

NOTICE  
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2015 IL App (5th) 140220-U

NO. 5-14-0220

IN THE

APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 90-CF-1365
	)	
DECARLOS MORROW, SR.,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

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

**ORDER**

¶ 1 *Held:* Where the defendant failed to show prejudice in his petition for leave to file a second successive postconviction petition, the circuit court properly denied him leave to file the petition.

¶ 2 The defendant, DeCarlos Morrow, Sr., appeals *pro se* the denial of his petition for leave to file a second successive postconviction petition. He argues that he is entitled to relief because his indictment was constructively amended. He also raises an insufficiency of the evidence claim. Because the defendant failed to show prejudice, as required to obtain leave to file a successive postconviction petition, we affirm.

¶ 3

## BACKGROUND

¶ 4 Lynne Thomas was found dead on December 16, 1990. On December 18, 1992, the defendant confessed to strangling her. Shortly after giving his confession, the defendant repeated his confession while being videotaped. A grand jury indicted the defendant. The indictment reads as follows: "The said defendant, without lawful justification, and with the intent to kill or do great bodily harm to Lynne Thomas, strangled Lynne Thomas, thereby causing the death of Lynne Thomas, in violation of Section 9-1(a)(1) Chapter 38, Illinois Revised Statutes."

¶ 5 The defendant went to trial on the first-degree murder charge. At that trial the videotape of the defendant's confession was played. At the conclusion of the trial, an instruction given to the jury stated:

"A person commits the offense of first[-]degree murder when he kills an individual if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual or another; or he knows that such acts will cause death to that individual or another; or he knows that such acts create a strong probability of death or great bodily harm to that individual or another."

The jury found the defendant guilty of first-degree murder. The jury also found that the defendant was eligible for a death sentence because the following aggravating factors existed: the murder was committed in the course of a robbery or attempted robbery; and the murder was committed in the course of aggravated criminal sexual assault, or attempted aggravated criminal sexual assault. Ultimately the jury declined to impose the death penalty. The circuit court denied defendant's posttrial motion, and sentenced him

to natural life, based on the jury's finding that the murder was committed in the course of a robbery or attempted robbery and/or aggravated criminal sexual abuse or attempted aggravated criminal sexual abuse.

¶ 6 The defendant appealed arguing, *inter alia*, that his confession was not voluntary. This court found that the confession was voluntary and affirmed the conviction. *People v. Morrow*, 269 Ill. App. 3d 1045 (1995).

¶ 7 On November 30, 1995, the defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1994)). The circuit court summarily dismissed the defendant's petition pursuant to section 122-2.1 and this court affirmed. *People v. Morrow*, No. 5-96-0052 (1998) (unpublished order under Supreme Court Rule 23).

¶ 8 On January 25, 1999, the defendant filed his first successive petition for postconviction relief. In the successive petition, the defendant raised two new issues. The circuit court denied the defendant's motion for leave to file a successive postconviction petition. The defendant appealed, and this court affirmed. *People v. Morrow*, No. 5-99-0304 (2001) (unpublished order under Supreme Court Rule 23).

¶ 9 On July 30, 2001, the defendant filed a petition for relief of judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)). Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant argued that the factors used by the court to enhance his sentence to one of natural life were not established by the jury beyond a reasonable doubt. The trial court *sua sponte* dismissed

the defendant's petition, and this court denied the defendant's request to file a late notice of appeal.

¶ 10 On February 28, 2014, the defendant filed a petition for leave to file a second successive petition for postconviction relief, accompanied by the petition he desired to file. The defendant argued that Supreme Court Rule 451(c) (eff. Apr. 8, 2013), *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002), and the plain-error doctrine relieved him of the need to show cause as required by the Act. The defendant alleged as error: that the indictment was constructively amended at trial, an argument more properly characterized as an *Apprendi* argument; and that due to a coerced confession and the circumstantial nature of the remaining evidence, he was not proved guilty beyond a reasonable doubt. The defendant included the *Apprendi* argument in his motion and the attached petition. The argument that he was not proved guilty beyond a reasonable doubt was contained only in the attached petition.

