

FOURTH DIVISION  
November 7, 2013

No. 1-11-3184

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 23119
	)	
TRACY TIMMONS,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOWSE delivered the judgment of the court.  
Justices Lavin and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where there was no indication in the record that the circuit court was aware of the defendant's motion to supplement his successive postconviction petition, and thus, did not exercise its discretion on whether to allow leave to file the supplement, the court's judgment is vacated and the cause is remanded with directions.

¶ 2 Defendant Tracy Timmons appeals from an order of the circuit court denying him leave to file a *pro se* successive postconviction petition for failure to meet the requirements of the cause and prejudice test. On appeal, defendant solely contends the court erred when it dismissed his petition without considering his claim of actual innocence, which he raised in a supplemental

petition submitted while his successive petition was pending before the court. There is no indication in the record that the circuit court was aware of the additional pleading. Accordingly, we vacate the circuit court's judgment and remand this case with directions.

¶ 3 Following a 2006 bench trial, defendant was convicted of attempted first degree murder, aggravated discharge of a firearm, and aggravated assault for firing multiple gunshots into a vehicle occupied by Reginald Armstrong at a gas station. At sentencing, the trial court merged the aggravated discharge of a firearm and aggravated assault convictions into the attempted murder conviction, and sentenced defendant to a term of 26 years' imprisonment.

¶ 4 On direct appeal, defendant argued that he was denied his right to a speedy trial, the trial court failed to conduct an adequate inquiry into his *pro se* posttrial claim of ineffective assistance of counsel, trial counsel rendered ineffective assistance, and the State failed to prove him guilty beyond a reasonable doubt. This court considered and rejected defendant's arguments, and affirmed his conviction and sentence. *People v. Timmons*, No. 1-06-3442 (2009) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Timmons*, 235 Ill. 2d 602 (2010).

¶ 5 In July 2010, defendant filed his initial *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant alleged that his sentence violated the proportionate penalties clause of the Illinois Constitution, and that the truth-in-sentencing laws were unconstitutional. The circuit court found defendant's allegations frivolous and patently without merit, and summarily dismissed his postconviction petition. Defendant did not appeal that judgment.

¶ 6 On May 9, 2011, defendant filed the instant *pro se* successive postconviction petition. Defendant alleged that: (1) the indictment was defective because he was not charged with the offense of unlawful possession of a firearm, which he claims was necessary to support the

charges in the indictment; (2) the trial court violated his due process rights when it merged the convictions for aggravated discharge of a firearm and aggravated assault into the attempted murder conviction; and (3) his trial counsel rendered ineffective assistance when he submitted a motion for a new trial that lacked substance, which was denied "without hesitation" by the trial court. Defendant did not submit a motion for leave to file his successive petition, nor did defendant address the required cause and prejudice test in his petition.

¶ 7 On August 29, 2011, defendant submitted a one-page *pro se* petition to supplement his successive postconviction petition with an affidavit from an alleged witness to the shooting. Therein, defendant moved the circuit court to include the affidavit as evidence to support an additional claim of actual innocence. He further asked the court to incorporate his claim of actual innocence into his successive petition. Defendant stated that at the time of trial, the witness and the information in the affidavit were unknown and unavailable to him. Attached to defendant's petition is an affidavit from Terry Tyra, claiming the gunman was Troy Pickins. Tyra averred that he did not see defendant at the gas station at the time of the shooting, and that he was "100% sure" the wrong man had been charged with the offense. Defendant did not request leave of court to file the supplemental petition and affidavit. Although the supplemental petition was file-stamped by the circuit court clerk, it does not appear on the court's memorandum of orders (half-sheet), and there is no indication in the record that the trial court was made aware of it.

¶ 8 On September 30, 2011, the circuit court found that defendant failed to meet the cause and prejudice test and denied him leave to file his successive postconviction petition. The court expressly noted that defendant did not address the cause and prejudice test to any extent in his successive petition. The court found that all of defendant's claims were based on the trial record and could have been raised on direct appeal. Therefore, the claims were waived and would have been procedurally barred, even if defendant had raised them in his initial postconviction petition.

