FIRST DIVISION
August 13, 2012

Nos. 1-10-3570 & 1-11-0449 (cons.)

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
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	
	)	No. 01 CR 18654
	)	
MILTON JONES,	)	
	)	Honorable
Defendant-Appellant.	)	Michael Brown,
	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ ***1*** ***Held*****:** Defendant's consecutive sentences are void. Defendant failed to establish the cause and prejudice necessary to be granted leave to file a second successive postconviction petition.

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¶ 2 This is a consolidated appeal of two cases. In case No. 1-10-3570, defendant appeals from the circuit court's denial of his request for leave to file a second successive postconviction petition. Defendant argues: (1) his consecutive sentences are void: and (2) he established the cause and prejudice necessary to have been granted leave to file his second successive postconviction petition. In case 1-11-0449, defendant appeals from the denial of a 2-1401 petition for from relief judgment. Defendant argues that the court improperly denied his motion where he argued that his consecutive sentences were void because neither victim suffered bodily harm. For the following reasons, we modify defendant's consecutive sentences for aggravated kidnaping to run concurrently and concurrent with his sentence for murder. We also affirm the judgment of the trial court with respect to its denial of defendant's request for leave to file a second successive postconviction petition.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2000)) and two counts of aggravated kidnapping (720 ILCS 5/10-2(a)(5) (West 2000). He was sentenced to a total of 37 years' imprisonment; 25 years' imprisonment for murder and six years' imprisonment for each count of aggravated kidnapping, all sentences to run consecutively. This court affirmed defendant's convictions on June 9, 2006, in *People v. Milton Jones*, No. 1-04-1359 (2009) (unpublished order pursuant to Supreme Court Rule 23). A full recitation of the facts underlying defendant's conviction can be found therein.

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¶ 5 Defendant filed his first postconviction petition in June 2007. Defendant argued that his trial counsel was ineffective for failing to call alibi witnesses, failing to show defendant any discovery, failing to prepare for trial and failing to request a fitness hearing. The circuit court summarily dismissed the petition on August 8, 2007.

¶ 6 Thereafter, on August 21, 2008, defendant filed a motion seeking leave to file a successive postconviction petition. Defendant claimed actual innocence and ineffective assistance of counsel. Defendant also alleged numerous errors committed by the trial court. The circuit court denied defendant leave to file the petition and defendant appealed. On appeal, he claimed the mittimus should be corrected to reflect a single conviction and sentence for murder, rather than three convictions. The parties agreed and this court issued an order on August 17, 2010, directing the clerk of the circuit court to correct the mittimus to reflect a single conviction for murder. *People v. Milton Jones*, No. 1-08-2846 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 Defendant sought leave to file the instant second successive postconviction petition on February 10, 2009, wherein defendant raised seventeen issues. Among them, defendant contended that his consecutive sentences were void because he did not inflict serious bodily injury to either victim, and he was denied due process of law where newly discovered evidence showed that the State failed to disclose M.C. Jones' criminal and mental health history in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). Defendant also claimed that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness for failing to file a supplemental motion requesting the criminal history of the State's witnesses. On October 29, 2010, the court

denied defendant leave to file his successive postconviction petition. Defendant's appeal from this finding is the subject of number 1-10-3570.

¶ 8 Defendant also filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Criminal Procedure of 1963 (735 ILCS 5/2-1401 (West 2000)), on December 15, 2010. In this petition, defendant argued that his consecutive sentences for aggravated kidnaping were void because neither kidnaping victim suffered serious bodily injury. The court denied the petition on January 7, 2011, finding that this court had already granted the requested sentencing relief by ordering the issuance of a corrected mittimus in *People v. Milton Jones*, No. 1-08-2846 (2010) (unpublished order pursuant to Supreme Court Rule 23). Defendant filed a timely appeal and the appeal was docketed under appeal number 1-11-0449.

¶ 9 The Office of the State Appellate Defender was appointed to represent defendant in both appeal numbers 1-10-3570 and 1-11-0449. On November 2, 2011, this court granted defendant's motion to consolidate the two appeals.

