

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).

2015 IL App (4th) 130466-U

NO. 4-13-0466

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 8, 2015

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DANIEL L. TURNER,)	No. 06CF1560
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition where defendant failed to demonstrate cause and prejudice to justify a successive petition, and no meritorious issue can be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant, Daniel Turner, with unlawful restraint, vehicular hijacking, and aggravated battery. The charges stemmed from an incident in September 2006, when defendant, Andrea Thomas, and two others, including defendant's brother, were riding

around town drinking in the brother's vehicle. When they exited the vehicle, defendant chased Thomas, and when he caught her, punched her in the face. He demanded the keys to her car, which she gave to him. Defendant forced Thomas into the car and drove away with her inside. His brother followed in his own vehicle. Thomas climbed into the back seat while defendant continued punching her. Defendant stopped the vehicle and Thomas escaped to a nearby Walgreens. Thomas turned around and saw defendant drive her vehicle into the front end of defendant's brother's vehicle, destroying the front end of Thomas's vehicle.

¶ 5 City of Champaign police officer Dennis Baltzell responded to the scene and completed an accident report, but he did not send the report to the State's Attorney's office. The report allegedly indicated the owner of the vehicle was Randall Farmer, not Thomas, as she had claimed.

¶ 6 After a January 2007 trial, the jury found defendant guilty of all three offenses. The trial court sentenced defendant to 30 years' for vehicular hijacking and to concurrent 3- and 5-year terms on the unlawful-restraint and aggravated-battery convictions. These sentences were ordered to run consecutively to defendant's sentences in another case.

¶ 7 Defendant filed a direct appeal, claiming he should have been sentenced to no more than 15 years' because of a conflict between two statutory provisions. This court affirmed defendant's conviction and sentence. *People v. Turner*, No. 4-07-0188 (June 23, 2008) (unpublished order under Supreme Court Rule 23).

¶ 8 On July 1, 2009, defendant filed a postconviction petition, alleging (1) the trial court erred in denying trial counsel's motion to withdraw, (2) the State failed to prove elements of vehicular hijacking, (3) appellate counsel was ineffective, and (4) the State used perjured testimony and committed a *Brady* violation (see *Brady v. Maryland*, 373 U.S. 83 (1963)) by

failing to reveal the State's agreement with the witness. The circuit court dismissed defendant's petition at the first stage and this court affirmed the dismissal on appeal. See *People v. Turner*, No. 4-09-0542 (October 25, 2010) (unpublished order under Supreme Court Rule 23).

¶ 9 On April 17, 2013, defendant filed a motion for leave to file a successive petition for postconviction relief and a proposed petition. Defendant alleged another *Brady* violation regarding Officer Baltzell's failure to send the report to the prosecutor. Defendant claimed the disclosure of the report would have afforded defense counsel the opportunity to impeach both Thomas's and Baltzell's testimony regarding the ownership of the vehicle. Defendant asserted he was unable to raise this issue earlier because he had just recently received the report.

¶ 10 On April 23, 2013, the circuit court denied defendant's motion for leave, finding defendant had not satisfied the cause-and-prejudice test. The court stated: First, "[a]s set forth on page 61 of the transcript attached to the defendant's petition, his attorney had a copy of this innocuous report." Second, "[a]bsolutely no prejudice can be assigned to this issue."

¶ 11 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In December 2014, OSAD filed a motion to withdraw as appellate counsel, including in its motion a brief analyzing potential meritorious issues. The record shows service on defendant. On its own motion, this court granted defendant leave to file additional points and authorities, which he did on February 10, 2015. The State has responded.

¶ 12 II. ANALYSIS

¶ 13 On appeal, OSAD contends no meritorious issues can be raised for review. Specifically, OSAD contends no colorable argument can be made that the circuit court erred in denying defendant's motion for leave to file a successive postconviction petition. In other words, OSAD contends no colorable argument can be made to show that defendant demonstrated the

requisite cause and prejudice of section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2012)) to allow the filing of a successive petition.

¶ 14 Defendant disagrees and claims his motion did satisfy the cause-and-prejudice test, arguing the result of the trial could have been different had the report been available to impeach the State's witnesses as to the owner of the vehicle. When the trial court has not held an evidentiary hearing, this court reviews *de novo* the denial of a defendant's motion for leave to file a successive postconviction petition. See *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010).

¶ 15 The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their constitutional rights. *People v. Guerrero*, 2012 IL 112020, ¶ 14. The Act generally limits a defendant to one postconviction petition and expressly states any claim cognizable under the Act that is not raised in the original or amended petition is deemed forfeited. *Guerrero*, 2012 IL 112020, ¶ 15 (citing 725 ILCS 5/122-3 (West 2006)). Section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) provides the following:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner 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. For purposes of this subsection (f): (1) 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; and (2) 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."

¶ 16 Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *Guerrero*, 2012 IL 112020, ¶ 15. In determining whether a defendant has established cause and prejudice, the trial court may review the " 'contents of the petition submitted.' " *People v. Gutierrez*, 2011 IL App (1st) 093499, ¶ 12 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 162 (2010)).

¶ 17 Defendant claimed he was unable to raise this issue in his postconviction petition because the accident report was not available to him. However, the report was in fact available as both defense counsel and the prosecutor referred to the report during defendant's January 2007 trial. The fact that defendant did not request a copy of the report until May 2012 does not constitute "cause" within the meaning of section 122-1(f) of the Act. See *Guerrero*, 2012 IL 112020, ¶¶ 16-17 (defendant did not establish cause when he knew about the mandatory supervised release term when he filed his original petition). No reasonable argument can be raised on appeal that defendant sufficiently demonstrated cause to justify the filing of a successive postconviction petition.

¶ 18 Likewise, defendant cannot establish prejudice. He cannot demonstrate that Officer Baltzell's failure to file the accident report so infected the trial that the resulting conviction was obtained without due process of law. See *People v. Wrice*, 2012 IL 111860, ¶ 48. He claimed, because Officer Baltzell did not file the report, the State committed a *Brady* violation by not disclosing the report, which showed the actual ownership of the vehicle Thomas had claimed was hers. Defendant contends, had he known about the information in the report, his attorney could have effectively impeached both Thomas and Officer Baltzell at trial.

However, defendant's argument fails when examining whether the identity of the owner of the vehicle used in the vehicular hijacking is a material element of the offense. See *People v. Beaman*, 229 Ill. 2d 56, 72-3 (2008) (a *Brady* violation occurs when the State fails to disclose evidence favorable to the defendant and material to guilt or punishment). Pursuant to the vehicular hijacking statute, the State was not required to prove ownership of the vehicle used during the commission of the crime. See 720 ILCS 5/18-3 (West 2006).

¶ 19 Accordingly, defendant failed to meet the requirements of the cause-and-prejudice test for the filing of a successive postconviction petition. We agree with OSAD that no meritorious issue can be raised in this appeal, as the circuit court properly denied defendant's petition for leave to file a successive postconviction petition.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment. As part of our judgment, we award the State \$50 against defendant as costs of this appeal.

¶ 22 Affirmed.