

2019 IL App (1st) 181117-U
No. 1-18-1117
Order filed September 26, 2019

Fourth Division

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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. 12 CR 12256
)	
SAMER AL-RABADI,)	Honorable
)	Kerry M. Kennedy,
Defendant-Appellant.)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Burke concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's motion for leave to file a successive postconviction petition was properly denied when he was not serving any part of his sentence at the time he filed the motion and therefore lacked standing to invoke the Post-Conviction Hearing Act.
- ¶ 2 Defendant Samer Al-Rabadi appeals from the denial of his motion for leave to file a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2018)).¹ On appeal, defendant contends that the circuit court erred when it denied him leave to file the successive petition alleging that counsel on direct appeal was ineffective for failing to argue that trial counsel had a conflict of interest. We affirm.

¶ 3 Following a joint bench trial with codefendants, Iklass and Abeer, who were his sisters, defendant was found guilty of felony retail theft and sentenced to two years of probation. We set forth the facts of the case in defendant's direct appeal (*People v. Alrabadi*, 2014 IL App (1st) 130001-U), and we recite them here only to the extent necessary to the disposition of this appeal.

¶ 4 Defendant and his sisters were charged with felony retail theft following their June 10, 2012 arrest. The matter proceeded to a joint bench trial where an Arabic interpreter was present, and defendant and his sisters were represented by the same attorney. Before trial commenced, trial counsel stated that he had spoken with the siblings about a "possible conflict." The following exchange then took place:

"THE COURT: Have you discussed with each one of these clients the potential conflict here, and you asked them whether or not they still want you to represent them?"

[COUNSEL]: I have, and I have done that on two occasions, earlier this morning, and before our break. Again, all of this was done with the benefit of the Arabic interpreter, and I believe, all three have indicated they wish to go forward. They don't feel there's a conflict. They would like to resolve the matter today."

The court then asked each sibling whether he or she understood that there were "some new developments" regarding statements that "one or all" of the siblings may have made, and that because of these statements each sibling was entitled to a separate attorney. Defendant indicated

¹ Defendant's surname is spelled Al-Rabadi and Alrabadi in the record and in a prior order of this court. Here, we adopt the spelling utilized in the caption of defendant's notice of appeal.

that he understood. The court then asked whether defendant understood that he could waive that conflict and proceed with trial counsel or retain another attorney. Defendant indicated that he understood, and that he had discussed the issue with trial counsel. Defendant then stated that he wanted trial counsel to represent him. After examining all three siblings, the trial court found that they had the right to waive any potential conflict, and “knowingly” waived their right to have different attorneys.

¶ 5 The evidence at trial established that a loss prevention officer at a Sears store observed defendant and his sisters, via a closed-circuit television system, enter an elevator with certain items in their hands, exit the elevator without the items, and leave the store without making any purchases. The loss prevention officer followed the siblings to the parking lot and observed them with shopping bags containing the items they had in the elevator. Police were then notified. A police officer testified that defendant stated that he wished to take the blame for the incident because his sister Iklass was ill and had children. At the close of the State’s case, the trial court granted trial counsel’s motion for a directed finding with regard with Abeer. Although defendant testified that certain outfits were inadvertently not paid for, he was found guilty of felony retail theft.² On December 5, 2012, defendant was sentenced to two years of probation. The scheduled termination date for defendant’s probation was December 4, 2014.

¶ 6 On direct appeal, defendant, represented by new private counsel, challenged the sufficiency of the evidence. We affirmed. See *Alrabadi*, 2014 IL App (1st) 130001-U.

¶ 7 In August 2013, defendant filed a motion for postconviction relief through new counsel alleging, in pertinent part, that trial counsel was operating under a conflict of interest when the

² The record reflects that Iklass was also found guilty of felony retail theft, and sentenced to two years of probation. She is not a party to this appeal.

State revealed “on the eve of trial” that defendant made statements that implicated himself but exculpated his sisters, and there was evidence that each sibling committed different acts in furtherance of the offense. The petition further alleged that trial counsel failed to obtain a written acknowledgment that counsel had advised the siblings of their right to conflict-free representation. The petition finally alleged that although the trial court “advised” the siblings as to “whether they were waiving the potential or actual conflict,” defendant was not “able to process” the court’s words because he was “too stressed” and had only a “marginal” command of the English language.

¶ 8 The circuit court summarily dismissed the petition as frivolous and patently without merit in a written order. The court noted that the petition’s allegations were contradicted by the record when the trial court admonished defendant regarding the potential conflict and defendant then stated that he wanted trial counsel to represent him, and an Arabic translator was present at trial. This judgment was affirmed on appeal. See *People v. Al-Rabadi*, 2015 IL App (1st) 140118-U.

¶ 9 In May 2014, defendant filed a motion for early termination of probation, alleging that he had complied with the terms of probation, and had obtained employment outside the United States that he wished to begin as soon as possible. The trial court entered an order terminating defendant’s probation satisfactorily on December 4, 2014.

