

NOTICE

Decision filed 02/26/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 130116-U

NO. 5-13-0116

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Williamson County.
	)	
v.	)	No. 82-CF-220
	)	
LEROY JENKINS,	)	Honorable
	)	John Speroni,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Goldenhersh and Schwarm concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly denied the defendant's motion for leave to file a successive postconviction petition where one of the issues had been decided in a previous proceeding and the defendant was barred by the doctrine of *res judicata* from raising it again, and where the defendant failed to meet the cause and prejudice test for filing a successive postconviction petition.

¶ 2 The defendant, Leroy Jenkins, was charged with armed robbery, aggravated kidnapping, unlawful restraint, and deviate sexual assault. Following a jury trial, the defendant was convicted and sentenced to natural life without parole. The defendant appealed, and this court vacated the unlawful restraint conviction and affirmed his remaining convictions and natural life sentence. *People v. Jenkins*, No. 5-83-0333 (Sept.

20, 1984) (unpublished order under Supreme Court Rule 23). In the years following his conviction and direct appeal, the defendant filed three postconviction petitions which were dismissed. Most recently, he filed a petition for a new trial that the trial court *sua sponte* recharacterized as a motion for leave to file a successive postconviction petition and denied. The defendant filed a timely notice of appeal from the denial of his request to file a fourth postconviction petition. We affirm.

¶ 3

### BACKGROUND

¶ 4 The defendant, Leroy Jenkins, was charged with armed robbery, aggravated kidnapping, unlawful restraint, and deviate sexual assault. Following a jury trial, the defendant was convicted of all counts and sentenced to natural life imprisonment without parole. The defendant appealed, and this court vacated the unlawful restraint conviction and affirmed his remaining convictions and natural life sentence. *People v. Jenkins*, No. 5-83-0333 (Sept. 20, 1984) (unpublished order under Supreme Court Rule 23).

¶ 5 On December 20, 1991, the defendant filed a *pro se* postconviction petition alleging ineffective assistance of counsel. The trial court dismissed the defendant's petition as patently without merit. The defendant appealed, and this court affirmed the dismissal. *People v. Jenkins*, 269 Ill. App. 3d 1159 (1995) (table) (unpublished order under Supreme Court Rule 23). On August 31, 1994, the trial court dismissed his second *pro se* postconviction petition, which had been filed while his first postconviction petition was pending. The defendant did not appeal this dismissal. On March 7, 1997, he filed a third *pro se* postconviction petition, and on March 17, 1997, he filed a *pro se* petition for *habeas corpus* relief. The trial court dismissed the defendant's postconviction petition as

frivolous and patently without merit. The court struck as moot other related motions and the defendant's complaint for *habeas corpus* relief.

¶ 6 The defendant appealed. The State Appellate Defender moved to withdraw as counsel because there was no merit to his appeal. The defendant filed a response. On February 25, 1999, after a plenary review, this court affirmed the trial court's order. *People v. Jenkins*, 302 Ill. App. 3d 1110 (1999) (table) (unpublished order under Supreme Court Rule 23).

¶ 7 On September 2, 2003, the defendant filed a *pro se* motion/petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)). On October 29, 2003, he filed a supplemental petition that incorporated his *pro se* arguments. He argued that his armed robbery and aggravated kidnapping convictions were void and should be vacated because the information failed to allege that he had been armed with a dangerous weapon and that the deficiencies of the charging instrument had not been cured by the jury instructions that required the jury, in order to find him guilty, to find that he had been armed with a dangerous weapon. He also argued that because at no time previous to the petition had his counsel attacked the verdicts as void, his attorneys' failure to do so deprived him of his right to competent trial and appellate counsel. The State filed a motion to dismiss.

¶ 8 On March 10, 2004, the trial court entered an order denying the defendant's motion/petition for relief from judgment. The defendant appealed. He then filed a *pro se* motion for rehearing. On October 5, 2004, the trial court denied the defendant's motion for rehearing and various supplements to it that he had filed. The defendant appealed.

¶ 9 On January 22, 2008, this court found that the defendant could not raise the allegations of his attorneys' alleged incompetence more than two years after entry of the judgment. It found that the defendant failed to assert or substantiate that his attorneys' alleged inadequate assistance was somehow concealed from him, and he failed to claim that he was under some legal disability or duress that prevented him from raising the issues. The appellate court had entertained a direct appeal and two appeals from the denial of his postconviction petitions in which the defendant failed to raise and argue these particular assertions of attorney incompetence. As a result of his failure to raise these issues, they were forfeited.

