

No. 1-12-0208

**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).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 91 CR 11754
	)	
JESSE SMITH,	)	The Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE TAYLOR II delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The doctrine of *res judicata* applies to this defendant's claim of trial counsel's ineffectiveness for failing to present a promised alibi witness, as brought in a successive post-conviction petition. Furthermore, defendant cannot meet the cause and prejudice requirements for a successive filing.
- ¶ 2 Defendant Jesse Smith appeals from the circuit court's denial of leave to file a successive *pro se* post-conviction petition. On appeal, defendant contends he has met the cause and prejudice requirements for a successive petition where the circuit court summarily dismissed his

initial post-conviction filing due to the lack of an affidavit from an alibi witness when that affidavit had in fact been filed with the court. We affirm.

¶ 3 Defendant and Willie Barnes were charged with the 1991 first degree murder of Charlotte Wilson (Charlotte) and the attempted first degree murder of Jerome Wilson (Wilson) and two onlookers. In a joint bench trial in 1992, the testimony established that at about midnight on February 2, 1991, Wilson and Charlotte, who were not related, were walking near 4525 South Federal in Chicago. Wilson testified that he saw defendant walking toward them in a breezeway. Defendant stopped about 13 feet in front of the victims and had his hands in his coat. Wilson did not see a gun but testified defendant "shot through his coat," striking Charlotte in the head.

¶ 4 Wilson asked why he shot Charlotte, and defendant removed the hood from his head, allowing Wilson to see his face. Defendant then removed a gun from his coat and shot Wilson in the side. Wilson fell to the ground. As he looked back into the breezeway, he saw Barnes holding a gun and firing it straight through the breezeway. Barnes was not wearing a hood. Wilson identified defendant and Barnes from police photo arrays and lineups. He also identified defendant in court as the first shooter and Barnes as the second shooter.

¶ 5 Defendant's attorney, Lawrence Vance, listed Carol Brown, defendant's common-law wife, as a potential witness on a pre-trial witness list. Vance also told the court in his opening statement that he would present evidence that defendant was not at the scene of the shooting and was home with his common-law wife that evening. However, Vance did not call Brown as a witness. In closing argument, Vance challenged the credibility of Wilson's testimony and argued that Wilson lacked a sufficient opportunity to view his assailants.

¶ 6 On December 14, 1992, the trial court convicted defendant and Barnes of first degree murder and three counts of attempted murder. Defendant also was convicted of aggravated

discharge of a firearm and aggravated battery. The court sentenced defendant to an extended term of 80 years in prison for murder and a concurrent 30-year term for each count of attempted murder. In a consolidated direct appeal in which the defendants challenged the sufficiency of the evidence against them, this court affirmed. *People v. Willie Barnes and Jessie Smith*, Nos. 1-93-1190 and 1-93-1714 (1995) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied leave to appeal. *People v. Barnes*, 163 Ill. 2d 565 (1995).

¶ 7 On January 12, 1996, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 1996)). In that petition, defendant asserted, among other claims, that Vance was ineffective in failing to call Brown as an alibi witness. Defendant asserted that Vance interviewed Brown and told her she would be called to testify and also told defendant that Brown would provide him with an alibi. Defendant also contended his appellate counsel was ineffective for failing to raise that issue in his direct appeal. Appended to that petition was defendant's affidavit that Vance told him Brown would testify.

¶ 8 On February 8, 1996, defendant filed in the circuit court a notarized affidavit of Brown. In the affidavit, Brown said Vance told her she would be called to testify at defendant's trial and she was prepared to testify that defendant could not have committed the crimes "because he was with me on the time in question." Brown further attested she "was waiting and expecting to testify when attorney Lawrence Vance informed me at the last minute I would not be called to testify." Lastly, Brown stated in the affidavit: "I know that Jesse Smith [*sic*] could not have committed the crimes he was charged for. I still don't understand why I was not called upon to testify." The notarization of Brown's affidavit was dated January 25, 1996.

