2015 IL App (2d) 130392-U
No. 2-13-0392
Order filed February 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HERMAN L. NITZ, JR., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 07-CF-2821 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court's order "summarily dismissing" defendant's second successive postconviction petition was susceptible to more than one interpretation, it was proper under either interpretation—either the court properly declined to rule on the issue of whether to grant leave to file the successive petition, or the court actually denied leave to file the successive petition, which also was proper.

¶ 2 Defendant, Herman L. Nitz, Jr., appeals the dismissal of his second successive postconviction petition. Originally, defendant's court appointed counsel filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), arguing that the appeal presented no issue of arguable merit because defendant had not made a motion or a request for

leave to file his successive petition. This court denied the motion, directing counsel to address whether, under *People v. Tidwell*, 236 Ill. 2d 150 (2010), it was error to dismiss the petition on the grounds that defendant had not made a motion or request for leave to file it. The parties filed briefs addressing this issue. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of theft of various items of jewelry from a display case in the foyer of St. Mark's Episcopal Church in Glen Ellyn, Illinois. 720 ILCS 5/16-1(a) (West 2006). Because the value of the stolen property was between $300 and $10,000 and the theft occurred in a place of worship, the offense was a Class 2 felony. 720 ILCS 5/16-1(b)(4.1) (West 2006). Based on his criminal history, defendant was sentenced as a Class X offender to 12 years' imprisonment. 730 ILCS 5/5-5-3(c)(8) (West 2006). The court imposed a three-year term of mandatory supervised release (MSR). 730 ILCS 5/5-8-1(d)(1) (West 2006). On direct appeal, this court rejected defendant's argument that his sentence was excessive. *People v. Nitz*, No. 2-09-0178 (unpublished order under Supreme Court Rule 23).

¶ 5 Defendant filed a number of *pro se* collateral attacks on his conviction, including two petitions for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), an initial petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2012)), and a motion for leave to file a first successive postconviction petition pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)). On June 4, 2012, this court affirmed the denial of defendant's motion for leave to file a first successive postconviction petition. *People v. Nitz*, 2012 IL App (2d) 110479-U.

¶ 6 On March 20, 2013, the circuit court clerk received in the mail a second successive postconviction petition from defendant. No motion for leave to file the petition accompanied the

mailing. The clerk stamped the petition "filed" and, pursuant to the court's local rules, placed the petition on the court's call. See 18th Judicial Cir. Ct. R. 30.10 ("In the case of motions, pleadings or other documents that are received by the Circuit Clerk by mail and which are filed, the Circuit Clerk shall place the matter on the court's call within 30 days of the date of filing."). At the status hearing on defendant's petition, at which only an assistant State's Attorney was present, the court noted that defendant had not requested leave of court to file a second successive postconviction petition. The court's written order indicated that defendant's petition was "summarily dismissed" on the basis that defendant had "failed to ask permission of the court to file a successive post-conviction petition." Defendant timely appealed.

¶ 7 II. ANALYSIS

¶ 8 On appeal, defendant contends that the supreme court in *Tidwell* held that a trial court has "authority to exercise discretion and review a successive petition in the absence of a motion seeking leave to file the petition." He argues that, given the manner in which the trial court dismissed his petition, it appears that the court believed that it lacked such discretion. Defendant maintains that a remand is appropriate in this situation, which would allow the trial court to exercise its discretion in deciding whether "his petition should be allowed to proceed."

¶ 9 The State responds that, under *Tidwell*, a trial court is not required to rule on a successive postconviction petition in the absence of a motion or a request for leave to file it. Thus, the State contends, the trial court was within its authority to dismiss defendant's petition.

¶ 10 The Act provides a method for a criminal defendant to assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). The Act contemplates the filing of only one petition. 725 ILCS 5/122-1(f) (West

2012); *People v. Edwards*, 2012 IL 111711, ¶ 22. However, there are two bases upon which the bar against successive postconviction petitions will be relaxed. *Edwards*, 2012 IL 111711, ¶ 22.

