

No. 1-09-3493

**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).

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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. 02 CR 7103
	)	
JAMES BOWMAN,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.

Justices Cunningham and Harris concurred in the judgment.

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ORDER

¶ 1 *Held:* Defendant was properly denied leave to file a successive post-conviction petition; he could not show cause as he raised his one-act, one-crime claim in an earlier petition and appealed its dismissal without raising that claim on appeal, and he could not show prejudice because his claim was not meritorious as his convictions for reckless homicide and aggravated driving under the influence were based on different victims.

¶ 2 Following a jury trial, defendant James Bowman was convicted of reckless homicide and aggravated driving under the influence of alcohol (ADUI) and sentenced to concurrent prison

terms of 14 and 12 years. We affirmed the judgment on direct appeal. *People v. Bowman*, 357 Ill. App. 3d 290 (2005). His first post-conviction petition was dismissed upon the State's motion. *People v. Bowman*, No. 1-07-0329 (2008) (unpublished order under Supreme Court Rule 23). Defendant now appeals from an order denying him leave to file a successive *pro se* post-conviction petition, contending that his petition raises a valid "one-act, one-crime" claim not previously ruled upon.

¶ 3 Defendant was charged with multiple counts of reckless homicide in the death of Alexander Esteban on May 21, 2001, when Esteban was under 12 years' old. At trial, the State proceeded on two counts, one alleging that he was under the influence of alcohol while operating the vehicle and the other not so alleging. Defendant was also charged with several counts of ADUI allegedly committed on the same date, with the State proceeding on a count alleging that he caused great bodily harm to Rosario Cruz, who was 60 years' old or older.

¶ 4 Following trial, the jury was instructed that the alcohol-based count of reckless homicide was aggravated reckless homicide while the other count was reckless homicide. The jury found defendant guilty of aggravated reckless homicide, reckless homicide, and ADUI, also finding that Esteban's age was under 12 years and Cruz's age was at least 60 years. The court sentenced defendant to the maximum prison terms of 14 years for reckless homicide, merging the two counts thereof, and 12 years for ADUI. Defendant's post-sentencing motion is not in the record, but the motion was denied without defense counsel, the State, or the court referring to a one-act, one-crime challenge.

¶ 5 On direct appeal, defendant did not raise a one-act, one-crime challenge.

¶ 6 In his first post-conviction petition, filed by counsel in June 2006, defendant raised a one-act, one-crime claim and an *ex post facto* challenge to his reckless homicide sentence. Neither the State's motion to dismiss, nor defendant's written response thereto, expressly addressed the

one-act, one-crime claim. At the motion hearing on January 18, 2007, neither the parties nor the court referred to a one-act, one-crime challenge. In his appeal from the dismissal of the petition, defendant did not address the one-act, one-crime issue but solely the *ex post facto* claim.

¶ 7 In the instant August 2009 *pro se* motion for leave to file a successive post-conviction petition, defendant raised a one-act, one-crime claim, among others, and argued that his claims were not previously raised due to his lack of legal knowledge. The court denied the motion on November 13, 2009, finding in relevant part that defendant's vehicle struck two people and thus two separate offenses were supported. This appeal timely followed.

¶ 8 On appeal, defendant contends that the trial court erred in denying him leave to file a successive post-conviction petition because he was raising a valid one-act, one-crime claim not previously ruled upon. The State responds that defendant raised but then abandoned the one-act, one-crime claim in his initial post-conviction petition.

¶ 9 A defendant may not file a second or successive post-conviction petition without leave of the court, which may be granted "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2008). Cause is "an objective factor that impeded [the petitioner's] ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2008). In other words, cause may be shown by the petitioner pleading some objective factor external to the defense that impeded counsel or defendant from timely raising the claim in an earlier proceeding. *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010). Prejudice requires a showing "that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2008). The cause-and-prejudice test for successive petitions is " 'more exacting' " than the gist standard for the summary dismissal of an initial

petition. *People v. Alcozer*, 241 Ill. 2d 248, 261 (2011), quoting *People v. Conick*, 232 Ill. 2d 132, 141–42 (2008); see also *People v. Welch*, 392 Ill. App. 3d 948, 955 (2009)(denial of leave to file a successive petition is not reviewed by the gist standard).

