2023 IL App (4th) 220510-U

NO. 4-22-0510

FILED
March 1, 2023
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.	)	Rock Island County
JASON J. THOMPSON,	)	No. 06CF696
Defendant-Appellant.	)	
	)	Honorable
	)	Clayton R. Lee,
	)	Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Steigmann and Lannerd concurred in the judgment.

ORDER

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

¶ 2 Defendant, Jason J. Thompson, appeals from the trial court's dismissal of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2020)). On appeal, defendant's appointed counsel, the Office of the State Appellate Defender (OSAD), moves to withdraw on the basis that any argument suggesting the trial court erred in dismissing defendant's section 2-1401 petition would be without arguable merit. For the reasons that follow, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In August 2006, the State charged defendant with two counts of first degree

murder (720 ILCS 5/9-1(a)(2), (a)(3) (West 2006)) in connection with the July 2006 shooting death of Michael Jones. On February 22, 2007, defense counsel filed a motion to quash arrest and suppress evidence, arguing defendant's statement made following his arrest should be suppressed because he was improperly arrested.

¶ 5 The hearing on defendant's motion to suppress was conducted over three days: February 28, 2007, March 9, 2007, and March 27, 2007. On the second day of the hearing, defendant was present in court with counsel. Detective Leo Hoogerwerf testified for the State. Hoogerwerf testified a copy of defendant's video-recorded interview was missing approximately two and a half hours of defendant's time in the interview room. However, Hoogerwerf indicated during that two-and-a-half-hour period, defendant was alone in the interrogation room. Hoogerwerf testified the "entire conversation" police had with defendant in the interrogation room was video recorded. At the conclusion of the hearing, the trial court denied defendant's motion to suppress.

¶ 6 A. Stipulated Bench Trial

¶ 7 Prior to trial, the parties advised the trial court an agreement had been reached where the State would amend the charges against defendant to remove references to statutory provisions enhancing penalties for the use of a firearm. In exchange, defendant would agree to a stipulated bench trial with the understanding a sentence of between 20 and 60 years was possible if he was found guilty.

¶ 8 On December 14, 2007, the matter proceeded to the stipulated bench trial. The parties stipulated to, *inter alia*, the following evidence.

¶ 9 Dandrea Boclair would testify she was outside her apartment watching a dice game shortly after 6 p.m. on July 26, 2006, when defendant approached her and said, "go inside,

take your children, something is going to happen." Boclair then went inside, and from her upstairs apartment, she observed "defendant over a dice game *** and saw the defendant strike [Jones] in the head with a gun more than once." When Jones attempted to flee, Boclair "saw the defendant point a gun at [Jones] and fire the gun in[to Jones]."

¶ 10 Cornelius Anderson would testify that he was standing near the dice game on July 26, 2006, when defendant approached Jones and said, " 'where's your s***.' " Defendant then struck Jones in the head with a gun. Anderson observed defendant chase Jones with a gun. Anderson saw Jones jump a fence and then "heard a gunshot." Anderson could not see defendant or Jones when he heard the gunshot, but defendant "was the only person with a gun and [he] heard the shot only a few seconds after [he] lost sight of the defendant."

¶ 11 Marcus Kelly would testify he was at the July 26, 2006, dice game and observed defendant strike Jones in the head with a handgun and yell, " 'give it up.' " When Jones tried to run away, defendant chased him. Kelly "saw the defendant point the gun at [Jones]." Kelly "heard the gun discharge, and [Kelly] heard [Jones] cry out in pain and flinch." Kelly ran from the scene and defendant followed him to his apartment. Defendant said to Kelly, " 'what did I do' " and gave Kelly the handgun.

¶ 12 Larry Trav Horton would testify he gave defendant a .45-caliber handgun approximately two weeks prior to the shooting. Horton identified People's exhibit No. 17 as the same handgun he gave defendant.

¶ 13 Andrew Pratt, a medical technician with the Rock Island Fire Department, would testify he was dispatched to 1529 4th Street in Rock Island on July 26, 2006. Upon arriving, Pratt found Jones unconscious and unresponsive, "suffering from a gunshot wound to the lower back

and leg." Jones was transported to the emergency room and turned over to the hospital staff and Dr. Michael Bar.

¶ 14 Dr. Michael Bar would testify he was working when Jones arrived at the emergency room on July 26, 2006. Jones was in profound shock related to massive blood loss. Emergency care was administered, but Jones died as a result of his injuries.

¶ 15 Dr. Mark Peters, the forensic pathologist who performed the autopsy, would testify, within a reasonable degree of medial certainty, Jones's death "was caused by hemorrhagic shock caused by bullet injuries to [his] abdomen and thigh [resulting from the] gunshot wound to [his] back."

¶ 16 Detective Leo Hoogerwerf would testify he was the Rock Island City detective assigned to investigate Jones's death. During a July 27, 2006, interview, defendant admitted he was the person who shot Jones with a .45-caliber handgun because Jones was known to be a drug dealer, and defendant believed he would have a substantial amount of drugs or money that defendant could then take.

