2019 IL App (4th) 160269-U

NO. 4-16-0269

FILED
April 4, 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 the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DARRELL W. SMITH,	)	No. 09CF1281
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Knecht and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's appeal presents no meritorious issues for review. We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 2 Defendant, Darrell W. Smith, appeals the trial court's denial of his motion for leave to file a successive postconviction petition and a motion to allow deoxyribonucleic acid (DNA) testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2008)). On appeal, the Office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD has filed a motion to withdraw as appellate counsel "[c]onsistent with *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and pursuant to Illinois law" on the ground that no meritorious issue can be raised. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In July 2009, the State charged defendant with two counts of aggravated criminal sexual assault (720 ILCS 5/12-3(a)(1), 12-14(a)(1) (West 2008)) (counts I and II), attempted aggravated criminal sexual assault (*Id*. § 5/8-4(a), 12-3(a)(1), 12-14(a)(1)) (count III), and home invasion (*Id*. § 5/12-11(a)(2)) (count IV). The State alleged defendant forcibly entered a house where 13-year-old T.G. lived and sexually penetrated her while armed with a knife.

¶ 5 Following a jury trial in March 2010, defendant was found guilty of all four offenses. The trial court merged count II into count I and sentenced defendant to 30 years in prison for aggravated criminal sexual assault (count I), a consecutive sentence of 30 years for home invasion (count IV), and a concurrent sentence of 15 years for attempted aggravated criminal sexual assault (count III). Defendant appealed, claiming that trial counsel was ineffective for failing to object to hearsay statements regarding T.G. This court affirmed the trial court's judgment, finding, in pertinent part, that counsel was not ineffective for failing to object to the hearsay statements because it was a "strategic choice" to rely on those statements and point out the inconsistencies in T.G.'s version of events during defense counsel's closing argument. See *People v. Smith*, 2011 IL App (4th) 100357-U.

¶ 6 In August 2012, defendant filed a one-hundred-page *pro se* postconviction petition, generally alleging that the State failed to prove him guilty beyond a reasonable doubt in violation of his due process and equal protection rights, his conviction was "based upon all kinds of hearsay," his conviction was "based on false DNA evidence," his sentence was excessive, and he "had authority to enter the dwelling [where the sexual assault occurred] because [defendant] and the victim['s] mother are friends and they used to get high off drugs together all the time in

the victim[’s] home.”

¶ 7 In November 2012, the trial court dismissed defendant’s petition. The court stated that defendant “claims he was deprived of his constitutional rights for a multitude of reasons which are often rambling and difficult to decipher.” The court found defendant’s petition was frivolous and without legal merit. Defendant appealed.

¶ 8 In September 2014, this court vacated certain fines improperly imposed but otherwise affirmed the trial court’s judgment. *People v. Smith*, 2014 IL App (4th) 121118, 18 N.E.3d 912.

¶ 9 On December 5, 2014, defendant filed a motion for leave to file a successive postconviction petition with the trial court. Defendant set forth the following “cause” for his failure to raise the claim in his previous petition: “I only learned about my claim when my appellate lawyer in the [postconviction] appeal informed me about it.” Defendant further alleged “prejudice” on the basis that “[t]he failure to bring the claims earlier *** so infected my *** conviction *** [and] violated due process.” Defendant attached an affidavit and his proposed petition, asserting numerous claims for relief.

¶ 10 In March 2016, the trial court entered a written order addressing defendant’s motion. The court found that “[defendant’s] only claim for cause is that he did not have an attorney to assist him with his first petition” and if that were sufficient to show cause then “every frivolous filing dismissed at the first stage, before appointment of counsel, would automatically support a second petition.” The court further found that defendant failed to establish that his “new theory of defense” was not “newly discovered evidence” because it was “well known to the defendant at the time he went to trial.” The court stated that defendant’s “new” evidence that

defendant claimed would exonerate him would merely provide "grounds for impeachment of his credibility ***." The court dismissed defendant's motion and imposed a fee for a "frivolous" filing.

¶ 11 In addition to his motion for leave to file a successive postconviction petition, defendant filed a motion to allow DNA testing pursuant to section 116-3 of the Code (725 ILCS 5/116-3 (West 2008)). Defendant's motion requested the following testing:

> "Eliminating samples necessary to obtain additional samples of blood, skin cells, hands, hair, saliva, fingerprints and haplotypes from any of her prior consensual partners, friends, [A.J.], Hurbert Jones, brothers and other relatives."

The trial court found defendant failed to specifically identify the "items he wants tested" and instead provided "only a general description of potential witnesses and types of evidence." The court also found his description of the requested forensic testing to be "nonsensical." The court denied the motion.

¶ 12 This appeal followed. OSAD was appointed to represent defendant. OSAD subsequently filed a motion to withdraw as appellate counsel. The record shows service on defendant, but he has not filed a response. After examining the record, we grant OSAD's motion and affirm the trial court's judgment.

¶ 13 II. ANALYSIS

¶ 14 A. Defendant's Motion for Leave to File a Successive Postconviction Petition

¶ 15 On appeal, OSAD argues no colorable argument can be made that the trial court erred in denying defendant's motion for leave to file a successive postconviction petition. We agree.

