

No. 1-09-1015

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).

THIRD DIVISION
May 18, 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. 97 CR 1839
)	
LEON BROYLES,)	Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: The trial court properly sentenced the defendant to a consecutive term of imprisonment for his attempted first degree murder conviction.

Leon Broyles, the defendant, appeals from the trial court's denial of his motion for leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act).

725 ILCS 5/122-1 *et seq.* (West 20008). On appeal he contends that his consecutive sentence for attempted first degree murder is void, and, accordingly, must be vacated in favor of a concurrent prison term. We affirm.

Following a jury trial, defendant was convicted of first degree murder, attempted first degree murder, and home invasion. He was sentenced to 43 years in prison for the first degree murder and to a consecutive term of 6 years for the attempted first degree murder. He was also sentenced to a concurrent term of six years for the home invasion.

Defendant then appealed, contending that his consecutive sentences for first degree murder and attempted first degree murder were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This court affirmed defendant's convictions and sentences. See *People v. Broyles*, No. 1-99-2192 (2001) (unpublished order under Supreme Court Rule 23).

In 2002, defendant filed a *pro se* postconviction petition alleging that he received ineffective assistance of counsel when counsel failed to move to suppress his confession. Defendant also filed a *pro se* motion to supplement his petition, and, subsequently, a *pro se* supplement to the petition alleging, among other claims, that his consecutive sentence for attempted first

degree murder was void and must be vacated in favor of a concurrent six-year prison term.

In 2005, counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), contending that he had communicated with defendant and would not be filing a supplemental petition. The trial court subsequently dismissed the petition, and this court affirmed that judgment on appeal. See *People v. Broyles*, No. 1-05-1228 (2007) (unpublished order under Supreme Court Rule 23).

In December 2008, defendant filed a *pro se* motion for leave to file a successive postconviction petition. The successive petition alleged that defendant had received ineffective assistance of trial, appellate, and postconviction counsel. The trial court found that defendant failed to satisfy the requirements of the cause-and-prejudice test, and denied him leave to file the successive petition. It is from this judgment that defendant appeals.

Although defendant's notice of appeal indicates that he is appealing from the trial court's March 2009 order denying his motion for leave to file a successive *pro se* postconviction petition, he makes no arguments on appeal relating to that petition. Rather, he argues that the consecutive sentence for attempted first degree murder is void, and must be vacated in

favor of a concurrent sentence. The State responds that defendant failed to raise this claim in his successive *pro se* postconviction petition, and cannot raise it for the first time on appeal.

We agree with the State. In an appeal from the dismissal of a postconviction petition, "any issues to be reviewed must be presented *in the petition* filed in the circuit court, and a defendant may not raise an issue for the first time while the matter is on review." (Emphasis in original.) *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010). While our supreme court may reach issues not raised in a postconviction petition pursuant to its supervisory authority, this court has no such authority and cannot reach claims that are not raised in the petition. *People v. Jones*, 213 Ill. 2d 498, 506-07 (2004).

While defendant argues that a void sentence may be attacked at any time (see *People v. Arna*, 168 Ill. 2d 107, 113 (1995)), he fails to acknowledge that he raised this claim in his first postconviction petition.

The scope of a postconviction proceeding is limited to constitutional matters that have not been, and could not have been previously adjudicated; issues that could have been raised on direct appeal but were not are procedurally defaulted and issues that were previously decided by a reviewing court are barred by the doctrine of *res judicata*. *People v. Harris*, 224 Ill. 2d 115,

124-25 (2007); see also *People v. Scott*, 194 Ill. 2d 268, 274 (2000) (rulings on issues that were raised before the trial court or on direct appeal are *res judicata*, and issues that could have been raised in an earlier proceeding, but were not, are generally waived).

Here, defendant alleged in the supplement to his *pro se* postconviction petition that the consecutive sentence for attempted first degree murder was void and must be vacated in favor of a concurrent term of imprisonment. The trial court denied defendant postconviction relief in that proceeding, and this court affirmed that judgment on appeal. Because the scope of the Act is limited to those issues that have not been, and could not have been, presented in an earlier proceeding, *res judicata* bars defendant from revisiting an issue raised in his first postconviction petition in this successive proceeding. *Harris*, 224 Ill. 2d at 125.

Even were this court, in the interest of fundamental fairness, not to apply the doctrine of *res judicata* (see *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389-90 (2001)), defendant's claim would still fail.

Defendant contends that attempted first degree murder cannot trigger consecutive sentencing pursuant to section 5-8-4(a) of the Unified Code of Corrections (the Code) (see 730 ILCS 5/5-8-4(a)

(West 1998)), because although a defendant convicted of attempted first degree murder is sentenced as if convicted of a Class X felony (see 720 ILCS 5/8-4(c)(1)(West 1994)), an attempt is an unclassified offense subject to section 5-5-2(a) of the Code. See 730 ILCS 5/5-5-2(a) (West 1998) (any unclassified offense which is declared to be a felony or provides a sentence of imprisonment for one year or more shall be a Class 4 felony).