¶ 11 On March 3, 2014, the circuit court denied the defendant's petition for leave to file a second successive postconviction petition, finding that the defendant failed to show cause for not raising the issues set forth in his second successive postconviction petition in a previous postconviction petition. The defendant filed a motion to reconsider the circuit court's order denying him leave to file a second successive postconviction petition, which the circuit court denied.

¶ 12 On appeal the defendant argues that: (1) he is excused from showing cause and prejudice because he is entitled to plain-error review; (2) at his trial, the indictment was constructively amended to include robbery and aggravated criminal sexual assault; and

(3) he was not proved guilty beyond a reasonable doubt because his conviction rested on circumstantial evidence and a coerced confession.

¶ 13 The State argues that the indictment was not constructively amended, so the defendant suffered no prejudice. It does not address the issue of whether or not the defendant was proved guilty beyond a reasonable doubt.

¶ 14 ANALYSIS

¶ 15 The Act 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). The Act only allows a defendant to file one postconviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2012). A court may only grant leave for a petitioner to file a successive petition when the petitioner shows cause and prejudice. *Id.*

"[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; \*\*\* 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." *Id.*

"Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). The quantum of proof required to show cause and prejudice is greater than that required at the first stage of the proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35.

"[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." *Id.* (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002)).

Finally, *res judicata* and waiver apply to claims in a postconviction petition, and they are a valid basis for a trial court to dismiss a claim in a postconviction petition *sua sponte*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 16 As an initial matter, we must decide whether to address both of the issues raised by the defendant (constructive amendment of the indictment and failure of proof beyond a reasonable doubt), or whether, as the State did, we should only address the issue raised in the motion for leave to file a successive postconviction petition. Section 122-1(f) of the Act does not require that the defendant file a separate motion with the successive petition he desires to file. 725 ILCS 5/122-1(f) (West 2012). In fact, "an explicit request [is not] even required *if* the circuit court sees fit to consider the matter and rule of its own accord." (Emphasis in original.) *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). A petitioner must only submit enough "documentation to allow a circuit court to make [a] determination" that leave should be granted. *Id.*

¶ 17 Given the lack of sophistication of *pro se* defendants, we will not penalize the defendant for failing to include his sufficiency of the evidence argument in his motion for leave to file a successive postconviction petition; we address both issues. We review the

trial court's denial of leave to file a successive postconviction petition *de novo*. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 25.

¶ 18 Amendment of the Indictment

¶ 19 The defendant asserts that because he was indicted only for murder by strangulation, the indictment was constructively amended when the State offered evidence that the defendant also committed a robbery and aggravated sexual assault, both elements used to enhance the penalty for first-degree murder. The defendant relies predominantly on two cases: *Stirone v. United States*, 361 U.S. 212 (1960), and *Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151 (2013).

¶ 20 In *Stirone*, the United States Supreme Court held that a defendant cannot be tried on charges different from, or broader than, those set forth in the charging instrument. *Stirone*, 361 U.S. at 217. "[A] defendant's fifth amendment rights are violated when a trial court constructively amends an indictment by instructing a jury on a charge not included in the indictment, and thereby broadens the indictment \*\*\*." *People v. Henderson*, 142 Ill. 2d 258, 328 (1990) (analyzing *Stirone*). The defendant does not argue that the trial court instructed the jury on a charge not included in the indictment. Instead, he argues that the admission of the State's evidence that the defendant committed the murder in the course of a robbery and/or aggravated sexual assault led the jury to convict him of murder, thereby constructively amending the indictment. We disagree. Initially, we note that in order to obtain a punishment of death, or an extended term sentence, the State was required to prove beyond a reasonable doubt that the defendant committed the murder in the course of robbery or attempted robbery and/or aggravated

criminal sexual assault or attempted aggravated criminal sexual assault. Ill. Rev. Stat. 1989, ch. 38, ¶ 9-1(b). There is no question that the State was entitled to put on evidence of these aggravating factors. More importantly, the defendant's argument that the evidence of robbery and aggravated sexual assault led to his conviction of murder is not supported by the record. The jury, after seeing a videotape of the defendant confessing to killing Thomas, found him guilty of first-degree murder beyond a reasonable doubt. The instructions given to the jury give no indication that the jury was instructed it could find the defendant guilty of first-degree murder for anything besides the killing of Lynne Thomas.

