

NOTICE  
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2012 IL App (4th) 110255-U

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NOS. 4-11-0255, 4-11-0256, 4-11-0257, 4-11-0258 cons.

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
ANTHONY GAY,	)	Nos. 03CF269
Defendant-Appellant.	)	03CF298
	)	03CF299
	)	04CF13
	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Steigmann and Knecht concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where this court has already found defendant did not suffer prejudice from the same alleged constitutional violation in a separate case, defendant cannot establish the prejudice prong of the cause-and-prejudice test, and thus the trial court properly denied his request for leave to file a successive postconviction petition.
- ¶ 2 In January 2011, defendant, Anthony Gay, sought leave to file a successive postconviction petition under section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2010)). The Livingston County circuit court denied defendant's request. Defendant appeals, asserting the court erred by denying him leave to file a successive postconviction petition because the proceedings on his initial petition were fundamentally deficient and prevented him from raising his due-process claim based on preindictment delay.

We affirm.

¶ 3

## I. BACKGROUND

¶ 4

While in prison on another conviction, defendant accrued numerous aggravated-battery charges, including the four at issue in these cases. In case No. 03-CF-269 (case 269), the State's October 16, 2003, charge was based on an October 29, 2000, incident. In case No. 03-CF-298 (case 298), the State's November 21, 2003, charge arose from a December 1, 2000, incident. In case No. 03-CF-299 (case 299), defendant's actions on December 3, 2000, served as the basis for the State's November 21, 2003, charge. In case No. 04-CF-13 (case 13), the State's January 20, 2004, charge rested on defendant's actions on January 23, 2001. Defendant also had seven other pending aggravated-battery cases in Livingston County, case Nos. 03-CF-59 (case 59), 03-CF-60 (case 60), 03-CF-61 (case 61), 03-CF-62 (case 62), 03-CF-146 (case 146), 03-CF-172 (case 172), and 03-CF-318 (case 318).

¶ 5

On March 3, 2004, pursuant to the intrastate detainers statute (730 ILCS 5/3-8-10 (West 2004)), defendant made a *pro se* demand for a speedy trial in the four cases at issue and cases 146, 172, and 318. Defendant had made an earlier speedy-trial demand in cases 59, 60, 61, 62, and 146. On July 22, 2005, the trial court sentenced defendant in cases 60, 61, and 62. On November 7, 2005, the court commenced defendant's trial in case 13. On November 14, 2005, defendant's trial in case 269 started. On January 20, 2006, the court began defendant's trial in case 299. Four days later, the court started defendant's trial in case 298. Defendant was found guilty of all four aggravated-battery charges. The court sentenced defendant to prison terms of eight years in case 269, five years in case 298, six years in case 299, and six years in case 13, all of which were to run consecutive to each other and the sentences in defendant's other cases.

Defendant appealed all four convictions.

¶ 6 On appeal in all four cases, defendant argued his conviction was obtained in violation of his speedy-trial right. In each case, this court rejected the speedy-trial argument. *People v. Gay*, 377 Ill. App. 3d 828, 834, 882 N.E.2d 1033, 1038 (2007) (case 13); *People v. Gay*, No. 4-06-0081, slip order at 9 (Nov. 8, 2007) (unpublished order under Supreme Court Rule 23) (case 269); *People v. Gay*, No. 4-06-0217, slip order at 15 (Dec. 31, 2007) (unpublished order under Supreme Court Rule 23) (cases 298 and 299) (finding delays attributable to defendant).

¶ 7 On July 23, 2007, defendant filed a petition for relief of judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)) in these four cases and eight others, contending the State's Attorney circumvented his speedy-trial right by waiting anywhere from 18 months to almost 3 years after the alleged incident to file an indictment. After a May 13, 2008, hearing, the trial court denied the section 2-1401 petition.

¶ 8 On January 14, 2008, defendant filed a *pro se* postconviction petition in the four cases at issue. In the petition, defendant argued the trial court circumvented defendant's speedy-trial right by ordering a fitness examination for defendant when defendant's fitness to be sentenced was not an issue. He also contended the court erred by denying his April 2005 motion to substitute Judge Robert M. Travers, alleging Judge Travers did sentence him in cases 60, 61, and 62 before addressing his posttrial motions in cases 61 and 62. Thus, defendant contended he was prejudiced because he did not say anything at the sentencing hearing in cases 60, 61, and 62 due to the pending posttrial motions, which infringed on his rights to testify and exercise allocution. Last, defendant argued his appellate counsel was ineffective for failing to argue the

two aforementioned issues. Along with the petition, he filed a motion for substitution of judge in the postconviction proceedings.

