

NOTICE
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2016 IL App (5th) 140237-U

NO. 5-14-0237

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).

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Alexander County. |
| |) | |
| v. |) | No. 92-CF-54 |
| |) | |
| DANNY DAVIS, |) | Honorable |
| |) | Charles C. Cavaness, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Because the defendant failed to show cause and prejudice or actual innocence, the circuit court's order denying the defendant leave to file a successive postconviction petition is affirmed.

¶ 2 The defendant, Danny Davis, appeals the dismissal of his motion for leave to file a successive postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other

document supporting his appeal. The defendant did not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Alexander County.

¶ 3

BACKGROUND

¶ 4 The defendant was charged with first-degree murder and robbery along with two coconspirators, one of whom was the defendant's brother. The State indicated its intention to seek the death penalty. The defendant's and his brother's trials were severed from that of the other defendant. Ultimately both the defendant and his brother agreed to plead guilty and testify against the third defendant in exchange for the State not seeking the death penalty. After ensuring that the defendants were making their pleas voluntarily, the defendants were called to testify in providing a factual basis for the guilty plea.

¶ 5 The defendant's brother testified that the third defendant said he was going to rob a store owner and kill her if she did not give up the money. The three of them approached the store owner's home from which she operated the store. The third defendant followed the store owner into the home and began stabbing her with a knife. At some point, the defendant also stabbed the store owner. They stole cigarettes, coins, and a police scanner. When they left, the store owner was coughing up blood as she fought for her life.

¶ 6 The defendant's testimony mimicked that of his brother with the exception of his testimony that he only "nicked" the store owner. But he admitted that he told a fellow inmate that he stabbed the victim a number of times.

¶ 7 The State proffered additional evidence that the defendant's fingerprints were found on the items stolen from the victim's apartment, and that those items were found in the defendant's home.

¶ 8 The court accepted the defendant's guilty plea. At a later date, the court sentenced the defendant to life in prison for first-degree murder and 10 years for robbery. The defendant filed a motion to withdraw his guilty plea, a direct appeal, and numerous collateral attacks on his conviction, all of which have been denied. A full recitation of each of those arguments and decisions is unnecessary. We will mention only those details of his posttrial maneuverings needed for the decision of this appeal in the analysis below.

¶ 9 This appeal centers on the defendant's latest collateral attack on his conviction. He filed a motion for leave to file a successive postconviction petition. In the motion he argued that he had evidence of actual innocence as well as evidence that supports the cause-and-prejudice test required to bring a subsequent postconviction petition. The defendant alleged that DNA testing from the Illinois State Police (ISP) proves that he is innocent of the crime. He also alleged that his attorney provided ineffective assistance of counsel by not obtaining copies of the reports prepared by the ISP before advising him that he should plead guilty. Finally, the defendant made a brief and unsupported claim that he was tortured into giving out-of-court statements incriminating himself.

¶ 10 ANALYSIS

¶ 11 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) 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). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage the court determines if the petition presents a gist of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition for failing to state the gist of a constitutional violation, the petition moves to second-stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage of the proceeding, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. All facts not rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381.

¶ 12 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.*

¶ 13 "[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.*

¶ 14 "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 first-stage proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 15 "[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)).

¶ 16 *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). We review *de novo* whether defendant has satisfied the cause-and-prejudice test. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009). Finally, a petitioner can seek leave to file a postconviction petition on the basis of actual innocence. *People v. Edwards*, 2012 IL 111711, ¶ 23. When a petitioner is seeking leave of court to file a successive postconviction petition based on actual innocence, "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]." *Id.* ¶ 24.

¶ 17 An allegation of a denial of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, defendant must show that "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Id.* at 525. Second, defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* In *People v. Tate*, 2012 IL 112214, the Illinois Supreme Court stated that at the second stage of postconviction proceedings the petitioner must "'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670. It is objectively unreasonable if an "attorney fail[s] to ensure that [a] defendant enter[s] [a] plea voluntarily and intelligently." *People v. Huante*, 143 Ill. 2d 61, 69 (1991). The

question here is whether defendant's counsel ensured that defendant entered his plea intelligently.

