

NOTICE  
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2018 IL App (5th) 150351-U

NO. 5-15-0351

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,	)	Jefferson County.
	)	
v.	)	No. 96-CF-149
	)	
BILLIE HOWELL,	)	Honorable
	)	Jerry E. Crisel,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the defendant failed to set forth a colorable claim of actual innocence, and any argument to the contrary would lack merit, appointed appellate counsel is granted leave to withdraw, and the judgment denying the defendant leave to file a successive postconviction petition is affirmed.

¶ 2 The defendant, Billie Howell, is currently serving a 3-year term of mandatory supervised release, having completed a 40-year term of imprisonment for first-degree murder. He appeals from an order denying his motion for leave to file a successive petition for postconviction relief. The defendant's court-appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has filed a motion to withdraw as counsel on the ground that this appeal does not present any issue of arguable merit. See

*Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993). OSAD served the defendant with a copy of its motion and a copy of the supporting brief that accompanied the motion. This court gave the defendant ample opportunity to file a written response to OSAD's motion or to file a *pro se* brief or memorandum, but he has not filed any such document. This court has examined OSAD's motion and the supporting brief, along with the entire record on appeal, and has concluded that this appeal does indeed lack merit. Accordingly, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3

### BACKGROUND

¶ 4

#### *Trial and Direct Appeal*

¶ 5 In July 1996, the defendant was charged with three counts of first-degree murder (intentional, strong-probability, and felony) in connection with the death of his ex-wife, Sandy Sneed. In August 1997, the cause proceeded to trial by jury. In September 1997, the jury found the defendant guilty of first-degree murder. The evidence adduced at the defendant's trial was detailed in this court's decision in the defendant's appeal from the judgment of conviction. See *People v. Howell*, No. 5-97-0928 (2000) (unpublished order under Supreme Court Rule 23). Here, only a small portion of that evidence is discussed.

¶ 6

The trial evidence showed that on July 4, 1996, late in the evening, Cindy Quance, her brother Tommy Ray Quance, and their friend Ernest Logsdon were sitting together at a bar in Mount Vernon. The defendant and Sneed were at the same bar, though not together. Cindy Quance was a friend of Sneed, and she knew the defendant. Tommy Ray Quance had met Sneed a couple of times but never had met the defendant. Ernest

Logsdon met Sneed for the first time that evening, at the bar, but he never met the defendant. Robin Hoerchler was also at the bar. She did not know Sneed; she had "seen [the defendant] a couple of times" but "didn't know him personally." Nothing in the record indicates that Robin Hoerchler was acquainted with Cindy Quance, Tommy Ray Quance, or Ernest Logsdon.

¶ 7 All four of these various bar patrons—Robin Hoerchler, Cindy Quance, Tommy Ray Quance, and Ernest Logsdon—testified at the defendant's trial, and all four described standing outside the bar as they witnessed the defendant shoot Sneed, once, at fairly close range. At trial, it was undisputed that Sneed died from a single gunshot wound to her chest, and that the bullet was fired from the defendant's .22-caliber pistol. In the decision issued in the direct appeal, this court described the evidence of the defendant's guilt as "overwhelming." Unless the shooting had been recorded on videotape, a stronger case against the defendant is difficult to imagine.

¶ 8 The defense at trial was that the defendant shot Sneed accidentally. The defendant testified that he was on the bar's parking lot when he removed his pistol from the passenger compartment of his car, intending to place it in the car's trunk. When Sneed got out of the defendant's car, where she had been sitting, she fell to the ground. The defendant, still carrying his pistol, walked over to Sneed, intending only to assist her. At that point, the defendant further testified, "the gun fell out of [his] hand" and hit the ground, "and the thing discharged." According to the defendant, he then picked up the gun from the ground. He asked the decedent whether she was all right, and she said that

she was. She got back into the defendant's car, in the front passenger's seat, and the defendant drove away from the bar.