¶ 17 The parties also stipulated to the admission of defendant's July 27, 2006, video-recorded interview with police. During that interview, defendant admitted shooting Jones in order to rob him of drugs and money.

¶ 18 Defendant testified on his own behalf and admitted he shot Jones after he "received a phone call from some individuals and it had been told to [him] that someone had given the green light on [Jones]." The trial court found defendant guilty on both counts.

¶ 19 B. Posttrial Proceedings

¶ 20 Prior to sentencing, defendant filed a *pro se* motion to dismiss counsel and a *pro se* posttrial motion. The posttrial motion alleged the statements Cornelius Anderson provided

police were the product of coercion and the suggestive showing of a single photograph of defendant. Defendant's posttrial motion further alleged his counsel had been ineffective in not forcefully presenting those points and that the trial court had erred in refusing his request to reopen the suppression hearing.

¶ 21 On February 28, 2008, the trial court heard arguments regarding defendant's posttrial motions. During a lengthy exchange, defendant addressed the quality of his videotaped interrogation, stating:

> "Now, if I am making this claim and I have due process rights to equal protection of the law to make *** how can I make this claim when, *** on Page 28 of Detective Steven Metscaviz's supplementary report he directly says *** that I was video recorded. And if I was placed in there at 1:53, why does [Metscaviz] start at 3:50 when they first turned on the DVD?"

The court interrupted defendant, stating:

> "You can sit in a room for a long period of time while the police are talking to other people and then they *** start talking to you. They ran the DVD the whole time. You just sat in the room. Let's move on. I have already ruled on this."

Thereafter, the court denied defendant's posttrial motions. The matter then proceeded to sentencing.

¶ 22 At sentencing, the trial court sentenced defendant to 60 years' imprisonment on each count, to be served concurrently. An amended sentencing order was entered on July 17, 2014, clarifying defendant was sentenced to 60 years' imprisonment on one count of first degree murder.

¶ 23 On direct appeal, defendant argued the trial court failed to admonish him pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997) and that his counsel was ineffective regarding the suppression matters. The appellate court affirmed. See *People v. Thompson*, No. 3-08-0132 (2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 24 On May 27, 2021, defendant *pro se* filed a petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2020)), alleging he had newly discovered evidence that would "materially affect and influence the verdict in this case." Defendant asserted the State had fraudulently concealed two and a half hours of his videotaped interrogation. Defendant maintained the missing portion of this interrogation constituted "newly discovered evidence, being that what could have been uncovered through the requested discovery concerning threats made to [defendant] during the time of his arrest." Defendant claimed he was not aware this discovery could not be obtained until the State's admission during a September 15, 2020, hearing, which constituted fraudulent concealment of evidence. In support of his contention, defendant referred to the March 9, 2007, motion to suppress hearing transcript in which Detective Hoogerwerf explained the existence of the two-and-a-half-hour time gap in defendant's videotaped interrogation.

¶ 25 On June 23, 2021, the State moved to dismiss defendant's section 2-1401 petition, asserting his claim was time-barred, noting the two-and-a-half-hour gap was not newly discovered evidence. The State referenced defendant's affidavit and argued the "statements that he makes in his new petition make it clear that he has been aware from the outset that the [two-and-a-half-]hour period that he was alone in the room was not recorded because he was not interviewed during that time." The State also argued the two-and-a-half-hour gap had already been addressed by Detective Hoogerwerf during defendant's March 9, 2007, motion to suppress

hearing. The State concluded that, because the issues relating to the time gap were known to defendant at the time of the suppression hearing, there was no fraudulent concealment to create an exception to the two-year statute of limitations.

¶ 26 On October 4, 2021, the trial court held a hearing on the State's motion to dismiss defendant's section 2-1401 petition. The State argued any issue regarding defendant's motion to suppress was available on direct appeal. The State further denied it fraudulently concealed evidence, and the evidence at defendant's trial was overwhelming. Defendant argued his defense attorney did not know what occurred during the missing two and a half hours. Defendant alleged he was coerced during the relevant gap and that he could have used that evidence during trial to discredit police officer testimony. The court took the matter under advisement.

¶ 27 On November 12, 2021, the trial court entered a written order entitled "Motion Ruling to Dismiss Second Post-Conviction Petition," stating, in relevant part, "The issue of the alleged missing gap in the interview were [*sic*] raised in a Motion to Suppress. Said motion was denied and could be raised on appeal. That issue is barred via *res judicata*." The court continued, "Further, the fraud allegation is unsubstantiated. No merit to the claim has been provided. Four eyewitnesses identified [defendant] at trial, and [defendant] admitted he committed the murder, not only at the time but at sentencing as well."

¶ 28 On November 22, 2021, defendant filed a motion to clarify the trial court's November 12, 2021, order. The State's response argued that, while the docket entry erroneously identified the matter as a postconviction petition, the contents of the court's November 12, 2021, order made it clear the court was addressing the State's motion to dismiss defendant's section 2-1401 petition.

