2022 IL App (2d) 220051-U
No. 2-22-0051
Order filed November 29, 2022

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-120
RICHARD G. NIELSEN,	)	Honorable Robert A. Wilbrandt Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Brennan and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant established neither cause nor prejudice to justify filing his successive postconviction petition claiming that his prescription medications rendered him incapable of knowingly and voluntarily waiving his right to testify at his murder trial. Defendant did not show cause, as the medical records he relied on were available when he filed his initial petition. In addition, defendant did not show prejudice, because his testimony that he subjectively believed that deadly force was needed to defend himself from the victim would not likely have changed the outcome at trial.

¶ 2 Defendant, Richard G. Nielsen, appeals from the judgment of the circuit court of McHenry County denying him leave to file a successive postconviction petition (725 ILCS 5/122-1(f) (West

2020)). Because defendant established neither cause nor prejudice to support filing a successive petition, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2013, a jury tried defendant on the charge of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2012)) for the stabbing death of Jeremy Lechner at the home of Rebecca Meyers on February 6, 2012.

¶ 5 At trial, the trial court asked defendant's counsel if defendant intended to testify. Counsel told the court that he "had multiple conversations with [defendant] about the fact that it is his decision and his decision alone in terms of whether he would like to testify." Counsel advised defendant about the pros and cons of whether he should testify. The court then asked defendant if he understood that the State had the burden of proving him guilty beyond a reasonable doubt, and defendant answered, "Yes, sir." The court then asked defendant if he understood that he was not required to present any evidence. Defendant responded, "Yes, sir." When the court asked him if he understood that he had "no obligation whatsoever to testify," defendant answered, "Yes, sir." The court then asked him if he understood that he had an absolute right to testify and to tell the jury "whatever [he] want[ed] to tell them." Defendant answered, "Yes, sir." The court advised defendant that he alone had the right to decide whether he would testify; his attorneys could advise him in that regard, but ultimately it was his decision. Defendant responded, "Yes, sir." When the court asked defendant if he had decided whether to testify, defendant answered that he was "refus[ing]" to testify. The court then asked defendant if anyone was forcing him, threatening him, or promising him anything in exchange for his "refusal" to testify. Defendant answered, "No, sir."

When the court asked defendant if it was "[his] decision alone," defendant answered, "Yes, sir." Defendant did not testify.

¶ 6 Defendant was convicted of first-degree murder. The trial court denied his posttrial motion and sentenced him to 32 years in prison.

¶ 7 Defendant appealed. In our decision, we encapsulated the undisputed facts as follows:

> "On February 6, 2012, [defendant] was told that he had to move out of the house he had lived in for four months. When attempts were made to prohibit defendant from reentering the house, defendant, who was intoxicated, became angry and started fighting with [Lechner, Rebecca's] boyfriend who also lived in the house. Defendant pulled out a knife and stabbed Lechner. Lechner subsequently died." *People v. Nielson*, 2015 IL App (2d) 131264-U, ¶ 2.

¶ 8 Defendant did not dispute on appeal that the State proved him guilty beyond a reasonable doubt of first-degree murder. Instead, he asserted that his first-degree murder conviction should be reduced to second-degree murder because he believed, albeit unreasonably, that deadly force was necessary to defend himself. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 20. We noted that the trial court instructed the jury on first-degree murder, second-degree murder, self-defense, and involuntary manslaughter. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 20. We added that defendant unsuccessfully argued in his posttrial motion that his conviction should be reduced to second-degree murder because the evidence established his unreasonable belief in the need for lethal force to defend himself. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 20.

¶ 9 In reviewing the evidence, we noted that defendant was asked to move out of Rebecca's home earlier on the day of the incident. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 26. When he returned later that night and found the door locked, he became angry and entered the house through

a side door. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 26. Once inside, defendant, clearly infuriated, confronted Tim Meyers, Rebecca's brother, who also lived in the house. Defendant then argued with Tim and Lechner. *Nielsen*, 2015 IL App (2d) 131264- U, ¶ 26. During the confrontation, defendant stabbed Lechner. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 27.

¶ 10 We further noted that both Tim and Rebecca, the only witnesses who testified to the stabbing, indicated that Lechner had not threatened defendant before defendant stabbed him. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 27. Rather, Tim testified that defendant threatened Lechner with deadly force by pulling out a knife when Lechner asked him to leave. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 27. Although Tim testified that defendant and Lechner scuffled before defendant stabbed Lechner, neither Tim nor Rebecca testified that Lechner or defendant threw any punches before the stabbing. At most, the evidence showed that Lechner grabbed defendant's wrist before defendant stabbed him. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 27. We concluded that Lechner's grabbing defendant's wrist after a verbal argument "certainly was not a threat of imminent death or great bodily harm that could have created a belief, unreasonable or otherwise, that the use of deadly force was necessary." *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 27.

