

SIXTH DIVISION
December 4, 2015

No. 1-13-2663

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 19685
)	
MATTHEW ECHEVARRIA,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 **Held:** We affirm the trial court's denial of leave to file a successive postconviction petition.

¶ 2 Defendant, Matthew Echevarria, appeals the denial of his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq* (West 2010). He contends that his right to due process was violated when the trial court denied his motion for leave to file the successive petition without notice to his counsel that the court would rule on his motion on that court date.

¶ 3 Following a 2002 jury trial, defendant was convicted of the 1999 first-degree murder of Robert Mirabella, and sentenced to 50 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Echevarria*, No. 1-02-2280 (2004) (unpublished order under Supreme Court Rule 23). In 2005, defendant filed a *pro se* petition for relief under the Act, asserting various constitutional violations. The trial court summarily dismissed his petition as frivolous and patently without merit, and this court affirmed that dismissal on appeal. *People v. Echevarria*, No. 1-05-1762 (2007) (unpublished order under Supreme Court Rule 23).

¶ 4 On May 16, 2008, defendant filed a *pro se* motion for leave to file a successive postconviction petition, and attached his successive petition to that motion. In his motion, defendant claimed that the summary dismissal of his initial petition without appointing counsel was improper since he stated the gist of a constitutional claim. In his successive petition, defendant asserted claims of ineffective assistance of trial counsel, insufficiency of the evidence to prove him guilty beyond a reasonable doubt, and actual innocence. On June 16, 2008, defendant filed a *pro se* motion for grand jury transcripts, which the trial court denied. Defendant then filed a "late motion for reconsideration" of that ruling, which the trial court also denied.

¶ 5 No further proceedings are reflected in the record until August 24, 2012, when counsel appeared in court on behalf of defendant. Counsel informed the court that he had been contacted by an innocence project about a year before regarding defendant's case, and requested time to file an amended petition since he was still going through the documents, and no ruling had been entered on the petition. At the close of the proceedings, the court asked, "I docketed this a long time ago, right?" to which counsel replied, "Yes." The court then granted the continuance.

¶ 6 On September 25, 2012, counsel appeared before a different judge, and explained that defendant had “filed a successive PC back in ‘07 or ‘08 and it was never ruled on. It sort of sat there until I motioned the case up in August.” The court responded that “[i]f it’s in the second stage there should be a State’s attorney assigned.” Counsel agreed, but stated that he was still investigating the case.

¶ 7 On November 15, 2012, counsel appeared before the original trial judge, represented that this was “a second stage PC,” and stated that he needed more time to investigate the case. The court granted defendant’s motion for a continuance and the case was then continued twice more. On May 8, 2013, counsel again asked that the case be continued because of a medical emergency. The court granted the continuance, then stated, “Did I docket this? Yes, I must have.”

¶ 8 On June 5, 2013, new counsel appeared on behalf of defendant and indicated that she would be taking over the case because defendant’s previous counsel was ill. The State pointed out that “for the record *** this is a successive petition. I want to make clear whether the court has docketed it and granted leave to file the successive petition.” Defense counsel indicated that she was also “confused about the procedural part, placement of the case,” and the following colloquy ensued:

“THE COURT: I don’t see any ruling on this.

THE STATE: As to leave to file?

THE COURT: Leave to file.

THE COURT: Let me take another look. I don’t remember. It is starting to all run together here.

THE STATE: One [postconviction petition] in '05 was denied and affirmed by the Appellate Court. This one in '08. May 16th of '08 this one was filed. It looks like, according to our printout of the clerk's system, it's been pending ever since. It doesn't show a leave to file having been granted.

THE COURT: In '08?

THE STATE: Yes.

DEFENSE COUNSEL: I told [the State,] the Appellate Court and Supreme Court made it clear that leave has to be granted. I don't know, at the time, that the Court would have been as clear on that then. I do know [previous defense counsel] was in the process of getting affidavits *** There are more things I need to look over, obviously.

THE COURT: Let me look at it. Put this on my couch in chambers."

¶ 9 On July, 18, 2013, the trial court denied leave to file the successive petition. Before so ruling, the following discussion took place:

"THE STATE: Judge, the last time this was up we, I believe we determined that this was a second successive P.C. and it was up today to determine if leave had been—

DEFENSE COUNSEL: Actually it was up to determine if leave had been filed because it was filed in 08. We looked in the half sheet, there was no clear indication. ***

THE COURT: Well, we're going to find out because leave to file is going to be denied pursuant to the Supreme Court. So we will just see what the Appellate Court says about this.

DEFENSE COUNSEL: Judge, for the record, I filed my appearance the last court date with the understanding that leave to file had been granted, I didn't know *** [I]f I had known earlier obviously that leave had not been granted, I would have potentially filed an amended petition with grounds for leave because I do believe in the records that I have there is an affidavit from somebody who is not in front of this court, so.

THE COURT: Well, all I can say is based upon the state of the record at the moment.

DEFENSE COUNSEL: Your honor also I didn't even have the copy of the petition TO review. Anyway, I didn't have a complete file. I came into this understanding leave had been granted, so that's where I stand.

THE COURT: All right. This is where I stand. I'll give you a copy of the Order."

¶ 10 In its written order denying defendant's motion for leave to file, the trial court found that defendant failed to satisfy the cause-and-prejudice test for filing a successive postconviction

petition. The court determined that defendant failed to identify any objective factor impeding his ability to raise his claims in an earlier proceeding, that he was not entitled to counsel for his initial petition because it did not proceed to the second stage, and that he failed to state a colorable claim of actual innocence. The court also assessed him \$105 in fees and costs for the frivolous filing under section 22-105 of the Code of Civil Procedure (Code). 735 ILCS 5/22-105 (West 2012).

¶ 11 In this appeal from that order, defendant does not address the merits of the court's ruling, but contends that he was denied his right to due process when the court, on a court date set for determining the status of the motion, entered into a ruling that denied that motion without notice to his postconviction counsel. He maintains that the court's unexpected ruling deprived him of adequate notice and the opportunity to be heard, and asserts that we should remand his cause for further proceedings under the Act. We review defendant's procedural due process claim *de novo*. *People v. Hall*, 198 Ill. 2d 173, 177 (2001).

¶ 12 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Generally, the Act contemplates the filing of only one postconviction petition (*People v. Ortiz*, 235 Ill. 2d 319, 328 (2009)), and provides that any claim of a substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-3 (West 2010). However, the bar against successive petitions may be relaxed where defendant can establish cause and prejudice for his failure to raise the claim earlier (*People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002)), or actual innocence (*Ortiz*, 235 Ill. 2d at 329).

¶ 13 That said, to file a successive postconviction petition, defendant must first obtain leave of court. 725 ILCS 5/122-1(f) (West 2010); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Leave of court may be granted only if defendant demonstrates cause for his failure to bring the claim in his initial postconviction proceedings and prejudice results from that failure (725 ILCS 5/122-1(f) (West 2010)), or sets forth a colorable claim of actual innocence (*People v. Edwards*, 2012 IL 111711, ¶¶ 22-24). A successive petition is not considered “filed” for purposes of the Act, and further proceedings will not follow, until leave is granted. *Tidwell*, 236 Ill. 2d at 161.

¶ 14 Here, defendant claims that the trial court violated his right to due process when, on a court date set for status on his motion seeking leave to file a successive petition, the trial court entered a ruling that denied the motion without notice to his postconviction counsel. He claims that this unexpected ruling deprived him of adequate notice and an opportunity to be heard requiring reversal and remand for further proceedings.

¶ 15 In support of this contention, defendant relies on *People v. Kitchen*, 189 Ill. 2d 424 (1999) and *People v. Bounds*, 182 Ill. 2d 1 (1998). In *Bounds*, defendant filed a postconviction petition for relief under the Act, and was subsequently granted leave to file an amended petition. *Bounds*, 182 Ill. 2d at 2. Before defendant filed his amended petition, however, the trial court granted the State’s motion to dismiss. *Id.* At the status hearing before the dismissal, the State, defense counsel, and the court agreed that the next court date would merely be a status date to establish defense counsel’s progress on the amended petition; however, on that date, the court granted the State’s motion to dismiss defendant’s postconviction petition without argument. *Id.* at 4-5. The supreme court found that the trial court’s ruling denied defendant his right to due process, noting that the trial court instructed the parties that the next court date would be for

status only, and defense counsel came prepared for a status call, only to be surprised when the trial court, without prior notice, granted the State's motion to dismiss. *Id.* at 5.

