

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) 130497-U

NO. 4-13-0497

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 16, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

v.)

DEBRA M. STAPLE,)

Defendant-Appellant.)

) Appeal from

) Circuit Court of

) Champaign County

) No. 08CF818

) Honorable

) Thomas J. Difanis,

) Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.

Presiding Justice Pope and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted the office of the State Appellate Defender's motion to withdraw as appellate counsel and affirmed the trial court's summary dismissal of defendant's second successive postconviction petition where defendant failed to show cause and prejudice.

¶ 2 In May 2013, defendant, Debra M. Staple, filed a second successive postconviction petition for relief, arguing (1) a conflict of interest existed where the sentencing judge had previously prosecuted defendant for an unrelated crime, and (2) ineffective assistance of trial counsel for failure to present mitigating evidence at sentencing. The trial court summarily dismissed the petition. Defendant filed a notice of appeal, and the court appointed the office of the State Appellate Defender (OSAD) to represent defendant. On appeal, OSAD moves to withdraw its representation of defendant, contending any request for review would be without merit. We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

We set forth the factual background of defendant's criminal case in *People v. Staple*, 402 Ill. App. 3d 1098, 932 N.E.2d 1064 (2010) (*Staple I*). We set forth the postconviction proceedings in *People v. Staple*, 2013 IL App (4th) 120484-U (unpublished order under Supreme Court Rule 23) (*Staple II*), which we quote at length:

"In January 2009, a jury convicted defendant, Debra M. Staple, of (1) aggravated battery (720 ILCS 5/12-4(b)(18), (e)(2) (West 2008)[)] and (2) obstructing justice (720 ILCS 5/31-4(a) (West 2008)). In February 2009, the trial court sentenced defendant to concurrent 10-year and 3-year terms of imprisonment for aggravated battery and obstructing justice, respectively. In April 2009, the court denied defendant's motion to reduce sentence and defendant filed a timely notice of appeal.

On direct appeal, defendant argued (1) the trial court erred by denying her motion to continue to retain private counsel and (2) the court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*.

In May 2010, while defendant's direct appeal was pending in this court, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)[,] arguing (1) she was denied her right to hire a private attorney[,], and (2) the State failed to prove her guilty of aggravated battery beyond a reasonable doubt. In

June 2010, the trial court summarily dismissed the petition as frivolous and patently without merit. Defendant did not file a notice of appeal from that dismissal.

In July 2010, this court issued a published opinion in defendant's direct appeal in which we rejected both of her claims and affirmed her conviction. *Staple I*, 402 Ill. App. 3d 1098, 932 N.E.2d 1064.

In April 2012, defendant filed *** [a] successive postconviction petition in which she again argue[d] the trial court erroneously denied her right to hire a private attorney. In May 2012, the trial court summarily dismissed the petition as frivolous and patently without merit because the 'exact same issues were argued and decided in the Appellate Court.' That same month, defendant filed a notice of appeal and the court appointed OSAD as counsel on appeal." *Staple II*, 2013 IL App (4th) 120484-U, ¶¶ 5-9.

While the appeal of defendant's first successive postconviction petition was pending, defendant filed the instant second successive postconviction petition, arguing (1) a conflict of interest existed where the sentencing judge had previously prosecuted defendant for an unrelated crime, and (2) ineffective assistance of trial counsel for failure to present mitigating evidence. In May 2013, the trial court summarily dismissed the second successive postconviction petition and defendant filed a timely notice of appeal. In August 2013, this court granted OSAD's motion to

withdraw from representing defendant on appeal of her first successive postconviction petition and affirmed the trial court's judgment. *Staple II*, 2013 IL App (4th) 120484-U, ¶ 10.

¶ 5 In June 2013, the trial court appointed OSAD to represent defendant in the appeal of the dismissal of her second successive postconviction petition. In October 2014, OSAD filed a motion to withdraw as appellate counsel, contending the record presents no meritorious issues for appellate review. On February 19, 2015, this court issued a rule to show cause why OSAD's motion should not be denied. OSAD represented notice of its motion was sent to defendant at the Decatur Correctional Center on October 21, 2014. This court's October 24, 2014, order granting defendant leave to file additional points and authorities was sent to defendant at the Decatur Correctional Center, the only address OSAD provided to this court. This court's order was returned to the Clerk's office marked "Offender no longer here." The Illinois Department of Corrections website (<http://www.illinois.gov/idoc/Pages/default.aspx> (last visited May 7, 2015)) showed defendant was released from custody (but remains on mandatory supervised release) on September 2, 2014, almost two months before counsel sent notice of the motion to withdraw.

¶ 6 On March 13, 2015, OSAD filed a motion to withdraw the previously filed motion and file a new motion to withdraw. OSAD updated this court with defendant's current address and, on its own motion, this court granted defendant leave to file additional points and authorities by April 17, 2015. Defendant filed none. We have considered the record and we conclude, as did OSAD, no meritorious issues can be raised as to the dismissal of defendant's second successive postconviction petition.

