

NOTICE
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2016 IL App (5th) 130496-U

NO. 5-13-0496

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,)	St. Clair County.
)	
v.)	No. 02-CF-77
)	
JASMON STALLINGS,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant sought leave to file a successive postconviction petition asserting actual innocence, but failed to present any newly discovered, material, noncumulative evidence that would probably change the result on retrial, the circuit court properly denied defendant's request.

¶ 2 Defendant Jasmon Stallings (defendant) was convicted of first-degree (felony) murder in 2003. He has repeatedly challenged the judgment of conviction, never successfully. This appeal is his fourth appeal in the case. While the third appeal was pending in this court, defendant filed in the circuit court a motion for leave to file a second successive postconviction petition, and the circuit court denied the motion. Defendant now appeals. This court affirms.

¶ 3

BACKGROUND

¶ 4 In 2002, defendant was charged with attempted armed robbery (720 ILCS 5/18-2(a)(2), 8-4(a) (West 2000)) and first-degree murder (720 ILCS 5/9-1(a)(3) (West 2000)). The first-degree murder was a felony murder charge predicated on the attempted armed robbery. Prior to trial, on motion of the State and without objection by defendant, the charge of attempted armed robbery was dismissed. The State proceeded to trial on the first-degree murder charge. A jury found defendant guilty of that charge. Subsequently, the circuit court sentenced defendant to imprisonment for 35 years.

¶ 5 On direct appeal to this court, defendant's argument was that his sentence represented an abuse of discretion. This court disagreed with defendant and affirmed the judgment of conviction and sentence. See *People v. Stallings*, No. 5-03-0596 (2004) (unpublished order under Supreme Court Rule 23).

¶ 6 In 2005, defendant filed in the circuit court a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)), wherein he claimed that direct-appeal counsel had provided constitutionally ineffective assistance. The circuit court summarily dismissed the petition as frivolous and patently without merit, and defendant appealed. Defendant's appointed appellate counsel, the Office of the State Appellate Defender (OSAD), filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted OSAD's *Finley* motion and affirmed the summary dismissal of defendant's postconviction petition. See *People v. Stallings*, No. 5-06-0591 (2008) (unpublished order under Supreme Court Rule 23).

¶ 7 In 2012, defendant filed in the circuit court a *pro se* motion for leave to file a successive postconviction petition. (Defendant did not submit a proposed successive petition.) Most of the *pro se* motion was devoted to discussion of the sundry postconviction claims that defendant wished to raise in a successive petition, though he also made some attempt to explain why he did not include those claims in his first postconviction petition. The circuit court denied defendant leave to file a successive postconviction petition, and defendant appealed. Defendant's appointed appellate counsel, OSAD, filed a *Finley* motion to withdraw. This court granted OSAD's *Finley* motion and also granted a motion by defendant to proceed *pro se*. Defendant filed in this court a *pro se* brief. This court concluded that defendant had failed to satisfy the cause-and-prejudice test (see 725 ILCS 5/122-1(f) (West 2012)) and on that basis affirmed the judgment denying leave to file a successive postconviction petition. See *People v. Stallings*, 2014 IL App (5th) 120374-U.

¶ 8 On September 9, 2013, while the last-described appeal was still pending in this court, defendant filed in the circuit court a second *pro se* motion for leave to file a successive postconviction petition. (As before, defendant did not submit a proposed successive petition.) In the motion, defendant asserted that he was claiming "actual innocence" and therefore was excused from having to satisfy the cause-and-prejudice test. Defendant stated that he was innocent of felony murder because "the forcible felony of attempt armed robbery was dismissed before the trial but defendant was still found guilty of it." According to defendant, "[o]nce a charge has been dismissed it can't later be used as a underlining [*sic*] felony for felony murder." Defendant attached to the motion

(1) a copy of a docket sheet indicating the pretrial dismissal of the attempted-armed-robbery charge, (2) a copy of the written judgment and sentence in the case, (3) a few pages of transcript from the pretrial hearing at which the attempted-armed-robbery charge was dismissed, and (4) a few pages of trial transcript wherein the court instructed the jury on various points, including that the State did not need to prove an intent to kill in order to sustain the charge of first-degree murder. No affidavits were attached to defendant's motion.

¶ 9 On September 10, 2013, the circuit court denied the motion for leave to file a successive petition. In regard to the claim of actual innocence, the court stated that defendant "[did] not allege any facts or support his allegations with affidavits." Defendant filed a timely notice of appeal, thus perfecting this appeal. The circuit court appointed OSAD to represent defendant in this appeal.

