

No. 1-09-2316

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
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	No. 04 CR 26102
ROBERT GILBERT,)	
)	The Honorable
Defendant-Appellant.)	Carol A. Kipperman,
)	Judge Presiding.
)	

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.

Justices Pucinski and Salone concurred in the judgment.

O R D E R

HELD: Circuit court correctly denied defendant's second petition for post-conviction relief where defendant failed to request leave of court before presenting the successive petition.

1-09-2316

Even assuming that defendant did request permission to file the successive petition, he failed to satisfy the cause and prejudice test for successive post-conviction petitions.

Defendant Robert Gilbert appeals from the circuit court's denial of his successive *pro se* petition for post-conviction relief. The circuit court denied the petition because the court found that defendant had not first requested leave of court to file it. On appeal, defendant contends that the circuit court erred because he submitted a written motion in which he specifically requested permission to file the successive post-conviction petition, and the assistant State's Attorney informed the circuit court that he (defendant) had filed that motion.

Following a jury trial, defendant was found guilty of attempted first degree murder and aggravated battery with a firearm, and was sentenced to two concurrent 25-year prison terms. The trial evidence disclosed that defendant purchased two used vehicles from a used car dealership in Melrose Park, and received a citation for an unregistered vehicle because he had not received the title certificate and registration from the dealership for the second vehicle as of August 25, 2004. On that date, defendant went to the dealership and shot the salesman, Torsten Korthase.

On direct appeal, this court affirmed the conviction and

1-09-2316

sentence for attempted first degree murder and vacated the conviction for aggravated battery with a firearm because both convictions stemmed from the same physical act. *People v. Gilbert*, No. 1-06-0882 (2008) (unpublished order under Supreme Court Rule 23).

On April 28, 2009, defendant filed a *pro se* post-conviction petition, which the circuit court summarily dismissed as frivolous and patently without merit on May 8, 2009. On December 16, 2010, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this court affirmed the circuit court's summary dismissal of defendant's first *pro se* post-conviction petition. *People v. Gilbert*, No. 1-09-1553 (2010) (unpublished order pursuant to Supreme Court Rule 23). Defendant did not include that petition in the record on appeal.

The record contains a *pro se* notice of filing in which defendant stated that on June 5, 2009, he would file a motion for leave to file a successive post-conviction petition. The notice of filing was not file-stamped and was not recorded on the half-sheet.

The record also contains defendant's *pro se* motion for leave to file a successive post-conviction petition. The motion was dated June 5, 2009, by hand, but it was not file-stamped and it

1-09-2316

also was not recorded on the half-sheet. The half-sheet did show defendant's post-conviction petition, pauper's petition, and motion for appointment of counsel.

In the motion for leave to file a successive petition, defendant observed that before he could file a successive post-conviction petition, he first had to file a separate motion requesting permission to do so, and he acknowledged that he had to show cause and prejudice.¹

The record contains another *pro se* notice of filing, file-stamped on June 30, 2009, by the court clerk, in which defendant stated that on June 5, 2009, he filed a post-conviction petition.

On June 30, 2009, defendant filed his second post-conviction petition, a successive petition, in which he acknowledged that he was required to obtain leave of court to file a successive post-conviction petition. He alleged various violations of his rights to due process and effective assistance of counsel. Defendant provided excerpts from unidentified transcripts in support of the petition.

On August 7, 2009, the assistant State's Attorney informed the court that defendant had "filed a motion requesting leave to

¹ Contrary to defendant's observation, a separate motion for leave to file a successive post-conviction petition is not required. *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010).

1-09-2316

file a successive petition alleging ineffective assistance of appellate counsel, and motion for grand jury transcripts, and police reports." The court said that it would "see if it says the same thing the initial petition said." The court passed, and later recalled, the case. The court then denied leave to defendant to file a successive post-conviction petition because no request for permission to file it had been made. The court stated:

"THE COURT: [Defendant] has filed a successive, 'successive,' petition for post-conviction relief. This petition will be denied. No request for permission having been made.

A copy of this order will be sent to defendant--to petitioner within ten days."

