

No. 1-11-2809

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 93-CR-23552
)	
FREDDIE FALCONER,)	Honorable
)	Nicholas Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶1 *Held:* The judgment of the circuit court was affirmed where it properly denied the defendant's motion for leave to file a successive postconviction petition; additionally, the defendant's argument that the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2012) formerly 705 ILCS 405/5-4 (West 1992)) violated his constitutional rights was rejected.

¶2 The defendant, Freddie Falconer, appeals from the circuit court order which denied him leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq.*) (West 2010)). The defendant argues that two of his ineffective-assistance-of-counsel claims raised in his motion satisfy the cause-and-prejudice test and should advance to

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second-stage proceedings. Those arguments are that: (1) his trial counsel had a *per se* conflict of interest because he was a cousin to the prosecuting Assistant State's Attorney (ASA); and (2) his trial counsel failed to present adequate mitigating evidence at his sentencing hearing. Additionally, the defendant argues that the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2012)) violates the due process and proportionate penalties clauses of the state and federal constitutions. We affirm.

¶ 3 The defendant, who was 16 years old at the time of his offense, was convicted of first degree murder (Ill. Rev. Stat. 1992, ch. 38, ¶ 9-1(a)(1)) and sentenced to 50 years' imprisonment for the 1993 murder of Isaac McKenzie. We briefly summarize the facts of the case here as a more detailed account of the case is available in *People v. Falconer*, 282 Ill. App. 3d 785, 668 N.E.2d 1095 (1996). On September 20, 1993, the defendant, who was carrying a golf club, and two friends came upon McKenzie as he was working on a car near 3945 South Ellis. The defendant, believing that McKenzie owed his mother \$160, confronted him about the money, and McKenzie made a derogatory comment about the defendant's mother. The defendant proceeded to club McKenzie to death. He initially gave police a statement on the evening of the crime, admitting that he and his two friends struck McKenzie. On the next day, the defendant admitted to police that he was the only person with a golf club and the only person who struck the victim. The police recovered three golf clubs from a family member of one of the defendant's friends. The defendant testified consistently with his two statements to police, except that he added that after McKenzie made a derogatory comment, McKenzie came at him with a tire iron. The defendant testified that he struck McKenzie the first time because he thought his life was in danger. Another witness, Craig Holland, testified

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that McKenzie was working on his car when the defendant arrived and struck McKenzie with the golf club. According to Holland, the defendant said nothing to McKenzie before striking him. The jury found the defendant guilty of first degree murder.

¶ 4 During the defendant's sentencing hearing, defense counsel urged the court to consider the June 1993 psychiatric evaluation which was attached to the presentence investigative report. Defense counsel argued that the evaluation demonstrated that the defendant had a mental illness before the crime and that his illness should be considered in mitigation. The psychiatric evaluation documented the defendant's auditory hallucinations, learning disability, and history of anger and behavioral issues. The diagnosis listed "disruptive behavior disorder, conduct disorder." Defense counsel further argued that the defendant's age should be considered a mitigating factor. The defendant also made a statement to the court in which he admitted that he sometimes heard voices and had hallucinations. He expressed remorse for his actions and stated that he needed counseling. Before announcing the defendant's sentence, the trial court stated that it considered the statutory aggravating and mitigating factors, the presentence investigative report, the psychiatric evaluation that defense counsel referenced, the defendant's comments, and the letters submitted by both the families of the defendant and the victim. In sentencing the defendant to a term of 50 years' imprisonment, the court noted the defendant's lack of remorse during trial, his preconceived plan to commit a heinous crime, and his violent predisposition, which was discussed in both the presentence investigative report and the psychiatric evaluation.

¶ 5 On direct appeal, the defendant argued that the State's comments during its closing and rebuttal arguments denied him a fair trial. We rejected the defendant's claims and affirmed his

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conviction and sentence. *Falconer*, 282 Ill. App. 3d at 794.

