2019 IL App (4th) 160823-U

NO. 4-16-0823

FILED
May 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 the |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | Champaign County |
| STEVEN A. BRADLEY | ) | No. 04CF1956 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Thomas J. Difanis, |
| | ) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris 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 the ground no meritorious issue can be raised on appeal. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 This court detailed this case's factual and procedural history in *People v. Bradley*, 2015 IL App (4th) 131106-U, and *People v. Bradley*, 2013 IL App (4th) 110166-U. On October 20, 2004, the victim, N.H., fell asleep on her couch and awoke to find defendant on top of her with his penis in her vagina. She pushed defendant off and contacted a friend and the police. She

denied consenting to the act. She denied biting defendant's lip or digging her fingernails into defendant.

¶ 5 Police officers spoke with defendant, who admitted to having sexual intercourse with N.H. Defendant contended the intercourse was consensual and attempted to prove N.H. enjoyed the act by showing officers where N.H. bit defendant and left scratch marks. The officers did not see any markings on defendant.

¶ 6 On October 28, 2004, the grand jury indicted defendant on one count of criminal sexual assault (count I) (720 ILCS 5/12-13(a)(2) (West 2004)), alleging he committed an act of sexual penetration on N.H. knowing N.H. was unable to give knowing consent. On February 8, 2005, the State charged defendant with a second count of criminal sexual assault (count II) (*Id.* § 12-13(a)(1)), alleging defendant committed an act of sexual penetration with N.H. by the use of force.

¶ 7 On February 10, 2005, a jury found defendant guilty of criminal sexual assault without consent (count I) and acquitted defendant of criminal sexual assault by force (count II). The trial court sentenced defendant to 15 years in prison. This court affirmed on direct appeal. *People v. Bradley*, No. 4-05-0405 (Sept. 11, 2006) (unpublished order under Illinois Supreme Court Rule 23). In May 2007, defendant filed a *pro se* postconviction petition. In June 2007, the trial court entered a first-stage dismissal order, concluding the petition was frivolous and without merit. This court affirmed. *People v. Bradley*, No. 4-07-0631 (June 6, 2008) (unpublished order under Illinois Supreme Court Rule 23). In January 2011, defendant filed a motion to allow deoxyribonucleic acid (DNA) testing, which the court denied as identity was not an issue. This court affirmed. *Bradley*, 2013 IL App (4th) 110166-U. In October 2013, defendant filed a *pro se* section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). Defendant

alleged (1) the trial court lacked the statutory authority to convict him of sexual assault without consent and (2) a violation of due process because the jury returned inconsistent verdicts. In November 2015, the trial court granted the State's motion to dismiss. This court affirmed. *Bradley*, 2015 IL App (4th) 131106-U.

¶ 8 On September 28, 2016, defendant filed a *pro se* motion for leave to file a successive postconviction petition. In his motion, defendant alleged cases decided after the dismissal of his initial postconviction petition constituted cause for him to file a successive postconviction petition. Defendant relied on *United States v. Johnson*, 743 F.3d 196 (7th Cir. 2014), and *People v. Alexander*, 2014 IL App (1st) 112207, 14 N.E.3d 654. Because these cases were "recently handed down *** and so novel," defendant claimed the legal foundations they created were "unknown and unknowable" to him at the time of his initial postconviction petition. In his proposed successive postconviction petition, defendant asserted: (1) the criminal sexual assault statute was facially unconstitutional, violating the due process clauses of the U.S. and Illinois Constitutions because it is vague on the issue of nonconsent; (2) the State "unconstitutionally avoided the burden to prove nonconsent beyond a reasonable doubt;" and (3) he was denied his sixth amendment right to trial by jury where the jury found him not guilty of criminal sexual assault by force, implying the jury believed "the encounter was consensual" and thereby barring his conviction. In October 2016, the trial court denied defendant's motion for leave to file a successive postconviction petition. Defendant appealed, and OSAD was appointed to represent the defendant on appeal.

¶ 9 On December 10, 2018, OSAD filed a motion for leave to withdraw as counsel on appeal with supporting memorandum. On its own motion, this court granted defendant until February 1, 2019, to file additional points and authorities. Defendant did not file a response.

