2019 IL App (4th) 150149-U

NO. 4-15-0149

FILED
February 14, 2019
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
MARLONE D. PENDLETON,	)	No. 09CF415
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly denied defendant's request for leave to file a successive postconviction petition where defendant failed to satisfy the cause-and-prejudice test.

¶ 2 In December 2009, a jury found defendant, Marlone D. Pendleton, guilty of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (d)(1) (West 2008)). On appeal, this court affirmed his conviction and sentence. In March 2012, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7) (West 2010)), which the trial court summarily dismissed. On appeal, this court vacated certain fines and fees pursuant to an agreed motion for summary remand. Defendant subsequently filed two requests for leave to file successive postconviction petitions in October 2012 and May 2013, both of which the trial court denied. Defendant appealed, but in August 2014, this court allowed defendant's motion to dismiss his consolidated appeals.

¶ 3 In January 2015, defendant filed a third request for leave to file a successive postconviction petition, which the trial court denied. Defendant appeals, arguing (1) the trial court erred by denying him leave because he satisfied the cause-and-prejudice test and (2) alternatively, the cause-and-prejudice requirements of the Act are unconstitutional. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Defendant's Jury Trial, Conviction, and Direct Appeal

¶ 6 In March 2009, the State charged defendant by information with one count of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2), (d)(1) (West 2008)). The State additionally charged four men, Rajon Campbell, Johnnie Campbell, Cortez Ross, and Mario Jackson, in connection with the alleged sexual assault. In November and December of 2009, defendant was tried in a joint jury trial with his four codefendants.

¶ 7 Testimony at trial showed that in March 2009, a 16-year-old girl, S.C., left her home after midnight to meet her boyfriend, codefendant Johnnie, who she had known for several years. S.C. testified that she and Johnnie went into the garage to talk. At some point, several other young men arrived, including defendant. S.C. stated that someone turned off the lights in the garage, and she was then sexually assaulted by several different men. She testified she knew she was assaulted by several different people because she could discern the differences in body weight on top of her. S.C. alleged that defendant was one of those individuals. Afterwards, S.C. went home and woke up her sister, Tara, to tell her what happened. The next day, Tara and S.C. went to Central High School in Champaign where they were students. At some point in the day, police officers caught Tara carrying several knives at Westside Park because she apparently intended to confront the defendants about the sexual assault. When police approached S.C. to

discuss the incident with Tara, S.C. began having difficulty breathing. The officers called an ambulance, and S.C. was transported to a hospital where she received a physical examination.

¶ 8 Lisa Moment, a nurse who treated S.C. after the incident, testified that she prepared a sexual assault kit on S.C. that included various swabs used to preserve deoxyribonucleic acid (DNA) present on the victim's body. Moment testified that S.C. had some bruising on her neck, abrasions on her hand, and extensive vaginal tears and bleeding. Detective Mary Bunyard also testified. Detective Bunyard indicated that she spoke with S.C. at the hospital, and S.C. told her that defendant was one of the men who assaulted her. Detective Bunyard obtained a DNA swab from defendant, which was tested and compared to DNA evidence gathered from the crime scene and the kit prepared by Moment. Dana Pitchford, a forensic scientist with the Illinois State Police, testified to locating defendant's DNA on various pieces of evidence linking defendant to the alleged sexual assault, including two condoms that also contained S.C.'s DNA, underwear that belonged to S.C., and swabs taken from S.C.'s person.

¶ 9 Defendant testified on his own behalf. He admitted being present in Johnnie's garage on the evening of the alleged incident. He spoke with S.C. on the phone and by text message that evening and arranged to meet with her after her parents went to bed. S.C. arrived at Johnnie's house sometime after midnight, and he directed her into the garage. He then smoked outside with his codefendants Cortez, Rajon, and Mario while S.C. waited in the garage. When he was finished, he entered the garage and spoke with S.C. on the couch for awhile when the conversation turned sexual. He stated that S.C. removed her clothing, defendant produced and put on a condom, and they proceeded to have consensual sex. Defendant indicated that S.C. did not object to the sexual contact in any way. At some point he noticed blood on the condom and

asked S.C. if she was on her period, to which she replied, "[N]o." He removed the first condom, applied another, and they continued to have sex. After a few minutes he noticed more blood, at which point he stopped. S.C. got dressed and declined defendant's offer to walk her home.