¶ 9 On March 28, 1996, the circuit court dismissed defendant's petition as frivolous and patently without merit. The court first noted that defendant's petition was not timely filed because defendant had until three years from the date of his December 1992 conviction, or until December 14, 1995, to file his post-conviction petition. The court also concluded that defendant had failed to demonstrate the delay was not due to his own culpable negligence.

¶ 10 As to the merits of defendant's post-conviction claims of ineffectiveness of defendant's trial and appellate counsel, the circuit court noted that Vance did not represent defendant in his direct appeal. As to defendant's claim of ineffective counsel for failing to call Brown as an alibi witness, the court noted that defendant did not provide an affidavit of Brown. The court also stated that because defendant's trial counsel provided effective assistance, his counsel on direct appeal did not provide deficient representation.

¶ 11 Defendant appealed the summary dismissal of his petition, and this court granted the motion of the office of the Cook County Public Defender to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the petition's dismissal. This court noted that defendant's petition was untimely and that defendant's claims of ineffective trial and appellate counsel either were, or could have been, presented on direct appeal, and were therefore barred by the doctrines of *res judicata* and waiver. *People v. Smith*, No. 1-96-1638 (1996) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied leave to appeal. *People v. Smith*, 174 Ill. 2d 588 (1997).

¶ 12 On August 28, 1998, defendant sought review in the United States District Court for the Northern District of Illinois by filing a *pro se* petition for a writ of *habeas corpus*, again claiming his trial and appellate counsel provided ineffective assistance. The federal district court granted defendant's request for an evidentiary hearing, at which Brown testified that Vance told she did

not need to testify even though she was present at trial. Defendant and Vance stipulated at the hearing that Vance would have said he did not remember why he did not call Brown as a witness. The federal district court found defendant's post-conviction petition and his *habeas* petition were time-barred and dismissed the latter petition in a written order dated September 3, 2002. The district court granted defendant's request for a certificate of appealability, and the Seventh Circuit Court of Appeals reversed the dismissal of defendant's *habeas* petition and remanded to the district court, finding the post-conviction petition should not have been dismissed as untimely filed and that defendant's *habeas* petition also was timely.

¶ 13 After additional review in the district court, defendant was allowed to appeal two issues to the Seventh Circuit: (1) whether Vance was ineffective "for failing to call an alibi witness and present an alibi defense" and (2) whether defendant's appellate counsel was ineffective for failing to raise the issue of Vance's ineffectiveness on direct appeal. *Smith v. Gaetz*, 565 F.3d 346, 351 (7th Cir. 2009) (noting those two issues were certified for appeal). The Seventh Circuit held defendant's ineffective assistance of appellate counsel claim was procedurally defaulted for the failure to raise it throughout his various appeals. The court further concluded that Vance's decision not to call Brown as an alibi witness was a strategic decision that did not support an ineffective assistance claim. *Id.* at 353-54.

¶ 14 On November 2, 2011, defendant submitted a *pro se* motion for leave to file a successive post-conviction petition. In that filing, defendant contended his appellate counsel was ineffective for not raising the issue of Vance's failure to call Brown as an alibi witness. Defendant asserted he could meet the cause and prejudice tests for a successive post-conviction filing, and he attached his own affidavit and Brown's affidavit to his successive petition. The circuit court denied defendant leave to file his successive petition, noting the issue of Vance's ineffectiveness

was raised in defendant's initial post-conviction petition. As to the contents of Brown's affidavit, the court noted:

"She does not say where they were, what they were doing, who else was present, how long they had been there. There are absolutely no details in this affidavit, just that she was with him. [The affidavit] [d]oesn't even say if she was with him at the crime scene or some other place."

¶ 15 On appeal, defendant acknowledges that his instant filing raises the same issue that he presented in his initial post-conviction petition. The State responds that because defendant has already litigated his claim in the proceedings on his first petition and in a federal *habeas* proceeding, the doctrine of *res judicata* bars him from raising the issue again here.