¶ 10 II. ANALYSIS

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

¶ 12 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) provides a means to collaterally attack a criminal conviction on the basis of 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). Generally, a defendant may only file one postconviction petition without leave of the court. 725 ILCS 5/122-1(f) (West 2014). Any claim not raised in the original or amended petition is forfeited. *Id.* § 122-3. This statutory bar to a successive petition will only be relaxed when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). To determine whether fundamental fairness requires relaxation of the statutory bar, the reviewing court employs the "cause-and-prejudice test." *Id.* 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.) *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 33, 19 N.E.3d 142. Prejudice is an error so infectious to the proceedings that the resulting conviction violates due process. *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 13 If defendant fails to show cause and prejudice, "his failure *** will be excused if necessary to prevent a fundamental miscarriage of justice." *Id.* at 459. A defendant must generally show actual innocence to demonstrate such a miscarriage of justice. *Id*. Here, defendant did not make a claim of actual innocence and therefore must show cause and prejudice for his failure to raise his claims in his earlier petition. This court reviews the trial court's denial of leave to file a successive petition *de novo*. *Wilson*, 2014 IL App (1st) 113570, ¶ 31.

¶ 14 In his motion for leave to file a successive postconviction petition, defendant asserts cause for filing a successive postconviction petition because both *Johnson* and *Alexander* were "unknown and unknowable" to him at the time of his initial postconviction petition.

¶ 15 Judicial decisions establishing new constitutional rules apply to any pending criminal case. *People v. Davis*, 2014 IL 115595, ¶ 36, 6 N.E.3d 709 (discussing *Schriro v. Summerlin*, 542 U.S. 348 (2004)). However, where a conviction is final, new rules are not applied retroactively to cases on collateral review except in limited circumstances. *Id.* New substantive rules " 'generally apply retroactively[,]' " while new procedural rules " 'generally do not apply retroactively.' " *Id.* (quoting *Schriro*, 542 U.S. at 351-52). Procedural rules apply retroactively only where the new rules are " 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.' " *Id.* (quoting *Schriro*, 542 U.S. at 352). Here, however, *Johnson* and *Alexander* do not create any new constitutional rules—substantive or procedural—requiring retroactive application to defendant's postconviction proceedings.

¶ 16 In *Johnson*, the defendant pleaded guilty for failure to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) (18 U.S.C. § 2250(a)). *Johnson*, 743 F.3d at 198. The defendant's sentence was enhanced under U.S.S.G. § 2A3.5(b)(1)(A) for committing a sex offense while in failure to register status, based on the testimony of S.W., the alleged victim, claiming defendant had performed oral sex on her without her consent. *Id.* at 200. The U.S. Seventh Circuit found the enhancement was unwarranted because S.W.'s testimony did not demonstrate defendant used force while performing the unwanted oral sex. *Id.* at 203-04. The court stated, "Illinois does not *** have a statute that criminalizes sexual intercourse with another adult without the other's consent, without more." *Id.*

at 202. In requiring a showing of force, however, the court noted the government was only arguing sections 11-1.20(a)(1) and 11-1.50(a)(1) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/11-1.20(a)(1), 1.50(a)(1) (West 2010))—requiring the defendant "uses force or threat of force"—applied. See *Johnson*, 743 F.3d at 201 n.2 ("The statute provides for other means of committing criminal sexual assault as well, but the government does not contend those apply here.").

¶ 17 Defendant contends the federal court's decision in *Johnson* finding Illinois's criminal sexual assault statute requires more than nonconsent creates a new constitutional claim on which to base his successive postconviction petition. We disagree. *Johnson* did not make a new substantive rule changing the interpretation of the statute but merely restated the law as it already existed in Illinois. Criminal sexual assault has long been known to require more than nonconsent because nonconsent is not an element of the offense. See *People v. Haywood*, 118 Ill. 2d 263, 274, 515 N.E.2d 45, 50 (1987) ("the prosecution is not required to prove nonconsent formally"); *People v. Roberts*, 182 Ill. App. 3d 313, 318, 537 N.E.2d 1080, 1084 (1989) ("The legislature clearly did not intend consent to be an affirmative defense, or to include it as an element of the crime."). Since the relevant decision is not a new rule, it cannot be retroactively applied to defendant's case. Therefore, defendant cannot demonstrate *Johnson* provides cause to file a successive postconviction petition.

