

No. 1-10-0391

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. 04 CR 3628
)	
GEORGE EVANS,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBride delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Denial of motion for leave to file a successive post-conviction petition affirmed where defendant failed to demonstrate cause for not raising sentencing claim in initial post-conviction petition.

¶ 2 Defendant George Evans appeals from an order of the circuit court of Cook County denying his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that the court erred in doing so where he demonstrated cause and prejudice for his failure to previously assert his claim that the State violated his constitutional rights by increasing his sentence beyond the 12-year term authorized by the trial court.

¶ 3 The record shows, in relevant part, that in 2005, defendant was found guilty of aggravated battery with a firearm, then sentenced to 12 years' imprisonment. On direct appeal, this court modified certain of his fines and fees and affirmed the judgment in all other respects. *People v. Evans*, No. 1-05-0850 (2007) (unpublished order under Supreme Court Rule 23).

¶ 4 On February 13, 2008, defendant filed a *pro se* petition for post-conviction relief alleging, essentially, that the trial court failed to inform him that he was being sentenced pursuant to the Truth in Sentencing Act and, thus, required to serve 85% of his sentence, and that it also failed to make a finding of severe bodily injury so as to subject him to the provisions of the Truth in Sentencing Act. The circuit court summarily dismissed this petition, and we affirmed that dismissal on appeal after granting the public defender's motion for leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Evans*, No. 1-08-1338 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 On December 14, 2009, defendant filed a *pro se* motion requesting leave to file a successive post-conviction petition. He asserted that his right to due process was violated when the court failed to admonish him of the three-year term of mandatory supervised release (MSR) which attached to his 12-year sentence. He claimed that if he were required to serve those three years of MSR in addition to his 12-year sentence, the actual time served would exceed the term announced by the trial court, which, he claimed, is unlawful under *Earley v. Murray*, 451 F.3d 71 (2d Cir. 2006).

¶ 6 Defendant further maintained that there was cause for his failure to assert his claim in his initial petition, stating:

"The information about the M.S.R. was not yet discovered to me yet. And when I did learn about it more research need to be done. Also it was still being decided in appeals court, so no case

were able to be used as evidence. Basically I Petitioner just discovered this."

He also maintained that he would suffer prejudice if he were unable to assert his claim.

¶ 7 On January 4, 2010, the circuit court denied defendant leave to file a successive petition, noting that defendant was "ignoring the fact that this was not something that he had bargained for." Rather, it was "a sentence after a trial and conviction and mandatory supervised release term is not something the Court has any control over." This appeal followed.

¶ 8 Under the Act, proceedings are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place (725 ILCS 5/122-1(b) (West 2008)); however, where, as here, defendant seeks to file a successive post-conviction petition, leave of court must first be obtained (725 ILCS 5/122-1(f) (West 2008)). The Act provides that the circuit court may grant leave to file a successive post-conviction petition only where defendant demonstrates cause for his failure to bring the claim in his initial post-conviction proceedings and prejudice as a result of that failure. 725 ILCS 5/122-1(f) (West 2008).

¶ 9 To show cause, defendant must identify an objective factor, external to the defense, that impeded his ability to raise his claim during his initial post-conviction proceedings. 725 ILCS 5/122-1(f)(1) (West 2008); *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). To show prejudice, he must demonstrate that the claim he seeks to raise so infected his trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f)(2) (West 2008); *Pitsonbarger*, 205 Ill. 2d at 464. Our review of the circuit court's denial of defendant's motion for leave to file a successive post-conviction petition is *de novo*. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028-29 (2010).

¶ 10 Defendant maintains that the circuit court erred in denying him leave to file a successive post-conviction petition where he stated "an arguable claim" of cause and prejudice. He

maintains that he stated an "arguable claim" of cause by his assertion that he had not yet discovered information about his MSR term when his first post-conviction petition was filed, and that he stated an "arguable claim" of prejudice because his time in the custody of the Illinois Department of Corrections would exceed the 12-year sentence imposed by the trial court if he were required to serve a three-years MSR term. He further claims that "[t]he longer sentence imposed by IDOC in this case usurped the power of the judiciary in violation of the Separation of Powers Clause."