¶ 6 On June 12, 1997, the defendant, with the assistance of private counsel, filed a postconviction petition which predominantly restated the arguments made in his direct appeal. The trial court dismissed the defendant's petition, finding the issues were either raised or could have been raised in his direct appeal and were therefore barred by *res judicata* and waiver. Following that dismissal, the appellate defender moved to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and this court granted counsel's motion. *People v. Falconer*, No. 1-97-3206 (Mar. 31, 1998) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 On December 28, 2010, the defendant filed a *pro se* motion for leave to file a successive postconviction petition. In his motion, the defendant asserted, in relevant part, that he was denied effective assistance of counsel where his trial counsel was a cousin to the prosecuting ASA and failed to adequately present mitigating evidence during his sentencing hearing. On April 28, 2011, the circuit court denied the defendant's motion, concluding that the defendant failed to satisfy the cause-and-prejudice test. Specifically, the court found that the record revealed that the relationship between defense counsel and the ASA was disclosed to the court and that the other assertions of ineffective assistance of counsel were entirely conclusory. The defendant filed a motion to reconsider, which the circuit court denied on August 8, 2011. The defendant timely appealed from that order.

¶ 8 On appeal, the defendant argues that his two claims of ineffective assistance of counsel satisfied the cause-and-prejudice test. Additionally, he argues that the automatic transfer provision of the Juvenile Court Act violated the due process and proportionate penalties clauses of the federal

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and state constitutions. We disagree.

¶ 9 The Act provides a means by which a criminal defendant can assert that "in the proceedings which resulted in his *** conviction there was a substantial denial" of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Evans*, 2013 IL 113471, ¶ 10. The Act permits the filing of only one petition without leave of court (725 ILCS 5/122-1(f) (West 2010)), and it provides that any claim not raised in the original petition is waived (725 ILCS 5/122-3 (West 2010)). *Evans*, 2013 IL 113471, ¶ 10. To initiate a successive postconviction proceeding, the defendant must first obtain leave of court, which is granted only when he demonstrates cause for his failure to bring the claim in his initial petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f); *Evans*, 2013 IL 113471, ¶ 10. To show cause, the defendant must identify an objective factor that impeded his ability to raise a specific claim during the initial postconviction proceeding. 725 ILCS 5/122-1(f); *Evans*, 2013 IL 113471, ¶ 10. To show prejudice, the defendant must demonstrate that the claim not raised during his initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f); *Evans*, 2013 IL 113471, ¶ 10.

¶ 10 The cause-and-prejudice test is applied to individual claims, not to the petition as a whole. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 20. When assessing whether a defendant has satisfied the cause-and-prejudice test, Illinois courts have generally adhered to the "more exacting" standard outlined above rather than the "gist" standard used to review initial petitions. *Edwards*, 2012 IL App (1st) 091651, ¶ 21; *People v. Miller*, 2013 IL App (1st) 111147, ¶ 26. Further, because a proceeding brought under the Act is a collateral attack on a judgment of conviction, all issues actually decided on direct appeal are barred by *res judicata*, and all issues that could have been raised

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in the original proceeding but were not are waived. *People v. Thompson*, 383 Ill. App. 3d 924, 931, 890 N.E.2d 1119 (2008); *People v. Orange*, 195 Ill. 2d 437, 447-48, 749 N.E.2d 932 (2001). We review *de novo* the circuit court's denial of leave to file a successive postconviction petition. *Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 11 The defendant argues that his conflict-free attorney claim satisfied the cause prong because his trial counsel never explained the significance of the conflict and he did not understand its significance until 2009, when his cell mate told him to research the conflict issue to determine if his rights had been violated. This excuse for not raising the issue in his initial petition does not satisfy the cause prong as our supreme court has determined that ignorance of the law does not constitute "cause" under the cause-and-prejudice test. See *People v. Evans*, 2013 IL 113471, ¶¶ 12-13 (finding the defendant's ignorance of the mandatory supervised release statute did not constitute cause under the cause-and-prejudice test and therefore the circuit court properly denied his motion for leave to file a successive postconviction petition).

