2019 IL App (1st) 153442-U

No. 1-15-3442

Order filed August 1, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 18294
	)	
EDWARD LEAK,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MCBRIDE delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it denied defendant leave to file a successive postconviction petition.

¶ 2 Defendant Edward Leak appeals from the denial of his *pro se* motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal, defendant contends that the circuit court erred when it denied him leave to file the petition because it met the requirements of the cause and prejudice test.

Specifically, defendant contends that he has established cause when he did not obtain the affidavit of a certain witness until several years after the filing of his initial postconviction petition. He contends that he has established prejudice because he was denied due process by the State's use of perjured testimony. We affirm.

¶ 3 Following a simultaneous, but separate, jury trial with codefendant John Brown, defendant was found guilty of the murder of Fred Hamilton, and of having procured another to commit murder for money or something of value. He was sentenced to 75 years in prison. We set forth the facts of the case in defendant's direct appeal (*People v. Leak*, 398 Ill. App. 3d 798 (2010)), and we recite them here only to the extent necessary to the disposition of this appeal.

¶ 4 The evidence at trial established that defendant and Hamilton worked together at defendant's family's funeral home. Defendant was also a Chicago police officer. In 2002, defendant purchased a $500,000 insurance policy listing Hamilton as the insured and defendant as the primary beneficiary. The policy was issued in January 2003, and defendant paid the premiums through February 2004. Hamilton left the funeral home in 2003 after funds went missing. Defendant filed a police report against Hamilton regarding the missing funds. Thereafter, Corey Ankum, who had worked at the funeral home, and Hamilton's brother, Ned, were both approached by defendant looking for Hamilton and heard him threaten "to kill" and "get" Hamilton.

¶ 5 Charmain Ankum, the mother of Hamilton's son, testified that after Hamilton was "fired," he began to act "paranoid" and "scared of certain things." Around Thanksgiving 2003, she saw defendant "circling the house" where she and Hamilton lived. On February 3, 2004, Charmain and Hamilton left the daycare where she worked around 6:30 p.m. When they reached

her vehicle, she noticed something sticking out of a tire, so they returned to the daycare and called a tow truck. Charmain, Hamilton, a coworker, and the tow truck driver were all standing in the street when a man wearing a mask emerged from a gangway. The man fired a gun at Hamilton "three or four times." Once Hamilton was on the ground, the man rolled him over and shot him again. As Charmain ran away, she turned around and saw the man shoot Hamilton again. Hamilton died as a result of the shooting.

¶ 6 Chicago police officer Robert Walker testified that he and his partner responded to a call that a person had been shot. When he arrived, he saw two men running from the area. Walker pursued, and caught, one of the men. He identified codefendant John Brown as this person.

¶ 7 Alfred Marley testified that he pled guilty to first degree murder based upon his involvement in Hamilton's death in exchange for a recommendation from the State that he serve a term of 27 years in prison. No other promises were made to him. Marley acknowledged that he had prior convictions for possession of a controlled substance and burglary.

¶ 8 Marley then testified that codefendant Brown, whom he knew "from the neighborhood," contacted him in January 2004 and offered to pay him to help with "a hit." Codefendant Brown explained that the hit was for a police officer named "Ray" and "said something about [an] insurance policy." Marley agreed, and later learned that Hamilton was the intended target. Marley and codefendant Brown attempted to shoot Hamilton in January 2004, but the gun jammed. On February 3, 2004, codefendant Brown picked Marley up and they drove to the area where Charmain worked. They punctured a tire on a jeep that Marley had previously seen Hamilton get into, and then waited. A maroon or red car pulled up and codefendant Brown told Marley, "that's his guy right there." Marley described the driver as an African-American male

