

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) 120088-U

NO. 4-12-0088

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
May 29, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
AARON DOBYNE,	)	No. 06CF1821
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Justices Knecht and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where any appeal in this case would be frivolous, we grant the motion to withdraw as counsel filed by the office of the State Appellate Defender (OSAD). We agree any appeal would be without merit because defendant neither satisfied the cause-and-prejudice test nor set forth a claim of actual innocence to justify the filing of a successive postconviction petition.

¶ 2 In January 2007, a jury found defendant, Aaron Dobyne, guilty of attempt (first degree murder) and aggravated battery. In March 2007, the trial court sentenced him to 30 years in prison on the attempt conviction. On appeal, this court affirmed as modified. In November 2010, defendant filed a *pro se* petition for postconviction relief, which the trial court summarily dismissed. This court granted defendant's motion to dismiss his appeal. In January 2012, defendant filed a second postconviction petition and a motion for leave to file a successive petition. The trial court denied the motion. Thereafter, OSAD was appointed to represent

defendant.

¶ 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 frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In November 2006, a grand jury indicted defendant on one count of attempt (first degree murder), alleging he, with the intent to commit the offense of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)), performed a substantial step toward the commission of that offense in that with the intent to kill Amanda Matson, he stabbed her in the chest with a knife (720 ILCS 5/8-4(a) (West 2006)). The grand jury also indicted defendant on single counts of attempt (armed robbery) (720 ILCS 5/18-2(a)(1) (West 2006)) and aggravated battery (720 ILCS 5/12-4(b)(1) (West 2006)). Defendant pleaded not guilty.

¶ 6 At defendant's January 2007 jury trial, Amanda Matson testified she was 60 years old. On June 3, 2006, she was buying dishwashing liquid at Dollar General at approximately 10 a.m. When she was in the middle of the store, she felt someone bump into her. She then felt "an arm [come] around [her] neck in a strong-arm fashion." She threw the arm away from her and both individuals ended up on the floor. She noticed a black man get up and start to leave the store. As she walked to the front, she noticed the front of her shirt was covered with blood. She had cuts to her mammary artery, her neck, and a finger on her right hand.

¶ 7 Kelly Davis, the general manager at Dollar General, testified he was working at a cash register when he heard a scream. After seeing a bleeding woman who said a man had stabbed her, Davis saw a black male heading down an aisle. When he told the man to stop, the

man "broke into a run." Davis chased after the man, who was about six feet tall with dark pants, and saw him pedaling away on a dark mountain bike with a heavy-duty frame. Davis saw the black male drop a knife about 30 feet from the doors. Davis reviewed the video surveillance tape and saw the man he chased out of the store. Davis turned the tape over to police.

¶ 8 C.E. Kibler, an operating room nurse, testified she and other medical personnel responded to Matson's arrival at the hospital. Kibler had to "hold pressure" on Matson's wound "because it was bleeding so much." Kibler described it as "extreme bleeding."

¶ 9 Champaign police lieutenant Scott Swan testified he was on patrol on June 8, 2006, five days after the stabbing incident. He was aware of the general information pertaining to the stabbing and the description of the suspect and had viewed the videotape prior to leaving the police station that day. While on patrol, Swan observed someone matching the suspect's description between a mile and a mile and a half from Dollar General. Swan described the man as a black male sitting in a park wearing a "do-rag" on his head and a watch on his left wrist. The "small-framed" man, identified as defendant, was wearing shorts and a light-gray T-shirt. Swan proceeded on to another call. When he was finished, he returned to the park to locate the individual. Swan observed defendant on a purple or maroon girl's mountain bike.

¶ 10 Swan lost sight of defendant and then noticed an elderly neighbor walking in the area. Swan picked up his neighbor to take him to a local business. However, Swan regained sight of defendant riding a bike. He then told his neighbor to exit the car so he could speak with the man on the bike. While watching in his rearview mirror, Swan saw defendant "make a glance to see what [Swan] was doing." Swan then "gaited [his] car to make a U-turn" and defendant "began pedaling really, really fast."