¶ 16 Specifically, OSAD identifies the following potential issues for review: whether (1) defendant established actual innocence based on "newly discovered" evidence regarding his own "statement" of events; (2) defendant established actual innocence based on his "recommendation[] for the judiciary to test the victim['s] mother to show that it was her DNA that had most of [defendant's] semen that was found in the victim"; (3) the court failed to conduct a *Krankel* inquiry based on defendant's motions alleging ineffective assistance of counsel prior to trial; (4) during trial, defense counsel provided ineffective assistance by (a) failing to investigate witnesses, (b) failing to file a "motion to access the evidence for DNA testing," (c) failing to object to T.G.'s hearsay testimony, (d) "preventing" defendant from testifying after defendant stated he did not wish to testify following the court's inquiry, (e) failing to raise a *Batson* challenge when defense counsel excused an African American juror after she expressed she was "hesitant" to hear testimony of a "sexual nature," (f) failing to "address" inconsistencies in the testimony, (g) failing to "address" the prosecutor's "coaching" of T.G. where she was asked to "change the date" and testify to events that occurred the day prior to the sexual assault.

¶ 17 The Post-Conviction Hearing Act (Act) "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). "Proceedings on a postconviction petition are collateral to proceedings in a direct appeal and focus on constitutional claims that have not and could not have been previously adjudicated." *People v. Holman*, 2017 IL 120655, ¶ 25, 91 N.E.3d 849. "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of

res judicata; issues that could have been raised, but were not, are forfeited." *Id.*

¶ 18 Further, the Act contemplates the filing of only a single postconviction petition. *Id.* However, leave may be granted to file a successive petition if the petitioner (1) raises a due process claim of actual innocence to prevent a miscarriage of justice or (2) satisfies the "cause-and-prejudice" test. *Id.* ¶ 26. "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial." *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829. Under the cause-and-prejudice test, a defendant must demonstrate "cause" by identifying " 'an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings.' " *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 33, 19 N.E.3d 142 (quoting 725 ILCS 5/122-1(f) (West 2010)). To demonstrate "prejudice," the defendant must show the "claim not raised during his or her initial post[]conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f)(2) (West 2008).

¶ 19 "[T]he Post-Conviction Hearing Act was not intended to be used as a device to obtain another hearing upon a claim of denial of constitutional rights where there has already been a full review of the issues raised." *People v. Cox*, 34 Ill. 2d 66, 67, 213 N.E.2d 524, 525 (1966). "[L]eave 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 or where the successive petition with supporting documentation is insufficient to justify further proceedings." *People v. Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172. This court reviews *de novo* a trial court's denial of a

defendant's motion for leave to file a successive postconviction petition. *People v. Merriweather*, 2017 IL App (4th) 150407, ¶ 25, 80 N.E.3d 127.

¶ 20 Here, as stated, OSAD argues no colorable argument can be made that defendant demonstrated a claim of actual innocence or established cause and prejudice to support his motion for leave to file a successive postconviction petition. Our review of the record reveals OSAD is correct. Further, all of the issues identified above have either been decided in connection with defendant's direct appeal, and are therefore barred by the doctrine of *res judicata*, or defendant forfeited the claims he now raises because they could have been raised on direct appeal or in his original postconviction petition. Under the circumstances presented, we cannot say the trial court erred in finding that defendant's motion was frivolous. See 735 ILCS 5/22-105(a) (West 2008). Accordingly, the court properly denied defendant's request for leave to file a successive postconviction petition.

¶ 21 B. Section 116-3 Motion for DNA Testing

¶ 22 OSAD additionally argues that no colorable claim can be made that the trial court erred in denying defendant's motion for further forensic DNA testing. We agree.

¶ 23 A defendant may move for postconviction DNA analysis "on evidence that was secured in relation to the trial which resulted in his or her conviction[.]" 725 ILCS 5/116-3(a) (West 2008). The evidence must not have been subject to the requested testing at the time of trial, and if it was previously subjected to testing, the defendant must show the evidence "can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results." *Id.* § 116-3(a)(2). Further, a defendant must "present a [*prima facie*] case that: (1) identity was the issue in the trial

which resulted in his or her conviction; and (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect." *Id.* § 116-3(b).

¶ 24 Here, defendant requested that the following evidence be subjected to further forensic testing:

> "Eliminating samples necessary to obtain additional samples of blood, skin cells, hands, hair, saliva, fingerprints and haplotypes from any of her prior consensual partners, friends, [A.J.], Hurbert Jones, brothers and other relatives."

Defendant described the method of forensic testing as follows:

> "The blood, skin, cells, hands, hair saliva, fingerprints and haplotypes. The vaginal swab sample and petitioner profile of the statistical implications of a recovered DNA, and the difference between 10 loci and 11 loci, plus the generally 11 locations they was looking for. *** If a 9-loci match maybe revealed to be a non-match when a 10-loci is tested, a 13-loci match maybe revealed to be a non-match if a 14-loci were tested. If petitioner was a 10-loci match revealed to be a non-match if a 11-loci is tested ***."

¶ 25 As the trial court noted, much of defendant's motion is "nonsensical" and it is difficult to discern the evidence he claims should be subjected to further testing or a new method of forensic testing that was not available at the time of his trial. Assuming OSAD is correct and defendant is requesting forensic testing of the victim's mother, A.J., and her prior sexual partners, it is clear based on our review of the record that this was not "evidence that was secured in relation to the trial which resulted in [defendant's] conviction[.]" 725 ILCS 5/116-3(a) (West

2008). Further, defendant failed to identify *any* discernible method of testing, let alone a new method, that would provide a "reasonable likelihood of more probative results." *Id.* § 116-3(a)(2). Accordingly, we affirm the denial of defendant's motion for further DNA testing.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 28 Affirmed.