

No. 1-10-1581

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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03CR16589
)	
LAWRENCE SCEEREY,)	The Honorable
)	John J. Scotillo,
Defendant-Appellant.)	Judge Presiding.

Justice James Fitzgerald Smith delivered the judgment of the court.

Presiding Justice Lavin and Justice Pucinski concur in the judgment.

HELD: Defendant's motion for leave to file a successive postconviction petition was properly denied pursuant to section 122-1(f) of the Post-Conviction Hearing Act where is unable to show the requisite cause and prejudice.

¶ 1

ORDER

¶ 2 Defendant Lawrence Sceerey appeals from the denial of a motion for leave to file a *pro se* successive postconviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2006), relating to his conviction of home

invasion and criminal sexual assault. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 After a jury trial, defendant was found guilty of two counts each of home invasion, residential burglary, criminal sexual assault, and criminal sexual abuse. The trial court sentenced defendant to ten years' imprisonment for home invasion and ten years' imprisonment for criminal sexual assault, to be served consecutively. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). Because the facts of the offense are fully set out in our order on direct appeal, we restate here only those facts necessary to an understanding of defendant's current appeal.

¶ 5 Evidence at trial showed that, in the early morning hours of September 26, 2001, 15-year-old Amanda C. awoke to find defendant lying on top of her with his palm pressed on the outside of her vagina and his fingers moving inside of her vagina. Her pants and underwear had been removed and her t-shirt and bra were pulled up. Amanda could clearly see defendant, recognized a scar on his face, and recognized him as her former stepfather with whom she had lived for five years. She began screaming, defendant shushed her, got off the bed, grabbed something from the floor, and left her room.

¶ 6 As Amanda ran to her mother's room, she saw defendant flee through the back door. Amanda told her mother what had happened to her, including identifying defendant. Her mother's boyfriend, Emmanuel Garza, knew defendant from growing up in the same

No. 1-10-1581

neighborhood. He left the house to find defendant. As he did so, he noticed that the motion sensor light did not activate. Earlier that evening when he arrived at the house, the motion sensor had illuminated the front porch light. At this time, however, the light did not turn on and Garza discovered that it had been unscrewed. When he screwed the lightbulb back in, the light came on. Garza then went to the back door and, although he had locked it earlier that night, saw that it was now unlocked and slightly open. Amanda's mother called the police.

¶ 7 When the police arrived, Amanda told them defendant had attacked her. She then went to the hospital. While she was at the hospital, she spoke with Detective Mercado. She told Detective Mercado that she had gone to bed around 11:30 p.m., and later felt her water bed move. She thought it was her cat, so she dismissed it. She told Detective Mercado that she remembered not being able to roll over and feeling claustrophobic. She woke up startled to see defendant on top of her. She said that when she woke up, her t-shirt and bra had been pulled up to her neck and she was not wearing her pants or underwear that she had gone to sleep wearing. Amanda stated that she could feel defendant's fingers in her vagina.

¶ 8 On December 26, 2001, Detective Mercado showed Amanda a photographic lineup. Amanda identified defendant's photograph out of the lineup. Police arrested defendant more than a year and a half later on July 11, 2003.

¶ 9 In addition to the evidence regarding the charged incident involving Amanda, the jury heard evidence pertaining to four prior criminal incidents. Three of these incidents involved accusations of sexual misconduct and were admitted into evidence pursuant to 725 ILCS 5/115-7.3 (West 2000). As proof of defendant's *modus operandi*, the State also introduced evidence of

No. 1-10-1581

defendant's peculiar form of ingress regarding an incident where defendant had previously entered his ex-wife's home and hidden in the attic.

¶ 10 Defendant did not testify.

¶ 11 The jury found defendant guilty on all counts. Defendant filed a motion for a new trial which the court denied. The trial court sentenced defendant to consecutive terms of ten years' imprisonment for home invasion and ten years' imprisonment for criminal sexual assault.

Defendant filed a motion to reconsider sentence, arguing that criminal sexual assault was a lesser-included offense of home invasion, and that defendant's consecutive sentences violated both the one-act, one-crime doctrine and double jeopardy. The trial court denied his motion.

¶ 12 On direct appeal, defendant argued that the trial court erred by allowing testimony of other crimes into evidence and that his conviction of criminal sexual assault must be vacated as a lesser-included offense of home invasion as pled in the charging instrument. We affirmed the trial court's judgment. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23).

