

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).

2013 IL App (4th) 110849-U

NO. 4-11-0849

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 1, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DEMEKCO L. FLAGG,)	No. 04CF1031
Defendant-Appellant.)	
)	Honorable
)	Scott B. Diamond,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* Where any appeal in this case would be without merit, we grant the motion to withdraw as counsel filed by the office of the State Appellate Defender (OSAD). We agreed any appeal would be without merit because no colorable argument could be made that the trial court erred in denying defendant's motion to file a successive postconviction petition.

¶ 2 In May 2007, the trial court found defendant, Demekco L. Flagg, guilty of multiple drug offenses and sentenced him to prison. This court affirmed defendant's convictions and sentences. In September 2008, defendant filed a *pro se* postconviction petition, which the trial court dismissed. This court affirmed. In August 2011, defendant filed a *pro se* motion for leave to file a successive postconviction petition, which the trial court denied.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending an appeal in this cause would be

without merit. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In August 2004, the State charged defendant by information with the offense of unlawful possession of a controlled substance with intent to deliver (count I) (720 ILCS 570/401(a)(2)(B) (West 2004)), alleging he knowingly and unlawfully possessed with intent to deliver 100 grams or more, but less than 400 grams, of a substance containing cocaine. The State also charged defendant with unlawful possession of a controlled substance (count II) (720 ILCS 570/402(a)(2)(B) (West 2004)), unlawful possession of cannabis with intent to deliver (count III) (720 ILCS 550/5(d) (West 2004)), and unlawful possession of cannabis with a prior unlawful-possession-of-cannabis conviction (count IV) (720 ILCS 550/4(d) (West 2004)). Defendant pleaded not guilty.

¶ 6

In March 2007, defendant's bench trial commenced. Former police detective Roger Ryan testified he investigated the shooting at defendant's residence at 620 East Decatur Street. He noticed the front door had been forced open. He also noticed a bullet hole in a window and a car with a broken window in front of the residence. In the kitchen, Ryan noticed a small Baggie of suspected cannabis on top of the refrigerator. He also saw bullet holes in the refrigerator, the stove, and a door. He recovered a bullet from the wall of a bathroom. Ryan stated the recovered cannabis weighed 29.17 grams. He also found cannabis blunts in an ashtray in the living room.

¶ 7

Decatur police officer Ed Hurst testified he met with defendant in the emergency room. Defendant stated he was at his residence with his girlfriend and children when he heard a noise at the front of the house. Two black males wearing ski masks forced open the front door.

Defendant heard shots being fired, and he ran into a bedroom. Upon being confronted by one of the intruders, defendant was shot. Thereafter, defendant's girlfriend drove him to the hospital.

¶ 8 Officer Jeff Hockaday testified he responded to 728 West North Street after receiving a vehicle description. While at the house, Nataviea Meadows pulled up to the house in a dark-colored Chevy Caprice. Hockaday looked through the window of the vehicle and observed a woman's purse with suspected cannabis on the center transmission hump. He seized 11 bags of cannabis weighing 40.4 grams.

¶ 9 Detective Steve Chabak testified he went to 620 East Decatur Street and observed a maroon Mercury and a white Chevy Caprice parked outside the residence. The white Chevy Caprice "had the front passenger[-]side window destroyed" and a bullet jacket in the front seat. Chabak stated he searched a bedroom in the residence and found a nine-millimeter handgun in a K-Swiss shoe box in the closet. The box also contained "numerous" plastic Baggies and a vinyl gun case. On the floor of the closet, he found a purse containing 19.8 grams of suspected cannabis and an identification card of Nakiaya Flagg. On a shelf in the bedroom, he found approximately 1.2 grams of suspected cannabis. Chabak also found a receipt with defendant's name and dated March 12, 2004. In the kitchen, Chabak found a pocket balance scale on top of the microwave and a small amount of cannabis in a utensil drawer.

¶ 10 Detective Patrick Campbell testified he spoke with defendant in the emergency room. Defendant consented to a search of his residence at 620 East Decatur Street. Defendant stated he believed the intruders fired three or four shots but he did not return fire.

¶ 11 Decatur police detective David Dailey, a member of the street-crimes unit, which has a main focus on narcotics-related investigations, testified as an expert in the field of narcotics

use and distribution. He obtained a search warrant for a 1994 Chevy Caprice. He observed apparent bloodstains on the front passenger seat and armrest of the door. He observed a purse with a credit card in the name of Natavia Meadows and \$337. Within the passenger compartment, Dailey found an Illinois Power receipt in defendant's name and addressed to 1057 North Illinois Street. A 2005 registration card listed the vehicle's owner as Pashonea Cook with an address of 728 West North Street. A Speed Lube receipt dated December 30, 2003, was in defendant's name. A memorandum of installment sale for the vehicle listed defendant as the purchaser.

