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2013 IL App (4th) 130042-U

NO. 4-13-0042

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 19, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
ROBERT F. RUSSO,)	No. 01CF84
Defendant-Appellant.)	
)	Honorable
)	Scott H. Walden,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant was not entitled to *habeas corpus* relief, the trial court did not err in dismissing his petition to vacate the judgment.

¶ 2 In August 2001, the trial court sentenced defendant, Robert F. Russo, to 60 years in prison following his conviction for first degree murder. This court affirmed his conviction and sentence as modified. In January 2005, defendant filed a *pro se* postconviction petition, which the trial court dismissed. This court affirmed on appeal. In January and April 2009, defendant filed *pro se* petitions for relief from judgment, which the trial court denied. This court affirmed on appeal. In December 2009, defendant filed a *pro se* petition for *habeas corpus*, which the trial court dismissed after finding it frivolous and patently without merit. This court affirmed on appeal. In October 2012, defendant filed a *pro se* petition to vacate judgment under the *habeas* statute, and the trial court found it frivolous and patently without merit.

¶ 3 On appeal, defendant argues the trial court erred in denying his petition for relief from judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In March 2001, the State charged defendant by information with first degree murder, alleging he, without lawful justification and with the intent to kill Dale Smith, struck Smith about the head with a hard object, thereby causing his death in violation of section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2000)). Defendant pleaded not guilty.

¶ 6 In June 2001, defendant's jury trial commenced. The State presented evidence that defendant suggested Smith spend the night at defendant's apartment on March 11, 2001. Defendant was the last person seen with the heavily intoxicated Smith. Mary Russo testified defendant told her he wanted her to draw a man away from Ronnie Roberts so he could kill the man. Russo also saw defendant with a meat cleaver in his back pocket. Jerome Shoop testified defendant told him he killed Smith and wanted help rolling Smith in a rug and throwing him in a ravine. Chuck Conover also testified defendant asked him for help in carrying Smith's body over a hill or to a ravine. Marlon Tournear saw Terry Hawe mopping the floor and washing the sidewalk outside of defendant's apartment as well as dragging a couch outside. Laura Tournear identified defendant as one of the men moving a couch. Smith's blood was found on the couch by the Dumpster as well as in defendant's apartment. Defendant stayed in a hotel for a few hours instead of his own apartment, hitchhiked out of town, and threw away his clothes, shoes, and identification.

¶ 7 Mark Johnsey, a forensic anthropologist with the Illinois State Police, testified as

an expert and concluded a "sharp[-]bladed knife" was used to cut the victim's arms and legs "around the skin down to the bone." Then, a handsaw was used to cut through the bone. Dr. Travis Hindman, a forensic pathologist, testified he performed an autopsy on Dale Smith in March 2001. Along with the amputation of both arms and both legs, Dr. Hindman observed "multiple deep lacerations of the scalp with brain tissue exuding from at least one of the lacerated wounds of the scalp," "lacerations of his left ear," and "a massive throat[-]cut wound of the neck." Dr. Hindman indicated the cause of death was due to "massive brain trauma due to narrow surface blunt force trauma to the *** left side of the head." He opined the trauma could have been caused by a hammer or the end of a tire iron. He concluded the blows to the victim's head caused the death as opposed to the throat wounds or amputations.

¶ 8 Following closing arguments, the jury found defendant guilty of first degree murder. In July 2001, the trial court sentenced him to 60 years' imprisonment. Defendant appealed and raised claims concerning the sufficiency of evidence at trial, violation of the marital privilege, violation of his right to substitution of judge for cause, and credit for time served in custody prior to trial. This court affirmed his conviction and sentence as modified. *People v. Russo*, No. 4-01-0432 (July 20, 2004) (unpublished order under Supreme Court Rule 23).

¶ 9 In January 2005, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2004)). The petition alleged defendant was denied the effective assistance of appellate counsel; his due-process rights were violated by the introduction of "false evidence" at trial, namely a saw and a hammer that were not connected to the crime; the prosecutor committed misconduct by introducing the saw and the hammer into evidence and in making his closing argument; the trial court erred in allowing

hearsay evidence at trial and in refusing to reopen defendant's case; and the accountability statute (720 ILCS 5/5-2(c) (West 2004)) was unconstitutional because it was ambiguous and violated his right to due process. In December 2005, the State filed a motion to dismiss. In March 2006, the court granted the State's motion to dismiss. This court affirmed. *People v. Russo*, No. 4-06-0247 (Aug. 20, 2007) (unpublished order under Supreme Court Rule 23).

¶ 10 In January 2009, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401(f) of the Procedure Code (735 ILCS 5/2-1401(f) (West 2008)). Defendant alleged (1) his conviction was void because the accountability statute was unconstitutionally vague; (2) the trial court's order compelling his wife to testify "truthfully" was void; and (3) the judgment was void because the trial judge refused to recuse himself while acting with an appearance of bias.

¶ 11 On April 13, 2009, the trial court issued a written order finding defendant was not entitled to relief from judgment. The court noted defendant raised no new issues of fact supported by affidavit. The points alleged were raised in his first appeal and found to be without merit. Further, the accountability argument had been raised in his postconviction petition, the dismissal of which was affirmed on appeal. Defendant filed a notice of appeal (No. 4-09-0291).

¶ 12 On April 20, 2009, defendant filed another petition for relief from judgment. Defendant alleged (1) the judgment was void because the trial court refused to reopen the case to hear testimony of an exculpatory witness; (2) witness statements supported a freestanding claim of innocence; and (3) the judgment was void based on the prosecutor's improper cross-examination and closing argument.