¶ 13 Defendant then filed a *pro se* petition for postconviction relief in March 2009. In his petition, defendant alleged, *inter alia*, that the elements of criminal sexual assault were "subsumed" by the home invasion statute and therefore a conviction and sentence for both offenses violated double jeopardy. The circuit court determined that the issue had been addressed on defendant's direct appeal and was therefore barred by *res judicata*. We affirmed the summary dismissal on appeal. *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23). In so doing, we noted that "although defendant now re-frames

No. 1-10-1581

the argument from his direct appeal, it is nonetheless the same argument. We previously addressed defendant's substantive contention that criminal sexual assault is a lesser-included offense of home invasion, and defendant's instant attempt to re-frame it as a violation of double jeopardy as opposed to a violation of the one-act, one-crime doctrine is unavailing." *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23).

¶ 14 On November 5, 2009, defendant filed a motion for leave to file a successive postconviction petition, to which he attached a successive postconviction petition. In his petition, defendant again alleged that his conviction for criminal sexual assault is a lesser-included offense under the charging instrument approach, but this time framed his claim as one of the ineffective assistance of counsel. The circuit court denied defendant's request for leave to file a successive postconviction petition, finding that defendant failed to demonstrate the requisite cause and prejudice where: (1) "he previously raised the identical issue on direct appeal and his initial petition for postconviction relief;" and (2) "he makes no viable claim whatsoever that any constitutional error so infected the entire trial that the resulting conviction or sentence violates due process."

¶ 15 Defendant appeals.

¶ 16 ANALYSIS

¶ 17 As he did in his first postconviction petition, defendant contends that the circuit court erred in dismissing his motion for leave to file a successive postconviction petition where "he was improperly convicted and sentenced on home invasion and criminal sexual assault, in

No. 1-10-1581

violation of double jeopardy, where criminal sexual assault was the predicate offense for home invasion." On appeal, he does not argue that his motion for leave to file a successive postconviction petition meets the cause-and-prejudice test, but claims that fundamental fairness requires relaxation of the bar of *res judicata*. He also claims again that his conviction for criminal sexual assault is void under *People v. Miller*, 238 Ill. 2d 161 (2010). Under the facts of this case, we are compelled to find that defendant is barred by the doctrine of *res judicata* from relitigating the same issues yet again. Accordingly, defendant is unable to show the cause and prejudice required to file a successive postconviction petition.

¶ 18 The Post-Conviction Hearing Act (Act) provides a remedy to a criminal defendant whose federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002); 725 ILCS 5/122-1 *et seq.* (West 2006). An action for post-conviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). Any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *Tenner*, 206 Ill. 2d at 392. Further, the Act contemplates the filing of only one post-conviction petition. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004); *Tenner*, 206 Ill. 2d at 392. Consequently, a defendant bringing a successive post-conviction petition faces immense procedural default hurdles that are lowered only where fundamental fairness so requires. *Pitsonbarger*, 205 Ill. 2d at 459; *People v. Flores*, 153 Ill. 2d 264, 274 (1992). The cause-and-prejudice test is the analytical tool used to determine whether fundamental fairness requires a court to make an exception to the waiver provision of section

No. 1-10-1581

122-3 of the Act and to consider a claim raised in a successive post-conviction petition on its merits. *Pitsonbarger*, 205 Ill. 2d at 459. The legislature codified the cause-and-prejudice test adopted in *Pitsonbarger* in section 122-1(f) of the Act (725 ILCS 5/122(f) (West 2006)). That section provides that a defendant must obtain leave of court to file a successive petition by demonstrating cause for his failure to raise the claim in his initial post-conviction proceedings, and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2006). Under this test, claims in a successive post-conviction petition are barred unless the defendant can establish good cause for failing to raise the claimed error in prior proceedings and actual prejudice resulting from the error. *Tenner*, 206 Ill. 2d at 393.

¶ 19 To establish cause, the defendant must show some objective factor external to the defense impeded his ability to raise the claim in the initial post-conviction proceeding. *Tenner*, 206 Ill. 2d at 393. 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. A defendant must show both cause and prejudice with respect to each claim raised in his successive petition. *People v. Britt-El*, 206 Ill. 2d 331, 339 (2002). However, even where a defendant cannot show cause and prejudice, his failure to raise a claim in an earlier petition may be excused to prevent a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 259. Our review of the circuit court's ruling on leave to file a successive postconviction petition is *de novo*. *People v. Anderson*, 402 Ill. App. 3d 1017, 1028-29 (2010).

¶ 20 Here, the circuit court properly denied defendant's motion for leave to file a successive postconviction petition where his claim is barred by *res judicata* and he failed to meet his burden

No. 1-10-1581

of demonstrating cause and prejudice.