¶ 11 Swan radioed to another officer that he was going to stop defendant to talk with him. Swan activated his overhead lights. Defendant turned around. Swan hit his air horn. Again defendant looked back and "continued to travel extremely fast." Swan was able to get alongside the man and said, "you're giving this old guy a heart attack. Just pull over." Defendant said he did not do anything wrong. Swan slowed down, and defendant crossed in front of him and went into a yard.

¶ 12 Swan "kind of got out" of his car and told defendant he just wanted to talk to him. Swan stated defendant was "not really complying." When defendant asked Swan where he wanted him, Swan pointed to a corner and suggested he sit down. Defendant then "mounted the bike and took off again." Defendant traveled on a sidewalk with officers in the area. Swan told him, "We've got about seven cars coming. You're not getting away. You need to stop." Defendant then stopped and got off his bike. Officers ordered him to the ground and handcuffed him.

¶ 13 Officer Rein testified he searched a residence where defendant was believed to reside. Rein noticed shoes that were similar to those worn by the suspect in the video. On one shoe, Rein observed what appeared to be blood. Officers took custody of the shoes.

¶ 14 Champaign police detective Keith Johnston testified he interviewed defendant on June 8, 2006. Defendant denied being in the area of the Dollar General store during the time of the stabbing. Johnston noticed defendant's wristwatch, told defendant it looked similar to the one worn by the suspect, and asked if he could have it tested for physical evidence. Defendant gave Johnston the watch. When Johnston mentioned officers found shoes with apparent blood on them, defendant stated any blood on the shoes would be his.

¶ 15 Carly Bien, a forensic scientist with the Illinois State Police, testified as an expert witness in forensic deoxyribonucleic acid (DNA) analysis. She performed DNA analyses on defendant's watch and shoes and the knife found at the scene. Neither Matson nor defendant could be excluded from the DNA material on the watch. The swabbings from the knife and the shoes matched Matson's DNA profile.

¶ 16 Defendant exercised his constitutional right not to testify. Following closing arguments and a jury question, the jury found defendant guilty of aggravated battery and attempt (first degree murder).

¶ 17 In February 2007, defendant filed a motion for acquittal or, in the alternative, for a new trial, which the trial court denied. In March 2007, the court sentenced him to 30 years in prison for the offense of attempt (first degree murder). No sentence was imposed for the aggravated battery. The court awarded defendant credit for 130 days served in pretrial custody.

¶ 18 Defendant filed a motion to vacate conviction and reduce sentence, asking, *inter alia*, the conviction for aggravated battery be vacated even though a sentence was not imposed. In April 2007, the trial court denied the motion. On appeal, this court, with one justice dissenting, affirmed as modified and remanded for the issuance of an amended sentencing judgment to reflect an additional day of sentence credit. *People v. Dobyne*, No. 4-07-0341 (Nov. 26, 2008) (unpublished order under Supreme Court Rule 23).

¶ 19 In November 2010, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant claimed his trial counsel was ineffective when he failed to properly impeach Lt. Swan with his police report and the alleged contradictions pertaining to defendant's arrest therein. In

December 2010, the trial court dismissed the petition, finding it frivolous and patently without merit. Defendant appealed, and in December 2011, this court granted defendant's motion to dismiss the appeal.

¶ 20 In January 2012, defendant filed a *pro se* petition for postconviction relief as well as a motion for leave to file a successive petition. Defendant alleged appellate counsel was ineffective in failing to argue the evidence was insufficient to support the jury's finding that he had the intent to kill the victim. In support of his motion to file a successive petition, defendant claimed he had discussed his first postconviction petition with postconviction appellate counsel, who advised him to dismiss the petition and file a successive petition asserting actual innocence.

