2015 IL App (4th) 140721

NO. 4-14-0721

FILED
May 27, 2015
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.	)	McLean County
JAMES SNOW,	)	No. 99CF1016
Defendant-Appellant.	)	
	)	Honorable
	)	Alesia A. McMillen
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder-White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to plead claims meeting the prejudice element required for leave to file a successive postconviction petition.

(2) Defendant's pleadings and documentation lack reliability and conclusive character and, thus, fail as a matter of law to set forth a colorable claim of actual innocence in order to claim "fundamental miscarriage of justice" exception.

¶ 2 In 2001, defendant was found guilty of the 1991 murder of William Little. He was sentenced to natural life in prison. After a direct appeal and a previous postconviction petition were filed, petitioner remains in prison serving a term of natural life for murder.

¶ 3 I. BACKGROUND

¶ 4 On direct appeal, this court vacated defendant's convictions and sentences on the knowing-murder and felony-murder counts because defendant could only stand convicted of one

murder for Little's death and affirmed defendant's conviction and sentence for intentional murder in all other respects. *People v. Snow*, No. 4-01-0435 (Aug. 20, 2004) (unpublished order under Supreme Court Rule 23). The Supreme Court of Illinois denied defendant's petition for leave to appeal. *People v. Snow*, 212 Ill. 2d 549, 824 N.E.2d 290 (2004). The full scope of the evidence against defendant may be found in our decision on direct appeal.

¶ 5 In May 2004, defendant filed a *pro se* postconviction petition. Defendant amended the petition twice before counsel filed an amended postconviction petition. Defendant again filed a *pro se* amended postconviction petition. In April 2008, the Exoneration Project entered its appearance on defendant's behalf.

¶ 6 In January 2010, the Exoneration Project filed a motion for discovery and an amended petition for postconviction relief. The State filed a motion to dismiss. After a hearing, in April 2011, the trial court granted the State's motion to dismiss. Defendant appealed. On March 5, 2012, this court affirmed the dismissal of defendant's postconviction petition. *People v. Snow*, 2012 IL App (4th) 110415, 964 N.E.2d 1139.

¶ 7 In May 2013, defendant filed a motion for leave to file a successive postconviction petition. In January 2014, the trial court denied the petition for leave to file a successive postconviction petition.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Defendant's motion for leave to file a successive postconviction petition raised claims based on alleged newly discovered evidence. These claims included defendant's allegations his right to due process under *Brady v.Maryland*, 373 U.S. 83 (1963), and his right to

the effective assistance of counsel were violated at trial. The allegations of ineffective assistance of counsel stemmed from the failure to find evidence defendant has now found and claims the State withheld from him. He does not argue this point in his appellate brief and it is deemed forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Counsel also filed a motion for postconviction deoxyribonucleic acid (DNA) testing not yet ruled on by the trial court and not a subject of this appeal. The allegations of newly found evidence relate to three witnesses: Danny Martinez, Bruce Roland, and Steve Scheel.

¶ 11 A. Standard of Review

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton,* 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). Under the Act, a petitioner may only file one petition. 725 ILCS 5/122-1(f) (West 2012). Leave of court is required to file a successive petition and leave "may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012). For purposes of the Act, a prisoner shows cause by identifying an objective factor impeding his ability to raise a specific claim during his initial postconviction proceedings. A prisoner shows prejudice by demonstrating the claim not raised in his initial postconviction proceedings so infected the trial the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2012).

¶ 13 The cause-and-prejudice test is applied to individual claims in the petition or leave to file successive postconviction petition and is not applied to the petition as a whole.

People v. Pitsonbarger, 205 Ill. 2d 444, 462, 793 N.E.2d 609, 623 (2002). Therefore, as to each claim, the petitioner must show cause by identifying an objective factor impeding his ability to raise the claim during his initial postconviction proceeding and must show prejudice by demonstrating the claim not raised during his initial postconviction proceeding so infected the trial the resulting conviction or sentence violated due process. 725 ILCS 5/1221(f) (West 2012).

¶ 14 Leave of court to file successive postconviction petitions should be denied when the claims 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. At this stage, prior to filing a successive petition, no evidentiary hearing is intended for cause-and-prejudice analysis and the determination is to be made on the pleadings. *Smith*, ¶ 33.

¶ 15 Because the trial court did not hold an evidentiary hearing when it reviewed petitioner's motion for leave to file a successive postconviction petition, this court will review the denial of leave to file *de novo*. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 16 B. Danny Martinez

¶ 17 Defendant argued Danny Martinez was a key witness against him because Martinez was an eyewitness. He testified at trial he saw defendant in the parking lot of the gas station shortly after the shooting. Martinez stated he recognized defendant when he saw a picture of him in a newspaper in 1999. He had not been able to pick him out of a lineup in 1991, shortly after the crime, and testified the lighting was too dark. On cross-examination, he admitted the lighting was fine and was the same lighting as a photograph of the lineup he saw in 2000 and identified defendant.

