2019 IL App (1st) 161536-U

No. 1-16-1536

Order filed April 24, 2019

Third 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. 00 CR 21935
	)	
JEREMIAH BETTS,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County denying defendant leave to file a successive postconviction petition is affirmed where defendant failed to satisfy the cause and prejudice test.

¶ 2 Defendant Jeremiah Betts, appeals from the denial of his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). Defendant contends the trial court erred in denying him leave to file his successive petition because he satisfied the cause and prejudice test. We affirm.

¶ 3 Following a 2001 bench trial, defendant was found guilty of first degree murder (720 ILCS 5/9-1(a)(1)(West 2000)); aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2000)); attempt first degree murder (720 ILCS 5/8-4(a), 720 ILCS 5/9-1(a)(1) (West 2000)); and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2000)). Defendant was sentenced to 30 years' imprisonment for first degree murder and a consecutive six year sentence for aggravated battery with a firearm. The other counts merged. We affirmed on direct appeal over defendant's challenge to the sufficiency of the evidence to sustain his convictions. *People v. Betts,* No. 1-02-2406 (2004) (unpublished order under Supreme Court Rule 23). Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised on appeal. See *Betts*, No. 1-02-2406 (2004) (unpublished order under Supreme Court Rule 23).

¶ 4 The facts adduced at trial show that in the evening hours of August 12, 2000, Tiffany Thomas attended a party being held in the yard of a residence located on the 114th block of South Throop Street. Thomas testified that while at the party, she spoke with defendant, who was wearing a white t-shirt and black overalls. She also spoke with defendant's twin brother, who was wearing a white shirt and jeans. Later, at approximately 2 a.m. on August 13, Thomas heard gunshots coming from the corner of 114th and Throop, about a half block away from the party. Thomas gathered her family in order to leave the party. As she was walking toward a friend's car, she saw defendant, his brother and a third individual walking down the middle of 114th Street. Thomas testified that defendant and his brother were holding guns while the third individual was holding his side as though he was injured. Thomas heard defendant say "[W]hich one of you all shot my guy? Why, you all nervous? You all nervous?" Thomas saw defendant

and his brother and the other individual heading toward the party. Thomas backed up toward the house and heard five or six gunshots from the street where defendant was standing. She did not see anyone fire a gun. Thomas went into the house and called the police. She saw that Gregory McCullough was shot and later learned that Angela Wright was also shot. Thomas identified defendant from a photo array and in a lineup. On cross-examination, Thomas misidentified a photo of defendant's twin brother as being defendant.

¶ 5 Gregory McCullough testified that he attended the party on 114th and Throop on August 12, 2000. At approximately 2 a.m. on the 13th, McCullough heard four or five shots and realized he was shot in the stomach. McCullough did not see who was shooting. McCullough was placed in an ambulance with Angela Wright, who died in the ambulance from a gunshot wound to her chest.

¶ 6 Clarence Bibbs testified that he has known defendant and his twin brother Benjamin for about ten years and they "looked like twins." Bibbs identified defendant in court. Bibbs was at the party on 114th and Throop on August 12, 2000, with defendant, Benjamin and Nickele Robinson, who was Benjamin's girlfriend. Bibbs left the party to walk Nickele home. As they were walking toward 114th and Ada Street, shots rang out from a black car and Bibbs was shot in the inner thigh and Nickele was also shot. Bibbs was able to get Nickele to his father's house on 114th and Ada. While Bibbs was at the house on Ada, defendant arrived with a person named Corleone and Bibbs told them that he and Nickele had been shot. Bibbs left the house to return to the party followed by defendant and Corleone. Bibbs testified defendant and Corleone had guns but he did not. Bibbs saw defendant and Corleone enter a van along with Benjamin and drive away. As Bibbs neared the party he saw the van. Bibbs saw defendant, Benjamin and Corleone

exit the van and say, "[Y]ou all like playing with guns?" All three then fired their guns toward the party. Bibbs returned to his father's house and saw defendant, Benjamin and Corleone with their guns out and heard Benjamin say "[Y]eah, we got them. We got some."

¶ 7 On cross-examination, Bibbs testified he was incarcerated in Cook County Jail for a narcotics offense. Bibbs used his brother's name "Robin Streets" when he got into trouble and also "Jason McClure" as alias on "one of his cases" in another courtroom. Bibbs admitted he gave defendant's name at the hospital when he was being treated for his gunshot wound because he had violated parole and knew the police were looking for him.