¶ 21 In January 2012, the trial court denied defendant's motion for leave to file a successive postconviction petition. The court found the issue asserted could have been raised in defendant's first postconviction petition and nothing indicated any objective factor impeded his ability to raise the 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 March 22, 2013. He has done so, and the State has filed a responsive brief as well. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be frivolous.

¶ 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. In that motion, defendant stated he agreed to dismiss his appeal of the dismissal of his first postconviction petition based on the advice of appellate counsel that he do so and file a successive petition based on actual innocence. Defendant argued the State failed to prove the element of intent to kill to support a conviction for attempt (first degree murder). However, defendant did not establish "some objective factor external to the defense" impeded his ability to raise the issue in his initial postconviction petition. The issue of the intent-to-kill element had been brought out at trial and during closing arguments. Thus, the issue was known to defendant and could have been raised in his first postconviction petition. As such, defendant cannot satisfy the cause prong to overcome the statutory bar to filing a successive postconviction petition.

¶ 28 Defendant also raised a claim of actual innocence, claiming the State failed to prove the intent-to-kill element to sustain his conviction for attempt (first degree murder). Even if defendant is unable to show cause and prejudice, the failure to raise a claim in an earlier

petition will be excused " 'if necessary to prevent a fundamental miscarriage of justice.' " *Ortiz*, 235 Ill. 2d at 329, 919 N.E.2d at 947 (quoting *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621). "In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence." *People v. Edwards*, 2012 IL 111711, ¶ 23, 969 N.E.2d 829. To support a claim of actual innocence, "the evidence in support of the claim must be newly discovered; material and not merely cumulative; and 'of such conclusive character that it would probably change the result on retrial.'" *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 950 (quoting *People v. Morgan*, 212 Ill. 2d 148, 154, 817 N.E.2d 524, 527 (2004)). On an actual-innocence claim, "leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Edwards*, 2012 IL 111711, ¶ 24, 969 N.E.2d 829 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

¶ 29 Here, defendant has not established a claim of actual innocence as he has not presented any newly discovered evidence. Instead, he argues the State failed to prove the intent element at trial. This does not constitute newly discovered evidence. Instead, it amounts to an allegation of insufficient evidence. "However, it has long been established that reasonable doubt of a defendant's guilt is not a proper issue for a postconviction proceeding." *People v. Collier*, 387 Ill. App. 3d 630, 638, 900 N.E.2d 396, 404 (2008).

¶ 30 Moreover, defendant's claim does not make it more probable than not that no reasonable juror would have convicted him in light of his argument. The victim was stabbed in the chest with a knife. She sustained a cut to her mammary artery, which caused extreme bleeding and required surgery to repair the artery. A defendant's intent "may be inferred from the

character or nature of the assault, the accompanying circumstances, and the use of a deadly weapon." *People v. Medrano*, 271 Ill. App. 3d 97, 103, 648 N.E.2d 218, 223 (1995). Further, it can be presumed defendant intended " 'the natural and probable consequences' " of his actions. *People v. Solis*, 216 Ill. App. 3d 11, 17, 576 N.E.2d 120, 123 (1991) (quoting *People v. Coolidge*, 26 Ill. 2d 533, 537, 187 N.E.2d 694, 697 (1963)). Here, a rational trier of fact could have found defendant had the intent to kill Matson, based on his use of a deadly weapon and the act of stabbing her in the chest. Thus, defendant did not raise the possibility that it is more likely than not that no reasonable juror would have convicted him. As he cannot establish error, he also cannot show appellate counsel was ineffective for not raising the issue on direct appeal. See *People v. Enis*, 194 Ill. 2d 361, 386, 743 N.E.2d 1, 16 (2000). Accordingly, the trial court did not err in denying defendant's motion for leave to file a successive postconviction petition.

¶ 31

### III. CONCLUSION

¶ 32 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.

¶ 33 Affirmed.