

(*People v. Tolbert*, 323 Ill. App. 3d 793 (2001)) and in her first postconviction petition (*People v. Tolbert*, No. 5-01-0465 (2002) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994))). In 2009, the defendant petitioned for leave to file a successive petition for postconviction relief. In a written order, the circuit court denied her petition, finding, *inter alia*, that she did not demonstrate the cause and prejudice necessary to file a successive postconviction petition. Additional facts will be provided as necessary throughout the remainder of this order.

¶ 5

ANALYSIS

¶ 6

Pursuant to section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2008)), where a petitioner has litigated a previous postconviction petition, that petitioner must obtain leave from the circuit court to proceed on a successive postconviction petition. In most cases, leave is available only where "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). For purposes of the Act, "cause" is shown "by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2008). "Prejudice" is shown "by demonstrating that the claim not raised during his or her initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2008). Interpreting the Act, the Illinois Supreme Court recently held that cause and prejudice need not be shown where a defendant sets forth, in a successive postconviction petition in a nondeath case, a claim of actual innocence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). We review *de novo* the decision of a circuit court to deny leave to a defendant to file a successive petition for postconviction relief. *People v. LaPointe*,

365 Ill. App. 3d 914, 923 (2006), *aff'd*, 227 Ill. 2d 39 (2007).

¶ 7 In the case at bar, the defendant concedes on appeal—and we agree—that a claim of actual innocence based upon newly discovered evidence has not been set forth and that, as a result, the defendant is entitled to proceed on her successive petition only if she can demonstrate cause and prejudice. The defendant claims that one of the allegations in the successive petition she sought to file "meets the cause and prejudice test": her claim, in paragraph 52, that trial counsel was ineffective because counsel failed to "fully investigate" a police report compiled by a "Sgt J. Nelson" concerning an interview with witness Emery Mack Decker wherein Decker stated that the defendant "was crying and hysterical, and at one point, fell and collapsed to the floor" of Decker's home while beseeching Decker to call an ambulance for her mortally wounded husband. According to the defendant, trial counsel should have secured an evidentiary deposition from Decker so that his testimony could be presented at her trial. Had counsel done so, the defendant's theory goes, Decker's testimony would have provided an "untainted" view of how upset the defendant was upon learning that her husband had been shot. However, because counsel failed to do this, and because Decker died before the defendant's trial, the defendant posits that she was left instead to rely upon the testimony of two employees of the Hardin County sheriff's department—dispatcher Shirley Oxford and Deputy Ed Conkle—to convey to the jury that she was hysterical when she discovered the injuries to her husband. The problem with that reliance, the defendant's theory goes, is that Conkle's testimony was equivocal about the defendant's state of mind, and the presence or absence of hysteria, and thus was more damaging to the defendant's case than would have been the deposition testimony of Decker.

¶ 8 There are a number of problems with the defendant's position. First, even if

this court were to assume, *arguendo*, that the defendant could demonstrate cause for failing to bring this claim in earlier proceedings, we simply could not find prejudice that "so infected the trial that the resulting conviction or sentence violated due process" (725 ILCS 5/122-1(f) (West 2008)). As this court noted in our disposition of the defendant's direct appeal, "the evidence in the instant case was not closely balanced." *People v. Tolbert*, 323 Ill. App. 3d 793, 803 (2001). Indeed, in his specially concurring opinion, Justice Kuehn characterized the evidence against the defendant as "overwhelming." *Tolbert*, 323 Ill App. 3d at 810. The issue of the presence or absence of hysteria in the defendant when she arrived at Decker's home and asked for an ambulance to be sent for her husband was at best tangential when considered in light of the overwhelming evidence of the defendant's involvement in her husband's murder.

¶ 9 Second, the defendant's assertion that the deposition testimony of Decker would not have been equivocal about the defendant's state of mind, and therefore would have been better than the testimony of Conkle, is pure speculation. As the State points out, although both Oxford and Conkle testified that the defendant had been hysterical or at least crying and visibly upset immediately after the murder, numerous other witnesses testified that later the defendant neither cried nor displayed any sense of grief or loss over her husband's death, and it is impossible to know how Decker might have testified upon cross-examination in a deposition. Moreover, as the State again points out, given the State's theory of the case—that the defendant's original plan for murdering her husband had broken down—any hysteria displayed by the defendant was just as likely to have been caused by the fact that her husband remained alive when she had expected him to already be dead than to have been caused by a sense of grief that her husband was gravely injured. Accordingly, the presence of

hysteria was not necessarily exculpatory and could just as easily have been evidence of guilt or could have been feigned entirely by the defendant.

¶ 10 Third, as the State points out, Oxford's live testimony that Decker had told her, in his emergency call to the sheriff's department, that the defendant was hysterical was in all likelihood more compelling than would have been the dry deposition testimony of Decker, for Oxford conveyed that Decker himself seemed a little hysterical, and Oxford was present as a live witness, whereas Decker's testimony would have been read into the record by someone who was not present when the emergency call was made.

¶ 11 Fourth, the defendant cannot demonstrate ineffective assistance of trial counsel because although it is clear that Decker died prior to the defendant's trial, the defendant has provided no information indicating that Decker was alive and able to give deposition testimony when trial counsel was preparing the defendant's case for trial. Because the defendant initially pled guilty to her husband's murder and then sought to withdraw that plea, it was a full two years from the date of the murder before counsel began to prepare this case for trial. The trial testimony of Oxford was that Decker, whom Oxford knew personally, was elderly and in poor health at the time of the murder and deceased by the time of the trial.

¶ 12 Fifth, as the State points out, valid strategic reasons existed for trial counsel to avoid eliciting testimony from Decker. The defendant claimed at her trial that the reason she stopped at Decker's home, rather than at homes closer to the scene of the murder, was that Decker was the only friendly person she knew who lived along the road. Oxford, however, testified that Decker told her that Decker did not know the defendant, and presumably Decker would have so testified as well. In short, there are multiple infirmities with the defendant's contention in paragraph 52 of her claim, and

the trial court did not err in denying her petition for leave to file her successive petition.

¶ 13

CONCLUSION

¶ 14

For the foregoing reasons, we affirm the denial of the defendant's petition for leave to file a successive petition for postconviction relief.

¶ 15

Affirmed.