2017 IL App (2d) 151270-U
No. 2-15-1270
Order filed May 17, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARK A. BYRD, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 96-CF-1597 Honorable Rosemary Collins, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion for leave to file a successive postconviction petition: defendant could not show prejudice, as the claim that he sought to raise was a variant of the same claim that he raised in his original petition and would fail for the same reasons.

¶ 2 Defendant, Mark A. Byrd, appeals *pro se* from a judgment denying him leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). We affirm.

¶ 3 Defendant was charged with first-degree murder (720 ILCS 5/9-1(a)(2) (West 1996)) for shooting Norris Nellum as Nellum rode in a car driven by Trisha Hansel and occupied by

Michael Wilkes and Kelli Harrington. At defendant's jury trial, the evidence established that, three days earlier, Nellum had beaten defendant's girlfriend, Rolanda Collins. There was evidence that, in the intervening days, defendant had said that he was looking for Nellum. Defendant put on evidence that Nellum had been looking to kill or harm him. He testified that, when the car drove by, Nellum rolled down his window and appeared to reach for something, so defendant shot him. The jury convicted defendant, and he was sentenced to life in prison.

¶ 4 On direct appeal, defendant argued that (1) his trial counsel had been ineffective in various respects; (2) the trial court had erred in limiting his cross-examination; and (3) Wilkes had committed perjury with the State's knowledge. We affirmed. *People v. Byrd*, No. 2-99-0649 (2000) (unpublished order under Supreme Court Rule 23). A more complete statement of facts can be found in that order and in orders entered in his appeals in proceedings under the Act; we shall note other facts as needed to explain our decision.

¶ 5 On April 30, 2001, defendant filed a petition under the Act. It claimed that (1) the trial court unfairly restricted his pretrial investigation of several possible witnesses; (2) his posttrial counsel was ineffective; and (3) the court erred in denying his motion for new posttrial counsel. The trial court dismissed the petition summarily. We reversed and remanded. *People v. Byrd*, No. 2-01-1240 (2003) (unpublished order under Supreme Court Rule 23). On remand, defendant filed a second amended petition that claimed that a State witness, Tina Balas, had committed perjury, with the State's knowledge, by testifying that she had not received any benefit in return for her testimony. On the State's motion, the trial court dismissed the petition.

¶ 6 We affirmed, holding that the petition had not made a substantial showing of prejudice. We observed that Balas had testified that, immediately after the shooting, defendant told her, in effect, that he had shot Nellum out of revenge for the attack on Collins. *People v. Byrd*, No. 2-

05-0968 (2006) (unpublished order under Supreme Court Rule 23), slip op. at 2. We observed that Balas's testimony did tend to prove that he shot Nellum out of revenge and not self-defense. We noted, however, that defendant had chosen to have the court instruct the jury on involuntary manslaughter but not on second-degree murder or self-defense. As he had proceeded on the theory that he had shot Nellum recklessly, not intentionally, Balas's testimony could not reasonably have affected the jury's verdict. We noted that the evidence "overwhelmingly establishe[d]" that defendant had acted knowingly or intentionally, not recklessly. *Id.* at 10.

¶ 7 On September 4, 2008, defendant moved for leave to file a successive postconviction petition. Then, as now, section 122-1(f) of the Act governed applications for leave to file successive petitions. It read (and reads now) as follows:

> "Only one petition may be filed by a petitioner under [the Act] without leave of the court. Leave of 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 2008).

¶ 8 The claim that defendant sought to raise was that the trial court had erred by denying his request to instruct the jury on self-defense. Defendant did not allege any cause for his failure to raise this claim in his first petition, but he contended that it fit within the actual-innocence exception to the cause-and-prejudice requirement (see *People v. Ortiz*, 235 Ill. 2d 319, 330

(2009)). The trial court denied the motion. We affirmed. *People v. Byrd*, No. 2-09-0276 (2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On July 29, 2015, defendant again moved for leave to file a successive petition. He claimed that the State had knowingly used Jamie Hernandez's perjured testimony that she had received no benefit in return for testifying against defendant.

