

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).

NO. 4-09-0689

Order Filed 2/28/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
MICHAEL WILLIAMS,)	Nos. 97CF20
Defendant-Appellant.)	97CF75
)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court. Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

Held: Because no colorable argument could be made that the trial court erred by dismissing defendant's motion for leave to file a successive petition for postconviction relief, the office of the State Appellate Defender was granted permission to withdraw as counsel on appeal and the court's dismissal was affirmed.

This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the grounds that no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

I. BACKGROUND

In April 1997, defendant, Michael Williams, pleaded guilty to (1) criminal damage to government-supported property (720 ILCS 5/21-4(1) (a) (West 1996)) in case No. 97-CF-20 and (2) aggravated battery upon a correctional institution employee (720

ILCS 5/12-4(b)(6) (West 1996)) in case No. 97-CF-75. In exchange for defendant's guilty plea, the State agreed to recommend a three-year sentence in case No. 97-CF-20 and a seven-year sentence in case No. 97-CF-75, to be served consecutively to each other and consecutively to prison sentences that defendant was already serving.

Prior to accepting defendant's guilty plea in case No. 97-CF-20, the trial court admonished defendant, in pertinent part, as follows:

"THE COURT: As a Class III felony, the possible maximum penalty upon conviction can be a prison sentence in the Illinois Department of Corrections [(DOC)] for a minimum of two and a maximum of five years with a one-year mandatory supervised release [(MSR)], or an extended sentence up to ten years with a one-year [(MSR)]. *** [U]nder the law, because the offense happened while [you were] incarcerated, it's mandatory that it be consecutive *** time. And the State's offer on the criminal damage of three years is one year over the minimum. Do you understand what the charge means?

[DEFENDANT]: Yes, sir.

THE COURT: *** And do you understand what the possible penalties are? And the only possible penalties in your case is [sic] more prison time from two to ten. *And the agreement is for three years with a one-year [MSR].* You understand that?

[DEFENDANT]: Yes, sir." (Emphasis added.)

The trial court then admonished defendant regarding his guilty plea in case No. 97-CF-75 as follows:

"THE COURT: Under Illinois law, if you touch, strike, hit, shove, push someone on the street, it's a Class A misdemeanor. If the person attacked, physically assaulted is a correctional officer, it automatically becomes a Class III felony. And do you understand what the charge of aggravated battery means in this case?

[DEFENDANT]: Yes, sir.

THE COURT: All right. Same penalties as for the criminal damage to state supported property; minimum two to a maximum of ten years. *** *The seven years which [you] would be pleading for, in fact, is an ex-*

*tended term and carries with it a one-year [MSR] or parole period. *** [Defendant], do you understand that?*

[DEFENDANT]: Yes, sir." (Emphasis added.)

After defendant waived his right to a presentence investigation report, the trial court accepted his guilty plea and sentenced him in accordance with the parties' agreement to a (1) three-year prison sentence in case No. 97-CF-20 and (2) seven-year prison sentence in case No. 97-CF-75. (At the time it imposed those sentences, the court did not again mention the applicable MSR terms).

In June 2004, defendant *pro se* filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2004)), alleging that in April 1997, (1) he was unfit to plead guilty because he suffered from "several diagnosed mental illnesses" and was "most likely borderline retarded" and (2) he received ineffective assistance of trial counsel in that his counsel failed to (a) inquire as to whether he was competent to plead guilty and (b) request a fitness hearing. The trial court later dismissed defendant's petition as frivolous and patently without merit pursuant to section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2004)).

Defendant appealed, and this court affirmed. *People v.*

Williams, No. 4-04-0610 (May 5, 2006) (unpublished order under Supreme Court Rule 23).

In July 2009, defendant *pro se* filed a motion for leave to file a successive petition for postconviction relief, alleging that he was denied the benefit of his guilty-plea bargain with the State when the trial court failed to admonish him in accordance with Supreme Court Rule 402 (eff. July 1, 1977) that his three-year prison sentence in case No. 97-CF-20 and seven-year prison sentence in case No. 97-CF-75 each included an additional one-year MSR term. Defendant also alleged, in pertinent part, that the cause of his failure to raise the MSR issue in his initial postconviction petition was because he first learned of the additional one-year MSR terms after a June 2009 conversation with the then-director of DOC, Michael P. Randle.

In August 2009, the trial court entered a summary order dismissing defendant's petition for leave to file a successive postconviction petition. Specifically, the court found that (1) the record belied defendant's claim that the court failed to admonish him about the applicable MSR terms and (2) defendant failed to demonstrate that (a) the facts upon which he relied were not available at the time he filed his initial postconviction petition, and (b) he was prejudiced by his failure to assert his MSR claim in his initial postconviction petition.

In September 2009, defendant filed a notice of appeal,

and the trial court appointed OSAD to represent him. In August 2010, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by September 24, 2010. Defendant has done so, and the State has responded.

II. THE TRIAL COURT'S DISMISSAL OF DEFENDANT'S SUCCESSIVE PETITION FOR POSTCONVICTION RELIEF

A. Defendant's Successive Postconviction Petition

OSAD argues that no colorable argument can be made that the trial court erred by dismissing defendant's motion for leave to file a successive petition for postconviction relief. We agree.

Section 122-1(f) of the Act provides the following guidance regarding the filing of successive petitions for postconviction relief:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court 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. For purposes of this subsection (f): (1) a pris-

oner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post[]conviction proceedings; and (2) a prisoner shows prejudice by demonstrating 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 is the analytical tool used to determine whether fundamental fairness requires a court to make an exception to the waiver provision of section 122-3 of the Act and to consider a claim raised in a successive postconviction petition on its merits." *People v. English*, 403 Ill. App. 3d 121, 130, 933 N.E.2d 366, 376-77 (2010). To avoid dismissal of a motion for leave to file a successive postconviction petition, a defendant must show both cause and prejudice with respect to each claim raised. *English*, 403 Ill. App. 3d at 130, 933 N.E.2d at 377.

In this case, defendant contends that the cause of his failure to raise his MSR claim in his initial postconviction petition was that he first learned of the additional one-year MSR terms after a June 2009 conversation with Director Randle.

However, defendant's contention--without more--fails to satisfy the "cause" prong of the test because it does not allege that an objective impediment prevented him from raising that claim in his initial postconviction petition. See *People v. Pitsonbarger*, 205 Ill. 2d 444, 460, 793 N.E.2d 609, 621 (2002) (cause for purposes of the cause-and-prejudice test is defined as an objective factor external to the defense that impeded defendant from raising the claim in an earlier proceeding).

Moreover, the record shows that (1) the trial court clearly admonished defendant regarding the applicable MSR terms and (2) defendant, in response to the court's query, stated he understood the court's admonishments. Thus, we agree with OSAD and the State that given this record, defendant cannot now convincingly claim that he was unaware of the applicable MSR terms at the time he filed his initial postconviction petition.

Accordingly, after examining the record and executing our duties in accordance with *Finley*, we agree with OSAD that no colorable argument can be made that the trial court erred by dismissing defendant's motion for leave to file a successive petition for postconviction relief.

III. CONCLUSION

For the reasons stated, we grant OSAD's motion and affirm the trial court's judgment. Because the State has in part successfully defended a portion of the criminal judgment, we

grant the State its statutory assessment of \$50 against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985), citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978).

Affirmed.