

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).

2012 IL App (4th) 100944-U

Filed 8/28/12

NO. 4-10-0944

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	DeWitt County
RONALD W. STURGEON,	)	No. 90CF83
Defendant-Appellant.	)	
	)	Honorable
	)	Chris E. Freese,
	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* We grant appointed counsel's motion to withdraw and affirm the trial court's judgment because no meritorious argument can be raised on appeal that defendant's motion for leave to file a successive postconviction petition demonstrated a claim of actual innocence.

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

¶ 3 I. BACKGROUND

¶ 4 In June 1991, a jury convicted defendant, Ronald W. Sturgeon, of first degree murder for the stabbing of Arthur Fornshell in a Clinton, Illinois, tavern. Defendant's theory at trial was self-defense or an unreasonable belief in the need for self-defense to mitigate the offense from first degree murder to second degree murder. The evidence at trial established

defendant drank several beers and multiple shots of liquor on the evening of the stabbing. In addition, defendant took more than his prescribed dosage of Valium, which he had been taking for 10 years. Defendant became involved in a disagreement with Fornshell's friend over a barstool, and all three men exchanged words. A confrontation ensued between defendant and Fornshell in the men's bathroom, during which Fornshell was mortally wounded.

¶ 5 Following defendant's jury trial, the trial court sentenced him in August 1991 to 50 years in prison. Defendant filed a direct appeal, and OSAD was appointed to represent him. This court affirmed. *People v. Sturgeon*, No. 4-91-0645 (Feb. 28, 1992) (unpublished order under Supreme Court Rule 23).

¶ 6 In July 1992, defendant *pro se* filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Ill. Rev. Stat. 1991, ch. 110, ¶ 2-1401). In December 1992, the State filed a motion to dismiss defendant's section 2-1401 petition. The following month, defendant *pro se* filed a motion for leave to file an amended section 2-1401 petition. In July 1993, the trial court dismissed defendant's original section 2-1401 petition and denied defendant's motion to amend the petition. Defendant appealed, and OSAD was appointed to represent him. In May 1995, this court affirmed the trial court's judgment, concluding although the trial court should have treated defendant's petition as a petition for relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-8 (West 1992)), the court did not err in dismissing the petition because it was frivolous and patently without merit. *People v. Sturgeon*, 272 Ill. App. 3d 48, 53-54, 649 N.E.2d 1385, 1389 (1995).

¶ 7 While defendant's appeal was pending, in September 1993, defendant *pro se* filed a postconviction petition. In April 1996, defendant filed an extensive affidavit and other exhibits

in support of his 1993 postconviction petition. Later that month, the trial court dismissed defendant's petition as untimely filed. In May 1996, defendant filed a notice of appeal, requesting appointment of counsel. That month, this court granted defendant's motion for appointment of counsel, and in May 1997, this court affirmed the trial court's dismissal of defendant's postconviction petition. *People v. Sturgeon*, No. 4-96-0344 (May 29, 1997) (unpublished order under Supreme Court Rule 23).

¶ 8 In May 1998, defendant filed a petition for *habeas corpus* relief with a motion for appointment of counsel. The trial court appointed defendant counsel, who in September 1999 filed a second postconviction petition in place of defendant's *habeas corpus* petition. In November 1999, the court dismissed the postconviction petition, finding it was frivolous and patently without merit. Defendant appealed, and this court affirmed. *People v. Sturgeon*, No. 4-99-1035 (Aug. 23, 2000) (unpublished order under Supreme Court Rule 23).

¶ 9 In May 2004, defendant *pro se* filed a third postconviction petition. In June 2004, the trial court dismissed defendant's petition because it was a successive petition and defendant had filed it without leave of the court. Defendant appealed, and the court appointed OSAD to represent him. In May 2005, OSAD filed a motion to withdraw. This court granted OSAD's motion and affirmed the trial court's judgment. *People v. Sturgeon*, No. 4-04-0613 (Jan. 27, 2006) (unpublished order under Supreme Court Rule 23).

¶ 10 During this time, defendant also filed a petition for writ of *habeas corpus* in federal court. The district court denied defendant's petition in June 2002 (*Ronald W. Sturgeon v. Mark A. Pierson*, 01-CV-3050 (C.D. Ill. June 5, 2002)), and both the Seventh Circuit Court of Appeals and the United States Supreme Court subsequently denied review. Ronald W. Sturgeon

v. Mark A. Pierson, No. 02-2694 (7th Cir. Dec. 2, 2002); *Sturgeon v. Pierson*, 538 U.S. 988 (2003).

¶ 11 In December 2009, defendant *pro se* filed (1) a motion for leave to file a successive postconviction petition and (2) a motion to proceed *in forma pauperis* and to have counsel appointed. The trial court appointed counsel to represent him. In June 2010, counsel filed an amended motion seeking leave to file a successive postconviction petition, asserting a claim of actual innocence. Specifically, counsel argued the Illinois Supreme Court's decision in *People v. Hari*, 218 Ill. 2d 275, 843 N.E.2d 349 (2006), coupled with this court's decision in *People v. Alberts*, 383 Ill. App. 3d 374, 890 N.E.2d 1208 (2008), required that defendant be given a new trial where an involuntary intoxication jury instruction could be given. The State filed a motion to dismiss the amended petition, arguing the supreme court's decision in *Hari* applied only to those cases where a defendant became involuntarily intoxicated as a result of experiencing an unexpected and unwarned side effect of a prescription medication. The State argued defendant's intoxication on the night of the stabbing was not involuntary or unwarned because defendant (1) had been taking Valium for 10 years, such that he was aware of the medication's side effects, and (2) took more than the prescribed dosage of Valium, in addition to consuming multiple beers and shots of liquor, on the night in question. After a November 2010 hearing, the court granted the State's motion to dismiss. Defendant filed a notice of appeal, and OSAD was appointed to represent him.

