

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-16-3362

Order filed June 13, 2019

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 87 CR 12111
)	
DEREK CROSBY,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

SUMMARY ORDER

¶ 1 Defendant Derek Crosby appeals from the order of the circuit court denying his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)).

¶ 2 Following a 1989 jury trial, defendant was found guilty of three counts of first degree murder (Ill. Rev. Stat. 1987, ch. 38, par. 9-1) and one count of attempted first degree murder (Ill. Rev. Stat. 1987 ch. 38, pars. 8-4, 9-1). Defendant was found death-penalty eligible but sentenced to life imprisonment for the three murder convictions and a concurrent extended-term of 60 years

for the attempted first degree murder. On appeal, defendant argued, *inter alia*, that his sentence violated the due process and equal protection clauses of the United States and Illinois constitutions and the prohibition against cruel and unusual punishment of the United States Constitution. See U.S. Const., amends. VIII, XIV; Ill. Const 1970, art I, § 2. This court affirmed. *People v. Crosby*, 243 Ill. App. 3d 1083 (1993).

¶3 In 2001, defendant filed a postconviction petition, which the circuit court summarily dismissed. The petition alleged that defendant's sentence violated the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This court held defendant's *Apprendi* claim could not be raised in a postconviction petition and affirmed the dismissal of his postconviction petition. *People v. Crosby*, No. 1-01-4179 (2003) (unpublished order under Supreme Court Rule 23).

¶4 In 2005, defendant filed a section 2-1401 petition alleging that his conviction violated *Apprendi*. The circuit court "denied" defendant's petition. This court affirmed, holding that the circuit court's dismissal was proper as defendant's claim was not only meritless but barred by *res judicata*, and thus dismissal of the petition was inevitable. *People v. Crosby*, No. 1-05-0992 (2006) (unpublished order under Supreme Court Rule 23).

¶5 In 2016, defendant filed the section 2-1401 petition at issue in this appeal. Defendant argued: (1) the first degree murder statute violated articles II, IV, and VI of the Illinois constitution (Ill. Const. 1970 art. II, IV, VI) because the legislature encroached on the power of the judiciary to impose sentence following a criminal conviction; (2) his life sentence violated the cruel and unusual punishment clause of the eighth amendment and the due process and equal protection clauses of the fourteenth amendment; and (3) his sentence violates article I, section 2 of the Illinois constitution. On August 15, 2016, the circuit court denied defendant's petition. We granted defendant leave to file a late notice of appeal.

¶ 6 The Office of the State Appellate Defender, which represents defendant on appeal, has filed a motion for leave to withdraw as appellate counsel. A memorandum in support of the motion has been submitted, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), in which counsel concludes that no issues of merit exist warranting argument on appeal. Counsel considered raising several issues including, *inter alia*, whether defendant's claims are barred by *res judicata*. Counsel concludes that they are. Copies of the motion and memorandum were sent to defendant and he was invited to respond. Defendant has filed a response, in which he generally reargues the merits of his claims but does not address *res judicata*.

¶ 7 We have carefully reviewed the record in this case, the aforesaid memorandum, and defendant's response and find no issues of arguable merit. Therefore, the motion of the State Appellate Defender for leave to withdraw as counsel is granted.

¶ 8 The judgment of the circuit court of Cook County is affirmed in accordance with Supreme Court Rule 23(c)(2) (eff. Apr. 1, 2018).

¶ 9 Affirmed.