¶ 10 The State charged the defendant with armed robbery predicated on his act of taking property from the victim "by threatening the imminent use of force." The information did not charge that the defendant carried a dangerous weapon at the time of the crime as required by paragraph 18-2(a) of the Criminal Code of 1961 (Ill. Rev. Stat 1981, ch. 38, ¶ 18-2(a)). This court noted that the jury was instructed that in order to convict the defendant of armed robbery, it was necessary to find that he was armed with a dangerous weapon, and the defendant did not object to that instruction. The court found that when the issue of insufficiency of the information is raised posttrial, an error in the charging instrument will only require a reversal if the error was prejudicial. The court found that the defendant was not prejudiced by being precluded from preparing or presenting his defense because he knew that the State intended to prove he utilized a weapon to accomplish his crimes. The jury was instructed that it was necessary to find that the defendant was armed with a dangerous weapon in order to find that he was guilty

of armed robbery, and it returned a guilty verdict. The defendant failed to raise the sufficiency of the charging instrument on direct appeal. This court held that the defendant's armed robbery conviction was not void. The court affirmed the denial of the defendant's section 2-1401 petition. *People v. Jenkins*, No. 5-04-0705 (Sept. 5, 2007) (unpublished order under Rule 23).

¶ 11 On December 12, 2012, the defendant filed a "Motion for New Trial and for Ineffective Assistance of Counsel." This pleading is the subject matter of the present appeal. The defendant alleged that his armed robbery conviction was void because the charging instrument did not allege that he was armed with a dangerous weapon and that his counsel was ineffective for causing him to reject the State's plea offer for 30 years' imprisonment by promising him an acquittal at trial.

¶ 12 In a docket entry dated February 5, 2013, the trial court noted that it reviewed the defendant's pleading titled "Motion for New Trial and for Ineffective Assistance of Counsel" and determined that it was "in fact, a motion for leave to file a successive postconviction petition." The court found that the motion did not meet the requirements of section 122-1(f) of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1(f) (West 2012)). The court denied the defendant's motion for leave to file a successive postconviction petition.

¶ 13 On March 8, 2013, the defendant filed a *pro se* motion for reconsideration, which was denied. He filed a timely notice of appeal.

¶ 15 The defendant argues that his armed robbery conviction is void because the charging instrument did not allege that he was armed with a dangerous weapon, as required in the armed robbery statute at the time of the offense (Ill. Rev. Stat. 1981, ch. 38, ¶ 18-2(a)). He asserts that the trial court erred in denying him leave to file a successive postconviction petition because a void order may be attacked at any time or in any court, either directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004).

¶ 16 "Because an action seeking postconviction relief is a collateral proceeding, not an appeal from the underlying judgment, the Act contemplates the filing of only one postconviction petition." *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). All actions decided on direct appeal or in the original postconviction petition are barred by the doctrine of *res judicata*. *Id.* "There is no question that, generally, postconviction petitions are subject to the doctrine of *res judicata*, so that all issues actually decided previously are barred from being relitigated." *People v. Mescall*, 403 Ill. App. 3d 956, 967 (2010).

¶ 17 Although the instrument charging the defendant stated the correct statutory number for armed robbery, it did not allege the use of a dangerous weapon as the statute itself states. However, the jury was correctly instructed upon, and returned a verdict for, the offense of armed robbery. The voidness argument that the defendant is raising now is the same voidness argument he raised on appeal from the denial of his section 2-1401 petition. This court reviewed the issue and found that the defendant's armed robbery conviction was not void. *People v. Jenkins*, No. 5-04-0705 (Sept. 5, 2007) (unpublished

order under Rule 23). Because the issue was previously decided, the doctrine of *res judicata* applies, and it may not be relitigated.

¶ 18 The defendant argues that fundamental fairness requires the reversal of the trial court's denial of leave to file a successive postconviction petition because he stated the gist of a constitutional claim that counsel rendered ineffective assistance during the plea negotiations where counsel promised an acquittal and, but for that promise, the defendant would have accepted the State's plea offer. Prior to recharacterizing as a successive postconviction petition a pleading that a *pro se* defendant has labeled as a different action cognizable under Illinois law, the trial court must notify the defendant that the court intends to recharacterize the pleading, warn the litigant that because of the recharacterization the petition will be subject to the restrictions of successive postconviction petitions, and provide the litigant an opportunity to withdraw the pleading or amend it to contain all the factors and arguments appropriate to a successive postconviction petition. *People v. Pearson*, 216 Ill. 2d 58, 68 (2005). The trial court did not provide these admonishments prior to recharacterizing the defendant's petition as a successive postconviction petition.

¶ 19 In his brief, the defendant concedes that "[t]he circuit court properly treated [the defendant's] Motion for New Trial and for Ineffective Assistance of Counsel as a motion for leave to file a successive post-conviction petition." Waiver is the voluntary relinquishment of a known right. *People v. Tapia*, 2014 IL App (2d) 111314, ¶ 36. Because the defendant does not challenge the trial court's decision to recharacterize his petition as a successive postconviction petition and he conceded that the trial court acted

properly, we will review the court's denial for leave to file a successive postconviction petition on its merits.