¶ 13 In May 2009, the State filed a motion to strike, arguing defendant raised no new

issues. In August 2009, the trial court ordered the petition denied and stricken as being a prohibited successive petition. The court found defendant attempted to avoid the general rule against successive section 2-1401 petitions by claiming the judgment against him was void. However, the points alleged were raised on direct appeal, in his postconviction petition, and his first section 2-1401 petition. Defendant filed a notice of appeal (No. 4-09-0607). This court consolidated defendant's appeals, granted the office of the State Appellate Defender's motion to withdraw as counsel, and affirmed the trial court's judgments. *People v. Russo*, Nos. 4-09-0291, 4-09-0607 (July 27, 2010) (unpublished order under Supreme Court Rule 23).

¶ 14 In December 2009, defendant filed a *pro se* petition for *habeas corpus* pursuant to section 10-102 of the Procedure Code (735 ILCS 5/10-102 (West 2008)). Defendant alleged certain errors rendered the trial court's judgment void because it violated due process, including (1) the State's alleged knowing use of false evidence at trial (involving a saw, a hammer, and a blood standard); (2) the court's admission of hearsay and irrelevant testimony; (3) the State's coaching of its witnesses; and (4) the court's refusal to give certain jury instructions. Defendant also claimed his trial counsel was ineffective, which contributed to the court's defective judgment.

¶ 15 In January 2010, the trial court, *sua sponte*, issued a written order. The court noted defendant had not challenged the court's jurisdiction or raised any occurrence subsequent to his conviction that would entitle him to release. The court found the petition frivolous and patently without merit and dismissed it. This court affirmed. *Russo v. Gaetz*, No. 4-10-0080 (July 7, 2010) (unpublished order under Supreme Court Rule 23).

¶ 16 In October 2012, defendant filed a *pro se* "petition to vacate judgment," citing the

habeas corpus statute, which he claimed was "supported by intervening U.S. Supreme Court precedent." He also claimed an "occurrence" had taken place since his trial, namely new case law on the issue of accountability, which entitled him to release from custody. Defendant argued the accountability theory allowed the State to prosecute him without notice or the opportunity to respond in violation of his constitutional rights. Further, he argued the elements of accountability were not proved at trial.

¶ 17 In December 2012, the trial court found the petition frivolous and patently without merit, stating, in part, as follows:

"The court has reviewed the cases cited by [defendant] that post-date his conviction. While some of the cases do address the issue of accountability, none of them present new or novel points of the law of accountability that would merit his release from custody.

Further, the court notes that in the [appellate] court's 7/20/04 affirming of the [defendant's] conviction, the reviewing court found sufficient evidence for conviction based on the actions of [defendant] directly—as principal—before addressing the issue of accountability."

The court dismissed defendant's petition. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues case law pertaining to accountability entitles him to relief from judgment. We disagree.

¶ 20 Section 10-124 of the Procedure Code (735 ILCS 5/10-124 (West 2010)) sets forth the grounds upon which *habeas* relief is available:

"It is well established that an order of *habeas corpus* is available only to obtain the release of a prisoner who has been incarcerated under a judgment of a court that lacked jurisdiction of the subject matter or the person of the petitioner, or where there has been some occurrence subsequent to the prisoner's conviction that entitles him to release." *Beacham v. Walker*, 231 Ill. 2d 51, 58, 896 N.E.2d 327, 332 (2008).

A petition for writ of *habeas corpus* for nonjurisdictional defects is inappropriate, even though the petition alleges errors involving a denial of constitutional rights. *Barney v. Prisoner Review Board*, 184 Ill. 2d 428, 430, 704 N.E.2d 350, 351 (1998); see also *Baker v. Department of Corrections*, 106 Ill. 2d 100, 106, 477 N.E.2d 686, 689 (1985) (noting a *habeas* petition is not a substitute for a direct appeal and "may not be utilized to correct mere judicial error"). "Consequently, where the original judgment of conviction is not void, a prisoner's maximum term has not yet expired, and nothing has occurred to warrant a prisoner's immediate discharge, the trial court is without jurisdiction to grant *habeas corpus* relief." *Faircloth v. Sternes*, 367 Ill. App. 3d 123, 125, 853 N.E.2d 878, 881 (2006). The only remedy available under *habeas corpus* is a prisoner's immediate release from custody. *Adcock v. Snyder*, 345 Ill. App. 3d 1095, 1098, 804 N.E.2d 141, 143 (2004).

¶ 21 In the case *sub judice*, defendant's petition for relief from judgment is yet another attempt to argue the issue of accountability, an issue that has been addressed in some fashion

previously on appeal. However, a *habeas* petition is not an appropriate vehicle by which to relitigate alleged trial errors of a nonjurisdictional nature.

¶ 22 In his petition, defendant presented nothing to show the trial court lacked subject-matter jurisdiction over the crime charged or personal jurisdiction over him as a defendant. The alleged "subsequent events," *i.e.*, case law on the theory of accountability, failed to show he was entitled to release. The United States Supreme Court has not issued a new rule of law that accountability is an element of the charged offense. Further, accountability is not a separate offense but merely an alternative manner of proving a defendant guilty of the substantive offense. See *People v. Ceja*, 204 Ill. 2d 332, 361, 789 N.E.2d 1228, 1247 (2003). Moreover, any error is harmless in defendant's case because this court found the evidence supported his conviction even apart from accountability. *Russo*, No. 4-01-0432, slip order at 17 (July 20, 2004) (unpublished order under Supreme Court Rule 23). As defendant failed to show he was entitled to his immediate release from custody, the trial court did not err in finding his petition frivolous and patently without merit.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we 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.

¶ 25 Affirmed.