

NOTICE
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2013 IL App (4th) 120699-U

NO. 4-12-0699

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 5, 2013
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Champaign County |
| CALVIN LYNN DORRIS, |) | No. 97CF820 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Richard P. Klaus, |
| |) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the trial court's denial of defendant's petition for leave to file a postconviction petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 1997, a jury convicted defendant of first degree murder (720 ILCS 5/9-1(a)(1) (West 1996)). In November 1997, the trial court sentenced defendant to 50 years' imprisonment. On appeal, this court affirmed defendant's conviction and prison sentence. *People v. Dorris*, No. 4-97-1102 (June 8, 1999) (unpublished order under Supreme court Rule

23) .

¶ 5 In March 1999, defendant filed his first postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 1998)), alleging his constitutional rights were violated because the jury did not contain any African Americans. In May 1999, the trial court denied defendant's petition on grounds of waiver and *res judicata*. In July 2000, this court granted OSAD's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), on appeal and affirmed the judgment. *People v. Dorris*, No. 4-99-0444 (July 27, 2000) (unpublished order under Supreme court Rule 23).

¶ 6 In October 1999, defendant filed his second postconviction petition, again alleging a jury pool violation and adding additional claims of error for (1) the trial court (a) refusing to suppress a gun; (b) failing to give a second degree murder instruction; and (c) allowing references to the victim's race; and (2) ineffective assistance of counsel for failing to (a) object to references to the victim's race and (b) allege the previous errors on appeal. In November 1999, the trial court dismissed this petition on the grounds of waiver and *res judicata*. In March 2001, this court affirmed the judgment. *People v. Dorris*, No. 4-99-0979 (Mar. 16, 2001) (unpublished order under Supreme court Rule 23).

¶ 7 In May 2003, defendant filed his third postconviction petition, alleging his (1) prosecution was illegal because the State's Attorney was a county employee and did not represent the State of Illinois and (2) postarrest interrogation violated his sixth amendment right to counsel. In July 2004, defendant's appointed counsel filed an amended petition, alleging ineffective assistance of appellate counsel on direct appeal for failing to (1) challenge the jury's racial composition; (2) raise a reasonable doubt issue; (3) raise an issue regarding the denial of the

motion to suppress; (4) raise an issue regarding the lack of a second degree murder instruction; (5) argue error in the repeated references to the victim's race; and (6) raise ineffective assistance of trial counsel. In October 2004, the trial court granted the State's July 2004 motion to dismiss defendant's third postconviction petition. In April 2006, this court granted counsel's motion to withdraw pursuant to *Finley* and affirmed the judgment. *People v. Dorris*, No. 4-04-0875 (Apr. 13, 2006) (unpublished order under Supreme Court Rule 23).

¶ 8 In February 2005, defendant filed a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2004)), alleging the following: (1) the judgment was void because the jury was not instructed on voluntary manslaughter based on the defense of self-defense; (2) ineffective assistance of trial counsel for not tendering involuntary manslaughter and reckless conduct instructions; (3) he was denied due process because he was impeached with his taped confession when the recording of the confession contained significant gaps; and (4) ineffective assistance of appellate counsel for failing to raise these issues. That same month, the trial court concluded these issues were not properly brought under a section 2-1401 petition and, thus, considered it as a successive (fourth) postconviction petition. The court denied the petition as frivolous and patently without merit. Defendant appealed, docketed as No. 4-05-0252.

¶ 9 In August 2005, defendant filed a second section 2-1401 petition for relief from judgment, alleging the State fraudulently concealed the felony charges pending against its witness. Later that month, the trial court dismissed the petition and barred defendant from filing any further pleading without leave of court. Defendant appealed, docketed as No. 4-05-0811.

¶ 10 In January 2008, this court, in a consolidated appeal, affirmed the trial court's judgments on defendant's section 2-1401 petitions where the only issue raised was whether the

trial court had the authority to summarily dismiss the petitions. *People v. Dorris*, Nos. 4-05-0252, 4-05-0811 cons. (Jan. 28, 2008) (unpublished order under Supreme Court Rule 23).

¶ 11 In May 2009, defendant filed a *habeas corpus* petition, alleging (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel; (3) his sixth amendment rights were violated because he was not given Miranda warnings (*Miranda v. Arizona*, 384 U.S. 436 (1966)) prior to questioning; and (4) his due process rights were violated because the search of his home was illegal. The trial court dismissed this petition because defendant had not obtained leave of court before filing it. No appeal was taken.

