

No. 1-09-2898

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FIFTH DIVISION
April 29, 2011

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. 94 CR 204
)	
COREY FOSTER,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgement.

ORDER

Held: Trial court properly dismissed a successive postconviction petition that was filed without leave of court, did not address the initial petition, and did not state an actual innocence claim.

BACKGROUND

In October 1994, defendant, Corey Foster, was sentenced to 50 years' imprisonment for the murder of Anthony Benton. Darius Sanders and Jamie Williams witnessed the murder and testified against defendant, who confessed James Hill, a fellow gang member, hired him to kill Benton. In October 1995, this court affirmed defendant's conviction and granted the Cook County public

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defender's office leave to withdraw as defendant's appellate counsel. The public defender persuasively argued, pursuant to *Anders v. California*, 386 U.S. 738 (1967), that there were no issues of merit on the record warranting argument on appeal. Defendant, who was advised of his right to submit any points in support of his appeal, did not respond.

In August 1996, defendant filed a *pro se* "Petition for Post-Conviction Relief or/Alternatively for Coram Nobis or Coram Vobis Relief" in the circuit court. He claimed, *inter alia*, ineffective assistance of counsel, that his confession was illegally coerced, and that the prosecutor used perjured testimony and suppressed a surveillance videotape from the crime scene. The trial court dismissed defendant's petition as "frivolous and patently without merit." This court affirmed.

In April 2008, defendant, through new counsel, filed the instant "Verified Petition for Post-Conviction Relief Pursuant to 725 ILCS 5/122-1 and for Relief From Judgment Pursuant to 735 ILCS 5/2-1401." Counsel maintained defendant is innocent, "as shown by lack of evidence at trial and new evidence"; that he is a "victim of cruel and unusual punishment"; and that he was denied effective assistance by trial and appellate counsel. Defendant's *pro se* postconviction petition was not mentioned. The State moved to dismiss this proceeding claiming, *inter alia*, that defendant could not file a second postconviction petition without prior leave of court. The trial court heard the State's motion, denied defendant's petition on the merits, and denied leave to file the petition. Defendant appeals, claiming he is entitled to an evidentiary hearing on his petition, that trial counsel was ineffective, and that the trial court engaged in improper fact finding during the hearing on the State's motion to dismiss. The State reasserts, *inter alia*, that defendant has not met the statutory requirements for a successive postconviction petition. We agree and affirm.

ANALYSIS

Postconviction petitions dismissed without an evidentiary hearing are reviewed *de novo*. *People v. Smith*, 383 Ill. App. 3d 1078, 1084-85 (2008). “Although the trial court’s reasons for dismissing a petition may provide assistance to this court [citation], we review the trial court’s judgment and not the reasons given for the judgment [citation.] We will affirm the trial court on any basis supported by the record even if the trial court reasoned incorrectly.” *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

The Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) “enables a defendant to challenge a conviction or sentence for violations of federal or state constitutional rights. [Citation.] An action for post-conviction relief is a collateral proceeding, not an appeal from the underlying judgment.” *People v. Tenner*, 175 Ill. 2d 372, 378 (1997). A defendant may file only one postconviction petition under the Act without prior leave of court. 725 ILCS 5/122-1(f) (West 2008). Where, as in this case, a successive petition is filed without leave,

“the court, whether *sua sponte* or on the State’s motion, should dismiss any such petition. In taking this action, the court need not--and should not--concern itself with the merits of any claims, contentions, or arguments that the petition contains. Section 122-1(f) constitutes a procedural hurdle to any such consideration that the legislature has intentionally chosen to impose regarding such petitions. See also *People v. LaPointe*, 365 Ill. App. 3d 914, 921 (2006) (“Until the trial court grants such leave [to a defendant under section 122-1(f) of the Act], a second or subsequent petition is not properly on file and may not be considered on its merits. To hold otherwise

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would be to treat section 122-1(f) as though it did not exist’).” (Brackets in original.)

People v. DeBerry, 372 Ill. App. 3d 1056, 1060 (2007).

As the petition here was filed without prior leave of court, we affirm the dismissal of defendant’s second postconviction petition. We also affirm the trial court’s denial of leave to file the petition.

“Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure.” 725 ILCS 5/122-1(f). Where, as in this case, a defendant does not argue cause or prejudice, such a showing may be excused if he states a claim of actual innocence in his successive petition.

People v. Ortiz, 235 Ill. 2d 319, 330 (2009).

“To obtain relief under a claim of actual innocence, however, the evidence adduced by the defendant must first be ‘newly discovered,’ i.e., it must be evidence that was not available at the defendant’s original trial and that the defendant could not have discovered sooner through diligence. [Citation.] It is well established that evidence is not ‘newly discovered’ when it presents facts already known to a defendant at or prior to trial, even if the source of these facts may have been unknown, unavailable, or uncooperative.” *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (2010).

Here, defendant claims to have

“uncovered two critical pieces of new evidence regarding his murder case; the State’s witness Darius Sanders recanted his trial testimony identifying Corey Foster as the shooter, and James Hill who would testify that he never talked spoke [*sic*] to the police in this matter, let alone told them he’d offered to pay Foster \$1,000 to kill

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Anthony Benton.”

Defendant maintains this evidence is new because Hill did not testify at the trial and because “Sanders admits he lied about Foster being the shooter and for the first time explains that he only identified Foster because the police told him they would charge him with the murder of Anthony Benton if he did not name Foster as the shooter.” Even assuming, *arguendo*, that this evidence was not available at defendant’s original trial 16 years ago, it is not “newly discovered” evidence for purposes of waiving the cause and prejudice requirement of the Act because defendant has not alleged, nor does the record demonstrate, that he was diligent in discovering Sanders and Hill’s “new” statements. Defendant’s actual innocence claim fails. The trial court is affirmed.

CONCLUSION

We affirm the dismissal of defendant’s second postconviction petition and the trial court’s denial of leave to file that petition. Defendant has not met the statutory requirements for filing a successive petition nor has he stated a claim of actual innocence.

Affirmed.