

NOTICE

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2018 IL App (4th) 150768-U

NO. 4-15-0768

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 7, 2018

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JARED MICHAEL SMITH,)	No. 09CF570
Defendant-Appellant.)	
)	Honorable
)	Craig H. DeArmond,
)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court. Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The motion of the office of the State Appellate Defender to withdraw as appellate counsel is granted and the circuit court’s denial of defendant’s motion for leave to file a successive postconviction petition is affirmed.

¶ 2 Defendant, Jared Michael Smith, appeals the circuit court’s denial of his motion for leave to file a successive postconviction petition. On appeal, the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD has filed a motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging any request for review would be without merit. We grant OSAD’s motion and affirm the court’s denial of defendant’s motion.

¶ 3 I. BACKGROUND

¶ 4 In November 2009, the State charged defendant with armed robbery with a fire-

arm (720 ILCS 5/18-2(a)(2) (West 2008)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). In May 2010, defendant's trial was conducted. The State presented evidence showing that on November 13, 2009, the East Side Tap tavern in Danville, Illinois, was robbed. The robber wore a dark ski mask, dark clothing, and was waving a gun. He went behind the bar, held a gun to the bartender's head while taking cash, and then fled through a back door. Police officers quickly responded to the scene and one officer observed an individual in a dark blue sweatshirt who began running when he saw the officer. The officer pursued and apprehended the individual outside a residence, and he identified the individual as defendant. The owner of the residence reported observing defendant hiding money under a decorative stone in his yard and the police discovered large amounts of cash on defendant's person and near the area of his apprehension.

¶ 5 Various other witnesses testified for the State, including two individuals who identified defendant as the man they observed running away from the tavern near the time of the offense and a tavern employee who viewed defendant after his arrest and identified him as the robber based on his general build, clothing, and skin tone. Relevant to this appeal, the State also presented the testimony of Cynthia Esworthy, who was working in the tavern as a cook at the time of the robbery. Esworthy heard the robber yelling and recognized his voice as that of a customer named "Troy." She testified she met Troy at the tavern the night before the robbery and stated he had been introduced to her by a friend named Bobby Bailey. Esworthy identified defendant as being the customer she met named Troy. The State also presented evidence that defendant sometimes went by the name "Troy Smith." The record reflects Bailey was not called as a witness and that Esworthy testified Bailey was "very sick" with bone and pancreatic cancer.

¶ 6 At the conclusion of the trial, the jury found defendant guilty of both armed rob-

bery with a firearm and unlawful possession of a weapon by a felon. In June 2010, the trial court sentenced him to concurrent prison terms of 27 years and 12 years, respectively. In March 2012, this court affirmed defendant's convictions and sentences on direct appeal. *People v. Smith*, 2012 IL App (4th) 100648-U.

¶ 7 In September 2012, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of his trial counsel. Relevant to this appeal, he alleged his counsel was ineffective for failing to call Bailey as a witness. Defendant maintained that, if called to testify, Bailey would have contradicted Esworthy's testimony by stating he did not know defendant and that he did not introduce defendant to Esworthy. He attached his own affidavit and portions of his trial transcripts to his petition.

¶ 8 In November 2012, the circuit court entered a written order denying defendant's petition. With respect to defendant's allegations regarding Bailey, the court stated as follows:

“Bobby Bailey was said to have introduced the Defendant to [Esworthy] the night before the robbery ***. No one called him to testify. [Esworthy] testified that he was very sick suffering with pancreatic and bone cancer at the time of the trial. His testimony could have been more harmful to the defense than helpful, but it is uncontested that he was not available to testify.”

¶ 9 Defendant appealed the denial of his postconviction petition and, in September 2014, this court affirmed. *People v. Smith*, 2014 IL App (4th) 121150-U. We found defendant's petition was correctly dismissed at the first stage of postconviction proceedings and stated as follows:

“Defendant did not attach to his petition an affidavit from Bailey. Therefore, in order to evaluate defendant's claim that he had never met Bailey, we have

defendant's own affidavit, which, in essence, makes this conclusory and self-serving claim, versus the trial testimony of Esworthy, which positively rebuts it.

We disagree with defendant that he had alleged the gist of a meritorious claim sufficient to survive first-stage dismissal when he alleged counsel was ineffective for failing to call Bailey as a witness. First, we find it is not arguable that counsel's performance fell below an objective standard of reasonableness on this ground, as such a decision is generally considered strategic and left to counsel's discretion. [Citation.] Second, and perhaps more convincingly, we find it is not arguable that defendant was prejudiced by counsel's failure. The evidence presented at trial overwhelmingly demonstrated defendant's guilt. One witness identified defendant as the robber at a show-up within a few minutes of the robbery. Defendant's build and clothing matched the witnesses' descriptions of the suspect. Two other witnesses watched defendant, who had a gun in his hand, run from police. Another witness found defendant, who had money in his hands and pockets, in his yard trying to hide himself and money from police. The bank bag from the tavern was recovered on the ground near defendant. Gloves with defendant's DNA were also found on the ground nearby.

Based on the strength of the evidence presented at trial, defendant cannot demonstrate he was arguably prejudiced by counsel's failure to call Bailey as a witness. Without an affidavit from Bailey, we are left only with defendant's self-serving assertion that he and Bailey had never met. In light of Esworthy's testimony that Bailey introduced her to defendant the night before the robbery, de-

defendant has failed to satisfy even the low threshold of a first-stage analysis.” *Id.*
¶¶ 22-24.

¶ 10 In August 2015, defendant filed a motion for leave to file a successive postconviction petition with the circuit court. Again, he asserted a claim of error based on his counsel’s failure to call Bailey as a witness. In his motion, defendant set forth the following “cause” for his failure to raise the claim in his previous petition:

“Attached is the police report/affidavit of *** Bailey. It shows that his testimony would’ve been more helpful than harmful, And that we were not friends and wouldn’t have been introduced as such. I was told by Appellate counsel that the police reports couldn’t be used because they were not introduced as evidence at trial. My First Dist[ri]ct counsel said they could be used. So to me this is new, and very important. Don’t understand why [the trial judge] wouldn’t allow the discovery to be sent to me, it is a part of the record isn’t it?”

Defendant also alleged “prejudice” on the basis that, had “the police report been read at trial, the jury would’ve had a totally different verdict. *** Esworthy’s testimony that this person, *** Bailey[,] had introduced me to her as his really good friend[] would’ve been seen for the mix up that it was, a mistake of identity.”

¶ 11 Defendant attached a “Supplemental Report” from the Danville Police Department to his motion, summarizing police officer Bruce Stark’s interview with Bailey on November 17, 2009. According to Stark’s report, Bailey witnessed the robbery at the tavern and described what he observed to Stark. Bailey also reported that he knew the gunman, had seen the color of the gunman’s skin, and heard the gunman’s voice. Bailey identified the gunman as “JARED TROY SMITH.” Stark further noted that Bailey “SAID HE KNOWS THIS IS JARED

SMITH BUT HE IS AFRAID OF SMITH. *** BAILEY SAID HE HAS KNOWN JARED SMITH GROWING UP AND HE DOESN'T WANT TO CONFRONT SMITH BECAUSE HE IS SCARED OF HIM.”

¶ 12 In September 2015, the circuit court entered a written order addressing defendant's motion. The court noted the issue raised by defendant had been previously addressed, defendant failed to attach an affidavit from Bailey to his filing, and the attached police report directly refuted his claim. It stated as follows: “Contrary to the assertion of the defendant that his counsel's failure to call Bailey was ineffective assistance, if called, Bailey would either acknowledge he knew the defendant or be confronted with his previous statement to police; which would have been far more damaging.” The court concluded the information presented in defendant's motion did “not rise to the level of cause or prejudice necessary for” a successive postconviction petition and denied the motion.