¶ 8 Shawnnea Robinson testified for defendant. On the night of the shooting, Robinson saw defendant, Benjamin, Bibbs and Corleone, all with guns, leave Bibbs's father's house and, with the exception of Corleone, return about ten minutes later. Robinson heard Benjamin tell Nickele that "I killed all the motherf***, I killed them all." Defendant placed a gun on the table and said "there was some kids there, they would have got killed too."

¶ 9 Defendant testified that on August 12, 2000, he was at a party on 114th and Throop when he heard gunshots. Defendant left the party and went to Bibbs's father's house. Bibbs was already at the house and told defendant he and Nickele were shot. Benjamin arrived and was mad because Nickele was shot. Defendant left the house to return to the party. On his way back, he saw Benjamin, Corleone and Bibbs with guns. Defendant heard shots but did not see who was shooting. Defendant ran back to the Bibbs home and heard Benjamin say "I got one of those motherf*** that did this to you." Corleone also replied "I think I got one too." Defendant learned that the police were looking for him and his brother and turned himself in to the police and participated in a lineup.

¶ 10 After closing arguments, the court found defendant guilty on all counts and sentenced him to 30 years' imprisonment for the first degree murder of Wright and a consecutive term of six years' imprisonment for aggravated battery with a firearm of McCullogh.

¶ 11 On November 30, 2004, defendant filed an initial postconviction petition arguing: (1) ineffective assistance of trial counsel for failing to investigate and call witnesses that would have supported his theory at trial; (2) the recanted testimony of the State's eyewitness (Bibbs) supported his claim of actual innocence; (3) the State failed to tender exculpatory evidence violating his right to a fair trial and due process; and (4) the State's use of perjured testimony (Bibbs) violated his right to due process**.**

¶ 12 Defendant attached to his petition an August 22, 2002, signed statement, purportedly from Bibbs. In the statement, Bibbs said that on August 2, 2002[1], he was interviewed by an assistant public defender and an investigator from the Cook County Public Defender's Office representing Benjamin Betts. Bibbs said that he did not see defendant, Corleone or Benjamin with a gun on the night of the shooting and only gave his original statement dated August 17, 2000, to the police because they threatened to beat him and charge him with the murder. Bibbs also said that he did not tell the assistant state's attorney (ASA), who interviewed him about the police misconduct because the same officer that threatened him was also in the interview room. Bibbs further said that he testified "at the first trial the way he did" because the ASA told him he had to testify to his statement. The statement was signed by Bibbs and the investigator, but was not notarized.

[1] The statement is dated and signed August 22, 2002 however the opening paragraph indicates that the date of the interview is August 2, 2002. The date is initialed by Bibbs and the investigator from the Public Defender's Office suggesting a possible mistake.

¶ 13 In a written order, the trial court summarily dismissed defendant's petition, finding his contentions to be frivolous and patently without merit. With regard to defendant's claim that the State's use of perjured testimony violated his right to due process, the court noted that defendant "supports his allegation of perjury with a signed affidavit by Clarence Bibbs." In summarily dismissing this claim, the court pointed out that: defendant failed to demonstrate that prosecutors knew or should have known that Bibbs perjured himself; and the evidence at trial, which consisted of two independent eyewitnesses linking defendant to the crime, supported his conviction.

¶ 14 Defendant appealed the summary dismissal, arguing his petition alleged the gist of a constitutional claim of actual innocence based on Bibbs' recantation. We affirmed, finding that the summary dismissal of defendant's petition was proper because defendant failed to explain why Bibbs' statement was not in the form of an affidavit. *People v. Jeremiah Betts*, No. 1-05-0211 (2007) (unpublished order under Supreme Court Rule 23).

¶ 15 On October 13, 2015, defendant filed a *pro se* motion for leave to file a successive postconviction petition along with a petition, alleging that: (1) the State knowingly used perjured testimony of Bibbs; (2) the perjured testimony of Bibbs was material to his guilt; (3) he is actually innocent; and (4) his trial counsel was ineffective for failing to investigate and uncover the perjured testimony of Bibbs.

¶ 16 Defendant attached to his motion a notarized affidavit from Bibbs. In the affidavit, dated February 5, 2015, Bibbs averred that, during the investigation of the case against Benjamin, he admitted that his testimony at defendant's trial was a fabrication. Bibbs said he gave a statement to an investigator on August 22, 2002, in which he explained that he implicated defendant after

police threatened to charge him with the murder. Bibbs averred that he perjured himself because he had made prior statements to the police and feared that if he did not testify consistently with those statements, the police would have charged him, and not defendant and his brother Benjamin, with murder. Bibbs further averred that when he testified during Benjamin's trial, which took place after defendant's trial, he testified consistently with his August 22, 2002, statement to Benjamin's attorney and investigator *i.e.* that neither defendant or Benjamin were involved in the shooting. Bibbs explained that his new found religious faith along with his heavy conscience prompted him to come forward and admit that he had falsely implicated defendant. Defendant also attached to his motion a portion of Bibbs' testimony from Benjamin's trial.

