

No. 1-09-1433

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).

FOURTH DIVISION
March 31, 1011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 90 CR 29321
)	
CALVIN COMPTON,)	Honorable
)	Colleen McSweeney-Moore,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: Where defendant's fourth post-conviction petition challenged sentence for armed robbery as underlying offense to murder conviction but mittimus reflected conviction under theory of intentional murder and subsequent case law did not aid defendant's argument; the circuit court's order denying leave to file petition was affirmed.

Defendant Calvin Compton appeals the circuit court's denial of his request for leave to file a fourth post-conviction

petition. Defendant, who was convicted of first degree murder and armed robbery, contends his petition presents a viable challenge to his armed robbery sentence as an impermissible sentence for the predicate felony to felony murder. We affirm.

Following a jury trial in 1992, defendant was convicted of the first degree murder and armed robbery of Margaret Hill. The evidence established that defendant and another man approached Hill in a parking lot after deciding to steal her car, and defendant shot Hill while he struggled with her.

The jury was instructed on three theories of first degree murder (intentional, knowing and felony murder) and returned a general guilty verdict. The trial court entered judgment on three counts of murder and sentenced defendant to an extended term of 75 years for murder and 25 years for armed robbery, with those terms to be served consecutively. Judgment also was entered on several counts of armed violence.

On appeal, this court ordered the mittimus be corrected to reflect a single murder conviction and also vacated defendant's armed violence convictions. *People v. Compton*, No. 1-92-4239 (1995) (unpublished order under Supreme Court Rule 23) (modified on denial of rehearing). The corrected mittimus reflects a conviction for intentional murder under section 9-1(a)(1) of the first degree murder statute applicable to defendant's crimes (Ill. Rev Stat. 1989, ch. 38, par. 9-1(a)(1)).

Defendant filed post-conviction petitions in 1995 and 1997; both of those petitions were dismissed. The record does not include those petitions, and defendant did not appeal those dismissals.

In 2000, defendant filed a third post-conviction petition, challenging his extended-term sentence as void under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Counsel was appointed to represent defendant, and the circuit court granted the State's motion to dismiss the petition. On appeal, this court reversed that dismissal and remanded for post-conviction counsel to comply with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). *People v. Compton*, No. 1-02-1952 (2004) (unpublished order under Supreme Court Rule 23). On remand, after a delay, the petition was docketed in 2006. Counsel was appointed and filed a Rule 651(c) certificate, stating defendant's claims were adequately presented in his *pro se* petition. Counsel did not add any claims to defendant's petition. In October 2008, the circuit court granted the State's motion to dismiss the third petition.

About two weeks after that dismissal, defendant filed a *pro se* motion asking the circuit court to reconsider that ruling. Defendant argued he had asked post-conviction counsel to raise additional issues, including a challenge to his consecutive sentences for murder and armed robbery, but that counsel had elected not to present them. In December 2008, the circuit court

struck the motion to reconsider, stating it lacked jurisdiction to rule on the motion.

In 2010, during the pendency of the instant appeal, this court affirmed the dismissal of defendant's third petition. *People v. Compton*, No. 1-09-0769 (2010) (unpublished order under Supreme Court Rule 23). This court concluded the circuit court erred by ruling directly on the merits of defendant's third petition without considering cause and prejudice.

This court nevertheless considered defendant's substantive arguments and found them unpersuasive. Defendant argued his post-conviction counsel failed to provide reasonable assistance and should have challenged his consecutive sentence for armed robbery because that offense was the predicate felony of his murder conviction. Defendant relied upon *People v. Smith*, 233 Ill. 2d 1, 23 (2009), in which our supreme court held that where a defendant is charged with intentional, knowing and felony murder, and where the defendant requests and is denied separate verdict forms and a general verdict of first degree murder is returned, the defendant cannot be convicted of and sentenced for both murder and the predicate felony to the felony murder charge.

This court rejected defendant's position, finding *Smith* inapposite because here, defendant did not request separate verdict forms or otherwise challenge the general verdict for first degree murder. This court held defendant's post-conviction

counsel did not provide unreasonable assistance for failing to amend his third petition to include that meritless claim.

On March 27, 2009, defendant requested leave to file a fourth post-conviction petition, which is the subject of this appeal. That *pro se* petition included the following claims: (1) defendant's extended-term sentence was void because the trial court incorrectly relied on the adjudications in his juvenile offenses; (2) his conviction and consecutive sentence for armed robbery were incorrectly imposed because armed robbery was the predicate felony for the charge of felony murder; (3) the State failed to indict him in a timely manner; and (4) the State knowingly used perjured testimony before the grand jury.

In requesting leave to file his fourth petition, defendant asserted those contentions were not included in his third petition because "it was obvious" post-conviction counsel "forgot [his] supplemental claims." Defendant asserted he would have prevailed on his claims had counsel raised them in his third petition.

