

NOTICE
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2015 IL App (5th) 130492-U

NO. 5-13-0492

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
Plaintiff-Appellee,)	Edwards County.
)	
v.)	No. 10-CF-1
)	
RANDALL S. WHITE,)	Honorable
)	David K. Frankland,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant's petition for leave to file a successive motion for postconviction relief failed to show cause, the circuit court properly denied the motion, and the State Appellate Defender's motion to withdraw as counsel on appeal is granted where there is no meritorious argument to the contrary.

¶ 2 Defendant, Randall S. White, appeals the denial of his motion for leave to file a successive postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent him. The OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). Defendant was given proper

notice and granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant has not filed a response. We have considered the OSAD's motion to withdraw as counsel on appeal, examined the entire record on appeal, and found no error or potential grounds for appeal. For the following reasons, we grant the OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Edwards County.

¶ 3

BACKGROUND

¶ 4 On December 20, 2009, defendant broke the arm of his infant son. While at the hospital where his son was receiving medical care, he spoke with two special agents from the Illinois State Police. Defendant was not placed under arrest, and he was free to leave at any time. Despite not being under arrest, the special agents read him, and allowed him to read, his *Miranda* rights. At that time defendant stated that he understood those rights, and he also initialed a written form that he understood the *Miranda* rights that he read. The special agents then made an audio recording of their conversation with defendant. Prior to a scheduled trial, defendant filed a motion to suppress the conversation. The court held a hearing on the motion. At that hearing both special agents testified, and the audio recording of the conversation was played. The court denied defendant's motion to suppress, holding that the conversation was not custodial in nature, and that even if it was custodial, defendant "knowingly and voluntarily waived his rights."

¶ 5 On April 6, 2010, defendant pleaded guilty to aggravated battery of a child, his son. 720 ILCS 5/12-4.3(a) (West 2008). The charge was based on his breaking of his

infant son's arm, a Class X felony. The court sentenced defendant to 18 years' imprisonment followed by 3 years of mandatory supervised release.

¶ 6 Subsequently, defendant filed a motion to reduce sentence. He argued that his sentence should be reduced for the following reasons: first, the injured child had fully healed of his injuries, and there will not be any lasting disability in the child; second, it was an accident; therefore, a sentence of 8-12 years to be served at 50% would be more appropriate; third, in November or December of 2009 there was a defendant who received a 12-year sentence for the drug-induced killing of her five-year-old son. The court held a hearing on the motion to reduce sentence and denied the motion.

¶ 7 On November 5, 2010, defendant appealed his sentence to this court. He argued that his sentence should be reduced for a number of reasons: first, at the time of the offense he was only 22 years old; second, he performed most of the child rearing without significant help from the child's mother; and third, he did not harm his son maliciously. This court declined to reduce defendant's sentence and affirmed. *People v. White*, 2012 IL App (5th) 100539-U.

¶ 8 Defendant was diagnosed as being bipolar on December 23, 2010.

¶ 9 On June 7, 2012, defendant filed a petition for postconviction relief seeking either the reduction of his sentence or a new sentencing hearing. He asserted the sentence represented an abuse of discretion. He made two arguments: first, that case law supported his contention that his sentence was an abuse of discretion; second, the mitigating factors in his case made his sentence an abuse of discretion. In support of his argument that the sentence was an abuse of discretion defendant cited a number of cases.

Some cases held that given the facts of those cases, sentences within the statutory limits were an abuse of discretion. He also cited cases where defendants charged with aggravated battery of a child received shorter sentences than he did. In support of his argument that the mitigating factors of his case made the sentence an abuse of discretion he recited the following facts: he was in special education classes while in school; he was 22 years old at the time of the offense; he worked at a factory and did most of the child rearing; he showed emotion over his son's broken arm; the breaking of his son's arm was not premeditated or intentional; and Catholic Social Services found him remorseful over the breaking of his son's arm.

¶ 10 On August 10, 2012, the court dismissed defendant's postconviction petition at the first stage of the proceeding. The court stated that the petition was barred by *res judicata* because on direct appeal defendant argued that his sentence was excessive.

¶ 11 On December 8, 2012, defendant filed a successive petition for postconviction relief. His petition sought a reduced sentence, a new sentencing hearing, or to be allowed to withdraw his plea of guilty in order to plead guilty to a lesser charge. He again claimed his sentence was an abuse of discretion. In support he reiterated the arguments made in his first postconviction petition with the following additional facts: he claimed he was abused by his father as a child; he pointed out that his sister testified at his sentencing hearing that she never saw defendant mistreat his son and that defendant showed affection for his son; his mother testified that defendant was always willing to help when someone asked and that although defendant had anger issues he never resorted to violence; defendant's pastor testified that defendant attended church off and on and

was diligent in the work assigned to him by the pastor as part of his community service; in his statement to the police, he never stated that he intended to harm his son; defendant also took the blame for actions of the child's mother because he was threatened by her family; defendant pointed out that his criminal record did not include any violent crimes. Defendant again cited to cases where other defendants received shorter sentences than he had for committing the same offense.

