

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 by Rule 23(e)(1).

2011 IL App. (3d) 100128-U

Order filed July 29, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS)	for the 13th Judicial Circuit,
)	LaSalle County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0128
v.)	Circuit No. 98 CF 431
)	
JOSEPH F. FUELNER,)	The Honorable
)	Cynthia Raccuglia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Schmidt and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because the record reveals that counsel filed a Rule 651(c) certificate in the instant case and defendant has failed to overcome the presumption that he received the representation Rule 651(c) requires a postconviction petitioner receive during second-stage proceedings, we find no error in the denial of defendant's motion for leave to file a successive post conviction petition alleging actual innocence.
- ¶ 2 This is an appeal from an order of the circuit court dismissing a second petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)). We affirm.

¶ 3

FACTS

¶ 4 Defendant, Joseph F. Feulner, was found guilty of two counts of aggravated criminal sexual abuse. He was sentenced to concurrent terms of imprisonment of 14 years. Defendant appealed, and we affirmed his conviction and sentence. *People v. Feulner*, 3-99-0531 (February 6, 2001) (unpublished order pursuant to Supreme Court Rule 23).

¶ 5 In July 2001, defendant filed a *pro se* petition for post conviction relief, which was denied following an evidentiary hearing. We affirmed the denial of defendant's petition. *People v. Feulner*, 3-02-0403 (February 26, 2004) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On May 31, 2005, defendant filed a subsequent post conviction petition alleging that trial counsel failed to interview alibi witnesses to establish that he was working as a truck driver at the time of his offense. Those witnesses would have included defendant's ex-wife and various shipping employees who helped load his trucks, as well as gas station employees who sold defendant fuel. The petition also alleged that trial counsel failed to investigate prior false claims of sexual abuse by the complainant.

¶ 7 On November 29, 2007, the trial court dismissed the petition because it had not granted leave to file the petition and the petition also did not meet the "cause and prejudice" test. Defendant appealed, arguing that post conviction counsel had not complied with Supreme Court Rule 651(c) (Rule 651(c) (eff. Dec. 1, 1984)). We reversed and remanded the matter with instructions that new post conviction counsel be appointed and that counsel "review defendant's 2005 successive *pro se* post conviction petition without undue delay and file an appropriate motion for leave, along with any amended pleadings and exhibits, in addition to a new certificate

as required by the mandates of *** Rule 651(c)." *People v. Feulner*, 3-07-0868 (May 15, 2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 On November 20, 2009, newly-appointed post conviction counsel filed: (1) a motion for leave to file defendant's successive post conviction petition, (2) a new post conviction petition supported by defendant's affidavit, and (3) a new Rule 651(c) certificate. The State subsequently filed a motion to dismiss and the matter proceeded to a hearing.

¶ 9 At the hearing, the trial court stated that, in considering the motion for leave to file defendant's successive post conviction petition, it had to examine the merits of the petition itself. Post conviction counsel agreed with the trial court. Upon reviewing the petition, the court noted that defendant was alleging actual innocence. The State agreed, noting that while defendant's motion for leave did not contain a specific ground, the appended post conviction petition expressly set forth a claim of actual innocence.

¶ 10 Defendant argued that the allegations of the petition were sufficient to present an actual innocence claim justifying the filing of the petition. In response, the State contended that the allegations in the petition did not establish actual innocence. Moreover, the State alleged that the evidence was neither newly discovered nor of such conclusive character that it would change the result on retrial. Ultimately, the trial court held that the allegations in the petition, including defendant's affidavit, were insufficient to meet the test of actual innocence. Thus, the court denied defendant leave to file a successive post conviction petition.

¶ 11 ANALYSIS

¶ 12 The sole issue before this court is whether the trial court erred in denying defendant's motion for leave to file a successive post conviction petition under the Act. Defendant asserts

that reversal is required due to post conviction counsel's alleged failure to comply with both our previous order and Rule 651(c). Specifically, defendant alleges that counsel erroneously failed to argue actual innocence and/or cause and prejudice. Because the record reveals that counsel filed a Rule 651(c) certificate in the instant case and defendant fails to overcome the presumption that he received the representation Rule 651(c) requires a postconviction petitioner receive during second-stage proceedings, we find no error in the denial of defendant's motion for leave.