but could not see his face. Codefendant Brown got into the maroon car while Marley waited elsewhere. Prompted by a phone call from codefendant Brown, Marley started walking toward the jeep and heard "a bunch" of gunshots. At the jeep, he saw Hamilton on the ground. Codefendant Brown was in a nearby gangway. Marley shot Hamilton "like two, three times" because he wanted to be paid. The men then walked toward a McDonald's parking lot where codefendant Brown said they were going to meet the police officer in the maroon car. However, he was not there. When a police car pulled up, Marley walked toward it while codefendant Brown ran. Police chased codefendant Brown and Marley got away. He learned the next day that codefendant Brown had been arrested. He was taken into custody on April 28, 2005, and subsequently gave a videotaped statement.[1] Marley made the statement before asking for an attorney or negotiating a sentence with the Office of the State's Attorney.

¶ 9 Assistant state's attorney Robert Heilingoetter testified that, when he spoke to defendant at a police station on July 14, 2005, defendant denied knowing codefendant Brown. Defendant stated that he used to work with Hamilton and that they had a "falling out" in June 2003. Defendant believed the victim had taken two cars, and reported them stolen. One vehicle was later recovered close to defendant's home and the other in the possession of Hamilton's friend. Defendant had not seen Hamilton since he left the funeral home, but had been looking for him. Defendant claimed Hamilton had used a stolen credit card to purchase jewelry. Defendant said he had a $500,000 life insurance policy on Hamilton, and was aware that Hamilton filed complaints against him with the police department's internal affairs division. Defendant subsequently stated that he saw Hamilton at a car wash in September 2003, and that the men

[1] This videotape is not included in the record on appeal.

engaged in a car chase that ended in an accident. Defendant also stated that he used the police department's computer system to determine Hamilton's location and contact with law enforcement.

¶ 10 Heilingoetter next testified that he told defendant that, on the night of Hamilton's death, codefendant Brown was taken into custody a few blocks from the shooting, and that records showed numerous calls from codefendant Brown's phone to a phone believed to belong to defendant. Defendant acknowledged that his number had been dialed from codefendant Brown's phone. When Heilingoetter told defendant that records showed outgoing calls from his phone to codefendant Brown's phone on the night of the murder, defendant admitted that he knew codefendant Brown. Defendant then stated that he met codefendant Brown in May 2003, that Hamilton had introduced them, and that Hamilton told codefendant Brown about the life insurance policy. Defendant did not see codefendant Brown again until Thanksgiving 2003, and codefendant Brown must have obtained defendant's cell phone number because codefendant Brown called him "repeatedly." During these conversations, codefendant Brown offered to kill Hamilton for $100,000 of the insurance policy. Codefendant Brown also stated that if defendant went to the police, he would say that it was defendant's idea to kill Hamilton. Defendant further stated that on the night of Hamilton's death, codefendant Brown called to say, " 'It's gonna happen.' "

¶ 11 When Heilingoetter told defendant that records showed there were "many" calls between defendant and codefendant Brown on the day of Hamilton's death, defendant did not "elaborate any further," and stated that he was at his girlfriend's home. Defendant "had no response" when Heilingoetter stated that "cell site" records indicated that defendant's cell phone "was hitting a

cell tower" in the area where Hamilton was shot. Defendant denied knowing Marley. Defendant's statement was not memorialized.

¶ 12 Additional testimony established that on the day of Hamilton's death, defendant's cell phone "hit" off cell towers in the vicinity of the shooting. It also established that between January 4, 2003, and February 3, 2004, there were 117 calls from codefendant Brown's cell phone to defendant's cell phone and 128 calls from defendant's cell phone to codefendant Brown's cell phone.

¶ 13 The jury found defendant guilty of first degree murder and that he procured another to commit that murder for money or something of value. He was sentenced to a term of 75 years' imprisonment. This judgment was affirmed on direct appeal. *People v. Leak*, 398 Ill. App. 3d 798 (2010).

