

No. 1-12-1579

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
Respondent-Appellee,)	Cook County.
)	
v.)	Nos. 92 CR 1580
)	93 CR 0060
)	
OMAR ZAMORA,)	Honorable
)	Rickey Jones,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Petitioner has not established prejudice requirement for successive post-conviction petition challenging the recalculation of his sentencing credit where he does not raise a substantive argument that his right to due process was violated.
- ¶ 2 Petitioner Omar Zamora appeals the circuit court's dismissal of his successive petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In the petition, Zamora asserted that his right to due process was violated when a portion of his sentencing credit for time spent in pre-trial custody was removed after a May 2007 hearing at which he was not present or represented by counsel. On appeal, Zamora asks this court to reverse the dismissal of his petition and remand for further proceedings or, in the alternative, to

vacate the mittimus entered at the 2007 hearing and remand for a sentencing hearing at which he is present. We affirm.

¶ 3 Zamora was arrested on December 14, 1991, and charged on January 21, 1992, in case No. 92 CR 1580 with possession of a controlled substance (cocaine) with intent to deliver. On November 20, 1992, while on bond on that charge, Zamora was arrested again and charged in case No. 93 CR 60 on another count of possession of a controlled substance (cocaine) with intent to deliver.

¶ 4 On January 20, 1994, following a jury trial, Zamora was convicted of the possession charge in case No. 92 CR 1580. On March 24, 1994, Zamora pled guilty to the possession charge in case No. 93 CR 60, and the court held a combined sentencing hearing on the two cases. Zamora was sentenced to 28 years in prison in case No. 92 CR 1580 and to 12 years in case No. 93 CR 60, with those sentences to be served consecutively. Zamora also was ordered to complete a three-year period of mandatory supervised release (MSR) following his prison sentence. The court awarded 489 days of credit against Zamora's sentence for time spent in pre-trial custody, which represented the number of days that elapsed since his November 20, 1992, arrest in case No. 93 CR 60.

¶ 5 On appeal, this court vacated Zamora's guilty plea in case No. 93 CR 60 because the hearing on the motion to withdraw the plea did not comply with Illinois Supreme Court Rule 604(d) (eff. Aug. 1, 1992). *People v. Zamora*, No. 1-95-0336 (1995) (unpublished summary order under Supreme Court Rule 23). On remand, Zamora was convicted following a bench trial and on March 6, 1997, Zamora was again sentenced to 12 years, to be served consecutively to the 28-year sentence in case No. 92 CR 1580. On June 12, 1998, this court affirmed. *People v.*

Zamora, No. 1-97-1341 (1998) (unpublished order under Supreme Court Rule 23). In a separate appeal, this court affirmed Zamora's conviction and sentence in case No. 92 CR 1580. *People v. Zamora*, No. 1-94-1469 (1995) (unpublished order under Supreme Court Rule 23).

¶ 6 On June 20, 1998, Zamora filed a *pro se* petition for a *nunc pro tunc* correction of the mittimus, asserting that he should receive credit in each of his cases for the time he spent in pre-sentence custody, pursuant to *People v. Robinson*, 172 Ill. 2d 452 (1996), and *People v. Johnson*, 286 Ill. App. 3d 597 (1997). Zamora contended he should receive credit for 489 days spent in pre-sentence custody on case No. 92 CR 1580 and also receive credit toward his sentence for the 1,618 days he spent in custody on case No. 93 CR 60 (from his arrest on November 20, 1992 to the date of his sentencing on remand on March 6, 1997). On July 20, 1998, the circuit court issued a corrected mittimus stating that Zamora should receive "489 days credit in aggregate to and in addition to time credited on [case No. 93 CR 60]."

¶ 7 Zamora filed post-conviction petitions under both case numbers. On May 8, 1997, Zamora filed a *pro se* petition for post-conviction relief in case No. 92 CR 1580 in which he challenged the jury's racial makeup. The circuit court summarily dismissed that petition, and this court affirmed. *People v. Zamora*, No. 1-97-3297 (1999) (unpublished order under Supreme Court Rule 23).

¶ 8 On February 22, 1999, Zamora filed a *pro se* petition for post-conviction relief in case No. 93 CR 60. In the petition, Zamora alleged three claims of ineffectiveness of his trial counsel, namely that: (1) counsel did not allow him to testify; (2) counsel did not investigate evidence to challenge the evidence of his residence to rebut the residency requirement of the

search warrant in his case; and (3) counsel did not file a viable motion challenging the warrant's sufficiency. On April 2, 1999, the circuit court summarily dismissed that petition.