¶ 10 Here, defendant, through counsel, actually raised a one-act, one-crime claim in his initial post-conviction petition. The parties dispute the import of the fact that this claim was then not mentioned further by either party or the court in motion pleadings, arguments, or the court's dismissal of the petition. The State argues that defendant thereby abandoned the claim, while defendant argues that it is unreasonable to infer abandonment and that his one-act, one-crime claim is not barred as *res judicata* because this court did not rule upon such a claim in reviewing the dismissal. Whether or not defense counsel abandoned the one-act, one-crime claim after raising it in the petition, nothing apparent from the record barred counsel from making argument upon the claim at the motion hearing, nor from raising the issue in a motion for reconsideration or clarification once the court dismissed the petition without expressly referring to it. Moreover, there was nothing barring appellate defense counsel from contending on appeal from the dismissal that the one-act, one-crime claim in the petition was arguably meritorious. See *People v. Ligon*, 239 Ill. 2d 94, 103 (2010)(issues addressed on appeal are *res judicata*, while issues that could have been raised on appeal but were not are forfeited or defaulted). We therefore conclude that no objective factor external to the defense impeded raising the one-act, one-crime claim in a proceeding earlier than the instant successive petition, so that defendant could not show cause for the filing of a successive petition.

¶ 11 Defendant also could not show prejudice because his one-act, one-crime claim is not meritorious. While multiple convictions are generally improper where there is a single physical act, the reviewing courts of Illinois have rejected the proposition that "the court need only look at the physical act involved" and held that crimes committed against multiple victims constitute

separate criminal acts. *People v. Pryor*, 372 Ill. App. 3d 422, 434 (2007). Thus, where a single act injures multiple victims, the consequences separately affect each injured person and there is a corresponding number of offenses for which the defendant may be convicted. *Pryor*, 372 Ill. App. 3d at 434. " 'In Illinois it is well settled that separate victims require separate convictions and sentences.' " *Pryor*, 372 Ill. App. 3d at 434, quoting *People v. Shum*, 117 Ill. 2d 317, 363 (1987).

¶ 12 In *People v. Latto*, 304 Ill. App. 3d 791 (1999), a defendant whose act of reckless driving while under the influence of alcohol killed one person and injured another was convicted of two counts of reckless homicide and two counts of ADUI. *Latto*, 304 Ill. App. 3d at 793, 798. Under the one-act, one-crime rule, we vacated one of the reckless homicide counts and one of the ADUI counts, while expressly finding that the ADUI count based upon the injured person would stand. *Latto*, 304 Ill. App. 3d at 806-07 n.5.

¶ 13 Only a single conviction for ADUI can stand where the defendant engaged in a single act of driving under the influence of alcohol, even if the aggravating factor was injuring another person and two or more persons were injured. *People v. Lavallier*, 187 Ill. 2d 464 (1999). By contrast, reckless homicide is a crime against an individual, focused upon the death of the victim or the result of the defendant's act, so that multiple convictions may stand where multiple persons were killed by a single instance of reckless driving. *People v. Fish*, 381 Ill. App. 3d 911 (2008). Where a defendant convicted of murder and aggravated arson raised a one-act, one-crime challenge to the aggravated arson conviction, contending that the convictions were all based on the same physical act of setting the fire, our supreme court affirmed because the murder and aggravated arson convictions were based on separate victims. *People v. Kuntu*, 196 Ill. 2d 105, 130-31 (2001).

¶ 14 Defendant cites *People v. Bennett*, 331 Ill. App. 3d 198 (2002) in support of his claim. While the *Bennett* defendant faced convictions for reckless homicide and ADUI and this court vacated the ADUI conviction, it did so upon the State's concession of error where the ADUI conviction had not received a sentence. *Bennett*, 331 Ill. App. 3d at 203; see also *People v. Johnson*, 392 Ill. App. 3d 127, 132 (2009) (final appealable judgment in a criminal case is a sentence, not a bare conviction). Because the State had little incentive to contest the *Bennett* defendant's challenge to his unsentenced ADUI conviction, and this court had little incentive to examine the resulting State concession, we do not find *Bennett* persuasive.

¶ 15 Based on the above, we conclude that a defendant may properly be convicted of one count of reckless homicide and one count of ADUI arising from the same incident of driving under the influence so long as the ADUI is based on a different victim than the reckless homicide. That is the case here, as defendant's ADUI conviction was based upon his injury of Cruz while his reckless homicide conviction was based upon Esteban's death.

¶ 16 Since defendant was unable to show the requisite cause or prejudice to file a successive post-conviction petition, the trial court properly denied him leave to file. Accordingly, the judgment of the circuit court is affirmed.

¶ 17 Affirmed.