2018 IL App (2d) 160382-U
No. 2-16-0382
Order filed June 5, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 08-CF-1221 |
| CHRISTOPHER A. CARTER, | ) | Honorable George J. Bakalis, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Hudson and Justice Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held*: The judgment of the trial court was affirmed where defendant's claim in his motion seeking leave to file a successive postconviction petition was barred by *res judicata*; notwithstanding that his claim was barred, defendant failed to establish cause and prejudice for failing to raise the claim earlier, or bring a colorable claim of actual innocence.

¶ 2 Following a 2012 jury trial in the circuit court of Du Page County, defendant, Christopher Carter, was convicted of six counts of predatory criminal sexual assault of a child and sentenced to natural life. 720 ILCS 5/12-14.1(a)(1), (b)(1.2) (West 2008). We affirmed the conviction in *People v. Carter*, 2014 IL App (2d) 121053-U. Thereafter, defendant filed a *pro se* petition

under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), asserting that his constitutional rights were violated due to ineffective assistance of counsel and judicial bias. The trial court summarily dismissed the petition, and we affirmed that judgment in *People v. Carter*, 2018 IL App (2d) 150654-U. Defendant filed a motion for leave to file a successive postconviction petition. The trial court denied defendant's motion. Defendant timely appealed. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In May 2008, defendant was indicted on six counts of predatory criminal sexual assault of a child under sections 12-14.1(a)(1), (b)(1.2) of the Criminal Code of 1961. The charges stemmed from allegations that defendant committed acts of sexual penetration upon C.C. and T.C., who were ages 13 and 11, respectively, at the time of his arrest.

¶ 5 The jury heard evidence that the sexual abuse began when C.C. was 10 years old and that it continued for more than three years. Both victims testified in detail as to the sexual and physical abuse that they endured at the hands of defendant. Internal examinations and DNA evidence corroborated their testimony.

¶ 6 Defendant testified, denying that he ever had sexual contact with C.C. or T.C. Defendant further testified that he first noticed what he thought were herpes sores on his genitals in 1996. The parties stipulated that he tested positive for herpes simplex virus 2 (HSV-2) while incarcerated in 2010, and that C.C. and T.C. tested negative for HSV-2 in 2011.

¶ 7 During his post-trial *Krankel* hearing, defendant alleged that his trial counsel was ineffective for not calling Judy Malmgren as an expert witness. Ms. Malmgren was a sexual assault nurse examiner hired by previous counsel to do a records review, and defendant asserted that she would have testified regarding transmission rates of HSV-2 and evidence collection

techniques. His trial attorney explained to the court at that time that there was nothing in Ms. Malmgren's report indicating that she had any opinion or knowledge as to transmission of sexually transmitted diseases or evidence collection. Moreover, her report confirmed that there was definitive evidence of penetrative trauma on C.C. and T.C. Defendant's trial attorney concluded that Ms. Malmgren would have done more harm than good had she been called to testify. The trial court found that this was reasonable trial strategy and that trial counsel was not ineffective.

¶ 8 In the direct appeal of his conviction, defendant's appellate attorney raised two claims of error regarding a limiting instruction provided to the jury regarding other crimes evidence and a comment by the prosecutor during the State's closing argument. We determined that no error had occurred on either issue, and affirmed. *People v. Carter*, 2014 IL App (2d) 121053-U, ¶ 60.

¶ 9 Defendant raised numerous claims in his original postconviction petition, including that his trial counsel was ineffective for failing to call Judy Malmgren as a witness. The trial court summarily dismissed defendant's original postconviction petition, finding that the arguments were frivolous and patently without merit or barred by waiver, and we affirmed. *People v. Carter*, 2018 IL App (2d) 150654-U.

¶ 10 While his appeal from the dismissal of his original postconviction petition was pending, defendant sought leave to file a successive postconviction petition, arguing again that his trial counsel provided ineffective assistance by failing to call Judy Malmgren as a witness at trial. The trial court denied defendant's motion for leave to file the petition, finding that he had failed to satisfy the cause-and-prejudice test or the-actual innocence requirement for filing a successive postconviction petition.

