

No. 1-11-1069

**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. 99 CR 111
	)	
WILLIAM SMITH,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

---

PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err in denying defendant leave to file a successive post-conviction petition where he failed to satisfy the cause and prejudice test.

¶ 2 Defendant William Smith<sup>1</sup> appeals from an order of the circuit court of Cook County denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he made an arguable claim of cause and prejudice to file his successive petition, where he alleged that the

---

<sup>1</sup> We note that defendant's legal name is Ricky Harris.

State failed to produce testimony at trial that it had promised during opening statements, that appellate counsel was ineffective in failing to raise that issue on direct appeal, and that post-conviction counsel was inadequate for failing to amend his *pro se* post-conviction petition to include those issues.

¶ 3 The record reflects that defendant, and co-defendant Marlan Barber, who is not a party to this appeal, along with three other men (the group), were indicted on charges of first degree murder and aggravated discharge of a firearm in a shooting incident that took place on November 12, 1998, and resulted in the death of 14-year-old Deon Alexander. Defendant and Barber were tried simultaneously by two different juries before the same judge in severed trials. The evidence presented at trial included the publication of defendant's handwritten statement detailing his participation in the group's "plan" to shoot two people, which included driving the group to retrieve two guns, and approaching the intended victims, who other members of the group would then shoot.

¶ 4 Defendant was found guilty of first degree murder and aggravated discharge of a firearm based on a theory of accountability, then sentenced to concurrent, respective terms of 28 and 15 years in prison. This court affirmed that judgment on direct appeal. *People v. Smith*, No. 1-02-0721 (2003) (unpublished order under Supreme Court Rule 23).

¶ 5 On September 10, 2004, defendant filed his initial post-conviction petition alleging ineffective assistance of trial counsel for failing to investigate his claims that he suffered from mental disability and asserting that his sentence was unconstitutional. Defendant's petition was advanced to the second stage of review and post-conviction counsel was appointed to represent him. On February 26, 2009, post-conviction counsel filed a Supreme Court Rule 651(c) (134 Ill. 2d R. 651(c)) certificate averring that he had consulted with defendant and reviewed the case and, because defendant had adequately set forth his claims of the deprivation of his constitutional

rights in his *pro se* petition, he had not filed an amended post-conviction petition. The State filed a motion to dismiss defendant's petition, which the circuit court subsequently granted based on its finding that defendant failed to make a substantial showing that his constitutional rights were violated, and this court affirmed that dismissal on appeal. *People v. Smith*, 2012 IL App (1st) 101479-U.

¶ 6 On March 8, 2011, defendant's motion for leave to file a successive post-conviction petition, along with a successive post-conviction petition, was received by the circuit court of Cook County. In his petition, defendant claimed, in relevant part, that he received (1) ineffective assistance of appellate counsel who, on direct appeal, failed to raise the issue of improper comments made by the prosecutor during opening statements, and (2) inadequate representation by post-conviction counsel, who failed to amend his initial *pro se* post-conviction petition to include a claim of ineffective assistance of appellate counsel based on the aforementioned failure. Defendant maintains that he was impeded in raising the claims in his successive petition because his IQ falls into the category of "border line mentally [sic] retarded" and due to inadequate representation by post-conviction counsel.<sup>2</sup> In support of his claim, defendant attached a letter from the Social Security Administration, dated December 5, 1997, stating, in pertinent part, that defendant was "found to be disabled with an onset of 9/01/78, due to mental retardation," as well as a portion of the transcript of the State's closing argument.

¶ 7 On March 18, 2011, the circuit court denied defendant's motion for leave to file a successive post-conviction petition, finding that defendant had failed to satisfy the cause and prejudice test set forth by the legislature.

---

<sup>2</sup> Defendant appears to assert inadequate representation by post-conviction counsel as both a substantive claim in his petition, as well as a basis for cause.

¶ 8 On appeal, defendant contends that the circuit court erred in denying his motion for leave to file a successive post-conviction petition because he adequately set forth the gist of a claim sufficient to satisfy both cause and prejudice due to appellate counsel's failure to raise the issue of prosecutorial misconduct and inadequate representation by post-conviction counsel. Our review of the trial court's denial of leave to file defendant's successive post-conviction petition is *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 9 We initially observe that defendant raised three claims in his successive post-conviction petition, but, on appeal, he focuses solely on the claims which are based on ineffectiveness of appellate counsel and inadequate representation by post-conviction counsel. In doing so, he has abandoned the remaining claims in his petition and forfeited them on appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 10 In general, the Act contemplates the filing of only one petition (*People v. Guerrero*, 2012 IL 112020, ¶ 15), and expressly provides that any claim of the substantial denial of constitutional rights not raised in the original or amended petition is waived (725 ILCS 5/122-3 (West 2008)). A defendant seeking to file a successive post-conviction petition must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2008). Leave to file may be granted where defendant demonstrates cause for his failure to bring the claim in his initial post-conviction petition and prejudice as a result of that failure. 725 ILCS 5/122-1(f) (West 2008); *People v. Tidwell*, 236 Ill. 2d 150, 152 (2010).