¶ 18 Tortured Confession

¶ 19 Even if the defendant had developed this argument, he could not show cause for failing to bring this claim in previous postconviction proceedings. He cannot argue that he was not aware of whether he was actually tortured. The trial court properly denied the defendant leave to file a successive postconviction petition on this ground.

¶ 20 Actual Innocence

¶ 21 The defendant claims that reports by the ISP establish that he is innocent. We disagree. Nothing in those reports shows that the defendant could not have been present at the murder in this case. Certainly, nothing in the reports would have been enough to offset the defendant's own statements while in custody that he stabbed the victim a number of times.

¶ 22 The defendant first points to evidence from the ISP that the victim's jeans did not have the defendant's blood on them. The report indicated the blood is from the victim. This does nothing to exonerate the defendant. He fails to explain why an attacker's blood would be expected to be found on the victim.

¶ 23 Next, the defendant notes another report that indicates that hair found on the victim and a curtain lying on the floor did not belong to the defendant. The report further indicated that no hair transfers were found between the victim and suspects. The report does, however, indicate that the hair did match a known hair sample. We do not know whose hair sample this is because the report is redacted. Regardless, the fact that hair of

someone else, perhaps even the victim, was found on the victim, does not preclude the possibility of the defendant committing the murder to which he pleaded guilty.

¶ 24 The defendant also points to a report that indicates blood was found under nail clippings of the victim. It is unclear how the defendant believes this helps his case. The report states merely that there were blood-like particles and fibers present and no control available. It makes no reference to whose blood it might have been, and given that the victim was stabbed 20 times, it is highly likely it is the victim's blood.

¶ 25 Another report referenced by the defendant refers to footwear impressions. The report indicates that none of the impressions could have been made by the defendants. But the crime scene report describes the scene as small with hardly enough room to walk around. Additionally, a laboratory worksheet noted that footprints at the scene appeared to have been overstepped and smudged. The crime scene report indicated that the victim's daughter and the apartment complex's maintenance man entered the victim's apartment and discovered the victim. It is possible the shoe impressions were made by them.

¶ 26 The second to last report referenced by the defendant indicated that the defendant's fingerprints were not found on certain items remaining at the victim's residence. The defendant fails to explain how the absence of his fingerprints on items not removed from the residence precludes him from being present for the murder and burglary of other items.

¶ 27 The final report referenced by the defendant indicates that blood on a curtain in the defendant's apartment could have come from all three defendants. This is in no way exculpatory.

¶ 28 Taken together, the reports advanced by the defendant do not support a claim for actual innocence. The Act is not a vehicle to "redetermine guilt or innocence. [Citation.]" *People v. Collier*, 387 Ill. App. 3d 630, 638 (2008). "[T]he hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' [Citation.]" *Id.* at 636. The defendant provides nothing to show "total vindication" or "exoneration."

¶ 29 Ineffective Assistance of Counsel

¶ 30 The defendant alleged that he met the cause-and-prejudice test for filing a successive postconviction petition. As a failure to meet either prong of the cause-and-prejudice test is fatal to the defendant's request to file a successive petition, we need address only one prong. We find that the defendant cannot show prejudice. The record is clear. The defendant chose to plead guilty to avoid the death penalty. The death penalty was an option if the State could prove the defendant took an active part in killing the victim. We know that the defendant had made at least two inculpatory statements, at least one of those stating that he had stabbed the victim five or six times, making the defendant eligible for the death penalty. Assuming, *arguendo*, that the defendant's trial counsel was objectively ineffective for not obtaining the ISP reports, it would not have resulted in a change in his advice to the defendant. Nothing in the reports makes the defendant any less likely to receive the death penalty if convicted. And generally, the reports do nothing to exonerate the defendant at all. Even if trial counsel did not have access to the reports, it cannot be said to have been a denial of due process. Therefore, the trial court properly denied the defendant leave to file a successive postconviction petition.

¶ 31

CONCLUSION

¶ 32 The defendant failed to show cause and prejudice or actual innocence as required by the Act to be allowed to file a successive postconviction petition. OSAD's motion for leave to withdraw is granted, and the circuit court of Alexander County's order is affirmed.

¶ 33 Motion granted; affirmed.