¶ 16 The Act allows criminal defendants to challenge their conviction or sentence based on substantial deprivations of their constitutional rights. 725 ILCS 5/122-1(a)(1) (West 1996). Petitions under the Act are considered a collateral attack on a final judgment as opposed to a substitute for an appeal. *People v. Edwards*, 2012 IL 111711, ¶ 22, 29. The Act contemplates the filing of only one post-conviction petition, and successive post-conviction actions are disfavored by Illinois courts. 725 ILCS 5/122-1(f) (West 1996). We review *de novo* the denial of leave to file a successive post-conviction petition. *People v. Adams*, 2013 IL App (1st) 111081, ¶ 30.

¶ 17 *Res judicata* bars the consideration in post-conviction proceedings of issues that were raised and decided on direct appeal. *People v. Tate*, 2012 IL 112214, ¶ 8. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions on the same cause of action. *People v. Carroccia*, 352 Ill. App. 3d 1114, 1123 (2004). *Res judicata* applies where three requirements are met: (1) a

final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the cause of action; and (3) an identity of parties or their privies. *Id.*

¶ 18 A defendant cannot raise issues in a post-conviction proceeding that have already been addressed pursuant to a federal *habeas corpus* petition. *People v. Terry*, 2012 IL App (4th) 100205, ¶ 29, citing *People v. Peeples*, 184 Ill. App. 3d 206, 208 (1989). See also *People v. White*, 198 Ill. App. 3d 781, 784-85 (1989); *People v. Peery*, 108 Ill. App. 3d 843, 845-46 (1982). Nevertheless, defendant contends *res judicata* does not apply in this case because his current claim differs from the issue raised in his *habeas* proceeding. He argues that in the *habeas* proceeding, the Seventh Circuit considered whether his appellate counsel was deficient in failing to raise in his direct appeal whether Vance was ineffective for choosing not to present Brown as an alibi witness at defendant's trial. In contrast, defendant contends, the issue now presented in his successive post-conviction petition is "whether trial counsel was ineffective for failing to call Brown as a witness" in light of Brown's attestation that Vance told her she would be called to testify.

¶ 19 The Seventh Circuit stated that the two issues certified for its decision on appeal were: (1) Vance's purported ineffectiveness in "failing to call an alibi witness and present an alibi defense," and (2) the ineffectiveness of appellate counsel for failing to raise Vance's potentially deficient representation. *Smith*, 565 F.3d at 351. In determining that Vance's representation was reasonable, the Seventh Circuit stated that Vance pursued a trial strategy of impeaching the credibility of Wilson, who identified defendant as the gunman. *Id.* at 353-54. The court noted that Vance "brought out several discrepancies regarding the distances Wilson said he ran while attempting to flee from the shooters" and got Wilson to concede other points on cross-examination. *Id.*

¶ 20 As to the contents of Brown's affidavit, the Seventh Circuit noted that Brown did not specify defendant's whereabouts at the time of the shooting but only stated he was with Brown during "the time in question." *Id.* at 354. The court further observed that calling Brown to testify presented inherent risks, such as the weakening of her ability on cross-examination by the State and its rejection by the trial judge as unreliable. *Id.* "Conversely, left alone, the absence of a clear motive for the murder combined with the inconsistencies in Wilson's testimony gave Vance a reasonable doubt defense on which to stand." *Id.*

¶ 21 As the Seventh Circuit's opinion illustrates, the claim of trial counsel's ineffectiveness set out in defendant's successive petition was decided in his *habeas* proceeding. The federal court could not answer the second certified issue without deciding the first issue, *i.e.*, whether defendant received the ineffective assistance of trial counsel. The Seventh Circuit concluded that Vance's performance fell within the reasonable range of professional assistance and, moreover, defendant's counsel on direct appeal did not err in choosing not to raise an issue of Vance's ineffectiveness. See *People v. Simms*, 192 Ill. 2d 348, 362 (2000) (where defendant's underlying claim is without merit, appellate counsel cannot be found ineffective for failing to raise that non-meritorious issue on appeal). Therefore, the Seventh Circuit ruled on the potential ineffectiveness of defendant's trial counsel, and *res judicata* bars its reconsideration by this court.

