2015 IL App (1st) 140370-U

FIFTH DIVISION
DECEMBER 18, 2015

No. 1-14-0370

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. 07 CR 8620
	)	
QUANTES SIMS,	)	Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Trial court did not err in denying defendant leave to file his successive postconviction petition because he forfeited his sole argument for cause by not raising it before the trial court, and thus failed to meet the cause and prejudice test.

¶ 2 Defendant Quantes Sims appeals from the denial of his 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)). On appeal, defendant contends that the trial court erred because the record established that his claim met the cause and prejudice test set forth in *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002); see also 725 ILCS 5/122-1(f) (West 2012). He argues that the trial court's failure to admonish him regarding his mandatory supervised release (MSR) term violated his due process rights and established prejudice, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005). He also argues that the trial court failed to address the *Whitfield* claim in his original postconviction petition, therefore establishing cause. We find that defendant has forfeited his only argument of cause on appeal. Had he not done so, his claim must still fail because we find his assertions insufficient to establish cause. Accordingly, we affirm.

¶ 3 On September 22, 2008, defendant entered into a negotiated plea of guilty to aggravated battery with a firearm causing great bodily harm in return for a 15-year sentence. The State presented a factual basis that defendant drove past the victim who was standing in a Chicago alley on March 26, 2000. When he drove past a second time, defendant stuck a gun out of the window, and fired five or six shots towards the victim, who was struck once in the arm and suffered two broken bones. Defendant stipulated to the State's assertion and the trial court found that there was a factual basis for the charge. It also found that defendant's plea was knowing and voluntary and sentenced defendant pursuant to the agreement. Although the court admonished defendant, it did not inform him that he would have to serve a three-year term of MSR.

Similarly, defendant's mittimus does not mention an MSR term. Defendant did not directly appeal his conviction.

¶ 4 Defendant subsequently filed a *pro se* postconviction petition alleging that an MSR term had been added to his sentence as "an afterthought." He also asserted that this constituted an unconstitutional *ex post facto* law "by making [him] serve over 85% negotiated" and cited *Collins v. Youngblood*, 497 U.S. 37 (1990). The trial court summarily dismissed the petition, finding that the MSR statute was a proper exercise of legislative authority. Defendant did not appeal the dismissal.

¶ 5 Defendant filed a second *pro se* postconviction petition on October 29, 2013, which is at issue in the current appeal. In the petition, defendant alleged that the trial court had failed to admonish him that he would have to serve a term of MSR in addition to his negotiated sentence and that he had only recently learned of the MSR term. He argued that his plea was therefore neither knowing nor voluntary, that the State had breached the agreement by imposing an MSR term, and that he was entitled to the benefit of his bargain. The successive petition does not indicate why this claim was not raised in defendant's initial postconviction petition. Defendant also filed a motion entitled "Motion for Leave to File and Proceed *in Forma Pauperis* and for Appointment of Counsel." The motion also does not indicate why the petition's claim was not raised earlier.

¶ 6 The trial court addressed defendant's successive opinion in a written order entered on December 20, 2013. In the order, the court referred to defendant's "Motion for Leave to File Successive Petition for Post-Conviction Relief" and noted that defendant was trying to "utilize"

Pitsonbarger and *Whitfield* to overcome the fact that his claims either were raised or could have been raised in his first postconviction petition. The court explained that defendant "attempts to satisfy the cause and prejudice test by claiming that he did not receive a copy of his plea transcript *** until after he had filed and received a ruling on the first petition." In the court's written order and its oral pronouncement, the trial court denied defendant's "Motion for Leave to File a Successive Petition for Post-Conviction Relief" and then separately dismissed "[t]he *pro se* motion for appointment of counsel and the motion to proceed *in forma pauperis*" as moot. Defendant appeals.

¶ 7 Initially, we note that the parties disagree on the completeness of the record on appeal. The State asserts that defendant failed to include in the record his motion for leave to file a successive postconviction petition. Defendant, in his reply, asserts that his "Motion for Leave to File and Proceed *in Forma Pauperis* and for Appointment of Counsel" serves as a motion for leave to file a successive petition and no other motion exists. As appellant, defendant bears the burden of providing a complete record on appeal and any doubts that arise from the missing motion must be resolved against him. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Because defendant argues that the motion does not exist and confines his arguments to the record as presented, we will consider his arguments as presented. However, if any doubt arises as a result of the apparently missing motion, we must presume the trial court acted in conformity with the law and resolve the doubts against defendant. See *O'Bryant*, 99 Ill. 2d at 392.

¶ 8 On appeal, defendant contends that the trial court erred in denying him leave to file a successive postconviction petition because his claim met the cause and prejudice test set forth in

Pitsonbarger, 205 Ill. 2d at 462. See also 725 ILCS 5/122-1(f) (West 2012). He argues that the trial court ignored the *Whitfield* claim in his original petition, therefore establishing cause. He asserts that the trial court's failure to admonish him of his MSR term violated his due process rights, establishing prejudice. The State responds that defendant did not raise this argument below and has forfeited it on appeal. It alternatively argues that defendant's original petition did not raise a *Whitfield* claim and that his failure to appeal the original petition's dismissal bars him from raising the claim anew.

¶ 9 The Act provides a mechanism for a defendant to allege that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 15. Postconviction proceedings are collateral in nature; they are not an appeal from earlier judgment. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Accordingly, a defendant generally forfeits any claims that could have been raised on direct appeal but were not. *Petrenko*, 237 Ill. 2d at 499. However, a defendant does not forfeit a *Whitfield* claim by failing to bring a direct appeal because it would be "incongruous to hold that defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him." *Whitfield*, 217 Ill. 2d at 188. Although *Whitfield* recognized an exception to the general forfeiture rule, *Whitfield* claims are still subject to procedural defaults of various types. See *People v. Molina*, 379 Ill. App. 3d 91, 99 (2008) (finding *Whitfield* claim waived where postconviction petition was untimely); see also *People v. Adams*, 373 Ill. App. 3d 991, 995 (2007) (holding *Whitfield* claim subject to waiver for failing to satisfy cause-and-prejudice test).

