

No. 1-09-2823

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

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 00 CR 19560 |
| |) | |
| RICHARD SCHLUETER, |) | Honorable |
| |) | John P. Kirby, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant's medical records did not constitute newly discovered evidence, defendant failed to establish cause for filing a successive post-conviction petition relitigating the same issue raised in his initial petition, and the circuit court's order denying him leave to file the successive post-conviction petition was affirmed.

¶ 2 Defendant Richard Schlueter appeals from an order of the circuit court denying his *pro se* motion for leave to file a successive post-conviction petition. On appeal, defendant contends that the circuit court erred in denying his motion because his successive petition contains new and vital evidence that explains why his guilty plea was involuntary. We affirm.

¶ 3 Pursuant to a fully-negotiated guilty plea, defendant was convicted of first degree murder for strangling his wife and sentenced to a term of 21 years' imprisonment. Defendant did not move to withdraw his guilty plea, nor did he attempt to perfect a direct appeal.

¶ 4 On August 11, 2004, defendant filed his initial *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 2004). Defendant alleged, *inter alia*, that his guilty plea was involuntary because he was "involuntarily drugged and intoxicated during the time of his guilty plea." The circuit court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 5 On appeal from that judgment, defendant argued, in relevant part, that his guilty plea was involuntary because he was overly medicated at the plea hearing. *People v. Schlueter*, No. 1-04-3416, order at 9 (2006). Defendant stated that he was being treated with the medication Seroquel for schizophrenia, Zoloft for depression, and albuterol and aerobid for asthma. *Id.* This court noted that prior to his plea hearing, the trial court conducted a fitness hearing and found defendant fit to stand trial. *Id.* At that hearing, Dr. Seltzberg, a psychiatrist, testified that she interviewed defendant, reviewed his medical records, and concluded that he was "able to understand the nature and purpose of the court proceedings against him." *Id.* at 10. Dr. Seltzberg noted that defendant's dosage of Seroquel had been increased, which was routine. *Id.* She specifically testified that Seroquel had no noticeable adverse effects on defendant, and that it would not affect his fitness for trial. *Id.*

¶ 6 In that appeal, defendant alleged that the combination of drugs caused him to suffer "toxic psychosis" at the time of his plea hearing which caused him to experience "dementia, delusions, dizziness, drowsiness, headache, tremors, and weakness." *Id.* This court found that the record showed that defendant acted with clarity and rebutted his claim that he was so overly medicated that his guilty plea was involuntary. *Id.* at 11-12. We again noted that defendant

had been declared fit, and that Dr. Seltzberg acknowledged that his Seroquel dosage had been increased. *Id.* We found that defendant answered the trial court's questions at the plea hearing and stated that he understood that he was pleading guilty. *Id.* at 12. We found no indication in the record that defendant appeared disoriented at the hearing. *Id.* Consequently, we affirmed the circuit court's dismissal of defendant's initial post-conviction petition. *Id.* The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Schlueter*, 222 Ill. 2d 619 (2007).

¶ 7 On July 17, 2009, defendant filed the instant *pro se* motion for leave to file a successive post-conviction petition, incorporating his petition with the motion. Defendant alleged that the proceedings on his first petition were fundamentally deficient because the State withheld vital medical records from him which would have shown that he was overly medicated and unfit to plead guilty. He further stated that in January 2009, his mother requested his medical records from the hospital which showed that he was diagnosed with the heart condition bradycardia, heart rate problems, substance abuse and suicidal tendencies at the time of his arrest in July 2000. Defendant alleged that he acted with due diligence in attempting to access these medical records. In addition, defendant stated that in 2007 the FDA required the manufacturer of Seroquel to provide updated information about the drug's side effects, including the fact that it lowers heart rates, produces clouded judgment and impairs thinking. Defendant alleged that this information was previously unavailable to him and that it supported his claim that he was involuntarily drugged during the plea hearing. He asserted that he was incorrectly diagnosed as being fit for trial with medication when it was the medication that was causing him to be unfit.

