

No. 1-08-2745

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. 02 CR 20710
)	
ARTURO VIEYRA,)	Honorable
)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

ORDER

Held: Where defendant claimed he did not know he could bring claim of ineffective assistance of counsel based on trial counsel's failure to assist him in presenting guilty plea, that assertion did not establish cause to bring successive postconviction petition; the denial of leave to file successive petition was affirmed.

Defendant Arturo Vieyra appeals the circuit court's order denying him leave to file a successive postconviction petition, claiming he received ineffective assistance of trial counsel during unsuccessful guilty plea negotiations. On appeal, defendant contends he has cause to bring this claim for the first time in a successive postconviction filing because when he filed his first petition, he was not aware of his right to effective counsel during plea proceedings. We

affirm.

Defendant was charged with the 2002 attempted murder and aggravated domestic battery of his estranged wife. In January 2003, during proceedings on those charges, defendant stated he wanted to act as his own attorney. The trial court admonished defendant he had a right to self-representation but advised defendant against proceeding *pro se*. The court informed defendant the charges against him carried a possible sentence of 6 to 30 years in prison. Although the court allowed the public defender to withdraw as defendant's counsel, the record shows that during subsequent court dates, defendant again was represented by counsel and that a guilty plea was discussed.

On October 14, 2003, when the case was set for trial, defendant was represented by two public defenders. Defense counsel informed the court that defendant asked for a conference under Illinois Supreme Court Rule 402 (eff. July 1, 1997) to discuss a guilty plea. After conferring, the parties informed the court that defendant would plead guilty to attempted murder in exchange for a 15-year sentence. When the court asked defendant if he understood the outcome of the plea discussion, defendant said he was "not all here, your Honor, I'm sorry."

Defense counsel repeated that defendant would plead guilty to attempted murder for a 15-year sentence. The following exchange then took place between the court and defendant:

"THE COURT: Do you understand what that means?

DEFENDANT: Yes, sir.

THE COURT: Okay. You are charged with the offense of attempt first degree murder which is a Class X felony. How do you plead to that charge, sir, guilty or not guilty?

THE DEFENDANT: I plead guilty."

The court admonished defendant of the consequences of his plea, and a factual basis for the plea was read. The court accepted defendant's plea as knowing and voluntary.

After conferring with defense counsel before the imposition of his sentence, defendant asked to apologize to the victim, and the court responded it would not require the victim to be present in court. Defendant asked that the State ask the victim if she wanted to be present, and the court responded: "No, Let's proceed with this thing, you are either pleading guilty today or not?" Defendant responded, "I am not, your Honor" and repeated "I am not pleading guilty, your Honor." The court indicated that defendant's guilty plea was withdrawn, and jury selection commenced.

At the end of the day, the following discussion took place in chambers:

"MR. AKERS [Assistant Public Defender]: I'm sorry, Judge, I didn't know procedurally if you asked me if he wanted to at this time go ahead and enter the plea, I didn't know if we were going to do it at the end of the day or not so I apologize if there was a miscommunication.

THE COURT: No, prior to - after the lunch break you informed me that there was a possibility that he wanted to enter a plea to this charge and I said we would just go ahead and if anything change[d] you can tell me about it.

MR. AKERS: Yes, Judge, yeah, I did.

DEFENDANT: Yes, your Honor, I would like to enter a plea of guilty to the 15 years that the State is giving me.

* * *

THE COURT: Okay. Did you have a chance to talk with this, talk about this with your attorneys?

DEFENDANT: Yes, sir, I did.

THE COURT: Okay, why are you changing your mind, now, before you told me that you didn't want to plead?

DEFENDANT: My ex-wife was out there and she kind of had something

to do with my decision.

THE COURT: What decision?

DEFENDANT: Pleading guilty.

THE COURT: Why is that?

DEFENDANT: Because she wants me out there for my children as soon as possible.

THE COURT: Well, she is not doing the time [in prison], you are. You follow that?

DEFENDANT: Yes, sir.

THE COURT: Is there any reason why, I mean are you pleading guilty because you are guilty of this charge or just -

DEFENDANT: I'm pleading guilty because I am trying to get back home as soon as possible and it is my understanding if I take it any further I stand a chance to lose out on even that opportunity.

THE COURT: Well, who knows what will happen once everything is over with but, like I said, at least right now you are, the parties are in agreement with this disposition and if that is what you are telling me you want to do right now, I'll consider accepting the plea today, but if you're not, we'll go to trial because we already got the jury picked as you saw in the last half hour or so[.] [I]t is only your decision.