¶ 12 Further, even if the defendant satisfied the cause prong, his petition fails to articulate any prejudice. Effective assistance of counsel means assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. *People v. Gacho*, 2012 IL App (1st) 091675, ¶ 27. There are two categories of impermissible attorney conflicts of interest: *per se* conflicts and "potential," "possible," or "actual" conflicts. *Gacho*, 2012 IL App (1st) 091675, ¶ 28-9. With *per se* conflicts, a defendant need not show prejudice in order to secure a reversal of his conviction. *Id.*, ¶ 28. With potential conflicts, a defendant's conviction may be reversed if the trial court was informed of the problem and failed to take adequate protective steps, or where the court

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was not apprised and the defendant can show that an actual conflict of interest adversely affected his counsel's performance. *Id.*, ¶ 29. A defendant may waive the right to a conflict-free counsel, but that waiver must be knowingly made. *People v. Washington*, 240 Ill. App. 3d 688, 699, 608 N.E.2d 546 (1992). In order to give a valid waiver, a defendant must be admonished regarding the existence and the significance of the conflict. *Id.*

¶ 13 Here, the defendant alleges a *per se* conflict existed and that his waiver was not valid because he did not learn of its significance until a cell mate advised him to research the issue. In every case involving a *per se* conflict, "the conflict was created by the defense attorney's prior or contemporaneous association with either the prosecution or the victim." *People v. Spreitzer*, 123 Ill. 2d 1, 14-5, 525 N.E.2d 30 (1988). "The justification for treating these conflicts as *per se* has been that the defense counsel in each case had a tie to a person or entity—either counsel's client, employer, or own previous commitments—which would benefit from an unfavorable verdict for the defendant." *Id.* at 16. Here, we do not agree that the mere fact that the defendant's public defender and the ASA were cousins created a *per se* conflict of interest, as the type of relationship that triggers a *per se* conflict must be a professional one, not a familial one. See *Spreitzer*, 123 Ill. 2d at 14-6 (discussing cases involving *per se* conflicts where defense attorney had prior or contemporaneous professional relationships with prosecutors or victims in the defendant's case). Thus, the familial relationship, on its own, does not constitute a *per se* conflict.

¶ 14 To argue the existence of a potential conflict, the defendant's petition included a letter from the Office of the Cook County Public Defender's Homicide Task Force Chief which states that the defendant's public defender disclosed to the defendant and the court that he and the ASA were

cousins. The record filed with this appeal is silent as to whether there was any exchange in open court about the attorneys' relationship. However, the defendant's petition, which we take as true, stated that the court was advised about the relationship, and the defendant made no allegation that the court failed to take adequate protective steps. Further, even if the court was not advised, the defendant failed to make any allegation that any conflict adversely affected his counsel's performance. Thus, the defendant's petition fails to satisfy the prejudice prong of the cause-and-prejudice test because it failed to establish that this claim not raised in his initial petition so infected his trial that his conviction or sentence violates due process.

¶ 15 Similarly, the defendant fails to state a cause for his failure to include in his initial petition his claim that counsel failed to present adequate mitigating evidence during sentencing. He argues in his brief only that his "mental health issues and his youth at the time of his trial arguably show cause" for failing to raise the claim earlier. First, the defendant turned 18 shortly after his sentencing hearing; therefore, his age cannot be an excuse for failing to raise the issue in his initial petition. Second, there is nothing in the record or in the defendant's petition that suggests that his mental health condition rendered him incapable of participating in his defense or postconviction proceedings. See *People v. Johnson*, 191 Ill. 2d 257, 269, 730 N.E. 2d 1107 (2000) ("A defendant is presumed to be fit at the time of post-conviction proceedings."); *People v. Montgomery*, 45 Ill. 2d 94, 96, 256 N.E.2d 802 (1970) (where the defendant's evidence of mental disturbance did not demonstrate that he was incapable of exercising reasonable diligence in pursuing postconviction relief, the court determined that his untimely petition was properly dismissed). Therefore, the defendant's mental health excuse, standing alone, does not constitute "cause" under the cause-and-

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prejudice test.