¶ 21 Citing *Alleyne*, the defendant argues that an uncharged offense cannot be used as an aggravating factor. In *Apprendi* the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Apprendi*, there is strong *dicta*, albeit still *dicta*, indicating that a factor that increases the sentence for a crime beyond the statutory maximum sentence, "must be charged in an indictment[.]" *Id.* at 476, 480-81 (citing *Jones v. United States*, 526 U.S. 227 (1999)).

¶ 22 Over a decade later in *Alleyne*, the United States Supreme Court revisited its decision in *Apprendi*. The question in *Alleyne* was whether *Apprendi* applied to facts raising the mandatory minimum sentence that could be imposed for a crime. *Alleyne*, 570 U.S. at \_\_\_\_, 133 S. Ct. at 2155. Building on *Apprendi*, the United States Supreme Court held that such a fact must be submitted to the jury and found beyond a reasonable doubt.

*Id.* Again, as in *Apprendi*, there is one instance of *dicta* in the *Alleyne* opinion that indicates that a factor that increases the mandatory minimum or maximum of a sentence must be charged in the indictment. *Id.* at \_\_\_\_, 2160.

¶ 23 Even assuming, *arguendo*, that *Apprendi* and *Alleyne* stand for the proposition that every fact that increases the range of a sentence must be found on the face of the indictment, it avails the defendant nothing. That is because in *People v. De La Paz*, 204 Ill. 2d 426 (2003), the Illinois Supreme Court held, in conformance with the majority of state and federal courts, that *Apprendi* does not apply retroactively. *Id.* at 438-39. In *People v. Johnson*, 2015 IL App (2d) 140388, the court held that *Alleyne* does not apply retroactively. Since *Apprendi* and *Alleyne* were decided well after the defendant's conviction became final, he cannot rely on them to argue that his sentence cannot be increased to natural life because the necessary elements and the enhanced sentence did not appear on the face of the indictment. The indictment was not constructively amended, and the fact that aggravating factors were not found in the indictment is not an *Apprendi/Alleyne* violation of which the defendant can avail himself.

¶ 24 Guilty Beyond a Reasonable Doubt

¶ 25 The defendant's claim that he was not proved guilty beyond a reasonable doubt rests on two propositions: first, that his confession was coerced, so it was not admissible against him; second, that without his confession the State's evidence consisted merely of circumstantial evidence that could not prove him guilty beyond a reasonable doubt.

¶ 26 This court addressed whether the defendant's confession was coerced in the defendant's direct appeal, and we found that the confession was not coerced. The

defendant's argument in this regard is barred by *res judicata*. Therefore, in determining if the defendant was proved guilty beyond a reasonable doubt we will consider his confession. "The standard of review in a challenge to the sufficiency of the evidence is whether, when considering all of the evidence in the light most favorable to the State, a rational fact finder could have found the elements of the offense proved beyond a reasonable doubt." *In re Donald R.*, 343 Ill. App. 3d 237, 246 (2003) (citing *People v. Harris*, 333 Ill. App. 3d 741 (2002)). There is no doubt that viewing the evidence in the light most favorable to the State, including the defendant's confession, a rational trier of fact could find the defendant guilty of first-degree murder.

¶ 27

#### CONCLUSION

¶ 28 Because the defendant cannot show prejudice with regard to the issues he desires to raise in his second successive postconviction petition, the judgment of the circuit court of St. Clair County is affirmed.

¶ 29 Affirmed.