DEFENDANT: Yes, sir, your Honor. As I said, I'm going to plead guilt[y] because of my children, I want to get back out there to get to them. I want to re-establish a life out there if I have an opportunity to.

THE COURT: Okay. But nobody is forcing you to do that, right?

DEFENDANT: I just fear the other consequences, your Honor.

THE COURT: Well, I'm saying nobody - you don't know what the consequences are. I want to make sure this is your own free will doing this.

DEFENDANT: To be all honest, your Honor, I don't mean to disrespect anyone in this room but I really just want a fair shake as I've been saying since day one and I feel I am not getting it but if this is it, this is it.

THE COURT: Well, you'll get a fair trial.

We're going to have a trial, let's go. I am not accepting this plea of guilty. You'll get a fair trial and we'll go from there."

A jury trial was held, and defendant was convicted of attempted murder and aggravated domestic battery. The court merged the two convictions and sentenced defendant to 30 years in prison.

On direct appeal, defendant raised the following issues: (1) the trial court erred in refusing to accept his plea; (2) the court erred in not conducting a fitness hearing; and (3) the taking of a DNA sample violated his constitutional right to be free from unreasonable searches and seizures. Affirming defendant's conviction, this court held that given defendant's "wavering" as to a guilty plea, the trial court did not abuse its discretion in refusing to accept the plea. *People v. Vieyra*, No. 1-03-3534 (2005) (unpublished order under Supreme Court Rule 23).

In 2007, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2006)), raising five claims of ineffectiveness of trial counsel. Defendant asserted his attorneys provided deficient representation in: (1) failing to interview certain people; (2) failing to exercise peremptory challenges to strike certain jurors; (3) stipulating to the testimony of an assistant State's Attorney who interviewed defendant; (4) failing to request a jury instruction on aggravated battery; and (5) failing to consult with him or adequately prepare a defense. Defendant also claimed the trial court erred in allowing the introduction into evidence of police reports detailing previous incidents of domestic violence and

that his appellate counsel was ineffective.

The circuit court summarily dismissed defendant's first petition, finding his claims to be frivolous and patently without merit. Defendant appealed that order, and this court affirmed. *People v. Vieyra*, No. 1-07-1402 (2008) (unpublished order under Supreme Court Rule 23).

On July 14, 2008, while his appeal from his first postconviction petition was pending, defendant filed a *pro se* motion, seeking leave to file a successive postconviction petition. Defendant asserted in the motion that his "trial counsel was ineffective in failing to consult with him during the pre-trial proceedings, which made it real difficult for [defendant] to make an informed decision."

In his motion, defendant stated he "depended on his attorney to be his advocate and converse with [him], explaining what to expect and what options [he] had, especially about the plea that was on the table." He further stated he "attempted several times [] to accept the plea, but counsel never conferred with or advised [him] either way" and had he received effective assistance from counsel, he "surely [] would have pled guilty and only received a 15-year sentence." On August 21, 2008, the circuit court entered a written order denying defendant leave to file his successive petition.

In this appeal, defendant contends he should be permitted to file a successive postconviction petition, claiming ineffective assistance of counsel in presenting his guilty plea. The Act provides for the filing of only one postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 328 (2009). To raise his current ineffective assistance claim, defendant must demonstrate cause and prejudice as required by the Act. 725 ILCS 5/122-1(f) (West 2006); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). "Cause" is established by identifying an objective factor, external to the defense, that impeded counsel's efforts to raise the specific claim in an earlier proceeding, and "prejudice" is demonstrated when the claim that was not raised in the first postconviction proceeding infected the defendant's trial such that the resulting conviction or

sentence violated due process. 725 ILCS 5/122-1(f) (West 2006); *Pitsonbarger*, 205 Ill. 2d at 460-64. It is the defendant's burden to establish both cause and prejudice. *People v. Johnson*, 392 Ill. App. 3d 897, 903 (2009). This court's review of the circuit court's denial of leave to file a successive postconviction petition is *de novo*. *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010).

Defendant contends his counsel was deficient in failing to offer him guidance when he entered his plea and that his counsel's shortcomings resulted in the court's rejection of the plea. He argues he meets the cause requirement to raise this claim in a successive petition because when he filed his first petition, he was not aware that his right to the effective assistance of counsel applied to pre-trial proceedings.

