No. 1-09-2667

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).

SIXTH DIVISION
June 10, 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. 05 CR 26182
	)	
CEDRIC G. HAYES,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

HELD: Where appellate court denied defendant's request for late notice of appeal of summary dismissal of initial post-conviction petition, and Illinois Supreme Court denied leave to appeal, defendant cannot show proceedings on his first petition were fundamentally deficient; the circuit court's denial of leave to file successive post-conviction petition was affirmed.

Defendant Cedric Hayes appeals the circuit court's denial of leave to file a successive post-conviction petition. On appeal, defendant contends the court should have allowed him to file a successive petition because the proceedings on his initial post-conviction petition were fundamentally deficient. We affirm.

Pursuant to a guilty plea, defendant was convicted of aggravated vehicular hijacking and attempted murder. At the plea hearing held on May 30, 2007, the court admonished defendant, in pertinent part, as follows:

> "THE COURT: As far as the charges in those two counts, they are Class X felonies. Class X felonies are punishable by six to thirty years in the Illinois Department of Corrections. That includes a three-year period of mandatory supervised release. They're also 85 percent sentences. You would receive credit for each day against that sentence that you have been in custody, which is 594 days.
>
> Do you understand those are the possible sentencing ranges in this case?
>
> DEFENDANT: Yes."

After hearing the factual basis for the plea, the court sentenced defendant to 10 years in prison for each offense, with those terms to be served concurrently. The court advised defendant of the procedures for withdrawing his plea and

appealing the judgment. Defendant did not move to withdraw his plea or directly appeal his convictions or sentence.

On March 14, 2008, defendant filed a *pro se* post-conviction petition asserting, *inter alia*, the trial court did not admonish him that the three-year period of mandatory supervised release (MSR) would be served following his 10 years of imprisonment, as opposed to being included within that 10-year period. On March 28, 2008, in a written order, the circuit court dismissed the petition as patently without merit, stating that an MSR term was correctly imposed and the record indicated defendant understood the terms of his sentence and period of MSR.

On May 21, 2008, approximately seven weeks after the dismissal of his petition, defendant filed a motion requesting leave to file a late notice of appeal of that ruling. Defendant alleged he "was unable to get bac[k] to the facility in IDOC to file a timely notice of appeal." On June 11, 2008, this court denied defendant's *pro se* motion to file a late notice of appeal. *People v. Hayes*, No. 1-08-1346 (2008) (dispositional order). Defendant filed a *pro se* motion to reconsider that ruling, which this court denied on July 24, 2008. Defendant's petition for leave to appeal to the Illinois Supreme Court was denied on November 26, 2008. *People v. Hayes*, 229 Ill. 2d 679 (2008) (No. 107164).

On June 25, 2009, defendant filed a *pro se* motion requesting leave to file a successive post-conviction petition. He asserted the proceedings on his first petition were deficient because his imprisonment and transport prevented him from filing an appeal from the dismissal of his initial petition within 30 days. Defendant again contended he was not accurately admonished at his plea hearing that the MSR term would be served in addition to his prison term.

In a written order on August 21, 2009, the circuit court denied defendant leave to file a successive petition, stating defendant's MSR argument already had been ruled upon and "the claim relating to the late filing does not relate to the proceedings which resulted in the defendant's conviction." The court further stated defendant was "simply attempting to use this petition to bootstrap an appeal he was late in filing after his original petition was denied." Defendant now appeals that ruling.

On appeal, defendant contends the circuit court erred in denying him leave to file a successive post-conviction petition. A significant portion of defendant's brief is devoted to challenging this court's denial of the late notice of appeal from his first post-conviction petition. Defendant acknowledges he did not appeal the circuit court's dismissal of his first petition within 30 days and that his request for a late notice of

appeal was denied by this court. Moreover, defendant challenged this court's denial of the late notice of appeal in a motion to reconsider, which in turn was denied by this court. Defendant appealed that decision to the Illinois Supreme Court, which denied his petition for leave to appeal.