¶ 13 To be entitled to relief under the Act, a defendant must demonstrate a substantial deprivation of federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1 (West 2010). The Act, however, contemplates the filing of only one post conviction petition. Under the express terms of the Act, "any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2000). The supreme court has held, however, that the statutory bar to a successive post conviction petition will be relaxed when fundamental fairness so requires. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004).

¶ 14 "To establish that fundamental fairness requires that a successive postconviction petition be considered on the merits, a defendant must show both cause and prejudice with respect to each claim presented." *Morgan*, 212 Ill. 2d at 153. However, where the death penalty is not involved and the defendant tenders a claim of actual innocence, the defendant is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009).

¶ 15 Here, defendant does not allege that he actually established cause and prejudice or a viable claim of actual innocence below in the trial court. Instead, defendant's argument, as a procedural matter, is that post conviction counsel failed to even argue "actual innocence or cause

and prejudice." Defendant believes this alleged failure violates both Rule 651(c) and our previous order, which required counsel to "review defendant's 2005 successive *pro se* post conviction petition without undue delay and file an appropriate motion for leave, along with any amended pleadings and exhibits ***."

¶ 16 Initially, we note the directions contained within our previous order are encapsulated within Rule 651(c). Rule 651(c) requires that the record disclose that post-conviction trial counsel: (1) consult with the petitioner to ascertain his contentions of constitutional deprivation; (2) examine the record of the proceeding of the original trial; and (3) make any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. Supreme Court Rule 651(c) (eff. Dec. 1, 1984).

¶ 17 We also note that counsel filed a Rule 651(c) certificate in the instant case. Where a certificate in accordance with Rule 651(c) is filed, "the presumption exists that petitioner received the representation Rule 651(c) requires a postconviction petitioner receive during second-stage proceedings." *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). Here, defendant has failed to meet his burden to overcome the presumption that he received the representation both our previous order and Rule 651(c) required.

¶ 18 Actual Innocence

¶ 19 The record directly rebuts defendant's assertion that counsel failed to argue actual innocence. While defendant's motion for leave did not contain a specific ground, the appended post conviction petition set forth a claim of actual innocence. At the hearing on defendant's motion for leave, the court reviewed the appended petition and expressly noted that defendant was alleging actual innocence. Ultimately, the trial court rejected defendant's claim that the

allegations of the petition were sufficient to present an actual innocence claim justifying the filing of the successive petition. Clearly, the theory of actual innocence was raised, argued, and judgment was entered on the issue. The fact that defendant's motion for leave did not expressly set forth a claim of actual innocence is of no consequence since the claim was contained within the appended post conviction petition and the issue was heard by the trial court. The filing of a petition for leave is not mandated under the Act if the trial court sees fit to consider the merits of the actual successive petition and rule on its own accord. *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010).

¶ 20 Cause and Prejudice

¶ 21 Unlike the theory of actual innocence, we acknowledge that counsel did not specifically present any cause and prejudice argument in the trial court. In acknowledging this point, however, we note that the theory of "cause and prejudice" is merely the test a court employs to determine whether fundamental fairness requires that a successive post conviction petition be considered on the merits; it is not an actual claim that is tendered in a successive post conviction petition. Stated another way, the court examines whether cause and prejudice exists with respect to the new claim defendant requests to have heard by the trial court. Here, defendant merely argues that counsel failed to argue cause and prejudice. He fails, however, to link this argument to any actual constitutional deprivation (post conviction) claim. An individual cannot argue that cause and prejudice exists unless he or she first presents an actual claim that he or she was deprived of some federal or state constitutional right. In light of these facts, we cannot say that counsel's representation violated our previous order or Rule 651(c).

¶ 22 Affirmed.