¶ 11 II. ANALYSIS

¶ 12 The Act provides a method whereby a person imprisoned in the penitentiary may assert that his or her conviction was the result of a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). A postconviction proceeding is not an appeal, but a collateral attack on the proceedings in the trial court. *People v. Tate*, 2012 IL 112214, ¶ 8. The action is limited to a review of constitutional claims not presented at trial. *People v. Greer*, 212 Ill. 2d 192, 203 (2004). Issues that were raised and decided on direct appeal or in previous postconviction petitions are barred by *res judicata*; issues that were not presented, but could have been, are waived. *People v. Edwards*, 2012 IL 111711, ¶ 21. A postconviction claim otherwise barred by *res judicata* may be permitted when fundamental fairness so requires if the claim arose from facts outside the record or where appellate counsel was incompetent. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005).

¶ 13 The Act requires leave of the court which entered the conviction before a petitioner may file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2014); *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007). A successive postconviction petition is not considered filed until leave to file it is granted by the court, even when the petition was previously accepted by the clerk's office. *LaPointe*, 227 Ill. 2d at 44. A court may grant leave to file a successive petition only when a petitioner can either establish "cause and prejudice" for failing to raise a claim earlier or bring forth a "colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶¶ 22-24. " '[C]ause' in this context refers to any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). Prejudice is any error that so infected the trial that the conviction itself violates due process. *Pitsonbarger*, 205 Ill. 2d at 464. Like the *Strickland* test for ineffective assistance of counsel, a petitioner will only prevail on the cause-and-prejudice

test if he or she can meet the requirements of both elements. *Pitsonbarger*, 205 Ill. 2d at 464. To demonstrate a colorable claim of actual innocence, a petitioner must come forward with new evidence that raises the probability that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Edwards*, 2012 IL 111711, ¶ 24. We review *de novo* the denial of a motion for leave to file a successive postconviction petition.[1] *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 14 As an initial matter, we note that defendant incorrectly frames the issue before this court. Defendant simultaneously sent his motion for leave to file a successive postconviction petition and his proposed successive petition to the clerk of the court. The clerk affirmed receipt of the documents by imprinting them with his stamp. The court then denied defendant's motion for leave to file a successive petition. Consequently, the proposed successive petition was never truly filed, notwithstanding that the clerk file-stamped the document. See *LaPointe*, 227 Ill. 2d at 44. Defendant now appears to interpret the court's ruling as both a denial of his motion for leave to file a successive petition and a dismissal of his successive postconviction petition, overlooking the important legal effect that the court did not dismiss the proposed successive postconviction petition because it never granted leave for the petition to be filed. Defendant argued additional claims in his proposed successive petition that were not included in his motion for leave to file a successive petition. Nine of the ten issues he raises relate solely to errors he

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[1] In *People v. Edwards*, 2012 IL 111711, ¶ 30, our supreme court left open the possibility that denial of leave to file a successive postconviction petition might be reviewed for an abuse of discretion or *de novo*. Though it has not yet been released for publication, *People v. Bailey*, which was filed October 7, 2017, clearly sets the standard of review as *de novo*. The result in this case would be the same under either standard.

asserts that the court made in dismissing his proposed successive petition. Because the proposed successive petition was never filed or dismissed, those issues were not before the trial court and cannot be argued before this court. Thus, properly framed, the issue before this court is whether the trial court properly denied defendant's motion for leave to file a successive postconviction petition. We therefore consider only defendant's explicit cause-and-prejudice argument and his implicit actual innocence argument[2] as they relate to the single claim in his motion for leave to file a successive postconviction petition. All other claims defendant brings regarding dismissal of the successive petition are not properly before this court.

¶ 15 In his motion for leave to file a successive postconviction petition, defendant focused solely on his trial counsel's failure to call Judy Malmgren as an expert. Defendant alleged that Ms. Malmgren would have contradicted the testimony of Dr. Sangita Rangala by testifying to higher rates of transmission of HSV-2. Defendant established at trial that he suffered from HSV-2 and asserted that, had he been having intercourse with C.C. and T.C., he would have transmitted the virus to them. Dr. Rangala was an expert in pediatric sexual assault and testified that transmission rates among female children who have had sexual intercourse with an infected adult male were statistically "rare."