Defendant makes a misplaced attempt in this appeal to invoke Supreme Court Rule 606(c) (effective Sept. 1, 2006), which governs late notices of appeal. He asserts to this court that pursuant to Rule 606(c), he was only required to provide a "reasonable excuse" for his failure to file a timely notice of appeal. Again, that argument presumably was made to this court in seeking reconsideration of that order, and also to the Illinois Supreme Court, which denied defendant relief, and it is not properly before this court now.

The instant appeal is taken from the circuit court's order of August 21, 2009, denying defendant leave to file a successive post-conviction petition. Defendant contends the proceedings on his first petition were "fundamentally deficient because [he] was denied one complete opportunity to show a denial of constitutional rights."

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a means by which a defendant may challenge a conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d

458, 471 (2006). The Act contemplates the filing of only one post-conviction petition. *People v. Jones*, 191 Ill. 2d 354, 358 (2000). Obtaining leave of court is a condition precedent to filing a successive post-conviction petition. *People v. Anderson*, 402 Ill. App. 3d 1017, 1027 (2010). Whether a defendant should be granted leave to file a successive post-conviction petition is controlled by statute, and because a court's compliance with statutory procedure is a question of law, our review is *de novo*. *People v. Barber*, 381 Ill. App. 3d 558, 559, 886 N.E.2d 1040, 1042 (2008).

A claim in a successive post-conviction petition may be reviewed when the proceedings on the defendant's initial petition were deficient in some fundamental way. *People v. Flores*, 153 Ill. 2d 264, 278 (1992). To raise an error that could have been presented in an earlier proceeding, the defendant must demonstrate cause for his failure to bring the claim in his initial post-conviction proceedings and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2008). "Cause" is defined as an objective factor, external to the defense, that impeded counsel's efforts to raise the claim in an earlier proceeding. *People v. Ortiz*, 235 Ill. 2d 319, 329 (2009), citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002). The difficulty of applying that test here is immediately apparent; defendant could not have raised in his first post-conviction

proceeding a claim that relates to his appeal from that proceeding.

Defendant's overarching contention in this appeal is that the proceedings on his first post-conviction petition were deficient because he did not "get[] his day" in the appellate court. Defendant's assertion is contradicted by the record because his request to file a late notice of appeal from his first petition was considered twice by this court.

Furthermore, defendant has provided no case law or statutory authority to support a conclusion that he did not receive a "complete" review of his first petition. Defendant cites *People v. Free*, 122 Ill. 2d 367 (1988), and *People v. Polansky*, 39 Ill. 2d 84 (1968). In *Polansky*, which involved an early version of the Post-Conviction Hearing Act, the Illinois Supreme Court held the defendant did not receive "one complete opportunity" to present his post-conviction claim when his first petition was dismissed without appointment of counsel and the defendant did not appeal that dismissal *pro se*. *Polansky*, 39 Ill. 2d at 86-88. In contrast, defendant in the instant case was not entitled to appointed counsel at the first stage of review, and defendant appealed the dismissal of his first petition but did not do so within the applicable time period. Defendant also cites *Free*, in which the proceedings on the defendant's initial post-conviction petition were deemed not deficient, thus barring consideration of

his successive petition. *Free*, 122 Ill. 2d at 376-77. Those cases do not support defendant's position in this appeal.

Defendant also cites *People v. Britt-El*, 206 Ill. 2d 331 (2002), in which the defendant's first post-conviction petition was dismissed as untimely and was not addressed on its merits. The appellate court considered the defendant's arguments of his own culpable negligence in the late filing of his petition, as permitted by section 122-1 of the Act (725 ILCS 5/122-1 (West 2000)). The instant case involves the late filing of a notice of appeal, not the late filing of the petition itself as in *Britt-El*.

In conclusion, this court's denial of defendant's request to file a late notice of appeal, and the supreme court's denial of leave to appeal that ruling, did not render the proceedings on defendant's first post-conviction petition fundamentally deficient. Therefore, he cannot now resurrect the claims that he brought in his first petition in a successive post-conviction filing.

Accordingly, the circuit court's order denying defendant leave to file a successive post-conviction petition is affirmed.

Affirmed.