¶ 16 In *Kitchen*, the trial court dismissed defendant's initial postconviction petition at the second stage of proceedings. *Kitchen*, 189 Ill. 2d at 430. Before doing so, there were a number of status hearings on defendant's motion for discovery, and on the penultimate court date, the parties agreed to continue the case for "a final ruling as to the discovery requests." *Id.* at 428-30. At that hearing, the court denied all of the discovery requests, and also denied defendant's postconviction petition. *Id.* at 430. Defense counsel protested that he was surprised by the court's abrupt ruling, and pointed out that the matter was before the court that day solely on a motion for discovery. *Id.* at 430-31. Following *Bounds*, the supreme court stated that "defense counsel went to court prepared for one type of proceeding, only to be surprised when the trial court, without prior notice, reached the merits of the petition and denied all post-conviction relief. The decision to deny the petition was made without notice to the parties and without the benefit of argument from either defendant or the State." *Id.* at 434. Under these circumstances, the supreme court found that the dismissal was incompatible with the procedure set forth in the Act. *Id.* at 435.

¶ 17 These cases are factually inapposite to this one. Here, defendant was seeking to file a successive postconviction petition, while *Kitchen* and *Bounds* both involved initial petitions. The court below also did not indicate that it would address only one matter on the next court date, then rule on a separate matter. Rather, the transcripts of each of the previous relevant court dates show that the parties and the court were focused on determining whether leave to file the successive petition had ever been granted. On the penultimate court date, where defense counsel was present, the State pointed out that a printout from the clerk's office showed that leave to file

had not been granted, and the court asked the State to place that printout in chambers for review and continued the matter. On the next court date, the court denied defendant's motion for leave to file a successive petition, and provided the parties a detailed, written order outlining its ruling. Under these circumstances, we find no due process violation occurred.

¶ 18 As noted, a successive postconviction petition will not be considered filed, and further proceedings will not follow, until leave to file is expressly granted by the trial court. *People v. LaPointe*, 227 Ill. 2d 39, 44-45 (2007). Although defendant contends that if postconviction defense counsel had proper notice, she would have amended his petition to satisfy the cause-and-prejudice test or to state a claim of actual innocence, we observe that it is defendant's burden to obtain leave of court before a successive postconviction petition may be filed, so that further proceedings can follow. *Tidwell*, 236 Ill. 2d at 157. When leave of court has not been granted, the petition is not considered "filed" (*LaPointe*, 227 Ill. 2d at 44), and no further proceedings on his petition could take place.

¶ 19 Defendant, nonetheless, contends that "[c]ounsel's surprise at the ruling was evident" because counsel was under the impression that the petition was at the second stage of proceedings. This misconception, however, arose only because of the comment of an earlier trial court judge, which was itself based upon the representations of the initial defense counsel. At the first court date which new defense counsel attended, the State made it clear that this was a successive petition, and the court needed to determine whether leave to file had been granted. This new defense counsel conceded on two separate court dates that "leave has to be granted," indicating her understanding that the petition had not advanced to the second stage of proceedings, and the parties' uncertainty regarding whether leave to file had already been granted. This case, therefore, does not present the kind of lack of notice and surprise present in

Kitchen and *Bounds*, and we find that the trial court did not deny defendant his right to procedural due process in denying his motion for leave to file a successive postconviction petition.

¶ 20 Defendant next contends that he was improperly assessed \$105 in fees and costs for filing a frivolous petition. Defendant does not contend that the trial court erred in denying his motion for leave to file a successive petition on the merits, nor in finding that his filings were frivolous. Rather, he maintains that the long delay in ruling on his petition was attributable to the court, which “thwarted the efficient administration of justice.”

¶ 21 If a prisoner seeking postconviction relief under the Act files a frivolous pleading, motion or other filing under the Act, he “is responsible for the full payment of filing fees and actual court costs.” 735 ILCS 5/22-105 (West 2008). Here, where defendant failed to meet the conditions that would allow the filing of a successive postconviction petition, he was properly assessed the \$105 in fees and costs for filing a frivolous motion for leave to file a successive petition under section 22-105 of the Code. *People v. Conick*, 232 Ill. 2d 132, 140 (2008).

¶ 22 For the reasons stated, we affirm the judgment of the trial court.

¶ 23 Affirmed.