CLERK'S OFFICE
APPELLATE COURT FIRST DISTRICT
STATE OF ILLINOIS
160 NORTH LA SALLE STREET, RM S1400
CHICAGO, ILLINOIS 60601

July 23, 2019

RE: People v. Crosby, Derek
General No.: 1-16-3362
County: Cook County
Trial Court No: 87CR12111

The Court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Thomas D. Palella
Clerk of the Appellate Court

c: Office Of The State Appellate Defender
State's Attorney Cook County



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING

200 East Capitol Avenue

SPRINGFIELD, ILLINOIS 62701-1721

CAROLYN TAFT GROSBOLL

Clerk of the Court

(217) 782-2035

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August 22, 2019

FIRST DISTRICT OFFICE

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Chicago, IL 60601-3103

(312) 793-1332

TDD: (312) 793-6185

Derek Crosby
Reg. No. Reg. No. N-01089
Menard Correctional Center
P.O. Box 1000
Menard, IL 62259

In re: People v. Crosby
125199

Dear Derek Crosby:

This office has timely filed your Petition for Leave to Appeal, styled as set forth above. You are being permitted to proceed as a poor person.

Your motion will be presented to the Court for its consideration, and you will be advised of the Court's action thereon.

Very truly yours,

Clerk of the Supreme Court

cc: Attorney General of Illinois - Criminal Division
Cook County State's Attorney, Criminal Division



SUPREME COURT OF ILLINOIS

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November 26, 2019

In re: People State of Illinois, respondent, v. Derek Crosby, petitioner.
Leave to appeal, Appellate Court, First District.
125199

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 12/31/2019.

Very truly yours,

Carolyn Taft Gosboll

Clerk of the Supreme Court

commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

(b) Co-conspirators.

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

- (1) Has not been prosecuted or convicted, or
- (2) Has been convicted of a different offense, or
- (3) Is not amenable to justice, or
- (4) Has been acquitted, or
- (5) Lacked the capacity to commit an offense.

(c) Sentence.

A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy, except that if the object is an offense prohibited by Sections 11-15, 11-16, 11-17, 11-19, 24-1(a)(1), 24-1(a)(7), 28-1, 28-3 and 28-4 of the "Criminal Code of 1961", approved July 28, 1961, as amended or prohibited by Sections 401, 402, 403, 404, 406(b) or 407 of the "Illinois Controlled Substances Act", enacted by the 77th General Assembly,¹ or an inchoate offense related to any of the aforesaid principal offenses the person convicted may be sentenced for a Class 3 felony however, conspiracy to commit treason, murder, or aggravated kidnapping shall not be sentenced in excess of a Class 2 felony, and conspiracy to commit any offense other than those specified in this subsection shall not be sentenced in excess of a Class 4 felony.

Amended by P.A. 78-255, § 61, eff. Oct. 1, 1973.

¹ Chapter 56½, §§ 1401 to 1404, 1406 or 1407.

8-3. Defense

§ 8-3. Defense. It is a defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense.

8-4. Attempt

§ 8-4. Attempt.

(a) Elements of the Offense.

A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

(b) Impossibility.

It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(c) Sentence.

A person convicted of an attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but, except for an attempt to commit the offense defined in Section 33A-2 of this Act,

- (1) the sentence for attempt to commit murder is the sentence for a Class X felony;
- (2) the sentence for attempt to commit a Class X felony is the sentence for a Class 1 felony;
- (3) the sentence for attempt to commit a Class 1 felony is the sentence for a Class 2 felony;
- (4) the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony; and

(5) the sentence for attempt to commit any felony other than those specified in Subsections (1), (2), (3) and (4) hereof is the sentence for a Class A misdemeanor.

Amended by P.A. 81-923, § 1, eff. Jan. 1, 1980.

8-5. Multiple convictions

§ 8-5. Multiple Convictions. No person shall be convicted of both the inchoate and the principal offense.

8-6. Offense

§ 8-6. Offense. For the purposes of this Article, "offense" shall include conduct which if performed in another State would be criminal by the laws of that State and which conduct if performed in this State would be an offense under the laws of this State.

Part B. Offenses Directed Against the Person

ARTICLE 9. HOMICIDE

Par.

9-1. **Murder—Death penalties—Exceptions—Separate hearings—Proof—Findings—Appellate procedures—Reversals.**

9-1.1. **Feticide.**

9-2. **Voluntary manslaughter.**

9-3. **Involuntary manslaughter and reckless homicide.**

9-3.1. **Concealment of homicidal death.**

9-4. **Concealing death of bastard.**

9-1. **Murder—Death penalties—Exceptions—Separate hearings—Proof—Findings—Appellate procedures—Reversals**

§ 9-1. **Murder—Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals.** (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

1. the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

2. the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or

under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

4. the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

5. the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual:

(i) was actually killed by the defendant, or

(ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the defendant is legally accountable under Section 5-2 of this Code, and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, aggravated criminal sexual assault, aggravated kidnapping, forcible detention, arson, aggravated arson, burglary, home invasion, or the attempt to commit any of the felonies listed in this subsection (c); or

7. the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

8. the defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another.

(c) **Consideration of factors in Aggravation and Mitigation.** The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional distur-

bance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

(d) **Separate sentencing hearing.** Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c). The proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or

2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding.

(e) **Evidence and Argument.** During the proceeding any information relevant to any of the factors set forth in subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) **Proof.** The burden of proof of establishing the existence of any of the factors set forth in subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) **Procedure—Jury.** If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.¹ If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) **Procedure—No Jury.** In a proceeding before the court alone, if the court finds that none of the factors

found in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(i) **Appellate Procedure.** The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) **Disposition of reversed death sentence.** In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

Amended by P.A. 83-1067, § 2, eff. July 1, 1984.

¹ Paragraph 1005-1-1 et seq. of this chapter.

For saving clause, construction and application of P.A. 83-1067, see note following ¶ 12-12 of this chapter.

9-1.1. Feticide

§ 9-1.1. Feticide. (a) A person commits the offense of feticide who causes the death of a fetus if, in performing the acts which caused the death, he, without lawful justification:

(1) either intended to kill or do great bodily harm to the mother carrying the fetus or knew that such acts would cause death or great bodily harm to the mother; or

(2) he knew that his acts created a strong probability of death or great bodily harm to the mother; or

(3) he was attempting or committing a forcible felony against the mother other than voluntary manslaughter; and

(4) he knew, or reasonably should have known under all of the circumstances, that the mother was pregnant.

(b) For purposes of this Section, "fetus" means a fetus which the physician or pathologist performing the fetal autopsy determines, based upon the particular facts of the case before him, to have been capable, at the time of its death, of sustained life outside of the mother's womb with or without life support equipment, and such capacity for sustained life is proven beyond a reasonable doubt.

(c) the provision of this Section shall not apply to any person who commits an act which results in the death of a fetus if:

(1) the act complied with the "Illinois Abortion Law of 1975";¹ or

(2) the act was committed by a physician licensed in Illinois to practice medicine in all of its branches in a case where, to a reasonable degree of medical certainty, the result of childbirth would be the death of the mother of the fetus, or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not; or

(3) the act which caused the death of the fetus was performed against the mother of the fetus under circumstances which would justify performance of the act under the provisions of Article 7 of the Criminal Code of 1961.²

(d) **Penalty.** The sentence for feticide shall be the same as for murder, except that the death penalty may not be imposed.

(e) The provisions of this Section shall not be construed to prohibit the prosecution of any person under any other provision of law.

Added by 82-303, § 1, eff. Aug. 21, 1981.

¹ Paragraph 81-11 et seq. of this chapter.

² Paragraph 7-1 et seq. of this chapter.

9-2. Voluntary manslaughter

§ 9-2. Voluntary manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code,¹ but his belief is unreasonable.

(c) **Sentence.**

Voluntary Manslaughter is a Class 1 felony.

Amended by P.A. 82-517, § 1, eff. Jan. 1, 1982.

¹ Paragraph 7-1 et seq. of this chapter.

9-3. Involuntary manslaughter and reckless homicide

§ 9-3. Involuntary Manslaughter and Reckless Homicide. (a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

(b) In cases involving reckless homicide, being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be *prima facie* evidence of a reckless act.

(c) For the purposes of this Section, a person shall be considered to be under the influence of alcohol or other drugs while: