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).

2011 IL App (4th) 100522-U

Filed 7/27/11

NO. 4–10–0522

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
ROBERT F. EMERY,	)	No. 95CF797D
Defendant-Appellant.	)	
	)	Honorable
	)	Theodore E. Paine,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held*: OSAD's motion to withdraw as counsel is granted where no colorable argument can be made the trial court erred in denying defendant leave to file a successive postconviction petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In March 1996, defendant, Robert F. Emery, was convicted of possession with intent to deliver more than 100 grams but less than 400 grams of cocaine (720 ILCS 570/401(a)(2)(B) (West 1994)). Because defendant had previously been convicted of unlawful

possession of a controlled substance with intent to deliver, he was sentenced to an extended-term of 40 years' imprisonment.

¶ 5 In April 1996, defendant directly appealed his conviction and sentence, arguing (1) the trial court erred in denying his motion to suppress statements he made in reliance on the prosecutor's promise of leniency, (2) the State's decision to try defendant separate from his codefendant wife violated the doctrine of separation of powers, and (3) his 40-year sentence was an abuse of discretion.

¶ 6 In August 1997, this court affirmed defendant's conviction and sentence. *People v. Emery*, No. 4–97–0090 (August 7, 1997) (unpublished order under Supreme Court Rule 23).

¶ 7 In April 1998, defendant filed a postconviction petition, arguing (1) he was denied effective assistance of counsel because his trial counsel advised him his sentence would not exceed 15 years' imprisonment if he went to trial, (2) his trial counsel denied him his right to testify, (3) the State retaliated against him because he refused its 20-year-plea deal by later asking for a 40-year sentence, and (4) the trial court imposed disparate sentences on defendant and his codefendant.

¶ 8 In May 1998, the trial court dismissed defendant's petition as frivolous and patently without merit.

¶ 9 In March 1999, this court affirmed the trial court's dismissal. *People v. Emery*, No. 4–98–0388 (March 15, 1999) (unpublished order under Supreme Court Rule 23).

¶ 10 In September 2008, defendant requested leave to file a second postconviction petition. Defendant argued he was denied effective assistance of counsel when his trial counsel failed to (1) challenge the chemist's testimony that he had tested exactly 12.9 grams of the

substance containing cocaine, (2) raise statutory factors to challenge his sentence, (3) challenge the chain of custody of the cocaine, and (4) file a motion *in limine* challenging the use of his past criminal history for impeachment purposes.

¶ 11 In addition, defendant argued (1) the jury instructions allowed him to be convicted based upon a presumption; (2) facts necessary to justify the sentence imposed were not proved to the jury beyond a reasonable doubt; and (3) his sentence should have been imposed by the jury and not the judge.

¶ 12 Defendant also argued his appellate counsel rendered ineffective assistance by failing to argue (1) statements defendant made while he was in pretrial custody should have been suppressed, (2) his trial counsel advised him to reject the State's 20-year offer and go to trial because he could not receive more than a 15-year sentence, and (3) he was denied his right to testify at trial.

¶ 13 In October 2008, the trial court denied defendant leave to file a successive postconviction petition. Defendant appealed, and OSAD was appointed.

¶ 14 In December 2010, OSAD filed a motion to withdraw as counsel, asserting no issues of arguable merit could be raised on appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points and authorities by January 20, 2011. Defendant filed none. After examining the record consistent with our responsibilities under *Finley*, we grant OSAD's motion to withdraw as counsel on appeal, and affirm the trial court's judgment.

¶ 15 II. ANALYSIS

¶ 16 OSAD argues no meritorious issue can be raised and an appeal from the trial

court's dismissal of defendant's request for leave to file a successive postconviction petition would be frivolous. We agree.

¶ 17 A. Standard of Review

¶ 18 A trial court's determination concerning whether to grant a defendant leave to file a successive postconviction petition is controlled by section 122–1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1(f) (West 2008)). *See People v. Barber*, 381 Ill. App. 3d 558, 559, 886 N.E.2d 1040, 1042 (2008). We review *de novo* a trial court's denial of a defendant's section 122–1(f) motion for leave to file a successive postconviction petition. *People v. LaPointe*, 365 Ill. App. 3d 914, 923, 850 N.E.2d 893, 901 (2006).