On May 8, 2009, the circuit court denied defendant leave to file his fourth petition. In a written order, the court stated defendant's arguments as to his extended-term sentence and his consecutive armed robbery sentence had been presented and were barred by *res judicata*.

In this appeal, defendant contends his fourth petition

presented a viable claim that he should not have been sentenced on his armed robbery conviction because that offense was the predicate crime to a felony murder conviction. He argues that given the jury's general verdict, it is unknown if he was found guilty of intentional, knowing or felony murder, and the trial court therefore erred in entering a conviction and sentence for the underlying felony.

The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) contemplates the filing of only one post-conviction petition (*People v. Jones*, 191 Ill. 2d 354, 358 (2000)), and a defendant bringing a successive petition "faces immense procedural default hurdles." *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). A successive post-conviction petition may be filed only upon leave of court where a petitioner demonstrates both cause for the failure to bring the claim in an initial post-conviction proceeding and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2008); *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002). To establish cause, the defendant must show some objective factor external to the defense that impeded his ability to raise the claim in the initial post-conviction proceeding, and to establish prejudice, the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process. *Tenner*, 206 Ill. 2d at 393.

As to cause, defendant argues this claim was not raised in his third petition because it only became viable based on the supreme court's 2009 decision in *Smith*. Even if this argument were sufficient to establish cause, *Smith* does not aid defendant.

Undisputably, a defendant cannot be convicted of felony murder and also receive a separate conviction and sentence for the underlying felony, which would be a lesser included offense of the murder. *Smith*, 233 Ill. 2d at 17, citing *People v. King*, 66 Ill. 2d 551, 566 (1977). Where an indictment alleges three forms of murder (intentional, knowing and felony murder) and a general guilty verdict is returned, a presumption exists that the jury found the defendant committed the most serious of the crimes alleged, i.e., intentional murder. *People v. Davis*, 233 Ill. 2d 244, 263 (2009); *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). This case does not even require that presumption, however, since the mittimus, as corrected after defendant's direct appeal, reflects a conviction for intentional murder.

As discussed in defendant's appeal from his third post-conviction petition, *Smith* held that where a defendant is charged with several murder theories, including felony murder, and a general verdict is returned, a conviction for the underlying felony cannot stand if the defendant requested separate verdict forms (by which the basis of the jury's verdict could be better ascertained) and the defendant's request was denied. See *Smith*,

233 Ill. 2d at 28-29.

Defendant acknowledges he did not request separate verdict forms at trial, as the court in *Smith* required in reaching its outcome. Nevertheless, he argues his case "presents a viable claim for extending the rule of *Smith*." Defendant directs us to the dissent in *People v. Moore*, 397 Ill. App. 3d 555, 576 (2009), which reasoned that sentencing on a predicate offense constituted error even without a request for separate verdict forms.

However, the plurality opinion in *Moore* and several other decisions of this court have expressly declined to extend *Smith* to situations where separate verdict forms were not requested. See *Davis*, 233 Ill. 2d at 273; *People v. Calhoun*, 404 Ill. App. 3d 362, 382 (2010); *People v. Allen*, 401 Ill. App. 3d 840, 856 (2010); *People v. Mabry*, 398 Ill. App. 3d 745, 755 (2010); *Moore*, 397 Ill. App. 3d at 566 (plurality opinion); *People v. Braboy*, 393 Ill. App. 3d 100, 108 (2009). We likewise hold *Smith* does not apply to defendant's case, and, therefore, defendant cannot meet the prejudice requirement. On that basis, the circuit court's order denying defendant leave to file a successive petition is affirmed. See *Pitsonbarger*, 205 Ill. 2d at 464 (2002) (defendant must meet both cause and prejudice tests).

Defendant's remaining contention in this appeal is that he is entitled to an additional day of credit for time spent in presentencing custody. He argues he received 770 days of credit

against his prison term but should receive 771 days of credit, which would include the day of his sentencing, which is the day the mittimus in this case was issued.

Defendant previously raised this identical contention in his appeal from the dismissal of his third petition, and this court rejected his argument that an additional day of presentencing custody credit was warranted for the day on which he was sentenced. Our decision relied on *People v. Williams*, 394 Ill. App. 3d 480, 481-83 (2009), which the Illinois Supreme Court has since affirmed. *People v. Williams*, No. 109361, slip op. at 6 (Ill. Jan. 21, 2011) (cut-off date for counting days of presentencing credit is day before sentence is issued, if mittimus, which commits defendant to custody of Department of Corrections, is effective on sentencing date). Defendant's renewed request for an additional day of credit cannot succeed in light of the supreme court's decision in *Williams*.

In conclusion, defendant cannot meet the cause and prejudice requirements to bring this fourth post-conviction petition. Accordingly, the circuit court's order denying defendant leave to file his successive post-conviction petition is affirmed.

Affirmed.