¶ 10 The proposed petition attached a partial transcript of Hernandez's testimony. She testified as follows.[1] On the day before the shooting, she, her boyfriend, and defendant had a conversation in which defendant said that Nellum was afraid of him but would have to face him sooner or later. Defendant said that, the previous evening, he and his brother had trapped Nellum in a parking lot but decided not to act, because too many people were around. On the day of the shooting, Hernandez called the police. An officer picked her up and drove her to the station, where she gave a statement. At that time, she had an outstanding warrant for her arrest but did not know about it; had she known, she would not have called the police. Hernandez acknowledged that she was on probation for a conviction of forgery and that a petition to revoke her probation was pending. She added, however, that nobody had made her any promises in order to get her to testify; that she was expecting no benefit in exchange for testifying; and that she had never asked for any benefit in return for testifying.

¶ 11 Defendant's proposed successive petition alleged that Hernandez's testimony as to whether she had received any benefit in exchange for her testimony was false and that the State elicited it knowing that it was perjury. The proposed petition alleged specifically that, the day after Hernandez testified against defendant, an assistant State's Attorney appeared at the hearing

[1]We draw our summary of Hernandez's testimony from the original trial transcript.

on the petition to revoke her probation, informed the judge that Hernandez had cooperated against defendant, and requested that the revocation petition be dismissed.

¶ 12 The proposed petition alleged further that Hernandez had committed perjury by testifying that her outstanding warrant had related to her "felony forgery conviction." In May 2015, defendant received documents establishing that the warrant had been issued for her failure to appear in case No. 96-CM-1227, "for soliction [*sic*]." Finally, the proposed successive petition alleged, Hernandez had committed perjury by testifying that she learned of the warrant only after she had given her statement: a supplemental police report that defendant had obtained on June 22, 2015, revealed that, before she gave the statement, police discovered the warrant, arrested her, and took her to the station.

¶ 13 The proposed petition alleged that the State's knowing use of Hernandez's perjured testimony had denied him a fair trial; had the jury known either that Hernandez had been arrested earlier for soliciting as a prostitute or that she had given her statement only after having been arrested on the warrant, it would have found her less credible. According to the proposed petition, Hernandez had been the only witness to testify to defendant's statement that, the evening before the shooting, he trapped Nellum in the parking lot and considered shooting him.

¶ 14 Defendant's motion addressed the cause prong of the cause-and-prejudice test as follows, supplying documentation. The prosecution did not disclose to him or his counsel that Hernandez had a prior conviction of solicitation and a pending charge of driving on an expired license (case No. 97-TR-41239). This information was unavailable to defendant during any prior proceedings through the first motion for leave to file a successive postconviction petition. On December 28, 2010, he wrote the Winnebago County court clerk, requesting a docket sheet in Hernandez's case; on February 10, 2011, the clerk's office wrote back that he had not provided sufficient

information for the office to track down the case. On March 16, 2011, he again wrote the clerk, but he never heard back. Defendant later obtained a "party summary report" that noted numerous cases involving Hernandez, including: (1) case No. 95-CF-773, a 1995 conviction of forgery, a Class 3 felony; (2) case No. 96-CM-1227, in which she had been charged with "Pedest Solicit Rides/Business," a Class A misdemeanor, and there had been a judgment on a forfeiture and a fine of $540; and (3) case No. 97-TR-41239, with a disposition date of August 20, 1997 (the day after she testified against defendant). The report listed the charge as "DL Expired 6 months or less" and stated that there had been an *ex parte* finding of guilty and fines and fees of $122.

¶ 15 Defendant's motion alleged further as to cause. Sometime in 2011, at defendant's request, Ora Wilson of Chicago (not further identified) wrote to the court clerk, requesting the transcript of the August 20, 1997, hearing in Hernandez's traffic case. Eventually, the clerk could send only an "ROA listing" stating that, in case No. 97-TR-41239, there had been a hearing; a finding of guilty; and fines and costs of $97.

