2018 IL App (4th) 4160582-U

NO. 4-16-0582

FILED
November 27, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DWAYNE A. DORSEY,	)	No. 01CF2153
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 1 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel, on the ground no meritorious issue can be raised in this case. We grant OSAD's motion and affirm the trial court's judgment.

¶ 2 I. BACKGROUND

¶ 3 A. Case No. 4-03-0251

¶ 4 In April 2002, a jury found defendant, Dwayne A. Dorsey, guilty of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2000)) and one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2000)). In May 2002, the trial court sentenced defendant to three consecutive terms of 30 years in prison. In

June 2002, defendant filed a motion to reconsider sentence. The court resentenced defendant to 30 years in prison for the first count of predatory criminal sexual assault of a child, a consecutive 60-year extended term for the second count of predatory criminal sexual assault of a child, and 30 years in prison for aggravated criminal sexual assault, to be served concurrently.

¶ 5 B. Case No. 4-02-0486

¶ 6 In March 2002, the trial court found defendant in indirect contempt of court for failing to comply with a court order. The court sentenced defendant to 180 days in prison.

¶ 7 C. Direct Appeal

¶ 8 This court consolidated case Nos. 4-02-0486 and 4-03-0251 for purposes of appeal. Defendant raised no issue with respect to case No. 4-02-0486 and therefore we dismissed the appeal in that case. In case No. 4-03-0251, defendant alleged (1) the State failed to prove him guilty beyond a reasonable doubt; (2) admission of the victim's hearsay statements was erroneous; (3) section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2000)), under which the hearsay statements of the victim were admitted, violated the confrontation clauses of both the state and federal constitutions; (4) his sentences violated the one-act, one-crime doctrine; (5) the trial court improperly increased his original sentence for the second count of predatory criminal sexual assault of a child; and (6) the sentences were excessive. This court restored the consecutive 30-year sentences for both counts of predatory criminal sexual assault of a child, finding the trial court improperly increased defendant's sentence for the second count. We also vacated the lesser offense of aggravated criminal sexual assault under the one-act, one-crime doctrine. In all other respects, we affirmed the trial court's judgment. *People v. Dorsey*, No. 4-03-0251 (January 8, 2004) (unpublished order under Supreme Court Rule 23).

¶ 9 D. Postconviction Proceeding

¶ 10 In April 2005, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 122-1 to 122-7 (West 2004)). Defendant alleged (1) he was denied a fair trial, (2) the prior complaints of the child were improperly admitted, (3) defense counsel conceded defendant's guilt when he acknowledged the trial court's authority to impose consecutive sentences, and (4) the State did not prove him guilty beyond a reasonable doubt. Defendant also filed a "supplement" alleging he was denied (1) a preliminary hearing, (2) a speedy trial and a public trial, and (3) his right to counsel. In May 2005, the trial court dismissed defendant's petition as frivolous and without merit. On appeal, this court granted OSAD's motion to withdraw. *People v. Dorsey*, No. 4-05-0459 (April 4, 2007) (unpublished order under Supreme Court Rule 23).

¶ 11 E. Second Postconviction Proceeding

¶ 12 On May 1, 2015, defendant filed a second *pro se* postconviction petition. Defendant alleged (1) he was denied a speedy trial, (2) the State retaliated against him when he requested a speedy trial, and (3) his sentence was excessive. On July 7, 2016, the trial court dismissed the petition, finding defendant did not request leave to file a successive postconviction petition pursuant to section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2014)), and did not state grounds which would allow defendant leave to file a successive postconviction petition.

¶ 13 F. OSAD's Motion to Withdraw

¶ 14 Defendant filed a timely notice of appeal, and the trial court appointed OSAD to represent him. In April 2018, OSAD filed a motion for leave to withdraw as counsel on appeal. The record shows service on defendant, who filed a response in opposition to OSAD's motion on

May 21, 2018. On July 23, 2018, the State filed a brief in support of OSAD's motion. We grant OSAD's motion and affirm the trial court's judgment.

¶ 15 II. ANALYSIS

¶ 16 OSAD contends any argument the trial court erred in dismissing defendant's successive postconviction petition is meritless. We agree.

¶ 17 The Postconviction Act provides a means to collaterally attack a criminal conviction on the basis of a substantial denial of a defendant's state or federal constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). Generally, a defendant may only file one postconviction petition without leave of the court. 725 ILCS 5/122-1(f) (West 2014). Any claim not raised in the original or amended petition is forfeited. *Id.* § 122-3. This statutory bar to a successive petition will only be relaxed when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). To determine whether fundamental fairness requires relaxation of the statutory bar, the reviewing court employs the "cause-and-prejudice test." *Id.* To demonstrate cause, a defendant must identify " 'an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' " *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 31, 19 N.E.3d 142. Prejudice is an error so infectious to the proceedings that the resulting conviction violates due process. *Pitsonbarger*, Ill. 2d at 464.

¶ 18 If the defendant fails to show cause and prejudice, "his failure *** will be excused if necessary to prevent a fundamental miscarriage of justice." *Id.* at 459. A defendant must generally show actual innocence to demonstrate such a miscarriage of justice. *Id.* Here, defendant did not make a claim of actual innocence and therefore must show cause and prejudice for his failure to raise his claims in his earlier petition.