¶ 11 We noted that, although Tim and Rebecca made statements to the police that might have supported a finding that defendant unreasonably believed that deadly force was necessary, they both explained why their trial testimony differed from their pretrial statements. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 28. We commented that the jury clearly credited their trial testimony over their statements to the police, and we refused to reevaluate the jury's assessment of that evidence. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 28.

¶ 12 Next, defendant asked us to consider "(1) the statements he made to the police and photographs taken of him, which allegedly reveal that Lechner physically assaulted him;

(2) defendant's intoxication, and Lechner's consumption of various drugs; (3) the fact that defendant allegedly attempted to give mouth-to-mouth resuscitation to Lechner; (4) the fact that defendant admitted stabbing Lechner; (5) the fact that defendant complied with police demands and did not resist arrest; (6) the fact that defendant did not flee from the scene; and (7) the fact that defendant stabbed Lechner only once." *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 29. None of these points persuaded us to reduce defendant's first-degree murder conviction to second-degree murder. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 29. For instance, although defendant told Officer William Bacon that Lechner punched him two or three times before the stabbing, the jury was presented with Tim and Rebecca's testimony that Lechner punched defendant only once—*after* the stabbing. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 30. We noted that other evidence—*e.g.*, (1) Bacon's testimony that defendant did not appear to have been beaten, (2) photos of defendant that showed only slight bruising and superficial abrasions to his face, and (3) testimony of the doctor who performed Lechner's autopsy that he observed no injuries to Lechner's hands—supported Tim's and Rebecca's testimony that Lechner did not punch defendant more than once before the stabbing. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 30.

¶ 13 We also rejected defendant's remaining points—including that he stabbed Lechner only once. Aside from the fact that defendant stabbed Lechner after a verbal argument where Lechner merely grabbed defendant's wrist, the evidence showed that defendant stabbed Lechner with great force. The knife pierced Lechner's skin and muscle, cut a rib in half, cut a lung, lacerated the pericardial sac, and pierced the heart. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 34. Given the force involved, we could not conclude that the mere fact that defendant stabbed Lechner only once supported a reasonable inference that defendant did not intend to unlawfully kill Lechner but

believed, albeit unreasonably, that deadly force was necessary. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 34.

¶ 14 We concluded that, when the evidence was viewed in the light most favorable to the State, a rational trier of fact could have found that defendant did not prove by a preponderance of the evidence that he had an unreasonable belief that he needed to use lethal force to defend himself. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 36. Thus, we declined to reduce defendant's first-degree murder conviction to second-degree murder. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 36.

¶ 15 On September 5, 2017, defendant filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). On October 2, 2017, he supplemented the petition. The trial court summarily dismissed both petitions. On appeal, we granted appellate counsel's motion to withdraw and affirmed. *People v. Nielsen*, No. 2-18-0010 (2019) (unpublished summary order under Illinois Supreme Court Rule 23(c)(2)). On December 19, 2019, defendant sought leave to file a successive postconviction petition. The trial court denied him leave, and defendant did not appeal. On November 23, 2020, defendant filed a petition for relief from judgment (see 735 ILCS 5/2-1401 (West 2020)). On August 20, 2021, defendant again sought leave to file a successive postconviction petition. In his proposed petition, defendant claimed, among other things, that his prescription drugs rendered him incapable of knowingly and voluntarily waiving his right to testify. To show cause for failing to bring his invalid-waiver claim earlier, defendant alleged that, while serving his sentence in this case, he obtained medical records from McHenry County and realized that he had been overmedicated during the trial. To show prejudice from his invalid waiver, defendant alleged that the jury "need[ed] to hear [his] side of what happened [*sic*]."

¶ 16 The trial court denied both defendant's section 2-1401 petition and his request for leave to file a successive postconviction petition. As pertinent to this appeal, the court denied leave to file

the invalid-waiver claim because defendant (1) failed to show cause for not bringing the claim in his initial petition and (2) failed to show how the absence of his testimony prejudiced him at trial.

¶ 17 Defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant challenges the denial of leave to file his successive postconviction petition—specifically, his claim that his prescription drugs rendered him incapable of knowingly and voluntarily waiving his right to testify. He contends that he alleged cause for failing to raise the claim earlier because he did not obtain the medical records supporting his claim until two years after he filed his initial postconviction petition. He further contends that he established prejudice because (1) the allegations of the proposed petition were factually sufficient to show that his consumption of drugs made him incapable of a valid waiver and (2) he was prejudiced by the absence of his testimony that he subjectively believed that deadly force was necessary to defend himself (defendant admits that the latter claim is only "implicit" in his allegation that the jury "need[ed] to hear [his] side of what happened [*sic*]").

