

NOTICE

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2015 IL App (5th) 120215-U

NO. 5-12-0215

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	St. Clair County.
)	
v.)	No. 86-CF-960
)	
STEVEN O. BECK,)	Honorable
)	Michael N. Cook,
Petitioner-Appellant.)	Judge, presiding.

PRESIDING JUSTICE CATES delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in denying defendant leave to file a successive postconviction petition when defendant failed to satisfy the "cause-and-prejudice" test for filing such petitions, and the same claim was already raised in an earlier proceeding.

¶ 2 Defendant, Steven O. Beck, appeals the order of the circuit court of St. Clair County denying him leave to file a successive postconviction petition and dismissing his pleadings. We affirm.

¶ 3 In December of 1986, defendant was indicted on six counts of armed violence, six counts of attempted murder, six counts of aggravated battery, and one count of home invasion in connection with incidents that occurred on November 22, 1986. Defendant

agreed to plead guilty to the six counts of armed violence as well as the six counts of aggravated battery in exchange for the State dismissing the other counts. There was no agreement as to sentencing. The judge admonished defendant as to the nature of the charges, the State's burden of proof, defendant's right to a trial by jury or judge, his right to plead guilty or not guilty, and the consequences of his plea. Defendant indicated his understanding, stated that he was satisfied with counsel's advice, and wished to plead guilty. The judge admonished defendant concerning possible penalties which included the imposition of consecutive sentences if the court determined that consecutive sentencing was necessary to protect the public. Defendant again indicated his understanding of the possible penalties and his continued desire to plead guilty. The court found that defendant understood the charges and his rights and further found that the guilty pleas were knowing, voluntary and supported by a factual basis. Accordingly, the court accepted defendant's guilty pleas. At the sentencing hearing, the court found that consecutive sentences were necessary to protect the public, given the nature and circumstances of the crimes, and imposed six consecutive 15-year sentences on the armed violence convictions, totaling 90 years' imprisonment for defendant.

¶ 4 Defendant first filed a motion to withdraw his plea of guilty and to reconsider the sentences, which the trial court denied. Defendant next filed an appeal with this court contesting his convictions and sentences. We affirmed his convictions and sentences. See *People v. Beck*, No. 5-88-0441 (June 26, 1990) (unpublished order pursuant to Supreme Court Rule 23).

¶ 5 On December 10, 1990, defendant filed *pro se* a petition for postconviction relief claiming that he did not understand the terms of the plea agreement and that his sentences constituted cruel and unusual punishment. He further alleged ineffective assistance of trial counsel. Attorney Johnson, identified in the record as "P.K. Johnson, Jr.," was appointed to represent defendant in the postconviction proceedings. Johnson filed an amended postconviction petition claiming that defendant's guilty pleas were involuntary and unknowing, that the admonitions at the plea hearing were improper, and that defendant lacked sufficient time to discuss with plea counsel the consequences of his guilty pleas. The amended petition further alleged that the sentences imposed were not in keeping with defendant's background and that his guilty plea counsel provided ineffective assistance. At the evidentiary hearing on his petition, defendant testified that he chose to plead guilty and that he understood his rights at the time he pleaded guilty. He faulted plea counsel for failing to argue at sentencing that sentences should have been imposed on two counts only, for the two victims he harmed, instead of on all six. The court found no basis for postconviction relief and denied defendant's petition.