¶ 7 **II. ANALYSIS**

¶ 8 As an initial matter, we note defendant is no longer in custody but the issues on appeal are not moot because she remains on supervised release. See *People v. Pack*, 224 Ill. 2d

144, 151, 862 N.E.2d 938, 942 (2007); *People v. Correa*, 108 Ill. 2d 541, 546, 485 N.E.2d 307, 309 (1985). The Post-Conviction Hearing Act (Act) provides a mechanism by which a defendant may raise a claim her conviction was the result of a substantial violation of her constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2012). The postconviction petition is a collateral proceeding where a defendant may raise issues that were not, and could not have been, raised on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). Issues raised and decided on direct appeal are barred by the doctrine of *res judicata* and any issues that could have been raised on direct appeal, but were not, are deemed forfeited. *Pitsonbarger*, 205 Ill. 2d at 456, 793 N.E.2d at 619.

¶ 9 The Act "contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). "Consequently, a defendant faces immense procedural default hurdles when bringing a successive postconviction petition. Because successive petitions impede the finality of criminal litigation, these hurdles are lowered only in very limited circumstances." *People v. Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709. If a defendant can establish "cause and prejudice," the procedural default hurdles may be lowered. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. Cause may be shown "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). Prejudice may be shown "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). A defendant must satisfy both prongs to prevail. *Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709.

¶ 10 Defendant's second successive postconviction petition reads, in full, as follows:

"Conflict of Interest, due to the fact that Judge Difanis was my sentencing Judge when at an earlier time he was the prosecuting attorney against me on an earlier case, when he was in the State's Attorney's Office.

Ineffective assistance of counsel because my counsel failed to present to the court mitigating circumstances on my behalf.

This petition may be untimely, however, I was just recently able to receive assistance."

OSAD contends defendant's allegations in this petition cannot satisfy the cause-and-prejudice test. Defendant fails to argue any objective factor prevented her from raising these two claims on direct appeal or in her first two postconviction petitions. OSAD also contends defendant cannot show prejudice because (1) she did not allege any factors to show Judge Difanis acting as the sentencing judge prejudiced her, (2) the record does not reveal Judge Difanis's personal knowledge of prior cases affected the sentence imposed, and (3) she did not point to any mitigating evidence trial counsel could have presented.

¶ 11 Defendant has forfeited both of these claims by failing to raise the issues in any prior proceeding and failing to show an objective factor precluded her from so doing. Both of defendant's claims are matters of trial record and defendant could have raised both claims either on direct appeal or in one of her previous two postconviction petitions. Defendant does not allege any objective factor precluded her from raising these claims in previous proceedings. See *People v. Holman*, 191 Ill. 2d 204, 211, 730 N.E.2d 39, 44 (2000) ("The defendant has presented no basis for us to excuse his failure to present this issue in the earlier petition."). The mere statement defendant was only recently able to receive assistance is insufficient to establish cause.

See, e.g., *People v. Jarrett*, 399 Ill. App. 3d 715, 727, 927 N.E.2d 754, 766 (2010) (defendant's general assertion of diligence insufficient to establish cause).

¶ 12 Defendant cannot meet the prejudice prong of the cause-and-prejudice test. Nothing in the record indicates Judge Difanis relied on his personal knowledge of defendant's criminal history in any way when imposing sentence. The trial court cited a period of four or five years where defendant managed to avoid any criminal convictions as a mitigating factor, even in light of the fact defendant was eligible for extended-term sentencing based on her extensive criminal history and multiple prior felonies. Nothing in the record suggests Judge Difanis was unable to be impartial in sentencing defendant. See *People v. Storms*, 155 Ill. 2d 498, 506, 617 N.E.2d 1188, 1191 (1993) (where nothing in the record suggested the judge could not be impartial in sentencing, the judge's prior service as an assistant State's Attorney was not a sufficient basis to disqualify him from sentencing a defendant he previously assisted in prosecuting).

¶ 13 As to the claim of ineffective assistance of counsel, defendant also cannot show prejudice. Defense counsel presented mitigation evidence in the form of a character letter and argued defendant's age, family ties, and drug abuse were all mitigating factors. Defendant has not identified any additional mitigating factors to convince us counsel's representation fell below an objectively reasonable standard. "To meet the cause-and-prejudice test for a successive petition requires the defendant to 'submit enough in the way of documentation to allow a circuit court to make that determination.'" *People v. Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172 (quoting *People v. Tidwell*, 236 Ill. 2d 150, 161, 923 N.E.2d 728, 734-35 (2010)). Defendant did not submit enough in the way of documentation for the trial court to determine both prongs of

cause and prejudice were satisfied. We affirm the trial court's dismissal of the second successive petition and conclude, as did OSAD, the record presents no meritorious issues for review.

¶ 14

III. CONCLUSION

¶ 15

We grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 16

Affirmed.