¶ 11 The first basis, known as the "cause and prejudice" exception, was adopted by our supreme court in *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002), and was later codified in section 122-1(f) of the Act. Under this exception, a defendant may file a successive postconviction petition upon demonstrating "cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice result[ing] from that failure." 725 ILCS 5/122-1(f) (West 2012). "[A] prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2012); *Pitsonbarger*, 205 Ill. 2d at 462. "[A] prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012); *Pitsonbarger*, 205 Ill. 2d at 464. The cause-and-prejudice test requires a defendant to meet "a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act [725 ILCS 5/122-2.1(a)(2) (West 2012)]." *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 12 The second basis for relaxing the bar against successive postconviction petitions, known as the "fundamental miscarriage of justice exception," has developed through case law and requires a defendant to show actual innocence. *Edwards*, 2012 IL 111711, ¶¶ 23. "The elements of a claim of actual innocence are that the evidence in support of the claim must be [1] 'newly discovered'; [2] material and not merely cumulative; and [3] of such conclusive character that it would probably change the result on retrial." *Edwards*, 2012 IL 111711, ¶ 32. When a defendant seeks to file a successive petition on the basis of actual innocence, leave should be

denied only where it is clear "that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24.

¶ 13 Under either exception, it is the defendant's burden to obtain "leave of court" before further proceedings on his claims can follow. *Edwards*, 2012 IL 111711, ¶ 24. The "leave of court" determination is made on the pleadings prior to the first stage of postconviction proceedings. *Smith*, 2014 IL 115946, ¶ 33. Our supreme court has clarified that "leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35. This court reviews *de novo* the denial of leave to file a successive postconviction petition. *People v. Edgeston*, 396 Ill. App. 3d 514, 518 (2009).

¶ 14 In *Tidwell*, the supreme court addressed "whether a motion or request is required to obtain a ruling allowing or denying leave to file a successive postconviction petition under section 122-1(f)." *Tidwell*, 236 Ill. 2d at 156. The court observed that, while section 122-1(f) "speaks to a required showing on the part of a defendant, and the necessity of action on the part of the circuit court, *** it does not explicitly *or* necessarily mandate the filing of a motion as a prerequisite to, or the impetus for, court action." (Emphasis in original.) *Tidwell*, 236 Ill. 2d at 158. Based on this observation, the court held that a trial court may *sua sponte* grant leave but that "it is not *required* to act in the absence of a motion or request." (Emphasis in original.) *Tidwell*, 236 Ill. 2d at 158. Stating its holding another way, the court explained that a trial court "is not obliged to rule in the absence of a motion or request, but *** may do so where documents submitted by a defendant supply an adequate basis for a ruling." *Tidwell*, 236 Ill. 2d at 152.

¶ 15 In reaching its holding, the court emphasized that it remains the defendant's burden to obtain "leave of court" to proceed with a successive postconviction petition. *Tidwell*, 236 Ill. 2d at 157. Thus, the court noted, "it is incumbent upon [a] defendant, by whatever means, to prompt the circuit court to consider whether 'leave' should be granted, and obtain a ruling on that question." *Tidwell*, 236 Ill. 2d at 157. According to the court, "[i]n most cases, this *will* require a motion or request and an articulated argument in order to initiate court action, but that is not necessarily so." (Emphasis in original.) *Tidwell*, 236 Ill. 2d at 157. At a minimum, the defendant must "submit enough in the way of documentation" to allow the court to decide whether to grant leave to proceed with the successive petition. *Tidwell*, 236 Ill. 2d at 161.

¶ 16 This brings us to the present case. Defendant mailed his second successive postconviction petition to the circuit clerk with no motion or request for leave to file it. Upon receiving the petition in the mail, the clerk stamped it "filed" and placed it on the court's call pursuant to a local rule. We note that, although the clerk stamped the petition "filed," a successive postconviction petition is not considered filed until the court has granted the defendant leave to file it. See *Tidwell*, 236 Ill. 2d at 158 ("[U]ntil such time as leave is granted, a successive petition, though received or accepted by the circuit clerk, will not be considered 'filed' for purposes of further proceedings under the Act.").

¶ 17 At the resulting status hearing, the court had two options: it could have simply declined to rule on whether to grant or deny leave to file the successive petition, or it could have *sua sponte* ruled on that issue. See *Tidwell*, 236 Ill. 2d at 158 (noting that a court "*may*" but "is not *required* to act in the absence of a motion or request" (emphases in original)). The court *sua sponte* entered an order "summarily dismiss[ing]" the petition. It is not entirely clear which option the trial court chose. The court's action could be interpreted as declining to rule on

whether to grant or deny leave to file the successive petition, or it could be interpreted as actually denying leave. We conclude that, under either interpretation, the court's order was correct. Thus, contrary to defendant's position, no remand is necessary.

