

No. 1-14-1469

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 71 C 1267
	)	
EUGENE HORTON,	)	Honorable
	)	Neera L. Walsh,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Ellis and Justice Burke concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Judgments of the circuit court affirmed where the record demonstrates the court considered and denied defendant's motion for leave to file a successive postconviction petition, and he has forfeited any substantive arguments for reversing these judgments on appeal.

¶ 2 Defendant Eugene Horton appeals contending that this court must remand his cause for further proceedings because the circuit court failed to consider and address his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725

ILCS 5/122-1 *et seq.* (West 2012)). Defendant argues that, although the circuit court addressed and denied two supplemental *pro se* pleadings filed by him, it overlooked or otherwise failed to address his motion for leave to file a successive postconviction petition. We conclude that the circuit court addressed defendant's motion and affirm.

¶ 3 Because defendant's court-appointed appellate counsel could not locate the transcripts from his jury trial and accordingly did not file a supplemental record, we will summarize the relevant evidence as stated in *People v. Horton*, 14 Ill. App. 3d 957, 960 (1973), his direct appeal.

¶ 4 On March 21, 1971, defendant and codefendants George Horton<sup>1</sup> and Felton Peck<sup>2</sup> were in the apartment of Jacqueline Mack in a Chicago Housing Authority complex. Terry Tomalak, a case worker for the Cook County Department of Public Aid, arrived at Mack's apartment. At some point during the evening, Tomalak and Peck got into an argument. Someone hit Tomalak, who fell into Mack's bedroom. The three men began hitting Tomalak over the head with bottles. Mack attempted to call the police, but Peck restrained her. Tomalak was able to free himself and ran toward the apartment's front door, but Peck stabbed him in the back. Tomalak fell to the floor. Mack observed defendant pick up a knife, and she ran into her bedroom. She heard a struggle and eventually saw Tomalak lying on the floor by a sofa. Patsy Taylor, who was also present at the apartment that night, corroborated Mack's testimony. An autopsy revealed 12 stab wounds on Tomalak's body, evidence of choking, and bruising and swelling on various parts of his body.

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<sup>1</sup> Codefendant George Horton will be referred to as "Horton" while defendant Eugene Horton will be referred to as "defendant."

<sup>2</sup> Peck was separately tried and convicted.

¶ 5 Defendant testified and asserted that only Peck and Tomalak fought. Defendant stated he watched the fight until Horton, his brother, broke it up. When defendant left the apartment that night, Tomalak was still alive. Horton did not testify.

¶ 6 The jury found defendant and Horton guilty of murder, and each was subsequently sentenced to between 100 and 150 years' imprisonment. They jointly appealed, and this court affirmed their convictions. *Horton*, 14 Ill. App. 3d 957.

¶ 7 Since his direct appeal, defendant has filed multiple collateral pleadings, including postconviction petitions. Each pleading has been either dismissed or denied by the circuit court and affirmed on appeal by this court. See *People v. Horton*, 47 Ill. App. 3d 915 (1977); *People v. Horton*, Nos. 1-86-2483 (1988); 1-00-3874 (2001); 1-01-1866 (2002); 1-01-3814 (2002); 1-02-2132 (2003); 1-04-0097 (2005) (unpublished orders under Supreme Court Rule 23); *People v. Horton*, 2013 IL App (1st) 112370-U; *People v. Horton*, 2013 IL App (1st) 112371-U.

Defendant has another pending appeal in case No. 1-15-2392.

¶ 8 On November 4, 2013, defendant filed the instant *pro se* motion for leave to file a successive postconviction petition and the successive postconviction petition. The petition raised several issues, including that: (1) defendant was actually innocent of Tomalak's murder based on affidavits from Horton and Charles Nixon, Peck's appellate counsel; (2) there was government intrusion into the attorney-client relationship because the State overheard private conversations between defendant, Horton and their counsel; (3) the State offered defendant a plea deal of 14 years' and 1 day imprisonment, but he was prevented from accepting the deal because of an assistant State's Attorney's interference; and (4) the jury should have heard about defendant's untreated post-traumatic stress disorder, which resulted from his military service and three stab wounds to the head.

