

THIRD DIVISION
September 30, 2015

No. 1-13-1139

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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 99 CR 5180
)	
)	
JAMES DOLIS,)	The Honorable
)	Joseph G. Kazmierski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason concurred in the judgment.
Justice Pucinski dissented.

ORDER

¶ 1 *Held*: The trial court properly denied defendant leave to file a successive postconviction petition where the defendant's ineffective assistance of counsel claim had been ruled on in a prior proceeding. In addition, any error pertaining to the order of protection entered did not render the judgment void, and thus, did not entitle defendant to relief in a collateral proceeding.

¶ 2 This appeal arises from the trial court's order denying defendant James Dolis leave to file a *pro se* successive petition under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2012). On appeal, defendant asserts he established both the cause and prejudice necessary to file a successive petition challenging trial counsel's ineffective assistance for failing

to call exculpatory witnesses. Defendant also contends the order of protection entered in conjunction with his underlying convictions for home invasion and aggravated battery is void. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of two counts of home invasion, for which he was sentenced to concurrent 30-year prison terms, and one count of aggravated battery, for which he received a concurrent 5-year prison term. Defendant's convictions were based on his unauthorized entry into the dwelling place of Ellen Stefanits and her adult son, Glenn Podeszwa at 3340 North Kilpatrick. During this encounter on February 11, 1999, defendant stabbed Podeszwa with a knife. The court also entered an order of protection with respect to Stefanits, Podeszwa and the daughter of defendant and Stefanits. We affirmed the judgment on direct appeal, rejecting defendant's contention that the trial court failed to inquire into his claim that trial counsel was ineffective for not presenting witnesses favorable to the defense, pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The reviewing court also found defendant had not named any potentially favorable witness or explained how their testimony would affect the outcome of his trial. Additionally, the reviewing court found there was no evidence that trial counsel neglected defendant's case and cited the landmark decision, *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Dolis*, No. 1-00-0759 (2002) (unpublished order under Supreme Court Rule 23(c)).

¶ 5 In 2002, defendant filed a combined petition for relief under the Act and under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2002)), asserting that trial counsel failed to subpoena or call several witnesses on defendant's behalf who would have established that defendant lived in Stefanits' home "up until Feb. 11, 1999." Defendant's amended

petition listed 45 witnesses who could have contradicted Stefanits' account of her relationship and cohabitation with defendant. Postconviction counsel also provided affidavits signed by defendant's mother, his aunt, his friends and acquaintances, including Nick Krimtovski, John Mazur, James Mazur, James Nunley and Jerry Grzanka. Counsel further provided an unsigned "affidavit" from Tom Shrepfer. Five of the affiants alleged that to their knowledge, the basis of which was not always clear, defendant lived with Stefanits at the time of the home invasion. Defendant's aunt, Kay Shrimpl, alleged that according to Stefanits, defendant lived there before he was incarcerated but when Podeszwa was home, Dolis was required to live in the garage. Various affiants also recalled interacting with defendant at Stefanits' home in the weeks before the incident. The trial court granted the State's motion to dismiss, finding that defendant's ineffective assistance of counsel claims were barred by *res judicata* to the extent they were adjudicated on direct appeal and that in any event, trial counsel would not have been ineffective for failing to investigate the aforementioned witnesses or call them to testify. We affirmed the trial court's denial of that petition under the Act, finding that defendant had not shown a substantial constitutional violation. See *People v. Dolis*, No. 1-05-0988 (2006) (unpublished order under Supreme Court Rule 23).

¶ 6 In April 2007, defendant filed a petition for writ of *habeas corpus*, asserting among other things, that he was innocent of home invasion because he lived in Stefanits' home. Defendant supplied several of the aforementioned affidavits as well as affidavits from Tim DeMarco and Bill Cellak, as well as defendant's mother. The federal district court denied the petition, finding the affidavits did not support a clear finding that defendant lived with Stefanits at the time of the incident. *Dolis v. Gilson*, No. 07 C 1816 (N.D. Ill. Dec. 23, 2009).