¶ 11 Cause may be shown by pleading some objective factor external to the defense that impeded his ability to raise the claim in his initial post-conviction proceeding, and prejudice by demonstrating that the claim not raised so infected the trial that the resulting conviction and sentence violated due process. 725 ILCS 5/122-1(f) (West 2008); *Gillespie*, 407 Ill. App. 3d at 123-24.

¶ 12 Defendant maintains that he made such a showing by setting forth an "arguable" claim of cause and prejudice to satisfy the test. According to defendant, the standard applicable to first stage dismissals of post-conviction petitions, whether the petition "has no arguable basis in law or in fact," should also be applied to successive petitions in determining whether a defendant has demonstrated cause and prejudice. Defendant relies on *People v. LaPointe*, 365 Ill. App. 3d 914, 923-24 (2006), *aff'd on other grounds*, 227 Ill. 2d 39 (2007), where the reviewing court held that a petition for leave to file a successive post-conviction petition need only state the gist of a meritorious claim of cause and prejudice. The State responds that defendant must establish both cause and prejudice, not merely make an "arguable" showing thereof. We agree.

¶ 13 The supreme court recently rejected the argument that successive post-conviction petitions should be evaluated under the same first-stage standard as an initial post-conviction petition. *People v. Walter Edwards*, 2012 IL 111711, ¶¶ 25-29. In reaching its decision, the supreme court relied on the language and legislative history of the Act, as well as the well-settled rule that successive post-conviction petitions are disfavored. *Edwards*, 2012 IL 111711, ¶¶ 26-29.<sup>3</sup> As such, rather than merely presenting the gist of a claim, defendant must make a "more exacting" showing of cause and prejudice to merit leave to file a successive post-conviction petition. See *People v. Conick*, 232 Ill. 2d 132, 142 (2008); see also *People v. Wayne Edwards*, 2012 IL App (1st) 091651, ¶ 22.

¶ 14 Defendant also maintains that all well-pleaded facts in his petition must be taken as true, relying on *People v. Wayne Edwards*, 2012 IL App (1st) 091651, ¶ 25, which, in turn, cites *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002) for that proposition. However, in

---

<sup>3</sup> We observe that in *People v. Evans*, 2013 IL 113471, ¶¶ 11-12, 18, noted by defendant at bar, defendant raised the issue of the applicable pleading standard for successive post-conviction petitions that are subject to the cause and prejudice test, but the Illinois Supreme Court did not address this issue and decided the case on another basis, as it urged the legislature to enact a more complete statutory framework for successive post-conviction practice.

*Pitsonbarger*, the court was referring to the standard for determining whether an evidentiary hearing is warranted, and not to the question of cause and prejudice (*Pitsonbarger*, 205 Ill. 2d at 455)), and thus, does not support defendant's proposition. Rather, in order for defendant to prevail on his motion, he was required to satisfy both prongs of the cause and prejudice test (*Guerrero*, 2012 IL 112020, ¶ 15), and, where he fails to satisfy the prejudice prong of the cause and prejudice test, we need not address whether he satisfied the cause prong (see *People v. Lee*, 207 Ill. 2d 1, 5 (2003)). For the following reasons, we find that defendant cannot satisfy the prejudice prong of the cause and prejudice test.

¶ 15 To establish prejudice, defendant must show that the claim not raised in his initial post-convictions petition so infected the trial that the resulting conviction violated due process. *Pitsonbarger*, 205 Ill. 2d at 464. Here, both of defendant's claims stem from his allegation that he was prejudiced by comments made by the prosecutor during opening statements, which referred to testimony placing a gun in defendant's hand on the night of the shooting, and which was subsequently not presented at trial.

¶ 16 In presenting an opening statement, it is improper for a prosecutor, with foreknowledge, to include matters that are not subsequently introduced at trial. *People v. Jackson*, 281 Ill. App. 3d 759, 774 (1996). However, reversible error occurs only where the prosecutor engages in such misconduct deliberately and defendant suffers substantial prejudice as a result. *Jackson*, 281 Ill. App. 3d at 774.

¶ 17 Defendant maintains that his right to due process was violated by the prosecutor's comment that a witness would testify that he had a gun on the night of the shooting and that the witness identified him in a lineup as one of the people who had a gun in his hand right before the shooting started. The State does not dispute that the prosecutor made these comments and that

no such evidence was introduced at trial; however, as shown below, the record reflects that this was not the result of deliberate misconduct on the part of the prosecutor.

