

No. 1-11-3131

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 25011
)	
LARRY PORCHE,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice HOFFMAN concurred in the judgment.

O R D E R

¶ 1 *Held:* Order denying defendant leave to file a successive post-conviction petition affirmed where defendant failed to satisfy the cause and prejudice test.

¶ 2 Defendant Larry Porche appeals from an order of the circuit court of Cook County denying him leave to file a successive *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that the court erred in dismissing his petition for failure to meet the cause and prejudice test where he has newly discovered evidence that was not available to him when he filed his first petition.

¶ 3 This court previously affirmed defendant's 2002 jury conviction of the September 25, 2000, aggravated criminal sexual assault of M.H., and sentence of 25 years' imprisonment. *People v. Porche*, No. 1-02-2348 (2003) (unpublished order under Supreme Court Rule 23). We also affirmed the summary dismissal of defendant's *pro se* post-conviction petition where he had alleged, *inter alia*, that trial and appellate counsel were ineffective because they failed to argue that a photograph posted of him on an elevated train platform rendered his identification unduly suggestive, and that trial counsel was ineffective for failing to argue and investigate improper behavior of courtroom personnel. *People v. Porche*, No. 1-04-3836 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 Defendant subsequently filed the *pro se* motion for leave to file a successive post-conviction petition at bar, alleging, in relevant part, that he had obtained newly discovered evidence that Chicago Transit Authority (CTA) police officer Nathaniel Hill had a bias against him when he investigated his case and conducted the photo array identification with A.V., a victim in another incident who testified at defendant's trial as part of other crimes evidence. Defendant also alleged that Officer Hill was biased against him when he testified against him at trial. Defendant claimed that he received this information from anonymous sources, who were friends of his family members and CTA and Chicago Police Department (CPD) employees, who wished to remain anonymous because of their employment positions.

¶ 5 Defendant alleged that prior to A.V.'s identification of him, he applied for a position with the CTA, and because of his criminal history, Officer Hill opened up an investigation of him on August 10, 2000. Defendant also alleged that his former girlfriend, who worked for the CTA, showed him how to illegally print CTA transfer cards, which he would sell. Officer Hill began to

investigate him, and on August 30, 2010, the officer followed him and told him that he would "bring him down."

¶ 6 On April 29, 2011, the circuit court denied defendant leave to file his successive petition, finding that he had failed to meet the cause and prejudice test. This court subsequently granted defendant's motion for leave to file a late notice of appeal from that order.

¶ 7 On appeal, defendant contends that the circuit court erred in denying him leave to file his successive petition because he failed to satisfy the cause and prejudice test. He claims that he presented "newly discovered evidence" through "anonymous" witnesses that Officer Hill, who conducted the photo array, was biased against him, and did not admit this bias at trial when he testified. Defendant claims that Officer Hill was biased because he had knowledge of him long before the photo array was conducted, and had a personal motive to ensure that he was identified as the perpetrator.

¶ 8 The Act contemplates the filing of only one post-conviction petition. *People v. Erickson*, 183 Ill. 2d 213, 222 (1989). However, leave of court may be granted to file a successive post-conviction petition where a defendant demonstrates cause for failing to raise the claim in his earlier petition and prejudice resulting from that failure. 725 ILCS 5/122-1(f) (West 2012). Defendant shows cause by identifying an objective factor that impeded his ability to raise a specific claim in his initial post-conviction petition, and prejudice by demonstrating that the claim not raised during his initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2012). Both prongs must be met before leave to file a successive post-conviction petition will be granted (*People v. Lee*, 207 Ill. 2d 1, 5 (2003); *People v. Edwards*, 2012 IL App (1st) 091651, ¶32), and

our review of the denial of leave to file a successive petition is *de novo* (*People v. Wilson*, 2014 IL App (1st) 113570, ¶31).

¶ 9 We initially observe that where a defendant sets forth a claim of actual innocence in his petition he is excused from showing cause and prejudice. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). In this case, however, defendant has not argued actual innocence based on newly discovered evidence; rather, he maintains that the newly discovered evidence was not available at the time he filed his initial petition, and, therefore, established the cause prong of the cause and prejudice test. He also maintains that he was prejudiced because Officer Hill's bias against him was not presented to the jury and could have influenced the identification process and raised doubt about the fact that defendant was even involved in the offense.

¶ 10 Although defendant claims that the anonymous sources of evidence cited in his petition are newly discovered; the vague assertions, without explanation or documentation as to when he learned of these "facts" or why this information was not available when he filed his initial petition, were insufficient to meet the cause prong of the test. *People v. Smith*, 2014 IL 115946, ¶35. Moreover, defendant specifically stated in his petition that Officer Hill followed him on August 30, 2010, and told him that he was going to "bring him down," which reflects defendant's awareness of Officer Hill's focus on him and potential bias prior to the sexual assault of which he was convicted. It is apparent that defendant could have raised this claim in his initial petition, and in the absence of any showing that there was some objective factor external to the defense that impeded his ability to do so, we find that he has failed to establish the cause prong of the test. *People v. English*, 403 Ill. App. 3d 121, 130 (2010).

¶ 11 We also find that defendant cannot establish prejudice. The trial record shows that A.V. was a victim of defendant in a similar crime, and identified defendant in the photo array conducted by Officer Hill. M.H., the victim in this case, identified defendant in a lineup conducted by another officer, and there is no indication that Officer Hill had anything to do with the identification of defendant as her assailant. Thus, defendant failed to show that his present claim so infected the trial that the resulting conviction or sentence violated due process, thereby establishing prejudice. *Smith*, 2014 IL 115946, ¶37, and cases cited therein. Since defendant failed to meet the cause and prejudice test, he is barred from filing a successive post-conviction petition. *Lee*, 207 Ill. 2d at 5; *English*, 403 Ill. App. 3d at 130.

¶ 12 In passing, we note that defendant also contends that there were irregularities in Officer Hill's trial testimony which made his testimony "questionable at best." To the extent that this is an attack on the sufficiency of the evidence to sustain defendant's conviction, we observe that such claims are not proper in post-conviction proceedings (*People v. Dunn*, 52 Ill. 2d 400, 402 (1972)) and that the issue is waived because we apply forfeiture to claims that defendant failed to address on direct appeal where they were based on facts ascertainable from the record (*People v. Jefferson*, 345 Ill. App. 3d 60, 70-71 (2003)).

¶ 13 In light of the foregoing, we affirm the order of the circuit court of Cook County denying defendant leave to file a successive post-conviction petition.

¶ 14 Affirmed.