¶ 18 Further, defendant was acquitted of criminal sexual assault by force (720 ILCS 5/12-13(a)(1) (West 2004) (renumbered as § 11-1.20(a)(1) by Pub. Act 96-1551 (eff. July 1, 2011))), the charge relevant to the decision in *Johnson*. Defendant was convicted of criminal sexual assault of a victim unable to give knowing consent (*Id.* § 12-13(a)(2) (renumbered as § 11-1.20(a)(2) by Pub. Act 96-1551 (eff. July 1, 2011))). The court in *Johnson* was clear its

determination requiring force was only relevant to charges under sections 11-1.20(a)(1) or 1.50(a)(1)— requiring force or threat of force—stating:

> "A person can also commit criminal sexual abuse by committing an act of sexual conduct knowing that 'the victim is unable to understand the nature of the act or is unable to give knowing consent.' 720 Ill. Comp. Stat. 5/11-1.50(a)(2). There is no suggestion that this provision applies in this case." *Johnson*, 743 F.3d at 201 n.3.

Therefore, even if Johnson established a new substantive rule, the rule cannot have prejudiced defendant because it is irrelevant to the offense for which defendant was convicted.

¶ 19 In *Alexander*, the defendant was found guilty of criminal sexual assault by use or threat of force (720 ILCS 5/12-13(a)(1) (West 2010)). *Alexander*, 2014 IL App (1st) 112207, ¶ 33. At trial, the victim testified she fell asleep at her grandmother's house. *Id*. ¶ 10. She later woke to find defendant, her first cousin, on top of her. *Id.* ¶¶ 8, 11. She attempted to push him off but was slow to do so. *Id.* ¶ 11. When she was able to push him off, she felt his penis slide out of her vagina. *Id*. Her pants and underwear were pulled down to her knees. *Id.* At issue on appeal was whether the evidence was sufficient to prove defendant had penetrated the victim and used force to commit an act of sexual penetration. *Id*. ¶ 38. The First District found the evidence supported a finding "[the] defendant used his position and body weight as inertia to prevent [the victim] from disengaging after she woke up. *** [The victim's] testimony reveals she struggled to free herself while [the] defendant was lying on her back. As a result, [the] defendant used force beyond the initial sex act to continue penetrating [the victim] even as she attempted to push him away." *Id.* ¶ 56

¶ 20 Defendant does not point to a specific holding in *Alexander* creating a new rule to apply retroactively. Instead, defendant contends the legal foundations of nonconsent and the defense of consent were not clear before his initial postconviction petition. In *Alexander*, the appellate court considered the sufficiency of evidence concerning proof of penetration and the use of force. *Id.* ¶ 38. The court did not make any determinations related to nonconsent or the defense of consent. Therefore, *Alexander* did not create a new rule on which defendant can sustain an objective showing of cause.

¶ 21 Further, as in *Johnson*, defendant was convicted of a different offense than the defendant in *Alexander*. The court in *Alexander* was clear there were different ways of committing criminal sexual assault, acknowledging "although one may be guilty of criminal sexual assault under section 12-13(a)(2) for having sex with a victim who is asleep, [the] defendant was instead charged under section 12-13(a)(1), which requires the use of force." *Id.* ¶ 53. Any determinations the court in *Alexander* made could not have prejudiced defendant as they are irrelevant to defendant's conviction under section 12-13(a)(2) of the Criminal Code.

¶ 22 Accordingly, we find defendant's petition does not satisfy the cause-and-prejudice test. The trial court properly denied leave to file a successive postconviction petition. Since defendant did not satisfy the cause-and-prejudice test, we do not consider the merits of defendant's successive petition as it was not considered filed. See *People v. Welch*, 392 Ill. App. 3d 948, 955, 912 N.E.2d 756, 762 (2009).

¶ 23 III. CONCLUSION

¶ 24 We grant OSAD's motion for leave to withdraw as counsel 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. See 55 ILCS 5/4-2002(a) (West 2016).

¶ 25 Affirmed.