

No. 1-10-0121

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 27177
)	
JAMES WALKER,)	The Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court
Presiding Justice HOFFMAN and Justice ROCHFORD concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court properly denied defendant leave to file a successive *pro se* postconviction petition when defendant did not establish the cause prong of the cause-and-prejudice test.

¶ 2 Defendant James Walker appeals from the trial court's denial of leave to file a successive *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West

2008)). He contends that he satisfied the cause-and-prejudice test and stated an arguable claim that he was denied a fair trial because the victim testified while under the effects of several prescription medications which could have affected her recollection. We affirm.

¶ 3 At the severed, but simultaneous, bench trial of defendant and codefendant Robert Davis, the victim, L.H., testified that in October 1998 the two men forced her to accompany them to an apartment. There, she was penetrated orally, vaginally, and anally numerous times by defendant, codefendant and another man. She was also beaten and submerged in scalding water. After the victim was permitted to leave, she contacted the police and identified defendant and codefendant. During cross-examination by codefendant's counsel, the victim testified that because of blows to the head suffered during the incident, her mind would "go and come" and she was prescribed Zoloft, Seroquel,¹ Neurontin, Exontor, and Ambien. During cross-examination by defendant's counsel, counsel asked what medication, if any, the victim had taken prior to testifying. The victim indicated that she had taken "Elavil," but had not taken Zoloft, Seroquel, or Neurontin.

¶ 4 In making its findings, the trial court recognized that the victim was not the most consistent or coherent witness and that her credibility could have been affected by the "considerable amount of medication" that she had been prescribed. However, her testimony was corroborated by her injuries and her "outcry," *i.e.*, her contemporaneous identification of defendant and codefendant. The court found defendant guilty of aggravated criminal sexual assault, aggravated kidnaping, aggravated battery, armed violence, and unlawful restraint, and

¹ Although the transcript indicates the victim was prescribed "Sarquil," the proper spelling is Seroquel.

sentenced him to an aggregate prison term of 54 years.

¶ 5 On appeal this court vacated defendant's convictions for armed violence and aggravated battery pursuant to the one-act, one crime doctrine. See *People v. Walker*, No. 1-01-1510 (2003) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 Defendant thereafter filed two unsuccessful *pro se* motions for DNA testing. See *People v. Walker*, No. 1-04-3418 (2005); No. 1-09-0413 (2010) (unpublished orders pursuant to Supreme Court Rule 23). This court also affirmed the summary dismissal of defendant's 2005 *pro se* petition for relief from judgment, recharacterized as a postconviction petition and later amended *pro se*. See *People v. Walker*, No. 1-05-2769 (2006); 1-07-0455 (2008) (unpublished orders pursuant to Supreme Court Rule 23).

¶ 7 On October 8, 2009, defendant filed a "petition for *mandamus*" seeking defendant's educational and "physiology" records. The "petition" asserted that these records would show that defendant had multiple learning disabilities which would have prevented him from understanding the ramifications of the proceedings at his trial. Attached to the petition were the affidavit of defendant's twin sister, Dori Walker Glover and school records indicating that Glover had a "slow" level of cognitive functioning. In her affidavit, Glover averred that she and defendant were in special education classes together in school.

¶ 8 Later that month, defendant filed the instant successive *pro se* postconviction petition alleging, *inter alia*, that the trial court abused its discretion when it permitted the victim to testify while under the influence of medication without first determining whether she was "okay to stand trial." The petition also alleged that trial counsel was ineffective when he did not (1) seek a continuance in order to obtain "better" testimony from the victim, (2) retain a doctor to monitor

the victim and explain the effects of her medications, and (3) cross-examine the victim regarding her fitness and medications. Attached to the petition were documents listing safety information and potential side effects for Elavil, Seroquel, Ambien, and Zoloft. Although this was his second *pro se* postconviction petition, defendant did not file a separate document seeking leave to file the petition.

¶ 9 The trial court denied defendant leave to file the instant successive petition finding, in pertinent part, that defendant's claims regarding the victim's medications could have been raised on direct appeal. The court also noted that defendant's claims were not sufficient under the Act because they were entirely conclusory. The court also dismissed defendant's *mandamus* petition.

¶ 10 On appeal, defendant contends that he has satisfied the cause-and-prejudice test because his cognitive disabilities prevented him from recognizing sooner that the victim's medications could have affected her recollection and because trial counsel's failure to cross-examine the victim regarding the "mental effects of her drug use" denied him effective assistance of counsel.