¶ 12 In February 2012, OSAD filed a motion to withdraw as counsel on appeal, attaching to its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). On its own motion, this court granted defendant leave to file additional points

and authorities. Defendant has done so, and the State has filed an appellee brief in response.

After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 13

## II. ANALYSIS

¶ 14 OSAD concludes no colorable argument can be made defendant's petition successfully raises a claim of actual innocence. We agree.

¶ 15 The Postconviction Act generally contemplates the filing of only one postconviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). However, a trial court will allow a defendant to file a successive postconviction petition where the defendant can demonstrate "cause" for his failure to bring the claim in his initial postconviction proceedings and "prejudice result[ing] from that failure." 725 ILCS 5/122-1(f) (West 2010); *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). A defendant shows "cause" by proving an external factor prevented him from raising the claim in an earlier proceeding. 725 ILCS 5/122-1(f)(1) (West 2010); *Ortiz*, 235 Ill. 2d at 329, 919 N.E.2d at 947. A defendant shows "prejudice" by demonstrating a claimed error "so infected the entire trial that the resulting conviction or sentence violates due process." 725 ILCS 5/122-1(f)(2) (West 2010); *Ortiz*, 235 Ill. 2d at 329, 919 N.E.2d at 947 (quoting *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624).

¶ 16 A trial court will also allow a defendant to file a successive postconviction petition where the defendant is advancing a claim of "actual innocence." 725 ILCS 5/122-1(c) (West 2010). Where a defendant sets forth a claim of "actual innocence," he is "excused from showing cause and prejudice." *Ortiz*, 235 Ill. 2d at 330, 919 N.E.2d at 948. A claim of actual

innocence must be "based on newly discovered, material, and noncumulative evidence that the defendant is innocent of the crime for which he has been tried, convicted, and sentenced."

*People v. Harris*, 206 Ill. 2d 293, 301, 794 N.E.2d 181, 187 (2002). The evidence must be "of such a conclusive character that it would probably change the result of retrial." *Harris*, 206 Ill. 2d at 301, 794 N.E.2d at 188.

¶ 17 Here, defendant's amended motion for leave to file a successive postconviction petition argues a claim of actual innocence—that is, that defendant should be granted a new trial to raise the affirmative defense of involuntary intoxication, in accordance with *People v. Hari*, 218 Ill. 2d 275, 843 N.E.2d 349 (2006), and *People v. Alberts*, 383 Ill. App. 3d 374, 890 N.E.2d 1208 (2008). OSAD concludes, however, because the facts of defendant's case are distinguishable from the facts in *Hari*, it would be frivolous to argue defendant's successive postconviction petition is "of such conclusive character" that it would provide defendant total vindication or exoneration and probably change the result on retrial.

¶ 18 In *Hari*, the defendant was prescribed Zoloft six days before he shot his wife and neighbor, with whom his wife was having an affair. *Hari*, 218 Ill. 2d at 279-80, 283, 843 N.E.2d at 351-52, 354. The doctor that wrote the prescription did not know the defendant was taking Tylenol PM, nor did he warn the defendant about combining Zoloft and Tylenol PM. *Hari*, 218 Ill. 2d at 288-89, 843 N.E.2d at 357. At trial, Dr. Mitrione, who was hired by defense counsel to evaluate the defendant, testified on the defendant's behalf. *Hari*, 218 Ill. 2d at 282, 843 N.E.2d at 354. Dr. Mitrione testified the Zoloft package insert contained a listing of side effects of Zoloft, which matched the listing in the Physicians' Desk Reference (PDR). *Hari*, 218 Ill. 2d at 282, 843 N.E.2d at 354. The insert did not specifically warn against taking Zoloft with a diphenhydramine

such as Tylenol PM. *Hari*, 218 Ill. 2d at 286, 843 N.E.2d at 356. He opined defendant suffered from involuntary intoxication from the adverse effects of the combination of Zoloft and diphenhydramine. *Hari*, 218 Ill. 2d at 285, 843 N.E.2d at 355. He further opined the involuntary intoxication deprived the defendant of the substantial capacity to appreciate the criminality of his acts or conform his conduct to the requirements of the law. *Id.*

¶ 19 At the jury instructions conference, defense counsel tendered jury instructions for an affirmative defense of involuntary intoxication. *Hari*, 218 Ill. 2d at 289, 843 N.E.2d at 357. The trial court denied counsel's requested instruction, citing the case law that existed at the time, which stated that involuntary intoxication may only be due to " 'trick, artifice, or force.' " *Hari*, 218 Ill. 2d at 289, 843 N.E.2d at 357-58. The supreme court, however, found the drugged condition in the defendant's case—an unexpected adverse side effect of a prescription drug that was unwarned by the prescription doctor, the PDR, or the package insert—was " 'involuntarily produced' " within the meaning of the involuntary intoxication affirmative defense statute. *Hari*, 218 Ill. 2d at 292, 843 N.E.2d at 359. Accordingly, the supreme court reversed the defendant's convictions and remanded the cause to the trial court for a new trial. *Hari*, 218 Ill. 2d at 302, 843 N.E.2d at 365.

¶ 20 Two years later, this court in *People v. Alberts*, 383 Ill. App. 3d 374, 890 N.E.2d 1208, concluded the rule announced in *Hari* should be given retroactive effect. *Alberts*, 383 Ill. App. 3d at 385, 890 N.E.2d at 1218.

¶ 21 OSAD points out several facts that distinguish defendant's case from *Hari*. First, unlike in *Hari*, here defendant cannot argue he suffered from both "unwarned and unknown" side effects on the night of the stabbing. Defendant admitted at trial he had been taking Valium for 10