¶ 21 Defendant's underlying claim that criminal sexual assault is a lesser included offense of home invasion is barred by the doctrine of *res judicata*. See *Tenner*, 206 Ill. 2d at 392 (any issues which were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted). At the motion to reconsider sentence below, defendant unsuccessfully argued that his conviction for criminal sexual assault was a lesser-included offense of home invasion, thus violation both double jeopardy and the one-act, one-crime doctrine. The trial court denied his motion and determined that he was properly sentenced to consecutive sentences for criminal sexual assault and home invasion. Defendant then appealed to this court. On appeal, defendant abandoned his double jeopardy claim, but continued to argue that his conviction for criminal sexual assault should be vacated under the one-act, one-crime doctrine. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). We denied defendant's claim and held that criminal sexual assault was not a lesser-included offense of home invasion in this case. In so finding, we compared the statutory definition of criminal sexual assault as set forth in section 12-13 of the Code of Criminal Procedure, 720 ILCS 5/12-13(a) (West 2000), with the factual description of the charges in the indictment. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). Upon comparing these, we concluded:

"the home invasion charging instrument did not set forth a broad foundation or main outline of criminal sexual assault. In particular, it did not explicitly allege[] that defendant committed an

act of sexual penetration nor did it describe any of the other required elements of that crime as outlined in the four subsections of the statute. See 720 ILCS 5/12-13(a) (West 2000). Thus, as defined in Count 2 of the indictment here, home invasion lacked factual elements that are necessary to the offense of criminal sexual assault. To prove home invasion in this case, the State had to prove that defendant was not a peace officer, that he knowingly and without authority entered Amanda C.'s home, that he remained there until he knew that someone was present, and that he "committed the offense of criminal sex assault in violation of Chapter 720 Act 5 Section 12-13" ' against Amanda C. in that home. Clearly, this count does not explicitly refer to an act of sexual penetration nor to any other element in relation to the offense of criminal sexual assault. See 720 ILCS 5/12-13(a) (West 2000).' " *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23).

¶ 22 We also found that the missing elements of the offense could not be inferred in this case. *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23). We held that the description of home invasion contained in the indictment did not set forth a "broad foundation or main outline" of criminal sexual assault and that the allegations of home invasion and the elements of criminal sexual assault were " 'simply too tenuous' to identify criminal

No. 1-10-1581

sexual assault as a lesser-included offense of home invasion." *People v. Sceerey*, No. 1-06-0307 (2007) (unpublished order under Supreme Court Rule 23), quoting *People v. Johnson*, 368 Ill. App. 3d 1146, 1165 (2006).

¶ 23 Then, in his postconviction petition, defendant again argued that criminal sexual assault is a lesser-included offense of home invasion. *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23). He argued:

"[I]t is impossible to prove the offense of home invasion charged under the (a)(6) predicate, without proving the elements of whichever enumerated offense in Sub-Section 6, is alleged. Consequently, the elements of the predicate offense are not only 'subsumed' by the home invasion statute, but necessarily included as well, and as such, conviction and/or sentence on that necessarily included lesser offense if prohibited by the double jeopardy clause of the [U]nited [S]tates [C]onstitution."

We held that:

"Defendant's argument, made first in a motion to reconsider sentence, then decided by this court on direct appeal, and finally repeated in the instant appeal of the dismissal of his postconviction petition is frivolous because the principle of *res judicata* bars grounds that were previously litigated." *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23).

No. 1-10-1581

¶ 24 In his first postconviction petition, defendant also argued, as he does now, that *People v. Miller*, 238 Ill. 2d 161, should save his identical claim from the bar of *res judicata*. He argued that *Miller* "clarified that the abstract elements approach is the proper method to be used in determining when an offense is a lesser-included offense of another." *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23). We found, however, that *Miller* was inapposite to defendant's claim because it does not relate to double jeopardy claims. *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23). Rather, *Miller* "clearly discusses lesser-included offenses only in the context of the one-act, one-crime doctrine and has no effect on the established body of law that applies to constitutional claims of double jeopardy." *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23).

¶ 25 Defendant's contention that we should relax the *res judicata* bar because his convictions and sentences are void where *Miller* "clarified the law regarding multiple acts and lesser-included offenses" is unavailing. As we previously determined on review of the summary dismissal of defendant's first postconviction petition, *Miller* is inapposite to the case at bar, as *Miller* did not alter the law regarding lesser-included offenses with regard to constitutional claims of double jeopardy. *People v. Sceerey*, No. 1-09-2995 (2011) (unpublished order under Supreme Court Rule 23). Accordingly, the trial court did not err when denying defendant's motion to file a successive postconviction petition.

¶ 26

CONCLUSION

No. 1-10-1581

¶ 27 For the foregoing reasons, we hold that defendant's motion for leave to file a successive postconviction petition was properly denied pursuant to the Act. The judgment of the trial court is affirmed.

¶ 28 Affirmed.