

No. 1-14-1115

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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. 08 CR 14499
)	
MATHEW RISTAU,)	Honorable
)	Vincent M Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We dismiss this appeal from order denying defendant leave to file a successive postconviction petition, where appeal was rendered moot by this court's prior decision reversing the dismissal of defendant's initial postconviction petition and remanding for further proceedings.

¶ 2 Defendant-appellant, Mathew Ristau, appeals from an order of the circuit court denying his *pro se* request for leave to file a successive postconviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, defendant argues that this decision was incorrect because his proposed successive petition raised a colorable claim of actual innocence based upon newly-discovered evidence. For the following reasons, we dismiss defendant's appeal as moot.

¶ 3

I. BACKGROUND¹

¶ 4 On July 30, 2009, defendant, while represented by an Assistant Public Defender (APD), entered into a negotiated plea of guilty to the charge of attempted first degree murder in exchange for a sentence of 20 years' imprisonment. Defendant did not file a direct appeal from his conviction or sentence.

¶ 5 Thereafter, defendant filed a *pro se* motion to withdraw his guilty plea claiming that the APD had forced him to plead guilty. On April 16, 2010, the circuit court allowed defendant to withdraw the motion to withdraw his guilty plea. On or about August 31, 2010, an affidavit executed by defendant was apparently placed in the circuit court record. While the affidavit was entitled: "Affidavit in Support of Postconviction Action," it, nevertheless, indicated that it was filed "in support of my previous attempt to go forth with my motion to withdraw guilty plea."

¶ 6 On September 24, 2012, defendant filed a *pro se* postconviction petition (initial petition). On March 27, 2013, the circuit court dismissed defendant's initial petition as being a frivolous, successive postconviction petition, with the circuit court apparently considering defendant's affidavit to represent his initial postconviction petition. Defendant appealed that decision to this court. See *People v. Ristau*, 2016 IL App (1st) 131302-U, ¶ 22.

¶ 7 On October 24, 2013, while defendant's prior appeal was pending, he filed the request for leave to file a successive postconviction that is at issue in this appeal. Therein, defendant asserted—*inter alia*—a claim of actual innocence based upon newly discovered evidence. Attached to the petition was an affidavit executed by an eyewitness, Thomas Hogueisson, who

¹ As will be discussed further below, the record on appeal is incomplete. Our recitation of facts therefore relies both upon the limited record before us and the content of an order we entered in a prior appeal filed by defendant. See *Ristau*, 2016 IL App (1st) 131302-U.

averred purportedly exculpatory statements and further stated that he did not come forward sooner due to pressure and threats from a prosecutor.

¶ 8 On December 20, 2013, the circuit court denied defendant leave to file his successive petition, ruling that defendant's claims were forfeited and that defendant did not raise a colorable claim of actual innocence. In the analysis contained in its written order, the circuit court continued to view the initial petition defendant filed on September 24, 2012, as a successive postconviction petition that had been properly dismissed. Defendant's motion to reconsider the denial of his request for leave to file a successive petition was denied on March 12, 2014, and he timely filed this appeal from that order.

¶ 9 Finally, we note that on March 18, 2016, this court issued a decision in defendant's prior appeal from the dismissal of his initial petition. *Ristau*, 2016 IL App (1st) 131302-U. Therein, we concluded that defendant's initial September 24, 2012, postconviction petition was not a successive petition, but rather an initial one under the Act. *Id.* ¶ 22. We further concluded that defendant's initial petition was improperly summarily dismissed beyond the 90-day limit provided for in the Act (see 725 ILCS 5/122-2.1(a)(2) (2012)), and we, therefore, reversed the dismissal order and remanded for further proceedings. *Ristau*, 2016 IL App (1st) 131302-U,

¶ 22.

¶ 10

II. ANALYSIS

¶ 11 On appeal, defendant contends that the circuit court improperly denied his request for leave to file a successive postconviction petition for relief because his proposed successive petition raised a colorable claim of actual innocence based upon newly-discovered evidence.

¶ 12 The Act contemplates the filing of a single postconviction petition. *People v. Holman*, 191 Ill. 2d 204, 210 (2000). Thus, section 5/122-3 of the Act provides that any claim of a

substantial denial of constitutional rights not raised in an original or amended postconviction petition is waived. 725 ILCS 5/122-3 (West 2014). Nevertheless, the statutory bar against a second or successive petition may be relaxed under two circumstances.

¶ 13 First, the bar is relaxed where a petitioner establishes cause and prejudice for the failure to previously raise a claim under the Act. *People v. Edwards*, 2012 IL 111711, ¶ 22. Second, it is relaxed under “what is known as the ‘fundamental miscarriage of justice’ exception.” *Id.* ¶ 23 (quoting *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002)). “In order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence.” *Id.* ¶ 23 (citing *Pitsonbarger*, 205 Ill. 2d at 459).

¶ 14 A petitioner must, nevertheless, first obtain leave of court to file such a successive petition. *People v. Smith*, 2013 IL App (4th) 110220, ¶ 20. When a petitioner claims actual innocence, the question facing the circuit court is whether the request for leave to file a successive petition and supporting documentation set forth a colorable claim of actual innocence; that is, whether petitioner raises the probability that, more likely than not, no reasonable juror would have convicted him in light of the new evidence. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30 (citing *Edwards*, 2012 IL 111711, ¶ 22). Petitioner must support any proposed successive petition based on actual innocence with newly discovered and reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. *Id.* ¶ 32.

