

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) 130927-U

NO. 4-13-0927

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 22, 2015

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DONTE LOFTON,)	97CF1130
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith, Jr.,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* No meritorious issues can be raised on appeal and, therefore, the motion of the Office of the State Appellate Defender to withdraw as counsel is granted.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised.

We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, Donte Lofton, filed this appeal after the trial court denied his request for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant attached to his petition a notarized letter from L.C., who identified defendant at trial as one of her attackers. In the letter, L.C. stated she

questioned defendant's conviction and maintained her identification of defendant during a lineup was improperly influenced by another witness.

¶ 5 In 1997, after a consolidated jury trial, defendant and his codefendant, Gregory Holmes, were convicted of three counts of home invasion (720 ILCS 5/12-11 (West 1996)), one count of armed violence (720 ILCS 5/33A-2 (West 1996)), and nine counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 1996)). Defendant was sentenced to 115 years' imprisonment.

¶ 6 At trial, testimony established the offenses were committed in the early hours of August 20, 1997, at two different houses. Five victims testified.

¶ 7 L.C. testified she went to bed around 12:15 a.m. Her five-year-old daughter was in the house. L.C. awoke finding defendant and Holmes in her bedroom. Defendant wore a ski mask; Holmes had a blue bandana over the lower part of his face. L.C. could see the outline of defendant's hair braids through the ski mask. Defendant previously visited L.C.'s house, up to 50 times. L.C. had also been in defendant's home before. L.C. knew defendant as "Tay" or "D-Money."

¶ 8 According to L.C., Holmes, holding a handgun, pulled L.C. from her bed by her hair. The men "wanted the money." L.C. denied having any money. Holmes pulled L.C. into the living room. There, the men forced L.C. to remove her clothes and lie on the floor. Holmes held a gun to L.C.'s head. While Holmes made vulgar statements to L.C. and made her lick the gun, defendant went through L.C.'s drawers. He returned to the living room calling her a "lying bitch" and telling her he knew she had money for her boyfriend's bond. Holmes began to stomp on L.C.'s head. The men threatened her daughter if she did not give them the money. Defendant

pulled out a screwdriver, handed it to Holmes, and told Holmes to "fuck that bitch." Holmes then used the screwdriver to sexually assault L.C. Defendant continued searching L.C.'s residence. When he finished, the men took L.C.'s telephone, pager, and Sony PlayStation. After the men left, L.C. went to a neighbor's house and called the police.

¶ 9 L.C. testified she identified defendant and Holmes in a lineup, after asking each man in the lineup to say, "You're a lying bitch." L.C. had not seen Holmes before. The police did not influence L.C.'s selection. She did not speak to the other victims until after the lineup.

¶ 10 Another victim, A.W., testified at trial regarding offenses committed at her residence on August 20, 1997. A.W. testified on that date, she resided with her sister, T.W., and her four-year-old niece. Their roommate, Amy Carney, moved out the previous day. Carney was defendant's former girlfriend. That evening, A.W.'s boyfriend, T.J., and T.W.'s boyfriend, G.W., were also at A.W.'s home. Around 12:30 or 1 a.m., the door to her home was kicked in. Holmes and defendant entered. A.W. identified both men. Holmes wore a bandana over his nose and mouth; defendant wore a ski mask and had braids. Defendant demanded T.W. give him "the money." While in the home, defendant and Holmes forced the adults to disrobe and perform various sex acts on each other. Defendant sexually assaulted one victim using a curling iron.

¶ 11 Three other victims of the attack at A.W.'s house testified and identified defendant and Holmes. T.W. testified, when she heard the door being kicked in, she looked at the clock and saw it was near 1:30 a.m. One intruder wore a bandana and the other wore a ski mask. T.W. recognized both men, identifying them as Holmes and defendant. T.J. testified regarding the assaults. In addition to witnessing and being forced to participate in sex acts, he was struck in the face and head by defendant and Holmes. T.J. identified defendant and Holmes

in a showup. G.W. also identified defendant and Holmes as the assailants. He identified them by their clothing and shoes in a showup.

¶ 12 The defense presented several alibi witnesses: Candace Dickens, Laura Bernice Cooper, Doris Nelson, and LaToya Jones. Each testified, on the night of August 19, 1997, Holmes and defendant were at Jones's home. Around 12:30 a.m. on August 20, defendant left Jones's home and went to the gas station with Dickens and Cooper. They were gone approximately 15 minutes. Between 12:30 and 12:45 a.m., Cooper, Dickens, and Nelson left Jones's house. Nelson returned a short time later and stayed until 2 a.m. Holmes and defendant were watching television during this time. Jones cooked tacos for defendant and Holmes around 2 a.m. A little later, the police knocked on the door. A police search did not reveal any of the stolen items, a ski mask, or a bandana.

¶ 13 On direct appeal, defendant's conviction for armed violence was overturned. On remand, his sentence was reduced to 110 years. *People v. Lofton*, No. 4-98-0769 (Apr. 28, 2000) (unpublished order under Supreme Court Rule 23). That sentence was affirmed on appeal. *People v. Lofton*, No. 4-00-0963 (Apr. 19, 2004) (unpublished order under Supreme Court Rule 23).

¶ 14 In December 2000, defendant filed his initial postconviction petition, asserting a claim under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The State moved to dismiss the petition. The trial court granted the motion upon concluding defendant was not entitled to *Apprendi* relief. This court affirmed. *People v. Lofton*, No. 4-02-0810 (unpublished summary order under Supreme Court Rule 23(C)(2)).

