2018 IL App (2d) 170222-U
No. 2-17-0222
Order filed May 1, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BILLY J. COX, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 04-CF-846 Honorable Thomas J. Condon, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's petition for leave to file a successive postconviction petition. Affirmed.

¶ 2 Defendant, Billy J. Cox, *pro se*, filed a motion, seeking leave to file a successive postconviction petition under section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2016). The trial court denied the motion. Defendant appeals, arguing that he sufficiently asserted a claim of actual innocence based on the State's alleged suppression of evidence, specifically, laboratory notes and his son's, Kenneth Cox's, notes of his conversations with his mother, the victim and defendant's wife, Carolyn Cox. We affirm.

¶ 3 I. BACKGROUND

¶ 4 During the jury trial, in 2007, the State presented evidence that, on September 13, 2004, defendant attempted to kill Carolyn over the course of six hours in their home in Bull Valley by striking her at least three times with a blunt object. The first strike occurred in the master bedroom, after which defendant dragged Carolyn on a rug down a hallway and into the garage's fourth bay. Defendant then took Carolyn back inside after she asked to see a doctor, placed her in the foyer, gave her a pillow and overalls, claimed that he called an ambulance, and struck her a second time. Carolyn opened her eyes, saw defendant, and asked for a bowl because she felt nauseated. She crawled to the bathroom, vomited, and crawled back to the hallway. Defendant again took her to the garage, placed her in the back of an SUV, struck her a third time, and left. Carolyn crawled back to the house and fell asleep or became unconscious. Family members and friends had started to try to contact the couple, who were due to leave for France later that day. Defendant returned to the house, carried Carolyn to the garage, placed her under the tailpipe of a running SUV, disabled the garage doors, and locked the doors to the house. Carolyn eventually crawled to the front of the vehicle, shut it off, and crawled to a running truck and breathed in air conditioning before the police arrived.

¶ 5 Defendant denied the allegations and argued that Carolyn sustained her injuries when she fell off of a ladder in the garage while defendant was outside doing yard work on the couple's 11-acre property. (Law enforcement witnesses testified for the State that defendant's clothing was clean for someone who alleged that he was doing yard work for six hours that day and that defendant was overdressed for the 80-degree weather). Defendant claimed that Carolyn was manipulated by their son, Kenneth, to testify against defendant. He also argued that Carolyn had

a history of falls and that no blood was found on his clothing that day, whereas Carolyn's clothing was saturated with it.

¶ 6 Defendant was convicted of attempt murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)) (by means of carbon monoxide) and aggravated domestic battery (720 ILCS 5/12-3.3 (West 2004)) (by means of a blunt object). He was sentenced to consecutive terms of 14 and 6 years' imprisonment, respectively. On direct appeal, defendant challenged the sufficiency of the evidence, argued that there were errors in the admission and exclusion of certain evidence, that he was prejudiced by alleged discovery violations, and that a hearing was required concerning alleged juror misconduct. This court affirmed. *People v. Cox*, No. 2-08-0028 (2010) (unpublished order under Supreme Court Rule 23). In 2011, defendant filed a postconviction petition, which was dismissed after second-stage proceedings. This court affirmed. *People v. Cox*, 2013 IL App (2d) 121391-U.

¶ 7 On October 31, 2016, defendant petitioned, *pro se*, for leave to file a second postconviction petition. In a 32-page document, he asserted that there was new evidence that showed that he was deprived of his constitutional rights and was entitled to relief under the Act, specifically, laboratory notes and notes that Kenneth took of his conversations with Carolyn. As relevant here, defendant alleged *Brady* violations, asserting that the State failed to disclose material information about a viable alternative suspect, namely, Kenneth. According to defendant, the State lacked any direct physical evidence against him, and the withheld evidence would have enabled defendant to present evidence and a more aggressive argument on Kenneth as an alternate suspect.