¶ 17 Defendant further attached to his motion an affidavit from Nickell Robinson, who averred that, after she was shot and waiting for an ambulance at Bibbs' house, she did not see defendant or Bibbs with a gun. Robinson further averred that defendant's attorney never tried to contact her about what happened on the night of the shooting.

¶ 18 On March 14, 2016, the court entered a written order, denying defendant leave to file his successive postconviction petition. In the order, the court found that defendant had not met the cause and prejudice test for filing a successive postconviction petition. With regard to defendant's claim that the State knowingly used perjured testimony from Bibbs, the court noted that defendant had knowledge of Bibbs' recantation when he filed his initial petition and because he failed to explain why he did not submit a notarized affidavit from Bibbs at that time, he has not shown cause for failing to raise the issue earlier. The court also noted that defendant did not offer any extrinsic evidence to show that Bibbs' trial testimony was false and, as such, Bibbs' recantation only showed that his statements are inconsistent, not that he committed perjury at

trial. The court further noted that defendant also did not show that the State had knowledge that Bibbs committed perjury. Lastly, the court found that even if Bibbs' trial testimony was false, it would not have affected the outcome of the case since other witnesses identified defendant as being involved in the shooting.

¶ 19 On appeal, defendant contends that the trial court erred when it denied him leave to file his successive postconviction petition because his claim that the State knowingly used the perjured testimony of Bibbs satisfied the cause and prejudice test. Our review of the trial court's order denying defendant leave to file his successive postconviction petition is *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 20 We initially note that defendant raised multiple claims in his successive postconviction petition, but, on appeal, he focuses solely on the claim that the State knowingly used the perjured testimony of Bibbs. In so doing, he has abandoned the remaining claims in his petition and forfeited them on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 21 The Act contemplates the filing of only one postconviction petition and "expressly provides that any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived." *People v. Guerrero*, 2012 IL 112020, ¶ 15; 725 ILCS 5/122-3 (West 2014). A defendant seeking to file a successive postconviction petition must first obtain leave of court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010); 725 ILCS 5/122-1(f) (West 2014).

¶ 22 The court may grant defendant leave to file a successive postconviction petition if defendant "demonstrates cause for his failure to bring the claim in his or her initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West

2014); *Tidwell*, 236 Ill. 2d at 152. Cause is demonstrated if a defendant identifies "an objective factor that impeded his or her ability to raise a specific claim during his or her initial postconviction proceedings." *People v. Wrice*, 2012 IL 111860, ¶ 48 (quoting 725 ILCS 5/122-1(f) (West 2014)). Prejudice is established "by demonstrating that the claim so infected the trial that the resulting conviction or sentence violated due process." *Id.* A defendant must establish both elements of the cause and prejudice test in order to prevail. *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 16.

¶ 23 After examining the record, we find that defendant cannot establish either element of the cause and prejudice test. Defendant argues that he has shown cause because his attempt to raise the claim in his initial postconviction petition was dismissed and we affirmed the dismissal on the basis that Bibbs' initial statement did not amount to an affidavit because it was not notarized. In setting forth this argument, defendant correctly points out that since this court's ruling on that appeal, our supreme court has held that the failure to obtain notarization is not a basis to dismiss a postconviction petition. *People v. Allen*, 2015 IL 113135, ¶ 34.

¶ 24 However, as mentioned, cause is established by identifying an objective factor that impeded a defendant's ability to raise a specific claim during his initial postconviction proceeding. See 725 ILCS 5/122-1(f) (West 2014). "Indeed, a ruling on an initial postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in the initial petition." *Guerrero*, 2012 IL 112020, ¶ 17 (citing *People v. Jones*, 191 Ill. 2d 194, 198 (2000)). Therefore, the question here is whether defendant's claim that the State knowingly used perjured testimony could have been raised in his initial petition. See *Guerrero*, 2012 IL 112020, ¶ 17.

¶ 25 The State responds that, not only could this claim have been raised in defendant's initial postconviction petition, but that he presented this issue in his initial petition, which was summarily dismissed by the trial court. Accordingly, the State maintains that he is barred by the doctrine of *res judicata* from raising this claim.