¶ 29 On May 10, 2022, the trial court made a docket entry clarifying its order, stating, "After reviewing [the] file, [the] court will address [the] issue of [its] previous ruling in that the ruling is for dismissal of [a] 2-1401 [petition], NOT dismissal of [a] postconviction [petition]."

¶ 30 The record reflects a *pro se* notice of appeal dated June 8, 2022, was file stamped on June 13, 2022. A day later, OSAD was appointed to represent defendant. On June 24, 2022, OSAD filed a "Motion to Allow *Pro Se* Notice of Appeal to Stand." We granted OSAD's motion on June 30, 2022.

¶ 31 II. ANALYSIS

¶ 32 The appellate defender moves to withdraw as counsel. In his motion, counsel states he read the record and found no issue of arguable merit. Counsel further states he advised defendant of his opinion. Counsel supports his motion with a memorandum of law providing a statement of facts, a list of potential issues, and arguments why those issues lack arguable merit.

¶ 33 OSAD first contends defendant was afforded a reasonable opportunity to respond to the State's motion to dismiss.

¶ 34 The United States and Illinois constitutions guarantee individuals the meaningful opportunity to respond in both time and manner. *People v. Stoecker*, 2020 IL 124807, ¶ 17; see also U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, § 2. In the context of a section 2-1401 petition, this guarantee requires a petitioner be given notice of a motion to dismiss and an opportunity to respond before the trial court can rule on the motion. *Stoecker*, 2020 IL 124807, ¶ 22.

¶ 35 Here, defendant was given notice of the State's motion to dismiss, which was filed on June 23, 2021. OSAD notes the hearing on the State's motion to dismiss was held more than three months after the State filed its motion, on October 4, 2021. In addition, the trial court

afforded defendant the opportunity to orally argue, at length, against the State's motion. We therefore agree with OSAD no meritorious argument can be made that the court procedurally erred in granting the State's motion to dismiss defendant's section 2-1401 petition.

¶ 36 OSAD next contends defendant's petition is untimely and no exception to the relevant statute of limitations applies.

¶ 37 A section 2-1401 petition must be filed no later than two years after the entry of the judgment, excluding time during which the petitioner is under a legal disability or duress or the ground for relief is fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 210-11 (1997).

¶ 38 Here, defendant filed his section 2-1401 petition more than 13 years after the underlying judgment was entered. OSAD notes defendant's argument that the "grounds for relief were fraudulently concealed from him" is meritless and belied by the record. Defendant was aware of the two-and-a-half-hour time gap in the police interview recording during his March 9, 2007, motion to suppress hearing. Therefore, we agree with OSAD that the fraudulent concealment exception to the two-year statute of limitations does not apply, and defendant's section 2-1401 petition was untimely.

¶ 39 Finally, OSAD contends defendant's section 2-1401 petition presents no arguably meritorious issues. Specifically, OSAD contends (1) defendant would have been convicted even if his videotaped confession had been suppressed and (2) defendant's claim regarding the two-hour time gap is not "newly discovered" evidence.

¶ 40 A section 2-1401 petition "is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v.*

Haynes, 192 Ill. 2d 437, 461 (2000). A defendant is entitled to relief if he demonstrates (1) a meritorious claim or defense, (2) due diligence in presenting the claim in the original action, and (3) due diligence in filing the section 2-1401 petition. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 15.

¶ 41 OSAD maintains defendant would have been convicted even if his videotaped confession had been suppressed because the evidence against him was overwhelming. We agree. At the stipulated bench trial, numerous witnesses would have testified defendant shot Jones while attempting to rob him. More important, defendant, as he did during the interview, again admitted to chasing and shooting Jones while testifying at trial. Moreover, defendant fails to provide any evidence demonstrating anything improper happened during the two-hour time gap. During the second day of the suppression hearing, Hoogerwerf testified the "entire conversation" police had with defendant in the interrogation room was video-recorded. As OSAD correctly notes, defendant was aware of the time gap since, at least, March 9, 2007, *i.e.*, the second day of the hearing on defendant's motion to suppress. Defendant cannot now raise the issue more than a decade later.

¶ 42 Finally, OSAD argues defendant's claim regarding the two-hour time gap in his video-recorded interview is not "newly discovered" evidence.

¶ 43 "Newly discovered evidence is evidence that was discovered after trial and that the [defendant] could not have discovered earlier through the exercise of due diligence." *People v. Robinson*, 2020 IL 123849, ¶ 47. As discussed *supra*, defendant was aware of his time-gap claim, at the very least, on the second day of the motion to suppress hearing on March 9, 2007. Additionally, defendant acknowledged the existence of a gap in the videotaped interrogation

during the hearing on his posttrial motion on February 29, 2008. Therefore, we agree with OSAD that no meritorious argument can be made regarding this issue.

¶ 44 In sum, we agree with OSAD that no meritorious argument can be made that the trial court erred in dismissing defendant's section 2-1401 petition.

¶ 45 III. CONCLUSION

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

¶ 47 Affirmed.