¶ 9 The defendant further testified that as he drove, he repeatedly asked Sneed whether she was all right and where she wanted to go, and Sneed repeatedly answered that she was fine and that she simply wanted to drive around town. Eventually, though, Sneed became unresponsive. The defendant testified at trial that he did not know when the decedent was shot. If she was shot while on the bar's parking lot, he testified, he was unaware of it at the time. In the decision issued in the direct appeal, this court discussed reasons to be highly skeptical of the defendant's trial testimony. To say the least, his testimony strained credulity.

¶ 10 The court instructed the jury on the three theories of first-degree murder and, at the defendant's request, on involuntary manslaughter, as well. The jury deliberated for three to four hours and returned a general verdict finding the defendant guilty of first-degree murder.

¶ 11 On October 9, 1997, the circuit court held a hearing in aggravation and mitigation. The court sentenced the defendant to imprisonment for 40 years.

¶ 12 In the direct appeal, referenced *supra*, the defendant argued that (1) he was deprived of a fair trial due to the circuit court's erroneous admission of testimony concerning hearsay statements allegedly made by Sneed in the minutes and weeks prior to the shooting, (2) the 40-year sentence was excessive, and (3) he was eligible for day-for-day good-conduct credit against his sentence. In August 2000, this court affirmed in part and modified in part, with the modification granting the defendant day-for-day good-

conduct credit. See *People v. Howell*, No. 5-97-0928 (2000) (unpublished order under Supreme Court Rule 23).

¶ 13        *The First Postconviction Proceeding: Petition, Dismissal, and Appeal*

¶ 14    In December 2000, the defendant filed *pro se* his first petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2000)). Supplemental or amended petitions followed. In March 2004, the defendant filed by appointed postconviction counsel a second amended petition for postconviction relief. The second amended petition included claims that (1) trial counsel had provided ineffective assistance by failing to seek a fitness hearing for the defendant and by failing to investigate certain aspects of the case, and (2) the defendant was deprived of due process when the State knowingly used perjured testimony from Cindy Quance and other trial witnesses and when he was put on trial despite impairments he experienced as a consequence of ingesting prescribed psychotropic drugs. The State moved to dismiss, without an evidentiary hearing, the defendant's second amended postconviction petition, due to untimeliness and a lack of merit. Also in March 2004, the circuit court granted the State's motion to dismiss. The defendant appealed.

¶ 15    OSAD represented the defendant in his appeal from the March 2004 dismissal of his second amended petition for postconviction relief. OSAD presented two arguments on the defendant's behalf. This court agreed with the defendant's argument that his late filing of the postconviction petition was not due to his culpable negligence. However, this court rejected the defendant's argument that he had made a substantial showing that the State knowingly used the allegedly perjured testimony of Cindy Quance and other

trial witnesses. Accordingly, this court affirmed the circuit court's dismissal of the defendant's second amended petition for postconviction relief. See *People v. Howell*, No. 5-04-0271 (2005) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 16            *The Defendant's Section 2-1401 Petition, and a Dismissed Appeal*

¶ 17    In June 2005, the defendant filed a petition to vacate void judgment, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)). In July 2005, the State filed a motion to dismiss the section 2-1401 petition. In September 2005, the defendant filed a "motion for judgment on the pleadings," wherein he claimed that the State had failed to file a response to his petition. In December 2005, the circuit court entered a docket-entry order denying the defendant's motion for judgment on the pleadings and scheduling a hearing on the defendant's petition for March 2006. The defendant filed a *pro se* notice of appeal from the December 2005 docket-entry order. This court, recognizing that the defendant was attempting to appeal from an interlocutory order that was not appealable, dismissed the appeal for lack of appellate jurisdiction. See *People v. Howell*, No. 5-05-0721 (2006) (unpublished dispositional order).

¶ 18            *The Defendant's Attempt to File a Successive Postconviction Petition*

¶ 19    On May 13, 2015, the defendant filed a *pro se* motion for leave to file a successive postconviction petition. In his motion, the defendant asserted that he had a claim of actual innocence and therefore did not need to demonstrate cause or prejudice.