¶ 20 The Act provides a tool through which a defendant can assert that his conviction was the result of a substantial denial of his rights under the constitution of the United States or Illinois or both. 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Little*, 2012 IL App (5th) 100547, ¶ 12. Except in limited circumstances, the Act contemplates the filing of only one postconviction petition. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Because the defendant has already had one complete opportunity to show a substantial denial of his constitutional rights, successive postconviction petitions are discouraged. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 16. To file a successive postconviction petition, the defendant must first obtain leave of court. *Little*, 2012 IL App (5th) 100547, ¶ 14. To obtain leave of court to file a successive postconviction petition, the defendant must either demonstrate actual innocence or satisfy the cause and prejudice test codified in section 122-1(f) of the Act. *Id.* To satisfy the cause and prejudice test, the defendant must show cause by identifying an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceedings and prejudice by demonstrating that the claim not raised during his initial postconviction proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2012). The denial of leave to file a successive postconviction petition is reviewed *de novo*. *Little*, 2012 IL App (5th) 100547, ¶ 14.

¶ 21 Because a postconviction proceeding is a collateral proceeding rather than an appeal of the underlying judgment, a postconviction proceeding only allows inquiry into



constitutional issues that were not, and could not have been, adjudicated on direct appeal. *Pitsonbarger*, 205 Ill. 2d at 455-56. Issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*, and issues that could have been raised, but were not, are waived. *Id.* For purposes of the cause and prejudice test, cause is "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *Id.* at 462. Prejudice occurs if the defendant was denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process. *Id.* at 464. For the defendant to prevail on the cause and prejudice test, both cause and prejudice must be shown. *Id.* Because the fundamental fairness exception applies to claims and not petitions, the cause and prejudice test must be applied to individual claims, not the petition as a whole. *Id.* at 462.

¶ 22 The defendant asserts that his trial counsel conveyed to him a plea offer from the State where he would receive a 30-year prison sentence in exchange for pleading guilty to one charge. He stated that he rejected the plea offer based upon trial counsel's assurance that he could be acquitted if the case went to trial. He argues that given that he was charged with two Class X felonies and two Class 1 felonies, and faced a possible sentence of natural life in prison, which he ultimately received, it is reasonable to assume that he would have accepted the plea offer but for counsel's promise of an acquittal. While the defendant admits that he did not raise the claim regarding his trial counsel's ineffective assistance during plea negotiations on direct appeal or in previous postconviction proceedings, he argues that fundamental fairness requires the relaxation of

waiver. He asserts that if his allegations against his trial counsel are proven true, counsel's unprofessional error resulted in him rejecting a plea offer and receiving a much more serious punishment than he would have had under the terms of the plea offer. He argues that for reasons of fundamental fairness he should be allowed to present his ineffective assistance of counsel claim.

¶ 23 The defendant cites no objective factor that precluded him from raising the claim in an earlier proceeding. Instead, he argues that, as a *pro se* litigant, he should be held to a more lenient standard and should be granted leave to file his petition because he stated the gist of a constitutional claim. While the trial court must examine every request for postconviction relief under the gist of a constitutional claim standard, successive postconviction petitions are subject to the more exacting cause and prejudice standard. *People v. Conick*, 232 Ill. 2d 132, 142 (2008). The defendant took a direct appeal and filed three prior postconviction petitions and a section 2-1401 petition for postjudgment relief. He never raised the issue of ineffective assistance of counsel during plea negotiations. He failed to provide any reason for why the argument had not been raised in one of his prior proceedings. Because the defendant did not show any objective factor, external to the defense, which impeded his ability to raise his claim in his prior postconviction petitions, he failed to satisfy the cause portion of the cause and prejudice test.

¶ 24 The trial court properly denied the defendant's motion for leave to file a successive postconviction petition. The defendant's armed robbery conviction was not void even though the charging instrument did not allege that he was armed with a dangerous

weapon. This court decided that issue on appeal from the denial of the defendant's section 2-1401 petition. Because that issue had been previously decided, the defendant was barred by the doctrine of *res judicata* from raising it again. The defendant failed to meet the cause and prejudice test for filing a successive postconviction petition. He did not cite any objective factor that precluded him from raising the claim of ineffective assistance of counsel during plea negotiations in his direct appeal or previous postconviction petitions. To prevail on the cause and prejudice test, both cause and prejudice must be shown, and because the defendant failed to satisfy the cause prong of the test, the trial court properly denied his motion for leave to file a successive postconviction petition.

¶ 25

#### CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Williamson County.

¶ 27 Affirmed.