2019 IL App (1st) 181586-U

FOURTH DIVISION
September 30, 2019

No. 1-18-1586

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Respondent-Appellee,	)	
	)	
v.	)	No. 01 CR 14980
	)	
DENNIS SCOTT,	)	
	)	Honorable
	)	Colleen A. Hyland,
Petitioner-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County denying the petitioner leave to file a successive postconviction petition where the petitioner failed to assert a claim of actual innocence and his sentence did not violate the eighth amendment of the United States Constitution.

¶ 2 Petitioner Dennis Scott, age 21 at the time of this occurrence, appeals the circuit court's denial of his motion for leave to file a successive petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). On appeal,

petitioner contends the circuit court erred in denying him leave to file a successive postconviction petition where (1) he stated a claim of actual innocence, and (2) his 67-year sentence violates the eighth amendment of the United States Constitution in light of Supreme Court decisions issued after his sentencing hearing. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This matter appears before us on appeal for the fourth time after the court affirmed petitioner's conviction on direct appeal (*People v. Scott*, No. 1-04-3487 (2006) (unpublished order under Supreme Court Rule 23)), the dismissal of his postconviction petition (*People v. Scott*, 2011 IL App (1st) 100284-U), and the circuit court's denial of his motion for leave to file a successive postconviction petition (*People v. Scott*, 2015 IL App (1st) 133081-U).

¶ 5 The facts of this matter are well established as set forth previously by this court. Following a 2004 jury trial, petitioner was convicted of first degree murder, attempted robbery and burglary for killing 85-year-old Viola Gaecke by repeatedly stomping on her head after she walked in on petitioner burglarizing her garage. The circuit court sentenced petitioner to a term of 60 years' imprisonment for the murder, and 7 years each for the attempted robbery and burglary. The 7-year terms ran concurrently with each other and consecutive to the murder sentence for an aggregate sentence of 67 years' imprisonment.

¶ 6 On direct appeal, petitioner alleged the circuit court erred when it failed to grant any of his pretrial motions, including motions to quash his arrest for lack of probable cause, to invalidate a search of his residence based on his involuntary consent, and to suppress his confession based on the police's refusal to honor his request for counsel. Petitioner further contended his 60-year sentence, in lieu of the death penalty sought by the State, was the result of the circuit court's improper consideration of invalid evidence and its failure to consider his

rehabilitative potential. This court affirmed petitioner's conviction and sentence (*Scott*, No. 1-04-3487 (unpublished order under Supreme Court Rule 23)) and our supreme court denied his petition for leave to appeal (*People v. Scott*, 224 Ill. 2d 589 (2007) (table)).

¶ 7 Petitioner subsequently filed a *pro se* petition for postconviction relief under the Act in 2007, arguing he was denied effective assistance of trial counsel where his attorney failed to raise certain arguments in the pretrial motions. The circuit court advanced the petition to second-stage proceedings and petitioner obtained private counsel. Petitioner's attorney filed an amended petition arguing only that the prosecution made improper prejudicial comments in its closing and rebuttal arguments. The circuit court dismissed the petition on the State's motion and this court affirmed. *Scott*, 2011 IL App (1st) 100284-U. Petitioner then filed a petition for writ of *habeas corpus* relief in federal court, which was denied.

¶ 8 In 2013 petitioner filed a *pro se* motion for leave to file a successive postconviction petition arguing he was denied effective assistance of trial counsel where his attorney knew petitioner was taking psychotropic medication at the time of trial and failed to request a fitness hearing. The trial court denied petitioner leave to file the successive petition and this court affirmed. *Scott*, 2015 IL App (1st) 133081-U.

¶ 9 Petitioner filed the instant motion for leave to file a successive postconviction petition through counsel in 2017 in which he raised two claims. First, petitioner argued he obtained newly discovered evidence demonstrating his innocence, namely an affidavit from an alibi witness, Jennifer Hill (Hill), indicating she was with petitioner and their friend, Tanya Hines (Hines), when the murder occurred. He further asserted he was unable to obtain Hill's affidavit sooner because (1) he could not afford an investigator and (2) Hill had not previously been contacted by any of his previous attorneys.