¶ 16 This is not the first time defendant has raised this issue. He first complained of ineffective assistance of counsel for failing to call Ms. Malmgren at his post-trial *Krankel*

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[2] Defendant's motion for leave to file a successive postconviction petition focused only on cause and prejudice as to why he should be permitted to file his petition, but imbedded in that argument was his contention that the potential new evidence would prove his innocence. We therefore address whether he presented a colorable claim of actual innocence as an alternative reason to permit filing his successive postconviction petition.

hearing, where the trial court found no ineffective assistance. He brought this claim a second time in his original postconviction petition. The trial court summarily dismissed the petition, finding it to be frivolous and patently without merit, and we affirmed the judgment. Defendant now asserts that he has cause to bring this issue a third time because of new evidence in the form of a letter he received from Ms. Malmgren after the filing of his original postconviction petition. He asserts in his proposed successive postconviction petition that her letter indicates that she was ready to testify in his favor regarding "transmissions and mechanisms" of HSV-2 and improper evidence collection techniques. Defendant further alleges that he was prejudiced by his attorney's failure to call Ms. Malmgren as an expert because she possessed knowledge that was the "linch pin" [*sic*] that could prove his innocence and "dismantle the State's case."

¶ 17 The State argues that this claim is barred by *res judicata*. We agree. The one-page letter upon which defendant relies,[3] dated June 28, 2015, provided no new information to support defendant's contentions. In it, Ms. Malmgren informed defendant in only general terms of what she had done with regard to defendant's case several years earlier, stating: "I reviewed copies of the records from Edward Hospital, including the forensic medical exams of both girls, documentation, and photos. I was aware of your herpes virus status." She says nothing about transmission rates of HSV-2 or evidence collection techniques. Based on this letter, defendant asserts in his motion: "I was not even able to become aware of the recently realized content and amounts of all she knew and possessed until receipt of a letter from Ms. Judy Malmgren." He

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[3] Defendant additionally relies on information contained in Ms. Malmgren's *curriculum vitae*, but that document was included in his original postconviction petition. Therefore, any claims arising from that document are claims that were either brought or could have been brought earlier, and are barred by *res judicata* or waived. *Edwards*, 2012 IL 111711, ¶ 21.

further contends that her explanation of statistics regarding HSV-2 would have been helpful to his defense and that her letter is "proof of the existence of favorable testimony." There is nothing in the letter to support these contentions. Ms. Malmgren makes no comment as to transmission rates of HSV-2, evidence collection techniques, or whether her testimony would have been favorable to defendant's case. Defendant asserts that fundamental fairness requires that the doctrine of *res judicata* should not apply to this claim because it stems from facts outside the record. While it is true that the letter from Ms. Malmgren is outside the record, it contains no new information that supports this previously raised claim. Consequently, the claim is barred.

¶ 18 Even if we were to overlook the bar imposed by *res judicata*, defendant has failed to demonstrate the requirements of the cause-and-prejudice test or actual innocence. In order to demonstrate cause to bring this claim, defendant needed to point to an objective factor, external to the defense, which impeded his ability to raise this claim earlier. *Pitsonbarger*, 205 Ill. 2d at 462. There is no objective reason why defendant could not have requested this information from Ms. Malmgren prior to his original postconviction petition. Ms. Malmgren stated in her letter of June 28, 2015, that she was responding to defendant's initial letter, which she said she received on June 20, 2015. This was nearly three years after the conclusion of his trial and four months after the filing of his original postconviction petition. Defendant cannot rely on his own unexplained delay as the basis on which he should be given leave to file a successive postconviction petition. See *Pitsonbarger*, 205 Ill. 2d at 462. Because defendant has not demonstrated cause, it is not necessary for us to address prejudice. *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 19 Demonstrating a colorable claim of actual innocence necessitated that defendant come forward with new evidence that raised the possibility that "it is more likely than not that no

reasonable juror would have convicted him in the light of the new evidence." *Edwards*, 2012 IL 111711, ¶ 24 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). As noted above, Ms. Malmgren's letter contained no new information that supports defendant's claim. Even if we were to accept that the information is new and that she would testify as defendant claims, such testimony would only present a differing opinion from that of Dr. Rangala on the likelihood of transmission of HSV-2. It would not be dispositive as to whether defendant had had intercourse with C.C. or T.C. Further, it would do nothing to counter the testimony of the girls or the physical evidence presented by the State. We cannot say, given access to this potential testimony, that no reasonable juror would have voted to convict defendant. Defendant has not, therefore, demonstrated a colorable claim of actual innocence.

¶ 20 Thus, notwithstanding that defendant's claim is barred by *res judicata*, he has also failed to demonstrate cause and prejudice as required by section 122-1(f) of the Act or a colorable claim of actual innocence.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Du Page County. 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 2016); *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 23 Affirmed.