¶ 10 At the end of defendant's direct examination, the following colloquy occurred between defendant and his counsel:

> "Q. Now, at some point after this incident, you had occasion to speak with the police, did you not?
>
> A. I—I mean, they—they offered me to speak to them, but I don't know, I had, I didn't want to talk.
>
> Q. Okay. So you—you started to talk to them but you did not—
>
> A. Yes, sir—
>
> Q. —have any formal interview?
>
> A. No, I did not talk to them."

¶ 11 On cross-examination, the following colloquy occurred between defendant and the State's attorney:

> "Q. The police—you mentioned it in response to one of Mr. Welch's questions, they talked to you about this?
>
> A. Yes, sir, they did.
>
> Q. They gave you an opportunity to tell your story?
>
> A. Yes, sir.
>
> Q. You never told them anything that you've told us here today?
>
> A. No, sir."
>
> Defense counsel raised no objections.

¶ 12 On redirect examination, the following colloquy occurred between defendant and defense counsel:

"Q. Mr. Pendleton, you were given an opportunity to tell your side of the story?

A. Yes, sir.

Q. And you did not?

A. No, sir, I didn't.

Q. Why not?

A. Basically, I was just, like, really, to be truthful and honest, I was afraid that they probably change my story around."

¶ 13 While testifying in rebuttal, Detective Bunyard recounted that on March 16, 2009, she had the opportunity to interview defendant at the Champaign police department along with Detective Mark Huckstep. She said the interview was audio recorded and a transcript was prepared in connection with the interview. Detective Bunyard identified a disk marked as People's Exhibit 18 as the recording of her interview with defendant, which the court admitted into evidence and played for the jury without objection. The audio recording memorialized the following conversation between Detective Bunyard, Detective Huckstep, and defendant:

"Huckstep: What are you reading there?

Defendant: I'm reading the bible.

* * *

Bunyard: They're very good, those are very good books. They have a lot to say.

Huckstep: So what would God want you to do here?

Defendant: I mean, I know he would want me to tell the truth.

Huckstep: Right.

Defendant: Like, it just, I'm not, I'm not trusting you won't try to, try to (inaudible).

Bunyard: You're not trusting what again?

Defendant: I'm not trusting this.

* * *

Huckstep: You want to [tell your side of the story]? Are you thinking about it or are you ignoring the question? Marlone, here's the thing. Do you want to talk to us or not?

Defendant: No.

Huckstep: You don't want to talk to us? Okay."

¶ 14 On cross-examination, Detective Bunyard stated that when she questioned defendant, she had already arrested him for an outstanding warrant and he was in custody.

¶ 15 During closing argument, the State attorney made the following assertion:

"You heard Detective Bunyard get on the stand. 'There's always two sides to a story. Give us your story. Tell us what happened. Please.' They pleaded with Mr. Pendleton. 'Tell us what happened.' And what did he do? He didn't do a darn thing. Didn't tell them anything. Certainly didn't tell them this was consensual. Certainly didn't tell them that he was the one that walked down to meet [S.C.] that morning. But he gets on the stand and he has to say something at this point because we've got his DNA on two condoms. *** He's got to come up with something and he comes up with consent."

Defense counsel raised no objections.

¶ 16 At the close of this evidence, the jury found defendant guilty of aggravated criminal sexual assault and acquitted defendant's four codefendants.

¶ 17 In January 2010, the trial court sentenced defendant to 26 years in prison with credit for 304 days previously served. Defendant appealed, arguing that his sentence was excessive. This court affirmed. *People v. Pendleton*, 2011 IL App (4th) 100186-U.

¶ 18 B. Postconviction Proceedings

¶ 19 In March 2012, defendant filed a *pro se* postconviction petition under section 122-1 of the Act (725 ILCS 5/122-1 (West 2010)), alleging that S.C. gave perjured testimony at defendant's trial. The trial court summarily dismissed the petition as frivolous and patently without merit. In April 2012, defendant appealed (case No. 4-12-0377).

