prejudice to overcome this hurdle. Petitioner argues that he has demonstrated cause because he was unable to obtain the affidavit of Diggs when he filed his initial *pro se* postconviction petition. We disagree. It is clear from the record that during post-trial proceedings petitioner strenuously moved to disqualify his trial counsel for not calling Diggs as a trial witness. Thus, if petitioner considered Diggs to be vital to his case, it is unclear why

petitioner did not locate Diggs to produce her affidavit at the time of his initial filing. Further, petitioner fails to identify any objective factor that impeded his ability to obtain a prior affidavit from Diggs. See *People v. Coleman*, 2013 IL 113307, ¶ 82 ("[t]o establish 'cause,' the [petitioner] must show some objective factor external to the defense impeded his ability to raise the claim in the initial postconviction proceeding"). In addition, Fairly's affidavit, with the attached July 2014 offender data search locating Diggs in the Indiana Department of Corrections, is hardly new evidence dispositive of what electronic information was available to trial counsel during petitioner's December 2010 trial. And although petitioner argues that the claim at issue is being raised for the first time in his successive petition, this is unsupported by the record. In petitioner's initial *pro se* petition he argued that he was "deprived of a potential defense" by trial counsel's failure to locate and call Diggs as a witness. Thus, all Diggs' affidavit does is flush this same claim out by providing further detail, but it is not a wholly separate claim as petitioner suggests. See *People v. English*, 403 Ill. App. 3d 121, 131 (2010) (where the reviewing court determined that *res judicata* prevented the petitioner from establishing "cause" for a successive postconviction petition when his ineffective assistance of counsel claim was the same as the claim in his initial petition despite his successive petition including new affidavits supporting the claim).

¶ 17 Nonetheless, even assuming petitioner could establish cause, the record demonstrates that petitioner can show no prejudice. See *People v. Smith*, 341 Ill. App. 3d 530, 536 (2003) (to show "prejudice" a petitioner must demonstrate that the error so infected the entire trial that the resulting conviction violated due process). Diggs' proposed testimony would only demonstrate an alleged conflict because of Diggs' romantic relationship with petitioner, which was already established in the trial record. The suggested testimony has no relevance to petitioner's charges

of aggravated kidnapping and attempt aggravated arson. Further, contrary to petitioner's assertion, Diggs' testimony would not have bolstered Hunter's as Hunter testified that she did not feel physically threatened by Perez. Moreover, the evidence against petitioner was substantial and the trial court found Perez's version of events credible. Perez's testimony was corroborated by Officer Williams who arrived on the scene and observed petitioner punching Perez's driver side door. Officer Brown also found two green cigarette lighters on petitioner's person. Additionally, the physical evidence found in Perez's vehicle included a can of Kingsford lighter fluid with petitioner's fingerprints, as well as a washcloth and hand towel with a flammable clear liquid. See *People v. Baugh*, 358 Ill. App. 3d 718, 736 (2005) (it is the function of the trier of fact to determine the inferences to be drawn from the evidence, assess the credibility of the witnesses, decide the weight to be given their testimony, and resolve any evidentiary conflicts). Accordingly, petitioner fails to show cause and prejudice that would allow us to make an exception to the waiver provision under the Act and consider the claim at issue raised in petitioner's successive petition. See *People v. Jones*, 191 Ill. 2d 194, 199 (2000) ("claims in a successive post-conviction petition are barred unless the [petitioner] can establish good cause for failing to raise his claims in prior proceedings and actual prejudice resulting from the claimed errors").

¶ 18

CONCLUSION

¶ 19 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.