¶ 19 A defendant is not required to file a formal motion seeking leave, but he must provide sufficient documentation for the court to determine whether leave is warranted. *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734-735 (2010). "[L]eave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172. This court reviews *de novo* a trial court's denial of a motion to file a successive postconviction petition. *Wilson*, 2014 IL App (1st) 113570, ¶ 31.

¶ 20 OSAD asserts at the outset this appeal does not present any procedural issues. Generally, the trial court must rule on a postconviction petition within 90 days of its filing. 725 ILCS 5/122-2.1 (West 2014). If it does not, the petition automatically advances to the second stage of proceedings. *Id.* However, a successive postconviction petition is not considered "filed" for purposes of section 122-2.1 until leave of the court is granted, regardless of the clerk's acceptance of the petition. *Tidwell*, 236 Ill. 2d at 159.

¶ 21 Defendant filed his second postconviction petition on May 1, 2015, and the trial court did not rule on it until July 7, 2016, more than a year later. However, because the trial court denied leave to file a successive petition, the petition was never "filed" for purposes of the Postconviction Act. Accordingly, any claim the trial court erred when it did not advance the successive petition to the second stage is meritless.

¶ 22 OSAD next asserts defendant's successive postconviction petition cannot satisfy the cause and prejudice test of section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2014)). Defendant disagrees and claims his petition did show cause and prejudice.

¶ 23 In his successive petition, defendant asserts he was denied a speedy trial, a claim he raised in his initial postconviction petition. "A ruling on an initial post-conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised on the initial petition." *People v. Orange*, 195 Ill. 2d 437, 449, 749 N.E.2d 932, 939 (2001).

¶ 24 Even if this court considered defendant's speedy trial claim, it would fail. A criminal defendant "shall be tried *** within 120 days from the date he [or she] was taken into custody unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (West 2000). Defendant was arrested on December 3, 2001, and tried on April 16, 2002, more than 120 days after he was taken into custody. However, defendant caused a delay that tolled the speedy-trial term from February 22, 2002, until March 7, 2002, when he refused to submit to a court-ordered urine sample. See *People v. Healy*, 293 Ill. App. 3d 684, 690, 688 N.E.2d 786, 789 (1997). Defendant also did not object to the 60-day continuance requested by the State on March 7, 2002, which further tolled the speedy-trial term. See *People v. Kliner*, 185 Ill. 2d 81, 115-16, 705 N.E.2d 850, 869 (1998). Defendant's trial took place on day 81 of the speedy-trial term, within the continuance to which he agreed, and therefore, his speedy trial claim is meritless.

¶ 25 Defendant also claims his sentence was excessive. This court rejected defendant's claim on direct appeal, and therefore it is barred by *res judicata*.

¶ 26 There is no evidence in the record to support defendant's claim the State retaliated against him in response to his request for a speedy trial. Defendant failed to cite any objective factor that impeded his ability to raise his claim in his initial postconviction petition. Defendant has failed to show cause as to this claim.

¶ 27 Defendant also cannot demonstrate prejudice. As noted *supra*, this court addressed defendant's excessive sentence claim on direct appeal and found no error.

Defendant's retaliation claim is similarly meritless. Defendant claims the State amended the charging instrument against him to increase the potential sentence for the second count of predatory criminal sexual assault of a child from 6 to 12 years, to 6 to 30 years after defendant requested a speedy trial. However, that charge at all times was a Class X felony punishable by 6 to 30 years in prison, with the possibility of an extended-term sentence of 30 to 60 years. 730 ILCS 5/5-8-2(a)(2) (West 2000) (extended-term sentencing for Class X felonies); 720 ILCS 5/12-14.1(b)(1) (West 2000) ("A person convicted of *** [predatory criminal sexual assault of a child] commits a Class X felony."). There is no support for defendant's claim of retaliatory prosecution, and he cannot demonstrate prejudice.

¶ 28 Defendant raises several new claims in his response to OSAD's motion to withdraw that do not appear in his successive petition. Although defendant did not claim actual innocence in his petition as noted *supra*, defendant nonetheless asserts his petition raises such a claim because (1) he was improperly denied a preliminary hearing on his indirect criminal contempt conviction and (2) his counsel was ineffective for filing a motion to reconsider sentence without defendant's signature. Defendant also claims the record was improperly altered. None of these claims appear in defendant's petition and therefore he cannot raise them for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004).

¶ 29 If this court considered defendant's preliminary hearing and ineffective assistance claims on the merits, they would fail. Neither argument contains facts to support a claim of actual innocence. The trial court found defendant in indirect criminal contempt after he refused to comply with a court order for a urine sample during his trial for the two counts of predatory criminal sexual assault of a child. Although defendant argues he would have complied "under

trustworthy conditions," this court fails to see how that willingness makes him factually innocent of indirect criminal contempt. Neither does the fact defendant did not sign the motion to reconsider sentence show defendant is innocent of any crime. This court also considered and rejected both of these claims in defendant's initial postconviction proceeding and they are therefore barred by *res judicata*.

¶ 30 Defendant's claim the record was altered is also meritless. The court reporter certified to the accuracy of the report of proceedings, which is taken as true and correct unless shown to be otherwise. Ill. S. Ct. R. 323(b) (eff. July 1, 2017). Defendant has not made such a showing.

¶ 31 Defendant's petition does not satisfy the cause-and-prejudice test or raise a claim of actual innocence. The trial court properly denied leave to file a successive postconviction petition.

¶ 32 III. CONCLUSION

¶ 33 We grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 34 Affirmed.