¶ 10 In March 2018, defendant filed, through different counsel, a motion for leave to file a successive petition for postconviction relief. The petition alleged that defendant’s trial counsel had an actual conflict of interest and that defendant was denied the effective assistance of appellate counsel when counsel failed to raise this issue on direct appeal. The circuit court denied defendant leave to file the successive postconviction petition. Defendant now appeals.

¶ 11 On appeal, defendant contends that the circuit court erred when it denied him leave to file a successive postconviction petition alleging counsel on direct appeal was ineffective for failing to argue that his trial counsel operated under a conflict of interest, specifically, in arguing the motion for a directed finding.

¶ 12 The Act contemplates the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2018)), 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.*

¶ 13 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 2018). “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.

¶ 14 Before reaching the merits of defendant’s claim on appeal, we must address the State’s claim that the circuit court properly denied defendant leave to file a successive postconviction petition because his probation terminated several years before he filed the motion at issue and he therefore lacked standing to invoke the Act.

¶ 15 Not every person convicted of a crime has standing to bring claims under the Act. Rather, the Act provides that only a “person imprisoned in the penitentiary may institute a proceeding” pursuant to the Act. 725 ILCS 5/122-1(a) (West 2018). Our supreme court has determined that a defendant is “imprisoned” when his liberty is curtailed in some way by the State because of the criminal conviction that he is attempting to challenge. *People v. Carrera*, 239 Ill. 2d 241, 246 (2010). A defendant’s liberty is curtailed when he is “always on a string, and [the State] may pull the string whenever [it] please[s].” (Internal quotation marks omitted.) *People v. Martin-Trigona*, 111 Ill. 2d 295, 300 (1986).

¶ 16 “[A] defendant retains standing under the Act so long as he is challenging a conviction from which he continues to serve some form of sentence, such that his liberty would be directly affected by invalidating his conviction.” *People v. Stavenger*, 2015 IL App (2d) 140885, ¶ 9. See also *People v. Pack*, 224 Ill. 2d 144, 147, 152 (2007) (a defendant sentenced to aggregate term of 67 years’ in prison could bring a claim under the Act 13 years after sentencing, challenging a conviction that resulted in a 7-year sentence, because invalidation of that conviction would advance his release date); *Martin-Trigona*, 111 Ill. 2d at 300 (defendant who posted appeal bond had standing to file postconviction petition because he could not leave the state without the court’s permission, leave the country under any circumstances, or change his residence without restrictions); *People v. Correa*, 108 Ill. 2d 541, 546 (1985) (defendant who was serving a term of mandatory supervised release had standing to file postconviction petition, as the Department of Corrections retained custody of, and still supervised, defendant).

¶ 17 However, “the Act and its remedies are not available to defendants who have completed their sentences and merely seek to purge their criminal records.” *People v. Rajagopal*, 381 Ill.

App. 3d 326, 330 (2008). A defendant who is no longer serving any part of his sentence lacks standing to bring a claim under the Act. *Carrera*, 239 Ill. 2d at 243-44, 257 (defendant who was subject to deportation but had completed probation lacked standing to bring a claim under the Act); *Stavenger*, 2015 IL App (2d) 140885, ¶ 12 (defendant who completed his sentence but had to register as sex offender lacked standing to bring a claim under the Act).

¶ 18 Here, defendant's sentence ended on December 4, 2014, when the trial court entered an order that his probation was completed satisfactorily. Defendant filed the instant motion for leave to file a successive postconviction petition in March 2018, more than three years later. At that point, invalidating defendant's conviction would not have affected his liberty. Accordingly, defendant lacked standing to file a postconviction petition in 2018 because he was no longer completing any part of his sentence.

¶ 19 Defendant relies on *People v. Bailey*, 2017 121450, ¶ 15, to argue that pursuant to section 122-1(f) of the Act, "it is only the cause and prejudice test that determines whether a motion to file a successive petition should be granted." We disagree.

¶ 20 The issue in *Bailey* was not whether the defendant had standing under the Act to file a successive postconviction petition; rather, "the single issue" before our supreme court was whether the denial of the defendant's motion for leave to file a successive postconviction petition must be reversed when "the circuit court permitted the State to provide input on the merits of the motion and petition at the cause and prejudice stage." *Id.* ¶ 12. There was no discussion of defendant's standing to invoke the Act. Moreover, defendant cites no authority for the proposition that a defendant has standing to file a successive postconviction petition once he has completed his sentence. To the contrary, in *People v. Dent*, 408 Ill. App. 3d 650 (2011), we

found that a defendant who had completed his prison sentence and parole lacked standing to file a successive postconviction petition attacking his conviction. *Dent*, 408 Ill. App. 3d at 651, 654.

¶ 21 Therefore, because defendant was no longer serving any portion of his sentence when he filed a motion for leave to file a successive postconviction petition, he had no standing to seek postconviction relief (*Stavenger*, 2015 IL App (2d) 140885, ¶ 9), and the circuit court properly denied him leave to file the petition.

¶ 22 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.