¶ 12 The trial court dismissed the petition for postconviction relief noting that "petitioner attempts to relitigate issues previously addressed at all levels." No appeal was filed.

¶ 13 On July 24, 2013, defendant filed a motion for leave to file a second successive petition for postconviction relief. He claimed there was newly found evidence that would lead to a different result if a new trial was granted and that this made his conviction a violation of due process. He also alleged that he received ineffective assistance of counsel in the proceedings that led to his guilty plea and sentencing. The newly obtained evidence was that shortly after his confinement with the Illinois Department of Corrections, he was diagnosed as being bipolar. A review of the record shows that at the latest, defendant was diagnosed as being bipolar on December 23, 2010. In support of his ineffective assistance claim he asserted: trial counsel did not file a motion to suppress his statement to the police because the police did not have a "search, seizure, or arrest warrant" to talk to him at the hospital while his son was being treated for the broken arm; he told his trial counsel that he had not been read his *Miranda* rights, and his trial counsel told him that this was not a good defense; even though six area newspaper articles

reported on his case, trial counsel did not file a motion for change of venue; during the hearing on his motion to suppress defendant's statement to the police, trial counsel did not object to the State's second witness being present in the courtroom during the first witness's testimony; his trial counsel failed to object to one of the investigating officer's perjured statements, but at the same time defendant asserts that the perjury was not known until after the trial; trial counsel told defendant that it was not in his best interest to waive a speedy trial; trial counsel told him that he should accept a plea because if he did not he would likely receive a 30-year sentence due to the overwhelming evidence, as opposed to 12 years that would be the maximum sentence the judge would impose as a result of the plea; and finally, trial counsel dismissed defendant's request to be evaluated by a psychologist to determine if he was fit to stand trial. In support of his motion defendant attached news clippings, various affidavits, and his prison medical records.

¶ 14 On August 30, 2013, the trial court denied defendant's motion for leave to file a second successive petition for postconviction relief. The trial court stated that defendant failed to show cause and prejudice as required by the Post-Conviction Hearing Act.

¶ 15 On September 7, 2013, defendant filed a notice of appeal resulting in this appeal.

¶ 16 The OSAD was appointed to represent defendant. After reviewing the record, the OSAD filed a *Finley* motion asking for leave to withdraw as counsel on appeal because there were no meritorious issues to raise in this appeal.

¶ 17 ANALYSIS

¶ 18 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) allows a person convicted of a crime to "assert that their convictions were the

result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Arguments not raised in the "original or an amended petition [are] waived." 725 ILCS 5/122-3 (West 2012). A defendant may only file one petition under the Act without leave of court. 725 ILCS 5/122-1(f) (West 2012). We review a trial court's denial of a defendant's petition for leave to file a successive petition for postconviction relief *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 19 "Leave of court 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." 725 ILCS 5/122-1(f) (West 2012). Cause is 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." *Id.* Prejudice is shown by "demonstrating that the claim not raised in his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.*; *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002). "[L]eave of court to file a successive postconviction petition should 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." *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 20 In this case, the circuit court correctly denied defendant leave to file a successive postconviction petition because defendant failed to show cause for failing to address the issues he desired to raise in the pending petition in his previous postconviction petitions.

¶ 21 First we address the issue of the newly found evidence: defendant was diagnosed as being bipolar. At the latest, defendant was diagnosed as being bipolar on December 23, 2010. He filed his first petition under the Act on June 7, 2012—over 15 months after he was diagnosed. Defendant made no attempt to argue that there was any factor that impeded him from including this argument in his first petition for postconviction relief. There is no question that defendant was aware of, and could have raised, the issue of his diagnosis at the time he filed his first petition for postconviction relief.

¶ 22 Additionally, defendant also did not attempt to show cause for why he did not raise his ineffective-assistance-of-counsel claims in his first petition for postconviction relief. All of the actions that defendant argues resulted in ineffective assistance of counsel were related to actions taken by his trial counsel in his trial and sentencing. These acts were known to defendant at the latest at the time of his sentencing. Therefore, the issues comprising defendant's ineffective-assistance-of-counsel claim could have, and should have, been raised in defendant's first petition for postconviction relief.

¶ 23 The circuit court properly denied defendant's motion for leave to file a second successive postconviction petition because defendant failed to show cause for not raising the issues he desired to present in this petition in his previous postconviction petitions. As defendant failed to show cause, we need not address the prejudice prong of the cause

and prejudice test. See *Smith*, 2014 IL 115946, ¶ 37; *People v. Evans*, 2013 IL 113471, ¶¶ 11-13.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, the motion of the OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Edwards County is affirmed.

¶ 26 Motion granted; judgment affirmed.