¶ 8 In the claims section of his motion/post-conviction petition, defendant alleged that his bradycardia condition was worsened by the Seroquel he was forced to take. Defendant acknowledged that he raised this same issue in his initial post-conviction petition, but argued that

he did not have the medical records to support his claim at that time despite his repeated attempts to access them. He claimed that the doctrines of *res judicata* and waiver did not apply to him in this situation because the medical records constitute newly discovered evidence. Defendant stated that when he filed his initial petition, he did not have all of the pages of his medical records. Defendant claimed that these records were given to the Chicago police department to be given to the trial court, but never were. Defendant asserted that he was prejudiced by the lack of medical records because they proved his contention that he was unfit due to his physical condition during the guilty plea hearing.

¶ 9 Attached to defendant's *pro se* motion and successive post-conviction petition are copies of his hospital medical records indicating that he was diagnosed with bradycardia on July 28, 2000, the day after his arrest. Also attached are two forms signed by defendant requesting that his medical records be released from Our Lady of the Resurrection Medical Center to his mother. The first request is dated July 7, 2005, and the second request is dated January 20, 2009.

¶ 10 In addition, defendant attached an affidavit from his mother, Arlene Schlueter, in which she avers that she submitted a medical records release form from defendant to the hospital and received 17 pages of records which she then sent to defendant to submit with his post-conviction petition. She further states that she subsequently requested the medical records again and received 68 pages of records. She does not specify the dates of either of these requests. Schlueter states that she does not know where the additional pages of records came from, but the "only thing [she] can figure is the police officer took the papers" because an assistant State's Attorney questioned defendant while he was in the hospital and did not ask for a copy of the medical records. Schlueter speculates that for that reason, she did not receive all of defendant's medical records with her first request. Schlueter states that if she had been given all of the

medical records the first time, she would have given them to defendant to submit "with his first post-conviction petition."

¶ 11 Defendant also attached his own affidavit in which he averred that he complained to his trial counsel and family about having to take Seroquel, and counsel told him to follow the doctors' orders. He stated that on the day of the plea hearing, his mother told him to follow counsel's advice, and counsel told him what to say at the hearing. Defendant stated that he was in a passive state due to his medication and that he was not acting of his own free will at the plea hearing. He further stated that his requests for unspecified records from his trial counsel and the court were refused except for the transcript of his plea hearing. His request for psychiatric reports from the hospital at the Cook County Department of Corrections was also refused. Defendant stated that in June 2008, medical personnel explained to him what bradycardia was and that his condition was severe. Defendant's affidavit does not mention a request for the hospital medical records attached to the instant post-conviction petition.

¶ 12 Defendant also attached several other documents including requests for the transcript from his plea hearing, the hearing transcript, correspondence from his appellate counsel, and medical records from June 2008 which indicate that he has bradycardia. In addition, defendant included copies of pages from three unidentified publications and a website discussing the possible side effects of Seroquel, and handwritten notes he allegedly took from a medical journal.

¶ 13 The circuit court found that defendant failed to meet the cause and prejudice test for filing a successive post-conviction petition. The court found that the factual assertions raised by defendant in his successive petition were available to him when he filed his initial petition. It further found that defendant's medical records showed that he was diagnosed with bradycardia prior to his guilty plea hearing, and that his doctors were aware of his physical condition when

they prescribed the psychotropic medication. The circuit court stated that this court previously rejected defendant's claim that he was overly medicated at the plea hearing, noting that he had been found fit to stand trial and that his conduct exhibited clarity at the hearing. The circuit court further found that defendant failed to show the significance of the medical records, or that the State actually withheld those records. Accordingly, the circuit court denied defendant's motion for leave to file the successive post-conviction petition.

¶ 14 On appeal, defendant contends that the circuit court erred in denying his *pro se* motion for leave to file his successive post-conviction petition because the successive petition contains new and vital evidence that explains why his guilty plea was involuntary. Defendant argues that the medical records show that he suffered from bradycardia, a serious cardiovascular condition, at the time of his guilty plea. He claims that such information was not known to Dr. Seltzberg, the psychiatrist who evaluated him. He further claims that his psychotropic medication, Seroquel, aggravated the side effects of his bradycardia, impaired his judgment, prevented him from understanding what was occurring, and caused him to plead guilty involuntarily.

