

**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).

2014 IL App (4th) 120922-U  
NO. 4-12-0922

**FILED**  
June 23, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JAMES PAUL MILLER	)	No. 05CF1011
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.  
Presiding Justice Appleton and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in denying defendant's motion for leave to file a successive postconviction petition where defendant did not establish cause and prejudice for his failure to bring the claim in his initial postconviction petition.

¶ 2 In August 2012, defendant, James Paul Miller, filed a motion for leave to file a successive postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)), which the trial court denied. Defendant argues the court erred in denying his motion for leave because his initial postconviction counsel failed to argue his trial counsel was ineffective for failing to move to withdraw his guilty plea and perfect his direct appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 16, 2006, defendant pleaded guilty to unlawful possession with intent to deliver cannabis (more than 2,000 grams but not more than 5,000 grams) (720 ILCS 550/5(f)

(West 2004)). On August 28, 2006, the trial court sentenced defendant to 28 years' imprisonment. Defendant filed neither a motion to withdraw his guilty plea, a motion to reconsider his sentence, nor a direct appeal.

¶ 5 On September 16, 2008, defendant filed a *pro se* postconviction petition and a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)). The petitions alleged, among other things, defendant's trial attorney was ineffective for failing to seek a fitness evaluation and hearing. On July 1, 2009, the trial court summarily dismissed defendant's postconviction petition and denied his section 2-1401 petition. The court found defendant was properly admonished prior to his guilty plea and nothing in the record indicated he was unfit when he entered his guilty plea. Defendant appealed.

¶ 6 On March 12, 2010, this court vacated the trial court's first-stage dismissal of defendant's postconviction petition because more than 90 days passed between the filing of defendant's postconviction petition and the court's ruling thereon. As a result, the trial court was required to appoint counsel for defendant and proceed to second-stage postconviction proceedings. *People v. Miller*, No. 4-09-0550 (Mar. 12, 2010) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 7 Thereafter, postconviction counsel was appointed for defendant. In May 2011, postconviction counsel filed a "Supplement to Petition For Post-Conviction Relief." It alleged trial counsel was also ineffective for advising defendant to reject a fully negotiated plea, which included a 20-year sentence. According to the petition, trial counsel advised defendant he would receive a sentence of less than 20 years if he entered an open plea.

¶ 8 Later that month, the State filed a motion to dismiss defendant's petition and the supplement to the petition prepared by postconviction counsel. The record does not contain an explicit ruling from the trial court on the State's motion to dismiss. Instead, the court set a hearing date for the petition.

¶ 9 On July 27, 2011, the trial court held a hearing on defendant's postconviction petition. Both trial counsel and defendant testified. Trial counsel testified he never promised defendant a fixed 20-year sentence. Instead, he testified it was his opinion the sentence would be in the "20 year range \*\*\* give or take 4 or 5 years." Trial counsel also testified defendant's decision to enter a guilty plea was primarily based on the State dismissing a charge that carried a mandatory life sentence. In addition, trial counsel testified he had no doubt defendant was fit. The court denied defendant's postconviction petition. As to defendant's mental health, the court stated:

"[Trial counsel] brought to the Court's attention during the plea that the Defendant had been on some form of medication, and the Court then began to question the Defendant about that medication. It was apparent from the transcript and the questions asked that the Defendant had been taken off the medication as he indicated today by the Sheriff's Department but when he was questioned about the effect that it had he indicated he understood what was going on. He had no problems with understanding the plea, the rights he was giving up; and the Court spent a considerable period of time discussing with the Defendant his

mental health situation at the point of the plea." *People v. Miller*,  
2012 IL App (4th) 110673-U, ¶ 23.

With regard to trial counsel's alleged promises with regard to sentencing, the court found trial counsel more credible than defendant.

¶ 10 Defendant appealed, arguing the trial court erred in denying his postconviction petition because "his guilty plea counsel was ineffective for failing to request a fitness evaluation prior to defendant entering his guilty plea because a *bona fide* doubt existed as to defendant's fitness to plead guilty and be sentenced." *Id.* ¶ 26 This court noted defendant's petition had been denied after a third-stage evidentiary hearing. *Id.* ¶ 2. In addition, this court recognized the trial judge who ruled on defendant's postconviction petition also presided over his plea and sentencing hearings and "had direct knowledge of defendant's behavior and demeanor at those hearings." *Id.* ¶ 27. This court's order recognized defendant appeared to have some mental health issues, but this did not "establish a *per se bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist in his defense." *Id.* ¶ 29. According to this court's order:

"Based on the record in this case, we cannot say the trial court's finding was manifestly erroneous. Defendant failed to establish the trial court at the plea or sentencing hearing would have found a *bona fide* doubt of his fitness to enter a guilty plea had [counsel] requested a fitness evaluation and hearing. As a result, defendant was not prejudiced by his trial counsel's failure to make that request. See *Eddmunds*, 143 Ill. 2d at 512-13, 578

N.E.2d at 957 ('[T]o establish that he was prejudiced by his trial counsel's alleged incompetency, the petitioner must demonstrate that facts existed at the time of his trial which raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and assist in his defense[.]'). To establish a claim of ineffective assistance of counsel, a defendant must show his attorney's representation was deficient and he was prejudiced by his attorney's performance." *Id.* ¶ 39.

This court affirmed the denial of defendant's petition. *Id.* ¶ 42. Thereafter, our supreme court denied his petition for leave to appeal. *People v. Miller*, No. 114751 (Nov. 28, 2012).

¶ 11 On August 30, 2012, defendant filed a motion for leave to file a successive postconviction petition. In the motion, defendant stated his trial counsel provided ineffective assistance by telling defendant he would not be sentenced to more than 20 years in prison if he rejected the State's 20-year plea offer and entered an open guilty plea. Defendant further argued his postconviction counsel was ineffective for not amending the initial postconviction petition to include an argument his trial counsel was ineffective for failing to move to withdraw his guilty plea as defendant directed.

¶ 12 In the successive petition, defendant argued his trial counsel was ineffective for advising defendant to reject the State's 20-year plea offer and enter an open guilty plea. Defendant entered the open plea based on his trial attorney's assurance he would receive no more than 20 years in prison. According to defendant, had he known his trial counsel was merely speculating, he would not have entered an open plea. Defendant alleged his postconviction

counsel was ineffective because he failed to follow defendant's direction and argue trial counsel's ineffectiveness for failing to move to withdraw defendant's guilty plea.

¶ 13 On September 13, 2012, the trial court denied defendant's motion for leave to file a successive postconviction petition. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court erred in denying his motion for leave to file a successive postconviction petition. We review *de novo* the trial court's denial of a defendant's motion for leave to file a successive petition for postconviction relief. *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 16 The Act contemplates the filing of only one postconviction petition, but exceptions may be made in certain circumstances. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456, 793 N.E.2d 609, 619 (2002). "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 2010). " 'Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court.' " *People v. Smith*, 2013 IL App (4th) 110220, ¶ 20, 986 N.E.2d 1224 (quoting *Gillespie*, 407 Ill. App. 3d at 123, 941 N.E.2d at 451).

¶ 17 "In seeking leave of court, a petitioner must demonstrate 'cause for his \*\*\* failure to bring the claim in his \*\*\* initial post[ conviction proceedings and prejudice result[ing] from that failure.' " *People v. Green*, 2012 IL App (4th) 101034, ¶ 28, 970 N.E.2d 101 (quoting 725 ILCS 5/122-1(f) (West 2010)). Stating the gist of a claim is not sufficient to obtain leave to file a successive postconviction petition. *Id.* ¶ 23, 970 N.E.2d 101 (citing *People v. Edwards*,

2012 IL 111711, ¶ 27, 969 N.E.2d 829 (finding no basis for applying a first-stage "gist" standard to a successive postconviction petition)); but see *People v. LaPointe*, 365 Ill. App. 3d 914, 923, 850 N.E.2d 893, 900-01 (2006). Section 122-1(f) states:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (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 proceedings; 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." 725 ILCS 5/122-1(f) (West 2010).

¶ 18 Defendant argues he showed "cause" for failing to raise his trial counsel's ineffectiveness in his first postconviction petition because his postconviction counsel was ineffective for not raising the issue as defendant requested him to do. Defendant claims he was "prejudiced" because he lost his right to a direct appeal.

¶ 19 As support for his argument he should have been given leave to file his successive petition, defendant points to the United States Supreme Court's recent decisions in *Martinez v. Ryan*, 566 U.S. \_\_\_, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 569 U.S. \_\_\_, 133 S.Ct. 1911

(2013), as support for his position. The Court's ruling in *Martinez* created an exception to the Supreme Court's earlier holding in *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Coleman*, the Supreme Court noted a defendant has no constitutional right to an attorney in state postconviction proceedings. *Id.* at 752. As a result, the Court stated a defendant cannot argue the ineffective assistance of his postconviction counsel is cause to excuse his procedural default in a federal *habeas* proceeding. *Id.* at 752-54. According to *Coleman*, "In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation[.]" *Id.* at 754.

¶ 20 In *Martinez*, the Supreme Court stated it needed to modify its earlier holding in *Coleman*—"that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default" in a federal *habeas* proceeding—to protect individuals with potentially legitimate claims of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at \_\_\_, 133 S.Ct. at 1315. The Court stated: "This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* The Court noted its decision in this case was an equitable ruling, not a constitutional ruling. *Id.* at \_\_\_, 132 S.Ct. at 1319. The Court further limited its ruling by stating:

"The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive

collateral proceedings, and petitions for discretionary review in a State's appellate courts. [Citations.] It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons." *Id.* at \_\_\_, 132 S. Ct. at 1320.

Recently, in *Trevino*, the Court expanded its earlier holding in *Martinez*, stating the exception applies even when a State system does not explicitly bar a defendant from arguing his trial counsel's ineffectiveness on direct appeal but—"as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 569 U.S. at \_\_\_, 133 S.Ct. at 1921.

¶ 21 Defendant argues we should apply the Supreme Court's equitable, nonconstitutional holdings in *Martinez* and *Trevino* in determining whether defendant has established cause for purposes of our allowing a successive postconviction petition. We first note *Martinez* and *Trevino* concerned federal *habeas* proceedings, not a successive state postconviction petition as in this case. As the First District has recognized:

"[In *Martinez*, the] Supreme Court did not hold that Arizona had to excuse Martinez's procedural default. To the contrary, Arizona's rulings holding that Martinez's ineffective assistance of counsel claims were procedurally defaulted were not vacated and remained in place. Martinez, as a result of this ruling, could receive no

further relief in the Arizona courts. Rather, the result of this ruling was simply that the federal courts, as a result of Arizona's particular rules of appellate procedure would find cause to avoid the federal doctrine of procedural default and thus he would be allowed to have a substantive review of his writ of *habeas corpus* in the *federal district court*." (Emphasis in original.) *People v. Jones*, 2013 IL App (1st) 113263, ¶ 30, 3 N.E.3d 891.

We agree with the First District that *Martinez* and *Trevino* do not require us to excuse defendant's forfeiture in this case. Further, we find no reason to adopt the analysis in *Martinez* and *Trevino*.

¶ 22 Defendant's argument his postconviction counsel's alleged ineffectiveness in not amending his petition to include an argument defendant's trial counsel was ineffective should somehow be considered "cause" pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)) is not persuasive and is contrary to Illinois law. Surely an individual filing a successive petition, who had the benefit of appointed counsel with regard to his first postconviction petition, should not be in a better position to file a successive petition than an individual whose initial petition was summarily dismissed without any assistance of counsel. Section 122-1(f) clearly states: "For purposes of this subsection (f): (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 petition." 725 ILCS 5/122-1(f) (West 2010). Considering defendant's petition could have included an argument his trial counsel was ineffective prior to

appointment of counsel, we do not see how appointed counsel's alleged ineffectiveness impeded defendant's ability to raise this issue during his or her initial postconviction petition.

¶ 23 For the sake of argument, even if we were to adopt the reasoning in the Supreme Court's opinions and find defendant established "cause," we still would not reverse the trial court's decision denying him leave because defendant has not established how he was "prejudiced" by trial and postconviction counsels' alleged failure to follow his directions. As stated earlier, pursuant to Illinois law, an individual seeking to file a successive postconviction petition "must demonstrate 'cause for his \*\*\* failure to bring the claim in his \*\*\* initial post[ ]conviction proceedings *and* prejudice result[ing] from that failure.'" *People v. Green*, 2012 IL App (4th) 101034, ¶ 28, 970 N.E.2d 101 (Emphasis added.) (quoting 725 ILCS 5/122-1(f) (West 2010)).

¶ 24 Defendant argues his loss of his right to a direct appeal—because his trial counsel did not file a motion to withdraw defendant's guilty plea pursuant to defendant's instruction—is sufficient to show prejudice. Defendant argues: "Where a defendant alleges that during a critical stage of a judicial proceeding he was denied the assistance of counsel altogether, [n]o specific showing of prejudice [is] required, because the adversary process itself [is] presumptively unreliable." (Quoting *People v. Edwards*, 197 Ill. 2d 239, 251, 757 N.E.2d 442, 449 (2001) (Internal quotation marks omitted.) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000))). According to defendant, "The Illinois Supreme Court [in *Edwards*] read *Flores-Ortega* as establishing that a *pro se* defendant cannot be required 'to demonstrate how his appeal would have been successful in order to establish that he was prejudiced by his attorney's failure to pursue a requested appeal.' "

¶ 25 Defendant's reliance on *Edwards* is misplaced because it involved the summary dismissal of an initial postconviction petition where the defendant only had to state the gist of a constitutional claim. In *Edwards*, the defendant filed a *pro se* postconviction petition, which included an allegation his trial counsel was ineffective. *Id.* at 242, 757 N.E.2d at 444. According to the defendant's petition, he asked his trial attorney to file an appeal after he pleaded guilty. *Id.* The attorney ignored the defendant's request. *Id.* The trial court found the defendant did not show any prejudice as a result of his trial counsel's alleged ineffectiveness. *Id.* According to the court, the defendant's petition did not include any recognized issues that could have been raised in a motion to withdraw the guilty plea. *Id.* As a result, the court dismissed the petition as frivolous or patently without merit. *Id.*

¶ 26 The defendant appealed, and the appellate court affirmed the dismissal. *Id.* at 243, 757 N.E.2d at 444-45. The defendant then appealed to our supreme court. *Id.*, 757 N.E.2d at 445. The supreme court noted a postconviction petition may be dismissed at the first stage of postconviction proceedings only if the petition is frivolous or patently without merit. *Id.* at 244, 757 N.E.2d at 445 (citing 725 ILCS 5/122-2.1(a)(2) (West 1998)). Our supreme court noted the only issue before it was whether defendant's petition was frivolous or patently without merit. *Id.* at 247, 757 N.E.2d at 447. The court found placing a burden on *pro se* defendants filing their first postconviction petitions to recognize both factual and legal errors in the plea process to avoid summary dismissal would result in some defendants being denied any meaningful review of their respective plea proceedings, despite their constitutional right to a direct appeal. *Id.* at 254, 757 N.E.2d at 451. However, the court clearly noted its holding was "limited to the specific issue before [it], *i.e.*, whether the circuit court erred in dismissing defendant's petition at the first

stage of post-conviction proceedings." *Id.* at 257, 757 N.E.2d at 453. Because the supreme court in *Edwards* was only concerned with the first stage dismissal of a defendant's first postconviction petition, it has little relevance to the situation in the case *sub judice*. *Id.*

¶ 27 The case *sub judice* involves defendant's ability to file a successive postconviction petition, which is not judged pursuant to section 122-2.1 of the Act (725 ILCS 5/122-2.1 (West 2010)). Instead, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)) applies. Defendant's appointed postconviction counsel's alleged failure to amend his petition to include a claim regarding trial counsel's ineffectiveness does not constitute an objective factor that impeded his ability to raise a specific claim during his initial postconviction proceeding. Defendant could have raised this issue on his own. Further, defendant has not established how he was prejudiced by his trial counsel's alleged failure to file a motion to withdraw his guilty plea. As a result, we do not find the trial court erred in denying defendant's request for leave to file a successive postconviction petition.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's ruling. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of the appeal.

¶ 30 Affirmed.