¶ 11 As an initial matter, the State takes issue with the analysis set forth in defendant's brief because he has imported certain principles associated with the first-stage review of a post-conviction petition into his discussion of cause and prejudice. Specifically, defendant relies on *People v. LaPointe*, 365 Ill. App. 3d 914, 924 (2006) for the proposition that he is only required to state the "gist" of a claim of cause and prejudice, *i.e.*, a claim with an arguable basis in law or fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). He also claims that the allegations in his petition must be taken as true "at this stage," citing *People v. Coleman*, 183 Ill. 2d 366 (1998) and *People v. Williams*, 392 Ill. App. 3d 359 (2009).

¶ 12 The State maintains that application of the gist standard under the present circumstances "transgresses the cause and prejudice standard." The State also claims that when determining whether defendant has established cause and prejudice, this court need not assume the truth of the allegations in his successive petition because first-stage post-conviction principles do not apply, and because he bears the burden of establishing cause and prejudice.

¶ 13 We believe that the Second District's holding in *LaPointe*, 365 Ill. App. 3d at 924, that defendant must state only the gist of a meritorious claim of cause and prejudice,¹ is questionable.

¹ We observe that in affirming *LaPointe*, the supreme court did not address this matter. *People v. LaPointe*, 227 Ill. 2d 39 (2007).

After that decision was announced, the supreme court noted, albeit in a different context, that the trial court must review every request for post-conviction relief, "whether it be an initial petition subject to review under the 'gist' standard or a proffered successive petition subject to the more exacting cause and prejudice standard." *People v. Conick*, 232 Ill. 2d 132, 142 (2008) (citation omitted). The reasonable inference to be drawn from that statement is that the "gist" standard applicable to first-stage petitions is, contrary to the appellate court's holding in *LaPointe*, a lower standard than that befitting the cause and prejudice analysis used to determine whether defendant should be allowed to file a successive petition.

¶ 14 We also find that defendant's reliance on *Coleman* and *Williams* for the proposition that his allegations of cause and prejudice must be taken as true is misplaced. In *Coleman*, 183 Ill. 2d at 380-81, the supreme court noted that all well-pleaded facts must be taken as true at the dismissal stage of post-conviction proceedings. In *Williams*, 392 Ill. App. 3d at 366-67, this court noted the same in the context of the first-stage review of a successive post-conviction petition when actual innocence was alleged, thereby excusing defendant from demonstrating cause and prejudice (*People v. Ortiz*, 235 Ill. 2d 319, 330 (2009)). Here, unlike those cases, defendant's petition had not yet reached the dismissal stage of proceedings because he had not been granted leave to file it pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2008); *People v. Tidwell*, 236 Ill. 2d 150, 158-61 (2010)), and he did not allege actual innocence to excuse him from satisfying the cause and prejudice requirements of that section. *Coleman* and *Williams* thus offer no support for his position. *People v. Jarrett*, 399 Ill. App. 3d 715, 725 (2010).

¶ 15 Those shortcomings notwithstanding, the record shows that defendant has failed to assert an arguable claim of cause for his failure to raise the instant claim in his initial post-conviction petition. By operation of law, every sentence includes a term of mandatory supervised release in

addition to the term of imprisonment imposed (730 ILCS 5/5-8-1(d) (West 2008); *People ex rel. Scott v. Israel*, 66 Ill.2d 190, 194 (1977)); and save for negotiated plea situations, due process does not require the trial court to admonish defendant that a term of MSR will attach to his sentence (*People v. Whitfield*, 217 Ill. 2d 177, 195 (2005)). Thus, the fact that defendant was not consciously aware of the three-year MSR term which attached to his sentence when he filed his initial post-conviction petition does not constitute an objective factor, external to the defense, which impeded his ability to raise this claim in his initial post-conviction petition. *Pitsonbarger*, 205 Ill. 2d at 462. Moreover, there is no indication that the factual basis for his claim was unavailable to him where he merely alleged that he had not yet "discovered" information regarding his MSR, and, in that respect, his reliance on *People v. Hudson*, 195 Ill. 2d 117, 123 (2001) is unavailing.

¶ 16 Because a showing of both cause and prejudice is required, defendant's failure to establish cause precludes him from challenging his sentence in a successive post-conviction proceeding, and his claim is procedurally defaulted. *People v. Brown*, 225 Ill. 2d 188, 207 (2007). We therefore affirm the order of the circuit court of Cook County denying defendant leave to file a successive post-conviction petition.

¶ 17 Affirmed.