¶ 12 In May 2012, defendant sought leave to file a petition for postconviction relief, alleging the following: (1) Public Act 84-1450 (eff. July 1, 1987) is unconstitutional because it violates the single-subject clause and, thus, his conviction and sentence is *void ab initio*; (2) Public Act 83-1067 (eff. July 1, 1985) is unconstitutional because it violates the single-subject clause and, thus, his conviction and sentence is *void ab initio*; and (3) he should be allowed forensic testing pursuant to section 5/116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2012)). In July 2012, the trial court denied the motion. Defendant appealed and OSAD was appointed to represent him.

¶ 13 In July 2013, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Finley*. On its own motion, this court granted defendant leave to file additional points and authorities by August 12, 2013. Defendant has not done so. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 14

II. ANALYSIS

¶ 15 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. Specifically, OSAD asserts (1) the petition does not sufficiently allege actual innocence and (2) defendant's claims do not satisfy the cause and prejudice test.

¶ 16 To obtain leave of court to file a successive postconviction petition, a defendant must either (1) demonstrate both that he has sufficient "cause" for not raising his claims in prior postconviction proceedings and would suffer "prejudice" if not allowed to raise the claims in the new petition; or (2) set forth a claim of actual innocence, such that a "fundamental miscarriage of justice" would occur if his conviction were allowed to stand. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002); 725 ILCS 5/122-1(f) (West 2012). Cause is shown by "identifying an objective factor that impeded [the defendant's] ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2012). Prejudice is shown "by demonstrating that the claim not raised during [the defendant's] initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.* Additionally, "the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence" to prevent a fundamental miscarriage of justice. *People v. Ortiz*, 235 Ill. 2d 319, 331, 919 N.E.2d 941, 948-49 (2009). When a successive postconviction petition presents a cognizable claim of actual innocence, the cause and prejudice standard articulated in section 122-1(f) of the Act does not apply. *Id.* at 331, 919 N.E.2d at 948.

¶ 17 A trial court's decision to grant or deny a motion for leave to file a successive postconviction petition is controlled by statute and is subject to *de novo* review. *People v.*

Thompson, 383 Ill. App. 3d 924, 929, 890 N.E.2d 1119, 1124 (2008).

¶ 18 A. Actual Innocence Claim

¶ 19 OSAD first notes defendant's petition makes a conclusory claim of actual innocence but fails to point to newly discovered evidence that would justify granting leave to file a successive postconviction petition. We agree.

¶ 20 To make a substantial showing of actual innocence sufficient to warrant an evidentiary hearing, a defendant must present newly discovered evidence that (1) could not have been discovered sooner through due diligence; (2) is material and not merely cumulative; and (3) is of such a conclusive character it would probably change the outcome of the trial. *Ortiz*, 235 Ill. 2d at 333, 919 N.E.2d at 949-50. "A claim of innocence must be based on newly discovered evidence that establishes the defendant's innocence rather than merely supplementing an assertion of a constitutional violation with respect to a trial." *People v. English*, 403 Ill. App. 3d 121, 132, 933 N.E.2d 366, 379 (2010). In this case, defendant fails to present any newly discovered evidence to support his conclusory claim of actual innocence. Further, we note, during his trial defendant claimed he shot the victim in self-defense.

¶ 21 B. Cause and Prejudice Test

¶ 22 Because this would be defendant's fifth postconviction petition, to succeed he must demonstrate "cause" for failing to raise this issue in prior proceedings and actual "prejudice" resulting from the alleged error. *People v. Orange*, 195 Ill. 2d 437, 449, 748 N.E.2d 932, 939 (2001).

¶ 23 1. *Single-Subject Rule*

¶ 24 A legislative enactment violates the single-subject rule " 'when the statute, on its

face, clearly embraces more than one subject.' " *People v. Cervantes*, 189 Ill. 2d 80, 94, 723 N.E.2d 265, 272 (1999) (quoting *People v. Dunigan*, 165 Ill. 2d 235, 254-55, 650 N.E.2d 1026, 1035 (1995)). "The term 'subject,' in this context, is to be liberally construed and the subject may be as broad as the legislature chooses. [Citations.] Nonetheless, the matters included in the enactment must have a natural and logical connection. [Citations.] The rule prohibits the inclusion of 'discordant provisions that by no fair intendment can be considered as having any legitimate relation to each other.' [Citations.]" *Johnson v. Edgar*, 176 Ill. 2d 499, 515, 680 N.E.2d 1372, 1379 (1997).