¶ 15 Defendant asserts that he established cause for raising this claim in a successive petition because the medical records were denied to him when he filed his initial post-conviction petition. He also claims that he just recently learned of his bradycardia diagnosis in June 2008. In addition, defendant asserts that he satisfied the prejudice prong for filing a successive petition because he presented an arguable claim, supported by the new medical record evidence, that his conviction violated due process where his guilty plea was not voluntary.

¶ 16 The State argues that the circuit court properly denied leave to file the successive petition because the issue of defendant's fitness to enter his guilty plea was previously resolved against him in his initial post-conviction proceeding, and his claim is now barred by the doctrines of *res judicata* and collateral estoppel. In addition, the State asserts that defendant's medical records

are not new evidence because they were available at the time of his plea hearing. The State further contends that defendant failed to establish cause for filing a successive petition because he has not shown that he made any attempt to secure his medical records prior to filing his initial post-conviction petition. The State also contends that defendant cannot establish prejudice because he was found fit for trial twice before he entered his guilty plea. Finally, the State argues that defendant has not presented any evidence to prove that it is dangerous to take Seroquel when you have bradycardia, but instead, defendant's claim is merely his own personal assertion.

¶ 17 In reply, defendant acknowledges that he raised the same claim in his initial post-conviction petition, but argues that he is now presenting newly discovered evidence to corroborate his claim that his bradycardia rendered him unfit, which relaxes the bars of *res judicata* and collateral estoppel. Defendant maintains that he established cause for raising his claim again in a successive petition because the medical records supporting his claim were not available to him when he filed his first petition. He further states that he did not learn of his bradycardia condition until 2008, and that he recently collected evidence that shows that the side effects of Seroquel can be devastating to people with cardiovascular conditions. Defendant also maintains that he established prejudice because his medication aggravated his bradycardia condition and caused him to enter an involuntary guilty plea, which violates due process.

¶ 18 We review the denial of defendant's *pro se* motion for leave to file a successive post-conviction petition *de novo*. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028-29 (2010). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2008); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2008)), defendant is prohibited from filing a successive post-

conviction petition without first obtaining leave of court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Such leave is granted only where defendant establishes cause for his failure to raise the claim in his initial post-conviction proceeding, and prejudice results from that failure. 725 ILCS 5/122-1(f); *Tidwell*, 236 Ill. 2d at 157. "Cause" is defined as "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). Prejudice occurs where the petitioner is "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Id.* at 464.

¶ 19 The doctrine of collateral estoppel bars reconsideration of an issue that has already been decided in a previous case. *People v. Tenner*, 206 Ill. 2d 381, 396 (2002). If, however, defendant offers additional evidence in support of his claim, then collateral estoppel will not apply. *People v. Enis*, 163 Ill. 2d 367, 386 (1994). This additional evidence must be newly discovered evidence. *People v. Gilliam*, 172 Ill. 2d 484, 506 (1996). Newly discovered evidence is evidence that was not available at the time of the initial proceeding and that defendant could not have discovered any sooner through due diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Such evidence must also be material, noncumulative, and of such conclusive character that it would likely change the prior judgment. *Id.*

¶ 20 Here, we find that defendant has failed to establish cause for filing a successive post-conviction petition because the medical records submitted with his successive petition do not constitute newly discovered evidence. Defendant claims that his medical records were not available to him when he filed his initial post-conviction petition on August 11, 2004. The record shows, however, that defendant did not submit his first request for his medical records until nearly a year later, on July 7, 2005. The medical records indicating the bradycardia diagnosis are dated July 28, 2000, the day after defendant was arrested for his wife's murder.

Thus, the records were available for more than two years before the guilty plea hearing and more than four years before defendant filed his initial post-conviction petition. There is no indication in the record that defendant diligently attempted to obtain the medical records prior to the submission of his initial post-conviction petition, but was precluded from doing so. Instead, the record contradicts his claim.

¶ 21 Consequently, we find that collateral estoppel bars defendant's attempt to relitigate the same issue that this court has already considered and rejected in his initial post-conviction proceedings. Defendant failed to meet the cause and prejudice test for filing a successive post-conviction petition. Accordingly, the circuit court's denial of defendant's motion to file the successive petition was proper.

¶ 22 For these reasons, we affirm the judgment of the circuit court of Cook County denying defendant leave to file a successive post-conviction petition.

¶ 23 Affirmed.