The right to effective assistance of counsel extends to plea negotiations. *People v. Miller*, 393 Ill. App. 3d 629, 633 (2009) (citing *People v. Curry*, 178 Ill. 2d 509, 518 (1997)). As a part of a defendant's right to effective assistance at that stage, a defendant has a right to be reasonably informed with respect to the direct consequences of accepting and rejecting a plea offer. *People v. Clark*, 406 Ill. App. 3d 622, 638 (2010). Defendant was correctly informed of the maximum sentence he would receive if his case proceeded to trial. During the discussion in chambers, the court asked defendant if he had spoken with his attorneys about resurrecting his previously withdrawn guilty plea, and defendant replied that he had.

Defendant asserted on direct appeal that the trial court erred in refusing to accept his guilty plea, and in his first postconviction petition, defendant raised several claims of ineffectiveness of his trial counsel. When defendant filed his first petition, he was aware of the facts surrounding the court's rejection of his guilty plea and could have included in that first petition his current claim that his trial attorneys did not assist him in presenting his plea. Because those facts were known to defendant when he filed his first petition, he has not demonstrated that he could not have raised this claim earlier.

Defendant has presented no legal authority for his position that cause to present a claim in a successive postconviction petition can be established by an earlier lack of knowledge of a potential legal theory. To the contrary, cause is legally defined as an objective factor, such as the discovery of new evidence, that prevented the defendant from raising his claim earlier and is external to the defense. See, e.g., *People v. Wrice*, 406 Ill. App. 3d 43, 52 (2010) (successive petition filed in 2007 alleged that the defendant's confession was a product of police torture in 1982; cause was established by accompanying report issued in 2006 confirming evidence of such abuse) *appeal allowed*, No. 111860 (March 30, 2011); *People v. Smith*, 352 Ill. App. 3d 1095, 1100 (2004) (allegation of perjured testimony by expert, which met "cause" requirement, was based on information not known until after the defendant filed first petition).

Cause may include a showing that a constitutional claim was so novel that its legal basis was not reasonably available to the defendant's counsel. *Pitsonbarger*, 205 Ill. 2d at 461. Applying that principle, this court has rejected a defendant's argument that cause was met by his lack of awareness of a particular legal argument until he read existing legal decisions that supported his point. *People v. McDonald*, 364 Ill. App. 3d 390, 394 (2006). Like the assertion of the defendant in *McDonald*, the position of defendant in this case is unsupportable. The fact that defendant was not aware of the possible legal viability of his ineffective assistance claim relating to his plea proceedings does not mean that claim was not available to defendant when he filed his first petition. Allowing a defendant to establish cause to file a successive postconviction petition based on newly acquired knowledge of an existing legal theory would lead to an unending line of postconviction claims. Because defendant has not established cause for filing his successive petition, we need not consider whether he has shown prejudice. See *Pitsonbarger*, 205 Ill. 2d at 464.

Defendant argues the issue presented here is comparable to that raised in *Curry*, where defense counsel provided unreasonable assistance during plea discussions by incorrectly advising

1-08-2745

the defendant of the potential sentence for his crimes, and the defendant rejected the plea offer based on counsel's advice. *Curry*, 178 Ill. 2d at 515-16 (which involved a direct appeal as opposed to postconviction proceedings). Here, defendant was accurately informed of the maximum sentence of 30 years.

This case presents a factual situation distinct from *Curry* and the line of cases in which a defendant argues he would have accepted a plea offer if not for an attorney's incorrect advice or otherwise ineffective assistance or that he did not understand the consequences of a plea agreement. See *Curry*, 178 Ill. 2d at 518. Here, defendant attempted to accept the State's plea offer, and he asserts he would have received 15 years in prison, as opposed to 30 years, had his attorneys aided him in effectively presenting his guilty plea. At issue here was not defendant's acceptance of the plea, as was the case in *Curry*, but rather, the trial court's acceptance of the plea agreement. After initial discussions about a guilty plea, defendant redacted that plea, and the court considered the plea to be withdrawn. Defendant then renewed his interest in pleading guilty because he wanted to "get back home as soon as possible." This court already has held on direct appeal that given defendant's inconsistent responses throughout the proceedings about whether he wished to plead guilty, the trial court did not abuse its discretion in refusing to accept defendant's plea. *Vieyra*, No. 1-03-3534, slip op. at 12.

The circuit court's order denying defendant leave to file a successive postconviction petition is affirmed.

Affirmed.