¶ 20 In October 2012, while his appeal was pending, defendant sought leave to file a successive *pro se* postconviction petition pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)), alleging (1) trial counsel was ineffective for failing to investigate the crime scene and potential witnesses and (2) appellate counsel was ineffective for failing "to provide all records on the issues ***." The trial court denied defendant's motion, finding that there was "nothing in the Defendant's request to file a successive petition that indicates he was impeded in an opportunity to raise these issues in his direct appeal or in his original postconviction petition." In November 2012, defendant appealed that decision (case No. 4-12-1084).

¶ 21 In May 2013, while the other two appeals were pending, defendant filed a third *pro se* pleading, alleging that (1) his sentence did not conform to the statutory requirements and was therefore void and (2) the mandatory supervised release (MSR) and truth-in-sentencing statutes were unconstitutional. The trial court construed the pleading as a request to declare

section 3-6-3 of the Unified Code of Corrections (730 ILCS 5/3-6-3 (West 2012)) unconstitutional and denied the request. Defendant appealed (case No. 4-13-0499).

¶ 22 In June 2013, upon an agreed motion for summary remand, this court issued an order in defendant's first collateral appeal vacating certain fines and fees and remanding the case to the trial court for a recalculation of defendant's fines. *People v. Pendleton*, No. 4-12-0377 (June 19, 2013) (order for summary remand). In August 2014, defendant moved to voluntarily dismiss his other pending appeals (case Nos. 4-12-1084 and 4-13-0499), which we allowed.

¶ 23 In January 2015, defendant again sought leave to file a successive postconviction petition. Defendant argued he was denied the effective assistance of trial and appellate counsel. Specifically, he argued that his trial counsel was ineffective for (1) eliciting testimony from defendant regarding his postarrest silence, (2) failing to object to the State's cross-examination of defendant regarding his postarrest silence, (3) failing to object to Detective Bunyard's testimony regarding defendant's postarrest silence, and (4) failing to object to the State's reference to defendant's postarrest silence during closing argument. He further argued that his appellate counsel was ineffective for failing to raise on direct appeal the issues of (1) the State's use of his postarrest silence at trial and (2) trial counsel's performance in failing to object. In February 2015, the trial court denied defendant's request, finding that defendant failed to satisfy the cause-and-prejudice test and did not set forth a colorable claim of actual innocence.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, defendant argues the trial court erred in denying him leave to file a successive postconviction petition because he established both cause and prejudice for his failure to raise his claims in the initial postconviction proceeding. Specifically, defendant contends that

as a layperson, he did not know the State's use of his postarrest silence at trial violated his constitutional rights. Defendant asserts this lack of knowledge impeded him from raising this issue in his first postconviction proceeding where his trial, appellate, and prior postconviction attorneys all neglected to identify the issue. Alternatively, defendant argues the Act's cause-and-prejudice requirements (725 ILCS 5/122-1(f) (West 2014)) are unconstitutional because they violate defendant's constitutional right to procedural due process.

¶ 27 A. Standard of Review

¶ 28 The Act provides a means to collaterally attack a criminal conviction based on 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). The Act contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). Any claim not raised in the original or amended petition is forfeited. 725 ILCS 5/122-3 (West 2014). Accordingly, a defendant must obtain leave from the court in order to file a successive petition under the Act. *Id.* § 122-1(f).

¶ 29 To obtain leave to file a successive postconviction petition, a defendant must either (1) show cause and prejudice for the failure to raise a claim in his or her earlier petition or (2) set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 22-24, 969 N.E.2d 829; 725 ILCS 5/122-1(f) (West 2014). This court reviews the trial court's denial of leave to file a successive petition *de novo*. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 31, 19 N.E.3d 142.

¶ 30 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." (Internal quotation marks omitted.) *Id.* ¶ 33All citizens are charged with knowledge of the law,

and our supreme court has held that subjective ignorance of the law is not an objective factor constituting cause for a defendant's failure to raise a constitutional claim in his initial postconviction petition. *People v. Evans*, 2013 IL 113471, ¶ 13, 989 N.E.2d 1096; see also *People v. Jones*, 2013 IL App (1st) 113263, ¶ 25, 3 N.E.3d 891 ("Merely failing to recognize your claim cannot be an objective factor external to the defense that prevents one from bringing the claim in the initial postconviction petition."). Finally, prejudice is "an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, Ill. 2d at 464.