¶ 25 a. Public Act 84-1450

¶ 26 Public Act 84-1450 (eff. July 1, 1987) amended section 9-2 of the Criminal Code of 1961 (Criminal Code) by (1) renaming the offense of murder to first degree murder, (2) abolishing the offense of voluntary manslaughter, and (3) creating the offense of second degree murder to take its place. 720 ILCS 5/9-1 (West 1996). "The intent of the legislature in enacting Public Act 84-1450 was to remedy the confusion and inconsistency that had developed in regard to the murder and voluntary manslaughter statutes." *People v. Jeffries*, 164 Ill. 2d 104, 111, 646 N.E.2d 587, 590 (1995). Pursuant to Public Act 84-1450, several statutes within the Criminal Code, the Unified Code of Corrections, the Illinois Vehicle Code, and the Juvenile Court Act of 1987 were amended to delete any references to the offenses of "murder" and "voluntary manslaughter."

¶ 27 We agree with OSAD the amendments to these statutes were logically connected to the aim of Public Act 84-1450 and, thus, did not violate the single-subject rule. Further, defendant was charged with four counts of first degree murder pursuant to the statute in effect at

the time of the offense (720 ILCS 5/9-1(a)(1), 5/9-1(a)(2) (West 1996)) and was given ample notice of the nature and elements of the crime charged.

¶ 28 b. Public Act 83-1067

¶ 29 Public Act 83-1067, more commonly known as the Criminal Sexual Assault Act (Pub. Act 83-1067, eff. July 1, 1985), "repealed eight statutes that had previously defined sex offenses under the Criminal Code" (*People v. Madison*, 334 Ill. App. 3d 680, 691, 778 N.E.2d 376, 384 (2002)) and replaced them "with the newly created offenses of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, and aggravated criminal sexual abuse" (*In re Detention of Lieberman*, 201 Ill. 2d 300, 313, 776 N.E.2d 218, 225 (2002)). The intent of the Criminal Sexual Assault Act was to group all "sexual offenses into a comprehensive statute with uniform statutory elements that would criminalize all sexual assaults without distinguishing between the sex of the offender or the victim and the type of sexual act proscribed." *Madison*, 334 Ill. App. 3d at 691, 778 N.E.2d at 384 (quoting *People v. Haywood*, 118 Ill. 2d 263, 271, 515 N.E.2d 45, 49 (1987)).

¶ 30 Defendant was not charged with a sex crime. However, he asserts Public Act 84-1450 was carved from Public Act 83-1067—which he contends violates the single-subject rule—and, thus, he concludes Public Act 84-1450 is unconstitutional. We agree with OSAD Public Act 83-1067 does not violate the single-subject rule because it deals with the proscription of a class of criminal offenses. Further, defendant fails to offer any explanation—nor are we aware of any—to support his assertion Public Act 83-1067 affects the constitutionality of Public Act 84-1450.

¶ 31 2. *Request for Forensic Testing*

¶ 32 Defendant's final claim sought permission to obtain forensic testing pursuant to section 116-3(a) of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/116-3(a) (West 2012)). Specifically, defendant requested "brain fingerprinting" testing. See *Harrington v. State*, 659 N.W.2d 509, 516 n. 6 (explaining brain fingerprinting as "measuring certain patterns of brain activity *** to determine whether the person being tested recognizes or does not recognize offered information. This analysis basically 'provide[s] information about what the person has stored in his brain.' "). We review a trial court's ruling on a section 116-3 motion *de novo*. *People v. Barrow*, 2011 IL App (3d) 100086, ¶ 25, 954 N.E.2d 895

¶ 33 Section 116-3(a) of the Procedure Code provides as follows: "A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of [1] fingerprint, [2] Integrated Ballistic Identification System, or [3] forensic [deoxyribonucleic acid] DNA testing ***." 725 ILCS 5/116-3(a) (West 2012). This section provides access to testing in only three circumstances; "brain fingerprinting" is not one of them. See *People v. Pursley*, 341 Ill. App. 3d 230, 235, 792 N.E.2d 378, 383 (2003) (holding the plain language of the statute in effect at the time provided only for fingerprint and DNA testing and, thus, did not include the ballistic testing requested by the defendant). The *Pursley* court acknowledged the legislature may amend the statute to include additional forensic tests, such as ballistic testing, in the future. The legislature did just that in Public Act 95-688 (eff. Oct. 23, 2007); see also *Barrow*, 2011 IL App (3d) 100086, ¶ 35, 954 N.E.2d 895 (holding section 116-3(a) of the Procedure Code did not entitle the defendant to testing of his shoes and a piece of plywood)). In defendant's case, section 116-3(a) of the Procedure Code does not provide for "brain fingerprinting." Thus, defendant cannot seek relief under section 116-3 and we need not

engage in further inquiry regarding this issue.

¶ 34

III. CONCLUSION

¶ 35 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no colorable argument can be made in this appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 36

Affirmed.