¶ 13 This appeal followed. As stated, OSAD was appointed to represent defendant on appeal. On August 29, 2017, it filed a motion to withdraw as appellate counsel. This court granted defendant leave to file additional points and authorities and he has responded. The State has also filed a brief and defendant has filed a reply brief. After examining the record, we grant OSAD's motion and affirm the circuit court's judgment.

¶ 14 II. ANALYSIS

¶ 15 On appeal, OSAD argues any claim that the circuit court erred by denying defendant's motion for leave to file a successive postconviction petition is without arguable merit and it should be permitted to withdraw as appellate counsel. For the reasons that follow, we agree.

¶ 16 Under the Post-Conviction Hearing Act (Act), “a criminal defendant may assert

that ‘in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.’ ” *People v. Holman*, 2017 IL 120655, ¶ 25, 91 N.E.3d 849 (quoting 725 ILCS 5/122-1(a)(1) (West 2010)). “Proceedings on a postconviction petition are collateral to proceedings in a direct appeal and focus on constitutional claims that have not and could not have been previously adjudicated.” *Id.* “Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are forfeited.” *Id.*

¶ 17 Additionally, the Act contemplates the filing of only a single postconviction petition. *Id.* “[A] ruling on a post[.]conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the initial petition.” *People v. Free*, 122 Ill. 2d 367, 376, 522 N.E.2d 1184, 1188 (1988). However, leave may be granted to file a successive petition if the petitioner (1) raises a due process claim of actual innocence to prevent a miscarriage of justice, or (2) satisfies the “cause-and-prejudice” test. *Holman*, 2017 IL 120655, ¶ 26.

¶ 18 “The elements of a claim of actual innocence are that the evidence in support of the claim must be ‘newly discovered’; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial.” *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829. Under the cause-and-prejudice test, a petitioner must “demonstrate[.] cause for his or her failure to bring the claim in his or her initial post[.]conviction proceedings and prejudice result[ing] from that failure.” 725 ILCS 5/122-1(f) (West 2012). Additionally, the Act provides as follows:

“(1) 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 pro-

ceedings; and (2) 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.*

The circuit court’s denial of a defendant’s motion for leave to file a successive postconviction petition is subject to *de novo* review. *People v. Merriweather*, 2017 IL App (4th) 150407, ¶ 25, 80 N.E.3d 127.

¶ 19 Here, in connection with his motion for leave to file a successive postconviction petition, defendant asserted that Bailey should have been called as a witness at his trial and that Bailey’s testimony would have been helpful to his case. In particular, defendant argued Bailey’s testimony would have contradicted Esworthy’s testimony that Bailey introduced defendant to her at the tavern on the night before the robbery, as well as her identification of defendant as the robber. However, as OSAD points out, this precise issue was previously raised by defendant and decided in connection with his initial postconviction petition. Thus, the claim is barred by the doctrine of *res judicata*. Additionally, because defendant did not previously fail to bring this claim, he necessarily cannot meet the requirements of the cause-and-prejudice test.

¶ 20 Further, OSAD correctly states that defendant’s motion for leave to file a successive postconviction petition failed to set forth a claim of actual innocence. Defendant did not address the necessary elements of an actual-innocence claim, nor would the arguments or documents he presented in connection with his motion support such a claim. Finally, we note the police report attached to defendant’s motion actually refutes, rather than supports, his contention that Bailey’s testimony would have been more helpful to him than harmful. Specifically, the report indicates that Bailey reported to Officer Stark that he was familiar with defendant and that he, in fact, identified defendant as the man who robbed the tavern.

¶ 21 Under the circumstances presented, the circuit court correctly denied defendant's motion for leave to file a successive postconviction petition. As argued by OSAD, any claim of error by defendant is without merit.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 24 Affirmed.