

No. 1-10-3048

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. 91 CR 6159
)	
CHRISTOPHER ROBINSON,)	Honorable
)	Maura Slattery-Boyle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Where the record belies defendant's claim that counsel failed to provide him with a reasonable level of assistance, the circuit court's order denying defendant leave to file a successive postconviction petition is affirmed.

¶ 2 Defendant Christopher Robinson appeals from an order of the circuit court denying his motion for leave to file a second successive postconviction petition. On appeal, defendant solely contends that his petition should be remanded to the circuit court for further proceedings because his postconviction counsel failed to provide reasonable assistance pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984). We affirm.

¶ 3 Following a 1996 bench trial, defendant was convicted of first degree murder and sentenced to 40 years' imprisonment for fatally shooting his friend, Paul Lambert, in the head during an argument over \$93. On direct appeal, defendant argued that his trial counsel rendered ineffective assistance because she failed to present testimony from three witnesses – Vanetta Jackson, and codefendants Clarence Matthews and Leroy McKelker¹ – who all would have testified that McKelker, not defendant, shot Lambert. Defendant also argued that statements Lambert made to two witnesses identifying defendant as the man who shot him should not have been admitted into evidence under the dying declaration exception to the hearsay rule. In addition, defendant claimed his sentence was excessive given his age and rehabilitative potential. This court rejected defendant's arguments and affirmed his conviction and sentence. *People v. Robinson*, No. 1-97-2341 (1999) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal (*People v. Robinson*, 185 Ill. 2d 656 (1999)), and the United States Supreme Court denied defendant's petition for writ of *certiorari* (*Robinson v. Illinois*, 528 U.S. 1170 (2000)).

¶ 4 In November 1999, defendant filed his initial *pro se* petition for relief under the Post-Conviction Hearing Act (the Act). 725 ILCS 5/122-1 *et seq.* (West 1998). Identical to his argument on direct appeal, defendant alleged that his trial counsel rendered ineffective assistance when she failed to call Jackson, Matthews and McKelker to testify that McKelker shot Lambert. Defendant also alleged that trial counsel was ineffective because, *inter alia*, she did not challenge the admission of Lambert's dying declaration by relying on medical reports to argue that it was unlikely Lambert was able to sit up or communicate after being shot in the head. The circuit court summarily dismissed defendant's postconviction petition. On appeal, defendant solely

¹Codefendants Matthews and McKelker were acquitted following a 1994 bench trial, which was held simultaneously with defendant's first trial which resulted in a hung jury.

argued that trial counsel was ineffective when she failed to call the three witnesses to testify. This court found that the issue was *res judicata* and affirmed the circuit court's dismissal of defendant's postconviction petition. *People v. Robinson*, No. 1-00-0304 (2002) (unpublished order under Supreme Court Rule 23). Our supreme court denied defendant's petition for leave to appeal. *People v. Robinson*, 202 Ill. 2d 691 (2003).

¶ 5 In March 2001, while the above appeal was pending, defendant filed a successive *pro se* postconviction petition in which he again alleged that trial counsel was ineffective when she failed to call Jackson, Matthews and McKelker to testify that McKelker shot Lambert. Defendant also alleged again that his trial counsel was ineffective because she did not call a medical expert to testify that after being shot in the head, Lambert would not have been conscious, able to speak, or able to identify the person who shot him. Defendant stated that he was unable to name a specific expert who should have testified because there were "several leading specialists among the numerous disciplines" that could have testified. Defendant requested postconviction counsel be appointed to obtain an affidavit from his trial counsel explaining why she did not have an expert testify. In addition, defendant alleged, *inter alia*, that his jury waiver was involuntary and unknowing. The circuit court found defendant's allegations frivolous and patently without merit, and summarily dismissed his petition. On appeal, defendant argued that two of his allegations had merit – that his trial counsel rendered ineffective assistance when she failed to call the three witnesses, and that he was deprived of his right to a jury trial. This court rejected those arguments and affirmed the dismissal of defendant's successive postconviction petition. *People v. Robinson*, No. 1-01-1551 (2003) (unpublished order under Supreme Court Rule 23). Our supreme court again denied defendant's petition for leave to appeal. *People v. Robinson*, 206 Ill. 2d 639 (2003).