¶ 16 Further, even if this excuse constituted cause, the defendant failed to demonstrate prejudice. In order to establish a claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and prove (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) absent counsel's deficient performance, there was a reasonable probability that the outcome of his trial would have been different. *People v. Lacy*, 407 Ill. App. 3d 442, 456, 943 N.E.2d 303 (2011). The defendant's claim of ineffective assistance of counsel may be disposed of if he fails to satisfy either prong. *Id.* at 457. Here, the defendant's petition states merely that defense counsel failed to call witness "Minn Adams," failed to call Dr. Chen, the psychiatrist who evaluated him in June 1993, and failed to discover "powerful" mitigating evidence, including domestic violence in his home. The defendant does not articulate the substance of Minn Adams' proposed testimony, he does not identify what Dr. Chen's testimony would have added to the information already contained in his psychiatric evaluation report, and he fails to specify any incidents of abuse in his home. The defendant's petition thus fails to show how the outcome of his sentencing hearing would have been different had counsel presented this additional mitigating evidence. Accordingly, the defendant fails to satisfy the prejudice prong of *Strickland*. He also has failed to demonstrate prejudice under the cause-and-prejudice test because he failed to establish that this claim not raised in his initial petition so infected his sentencing hearing that his sentence violates due process.

¶ 17 The defendant, relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), argues that his ineffective assistance of counsel claims should advance because his postconviction counsel's failure

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to raise the issues in his initial petition should not result in procedural default. In *Martinez*, the Supreme Court held that:

"Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez*, 132 S.Ct. at 1320.

¶ 18 We have already declined to apply *Martinez* under similar facts in *People v. Miller*, 2013 IL App (1st) 111147, 988 N.E.2d 1051, ¶ 41. In *Miller*, we determined that *Martinez*, which expressly was not a constitutionally-based decision, applied to federal courts considering *habeas corpus* petitions. *Id.* We further determined that *Martinez* applied to collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. *Id.* Under Illinois law, unlike under the Arizona law considered in *Martinez*, a defendant may raise an ineffective assistance claim on direct appeal. *Id.* Moreover, even if *Martinez* applied, we stated only substantial claims would trigger any duties under *Martinez* to relax forfeiture where the failure to timely raise the ineffectiveness claim resulted from a lack of counsel or ineffective counsel. *Id.* The *Miller* court therefore declined to relax the forfeiture rule and affirmed the denial of the defendant's motion for leave to file a successive postconviction petition. *Miller*, 2013 IL App (1st) 111147, ¶ 41, 46.

¶ 19 Here, we agree with the reasoning in *Miller* that *Martinez* applies to federal *habeas corpus* proceedings and only to situations involving initial collateral review proceedings. Further, even if *Martinez* applied, the defendant's claims cannot be considered substantial where, by his own

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admission and the attached letter in his petition, his attorney's relationship to the ASA was disclosed to him and to the court; and where he has failed to articulate the substance of the other "powerful" mitigating evidence which was not presented at his sentencing hearing. Accordingly, the circuit court did not err in denying the defendant's motion for leave to file a successive postconviction petition on the basis that the defendant failed to satisfy the cause-and-prejudice test.

¶ 20 Next, the defendant argues that the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2012), formerly 705 ILCS 405/5-4 (West 1992)) violated the due process clauses (U.S. Const.amend. XIV; Ill. Const. 1970, art. I, §2) and the proportionate penalties clauses (U.S. Const. Amend. VIII; Ill. Const. 1970., art. I, § 11) of the state and federal constitutions where it resulted in his transfer to adult court without a hearing and subjected him to more severe punishment.