¶ 22 Even if defendant's claim of trial counsel's ineffectiveness had not already been decided, we also find that defendant cannot satisfy the stringent requirements to file a successive post-conviction petition. We first note that defendant repeatedly attempts to invoke the standard of review applied to initial post-conviction petitions, contending that an "arguable basis of law and fact" standard applies, citing to *People v. Hodges*, 234 Ill 2d 1, 17 (2009). Defendant asks this court to follow *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006), *aff'd on other grounds*, 227

Ill. 2d 39 (2007), which held that *pro se* petitioners presenting successive filings need only state the "gist" of cause and prejudice. Since *LaPointe*, however, our supreme court has expressly addressed this issue and stated that "there is simply no basis in [the Act] for applying a first-stage analysis to a *successive* petition." (Emphasis in original.) *People v. Edwards*, 2012 IL 111711, ¶ 27 (noting that successive petitions are disfavored). See also *People v. Conick*, 232 Ill. 2d 132, 142 (2008) (the cause and prejudice standard for successive petitioners is "more exacting" than the "gist" standard applied to initial filings under the Act). Therefore, defendant's contentions that considerations of cause and prejudice are subject only to the "arguable" standards set out in *Hodges* are rejected.

¶ 23 The Act provides that in seeking leave of court to bring a successive petition, the defendant must show the express statutory requirements of cause and prejudice. 725 ILCS 5/122-1(f) (West 1996). "Cause" is an objective factor that impeded counsel's efforts to raise the claim in an earlier proceeding, and "prejudice" occurs when the claimed constitutional error so infected the trial that the conviction or sentence denied the defendant due process. 725 ILCS 5/122-1(f) (West 1996). Both of those requirements must be met for the defendant to prevail. *People v. Guerrero*, 2012 IL 112020, ¶ 15.

¶ 24 First, as to cause, we have concluded that defendant's claim of the ineffectiveness of his trial counsel was, in fact, raised in an earlier proceeding. Second, as to prejudice, defendant must show the claim he failed to raise in his initial petition so infected his trial that he was denied due process. See 725 ILCS 5/122-1(f) (West 1996). To meet the prejudice requirement in this case, defendant would have to meet both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984), which he cannot do. Under *Strickland*, a defendant must demonstrate both that his

trial counsel's performance was objectively unreasonable and that but for counsel's error, the result of his trial would have been different. *Strickland*, 466 U.S. at 694.

¶ 25 Defendant specifically challenges Vance's failure to call Brown as an alibi witness after expressly promising to do so at the outset of trial. A defense counsel's failure to provide testimony promised during opening statements is not *per se* ineffective assistance of counsel. *People v. Wilborn*, 2013 IL App (1st) 092802, ¶ 80, *disagreed with on other grounds*, *People v. Hommerson*, 2013 IL App (2d) 110805, ¶ 13. While counsel may be deemed ineffective in that circumstance, the *Wilborn* court noted that "counsel's decision to abandon a trial strategy during trial may be reasonable under the circumstances" and "the decision not to provide promised testimony may be warranted by unexpected events." *Wilborn*, 2013 IL App (1st) 092802, ¶ 80.

¶ 26 Defense counsel "need not call a witness if he reasonably believes that under the circumstances the individual's testimony is unreliable or would likely have been harmful to the defendant." *People v. Flores*, 128 Ill. 2d 66, 106 (1989); see also *People v. Elder*, 73 Ill. App. 3d 192, 203 (1979) (counsel made strategic decision to emphasize discrepancies in testimony of State's witness rather than introduce alibi testimony). As the Seventh Circuit observed, Vance likely anticipated during defendant's trial that Brown's testimony as defendant's common-law wife was subject to attack as biased and that her testimony was potentially more harmful than helpful. Additionally, defendant cannot show that Brown's alibi testimony would have made a difference in the outcome of his trial. Wilson's testimony and his identification of defendant were strong, and the purported alibi in Brown's affidavit was vague and non-specific.

¶ 27 Accordingly, because defendant cannot meet the cause and prejudice requirements, we affirm the circuit court's denial of leave to file a successive post-conviction petition.

¶ 28 Affirmed.