¶ 15 In February 2012, defendant petitioned for leave to file a successive

postconviction petition. Defendant asserted a claim of actual innocence based on newly discovered evidence. In support, defendant attached a letter from L.C. that was notarized. We note the letter is not an affidavit, as there is no indication L.C. provided sworn testimony. In the letter, L.C. wrote the following, in part:

"From the beginning of this case I have had doubts that [defendant] was the assailant in this case. The points I use for basis of this belief are as follows:

1. None of the stolen merchandise from either home was ever recovered on or around [defendant].
2. After the trial it was revealed that [defendant] had been involved in a sexual relationship that had gone sour with one of the alleged victims.
3. I spoke personally to another victim from the second house, [G.W.], who told me he[,] too[,] didn't believe that [defendant] was the one who committed this crime, which is one reason why a warrant had to be issued for his arrest to testify in this proceeding.
4. Prior to my lineup identification[,] I was in the same room as [A.W.] (the female victim from [the] second house, and [defendant's] ex-girlfriend) [and] she mentioned to me what kind of shoes [defendant] had [on]. When I made my identification[,] I would be lying if I said I didn't look at his shoes because I did[.]

[W]ithout [A.W.] telling me that I may not have been able to make this identification.

I am afraid that the police trusted in this [A.W.'s] statement and identification[;] however[,] I believe as do other victims in this case that this identification was not accurate and an innocent man is sitting in prison. Please help him."

¶ 16 Without granting defendant leave to file a successive petition, the trial court appointed counsel and allowed for an amended pleading. The State moved to dismiss the successive petition. The trial court found the contents of L.C.'s "affidavit" could have been discovered sooner and the evidence was not so convincing it would likely change the outcome of the trial. The court denied defendant leave to file the successive postconviction petition.

¶ 17 Defendant filed a timely notice of appeal. The trial court appointed OSAD to represent him. OSAD moved to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987). Notice of OSAD's motion was sent to defendant. This court gave defendant time to file additional points and authorities, which he did. The State filed a responding brief.

¶ 18 II. ANALYSIS

¶ 19 The Act sets forth a statutory remedy for criminal defendants who claim substantial violations of their constitutional rights occurred at trial. *People v. Edwards*, 2012 IL 111711, ¶ 21, 969 N.E.2d 829. The Act contemplates only one postconviction proceeding. *Id.* ¶ 22, 969 N.E.2d 829. There are, however, two means by which the prohibition against successive postconviction proceedings will be relaxed. *Id.* The first means is the "cause and

prejudice" exception, set forth in section 122-1(f) of the Act. *People v. Shotts*, 2015 IL App (4th) 130695, ¶ 64, 33 N.E.3d 313 (citing 725 ILCS 5/122-1(f) (West 2012)). Under this exception, a petitioner must show 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." 715 ILCS 5/122-1(f)(1) (West 2012). A petitioner establishes 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." 715 ILCS 5/122-1(f)(2) (West 2012). The second means is the "fundamental miscarriage of justice" exception. Under this exception, a petitioner must establish actual innocence. *Schotts*, 2015 IL App (4th) 130695, ¶ 65, 33 N.E.3d 313. Leave of court should be granted if the petition and documentation show the probability no reasonable juror would have convicted the defendant in light of the new evidence. *Edwards*, 2012 IL 111711, ¶ 24, 969 N.E.2d 829.

¶ 20 A trial court should deny leave of court to file a successive postconviction petition when a review of the successive petition and supporting documentation makes clear the petition and documentation are insufficient to justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172.

¶ 21 OSAD asserts no meritorious grounds may be asserted to challenge the trial court's decision denying defendant leave of court to file a successive postconviction petition. We agree.

¶ 22 No colorable argument can be made defendant's successive petition and supporting documentation is sufficient to justify further proceedings. The petition and documentation do not trigger either the cause-and-prejudice exception or the fundamental-

miscarriage-of-justice exception. Regarding the first exception, the record establishes defendant cannot establish the prejudice prong, as he has not demonstrated the alleged error so infected the trial the resulting conviction violated due process. Even if this court were to accept as true L.C.'s statements in the letter, statements that contradict her own testimony at trial, the identification evidence against defendant remains strong. Four other complaining witnesses identified defendant. Three of these four were familiar with defendant before the night of the attack. Even if L.C. was swayed during her identification of defendant, she later identified him at trial. No colorable claim can be made defendant was prejudiced by this alleged error.

¶ 23 Regarding the second exception, which requires proof of actual innocence, the record shows defendant's successive petition and supporting documentation are insufficient to give rise to a claim of actual innocence. Given the testimony of the four other victims, it is not probable no reasonable juror would have convicted defendant had L.C. indicated some doubt as to her identification of defendant. L.C.'s testimony regarding two men wearing a bandana and a ski mask who entered her home during the same early hours of August 20, 1997, demanded money, and committed sexual assault, would stand. The four other victims of that night identified two assailants matching L.C.'s description as defendant and Holmes. Those two assailants also demanded money and committed sex offenses. Three of those victims were familiar with defendant, making a positive identification of him more likely. While L.C.'s letter hints at another witness having similar doubts, no affidavit or other statement by that witness is in the record.

¶ 24 No colorable argument can be made the trial court erred in denying defendant leave to file the successive postconviction petition.

¶ 25

III. CONCLUSION

¶ 26 We grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 27 Affirmed.