¶ 20    The motion was accompanied by a proposed successive petition for postconviction relief. In the proposed successive petition, the defendant accused trial counsel of (1) inadequately preparing him to testify at trial, (2) failing to raise "the affirmative

defense of Negligence," (3) failing to file a motion *in limine* seeking to bar the State from presenting evidence that Sneed had obtained an order of protection against him and that Sneed feared him, and (4) failing to present to the jury a telephone transcript that had been discussed in the court's chambers. Also in his proposed successive petition, the defendant claimed that his sentence was void because (1) he was not given sufficient credit for time served and (2) restitution and fees in the case were excessive. (The defendant's sentence did not include restitution.)

¶ 21 On May 22, 2015, the circuit court entered a written order denying the defendant's motion for leave to file a successive postconviction petition. The court described what was necessary to plead a colorable claim of actual innocence, and concluded that the defendant had failed to plead such a claim. From that judgment, the defendant now appeals.

¶ 22 ANALYSIS

¶ 23 This appeal is from an order denying the defendant leave to file a successive petition for postconviction relief on the basis of actual innocence. As previously mentioned, OSAD has filed a *Finley* motion to withdraw as the defendant's counsel in this appeal.

¶ 24 The Act provides a statutory remedy to criminal defendants who claim that their constitutional rights were substantially violated during the proceedings that resulted in their convictions. *People v. Eddmonds*, 143 Ill. 2d 501, 510 (1991). The Act contemplates the filing of only one postconviction petition, and therefore Illinois courts disfavor successive petitions. *People v. Edwards*, 2012 IL 111711, ¶¶ 22, 29. A

defendant may file a successive petition only if he obtains leave of court to do so. 725 ILCS 5/122-1(f) (West 2016); *Edwards*, 2012 IL 111711, ¶ 24. A court should relax the bar against successive postconviction petitions only where the defendant (1) establishes cause and prejudice for his failure to raise the claim earlier, or (2) sets forth a colorable claim of actual innocence. *Edwards*, 2012 IL 111711, ¶¶ 22, 23.

¶ 25 In regard to the cause-and-prejudice test, a postconviction petitioner "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." 725 ILCS 5/122-1(f)(1) (West 2016). A petitioner "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." 725 ILCS 5/122-1(f)(2) (West 2016). See also *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002).

¶ 26 If a defendant relies on the actual-innocence exception to the bar on successive petitions, "leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the [defendant] that, as a matter of law, the [defendant] cannot set forth a colorable claim of actual innocence." *Edwards*, 2012 IL 111711, ¶ 24. Stating a colorable claim of actual innocence requires a defendant to come forth with evidence that is newly discovered, material, rather than merely cumulative, and "of such conclusive character that it would probably change the result on retrial." (Internal quotation marks omitted.) *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

¶ 27 Our supreme court has not decided on the standard of review that should be applied in an appeal from an order denying a defendant leave to file a successive



postconviction petition on the basis of actual innocence. However, the court has suggested that such an order should be reviewed either *de novo* or for an abuse of discretion. *Edwards*, 2012 IL 111711, ¶ 30. Here, the defendant's claim of actual innocence fails under either standard of review.

¶ 28 In his *pro se* motion for leave to file a successive postconviction petition, the defendant asserted that he was setting forth a claim of actual innocence and that he therefore was not required to satisfy the cause-and-prejudice test. However, the defendant did not come forth with any evidence of actual innocence. He did not produce a scintilla of exculpatory evidence, let alone the type of exculpatory evidence demanded by *Ortiz*. Instead, the defendant merely complained about the performance of his trial attorney and argued that his sentence was void. Given the defendant's complete and obvious failure to set forth a colorable claim of actual innocence, the circuit court had no alternative but to deny the defendant leave of court to file a successive postconviction petition.

¶ 29 There is no way of knowing whether the defendant could have satisfied the cause-and-prejudice test. Relying solely on his baseless assertion of actual innocence, the defendant did not even attempt to satisfy that test. As for the claim that his sentence was void, this claim is obviously meritless, for the circuit court clearly had jurisdiction over the defendant's criminal case and over the defendant personally. See *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-12.

¶ 30

## CONCLUSION

¶ 31 The defendant did not begin to set forth a colorable claim of actual innocence. Therefore, the circuit court had no real choice but to deny the defendant leave to file a successive postconviction petition. Any argument to the contrary would lack merit. Therefore, OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 32 Motion granted; judgment affirmed.