¶ 10 In this court, OSAD has filed a *Finley* motion to withdraw, and defendant has sought leave to proceed with this appeal *pro se*. In a previous order, this court granted both motions.

¶ 11 ANALYSIS

¶ 12 Defendant has filed a *pro se* appellant's brief that fails to conform to applicable supreme court rules in various respects. Its two most egregious deficiencies are the absence of a statement of facts and an argument section that lacks any citations to authority or to pages in the record. These two deficiencies amount to flagrant violations of subsections (h)(6) and (h)(7), respectively, of Illinois Supreme Court Rule 341. See Ill. S. Ct. Rs. 341(h)(6) (eff. Feb. 6, 2013), 341(h)(7) (eff. July 1, 2008).

¶ 13 A court may justifiably strike an appellant's brief and dismiss an appeal where the brief lacks any substantial conformity to the supreme court rules governing the contents of briefs and thus hinders appellate review. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 15. Defendant's brief certainly lacks any substantial conformity to the pertinent rules. Nevertheless, this court will consider the merits of defendant's appeal.

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) provides a person imprisoned in the penitentiary with a statutory means of collaterally attacking a judgment of conviction on the ground that his or her constitutional rights were substantially violated during the proceedings that resulted in the conviction. Only one postconviction proceeding is contemplated under the Act. *People v. Edwards*, 2012 IL 111711, ¶ 22. However, there are two circumstances in which the bar against successive proceedings will be relaxed, namely: (1) when a defendant establishes cause and prejudice for his or her failure to raise the claim in a prior postconviction petition, and (2) when a defendant shows "actual innocence." *Id.* ¶¶ 22, 23. See also 725 ILCS 5/122-1(f) (West 2012) (codifying the cause-and-prejudice exception).

¶ 15 A defendant who seeks to institute a successive postconviction proceeding must first obtain leave of the circuit court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Along with his motion for leave to file a successive petition, a defendant must submit documentation sufficient to allow the court to determine whether leave should be granted. *Id.* at 161. This requirement applies regardless of which exception—the cause-and-

prejudice exception or the actual-innocence exception—the defendant is relying upon. *Edwards*, 2012 IL 111711, ¶ 24.

¶ 16 If a defendant relies on the actual-innocence exception, the circuit court should deny leave to file a successive petition "only where it is clear, from a review of the successive petition and the documentation provided by the petitioner, that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence." *Id.* ¶ 24. "Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence [citation]." (Internal quotation marks omitted.) *Id.*

¶ 17 As for the standard of appellate review applicable to the denial of a motion for leave to file a successive postconviction petition, there is some doubt. In *Edwards*, our supreme court declined to decide the matter, explaining that it did not need to choose between reviewing for an abuse of discretion and reviewing *de novo* because, in the particular case before it, the defendant-appellant's actual-innocence claim failed under either standard of review. See *Edwards*, 2012 IL 111711, ¶ 30.

¶ 18 Here, too, it is unnecessary to choose between the abuse-of-discretion standard and the *de novo* standard, for defendant's actual-innocence claim fails either way. It is immediately and abundantly clear, as a matter of law, that defendant failed to set forth a colorable claim of actual innocence.

¶ 19 A defendant who claims actual innocence must support the claim with evidence that is "newly discovered; material and not merely cumulative; and of such conclusive

character that it would probably change the result on retrial. [Citations.]" (Internal quotation marks omitted.) *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Here, defendant did not present or describe any newly discovered evidence, let alone newly discovered evidence that was material, noncumulative, conclusive, and likely to change the result on retrial. Instead, defendant merely claimed that because the charge of attempted armed robbery had been dismissed pretrial, it could not serve as the predicate felony for the felony-murder count. Reviewing what happened in the proceedings that resulted in conviction is obviously not the same as submitting newly discovered evidence of actual innocence.

¶ 20 Finally, this court notes that there was nothing wrong in using attempted armed robbery as the predicate felony for the felony-murder count. The pretrial dismissal of the attempted-armed-robbery charge had no impact or bearing on the charge of felony murder. The State was free to pursue the felony-murder charge despite the dismissal of the underlying felony charge. See, e.g., *People v. Wilson*, 348 Ill. App. 3d 360, 364-65 (2004) (rejecting defendant's argument that his felony-murder conviction should be reversed because the underlying felony had been dismissed pretrial on statute-of-limitations grounds).

¶ 21 The circuit court properly denied defendant's September 9, 2013, motion for leave to file a successive postconviction petition. The circuit court's judgment is affirmed.

¶ 22 Affirmed.