

NOTICE
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2014 IL App (5th) 120398-U

NO. 5-12-0398

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,)	St. Clair County.
)	
v.)	No. 06-CF-731
)	
LaQUIZE McMATH,)	Honorable
)	Michael N. Cook,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* Where the defendant did not show cause or prejudice, the circuit court did not abuse its discretion when it denied the defendant's motion to file a successive postconviction petition, and the State Appellate Defender's motion to withdraw as counsel on appeal is granted where there is no meritorious argument to the contrary.

¶ 2 The defendant, LaQuize McMath, appeals the circuit court's denial of his motion for leave to file a successive postconviction petition. The Office of the State Appellate Defender (OSAD) has been appointed to represent him. OSAD has 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 was granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant has filed a response. We have considered OSAD's motion to withdraw as counsel on appeal, as well as the defendant's response thereto. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of St. Clair County.

¶ 3

BACKGROUND

¶ 4 This is the third time the defendant has been before us on appeal. As such, we recite only those facts necessary to the disposition of the current appeal.

¶ 5 On May 11, 2006, the State charged the defendant by criminal complaint with armed violence, first-degree murder, and aggravated unlawful use of a weapon by a felon in the shooting death of Larry Townsend. On June 2, 2006, the grand jury returned an indictment alleging the same three crimes.

¶ 6 On June 4, 2007, the case proceeded to a jury trial on the armed violence and first-degree murder charges. The witnesses relevant to this appeal were Terrance Wells, his cousin Travis Wells, and Gary Bailey, all of whom testified for the State.

¶ 7 Terrance Wells testified that the weather was clear and sunny on the day in question. He had known the defendant for approximately 20 years and the victim for approximately 6 months. There was a crowd, including the victim and at least three witnesses, gathered in front of a Centreville residence. The defendant approached the crowd with a gun in his hand and told everyone to move out of the way. Then he fired a

shot into the ground. He then told the victim that he had until the count of 10 to leave the area. The defendant started counting and fired several more shots into the ground. The victim began to run away. Terrance then saw the victim lying on the ground. Terrance did not see anyone else with a gun that day. During the police investigation, he picked the defendant out of a photo array as the person who fired the shots.

¶ 8 Travis Wells testified that he had known the victim for 10 years. He also knew the defendant, but did not testify as to the length of their acquaintance. The incident took place in front of Travis's residence. Travis went inside his residence to make a drink for the victim when he heard the defendant begin to count. He heard gunshots. When he exited the apartment, he saw the defendant putting a gun under his shirt and backing up. The defendant ran away. During the police investigation, Travis picked the defendant out of a photo array as the person who had the gun on the day of the incident.

¶ 9 Gary Bailey testified that he had known both the victim and the defendant for approximately 10 years. The defendant approached the crowd, and when the defendant started counting, Bailey ran behind a building. He heard shots being fired as he was doing so. He saw the victim running in the same direction, and he heard the victim saying that he had been hit or shot. The victim collapsed.

¶ 10 Following testimony from additional witnesses, the court read the following instruction to the jury:

"When you weigh the identification testimony of a witness, you should consider all of the facts and circumstances in evidence, including, but not limited to the following: The opportunity the witness had to view the offender at the time of the

offense; or the witness' degree of attention at the time of the offense; or the witness' earlier description of the offender; or the level of certainty shown by the witness when confronting the defendant; or the length of time between the offense and the identification confrontation." See Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter, IPI Criminal 4th).

Defense counsel did not object to this instruction. The jury found the defendant guilty of first-degree murder. Prior to sentencing, the State dismissed the unlawful possession of a weapon by a felon charge. The court then sentenced the defendant to 32 years' imprisonment and 3 years' mandatory supervised release.

¶ 11 On direct appeal, this court affirmed the defendant's conviction. *People v. McMath*, No. 5-07-0496 (2008) (unpublished order under Supreme Court Rule 23). The defendant subsequently filed a *pro se* postconviction petition. The circuit court dismissed the petition as frivolous and patently without merit. This court affirmed. *People v. McMath*, Nos. 5-09-0296 & 5-09-0546 (cons.) (2010) (unpublished order under Supreme Court Rule 23).