¶ 9 Supporting the petition's actual innocence claim, defendant attached affidavits from Horton and Nixon. Horton averred that defendant was not involved in the beating or stabbing of Tomalak. Rather, Horton and Peck were the ones who beat and stabbed Tomalak to death. Horton would have testified to these statements at his and defendant's trial "if [his] attorney would've allowed [him] to do so." Nixon averred that Peck never denied stabbing and killing Tomalak, never told him that anyone else stabbed Tomalak and never "attempt[ed] to place the blame" on anyone else for his conduct.

¶ 10 In both the motion for leave to file a successive petition and the successive petition, defendant asserted the claims could not be raised earlier because of his military-related post-traumatic stress disorder, associated memory loss, fear of retaliation from gang members for "inform[ing]" on other gang members, such as his codefendants, and the State's failure to disclose evidence that both of his codefendants admitted defendant did not participate in the murder of Tomalak, among other reasons. The successive petition alleged defendant suffered prejudice from his failure to raise the claims earlier as "the trial proceedings were so infected by the deception of trying a mentally unfit and wounded U.S. soldier."

¶ 11 On December 23, 2013, defendant filed two additional *pro se* documents in the circuit court: a "Motion to Disclose Documents and Things" (motion to disclose) and a "Motion to Examine Eugene Horton and for Jury to Rehear Previous Motions for Guilty Plea and Severance" (motion to examine).

¶ 12 In the motion to disclose, defendant requested information from 1971 to 2013 from the Chicago Police Department, Illinois Department of Corrections and Cook County jail, including the disclosure of documents relating to medical care for his three stab wounds, documents

relating to medical care for his post-traumatic stress disorder, the identity of medical personnel who examined him and complaints from him about pain in his head.

¶ 13 In the motion to examine, defendant noted he had a successive postconviction petition pending, which raised the issue of whether he was "mentally fit to participate in prior guilty plea and severance hearings" due to his post-traumatic stress disorder, stab wounds and associated memory loss. He requested a physical and mental fitness evaluation, which, he alleged, would corroborate his claims.

¶ 14 On April 7, 2014, the circuit court stated in open court that defendant had "filed two *pro se* motions," and it had prepared a written order addressing those motions. The court then mentioned only the motion to examine and stated it denied the motion for a lack of jurisdiction. The court next stated that defendant "filed another motion that is a successive post conviction petition," and it had prepared a written order addressing the petition. The court found that defendant had failed to satisfy the cause-and-prejudice test required to file a successive petition and subsequently orally denied defendant leave to file the petition.

¶ 15 In the court's first written order, it addressed defendant's motion to examine and concluded that, because more than 30 days has passed since defendant was sentenced, it did not have jurisdiction to entertain the motion. The court additionally declined to re-characterize the motion as a postconviction petition. Consequently, the court denied the motion to examine.

¶ 16 In the court's second written order, it addressed defendant's "successive petition," but stated the petition was titled "Motion to Disclose Documents or Things." The court observed that defendants are generally allowed only one postconviction petition, but a court may allow a defendant to file a successive petition if he satisfies the cause-and-prejudice test. It found that defendant had failed to identify an objective factor impeding him from raising his claims in

earlier proceedings and failed to demonstrate any resulting prejudice. The court also noted that defendant had not alleged "that the facts underlying his claims were withheld from him or that they are based on newly discovered evidence." Additionally, the court denied defendant's various requests for documents. Consequently, the court denied him leave to file the successive petition. This appeal followed.

¶ 17 Defendant contends that, while the circuit court addressed his two *pro se* discovery motions, the court failed to address his motion for leave to file a successive petition and "wholly fail[ed] to rule on any of the claims in the successive petition filed by [him] on November 8, 2013." He therefore requests that we remand the matter to the circuit court for a ruling on his motion for leave to file a successive petition. The State argues that remand is unnecessary where the court considered and addressed defendant's motion for leave to file a successive petition before denying it.