¶ 19 B. Post-Conviction Hearing Act

¶ 20 The Act contemplates the filing of one postconviction petition. See 725 ILCS 5/122–1(f) (West 2008) (a defendant may only file one postconviction petition without leave of the court). Issues decided on direct appeal or in the original postconviction petition are barred from successive petitions by the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005). All issues that could have been raised in the original proceeding or original postconviction petition are waived. *Blair*, 215 Ill. 2d at 443, 831 N.E.2d at 615. Where *res judicata* or waiver preclude a petitioner from obtaining relief, his claim will necessarily be frivolous and without merit. *Blair*, 215 Ill. 2d at 443, 831 N.E.2d at 615. "As a consequence, a defendant faces a daunting procedural hurdle when bringing a successive post-conviction petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000).

¶ 21 C. Cause-and-Prejudice Test

¶ 22 In *People v. Pitsonbarger*, 205 Ill. 2d 444, 458, 793 N.E.2d 609, 621 (2002), the

supreme court held that the procedural bars of forfeiture and *res judicata* may be relaxed with respect to successive postconviction petitions under certain circumstances. The court found the "cause-and-prejudice" test was the "analytical tool that is to be used to determine whether fundamental fairness requires" a defendant's successive postconviction petition be considered on the merits. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621.

¶ 23 Under the cause-and-prejudice test, claims in a successive postconviction petition are barred unless the defendant can establish (1) good cause for failing to raise his claims in prior proceedings and (2) actual prejudice resulting from the claimed errors. *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29. "Cause" can be "any objective factor, external to the defense, which impeded the [defendant's] ability to raise a specific claim in the initial post-conviction proceeding." *Pitsonbarger*, 205 Ill. 2d at 462, 793 N.E.2d at 622. "Prejudice" is "an error which so infected the entire trial that the resulting conviction violates due process." *People v. Britt-El,* 206 Ill. 2d 331, 339, 794 N.E.2d 204, 209 (2002). Like the test for ineffectiveness of counsel, the cause-and-prejudice test is composed of two elements, *both* of which must be met in order for the defendant to prevail. *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624. Thus, if defendant's claims have no merit, no prejudice resulted, and the test is not met.

¶ 24 If the petitioner cannot show cause and prejudice, his failure to raise a claim in an earlier petition may still be excused if necessary to prevent a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. However, the court explained in non-death-penalty cases, a petitioner must show actual innocence to demonstrate such a miscarriage of justice. *Pitsonbarger,* 205 Ill. 2d at 459, 793 N.E.2d at 621. We note defendant’s claims in this case do not involve actual innocence.

¶ 25 D. Defendant's Claims

¶ 26 1. *Claimed Trial Court Errors*

¶ 27 Defendant's petition alleges (1) the jury instructions allowed him to be convicted based upon a presumption; (2) facts necessary to justify the sentence imposed were not proved to the jury beyond a reasonable doubt; and (3) his sentence should have been imposed by the jury and not the judge.

¶ 28 Each of these arguments was available to defendant when he filed his initial postconviction petition. However, defendant does not explain why he did not include them in that petition. As stated, all issues that could have been raised in the original postconviction petition, but were not, are forfeited. *Blair*, 215 Ill. 2d at 443–44, 831 N.E.2d at 615. Accordingly, we find defendant forfeited these allegations.

¶ 29 Forfeiture aside, defendant has not satisfied the cause-and-prejudice test for any of the issues raised because his arguments are meritless. For instance, defendant argues the State failed to prove to the jury certain facts necessary to authorize his extended-term sentence. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). However, in *People v. De La Paz*, 204 Ill. 2d 426, 428-29, 791 N.E.2d 489, 491 (2003), the Illinois Supreme Court held "*Apprendi* does not apply retroactively to causes in which the direct appeal process had concluded at the time that *Apprendi* was decided."

¶ 30 In this case, defendant filed his petition for leave to appeal this court's decision in his direct appeal on October 7, 1997, which the supreme court denied on December 3, 1997,

(*People v. Emery,* 175 Ill. 2d 537, 689 N.E.2d 1142 (1997)). *Apprendi* was decided on June 26, 2000. Because *Apprendi* does not apply, defendant's claim has no merit.

¶ 31 Also meritless is defendant's argument his sentence should have been imposed by the jury and not the judge. It is well settled in Illinois in noncapital cases the judge and not the jury imposes a defendant's sentence.

¶ 32 *2. Ineffective Assistance of Trial Counsel*

¶ 33 Defendant's petition alleges he was denied effective assistance of counsel when his trial counsel failed to (1) challenge the chemist's testimony he had tested exactly 12.9 grams of the substance containing cocaine, (2) raise statutory factors to challenge his sentence, (3) challenge the chain of custody of the cocaine, and (4) file a motion *in limine* challenging the use of his past criminal history for impeachment purposes.