¶ 14 In 2010, defendant filed a postconviction petition alleging that he was denied his right to cross-examination when the trial court did not allow the defense to question Charmain Ankum, the mother of Hamilton's son, regarding whether she or her family would benefit from Hamilton's death, and permitted the State to introduce certain hearsay statements. Defendant subsequently filed an amended petition alleging that he was denied the effective assistance of counsel when trial counsel failed to present documentation that a case was pending at the time of trial brought by State Farm Insurance with Jaelin Hamilton, a minor, as a named defendant. The circuit court summarily dismissed the petition as frivolous and patently without merit in a written order. This judgment was affirmed on appeal. See *People v. Leak*, 2012 IL App (1st) 110412-U.

¶ 15 On December 19, 2014, defendant filed a *pro se* motion for leave to file a successive postconviction petition. The petition alleged that newly discovered evidence, that is, the affidavit

of Alfred Marley, established that defendant's conviction was obtained through the use of perjured testimony. Specifically, the petition alleged that Marley was threatened with a 45-year prison sentence for Hamilton's murder unless he agreed to implicate defendant "by testifying falsely and providing perjured testimony." Attached to the petition in support were, *inter alia*, the affidavit of Alfred Marley, a disposition by the Illinois Torture Inquiry and Relief Commission regarding a claim by Darryl Christian, and portions of transcripts from defendant's trial

¶ 16 In his affidavit, dated August 15, 2014, Marley averred that he pled guilty to the murder of Hamilton "under duress and coercion." He further averred that he agreed to the "false testimony that I was hired by [codefendant Brown] to commit the murder" because he was threatened with a 45-year prison sentence. Marley next averred that he did not murder Hamilton and he was not hired by codefendant Brown to murder Hamilton. Marley also averred that he did not have a firearm, only traveled with codefendant Brown "under the assumption" that they were going to collect money with "no acts of violence," and was talking to a woman "nowhere near the scene of the murder" when he heard gunshots. Marley finally averred that he had never "heard of or met" defendant.

¶ 17 On May 13, 2015, the circuit court denied defendant leave to file the successive postconviction petition. Defendant filed a *pro se* motion for reconsideration, which the circuit court denied on July 28, 2015. On December 22, 2015, this court granted defendant leave to file a late notice of appeal.[2]

[2] Defendant's appeal from the circuit court's July 18, 2018 order denying him leave to file a second successive petition for postconviction relief is also currently pending before this court. See *People v. Leak*, No. 1-18-1924

¶ 18 On appeal, defendant contends that the circuit court erred when it denied him leave to file the successive petition as the petition alleged that he was denied his right to due process by the State's knowing use of Marley's false testimony. He contends he has met the requirements of the cause and prejudice test because he did not receive Marley's affidavit until several years after filing his initial postconviction petition and Marley's testimony impacted the outcome of his trial.

¶ 19 Our supreme court has held that the scope of postconviction review is limited to constitutional matters which have not been, and could not have been, previously adjudicated. *People v. Evans*, 186 Ill. 2d 83, 91-92 (1999). The judgment of the reviewing court on a previous appeal is *res judicata* as to the issues actually decided, and any claim that could have been presented in the direct appeal is, if not raised, thereafter barred under the doctrine of waiver. *Id.* at 92.

¶ 20 The Act contemplates the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2014)), and "any claim not presented in an original or amended petition is waived." *People v. Sanders*, 2016 IL 118123, ¶ 24. A defendant must overcome "immense procedural default hurdles" in order to file a successive postconviction petition. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). These hurdles are only lowered in limited circumstances because successive postconviction proceedings "plague the finality of criminal litigation." *Id.*

¶ 21 Leave of court may be granted when a defendant demonstrates cause for failing to raise the claim in his earlier petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2014). "Cause" is established when the defendant shows that some objective factor impeded his ability to raise the claim in the original postconviction proceeding. *Tenner*, 206 Ill.

2d at 393. "Prejudice" is established when the defendant shows that the claimed error so infected his trial that the resulting conviction violated due process. *Id.* A defendant must establish both cause and prejudice. *People v. Edwards*, 2012 IL 111711, ¶ 22.