¶ 18 The narrow issue presented in this appeal concerns whether the circuit court ruled on defendant's motion for leave to file a successive postconviction petition, and thus, whether the court rendered a final judgment on the motion. The question before us is essentially a jurisdictional question. "Absent statutory exceptions, appellate courts lack jurisdiction to review orders, judgments and decrees that are not final." *People v. Shinaul*, 2015 IL App (1st) 140477, ¶ 9, *appeal allowed*, No. 120162 (Jan. 20, 2016). Instead, the "circuit court generally retains jurisdiction over cases pending before it until a final judgment is entered." *County of Cook v. Illinois Fraternal Order of Police Labor Council*, 358 Ill. App. 3d 667, 671 (2005). The Act contains no exceptions to review non-final judgments. See 725 ILCS 5/122-1 *et seq.* (West 2012). In fact, the Act specifically states "[a]ny final judgment entered upon such petition shall be reviewed in a manner pursuant to the rules of the Supreme Court." 725 ILCS 5/122-7 (West

2012); see also Ill. S. Ct. R. 651(a), (d) (eff. Feb. 6, 2013) (stating that "[a]n appeal from a final judgment of the circuit court in any post-conviction proceeding shall lie to the Appellate Court" and postconviction appeals are governed by the supreme court rules on criminal appeals). We conclude that we have jurisdiction over defendant's appeal with respect to his motion for leave to file a successive petition and the successive petition itself only if the circuit court entered a final judgment disposing of the motion. Otherwise, jurisdiction resides in the circuit court with respect to the motion and petition.

¶ 19 Based on our review of the record, we find the circuit court considered and addressed defendant's motion for leave to file a successive petition before denying it, thus rendering a final judgment on the motion. In the court's second written order, it expressly stated that defendant could not satisfy the cause-and-prejudice test because he failed to identify an objective factor impeding him from raising his claims in earlier proceedings and failed to demonstrate any resulting prejudice. As defendant had already filed an initial postconviction petition (see *Horton*, 47 Ill. App. 3d 915), the circuit court could only allow him to file the instant successive petition if he satisfied the cause-and-prejudice test. *People v. Wrice*, 2012 IL 111860, ¶¶ 47-48; see also 725 ILCS 5/122-1(f) (West 2012). The cause-and-prejudice test thus "acts as a procedural hurdle to any consideration of the claims in the postconviction petition." *People v. McDonald*, 405 Ill. App. 3d 131, 135 (2010). The court further found that defendant had not alleged that any of the facts underlying his claims were based on newly discovered evidence, as would be required to support an actual innocence claim. See *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 20 We acknowledge the court never specifically mentioned the motion for leave to file a successive petition filed by defendant on November 4, 2013. Rather, the court stated defendant "filed the instant successive petition, titled 'Motion to Disclose Documents or Things' on

December 23, 2013." However, this innocuous conflation of the various documents filed by defendant does not demonstrate the court failed to rule on his motion for leave to file a successive petition or was unaware of his pending successive petition, as he suggests. In the motion to disclose, defendant did not allege any constitutional deprivations, but merely requested various documents from various sources. Nothing in the motion to disclose raises an issue related to cause and prejudice, and in fact, the words "cause" and "prejudice" do not appear once. Because the motion to disclose is merely a request for documents, the court's references to cause and prejudice in its written order could only rationally relate to one of defendant's pleadings: his motion for leave to file a successive postconviction petition and the accompanying successive petition.

¶ 21 Furthermore, during the court's oral pronouncement denying him leave to file the successive petition, it specifically referenced his successive petition and found he had not satisfied the cause-and-prejudice test. Additionally, the court's "Certified Report of Disposition" specifically stated that defendant's "leave to file successive post-conviction petition is denied." In light of the foregoing, we find the circuit court considered and addressed defendant's motion for leave to file a successive postconviction petition before denying it, therefore rendering a final judgment on the motion. Consequently, we have jurisdiction in this matter (see *Shinaul*, 2015 IL App (1st) 140477, ¶ 9) and find defendant is not entitled to the relief he requests.

¶ 22 Finally, we note that, because defendant's only claim of error on appeal is that the circuit court failed to rule on his motion for leave to file a successive petition, he has forfeited any substantive claims concerning the court's denial of leave and its denial of his other *pro se* motions. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 23 For the foregoing reasons, we affirm the judgments of the circuit court of Cook County.



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¶ 24 Affirmed.