¶ 10 ANALYSIS

¶ 11 Defendant first argues, and the State agrees, that his consecutive sentences are void as he did not inflict severe bodily injury on either victim. Defendant claims that his sentences for aggravated kidnaping should be modified to run concurrently with one another and concurrent with his sentence for first degree murder. Defendant raised this issue in both his second successive postconviction petition and his motion for relief from judgment.

¶ 12 At sentencing, the trial court sentenced defendant to a total of 37 years'

imprisonment: 25 years for the first degree murder of Patrick Banks, six years for the aggravated kidnaping of Lolita Sierra and six years for the aggravated kidnaping of M.C. Jones. All three sentences were ordered to be served consecutively.

¶ 13 At the time of the offenses in the instant case consecutive sentences were available for:

> "offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the Defendant inflicted severe bodily injury, or where the Defendant was convicted of a violation of Section 12-13, 12-14, or 12-4.1 of the Criminal Code of 1961." 730 ILCS 5/5-8-4(a) (West 1999).

¶ 14 The legislature amended section 5-8-4(a) effective January 1, 2000, six months after the offenses in the case, making murder a triggering offense for consecutive sentences even where a defendant does not inflict severe bodily injury on the victim of a Class X or Class 1 felony. 730 ILCS 5-8-4(a) (West 2000); See also *People v. Whitney*, 188 Ill. 2d 91, 92-93 (1999). Nevertheless, defendant has a right to be sentenced under the law in effect at the time of the offense. *People v. Varghese*, 391 Ill. App. 3d 866, 878 (2009). As such, under the 1999 version of the statute, consecutive sentences cannot be imposed unless defendant inflicted severe bodily injury on Sierra or M.C.

¶ 15 Defendant argues and the State concedes that there was no evidence that Sierra or M.C. suffered severe bodily injuries. Our review of the record in the instant

case also reveals that there was no evidence that would support a finding that defendant inflicted severe bodily injury on either Sierra or M.C. We therefore agree with the parties that defendant's consecutive sentences are void.

¶ 16 We note that defendant has not waived this issue by failing to raise it in an earlier proceeding because a void sentence can be attacked at any time. A claim that a judgment is void is not subject to waiver and can be raised at any time, either directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). In *Thompson,* the petitioner argued for the first time on appeal from the summary dismissal of his postconviction petition that his extended-term sentence was void. Our supreme court held that because a void judgment could be attacked at any time, the petitioner's claim "[did] not depend for its viability on his post-conviction petition." *Thompson*, 209 Ill. 2d at 27. The court further held that "courts have an independent duty to vacate void orders * * *." *Thompson,* 209 Ill. 2d at 27. We have the authority to correct void orders at any time, regardless of the fact that petitioner has chosen to attack the void judgments by way of a successive postconviction petition. *People v. Arna*, 168 Ill. 2d 107, 113 (1995); *Thompson*, 209 Ill. 2d at 27.

¶ 17 Defendant argues that this court should merely modify his sentences so that the sentences for aggravated kidnaping run concurrently and concurrent with his sentence for first degree murder. Citing *People v. Hauschild*, 226 Ill.2d 63, 80 (2007), *and People ex. rel. Waller v. McCoski*, 195 Ill. 2d 393 (2001), the State urges this court to remand the cause to the trial court for resentencing because a void sentence compels a new sentencing hearing. In *Hauschild*, the defendant's sentence was declared void and

the cause was remanded for resentencing after an amended sentencing statute had been found to violate the proportionate penalties clause. *Hauschild*, 226 Ill. 2d at 80-81. In *McCoski*, the cause was remanded to the trial court for resentencing on mandamus from our supreme court ordering the trial court to impose consecutive rather than concurrent sentences. *McCoski*, 195 Ill. 2d at 402.

¶ 18 *Hauschild* and *McCoski* are distinguishable from the instant case on the grounds that both *Hauschild* and *McCoski* faced a possible increase in punishment. Here, we are merely called upon to modify defendant's consecutive sentence to run concurrently. In addition, defendant's entire sentence is not void. The void portion of a sentence is only void to the extent that it exceeds what the law permits. The legally authorized portion of the sentence remains valid. *People v. Brown*, 225 Ill. 2d 188, 205 (2007).