¶ 9 Zamora's case then remained dormant for the next eight years, when, on May 3, 2007, an assistant State's Attorney presented to the circuit court a "Motion to Correct the Mittimus," referring to the mittimus dated July 20, 1998. Neither Zamora nor his counsel was present in court. The State informed the circuit court it had received a letter from the Illinois Department of Corrections (IDOC) that Zamora's credit for time spent in pre-trial custody should be modified. The State asserted that although Zamora had been in custody on both of his cases for 489 days from November 20, 1992, to March 24, 1994, Zamora could only receive one day of credit for each day in custody and could not receive "double credit" towards those days as to his consecutive sentences. The State argued that the July 20, 1998, mittimus had erroneously awarded Zamora an additional 489 days of credit against his sentence. On May 3, 2007, the circuit court issued a corrected mittimus in case No. 92 CR 1580 stating that Zamora would receive credit "for time actually served in custody beginning 11-20-92 to the present" plus credit for December 14 and 15, 1991, which were the two days he spent in custody immediately after his initial arrest.

¶ 10 Although the State's motion lacked citation to legal authority, its contents reflect the Illinois Supreme Court's November 1998 decision in *People v. Latona*, 184 Ill. 2d 260, 270-71 (1998), that consecutive sentences are treated as a "single term" of imprisonment and that when consecutive sentences are imposed, all time spent in custody is credited only once against the aggregate term of the consecutive sentences. The supreme court in *Latona* acknowledged its holding in *Robinson* as to a different sentencing statute but held that the case before it involved

consecutive sentences as governed by section 5-8-4(e)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-4(e)(4) (West 1994)). *Latona* also expressly overruled *Johnson*.

¶ 11 On January 6, 2010, Zamora filed the *pro se* post-conviction petition that is the basis of this appeal. In the petition, which states it is brought in both case No. 92 CR 1580 and case No. 93 CR 60, Zamora asserted his constitutional right to due process was violated when he was not given notice of or represented at the May 2007 proceeding in which his sentencing credit was reduced by 489 days. Post-conviction counsel was appointed to represent Zamora. On June 15, 2011, counsel filed a supplemental petition asserting Zamora was denied his right to due process and contending the original award of an additional 489 days of credit for simultaneous custody against Zamora's sentence was proper under *Robinson*, which was the controlling law when the July 1998 corrected mittimus was issued.

¶ 12 On September 8, 2011, the State moved to dismiss the petition, asserting Zamora's request was being improperly raised in a successive post-conviction filing. The State also argued a post-conviction petition was not the correct means to challenge the amount of sentencing credit and that the removal of Zamora's time credit in his absence did not violate his rights because it did not occur at a critical stage in his proceedings. On November 30, 2011, after hearing argument, the circuit court granted the State's motion to dismiss the petition.

¶ 13 On December 9, 2011, post-conviction counsel filed a motion to reconsider, asserting that Zamora's additional 489 days of credit should be restored because *Robinson* was the controlling law at the time of sentencing. On December 15, 2011, the circuit court denied Zamora's request for reconsideration of its ruling but continued the case to rule on Zamora's request for a corrected mittimus.

¶ 14 On February 16, 2012, Zamora's counsel addressed the court:

"MR. SANDERS [assistant public defender]: Judge, we set up a phone call with the Illinois Department of Corrections records supervisor in [E]ast Moline, and [assistant State's Attorney] Mr. Kelly came down to my office. I have a speaker phone. As a result of the conversation, we came to an agreement on what we think is a fair disposition of the case.

THE COURT: Okay.

MR. SANDERS: Judge, I'm handing you two copies of an order. This would partially grant the motion to correct mittimus, and say that [Zamora] should be released from prison and placed on Mandatory Supervised Release as of May 17, 2012. It appears that Illinois Department of Corrections made a calculation error when it implemented your order, and all three of us agreed that an error was made by IDOC.

THE COURT: So is there a need for a corrected mitt to reflect that before it's sent to the penitentiary or just this order?

MR. KELLY [assistant State's Attorney]: I think all three of us agree that the language should be crystal clear, and that is what we've tried to do on the agreed order. And to be perfectly frank with the court, the Department of Corrections could not explain to us how they calculate their day's credit [*sic*]."

¶ 15 The assistant State's Attorney told the court that Zamora's release date had been changed from August 18, 2012, to May 17, 2012. Zamora's counsel stated, "We believe that this is fair." The court ordered that Zamora's sentence would be complete on May 17, 2012, on which date he would be released from prison and placed on MSR. This court allowed Zamora's late notice of appeal from that ruling.

¶ 16 In this appeal, Zamora contends he was deprived of due process and his right to counsel when, at the May 2007 *ex parte* proceeding, the circuit court subtracted 489 days of sentencing credit without providing him with notice of that proceeding or the opportunity to raise a defense to the reduction of his sentencing credit. Zamora contends this case should be remanded for further post-conviction proceedings. In the alternative, he asks this court to vacate the July 1998 mittimus and remand for a new sentencing hearing in which he participates.

¶ 17 We first consider the State's contention that Zamora's challenge to the amount of credit to be applied to his prison sentence is moot because he has been released from prison. An appeal is moot if no actual controversy exists or if events have occurred that make it impossible for the reviewing court to grant effectual relief to the complaining party. *People v. Roberson*, 212 Ill. 2d 430, 435 (2004). Generally, the validity of a sentence becomes a moot question after the sentence is served. *People v. Whitney*, 368 Ill. App. 3d 678, 680-81 (2006). The IDOC website indicates that Zamora was released from prison on May 17, 2012, and is currently serving his three-year MSR period. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 8 (this court may take judicial notice of records appearing on the IDOC website). Zamora's MSR period is scheduled to end on May 17, 2015.

¶ 18 An MSR term is a term "in addition to the term of imprisonment" and is separate and distinct from a prison sentence. 730 ILCS 5/5-8-1(d) (West 2004); *Faheem-El v. Klinicar*, 123 Ill. 2d 291, 298 (1988). An MSR period is statutorily mandated and cannot be altered by a court. *People v. Whitfield*, 217 Ill. 2d 177, 200-01 (2005). The State asserts that Zamora's release from custody has made it impossible for this court to grant relief because any sentencing credit that this court may award can no longer be applied toward his prison sentence and, furthermore, his MSR period cannot be shortened.

¶ 19 The State cites *People v. Porm*, 365 Ill. App. 3d 791 (2006), which held that the constitutional rights of the defendant in that case were violated when he was not admonished that a three-year MSR period would follow his sentence. The *Porm* court noted that the defendant did not challenge the length of his prison sentence or seek to vacate or withdraw his plea; rather, the defendant asked that the MSR period be stricken from his sentence. *Id.* at 792. The court agreed that under *Whitfield*, the absence of the MSR admonition violated the defendant's constitutional right to due process; however, the court concluded the defendant's claim was moot because it could not grant the defendant the only relief he requested, in that an MSR term was statutorily mandated and could not be stricken from his sentence. *Id.* at 794-95.

¶ 20 Even though any change to Zamora's sentence could not affect the length of his MSR term (see *Whitfield*, 217 Ill. 2d at 200-01), this court has held that a challenge to the length of a prison term is not moot if it is brought before the defendant has completed his or her MSR period. See *People v. Elizalde*, 344 Ill. App. 3d 678, 681 (2003), *overruled in part on other grounds*, *People v. Graves*, 235 Ill. 2d 244 (2009); *People v. Lieberman*, 332 Ill. App. 3d 193, 196 (2002); see also *People v. Saleh*, 2013 IL App (1st) 121195, ¶ 10 (a challenge to the validity

of an imposed sentence becomes moot once the entire sentence has been served). A defendant who is on MSR is subject to incarceration for a violation of the conditions of such release and, therefore, could be directly impacted by a change in sentencing credit. See *People v. Jackson*, 199 Ill. 2d 286, 294 (2002) (and cases cited therein). Based on that precedent, we conclude that Zamora's claim is not moot, and we proceed to consider his successive post-conviction filing.

¶ 21 The Act generally limits a defendant to the filing of one postconviction petition. *People v. Guerrero*, 2012 IL 112020, ¶ 15. Successive petitions are discouraged because the defendant already has been given "one complete opportunity to show a substantial denial of his constitutional rights." *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 16, quoting *People v. Logan*, 72 Ill. 2d 358, 370 (1978). Successive petitions are governed by section 122-1(f) of the Act, which limits such a filing to cases where it is necessary "to prevent a fundamental miscarriage of justice." *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). The bar to successive post-conviction petitions is relaxed "when fundamental fairness so requires" *People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 59, quoting *People v. Morgan*, 212 Ill. 2d 148, 153 (2004).

¶ 22 Our supreme court has identified two situations in which fundamental fairness will allow the filing of a successive post-conviction petition. The first alternative for determining whether a claim raised in a successive post-conviction petition may be considered on its merits is the cause and prejudice test. *Pitsonbarger*, 205 Ill. 2d at 459. Under that test, claims in a successive petition are barred unless the defendant can show cause for failing to raise the claim in his initial petition and prejudice resulting from the failure. 725 ILCS 5/122-1(f) (West 2010). The second basis by which the bar may be relaxed is what is known as the "fundamental

miscarriage of justice" exception, which requires a petitioner to show actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 23.