¶ 11 The Act contemplates the filing of only one postconviction petition and a defendant must obtain leave of court before filing a successive postconviction petition. See 725 ILCS 5/122-1 (f) (West 2008) (only "one petition may be filed *** without leave of the court"). Leave to file a successive postconviction petition may be granted when a defendant has established cause and prejudice, or when fundamental fairness so requires. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Pursuant to the cause-and-prejudice test, the defendant must show good cause for failing to raise the claimed error in a prior proceeding and that actual prejudice resulted from the error. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). "Cause" may be shown by pleading some objective factor external to the defense that impeded counsel or defendant from timely raising

the claim in an earlier proceeding. *Pitsonbarger*, 205 Ill. 2d at 460. "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction or sentence violated due process. *Pitsonbarger*, 205 Ill. 2d at 464. The failure to establish either prong of the cause-and-prejudice test is a statutory bar to the filing of a successive postconviction petition. *People v. Lee*, 207 Ill. 2d 1, 5 (2003). This court reviews the trial court's denial of a motion to file a successive postconviction petition *de novo*. *People v. LaPointe*, 227 Ill. 2d 39, 43 (2007).

¶ 12 Initially this court notes that defendant's claim that the victim's prescription medications may have affected her recollection is inappropriate for a postconviction proceeding. A proceeding under the Act is not an appeal from a judgment of conviction; rather, it is a collateral attack upon the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Consequently, issues that could have been raised on direct appeal, but were not, are forfeited. See *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007) (the scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated). Defendant's claim that the victim's prescription medication could have affected her recollection is based entirely upon facts contained in the trial court record. Thus, as this claim could have been raised on direct appeal, but was not, it is forfeited for purposes of this postconviction proceeding. See *Harris*, 224 Ill. 2d at 124-25. However, even were this court to excuse defendant's failure to raise this claim on direct appeal, he must still establish "cause" for the failure to raise this issue in his first postconviction petition.

¶ 13 Defendant contends that he established "cause" pursuant to the cause-and-prejudice test because his cognitive disabilities prevented him from recognizing the potential impact of the victim's "drug use" upon her recollection until the preparation of the instant *pro se* successive

petition. The problem with this argument, however, is that the issue of defendant's alleged cognitive disabilities was not raised in the successive *pro se* postconviction petition filed in the trial court.

¶ 14 Our supreme court has repeatedly held that any issues to be reviewed must be presented in the postconviction petition filed in the trial court and a defendant may not raise an issue for the first time while the matter is on review. *Petrenko*, 237 Ill. 2d at 502. Although defendant raised many arguments in his successive *pro se* petition, he did not allege that he suffered from a cognitive disability. In fact, the documents defendant relies on to support this argument on appeal were submitted in support of the *pro se mandamus* petition seeking his educational records. Defendant identifies no authority permitting a defendant to rely on documents attached to another filing to support a postconviction petition. Because defendant failed to raise the issue of his cognitive disability in his successive postconviction petition, he cannot raise it for the first time on appeal. *Petrenko*, 237 Ill. 2d at 502. However, even were this court to apply the cause-and-prejudice test to defendant's claims, his failure to establish "cause" dooms his appeal.

¶ 15 Defendant attempts to establish good cause for failing to raise the issue of the victim's medication sooner by asserting that he did not recognize the issue until he was preparing the instant petition. However, he fails to identify any external objective factor that impeded him from raising this claim in an earlier proceeding, and, consequently, cannot satisfy the "cause" prong of the cause-and-prejudice test (see *Pitsonbarger*, 205 Ill. 2d at 460).

¶ 16 We are unpersuaded by defendant's reliance on *People v. Smith*, 352 Ill. App. 3d 1095, 1100 (2004). In that case, the court determined that the "cause" prong of the cause-and-prejudice test was satisfied when the claim that a State witness perjured herself, raised for the

first time in the defendant's successive postconviction petition, was based upon information which was unknown until after the defendant had filed his first petition. In the case at bar, there is no allegation that the information regarding the victim's medications or their potential side effects were previously unavailable to defendant.

¶ 17 Accordingly, as defendant has failed to identify an external factor which prevented this issue from being raised in a prior proceeding, he cannot establish the cause prong of the cause-and-prejudice test and is statutorily barred from filing his successive *pro se* postconviction petition (*Lee*, 207 Ill. 2d at 5).

¶ 18 For the reasons stated above, we affirm the judgment of the trial court.

¶ 19 Affirmed.