

NOTICE
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2015 IL App (4th) 130727-U
NO. 4-13-0727

FILED
March 18, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Logan County
FRANCHIE L. ELLIS,)	No. 06CF57
Defendant-Appellant.)	
)	Honorable
)	William A. Yoder,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* OSAD's motion to withdraw as counsel is granted where no colorable argument can be made the trial court erred in denying defendant leave to file a successive postconviction petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In June 2006, defendant, Franchie L. Ellis, was charged by information with aggravated driving under the influence (count I) (625 ILCS 5/11-501(d)(1)(F) (West 2006)), punishable by up to 28 years' imprisonment (730 ILCS 5/3-6-3(a)(2.3) (West 2006)); unlawful

possession of a controlled substance (count II) (720 ILCS 570/402(c) (West 2006)); and obstructing justice (count III) (720 ILCS 5/31-4(a) (West 2006)).

¶ 5 In January 2007, defendant entered into a partially negotiated guilty plea, pleading guilty to counts I and III with no agreement as to sentence. In May 2008, the trial court sentenced defendant to concurrent terms of 28 years' and 6 years' imprisonment on counts I and III, respectively.

¶ 6 In September 2008, defendant directly appealed his conviction and sentence, arguing (1) his guilty plea was invalid because his defense counsel had been ineffective when counsel (a) failed to communicate with defendant about the merits of the case; (b) failed to show defendant any evidence against him; (c) told defendant he would receive a sentence of three to four years, even though the minimum was six years; (d) sent an associate whom defendant had never met to advise him to plead guilty without discussing the guilty plea with defendant in detail; and (e) failed to advocate for a sentencing cap; and (2) his sentence was excessive. This court affirmed, finding *inter alia*, (1) defendant failed to show his counsel's allegedly deficient performance prejudiced him and (2) the trial court did not abuse its discretion in sentencing him to 28 years in prison. *People v. Ellis*, No. 4-08-0662, slip order at 1 (May 5, 2010) (Appleton, J., dissenting) (unpublished order under Supreme Court Rule 23). In September 2010, a petition for leave to appeal was denied. *People v. Ellis*, No. 110525, 938 N.E.2d 525 (Table).

¶ 7 In April 2011, defendant filed a postconviction petition, arguing (1) his trial counsel was ineffective for (a) advising him he would receive a three- to four-year sentence, (b) failing to discuss a deal or sentencing cap with the State, (c) failing to conduct pretrial discovery, and (d) failing to communicate or effectively represent him; and (2) his sentence was

disproportionate to the nature of his offense where (a) the weather conditions were poor; his driving was not reckless; and he had a limited criminal record; (b) another person with a more extensive criminal history had been convicted and received a five-year sentence; and (c) he "received the sentencing guidelines of a Class X sentence (6-30 years) for a [C]lass 2 charge." Defendant attached to the petition a complaint filed on August 29, 2006, by the Attorney Registration and Disciplinary Commission (ARDC) against defense counsel, alleging ineffective assistance, conflict of interest, neglect, failure to adequately supervise associates, misrepresentation, and failure to promptly refund unearned fees involving cases unrelated to defendant's case.

¶ 8 In June 2011, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. Defendant appealed. In June 2012, OSAD moved to withdraw, arguing no meritorious arguments could be raised on appeal. In December 2012, this court found defendant's arguments regarding ineffective assistance of counsel were either barred by *res judicata* or forfeited because they could have been presented on direct appeal. This court found defendant's argument regarding his sentence was also barred by *res judicata*. Therefore we granted OSAD's motion to withdraw and affirmed the trial court's dismissal. *People v. Ellis*, 2012 IL App (4th) 110586-U (Appleton, J., specially concurring, noting while he had dissented from the decision on direct appeal, he agreed the issues raised were *res judicata*).

¶ 9 In July 2013, defendant filed a successive postconviction petition and motion for leave to file that petition. (The motion does not contain a file stamp, nor does the circuit clerk's docket sheet reflect the filing of the motion. The page numbers of the record stamped on the motion are subsequent to the page numbers stamped on the successive petition.) The petition

alleged defense counsel's ineffective assistance violated his sixth-amendment right to effective and competent counsel and denied him his fourteenth-amendment right to due process.

Specifically, defendant alleged counsel (1) did not communicate with him about the merits of his case or as "matters progressed"; (2) did not prepare a defense or challenge the charges against him; (3) told defendant he would receive a three or four year sentence; and (4) did not represent him at the plea hearing, sending an associate instead. Defendant attached to the petition the ARDC's decision in *In re Raymond Prusak*, 06CH66, which had been issued on November 18, 2008. The ARDC found Prusak's incompetence, neglect, and failure to supervise subordinates as alleged in the 2006 complaint were founded.

¶ 10 In his motion for leave to file a successive petition, defendant argued the ARDC's decision was newly discovered evidence showing both cause and prejudice. Defendant alleged cause existed because he "did not get the information and results" from the ARDC decision until July 2011. He alleged prejudice existed because the decision corroborated his claim Prusak engaged in neglectful and incompetent conduct in his case by showing he engaged in very similar conduct in contemporaneous cases.

¶ 11 On August 14, 2013, the trial court summarily dismissed the second postconviction petition. The court ruled the petition raised the same claims defendant had raised on direct appeal and in his first postconviction petition. Defendant appealed, and OSAD was appointed.

¶ 12 In December 2014, OSAD filed a motion to withdraw as counsel on appeal, asserting no issues of arguable merit could be raised on appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points

and authorities by January 19, 2015. Defendant filed none. After examining the record consistent with our responsibilities under *Finley*, we grant OSAD's motion to withdraw as counsel on appeal, and we affirm the trial court's judgment.

