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2017 IL App (3d) 150349-U

Order filed August 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0349
v.	)	Circuit No. 04-CF-236
	)	
RAYMOND D. TIMOTHY,	)	
	)	Honorable David A. Brown,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant leave to file a successive postconviction petition where defendant failed to satisfy the cause-and-prejudice test.

¶ 2 This is an appeal from the denial of defendant's October 2009 petition for leave to file a successive postconviction petition. Defendant argues that his motion for leave to file a successive postconviction petition was implicitly granted by the trial court in November 2009, and, therefore, the trial court's March 2015 order denying leave was error. We affirm.

¶ 3 FACTS

¶ 4 I. Defendant's Trial and Sentencing

¶ 5 In March 2004, defendant was charged by indictment with two counts of first degree murder stemming from a February 2004 shooting. At trial, defendant asserted that he acted in self-defense.

¶ 6 The evidence showed that on the morning of February 28, 2004, defendant and Delandus Gore played a dice game near the Home Run Mart on Starr Street in Peoria. After playing for approximately 2½ hours, a physical altercation between the two broke out. Eventually, defendant's cousin, Jimmy Timothy, separated defendant and Gore, and the two left the area, walking in opposite directions.

¶ 7 One witness, Kendrick Norris, testified that upon parting ways, he heard defendant say, "I'll be back, I'll be back." Another witness, Richard Anderson, stated he heard defendant say, "I'll be back and I've got a gun." Defendant's cousin, Jimmy, testified he heard Gore say, "Shit ain't over. I'm coming back."

¶ 8 Later that morning, both defendant and Gore returned to the area where the fight occurred. By this time, defendant had possession of a handgun, which he had retrieved from his residence. According to defendant, as he was walking back toward the Home Run Mart, he saw Gore "jump out of the car with money in his hand and the gun." Gore started walking toward him, raised his gun, and pointed it at defendant. Defendant thought Gore was going to shoot him so "I reached in my pocket and just started pulling the trigger. I did not point necessarily at him, just pulling the trigger. I didn't even try to aim." Approximately seven shots were fired, one of which struck Gore in the head. Gore died two days later.

¶ 9 Defendant's cousin, Jimmy, testified that he arrived at the scene of the shooting after the shots were fired. He saw Gore lying on the pavement with a gun in the palm of his hand. He then saw a man named Eric, known by the street name "Big Hat," pick up the gun and "take off with it." On cross-examination, Jimmy stated the gun was actually on the ground "[n]ot that far" from Gore. None of the State's witnesses, who were present at the scene of the shooting, recalled seeing Gore with a gun. They also denied seeing anyone other than defendant run from the scene of the shooting.

¶ 10 Following closing arguments, pattern jury instructions for first degree murder, second degree murder, and self-defense were given. Thereafter, the jury found defendant guilty of both counts of first degree murder.

¶ 11 In June 2005, defendant filed a motion for judgment, notwithstanding the verdict, or alternatively, for a new trial. In his motion, defendant alleged, in part, that his public defender (who filed the motion on behalf of defendant) provided ineffective assistance of counsel. Thereafter, the case was reassigned to a different public defender and the matter was continued several times while witnesses were "being located."

¶ 12 At the November 2005 hearing on defendant's motion, defense counsel testified that he did not call Eric Ellis—the man who Jimmy Timothy testified picked up Gore's gun and ran away—to testify because he was unsure what Ellis's testimony would be given since he had told two different versions of the shooting.

¶ 13 Ellis also testified at the hearing. He denied taking a gun from Gore's person, but witnessed someone whom he could not identify run up to Gore, who was lying on the pavement, "grab something" and run away. George Riley also testified. Riley knew defendant, Gore, and Ellis. According to Riley, following defendant's conviction, Ellis told him, "man, I don't care

everybody mad at me but [Gore] was my boy. So I'm the one that grabbed the gun and ran with it." Thereafter, the trial court denied defendant's motion, finding the decision not to call Ellis as a witness was a matter of trial strategy, not ineffective assistance of counsel.

¶ 14 Immediately thereafter, defendant's sentencing hearing commenced and the trial court sentenced defendant to 48 years' imprisonment. Defendant then filed a motion to reconsider the sentence, which the court denied.

¶ 15 II. Direct Appeal

¶ 16 On direct appeal, the Office of the State Appellate Defender (OSAD) filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). This court agreed with OSAD that there were no arguable errors to be considered on appeal. Specifically, we found (1) no issue with the charging instruments, (2) the trial court had jurisdiction and venue was proper, (3) the evidence was sufficient to prove defendant guilty beyond a reasonable doubt, (4) no reversible error was committed during the trial proceedings, (5) defendant was not deprived of the effective assistance of counsel, and (6) the trial court did not abuse its discretion in sentencing defendant. We affirmed the trial court's judgment and allowed OSAD to withdraw as counsel. See *People v. Timothy*, No. 3-05-0830 (2006) (unpublished order under Supreme Court Rule 23).

¶ 17 III. Initial Postconviction Proceedings

¶ 18 In March 2009, defendant's private counsel filed a postconviction petition, asserting that defendant was "denied the opportunity to present evidence which clearly supported his affirmative assertion of self-defense." Specifically, defendant maintained that despite due diligence, his trial counsel was unable to locate two witnesses, Jeffrey Lawson and Eric Ellis, at

the time of his trial to testify in support of his self-defense claim. According to defendant, the State knew the whereabouts of these witnesses but did not disclose them prior to trial.

¶ 19 On April 22, 2009, the trial court dismissed defendant's postconviction petition, finding that (1) defendant testified as to self-defense at trial, (2) trial counsel chose not to call Ellis to testify at trial because counsel was unsure what the substance of Ellis's testimony would be, (3) Ellis testified at the posttrial motion hearing that "he saw someone run up to [Gore] and take something," and (4) the record contained nothing to indicate the existence of a witness named "Lawson," nor were there any supporting affidavits as to what his testimony would have been. Further, the court noted not only were these issues that could have been raised on direct appeal, and thus waived or barred by *res judicata*, but also that they lacked the "minimal specificity and substantive constitutional allegations necessary to survive [the first] stage of the proceedings."

¶ 20 In May 2009, defendant filed a motion to reconsider the trial court's dismissal of his postconviction petition. In his motion to reconsider, defendant referred to a "subsequently filed" amended petition for postconviction relief. The record contains a proof of service that was filed on April 23, 2009, for an amended petition for postconviction relief. According to the record, the amended petition was served upon the assistant State's Attorney on April 20, 2009. This amended petition for postconviction relief is not contained in the record before us. Further, the record contains no indication that defendant's motion to reconsider was ever ruled upon.

¶ 21 IV. Successive Postconviction Proceedings

¶ 22 On October 19, 2009, defendant filed several motions, including a motion for leave to file a successive postconviction petition, a successive petition for postconviction relief, and a motion for appointment of counsel. His motion for leave alleged that he was "poorly represented" by "incompetent" postconviction counsel who "purposely fil[ed] a frivolous postconviction petition

containing no merit *** and failed to obtain the affidavits that were needed to support the petition and failed to represent [defendant] as law and justice requires." Defendant's successive postconviction petition alleged (1) ineffective assistance of trial counsel for failing to (a) present witnesses who would support his self-defense claim and (b) impeach the State's witnesses, (2) the trial court improperly admitted the testimony of a detective regarding statements defendant made, (3) ineffective assistance of appellate counsel for failing to adequately raise the aforementioned issues, and (4) unreasonable assistance of postconviction counsel for filing a frivolous postconviction petition.

¶ 23 In November 2009, Judge James Shadid entered an order acknowledging the motions filed by defendant and, in particular, noting defendant's successive postconviction petition alleged ineffective assistance of trial and postconviction counsel. The trial court then appointed counsel for defendant, ordered a copy of the petition to be sent to the defendant's appointed counsel and the assistant State's Attorney, and set the matter for review "for the purpose of scheduling filings of motions/responses."

¶ 24 Over the next 5 years, there were approximately 30 continuances, presided over by several different judges, and handled by a number of different assistant State's Attorneys and two different public defenders. Throughout this period, all parties treated the matter as being in the second stage of postconviction proceedings.

¶ 25 In September 2014, public defender Sam Snyder filed his 651(c) certificate and a motion to withdraw, asserting defendant's contentions were "patently without merit." At the November 2014 hearing on Snyder's motion to withdraw, Snyder opined that none of defendant's claims "had any merit at all." Defendant responded that he had informed Snyder of a witness, Jeffrey Lawson, who was "willing to give an affidavit to support [defendant's] petition" that he acted in

self-defense, but that Snyder "didn't want to go forth in doing it." Snyder responded that he had no recollection of such a conversation. The court then took the matter under advisement.