¶ 10 Second, petitioner contended his sentence violated the eighth amendment of the United States Constitution in light of his borderline IQ, attention deficit hyperactive disorder, post-traumatic stress disorder and depression, which rendered him less culpable than other adult offenders. Petitioner's assertion that he experienced depression and post-traumatic stress disorder was based on his mother's affidavit indicating petitioner developed these conditions after being arrested for the instant offense. Petitioner maintained he was relying on the Supreme Court holdings in *Miller v. Alabama*, 567 U.S. 460, 469, 489 (2012), *Graham v. Florida*, 560 U.S. 48, 67, 75, 82 (2010), *Roper v. Simmons*, 543 U.S. 551, 567, 578 (2005), and *Atkins v. Virginia*, 536 U.S. 304, 306, 321 (2002), and he therefore could not have brought his claim at an earlier proceeding. After reviewing the motion, the circuit court denied petitioner leave to file the successive postconviction petition. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, petitioner makes the same two arguments that he raised in his motion for leave to file his successive postconviction petition: he obtained newly discovered evidence and his sentence violates the eighth amendment of the United States Constitution in light of Supreme Court decisions issued after his sentencing hearing.

¶ 13 The instant proceeding involves petitioner's second motion for leave to file a successive postconviction petition after his initial postconviction petition was dismissed. The Act contemplates the filing of only one postconviction petition. *People v. Edwards*, 2012 IL 111711, ¶ 22; 725 ILCS 5/122-1(f) (West 2016). Thus, a petitioner seeking to institute a successive postconviction proceeding must first obtain "leave of court." *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Our supreme court has provided two bases upon which the bar against successive proceedings may be relaxed. *Edwards*, 2012 IL 111711, ¶ 22. The first basis is when a

petitioner establishes both "cause and prejudice" for failing to raise the claim earlier. *Id*.; *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 28. The second is the "fundamental miscarriage of justice" exception, under which the petitioner must demonstrate actual innocence. *Edwards*, 2012 IL 111711, ¶ 23. As each issue raised by petitioner invokes a different exception, we will discuss them in more detail as we address his claims below.

¶ 14 A. Petitioner's Claim of Actual Innocence

¶ 15 Petitioner contends he obtained newly discovered evidence which proves he was innocent of the crime charged. His claim is based on the affidavit of Hill, who averred she was with petitioner and Hines inside petitioner's residence when the murder occurred.

¶ 16 When a petitioner claims actual innocence, the question is whether his petition and supporting documentation set forth a colorable claim; that is, whether they raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id*. ¶¶ 24, 31, 33. The evidence supporting the claim of actual innocence must be (1) newly discovered, (2) material and not merely cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *Id*. ¶ 32. Newly discovered evidence is defined as "evidence that was unavailable at trial and could not have been discovered sooner through due diligence." *People v. Harris*, 206 Ill. 2d 293, 301 (2002). Moreover, "[e]vidence is considered cumulative when it adds nothing to what was already before the jury." *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). We review the denial of leave to file a successive petition claiming actual innocence *de novo*. *People v. Jones*, 2016 IL App (1st) 123371, ¶ 71.

¶ 17 Initially, we acknowledge that although petitioner makes a claim of actual innocence, he analyzes his claim under the cause and prejudice test. Our supreme court in *Edwards*, however, rejected such an approach and instead evaluated the petitioner's claim of actual innocence under

the standard set forth above. *Edwards*, 2012 IL 111711, ¶ 31-32. We therefore review whether petitioner here set forth a colorable claim of actual innocence under the aforementioned principles. *Id*. For the reasons discussed below, we find petitioner cannot satisfy any of the three elements of a freestanding claim of actual innocence.

¶ 18 In reviewing petitioner's claim of actual innocence, we find *Edwards* to be instructive. *Id*. ¶¶ 32-41. In *Edwards*, the defendant requested leave to file a successive postconviction petition alleging actual innocence based on newly discovered evidence which he claimed was unavailable to him at trial. *Id*. ¶¶ 12, 35. The defendant submitted with the petition two alibi affidavits establishing he was with the affiants, rather than at the location of the offense, when the offense occurred. *Id*. ¶ 12. The affiants further averred they refused to cooperate with investigators prior to trial and they refused to testify on the defendant's behalf. *Id*. The circuit court denied the defendant leave to file the successive petition, finding he failed to satisfy the cause-and-prejudice test. *Id*. ¶¶ 14, 31. The appellate court affirmed, concluding the petitioner failed to state a claim of actual innocence. *Id*. ¶¶ 15-16.

¶ 19 On appeal, our supreme court rejected the defendant's contention that the alibi evidence was unavailable to him due to the affiants' refusal to cooperate with investigators or testify at trial. *Id*. ¶¶ 35-37. The court observed that the defendant knew of the alibi at the time of trial, yet there was no indication he subpoenaed the witnesses nor was there any explanation as to why subpoenas were not issued. *Id*. The court found the defendant therefore could have discovered the evidence sooner through the exercise of due diligence and, accordingly, the evidence was not newly discovered. *Id*. ¶ 37. Because the defendant failed to present newly discovered evidence, the court concluded he failed to assert a claim of actual innocence and did not address whether the evidence was cumulative or conclusive. *Id*. ¶¶ 37-41.