¶ 16 Defendant alleged that he made several more attempts to obtain the transcript of the August 20, 1997, hearing. In 2015, he wrote the Office of the Public Defender but was told that there had been no court reporter, so that no transcript existed. On April 30, 2015, he wrote the State's Attorney's office, inquiring when Hernandez's probation began in the forgery case, No. 95-CF-773; when any probation-revocation petitions had been filed; and the dispositions of any such petitions. In May 2015, the State's Attorney's office wrote back that it had found no materials related to the case. In April 2015 and then May 2015, defendant wrote the Rockford police department for information relating to Hernandez's traffic case. He received a police report stating that, on January 4, 2001, Hernandez was arrested for "failure to appear from a

traffic charge bond $130.00 [*sic*]" and taken into custody. A report by Officer J. Gradick, dated June 24, 1996, stated that Gradick had located Hernandez; that she told him that she had information about the shooting of Nellum; that when Gradick told her that she would have to come down to the station, she was reluctant at first; and that he then found that she was wanted on a bench warrant. She was arrested, taken to the station, and turned over to detectives.

¶ 17 The trial court denied defendant's section 122-1(f) motion. Its order stated that "the issues were raised before, and *** the evidence discussed in the motion [was] not new." Defendant timely appealed.

¶ 18 On appeal, defendant contends that he satisfied section 122-1(f)'s cause-and-prejudice test, because he showed both (1) that he could not have obtained the information on Hernandez when he filed his petition under the Act; and (2) that the State's knowing use of her perjured testimony denied him due process. The State responds that, whatever the merits of defendant's arguments on cause, he failed the prejudice prong.

¶ 19 The parties note that the trial court was mistaken in stating that defendant had already raised the claim that he sought to raise here. Defendant's prior pleadings under the Act did not claim that *Hernandez* had committed perjury. However, as we review the trial court's judgment and not its reasoning (*People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003)), the court's mistake does not affect our resolution of whether, under applicable principles, defendant should have been allowed to file his proposed successive petition.

¶ 20 We review *de novo* the trial court's denial of leave to file a successive petition under the Act. *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 32. Leave should be denied when it is clear, from a review of the proposed petition and the supporting documentation, that the claims

raised fail as a matter of law or that the successive petition with supporting documentation is insufficient to justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 21 We need not consider whether defendant satisfied the cause prong of section 122-1(f), because we agree with the State that he did not satisfy the prejudice prong. To do so, he had to allege facts demonstrating that the error not raised in the original postconviction proceeding "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2014). The facts alleged here did not meet this standard.

¶ 22 We agree with the State that the issue in this appeal is similar to the one that defendant raised in his appeal from the dismissal of his original petition—and that we may dispose of it on similar grounds. There, Balas's testimony was relevant primarily to proving that defendant had shot Nellum out of revenge. Here, Hernandez's testimony was relevant primarily to proving that defendant had shot Nellum out of revenge. There, defendant argued that he had made a substantial showing of prejudice from the State's use of Balas's allegedly perjurious testimony that she had received no benefit for testifying for the State. Here, defendant argues that he alleged facts to show that he had been prejudiced by the State's use of Hernandez's allegedly perjurious testimony that she had received no benefit for testifying for the State. There, we explained that Balas's testimony, while relevant to a claim of self-defense that defendant did not raise, could not reasonably have affected the jury's verdict, as the evidence had overwhelmingly refuted defendant's defense that he shot Nellum recklessly and not intentionally. Here, we conclude that Hernandez's testimony, while also relevant to the nonissue of self-defense, could not have affected the jury's verdict, for the same reasons.

¶ 23 Defendant is essentially making the same argument that failed on his earlier appeal. The only differences are that (1) he has chosen a different witness; and (2) he is appealing from the

denial of leave to file a successive petition, not from the dismissal of his original petition. Neither difference is meaningful. Defendant failed to satisfy the prejudice prong of section 122-1(f). The trial court properly denied him leave to file a successive petition.

¶ 24 The judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 25 Affirmed.