¶ 26 On December 5, 2014, Judge David Brown issued an order. In its order, the court referred to the procedural history of the case and then noted:

> "[I]t appears throughout the five (5) or so years this matter has been pending, the parties and the various presiding judges, including the undersigned, failed to recognize that the court never ruled on Defendant's Motion to File Successive Petition. After reviewing the entire file when considering defense counsel's Motion to Withdraw, it became clear to the court that Judge Shadid's order back in November of 2009 did not constitute an approval of or granting of the Motion for Leave to File Successive Petition."

Accordingly, the court reserved ruling on the motion to withdraw and, instead, set a briefing schedule for the parties to file any response to the motion for leave to file a successive postconviction petition.

¶ 27 On December 31, 2014, the State filed its response to the motion for leave to file, asserting that defendant failed to show the requisite cause-and-prejudice necessary to allow a successive postconviction petition.

¶ 28 At a January 23, 2015, hearing, public defender Snyder stated he did not intend to file anything in support of defendant's motion for leave to file a successive postconviction petition because he believed doing so would "violate ethical cannons."

¶ 29 On March 23, 2015, the trial court entered an order denying defendant's October 2009 motion for leave to file a successive postconviction petition. The court found that defendant "failed to make a sufficient showing of cause and prejudice to warrant a successive petition." Specifically, the court noted that "[d]efendant's only reference to anything that might be considered cause is an allegation that his private post-conviction counsel was incompetent." It then found "[t]hat allegation fails to make a showing of an objective factor external to the defense, which impeded his ability to raise the claims in the initial post-conviction proceedings [where] private counsel was part of the defense in this case, and therefore not external thereto." Further, the court found defendant failed to show prejudice as his claims were either untimely, barred by waiver and/or *res judicata*, or lacked merit.

¶ 30 This appeal followed.

¶ 31 ANALYSIS

¶ 32 On appeal, defendant argues that his motion for leave to file a successive postconviction petition was implicitly granted by the trial court in November 2009 and, therefore, the March 2015 order denying leave for failure to satisfy the cause-and-prejudice test was error.

¶ 33 "Under section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2006)), a defendant must obtain leave of the trial court before he may obtain review of a second or subsequent postconviction petition on its merits." *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010). "To obtain leave to file a successive petition, as a threshold requirement, the defendant must satisfy the cause-and-prejudice test." *Id.* Under the cause-and-prejudice test, a defendant must demonstrate (1) cause by identifying an objective factor that impeded his ability to raise the claim in his initial postconviction proceedings and (2) actual prejudice by showing

the alleged error infected the trial in such a way that the resulting conviction or sentence violated due process. *People v. Wrice*, 2012 IL 111860, ¶ 48.

¶ 34 In this case, the trial court did not expressly grant defendant's motion for leave to file a successive postconviction petition. Nonetheless, defendant cites *People v. Harper*, 2013 IL App (1st) 102181, in support of his contention that the court implicitly granted him leave. In that case, the appellate court concluded that the trial court's "act of docketing the postconviction matter, appointing counsel, and acknowledging that the defendant was entitled to be heard supports the conclusion that the circuit court [implicitly] granted the defendant's motion for leave to file his *pro se* successive postconviction petition." *Id.* ¶ 37; see also *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010) (a court may grant leave *sua sponte*, without a formal motion seeking leave, after finding the defendant satisfied the cause-and-prejudice test). Similarly, in this case, defendant asserts the trial court's acts of acknowledging the petition, appointing counsel, and docketing the case supports a finding that the court implicitly granted him leave.

¶ 35 However, even assuming, *arguendo*, that the trial court here implicitly granted defendant leave to file a successive postconviction petition in November 2009, such an interlocutory order would not prevent the court from later reconsidering its order. "So long as the case was pending before it, the trial court had jurisdiction to reconsider any order which had previously been entered." *People v. Mink*, 141 Ill. 2d 163, 171 (1990). This is true even if the original order was entered by another trial judge. *Balciunas v. Duff*, 94 Ill. 2d 176,185 (1983). Accordingly, even if we were to find that Judge Shadid implicitly granted defendant leave to file a successive postconviction petition, Judge Brown committed no error by subsequently reconsidering the issue of whether defendant's petition for leave satisfied the cause-and-prejudice test.

¶ 36 In closing, we note that while defendant does not take issue with the trial court's ultimate determination that he failed to satisfy the cause-and-prejudice test, based on our review of the record in this case, we agree with the trial court's decision to deny defendant leave to file a successive postconviction petition.

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the trial court's December 2014 order finding leave was never granted and its March 2015 order denying defendant leave to file his successive postconviction petition.

¶ 39 Affirmed.