¶ 20 Here, as in *Edwards*, petitioner does not dispute that he knew of his alibi witness at the time of trial and instead argues that the evidence was unavailable to him. See *id.* ¶ 35. Unlike the affiants in *Edwards*, however, in the case at bar Hill averred that (1) she would have cooperated with defense counsel had she been contacted, and (2) at the time of petitioner's trial, she was available and willing to testify on his behalf. See *id.* ¶ 12. Petitioner gives no explanation as to why Hill was not contacted prior to trial or why she was not subpoenaed to testify. As in *Edwards*, petitioner could have discovered the evidence sooner through the exercise of due diligence. *Id.* ¶ 35-37. Accordingly, the evidence is not newly discovered and fails to support petitioner's claim of actual innocence. *Id.* ¶ 37; see also *Harris*, 206 Ill. 2d at 301 (alibi witnesses' affidavits were not newly discovered evidence where defendant was allegedly with the witnesses when the offense occurred).

¶ 21 In addition, petitioner cannot demonstrate the evidence is not merely cumulative as required to support a claim of actual innocence. See *Edwards*, 2012 IL 111711, ¶ 32. As stated, "[e]vidence is considered cumulative when it adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335. At his trial, petitioner presented the alibi testimony of Hines, who testified she was with petitioner and Hill at petitioner's residence when the murder occurred. In the affidavit appended to petitioner's instant successive petition, Hill merely confirmed she was with Hines and petitioner when the offense occurred. Hill's affidavit adds nothing to what was already before the jury and is therefore cumulative. See *id.*

¶ 22 Furthermore, Hill's affidavit is not of such a conclusive character that it would likely change the result on retrial. See *Edwards*, 2012 IL 111711, ¶ 32. Generally, " 'actual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [Citation.] Rather, the hallmark of 'actual innocence' means 'total

vindication' or 'exoneration.' " *People v. Collier*, 387 Ill. App. 3d 630, 636-38 (2008). An allegation of actual innocence is not intended to question the strength of the State's case. *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008).

¶ 23 The record here reveals that the State produced substantial credible evidence demonstrating petitioner committed the murder. According to the record, petitioner confessed to the crime, both orally and in writing; his fingerprints were discovered inside of the victim's garage; police discovered clothes in petitioner's residence matching the description of the attire worn by the offender; the shoes discovered in petitioner's residence contained the victim's blood; and the pants discovered in petitioner's residence contained the victim's blood and petitioner's DNA. Moreover, a witness observed the offender flee from the victim's garage moments after the murder, and this witness, as well as two additional witnesses, observed an individual earlier that day wearing the clothes that were discovered in petitioner's residence. One of the witnesses further observed the individual enter petitioner's residence. These three witnesses viewed petitioner in a showup, prior to which petitioner attempted to alter his appearance by wearing glasses, changing his clothes, and shaving his facial hair, head, or both. As a result, at the showup the witnesses stated petitioner had the same features as the individual they observed earlier, but he had changed his appearance or could be the individual's brother.

¶ 24 In addition, the record demonstrates that Hines testified she was alone with petitioner in his residence for two hours that day while Hill was in another room. Hill, however, contradicted Hines' testimony in her affidavit by attesting that she "never lost sight" of petitioner while she and Hines were at his residence. In light of the evidence produced at trial, including petitioner's confession, his fingerprints at the scene of the offense, the victim's blood on petitioner's shoes, and Hines' testimony which was inconsistent with Hill's affidavit, we find the evidence

submitted by petitioner is not so conclusive that it would likely change the result on retrial. See *Edwards*, 2012 IL 111711, ¶ 32. Petitioner's claim of actual innocence merely challenges the strength of the State's case and is not evidence of "total vindication." See *Collier*, 387 Ill. App. 3d at 636-38; *Coleman*, 381 Ill. App. 3d at 568.

¶ 25 As petitioner's evidence is cumulative, not newly discovered, and not of such a conclusive character that it would likely change the result on retrial, he has failed to assert a colorable claim of actual innocence. See *Edwards*, 2012 IL 111711, ¶¶ 32, 37; *Ortiz*, 235 Ill. 2d at 335; *Collier*, 387 Ill. App. 3d at 636. Accordingly, we affirm the circuit court's denial of petitioner's motion for leave to file a successive postconviction petition based on this claim. See *id*.