¶ 6 Defendant next appealed the judgment denying his postconviction petition. The circuit court appointed the Office of the State Appellate Defender (OSAD) to serve as his attorney on appeal. OSAD, however, filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). After concluding that all of the issues raised in the postconviction petition were either forfeited or without merit, this court granted OSAD's motion and affirmed the circuit court's judgment. See *People v. Beck*, No. 5-91-0755 (May 4, 1992) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 On October 11, 2000, defendant filed *pro se* a petition for *habeas corpus* claiming that the consecutive sentencing in his case was unconstitutional under the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Defendant argued that his sentences were void in that he was entitled to notice in the indictment of "whether the public needed protecting from the defendant." He also asserted that he was entitled to a jury's determination of that issue beyond a reasonable doubt. The circuit court dismissed the *habeas* petition after concluding that *Apprendi* was inapplicable to consecutive sentencing, and that defendant, by pleading guilty, waived any rights articulated in *Apprendi*. Defendant again appealed from this judgment. After concluding that *Apprendi* was inapplicable in this instance because defendant's valid pleas of guilty waived the rights to trial and proof beyond a reasonable doubt, this court again affirmed the circuit court's judgment. *People v. Beck*, No. 5-01-0542 (May 24, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 On January 31, 2005, defendant filed *pro se* a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)). This time defendant claimed his consecutive sentences were void because the trial court failed to state a justification for consecutive sentencing. The State countered by filing a motion to dismiss on the grounds that the petition failed to state a cause of action and was untimely. The court granted the State's motion to dismiss. The court concluded that the sentences were not rendered void by any failure to set forth in the record the basis for the court's opinion that consecutive sentences were necessary to protect the public. The court further stated that if defendant wanted a more detailed

justification for consecutive sentencing, he should have asked the trial court to provide it at the sentencing hearing. Defendant filed an untimely notice of appeal, and this court dismissed the appeal for lack of appellate jurisdiction. See *People v. Beck*, No. 5-05-0304 (Aug. 8, 2005) (unpublished summary order).

¶ 9 On March 28, 2011, defendant filed *pro se* a petition for successive postconviction relief and a *pro se* motion for leave to file a successive petition for postconviction relief. Defendant again claimed his sentences were void and that his rights guaranteed by the sixth and fourteenth amendments were violated. Defendant further requested that the court vacate the judgment entered on November 4, 1987, and grant him a new trial. The circuit court appointed attorney Johnson, identified in the record as "P.K. Johnson IV," to represent defendant in the successive postconviction proceedings. On March 28, 2012, Johnson filed a motion to withdraw as counsel stating his conclusion that the *pro se* successive petition was without merit.

¶ 10 At a hearing at which defendant, Johnson and the prosecutor were present, Johnson clarified for the court that he was the same attorney who had represented defendant in his first postconviction proceedings in 1991. He further stated that he believed defendant's petition was frivolous based upon the history of the case. The State asserted that, whether or not defendant should receive different counsel, they would be in the identical position that Johnson was in now. Defendant had no objection to Johnson's withdrawing, but he wanted the court to appoint him another attorney. The court granted Johnson's motion for leave to withdraw but denied defendant's request for the appointment of another attorney. The court further dismissed defendant's petition for

successive postconviction relief on the grounds of *res judicata* in that all the issues raised had previously been heard, and denied defendant leave to file a successive postconviction petition after noting that no order had been entered granting him leave to file a petition for postconviction relief. Defendant now appeals the court's denial of his motion for leave to file a successive postconviction petition as well as the dismissal of his postconviction petition. He also argues on appeal that the court erred in allowing appointed counsel to withdraw. He contends, given that his petition had been docketed for further proceedings, that the court erred in dismissing his successive postconviction petition without appointing new counsel when the attorney appointed for him could not provide reasonable assistance. We affirm.

¶ 11 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a means whereby criminal defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Harris*, 206 Ill. 2d 293, 299, 794 N.E.2d 181, 186 (2002). A postconviction proceeding is a collateral attack upon a prior conviction or sentence and does not relitigate a defendant's innocence or guilt. *People v. Evans*, 186 Ill. 2d 83, 89, 708 N.E.2d 1158, 1161 (1999). Consequently, any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been raised on direct appeal are deemed waived. *People v. West*, 187 Ill. 2d 418, 425, 719 N.E.2d 664, 669-70 (1999).