¶ 8 First, defendant argued that prosecutor Nicole Owens suppressed evidence of laboratory notes until the 16th day of trial, disclosing it just prior to rebuttal arguments. The notes, he

argued, showed evidence of possible third-party involvement, were exculpatory, and contained impeaching information. The trial court barred the notes. (Defendant did not attach to his petition a copy of the report of proceedings from the trial court, and no such transcript is contained in the record on appeal.) The one-page report containing the notes, which defendant attached to his petition as an exhibit, was prepared by Cynthia (last name illegible) of the Illinois State Police forensic services area and consists of a summary of a telephone conversation she had with McHenry County sheriff's detectives Mullen and Umbenhower and prosecutor Owens. The report summarizes the State's theory of the case and mentions that an unidentified male profile was found on several items at the scene. Detectives "were concerned that the defense might claim that a third-party actually committed the crime. They collected a standard from the suspect for comparison." The detectives, the report further noted, wanted the forensics laboratory to examine additional evidence "in case the defense claimed a third-party committed the crime." Cynthia informed the detectives that she would not look at 100 additional items and suggested that the detectives select the 15 best items, which would be outsourced. No follow-up information is contained in the notes.

¶ 9 Second, defendant claimed that the State suppressed Kenneth's notes of his conversations with Carolyn. He noted that Kenneth testified that he turned over his notes to his attorney, who, in turn, testified that he turned them over to prosecutors. (Defendant again did not attach to his petition a copy of the report of proceedings from the trial court, and no such transcript is contained in the record on appeal.) The State, defendant noted, failed to disclose the notes during discovery. Defendant's theory, again, was that Kenneth manipulated Carolyn while she was mentally frail and in the hospital. Initially, Carolyn did not recall how the attack occurred, but, after discussions with Kenneth, she pointed to defendant as the attacker.

¶ 10 On December 30, 2016, the trial court denied defendant's petition, finding that: (1) every claim defendant raised had been previously raised and ruled upon and was, thus, barred by *res judicata*; and (2) his actual-innocence claim contained only one new fact (unrelated to defendant's arguments on appeal), but no supporting documentation was attached to the petition, and, otherwise, the evidence merely refuted Carolyn's testimony on a collateral matter. Defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 A. Incompleteness of Record

¶ 13 We start by considering the state of the record on appeal. The common-law record, as the State notes, does not contain any documents filed prior to October 31, 2016. It consists of defendant's petition (filed on that date), the trial court's December 30, 2016, order, and several orders and letters concerning the preparation of the record for this appeal and related matters. The report of proceedings consists of a transcript of proceedings held on December 21, 2016, wherein the trial court merely informed the parties that it had almost completed its review of defendant's petition and wherein it set a new court date of December 30, 2016.

¶ 14 Defendant's briefs repeatedly refer to proceedings prior to the filing of the present petition on October 31, 2016, but contain, in the statement of facts, few citations to the record (because the record on appeal does not contain any documents prior to this date). In his argument sections, defendant repeatedly refers to facts and exhibits that are not of record (again, due to the state of the record on appeal).

¶ 15 In any appeal:

> "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on

> appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 16 We agree with the State that, under *Foutch*, we must affirm the trial court's denial of defendant's petition on the basis that the record on appeal is incomplete.

¶ 17 B. Denial of Petition

¶ 18 Even if we consider the merits of defendant's claims, for the following reasons, we conclude that the trial court did not err in denying his petition.

¶ 19 We review *de novo* the denial of a motion for leave to file a successive postconviction petition. *People v. Bailey*, 2017 IL 121450, ¶ 13.

¶ 20 The Act offers a procedural device through which a criminal defendant may assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2016). Proceedings under the Act are collateral to proceedings in a direct appeal and focus on constitutional claims that have not and could not have been previously adjudicated. See *People v. Towns*, 182 Ill. 2d 491, 502 (1998). Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are forfeited. See *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). The Act itself contemplates the filing of a single petition: "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2016). Because successive petitions impede the finality of criminal litigation, that statutory bar will be relaxed only " 'when fundamental fairness so

requires.' " *People v. Coleman*, 2013 IL 113307, ¶ 81 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002)).

¶ 21 Generally, there are two such instances. See *People v. Edwards*, 2012 IL 111711, ¶ 22. A defendant may raise a due process claim of actual innocence to prevent a miscarriage of justice (*Coleman*, 2013 IL 113307, ¶ 83), or a defendant may raise any other defaulted constitutional claim by satisfying the so-called "cause-and-prejudice" test (*id.* ¶ 82). To establish "cause," the defendant must show some objective factor external to the defense that impeded his or her ability to raise the claim in the initial postconviction proceeding. *Pitsonbarger*, 205 Ill. 2d at 460. To establish "prejudice," the defendant must show the claimed constitutional error so infected his or her trial that the resulting conviction violated due process. *Id.* at 464. The cause-and-prejudice test has been codified in the Act. See 725 ILCS 5/122-1(f) (West 2016); *People v. Tidwell*, 236 Ill. 2d 150, 156 (2010).