¶ 26 B. Sentencing

¶ 27 Petitioner next contends his sentence violates the eighth amendment's bar against cruel and unusual punishment in light of (1) Supreme Court decisions issued after his sentencing hearing and (2) his alleged lessened culpability. Specifically, petitioner relies on *Miller*, *Graham*, *Roper*, and *Atkins*, wherein the Supreme Court held the eighth amendment prohibits imposing (1) a mandatory life sentence without the possibility of parole upon juvenile homicide offenders without consideration of mitigating circumstances (*Miller*, 567 U.S. at 489), (2) a life sentence without the possibility of parole upon juvenile non-homicide offenders (*Graham*, 560 U.S. at 82), (3) capital punishment upon juvenile homicide offenders (*Roper*, 543 U.S. at 578), and (4) capital punishment upon intellectually disabled offenders (*Atkins*, 536 U.S. at 321).

¶ 28 As stated above, the bar against successive postconviction proceedings may be relaxed where a petitioner establishes both "cause and prejudice" for failing to raise the claim earlier. *Edwards*, 2012 IL 111711, ¶ 22; *Crenshaw*, 2015 IL App (4th) 131035, ¶ 28; 725 ILCS 5/122-

1(f) (West 2016). A petitioner establishes "cause" by identifying an objective factor external to the defense that impeded his efforts to raise his claim in the initial postconviction proceeding. *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002); 725 ILCS 5/122-1(f) (West 2016). To establish "prejudice," the petitioner must demonstrate that the claim not raised in his initial postconviction petition "so infected the entire trial that the resulting conviction or sentence violates due process." *Id*. at 464. Moreover, "leave 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." *People v. Smith*, 2014 IL 115946, ¶ 35. We review the denial of leave to file a successive postconviction petition *de novo*. *People v. Terry*, 2016 IL App (1st) 140555, ¶ 28.

¶ 29 Initially, we acknowledge that issues that could have been raised on direct appeal, but were not, are forfeited. *People v. English*, 2013 IL 112890, ¶ 22. Here, petitioner relies in part on *Atkins*, which held that imposing the death penalty upon intellectually disabled offenders violates the eighth amendment. *Atkins*, 536 U.S. at 321. *Atkins* was decided in 2002. See *Atkins*, 536 U.S. 304. Petitioner's direct appeal, however, was filed in 2004, and thus petitioner could have included a claim pursuant to *Atkins* but did not do so. As a result, petitioner's contention regarding *Atkins* is forfeited. See *English*, 2013 IL 112890, ¶ 22.

¶ 30 Even if we were to consider petitioner's claim, his reliance on *Atkins* is misplaced. Petitioner concedes that he is not intellectually disabled, and *Atkins* is therefore inapplicable. Accordingly, petitioner has failed to demonstrate prejudice from failing to raise his claim earlier. See *Smith*, 2014 IL 115946, ¶¶ 35, 37 (a petitioner cannot demonstrate prejudice where his underlying claim has no merit); *Atkins*, 536 U.S. at 321; *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 31 Petitioner's reliance on *Miller*, *Graham*, and *Roper* is similarly misplaced as these cases

are also inapplicable to petitioner's specific circumstances. See *Miller*, 567 U.S. at 489; *Graham*, 560 U.S. at 82; *Roper*, 543 U.S. at 578. *Miller*, *Graham*, and *Roper* protect juvenile offenders from *de facto* life sentences and capital punishment. *Id*. They were grounded in the Court's concern, based on scientific research about adolescent brain development, that juveniles lack maturity, are more vulnerable to bad influences, and are more amenable to rehabilitation. *Roper*, 543 U.S. at 569-70. But the Court drew a line between juveniles and adults at the age of 18 years; while it acknowledged that the line was arbitrary, it "must be drawn." *Id*. at 574; see also *Miller*, 567 U.S. at 465; *Graham*, 560 U.S. at 74-75; *People v. Harris*, 2018 IL 121932, ¶¶ 56, 60-61. As petitioner was 21 years old at the time of the murder, he falls on the adult side of that line. Since the eighth amendment challenge is therefore meritless, petitioner has failed to establish prejudice for failing to raise his claim earlier. See *id*.; *Smith*, 2014 IL 115946, ¶¶ 35, 37; *Pitsonbarger*, 205 Ill. 2d at 464. Accordingly, the circuit court properly denied petitioner leave to file his successive postconviction petition. See *id*.

¶ 32 III. CONCLUSION

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

¶ 34 Affirmed.