¶ 12 On June 5, 2012, the defendant filed a motion for leave to file a successive postconviction petition. In that motion, the defendant asserted that the jury instruction on eyewitness identification testimony, IPI Criminal 4th No. 3.15, was erroneous because it contained the conjunction "or" between the separately listed factors. The defendant argued that (1) trial counsel was ineffective for failing to challenge the erroneous jury instruction, (2) appellate counsel was ineffective on direct appeal for not raising the issue of the erroneous jury instruction either as a stand-alone issue or as an ineffective

assistance of trial counsel claim, and (3) he was denied due process as a result of the erroneous jury instruction.

¶ 13 On August 24, 2012, the circuit court denied the defendant's motion for leave to file a successive postconviction petition. The defendant filed a *pro se* notice of appeal. On September 6, 2012, OSAD was appointed to represent the defendant. On September 20, 2012, OSAD filed an amended notice of appeal.

¶ 14 ANALYSIS

¶ 15 The potential issues identified by OSAD are whether the defendant showed both cause and prejudice for neglecting to raise, in his original postconviction petition, trial counsel's alleged ineffectiveness for failing to object to a faulty jury instruction on eyewitness identification, appellate counsel's alleged ineffectiveness for failing to raise that issue on direct appeal, and the alleged denial of due process that resulted from the erroneous jury instruction.

¶ 16 The Post-Conviction Hearing Act (Act) contemplates the filing of only one postconviction petition. 725 ILCS 5/122-3 (West 2010). Consequently, all issues that were raised and decided on direct appeal or in the original postconviction proceedings are barred from further consideration by *res judicata*, and all issues that could have been raised but were not are forfeited. *People v. Anderson*, 375 Ill. App. 3d 990, 1000 (2007). Strict application of the doctrine of forfeiture will be relaxed where fundamental fairness requires. *People v. Newman*, 365 Ill. App. 3d 285, 288 (2006). The test to determine whether fundamental fairness requires an exception to the statutory bar of forfeiture is the cause-and-prejudice test enunciated in *People v. Pitsonbarger*, 205 Ill. 2d 444, 458

(2002), and codified in section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)). To demonstrate cause, a defendant must identify an objective factor that prevented him from raising the claim in his initial postconviction proceeding. 725 ILCS 5/122-1(f) (West 2010). To demonstrate prejudice, he must demonstrate that the claim so infected the proceeding that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2010). Other than meeting the requirements of the cause-and-prejudice test, a defendant may be excused for failing to raise a claim in an earlier petition only if necessary to prevent a fundamental miscarriage of justice. *People v. McDonald*, 364 Ill. App. 3d 390, 393 (2006). To show a fundamental miscarriage of justice, a defendant must show actual innocence. *People v. Smith*, 341 Ill. App. 3d 530, 536 (2003). We review the denial of a motion to file a successive postconviction petition *de novo*. *People v. Croom*, 2012 IL App (4th) 100932, ¶ 21.

¶ 17 In this case, the defendant did not claim actual innocence. Instead, he argued that his trial counsel and appellate counsel were ineffective for not raising the erroneous jury instruction issue in the respective proceedings, and that he was denied due process because of the erroneous jury instruction. We address the due process claims first.

¶ 18 As OSAD correctly notes, the jury instruction that the circuit court gave in this case was clearly erroneous. In *People v. Herron*, our supreme court held that the use of the conjunction "or" in the 2000 version of IPI Criminal 4th No. 3.15 was expressly prohibited because it made the instruction ambiguous and misleading. *People v. Herron*, 215 Ill. 2d 167 (2005). IPI Criminal 4th No. 3.15 was changed in 2003 to remove the "ors" between the factors. IPI Criminal 4th No. 3.15 (Supp. 2003). In this case, the

circuit court gave the invalid 2000 IPI Criminal 4th No. 3.15 instruction rather than the 2003 IPI Criminal 4th No. 3.15, which was clearly erroneous.

