

NOTICE

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FILED
March 5, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 160808-U
NOS. 4-16-0808, 4-16-0888 cons.

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
MARK B. CAMPBELL,)	No. 02CF545
Defendant-Appellant.)	Honorable
)	Scott D. Drazewski,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the Office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's judgment.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal, on the ground no meritorious issue can be raised in these consolidated cases. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On direct appeal, this court diligently set forth all of the relevant facts involved in this case. Accordingly, only the facts relevant to these consolidated appeals are set forth below.

¶ 5 A. Bench Trial and Direct Appeal

¶ 6 Following a bench trial in April 2003, the trial court found defendant, Mark B. Campbell, guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2000)), attempt (first

degree murder) (720 ILCS 5/8-4, 9-1 (West 2000)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2000)). The court sentenced defendant to consecutive terms of 85 years in prison for first degree murder, 20 years for attempt (first degree murder), and 10 years for armed robbery.

Defendant appealed, claiming the trial court erred by improperly restricting cross-examination of one of the State's witnesses, and this court affirmed. *People v. Campbell*, No. 4-03-0733 (2005) (unpublished order under Supreme Court Rule 23).

¶ 7 B. First Postconviction Proceeding

¶ 8 In July 2005, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2004)), alleging his constitutional rights were violated in his arrest, trial, conviction, and sentence. Defendant alleged he was denied due process, a fair trial, and effective assistance of trial counsel, where (1) trial counsel failed to properly impeach several witnesses with prior inconsistent statements; (2) trial counsel failed to thoroughly examine the witness/victim Michael Dopson's usage of drugs on the day of the incident, or the effect of drugs on his system, and failed to tender the appropriate instruction as to the credibility of a narcotics addict; (3) the indictment was fraudulently obtained by perjured and false testimony; and (4) trial counsel failed to call witnesses "D.U.S.M." Jackson and Stephany Redmond to rebut Dopson's perjured testimony.

¶ 9 Defendant further argued he was denied the effective assistance of appellate counsel because appellate counsel did not argue on direct appeal (1) whether the evidence was sufficient to convict defendant; (2) whether *corpus delicti* was necessary to legally convict defendant beyond a reasonable doubt; (3) whether "confrontation was violated when Michael Dopson's inconsistent three statements violated constitution, warranted a new trial"; (4) whether testimony of a crime-scene investigator showed Dopson's testimony did not match the

description of the crime; (5) whether defendant was denied the right to effective assistance of trial counsel; and (6) whether his convictions and sentences violated the one-act, one-crime rule.

¶ 10 On October 12, 2005, defendant filed a *pro se* motion to amend his petition. In his motion, defendant set forth the following claims: (1) whether the evidence presented at trial was sufficient to prove him guilty beyond a reasonable doubt; (2) whether the burden of proof was shifted to defendant when the State argued in closing no explanation had been presented against the State's evidence; and (3) whether defendant was denied a fair trial due to the prosecutor's misstatement of evidence and argument regarding facts not based in evidence.

¶ 11 On October 19, 2005, the trial court dismissed defendant's petition as frivolous and patently without merit pursuant to section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2004)). The court found defendant failed to comply with sections 122-1 and 122-2 of the Act requiring him to support his allegations by affidavit, records, or other evidence. The court further addressed and rejected each of defendant's claims.

¶ 12 In April 2007, this court affirmed the trial court's judgment and granted OSAD's motion to withdraw. *People v. Campbell*, No. 4-05-0972 (2007) (unpublished order under Supreme Court Rule 23).

¶ 13 C. Second Postconviction Proceeding

¶ 14 In March 2008, defendant filed a *pro se* motion for leave to file a successive postconviction petition. In the attached postconviction petition and amendments filed in September 2008 and April 2009, defendant argued (1) the State failed to prove him guilty beyond a reasonable doubt, (2) trial counsel rendered ineffective assistance of counsel, (3) the prosecutor committed misconduct, and (4) appellate counsel in previous appeals rendered ineffective assistance by failing to raise these issues on direct appeal. In April 2009, the trial

court entered an order striking defendant's successive petition and amendments thereto because he failed to demonstrate cause for his failure to bring his claims in the initial petition.

¶ 15 Defendant appealed, and the trial court appointed OSAD as counsel. In June 2010, OSAD moved to withdraw as counsel, asserting no meritorious issues could be raised on appeal. In December 2010, this court affirmed the trial court's judgment and granted OSAD's motion to withdraw. *People v. Campbell*, 4-09-0276 (2010) (unpublished order under Supreme Court Rule 23).

¶ 16 D. Third Postconviction Proceeding and Motion for Forensic Testing

¶ 17 In September 2016, defendant filed his second motion for leave to file a successive postconviction petition and his third postconviction petition. Defendant attached his proposed postconviction petition, asserting 20 separate claims for relief. Along with his postconviction petition, defendant filed a motion for further forensic testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/116-3 (West 2014)). Specifically, defendant requested further testing of certain discharged bullets and an unidentified fingerprint admitted into evidence at trial.

¶ 18 On October 12, 2016, the trial court denied defendant's second request to file a successive postconviction petition. The court did not address defendant's motion for further forensic testing. On October 27, 2016, defendant appealed the court's denial of his request for leave to file a successive postconviction petition (case No. 4-16-0808).

¶ 19 On November 4, 2016, defendant filed a *pro se* motion requesting the trial court conduct a hearing on the motion for forensic testing. On November 14, 2016, the court issued a written order striking the motion without prejudice, finding (1) defendant failed to make a *prima facie* case he was entitled to forensic testing under section 116-3 of the Code (725 ILCS

5/116-3 (West 2014)) and (2) it was not required to conduct a hearing on the motion. On November 28, 2016, defendant filed a notice of appeal (case No. 4-16-0888).

¶ 20 On September 24, 2018, this court granted OSAD’s motion to consolidate the two appeals (case Nos. 4-16-0808 and 4-16-0888). On September 26, 2018, OSAD filed a motion for leave to withdraw as counsel on appeal with a supporting memorandum. On September 28, 2018, we granted OSAD’s motion to supplement the record in these two cases with portions of the record from defendant’s appeal in case No. 4-18-0467, which we discuss below. On November 29, 2018, the State filed a brief in support of OSAD’s motion for leave to withdraw as counsel on appeal. The record shows service on defendant, who filed a response in opposition to OSAD’s motion on December 11, 2018. After examining the record, we grant OSAD’s motion and affirm the trial court’s judgment.

¶ 21 II. ANALYSIS

¶ 22 A. Case No. 4-16-0808

¶ 23 OSAD contends no colorable argument can be made the trial court erred in denying defendant’s motion for leave to file a second successive postconviction petition. We agree.

¶ 24 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). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant’s conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Furthermore, “issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited.” *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100. The Act contemplates the filing of only one

postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). A defendant must obtain leave from the court in order to file a successive petition under the Act. 725 ILCS 5/122-1(f) (West 2014).

¶ 25 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. *Pitsonbarger*, 205 Ill. 2d at 459. Cause is defined as “some objective factor external to the defense” that prevented the defendant from raising the claim in an earlier proceeding. (Internal quotation marks omitted.) *Id.* at 460. Prejudice is an error so infectious to the proceedings that the resulting conviction or sentence violates due process. See *id.* at 464. To support a claim of actual innocence, “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. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 950 (2009) (quoting *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004)). 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.

¶ 26 In its memorandum of law in support of its motion to withdraw, OSAD discusses *seriatim* the 20 enumerated claims in defendant’s second successive postconviction petition. OSAD argues no colorable argument can be made that defendant demonstrated a claim of actual innocence or established cause and prejudice. Our review of the record reveals OSAD is correct. We conclude no colorable argument can be made the trial court erred in dismissing defendant’s motion.

¶ 27 B. Case No. 4-16-0888

¶ 28 OSAD additionally argues no colorable claim can be made further forensic testing is required. We agree.

¶ 29 Section 116-3 of the Code permits a criminal defendant to request additional forensic testing of evidence that was secured in relation to the trial that resulted in his conviction by written motion to the trial court that entered the judgment of conviction in his case. 725 ILCS 5/116-3(a) (West 2016). We review the trial court's denial of a motion for additional forensic testing *de novo*. *People v. Perez*, 2016 IL App (3d) 130784, ¶ 20, 59 N.E.3d 891.

¶ 30 Here, defendant's appeal is moot because, following the trial court's denial of defendant's initial motion for forensic testing, defendant filed a second motion for forensic testing that was granted. An appeal is moot when no actual controversy exists or when intervening events occur that render it impossible for the court to grant effectual relief to the complaining party. *In re J.T.*, 221 Ill. 2d 338, 349-50, 851 N.E.2d 1, 7-8 (2006). As noted *supra*, we permitted OSAD to supplement the record in these two cases with portions of the record from defendant's case No. 4-18-0467, an appeal which we allowed defendant to voluntarily dismiss in September 2018. The relevant portions of the record in that case reflect the trial court granted defendant's second motion for additional forensic testing and the testing was completed. In April 2018, the trial court entered a written order as agreed to by the parties indicating the testing was completed to defendant's satisfaction. We are thus unable to grant effectual relief to defendant on his claim the trial court erred in denying his initial motion for forensic testing, and his appeal is moot. We agree with OSAD no colorable argument can be made further forensic testing is required.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 33 Affirmed.