¶ 10 The legislature intended the Act to provide defendants only a single petition except where a due process violation compels a successive petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 16. In order to file a successive postconviction petition, a defendant must first seek leave from the trial court to do so. 725 ILCS 5/122-1(f) (West 2012); *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Except where a defendant alleges actual innocence, leave will only be granted where a defendant "demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012); see also *People v. Ortiz*, 235 Ill. 2d 319, 329-31 (2009). A defendant must prove “cause” by showing an "objective factor external to the defense" that impeded his efforts to raise the claim in an earlier proceeding. *Pitsonbarger*, 205 Ill. 2d at 462. Prejudice is shown where the claimed constitutional error "so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464. The defendant bears the burden of prompting the court to consider whether leave should be granted and " 'submit[ting] enough in the way of documentation to allow a circuit court to make that determination.' " *People v. Edwards*, 2012 IL 111711, ¶ 24 (quoting *Tidwell*, 236 Ill. 2d at 161). We review the denial of a motion for leave to file a successive petition *de novo*. *People v. Wrice*, 2012 IL 111860, ¶ 50.

¶ 11 Defendant has forfeited his claim by failing to raise it in his initial postconviction petition. However, he asserts that his original petition sufficiently raised a *Whitfield* claim. At the first stage of postconviction proceedings, a trial court is required to liberally construe the claims of a *pro se* petition. See *People v. Hodges*, 234 Ill. 2d 1, 21 (2009). Yet, even viewing defendant's initial petition with a lenient eye, we find no claim under *Whitfield*. The pleading

does not mention admonishments, the voluntariness of his plea, or any language to suggest that he did not receive the benefit of his bargain. While he was not required to provide legal citation with his petition (*People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)), defendant did so. Rather than citing *Whitfield*, he identified his claim as a matter of "*ex post facto* law" and cited *Youngblood v. Collins*, 497 U.S. 37 (1990). Even under a liberal reading, defendant's bare assertion that the MSR term was added as an "afterthought" does not implicate an attempt to raise a *Whitfield* claim. Thus, defendant has forfeited any claim under *Whitfield* unless he can satisfy the cause and prejudice test set forth in *Pitonsbarger*. See *Pitsonbarger*, 205 Ill. 2d at 462.

¶ 12 Turning to defendant's cause argument, he argues that the trial court failed to address the *Whitfield* claim in his original postconviction petition, therefore establishing an external cause. The State responds that defendant has forfeited this argument on appeal because he did not raise it in the court below, citing *People v. Jones*, 213 Ill. 2d 498 (2004). It asserts alternatively that defendant's argument fails because his original petition did not raise a *Whitfield* claim and defendant did not appeal that petition's dismissal.

¶ 13 In *Jones*, the defendant's *pro se* postconviction petition alleging ineffective assistance of counsel was summarily dismissed by the trial court. *Jones*, 213 Ill. 2d at 502. While the defendant raised a new claim of improper admonishment on appeal, our supreme court held that the claim had been forfeited because it was not included in his petition. *Jones*, 213 Ill. 2d at 508-09 (citing *People v. Jones*, 211 Ill. 2d 140 (2004)). The supreme court noted that while an attorney's goals in adding new claims are "laudable," they "conflict with the nature of appellate review and the strictures of the Act" where a claim "was not fully considered by the trial court in

the course of its ruling." *Jones*, 213 Ill. 2d at 504-05. Here, as in *Jones*, defendant raises an entirely new argument on appeal. Neither his petition nor his motion to file *in forma pauperis* sets forth any argument for cause. Neither document even mentions his prior postconviction proceedings which are central to his claims on appeal. Therefore, as in *Jones*, defendant is barred from raising a new argument on appeal. We acknowledge that *Jones* involved the claims of an initial postconviction petition; however, we believe the supreme court's reasoning is equally applicable to the cause and prejudice arguments required with successive postconviction motions. As this court has previously noted, "[i]t is axiomatic that arguments may not be raised for the first time on appeal." *People v. Estrada*, 394 Ill. App. 3d 611, 626 (2009). We therefore find that defendant has forfeited the only cause argument he has raised on appeal.

¶ 14 We note that even if defendant had not forfeited his cause argument, it must ultimately fail. As previously discussed, we disagree with defendant's assertion that he implicitly raised a *Whitfield* claim in his original postconviction petition. Thus, the trial court cannot be faulted for failing to address a claim that was not raised. Moreover, where a defendant asserts cause based upon a deficient initial postconviction proceeding, he or she "must show that the deficiency directly affected his ability to raise the specific claim now asserted." *Pitsonbarger*, 205 Ill. 2d at 462. Despite now asserting that the trial court misinterpreted his original petition, defendant chose not to appeal. A postconviction petition is not a substitute for or an addendum to an appeal. See *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). If defendant believed that the trial court misinterpreted his *Whitfield* claim, the proper avenue for defendant's claim was an appeal from the initial petition's dismissal. His own failure to do so is not an external cause.

¶ 15 For the foregoing reasons, we find that defendant has forfeited his sole argument alleging cause for his failure to raise his *Whitfield* claim in a previous petition. Having raised no other arguments, he has not met his burden to prove cause. Therefore, we find that the trial court did not err in denying defendant leave to file a successive postconviction petition. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 16 Affirmed.