¶ 18 Now defendant argues he had obtained new evidence through a Freedom of Information Act (FOIA) request in 2012 which indicated Martinez told the police earlier than 1994 defendant was not the person he saw in the gas station parking lot. Defendant received a copy of a polygraph work sheet from an exam taken by Martinez in 1994. Handwritten notes in the margin indicated Martinez "says" defendant is "not [the] person he saw." The subject of the redacted polygraph exam is not actually identified. Defendant assumed it was him.

¶ 19 The State does not contest the "cause" portion of the test for filing a successive postconviction petition. Information as to all three witnesses whom defendant discusses was received through 2012 FOIA requests. Thus, this information was not available at his trial or first postconviction proceeding. Defendant claims this information was available to the State at the time of trial and the fact it was not given to him at that time was a *Brady* violation. Defendant argues Martinez was a key witness against him, and if he had this evidence at the time of trial, he could have called police officers to impeach Martinez at trial.

¶ 20 The State argues this is not an eyewitness case. They so argued in their opening argument at trial. The State presented circumstantial evidence and an accumulation of witnesses who testified defendant implicated himself to them and some actually stated he confessed to the crime. Hours after the crime, defendant showed up at Karen Strong's house needing somewhere to stay for a few days. Strong's husband told her defendant needed a place to stay because he was involved in Little's murder. Weeks after the shooting, when defendant was wanted for the crime, Missouri police found him hiding in an attic underneath the insulation. After Illinois police went to pick him up, on the ride back and not under arrest for the Little murder, defendant asked why the police were looking at him for that crime. Defendant was said to be "very

nervous" and he asked the police "what would happen to him if he knew something about the murder." During the ride, defendant asked periodically about the murder.

¶ 21 During questioning at the police station, defendant became most agitated when talking about the gas station murder. Defendant asked, "why could he be charged with murder if he didn't have the gun." After the police explained accountability, defendant wanted to know "what would happen to him if he knew something." Defendant indicated if he told the truth about his involvement, he would have to incriminate himself. The police concluded defendant had implicated himself in the murder.

¶ 22 In September 1999, defendant was a murder suspect and, when stopped in Ohio, he lied and told police he was "David Arison" and presented Arison's birth certificate. He denied being defendant and fled from police when they tried to check his tattoos.

¶ 23 There was a large amount of evidence implicating defendant in the crime. The polygrapher's notes do not come close to the materiality standard for a *Brady* claim. See *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (whether favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict).

¶ 24 Defendant did not demonstrate Martinez's alleged perjured testimony could have affected the jury's verdict and, thus, failed to show prejudice to satisfy requirements for leave to file a successive postconviction petition. The vague, cryptic, and highly condensed remark on the polygraph work sheet is insufficient to support an allegation of perjury. Martinez was thoroughly cross-examined, was not a "star" witness, and was impeached in other ways. See *People v. Moore*, 2012 IL App (4th) 100939, ¶ 28, 975 N.E.2d 1083 (where a criminal defendant seeks to overturn his conviction on the basis of perjured testimony, the defendant must not

merely allege perjury by a State's witness but must present clear, factual allegations of perjury and not mere conclusions or opinions). The context of the remarks in this case do not compel the reading defendant advocates when he argues "Danny Martinez specifically told police" defendant "was not the person." Defendant failed to plead the required prejudice as a matter of law, and the trial court appropriately denied him leave to file claims related to Martinez. *Smith*, 2014 IL 1115946, ¶ 35 (leave to file a successive petition should be denied when claims fail as a matter of law or where the proposed successive petition and documentation are insufficient to justify further proceedings).

¶ 25 C. Bruce Roland

¶ 26 Defendant argues Roland testified falsely at his trial and he did not obtain information of this fact until after the appeal of the denial of his first postconviction petition was concluded. He obtained an unredacted copy of Roland's polygraph exam report through a 2012 FOIA request. The report indicates he failed the exam in regard to implicating defendant. Further, defendant received an affidavit from Danielle Prosperini, who was living with Roland at the time of defendant's trial. Prosperini contacted postconviction counsel after defendant's appeal of the denial of his first postconviction petition was concluded.

¶ 27 Prosperini's affidavit asserts Roland admitted to her he lied in his testimony at defendant's trial and he felt badly about it. At trial, Roland testified defendant confessed to him about his involvement in Little's murder while both were inmates at Logan Correctional Center. The State relied heavily on Roland's testimony in closing argument as it corroborated another witness's testimony about seeing someone in the gas station have an argument with Little before the time he was shot.

¶ 28 In addition to Roland's admission to her he lied in his testimony, Prosperini stated Roland was given assistance with a driving under the influence (DUI) case and was threatened in order that he provide his testimony for the State. Prosperini claims she was threatened also in exchange for her cooperation in recording telephone conversations with Strong where she was asked to "grill [Strong] about the case" and "ask her where the gun was."