¶ 13

II. ANALYSIS

¶ 14 OSAD argues no meritorious issue can be raised and an appeal from the trial court's dismissal of defendant's successive postconviction petition would be frivolous. We agree.

¶ 15

A. Standard of Review

¶ 16 A trial court's determination concerning whether to grant a defendant leave to file a successive postconviction petition is controlled by section 122-1(f) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(f) (West 2012)). See *People v. Barber*, 381 Ill. App. 3d 558, 559, 886 N.E.2d 1040, 1042 (2008). We review *de novo* a trial court's denial of a defendant's section 122-1(f) motion for leave to file a successive postconviction petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25, 966 N.E.2d 417.

¶ 17

B. Post-Conviction Hearing Act

¶ 18 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 rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Relief under the Act is only available for constitutional deprivations that occurred at the defendant's original trial. *Id.* The Act generally limits a defendant to one postconviction petition. *Id.* ¶ 15, 963 N.E.2d 909. Issues decided on direct appeal or in the original postconviction petition are barred from successive petitions by the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005). All

issues that could have been raised in the original proceeding or original postconviction petition are waived. *Id.* Where *res judicata* or waiver preclude a petitioner from obtaining relief, his claim will necessarily be frivolous and without merit. *Id.* at 445, 831 N.E.2d at 615. "As a consequence, a defendant faces a daunting procedural hurdle when bringing a successive post-conviction petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000).

¶ 19 However, there are two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. "The first basis for relaxing the bar is when a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier." *Id.* Section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) provides the following:

"Leave of court [to file a successive postconviction petition] 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."

¶ 20 "[T]he cause-and-prejudice determination [is] made on the pleadings prior to the

first stage of postconviction proceedings." *People v. Smith*, 2014 IL 115946, ¶ 33, 21 N.E.3d 1172. A petitioner must submit enough in the way of documentation to allow the trial court to determine whether the cause-and-prejudice test has been met. *Id.* ¶ 35, 21 N.E.3d 1172. Thus, leave of court to file a successive postconviction petition will 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." *Id.*

¶ 21 "The second basis by which the bar to successive postconviction proceedings may be relaxed is what is known as the 'fundamental miscarriage of justice' exception." *Edwards*, 2012 IL 111711, ¶ 23, 969 N.E.2d 829. To demonstrate a "fundamental miscarriage of justice," the petitioner must show actual innocence. *Id.*

¶ 22 C. Cause-and-Prejudice Test

¶ 23 Under the cause-and-prejudice test, claims in a successive postconviction petition are barred unless the defendant can establish (1) good cause for failing to raise his claims in prior proceedings and (2) actual prejudice resulting from the claimed errors. *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29. "Cause" can be "any objective factor, external to the defense, which impeded the [defendant's] ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462, 793 N.E.2d 609, 622 (2002). "Prejudice" results when "an error *** so infected the entire trial that the resulting conviction violates due process." *People v. Britt-El*, 206 Ill. 2d 331, 339, 794 N.E.2d 204, 209 (2002). Like the test for ineffectiveness of counsel, the cause-and-prejudice test is composed of two elements, both of which must be met in order for the defendant to prevail. *Pitsonbarger*, 205 Ill. 2d at 464, 793

N.E.2d at 624. Thus, if defendant's claims have no merit, no prejudice resulted, and the test is not met.

¶ 24

D. Defendant's Claims

¶ 25

Defendant's petition alleges defense counsel's ineffective assistance rendered his guilty plea void because counsel (1) did not prepare a defense, (2) did not consult with defendant, and (3) told defendant he would receive a three or four year sentence. These exact issues were raised in defendant's direct appeal and/or his initial postconviction petition. As a result, they are barred by *res judicata*. Moreover, defendant cannot satisfy the cause-and-prejudice test. He cannot establish cause because no external factor prevented him from raising his claims before this successive postconviction petition. In fact, defendant did raise them in his previous filings, *i.e.*, in his motion to withdraw his guilty plea, his direct appeal, and his initial postconviction petition.

¶ 26

In his motion for leave to file the successive petition, defendant asserted the ARDC's November 18, 2008, decision was newly discovered because he did not receive it until July 2011. However, the ARDC decision was publicly available to defendant on the date of its issuance. Defendant filed his initial postconviction petition in April 2011, over two years after the ARDC's decision was issued. Clearly, it was available to defendant when he filed his initial petition. Nor has he identified any external factors preventing him from including the ARDC decision with his initial petition. Moreover, even if defendant could successfully argue cause by establishing he did not have access to the ARDC's decision before filing his initial petition, he cannot establish prejudice. The ARDC decision did not contain any new allegations from those in the ARDC complaint, which was introduced in the trial court at the hearing on defendant's

petition to withdraw his plea. The only effect the decision had was to lend credibility to allegations of counsel's deficient performance in defendant's case. However, the trial court and this court already determined counsel's admittedly deficient performance did not render defendant's plea involuntary.

¶ 27 E. Fundamental Fairness

¶ 28 If the petitioner cannot show cause and prejudice, his failure to raise a claim in an earlier petition may still be excused if necessary to prevent a fundamental miscarriage of justice. *Pitsonbarger*, 205 Ill. 2d at 459, 793 N.E.2d at 621. However, the court explained, in non-death-penalty cases, a petitioner must show actual innocence to demonstrate such a miscarriage of justice. *Id.* We note defendant's claims in this case do not involve actual innocence.

¶ 29 Accordingly, we find the trial court's summary dismissal of defendant's successive postconviction petition should be affirmed. We note, however, rather than summarily dismissing the successive petition, the better practice, in accordance with the statute, is to deny leave to file the successive postconviction petition. Because any appeal in this cause would be frivolous, OSAD is granted leave to withdraw as counsel.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 32 Affirmed.