¶ 19 As we have the authority to correct the mittimus pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we see no reason to remand for resentencing in this case. Accordingly, we modify defendant's sentence so that the term of imprisonment for two counts of aggravated kidnapping run concurrently and concurrent to his term of imprisonment for murder.

¶ 20 Defendant next argues that he has satisfied the cause-and-prejudice test when he alleged that newly discovered evidence showed that key State's witness M.C. Jones had undisclosed criminal convictions when he testified against defendant at trial.

¶ 21 The Post Conviction Hearing Act (Act) (725 ILCS 5/2-122-1 *et seq.* (West 2010)), allows prisoners to collaterally attack a prior conviction and sentence where there was a substantial violation of his or her constitutional rights. *People v. Gosier*, 205 Ill.2d 198,

203 (2001). In order for a defendant to successfully challenge a conviction or sentence pursuant to the statute, he or she must demonstrate that there was a substantial deprivation of federal or state constitutional rights. *People v. Morgan*, 187 Ill.2d 500, 528 (1999).

¶ 22 The Act contemplates the filing of only one postconviction petition. *People v. Evans*, 186 Ill. 2d 83, 89 (1999); 725 ILCS 5/122-1(f) (West 2010). Consequently, all issues actually decided on direct appeal or in an original postconviction petition are barred by the doctrine of *res judicata* and all issues that could have been raised on direct appeal or in an original postconviction petition, but were not, are waived. *People v. Blair,* 215 Ill. 2d 427, 443 (2005); 725 ILCS 5/122-3 (West 2010).

¶ 23 Successive postconviction petitions are only allowed when fundamental fairness so requires or when a defendant can establish cause and prejudice for failing to raise the issue in an earlier proceeding. *People v. Lee*, 207 Ill. 2d 1, 4-5 (2003). “The cause-and-prejudice test” is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 (725 ILCS 5/122-3 (West 2010)), so that a claim raised in a successive petition may be considered on its merits. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002); 725 ILCS 5/122-1(f) (West 2010). A defendant must meet a "more exacting" or "substantial" showing of cause and prejudice to be granted leave to file a successive postconviction petition. *People v. Edwards*, 2012 IL 111711 ¶ 22, 32. A "gist" of a claim of cause and prejudice is insufficient. Id at ¶25, 29.

¶ 24 Pursuant to the cause-and-prejudice test, the petitioner must show good cause

for failing to raise the claimed errors in a prior proceeding and actual prejudice resulting from the claimed errors. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f) (West 2010) "Cause" is defined as "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim at the initial postconviction proceeding." *Pitsonbarger*, 205 Ill. 2d at 462; 725 ILCS 5/122-1(f) (West 2010). "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction violates due process. *Pitsonbarger*, 205 Ill. 2d at 464; 725 ILCS 5/122-1(f) (West 2010). A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under *res judicata* and waiver. *Pitsonbarge*r, 205 Ill. 2d at 463; 725 ILCS 5/122-1(f) (West 2010). We review the trial court's denial of a motion to file a successive postconviction petition *de novo*. *People v. LaPointe*, 365 Ill. App. 3d 914, 923 (2006).

¶ 25 Defendant claimed in his second successive postconviction petition that the State failed to disclose that "M.C. Jones was a convicted Sex Offender with a long active criminal history of 38 arrests from 1984 to 2002 and also violation [sic] of criminal procedure rules and conditions of a Sex Offender." Defendant then gave specific information regarding M.C. Jones' arrests and convictions. He also alleged that M.C. Jones had a mental health history as revealed by court records associated with his burglary conviction.