¶ 21 Statutes are presumed constitutional, and we must construe statutes so as to uphold their constitutionality if there is any reasonable way to do so. *People v. Smith*, 383 Ill. App. 3d 1078, 1094, 892 N.E.2d 55 (2008). The party challenging the validity of a statute has the burden of clearly establishing a constitutional violation. *Id.* We review the constitutionality of a statute *de novo*. *Id.*

¶ 22 The defendant acknowledges that the automatic transfer provision has previously been found to be constitutional (*People v. J.S.*, 103 Ill. 2d 395, 405, 469 N.E.2d 1090 (1984); *People v. M.A.*, 124 Ill. 2d 135, 147, 529 N.E.2d 492 (1988)), but he argues that we should revisit the issue in light of three recent Supreme Court cases regarding sentencing schemes applied to juveniles: *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011 (2010); and *Roper v. Simmons*, 543 U.S. 551 (2005).

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¶ 23 The defendant first argues that his substantive due process rights were violated because the automatic transfer provision did not allow for consideration of the four legitimate penological justifications (retribution, deterrence, incapacitation and rehabilitation). He argues that *Roper* and *Graham* illustrate that, when none of the four penological justifications for adult sentences apply to juvenile offenders, it is not rational to transfer them to adult court without a hearing. This argument was made and rejected in *People v. Jackson*, 2012 IL App (1st) 100398. In *Jackson*, we pointed out that: both *Roper* and *Graham* decided constitutional challenges made to sentencing statutes; no due process arguments were raised or addressed in either case; and that the Illinois supreme court's decision in *J.S.*, which rejected a due process challenge to the automatic transfer provision, still controlled the issue at bar. *Jackson*, 2012 IL App (1st) 100398, ¶ 16. The *Miller* decision, like *Roper* and *Graham*, was decided on a constitutional challenge made to a sentencing statute. Therefore, that case has no effect on the analysis in *Jackson*. We follow *Jackson* and reject the defendant's argument that the automatic transfer provision violated his right to substantive due process.

¶ 24 The defendant also argues that the automatic transfer provision violated his procedural due process rights because it required his transfer without affording him a hearing. As with the defendant's substantive due process argument, the *Jackson* court rejected this same argument, again for the reason that recent Supreme Court case law had no impact on *J.S.*'s holding that the automatic transfer provision did not violate procedural or substantive due process rights of the defendant. *Jackson*, 2012 IL App (1st) 100398, ¶ 17 (following supreme court's *J.S.* decision); see also *People v. Salas*, 2011 IL App (1st) 091880, ¶ 76-80 (similarly rejecting due process challenges to the

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automatic transfer statute, finding that *Roper* and *Graham* were inapplicable and that *J.S.* remains binding). We follow *Jackson's* holding here and reject the defendant's procedural due process argument.

¶ 25 Finally, the defendant argues that the automatic transfer provision violates the proportionate penalties clause of the Illinois Constitution and the eighth amendment of the U.S. Constitution because it mandates adult sentencing for juveniles, who, under the rationale in *Roper*, *Graham* and *Miller*, should not be treated the same as adults. The defendant's argument has been rejected in *Jackson* and *Salas* on the basis that the defendant is not challenging his *sentence*, but rather the *procedure* that exposed him to the adult sentencing scheme. Those courts determined that the proportionate penalties clause of the Illinois Constitution and the eighth amendment of the U.S. Constitution apply to penalties and punishments, not to procedure, and therefore do not apply to a defendant's challenge to the automatic transfer provision. See *Jackson*, 2012 IL App (1st) 100398, ¶¶ 19, 24; *Salas*, 2011 IL App (1st) 091880, ¶¶ 68, 70. We agree with the reasoning in *Jackson* and *Salas* and similarly find that the automatic transfer provision does not violate the proportionate penalties clause of the Illinois constitution or the eighth amendment of the U.S. constitution.

¶ 26 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.