¶ 19 However, the defendant did not raise the issue of the erroneous jury instruction in his original postconviction petition. Ignorance of the law does not provide "cause" to justify the failure to bring a claim in an original postconviction petition. *People v. Evans*, 2013 IL 113471, ¶ 13. The defendant's motion to file a successive postconviction petition identifies no objective factor that would have prevented him from raising the issue in his original postconviction petition, and thus the defendant has not shown cause.

¶ 20 Assuming, *arguendo*, that the defendant had shown cause for his failure to bring the claim in the original postconviction petition, the defendant has not shown that he was prejudiced as a result of the erroneous jury instruction. In *Herron*, the supreme court held that a defendant was prejudiced by the erroneous IPI Criminal 4th No. 3.15 instruction only where the defendant could show that the evidence was closely balanced based on the totality of the State's evidence. *Herron*, 215 Ill. 2d at 192-93. The erroneous IPI Criminal 4th No. 3.15 is prejudicial where the case turns on eyewitness identification testimony and that testimony was uncertain. *People v. Piatkowski*, 225 Ill. 2d 551, 570-71 (2007). In *People v. James*, the court found that the IPI Criminal 4th No. 3.15 error was harmless because three eyewitnesses who knew the defendant identified him as one of the individuals who shot the victim. *People v. James*, 348 Ill. App. 3d 498, 500-01 (2004). In *People v. Sims*, the court found that IPI Criminal 4th No. 3.15 error was harmless because an eyewitness familiar with the defendant identified that defendant

as one of the people who shot the victim. *People v. Sims*, 358 Ill. App. 3d 627, 631 (2005).

¶ 21 Here, there were three eyewitnesses to the shooting. All three witnesses knew and positively identified the defendant. Terrance Wells testified that he saw the defendant with a gun, heard him start counting to the victim, and saw him shoot into the ground a number of times. Travis Wells testified that he heard the defendant counting while Travis was inside his apartment, heard the gunshots, and saw the defendant place a gun under his shirt when Travis exited the apartment. Gary Bailey heard the defendant begin to count, saw the defendant begin shooting, and saw the victim collapse as he was running away from the defendant. This testimony by all three witnesses clearly showed that the defendant was the shooter. Even if the correct jury instruction had been given, the evidence was not so closely balanced that a reasonable trier of fact could have found the defendant not guilty. See *James*, 348 Ill. App. 3d at 507.

¶ 22 The defendant also argued in his motion for leave to file a successive postconviction petition that trial and appellate counsel were ineffective for having failed to raise the erroneous instruction issue. To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 460 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). Because the defendant was not prejudiced by the erroneous instruction, his ineffective assistance of counsel claims must fail.

¶ 23 In his reply brief, the defendant argues that all three eyewitnesses had criminal charges against them at the time they testified against the defendant and thus their testimony could not be trusted for its veracity. Defense counsel properly addressed this issue when he cross-examined each witness. Terrance Wells testified that he was given immunity on the day of the trial. When he gave his statement to the police, it was on the day of the shooting and he had not been given immunity at that time. He also testified that no one had made any threats or promises to cause him to give a statement. Gary Bailey testified that, at the time of trial, he had been in jail for five days. Again, defense counsel properly questioned Bailey about this information. Travis Wells testified that, at the time of trial, he was in custody at the county jail. Defense counsel again brought out this information during cross-examination. The jury was given the opportunity to know of the pending charges against the witnesses so they could properly assess any bias, prejudice, or ulterior motives behind the witness's testimony. *People v. Makiel*, 358 Ill. App. 3d 102, 114-15 (2005). Nevertheless, the jury deemed the witnesses' testimony credible, and we see no error in allowing those witnesses to testify.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, the motion of OSAD to withdraw as counsel on appeal is granted, and the judgment of the circuit court of St. Clair County is affirmed.

¶ 26 Motion granted; judgment affirmed.