¶ 12 Detective Dailey testified he conducted a search of the trunk and found three shoe boxes. One Nike box (size 9) contained 6 bags of cannabis weighing 94 grams and a box of sandwich bags. Some of the plastic bags had been altered. Stains on the shoe box appeared to be dried blood. A Nike box (size 8) contained a digital scale, altered sandwich bags, and bags with white residue inside. A gray shoe box (size 8) contained 252 grams of cocaine, 48 more grams of cocaine, and suspected bloodstains. Dailey also found 59 grams of cocaine in a black trash bag in the trunk. Inside a black Nike bag, he found 2 bags of cannabis weighing 20.6 grams, 16 bags of cannabis weighing 70 grams, and altered sandwich bags. A black leather briefcase located in the trunk contained \$6,960 in seven separate bundles, a digital scale, and two shirts, one of which was black and had bloodstains on it. The shirt also had a hole in the chest area. The trunk contained bills in the name of Natavia Meadows, a postcard addressed to defendant from the Community Health Improvement Center, and discharge instructions for defendant from Decatur Memorial Hospital.

¶ 13 Detective Dailey testified the commonly consumed dosage unit of cocaine is 0.2

grams. For cannabis, it is approximately 0.5 grams. He stated 334.3 grams of cocaine would contain 1,671 dosage units and 149 grams of cannabis would contain 298 dosage units. The street value of cocaine was \$100 per gram and cannabis was \$10 per gram. Dailey stated drug dealers use digital scales to "ensure their profit margin" and handle large sums of money because the "drug business is a cash business." Plastic sandwich bags are used to package illegal drugs for distribution. Dailey stated drug dealers often carry handguns. Based on his training and experience, Detective Dailey opined the cocaine and cannabis were possessed here with the intent to deliver. He stated the amount of contraband was more than a recreational user would possess, no paraphernalia was located in the vehicle or the residence, and the digital scales and plastic bags were consistent with distribution.

¶ 14 Jennifer Aper, a forensic scientist with the Illinois State Police, testified she tested four exhibits that indicated positive for blood. Rhonda Carter, a forensic scientist with the Illinois State Police, testified as an expert in the field of deoxyribonucleic acid (DNA). She stated a red and/or brown substance indicated as blood matched defendant's DNA profile. Eric Nayland, an Illinois State Police forensic scientist specializing in latent prints, testified he tested nine plastic bags for fingerprints. Four of the bags found in the shoe box in the vehicle's trunk contained fingerprints matching those of defendant. The parties stipulated the State's exhibits contained a total of 334.3 grams of cocaine and 149.67 grams of marijuana.

¶ 15 Defendant testified on his own behalf. He stated he was living at 620 East Decatur Street on August 6, 2004, with his girlfriend and five children. At approximately 2 a.m., he heard "somebody kicking at the door." He ran toward the back. When the intruders entered, a shot was fired that hit the stove. Defendant ran to his bedroom and then to the bathroom, and

another shot was fired. After he peeked around his bedroom door, he was shot in the chest. He pulled off his black shirt and threw it on the floor. His girlfriend drove him to the hospital in a blue Chevy Caprice. The car was registered in the name of his sister, Pashonea Cook. He stated he and his mother purchased the car for his sister. He took it to have the oil changed "a couple times." Neither defendant nor Meadows removed anything from the house or vehicle before heading to the hospital. Defendant did not know anything about the items in the trunk. He had no idea how his fingerprints were found on the plastic Baggies but stated they were used "probably for kids' lunches" as he had packaged lunch for his children. He stated he had been drinking Cognac that evening along with smoking marijuana blunts. He stated he wore size 10.5 Nike shoes.

¶ 16 Following closing arguments, the trial court found defendant guilty on all four counts. In May 2007, defendant filed a motion for judgment of acquittal or, in the alternative, for a new trial, which the court denied. Thereafter, the court sentenced defendant to 20 years in prison on count I and a concurrent term of 3 years on count III. Counts II and IV, dealing with unlawful possession, merged with the two intent-to-deliver counts. In June 2007, defendant filed a postsentencing motion, which the court denied.

¶ 17 Defendant appealed, arguing the trial court erred in denying his motion to suppress and the State failed to prove him guilty beyond a reasonable doubt. This court affirmed his convictions and sentences. *People v. Flagg*, No. 4-07-0524 (May 22, 2008) (unpublished order under Supreme Court Rule 23).