¶ 9 On April 11, 2008, the court entered a written order denying defendant's postconviction petition at the first stage. On April 24, 2008, defendant filed a *pro se* motion to vacate the court's judgment on his postconviction petition, requesting the court to vacate its April 11, 2008, judgment and allow the postconviction proceedings to continue. Defendant did not assert the court had already docketed the petition for second-stage proceedings.

¶ 10 On May 13, 2008, the trial court held a hearing on defendant's section 2-1401 petition and the other pending matter in these cases. At the hearing, defendant raised his conversation with then-Livingston County State's Attorney Thomas Brown about a plea agreement involving the pending investigations against defendant. The court denied the section 2-1401 petition, finding the matters were not appropriate for a section 2-1401 petition. The court then addressed the motion for substitution of judge in the postconviction proceedings and denied it as well. On the day of the hearing, defendant filed a *pro se* motion to amend the postconviction petition in these cases and all of his other pending postconviction petitions, which included his preindictment-delay claim, and the court refused to allow defendant to file an amended postconviction petition in these four cases because they had already been denied. Last, the court heard defendant's motion to vacate the denial of the postconviction petition and denied it. Defendant appealed the dismissal of his postconviction petition.

¶ 11 On appeal, the office of the State Appellate Defender (OSAD) filed a motion to withdraw as counsel on defendant's appeal from the dismissal of his postconviction petition. This court granted OSAD's motion and affirmed the trial court's dismissal of defendant's

postconviction petition. *People v. Gay*, No. 4-08-0368 (Sept. 11, 2009) (unpublished order under Supreme Court Rule 23).

¶ 12 On January 18, 2011, defendant filed a written request for leave to file a successive postconviction petition in all four cases and the proposed successive petition. The request for leave noted the trial court had dismissed his original petition at the first stage, which prevented him from amending his petition to include the preindictment-delay claim. Defendant set forth the cause-and-prejudice test but did not explain how his claim met that test. Additionally, we note defendant did not assert the original proceedings were a nullity.

¶ 13 On March 15, 2011, the trial court entered a written order, denying defendant's request without hearing any evidence. The court explained the preindictment-delay claim had been litigated both in the trial court and on appeal and defendant had failed to demonstrate fundamental fairness requires relaxation of the forfeiture rule.

¶ 14 On March 24, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009). See Ill. S. Ct. R. 651(d) (eff. Dec. 1, 1984) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 651(a) (eff. Dec. 1, 1984).

¶ 15 **II. ANALYSIS**

¶ 16 Initially, we address defendant's request to examine the proceedings on defendant's original postconviction petition because they were so fundamentally deficient that we should declare them a nullity. However, defendant did not raise this issue in the trial court, and our supreme court has held a defendant cannot raise an issue for the first time on appeal from the

dismissal of a postconviction petition. *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004). Moreover, defendant cannot demonstrate prejudice from any procedural error in the first postconviction proceedings because this court has already (1) found the issues raised in the original petition were frivolous and patently without merit and, as explained below, (2) rejected the issue defendant sought to add to his original petition, which he seeks to raise now in the successive petition. Accordingly, we decline to examine defendant's original postconviction proceedings to look for procedural errors.

¶ 17 When the trial court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 18 The Act (725 ILCS 5/art. 122 (West 2010)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909, 915. Relief under the Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d at 915. Moreover, the Act generally limits a defendant to one postconviction petition and expressly states any claim cognizable under the Act that is not raised in the original or amended petition is deemed forfeited. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d at 915 (citing 725 ILCS 5/122-3 (West 2006)). However, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)) provides the following:

"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 prisoner 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."

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d at 915. In determining whether a defendant has established cause and prejudice, the trial court may review the " 'contents of the petition submitted.' " *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12, 954 N.E.2d 365, 372 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162, 923 N.E.2d 728, 735 (2010)).