On August 26, 2009, defendant filed his third petition--a second successive *pro se* petition for post-conviction relief--which he styled as an amended petition. In that petition, defendant again stated that to file a successive post-conviction petition to assert a claim of ineffective assistance of appellate counsel, "he first must obtain leave of court to file such." Defendant again alleged, *inter alia*, various violations of his

1-09-2316

right to effective assistance of trial counsel and that the court and the prosecutor punished him for choosing a jury trial by imposing a sentence 10 years more than the sentence offered at a pretrial conference.

On September 3, 2009, defendant filed a notice of appeal from the August 7, 2009, denial of the second (June 30) petition.

On appeal, defendant contends that the circuit court erred because in his written motion, he specifically requested permission to file the successive post-conviction petition. Defendant maintains that this court should reverse the circuit court's decision denying leave to file the June 30 post-conviction petition, and remand the cause for further proceedings.

The State responds that the circuit court properly dismissed defendant's second post-conviction petition because he failed to seek leave to file it. The State argues that the circuit court did not expressly grant leave to defendant to file a successive petition before defendant attempted to file it. The State observes that defendant's motion and notice of motion contained no file-stamp, the half-sheet does not show that defendant filed a motion for leave to file the petition, and defendant's notice of filing refers to the petition but not to any motion for leave

1-09-2316

to file it. The State maintains that "there is nothing to indicate that a motion seeking leave was properly filed." The State further maintains that the decision of the circuit court can also be affirmed because defendant's petition did not satisfy the cause and prejudice test. The State argues that defendant did not present a proper excuse for his failure to raise the ineffective assistance claim in his first petition. The State also argues that there was no prejudice because defense counsel zealously represented defendant.

Defendant replies as follows. The prosecutor in the courtroom told the court that defendant had filed a motion seeking leave to file a successive petition. The motion was included in the common law record. "[I]t is extremely likely that" the lack of a file-stamp on the motion was due to an oversight on the part of the court clerk, and defendant should not be penalized for that. Defendant speculates that the motion for leave to file was filed simultaneously with the successive petition. Defendant stresses that this appeal does not concern the merits of his petition, and that it concerns only the court's decision that he did not request permission to file the petition.

In making this argument, defendant misunderstands the nature of *de novo* review. Even if defendant did first request leave of

1-09-2316

court, this court reviews the result reached, not the rationale proffered, and we can affirm the circuit court's decision for any reason supported by the record regardless of the circuit court's rationale. *People v. Johnson*, 208 Ill. 2d 118, 129 (2003); *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). In the present case, even if the circuit court incorrectly decided that defendant had not first sought leave of court to file a successive petition, the circuit court's decision denying the successive petition can be affirmed because the petition did not satisfy the cause and prejudice test.

A successive post-conviction petition is generally subject to the cause and prejudice test. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002); 725 ILCS 5/122-1(f) (West 2008). Cause is an objective circumstance, external to the defense, that impeded the efforts of the defendant's attorney from raising the claim earlier. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2008). Prejudice exists if the alleged error infected the entire proceeding so that the conviction or sentence violates due process. *Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f) (West 2008). Unless the circuit court finds cause for the defendant's failure to raise the matter in his initial petition and resulting prejudice, a successive post-

1-09-2316

conviction petition will not be considered to have been filed, even if it was received by the circuit court clerk. *People v. Tidwell*, 236 Ill. 2d 150, 158-59 (2010); *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007). The defendant in a noncapital case is excused from pleading cause and prejudice in a successive post-conviction petition if he sets forth a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). *De novo* review applies to the issue whether the defendant satisfied the cause and prejudice test. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009).

In this case, defendant does not raise a claim of actual innocence. He raised claims of ineffective assistance of counsel and due process in the successive petition, and he failed to include the initial petition in the record on appeal. Defendant did not show cause and prejudice for his failure to assert any of the matters earlier. We see no objective circumstance that would have prevented defendant's attorney from raising the arguments in the initial petition. Nor did defendant demonstrate that any of the alleged errors infected the trial to the extent that the attempted murder conviction violates due process. See *People v. Holman*, 191 Ill. 2d 204, 211-12 (2000).

The cases cited by defendant are distinguishable. For

1-09-2316

example, in *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009), the defendant asserted a claim of actual innocence, which he was entitled to assert in a successive petition without showing cause and prejudice because convicting an innocent person violates his right to due process. *Williams*, 392 Ill. App. 3d at 367, 370.

We have considered, and rejected, all of defendant's arguments on appeal.

The judgment of the circuit court is affirmed.

Affirmed.