¶ 7 In 2010, defendant filed a second petition under section 2-1401, which ultimately led to the vacatur of one home invasion conviction. See *People v. Dolis*, No. 1-10-1632 (2012) (unpublished order under Supreme Court Rule 23)). Defendant also filed a petition seeking a declaratory judgment that the legislature lacked power to impose a mandatory supervised release (MSR) term. The trial court dismissed the petition, finding it to be without merit. On appeal, appointed counsel moved to withdraw because there were no arguable issues to be raised on appeal, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In his *pro se* response, defendant argued he had a meritorious claim that the order of protection entered by the trial court was void absent statutory compliance and service of process. We agreed with counsel's assessment and affirmed that judgment, granting appointed counsel's motion to withdraw in the process. See *People v. Dolis*, 2012 IL App (1st) 110407-U.

¶ 8 Finally, in 2012, defendant filed the three petitions which led to this appeal. In defendant's April petition pursuant to section 2-1401 of the Code, defendant asserted that the order of protection imposed at sentencing failed to comply with statutory requirements and, thus, was void. In July, defendant filed yet another section 2-1401 petition, asserting that he was innocent of home invasion because he lived with Stefanits in February 1999. Defendant also attached several affidavits, all of which had apparently been submitted with defendant's State court petitions or his federal *habeas corpus* petition. The July petition was apparently treated as a supplement to the April petition.

¶ 9 In July, defendant filed an "Actual Innocence Post Conviction Petition and Addendum to Supplement 5/2-1401(f) Petitions," essentially arguing that he was actually innocent and that no strategy could have justified failing to call the witnesses who later provided affidavits. In response, the State moved for the trial court to deny defendant leave to file his successive

postconviction petition and to deny him relief under section 2-1401 as well. Defendant then filed a supplement to his pending petitions and moved to strike the State's motion to dismiss his petition for section 2-1401 relief.

¶ 10 Following arguments at a hearing, the trial court granted the State's motion to dismiss defendant's section 2-1401 petition, finding the petition was untimely and that issues in the petition had been raised before. In addition, the trial court denied defendant leave to file his successive petition under the Act, finding defendant could not demonstrate actual innocence. In reaching this decision, the court cited the federal district court's determination that defendant failed to demonstrate it was more likely than not that no reasonable juror would have convicted him. The trial court subsequently denied defendant's motion to reconsider.

¶ 11 II. ANALYSIS

¶ 12 A. THE ACT

¶ 13 On appeal, defendant asserts the trial court erred in denying him leave to file a successive postconviction petition because he raised a viable claim that trial counsel was ineffective for failing to call witnesses who would testify he lived with Stefanits at the time of the offense. Defendant acknowledges that he raised this claim in his first postconviction petition, but asserts it was "never fully addressed." We review the denial of leave to file a successive petition *de novo*. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30. Accordingly, we may affirm the judgment on any basis in the record, regardless of the trial court's reasoning. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 14 Pursuant to section 122-1(f) of the Act, generally, only one petition may be filed without leave of court. 725 ILCS 5/122-1(f) (West 2012). The trial court may grant leave under two circumstances. See *People v. Coleman*, 2013 IL 113307, ¶ 82. First, the trial court may grant

leave where the petitioner shows his actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 23. Actual innocence requires that evidence in support thereof must be newly discovered, material, not cumulative and of such a conclusive character that it would probably change the result upon retrial. *Id.* ¶ 32. Although defendant's petition alleged he was innocent, defendant does not argue on appeal that this allegation required the trial court to grant him leave to file his successive petition.

¶ 15 Second, the trial court may grant leave where the petitioner's pleadings demonstrate cause for his failure to raise his claim in his first postconviction petition and resulting prejudice. *People v. Smith*, 2014 IL 115946, ¶ 33. Specifically, a petitioner demonstrates cause by identifying an objective factor that impeded his "ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2012); see also 725 ILCS 5/122-3 (West 2012) (providing that claims not raised in an original petition are waived). In addition, the ruling on the defendant's first postconviction petition has the effect of *res judicata* regarding all claims that were, or could have been, raised in the first petition. *People v. Guerrero*, 2012 IL 112020, ¶17. Furthermore, it is well-settled that "[t]he doctrine of *res judicata* is not dependent upon the correctness of the judgment." *People v. Kidd*, 398 Ill. 405, 410 (1947); see also *People v. Shriner*, 262 Ill. App. 3d 10, 15 (1994) (finding acceptance of the "defendant's claim that a petitioner may avoid application of the *res judicata* doctrine by claiming that an issue was incorrectly decided in the direct appeal would eviscerate the *res judicata* doctrine's application to post-conviction proceedings").

¶ 16 Here, the trial court properly denied defendant leave to file his successive petition. Defendant cannot establish cause because he could, and did, raise this issue earlier. Specifically, defendant's initial postconviction petition asserted that trial counsel failed to subpoena or call

several witnesses who would have established that defendant lived with Stefanits at the time of the offense. Even assuming the trial court incorrectly determined that the reviewing court's decision on direct appeal barred defendant's attempt to raise the issue in his first petition, that error would have no bearing on the effect of the initial proceedings under the Act. We further note that in dismissing defendant's first petition, the trial court also appeared to have considered the merits of defendant's claim.

¶ 17 We are unpersuaded by defendant's reliance on *People v. Britt-El*, 206 Ill. 2d 331, 337-38 (2002). There, the supreme court rejected the defendant's assertion that his second petition was not truly successive because the trial court dismissed the first petition as untimely, rather than dismissing it on the merits. See also *Id.* at 337-38. The supreme court found with respect to the first petition that the defendant was accorded a full and final resolution on whether he had demonstrated a lack of culpable negligence for the untimeliness of his first petition. *Id.* Thus, *Britt-El* demonstrates that proceedings on a first postconviction petition are not rendered incomplete merely because the petition was dismissed on a purely procedural basis. This in no way furthers defendant's contention. Accordingly, the trial court properly denied defendant leave to file his successive petition.

¶ 18 B. ORDER OF PROTECTION

¶ 19 Next, defendant asserts the order of protection originally entered with his conviction must be vacated as void because it was entered without statutory authority. Specifically, defendant contends that no written petition for an order of protection naming Stafanits, her daughter and Podeszwa as petitioners was filed. See 725 ILCS 5/112A-2(a) (ii) (West 2000); 725 ILCS 5/112A-5(a) (West 2000). In addition, the trial court failed to hold a hearing on the request for an order of protection and make findings. See 725 ILCS 5/112A-20(b) (3), (4) (West 2000); 725

ILCS 5/112A-14 (c) (3) (West 2000). Notwithstanding our apparent rejection of this contention in our affirmance of the dismissal of defendant's second 2-1401 petition, we once again find that defendant's contention is not persuasive.

¶ 20 A void order may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. In addition, a judgment is void where entered without jurisdiction. *People v. Moran*, 2012 IL App (1st) 111165, ¶ 15. With that said, subject matter jurisdiction relates to a court's power to "determine cases of the general class to which the proceeding in question belongs." *People v. Hughes*, 2012 IL 112817, ¶ 20; see also *In re Marriage of Baniak*, 2011 IL App (1st) 092017, ¶ 15 (observing that jurisdiction is conferred by the constitution, not the legislature but that the authority to exercise jurisdiction is commenced by filing a complaint). Once the trial court has acquired jurisdiction, no subsequent error will oust it. *People v. Davis*, 156 Ill. 2d 149, 156 (1993). Instead, merely erroneous orders are only voidable and not subject to collateral attack. *In re M.W.*, 232 Ill. 2d 408, 414 (2009). Furthermore, even due process violations do not render a judgment void. *Hughes*, 2012 IL 112817, ¶ 29; but see *In re Hoffman*, 49 Ill. App. 2d 436, 440-41 (1964) (suggesting that due process violations may leave a court without personal jurisdiction, rendering a judgment void).

¶ 21 Here, the trial court's authority to exercise jurisdiction commenced when the State filed criminal charges against defendant. In addition, defendant does not dispute that the trial court had jurisdiction to adjudicate the charges against him. *Cf. In re S.A.C.*, 147 Ill. App. 3d 656, 657 (1986) (the respondent successfully argued that the trial court lacked jurisdiction where the *sole* matter before the court was a protection order). Furthermore, defendant does not dispute that orders of protection are within the general class of cases the trial court had the power to

adjudicate. As a result, any procedural error that ensued did not render the order of protection void.

¶ 22 In reaching this decision, we reject defendant's reliance on the direct appeal at issue in *People v. Cuevas*, 371 Ill. App. 3d 192, 197 (2007). There, the reviewing court had no need to determine whether the error at issue would render the order of protection void, as the error was not raised in the context of collateral proceedings. *Id.*; see also *People ex rel. Minter v. Kozin*, 297 Ill. App. 3d 1038, 1044 (1998); *In re Marriage of Henry*, 297 Ill. App. 3d 139, 143 (1998). We also reject defendant's reliance on case law that applies to sentencing. Although sentencing orders that exceed the scope of statutory requirements may be void (*Jackson*, 2011 IL 110615, ¶ 10), the primary purpose of orders of protection is to protect, not to punish. Defendant fails to acknowledge the fundamentally different nature of the two orders and has not persuaded us to expand existing sentencing precedent to include orders of protection.

¶ 23 III. CONCLUSION

¶ 24 The trial court properly denied defendant leave to file a successive postconviction petition raising an issue that has already been decided. In addition, defendant cannot challenge any errors regarding the order of protection in this collateral proceeding.

¶ 25 For the foregoing reasons, we affirm the trial court's judgment.

¶ 26 Affirmed.

¶ 27 Justice Pucinski, dissenting.

¶ 28 Once again, as in the direct appeal (2013 IL App (1st) 101027-U), I am at odds with my respected colleagues in the majority on the matter of the Order of Protection.

¶ 29 Illinois law is very clear: "Actions for orders of protection are commenced in conjunction with a delinquency petition or a criminal prosecution by filing a petition for an order of

protection, under the same case number as the delinquency petition or criminal prosecution

***provided that: *** (ii) the petition, which is filed by the State's Attorney, names a victim of the alleged crime as a petitioner." 725 ILCS 5/112A-2 (West 2000).

¶ 30 So, one defendant, one case number, two actions.

¶ 31 This is because: "(a) Any proceedings to obtain, modify, reopen or appeal an order of protection, whether commenced alone or in conjunction with a civil or criminal proceeding, shall be governed by the rules of civil procedure of this State." (725 ILCS 5/112A-6) (West 2000).

Order of protection cases are civil and cannot begin until the starting document, called the petition, has been filed.

¶ 32 In this case the State's Attorney and the judge took a shortcut which is unsupported by the statute. Without a petition there is no cause of action. And while "each circuit court in Illinois has the power to issue orders of protection" (725 ILCS 5/112A-8) (West 2000) no court can enter an order in a case that hasn't been filed. Without a petition the court does not have jurisdiction to enter an order of protection.

¶ 33 Further, every order of protection requires the court to make specific statutory findings in writing or orally but transcribed into the record of proceedings. This court did not make the specific statutory findings. 725 ILCS 5/112A-14) (West 2000).

¶ 34 The order of protection in this matter is void because there was no petition, but even if that could somehow be excused, the order of protection is still clearly voidable since there were no specific statutory findings.

¶ 35 Even assuming that the petition isn't necessary, and that the testimony in the criminal case may have supported an order of protection, the court still had to pronounce the specific order of protection findings to enter one.

¶ 36 For example, there was no finding that the Petitioner was a protected person under the Illinois Domestic Violence Act; no finding that there was abuse, no finding that "the nature severity, pattern and consequences of the respondent's past abuse ***and the likelihood of danger of future abuse" (725 ILCS 5/112A-14 (c) (1)) (West 2000) warranted an order of protection. Even though there were findings of criminal acts, the court still had to find that those acts amounted to abuse; and while it would seem that those findings would be redundant in a criminal case where the defendant was found guilty, the law is very precise. Obviously, if the legislature had intended for orders of protection to be entered without a separate petition and without separate findings based on the same conduct as a criminal prosecution, it would have written a very different law, for example provided for orders of protection as part of the sentencing statute.

¶ 37 The order of protection in this case should be reversed.