¶ 6 In May 2004, defendant filed a *pro se* petition for *mandamus* relief alleging that the trial court did not consider his mitigating evidence at sentencing. The trial court denied defendant's petition, and his subsequent motion for reconsideration. Defendant did not appeal that judgment.

¶ 7 On October 19, 2004, defendant filed the instant *pro se* successive postconviction petition, his third, alleging that his actual innocence was established by affidavits from Jackson, Matthews, McKelker, and Bert Anderson stating that McKelker shot Lambert. Defendant claimed that these affidavits were new evidence that could not have been discovered prior to his trial, and that he established cause for filing a successive postconviction petition, because McKelker did not admit to shooting Lambert until after defendant's trial. Defendant acknowledged that he had previously raised this same issue "numerous times," but argued his procedural default should be excused due to a "fundamental miscarriage of justice." He further claimed he was prejudiced because his conviction violated due process. In addition, defendant argued that his trial counsel was ineffective, which counsel admitted when she filed a posttrial motion alleging her own ineffectiveness. Attached to defendant's petition were the affidavits from Jackson, Matthews, McKelker and Anderson, and two pages of the trial transcript where counsel raised her own ineffectiveness. Defendant did not file a motion for leave to file this successive postconviction petition.

¶ 8 On March 9, 2005, the circuit court noted that defendant had submitted a successive postconviction petition, and that more than 90 days had passed since it was submitted. On that basis, the court found that "[b]y operation of law the petition must be docketed," and appointed the public defender to represent defendant. The court did not conduct a cause and prejudice analysis pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2004)).

¶ 9 In April 2005, postconviction counsel was assigned to this case. Counsel told the court that she had reviewed defendant's petition and was ordering the trial transcripts and files. In July

2005, counsel stated that she received the transcripts and was "checking with some witnesses." Three months later, counsel stated that she was obtaining the appellate briefs from defendant's direct appeal. In January 2006, counsel moved to subpoena Lambert's medical records from Christ Hospital to explore the issue of whether Lambert was medically capable of identifying defendant as the man who shot him. It was later discovered that the hospital had destroyed Lambert's medical records. Counsel then moved to subpoena the trial file from defendant's posttrial attorney, but he could not locate his file. In June 2008, counsel was still attempting to locate Lambert's medical records from the trial files of defendant and codefendants in both the public defender's office and the State's Attorney's office. In December 2008, counsel told the court that she was "reviewing medical records for the victim." Counsel's investigation continued for several months, and in August 2009, she stated that her investigator was interviewing people in regards to this case.

¶ 10 In October 2009, counsel told the court that she noticed defendant had not filed a motion for leave to file his successive postconviction petition, and she was in the process of obtaining an affidavit from defendant. The following month, counsel said she had discussed the case with defendant and he wanted to add another issue to his petition.

¶ 11 On December 2, 2009, postconviction counsel filed a motion for leave to file a successive postconviction petition together with an amended petition. Counsel informed the court that she had spoken with defendant, and he decided to withdraw the allegation raised in his *pro se* petition, and instead, raise a different allegation. In the amended petition, defendant solely alleged that his trial counsel rendered ineffective assistance because she failed to present expert testimony that it was unlikely Lambert was conscious after being shot in the head, and that Lambert would have been unable to recall who shot him. The majority of the allegation in the amended petition is repeated verbatim from defendant's second *pro se* petition, including the

assertion that he was unable to name a specific expert or field of expertise because there were "several leading specialists among the numerous disciplines" that could have testified. Also identical to his second petition, defendant requested the appointment of counsel to obtain an affidavit from his trial counsel explaining why she did not present expert testimony.