¶ 19 Citing the Second District's decision in *People v. LaPointe*, 365 Ill. App. 3d 914, 924, 850 N.E.2d 893, 901 (2006), *aff'd on other grounds*, 227 Ill. 2d 39, 45, 879 N.E.2d 275, 278 (2007), defendant argues he need only state the low "gist" of a claim of cause and prejudice to obtain leave to file a successive postconviction. We disagree. Unlike with the first-stage review of an initial postconviction petition, our supreme court has not used the "gist" language in analyzing cause and prejudice to determine whether leave to file a successive postconviction petition should be allowed. See *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d at 915; *People v.*

*Wrice*, 2012 IL 111860, ¶ 48, 962 N.E.2d 934, 946. In fact, the supreme court noted the difference between the "gist" standard and the cause-and-prejudice standard when it stated the following: "The trial court must still examine every request for postconviction relief whether it be an initial petition subject to review under the 'gist' standard [citation] or a proffered successive petition subject to the more exacting cause and prejudice standard [citation]." *People v. Conick*, 232 Ill. 2d 132, 142, 902 N.E.2d 637, 643 (2008). Moreover, with a successive postconviction petition seeking to raise an actual-innocence claim, the supreme court rejected the argument defendant had to only state a gist of a claim of actual innocence and held defendant had to set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶¶ 24-29, 969 N.E.2d 829, 836-37.

¶ 20 The sole issue defendant seeks to raise in his successive postconviction petition is the State's Attorney violated defendant's constitutional rights to due process and a speedy trial by intentionally delaying the filing of the charges in the four cases at issue here and in eight other cases. However, defendant raised this same issue in an amended postconviction petition in one of the other eight cases (*People v. Gay*, No. 03-CF-172 (Cir. Ct. Livingston Co)). *People v. Gay*, 2011 IL App (4th) 100009, ¶ 32, 960 N.E.2d 1272, 1280. There, on appeal from a second-stage dismissal of the amended postconviction petition, this court concluded defendant failed to make a substantial showing the preindictment delay violated defendant's constitutional rights because defendant could not demonstrate either prejudice to him or a tactical advantage to the State resulted from the lapse of time between the commission of his crime and the prosecution from the case. *Gay*, 2011 IL App (4th) 100009, ¶ 44, 960 N.E.2d at 1284.

¶ 21 Regarding prejudice, this court concluded defendant did not suffer prejudice

because any preindictment delay had no effect on the operation of defendant's speedy-trial rights. *Gay*, 2011 IL App (4th) 100009, ¶ 38, 960 N.E.2d at 1282. This court explained the lack of prejudice as follows:

"Defendant filed his speedy-trial demand in this case on March 3, 2004. At that time, defendant had 3 cases pending sentencing, 10 cases (including this case) where guilt-innocence remained unresolved, and 1 case with a postconviction petition pending. Speedy-trial demands were simultaneously pending in several of these cases, including those awaiting sentencing. By statute, the 160-day speedy-trial period was tolled until defendant was sentenced on a pending charge. [Citations.] The time period between the day defendant was sentenced in [Livingston County] case Nos. 60, 61, and 62 on July 22, 2005, and the day defendant was tried in this case on August 30, 2005, is 38 days, well within the 160-day time period. [Citation.] Thus, had the State charged defendant in case No. 172 along with the first charges subject to defendant's speedy-trial demand, defendant's prosecution in case No. 172 would have been timely." (Internal quotation marks omitted.) *Gay*, 2011 IL App (4th) 100009, ¶ 38, 960 N.E.2d at 1282.

¶ 22 Additionally, in his brief in this appeal, defendant cites *United States v. Lovasco*, 431 U.S. 783, 795 (1977), in support of his argument the preindictment delay violated his due process rights. In defendant's other appeal, we addressed *Lovasco* and concluded "the supposed

advantage defendant claims the State enjoyed by reason of its delay in bringing charges cannot be the kind of 'tactical' edge which gives rise to a due-process violation." *Gay*, 2011 IL App (4th) 100009, ¶¶ 39-42, 960 N.E.2d at 1282-83. Moreover, this court pointed out defendant's position that the State's staggering of indictments to avoid running afoul of the speedy-trial statute constituted an unconstitutional, tactical preindictment delay leads to absurd results. *Gay*, 2011 IL App (4th) 100009, ¶ 43, 960 N.E.2d at 1283-84.

¶ 23 Here, the facts are the same as the one in the other case since the four cases at issue were also included in the March 2004 speedy-trial demand and tried within 160 days (excluding the delays attributable to defendant) of July 22, 2005. Moreover, defendant again alleges the preindictment delay was to prevent him from exercising his speedy-trial rights. Accordingly, defendant cannot establish the prejudice prong of the cause-and-prejudice test because this court has already found defendant did not suffer prejudice from the alleged constitutional violation.

¶ 24 Thus, we find the trial court properly denied defendant's request for leave to file a successive postconviction petition.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the Livingston County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.