¶ 34 However, each of defendant's arguments was available for inclusion in his initial postconviction petition. No colorable argument can be made why these issues were not included in that petition. Further, defendant has not satisfied the cause-and-prejudice test for any of the issues raised. Accordingly, defendant has forfeited these issues. *Blair*, 215 Ill. 2d at 443, 831 N.E.2d at 615.

¶ 35 3. *Ineffective Assistance of Appellate Counsel*

¶ 36 Defendant's petition alleges his appellate counsel rendered ineffective assistance by failing to argue the following on direct appeal: (1) the trial court erred in denying his motion to suppress statements defendant made while he was in pretrial custody; (2) defendant's trial counsel erroneously advised him to reject the State's 20-year offer and go to trial because he could not receive more than a 15-year sentence; and (3) defendant was denied his right to testify

at trial.

¶ 37 We analyze ineffective-assistance-of-appellate counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1106 (2000) (applying *Strickland* to an ineffective-assistance-of-appellate-counsel claim). "To prevail on an ineffective-assistance claim, a defendant must show that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant such that he was deprived of a fair trial." *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889, 907 (2005).

¶ 38 A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Houston*, 226 Ill. 2d 135, 144-45, 874 N.E.2d 23, 30 (2007). However, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 39 In this case, defendant cannot establish the prejudice prong of the *Strickland* analysis because the issues he asserts his appellate counsel should have raised are meritless. See *Simms*, 192 Ill. 2d at 362, 736 N.E.2d at 1107 ("a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal").

¶ 40 We understand defendant to be arguing statements he made while in pretrial custody should have been suppressed and his appellate counsel's failure to argue the issue somehow deprived him of access to the federal courts. However, defendant's counsel did in fact raise the suppression issue on direct appeal. Moreover, this court affirmed the trial court's denial of his motion to suppress. See *People v. Emery*, No. 4-97-0090, slip order at 4-5 (August 7,

1997) (unpublished order under Supreme Court Rule 23). Issues decided on direct appeal are barred by *res judicata*. *Blair*, 215 Ill. 2d at 443, 831 N.E.2d at 615. As a result, defendant is precluded from raising that issue in a postconviction petition. Further, because counsel raised the issue on appeal, defendant cannot show he was prejudiced by appellate counsel's failure to do so.

¶ 41 Defendant also argues his appellate counsel was ineffective for failing to argue his trial counsel was ineffective for advising him to reject the State's 20-year offer and go to trial because he was not going to receive more than 15 years' imprisonment. The court sentenced defendant to 40 years' imprisonment. However, defendant previously raised this issue in his first postconviction petition. Thus, the issue is barred by *res judicata*. Moreover, at the hearing on defendant's motion to reduce his sentence, defendant admitted he knew he was facing a prison term of between 9 and 80 years. As defendant's claim has no merit, he cannot show he was prejudiced by appellate counsel's failure to raise the issue.

¶ 42 Finally, defendant maintains his appellate counsel erred by failing to argue defendant was denied his right to testify at trial. We note this issue was included in defendant's initial postconviction petition. As a result, the issue is barred by *res judicata*. Further, this issue is meritless because defendant never asserted he wished to testify. During defendant's trial, his trial counsel informed the court he had discussed the matter with defendant and defendant did not wish to testify. Defendant did not contemporaneously assert that he wished to testify. See *In re Joshua B.*, 406 Ill. App. 3d 513, 515, 941 N.E.2d 1032, 1034 (2011) (citing *People v. Shelton*, 252 Ill. App. 3d 193, 201, 624 N.E.2d 1205, 1210 (1993) (a defendant's conviction cannot be reversed where a defendant contends on appeal he was prevented from testifying at trial unless he contemporaneously asserted his right to testify by informing the trial court he wished to do so)).

While the trial court did not actively inquire as to defendant's decision, it was not required to do so. *Joshua B.*, 406 Ill. App. 3d at 515, 941 N.E.2d at 1034 (citing *People v. Chatman*, 357 Ill. App. 3d 695, 703, 830 N.E.2d 21, 30–31 (2005) ("In order to effect waiver of his right to testify, a defendant is not required to execute a specific type of waiver, nor is the trial court required to ascertain whether a defendant's silence is the result of a knowing and voluntary waiver to testify")). Because defendant's claim has no merit, he cannot satisfy the cause-and-prejudice test.

¶ 43 The trial court did not err in denying defendant leave to file his successive postconviction petition. Because any appeal in this cause would be frivolous, OSAD is granted leave to withdraw as counsel.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 46 Affirmed.