

No. 1-11-1339

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. 98 CR 1683
)	
TYRONE FULLER,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant failed to include in his successive post-conviction petition a claim alleging ineffective assistance of counsel during the re-sentencing hearing, the trial court did not err in denying him leave to file the petition; we affirm.
- ¶ 2 Defendant Tyrone Fuller appeals from an order of the circuit court 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 2010). On appeal, defendant contends that his successive petition sufficiently alleged that his counsel during the 2004 re-sentencing hearing was ineffective for

failing to investigate and present available mitigating evidence suggesting that his codefendant, Kimberly Britt, was the actual shooter. We affirm.

¶ 3 Defendant and his codefendants Kimberly Britt and Erick Hughes, who are not parties to this appeal, were charged with three counts of murder, one count of attempted murder, and two counts of armed robbery. Following a hearing on December 1, 1999, defendant entered open pleas of guilty to all the charges in connection with the December 1997 armed robbery of a jewelry store and the shooting death of its owner, Marc Feldman, and the attempted shooting of Aaron Smith, an employee. Following a sentencing hearing, a jury found defendant eligible for the death penalty, and the trial court sentenced him to death. During the plea hearing and the capital sentencing hearing, defendant was represented by private counsel Raymond Prusak.

¶ 4 The trial court subsequently denied defendant's postplea motions filed by defendant's brother and by Prusak. On direct appeal, the supreme court vacated two of the murder convictions because only one person had been murdered. In addition, the supreme court vacated defendant's death sentence based on an omission in the jury instructions and the verdict form. The cause was remanded for resentencing. *People v. Fuller*, 205 Ill. 2d 308, 347-48 (2002).

¶ 5 In January 2001, while defendant's direct appeal was pending, he filed a post-conviction petition. After the supreme court vacated his death sentence on direct appeal, the circuit court, upon agreement between the State and defendant's post-conviction counsel, dismissed the petition without prejudice as it was premature. In February 2003, post-conviction counsel sought to reinstate the 2001 post-conviction petition, but the circuit court denied the motion because a new sentence had not yet been imposed.

¶ 6 On August 2, 2004, defendant's new sentencing hearing was held and he was represented for the first time by assistant public defender Preston Jones. Notably, the State was precluded from seeking the death penalty due to the blanket grant of clemency by then Governor Ryan. The

parties stipulated to the evidence introduced at the prior guilty plea proceeding and the eligibility portion of the death penalty hearing. In addition, the State presented three witnesses in aggravation, certified copies of defendant's prior convictions, evidence that defendant was on parole for a prior armed robbery at the time of the instant offenses, and a victim impact statement. The State argued for a sentence of natural life.

¶ 7 Defendant presented four witnesses in mitigation and gave a statement to the court. Defense counsel did not challenge defendant's eligibility for a life sentence. Instead, counsel argued that defendant was remorseful and rehabilitated and deserved only a term of years.

¶ 8 The trial court sentenced defendant to natural life imprisonment and then denied defendant's motion to reduce sentence. We affirmed defendant's sentence on appeal. *People v. Fuller*, No. 1-04-2765 (2005) (unpublished order under Supreme Court Rule 23).

¶ 9 On September 13, 2007, post-conviction counsel filed an "amended" post-conviction petition on defendant's behalf, alleging that defendant's guilty plea was involuntary and he was denied effective assistance of trial counsel. On October 19, 2007, counsel filed a corrected petition raising three additional claims. Defendant specifically asserted that he was denied effective assistance of trial counsel because his attorney failed to investigate the evidence and encouraged him to plead guilty, he was denied his rights to due process and conflict-free counsel where the trial court did not appoint him new counsel after he presented a posttrial claim of ineffective assistance of counsel, and defendant was denied effective assistance of appellate counsel for failing to raise these claims on appeal.

¶ 10 Defendant attached to his petition affidavits from himself and his mother. In his affidavit, defendant claimed that his trial counsel, Raymond Prusak, did not communicate with him or his family, and that Prusak was not prepared to try the case because he had not spoken to any witnesses. Instead, Prusak encouraged defendant to plead guilty and seek a lenient sentence. In

her affidavit, defendant's mother stated that Prusak did not return her calls or speak to her. Defendant's mother also attested that in 1999, she spoke to several people in the neighborhood who told her that Britt asked them how to get gunshot residue off her hands and stated that she was involved in a shooting.

¶ 11 In 2008, the circuit court summarily dismissed defendant's post-conviction petition. We affirmed that judgment on appeal. *People v. Fuller*, No. 1-08-0223 (2010) (unpublished order under Supreme Court Rule 23). We specifically found that defendant forfeited his claim that his attorney Prusak failed to engage in the pretrial investigation that Britt was the shooter because he did not raise this claim in his motion to vacate his guilty plea or on direct appeal. *Fuller*, order at 21. Furthermore, we explained that the content of his mother's affidavit regarding Britt asking others how to remove gunshot residue was contained in the record at the time of direct appeal. *Fuller*, order at 21-22. We further held that even if this claim had not been forfeited, "the record completely belies the claim that anyone other than defendant shot Feldman." *Fuller*, order at 22.