¶ 18 During closing argument, the prosecutor noted that defendant did not physically hold a gun on the night of the incident, and then discussed the principles of accountability, through which defendant could be held legally accountable for the actions of others. Defense counsel pointed out in his argument that although the State had just acknowledged that defendant did not have a gun the night of the shooting, "that's not what they told you four days ago," *i.e.*, during opening statements. In rebuttal argument, the prosecutor stated:

"And counsel's correct. We didn't bring anyone who could tell you exactly who was doing the shooting and who had the gun in his hand. And shame on me during opening statements believing our evidence will show one thing when it actually showed something else because you know what? Witnesses are people. \*\*\* They have fears. They have their own concerns, their own motivation to say what it is they are going to say. So, when those witnesses told you that they couldn't see exactly who had the gun, sorry, *mia [sic] culpa*. Does it make him not guilty? No, not at all because he's on the street. \*\*\* When you help to arm your friends to go shoot at some people, regardless of whether you think you're going to talk first and shoot later, you're guilty. You hold those guns in your hand. You stand in the shoes of the people that you help."

¶ 19 These statements illustrate that, at the beginning of trial, the prosecutor anticipated that a witness would testify to seeing defendant with a gun on the night of the shooting. During closing

argument, the prosecutor acknowledged the lack of such evidence, and conveyed her belief that the witness was motivated to testify otherwise due to certain fears and concerns.<sup>4</sup> Further, the record reflects that Steven Small, an occurrence witness, was impeached on direct examination for his reluctance to identify defendant in court, and acknowledged that contempt proceedings were instituted against him for failure to honor his subpoenas to appear in court on this case. Based on this evidence, we find that the prosecutor did not engage in deliberate misconduct by referring to evidence during opening statements that was subsequently not presented at trial, nor that defendant was prejudiced thereby. *Jackson*, 281 Ill. App. 3d at 773-74; *People v. Cobb*, 186 Ill. App. 3d 898, 914-15 (1989).

¶ 20 The prosecutor acknowledged that defendant did not have a gun on the night of the incident, and he was convicted under a theory of accountability (720 ILCS 5/5-2(c) (West 1998)), which required proof that he shared a common criminal plan or purpose (*People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995)), and not that he was in actual possession of a gun (*People v. McComb*, 312 Ill. App. 3d 589, 595 (2000) ("[W]hether the defendant actually wielded the gun is not determinative under an accountability theory"). In that respect, the evidence against him at trial, including his handwritten statement detailing his involvement in a "plan" with the group to shoot two people, was overwhelming.

¶ 21 Finally, the record reflects that, prior to opening statements, the trial court twice instructed the jury that an opening statement is not evidence, and following closing argument, advised the jury that "[n]either opening statement nor closing arguments are evidence, any statement or argument made by the attorneys which is not based on the evidence should be

---

<sup>4</sup> We note that, on direct appeal, defendant argued that these statements by the prosecutor during rebuttal closing argument denied him a fair trial, and this court rejected that argument, finding that the statements were a fair comment on the evidence and made in response to defense counsel's own comments during closing argument. *Smith*, No. 1-02-0721, order at 15-17.

disregarded," thereby curing any potential prejudice. See *People v. Graca*, 220 Ill. App. 3d 214, 220-21 (1991) (finding no substantial prejudice to defendant where, *inter alia*, the court informed the jury that opening statements were not to be considered as evidence).

¶ 22 Because defendant's underlying claim that the prosecutor committed reversible error due to his comments during opening statements, lacks merit, it could not have so infected the trial such that his resulting conviction and sentence violated due process. Accordingly, defendant was not prejudiced by appellate counsel's failure to raise an ineffectiveness claim on this basis on direct appeal (*People v. Johnson*, 183 Ill. 2d 176, 187 (1998)), and cannot satisfy the prejudice prong of the cause and prejudice test (725 ILCS 5/122-1(f) (West 2008)).

¶ 23 As to defendant's second claim regarding the inadequacy of post-conviction counsel, we note that the Act requires that post-conviction counsel provide a reasonable level of assistance to defendants. 725 ILCS 5/122-4 (West 2008); *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). To ensure that defendants receive this level of assistance, Illinois Supreme Court Rule 651(c) imposes certain duties on post-conviction counsel, including making any necessary amendments to a *pro se* petition in order to adequately present defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Suarez*, 224 Ill. 2d at 42. Rule 651(c) does not, however, require counsel to advance nonmeritorious claims on defendant's behalf. *People v. Greer*, 212 Ill. 2d 192, 205 (2004). Accordingly, post-conviction counsel's failure to amend defendant's *pro se* petition to include the meritless claim of ineffective assistance of appellate counsel for failing to raise a claim on direct appeal based on the comments the prosecutor made during opening statement, did not render post-conviction counsel's assistance unreasonable. See *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006); *Greer*, 212 Ill. 2d at 205.

¶ 24 For the foregoing reasons, we find that defendant failed to establish the prejudice prong of the cause and prejudice test, and, as a result, the trial court did not err in denying him leave to

1-11-1069

file a successive post-conviction petition. We, therefore, affirm the judgement of the trial court to that effect.

¶ 25 Affirmed.