¶ 18 In September 2008, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)). He

alleged his trial counsel was ineffective for failing to inform him he could have refused to sign the consent-to-search form given to him while in the hospital, his appellate counsel failed to raise viable issues he raised in his posttrial and postsentencing motions, and the trial judge should have recused himself.

¶ 19 The trial court dismissed the petition, finding it frivolous and patently without merit. This court affirmed the trial court's judgment. *People v. Flagg*, No. 4-08-0827 (Feb. 2, 2010) (unpublished order under Supreme Court Rule 23).

¶ 20 In August 2011, defendant filed a *pro se* motion for leave to file a successive postconviction petition. Therein, defendant argued sufficient cause existed to excuse his failure to raise the issues on a prior occasion because he was denied the effective assistance of trial and appellate counsel. Defendant also stated he did not have the assistance of anyone in the prison library when drafting his initial postconviction petition. He claimed he was prejudiced by the failure to raise his claims earlier because those claims so infected the outcome of the trial that his due-process rights were violated. As his allegations of error, defendant alleged (1) trial counsel was ineffective for failing to challenge the foundation of expert testimony regarding the fingerprint match; (2) trial counsel was ineffective for failing to object to the admission of DNA evidence because it could have been contaminated as a result of Detective Dailey's search; and (3) appellate counsel was ineffective for not raising trial counsel's ineffectiveness on these two issues.

¶ 21 The trial court denied defendant's motion. The court found the evidence of defendant's guilt was "overwhelming" and his motion for leave to file a successive postconviction petition presented "no substantial constitutional issue." This appeal followed.

¶ 22

II. ANALYSIS

¶ 23 On appeal, OSAD has filed a motion to withdraw as counsel and has included a supporting memorandum pursuant to *Finley*. Proof of service has been shown on defendant. This court granted defendant leave to file additional points and authorities on or before December 20, 2012, and he has done so. The State has also filed a brief. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be without merit.

¶ 24 The Act "provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials." *People v. Taylor*, 237 Ill. 2d 356, 371-72, 930 N.E.2d 959, 969 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008). However, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *People v. Tate*, 2012 IL 112214, ¶ 8, 980 N.E.2d 1100; see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002).

¶ 25 The Act "generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009); *People v. Flores*, 153 Ill. 2d 264, 273, 606 N.E.2d 1078, 1083 (1992); see also 725 ILCS 5/122-1(f) (West 2010) (only one postconviction petition may be filed without leave of the court). "[A] ruling on an initial post[]conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d

26, 29 (2000). The denial of a defendant's motion to file a successive postconviction petition is reviewed *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 26 The statutory bar to filing successive postconviction petitions, however, will be relaxed when fundamental fairness so requires. *Flores*, 153 Ill. 2d at 274, 606 N.E.2d at 1083.

"To establish that fundamental fairness requires that a successive postconviction petition be considered on the merits, the defendant must show both cause and prejudice with respect to each claim presented. See [*Pitsonbarger*], 205 Ill. 2d [at 460-61, 793 N.E.2d at 621-22]. 'For purposes of this test, "cause" is further defined as some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding, and "prejudice" is defined as an error which so infected the entire trial that the resulting conviction violates due process. *Flores*, 153 Ill. 2d at 279[, 606 N.E.2d at 1085].' " *People v. Lee*, 207 Ill. 2d 1, 5, 796 N.E.2d 1021, 1023 (2003) (quoting *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29).

¶ 27 In the case *sub judice*, OSAD contends the claims raised in defendant's motion to file a successive postconviction petition failed to satisfy the cause-and-prejudice requirement because (1) the record shows no objective external factor that would have impeded defendant from raising the issues in his first postconviction petition and (2) the alleged errors cannot be said to have infected the entire trial so that the resulting conviction violated due process. OSAD also points out the evidence against defendant was overwhelming.

¶ 28 Our review of the record, defendant's *pro se* motion for leave to file a successive postconviction petition, his *pro se* response to OSAD's motion to withdraw, and the State's response lead us to conclude OSAD is correct. No objective reasons are shown why defendant could not have raised his claims in his initial postconviction petition. The issues as to fingerprint testimony and Detective Dailey's search cannot be said to have so infected the trial process such that defendant's conviction resulted in a violation of due process. Moreover, the evidence of defendant's guilt was overwhelming. Accordingly, as defendant failed to satisfy the cause-and-prejudice test, we find no colorable claim can be made that the trial court erred in denying defendant's motion.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed.