

NOTICE
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2014 IL App (4th) 120886-U

NO. 4-12-0886

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 15, 2014
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Champaign County |
| JEFFREY L. MARCRUM, |) | No. 10CF47 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Thomas J. Difanis, |
| |) | Judge Presiding. |

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court grants the office of the State Appellate Defender's motion to withdraw and affirms the circuit court's denial of defendant's motion for leave to file a successive postconviction petition where defendant has failed to meet the cause-and-prejudice test or the claims are barred by *res judicata*.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we grant OSAD's motion to withdraw and affirm the trial court's judgment, but we remand with directions to correct the sentencing judgment to reflect a three-year term of mandatory supervised release (MSR).

¶ 3 **I. BACKGROUND**

¶ 4 In February 2010, defendant, Jeffrey L. Marcrum, entered into a fully negotiated plea agreement, wherein he pleaded guilty to burglary, a Class 2 felony, and agreed to be

sentenced as a Class X offender in exchange for the State's agreement to recommend a seven-year prison sentence and dismiss the pending charges of theft and obstruction of justice (filed in a separate case). The factual basis indicated defendant had concealed two bottles of liquor while inside County Market, walked past the cash registers, and attempted to leave the store. The store alarms activated and locked the doors, preventing defendant from exiting. He was chased through the store and subsequently detained by a loss-prevention officer and the store manager. Defendant admitted he went to County Market to steal liquor.

¶ 5 The trial court accepted the factual basis and the terms of the plea agreement. The court sentenced defendant to seven years in prison and ordered him to serve a three-year term of MSR. However, the written sentencing judgment reflected only a two-year MSR term. A month later, defendant filed a *pro se* motion to withdraw his plea, alleging he had not voluntarily, intelligently, and knowingly entered into the plea agreement. The court appointed counsel to represent defendant; however, counsel later moved to withdraw defendant's motion to withdraw his plea, stating defendant no longer wished to pursue the relief initially requested.

¶ 6 In April 2011, defendant filed a *pro se* postconviction petition, alleging, *inter alia*, his trial counsel was ineffective. Finding defendant's petition was frivolous and patently without merit, the circuit court entered an order of summary dismissal. Defendant appealed and this court affirmed. *People v. Marcrum*, 2013 IL App (4th) 110514-U.

¶ 7 In September 2011, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), claiming he should not have been sentenced as a Class X offender because two of the convictions used to elevate him to Class X status were void. The circuit court granted the State's motion to dismiss, finding defendant had failed to state a cause of action. Defendant appealed. OSAD was

appointed to represent defendant on appeal, but rather than pursuing the appeal, OSAD filed a motion to withdraw, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted OSAD's motion. *People v. Marcrum*, 2013 IL App (4th) 120002-U.

¶ 8 In August 2012, defendant filed a *pro se* motion for leave to file a successive postconviction petition, alleging (1) the sentencing judgment was void because it provided for a two-year MSR term, (2) his counsel was ineffective for failing to file a motion to suppress, (3) his counsel incorrectly advised him he would likely be convicted of obstruction of justice, (4) his counsel should have requested a fitness hearing, and (5) miscellaneous other issues that allegedly deprived him of due process. The circuit court denied defendant's motion for leave, finding (1) the allegations repetitive of his original postconviction petition, and (2) his "request cannot and does not pass the cause[-]and[-]prejudice test."

¶ 9 This appeal followed. The circuit court again appointed OSAD to represent defendant. In October 2013, OSAD filed a motion to withdraw as counsel pursuant to *Finley*. OSAD provided defendant with a copy of the motion to withdraw and this court gave defendant time to file additional points and authorities. He did so. The State has also responded.

¶ 10 II. ANALYSIS

¶ 11 On appeal, OSAD contends no meritorious issues can be raised for review. Specifically, OSAD contends no colorable argument can be made in this appeal that could potentially justify the filing of a successive postconviction petition. We agree.

¶ 12 In order to file a successive postconviction petition, a defendant must (1) request leave to do so from the circuit court, (2) demonstrate cause (some type of impediment) to explain his failure for not raising the claim in his original petition, and (3) demonstrate prejudice by showing "an error that so infected the entire trial that the resulting conviction or sentence violates

due process." *People v. Pitsonbarger*, 205 Ill. 2d 444, 464 (2002). Or, a defendant may forgo the cause-and-prejudice test by setting forth a claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 330-31 (2009).

¶ 13 In his underlying successive postconviction petition, defendant does not set forth a claim of actual innocence based on newly discovered evidence. Thus, OSAD evaluated defendant's petition for potential claims under the cause-and-prejudice test and identified the following potential issues.

¶ 14 A. Counsel's Failure To File a Motion To Suppress

¶ 15 Defendant claims, because he did not receive the police reports he had requested until May 2012, he was unable to discern, until that time, the likely success of a motion to suppress, had one been filed. In both his original postconviction petition and in his successive postconviction petition, defendant claimed his counsel was ineffective for not questioning the police officers (specifically, Officer Jones), the store manager, and a loss-prevention officer about their conversations with defendant at the scene. Defendant claimed these individuals lied to him and tricked him into giving a written statement after he had invoked his right to counsel. In June 2012, defendant sent a letter to Officer Jones requesting she provide an affidavit confirming his allegations. However, no affidavit was attached to his motion for leave to file a successive postconviction petition, as required by section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2012)).

¶ 16 Further, the police report defendant received in May 2012 was prepared by Officer Bloom, who had arrived on the scene after defendant was in custody. Officer Bloom placed defendant under arrest, advised him of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 486 (1966)), and asked defendant if he had planned to steal anything else from the store

"beside[s] the liquor." Bloom indicated in his report that defendant "stated that [he] came to County Market to only steal liquor. [Defendant] then said he wanted a lawyer because he did not want to go to jail for burglary. [Defendant] refused to provide any further information."

¶ 17 As OSAD points out, defendant cannot demonstrate prejudice from the late receipt of Bloom's police report because the report does not address defendant's conversations with Officer Jones, the store manager, or the loss-prevention officer. Bloom's report does not support defendant's claim that the other individuals had violated his *Miranda* rights. Therefore, the circuit court's previous dismissal of this exact claim, which had been raised in defendant's original petition, without the support of newly discovered evidence, is *res judicata*. *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). Defendant's recent receipt of Officer Bloom's police report does not affect the court's prior ruling.

¶ 18 B. Counsel's Assessment of the Obstructing-Justice Charge

¶ 19 Defendant claims our supreme court's decision in *People v. Comage*, 241 Ill. 2d 139 (2011), supports his position that he had not, in fact, committed obstruction of justice, contrary to his attorney's opinion. As part of defendant's plea agreement, the State had agreed to dismiss a pending charge of obstruction of justice filed in a separate case against defendant. According to defendant, his attorney had advised him he had no defense to the charge, leading him to accept the State's offer. The charge was based on a police officer's observation of defendant allegedly throwing a wad of paper to the ground as the officer approached defendant. The wad of paper contained individually packaged Baggies of marijuana.

¶ 20 The supreme court held in *Comage* that the defendant's act of throwing drug paraphernalia over a fence did not constitute the defendant's concealment of evidence within the meaning of the obstruction-of-justice statute. *Comage*, 241 Ill. 2d at 150. This decision was

issued on February 25, 2011, approximately six weeks prior to the filing of defendant's original postconviction petition. In his motion for leave to file a successive petition, defendant does not allege any facts demonstrating cause for failing to include this claim in his original petition. Without cause, we need not discuss whether defendant was prejudiced.

¶ 21 C. Defendant's Fitness

¶ 22 OSAD also raises a potential issue involving defendant's claimed unfitness based upon his "mental health and medical issues." In his proposed successive postconviction petition, defendant relies upon a recent "announcement" by several governmental agencies that a person's consumption of caffeinated alcoholic beverages could cause certain mental impairments if taken with prescription drugs. Defendant claimed he was unfit to assist with his defense after he had taken "Vicodin, Norco, [and] Darvocet." He claimed his counsel was ineffective for failing to investigate the effects of mixing caffeinated alcoholic drinks with these prescription medications.

¶ 23 As OSAD notes, defendant does not allege he had consumed caffeinated alcoholic drinks while taking prescription medications, and therefore his claim is without merit. Further, as the State notes, defendant had been in continuous custody between his arrest on January 12, 2010, and the day he pleaded guilty on February 9, 2010. Any adverse effects of consuming caffeinated alcoholic beverages with prescription medication would have dissipated, making his claim that he was unfit to assist in his defense unsubstantiated.

¶ 24 D. *Brady* Violation

¶ 25 Defendant claims his counsel was ineffective for failing to request an alleged undisclosed e-mail communication between Officers Jones and Bloom, which, according to defendant, contained a promise by the police that defendant would not be charged with burglary. Defendant insists the communication was suppressed by the State in violation of *Brady v.*

Maryland, 373 U.S. 83 (1963). He raised this issue in his original postconviction petition and thus, it is barred by *res judicata*. Without an allegation of newly discovered information, this claim must fail. *Anderson*, 375 Ill. App. 3d at 1000.

¶ 26 E. Failure To Read Original Postconviction Petition

¶ 27 Defendant claims the law clerk who helped him prepare and file his original postconviction petition had him sign the petition without first reading it. Pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), defendant's signature on the petition certified he had read the petition, the contents of which were "well grounded in fact" and not filed for an improper purpose. Under these circumstances, defendant cannot assert facts demonstrating he was in violation of this rule while asserting he is entitled to relief. His claim is without merit.

¶ 28 F. Rule 604(d) Certificate

¶ 29 Defendant claims defense counsel's Rule 604(d) certificate is rebutted by the record when no amended motion to withdraw his guilty plea was filed despite counsel's certification that she made "any amendments to the motion to withdraw guilty plea necessary for adequate presentation of any defects in those proceedings." See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Defendant's claim fails for three reasons. First, counsel is not required to file an amended motion unless one is necessary to adequately present the alleged defects. See *People v. Lindsay*, 239 Ill. 2d 522, 528 (2011). Second, defendant's motion to withdraw his guilty plea was withdrawn, and accordingly, the certificate was also withdrawn. Finally, defendant previously raised this issue in his original postconviction petition and the same was subsequently dismissed, barring it from consideration by the doctrine of *res judicata*. *Anderson*, 375 Ill. App. 3d at 1000.

¶ 30 G. Disparate Sentencing

¶ 31 Defendant claims his seven-year prison sentence is "disparate to his consecutive case [No.] 10-CF-287 sentence of three years as a Class 4 offender in Champaign County," a case wherein defendant pleaded guilty to theft with a prior theft conviction. Defendant cannot compare the two penalties imposed upon the convictions as disproportionate when they involved two different offenses with different elements. *People v. Sharpe*, 216 Ill. 2d 481, 521 (2005). Further, if he intends to challenge each respective sentence, he cannot do so without first filing a motion to withdraw his respective guilty pleas. *People v. Evans*, 174 Ill. 2d 320, 332 (1996). Regardless, defendant has not alleged any cause that would justify leave to file a successive postconviction petition.

¶ 32 H. Prejudice of Postconviction Judge

¶ 33 Defendant claims the postconviction judge demonstrated prejudice against him by denying him leave to file a successive petition on the basis the petition was frivolous and patently without merit. He claims this was an inappropriate standard for a denial, which demonstrates the judge "showed animosity and ill will toward" him. Defendant also claims the judge demonstrated animosity against him by writing a letter to the warden informing him of the frivolous pleading defendant filed. Both of defendant's assertions are without merit because (1) "[a] judge's ruling[] alone almost never constitute[s] a valid basis for a claim of judicial bias or partiality" (see *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002)), and (2) section 3-6-3(d) of the Unified Code of Corrections (730 ILCS 5/3-6-3(d) (West 2012)) provides the Illinois Department of Corrections the authority to revoke up to 180 days of a prisoner's good-conduct credit if, after a hearing, it determines the prisoner filed a pleading against the State, which the court specifically found was frivolous.

¶ 34 I. Summary

¶ 35 To the extent defendant made any further miscellaneous claims in his proposed successive postconviction petition, we find them either without merit or barred by forfeiture or *res judicata*, as he has failed to allege sufficient cause to excuse the failure to include those purported issues in his original postconviction petition.

¶ 36 Further, we conclude the written sentencing judgment should be amended to reflect a three-year MSR term instead of a two-year term. The written sentencing judgment contains a typographical error. When orally pronouncing defendant's sentence, the trial court clearly ordered defendant to serve a three-year MSR term. This typographical error does not render defendant's sentence void, as defendant contends, nor does it satisfy the cause-and-prejudice test so as to justify leave to file a successive postconviction petition. However, we remand the cause with directions to amend the sentencing judgment to reflect the correct MSR term of three years.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the circuit court's judgment and remand with directions to amend the written sentencing judgment to conform to the oral pronouncement of sentence, three years' MSR. As part of our judgment, we award the State \$50 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 39 Affirmed and remanded with directions.