¶ 18 Assuming that the court's order "dismissing" the petition was a declination to rule on the issue of whether to grant leave, the court acted within its discretion. *Tidwell* makes clear that a trial court is not required to rule on the issue of leave to file a successive postconviction petition in the absence of a motion or request. *Tidwell*, 236 Ill. 2d at 158.

¶ 19 Alternatively, assuming that by the court's action it denied leave to file the petition, the denial of leave was proper. All of the claims in defendant's petition either fail as a matter of law or do not warrant further proceedings under the Act because they fail to satisfy any exception to the bar against successive postconviction petitions. See *Smith*, 2014 IL 115946, ¶ 35 ("leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings").

¶ 20 Some of the claims in defendant's petition challenge actions by the Department of Corrections (DOC) after he was convicted and sentenced. Defendant alleges that DOC denied him 180 days' good conduct credit and treatment for Hepatitis C and mental health issues. These claims are inappropriate matters for postconviction relief, which is available only for constitutional deficiencies in the proceedings that resulted in a defendant's conviction, not for events occurring after the conviction. 725 ILCS 5/122-1(a)(1) (West 2012).

¶ 21 Defendant also claims that, because he was convicted of a Class 3 felony, he was ineligible for sentencing as a Class X offender, and his MSR term should have been 18 months

as opposed to 3 years. He correctly asserts that a void sentence can be attacked at any time, including in a successive postconviction petition. *People v. Waldron*, 375 Ill. App. 3d 159, 160 (2007). Nevertheless, defendant's claims fail as a matter of law, because he was not convicted of a Class 3 felony, but a Class 2 felony. The indictment charged defendant with theft of between $300 and $10,000 in property from a place of worship, which is a Class 2 felony. 720 ILCS 5/16-1(b)(4.1) (West 2006). The jury returned a guilty verdict on this offense, and the trial court entered a conviction of this offense. The mittimus indicates that defendant was convicted of a Class 3 felony, but this was clearly a scrivener's error. Because defendant had at least two prior convictions of Class 2 felonies, the trial court properly sentenced defendant as a Class X offender (730 ILCS 5/5-5-3(c)(8) (West 2006)) and imposed a three-year MSR term (730 ILCS 5/5-8-1(d)(1) (West 2006)). Defendant's sentence was not void.

¶ 22 Defendant also claims that his MSR term is void under the reasoning of *Carroll v. Hathaway*, No. 10-C-3862 (N.D. Ill. Jan. 19, 2012), in which the federal district court issued a writ of habeas corpus excusing the defendant from having to serve any MSR term, where the state trial court failed to impose an MSR term at sentencing. Defendant's claim fails as a matter of law, because the trial court here imposed a 3-year MSR term at sentencing. Furthermore, the district court in *Hathaway* reversed its decision on reconsideration (*Carroll v. Hathaway*, No. 10-C-3862 (N.D. Ill. Sept. 5, 2012)), and the Seventh Circuit affirmed the denial of habeas relief on appeal (*Carroll v. Daugherty*, 764 F.3d 786 (7th Cir. 2014)).

¶ 23 Defendant's successive petition also contains a claim labeled "actual innocence," but the only allegation in support of the claim is that defendant's "guilt was not proven beyond a reasonable doubt at his jury trial." Defendant asserts in the petition that he needs a copy of the record so that he can "fully develop and better present his actual innocence claim based solely on

facts in that record." Defendant's actual innocence claim fails as a matter of law, because such claims must be based upon newly discovered evidence. *Edwards,* 2012 IL 111711, ¶ 32. Any evidence contained in the record is not newly discovered.

¶ 24 The State requests that we correct defendant's mittimus to reflect that his theft conviction is a Class 2 felony, not a Class 3 felony. Because we have already determined that the mittimus contains a scrivener's error listing the conviction as a Class 3 felony, we grant the State's request. We correct defendant's mittimus to reflect that his conviction of theft was a Class 2 felony (720 ILCS 5/16-1(b)(4.1) (West 2006)). See *People v. Douglas,* 381 Ill. App. 3d 1067, 1069 (2008) (pursuant to its authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1976), the appellate court may correct the defendant's mittimus without remanding the cause to the trial court).

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we modify the mittimus to reflect that defendant's conviction of theft was a Class 2 felony, and we affirm the judgment of the circuit court of Du Page County in all other respects.

¶ 27 Affirmed as modified.