In addition, the court considered the three claims alleged in the successive petition and found they were substantively without merit. The court did not address defendant's petition to supplement his successive petition, his claim of actual innocence, or the affidavit.<sup>1</sup>

¶ 9 On appeal, defendant solely contends the circuit court erred when it dismissed his successive postconviction petition without considering his claim of actual innocence raised in the supplemental petition. Defendant argues that his supplement was timely filed and raised a colorable claim of actual innocence. He asserts that the circuit court either ignored his supplemental petition or was unaware of his additional claim. Defendant asks this court to either remand his case for further proceedings under the Act, or vacate the dismissal of his successive petition and remand for consideration of his claim of actual innocence, or treat his supplemental petition as an independent second successive petition and remand for further consideration.

¶ 10 The State argues that defendant failed to bring his supplemental petition to the circuit court's attention, then filed his notice of appeal, thereby abandoning his claim of actual innocence. The State acknowledges that defendant's supplemental petition was not docketed on the court clerk's half-sheet, and the transcript does not show it was ever before the court. The State contends that defendant's argument that he presented a colorable claim of actual innocence is premature because he has not yet obtained leave to file the supplemental petition. The State asserts that, in effect, the supplement is an independent second successive postconviction petition and it is defendant's burden to bring it to the circuit court's attention.

¶ 11 We review the circuit court's denial of leave to file a successive postconviction petition *de novo*. *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010). The Act provides a process

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<sup>1</sup>In March 2012, 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 2012)) challenging his sentence and term of mandatory supervised release. The circuit court dismissed that petition. Defendant's appeal in that case is pending before this court in case number 1-12-3269, and is not related to the issue in this appeal.

whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Pursuant to section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2010)), defendant is prohibited from filing a successive postconviction petition without first obtaining leave of court. *People v. Tidwell*, 236 Ill. 2d 150, 157 (2010). Generally, such leave is granted only where defendant establishes cause for his failure to raise the claim in his initial postconviction proceeding, and prejudice results from that failure. 725 ILCS 5/122-1(f); *Tidwell*, 236 Ill. 2d at 157. "Cause" is defined as "any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). Prejudice occurs where the petitioner is "denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Pitsonbarger*, 205 Ill. 2d at 464. Defendant is excused from meeting the cause and prejudice requirement when he raises a claim of actual innocence in his successive post-conviction petition. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009).

¶ 12 Section 122-5 of the Act provides "[t]he court may *in its discretion* make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases." (Emphasis added.) 725 ILCS 5/122-5 (West 2010). Under this provision, the circuit court may, in its discretion, allow a defendant to amend his postconviction petition. *People v. Watson*, 187 Ill. 2d 448, 451 (1999). Pursuant to our rules of civil procedure, as referenced in the Act, a petitioner may amend his pleading with leave of court prior to entry of a final judgment. 735 ILCS 5/2-616(a) (West 2010); *Watson*, 187 Ill. 2d at 453 (Freeman, J. concurring). Consequently, defendant must be granted leave of court to file an amended or supplemental petition.

¶ 13 Here, however, the record before us indicates that the circuit court did not exercise its discretion on whether to allow defendant leave to file his supplemental petition. Although the supplemental petition and affidavit were file-stamped by the clerk's office a month before the court's ruling, the document does not appear on the half-sheet and there is no indication in the record that the court was aware of the filing. The State maintains that defendant abandoned the supplemental petition and his claim of actual innocence by failing to request a ruling on it. We are not persuaded by this argument. In the supplemental petition, defendant expressly moved the court to incorporate that petition into his earlier-filed successive postconviction petition. It appears that through inadvertence, this request was not brought to the court's attention. Under these circumstances, we believe the appropriate action is to remand this cause to the circuit court for a ruling on defendant's request for leave to amend his successive postconviction petition. Ill. S. Ct. R. 366(a)(5) (eff. Feb 1, 1994) (the reviewing court may, in its discretion, remand a case as may be required). See *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 20 (postconviction case remanded to the circuit court where the record shows the court did not exercise its discretion when ruling on defendant's motion for discovery).

¶ 14 For these reasons, we vacate the circuit court's judgment denying defendant leave to file his successive postconviction petition, and remand this cause with directions to rule on defendant's request for leave to amend his successive petition.

¶ 15 Vacated; remanded with directions.