Section 5-8-4(a) of the Code provides that when a defendant is sentenced to multiple terms of imprisonment, the trial court shall impose consecutive sentences for offenses which were committed during a single course of conduct, where there was no substantial change in the nature of the criminal objective, unless one of the offenses for which the defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily harm. See 730 ILCS 5/5-8-4(a) (West 1998).

A person commits an attempt when, with the intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense. See 720 ILCS 5/8-4(a) (West 1998). The sentence for attempted first degree murder, absent certain aggravating factors, is the sentence for a Class X felony. 720 ILCS 5/8-4(c)(1) (West 1998).

Defendant concedes that our supreme court has stated that attempted first degree murder is a Class X felony which can serve

as a triggering offense under section 5-8-4(a) of the Code. See *People v. Harris*, 203 Ill. 2d 111, 116-17 (2003); see also *People v. Deleon*, 227 Ill. 2d 322, 331 (2008) (highlighting the defendant's acknowledgment that attempted first degree murder is "undeniably" a Class X felony); *Arna*, 168 Ill. 2d at 112-13 (finding the trial court erred in imposing concurrent sentences for two convictions for attempted murder when the record reflected that the requirements of section 5-8-4(a) were satisfied). However, he contends that none of those cases have squarely addressed the nature of an attempted first degree murder conviction.

This court's decision in *People v. Perkins*, 274 Ill. App. 3d 834 (1995), is instructive. There, the defendant was convicted of two counts of attempted first degree murder and sentenced to consecutive prison terms of 20 and 25 years. On appeal, he contended the consecutive sentences were not mandatory because although a conviction for attempted first degree murder is sentenced as a Class X felony, attempted first degree murder is actually an unclassified felony which must be treated as a Class 4 felony for purposes other than sentencing. Thus, the question on appeal was whether the trial court correctly determined that attempted first degree murder was a Class X felony for the purposes of consecutive sentencing.

The *Perkins* court first acknowledged that with the exception of certain instances where the offense of attempted murder is specified to be a Class X felony (see 720 ILCS 5/8-4(c)(1) (West 1994)), the felony of attempted murder is an unclassified offense. *Perkins*, 274 Ill. App. 3d at 836. The court then determined that because the legislative scheme required that the sentence for a Class X felony be imposed upon those who were convicted of attempted murder, it was clear that the penalty for an attempted crime is tied to the principal offense. *Perkins*, 274 Ill. App. 3d at 836. Therefore, to accept the defendant's conclusion that attempted murder had the same penalty as a Class X offense for general sentencing, but then became a Class 4 felony for purposes of the imposition of consecutive sentences would ignore the legislature's intent that penalties correspond to the seriousness of the offense. *Perkins*, 274 Ill. App. 3d at 837. "The seriousness of attempted murder does not change simply because we move from general sentencing to consecutive-term sentencing." *Perkins*, 274 Ill. App. 3d at 837; see also *People v. Musial*, 90 Ill. App. 3d 930, 936 (1980) (finding it "would be anomalous for any court to hold that attempt murder should be downgraded by three categories with a commensurate reduction in the sentencing range simply because the prohibited act is not completed").

The *Perkins* court then found that because section 5-8-4(a) speaks of the sentencing for attempted murder as that for a Class X felony, the provision necessarily refers both to sentencing for the offense and to situations where consecutive sentencing is possible; any other reading of the statute would conflict with the plain language of the section. *Perkins*, 274 Ill. App. 3d at 838. Accordingly, the court found that the trial court properly sentenced the defendant to consecutive terms of imprisonment.

We are unpersuaded by defendant's assertion that *People v. Pullen*, 192 Ill. 2d 36 (2000), prohibits this court from treating the attempted first degree murder conviction as a Class X felony for "all purposes of sentencing." In *Pullen*, our supreme court determined that *Perkins* was inapposite, as *Perkins* dealt with the classification of an unclassified felony, and, the felony at issue in *Pullen* had been explicitly classified by the legislature. *Pullen*, 192 Ill. 2d at 46.

Here, the trial court properly sentenced defendant to a consecutive term of imprisonment for the attempted first degree murder conviction because the plain language of section 5-8-4(a) refers to general sentencing as well as to those situations in which consecutive sentencing is possible. *Perkins*, 274 Ill. App. 3d at 838.

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For the reasons stated above, we affirm the order of the circuit court denying defendant leave to file a successive *pro se* postconviction petition.

Affirmed.