¶ 12 In the motion for leave to file, defendant acknowledged that he had raised this issue in both of his prior postconviction petitions. He claimed, however, that he had cause for raising the issue again because this court did not address the issue in either of our prior decisions affirming the dismissal of his first two postconviction petitions. For that reason, defendant asserted that the issue must be considered in the interest of fundamental fairness. He also claimed that the issue was not barred by *res judicata* because it was never reviewed by this court. Defendant alleged that he was prejudiced by not having the issue considered because an expert's testimony would have raised reasonable doubt in this case. Attached to the petition was an affidavit from defendant stating that, based on his conversation with postconviction counsel, he wanted to withdraw the issue in his *pro se* petition and file the amended petition in its place.

¶ 13 On January 20, 2010, counsel informed the court that defendant never filed a motion for leave to file his third postconviction petition, but the court had advanced the petition to second-stage proceedings. Counsel explained that by filing a motion for leave to file with defendant's amended petition, she was "backtracking to stage one" and wanted to "make everything proper under the statute." The court initially stated that leave to file had already been granted, and it was now the State's turn to determine whether or not to move to dismiss the petition. Counsel disagreed and said the court needed to rule on defendant's motion. The court maintained that the ruling had already been made, and "rather than backtracking," granted defendant's motion for leave to file his amended petition. Counsel then stated that she was still trying to obtain

Lambert's medical records, and that she planned to show those records to "a potential expert to see if there is anything there we can argue."

¶ 14 Counsel subsequently filed a motion to obtain Lambert's autopsy reports and photographs from the medical examiner's office. Counsel stated that the records were needed to prove the allegation in defendant's amended petition. Counsel further stated that the request was being made to aid in the investigation of defendant's case, and for counsel to be in compliance with Rule 651(c). At no time throughout these proceedings did counsel file a certificate of compliance with Rule 651(c).

¶ 15 The State filed a motion to reconsider the circuit court's ruling granting defendant's motion for leave to file his third postconviction petition. The State argued that the court should conduct a cause and prejudice analysis, and that defendant had failed to satisfy that test. The State further argued that defendant's allegation was barred by *res judicata* because this court addressed the issue of ineffective assistance of counsel in all three of his prior appeals. In addition, the State argued that the supreme court rejected defendant's claims when it denied his petitions for leave to appeal. The State asserted that by raising the issue again, defendant was asking the circuit court to review the appellate and supreme courts' decisions.

¶ 16 Defendant filed a response to the State's motion to reconsider claiming he satisfied the cause and prejudice test. Defendant acknowledged that he raised the identical issue in both of his prior postconviction petitions, but argued he established cause for raising it again because the appellate court never addressed the issue. He further argued that he established prejudice because an expert's testimony could have discredited the eyewitnesses' testimony that Lambert identified defendant as the man who shot him. Finally, defendant argued that his allegation was not barred by *res judicata* because it was never adjudicated by a court of review. In a supplemental response, defendant argued that he established cause because "the Appellate Court

failed to address the particular issue," and defendant "does not and cannot control which issues the Appellate Court chooses to decide." Defendant claimed that "through no fault of his own, [he] was precluded from relief by the Appellate Court."

¶ 17 The circuit court found that defendant's successive *pro se* postconviction petition was initially advanced to the second stage of proceedings without a cause and prejudice analysis. Because defendant's petition had been on the court's docket for several years, the court was going to allow it to proceed; however, it then determined that, pursuant to the Act, it was required to conduct a cause and prejudice analysis.

¶ 18 At a hearing, postconviction counsel and the State raised the same arguments presented in their motions and responses, discussed above. The circuit court found that the appellate court did not fail to rule on the issue in defendant's prior appeals, but instead, had affirmed the lower court on all issues involved in the postconviction proceedings. The court further found that defendant failed to meet the cause and prejudice test for successive postconviction petitions. Accordingly, the circuit court reversed its prior ruling and denied defendant's motion for leave to file a successive postconviction petition. The court subsequently denied defendant's motion to reconsider that ruling.