¶ 12 Section 122-3 of the Act contemplates the filing of only one petition. *People v. Erickson*, 183 Ill. 2d 213, 222-23, 700 N.E.2d 1027, 1032 (1998), *holding modified by*

People v. Pitsonbarger, 205 Ill. 2d 444, 793 N.E.2d 609 (2002). Successive postconviction petitions are permissible, however, provided certain stringent requirements are met to determine whether fundamental fairness requires an exception to the waiver rule of section 122-3. These requirements, known as the "cause and prejudice" test, dictate that a defendant show good cause for failing to raise the claimed error in a previous proceeding and show the actual prejudice that resulted from that claimed error. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). "Cause" means that there must have been some objective circumstance external to the defense that impeded the defendant's ability to raise the claim in an initial postconviction proceeding. *Pistonbarger*, 205 Ill. 2d at 460, 793 N.E.2d at 621. And, to establish "prejudice," the defendant must show that the claimed constitutional error so infected the trial that the resulting conviction violated due process. 725 ILCS 5/122-1(f) (West 2010). Both prongs of the test must be satisfied in order for a defendant to prevail on a motion for leave to file a successive petition for postconviction relief. *People v. Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909.

¶ 13 Here, defendant contends that because the circuit court appointed counsel, the court must have treated his *pro se* motion for leave to file a successive postconviction petition and the petition itself, as satisfying the cause and prejudice test, and therefore "filed." The appointment of counsel, however, does not transmute the successive petition into an initial petition. As recognized in *People v. Collier*, the trial court's consideration of the merits of the petition cannot be construed as an implicit ruling that a defendant has met section 122-1(f)'s threshold. *People v. Collier*, 387 Ill. App. 3d 630, 635, 900 N.E.2d

396, 402 (2008). We agree. The only way to meet 122-1(f)'s threshold is to establish the procedural requirements (cause and prejudice) for successive petitions. Defendant did not do so.

¶ 14 We additionally note that there is no constitutional right to counsel in postconviction proceedings (see *People v. McNeal*, 194 Ill. 2d 135, 142, 742 N.E.2d 269, 273 (2000)), nor is counsel required to pursue pleadings when there is no basis to do so under the facts and the law (see Illinois Rule of Professional Conduct 3.1). Defendant has already raised the legality of his consecutive sentences on direct appeal, in his initial postconviction petition, in a *habeas corpus* petition, and in a section 2-1401 petition. Even OSAD could find no basis on which to pursue an appeal with respect to defendant's initial postconviction petition. Certainly, appointed counsel cannot be faulted for finding no merit and moving to withdraw concerning defendant's successive postconviction petition. See also *People v. Greer*, 212 Ill. 2d 192, 205, 817 N.E.2d 511, 519 (2004) (fulfillment of third obligation under Rule 651(c) does not require postconviction counsel to advance frivolous or spurious claims on defendant's behalf). Moreover, consideration of any claims of ineffective assistance with respect to first postconviction counsel raised in a subsequent postconviction proceeding is beyond the scope of the Act. *People v. Flores*, 153 Ill. 2d 264, 277, 606 N.E.2d 1078, 1084 (1992), *holding modified by Pitsonbarger*, 205 Ill. 2d 444, 793 N.E.2d 609 (2002). Clearly, the trial court did not reach the merits of defendant's successive postconviction petition. Accordingly, we find no error in the court's dismissal of defendant's petition and denial of leave to file a successive postconviction petition. See *People v. Spivey*, 377 Ill. App. 3d 146, 150, 879

N.E.2d 391, 395 (2007) (neither trial courts, nor courts of review, should consider anything contained within a postconviction petition that violates section 122-1(f) of the Act); *People v. Williams*, 394 Ill. App. 3d 236, 242-43, 914 N.E.2d 641, 648 (2009) (because section 122-1(f) is a procedural prerequisite to obtaining review on the merits, the failure to meet the requirements of the statute means that neither the trial court nor the reviewing court should consider the merits of the petition).

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County denying defendant leave to file a successive postconviction petition.

¶ 16 Affirmed.