¶ 26 Here, defendant's argument essentially admits, and the record shows, that he raised the claim of the State's knowing use of Bibbs' perjured testimony in his initial petition. Moreover, defendant supported this claim with Bibbs' statement, albeit it was not notarized. As such, given that defendant raised this claim in his initial petition, it is axiomatic that he cannot show cause *i.e.* identify an objective factor that impeded him from raising this claim during his initial postconviction proceedings.

¶ 27 In reaching this conclusion, we briefly note that in summarily dismissing defendant's initial petition, the trial court treated Bibbs' statement as an affidavit and nevertheless rejected defendant's claim that the State knowingly used perjured testimony. Therefore, defendant's argument that he was somehow impeded from raising this claim in his initial postconviction proceeding is unavailing. Although this court, in affirming the summary dismissal, did not consider defendant's claim on the merits, defendant is still unable to satisfy the cause element where he has failed to explain why he did not submit a notarized affidavit from Bibbs during the initial postconviction proceedings.

¶ 28 That said, even assuming defendant showed cause, he cannot establish the prejudice element for filing a successive postconviction petition. As mentioned, prejudice is established "by demonstrating that the claim so infected the trial that the resulting conviction or sentence violated due process." *People v. Wrice*, 2012 IL 111860, ¶ 48 (quoting 725 ILCS 5/122-1(f)

(West 2014)). Defendant argues that he has shown prejudice because the State presented perjured testimony when Bibbs testified and that there is a likelihood that his perjured testimony affected the outcome of his trial.

¶ 29 The State's knowing use of perjured testimony in order to obtain a criminal conviction constitutes a violation of due process of the law. *People v. Olinger*, 176 Ill.2d 326, 345 (1997). A conviction obtained through the knowing use of perjured testimony must be set aside. *Id*. Where the State allows false testimony to go uncorrected, the same principles apply. *Id*. "However, the State's obligation to correct false testimony does not amount to an obligation to impeach its witnesses with any and all evidence bearing up their credibility." *People v. Simpson*, 204 Ill.2d 536, 552 (2001); *People v. Pecoraro*, 175 Ill.2d 294, 312-14 (1997).

¶ 30 Here, defendant did not provide any evidence to establish that the State knew Bibbs' testimony was false. In his affidavit, Bibbs averred that, during the investigation of the case against Benjamin, he admitted that his testimony at defendant's trial was a fabrication. Bibbs said he gave a statement to an investigator on August 22, 2002, in which he explained that he implicated defendant after police threatened to charge him with the murder. Bibbs averred that he perjured himself because he had made prior statements to the police and feared that if he did not testify consistently with those statements, the police would have charged him with the murder. Bibbs further averred that when he testified during Benjamin's trial, which took place after defendant's trial, he testified consistently with his August 22, 2002, statement to Benjamin's attorney and investigator *i.e.* that neither defendant or Benjamin were involved in the shooting. Accepting these allegations as true, there is still no evidence that, at the time Bibbs testified at defendant's trial, the State knew his testimony was false. Simply put, defendant has

not shown that the State was aware that Bibbs' testimony was false. See *People v. Nowicki*, **385** Ill. App.3d 53, 97 (2008) (the State cannot be charged with the obligation to correct the false testimony of a witness when it does not know that the witness' testimony is false.). Because defendant has failed to show that the State knowingly used perjured testimony he cannot establish the prejudice element *i.e.* that the claim so infected the trial that the resulting conviction violated due process.

¶ 31 In reaching this conclusion, we are not persuaded by defendant's reliance on *People v. Rish*, 344 Ill. App.3d 1105, 1115-16 (2003). In *Rish*, the Third District found that "knowledge by police officers is not automatically imputed to the prosecution in a per se manner. Rather the imputation requires an individualized focus of the factual circumstances. Among the factors to be considered would be the reasonableness of such imputation, whether the failure to transmit such knowledge up the informational chain was inadvertent or intentional, and whether any real prejudice occurred." *Rish*, 344 Ill. App.3d at 1116 (citing *People v. Robinson*, 157 Ill.2d 68, 79 (1993)). As stated above, Bibbs' first mention of any type of pressure by the police to implicate defendant was said to an investigator from the Public Defender's office investigating Benjamin's case almost a year after he testified in defendant's case. Accordingly, there is no evidence that the State had knowledge of the perjured testimony at the time of defendant's trial.

¶ 32 In sum, where defendant has failed to satisfy either element of the cause and prejudice test the circuit court did not err in denying him leave to file a successive postconviction petition. See *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 32 **(**"Both prongs must be met before leave to file a successive petition will be granted"); 725 ILCS 5/122-1(f) (West 2014).

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

¶ 34 Affirmed.