

No. 1-11-1246

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 92 CR 13905
)	
ANDRE ARCHER,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Dismissal of defendant's successive post-conviction petition affirmed over defendant's claim that the circuit court entered a partial dismissal because it failed to specifically address a claim made in his petition in its oral pronouncement.

¶ 2 Defendant Andre Archer appeals from the dismissal of his successive *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that *People v. Rivera*, 198 Ill. 2d 364 (2001), mandates reversal because the circuit court failed to specifically address a claim that his extended-term sentence violates the holding in *People v. Swift*, 202 Ill. 2d 378 (2002), thereby rendering an improper, partial summary

dismissal. He further contends that the circuit court's failure to specifically acknowledge this claim rendered the dismissal of his petition void for failing to enter the judgment within the 90-day period for initial review.

¶ 3 Following a jury trial in 1993, defendant was convicted of first degree murder and sentenced to 70 years' imprisonment based on the trial court's finding that the murder was exceptionally brutal and heinous. This court affirmed that judgment on direct appeal (*People v. Archer*, No. 1-93-2900 (1996) (unpublished order under Supreme Court Rule 23)), and subsequently affirmed the second-stage dismissal of his initial post-conviction petition after granting counsel's motion to withdraw (*People v. Archer*, No. 1-03-1926 (2004) (unpublished order under Supreme Court Rule 23)).

¶ 4 On February 16, 2011, defendant filed the subject successive *pro se* post-conviction petition in which he solely alleged that the excess portion of his extended-term sentence was void. On March 14, 2011, the circuit court orally dismissed the petition, stating as follows:

"He brings a post-conviction petition. He was convicted on a 1992 case, convicted in 1993 of murder, and sentenced by Judge Carnezis [*sic*] to a 70-year sentence. He says that he was young, it was his first incarceration, and the sentence doesn't give any credence to his ability to be rehabilitated.

Actually, the sentence is within the range of available sentences. It was an extended term, but it was still within the range of sentences. There is nothing here at this time to indicate that Judge Carnezis erred in giving him a sentence within the range.

So his post-conviction petition to reduce sentence *pro se* is denied."

¶ 5 In this court, defendant first contends that we must reverse the dismissal of his successive petition and remand the cause for second-stage proceedings under the Act, based on an application of *People v. Rivera*, 198 Ill. 2d 364 (2001), which held that partial summary dismissals are not permitted under the Act. He claims that the circuit court's failure to address the sentencing claim pursuant to *People v. Swift*, 202 Ill. 2d 378 (2002), constitutes a partial summary dismissal. This court reviews *de novo* the circuit court's ruling on a successive post-conviction petition. *People v. Williams*, 392 Ill. App. 3d 359, 367 (2009).

¶ 6 We agree with defendant that *Rivera* does not allow for the partial dismissal of a post-conviction petition; however, we disagree with his application of it to the instant case. In *Rivera*, the supreme court examined the circuit court's authority to dismiss part of defendant's post-conviction petition while advancing other claims to the second stage of proceedings, with the appointment of counsel to assist in the presentation of those claims. Unlike *Rivera*, where the circuit court improperly dismissed four and advanced two claims to the second stage of proceedings, the circuit court here dismissed defendant's entire successive post-conviction petition which raised a single claim. *People v. Terry*, 2012 Il App (4th) 100205, ¶ 43. In doing so, the circuit court clearly revealed its intent to dismiss the whole petition. We therefore decline to construe the circuit court's resolution of the sole claim in his petition as a partial dismissal where it plainly stated, "his post-conviction petition to reduce sentence *pro se* is denied." *People v. Lee*, 344 Ill. App. 3d 851, 855 (2003).

¶ 7 Defendant further contends that the circuit court's failure to properly acknowledge his claim rendered the dismissal of his petition void for failing to enter the judgment within the 90-day period for initial review. In presenting that argument, defendant ignores the fact that successive petitions are treated differently than initial petitions under the Act. *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007). This distinction includes the fact that "[t]he 90-day *statutory*

period within which the circuit court must rule or else trigger the automatic docketing of an *initial* postconviction petition for second-stage consideration does not apply to *successive* petitions until leave is granted to file the successive petition." (Emphasis added.) *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 19 (citing *LaPointe*, 227 Ill. 2d at 44). Here, because defendant neither specifically sought, nor was granted leave to file his petition, it was not "filed" for purposes of the 90-day docketing provision of the Act, and the circuit court acted within its discretionary authority to consider the contents of his petition. *People v. Tidwell*, 236 Ill. 2d 150, 158-59 (2010).

¶ 8 Defendant's further procedural argument is also without merit. Although defendant claims that *People v. Porter*, 122 Ill. 2d 64 (1988), stands for the proposition that a circuit court may not summarily dismiss a post-conviction petition with "*no written order whatsoever*" (emphasis in original), he overlooks the supreme court's express statement, "It is not mandatory *** that the order dismissing the petition be written, or that it specify findings of fact and conclusions of law." *Porter*, 122 Ill. 2d at 85. Thus, the oral pronouncement by the circuit court is sufficient and provides no basis for the relief requested by defendant.

¶ 9 Defendant's reference to the circuit court's failure to "critically" find that his sentencing claim was "frivolous and patently without merit" further ignores the differences between initial and successive petitions under the Act. *LaPointe*, 227 Ill. 2d at 44. Where the death penalty is not concerned and no claim of actual innocence is raised, defendant is prohibited from raising the current claim in a successive post-conviction petition unless he establishes a legally cognizable cause for his failure to raise it earlier and actual prejudice. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459-60 (2002); 725 ILCS 5/122-1(f) (West 2008).

¶ 10 As the State points out, defendant has ignored the successive nature of his petition and the attendant consequences on appeal, and appears to rely on his allegation that his extended-term

sentence was void to excuse him from the procedural hurdle of satisfying the cause-and-prejudice test. Although in *People v. Thompson*, 209 Ill. 2d 19, 27 (2004), the supreme court recognized that a void order may be attacked at any time and in any court, either directly or collaterally, it subsequently clarified that where defendant's sentence is not void, his right to bring a post-conviction challenge to the sentence must conform to the requirements governing post-conviction petitions. *People v. Brown*, 225 Ill. 2d 188, 206 (2007).

¶ 11 In this case, defendant proffers the same voidness argument rejected by this court in *People v. Rockman*, 2012 IL App (1st) 102729, ¶¶ 27-32. In *Rockman*, 2012 IL App (1st) 102729, ¶¶ 11, 25, defendant argued that the excess portion of his extended-term sentence was void pursuant to *Swift*, 202 Ill. 2d at 388, which held that when a jury solely determines the basic elements of first degree murder, the plain language of the statute makes defendant eligible for the sentencing range specified for first degree murder, but not for an extended-term sentence. We rejected defendant's argument that since the supreme court's interpretation of a statute is retroactive to that statute's effective date, the statute never authorized his extended-term sentence and, as a result, his extended-term sentence is void. *Rockman*, 2012 IL App (1st) 102729, ¶ 27. We noted that *Swift* was an *Apprendi* case and that the supreme court simply applied the rule of *Apprendi* to the statute before it. *Rockman*, 2012 IL App (1st) 102729, ¶ 30.

¶ 12 Here, as in *Rockman*, we remain unpersuaded that *Swift* is somehow distinguishable from all the other cases recognizing that *Apprendi* does not apply retroactively to cases in which the direct appeal process had concluded when *Apprendi* was decided. *Rockman*, 2012 IL App (1st) 102729, ¶ 30. As the circuit court noted, defendant was sentenced to an extended term of imprisonment in 1993. *Apprendi* was decided in 2000, and, thus, defendant's extended-term sentence would be invalid and defendant prejudiced only if *Apprendi* applied retroactively to the sentencing proceedings in 1993. *People v. Lee*, 207 Ill. 2d 1, 5 (2003). However, less than six

1-11-1246

months after *Swift*, the supreme court held in *People v. De La Paz*, 204 Ill. 2d 426, 439 (2003), that *Apprendi* does not apply retroactively. Defendant's sentence, therefore, is not void, and his right to bring a successive post-conviction petition challenge to that sentence must satisfy the cause-and-prejudice test. *Brown*, 225 Ill. 2d at 206. In light of the above, defendant cannot establish prejudice in this case (*Lee*, 207 Ill. 2d at 5), and his challenge to the dismissal of his successive petition fails.

¶ 13 For the reasons stated, we affirm the order of the circuit court of Cook County.

¶ 14 Affirmed.