¶ 22 When asserting a claim of actual innocence, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Id.* ¶ 24. That is, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.' " *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

> "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial. [Citations.] We deem it appropriate to note here that the United States Supreme Court has emphasized

> that such claims must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' *Schlup*, 513 U.S. at 324. The Court added: 'Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.' *Id.*" *Id.* ¶ 32.

¶ 23 A defendant has not only the burden to obtain leave of court before further proceedings on his or her claims can follow, but also to "submit enough in the way of documentation to allow a circuit court to make that determination." *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). This is the case under either the actual-innocence or cause-and-prejudice exception. *People v. Edwards*, 2012 IL 111711, ¶ 24.

¶ 24 Defendant's primary *Brady* claim was that prosecutor Owens did not disclose the laboratory notes until the 16th day of trial, before rebuttals, at which point the trial court "predictably" excluded the report from trial. The court's action, he urges, "created a reverse effect against" him by making unavailable information that was favorable for him and proved his actual innocence. Defendant asserts that the report was exculpatory because it pointed to a viable third-party suspect, Kenneth. The suppression of the report was willful, in his view. Owens prosecuted the case, knowing that a third party had been discovered but not disclosed to the defense or the jury, and she knew that, if she disclosed the information, her entire case against defendant would be lost.

¶ 25 We reject defendant's claim for two reasons. First, it is not conclusive. At best, the laboratory notes reflect that an identified male profile was present on several items and that the detectives and Owens were concerned that the defense might raise a claim that a third party committed the crimes and they wanted the laboratory to analyze various items. They collected a

standard from defendant, and they wanted additional evidence looked at by laboratory personnel in case the defense claimed a third party committed the crime. The remainder of the document reflects negotiations between the laboratory employee and the detectives and Owens concerning how many pieces of evidence the laboratory could reasonably analyze prior to trial. No findings are contained in the notes of the telephone conversation, the notes do not specify the items on which the profile was found, they do not reflect that the profile places that third party at the home on the day of the incident, and the notes do not reflect that the presence of the profile establishes that defendant was not present. The report does not even clearly specify that the unidentified male profile was all from the same unidentified male. Defendant points to no other documents that contain any follow-up information to this telephone exchange. Thus, it defies logic as to how the document constitutes conclusive evidence of a viable alternative suspect and defendant's actual innocence. Even assuming that the profile was Kenneth's, without more, it is unremarkable that the Cox's son's profile was present in their home and it is certainly not conclusive of defendant's innocence.

¶ 26 Second, we reject defendant's argument because the laboratory notes, which defendant claims were disclosed during trial, are not new. Futher, defendant could have raised this issue in his first postconviction petition. However, he did not raise it, and he does not argue in his appeal that some external factor impeded his ability to raise it in his initial postconviction petition. Accordingly, he has not satisfied the "cause" element of the "cause-and-prejudice" test. *Pitsonbarger*, 205 Ill. 2d at 460.

¶ 27 Next, defendant also claims that the State violated *Brady* by suppressing Kenneth's notes of his conversations with Carolyn when she was in the hospital. He claims that they were favorable and material to his case because "otherwise the State would not have suppressed

them." Defendant's theory at trial was that Carolyn was manipulated by Kenneth to testify against defendant. Kenneth's influence over his mother was brought out at trial, including that he was continuously with her at the hospital, was in constant contact with police in the week following the incident, took notes of his conversations with Carolyn, ascended to control of Exacto, the family business, and took actions with respect to the company and the family's finances to protect Carolyn and the family estate. Defendant's claim in this appeal that the notes were necessarily favorable and material to his case is pure speculation. Regardless, even if favorable, the questions of Carolyn's alleged manipulation and her and Kenneth's credibility were presented at trial and raised again in defendant's first postconviction petition. Because they are not new and are cumulative, they cannot be re-litigated in a successive postconviction proceeding.

¶ 28 In summary, the trial court did not err in denying defendant's petition for leave to file a second postconviction petition.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, the judgment of the circuit court of McHenry 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 31 Affirmed.