¶ 12 On March 11, 2011, defendant filed the instant successive *pro se* petition under the Act, again alleging that his trial attorney, Raymond Prusak, failed to provide him effective assistance of counsel. Defendant specifically alleged that Prusak only spoke to him about money, even though defendant explained to him that he only took the blame for the shooting because Britt was the mother of his children. Moreover, Prusak failed to interview witnesses, test clothing for gunpowder residue, and investigate evidence showing that Britt asked people how to remove gunpowder residue. Defendant also asserted that he attempted to discharge Prusak for providing ineffective assistance, and that the circuit court was required to conduct an inquiry into said allegations. Defendant finally maintained that appellate counsel was ineffective for failing to raise these claims on appeal. Defendant attached to his petition affidavits from Carol Brown, Tojer Dobbins, and Mary Smith, who attested that Britt asked them how to remove gunpowder

from her hands. Brown further attested that Britt stated that she shot the victim, and that "they gone put it on [defendant]."

¶ 13 In a separate motion for leave to file the petition, defendant urged the court to accept his successive petition on the basis that he "was denied his right to due process and effective assistance of counsel at every stage, trial counsel, appellate counsel, and post-conviction counsel, *** where the attorney's [*sic*] failed to investigate the evidence in this Capital prosecution, evidence that clearly would show that [defendant] was not the shooter, and his sentence of natural life could have been a term of years 20 to 60."

¶ 14 On April 1, 2011, the circuit court denied defendant leave to file the instant petition, finding that he failed to meet the cause and prejudice test.

¶ 15 On appeal, defendant maintains that his counsel (assistant public defender Jones) at the 2004 re-sentencing hearing failed to investigate and present available mitigating evidence that Britt was the actual shooter. We review *de novo* the trial court's denial of leave to file defendant's successive post-conviction petition. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). Claims which are not included in a post-conviction petition cannot be raised for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 504-05 (2004).

¶ 16 Defendant correctly acknowledges that his successive petition purports to raise an ineffectiveness claim with respect to his plea hearing in 1999 and his *first* sentencing hearing in 1999, where he was represented by Prusak. The State agrees that defendant's successive petition was directed at Prusak and actually made no claim regarding attorney Jones, who represented defendant at his second sentencing hearing in 2004. Our thorough examination of the record and the successive petition at issue comports with defendant's acknowledgment and the State's position. The successive petition is replete with explicit references to Prusak, the *capital* sentencing hearing, and the same claim that codefendant Britt was trying to find a way to remove

gunshot residue. The successive petition never mentions attorney Jones or the resentencing hearing. Accordingly, we find no reason to consider defendant's issue for the first time on appeal. *Jones*, 213 Ill. 2d at 504-05.

¶ 17 To avoid the successive petition's obvious absence of the issue now raised on appeal, defendant argues that the new issue can be gleaned from certain phrases in the successive petition which mention his "life" sentence rather than the death sentence which had been vacated. In turn, defendant observes that his life sentence was imposed while he was represented by Jones, not Prusak. Defendant's attempt is disingenuous because the petition clearly states "capital" sentencing hearing and Prusak in his allegations:

"Denied effective assistance of counsel at his capital sentencing hearing when his attorney who conducted virtually no investigation failed to present substantial available mitigation evidence. Prusak was made aware that codefendant Kimberly Britt had been asking how to investigate this evidence being it could change the sentence of his client Fuller."

The petition also alleged that "had Prusak totally done [an] investigation" into Britt, defendant's "sentence would not have been death or life." Moreover, this claim, like all the others included in this successive petition, were the same claims as those presented by defendant in his initial post-conviction proceeding. We find defendant's contorted version of the actual and clear allegations unavailing.

¶ 18 Regardless of how liberally this court might interpret a *pro se* petition, it cannot extend to the lengths advanced by post-conviction counsel in this appeal. See *People v. Cole*, 2012 IL App. (1st) 102499, ¶13, relying on *Jones*, 213 Ill. 2d 498, at 504 (implicit claims in a defendant's post-conviction petition may not be raised for the first time on appeal when those claims were

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never ruled upon by the circuit court); see also *People v. Taylor*, 237 Ill. 2d 68, 76 (2010) (a claim that is implicit necessarily means the claim is not stated). Therefore, because defendant's petition did not raise the only claim to have allegedly warranted successive proceedings, and given that defendant cannot raise a new claim for the first time on appeal, we find that the trial court did not err in denying him leave to file his successive post-conviction petition.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.