¶ 19 On appeal, defendant solely contends that postconviction counsel failed to provide him with reasonable assistance because she did not comply with the requirements of Rule 651(c). Specifically, defendant claims counsel should have obtained affidavits from his trial counsel and a medical expert. He also claims counsel should have argued that the allegation in the amended petition was not subject to the cause and prejudice test because it was raised in his two prior postconviction petitions, but never adjudicated, and therefore, had not been waived.

¶ 20 The State asserts that defendant was not entitled to appointed counsel because he did not satisfy the cause and prejudice test for filing a successive postconviction petition, and therefore,

cannot claim that counsel provided unreasonable assistance. The State argues that because the appointment of counsel in this case was outside the scope of the Act, defendant was merely entitled to due diligence by counsel, which was sufficiently rendered.

¶ 21 We review the denial of defendant's motion for leave to file a successive postconviction petition *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2004); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2004)), defendant is prohibited from filing a successive postconviction petition without first obtaining leave of court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Generally, such leave is granted only where defendant establishes cause for his failure to raise the claim in his initial postconviction proceeding, and prejudice results from that failure. 725 ILCS 5/122-1(f); *Tidwell*, 236 Ill. 2d at 157. "Cause" is defined as "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). Prejudice occurs where the petitioner is "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 22 The right to the assistance of counsel in postconviction proceedings is a matter of legislative grace, and a defendant is guaranteed only the level of assistance provided for in the Act. *People v. Pinkonsly*, 207 Ill. 2d 555, 567 (2003). The Act provides for the appointment of counsel for indigent defendants only where the postconviction petition was not summarily dismissed as frivolous and patently without merit during the first stage of proceedings. 725 ILCS 5/122-4 (West 2004). After a petition has advanced to the second stage of proceedings, and counsel has been appointed under section 122-4, then the Act requires that postconviction

counsel provide defendant with a "reasonable level of assistance." *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). It is at this point that counsel's compliance with Rule 651(c) is required to insure that defendant receives the reasonable level of assistance contemplated by the Act. *Suarez*, 224 Ill. 2d at 42. In circumstances where defendant has no right to counsel, the appointment of counsel does not carry with it a right to any particular level of assistance from counsel. *People v. Love*, 312 Ill. App. 3d 424, 427 (2000).

¶ 23 Here, we find that the assistance provided by counsel under the unique circumstances of this case was sufficient. In this case, counsel was appointed by the circuit court before defendant's second successive postconviction petition was filed. In fact, defendant had not yet filed a motion for leave to file his successive petition. Consequently, the appointment of counsel was outside the scope of the Act. Defendant had no right to counsel, and therefore, no right to any particular level of assistance from counsel. Nevertheless, the record reveals that counsel represented defendant with diligence. Counsel reviewed defendant's petition, discussed the case with defendant, reviewed the trial transcripts and files, persistently attempted to obtain Lambert's medical records from numerous sources, had her investigator interview people in regards to this case, submitted a motion for leave to file defendant's successive petition as required by the Act, and attempted to submit an amended postconviction petition. Based on the record and the circumstances in this case, defendant's claim that counsel provided him with unreasonable assistance is without merit.

¶ 24 We also note that, regardless of what level of assistance was required, postconviction counsel would not have been able to establish cause for failing to previously raise the issue regarding medical evidence of the victim's inability to identify defendant because defendant actually raised this issue in his two prior postconviction petitions. These petitions were dismissed by the trial court, the dismissals were affirmed by this court and the supreme court

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denied leave to appeal. Defendant's argument that he can raise the issue a third time because this court did not explicitly rule on it is incorrect. Defendant does not claim that the issue was argued in the previous appeals. Even if it was raised and this court somehow erred in failing to consider it, his remedy lay in an appeal to a higher court, not in filing yet another successive petition.

Defendant has not established any denial of fundamental fairness in the previous proceedings.

¶ 25 For these reasons, we affirm the judgment of the circuit court of Cook County denying defendant's motion for leave to file his second successive postconviction petition.

¶ 26 Affirmed.