¶ 20 Before we address the merits, we note that the State filed a motion to strike certain online resources cited in defendant's opening brief. The State contends that these resources (1) contain factual and legal matters not presented in the trial court, (2) cannot properly be judicially noticed, and (3) do not constitute proper secondary authority such as legal treatises or law review articles. We ordered the motion taken with the case. In his reply brief, defendant asserts that the cited resources—relating to the side effects of the medications he allegedly was taking when he waived his right to testify—"do not support an independent argument on appeal that was not included in [defendant's] *pro se* petition." Rather, "the challenged citations provide readily verifiable facts regarding propositions of general knowledge intended to aid this Court in its review of this case."

Defendant notes that his argument on appeal "is not dependant [*sic*] on information from the citations," and he asks us to consider the resources "to the extent [we] find[ ] them useful or informative."

¶ 21 We decline to strike the citations to the online materials. They do not constitute independent factual or legal matters not raised below, but merely provide supplemental information regarding the potential side effects of the drugs defendant claims affected his ability to waive his right to testify. Indeed, they are resources that this court might have independently examined to understand the full nature of defendant's *pro se* claim. Thus, we deny the State's motion to strike.

¶ 22 Turning to the merits, the Act allows a criminal defendant to assert that his federal or state constitutional rights were substantially violated in the proceedings leading to his conviction. 725 ILCS 5/122-1(a)(1) (West 2020). The Act itself, however, contemplates the filing of a single petition. *People v. Dorsey*, 2021 IL 123010, ¶ 32. Accordingly, a defendant faces immense procedural default hurdles when bringing a successive postconviction petition. *Dorsey*, 2021 IL 123010, ¶ 32. Those hurdles are lowered only in very limited circumstances, so as not to impede the finality of criminal litigation. *Dorsey*, 2021 IL 123010, ¶ 32. One of those hurdles is that the defendant must obtain leave of court to file a successive petition. 725 ILCS 5/122-1(f) (West 2020). To obtain such leave, the defendant must demonstrate (1) cause for failing to raise the claim in the initial petition and (2) prejudice resulting from that failure. *Dorsey*, 2021 IL 123010, ¶ 32. To show cause, the defendant must identify an objective factor that impeded the ability to raise the specific claim during the initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2020). To show prejudice, the defendant must demonstrate that the claimed error so infected the

trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2020).

¶ 23 Leave of court to file a successive petition should be denied when it is clear from a review of the successive petition and its supporting documents that the claims fail as a matter of law or are insufficient to justify further proceedings. *Dorsey*, 2021 IL 123010, ¶ 33. We review *de novo* the denial of a motion for leave to file a successive postconviction petition. *Dorsey*, 2021 IL 123010, ¶ 33.

¶ 24 Defendant asserts that he showed cause because he did not become aware that he was overly medicated until he obtained his medical records from McHenry County, after the trial court dismissed his initial postconviction petition. However, the medical records were available to defendant before filing his initial petition. Further, defendant knew that he was taking certain medications during the trial. If he believed they impacted his mental capacity during the trial, he could have claimed as much in his initial petition. Accordingly, defendant was entirely able in his initial petition to raise an issue regarding his capacity to knowingly and voluntarily waive his right to testify. More importantly, he has not identified any objective factor that impeded his ability to raise the claim in his initial petition. Thus, he has not established cause for filing a successive postconviction petition.

¶ 25 Nor has he established prejudice. First, contrary to his claim of adverse effects due to over medication, defendant was responsive during the court's thorough colloquy about defendant's decision not to testify. Second, even had defendant exercised his right to testify, his testimony that he subjectively believed that deadly force was necessary to defend himself would not likely have changed the outcome at trial. As we discussed in our disposition on direct appeal, the evidence established beyond a reasonable doubt that defendant did not act with the belief, reasonable or

unreasonable, that deadly force was necessary. In doing so, we necessarily rejected any argument that defendant acted in self-defense. Indeed, we determined that the evidence showed that defendant was not defending himself but indeed was the aggressor. Specifically, we concluded that Lechner's grabbing defendant's wrist after a verbal argument "certainly was not a threat of imminent death or great bodily harm that could have created a belief, unreasonable or otherwise, that the use of deadly force was necessary." *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 27. We further noted that the evidence established that defendant did not suffer any physical injuries consistent with his theory that deadly force was necessary to prevent Lechner from beating him. Likewise, we addressed defendant's various points, including that (1) police photos showed that he had been beaten, (2) he admitted stabbing Lechner, and (3) he stabbed Lechner only once. We held that these points did not give rise to a reasonable inference that defendant did not intend to unlawfully kill Lechner but believed, albeit unreasonably, that deadly force was necessary. *Nielsen*, 2015 IL App (2d) 131264-U, ¶ 34. Considering the overwhelming evidence that defendant did not act with a belief, unreasonable or otherwise, that deadly force was necessary, his proposed testimony that he himself believed that lethal force was needed would not likely have changed the outcome at trial. Accordingly, any error in accepting his waiver of the right to testify did not so infect the entire trial that his conviction violated due process. Thus, defendant failed to establish prejudice sufficient to justify filing a successive postconviction petition.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 28 Affirmed.