¶ 29 Prosperini's affidavit indicated Roland failed a polygraph test and the unredacted polygraph report indicates the same. Defendant argues he would have investigated Roland more carefully and would have had reason to challenge his testimony more aggressively at trial. He argues the State knew it had put immense pressure on Roland to cooperate. Roland did not initially want to cooperate, but the State provided consideration on his DUI case to get him to change his mind about cooperating.

¶ 30 Defendant argued but failed to persuade perjured testimony "always" satisfies the prejudice test. However, in a case like *People v Olinger*, 176 Ill. 2d 326, 349-50, 680 N.E.2d 321, 333 (1997), prejudice was found because perjured testimony, if known, "may well have" led the jury to disbelieve the testimony of a critical witness against the accused. Here, defendant was convicted on the strength of the evidence against him. The jury would more than likely have convicted him even if it disbelieved the testimony of Roland.

¶ 31 Defendant hints at a *Brady* violation with respect to undisclosed information about threats and assistance issued to Roland. For the same reasons as above, defendant's claim does not meet the materiality standard so it fails the prejudice test as a matter of law.

¶ 32 Defendant argued but failed to cite the record or explain what evidence he has to support his allegation other "witnesses received deals in exchange for their assistance" in the

prosecution. He also presented no evidence to support his assertion the Bloomington police department and the McLean County prosecutor's office have a pattern of misconduct in offering deals and pressuring witnesses to provide false testimony.

¶ 33 D. Steve Scheel

¶ 34 Defendant argued Steve Scheel's testimony about defendant's confession to him was false and the State was aware of it because of polygraph exam results indicating no confession was ever made. Defendant only obtained documents in regard to Scheel's polygraph exam after a FOIA request in 2012. Prior to this request, documents received by defendant about Scheel's polygraph indicated Scheel told the polygrapher his story about defendant confessing to him was true.

¶ 35 In a 1993 polygraph exam, Scheel stated defendant never confessed to him. The State withheld the report indicating what Scheel stated. The State prepared and disclosed to defendant an "amended" report containing the opposite responses to relevant questions. Scheel actually took two polygraph exams with conflicting answers as to whether defendant confessed to him. Both times, the polygraph examiner noted he did not believe Scheel. Defendant takes all this information and comes to the conclusion Scheel told investigators defendant never confessed to him and claims, with this information, he could have impeached Scheel.

¶ 36 Whether Scheel was telling the truth at trial does not fulfill the prejudice standard required for filing of a successive postconviction petition. Defendant was convicted on the strength of all the evidence against him. Defendant's alleged *Brady* violation meets the same fate, as the evidence Scheel may or may not have told the police prior to trial defendant confessed to him does not meet the materiality standard of *Brady*.

¶ 37 E. Fundamental Miscarriage of Justice

¶ 38 Finally, defendant argues the trial court denied his petition for leave to file a successive postconviction petition because he did not make a colorable claim he was actually innocent. Defendant argues this is not the required finding to file a successive postconviction petition. Actual innocence is one of two ways to enable a petitioner to file such a petition. See *People v. Ortiz*, 235 Ill. 2d 319, 330-31, 919 N.E.2d 941, 948 (2009). Cause and prejudice is the other way, and he argues he has demonstrated this in his petition for leave.

¶ 39 However, defendant also claims his conviction was based on false and unbelievable evidence and on compromised testimony. He claims he is actually innocent and he has made a colorable claim to this effect and it would be a fundamental miscarriage of justice to allow his conviction to stand.

¶ 40 Defendant's pleadings and documentation are not of a conclusive character and fail, as a matter of law, to set forth a colorable claim of actual innocence. Leave of court to file a successive postconviction petition should be granted under this exception only when a petitioner's supporting documentation raises the probability it is more likely than not no reasonable juror would have convicted him in light of the new evidence presented. *People v. Edwards*, 2012 IL 111711, ¶ 24, 969 N.E.2d 829. The new evidence must be of such conclusive character it would probably change the result on retrial. *Edwards*, ¶ 40. Claims of actual innocence must be supported with new, reliable evidence not presented at trial, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. *Edwards*, ¶ 32.

¶ 41 Defendant cites recantations of certain witnesses and incentives purportedly given

to others. However, all of these witnesses were cross-examined at trial and recantations have been deemed unreliable, especially where given by unrepresented witnesses outside the presence of the prosecution. See *People v. Steidl*, 142 Ill. 2d 204, 254-55, 568 N.E.2d 837, 858-59 (1991). Affidavits containing inadmissible hearsay are not sufficiently conclusive. *People v. Morales*, 339 Ill. App. 3d 554, 565, 791 NE.2d 1122, 1132 (2003). Evidence merely impeaching a witness will typically not be of such conclusive character as to justify postconviction relief. *People v. Collier*, 387 Ill. App. 3d 630, 637, 900 N.E.2d 396, 403 (2008). Defendant's newly found evidence fits all of those categories and, thus, does not support a claim of actual innocence and there is no fundamental miscarriage of justice in denying him leave to file a successive postconviction petition.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated above, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 44 Affirmed.