¶ 31 If the defendant fails to show cause and prejudice, the court will excuse defendant's failure if necessary to prevent a fundamental miscarriage of justice. *Id.* at 459. A defendant must show actual innocence to demonstrate such a miscarriage of justice. *Id.* While defendant asserted a claim of actual innocence in his petition before the trial court, he has abandoned this claim on appeal, and thus, we decline to consider it. See, *e.g.*, *People v. Jones*, 2017 IL App (1st) 123371, ¶ 60, 87 N.E.3d 938.

¶ 32 B. This Case

¶ 33 Defendant contends that the State improperly used his postarrest silence to attack his credibility at trial in violation of his constitutional rights under *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); U.S. Const., amend. XIV, § 1. In *Doyle*, the United States Supreme Court held that a prosecutor's use for impeachment purposes of a criminal defendant's silence at the time of arrest and after receiving *Miranda* warnings violates the due process clause of the fourteenth amendment. *Doyle*, 426 U.S. at 618. Illinois courts have consistently held that prosecutorial comments concerning a defendant's postarrest silence are generally improper, one exception being impeachment of a defendant's testimony with a prior inconsistent statement. *People v.*

Pegram, 124 Ill. 2d 166, 176, 529 N.E.2d 506, 510 (1988); see also *People v. Simmons*, 293 Ill. App. 3d 806, 811, 689 N.E.2d 418, 422 (1998).

¶ 34 Although we express serious concern as to the propriety of the State's comments under *Doyle*, defendant cannot demonstrate cause for his failure to raise this issue in his initial postconviction petition. Defendant asserts in his petition that "[t]here is cause for the petitioner's failure to bring the claims contained in the current petition, in that he did not know he had this issue until [his] post conviction appellate lawyer brought it to [his] attention when she was discussing the law and the facts of my case." Defendant acknowledges that ignorance of the law does not constitute cause under *Evans*. However, he argues this rule should not apply to him because his claim involves a more obscure constitutional doctrine. He asserts his case is distinguishable from *Evans* because that case involved the defendant's ignorance of a particular statute rather than United States Supreme Court precedent. See *Evans*, 2013 IL 113471, ¶ 13. The *Evans* court recognized no such exception in its holding, and we decline to do so in this case. "[I]f merely failing to recognize a claim when in full possession of the necessary facts would suffice as cause under the cause-and-prejudice test, the statutory bar would be swallowed by the exception as all one would have to do was claim ignorance to avoid it." *Jones*, 2013 IL App (1st) 113263, ¶ 25. Defendant possessed the necessary facts to support his *Doyle* claim once it allegedly occurred, and he points to nothing external to the defense that impeded his ability to raise the issue in his initial petition. Accordingly, defendant cannot demonstrate cause as a matter of law, and the trial court properly denied him leave to file a third successive petition. Given defendant cannot demonstrate cause, we decline to address whether his previous attorneys' failures to raise his *Doyle* claim prejudiced him. See *id.* ¶ 32.

¶ 35 C. Defendant's Alternative Argument

¶ 36 Defendant alternatively argues that the cause-and-prejudice requirements of the Act (725 ILCS 5/122-1(f) (West 2014)) are unconstitutional and asks us to extend the "fundamental miscarriage of justice" exception beyond claims of actual innocence on that basis.

¶ 37 Historically, a fundamental miscarriage of justice is demonstrated by a showing of actual innocence. *Pitsonbarger*, 205 Ill. 2d at 459. Our supreme court has held that "where *** the death penalty is not involved and the defendant makes no claim of actual innocence, Illinois law *prohibits* the defendant from raising an issue in a successive postconviction petition unless the defendant can establish a legally cognizable cause for his or her failure to raise that issue in an earlier proceeding and actual prejudice would result if defendant were denied consideration of the claimed error." (Emphasis added.) *People v. Brown*, 225 Ill. 2d 188, 206, 866 N.E.2d 1163, 1173 (2007). Thus, where our supreme court has chosen to limit the "fundamental miscarriage of justice" exception to claims of actual innocence, this court is bound by that decision. See *id.*at 206-07; *People v. Brown*, 171 Ill. App. 3d 500, 503-04, 525 N.E.2d 1228, 1230 (1988).

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's judgment.

¶ 40 Affirmed.