¶ 22 In *People v. Smith*, 2014 IL 115946, ¶ 35, our supreme court reiterated that "the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard." A circuit court should deny a defendant leave to file a successive postconviction petition when it is clear, based upon a review of the successive petition and the attached documentation, that the defendant's claims fail as a matter of law or when the petition and its supporting documents are insufficient to justify further proceedings. *Id.* We review *de novo* whether a defendant has fulfilled his burden to justify further proceedings on a successive postconviction petition. *Id.* ¶ 21.

¶ 23 In the case at bar, defendant contends, and the State concedes, that he has established cause when Marley's affidavit averring that he lied at trial was dated August 15, 2014, several years after defendant filed his initial postconviction petition. However, even if defendant has established cause, the circuit court properly denied him leave to file the successive postconviction petition because he has failed to establish prejudice.

¶ 24 In order to satisfy the prejudice prong, a defendant must show that the claim not raised in his initial postconviction petition "so infected the entire trial that the resulting conviction or sentence violates due process." *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). In the case at bar, defendant cannot make that showing.

¶ 25 Defendant's petition claimed that the State knowingly used Marley's false testimony. The State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation

of due process. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995). A conviction obtained by the knowing use of perjured testimony violates due process and must be set aside if there is "any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997).

¶ 26 Defendant supported his claim with Marley's affidavit recanting his trial testimony. Our supreme court has held that the "recantation of testimony is regarded as inherently unreliable" and, consequently, a new trial is not granted based upon recanted testimony absent "extraordinary circumstances." *People v. Morgan*, 212 Ill. 2d 148, 155 (2004). No such circumstances are present here.

¶ 27 First, there is simply no evidence the State was aware that Marley's testimony was false. Although Marley avers that he entered a plea of guilty to murder "under duress and coercion" and agreed to the "false testimony" that he was hired by codefendant Brown to help murder Hamilton, he testified at trial that he made his videotaped statement before asking for an attorney or negotiating a sentence with the State.

¶ 28 Moreover, even if this court were to accept the contents of Marley's affidavit as true, defendant cannot establish prejudice. In his affidavit, Marley avers that he lied when he testified that he was hired by codefendant Brown to "commit the murder." He claimed that he did not have a gun, and was "blocks away" speaking to a woman when he heard gunshots. In essence, Marley raises a claim of his own actual innocence; that is, he avers that he was unaware of, and did not participate in, the events leading to Hamilton's death. With regard to defendant, Marley merely avers that he had never "heard of or met" defendant. However, this statement does not contradict Marley's testimony at trial. At trial, Marley did not identify defendant; rather, he

testified that the "hit" on Hamilton was for a police officer named Ray. In fact, Marley testified that he did not see the face of the African-American man in the car.

¶ 29 To the extent that defendant argues that Marley's allegedly false testimony was "critical" to the outcome of defendant's trial, we disagree. The State's case established that defendant purchased a $500,000 insurance policy on Hamilton with defendant as the primary beneficiary, defendant and Hamilton had a subsequent falling out, defendant threatened Hamilton in front of two different witnesses, and defendant's cellular phone "hit" off towers in the vicinity of the shooting. Codefendant Brown was taken into custody fleeing the scene of the shooting, and cellular phone records showed 245 phone calls between defendant and codefendant Brown's phones in the month before the shooting. This ample evidence connected defendant to codefendant Brown's shooting of Hamilton. Marley's testimony, although it implicated himself and codefendant Brown in the shooting, was not critical as it did not place defendant at the scene of the shooting, and Marley did not identify defendant at trial.

¶ 30 We therefore find that defendant has failed to establish the necessary prejudice to meet the cause and prejudice test for his claim that the State used allegedly false testimony at trial. Accordingly, the circuit court properly denied defendant leave to file his successive postconviction petition. See *Edwards*, 2012 IL 111711, ¶ 22 (a defendant must establish both cause and prejudice).

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.