¶ 15 In addition to being newly discovered, the evidence in support of a claim of actual innocence must also be: (1) material and not merely cumulative; and (2) of such conclusive nature that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). When a petitioner raises a claim of actual innocence in a proposed successive petition, a

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court will deny leave to file only when it is clear, after review of the petition and its supporting documentation, that as a matter of law the proposed petition does not make the required colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶ 24. This court reviews the denial of leave to file a successive postconviction petition *de novo*. *Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 16 The parties strongly dispute the propriety of the circuit court's denial of defendant's request for leave to file a successive postconviction petition for relief, with the State fundamentally disputing that defendant has any basis to make a postconviction assertion of actual innocence where he pleaded guilty rather than proceed to trial. However, we need not reach the merits of this dispute, as we conclude that this issue is moot in light of this court's prior decision reversing the dismissal of defendant's initial postconviction petition and remanding for further proceedings.

¶ 17 As our supreme court has noted:

"A question is said to be moot when it presents or involves no actual controversy, interests or rights, or where the issues involved have ceased to exist. [Citations.] Courts of review will generally not consider moot or abstract questions because our jurisdiction is restricted to cases which present an actual controversy. [Citation.] When a reviewing court has notice that substantial questions involved in the trial court no longer exist, it will dismiss the appeal. [Citation.]" *People v. Blaylock*, 202 Ill. 2d 319, 325 (2002).

¶ 18 The issue presented in this appeal is whether defendant should have been granted leave to file a successive postconviction petition raising issues not included in his initial petition, one that had been considered a successive petition and dismissed. Indeed, both defendant's request for

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leave to file such a successive petition and the circuit court's denial of that request were premised upon the understanding that defendant's initial postconviction petition had been dismissed and was no longer pending.

¶ 19 As a result of our decision in defendant's prior appeal, however, that is no longer the case. Rather, our prior order concluded that the initial petition was not, in fact, a successive petition, and reversed the dismissal of defendant's initial postconviction petition and remanded for further proceedings. In his final, reply brief filed in this case, defendant specifically asserts that proceedings with respect to his initial postconviction petition are *still pending* in the circuit court.

¶ 20 As we noted above, the Act contemplates the filing of a single postconviction petition. (*Holman*, 191 Ill. 2d at 210), with section 5/122-3 of the Act specifically providing that any claim not raised in an original or amended initial postconviction petition is waived (725 ILCS 5/122-3 (West 2014)). While there is support for the filing of a successive postconviction petition raising new issues under certain circumstances, we are aware of no authority supporting the prosecution of a successive petition while an initial petition is still pending in the circuit court.

¶ 21 Rather, because proceedings on defendant's initial petition remain pending below, any additional postconviction claims defendant may have to present—including the claims at issue here—can and should be raised by seeking to amend his initial petition. Section 122-5 of the Act specifically provides that the circuit court “may in its discretion make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases.” 725 ILCS 5/122-5 (West 2014). This section “grants the trial court discretion to allow amendments at any stage of

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postconviction proceedings *** prior to final judgment.” *People v. White*, 2013 IL App (2d) 120205, ¶ 9. Allowing proceedings on two separate postconviction petitions to proceed simultaneously would also run afoul of “the well-settled rule that successive postconviction actions are disfavored by Illinois courts.” *Edwards*, 2012 IL 111711, ¶ 29.

¶ 22 In sum, we conclude that the issue facing the circuit court—defendant’s right to file a successive petition—no longer exists and has been rendered moot by our prior decision reversing the dismissal of defendant’s initial petition and the fact that proceedings on that petition are currently pending in the circuit court. We therefore dismiss this appeal at moot. *Blaylock*, 202 Ill. 2d at 325.

¶ 23 Even if we concluded that this appeal was not moot, we would be compelled to dismiss this appeal in light of the incomplete record presented to this court.

¶ 24 Here, the record on appeal contains a common law record and report of proceedings only with respect to the proceedings on defendant’s request for leave to file a successive postconviction petition. The appellate record does not include a common law record or report of proceedings with respect to the pre-trial matters leading up to defendant’s plea of guilty, his guilty plea and the factual basis therefore, or defendant’s initial postconviction petition. While defendant indicated in his reply brief that he would be supplementing the record, to date he has failed to do so.

¶ 25 It is well recognized that “an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Foutch v. O’Bryant*, 99 Ill.2d 389, 391-92

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(1984); see also *People v. Fair*, 193 Ill. 2d 256, 264 (2000) (applying *Foutch* in the context of a criminal appeal). “ ‘[I]n the absence of a proper record a reviewing court may dismiss an appeal or, in the alternative, summarily affirm the judgment of the trial court.’ ” *Marx Transport, Inc. v. Air Express International Corp.*, 379 Ill. App. 3d 849, 853 (2008) (citing *Landau & Associates, P.C. v. Kennedy*, 262 Ill. App. 3d 89, 92 (1994)).

¶ 26 Here, we fail to see how we could even begin to evaluate the propriety of the circuit court’s denial of leave to file a successive petition upon the record before us. Therefore, pursuant to the above authority and in light of the lack of a sufficient record on appeal, even if we did not conclude that this issue was moot we would be compelled to dismiss this appeal for the lack of a proper record.

¶ 27

III. CONCLUSION

¶ 28 For the foregoing reasons, we dismiss this appeal as moot.

¶ 29 Appeal dismissed.