¶ 26 While defendant claims that M.C's criminal and mental health history is "newly discovered," it was in fact available at the time of defendant's trial. Evidence is considered newly discovered if it is: (1) material and not only cumulative; (2) likely

change the outcome if a new trial were ordered; and (3) either not discovered or not discoverable through due diligence during the trial. *Patterson*, 369 Ill. App. 3d at 15. M.C.'s criminal history and his unfitness for trial are matters readily available via a computer system maintained by the Clerk of the Circuit Court of Cook County and could have been obtained with due diligence. Given that M.C.'s convictions were from 1986, 1997, and 2000, there was nothing impeding defendant from including his current claim in his 2007 postconviction petition. The Act does not allow a defendant to escape the doctrine of *res judicata* and waiver and advance previously rejected claims with self-described new evidence. *Tenner*, 206 Ill. 2d at 398. As such, defendant has failed to establish cause for failing to raise this issue in his first postconviction petition and his claim must fail.

¶ 27 Defendant next claims that he has established cause for his claim that the State violated *Brady v. Maryland* in failing to disclose M.C. Jones' criminal history. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the prosecution violates a defendant's constitutional right to due process of law by failing to produce evidence favorable to the accused and material to guilt or punishment. To prove that he was denied due process of law under *Brady*, a defendant must show that: (1) the evidence is favorable because it is exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008). A defendant must show that the favorable evidence could reasonably have put the whole case in such a different light as to undermine confidence

in the verdict. *People v. Coleman*, 183 Ill. 2d 366, 393 (1998).

¶ 28 We first note that defendant has waived this issue by not raising it in his original postconviction petition. See *Pitsonbarger*, 205 Ill. 2d at 458. The exhibits submitted regarding M.C.'s criminal and mental health history were discoverable prior to his filing of his original postconviction petition. Therefore, defendant cannot establish the cause portion of the cause and prejudice test.

Moreover, even assuming that the State was in possession of M.C.'s criminal history at defendant's trial and that defendant could not discover it by the time he filed his first postconviction petition, defendant cannot meet the materiality test of *Brady* because there is no reasonable probability that, had such evidence been disclosed to the defense, the result of the proceedings would have been different. The jury was aware that M.C. had a sordid past. M.C. testified at trial that he smoked crack on the day of the crime. Sierra and Banks went to M.C.'s apartment to buy crack cocaine. On the way there, Banks stole disc jockey equipment from a vehicle and carried it into M.C.'s apartment. The equipment was sold from M.C.'s apartment. Banks returned to the apartment with six bags of crack that he received in exchange for the disc jockey equipment. M.C. smoked the crack with Jones and Sierra in his apartment.

¶ 29 Furthermore, there was nothing in the record and nothing attached to his petition that established that the State did not tender M.C.'s criminal history and evidence of his mental health history. The necessity of attaching “affidavits, records, or other evidence” to the petition is addressed in section 122-2 of the Act, which provides that “[t]he petition shall have attached thereto affidavits, records, or other evidence *supporting its*

allegations or shall state why the same are not attached." (Emphasis added.) 725 ILCS 5/122-2 (West 2010); *People v. Collins*, 202 Ill. 2d 59, 67 (2002). Defendant failed to attach an affidavit from the Assistant State's attorney assigned to the case or from his trial attorney. Without these affidavits, defendant has no basis to assert that the criminal history was not tendered by the State or received by defense counsel. Consequently, defendant has failed to establish the necessary cause and prejudice and the circuit court properly denied defendant leave to file his successive postconviction petition.

¶ 30 Defendant's claim that trial counsel was ineffective for failing to discover and use M.C.'s criminal and mental health history to challenge his testimony must also fail. First, defendant has failed to establish that counsel was unaware of M.C.'s criminal and mental health history. Defendant has provided no affidavit from the State or defense counsel in this case. Second, as the information regarding M.C.'s criminal history was available at the time defendant filed his postconviction petition in 2007, defendant cannot establish cause for failing to raise his ineffective assistance claim in his original petition.

¶ 31 CONCLUSION

¶ 32 For the aforementioned reasons, we affirm the judgment of the circuit court denying defendant leave to file his second successive postconviction petition, and pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), to correct the mittimus (*People v. McCray*, 273 Ill. App. 3d 396, 403 (1995)), modify defendant's six year sentences for aggravated kidnaping to run concurrently with

one another and concurrent with his sentence for murder.

¶ 33 Affirmed as modified. Mittimus corrected.