¶ 23 The defendant has the burden to obtain leave of court before a successive petition may be filed, and it is incumbent on the defendant to prompt the circuit court to consider whether leave should be granted and to obtain a ruling on whether he has demonstrated cause and prejudice. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). A circuit court's denial of leave to file a successive post-conviction is reviewed *de novo*. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 24 Here, Zamora does not articulate a claim of actual innocence but rather argues he "has satisfied the fundamental fairness prong of the cause-and-prejudice test." We thus consider whether Zamora has shown cause and prejudice in this appeal. To show cause, a defendant must demonstrate that some objective factor external to the defense impeded his ability to raise the claim in the initial post-conviction proceeding, and to establish prejudice, the defendant must show the claimed constitutional error so infected his trial that the resulting conviction or sentence violated due process. *People v. Coleman*, 2013 IL 113307, ¶ 82. The defendant has the burden of establishing both elements of the cause and prejudice test. *Pitsonbarger*, 205 Ill. 2d at 464.

¶ 25 Although Zamora argues that the record in this case demonstrates that he met the cause and prejudice requirements, Zamora did not obtain a ruling from the circuit court on whether he established cause and prejudice. Because our review of the circuit court's claim is *de novo*, we review the disposition rather than the reasoning of the circuit court, and our "review is completely independent of the trial court's decision." *People v. Anderson*, 2012 IL App (1st)

103288, ¶ 34. Therefore, the absence of a ruling on cause and prejudice by the circuit court does not preclude our consideration of those factors.

¶ 26 First, as to cause, we note the timing of Zamora's initial filings under the Act. Zamora filed a *pro se* petition for post-conviction relief in case No. 92 CR 1580 on May 8, 1997. He filed a *pro se* petition for post-conviction relief in case No. 93 CR 60 on February 22, 1999. Those filings occurred long before the 2007 proceedings that give rise to his current claim. Zamora therefore could not have raised the claim challenging the 2007 change to his sentencing credit in either of his initial post-conviction petitions. Zamora therefore has met the cause requirement to bring his current claim in a successive post-conviction filing.

¶ 27 However, Zamora also has the burden of establishing prejudice, which requires him to show that his conviction and sentence violated due process. See *People v. Tenner*, 206 Ill. 2d 381, 393 (2002). In considering that burden, this court has noted that a defendant "has the burden to plead sufficient facts and submit supporting documentation sufficient to allow the circuit court to make its prejudice determination." *Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 28 Zamora argues he should have been given notice of that proceeding and the opportunity to be represented by counsel who would have argued that *Latona* should not automatically apply to his case. In bringing its 2007 motion to correct the mittimus, the State asked the circuit court to apply the 1998 ruling of *Latona* to reduce the amount of sentencing credit Zamora should receive and allow only one day of credit for days in custody as to simultaneous cases to be applied to his consecutive sentences. The State points out that Zamora cannot establish prejudice because he received a hearing in which he was represented by counsel and where the issue of his credit for time spent in custody prior to his sentencing was argued.

¶ 29 Zamora contends that this case should be remanded so he can present his retroactivity arguments that he was not able to previously offer in the May 2007 proceeding. However, Zamora has representation on appeal, and this court has *de novo* review. A petition for leave to file a successive post-conviction petition is not in itself a post-conviction petition and never advances to additional stages of review. *People v. Croom*, 2012 IL App (4th) 100932, ¶ 24 (rejecting defendant's assertion that he need only state the "gist" of a claim of cause and prejudice and did not have to demonstrate cause and prejudice until further proceedings took place). Moreover, the trial court had a conference to correct the mittimus and entered an order setting a May 17, 2012 release date. Defendant entered an agreed order. He acquiesced in that ruling. Zamora does not provide this court with substantive arguments on the prospective or retroactive application of *Latona* to his sentence or set out an analysis under which he was deprived of sentencing credit as a matter of law. Because Zamora has not shown that the holding in *Latona*, in which our supreme court addressed the application of pre-sentencing custody credit to consecutive sentences, should not have been applied to his case, he has not met his burden of establishing that he was prejudiced by the lack of notice of or representation at the 2007 proceeding.

¶ 30 Accordingly, the circuit court's dismissal of Zamora's successive post-conviction petition is affirmed.

¶ 31 Affirmed.